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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.360A/1996

| BETWEEN | ERALD WIGGAN and HYACINTH WIGGAN | PLAINTIFFS |
|---|---|---|
| A N D | EURTIS MORRISON | FIRST DEFENDANT |
| A N D | MR. & MRS. NEVILLE RUSSELL | SECOND DEFENDANT |

Miss Carol Davis and Mrs. Ingrid Lee Clarke Bennett instructed by Pollard Lee Clarke and Campbell for the Plaintiffs.

Mr. Lowell Smith and Mr. Maurice Long instructed by Clough, Long and Company for the first Defendant.

HEARD: 6th – 10th and 13th – 17 December, 1999, 11th and 18th February, 2000

**MCINTOSH, MARVA J.**

The plaintiffs Erald Wiggan and his wife Hyacinth Wiggan brought action against the first defendant for negligence.

The plaintiffs in their statement of claim plead that they are the registered proprietors of property situate at Lot 90 Greenwich Park in the parish of St. Ann registered at Volume 1183 Folio 697 of the Register Book of Titles.

They claim that the first defendant is a Land Surveyor and represented himself to the plaintiffs to be duly qualified in his profession. Further that they sought the services of the first defendant by requesting a survey of their property for the purpose of verifying the location of their lot as the plaintiffs intended to commence construction on their lot.

The first defendant inspected and/or surveyed the said property and represented and identified a particular lot as being the plaintiffs' lot – "Lot 90".

The plaintiffs relied on the first defendant's representations and proceeded to commence construction on the lot which had been identified by the first defendant. The lot identified turned out to be not Lot 90 but Lot 91 which belong to the second defendants.

The first defendant was under a duty of care in making the representations to the plaintiffs, these representations were incorrect and misleading and the first defendant being under a duty of care was in breach of that duty as a result the plaintiffs claim damages for negligence.

In his defence the first defendant admits that he is a land surveyor and he represented himself to the plaintiffs as being qualified in his profession. He further states

that the plaintiffs requested him to undertake a survey of Lot 90 Greenwich Park and to identify that lot for them.

The first defendant denies that the plaintiffs at any time advised him that they intended to commence construction on their lot soon or at all. Further he denies that the plaintiffs employed him to do the survey and made no agreement with him to do a survey of their lot.

He denies that he made any representation on which he knew or ought to have known the plaintiffs would rely and if the plaintiffs did commence construction on land belonging to the second defendants this was not done in reliance on any representation made by him to the plaintiffs.

In the alternative the first defendant pleads that he approached the vicinity of Lot 90 and 91 and did certain measurement. He further pleads that his findings were disputed by the second plaintiff.

Again, in the alternative the first defendant pleads that he went to the rear section of the said lands to try to locate further survey pegs but could find none. He thereupon advised the plaintiffs that something was not correct and as such he would return to the site on another day in order to straighten things out.

The first defendant further pleads that on or around 9th May, 1995 the first plaintiff attended the office of the first defendant, paid $1500, and requested him to do the survey that they had originally requested.

At that time the first defendant and the first plaintiff went to Greenwich Park, at which time the first defendant was shown "a dwelling house under construction on the lot of land which the first defendant had previously look at.

The first defendant further pleads that he did extensive checks on ground and found that "Lot 90 was in fact the adjoining lot of land to the east of the land on which the said dwelling house had been constructed."

The first defendant denies that he made a mistake and denies that he was negligent and over that the plaintiffs are not entitled to damages or special damages.

THE PLAINTIFF'S CASE

Mr. Erald Wiggan, the first plaintiff was the main witness and his evidence was that he and his wife Hyacinth Wiggan are both Jamaicans who now reside in England but are desirous of returning to Jamaica to live and in furtherance of this they bought a property on which they intended to build a house, from one Mr. Meikle in 1993. This property was Lot 90 Greenwich Park, St. Ann.

At the time of purchase Mr. Meikle had pointed out where the boundaries were. Mr. Wiggan however was not satisfied as to the boundary and wanted the land properly surveyed so that the exact position of Lot 90 could be ascertained.

Having made enquiries he approached the first defendant who was a land surveyor and who had represented himself to be qualified in his profession.

Mr. Wiggan contacted the first defendant on 30/5/94 by visiting his office. It was Mr. Wiggan's evidence that he told Mr. Morrison that they had bought a lot of land in Greenwich Park – Lot 90, and they wanted him to come and survey it – they intended building a house on it soon and they wanted to know the correct boundaries.

Mr. Morrison agreed to do the survey. They all (Mr. Wiggan, Mrs. Wiggan and Mr. Morrison) agreed to meet at the property on Tuesday 31st May, 1994.

On that day 31st May, 1994 the plaintiffs went to the property but the first defendant did not show up.

The following day the plaintiffs went to the first defendant's office and there the first defendant asked them if they had put a sign "Lot 90" near two ackee trees. When the plaintiffs told him they had, the first defendant said he had passed earlier and taken up the sign. He told them he had put a red paint tin and tied a red piece of cloth on a plant at the front of the lot and these were near the boundary; further he said that they (the plaintiffs) were going to build on the wrong lot.

On Friday 3rd June, 1994 the plaintiffs went to the property and the first defendant also went there. The second defendant told them she believed that their lot started before Mr. Williams' wall finished. The plaintiffs showed the first defendant the lot they thought was theirs. The first defendant told them that where the pegs was, was not their lot – they were going to build on the wrong lot. He took them up the road and showed them a peg and said "this is your lot".

The first defendant showed the plaintiffs a peg, he later took a tape and measured between 2 pegs at the front. At the back of the lot he measured and then said to the first plaintiff "this is your lot you have a nice piece of land here, you can go ahead and build. Call me and let me have a look when you're finished."

The next day the first plaintiff went to the first defendant's office to pay him for the survey but the first defendant refused payment saying he did not charge for survey he had done because the pegs were there and he just pointed them out.

The plaintiff then had the lot which first defendant had pointed out as plaintiffs' cleared and fenced it. Plaintiff then proceeded to buy materials and commenced construction on the lot. Bills for materials purchased were tendered in evidence.

In May, 1995 the first plaintiff received certain information and this caused him to contact the first defendant on 9th May, 1995. He asked the first defendant to come back and point out the boundaries between Lot 90 and Lot 91.

The first defendant was reluctant to go saying the first plaintiff was wasting his time because he (first defendant) had already surveyed the land and pointed out the boundaries. First defendant said he had not charged the first time but on this occasion he wanted payment as first plaintiff was wasting his time. The first plaintiff paid $1,500 to the first defendant was given a receipt.

On 15th May, 1995 the first plaintiff and the first defendant met at the site. The first defendant again measured and on this occasion told the first plaintiff that he was building on the wrong lot. He told first plaintiff that something was wrong, that one of the pegs "threw me" and that first plaintiff's wife was right all along.

Having made these statements the first defendant told the first plaintiff not to worry "the only thing I can do is to buy the lot from the owner and exchange it with you."

The first defendant then made efforts to acquire Lot 91 (on which the first plaintiff had commenced building a house) from the owners (the second defendants) but all failed as the second defendants refused to sell.

The first plaintiff purchased Lot 90 when the first defendant was requested to point out the lot, he in fact pointed out Lot 91 to be first plaintiff's, the first plaintiff started building his house on Lot 91, the house he was building was subsequently demolished.

Three witnesses were called.

Mr. Roy Meikle gave evidence that he had sold Lot 90 Greenwich Park to the plaintiffs and he pointed out the boundaries to them. Further he advised them to "...............check with Mr. Morrison who is the surveyor for the area before he builds on it."

Mr. Meikle testified that he saw the plaintiffs start a building on one of the lots but this was not the one of which he had pointed out the boundaries.

Mr. Earl Spencer, a Commissioned Land Surveyor, gave evidence as to the procedure for carrying out a survey for the purpose of "re-establishing the boundaries". His evidence was that a surveyor wishing to re-establish the boundaries would get a DP and having arrived at the particular road on which it was expected to find Lot 90, the

surveyor would measure from the nearest juncture or a unique point using a surveyor's measuring tape with reference to the differences on the lot frontages which, in this case, are stated in the field notes on the plan. That set of measurements would bring you into the proximity of the particular lot. Having reached in the region of the Lot 90 the surveyor would then search for marks. On finding any number of marks he would then survey them in using the survey instrument "Theodolite".

At the end of this exercise the surveyor would point out the boundary marks to the owner.

If the procedures set out by him were used Mr. Spencer said it was not likely that a surveyor would point out Lot 91 as Lot 90 and if Lot 91 had been pointed out as Lot 90 then it would suggest that the proper procedures had not been used.

Mr. Lenworth Lauther, a licensed real estate dealer, gave evidence to the effect that he had valued the partially completed house which had been built by the first plaintiff and based on measurements of the section built estimated the value of the incomplete building.

The Defendant's Case

Mr. Eurtis Morrison, Commissioned Land Surveyor testified that he met the plaintiffs when they came to his office in Ocho Rios on 25th may, 1994. (He denied under cross-examination that the first meeting took place on 30th May, 1994).

At this meeting the plaintiffs told him they had purchased Lot 90 Greenwich Park and wanted to do a survey. He made arrangements to go with them to do the survey.

Mr. Morrison testified that he went to Greenwich Park same day about 5 p.m. and the plaintiffs were not there when he arrived but came later. He walked the area of the lots, from Lot 87 going west searching for pegs, "eventually I found pegs. I found peg in the front of a lot", and he took measurements from that peg to a fixed point on a defined point to determine what peg that was.

He took measurements along the boundary of the road with Lot 90 and stopped at a point with the alignment of a wall which is the western boundary of Lot 85. He stated that he took measurements "from the peg down the road roughly on the boundary of Lot 90 and stopped at a point that intersect with the alignment of the west boundary of Lot 85."

Further Mr. Morrison testified that he started to take a measurement to indicate where the western corner of Lot 90 would be but in doing so he was obstructed by Mrs.

Wiggan who wasn't saying anything to him but was making a lot of noise saying it was not her land. He stopped taking measurements.

He then went to the back of the premises with Mr. Wiggan (first plaintiff) and saw three pegs – he took some measurements between the pegs – he could not identify them – he could not relate them to the lots involved, that is, to Lot 90.

He said he left the lot and went to Mr. Wiggan told him there was a problem and he (Mr. Morrison) would come back another day and straighten it out. He told Mr. Wiggan to bush out the land and let him (Mr. Morrison) know.

The evidence of Mr. Morrison continued – he told the court that he never say Mr. Wiggan again until one year later when Mr. Wiggan came to his office and paid $1500. Mr. Morrison said he arranged with Mr. Wiggan to go back to the location i.e. Lot 90 Greenwich Park. They went there.

He took his compass and started to do a relocation or redefinition of the boundaries. When he reached to the corner of Lots 89 and 90 he said "oh this is the point your wife was speaking about. It was there by two small ackee trees."

In cross examination he said that the ackee tree was in fact on Lot 90.

The first defendant (Mr. Morrison) said he went back to his office and there asked Mr. Wiggan why he "jumped the gun", he was in a very serious position and all he (Mr. Morrison) could do to help was to find out who the owners were and put him in touch with them.

He made efforts and did in fact get the name of the owners of the property Lot 91 and sent letters to them asking them to sell the land to him. If they had done so he testified he would have sold it to Mr. Wiggan or exchanged it with him.

Under cross-examination Mr. Morrison admitted that he did not have a copy of the DP with him when he did the survey in 1994. Also that he had told Mrs. Wiggan then that he is the surveyor and is supposed to know where the boundary is.

The leading case on negligent, mis-statement or misrepresentation is **HEADLEY BRYNE & CO. LTD. V. HELLER PARTNERS LTD. [1964] A.C. 465** in which the appellants were advertising agents who had placed substantial forward advertising orders for a company on terms by which they, the appellants, were personally liable for the cost of the orders. They asked their bankers to inquire into the company's financial stability and their bankers made enquiries of the respondents, who were the company's bankers. The respondents gave favourable references but stipulated that these were ""without responsibility". In reliance on these references the appellants placed orders

which resulted in a loss of £17,000. They bought an action against the respondent for negligence.

The court held that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of special skills trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment.

However since there was an express disclaimer of responsibility, no such duty was, in any event, implied.

At page 502 of this Judgment Lord Morris of Borth –y- Gest said:

> "I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make a careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise."

And at page 495: Using the words of Lord Longborough in <u>**SHIELLS V. BLACKBURNE**</u> **(1789) 1 H.B. 158**

> "... .........'if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession as to imply skill, an omission of that skill is imputable to him as gross negligence'.
> ...............I can see no difference of principle in the case of a banker. If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberate advice as to certain financial matters of a nature with which the bank ordinarily dealt the bank would be under no obligation to accede to the request: if, however, they undertook, though gratuitously, to give deliberate advice ( I exclude what I might call casual and perfunctory conversations) they would be under a duty to exercise reasonable care in giving it. They would be liable if they were negligent although, there being no consideration, no enforceable contractual obligation was created."

The duty of care arises where there is a "special relationship", Lord Devlin said at page 528:

> ".........there is ample authority to justify your Lordships in saying now that the categories of special relationship which may give rise to a duty to take care in word as well as deed are not limited to contractual relationship or to relationships of fiduciary duty, but includes also relationships which in the words of Lord Shaw in <u>**Nocton v. Lord Ashburton**</u> are "equivalent to contract" that is, where there is an assumption of responsibility in circumstances in which but for the absence of consideration, there would be a contact".

The test set out in the **HEDLEY BRYNE** case requires the plaintiff, if he is to succeed to show six factors:

First - the representations whether by word or deed were made.

Second - that a special relationship "equivalent to contract" existed and that the person making the representation was holding himself out in his profession or otherwise as being in a position to give an opinion or advice on which reasonable persons would rely.

Third - that the person making the representation is aware that the person to whom it is given will rely on it.

Fourth - that the person to whom the representation is made does rely on it.

Fifth - that the representation were made negligently.

Sixth - that as a result, the person who relied on the representation suffered damage.

In **BAXTER V. F.W. GAPP & CO. LTD.** **(1983) 4 ALL E.R. 457** the plaintiff sued a company and its managing director Mr. Gapp, for negligence in making a valuation of property upon which the plaintiff was desirous of lending money by way of mortgage. The mortgagor defaulted, the property was sold for a great deal less than the amount at which it was valued, resulting in a serious loss to the plaintiff. He brought an action against the defendants alleging that the valuation was not a justifiable valuation and it was done negligently. The defendant was held liable.

This judgment discusses at length the duty of a professional man called upon to give professional advice.

In the instant case the plaintiffs will have to prove the six requirements set out above in order to succeed.

Looking first at representation made, the court has to consider whether the first defendant did in fact point out boundaries of Lot 90 after doing a survey.

The evidence of the first plaintiff Mr. Wiggan is clear – that he attended upon Mr. Morrison requested him to do a survey and identify Lot 90, that Mr. Morrison did visit the site, take measurements, pointed out pegs, identify a lot as being Lot 90 and told Mr. Morrison "this is your lot".

I accept the evidence of the first plaintiff and find that although there are some inconsistencies in it they are slight and do not affect the credit of this witness. He impressed me as a careful person who wanted to be sure about the lot before commencing construction and on arriving in Jamaica wishing to build he sought the

services of a Commissioned Land Surveyor to identify the boundaries of Lot 90 which he had purchased the previous year.

I reject the first defendant's evidence that he told Mr. Wiggan something was wrong, that he would come back another day and that Mr. Wiggan should bush the lot and call him and that in spite of this Mr. Wiggan went ahead spending substantial sums to commence constructing a house on "a lot" which turned out to be Lot 91 and not Lot 90.

It is clear on the evidence of both the plaintiff and the defendant that there was a special relationship between the parties.

The defendant admitted to the plaintiffs he was a Commissioned Land Surveyor. The plaintiffs informed him that they wanted him to do the survey to identify their boundaries – under cross-examination the defendant admitted this.

The evidence is that on the first occasion in 1994 when Mr. Wiggan approached the first defendant Mr. Morrison requested him to do the survey and Mr. Morrison did in fact visit the property and take measurements. No money was paid by Mr. Wiggan, however on the subsequent occasion in 1995 when the parties spoke, Mr. Morrison requested payment and Mr. Wiggan paid $1,500. In any event even if the services rendered by the first defendant were gratuitous a special relationship existed because the first defendant was consulted and gave advice in his professional capacity.

There is evidence that the first defendant was well aware that his advice would be relied on by the plaintiffs. I believe the first plaintiff when he said in evidence that he told first defendant that "we intended to build on the lot so we wanted a survey done – we wanted to show the correct boundaries". The first defendant actually visited the property, measured and pointed out a lot saying "this is your lot you have a nice piece of land here. You can go ahead and build. Call me and let have a look when you finish."

In cross-examination the first defendant said "................the expression I had was that they wanted to put up a building", and admitted that he knew the plaintiffs were seeking his services because he was a Commissioned Land Surveyor.

The plaintiffs allied on the advice of the first defendant and as soon as it had been obtained, proceeded to prepare the lot identified by the first defendant, and commenced building on it – although both plaintiffs appeared (and it turns out quite rightly) to have been of the opinion that it was the lot adjoining the one identified by the first defendant that was theirs. The accepted the identification done by the first defendant and acted on it.

Was the advice of the first defendant negligently given?

Mr. Spencer a Commissioned Land Surveyor in his evidence related the proper procedures that should have been followed in carrying out a survey of the type requested by the plaintiffs – it is clear that these procedures were not the ones employed by the first defendant and that resulted in the wrong lot being identified.

I accept Mr. Spencer as being an expert in his field and accept his evidence which was unchallenged by the defendant.

In relation to Damages it has been submitted on behalf of the plaintiffs that a reliable measure of damages would be the estimated cost of replacing the construction that had been done in 1994-1995 which is not all lost.

Mr. Lauther estimated this loss at $5,400,000 and also stated that construction costs have increased during the period 1995-1999 and the plaintiffs ask that this increased cost be included in the amount awarded.

On the other hand it has been submitted on behalf of the first defendant that the plaintiffs should have mitigated damages by commencing construction on the correct lot – Lot 90 after the demolition of the building they had sought to erect on Lot 91.

The plaintiffs obviously did not take these steps to mitigate damages and I am of the view that in the light of all the circumstances it would not be reasonable to expect the plaintiffs to commence another building on the adjoining lot.

Mr. Lauther's evidence which was not really seriously challenged is that the structures which had been erected would have cost the plaintiffs approximately $5.4 million and I accept this.

I find that the plaintiffs consulted the first defendant in his professional capacity and engaged his services as a Commissioned Land Surveyor to identify the boundaries and point out to them lot 90 Greenwich Park, St. Ann. That the first defendant was well aware of the purpose for which his services were engaged and the desire and intention of the plaintiffs to construct a house on Lot 90.

The plaintiffs on the strength of this identification by the first defendant commenced construction of a building on the lot identified, that is Lot 91, in the belief that it was in fact Lot 90 which was their property. As a result when the error was discovered the building which was 40% completed had to be demolished causing considerable loss to the plaintiffs. In the circumstances Judgment for the plaintiffs in the sum of $5,400,000 with interest at 35% per annum from 9th May, 1995 to 18th February, 2000.

Costs to the plaintiffs to be agreed or taxed.