THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2006/0187

BETWEEN:

REGINALD NANTON

Claimant

AND

GEORGE LEWIS

Defendant

Appearances:
Dr. David Dorsett for the Claimant
Mr. Dane Hamilton Q.C. for the Defendant

.....
2007: December 17
2008: January 14, 25; October 31
.....

JUDGMENT

[1] **Harris J**: This is an action for the negligent breach of a duty of care on the part of a gratuitous agent resulting in economic loss.

INTRODUCTION/FINDING

[2] The Claimant ordinarily resides outside of the state of Antigua and Barbuda. He decided to construct a dwelling house on a parcel of land he had purchased from Central Housing and Planning Authority **(CHAPA)**, several years earlier. Not being able to be present in Antigua and Barbuda to oversea its construction, he

asked the Defendant, a close friend and resident in Antigua to oversee and manage the construction of the building and to assist him in identifying and retaining a Builder/Contractor. The Defendant, although not a builder/contractor was the owner and operator of a small business selling windows and a small array of hardware goods and had limited experience of overseeing building construction.

[2] Whilst in Antigua and Barbuda in 2001, the Claimant identified his lot to a fencer by pointing out the lot to him. The lot was subsequently fenced. Then the Claimant showed the fenced in lot to the contractor and then to the Defendant, each person being showed the lot on a separate occasions over several years and, each with the knowledge of the Defendant. The claimant never expressed any doubt that the lot was his and held it out as his at all times.

[3] The construction commenced in February 2003 on the said fenced lot and there was regular periodic communication between the defendant in Antigua and the Claimant abroad. The materials were sourced from among other places, the Defendants window and hardware business with the knowledge of the Claimant. Both labour and materials were paid for by the Defendant when required, from monies advanced by the Claimant.

[4] The house had reached an advanced stage of construction when it was discovered first by the alleged true owner, that the Claimant had identified, had fenced and shown the lot adjacent to the lot he had actually purchased and as a consequence, the house had been built on the wrong lot. Further, upon inspection of the house the Claimant discovered certain defects in the construction resulting from poor workmanship. I note here that the claimant has not established definitively or at all that the lot built on in fact was not his. The technical report of Mr. Simon does not address this point at all.[1] The defendant has not taken the point and presumably concedes it.

[1] Mr. Henderson Simon's witness statement at para 2 sets out his mandate. It does not appear to include establishing that the lot built on was not in fact that which belonged to Mr. Nanton.

[5] The Claimant sues the Defendant on the ground that the Defendant was a gratuitous agent who offered to oversee the construction of the Claimant's house and to engage a contractor to build the house. The claimant alleges that the Defendant owed him a duty of care to exercise the degree of care and skill which could reasonably be expected of him in all the circumstances and that duty of care extended to cover the Defendants duty to ensure the quality of workmanship on the building and to make and carry out all the necessary surveys, examinations and enquiries that would have ensured that the construction would occur on the property of the Claimant and not that of another.

[6] The Defendant counterclaims against the Claimant for an outstanding balance on account, for construction materials. The Defendant disputes the extent of his duty as contended by the Claimant above and in the alternative, alleges contributory negligence on the part of the Claimant.

[7] **HELD:** that (i) although the Defendant was a gratuitous agent of the Claimant and did owe a duty of care to the Claimant, on the facts of this case the duty of care did not extend to ascertain whether the lot shown by the Claimant to the Defendant and others as the claimants, was in fact his. Even if the said duty was owed, in the circumstances of this case, the defendant did not act in breach of that duty. (ii) that there is judgment for the Defendant on his counterclaim for the outstanding balance on account.

[8] Several issues would arise for determination on this matter if the primary issue is determined in favour of the Claimant.

[9] The primary issue in my view is, whether the agency agreement – such as it was – extended to include a duty on the Defendant to ascertain that the fenced in lot

shown to him and the others by the Claimant were one and the same and was indeed the Claimants.

[10] The Claimant contends that in the circumstances of this case, the Defendant, as his gratuitous agent, was expected to enquire of the appropriate authorities such as the Land Registry, Survey Department and the Development Control Authority **(D.C.A.)** to ascertain the Claimants lot and to properly direct and ensure the erection of the building on the Claimants land, parcel 127. Further, the Claimant contends that the Defendant was to hire a Contractor to build the building and not build it himself, as he did. That if he had hired an independent contractor that contractor would in the normal course of his duties have had to first ascertain the ownership of land.

[11] The Defendant says that his undertaking with the Claimant was to assist his friend in supervising the construction process by **(a)** acting as an intermediary for payment of the contractor **(b)** sourcing building materials for the Claimant and **(c)** informing the Claimant of the progress of the construction. The Defendant contends that the construction commenced in or around February 2003 on the lot of land at least twice cleared by the Claimant, fenced in on the Claimant's direction, shown to the defendant, shown to the contractor and at all material times held out by the Claimant as his own.

[12] The Defendant contends further that the Contractor was hired by the Claimant and not by him.

LAW

[13] I accept that the governing principle with respect to the duty and standard of care of a gratuitous agent is to be found in the combination and distillation of the following core cases; **Hedley Byrne & Co Ltd v Heller & Partner Ltd [1963] 2 All ER**

575[1], Henderson v Merrett Syndicates ltd [1994] 3 All ER 506[2] and Chaudry v Prabhaker [1988] 3 All ER 718 (721-722).

[14] Counsel for both parties have placed considerable reliance on the principles enunciated in these three cases and the line of cases that both preceded and followed them. I do not detect a difference in the parties understanding or core application of the respective principles. I think it useful to set them out below:

(a) *A duty of care arises where there is an assumption of responsibility for the gratuitous provision of services which may give rise to a remedy in Damages where there is a breach of that duty in that the services are negligently performed. Such damages will extend to pure economic loss;*

(b) *There must be reliance by the other party on that assumption of responsibility. That is not reliance in fact, but whether the claimant could reasonably rely on an assumption of personal responsibility by the defendant who performed services on his behalf;*

(c) *The test of liability is objective. The primary focus must be on things said or done by the Defendant or on his behalf in dealings with the claimant which ought to be judged in light of the relevant circumstances;*

(d) *A Gratuitous Agent is expected to exercise such skill and care, ordinarily exercised in his own affairs , or where he has expressly or impliedly held himself out to his principal as possessing skill or care as would normally be shown by one possessing that skill. The relevant circumstance is the actual skill and experience the agent has.*

[15] There is no dispute over the fact that the Claimant embarked on the construction of a dwelling house on land at fitches Creek. The Claimant's land is parcel 127 Block 2292 B. The Claimant testified of having purchased his plans - a North American design - applied or and obtained planning permission. The application

[1] See Judgment of Lord Devlin
[2] See Judgment of Lord Goff

process for planning permission involved supplying the Development Control Authority with the proof of his title and the layout of the lot on which he intended to build[1].

[16] The Claimant was a good friend of the Defendant and visited him at his workplace whenever he was in Antigua.

[17] The evidence discloses that the Claimant and Defendant came to an understanding that the Defendant would gratuitously assist the Claimant in the construction of his house by "being his eyes and ears" on the ground and to handle administrative matters[2] such as being an intermediary for payment of the contractor, sourcing building materials for the Claimant, informing the Claimant of the progress of the construction. Prior to the parties entering into the 'agreement' and upon the request of the Claimant, the Defendant contacted a backhoe operator, one Glenford Morris. In the presence of the Defendant, the Claimant spoke to Morris about clearing his land and they left for the land together.

IDENTIFICATION OF LANDS

[18] The evidence of Morris is that that the Claimant engaged him to clean the land. That he had spoken with him and the Claimant took him to see the land. He said that he cleared the land and did so also on subsequent occasions and the Defendant was responsible for paying him. This first meeting was back in 1996.

[19] The Defendant said he first went to see the Claimant's land about 1 yr after purchase, that is in or about 1996. The Claimant in cross-examination said that he had taken the Defendant to Fitches Creek and shown him the land several times. He said he was able to approximate a particular location where the land was.

[1] See the cross-examination evidence of the claimant
[2] See paragraph 2 of DEFENCE at pp 10 of the Trial Bundle

[20] His evidence was that later in time "*I showed Mr. Lewis a lot, but not the specific thing. I wasn't certain of the marks. I showed him because he was getting ready to fence*". His recollection was that he first took the Defendant to the land in 2003-2004.

[21] The Claimant alleged that the Defendant suggested fencing the lot and "*initiated the whole thing*". The Defendant disputes this.

[22] In cross-examination the Defendant said that there was "*no dispute as to where Mr. Nanton's land was. He showed it to me, he showed it to everybody*", and he maintained that *"it is not true that I promised to check on the land and its location"*.

[23] It is not refuted in evidence, that in or about June 2002 the Claimant told the Defendant that he was going to CHAPA to confirm the boundaries and to speak with one Stafford Pereira. The Defendant's evidence is that about a day later the Claimant came to his place of business and told him that his surveyor had come and had established his boundaries. In cross-examination of the Claimant, he conceded that he did not ask the Defendant to have the boundaries re-established and the Defendant did not promise him that he would have the land surveyed.

[24] On a later occasion the Defendant said that he was on the land with the Claimant. The land had previously been cleared and he saw for himself surveying stakes. At this time the Claimant asked him to recommend a good fencing man and he, the Defendant, recommended one Don Kerr. The Defendant said that the land was fenced in June 2002 and that on a later visit to the land he observed that it was fenced. During the period of the fencing, June 2003, the Defendant said that the "*Claimant was in Antigua throughout*". This was refuted by the Claimant.

[25] Don Kerr gave evidence of speaking with the Defendant, receiving certain instructions and going to Fitches Creek and meeting a person there that he understood to be the Claimant.[1] The land was cleared and defined with surveyor stakes and pointed out to him. He subsequently fenced the land in accordance with the boundaries that he saw laid down and shown to him by the Claimant. He was paid by the Defendant.

[26] In the Claimants evidence-in-chief, at para. 15 of his witness statement, pp 119 of the Trial Bundle, the Claimant acknowledged that at one time the land was cleared by one Ren O'Neil, a licensed surveyor, and at another time by Bernadette Roberts[2]. He said that he was not present on either of those occasions and the fencing of the land was wholly the initiative of the Defendant.

[27] The Court finds that the land that was cleared by the Claimant's surveyor and by Bernadette Roberts, is the same land that he showed to the Defendant and the Builder.

[28] The Claimant, in chief, had remarkably little to say about the progress of the construction works, the builder, backhoe operator, land clearing. In cross-examination he admitted that he did not give a copy of his Land Certificate or plans and drawings to the Defendant, neither did he give him a copy of the location/map of the area. This is so he said because he recognized that the area the building was to go down was already fenced. I understood the Claimant to be saying that he recognized the area of land as his and that the said area he recognized as his, was already fenced.

[1] He identified the claimant in court and insisted under cross examination that after all these years he could still on his own identify the claimant.
[2] The Defendant's evidence is that he was aware of Bernadette Roberts - the claimant's cousin - clearing of the land.

[29] The Claimant acknowledged showing Mr. Reynolds, a construction manager/builder and contractor retained by the claimant to assist him, the land that was fenced and that they both walked around the lot with plans in hand "*to figure out how we were going to put down this building. We planned the layout of the building. This layout was within the confines of the fenced area of the land*'. Mr. Reynolds having been retained by the Claimants agent is by virtue of that, the 'employee' of the Claimant. Mr. Reynolds did not, on the evidence, advise either the Claimant or the Defendant that the lot was not the correct lot. The claimant has not alleged that he was required to, either expressly or impliedly.

[30] There is no dispute now that the Claimant treated the fenced portion of land as his own and held it out as his land upon which he wanted his dwelling house constructed.

[31] The question is now, how did he arrive at the conclusion that it was his land? Was he misled by the Defendant? The evidence suggests not. The evidence supports the view that the Claimant had led himself into error from very early in his ownership. His evidence is that his land was cleared in the beginning by a surveyor one Mr. O'Neil[1]. We do not know what were the instructions given to Mr. O'Neil at the time. I accept, on the preponderance of the evidence in support of the Claimants role in identifying, showing and causing the land to be cleared over the years in an unbroken chain of identification leading up to and including the fencing of the property and the planning of the layout of the building with Mr. Reynolds.

[32] The chain of evidence of the identification of the lot through the Claimant, Glenford Morris the backhoe operator, Don Kerr the fencer, the Defendant and Everett Reynolds, is, in my view, on a balance of probabilities an unbroken chain. The lot of land that the building was constructed upon is the same lot that was

[1] The Claimant gave evidence that he is the Surveyor for C.H.A.P.A.

identified to each person and the same lot the Claimant had on his own, come to know as his lot.

[33] This error on the part of the Claimant is perhaps not inconceivable. It can happen when one owns land in an undeveloped area with no demarcation. This indistinguishable character of such lands is further exacerbated by one not residing in the country. Were he resident in Antigua, through regular visits to the land, certain distinguishing feature may become evident thereby facilitating the correct identification of the parcel of land.

[34] The Court is satisfied that the Claimant positively identified to the relevant persons the land upon which the house was built, as his. The next question to be addressed is; notwithstanding the identification of the building site by the Claimant, was the Defendant responsible for ascertaining that the building site identified by the Claimant upon which he had obtained his planning approval to build was in fact that of the claimant?

[35] The Claimant avers, that the agreement – albeit gratuitous – required the Defendant to hire a contractor and not to be the contractor himself. He says that the defendant was the contractor himself and hired a team to work. This suggests the Claimant, deprived him of the benefit of a Contractor's duty to ascertain that the construction site was the correct site. The Claimant insists that the house was to be built by 'Chartech Homes', a company the Defendant says he knows nothing of. Other than the Claimant assertion on this point, there is no evidence, documentary or otherwise of this company's involvement or prospective involvement with the construction of the claimant's building.

[36] The Claimant contends that further to this the Defendant was duty bound as his construction supervisor and by virtue of a term of their agreement (an implied

term)[1] to carry out such acts as are necessary to have determined that the construction site was the proper site.

[37] The Defendant denies that he was the contractor and in support of this, led evidence from one Kensworth Browne. Mr. Browne gave evidence of coming on a site on which work had already commenced. The foundation had been excavated and workmen were already on site. Mr. Browne said he was hired by the Defendant and that he, Mr. Browne, was the contractor and not the Defendant[2]. The Defendant does not dispute being responsible for paying the contractors and being the claimant's agent. It is not surprising therefore that the contractor would consider himself as having been contracted by the person responsible for paying him. I accept this evidence and make the finding that upon retaining Kensworth Browne, he Kensworth Browne was the contractor.

[38] However, from the evidence of Mr. Browne it is also clear that work had already commenced on the site. His evidence is that the foundation had been dug and that there were men on the construction site. I accept the evidence of the defendant in relation to his role in the engagement of a contractor to build the claimant's house that "*every thing that was agreed to was with the express agreement and full approval of Mr. Nanton*" and that "*A contractor would have to be engaged by agreement between myself Mr. Nanton and the contractor*". I think it is an almost inescapable conclusion that those initial works referred to by Mr. Browne as having been done before he entered the site, had been commenced by person employed by the Defendant and employed with the agreement and approval of the Claimant ,to carry out the works. I do not accept that the claimant divorced himself from the process of, at the very least, approving the hiring of contractors however narrow their responsibility. I conclude that the initial works carried out on the site were not carried out with the defendant as the contractor.

[1] The Claimant never alleged that this was an express term of the gratuitous agency agreement.
[2] In cross examination the Defendant denied being the one to hire Mr. Browne and that any one hired would have been so hired with the express agreement between himself, Mr. Nanton, the Claimant, and the Contractor.

[39] I am not satisfied however, that this duty to ascertain the correctness of the worksite necessarily lies with the first contractor. In any event, on the facts of this case a contractor would not be negligent in relying on the clients/Claimant definitive and patent identification of the fenced in worksite as representing the correct worksite. Further, the claimant in cross examination accepted that "...I never employed Mr. Lewis as a contractor. I never knew him as a contractor".

[40] The 2nd limb to the question posed earlier in para 34 and 36 above, is whether the agency agreement between the parties imposed an implied duty on the Defendant to ascertain the correctness of the worksite.

[41] It is not in dispute that as a general proposition a gratuitous agent is under a duty of care that could potentially bind him, as a "construction supervisor", to ascertain the ownership and location of a worksite[1]. The law and authorities relied on by the parties in this matter and set out above broadly support this view.

[42] The question is however, whether in the circumstances of the instant case such a requirement formed part of the gratuitous agency agreement. The Defendant contends that it did not and led evidence from Everett Reynolds a "qualified construction manager and building contractor"[2] to that effect.

[43] Everett Reynolds, had visited the site with the Claimant, had discussion with the Claimant on site and advised the Claimant with respect to certain design and structural changes to the plans and building.

[44] Mr. Reynolds gave evidence that part of a supervisors task is to "*see that a job is proceeding on the right place*" and that "*they will have to do certain checks to*

[1] This is the general position. See cross-examination of Everett Reynolds.
[2] See para 1 of his Witness Statement at pp 114 of the Trial Bundle for this.

satisfy themselves that the job is proceeding at the right place" which would involve looking at the approved plans but not the survey maps.

[45] I understood the witness to be referring to seeing that the construction took place in the right place within the lot as opposed to the right lot within the development. In any event, he went on to say that the 'supervisor' has to accept the clients representation in relation to the location of the site as true and accepts absolutely no responsibility for identifying the location of the site or verifying the representation of the client[1]. I accept the witnesses' evidence. I find that the role of the 'supervisor' would not, in the face of the client's definitive representation of the location of the lot, include further and independently ascertaining the location and the ownership of the client's lot.

[46] In the instant case, the Claimant led no evidence nor was it gleaned from the evidence as a whole, that at the relative time(s) the Claimant or any of the parties or other relevant persons had any doubt about the location, limits and/or ownership of the lot upon which the construction ensued.

[47] Further, I note that the Defendant is not an unemployed man. He in fact is a businessman with a window and hardware store. I do not presume that he would enter into an agreement or that the Claimant would expect him to enter into an agreement – such as it was – that encompasses terms & conditions that would amount to a full time comprehensive 'supervisory' agreement.

[48] The Claimant himself testified to seeking the assistance of CHAPA's surveyor and that he did not ask the Defendant to survey the land to re-establish the boundaries nor did the Defendant promise to carry out same. The Claimant to my mind understands what is required to ascertain the correctness of his

[1] The Court recognizes that this witness is that of the Defendant and was one of the several persons hired to advise the Claimant. These facts are factored in determining what weight to attribute to his opinion as to the role and scope of duty of a construction supervisor.

boundaries. I believe that if the claimant had any doubt whatsoever over the identity of his land he would have expressly requested the defendant to ascertain that fact, if not himself do it.

[49] In such a gratuitous arrangement, the parties would have sought to pare down the responsibility of the gratuitous agent as far as possible; it was after all, a favour between friends ,albeit one that carried with it attendant legally enforceable responsibilities. Given the evidence of the Claimant's representations over the years as to the identity of the land and in all the circumstances, I am satisfied that the duty to ascertain the correctness of the lot which was identified to the Defendant and others by the Claimant as his own, was not part of the Defendant's duties under the gratuitous agency agreement between them. And, if it were, the defendant would have sufficiently discharged his responsibility for doing so by relying on the continuous representations of the claimant[1]. I believe that this finding bears logical analysis.

[50] Counsel for the Defendant, Mr. Dane Hamilton Q.C. indicated in his closing submission and the court having considered it, accepts as correct, that if the Court determines that the Defendant was not under a duty to ascertain whether the construction should have commenced on parcel 127 instead of 128 and/or that the Defendant as a gratuitous agent was not negligent in overseeing the commencement of the construction on the wrong parcel of land, in favour of the Defendant, the Court need not address the question of whether the structure was erected negligently without reasonable care and skill. I do so determine in favour of the Defendant.

[51] I therefore decline to address the further claims of the Claimant[2].

[1] Bolitho v City and Hackney Health Authority [1977] 4 All ER 771HL

[2] Save to say that that the court accepts the defendant's evidence that all the changes made to the house as constructed, were made with the knowledge and approval of the claimant, a fact that the maker of the claimant's exhibited report, Mr. Simon, may not have been aware of. The court notes that even Mr. Simon conceded in his statement at para 12, that the building could not have been built entirely as per plan and that it: ...would require some adjustments..."

[52] I accept the evidence of the system by which the construction work was funded and supplied with material. The Claimants evidence does not suggest that throughout the project, where he was in frequent contact with the Defendant, that the claimant queried the manner, quantum and recipients of the disbursements made by the Defendant. Indeed even in his claim, he has not alleged that the funds were not applied for the purpose for which they were intended or that the monies disbursed did not correspond with work accomplished on the building and building site. The Claimant's evidence with respect to his container of material is some what incomprehensible. The court is no better of at the end of the case than it was at the beginning in understanding the status of the container, what it contained and whether the materials therein were available to the defendant and/or required at the stage of construction that had been reached. The stage of construction of the house would have utilized primary construction material such as sand, gravel, cement, blocks and steel. The Claimant has not itemized the contents of his container[1]. Its contents are peculiarly within his knowledge alone. I accept the case for the defendant that changes were made to the claimant's North American designed house, which included the removal of the chimney, the using of 8ins blocks instead of 4ins, and the other changes, all with the approval and understanding of the claimant[2]. If these design changes resulted in certain items in the container that he referred to in evidence being rendered obsolete, then the claimant in my view, its taken to have known and accepted this.

[53] On the question of the defendant's counterclaim for monies due to him on account for materials supplied to the project, the Defendant has supplied documentary evidence of his disbursement. I accept as reasonable and common place, both in an arms length commercial agreement and in a gratuitous arrangement such as this one, that the defendant would supply material for the project on account, with the expectation of being paid either within a stipulated period or within a reasonable time. The claimant had made payment towards his indebtedness prior to this outstanding amount. The

[1] Mr. Simon made reference to certain items.
[2] See witness statements of Kensworth Brown and Everette Reynolds for details - and reasons - of alteration.

disbursements appear relevant to the project and reasonable in quantum. I find for the Defendant on his counterclaim for the sum claimed. However, I observe that the efforts in defending the claim and pursuing the counterclaim are hardly distinguishable in this matter.

ORDER

[54] For the reasons provided above it is hereby ordered that:

(i) The Claimants claim is dismissed in its entirety.

(ii) Judgment for the Defendant on his counterclaim in the sum of $17,232.37.

(ii) Interest pursuant to S.27 of the Eastern Caribbean Supreme Court Act from the April 2006 to the date of this order at the rate of 3% per annum.

(iv) Interest pursuant to the Judgment Act at 5% per annum from the date of this judgment to satisfaction.

(v) Costs pursuant to the CPR 2000 on the Prescribed Costs scale based on the sum claimed of $100,160.00.

(vi) No costs awarded on the counterclaim[1].

DAVID C. HARRIS
JUDGE
THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

[1] See bottom of para. 53 for the reason for this.