

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

MONTSERRAT

CLAIM NO. MNIHCV2009/0010

BETWEEN:

JOHN E RYAN
V. YVETTE FENTON-RYAN

Claimants

AND

PROVIDENCE ESTATE LTD
WARREN CASSELL

Defendant

Appearances:

Mr. Jean Kelsick for the Claimants

Mr. Hogarth Sergeant for the First Defendant

The Second Defendant in person

2010: June 10, 11;
2012: March 05.

JUDGMENT¹

Introduction

[1] The First Claimant, ["Mr. Ryan"] and the Second Claimant, his wife ["Mrs. Ryan"] are real estate developers, who agreed to purchase four lots of land owned by the First Defendant ["PEL"] at Providence in Montserrat. The purchase was never completed but the Ryans paid a deposit and incurred costs for clearing and surveying the lots. All transactions relating to the purchase were between the Ryans and the Second Defendant ["Mr. Cassell"].

[2] The Ryans instituted this claim alleging that they were entitled to rescind the purchase agreement on the basis that Mr. Cassell had falsely represented to them that there was

¹ Approved for delivery subject to any editorial corrections

no difficulty with access to the land and where in fact there was no vehicular access other than by a right of way over a third party's land and no such right of way existed. In addition, when they met with Mr. Cassell and agreed the balance of the purchase price would be reduced by them bearing the cost of constructing a road, Mr. Cassell had concealed the fact that one of the lots had been sold to a third party. Their case is not only were they were entitled to rescind the agreement but that in a letter dated 23rd May 2008, Mr. Cassell had repudiated the agreement. They claimed that they were therefore entitled to damages for breach of contract.

- [3] PEL has denied any liability in the matter alleging that the company had no knowledge of the Ryans and Mr. Cassell had never been a Director or its legal representative. Any such claims by Mr. Cassell to that effect were therefore fraudulent.
- [4] Mr. Cassell's defence is that at the material times he was acting as an agent, servant or representative of PEL. He has denied any misrepresentation on his part, claiming that he had told the Ryans that there were issues with access to the lots and they had agreed to pave the road in exchange for paying less. They were not entitled to their deposit because it was non-refundable and they had not paid the balance on the purchase price within the stipulated period. He denied concealing that one lot was sold to a third party claiming that the Ryans were aware that other persons were interested in purchasing the land. He had not repudiated the agreement and was not liable for any loss that the Ryans had suffered.
- [5] The negotiations between the Ryans and Mr. Cassell regarding the purchase of land at Providence began on 9th September 2007, when Mr. Ryan contacted Mr. Cassell. Mr. Cassell confirmed that the land was owned by PEL and that he was duly authorized to sell them.
- [6] The next day the Ryans and Mr. Cassell met on site and the available lots were identified. The Ryans indicated that they were interested in purchasing Lots 35 and 36. At that stage, Mr. Ryan raised the issue of access to the lots and he recalled that Mr. Cassell had emphatically assured him that there was no problem with access, reminding him that he was "*the lawyer here*". Mr. Cassell's recollected in his witness statement that he had explained to the Ryans that while there was no access road

shown on the government's map, there was an access road, which had been used for several years by others living in the area. When cross-examined by Mr. Kelsick, Mr. Cassell attributed this observation and the fact that the road might not have been a road to Mr. Ryan and when challenged by Mr. Kelsick he explained it by stating that he had not recorded the conversation. Mr. Ryan was clear in an answer to Mr. Cassell however that there was a trace solely on Lot 13/5/25, which belonged to a third party, leading up Lot 35.

[7] The Ryans agreed to purchase Lots 35 and 36, asked Mr. Cassell to prepare an agreement for sale and on 10th September 2007 made a 10% down payment of \$22,000.00, paid by cheque to Cassell & Lewis, on Mr. Cassell's instructions. The Ryans subsequently agreed to purchase Lots 37 and 38 and made a 10% deposit of \$20,000.00 on 15th September 2007 by cheque also payable to Cassell and Lewis and Mr. Cassell gave them a copy of the site plan showing the four lots.

[8] After the cheques were paid, Mr. Ryan obtained Mr. Cassell's permission to enter onto the lands to have a topography done on Lot 35 and to survey and clear them. He indicated to Mr. Cassell that without Lot 35, he would not be prepared to go along with the purchase, as without it, they could not configure the development of the land as they would have liked to. The surveying and clearing were completed at a cost of \$4,500.00 and \$7,270.00. Invoices and the cheques evidencing payment for the work were exhibited as part of the Ryans' case.

[9] Agreements for the sale of Lots 35, 36, 37 and 38 were never executed. Mr. Cassell had presented a draft agreement for sale in relation to Lots 35 and 36 which had to be amended to include Lots 37 and 38. The draft agreement did not include a clause in relation to access to Lot 35 and Lot 36 and so began the back and forth between the parties on that issue. Proposals were made and meetings were held but they yielded no results.

[10] The situation crescendoed with a letter from Mr. Cassell to the Ryans dated 23rd June 2008, which referenced the impasse and stated *"I met with Mr. Ryan several months later and he said that he was not investing in property unless the road issue was resolved. I also told him that I am prepared to refund his money and sell the lots"*. He

went on to inform them that he was returning the deposit of \$11,000.00 and survey fees of \$950.00 as Lot 35 was no longer available. The Ryans had discovered that it had actually been sold on 2nd May 2008. In relation to Lots 36 and 37, he made no mention of Lot 38, he advised the Ryans as follows "*[s]hould you fail to pay the balance for these properties by or before noon May 30, 2008, your deposit will be returned to you and the properties would be sold to another*".

- [11] The Ryans informed Mr. Cassell that once Lot 35 had been sold they were no longer interested in purchasing the remaining lots. Their solicitor wrote to him on 21st July 2008, challenging the legal basis for dividing the agreement and for returning \$11,950.00, when the deposit had been paid on two lots. He also indicated that his clients had accepted Mr. Cassell's repudiation of the sale in relation to Lots 35, 36, 37 and 38 and they were returning the \$11,950.00. They demanded the repayment of \$53,770.00, which covered the total deposit paid and the costs of surveying and clearing the lots.
- [12] One of the critical issues in this case is whether Mr. Cassell had the authority to act on behalf of PEL. Mr. Ryan stated that at their first meeting he understood that Mr. Cassell had the authority to sell although he did not say that he was acting on PEL's behalf or that he was a director of the company. Mr. Cassell had instructed him to make the cheques payable to Cassell and Lewis. He did not know if Cassell and Lewis had shares in PEL and at no time in their discussions had Mr. Cassell mentioned PEL, Walter Wood or Owen Rooney.
- [13] Owen Rooney testified that he had been a Director, Company Secretary and Treasurer of PEL since its incorporation in 1989. The company had been founded by himself and his former business partner Walter Wood for the purpose of owning and developing lands at Providence Estate. The business relationship and contact between Mr. Rooney and Mr. Wood broke down around 1992. Mr. Rooney made a substantial financial investment in the project, the eruption of Montserrat's Soufriere Volcano intervened and the proposed development of the Providence land did not proceed as planned.

- [14] Mr. Rooney's evidence does not include much about what happened with PEL between 1995 and 2007 but he does state that some time during that period it had been struck off the Register. Around July 2007, Mr. Rooney learned that Mr. Wood had executed a Transfer of Share Agreement without his knowledge or approval, even though he was a shareholder, director, company secretary or treasurer of PEL. He knew that Mr. Cassell was involved in the transaction and he contacted him both personally and through his solicitor and he also contacted Mr. Wood.
- [15] In August 2007, Mr. Rooney became aware of two things: that Mr. Cassell was selling Providence Estate lands and that he had filed a Notice to Restore PEL to the Companies Register and in both cases, he had done so without Mr. Rooney's knowledge and approval. In the Notice Mr. Cassell listed himself as the sole shareholder and director of PEL and on 24th August, he filed a Notice of Change of Directors, which removed Mr. Rooney as a Director.
- [16] Mr. Rooney maintained that Mr. Cassell had never been a Director or officer of PEL and at no time did he have the authority to act on behalf of the company. If he had represented otherwise to the Ryans it was only in an attempt to defraud them.

Was Mr. Cassell acting on behalf of PEL in his dealings with the Ryans?

- [17] When the Ryans began the transactions with Mr. Cassell to purchase PEL's lands as far as Mr. Ryan was concerned he had the authority to sell those lands and Mr. Ryan had no reason to doubt or enquire into that authority. It makes no difference to his case that Mr. Cassell never told him that he was acting on PEL's behalf or that he was a director of the company.
- [18] In his Defence at paragraph 3 Mr. Cassell asserts "*that all material times he acted as an agent and servant of the 1st Defendant*". His witness statement contains 21 paragraphs and paragraph 20 contains the only reference to his capacity. It states: "*when I acted I acted for and on behalf of the company/Providence and/or the company Cassell & Lewis*". There was no amplification of this statement when Mr. Cassell gave his evidence in chief. When permitted to deal with any matters raised by Mr. Sergeant in cross-examination, his last statement was "*at all material times I acted as a Director of Providence Estate or of Cassell & Lewis*".

- [19] Although, he asserted that he was an agent of PEL, his evidence elicited in cross-examination by Mr. Kelsick, was that no agency agreement existed. If he intended to rely on his holding the office of Director of PEL or Cassell & Lewis, he failed to make it part of his case and what is fatal is that he took no steps to prove it. If he intended to rely on the Resolution of Members dated the 21st day of September 2007, to “clothe him with authority” at the material times as, Mr. Kelsick submitted, he never mentioned it in his Defence or his Witness Statement and it was not a document forming part of his case before the court. It was the Ryans who put the document into evidence.
- [20] All of Mr. Cassell's references to Cassell & Lewis do not take the issue of his capacity any further. Any role played by Cassell & Lewis is not part of his pleaded case, the only reference in Mr. Cassell's witness statement is the one stated at paragraph 17 of this judgment. Any evidence regarding the role Cassell & Lewis might have played was only elicited in cross-examination. He made no attempt to prove that Cassell & Lewis had some authority to act on behalf of PEL as part of his case.
- [21] In my judgment, there is no evidence, and Mr. Cassell did not make one reference to any such evidence in support in his submissions, on which I can conclude that in his dealings with the Ryans for the sale of land at Providence, Mr. Cassell was acting on behalf of PEL in any capacity because he has failed to prove that he was. It seems to explain the fact that he never told Mr. Ryan that he was.
- [22] A related issue would be whether PEL received or benefitted from the monies paid by the Ryans to Cassell & Lewis as the deposits on Lots 35, 36, 37 and 38. The only evidence is that those monies went to Cassell & Lewis' account and not to any account in the name of PEL. In fact Mr. Cassell indicated that he did not know of any account held by PEL in Montserrat or elsewhere but he did know that none had been opened by Cassell & Lewis in PEL's name.
- [23] For the reasons that I have just stated I have concluded that if the court finds in favour of the Ryans, Mr. Cassell alone will be liable for any loss or damage that they are found to have suffered. PEL will bear no liability in this matter.

Are the Ryans entitled to rescind the agreement?

- [24] The Ryans have grounded their entitlement to rescind the agreement with Mr. Cassell on the ground that he falsely represented that access to the lots that they had agreed to purchase was no problem. Mr. Ryan's evidence is that he said this at the very first meeting at the site.
- [25] I agree with Mr. Kelsick that Mr. Cassell gave at least three different explanations on the access issue. To say in answer to a question from Mr. Kelsick that he did not take the view that Mr. Ryan would rely on anything he said because of his experience and because Mr. Ryan had said that he would go to the Registry and do what was necessary, suggests that Mr. Cassell treated the access issue as if it was the Ryans' problem and not a matter that he had a duty to address, even if it was true that they had the option to buy or not to buy.
- [26] Whether or not he had also explained to them that while there was no access road shown on the government's map, there was an access road, which had been used for several years by persons in the area was irrelevant once he told him that access was no problem and I accept Mr. Ryan's evidence that he did.
- [27] Mr. Ryan impressed me as a truthful witness who answered very directly throughout his testimony. I did not find that he was being evasive in any way. Mr. Cassell on the other hand was evasive and not very direct in some of his answers. He could not recall when he became a Director of PEL, he would only say that Mr. Rooney and Mr. Wood were "not necessarily" Directors of PEL when he contracted with the Ryans on 9th and 15th September 2007, although the Resolution of which he was well aware showed that they were removed with effect from 21st September 2007. For those reasons I accept Mr. Ryan's evidence on the issue.
- [28] As late as 23rd June 2008, the access issue remained unresolved and that is clear from Mr. Cassell's letter. In my judgment it was a misrepresentation to tell Mr. Ryan in September 2007 before he had paid the deposit on the lots that access was not a problem.

[29] The sale of Lot 35 to a third party is another separate issue. On the 9th September 2007, the Ryans paid a 10% deposit in relation to Lots 35 and 36, the agreement with Mr. Cassell, reflected by the cheques made payable to Cassell & Lewis, on his instruction related to one transaction and for the sale of two lots. I find therefore that Mr. Cassell had repudiated the agreement by informing the Ryans that Lot 35 was no longer available and by returning \$11,950.00 to them. No discussions had ever been held between the parties about purchasing one lot or the other, the agreement was always in relation to both lots. To separate them was a unilateral decision by Mr. Cassell.

[30] Based on my findings, I have concluded that the Ryans are entitled to rescind the agreement with Mr. Cassell to purchase Lots 35, 36, 37 and 38, as a result of his breach of contract and they are entitled to damages for the loss that they have suffered. Having found that they have proved the special damages claimed, I award them \$55,383.50 in damages and prescribed costs in the sum of \$15, 076.00 in accordance with Rule 65.5(2)(a) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000. Mr. Cassell is personally liable for both sums.

Order

[31] For the reasons stated in this judgment, I make the following order:

1. Judgment is entered for the Ryans in MNIHCV2009/0010.
2. The Ryans are entitled to rescind the agreement entered into with Mr. Cassell on or about the 10th September 2007, for the purchase of Lots 35, 36, 37 and 38 all comprising part of Parcel 16 Block 13/10, St. Peters Registration Section.
3. There is no liability to the Ryans on the part of PEL in this Claim.
4. Warren Cassell is to pay the Ryans \$55,383.50 in damages and prescribed costs in the sum of \$15,076.00.

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High Court Judge