

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2010/0730

BETWEEN:

**ROSE MARIE KELLY
TREVOR D. JONES**

Claimants

And

**ANNE SPIVEY
(As Representative of the Estate of Merle Henry)
ANNE SPIVEY
(As Personal Representative of the Estate of Audrey Nicholls)**

Defendants

Appearances:

Ms. Leslie-Ann Brissett for the Claimants

2016: September 29th

JUDGMENT

- [1] **HENRY, J.:** By Amended Fixed Date Claim Form filed 10th November 2014, the claimants seek an order for specific performance of an agreement for sale of certain lands dated 25th April 2007; or alternatively for damages.
- [2] In their Amended Statement of Claim the claimants plead that by written agreement entered into on 25th April 2007, Audrey Nicholls and Merle Henry agreed to sell and the claimants agreed to purchase certain property. In addition, a Power of Attorney was executed by the vendors to enable their agent to execute instruments of transfer. It was a term of the agreement, inter alia, that in addition to the purchase price, the claimants would pay all legal fees, transfer taxes, and fees associated with the transfer of the property. The claimants plead that having paid the agreed purchase price, they were, at all material times ready, willing and able to pay all legal fees, transfer taxes and fees associated with the transfer of the property. However, on 27th June 2008, the daughter of Audrey Nicholls delivered two letters to the first claimant (Ms. Kelly), which purported to rescind the sale of the subject property. On 22nd July 2008, two cheques each in the amount of

EC\$77,812.50 were delivered to Ms. Kelly from the vendors with a note purporting to return the purchase price. Thereafter, in breach of the contract, the defendants sold the subject property to a third party and consequently failed and/or refused to complete the said Agreement for Sale dated the 25th April 2007.

- [3] Leave was granted to the claimants to serve the Fixed Date Claim Form and Statement of Claim on the defendants out of the jurisdiction pursuant to Part 7 of the Civil Procedure Rules (CPR). The affidavit of service was duly filed on 15th April 2015. The defendants failed to file Acknowledgement of Service and the claimants made application for judgment to be entered. The matter was set down for hearing and Notice was served on the defendants. However, the defendants failed to appear.

The Evidence

- [4] Ms Kelly was the only witness called at the trial. Her witness statement was admitted in evidence together with the documents referred to therein.
- [5] Her evidence is that her uncle Ernest Henry (now deceased), was the proprietor of certain lands at Ffryes from whom she had rented a portion. In July 2006, she was advised that he intended to sell the lands instead of renting. Subsequently, she approached her uncle requesting that he sell her a piece of the land near Ffryes beach. He took her to look at a portion of the land and they agreed she would purchase 1 acre. The land was subsequently surveyed and together they viewed the boundaries. She had previously requested that one of the boundaries be put "20ft to the right", which she considered more appropriate for building her home. She observed that this had not been done and upon inquiry was told that that portion did not belong to him. She subsequently learnt that the piece of land she wanted was owned by Merle Henry, a relative living in Trinidad.
- [6] Ms Kelly wrote to Merle Henry in March 2007 expressing an interest in purchasing the land. Her evidence is that Merle denied she owned the land and demanded proof. Ms Kelly states that she subsequently sent her a copy of the land register, which she states had Merle Henry's name listed as owner. She wrote to Merle Henry in these terms:- "My understanding from Ernest Henry is that you own about 5 1/2 acres. I would like to buy all of it, if you will sell". Discussions continued and she later offered to purchase 2.16 acres from Merle Henry and 2.16 acres from her sister Audrey at a cost of EC\$75,000.00 for each portion. Her evidence is that the sisters accepted and on 25th April 2007, she travelled to Trinidad to the office of the Attorney representing the sisters. Powers of Attorney in favour of Ernest Henry were executed by the sisters as well as the Agreement for Sale.
- [7] After some delay in January 2008, Ms Kelly paid the sum of \$8,296.00 for the survey of 4.34 acres of land on the hillside by Ffryes beach. Nothing else seemed to happen until June 27th 2008 when the daughter of Audrey Nicholls delivered two letters to her, one from Merle Henry and the other from Audrey Nicholls. Each letter was in regard to the contract for sale of the lands at Ffryes

Estate and each one rescinded the contract as being void on the basis of misrepresentation and inaccuracies on the part of Ms Kelly. The third paragraph in each letter reads:-

"I have sought legal advice on the matter and my lawyer has advised me that any agreement between us which was based on those misrepresentations is voidable. Accordingly, I am entitled in law to rescind any such agreement. I elect to do so for several reasons, chief of which is the gross undervaluation you provided me for the land and the undue influence exerted by you in convincing me to seal the deal without the benefit of independent professional advice."

- [8] The letters offered to repay the \$75,000.00 with interest at the rate of 3%. On 22nd July 2008, two bank drafts each in the amount of EC\$77,812.50 was delivered to Ms Kelly. Her evidence is that up to the date of the hearing she has not negotiated the drafts.

Issues

- [9] Are the claimants entitled to specific performance? If not are they entitled to damages in lieu thereof?

The Agreement

- [10] The Amended Fixed Date Claim Form seeks specific performance of a written agreement entered into between the claimants and the defendants on the 25th April 2007 for the sale of a property situated at Ffryes Estate and described as Registration Section: South West; Block 55 1184A; Parcel 330. The claim states that the claimants will rely upon the terms and conditions of the said agreement at trial. In fact, at trial the claimants have presented two agreements for sale both dated the 25th April 2007 – one between Audrey Nicholls of Trinidad as seller and Rose Marie Dalmain Dowe-Kelley as purchaser; the second between Merle Henry of Trinidad as seller and Rose Marie Dalmain Dowe-Kelley as the purchaser. The recital in each of the agreements reads:-

"Whereas the Seller is one of the Registered Proprietors of land which is more particularly contained and described in the Land Registry as Registration Section: South West, Block: 55 1184A (hereinafter called "the Property") and the Purchaser is desirous of purchasing the said Property."

- [11] The remainder of the Agreements each consist of three paragraphs as follows:-

"NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. The seller will sell and the Purchaser will buy the Seller's portion of the Property (which is 2.16 acres) for the sum of SEVENTY-FIVE THOUSAND DOLLARS EASTERN CARIBBEAN (EC\$75,000.00).
2. The Seller agrees that the Purchaser has satisfied payment of the purchase sum and hereby grants permission to allow the execution of an Instrument of Transfer of the

Property to Rose Marie Dalmain Dowe-Kelley and Trevor D. Jones and such other assurances and documents as may be necessary to carry out the transfer of the Property.

3. The Purchaser agrees to pay all legal fees and transfer taxes and fees associated with the transfer of the Property."

[12] One Agreement is signed by Merle Henry, the other by Audrey Nicholls.

[13] There is no single Agreement for sale between the claimants and defendants as pleaded. The recital in each agreement acknowledges that the named seller "is one of the Registered Proprietors of the land", thus signifying some form of co-ownership. However, no further mention is made in the agreement of the identity of the co-owners or the nature of the co-ownership. Secondly, the property is only described by the registration section and block number. No parcel number appears in the entire Agreement.

[14] Counsel for the claimants refers the court to the Powers of Attorney executed by the defendants at the time the Agreements for sale were executed. Each Power of Attorney is headed as follows:-

"Registered Land Act, Cap. 374

POWER OF ATTORNEY

<u>REGISTRATION SECTION</u>	<u>BLOCK</u>	<u>PARCEL</u>
SOUTH WEST	55 1184A	330

[15] The terms of each Power of Attorney are identical except for the identity of the person making the appointment. Both Audrey Nicholls and Merle Henry appointed Ernest Henry as their Attorney to do various acts and manage certain affairs. Paragraph 5 in each document gives the Attorney the following power:-

"To sell my interest in the said property and execute and sign in my name and on my behalf any deed or document relating to my property and employ such professional advisers as may be necessary for that purpose."

[16] The Power of Attorney however, makes no mention of the Agreements for sale to the claimants.

The Claim by the First Claimant

[17] Notwithstanding that the agreements each omit the parcel number, Counsel submits that the parcel number is ascertainable from the Powers of Attorney and from the course of dealings between the parties. Therefore the absence of the parcel number would not constitute a bar to enforcement of the agreements. Even if the court were to accept that the agreements are in respect of parcel 330, there are serious issues which prevent enforcement of the sale of that parcel.

[18] A copy of the Land Register for Parcel 330 was among the exhibits. The court notes that the first registration is dated 15/10/2007. The Proprietorship Section lists the names and addresses of the proprietors as:

“Ernest Henry of Ffryes Estate upon trust for Adeline A. Lewis, deceased, Esmee Briggs, Merle Henry, Audrey Nicholas, Eulaline Athill, Arthur Henry, Donald Henry, John Henry and Ernest Randolph Henry all of Ffryes Estate, St. Mary, Antigua and Barbuda as Joint Proprietors”.

[19] The size of the area is listed as 4.34 acres. The register refers to Mutation No. RNLC200700323 (55 1184A 323). No other documentation from the Land Registry as to ownership by the defendants of lands located at Ffryes Estate was submitted to the court.

[20] The emails between the Attorney for Ernest Henry and Ms Kelly indicate that there was a master parcel of 38 acres to which several beneficiaries were entitled. Among them were three sisters – Merle Henry, Audrey Nicholas and Esmee Briggs who were entitled to their father’s share in the 38 acres. Counsel submits that this is the portion of land represented in Parcel 330 and which is the subject of the agreement for sale. However, there is no documentary evidence before the court to substantiate this assertion. The only land Register submitted contradicts the claimant’s assertion that parcel 330 is owned by the three sisters.

[21] The court is bound by the information on the land register before the court which indicates that parcel 330 is held in trust for nine beneficiaries as joint proprietors. Without more, two of the nine could not validly contract to sell what amounts to the entire parcel.

[22] Furthermore, section 3 of the Registration and Records Act Cap 375 provides that every deed is absolutely void as against any subsequent purchaser for valuable consideration, unless the deed shall have been duly registered before the registration of the deed under which the subsequent purchaser shall claim. Both agreements were executed on the 25th April 2007. However, they were not registered in accordance with the provisions of the Registration and Records Act Cap 375 until 8th November 2012. Paragraph 15 of the Amended Statement of Claim pleads that the subject property was sold to a third party in November 2008. There is no averment that the third party was not a subsequent purchaser for value without notice.

[23] Accordingly, the claim for specific performance is refused.

The Claim by the second Claimant

[24] The second claimant is not a party to either of the Agreements for sale. His name is mentioned in paragraph 2 of the Agreement which indicates that the Instrument of Transfer of the property is to be in the name of RoseMarie Dalmain Dowe-Kelley and Trevor D Jones. There is absolutely no

privity of contract between Trevor Jones and either defendant. Accordingly he cannot maintain an action for breach of contract¹.

Damages

[25] By two bank drafts dated the 25th July 2008, the defendants returned to Ms Kelly the sums tendered for the purchase of the land along with interest at the rate of 3%. Ms. Kelly however, failed and/or refused to negotiate the bank drafts. Counsel submits that they are now stale and that the court ought to, at least, order the defendants to reissue cheques in the amount of the purchase price plus interest.

[26] A banker's draft is a draft drawn by a bank upon itself. It is different from a cheque. A banker's draft contains the bank's undertaking to pay the amount of the draft. It is therefore for Ms Kelly to present the original drafts to the bank for payment and to satisfy the bank that the drafts, although issued in 2008, were never previously cashed.

Conclusion

[27] The claim by the second claimant is dismissed for lack of privity of contract with the defendants. Ms Kelly has failed to establish that she is entitled to specific performance of the Agreements or to damages.

[28] Accordingly, the claim is dismissed.


CLARE HENRY
High Court Judge
Antigua and Barbuda

¹ Tweddle v Atkinson [1861 – 73] All ER 369; Edwards v Kaiser Jamaica Corporation et al #JM 1981 SC 14