

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2008/0484

BETWEEN:

C.O. WILLIAMS CONSTRUCTION (ANTIGUA) LIMITED

Claimant/Ancillary Defendant

-and-

JENNINGS BUILDING PRODUCTION LIMITED

Defendants/Ancillary Claimant

Appearances:

Ms. Gail Christian and Ms. Sherry-Ann Bradshaw **for the Claimant**

Ms. E. Deniscia Thomas **for the Defendant**

2010:

2010: 12, October

JUDGMENT

1. **Harris, J.:** This is a matter arising out of the exercise by a Chargee of its statutory power of sale over the Lands of the Defendant Company. The claimant is the purchaser of the said lands. On the 18th day of April 2009 representatives of the Claimant Company, attended a public auction conducted by Trevor Santos, Licensed Auctioneer of TBS Realty, where its' bid, to purchase certain equipment and the lands referred to above at a cost of \$3,100,000.00, was accepted.
2. The said Auction was conducted on the instruction of the Antigua Commercial Bank (the 'Bank' or the 'chargee') pursuant to its power to sell as Chargee.

3. On the 7th day of July 2008 the Instrument of Transfer was executed by the representatives of the Claimant's Company and representatives of the Bank. The defendant was the chargor and registered proprietor of the charged lands. As a result of the Defendant's unauthorized entry on the lands on the 9th day of August 2008 the Claimant made application to the High Court of Justice on the 13th day of August 2008 for injunctive relief. Said relief was granted and the Claimant filed a Fixed Date Claim Form and an amendment thereto claiming essentially, its entitlement to the subject property to the exclusion of the Defendant.
4. The Defendant filed a Defence and an Amended Defence and Counterclaim. Its position is that there was no valid legal charge held by the Bank over the property and thus the Bank had no authority to sell the lands by public auction or otherwise and further that the passage of time would have voided any Charge or other interest held by the Bank as the Defendant was in default of its loan payments for 20 years¹. The Defendant claims that the entry on the register (relating to the said lands) of a Restriction by Keith Pigott, Director and Incorporator of the Defendant Company barred all dealings with the lands. The Defendant further asserts that the Claimant engaged in fraudulent acts which resulted in the removal of the Restriction thus making way for the Claimant to be registered as the Proprietor of the Lands.
5. The Defendant disputes the Chargee's rights to sell the Property and alleges that the Chargee sold the lands by way of private treaty and not by Public auction. Further, the Defendant alleges that the equipment found upon the lands and which were sold at the auction formed no part of the security interest of the Chargee and could not be validly sold to the purchaser at that auction. Further still, the Defendant alleges that the Claimant, its agents, servants, employees and representatives together and with others unknown conspired to default and injure the Defendant by unlawfully taking possession and control of the Defendant's parcels thereby causing damage to and interfering with the Defendant's course of Business. No allegation of fraud was made against the Bank. Indeed the Defendant did not seek to join the Bank or a party in this matter.
6. The Defendant alleges, the following particulars of Fraud in its Counterclaim:

¹ In the end, the defendant did not in fact actively pursue this last limb at trial. It has not been proved.

1. The Claimant has Alleged that it purchased the parcels herein via public auction whilst knowing the same to be untrue;
 2. The that it was the sole purchaser thereof via said public auction;
 3. Procuring the execution of the transfer document whilst knowing or being reckless as to whether or not it was entitled so to do;
 4. Procuring the removal of the restriction by deception;
 5. Applying to be registered as owner of the parcels of land whilst the same was in issue before the Court and whilst knowing or being reckless to the fact that it was not entitled so to do;
 6. Obtain a pecuniary advantage- that is, being registered as the owner of the said parcels of land whilst the matter was in issue before the Court;
 7. Conspired whether together with its against, servants, employees or representatives to abrogate the rights and interests of the interests of the Defendants to and in the parcels of land;
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7. The Defendant Claims loss and damage. By its pleadings, the Claimant claims:
 1. *"An Order of this Honourable Court granting the Claimant Company possession of the Lands registered and recorded in the Registry of Lands as follows: Registration Section: Jennings Block: 53 1486A Parcel: 29 & 30*
 2. *A Declaration that the Defendant Company neither by its agent, servants, employees, representatives, or otherwise however shall be entitled to enter upon or cross or otherwise interfere with the Claimant Company's Land.*
 3. *Damages for trespass to the above-identified premises.*
 4. *An Order of this Honourable Court removing the Restriction registered on the above-identified parcels of land.*
 5. *\$3,113,672.37 being loss and the damage occasioned by the Claimant's inability to deal with or otherwise utilize the lands.*
 6. *Interest as such rate and for such period as this Honourable Court may regard as just and appropriate, pursuant to the Eastern Caribbean Supreme Court Act (Cap. 143).*
 7. *Such further or other remedy as this Honourable Court considers just and appropriate.*
 8. *Costs."*

8. The Defendant's Counterclaim for:
 1. *"Damages for unlawful interference with property;*
 2. *Damages for unlawful interference with business;*
 3. *Damages for trespass;*
 4. *Damages for Fraud;*
 5. *A declaration that the Claimants do not possess any legal interest in said lands;*
 6. *A declaration that the Claimants are not entitled to be registered as the proprietors of said lands;*
 7. *An Order mandating the Registrar of Lands to cancel the lands certificate issued to the Claimants;*
 8. *An Order mandating the Registrar of Lands to register title to the parcels in the name of the Defendants;*
 9. *Interest;*
 10. *Such further or other remedies as the Court deems just;*
 11. *Costs."*

9. Evidence was led by Mr. Trevor "Taddy" Santos, Auctioneer, Ian Deare and Kevin Johnson for the Claimants. For the Defendants/Counterclaimant evidence was adduced from Keith Pigott and Everette Jones

FACTS AND FINDINGS

Misdescription

10. The Defendant alleged that the property was misdescribed on the 'Conditions of Sale' document which was signed after the auction Mr. Santos, Auctioneer, and the bidder. In cross-examination the auctioneer acknowledged that clause 1 of the condition of sale has a typographical error in

stating the description of the lands as 53, 1484 A parcels 29 and 30 instead of 53,1486 A parcel 29 and 30².

11. It appears that it was so misdescribed. However, the parcels were properly described in the Charge documents,³ the certified copy of the land Register⁴, the Land Register extracts,⁵ the land Certificate ⁶ and the Dailey Observer Newspaper notes⁷. In the end the Defendant has not pleaded nor has it asserted or that all these lands do not refer to one and the same parcels; the subject of the auction. Further, the evidence suggests that no one was labored under a misunderstanding as to what property was being auctioned. I find that nothing turns on the inadvertent misdescription on the *Conditions of Sale* document, a private contract, which was entered into after the bid was accepted at the conclusion of the auction and to which the Defendant in any event has no privity of contract⁸.

SALE BY PRIVATE TREATY

12. The Defendant put the Claimant to strict proof that it purchased the subject property at the auction held on the 18th April 2008 or any other day. The Defence at para 4 therefore alleges that the Claimant acquired the property including Land and equipment by way of a private arrangement with the Chargee, Antigua Commercial Bank ('ACB') and the Caribbean Financial Service Limited (CFSC)⁹.

² See "Conditions of sale of Freehold land by Auction" pp 38 of Trial Bundle Volume 4.

³ The Defendant has not pleaded or otherwise asserted that the lands referred to in the Charge documents at pp 4-9 of TB 4 is order that the subjects lands.

⁴ Pp 10 of TB4;

⁵ See pp 11-16

⁶ See pp 17 of TB4

⁷ See pp 19 of TB4.

⁸ Name of the parties privy to the Contract have taken the point.

⁹ The Defendants statement of case avers that CFSC holds the security interest in the machinery located on the land.

13. Mr. Piggot the Managing Director of the Defendant Company testified that the managing Director of the Claimant Company, Mr. Ian Deane told him that the Claimant had acquired the Lands privately. Mr. Deane denied this conversation. The facts are however, that the lands and equipment were sold by Public auction and the Court so finds. The Defendant has not contested the regularity of the conduct of the Auction and in any event has not proved that the process leading up to the Auction and the Auction were in breach of the relevant provisions of the Registered Land Act. Cap. ("RLA") or otherwise irregular.

CLAIMANT NOT THE PURCHASER AT THE AUCTION

14. Contrary to the Claimant's assertion that it purchased the subject property at auction, the Defendant, in the alternative contends that the evidence including the conditions of sale documents, reflect that the property was purchased by way of the auction, by the Company CCI Ltd and not the claimant.

15. It is accepted by the parties that one Mr. Deane bid on the property at the subject auction and subsequently signed the conditions of sale document. It is not disputed that Mr. Deane signed the words "...for and on behalf of CCI Ltd" on the Conditions of Sale. Document. It is also not in dispute that Mr. Deane is the General Manager and Director of the Claimant Company. He also testified that he had the authority to sign for the Claimant and further that he was a director of the Claimant Company. He testified further, that he had the authority to sign for the Claimant and that he was a director of CCI Ltd. with the authority to execute the 'Conditions of Sale' for CCI Ltd. Neither of these assertions were contested or in any event, disapproved at trial. This evidence remains unchallenged and accepted by the Court.

16. Mr. Deane in cross examined said "the condition of sale contract was between the vendor and CCI Ltd., but I was acting agent for C.O Williams". Mr. Deane acknowledged that he did not present any document to the Court showing that CCI Ltd. was the nominee of C.O Williams/ Claimant.

17. On these facts the Defendants contends that the Claimant be non-suited. The Defendant contends that the nominee relationship between C.O Williams and CCI Ltd. should have been pleaded but

was not. They contended further that the Claimant was not purchaser and as a consequence all acts carried out subsequently as owner of the property are unlawful.

18. The Court does not know that this point need be pleaded. The R.L.A does not speak to the status of a nominee in the auction process. The Defendant has not submitted any authority that supports its contention on this point. However, the 'Conditions of Sale' at para 8 thereof assumes the regularity of vesting the auctioned property in the purchaser or their nominee. As with any purchase and transfer under the R.L.A the purchaser can direct the registrar to register whomsoever he wants, as the Registered Proprietor.
19. In the instant case, even if CCI Ltd purchased the property as a principal as opposed to as a nominee/agent, it is perfectly regular and lawful to direct the Registrar to register another entity as the proprietor. It is worth nothing that 'Agency' can be found as a question of fact and also does not necessarily have to arise out of written contractual relations.
20. Further, on its face, the parties to this transaction were, ACB as Chargee/Vendor, Mr. Santos acting for the Chargee/Vendor and Mr. Deane for CCI Ltd. Without taking a definitive position on the point, the Defendant's Locus standi with respect to this point is questionable.
21. The Court finds that the Claimant need not prove CCI Ltd. as its nominee/agent and if it does so require proof, it has in fact so provided by the evidence of the circumstances surrounding the auction and the parties that CCI Ltd. acted as its nominee. The act of Mr. Deane also of CCI Ltd appears to have been ratified by the claimant by virtue of this action and all the acts that gave rise to the claimant being registered as the proprietor. But further or in the alternative, even if the "nominee" status need be proved but has not been proved, the registration of the Claimant as proprietor at the instance of CCI Ltd is sufficient to entitle the Claimant thereafter to carry out the acts of ownership. The court presumes that the Registrar acted regularly in registering the claimant. There no sufficient evidence accepted by this court to contradict this presumption.

WAS THE EQUIPMENT PART OF THE AUCTION

22. The determination as to whether the equipment is a fixture or movable would go a long way in simplifying the resolution of this issue. Neither party provided this angle to resolving this issue.
23. There can be no dispute that the Notice of the auction did not specify that the equipment (stone crusher etc.) was also on for sale. Mr. Santos testified that the notice referred to the land being sold "as is", which means with everything on it including the equipment. He testified that he was directed by the Chargee that the equipment was to be sold along with the lands upon which it lay.
24. Mr. Deane testified that for his part, his first understanding that the equipment was for sale was at the Auction itself. He was not aware of the value of the equipment separate from that of the land. At the time of making his bid though, Mr. Deane was aware that the equipment was part of the auction. In any event Mr. Deane insisted that the equipment was not operational and appeared to be scrap.
25. The Defendant pleaded that the equipment was the subject of a security interest of C.F.S.C. Mr. Piggot supported this in his testimony. An internal facsimile from the said C.F.S.C is exhibited at pp. 64 of Trial Bundle 4. No objection has been taken by either party to the potential, hearsay character of this note, but it does support the Defendant's contention that C.F.S.C had a security interest in the equipment. C.F.S.C is not a party to this action. On the evidence it is more likely than not, that C.F.S.C had a security interest in this equipment and that it was privy to the auction and sale of the equipment. The Defendant has raised this issue over the legal status of the equipment, stopping short of asserting that the Defendant had the right to the equipment or to determine its sale and proceeds therefrom.
26. The Defendant has not disproved the regularity of the sale of the equipment. The evidence of the claimant and indeed, in the case, supports the regularity of the sale. The CFSC has not been joined in this matter and there is no evidence that the 1st Defendant has sought to join them or otherwise pursued its alleged rights to the equipment.

LOSS AND DAMAGE

27. The Claimant has by its Claim alleged Cost and damages commencing at EC\$3,113,672.37. A schedule setting out certain losses is exhibited.
28. The Claimant has not proved that it would have had "crushing" capacity to supply the material it contends it could have. I am not satisfied of the capacity the plant would have had and the operation costs. That is to say, the profits generated on each ton of material it would have sold.
29. Further, it is not entirely clear how the Defendant caused this loss by pursuing this action. The Claimants timidity in pursuing its commercial interest in the face of this action cannot entirely if at all be attributed to the Defendants. The trespass alleged by the Claimant, although perhaps not "trifling", does not in my view amount to the cause of substantial or any special damages. General damages of a nominal amount are accepted.
30. The Restrictions registered on the subject lands are not now shown to be justifiable and must be removed.

FRAUD

31. The concept of "fraud" is a broad notion. The Defendant has alleged that the Claimant has conspired with others (unnamed and unknown) to defraud the said defendant. The Defendant has merely alluded to perhaps curious circumstances and to borrow a concept usually associated with the law of Tort, submitted in essence; *res ipsa loquitur*. Fraud must not only be specifically pleaded, but must be especially proved. Simply, the defendant has failed to prove the elements of Fraud or conspiracy to defraud.

COUNTERCLAIM

32. The 1st defendant's amended counterclaim¹⁰ for Damages for; collusion between the claimant and 2nd defendant; wrongful interference with property; unlawful interference with business; Fraud; and a declaration that the auction of the 18th April 2008 was null and void; and for a revocation of the transfer of the property to the claimant; is not supported on the law and the facts.

CONCLUSION

33. The claimant is the bona fide purchaser of the charged property and on the balance of probabilities also of the subject equipment for the reasons provided above.

JUDGMENT ORDER

34. THE CLAIMANT IS HEREBY GRANTED THE FOLLOWING ORDERS.

- i. Judgment for the claimant with costs.
- ii. The counterclaim against the claimant is dismissed in its entirety
- iii. A Declaration that the defendant company either by its servants, employees, representatives, or otherwise howsoever shall not be entitled to enter upon or cross or otherwise interfere with the claimant company's lands more particularly described as REGISTRATION SECTION: Jennings; BLOCK: 53 1486A; PARCEL: 29 & 30.
- iv. Damages for trespass in the nominal sum of EC\$8,000.00
- v. Judgment Act interest.



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DAVID C HARRIS
HIGH COURT JUDGE
ANTIGUA and BARBUDA

¹⁰ See pp 69 of the Trial Bundle Volume 1.