

IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO: 472 of 2018

BETWEEN

ANTHONY PRESAS

CLAIMANT

AND

AMBERGRIS SEASIDE REAL ESTATE LIMITED

DEFENDANT

Keywords: Estate Agent. Contract Sale of Real Estate; Non Exclusive Listing and Sales Agreement; Implied Terms of Contract;

Tort of Negligence; Negligence in Wiring Funds to Fraudster; Fraudulent email accounts; Verification Measures

Exemption Clause; Disclaimer.

Before the Honorable: Mr. Justice Courtney A. Abel

Hearing Dates: 6th February, 2019 and 7th February, 2019

Appearances:

Mr. Aldo G. Reyes, for the Claimant.

Mr. Mikhail Arguelles for the Defendant

WRITTEN JUDGMENT
Orally Delivered on the 7th day of February, 2019

Introduction

- [1] Anthony Presas (“AP”) engaged Ambergris Seaside Real Estate Limited (“ASREL”) as a real estate broker to facilitate with the sale of property being San Pedro Registration Section, Block 7, and Parcel 2327 (H1) (“the Property”).
- [2] ASREL secured a purchaser and received the proceeds of the sale which was to be forwarded to AP.
- [3] A fraudster intercepted the communication between AP and ASREL resulting in ASREL wiring the sale proceeds to an unknown third party.
- [4] AP has thus filed this claim against ASREL for the sums wired to the unknown third party.
- [5] AP is arguing that ASREL was negligent in its dealing with the fraudster specifically that ASREL made no attempt to verify the communication from the fraudster which was very different from the communication details of AP.
- [6] ASREL is denying the claim and is arguing that it was due to AP’s negligence that his email had been hacked by the fraudster with whom he had negligently communicated resulting in a fraud being perpetrated. Alternatively, that even if ASREL was negligent that the same was contributed to by AP.
- [7] The parties have agreed that the losing party should pay the winning party costs in the sum of BZ\$15,000.00.

Issues

- [8] Generally whether AP and/or ASREL were at fault for either or both of their email accounts being compromised by the fraudster?
Specifically:

- (a) Whether AP and/or ASREL were negligent in corresponding with fraudulent email accounts?
- (b) Whether or not ASREL ought to have taken further verification measures before wiring the sum of US\$422,127.40 to an unknown third party?
- (c) Whether or not ASREL was otherwise negligent in wiring the sum of US\$422,127.40 to an unknown third party pursuant to the email instructions of the fraudster?
- (d) And if ASREL was negligent, was the negligence contributed to by the negligence of AP?
- (e) Whether the disclaimer that exists in the agreement between the AP and ASREL protects and avails ASREL?

Background

- [9] Hol Chan Reef Villas (“Hol Chan”) is a new condominium development in South San Pedro Town, Ambergris Caye, Belize.
- [10] In late 2014 AP and his wife, Susan Presas (“Susan”); and his mother-in-law, Elizabeth Brown (“Elizabeth”) were seeking to acquire a condominium unit in San Pedro as an investment. After some extensive searches, they found a three bedrooms, three bathrooms beach front condominium unit identified as 1D at Hol Chan (“the Condo”). They also decided that legal title to the Condo should be held in the name of a corporation.
- [11] An international business company was therefore formed under the laws of St. Lucia known as MYBELPAR Limited (hereinafter “MYBELPAR”) through a service provider called, Hewanorra Corporate Services Limited. It was registered with three directors, namely, AP, Susan and Elizabeth. MYBELPAR had a share capital of 10,000 shares which were allotted as follows:

- Susan Presas: 4,999
- Elizabeth Brown: 5,001

- [12] After MYBELPAR was registered, the Land Certificate (LRS-201509162) for the Condo was issued in the name of MYBELPAR.
- [13] After about a year AP of owning the Condo his family decided to put it on sale. Susan and Elizabeth then entrusted and authorized AP to undertake the entire process of selling the Condo.
- [14] AP met Joshua Buettner (“Joshua”) and decided to use him for the sale of the Condo and commenced communicating with him by email on the 21st November, 2014 that they were selling the Condo and invited him to introduce potential purchasers. This initial email was sent from AP’s email account tpresas@outlook.com to Joshua’s email account info@ambergrisrealestate.com. Communications continued between AP and Joshua via these emails.
- [15] Eventually on the 4th November, 2015 Joshua advised that his company, ASREL, was prepared to serve as realtor for the sale of the Condo.
- [16] Communications via emails continued between AP and Joshua during the period of 4th November, 2015 to the 9th November, 2015.
- [17] On the 9th November, 2015 it was agreed in writing between Joshua, for ASREL, and AP for the sale of the property on the terms of an Exclusive Listing and Authorization to Sell Agreement for a duration of six months.
- [18] Between the period of 10th November, 2015 to the 18th May, 2016 AP and Joshua exchanged no less than 30 emails regarding updates and strategy to get the Condo sold. In all these emails during this time AP used his tpresas@outlook.com email account. At this time, the Condo still had not been sold and AP was becoming very concerned.
- [19] As at the 18th May, 2016 ASREL’s initial Exclusive Listing and Authorization to Sell Agreement had expired and as such Joshua emailed AP a new version for a further duration of 6 months. In this email Joshua stated that the terms of this new agreement would be considered effective by his email. AP agreed to the terms of this new agreement.
- [20] The terms of the new agreement, between MYBELPAR and ASREL included the following:

- (a) That ASREL is authorised to list and sell the Property at an agreed selling price subject to a brokerage fee of 8% to be paid to ASREL upon a sale.
- (b) MYBELPAR agreeing to hold ASREL "*harmless from any liabilities or damages arising out of incorrect or undisclosed information*".
- (c) ASREL agreeing to update MYBELPAR from time to time of any issues pertinent to MYBELPAR's interest.
- (d) All facsimile/electronic signatures are considered binding in regards to this Agreement.

- [21] Finally, on the 11th August, 2016 AP received an email from Joshua which contained an offer to purchase the Condo for the price of US\$440,000.00. A final sale price of US\$465,000.00 was then agreed.
- [22] On the 12th August, 2016 Joshua emailed AP the draft Earnest Money Deposit and Agreement for Sale duly signed by the purchaser. AP signed the Agreement and sent it back to him.
- [23] Belize Caye Investments Limited ("BCIL") was handling the closing. Belize Caye Investments Limited is a company operating out of San Pedro Town and they serve as closing agents for purchasers of the property. Its principal was Alberto Villanueva (hereinafter "Alberto").
- [24] The net proceeds which Elizabeth and Susan were to receive after all deductions, including ASREL's commission, were US\$423,312.40.
- [25] The closing was coordinated by Alberto of Belize Caye Investments Limited and entailed all the closing documents being sent to the purchaser for execution. Thereafter they would be couriered to AP who arranged for all documents to be countersigned by Elizabeth, Susan and AP. AP then couriered the closing documents via FedEx to ASREL's office.
- [26] It had been decided that instead of transferring title to the Condo that Elizabeth and Susan would be transferring all their shareholding in MYBELPAR to the purchaser.
- [27] In anticipation of closing, on the 31st October, 2016 AP emailed Alberto the wire instructions so the sale proceeds could be transmitted to Elizabeth and

Susan's accounts at Kemba Financial Credit Union in Ohio. Alberto responded to him on the same day indicating that he was planning to disburse the funds to Joshua and he in turn would remit the funds to AP.

- [28] On the morning of 13th October, 2016 AP called Joshua by telephone and expressed concerns and fears about sending the transfer documents without having received the sale proceeds. Joshua responded that it was standard practice that he would hold all transfer documents which would not be released to Belize Caye Investments Limited until sale proceeds was received.
- [29] Between 13th October, 2016 and 21st November, 2016 the email exchanges between AP and ASREL consisted of 128 email correspondences in relation to the accounts respectively for tpresas@outlook.com and info@ambergrisrealestate.com.
- [30] On the 13th October, 2016 at 2:09 p.m. AP sent an email to Joshua wherein he indicated to him that he was going to send him the FedEx tracking number for the closing documents and AP asked him for a closing statement. On the same day at 2:50 p.m. ASREL received an email from albcopperalloys@gmail.com stating that it would be better to communicate with this email address rather than the other email address. After receiving that email ASREL replied to the request by sending their next email to the original and correct email address tpresas@outlook.com on the 13th October, 2016 at 3:34 p.m.
- [31] On that same day, 13 October, 2016 at 5:23 p.m. AP received the first fraudulent email purporting to be Joshua from the email account ambergrisrealestate@yahoo.com. Joshua's real email address was of course info@ambergrisrealestate.com. This fraudulent email was in response to AP's email earlier that day and stated as follows:

“Dear Tony:

I will send you the closing statement as soon as possible. Please email me the tracking number when you FedEx the documents.

*Ambergris Seaside Real Estate
c/o Joshua Buettner
21 Barrier Reef Drive
San Pedro Town
Belize*

501-226-4545

*Please for faster replies send your emails to my id:
ambergrisrealestate@yahoo.com*

Sincerely,

*Joshua Buettner
Ambergris Seaside Real Estate
P.O. Box 163
San Pedro Town
Belize”*

- [32] No verification measure was taken by Joshua or ASREL in relation to the email address albcopperalloys@gmail.com, which was, as can be seen, entirely different from any email address which AP had been using.
- [33] Shortly thereafter ASREL received another email from the fraudster informing ASREL to use the new email address as he was having problems accessing his email address. So, ASREL proceeded on that basis always apparently believing that the real AP was now albcopperalloys@gmail.com since the third email in the sequence was asking to “re-send” what they had sent to the correct tpresas@outlook.com email address despite that he had asked ASREL in the first email to send to albcopperalloys@gmail.com.

This, apparently caused ASREL to assume that the fraudster had sent the second email to AP'S correct email address and to conclude that AP was therefore to blame for having allowed that which subsequently caused these events to unfold.

[34] On the other hand AP is alleging that it is clear from this initial email from the fraudster that he had gained access to Joshua's genuine email account. This is because he responded to the specific comments and queries of AP'S email to Joshua, namely, by indicating that he would send AP the closing statement and by asking AP for the tracking number. It was at this point that the fraudster sought to re-direct AP's email to the fraudulent account ambergrisrealestate@yahoo.com.

[35] AP then received an email of 13th October, 2016 from Delfina Hoare, office manager of ASREL using Joshua's real email account info@ambergrisrealestate.com which contained the closing statement.

[36] ASREL then received emails from albcopperalloys@gmail.com with attachments and information and they also noticed that BCIL communicated with the same email address. ASREL later discovered that AP was also communicating with the fraudster via belizecaye@yahoo.com which they supposed to be that of BCIL which is belizecaye@yahoo.com.

[37] At some point around the end of October 2016 Alberto communicated with AP indicating that he was planning on disbursing the funds to Joshua and he in turn would remit the funds to AP. He inquired if this would work for AP.

- [38] AP responded back to this email on the 13th October, 2016 by simply hitting the reply button stated, "Thanks Delfina!!"
- [39] On the 14th October, 2016 AP received another email from the fraudulent email account ambergrisrealestate@yahoo.com stating, "*Remember to send your replies only to this email for faster replies.*" This email was signed off as being sent by Delfina Hoare.
- [40] On the 19th October, 2016 AP sent an email to Joshua's real email account info@ambergrisrealestate.com with a link to the FedEx tracking number and AP received a response on this very same day from the fraudulent email account stating, "*Thank you for the email, I have well received the tracking number.*"
- [41] On the 20th October, 2016 AP received an email from the fraudster wherein he asked that I "*get in touch with the folks in St. Lucia to have them confirm that the paperwork is properly executed.*"
- [42] After AP had received all the closing documents and arranged for full execution, AP scanned them and on the 25th October, 2016 he emailed them to the registered agent in St. Lucia for confirmation that they were sufficient to transfer the shares of MYBELPAR. In this email, AP requested that they respond and include the fraudulent email account, ambergrisrealestate@yahoo.com.
- [43] AP asked that the fraudulent email account be included because he apparently genuinely believed that it was Joshua given the almost identical

email address and because the emails that came from that email account contained confidential information.

[44] For the next few weeks AP continued to correspond with the fraudster at ambergrisrealestate@yahoo.com believing it was Joshua.

[45] Since 14th October, 2016 AP did not receive any further emails from Joshua's real email account.

[46] On or about 19th October, 2016 AP couriered the closing documents to the defendant's office. After couriering the closing documents to the defendant's office, AP sent several emails to the fraudulent email over the next few weeks following up on closing and the date when the sale proceeds would be transmitted.

[47] On the 31st October at 2:02 Alberto communicated with AP indicating that he was planning a disbursement of the funds to Joshua. He indicated that he in turn would remit the funds to AP and also queried whether this would be okay. At some point thereafter, at the end of October, AP and Alberto agreed with the fraudster, who was pretending to be ASREL, and BCIL, to have the funds sent to ASREL so that ASREL could wire them to AP providing that the same was agreeable to Joshua.

[48] On the 14th November, 2016 AP received an email from the fraudster advising that the sale proceeds would be wired the next day. On the same day ASREL received the funds from BCIL in the amount of US\$443,102.40. Immediately ASREL wired the funds, in the amount of US\$422,127.40, as

per the closing statements, to the only wire information they had ever received from anyone - which turned out to be the fraudster's.

[49] On the 15th November, 2016 AP received two emails from the fraudster one which contained a revised closing statement very similar to the initial closing statement sent to AP by Delfina Hoare on the 13th October, 2016.

[50] On the 16th November, 2016 AP still had not received the sale proceeds so he sent Joshua a text message on his mobile number stating as follows:

“Hi Josh. Just trying to get confirmation that the funds were sent. Never received receipts. Thanks, Tony.

I need more details. I was told funds would be sent without fail on Monday. It's now Wednesday and funds have not been sent. Starting to get lots of pressure here to find out what's going on.”

[51] A few hours after AP sent these text messages, Joshua called him on his mobile number and told AP that he already initiated the wire and sent him the wire confirmation a few days earlier.

[52] It was at this point that AP realized that Joshua had been corresponding with a fraudulent email account and had wired the sale proceeds to this fraudster. AP later became aware from Joshua's Houston attorney that Joshua had been corresponding with a fraudulent email account albcopperalloys@gmail.com in the mistaken belief that it was AP.

[53] On the 17th November, 2016 ASREL received a call from a representative of Elizabeth and Susan asking about the events that led up to the fraud.

The representative also indicated that he was doing some research and work on his side to try and figure out the situation.

[54] Joshua then informed AP that he had contacted the FBI to file a report about the fraudulently intercepted wire.

[55] Thereafter AP engaged in extensive activity to apprehend the perpetrators and recover the embezzled funds. AP also followed up extensively with Detectives at the Houston Police Department.

[56] Finally, in February 2017 a portion of the embezzled funds was recovered and on the 27th February, 2017 the sum of US\$171,058.61 was wired to Elizabeth and Susan in the following apportioned amounts

- Elizabeth: US\$85,699.61
- Susan: US\$85,359.00

[57] In August 2017 a demand letter was sent to ASREL for the sum of US\$252,253.79.

[58] However this sum remains unrecovered and outstanding.

[59] A suspect was apprehended and charged; however, the suspect has retained an attorney and has pleaded not guilty to the charges. The suspect is one Azubuine Oji Esiaba and the charge is for theft of more than US\$300,000.00.

The Court Proceedings

[60] AP filed a Claim Form and Statement of Claim on the 25th July, 2018. He sought the following reliefs:

1. The claim is for the sum of US\$252,253.79 being the balance of the sale proceeds from the sale of the Property which was paid

over to ASREL in its capacity as realtor, escrow agent and/or bailee of AP and which the ASREL negligently paid out to some unknown third party.

2. Interest pursuant to *section 166* of the **Supreme Court of Judicature Act**.
3. Costs.
4. Such further or other relief as the Court sees fit.

Amount Claimed:	US\$ 252,965.00
Court Fees	BZ\$ 132.50
Legal Practitioner's Fixed Costs on Issue	BZ\$ 7,500.00
Interest to be Assessed	
TOTAL CLAIM	US\$ 252,965.00
	BZ\$ 7,632.50

[61] ASREL filed its defence on the 5th September, 2018. In its defence ASREL defended the claim by largely denying the allegations and asserting:

- (a) That due to the negligence of AP his email had been compromised by the fraudster which allowed the fraud to be perpetrated.
- (b) As AP did not provide ASREL with the correct wire information AP caused and allowed incorrect information to be passed on to the ASREL on 26th October, 2016 with email address albcopperalloysw@gmail.com
- (c) AP never provided alternate banking instructions and the instructions from the fraudster was the only such instructions received.
- (d) Alternatively that even if ASREL was negligent that the same was contributed to by AP.

[62] There was no counterclaim by ASREL.

- [63] A CMC was held on the 1st October, 2019 at which CMC certain directions were given including for security for costs in the sum of BZ\$45,000.00, disclosure of documents, witness statements and the attendance of witnesses at any trial.
- [64] A further CMC was held on the 10th December, 2019 at which directions were given for a Pre-Trial Memoranda and a trial bundle and a date fixed for trial for the 7th February, 2019.
- [65] Pre-trial Review was held on the 6th February, 2019.
- [66] AP was the only witness testifying on behalf of himself. Mr. Joshua as the director of ASREL testified on its behalf.

The Law

- [67] It appears undisputed that a professional realtor is a reporting entity under the *Money laundering (prevention) Act* and as such is required to establish and verify the identity of any of its customers when establishing a business relationship or in conducting any transaction in an amount over \$20,000.¹ They are also required to pay special attention to all complex, unusual or large business transactions².
- [68] A professional realtor owes a contractual and common law duty to its client³. A similar duty may arise in the law of tort⁴.
- [69] The contractual duties and obligations may arise from and/or be contained in a written agreement setting out the terms and conditions upon which the parties have agreed to be bound⁵. Such contractual duties and obligations may also be reasonably implied from the written terms of the agreement. Such realtors, with modern developments in relation to information technology and email communications, may be taken to be aware risks of

¹ Chapter 104, Revised Edition 2011 Laws of Belize. See Section 15

² Ibid see Section 17(1)(a).

³ Paragraph 8-303 of Charlesworth & Percy on Negligence, Eleventh Edition.

⁴ See Supreme Court of Belize Civil Claim Not 656 of 2013 BA Holdings LLC v Heritage International Bank & Trust Limited per the judgment of CJ Kenneth Benjamin Paragraphs 32- 34.

⁵ See Supreme Court of Belize Civil Claim Not 656 of 2013 BA Holdings LLC v Heritage International Bank & Trust Limited per the judgment of CJ Kenneth Benjamin Paragraphs 25 – 38.

scammers and hackers. This has particularly arisen in relation to banks and their customers; but is not limited to such relationships.

- [70] A term may be implied term into an agreement, such as the Agreement, that MYBELPAR and or AP was to authorise the transfer of any funds from ASREL to any third party. This would include that any facsimile/electronic signatures or communications ought to be verified by ASREL and that no third party requests would be processed without due authorisation. Also that ASREL ought to take reasonable measures to verify that its communication was with MYBELPAR and or A, as their clients, and are not intercepted.
- [71] It follows that if a professional realtor transfers funds without the authorisation of its client or ought to be put on its inquiry that an authorisation to transfer funds is not that of its client or is negligent in making any such transfer, the realtor would be liable for any such transfer.
- [72] So-called exemption clauses, such as exists in the Agreement between MYBELPAR and ASREL purporting to hold the latter “*harmless from any liabilities or damages arising out of incorrect or undisclosed information*”, have got to be interpreted. In the case of *Consolidated Engineers Ltd v Kaiser Bauxite Co*⁶, White J referred to the earlier case of *Rutter v Palmer* where Scrutton LJ who held as follows:

In construing an exemption clause certain general rules may be applied: the first of which is that the defendant ought not to be relieve from liability for the negligence of his servants unless clear and unambiguous words to that effect are used. In the second place, the liability of the defendant has to be ascertained quite apart from the exempting words in the contract. Then again, the particular clause in the contract has to be construed and considered, and if the only liability of the party pleading the exemption is a liability for

⁶ (1977) 26 WIR 462.

negligence, the clause will more readily operate to discharge him.

- [73] It is also to be noted that where an exemption clause or disclaimer is drafted by a party, such as the ASREL, and formed part of its standard listing agreement, it will be construed *contra proferentem*, that is to say that any doubt or ambiguity will be resolved against it in favour of the other party⁷

Whether AP authorized the transfer of funds

- [74] It is clear from the background as I've set it out, which can be taken to be facts which this court has found, that by a means unknown to this Court the fraudster was able to find out about the transaction the subject matter of the present proceedings and its details. As a result of such information the fraudster was then able to interject him/herself into the communication between AP, ASREL and BCIL.
- [75] It is also clear that it was the fraudster who authorised the transfer of the funds to an account which was under his/her control; and that there was no actual authorization by MYBELPAR its servants and or agents or AP for the transfer of funds to an account provided by the fraudster.
- [76] It follows that ASREL was in breach of the implied term of the Agreement, that MYBELPAR and or AP was to authorise the transfer of any funds from ASREL to any third party. This breach resulted from the fact that no facsimile/electronic signatures or communications emanated from MYBELPAR its servants and or agents or AP.
- [77] It follows that when ASREL, as a professional realtor, transferred the funds without the authorisation of its client to an account supplied by the fraudster it, that it was ASREL which was being defrauded. This moreover is the case as it ought to have been put on its inquiry that an authorisation to transfer funds had not been made by its client or was indeed negligent in making any such transfer. The realtor, ASREL, has therefore, in the view of the

⁷ Paragraph 14-009 Chitty on Contracts, Volume 1, Twenty Ninth Edition.]

Court, to bear the cost of any such loss caused by such an unauthorised transfer.

**Whether AP and or ASREL were negligent in corresponding with
fraudulent email accounts**

- [78] I must first state that having seen and heard AP I was very impressed with the manner in which he gave his evidence, the clarity and the overall honest way in which he testified.
- [79] By contrast I was not so impressed by the way in which Joshua gave his evidence. The impression that was left with this Court was that he was very evasive and was prepared to do and to take any steps he could, reasonable or unreasonable, plausible or implausible, to try and get out of the responsibility which he clearly had as a broker, and as a middle man, to ensure that the funds which was his obligation to transfer to and at the direction of AP, was transferred to that effect.
- [80] There was some evidence in the case, also, that he, Joshua, did recognise that he was at risk and was trying to minimize his risk. That he spent good money, and I accept that he did try to take steps to solve this fraud, in a way that would result in all of the funds being obtained from the fraudster.
- [81] I also accept, however, that after it was clear that all of these funds were not going to be returned that he immediately, it seems, was doing everything and anything he could do to try and not have to bear the consequence of any of his failure (which I have found) in which ASREL might have been implicated, that resulted in the funds going to the fraudster.
- [82] I am quite satisfied that, on the evidence, there was not any or any sufficient verification procedures in place nor indeed carried out by ASREL of any signatures or communications emanated from MYBELPAR its servants and or agents or AP in relation to the transfer of funds. As a result it was possible for a third party, a fraudster, to make a request that such a transfer be processed.

[83] I am also satisfied, based on the evidence, that there was not any or any sufficient and reasonable measure taken by ASREL to verify that its communication was with MYBELPAR and or AP, as their clients, and to ensure that any communication was not intercepted.

Whether or not ASREL ought to have taken further verification measures before wiring the funds to an unknown third party

[84] This Court has concluded that Joshua, on behalf of ASREL should have taken further verification measures.

[85] Joshua is a professional person operating a business that has serious fiduciary and other responsibilities to its clients, in this particular case AP and his family. Transferring funds especially a large amount of funds which was being wired, the sum of US\$422,127.40, is a serious obligation.

[86] Having considered this case very carefully this court has concluded that the fraud could simply have been avoided by the existence of simple verifications measures having been taken. Such measures would have included checking the email address of the fraudster, which is albcopperalloys@gmail.com, which bears absolutely no resemblance whatsoever to the email address which AP had previously been using (which is: tpresas@outlook.com). In this regard this Court finds all the arguments and all the evidence on which ASREL such arguments, to be completely disingenuous. This court has concluded, to cut a long story short, that Joshua is effectively trying to shift responsibility for his own negligence, and that of ASREL, onto AP by suggesting that AP was negligent in communicating with the fraudster. This Court doesn't accept that Joshua can shift his responsibility as a broker onto AP in this way.

[87] This court finds that it is disingenuous to suggest that somehow AP was a professional realtor when AP had gone to ASREL to perform the professional real estate functions. AP was not a registered realtor in Belize. He had no contractual responsibility in that regard and frankly the argument

does nothing more than discredit Joshua and his testimony in trying to suggest he was not negligent.

[88] In addition it's clear that Joshua and ASREL had not even before the transaction carried out the slightest due diligence requirements neither in relation to AP nor the fraudster.

[89] Also AP tried to shift the responsibility for his due diligence unto BCIL. This attempt to shift responsibility appears to be a practice to which Joshua habitually resorts.

Whether or not ASREL was otherwise negligent in wiring the sum of US\$422,127.40 to an unknown third party pursuant to the email instructions of fraudster

[90] It follows from my conclusion in relation to the previous two issues that this Court has concluded that ASREL was negligent in wiring the sum of US\$422,127.40 to an unknown third party pursuant to the email instructions of the fraudster.

Whether the negligence was contributed to by the negligence of AP

[91] This Court has concluded that there was no contributory negligence.

[92] In any event there's been no claim for contributory negligence. It has been raised as a defence but has not been claimed as counter-claim.

[93] It's being suggested that the AP negligently allowed himself to be misled by communicating with two different email accounts on several occasions. Also that AP allowed the fraudster access to the private and confidential information being passed to him and that the fraudster was then able to use the information to mislead Joshua who portrayed himself as AP.

[94] The difficulty with these arguments is that it assumes an answer to the million dollar question in this case, which has never been answered. This question is how it was that the fraudster managed to find out about the

details of this transaction which allowed him to interject himself into the communication between AP, Joshua, ASREL and BCIL. If this question could be answered that might well supply an answer to the question whether AP might have contributed to the negligence. But as I've indicated, this question has never been answered before nor to the reasonable satisfaction of this court.

Whether the disclaimer that exists in the agreement between AP and ASREL protects and avails ASREL

- [95] Frankly, I consider the point being raised by ASREL is the weakest argument of all. This is because I don't consider, looking at the terms of the disclaimer, that it covers the issues that are included in this claim.
- [96] In addition by carefully construing the disclaimer ASREL, as the defendant, ought not to be relieve from liability for the negligence of its servants, because its words are insufficiently clear and unambiguous to that effect.
- [97] Quite apart from the words of the disclaimer this court has ascertained, and found the liability of ASREL quite apart from the alleged exempting words in the contract.
- [98] Then again, in construing and considering the particular clause in the contract this court has found that the liability of ASREL, pleading the exemption, is not merely a liability for negligence but in breach of contract, and therefore the clause will not more readily operate to discharge ASREL. Certainly it doesn't excuse or exempt ASREL from transferring funds to fraudster without the authorization of AP.
- [99] In the view of this Court it does not exempt ASREL for any negligence which this Court has found that facilitated the transfer of the funds to the fraudster including lack of verification and the taking of proper due diligence measures.

Determination

- [100] It is clear that the fraudster got in-between and compromised the communication between ASREL, AP and also BCIL and caused each to communicate with the fraudsters.
- [101] Having heard the evidence of both witnesses, I've concluded that frankly they were both victims.
- [102] This court has formed the view that almost certainly AP was genuinely not implicated in any fraud. Likewise this court has concluded that Joshua was unlikely to have been implicated in any fraud.
- [103] The million dollar question is how it was that the fraudster managed to interject himself into this transaction and by the close of the case, including the hearing of arguments, this question still remains unanswered.
- [104] But there are a number of possibilities including that there are other two persons in ASREL's office who clearly had access to ASREL's email and the information about this transaction. Also that within BCIL's office there were person connected within it who would have also had access to a lot of the information concerning this transaction. This Court is just not in a position, based on the evidence before it, to say whether any of the latter two sets of people could have leaked the information and might have provided the means by which this fraudster could have interjected himself into the email communications between AP, ASREL and BCIL.
- [105] The authorization which was provided to ASREL and Joshua was not, in the view of this Court; the act of AP, it was the act of the fraudster.
- [106] AP, negligence apart, was an innocent party to the act of authorization by the fraudster.
- [107] Add to first issue that the finding by this Court that there was no authorization whether directly or indirectly by AP, provides a short answer to the claim by AP for payment of the sum of \$252,253.79. This sum is the balance of the proceeds from the sale of the property which is due from ASREL to the claimant and more specifically Elizabeth and Susan.

[108] This court has looked at all the evidence apart from testimonies of the witnesses in the case, and I am satisfied that ASREL was negligent in corresponding with the fraudulent email accounts of the fraudster.

Costs

[109] The agreed sum of \$15,000.00 is to be paid by ASREL, the losing party, to AP who has succeeded.

[110] The Security for cost which counsel for ASREL is holding should be returned to AP.

Disposition

[111] This court will therefore grant Judgment to the claimant AP:

1. For the sum of US\$252,253.79 being the balance of the sale proceeds from the sale of the property being San Pedro Registration Section, Block 7, Parcel 2327H1 which was paid over to the Defendant ASREL in its capacity as realtor, escrow agent and/or bailee of the Claimant and which the Defendant in breach of contract failed to pay to AS and/or negligently paid out to some unknown third party.
2. Interest is awarded on the aforementioned sum at the rate of 6% per annum commencing on the 14th November 2016.
3. Costs to AP in the agreed sum of BZ\$15,000.00.
4. The Security for Cost which counsel for ASREL is holding shall be returned to AP.

The Hon. Mr. Justice Courtney A. Abel

5th March 2019