

COMMONWEALTH OF THE BAHAMAS

**IN THE SUPREME COURT
Common Law and Equity Division
2015/CLE/gen/01182**

B E T W E E N:

JERMAINE WILLIAMS

Plaintiff

AND

METHODIST HOLDINGS (MCCA) ANDROS LIMITED

Defendant

Before: Deputy Registrar, Mrs. Camille Darville Gomez (as I then was)

Appearances: Miss Sherita Forbes for the Plaintiff
No appearance by or on behalf of the Defendant

Hearing Date: 22nd November, 2017

ASSESSMENT OF DAMAGES

Damages- Breach of contract for the sale of land- Defect of title – fraudulent misrepresentation – Plaintiff's loss of bargain - rule in Bain v Fothergill (1874) LR HL 158.

1. This is an assessment arising from a claim for breach of a contract for the sale of land. The Defendant contracted with the Plaintiff to convey in fee simple lot number 38B situated in the subdivision known as John Wesley Estates in San Andros, The Bahamas ("the said property").
2. The Plaintiff paid the purchase price and closing costs associated with the purchase of the said property and then attempted to make a quick sale to a third party for a profit.

3. During the course of the transaction to sell the said property, the Plaintiff discovered that the Defendant did not own it and that it was in fact owned by Harry Treco (now deceased).
4. The Plaintiff in his Supplemental Skeleton Argument dated June 5, 2019 claimed damages for fraudulent misrepresentation in the total sum of \$83,291 which included the following:

Property sale price	\$ 8,000
Legal fees	\$ 366
Title search fees	\$ 125
Damages for disappointment and inconvenience in loss of a sale	\$20,000
Appraisal	\$ 350
Appraisal value of the land less value at date of purchase	\$54,450
Total	<u>\$83,291</u>

5. In the specially endorsed Writ of Summons filed on August 12, 2015 the Plaintiff alleged that the Defendant conveyed to him the subject property on March 1, 2011 for the sum of \$8,000.00.
6. The Plaintiff paid to the Law Chambers of Anthony Thompson & Co, the Defendant's registered office, the purchase price by way of manager's cheque to be held in escrow for the purchase of the said property.
7. The Defendant's attorney presented an abstract of title which indicated that on November 30, 2006 an agreement was made to convey the said property to the Defendant. It further indicated that on October 31, 2007 a conveyance, was about to be lodged for recording, from Harry Treco, the owner of the said property to the Defendant.
8. On March 4, 2011, an Indenture of Conveyance to transfer title of the said property from the Defendant to the Plaintiff was executed and is now recorded in Volume 11357 at Pages 434 to 447 in the Registry of Records in the City of Nassau.

9. Sometime, in January 2014, the Plaintiff entered into an agreement with a prospective Third Party purchaser for the sale of land in the amount of Twenty Thousand Dollars (\$20,000.00). The prospective purchaser made a deposit as down-payment to be held in escrow until completion of the sale.
10. During the requisition period of the sale, the prospective purchaser discovered a discrepancy with the title and as a result the transaction was terminated and all deposits returned.
11. In response, the Plaintiff conducted his own title research and confirmed that there was an encumbrance of a mortgage in 1987 between Harry Treco to Canadian Imperial Bank of Commerce which was never extinguished by a Satisfaction of Mortgage.
12. *A fortiori*, the Defendant never possessed the requisite authority to transfer free and clear title to the said property.
13. Accordingly, the Plaintiff avers that the Defendant fraudulently misrepresented ownership in the land, causing him damages. He has quantified his damages at \$83,291, the details of which are set out in paragraph 4.
14. The Plaintiff on November 25, 2016 entered a Default Judgment as follows:
 - (i) The outstanding balance of \$8,366 and any other amount the court deems fit for the loss of the proposed sale;
 - (ii) All other loss of damages;
 - (iii) Alternative damages;
 - (iv) Costs awarded to the Plaintiff;
 - (v) Further and other relief as the Court deems just.
15. Notwithstanding the default judgment entered against the Defendant, the Plaintiff filed a Notice of Assessment of Damages on September 1, 2017 and November 20, 2017 and the matter proceeded before me.

16. The Plaintiff's default judgment did not seek an assessment of damages.
17. Therefore, in view of the fact that a default judgment had already been entered at the time of the assessment, I am unable to award any further damages to the Plaintiff.
18. However, if I were not bound by the default judgment entered, I would have awarded damages in the amount of \$8,841.00, plus the reasonable costs of the action to the Plaintiff to be taxed, if not agreed.
19. I hereinafter set out the reasons for my said award notwithstanding that I made none.
20. The Plaintiff testified that he filed a Witness Statement in this matter on August 31, 2017 (however, I note that it was made on August 31, 2017 but filed on September 1, 2017) and that he fully stood by the statement made however he asked the Court to make an amendment regarding the loss amount initially stated. At paragraph 15 of the witness statement the Plaintiff claimed that his total losses for this action excluding legal fees was Twenty Thousand, Eight Hundred and Forty-one Dollars (\$20,841) and he asked for this amount to be amended to reflect a total cost of Seventy-five Thousand, Two Hundred and Forty-six Dollars (\$75,246). These figures conflict with the Supplemental Skeleton Argument where the figure claimed is \$83,291 and the earlier undated Skeleton Argument where it is \$91,291
21. The Plaintiff also testified that he made a supplemental witness statement on the 16th November 2017.
22. The remainder of the questions answered by the Plaintiff were for the purposes of proving the alleged loss of \$75,246 suffered as a result of an alleged fraudulent and or/ negligent misrepresentation on the part of the Defendant.
23. The Plaintiff evidenced a sales agreement in the amount of \$20,000 between himself and a prospective purchaser. By an appraisal report of said property, the market value is estimated at \$62,450.00.

24. The issue for determination is the level of damages that the Plaintiff is entitled to recover.

25. The general principles governing the recovery of damages in conveyancing for a breach of contract was stated by Parke, B., in Robinson v Harman (1848) 1 Exch. 850 at 855, who stated:

“The rule of common law is, that where a person sustained a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”

26. Indeed, this principle is limited by the normal rules relating to remoteness of damages and mitigation of loss. However, if fraud is alleged as in this circumstances, then the principle enunciated in Bain v Fothergill (1874) LR HL 158 must be aptly applied.

27. The rule in Bain v Fothergill (*supra*) held that:

“In the absence of fraud or bad faith, no damages for loss of bargain are recoverable where the vendor fails to convey because of a defect in title. All that the purchaser is entitled to is the deposit with interest plus any expenses incurred in the investigation of the title.

Lord Hatherley at p.210 stated:

“...the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can effectively be made by his vendor; and taking the property with that knowledge, he is not to be held to recover any loss on bargain he may have made.”

28. It is the Plaintiff's contention that the Defendant fraudulently induced him to enter into the contract to purchase a property which was not owned by the Defendant and as such should be determined based on the laws of Fraudulent Misrepresentation and the Tort of Deceit.

29. The House of Lords decision of Derry v Peek (1889) 14 App Cas 337 established a 3-part test for fraudulent misrepresentation. In this case the Court stated:

“In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.” (Underlined emphasis is mine).

30. In the case of **Doyle v Olby**, [1969] 2 QB 158 at 167 Lord Denning MR, after referring to Lord Atkin's dictum, stated the principle as follows:

“On principle, the distinction seems to be this: in contract, the defendant has made a promise and broken it. The object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment.”

31. **Doyle v Olby (Ironmongers) Ltd.** has subsequently been approved and followed by the Court of Appeal in **East v Maurer** [1991] 2 All ER 733, and **Downs v Chappell** [1996] 3 All ER 344. In both cases the plaintiffs had purchased a business in reliance on the defendant's fraudulent misrepresentation. The Court held that the plaintiffs were entitled to recover the loss of bargain and profits because of the inducement of the misrepresentation.

32. In the instant case, despite the allegations of fraudulent misrepresentation by the Plaintiff, after careful assessment of the witness statement, skeleton arguments and testimony before me, the Plaintiff failed to disclose that the Defendant either intentionally (i) made a false representation, (ii) made a representation without belief in its truth, or (iii) recklessly made a representation without caring whether it be true or false.

33. According to a title research by an independent researcher, the original transaction between the parties could not be finalized because there was no recorded Satisfaction of Mortgage in respect of a mortgage in 1987 between Harry Treco and Canadian Imperial Bank of Commerce. Furthermore, the search revealed there is no record of a conveyance or transfer of property from Harold Treco to the Defendant.

34. The Plaintiff stated that having been advised by the lawyer for the prospective buyer that the title was not clear he did his own research and confirmed that the property was not

properly transferred. This ought to have been discovered by the attorney for the Plaintiff at the requisition stage, however, the Plaintiff and the Defendant shared the same attorney and it was not revealed for whatever reason. This is one of the main reasons why the purchaser in a property transaction is always advised to have his own independent attorney whose duty or obligation is exclusively to him.

35. In reliance on the dictum of **Lord Hatherley**, in **Bain v Fothergill** (supra) the Plaintiff contracted with his eyes wide open. Indeed, it is the responsibility of the purchaser (i.e. the Plaintiff in the instant case) to ensure the authenticity of what he is receiving. The purchaser is able to discharge that responsibility by having an independent attorney represent him. The attorney would investigate title by conducting the necessary searches that would reveal encumbrances and other title defects. It is unclear whether that was done in the instant case.

36. In any event, the Plaintiff's misfortune as unfortunate as it may be, did not emanate from any inaction by the Defendant, but from the Plaintiff's reliance on an attorney shared by himself and the Defendant. The shared attorney whose duties was spilt between the purchaser and vendor did not properly advise the Plaintiff. This was a case where the well-known maxim *caveat emptor* be applied. See **Renalda Isaac v Scotiabank (Bahamas) Ltd.** SCCivApp. No. 156 of 2016.

37. I am of the opinion based on the evidenced adduced by the Plaintiff, fraud or bad faith on the part of the Defendant has not been proved, as a result the Plaintiff is unable to recover damages for loss of bargain. Therefore, the Plaintiff is only entitled to the original costs of the aforementioned property with interest, the costs of legal fees, and all expenses incurred in the investigation of the title.

38. In **Flureau v Thornhill** (1776) 2 Wm. Bl. 1078, the vendor was unable to make a good title. He offered the purchaser the option of taking the title with all its fault or recovering his deposit with interest. The purchaser instead sought damages for the loss of good bargain he had made. This claim was rejected. **De'Grey, CJ.** delivering the judgment asserted:

“Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost.”

39. Accordingly, I would have assessed the Plaintiff's damages in the sum of \$8,841 as follows:

1. Property Sale Price	-	\$8,000
2. Legal Fees	-	\$ 366
3. Title Search Fees	-	\$ 125
4. Appraisal Fees	-	\$ 350
Total	-	<u>\$8,841</u>

40. I would have ordered that the Defendant pay interest on the sum of \$8,841 at 2% per annum from the 4 March, 2011 until the date hereof and thereafter in accordance with the Civil Procedure (Rate of Interest) Act and further, that the Defendants are to pay the Plaintiff's reasonable costs of this action to be taxed, if not agreed.

41. I reiterate my position that I whilst I have assessed the Plaintiff's damages, I am unable to make any order. I am constrained by the Default Judgment already entered for \$8,366 plus costs to the Plaintiff, and, am bound by it. Therefore, I make no further award of damages.

Dated this 1st day of **August A.D. 2019**



Camille Darville-Gomez
The Registrar