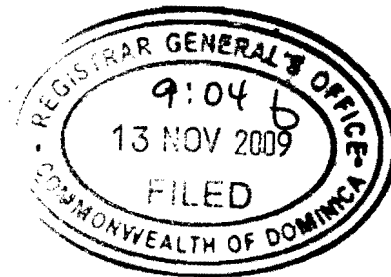


**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

**COMMONWEALTH OF DOMINICA
DOMHCV2007/0168**

BETWEEN:



CASTAWAYS DEVELOPMENT LTD

Claimant

and

**LINDA HARRIS
CASTAWAYS HOTEL LTD.**

Defendants

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. Michael Bruney for Claimant
Mr. Gerald Burton for Defendant

JUDGMENT

[2009: 1st 2nd October; 13th November]

- [1] **COTTLE J:** By claim 590 of 1995 Castaways Development Ltd. (Development) sought to recover 2.272 acres of land in Mero in the Commonwealth of Dominica. That land was included on the Certificate of Title of Development but was being occupied by Castaways Hotel Ltd. (Hotel).

Introduction

- [2] Development was owned and controlled by one Milan Cjevic, while Hotel was owned and controlled by William Harris.

Development sought the following relief:

1. an order that the defendants or either of them do forthwith pull down and remove a fence built by the 1st or 2nd defendant, or his servants or agents on the plaintiff's land at Mero in the parish of St. Joseph.
2. Damages for trespass
3. Possession of the land described in the Schedule hereto
4. Mesne profits at a rate to be determined by the Honorable Court from May 14. 1987 until possession is given up
5. An injunction to restrain the 1st and 2nd defendants whether by themselves or by their servants or agents or otherwise howsoever from remaining on or in possession of the plaintiff's said land.
6. further or other relief
7. costs

SCHEDULE

A portion of land known as Beach Lot Nos. B, C, & D, a part of Mero Estate in the parish of St. Joseph containing 2.72 acres and bounded as follows:

North: by a public road and Lot A (Castaways Developments Limited);
North- East by a public road and Lot A (Castaways Developments Limited);
South- West by the sea;
East by the public road

- [3] While this claim was pending, by suit 278 of 1996, Hotel sued Development for specific performance of an agreement to transfer to Hotel "all lands belonging to Developments west of the highway, south of the Mero River 54, 239 sq. ft plus lots 10, 11,325 and 329. Despite having been filed after suit 590 of 1995, this case was tried first and judgment was given for Hotel. The learned trial Judge Enfield J. gave an oral decision which was transcribed by the court stenographer. The record reveals the learned judge as saying "I therefore propose to grant specific performance of the agreement which is Exhibit A1. The form of the specific orders should be brought in by counsel at a convenient time which I shall fix in a few minutes for the consideration of the Court."

Einfeld J. went on to say at the end of his oral judgment, "the matter stands over for final orders to 3 o' clock on Tuesday 2nd March."

- [4] The judgment of Einfeld J was delivered on 24th February 1999. There is no indication that counsel for Hotel, who would have had carriage of the order, submitted any draft of the specific order as the judge had indicated. There is

also no indication as to what, if anything happened on Tuesday 2nd March 1999.

On 24th February 2000 the following order was filed:

ORDER

UPON HEARING a Writ of Summons and Statement of Claim on the 10th day of July, 1996, and the Defense and Counter-Claim.

UPON HEARING Mr. Anthony W. Astaphan Counsel for the Plaintiff and, Mr. Michael Bruney, Counsel for the Defendants.

AND UPON HEARING the evidence on behalf of the Plaintiffs and Defendants.

THIS COURT DOTH ORDER that the agreement between the Plaintiff and the Defendants mentioned in the Statement of Claim and entered into evidence as "A.1" in respect of "all land belonging to Castaways Development Limited, west of the highway, south of Mero river, 54, 239 sq ft, plus lots 10, 11, 325 and 329 "be specifically performed and carried into execution by the executors of the first defendant and/or the second defendant.

IT IS FURTHER ORDERED that the executors of the of the First Defendant and/or the second Defendant do execute proper Memoranda of Transfer of 54, 239 square feet of the said land inclusive of all the land belonging to and in the name of the second Defendant's Certificate of Title west of the highway

and south of the Mero river, plus lots 325 and 329, mentioned in the said agreement to the Plaintiffs within seven days hereof subject to the easement referred to in the said agreement, the siting and details of such easement to be agreed between the parties and that the executor of the first Defendant, an/or the second Defendant do deliver to the Plaintiffs with seven days hereof a copy of the Certificate of Title to enable the Plaintiffs to obtain Certificates of Title for the said lands.

AND IN DEFAULT of the execution of any Memoranda of Transfer or delivery of a copy of the Certificate of Title, IT IS ORDERED that the Plaintiffs are entitled to obtain a Certificate of Title for the said lands and that the Registrar of Titles execute Memoranda of Transfer for the said lands upon the written request of the Plaintiffs and upon the Registrar of Titles being satisfied that the executors of the first Defendant and/or second Defendant have refused to execute the Memoranda of Transfer and deliver a copy of the Certificate of Title as ordered.

AND IT IS FURTHER ORDERED that the Defendant's Counter Claim be dismissed and the Defendants pay the Plaintiffs costs on the Claim, and on the Defendants' Counter- Claim.

[5] On the 1st April 2004 the Registrar, at the instance of Hotel and on the basis of the court order filed on 24th February 2000, issued a Certificate of Title to Hotel for 3.0150 acres of land at Mero.

[6] It is also worth setting out here that on 18th March 1999 in Suit 590 of 1995 Hotel sought to have the statement of claim struck out. The application was

heard on 18th April 2000 and 21st November 2000 Cenac J. refused the application and permitted Hotel 7 days to file a defense. This they did and that claim has languished since then with no further activity at all.

[7] It is against this backdrop that Development have brought the present claim. They seek:

1. A declaration that the certificate of title No. 177 of 2004 dated the 1st day of April 2004 and registered in Book M 15 Folio 6 of the Register of Titles in respect of 3.0150 acres, part of Castaways Development in the parish of St. Joseph and described in the First Schedule hereto of which land the 2nd – named Defendant is the registered proprietor was obtained by the fraud of the 1st and 2nd named Defendants and/or issued by the 3rd – named Defendant acting negligently and in breach of his statutory duty
2. An order that the 1st and 2nd named Defendants do forthwith return to the Registry the duplicate certificate of title to the said land for cancellation
3. An order that the 3rd named Defendant do forthwith cancel the said certificate of title and re- issue a certificate of title in the name of the claimant in respect of a portion of the said land comprising 2.272 acres of the said land and known as “The Marina” , and which is more specifically described in the Second Schedule hereto and delineated on the survey plan annexed hereto drawn by Karol Winski and dated January 16th 1964 and that such certificate of title be issued free from encumbrances.

4. An order that the Defendants be ordered to do all the necessary, including the payment of all associated costs, in order to facilitate the re-issuance of the said certificate of title on The Marina in the name of the Claimant.
5. An order that the said 1st and 2nd named Defendants do pay the Claimant damages for misrepresentation including aggravated and exemplary damages.
6. An order that the 3rd named Defendants pay to the Claimant damages for negligence and/or breach of statutory duty.
7. Further or other relief
8. Costs.

[8] They argue that Hotel fraudulently induced the Registrar to act by willfully misrepresenting that they were entitled to 3.0150 acres of land when they knew that the order of Einfeld J. only gave them 54, 239 sq ft of land. Hotel also knew that Suit 590 of 1995 concerning 2.272 acres was still pending. It is common ground that the 3.0150 acres transferred by the Registrar includes the 2.272 acres claimed by Development in Suit 590 of 1995.

[9] In their defense to the present claim, Hotel says they acted through professionals and had no knowledge of any misrepresentation to the Registrar. They honestly believed that the Order of the court reflected the judgment of Einfeld J.

The Evidence

- [10] There was one witness for the claimant. Mr. Jeremiah David is a licensed land surveyor and holds power of attorney for Development. He swore an affidavit setting out that the 2.272 acres of land belonged to one Frank Sifer to whom Developments had agreed to transfer the portion consequent in certain litigation in Canada in 1969. William Hanns was the director of Development and knew of the Canadian case and the proposed transfer to Frank Sifer. Development never complied and completed the transfer of the land to Frank Sifer who was then the beneficial owner. A few years after the Canadian proceedings (this would be in the 1970's) Hotel entered upon this parcel. Frank Sifer died in 1987. Development agreed with the only beneficiary to his estate to relinquish all claims to the 2.272 acres in return for valuable consideration.
- [11] Suit 590 of 1995 was then brought against Hotel and remains still to be heard. Mr. David also swore that it was by mere chance that he discovered in 2006 that Hotel had drawn up the final order in suit 278 of 1996 and had perfected the order. He found this out when he discovered the Memorandum of Transfer effected by the Registrar, purportedly on the strength of the decision of Einfeld J. in 1999. Mr. David informed Development and placed a caveat forbidding dealing with the land on the certificate of title.
- [12] Under cross examination, Mr. David agreed that Hotel has been in occupation of the disputed land since sometime in the 1970's certainly for more than thirty years now. Hotel has erected a fence around the land in question, but the fence was built less than 30 years ago.

- [13] Linda Harris is the daughter of William Harris. She was Managing Director of Hotel since 1980 but is now retired. Prior to her father's death in 1999 he was the sole shareholder of Hotel. She typed the agreement that was the subject of claim 278 of 1996. She too swore an affidavit. She was cross examined. She did not impress the court as a witness on whom reliance can be placed. She denied recalling details of the 1995 law suit despite the fact of having represented Hotel in the case and having sworn affidavits with exhibits annexed.
- [14] It was her position that suit 278 of 1996 had decided all the issues in dispute between the parties. That position is difficult to reconcile with the facts. Ms. Harris was intimately involved in suit 590 of 1995 and suit 278 of 1996. She knew they concerned different matters. She was at all times represented and advised by experienced legal practitioners. She would have had the benefit of their advice at all material times.
- [15] The claimants' case in the present claim is that the first defendant acting on behalf of the 2nd defendant had no honest belief that they were entitled to 3.0150 acres of land. Despite this lack of honest belief they made representation to the Registrar of Lands causing him to issue them a Certificate of Title.
- [16] The defendants case is that throughout they acted on the advice of counsel. They had a reasonable and honest belief that suit 278 of 1996 had determined all matters of land dispute in their favor.

As an alternative or additional argument, the defendants say that they have occupied the disputes lands for more than the required period and are now entitled to the land by prescription.

[17] The defendants point out that they have filed a defense to suit 590 of 1995 averring the prescription and the claimants have since taken no steps in the nine years which have gone by.

[18] Having seen and heard the witnesses and having considered the documentary evidence I have concluded that the defendants could have had no honest belief that the judgment of Einfeld J. gave them a right to have 3.0150 acres allotted to them. At the very least the agreement that was to be specifically performed was unclear. It did not specifically award title to 3.0150 acres of land. It also spoke of four additional lots. It spoke as well of an easement to be granted over the land to be transferred to Hotel. The final order makes no attempt to deal with all of these lots or the easement and it is a final order prepared and perfected by the claimant's legal advisors.

[19] It does not avail the claimants anything to argue that their lawyers acted without instructions. They were only too happy to accept the benefit – the certificate of title. Their solicitors must be taken to have been acting on their behalf.

[20] The suggestion that the defendants honestly believed that the judgment of Einfeld J. gave them the right to have the lands they obtained in the certificate of title issued by the Registrar, does not stand up to scrutiny for the following reasons

1. The terms of the contract to be specifically performed were drafted by the defendants – indeed it was the first defendant who typed it up. She must have known of the contents.
2. The first defendant knew of the existence of suit 590 of 1995. She swore to affidavits in that claim. Under cross examination she finally admitted that when she swore the affidavit in case 590 of 1995 (this was in 1999) she knew what that case was about.
3. The first defendant was present in court when Enfield J. gave his decision. She must have known it did not conclude the questions about the ownership of Frank Sifer's land.
4. Despite her protestations to the contrary I believe that the first defendant was very well aware of the decision of Cenac J. refusing her application to strike out claim 590 of 1995.

Conclusions

- [21] I thus conclude that the defendants had no honest belief that the judgment of Enfield J. entitled them to either the order which they ultimately filed or the certificate of title they obtained on the basis of that order.
- [22] As for the argument that the defendants have acquired a right to the lands in question by prescription I make no finding.

[23] There is a procedure laid down in section 33 of the Title by Registration Act Chap 36:30 for obtaining title by prescription. The defendants have not followed that procedure.

[24] The factual conclusions at which I have arrived leave this court in some difficulty. The court order based, allegedly, on the judgment of Einfeld J. has not been appealed. It has not been otherwise set aside. It should, in principle be obeyed and given affect to until or unless it is set aside or overturned. Yet, I feel great abhorrence at the thought of the courts process being abused to work manifest injustice.

Halsbury's laws of England 4th Edition at paragraph 13.53 puts it thus:

Fraud is an extrinsic, collateral act which vitiates the most solemn proceedings of court of justice. A judgment obtained by fraud or collusion, even, it seems, a judgment of the House of Lords, may be treated as a nullity.

[25] I will treat the order obtained by the present Defendants in the earlier case as a nullity. I therefore order that the certificate of title No. 177 of 2004 dated 1st April 2004 and registered by the defendants in Book M15 Folio 6 be returned by the defendants to the Registrar of Titles forthwith for cancellation.

[26] The Registrar of Titles is ordered to re-issue to the claimants the Certificate of Title in respect of 2.272 acres of land as described in the second schedule to this amended fixed date claim form filed on 1st April 2008.

[27] The first and second defendants are ordered to pay all costs associated with the cancellation and re-issue of the Certificates of Title.

Damages:

[28] It was argued that this is a fit case for the award of aggravated and or exemplary damages. I do not consider that the claimants have led sufficient evidence to demonstrate that the actions of the defendants were calculated to earn them a profit in excess of any likely award of damages so as to justify an award of exemplary damages.

[29] I decline to make any such award. I consider that the return to the claimants of the parcel of land in question along with the already awarded indemnification by the defendants of all associated costs of the land transfer is sufficient.

[30] The defendants will pay to the claimants the costs of this action on the prescribed costs basis, in the sum of \$14,000.00.




Brian Cottle
High Court Judge