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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

SUIT NO. O-009 OF 2002

BETWEEN OMAN LIMITED CLAIMANT

AND BEVAD LIMITED DEFENDANT

Lloyd Barnett and Keith Bishop instructed by Keith Bishop and Company for claimant.

Patrick Bailey and Gillian Mullings instructed by Patrick Bailey & Company for defendant

Heard: March 8, July 12 and 13, 2004, September 19 and 20, and November 15, 2005

JONES, J:

[1] When Paul Harris, building contractor of Oman Limited, agreed to purchase from Bevad Limited a half acre lot with an approved plan for the construction of an apartment complex in an upscale St Andrew community, he was hoping for an "Ozymandian moment". Ozymandias, you will recall, was an Egyptian pharaoh who provided the nineteenth century English poet Percy Bysshe Shelley [1792-1822], with the creative spirit to write a poem in which a "traveller from an antique land" comes face to face with the broken remains of a "half sunk" statue in the desert, on the base of which, appeared the words: "My name is Ozymandias, King of Kings; Look on my works, ye Mighty, and despair!"

[2] For Paul Harris, sadly, this was not to be. He complained that Dixie Adams, of Bevad Limited, fraudulently misrepresented to him the precise lot for sale, and the content of the "approved plans" for the proposed development. As a result, he filed an action in this court on October 18, 2002, seeking rescission of both the contract for sale of the lot and the

building plans, together with damages for what he says is the lost opportunity to construct and make a profit from the sale of the apartments.

[3] Bevad Limited's response came sharp and swift; caveat emptor (let a purchaser beware). They say the risk of any defects in title is on the purchaser, Paul Harris, who ought to have satisfied himself by a full investigation of all matters relating to the land before completing the purchase. This was only the final twist in a complicated saga.

[4] The facts briefly were that sometime in 1996, Paul Harris, a building contractor of Oman Limited was approached by Winston Crichton of Property Brokers Limited who offered for sale a half acre lot at Hopedale Avenue in Saint Andrew. Winston Crichton told him that the lot was being sold with an approved plan for the development of ten two bedrooms, two one bedrooms, and two studios. He was taken to the land and shown an open lot to the right of an apartment building, at # 9 Hopedale Avenue. The lot shown was vacant with a partially completed building. During a tour of the land, Paul Harris expressed some concerns about the partially finished building and the parking as it was his intention to construct apartment buildings on the lot. Winston Crichton referred these concerns to Dixie Adams of Bevad Limited.

[5] They both went to the office of Dixie Adams at Grant's Road, Kingston, where they were shown some drawings. Paul Harris says he was not satisfied with what he saw. As a result, one week later Dixie Adams took them to inspect the lot and they were told by him that the unfinished building was not part of the drawings that were for sale. As far as the parking was concerned, Dixie Adams told them that Bevad Limited had permission from the "Authority" to pave a part of the road and use it for parking. During the inspection, they

were shown the boundaries and frontage (Beverley Drive and Hopedale Avenue) of the land. Dixie Adams then gave them details of the design of the building and its proposed location on the land. Paul Harris contends that the land shown to him was the same land that Winston Crichton had shown him earlier.

[6] Paul Harris then instructed his attorney Reginald Fraser Jr. to proceed with the sale. He later obtained a surveyor identification report through his attorney. He conceded that he may have received a copy of a letter written by his attorney to Jennifer Messado, the vendor's attorney, with the following paragraph:

"We have received a surveyor's identification report, and the same is in order. We are checking on the property taxes, as stated in our letter to you of June 14, and will revert to you in a couple of days."

[7] Although his intentions were to construct two and one bedroom apartments, this changed when the real estate business took a downward turn and so he decided to do a redesign of the plan for studios, which would be easier to sell, based on price. He engaged an architect to do the redesign but was unable to locate the "approved plan" at the KSAC. As a result, he made contact with the KSAC, and also with the vendor's attorney, Jennifer Messado, but was unable to obtain any additional information about the status of the plan.

[8] He instructed that the plan be redrawn and during this process, he visited the lot with his surveyor and showed him the diagram and copy title. He was later advised that the lot did not conform to the diagram and then was shown the land which was represented by the diagram. Paul Harris contends that he would not have bought that lot for the purpose of the planned housing project.

[9] From these facts the following issues arise:

- a) Whether or not Dixie Adams as agent of Bevad Limited pointed out the lot at the right of the apartment building containing an incomplete building as the lot for sale when this lot was not in fact the lot owned by Bevad Limited which was being sold?
- b) If so, was that representation made without belief in its truth or recklessly not caring whether it was true or false?
- c) Whether or not Dixie Adams represented that there were approved drawings for twenty-six habitable rooms for the lot which he pointed out to Paul Harris?
- d) If so, was it apparent to Dixie Adams that his representation regarding the drawings would have caused losses having regard to the development objectives which were communicated to him by Paul Harris of Oman Limited?
- e) If so, what damages are appropriate?

First Issue: did Dixie Adams as agent of Bevad Limited point out the lot at the right of the apartment building containing an incomplete building as the lot for sale?

[10] The evidence of both Winston Crichton and Paul Harris was that Dixie Adams pointed out the lot to the right of the apartment complex which was not the lot referred to in the agreement for sale and certificate of title owned by Bevad Limited. This lot contained an incomplete building and from the court's visit to the locus is distinct in appearance and position from the other lot contained in the agreement. No evidence has been led to contradict this and the court accepts the evidence of Paul Harris and Winston Crichton and con-

cludes that the wrong lot was in fact pointed out by Dixie Adams, the agent of Bevad Limited.

Second Issue: was that representation made without belief in its truth or recklessly not caring whether it was true or false?

[11] Just over a hundred years ago, Lord Herschell in **Derry v Peek**, set out the classical definition of fraud in the following proposition¹:

"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

[12] A recent application of this principle can be found in the Canadian case of **G. R. Carr Enterprises Ltd. v. Baker**². In that case the defendant vendors, B and A, and C Ltd., were co-owners of a residential building. B and A paid C Ltd. a fee to handle the daily affairs of the building, such as leasing, rent levels, and paying expenses. The plaintiff purchaser G.R Carr Enterprises entered into an agreement of purchase and sale with the vendors for the building. At closing, the president of C Ltd. - one of the vendors - signed a

¹ [1889] 14 App. Cases 337 at page 374

² Ontario Court of Justice (General Division) 1996 Carswell Ont. 2782 (Delivered) June 25, 1996

statutory declaration stating that none of the building's tenants had applied for rent review, and that the building's expenses were \$14,020. In fact, three rent review applications had been made, and expenses with respect to the building were in the range of \$18,200 to \$22,000. The plaintiff purchaser brought an action for damages for fraudulent misrepresentation against the vendors and the president of C Ltd. personally. A and B claimed that C Ltd. and its president were not authorized to make the representations on their behalf. Judgment was given for the plaintiff.

[13] In this case, Bevad Limited contended that even if Dixie Adams had shown the wrong lot of land to Paul Harris, the Surveyor's Identification Report requested by Reginald Fraser Jr. is a supervening piece of information. They say that Paul Harris of Oman Limited did not rely on the representation made to him by Dixie Adams about the lot to be sold, but on the independent advice of his surveyor contained in the report.

[14] In general, an action to rescind a contract for misrepresentation would fail if the purchasers did not rely on the vendor's statements but tested their accuracy by independent investigations and declared themselves satisfied with the result³. However, a claimant will not be left without relief for fraudulent misrepresentation except on clear proof that he had actual and complete knowledge of the true facts. The onus would be on the defendant to prove that the claimant has explicit knowledge of the truth. In this case, Bevad Limited has not discharged this burden as there is no evidence that Paul Harris or Oman Limited had actual and complete knowledge of the true facts of what he purchased. In **Nocton v Lord Ashburton** Lord Dunedin made it clear that⁴:

³ Cheshire & Fifoot's Law of Contract 8th Ed. at page 250

⁴ [1914] A.C. 932 at page 962

"No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction."

[15] The standard of proof required to prove fraud in a civil matter is on a balance of probabilities. However, a court when considering a case of fraud in a civil matter will, of course, require a higher degree of probability than in a case of negligence: see **Hornal v Neuberger Products Limited**⁵.

[16] In this case, there cannot be any doubt that the representations made by Dixie Adams were false. He was the principal officer of Bevad Limited and had actual or ostensible authority to conduct business on its behalf. He must have or ought to have known that the lot that the company was selling was not the one that he showed to Paul Harris. In addition to the lot, Dixie Adams also agreed to sell approved building plans for that lot. I find to a high degree of probability that his action in pointing out the wrong lot - if it was not intentional - was at least reckless or indifferent to the truth. While the Surveyor's Identification Report ordered by Reginald Fraser Jr. on behalf of Oman Limited would have afforded them an opportunity to examine and corroborate the representation made by Dixie Adams, this cannot by itself, deprive Oman Limited of its claim for fraudulent misrepresentation. Accordingly, the court concludes as a matter of law that the statements of Dixie Adams in pointing out the wrong lot constituted fraudulent misrepresentation.

⁵ [1957] 1 Q.B. 247

Third Issue: did Dixie Adams represent that he had approved plans for twenty-six habitable rooms for the lot which was shown by him to Paul Harris?

[17] The Agreement for Sale of the Plans provides for twenty-six habitable rooms. This was signed together with the Agreement for Sale of the lot of land. Bevad Limited contends that the agreement excluded liability for any representation on the part of the vendor.

They point to clause (g) in the agreement:

"The purchaser is deemed to have examined the said Plan prior to the sale and no warranty, condition, description or representation on the part of the vendor is given or implied from anything said or written and any statutory or warranty of condition or of description expressed or implied as to the Plans, the subject of this sale is hereby excluded. The purchaser must take them on its own judgment as the result of its examination and no description expressed or implied given by the Vendor shall constitute a sale by description"

[18] In **Pearson & Son Limited v Dublin Corporation**, the agreement provided that the contractors should not rely on any representations made in plans or elsewhere, but must ascertain and judge the facts for themselves. Lord Loreburn L.C dealt with the use of an exclusion clause in this way⁶:

"Now it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them. I will not say that a man himself innocent may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents. It suffices to say that in my opinion the clauses before us do not admit of such a construction. They contemplate honesty on both sides and protect only against honest mistakes. The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge."

⁶ [1907] A.C. 351 at page 353-354,

[19] Lord Ashbourne in his contribution had this to say⁷

"I cannot think that in face of the evidence in the case this clause could be regarded as establishing a defence. Such a clause might in some cases be part of a fraud and might advance and disguise a fraud, and I cannot think that on the facts and circumstances of this case it can have such a wide and perilous application as was contended for. Such a clause may be appropriate and fairly apply to errors, inaccuracies and mistakes, but not to cases like the present."

[20] On this basis, I reject the argument that the "no warranty" clause in the Agreement for Sale of the Plans can exclude Bevad Limited from liability for the sale of "approved plans" not in accordance with what was agreed both orally and in writing.

[21] In addition, Oman Limited contends that an "approved plan" was given to the purchaser and they have failed to produce it for inspection of the court so that a determination can be made as to the authenticity of the stamp. On the other hand, the evidence of Paul Harris which was corroborated by Winston Crichton that Dixie Adams brought plans to the site when he showed the lot of land has not been contradicted. The number of habitable rooms on the plan sold to Oman Limited was for twenty-six rooms whereas the number of approved rooms on the plan recorded at the KSAC was for eleven rooms. I find that Dixie Adams also falsely represented that he had an approved plan for twenty-six habitable rooms.

⁷ Already cited at page 360

Fourth Issue: was it apparent to Dixie Adams that his representation regarding the drawings would have caused losses having regard to the development objectives which were communicated to him by Paul Harris of Oman Limited?

[22] Paul Harris of Oman Limited lost a business opportunity to develop the lot he was shown into an apartment complex with twenty-six habitable rooms. He has also lost the use of the money that was paid for the wrong lot and the plan not approved by the KSAC. I accept the evidence of Paul Harris that he indicated to Dixie Adams the purpose of his investment in the land shown to him and, therefore, Dixie Adams would have had notice that in pointing out the wrong land and selling an unapproved plan would cause severe losses to Paul Harris of Oman Limited.

Fifth Issue: what are the appropriate remedies in this case?

[23] One of the consequences of a misrepresentation is that the contract is voidable at the request of the claimant. They may elect to confirm or annul the contract. The contract is annulled when the claimant makes it clear that they do not wish to be bound by its provisions. In **Abram Steamship Co. v Westville Steamship Co.** Lord Atkinson explained it in this way⁸

"Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in statu quo ante and restores things, as between them, to the position in which they stood before the contract was entered into."

[24] Oman Limited on discovering the misrepresentation during the survey conducted in July 2002 by E.H Williams instructed its attorneys to file an action in October 2002 claiming

⁸ [1923] A.C 773 at page 781

rescission of the sale and making it clear that it did not intend to be bound by the agreement for sale of the lot or for the plans.

[25] In **Hart v Swaine**⁹ a vendor sold land as freehold, received the purchase-money, and conveyed the land as freehold. The purchaser later found out that the property was really copyhold. The vendor contended that when he made the representation he believed it to be true. It was held by Fry J. that, assuming, that the vendor had made the representation "bona fide", he committed a legal fraud and accordingly the sale must be set aside and the purchase-money repaid with interest. The court also ordered that the vendor pay all the expenses which the purchaser had incurred in consequence of the purchase. In the instant case, Oman Limited claimed the return of all sums of money paid to Bevad Limited for the purchase of the lot as well as all costs involved in the transaction. On the authorities cited, this court can do no less than to give the relief which Oman Limited has claimed.

[26] In addition to rescission, the claimant is also entitled to compensation for all contractual losses which arise from the representation made. This is in actual fact a claim in tort, so the test is not whether the loss could have been foreseen. In **Doyle v Olby (Ironmongers) Limited** Lord Denning made it clear that¹⁰:

"The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:

⁹ [1876] 7 Ch. D. 42

¹⁰ [1969] 2 Q.B 158 at page 167

'I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages.'

All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen."

[27] Oman Limited has asked for general damages for deceit. They have claimed a lost opportunity to construct, sell and profit from the proposed apartments. In general, a claimant may recover damages for loss of prospective profits if the loss is the natural and direct result of his acting on the fraudulent misrepresentation.

[28] In **East v Maurer**¹¹ it was held that loss of profits could be recovered in an action for deceit as being actual damage directly flowing from the fraudulent representation. The court said that the starting point of the assessment was compensation for all the losses suffered rather than just placing the claimant in as good a position as if the statement had been true. In that case, the claimant established that following the defendants' misrepresentation, they had failed to earn the expected profits from the business. As a result, they claimed that they were entitled to the loss of their expected profits while waiting for the opportunity to mitigate their loss by making the best use of the business they purchased. Beldam L.J. in dealing with the issue of whether loss of profit is a recoverable head of damage in an action for fraudulent misrepresentation said¹²:

"...it seems to me clear that there is no basis upon which one could say that loss of profits incurred whilst waiting

¹¹ [1991] 1 WLR 461

¹² At page 466

for an opportunity to realise to its best advantage a business which has been purchased, are irrecoverable”

[29] In this case, the main thrust of the claim under this head was through the evidence of Rohan Thompson who provided the court with a schedule of the accumulated interest that would accrue to Oman Limited over the period had the money paid been left in the account at the bank. The schedule showed that for the period March 1996 to May 2004 the amount of \$7,500,000.00, which Oman Limited withdrew from its account, if invested at National Commercial Bank, St Jago Plaza in Spanish Town, St Catherine, would provide a capital gain of \$17,090,489.50 after taxes are deducted. That figure when updated to October 2005 using 12.65 percent (the bank's rate) and making deductions for income taxes (25%) amounts to \$20,689,585.08.

[30] It is the duty of the claimant to take all reasonable steps to mitigate the loss arising from the fraudulent misrepresentation. This is in essence a determination of what is reasonable in the particular circumstances. The evidential burden is on the defendant to show, first, that the claimant has failed to act reasonably, and second, that it would have been to the claimant's advantage to have acted reasonably. In this case, Bevad Limited has failed on balance to discharge this evidential burden as they have not put forward any evidence showing or tending to show that Paul Harris of Oman Limited refused to act reasonably in order to mitigate his loss.

[31] In the judgment of this court, when Oman Limited was induced to purchase the lot and “approved plans” as a result of fraudulent misrepresentation by Bevad Limited, the recoverable damages ought to be assessed “in the round” on the basis of a reasonable return on the money held by Bevad Limited, which would otherwise have been invested on an-

other construction project. Consequently, the court accepted the amount of \$20,689,585.08 as a fair assessment of Oman Limited's prospective loss of profits, which would directly flow from its lost business opportunity, and will accordingly award general damages for deceit in that amount.

[32] For all the reasons which the court has given, Oman Limited shall have its judgment in the following terms:

- a) First, the judgment will be to set aside the sale of the land comprised in Certificate of Title registered at Volume 1082 Folio 341 together with the sale of the building plans to Oman Limited by Bevad Limited and declare that the Agreement for Sale of Land and the Agreement for Sale of Plans both dated April 11, 1996, between Oman Limited and Bevad Limited are null and void and of no legal effect.
- b) Second, a note of this judgment must be indorsed by the Registrar of Titles on the Certificate of Title registered at Volume 1082 Folio 341, and all documents of title for the said lot of land together with the building plans in the possession of Oman Limited possession must be given to the defendant, Bevad Limited.
- c) Third, Bevad Limited must repay the purchase-money, of \$4,000,000.00 for the lot and \$3,350,000.00 for the plans together with the proved expenses incurred by Oman Limited in consequence of the purchase of the land which amounts to \$140,000.00.

- d) Fourth, General Damages assessed to Oman Limited for prospective loss of profit in the amount \$20,689,585.00

- e) Bevad Limited to pay the cost of this action in accordance with the CPR 2002 and any other cost associated with the endorsement of the Certificate of Title; such cost to be agreed or taxed.