

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

Common Law and Equity Division

2015/CLE/gen/00444

B E T W E E N

JOHNATHAN GLINTON

Plaintiff

AND

COMPUTITLE LIMITED

Defendant

Before: Deputy Registrar Carol D. Misiewicz

Appearances: Tiffany Dennison for the Plaintiff
No Appearance on behalf of Defendant

Hearing Date: 17th July, 2018

ASSESSMENT OF DAMAGES

Negligence - Default Judgment- Damages - Special Damages - Special Damages must be strictly proved.

C. Misiewicz, Deputy Registrar

1. The Plaintiff's claim is against the Defendant for damages arising from a conveyance between himself and a third party which ultimately turned out to be a nullity, because of a fault in the title search. The Writ of Summons was filed on 9 April 2015 and was specially indorsed with a Statement of Claim. A Memorandum of Appearance was filed on 28 April 2015, and no Defence have been entered the Plaintiff signed Judgment in Default of Defence on 11 June 2015 in terms as hereunder:

"IT IS THIS DAY ADJUDGED that Judgment in Default of Defence be and is hereby entered for the Plaintiff as set forth in the Statement of Claim along with damages to be assessed, interest and costs thereon."

2. The Notice of Assessment of Damages was filed on 9 October 2015. After multiple attempts at having the matter heard which did not come off for varying reasons, I eventually conducted the assessment hearing on 17 July 2018. Mrs. Dennison of Counsel for the Plaintiff informed the Court that a Notice of Adjourned Hearing filed 5 December 2017 was served upon Counsel for the Defendant, Dupuch & Turnquest, on 22 June 2018. The Court being satisfied as to service proceeded with the hearing of the assessment on the fixed date.
3. The Plaintiff gave sworn testimony. After explaining by way of background how he came to make his claim, the Plaintiff testified as to the losses he had suffered. His evidence was that he had paid the Treasurer of the Commonwealth of The Bahamas, (“The Treasurer”) being the Vendor of Lot No. 32 situated Pinedale Subdivision in the Settlement of Eight Mile Rock, Grand Bahama the sum of \$13,686.18, which sum he had raised on Mortgage with Commonwealth Bank. However, Lot 32 was conveyed to Barry Joseph by Natalie Smith on 2nd December 2002 and recorded on 24th March 2003 pursuant to the Registration of Records Act, which ultimately nullified the conveyance to him from The Treasurer, who had purported to transfer its legal and equitable right from a conveyance from Nathalie Smith dated 8th January, 2001 but only recorded on 28th July, 2003.
4. The Plaintiff’s claim is more concisely outlined in his Statement of Claim. As established by Lord Pearson in **Drummond-Jackson v British Medical Association**, [1970] 1 WLR 688 the consideration of whether or not a claim is reasonable emerges out of the existence of a statement of claim.
5. That being the case, the statement of claim avers:

STATEMENT OF CLAIM

1. The plaintiff is and was at all material times a resident of the Island of Grand Bahama, a citizen of the Commonwealth of The Bahamas and intended purchaser of Lot 32,

Pinedale Subdivision, in the Settlement of Eight Mile Rock on the Island of Grand Bahama, one of the Islands within the Commonwealth of The Bahamas (the property).

2. The defendant is and was at all material times a company incorporated under the laws of the Commonwealth of The Bahamas and carrying on the business of title searches for the provision of deeming clear and marketable title to properties for sale, purchase and mortgage.
3. That on or about the 28th January, 2013, the plaintiff sought to complete purchase of the subject property by way of mortgage facility with Commonwealth Bank Limited in the amount of Thirteen Thousand Eight Hundred Dollars (\$13,800.00). [Red type in original].
4. That in pursuance of purchase and mortgage the plaintiff sought legal advise (*sic*) on clear and marketable title through the firm of Cafferata & Co. ("the firm"). The firm completed the purchase and mortgage on behalf of the plaintiff with report on title rendered by the defendant on the 10th February, 2009, search reference #76089 indicating clear and marketable title, the last document of record being Conveyance dated 8th January, 2001 from Natalie Smith to the Treasure of The Commonwealth of The Bahamas recorded in the Registry of Records of the said Commonwealth at Volume 8699 at pages 562 to 566.
5. That in or about latter 2013, after the plaintiff had fully satisfied the mortgage over the property, the plaintiff attended the same with the intent of completing a partial structure commenced in or about 1990, when the property was initially cleared. However, upon attendance to the said property, the plaintiff discovered a third-party, assumed to be trespassing on the property, building a structure thereon. Upon investigations by the plaintiff, the third-party informed the plaintiff of their purchase of the property.
6. Upon instructions by the plaintiff, the firm of Cafferata & Co., in April, 2013, conducted further investigations to find that Graham Thompson, conducted searches on behalf of its client, Barry Joseph on the 26th October, 2009; search reference #77717-RTP which revealed the Conveyance in favour of Mr. Joseph dated the 2nd December, 2002 recorded in the said Registry of Records at Volume 8595 at pages 585 to 588, which was not included in the plaintiff (*sic*) initial search results. Although the search failed to provide

the Conveyance of the 8th January, 2001 from Natalie Smith to The Treasury of the Commonwealth of The Bahamas aforementioned.

7. A third search was conducted through the defendant dated the 7th February, 2013, by Graham Thompson, search reference #83971, which then included the Conveyance from Natalie Smith to The Treasurer of the Commonwealth of The Bahamas dated the 8th January, 2001 aforementioned, but omitted the Conveyance to Barry Joseph, again as aforementioned.
8. Had the search been complete and accurate, carried out with reasonable care and skill, the counsel for the plaintiff would not have approved clear and marketable title resulting in the detriment of the plaintiff.
9. That despite numerous requests and demands to the defendant by the instructions of the plaintiff, the defendant has failed and or refused to respond to the concerns or attempted to rectify the same.
10. That on or about the 17th November, 2014, the plaintiff engaged litigation counsel to attend to recovery of loss, the response from the defendant indicated the searches did not pertain to the same lot further evidencing the continuing lack of skill, care and competence of the defendant, despite holding themselves out to be of such reasonable skill, care and competence.
11. That as a direct result of the professional negligence of the defendant, the plaintiff has suffered loss and damage.

Particulars of Negligence

- a) Failing and or refusing to render proper, full and adequate title details on three (3) separate occasions all yielding different results.

AND THE PLAINTIFF CLAIMS:-

1. \$13,800.00 purchase price
2. All interest paid under mortgage facility

3. All legal fees expended to pursue purchase and mortgage of the property
4. All monies expended in property improvements
5. Any other damages for breach of duty of care as professionals
6. Costs
7. Interest
8. Such further or other relief the Court may deem fit.

Assessment

6. It is quite difficult to assess damages when the facts are one-sided, mainly because of the risk that issues may not be appropriately ventilated. Nonetheless, I am compelled to do the same.
7. The Plaintiff's claim against the Defendant is for the failure to use reasonable skill and care in producing a title search report disclosing all recorded transactions in title. The Plaintiff relied on the professional advice of the Defendant and consequently suffered damages.
8. The Defendant's title report omitted recordings which were lodged some 10 years prior to the Defendant's search. In fact, Natalie Smith conveyed the same property (Lot 32) twice. The first time was to The Treasurer on 8th January, 2001 and the second time was to Barry Joseph on 2nd December 2002. However, the second conveyance was lodged for recording on 24th March 2003 prior to the recording of the first conveyance, which was lodged for recording on 28th July, 2003.
9. Section 10 of the Registration of Records Act gives documents priority in the date of record lodging and not in date of execution (see the Privy Council decision in **Oceania Heights Limited v Willard Clarke** [2013] UKPC 3). Hence, the second conveyance to Barry Joseph took priority over the first conveyance to the Treasurer.

10. Therein lies the evidence of the Plaintiff's contention: how is it that the Defendant who purports to be a prudent title search company was unable to disclose the same if a proper search was conducted?

11. The decision of **Hayes v Dodd** [1990] 2 All ER 815 is most instructive. There the plaintiffs sued their conveyancing solicitor for failing to point out to them that there was no right of way over the only reasonable access to the motor repair premises which they were buying. **Staughton, LJ** said at 818f-819a:

The first question in this appeal relates to the basis on which damages should be assessed. Like Hirst, J. I start with the principle stated by Lord Blackburn in Livingstone v. Rawyards Coal Co. (1880) 5 A.C. 25 , at page 39:

“You should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”.

12. One must therefore ascertain the actual situation of the Plaintiff and compare it with the situation if the breach of contract had not occurred.

13. What then was the breach? It was not the breach of contract for the sale of land. The breach was negligence of the Defendant who held itself out to be a prudent and professional title search company, with an assurance to use reasonable skill and care in performing its services. If it had done so, it would have disclosed to the discrepancy on the title; and it is clear that, on the receipt of such information, the Plaintiff would not have completed the transaction with the Treasurer. He would have bought no property, spent no money, and borrowed none from the bank.

14. In **Perry v Sidney Phillips and Son** [1982] 1 WLR 1297 the surveyor failed to observe serious defects in the purchase of a house. The Court held: *when calculating the loss arising from a negligent survey, the loss is usually calculated as at the date of the purchase which followed.* **Lord Denning MR** said that:

“...damages should be on a scale which is not excessive but modest ... ‘where there is a contract by a prospective buyer with a surveyor under which the surveyor agrees to survey a house and make a report on it – and he makes it negligently – and the client buys the house on the faith of the report, then the damages are to be assessed at the time of the breach, according to the difference in price which the buyer would have given if the report had been carefully made from that which he in fact gave owing to the negligence of the surveyor. The surveyor gives no warranty that there are no defects other than those in his report. There is no question of specific performance. The contract has already been performed, albeit negligently. The buyer is not entitled to remedy the defects and charge the cost to the surveyor. He is only entitled to damages for the breach of contract or for negligence.”

15. Therefore, following the decision in **Perry v Sidney et al** (*supra*) the allowable damages are:

- i. The purchase price for Lot 32 in the sum of **\$13,686.18**;
- ii. Interest at 14% payable pursuant to the mortgage/loan agreement in the sum of **\$4,173.13** (sum of \$13,686.18 @ 14% for 45 months).
- iii. Legal fees and disbursements associated with purchase **\$2,427.56**.
- iv. Appraisal from Aston Jones & Associates at **\$250.00**.

16. I do note that the Plaintiff pleads other special damages as monies disbursed for home improvements however the same was not proven. I am guided by the Court of Appeal decision of in **Lubin v. Major** [1992] BHS J. No. 22 wherein **Henry, J.** stated:

“...it is settled law that special damages must be pleaded and proven ... a person who alleges special damage must prove the same. It is not in general sufficient for him merely to plead special damage and thereafter recite in oath the same facts, or give evidence in an affidavit without any supporting credible evidence, and sit back expecting the tribunal of fact to accept his evidence as true in its entirety, merely because the aforesaid evidence is not controverted, even though the particular damage in the sense of a loss having been incurred appears

reasonably improbable and or the money value attributed to the said loss or damage appears unlikely and or unreasonable viewed in the context of the susceptibility of human beings in general to overestimate and exaggerate loss, damage, and suffering without any intention whatsoever of being deliberately dishonest....”

17. There are no invoices before the Court to support and further claim for special damages.

Having regard to the same, I will reiterate the dicta of **Lord Blackburn in Livingstone v. Rawyards Coal Co. (1880) 5 A.C. 25**, at page 39:

“You should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”.

18. Additionally, as stated by **Lord Denning, MR. in Perry v Sidney et al (supra)**, “the buyer is not entitled to remedy the defects and charge the cost to the [Vendor].

19. Therefore the damages awarded to the Plaintiff are assessed at \$20,536.87 as outlined at paragraph 15 above, with interest at a rate of 6.25% from the date of Judgement to the date of payment.

20. Costs to the Plaintiff to be taxed if not agreed.

Dated the 16th day of May A.D., 2019



Carol D. Misiewicz
Deputy Registrar