

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

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2011/0394

BETWEEN:

NORRIS SCHOLAR

Claimant

and

[1] FOUNTAIN OF LOVE MINISTRIES

1st Defendant

[2] PASTOR RAYMOND PROSPER

2nd Defendant

[3] IRA ARCHIBALD

3rd Defendant

RAYMOND PROSPER

Ancillary Claimant

and

**[1] CONSUELA JOSEPH
(formerly CONSUELA AKBAR)**

1st Ancillary Defendant

[2] IRA ARCHIBALD

2nd Ancillary Defendant

[3] NORRIS SCHOLAR

3rd Ancillary Defendant

Appearances:

Mrs. Kamilah Roberts for the Claimant

Ms. Samantha May for the 1st Ancillary Defendant

Mr. Kendrickson Kentish and Amaya Athill for the 3rd Defendant

Mr. Sherfield Bowen for the 1st and 2nd Defendants

2014: February 11
May 14

JUDGEMENT

- [1] **Cottle, J.:** Mr. Norris Scholar is now the registered proprietor of the parcel of land at the heart of the present dispute. It had been formerly owned by Mrs. Consuela Joseph and her deceased husband and sold to Mr. Scholar by Mr. Ira Archibald, who acted as agent for Mrs. Joseph. On the parcel in question Pastor Raymond Prosper operates the Fountains of Love Ministries, a church.
- [2] Mr. Scholar purchased the land at a public auction on 26th August, 2008. He completed the registration as proprietor on 12th March, 2010. Pastor Prosper has been operating the Fountain of Love Ministries from a building on the land since 2004. On 28th April, 2001, he contracted with Mr. Archibald as agent for Mrs. Joseph for the purchase and sale of the parcel. It was agreed that he would make an initial payment of \$16,000.00 out of the agreed purchase price of \$72,636.00. The balance was to be paid within 18 months. A further \$38,000.00 was paid leaving a balance of \$18,636.00 still due.
- [3] Mr. Scholar has now filed the present claim. He seeks to have Pastor Prosper and the Fountains of Love Ministries an unincorporated entity, evicted from the land as Mr. Scholar is now the registered proprietor. He also claims against Mr. Archibald for damages.
- [4] Pastor Prosper has filed an ancillary claim against Mrs. Joseph, Mr. Archibald and Mr. Scholar. In the Ancillary Claim Form he seeks only specific performance of the sales agreement. Other relief is sought in the Statement of Claim.
- [5] Under Rule 8.6 part (1) (b), Civil Procedure Rules 2000 (CPR), the Claimant must specify any remedy he seeks. The failure of Mr. Scholar to seek any order or relief against Mr. Archibald is in breach of part 8.6 (1) (b). However, it is true that part 8.6 (2) allows the court to grant any remedy that the court considers the Claimant to be entitled to in the circumstances.
- [6] In the Statement of Claim, Pastor Prosper asks for \$250,000.00 in damages if specific performance is not granted.

The Evidence

- [7] Mr. Norris Scholar is an Attorney at Law. He lives next to the parcel of land in issue and as such he was well aware of the church which was situated on the land. Mr. Scholar saw a newspaper advertisement offering the parcel for sale at a public auction. He searched the Land Registry. He learned that the parcel was registered in the names of Hakim Akbar and Consuela Akbar. He learned that Mr. Akbar had been presumed dead and that Letters of Administration had been issued to his widow Consuela (now Joseph). In August or September, 2008, Mr. Archibald furnished him with a copy of the grant of Letters of Administration. He says he asked Mr. Archibald about the occupation of Pastor Prosper and the church and was told that vacant possession was guaranteed him as Mr. Prosper and the church were tenants on whom notice to quit had been served. On 28th August, 2008, he attended the auction. He bid and the property was knocked down to him at a price of \$125,000.00. On 27th August, 2008, he paid the required 10% deposit. He applied to the RBTT Bank for a loan of \$84,000.00 to part finance the rest of the purchase price. The loan was granted. He paid the balance of the purchase price on 15th May, 2009. On 12th March, 2010, he was registered as proprietor. The bank also registered a charge against the land on the same day. Mr. Scholar says he has been paying the property taxes since 2009.
- [8] During all this time, Pastor Prosper and the church continued in occupation. It was not until 2011 that Mr. Scholar wrote to them demanding that they vacate. In his witness statement Mr. Scholar says that it was in 2013 that he got information about the claims of the church and Pastor Prosper to the land. He says he was a bona fide purchaser for value without any notice of the dealings between Pastor Prosper and Mr. Archibald on behalf of Mrs. Joseph.
- [9] Mr. Scholar was cross examined. He admitted that Mrs. Prosper, the wife of Pastor Prosper and a member of the church, had approached him in 2008 or 2009. She had shown him receipts evidencing payment for the land. Mr. Scholar refused to act for her. He did not advise her to have a caution placed on the land register. When pressed, Mr. Scholar said "I did become aware of her interest in the land. Yes, after I became aware of her interest I continued in my transaction because it was already well advanced."

- [10] Raymond Prosper is the senior pastor at the Fountain of Love Ministries. The church is named as the 1st Defendant. It is not a natural or legal person. Nothing was made of this at the trial as it was clear that Pastor Prosper represented the church in this matter. Pastor Prosper is married to Nora Prosper. In 2001, they attended the offices of Mr. Archibald. They wanted premises to build a church. They agreed to buy the parcel in issue in this case. The price was agreed at \$72,636.00. A payment schedule was agreed. It was reduced to writing and signed by Mr. Archibald as agent for the land owners. Under the plan \$16,000.00 was payable as a deposit. The balance was to be paid within 18 months. The initial deposit was paid on 29th April, 2001. By April, 2002, \$18,000.00 was paid leaving a balance of \$38,636.00. Around 23rd September, 2002, Pastor Prosper says he returned to pay the balance. Mr. Archibald was then abroad and because his wife was unsure of the outstanding balance Pastor Prosper paid \$10,000.00 to Mr. Archibald's office.
- [11] On or about 30th September, 2002, he returned to Mr. Archibald. He tendered the remaining balance of \$28,636.00. Mr. Archibald declined to accept. He said there was a problem. Mr. Akbar had gone down in a plane crash. No body was recovered. Pastor Prosper says that Mr. Archibald told him that in the circumstances it would take 7 years for him to be declared legally dead. As the property was jointly owned no transfer could take place before that time. Pastor Prosper went away with the money.
- [12] In April, 2003, Mr. Archibald was approached. The Prospers wished to erect a church building on the land. Mr. Archibald consented but suggested that \$10,000.00 more be paid so the Prospers could "have more equity". The money was paid on 3rd April, 2003 and Mr. Archibald issued his receipt. On 7th April, 2003, Mr. Archibald provided a letter to the Prospers which they took to the Development Control Authority to get permission to build. Approval was granted and the church construction commenced in February, 2004.
- [13] Pastor Prosper says that in 2009 he received a letter from Mr. Archibald. It was dated 2007. It demanded payment of \$46,060.59 in 14 days. It referred to a contract date of 5th April, 2000. On 19th September, 2009, Pastor Prosper hand delivered his reply. He suggested that the amount demanded was erroneous and asked to be advised of the correct balance due.

- [14] It was only in September, 2009, that Pastor Prosper learned that the land had been sold to Mr. Scholar in August, 2008.
- [15] Pastor Prosper was cross examined. He said he was unaware that Mr. Akbar had died in 1997. He explained that when they approached Mr. Archibald about building in 2003, they did not speak to Mrs. Consuela (Joseph). They did not know her. He insisted that he tried to complete payment to Mr. Archibald who would not accept full payment. He made no payments after April, 2003 because he awaited word from Mr. Archibald who they would see regularly.
- [16] Mrs. Nora Prosper is the wife of Pastor Raymond Prosper. She too is a pastor in the church. She gave evidence along the lines her husband did.
- [17] Mr. Ira Archibald is now retired. He used to be a Real Estate Agent and Auctioneer. He acted as agent for the sale of the land in issue. He says he agreed to sell it to the Prospers for \$70,000.00. They were to pay by installments. He says they stopped paying in or around 2006/2007. He offered the land for sale at public auction 3 times in 2008. The first two were unsuccessful but the land was sold to Mr. Scholar at the third auction. He says Mr. Scholar is a close personal friend.
- [18] Under cross examination, Mr. Archibald agreed that he received no payments after April, 2003. He wrote to the Development Control Authority to get permission for the Prospers to build the church. He denied refusing to accept the balance of the purchase price. He did not tell them that they had to wait 7 years for Mr. Akbar to be declared dead before they could get title. He wrote the Prospers in 2006 demanding payment of the balance due. He did not produce a copy of this letter. He did speak to Mr. Scholar but did not tell him that he had signed a purchase agreement with the Prospers. He agreed that the funds had been paid to his office and receipts issued. He agreed that the balance due by the Prospers was \$18,836.00. He never told Mrs. Consuela Joseph that he had received money from the Prospers since 2003. He did not pay any of that money to Mrs. Joseph. He said the money "could still be there."

- [19] Mrs. Consuela Joseph owned the land in issue jointly with her husband. He disappeared in a plane crash. She was told it would take 7 years to have him declared dead to allow her to sell the land. She discussed this with Mr. Archibald. He advised her to go to the law firm Clark and Clark for advice. She did so and the lawyers were able to secure a court order declaring her husband dead without having to wait for 7 years.
- [20] When Mrs. Joseph was cross examined, she said that she had never met or spoken with the Prospers. She did not give Mr. Archibald permission to allow them to build on the land. She confirmed that it was Mr. Archibald who told her she needed to wait for 7 years before she could do anything with the land. He did not pay to her any of the purchase money which he had collected from the Prospers between 2001 and 2003. In 2006, she enquired of Mr. Archibald. She was unhappy the land had not yet been paid for. She suggested asking the Prospers to pay rent in the interim. Mr. Archibald told her he would give them a period to pay up. No further payments having been received she was content that the property be put back on the market. She has received the payment from Mr. Scholar.
- [21] The court had the benefit of seeing and hearing the witnesses. I found the Prospers to be reliable witnesses. I believe Pastor Prosper that they offered Mr. Archibald the full purchase price within 18 months of the agreement. I believe that Mr. Archibald refused to accept the full price and explained that Mr. Akbar's disappearance would require a 7 year wait for him to be declared dead. Mr. Scholar did not impress the court. He was not a bona fide purchaser for value without notice. He knew of the occupation of the church and the Prospers. Before completing his purchase he knew that the Prospers had a purchase agreement. He saw the receipts evidencing their payment on account for the lands. Mr. Archibald was less than completely candid with the court. I find that much of the blame for the present debacle rests squarely on his shoulders. In his evidence in chief he was unsure of the contract price of the land he agreed to sell to the Prospers. He wrote a letter which was backdated and still demanded an incorrect balance. He gave the wrong date at which he stopped taking payment from the Prospers. I did not think his evidence could be relied on.

Contentions of the Parties

[22] Mr. Scholar, through his counsel, submits that several matters fall for determination. He lists them as follows:

Does the Claimant have a valid claim against the First Defendant, Fountain of Love Ministries, being an unincorporated entity?

- (a) Are the Claimant's rights as registered proprietor of Parcel #173 subject to any overriding interests in favour of the 1st and 2nd Defendants and if so what is the nature and extent of the overriding interests?
- (b) Is there in existence a valid enforceable contract for sale between the Second Defendant and the First Ancillary Defendant?
- (c) Is the Claimant entitled to vacant possession of Parcel #173?
- (d) Have the 1st and 2nd Defendants wrongfully remained in possession of Parcel #173?
- (e) If so should damages be ordered to be paid by the First and Second Defendants to the Claimant for loss of use of Parcel #173?
- (f) Was the sale of land from the First Ancillary Defendant to the Claimant a sham or otherwise liable to be rendered null and void?
- (g) Is the Second Defendant/Ancillary Claimant entitled to specific performance of the April, 2003 agreement to purchase Parcel #173?
- (h) Alternatively, is the Second Defendant/Ancillary Claimant entitled to damages?
- (i) Is the Third Defendant liable in negligent misrepresentation to the Claimant?

[23] I will treat with them seriatim. As noted earlier, at the trial of this matter, no emphasis was placed on the fact that the Fountain of Love Ministries is an unincorporated entity. This was a correct attitude to adopt as Pastor Prosper was also a party to this claim and acted on behalf of the church.

[24] Section 23 of the Registered Land Act Capt 374 of the Laws of Antigua and Barbuda provides that absolute ownership of land rests in the registered proprietor. This absolute ownership is subject to any overriding interests under Section 28. Section 28 (g) preserves:-

“28. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed.”

[25] On the facts as I have found them, Mr. Scholar was aware that the church and Pastor Prosper were in actual occupation. Before he completed the purchase and certainly before he was registered as proprietor, Mr. Scholar was aware that the Prospers had a sale agreement for the land and had receipts showing part payment. The effect of that is that the rights of the Prospers to the land subsist and affect the land.

[26] There was a contract between Mr. Archibald and the Prospers. The full purchase price was offered. Mr. Archibald refused it. The Prospers were at all material times ready and willing to complete the purchase. It was entirely due to the default of Mr. Archibald that this was not done since 2003. It follows that Mr. Scholar is not entitled to vacant possession of the land and Pastor and Mrs. Prosper are rightfully in occupation.

[27] Section 140 of the Act empowers the court to order rectification of the Land Register where it is satisfied that the registration was obtained by fraud or mistake. At the time of the sale Mr. Archibald knew that he had previously contracted with the Prospers for the sale of the land to them. He knew that they had paid most of the purchase price. He knew that he had refused to accept the balance on the basis that no title could be passed to them before the expiry of 7 years after the disappearance of Mr. Akbar, one of the registered owners. The purchaser, Mr. Scholar knew that the Prospers were in occupation. Having been shown the receipts for payment, he could not claim to believe them to be tenants. The sale to Mr. Scholar in those circumstances is fatally tainted. I find that Pastor Prosper is entitled to specific performance of the 2001 agreement.

- [28] Counsel for the Claimant also raised the issue of negligent misrepresentation by Mr. Archibald. On the evidence before me I find that Mr. Scholar was not misled. Before he completed the transaction he was aware of the interest of the Prospers. He cannot claim to have relied on the representations of Mr. Archibald when he had cogent evidence to the contrary. As a professional man Mr. Scholar would have been well aware of his obligation to make proper investigations, knowing as he did, of the occupation of the land.
- [29] Mr. Archibald seeks to avoid all liability in this matter. He says he is not liable to Mr. Scholar for negligent misrepresentation. He denies having made the statement alleged. He says the pleadings in this regard are vague and not particularized. He also reiterated that the duty to investigate remained on Mr. Scholar as render. In order for a Claimant to recover damages for negligent misrepresentations he must show that he relied on the representation to his detriment in circumstances where the advisor had a duty of care under the principle laid out in **Hedley Byrne v Heller** [1964] AC 465. In the present case the facts show that Mr. Scholar had information which told him that the Prospers were not tenants. He had that knowledge before he completed the purchase. It cannot then be said that he relied on the representation made by Mr. Archibald.
- [30] Mr. Archibald says as far as the ancillary claim is concerned he is not liable as he was an agent for a disclosed principal and no liability thus attaches to him personally for breach of contract.
- [31] The result of my analysis of this unfortunate state of affairs is that I conclude that the claim of Mr. Scholar has failed. His legal interest in the land as registered proprietor is tainted by the fraudulent manner in which the registration was obtained. In any event his title would be subject to the overriding interest of the Prospers as occupiers. I decline to grant any relief against Mr. Archibald. The ancient maxim *ex turpi causa non oritur actio* springs to mind. Additionally, I have found that he did not rely on any representation made to him by Mr. Archibald. The injunction prayed for is refused.
- [32] I find for Pastor Raymond Prosper on the ancillary claim. I order specific performance of the contract of 28th April, 2001 which has already been substantially part performed by Pastor Prosper.

Upon completion of the contract I direct that the land register be amended to reflect that Pastor Prosper is the registered proprietor of the parcel.

- [33] The costs of Pastor Prosper on the claim and the ancillary claim will be paid by Mr. Archibald and Mr. Scholar. The amount of the costs will be \$7,500.00 being prescribed costs.

Brian Cottle
High Court Judge