

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0178

BETWEEN:

ANTHONY GILBERT
JENNER MARTIN-GILBERT
CLAIMANTS

AND

NATOYA EDWARDS
DEFENDANT

Appearances:

Mr. Stephen Williams and Ms. Danielle France for the Claimants

Ms. Kemisha Joyles for the Defendant

2020: 15th December

2021: 28th January

JUDGMENT

Byer, J.:

- [1] A couple ready to purchase a parcel of land and build their home, find themselves in possession of a parcel of land that cannot be developed. The defendant, the vendor of the parcel of land, insists that the claimants knew that the land had an issue which they were mandated to investigate and as such, the defendant has no obligation to them and the loss of their dream.
- [2] That is the nub of this case. A case which in this court's mind really fails or succeeds on what if any obligation arose between the claimants and the defendant and who the court believed at trial.

Background

- [3] The claimants and the defendant entered into a sale agreement dated the 21st March 2017 for the sale of a parcel of land Registration No. 1764 of 2017.
- [4] The claimants negotiated a loan to purchase the said lands.
- [5] A deed of conveyance dated the 15th May 2017 was executed by the defendant in favour of the claimants bearing Registration No. 1764 of 2017.
- [6] The claimants obtained a mortgage of \$75,000.00 from the Bank of Saint Vincent and the Grenadines dated the 26th April 2017 in order to facilitate the purchase of the land and affiliated expenses.
- [7] The claimants engaged the services of draftsman Mr. Cornelius Cyrus, subsequent to the purchase of the land in 2017, to design a house that was to be constructed thereon. He subsequently drew their attention to the fact that there were major underground pipelines that were not visible to the naked eye running through the land.
- [8] The claimants wrote to CWSA for clarification on the issue. CWSA through its General Manager, Mr. Garth Saunders responded via letter dated the 17th October 2017 in which he stated the said lands were encumbered by the CWSA main pipeline over which no construction was permitted. This letter was forwarded to the Chief Surveyor, Mr. Keith Francis denying permission to construct, as a result of the said pipelines.
- [9] The claimants tried to mitigate their losses by attempting to design a house that could be constructed around the pipelines but were advised by agents in the Ministry of Physical Planning and Development that they should not waste their time as they would not be allowed to build on the plot.
- [10] A letter addressed to the Planning Department from the CWSA was subsequently forwarded to the claimants. This letter was captioned **Re: Proposed Multiple Family Residence – Anthony Gilbert – Murray’s Village**. The letter further went on to state that it was in reference to an application from the Ministry of Planning K/5/2018 dated the 8th February 2018. Mr. Garth Saunders, who also wrote this letter, further stated that he was advised by his engineering department that based on the location of major pipelines in the proposed development, permission could not be granted for construction over the said pipelines.
- [11] As a result of the above, a letter was written by the claimants’ attorney to the defendant on the 5th November 2018, in an attempt to come to some settlement on the matter. The defendant responded on the 23rd November 2018, in which she denied any liability.

- [12] The claimants subsequently filed this claim in which they alleged that there were fundamental breaches of both the expressed and implied contractual terms and sought damages for the same.
- [13] On that factual matrix, by Statement of Claim filed on the 29th October 2019 the claimants sought the following reliefs:
- i. Damages of \$87,861.02.
 - ii. Interest calculated at \$11.86 per day.
 - iii. Interest on damages pursuant to section 27 of the Eastern Caribbean Supreme Court Act CAP 24 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.
 - iv. A declaration that the defendant has breached the agreement of sale.
 - v. An Order rescinding the sale and purchase.
 - vi. An Order cancelling Deed No. 1764 of 2017.
 - vii. Such further or other reliefs as the court deems fit.
- [14] The damages sought in fact are a computation of the loss and damage allegedly suffered by the claimants in undertaking the sale and are as set out hereunder:

PARTICULARS OF SPECIAL DAMAGE

1. Purchase price paid to the Vendor	\$61,222.09
2. Cost of registering the reconveyance	\$ 426.00
3. Taxes	\$ 101.91
4. Claimants 5% share of stamp duties	\$ 3,250.00
5. The Interest payments made to date	\$11,235.52
6. Legal and Registration Fees of Deed of Conveyance	\$ 5,194.00
7. Legal and Registration Fees of Mortgage	\$ 2,869.00
8. Administration Fees to Bank of St. Vincent	\$ 562.50
9. Cornelius Cyrus Drafting Plan	<u>\$ 3,000.00</u>
Total	<u>\$87,861.02</u>

- [15] Having had the opportunity to conduct the trial of this matter and hearing the evidence that was given and elicited on cross examination, this court is satisfied that there are in fact two central issues that must be considered:
- 1. Whether the defendant had disclosed the presence of the underground pipelines to the claimants and

2. If there had been non-disclosure, whether that non-disclosure was so substantial that it affected the purpose for which the land had been purchased.

Issue #1: Whether the defendant had disclosed the presence of the underground pipelines to the claimants.

[16] In order to determine this issue, it is clear, that the evidence elicited at trial must be carefully assessed.

[17] From that assessment the court makes the following findings based on a balance of probabilities:

- i. That the defendant advertised the lot of land at Murray's Village for sale at a purchase price of \$70,000.00 based on a valuation of Franklyn Browne which clearly stated that the price was based on the "unencumbered fee simple interest". There was no mention of the presence of pipelines on the said lot of land. The court accepts that this was a fact unknown to the valuator.
- ii. That the claimants sought to buy the land for the purpose of building their home. That at inspection of the land the father of the defendant indicated the boundaries to the said lot but that the land was not in a condition to be walked as the same was overgrown with grass. The marker on the land that was labelled "CWSA" was therefore not visible.
- iii. That the father of the defendant, as her agent, who brought the claimants to the land, never told the claimants that the land had pipelines running under the land, but I accept that he did tell them that the defendant had obtained planning permission for the development of the land.
- iv. That the defendant knew of the presence of the pipelines on the land since 2012 when the first attempt at a sale had fallen through and at the very least knew that the indication had been that it would cost \$26,000.00 to re-locate the pipelines. That the reduction in price of \$5,000.00 was not for the purposes of covering that cost but rather for the means of sealing the transaction for sale.
- v. That the defendant knew that the claimants intended to purchase the land for the purpose of development and that they were obtaining finance for the purchase from a financial institution. That with that knowledge the defendant purportedly created a sale and purchase agreement which made no mention of the presence of any pipelines or the cost of the removal of the same. Rather the defendant executed a deed of conveyance to the claimants contracting that the same was free from encumbrances.

vi. That the defendant during the contract stage of the transaction, in an effort to make the property as marketable as possible offered her approved plans to the claimants for their use.

vii. That neither the defendant nor her agent (her father) told the claimants about the pipelines running under the land or provided any documentation to the claimants during the contract process that indicated the same.

[18] Having made these findings of facts from the evidence, it is clear in this court's mind that the defendant and her witness were less than forthright with the court and sought to diminish their role in the misfortune that the claimants have found themselves. This court finds that they have failed miserably in that regard.

[19] The court therefore accepts on a balance of probability that the defendant never told the claimants of the presence of the underground water pipes on the parcel of land. When this court accepts that the claimants had made it clear the purpose for the purchase and the fact that the financing was obtained from a financial institution, it is clear to this court that these claimants were not simply purchasing for the purpose of investment but would have required the parcel of land to develop.

[20] The defendant knew this, knew that she had failed to sell the parcel previously due to the presence of those very pipes and took the conscious decision not to share that information with the claimants. I therefore find that the defendant had not disclosed to the claimants this information as to the presence of the underground water pipes.

Issue #2: If there had been non-disclosure, whether that non-disclosure was so substantial as to affect the purpose for which the land had been purchased.

[21] Having found that there was in fact a non-disclosure by the defendant, the more critical question must be whether that non-disclosure was so substantial to support the relief as claimed by the claimants.

[22] The submissions of the claimants in this regard are that a non-disclosure that can be considered substantial is one that essentially deprives the buyer of their bargain. The claimants submitted that the defendant not only knew of the intention of the claimants but also that it was clear that the defendant sold the lot of land under the guise of residential development.

- [23] The claimants being unable to use the land for that purpose have therefore been deprived of their bargain submitted that as a result they can rescind the bargain and recover the monies expended as damages for breach of contract.
- [24] The claimants by supplemental submissions filed on the 8th January 2021 sought to also submit that not only were the claimants deprived of the purpose of their bargain but that additionally the presence of the pipelines amounted to a defect in title. The claimants submitted that the fact that the Central Water and Sewage Authority (hereinafter referred to as CWSA) owned these pipes that ran under the land, the defendant could not have in any event conveyed title to the land to the defendant at all or in any event certainly not free of any encumbrances and as such the defendant had breached the contract with the claimants for which the claimants were entitled to damages as claimed.
- [25] The essence of the submission of the defendant was that the claimants having not been induced to purchase the land, failed to carry out an adequate inspection of the land whereby they would have discovered the clear marker of the presence of the interest of the CWSA. Having failed to do so, the claimants must be bound by their failure and as such they were not entitled to rescind the contract as pleaded.
- [26] The defendant also additionally submitted that since the claimants have never produced a document from the authority that governs land development, the Department of Planning, to indicate that they were prohibited from building, it was clear, in the submission of the defendant, that there was nothing to indicate that the land sold was not fit for the purpose it was required.

Court's Analysis and Findings

- [27] The starting point for this court on this issue must be to look at the bargain that was entered into as between the claimants and the defendant. Once the sales and purchase agreement was completed and the defendant had conveyed the property to the claimants, the contract that was thus created was the actual deed of conveyance. It is therefore to this deed of conveyance that this court must look to decipher the obligation of the defendant.
- [28] The operative words of the conveyance stated it as thus “**...and the Vendor doth hereby COVENANT with the PURCHASERS that notwithstanding anything done by the VENDOR the VENDOR now hath good right to grant the said hereditaments UNTO and TO THE USE OF THE PURCHASERS their heirs and assigns in manner aforesaid AND THAT THE PURCHASERS shall and may from time to time and at all times hereafter peaceably and quietly possess and enjoy the same and receive the rents and profits thereof without any lawful eviction interruption claim and demand whatsoever from or by the VENDOR her heirs and assigns or any person or persons lawfully or equitably claiming from under or in trust**

for her AND THAT free from encumbrances whatsoever made occasioned or suffered by the Vendor or any person or persons whomsoever having or lawfully claiming any estate or interest in the said property or any part thereof from under or in trust for the Vendor the VENDOR shall and will from time to time and at all times hereafter at the request and costs of the PURCHASERS doth and execute or cause to be done and executed all such acts deeds assurances and things for the further or more perfectly assuring the said hereditaments and premises and every part thereof UNTO and TO THE USE OF the PURCHASERS their heirs and assigns in manner aforesaid as shall or may be reasonably required.”¹

- [29] Thus the contractual obligation of the defendant was to convey to the claimants the lot of land “free from encumbrances”. According to the authors of the text Megarry and Wade: The Law of Real Property², “...a good title means a title free from all incumbrances except those which are patent or are known to the purchaser at the time of contracting. The term “incumbrances” covers all subsisting third party rights ...”
- [30] From this definition alone, it is clear, that the existence of water lines under the lot of land purchased by the claimants was in fact encumbered by a third party, CWSA. This was in fact confirmed in correspondence from the CWSA in October 2017³ some five months after purchase.
- [31] However the only exception to this characterization is if the so called incumbrance was patent or if it was known to the purchaser. In order to therefore assess, whether either of these apply in the present circumstances, the definition of a patent defect is required. In the text Commonwealth Caribbean Property⁴ the learned author Gilbert Kodilinye stated it thusly “a defect is not patent merely because the purchaser had constructive notice of it. It must be a defect that arises either to the eye or by necessary implication from something which is visible to the eye.” Indeed, this point was reiterated in the case of **Yandle & Sons v Nelson**⁵ in which Sargeant J had this to say, “I think, therefore, that in considering what is a latent defect and what is a patent defect, one ought to take the general view that a patent defect, which can be thrust upon the purchaser, must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. It would not be fair to hold that a purchaser is to be subjected to all the rights which he might have found out if he had pursued an inquiry based upon that which was presented to his eye. I think he is only liable to take the property subject to those defects which are patent to the eye, including those defects which are a necessary consequence of something which is patent to the eye.” It is upon this contention and definition that the defendant seeks to rely when at trial they asked the claimants about whether they had inspected the land prior to purchase and the

¹ Deed of Conveyance dated the 15th May 2017 recorded a Deed #1764/2017

² 9th Edition Stuart Bridge, Elizabeth Cooke and Martin Dixon

³ Exhibit AG5 to the WS of the first claimant filed 15/5/2020

⁴ 4th Edition

⁵ [1922] 2 Ch 199 ChD

placement of a marker with the letters “CWSA” inscribed on it on the said lot of land. However, this court has already found as a fact that no inspection was undertaken by the claimants due to the land failing to be conducive to do so. As such it is clear to this court that there was nothing that was visible to the claimants that would have warranted investigation and which they then failed to do.

- [32] So in this court’s mind, the encumbrance on the land was clearly latent. As Kodilinye put it plainly⁶, *“The rationale of the duty to disclose latent defects in title is that the state of the vendor’s title is a matter **exclusively** within his knowledge and it is reasonable to expect that the purchaser will rely on the vendor to disclose such defects. Where a vendor is in breach of this duty, the purchaser may treat the contract as repudiated and sue the vendor for damages. Moreover, although non-disclosure per se does not amount to misrepresentation, a ‘suppression of the truth may contain a suggestion of falsity’ rendering the vendor liable in damages for misrepresentation.”* (My emphasis added) Therefore where the defect is patent, the defendant cannot rely on the defence of “oh well the party who was misled could have checked and found out the facts for himself and he really has only himself to blame that he relied on me and did not make the inquiries that he might have made.”⁷
- [33] That having been said, the question must therefore now be, was that failure to divulge this latent defect one that was so substantial to allow the claimants to rescind the contract? In this court’s mind the answer to that is yes. A “non-disclosure (where there is a duty to disclose) [does] cause a breach of contract.”⁸
- [34] In this court’s mind this was not a matter of title that could have been discovered by the requisite investigation of title, this was a matter that was solely within the province of the defendant and which they failed to disclose. That failure has consequences and for these claimants, the court is satisfied that they are entitled to rescind the contract and seek damages for such breach of contract⁹.
- [35] I therefore find that the non-disclosure was substantial and that the purpose for which the claimants had purchased the land was completely undermined. The claimants have lost the essence of their bargain. No amount of reasonable inspection¹⁰ of title would have exposed this encumbrance which amounted to a defect in title. The defendant, wanted to be rid of this property, and she did not care how she did so. The defendant therefore could not sell the land free from encumbrances as she had covenanted to do.

⁶ Commonwealth Caribbean Property Law at page 207-208

⁷ **Laurence v Lexcourt Holdings Ltd** [1978] 1 WLR 1128 at 1137

⁸ JT Farrand Contract and Conveyance at page 62

⁹ **Bain v Tweddle** [1959] CH 679

¹⁰ **Re Puckett and Smith’s Contract** [1902] 2 Ch 258

[36] Judgment is therefore entered for the claimants on the statement of claim. In so giving judgment the court is guided by the provisions of the Eastern Caribbean Supreme Court (St Vincent and the Grenadines) Act¹¹ and section 20 in particular which empowers the court to "...in every cause or matter pending before the court, grant either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of these matters avoided."

Order of the court is therefore as follows:

1. An order rescinding the sale and purchase agreement is denied. The same having been subsumed by the conveyance dated the 15th May 2017.
2. The Deed of Conveyance dated the 15th May 2017 numbered 1764 of 2017 is cancelled.
3. The declaration that the defendant has breached the sale and purchase agreement is denied for the reason advanced at number 1 above but a declaration is granted finding that the defendant has breached the contract as contained in the deed of conveyance.
4. Damages are awarded to the claimants in the sum of \$87,861.02 on the said breach with interest at the statutory rate, the claimants having failed to offer any evidence to the alternate rate of interest as prayed.
5. Prescribed costs to the claimants pursuant to Part 65.5 CPR 2000 Appendix B.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar

¹¹ CAP 24