IN THE COURT OF APPEAL OF BELIZE AD 2021

CIVIL APPEAL NO 4 OF 2019

AMBERGRIS SEASIDE REAL ESTATE LIMITED Appellant

v

ANTHONY PRESAS Respondent

_____

BEFORE

The Hon Mr Justice Samuel Awich Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram Justice of Appeal
The Hon Mr Justice Murrio Ducille Justice of Appeal

E Courtenay SC along with M Arguelles and G Courtenay for the appellant
A Reyes for the respondent

_____

20 October 2020 and 17 February 2021

AWICH JA

[1] I concur in the reasons prepared by the learned Hafiz- Bertram JA, for the order made by this Court on 20 October 2020, allowing the appeal of Ambergris Seaside Real Estate Limited.

_____

AWICH JA

HAFIZ BERTRAM

Introduction

[2] This is an appeal against the judgment of Abel J, dated 5 March 2019, in relation to a claim in negligence, which arose as a result of a fraudster hacking the email accounts of one or both of the parties and the escrow agent. As a result, monies from the sale of a property was paid over to the fraudster. The appeal which was heard on 20 October 2020, was allowed and the judgment of the trial judge set aside. Costs was awarded to the appellant in this Court and in the court below. The costs in the court below was BZ$15,000.00 as agreed by the parties. We promised to give reasons in writing and I do so now.

[3] Anthony Presas ('Presas'), the respondent brought a claim in negligence against the appellant, Ambergris Seaside Real Estate Limited ('Ambergris Seaside'). Presas claimed the sum of US$252,253.79, being the balance of sale proceeds from the sale of property in San Pedro registration section, block 7, Parcel 2327H1 ('the property') which was paid over to Ambergris Seaside in its capacity as realtor, escrow agent and/or bailee of Presas. He claimed that the monies were negligently paid out by Ambergris Seaside to an unknown party.

[4] Presas represented his wife Susan Presas ('Susan') and his mother-in-law, Elizabeth Brown ('Elizabeth') in the claim before the court. He was authorized by Susan and Elizabeth by a Power of Attorney dated 25 May 2018 to represent them.

[5] Susan and Elizabeth were the sole shareholders of MYBELPAR Limited, a Company formed under the laws of St. Lucia, which was the registered proprietor of the property.

[6] Ambergris Seaside is engaged in the business of real estate agents and operates from Ambergris Seaside, San Pedro, Belize.

[7] In 2016, Susan and Elizabeth decided to sell the property and requested that Ambergris Seaside represent them in the process of securing a purchaser and concluding a sale. Thereafter, Presas and Ambergris Seaside entered into an exclusive listing and authorization to sell agreement dated 6 November 2015, which was extended by an

agreement dated 18 May 2016 ('the Listing agreement'). Joshua Buettner ("Joshua") agent of Ambergris Seaside communicated with Presas in relation to the sale of the property.

[8] Ambergris Seaside secured a potential purchaser for the property and agreed on a purchase price of US$465,000.00. Thereafter, Presas executed an 'Earnest Money Deposit And Agreement For Sale' with the purchaser of the property ('the Sale Agreement').

[9] Susan and Elizabeth agreed to transfer all shares in MYBELPAR to the purchaser instead of transferring title to the Property.

[10] On or about 31 October 2016, the Purchaser's closing agent, Belize Caye Investment Limited ('BCIL') confirmed that it was in receipt of the full purchase price and as such the closing took place and Ambergris Seaside submitted the fully executed Share Transfer Instruments to BCIL.

[11] On or about 1 November 2016, BCIL gave Ambergris Seaside, the full purchase price, less the commission and other expenses which was then to be wire transferred to Presas.

[12] In early November of 2016, Joshua of Ambergris Seaside proceeded to wire US$423,312.40 to Presas.

[13] On 16 November 2016, Presas texted Joshua to inquire about the purchase price. It was then that he became aware that he had transferred the money to an unknown third party in Houston Texas, USA. Joshua contacted law enforcement authorities in Texas and recovered a portion of the purchase price. The sum of US$252,253.79. was not recovered.

[14] Presas claimed that Ambergris Seaside has failed to settle the sum of US$252,253.79. Further, that he has suffered financial loss as a direct result of the negligence of Ambergris Seaside.

Particulars of negligence in the claim

"(i) Failing to adequately secure its email account from hackers;

(i) Purporting to communicate with Presas by responding to a new and unknown email address;

(ii) Failing to verify if the emails from the new email address emanated from Presas;

(iii) Accepting payment instructions from a new and unknown email address;

(iv) Wiring the balance of the purchase price without first taking any or any reasonable measures to verify that the wiring instructions emanated from Presas;

(v) Wiring the balance of the purchase price without taking any or any reasonable measures to verify that Presas was the recipient of the wire transfer; and

(vi) Failing in all other regard to take any or any reasonable efforts to safeguard Presas' sale proceeds from the fraudulent enterprise of fraudsters."

Judgment of Abel J

[15] By an oral decision given on 7 February 2019, which was entered and perfected on 21 February 2019, Abel J awarded Presas the sum of US$252,253.79. Interest was also awarded and costs in the sum of BZ$15,000.00. The trial judge made this award after considering the general issue of whether Presas and/or Ambergris Seaside were at fault for either or both of their email accounts being compromised by the fraudster. The specific issues considered by the judge were:

(a) Whether Presas and/or Ambergris Seaside were negligent in corresponding with fraudulent email accounts;

(b) Whether Ambergris Seaside ought to have taken further verification measures before wiring the sum of US$422,127.40;

(c) Whether Ambergris Seaside 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; and

(d) If Ambergris Seaside was negligent, was the negligence contributed to by the negligence of Presas;

(e) Whether the disclaimer that exists in the agreement between Presas and Ambergris Seaside protects and avails Ambergris Seaside.

[16] Under the heading of 'Determination' the learned trial judge found the following:

"Determination

[100] It is clear that the fraudster got in-between and compromised the communication between ASREL (Ambergris Seaside), AP (Presas) and also BCIL and caused each to communicate with the fraudster(s).

[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 two other 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."

The Appeal

[17] The appellant, Ambergris Seaside, appealed against the whole decision of Abel J. The relief sought was for the appeal to be allowed and the decision set aside. Also for Presas to pay to Ambergris Seaside cost of $15,000.00 and costs of the appeal. There were six grounds of appeal, namely:

(a) The trial judge erred in fact and law in concluding that Ambergris Seaside was guilty in negligence in the absence of scientific evidence from Presas to satisfy the evidentiary burden and standard, that Ambergris Seaside was negligent;

(b) The trial judge erred in fact and placed undue weight on his conclusion that the hack needed to have been proven to have originated from Presas in order to attribute negligence to him;

(c) The trial judge misdirected himself in fact and erred in law in failing to find that Presas had no right or cause to commence and or continue a claim in his name as no cause of action vested in Presas, although given a Power of Attorney;

(d) The trial judge erred in finding that Presas was entitled to damages, interest and cost as no cause of action vested in him, and he has not suffered any loss or damage;

(e) The trial judge erred in law by failing to take account of the fact that the proper cause of action vests in the principals of Presas against the known fraudster in Houston, United States of America. Further, by the decision the court has effectively put the principals of Presas in a position of becoming unjustly enriched as that route of action still exists;

(f) The trial judge erred in fact and law in finding that there was no contributory negligence by Presas and by finding further that contributory negligence could not be claimed as there was no counterclaim. Further, the judge failed to apply the legal principle that the court has the power to make any order whether pleaded or not, whether by a counterclaim or not.

Whether Ambergris Seaside was negligent in wiring funds to fraudster

[18] It was argued for Ambergris Seaside that Abel J erred in fact and law in concluding that it was guilty in negligence in the absence of scientific evidence from Presas to satisfy the evidentiary burden and standard, that it was negligent. Further, learned senior counsel, Mr. Courtenay contended that no duty of care was owed by Ambergris Seaside to Presas since the Listing agreement to sell between the parties did not contemplate

that its agent would collect the payment and remit the same to Presas. Senior counsel relied on the case of **Midland Bank Trust Co. Ltd v Hett, Stubbs and Kemp** [1978] 3 All ER 571, where it is shown that in a case of professional negligence founded in contract, there has to be an examination of the scope of the obligations as derived from the express terms and limits of the contract of engagement. Counsel argued that Ambergris Seaside did not owe Presas a duty of care in conducting the transfer of the purchase funds as this was not provided for in the terms of the contract.

[19] Counsel further argued that where there is an allegation of professional negligence this had to be substantiated by expert evidence. He relied on **Pantelli Associates Ltd. v Corporate City Developments Number Two Ltd** [2010] EWHC 3189 (TCC). In the present matter, Presas alleged in his claim that Ambergris Seaside failed to "*adequately secure its email account from hackers,"* however, no expert evidence had been adduced at trial to show the standard of care Ambergris Seaside ought reasonably to have exercised in the discharge of its alleged duty or the adequacy of the security systems that Ambergris Seaside had in place for its email service. Mr. Courtenay further relied on **Various Claimants v WM Morrisons Supermarket Plc** [2017] EWHC 3113 (QB), where there was an allegation of breach of duty in the context of a data breach in order to determine whether there had been a failure to comply with the appropriate standard of care.

[20] Learned counsel, Mr. Reyes contended that Joshua of Ambergris Seaside owed a duty of care to Presas as Joshua agreed to accept the sale proceeds and remit same to Presas. Counsel relied on the case of **Caparo Industries Plc v Dickman and others** [1990]1 All ER 568, where the three step criteria to test for a duty of care is (a) there must be foreseeability; (b) proximity; and (c) it must be fair, just and reasonable. He argued that all of these criteria had been satisfied in the present case.

[21] Mr. Reyes further argued that Presas rendered sufficient evidence for the court below to make a finding of negligence on the part of Joshua/Ambergris Seaside notwithstanding the absence of expert evidence. Counsel submitted that the absence of expert evidence on the standard of care owed by Joshua is not fatal to Presas' case because Joshua is not a professional and further, realtors are not professionals under

Belize law because this vocation lacks the necessary features to be classified as a profession.

[22] He further argued that the lack of expert evidence was not fatal to Presas' case as the evidence of an expert in a case against a professional is not an absolute requirement. He relied on **Jackson & Powell on Professional Negligence,** Fifth Edition at paragraphs 6-008 to 6-011, which showed that there are two categories of cases in professional negligence where expert evidence is not required. The first being solicitor's negligence cases and the second category is where the *Bolam (Bolam v Friern Hospital Management Committee [1957] 2 All ER 118)* test does not apply. He listed three types of cases under the two categories and relied specifically on the third type of case where it is stated that it is not necessary to apply any particular professional expertise in order to decide whether a defendant has failed to exercise the skill and care expected of an ordinary member of his profession. He submitted that the application of the third type of case was illustrated in **J.D. Williams and Co. Ltd. v Michael Hyde and Associates Ltd.** [2000] All ER (D) 930.

Discussion

Was a duty of care owed by Ambergris Seaside under the contract?

[23] The claim made by Presas was one of negligence which in my opinion, did not arise out of his contractual relationship with Ambergris Seaside under the Listing Agreement. As shown in **Midland Bank Trust**, in a case of professional negligence founded in contract, there has to be an examination of the scope of the obligations as derived from the expressed terms and limits of the contract of engagement. The Agreement to sell the property showed that Presas agreed to pay Ambergris Seaside a brokerage fee of 8% "*upon consummation by any purchaser of a valid contract of sale or exchange of the property* …" There was no contractual term in the agreement that Ambergris Seaside would collect the sale proceeds and remit it to Presas. As such, there could not have been a contractual duty of care owed by Ambergris Seaside to Presas. In fact, the evidence showed that BCIL was the escrow agent. The Sale Agreement between Presas and the purchaser provided for the payment of the purchase

price to be held by BCIL prior to closing and not Ambergris Seaside. Paragraphs B 1, 2, and 3 of the Sale Agreement show the following:

> "B. The consideration and terms of this agreement are as follows:
>
> 1. The total purchase price for the aforementioned property is Four Hundred and Sixty Five Thousand Dollars in the currency of the United States ($465,000.00 USD).
> 2. A refundable earnest money deposit in the amount of Five Thousand Dollars in the currency of the United States ($5,000.00 USD) is to be paid to the Escrow Account of Belize Caye Investments Ltd. (hereinafter referred to as "Escrow Agent") by electronic wire transfer within 5 business days of the acceptance of this agreement by the Seller.
> 3. The balance of the purchase price in the amount of Four Hundred and Sixty Thousand Dollars in the currency of the United States ($460,000.00 USD) is to be paid to the Escrow Agent on or before September 23rd 2016, to be distributed as per Seller's instructions at Closing."

[24] Ambergris Seaside, as shown by the above terms of the Sale Agreement was not involved in any contractual agreement with Presas in relation to the purchase money. As such, there could not have been a duty of care owed to Presas by Ambergris Seaside under the Listing Agreement and the Sale Agreement. As shown in the case of **Midland Bank Trust**, the court has to be careful in imposing duties on professional men which goes beyond the scope of what they are requested to and undertake to do. Presas cannot be protected through the contractual relationship with Ambergris Seaside. Further, in relation to a parallel tortious duty, it is normally confined to the contractual duty and there was no term in the contract to wire transfer the funds. Therefore, it was my opinion that Ambergris Seaside owed no duty of care to Presas when Joshua collected the funds and remitted same to Presas, as this was beyond the scope of its contractual relationship. It follows that there could not have been a parallel duty of tort under the Listing agreement.

Was a separate duty of care owed in tort to Presas when Joshua agreed to wire transfer the funds?

[25] There was no duty of care owed by Ambergris Seaside under the contractual agreement between Presas and Ambergris Seaside as discussed above. The issue raised by Mr. Reyes was that a duty of care arose as a result of Joshua's acceptance to wire transfer the funds to Presas. He submitted that the evidence from Joshua in cross examination showed that Joshua, Alberto and Presas agreed that the sale proceeds would be sent to him to assist with the wire transfer. Ambergris Seaside argued that Joshua was not under a duty of care because there was no contractual obligation to do so and also that he was not the escrow agent. Further, that the evidence before the trial judge showed that when Joshua was requested to assist with the wire transfer of the funds, the fraudster had already intercepted the email communications among them in order to fraudulently obtain the funds.

[26] It is important to examine how Ambergris Seaside was requested to take on the tasks of transferring the funds to Presas instead of the escrow agent, BCIL. The evidence showed that the fraudster had already compromised the email communication among Presas, Joshua and Alberto of BCIL, prior to the closing of the sale. It was the fraudster who pretended to be the agent of BCIL and instructed that the funds be sent to Ambergris Seaside. The fraudster then instructed Ambergris Seaside to transfer the sale proceeds to his bank account in Houston Texas. There was no agreement between Presas and Ambergris Seaside to wire transfer the funds. The fraudster compromised the email accounts and communicated with the parties and BCIL, thereby inducing them to change the prior agreement between Presas and BCIL.

[27] The question to be answered is whether Ambergris Seaside owed a duty of care to Presas as a result of Joshua's acceptance to assist with the transfer of the funds. The findings of negligence were made without expert evidence on (a) practices of real estate professionals in Belize to determine the applicable standard of care Ambergris Seaside owed in the circumstances; and (b) Expert evidence as to how the email communications were intercepted by the fraudster.

[28] I respectfully disagreed with learned counsel, Mr. Reyes that the absence of expert evidence on the standard of care owed by Joshua is not fatal to Presas' case as Joshua is not a professional. Ambergris Seaside is in the business of real estate and is engaged in selling properties and other related matters. It cannot be said that professionals are only those who are licensed to practice or are regulated by statute. There are other professions with special skill, as for example, mechanics, who are experts in their field. I was of the view that realtors are professionals although they are not licensed professionals as Belize has no laws regulating that profession. I take judicial notice of the fact that there is an Association of Real Estate Brokers of Belize which represents real estate professionals in Belize. The buying and selling of properties includes not only the brokers and sales associates but other professionals in the industry such as appraisers, surveyors, developers and attorneys. Hence, I was of the view, that Ambergris Seaside was a professional company in the real estate industry and its agent Joshua also a professional. Abel J acknowledged at paragraphs 86 and 87 of his judgment that, "*This court has concluded that Joshua, on behalf of Ambergris Seaside should have taken further verification measures. Joshua is a professional operating a business that has a serious fiduciary and other responsibilities to its clients, in this particular case AP and his family."*

[29] Mr. Reyes further argued that the lack of expert evidence in not fatal to this matter because evidence of an expert in a case of professional negligence is not an absolute requirement. I respectfully disagreed with this argument as this was a matter of data breach and expert evidence was necessary to prove negligence. In **Jackson & Powell on Professional Negligence** at paragraphs 6-008, relied upon by Mr. Reyes, it was stated that expert evidence was rarely admitted upon the question whether a solicitor has discharged his duty of skill and care. The rationale given was that the courts themselves possess the necessary professional expertise to decide the question. The instant matter was not such a case as it concerned the adequacy of the security systems that Ambergris Seaside had in place for its email server. Further, it was not an obvious case as **J.D. Williams,** relied upon by Mr. Reyes, where expert evidence was not necessary in a professional negligence case. The Court of Appeal in that case found that the exercise of judgment in determining if the architect was negligent did not require

any special architectural skill and that there was no need to "get under the skin of a different profession." In my view, each case must be determined on its own facts and there will be cases where the negligence is so obvious that expert evidence would not be needed. In the instant matter, a fraudster intercepted communications between the parties and Abel J was unable to answer the million dollar question without the evidence as shown at paragraph 103 of his judgment.

[30] In the case of **Sansom and another v Metcalfe Hambleton & Co** [1998] 2 EGLR 103 at page 105, relied upon by Mr. Courtenay, in his reply submissions, it was held that a court should be slow to find a professionally qualified man guilty of a breach of skill and care towards his client without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard.

[31] In the instant matter, it was my view, that there was need for expert evidence to prove how the hacking occurred. Abel J in the absence of such evidence (at paragraphs 81 to 83 of his judgment) stated that he was satisfied that Ambergris Seaside had not any or any sufficient verification procedures in place in relation to the transfer of funds. He further stated that he was satisfied based on the evidence "*that there was not any or any sufficient and reasonable measure taken to verify that its communication was with MYBELPAR and or Presas as their clients, and to ensure that any communication was not intercepted*." The trial judge made these statements without expert evidence on the adequacy of Ambergris Seaside's security systems for its email server. In assessing the evidence, he concluded that the fraud could simply have been avoided by the existence of simple verification measures, which 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 (Presas) had previously been using (which is tpresas@outlook.com)." In my opinion, this was not a matter which should have been determined in such a simplistic manner as the fraudster was communicating with three persons. Further, it has been shown by the evidence that the fraudster informed Ambergris Seaside to use the new email address as he was having problems accessing his email address. Also, the fraudster pretending to be

Joshua communicated with Presas using a fraudulent email account ambergrisrealestate@yahoo.com. Joshua's email address was info@ambergrisrealestate.com. Even though the fraudster had asked Ambergris Seaside to use albcopperalloys@gmail.com, Joshua had sent an email to tpresas@outlook.com and the fraudster directed him to resend the mail to the new email address. Both Joshua and Presas had no clue that they were communicating with a fraudster.

[32] Presas alleged in his claim that Ambergris Seaside failed to "*adequately secure its email account from hackers."* The burden was on Presas to prove by expert evidence that Ambergris Seaside failed to adequately secure its email server. A bare allegation was not sufficient. In fact, the trial judge had no evidence as to whose account was hacked. Abel J found under the heading of "Determination" at paragraphs 100 to 102 that the "*fraudster got in-between and compromised the communication*" between Ambergris Seaside, Presas and BCIL causing each of them to communicate with the fraudster. The judge concluded that having heard the evidence of both witnesses, that "*frankly they* (Presas and Ambergris Seaside) *were both victims*." Abel J further formed the view that Presas "*was genuinely not implicated in any fraud. Likewise this court has concluded that Joshua was unlikely to have* been implicated in any fraud."

[33] The trial judge further acknowledged at paragraph 103, that "*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*." Also, at paragraph 104, the judge mentioned possibilities as to how the fraudster may have compromised the email communication among the parties and BCIL but had no evidence to support such possibilities. He accepted that based on the evidence the court was not in a position to find how the fraudster interjected himself into the email communications between Presas, Ambergris Seaside and BCIL. This lack of evidence in my view, was not consistent with the finding of negligence by the trial judge against Ambergris Seaside.

[34] Mr. Courtenay helpfully provided to this Court, further authorities which dealt with negligence against professionals. I mean no disrespect if each and every case is not discussed included those from Mr. Reyes. In the case of **In the matter of Stanford International Bank Limited (In Liquidation) and another v Nigel Hamilton-Smith and another** [2010] ECSCJ No. 415 at 44, relied upon by Ambergris Seaside, which involved international fraud, the Eastern Caribbean Court found that expert evidence was necessary to prove whether computer data was mishandled, owing to the nature and complexity of the issues raised. In the instant matter, there was no evidence from an expert as to verification procedures to be taken by real estate agents in Belize nor in the context of protecting itself from fraudsters and what other real estate agents in the industry here in Belize would have done. As such, the findings of Abel J on sufficient verification procedures were made arbitrarily without any expert evidence.

[35] In the case of **Various Claimants** there was an allegation of breach of duty in the context of a data breach as in the instant matter. The court had evidence on the protection of data and internal checks which it analyzed and it addressed standard of care. The court considered statutory provisions and the words duty to take "reasonable care" did not appear in the statute. However, the court took into consideration the common law approach. At paragraph 68, the court said:

> "Though, as I pointed out, the words "reasonable care" are not employed, there is a resonance here of the common law approach to the tort of negligence, where the standard of reasonable care is to be judged by balancing the magnitude of the risk of the activity in question … against the availability and cost of measures to prevent the risk of materializing, and the importance of the object to be achieved by performing those actions. That approach is accordingly indicative of the standard which should apply here, whilst remaining mindful that it is being applied in the field of data protection and it is, in general terms, of considerable importance that data be kept secure."

[36] Likewise, in the instant matter, that approach could have been applicable as it concerned the interception of data from computer servers.

[37] The importance of expert evidence was also highlighted in the Court of Appeal case of **Fong Maun Yee v Yoong Weng Ho Robert** [1997] 3 LRC 138, relied upon by Ambergris Seaside, where it is stated that:

> "The extent of any given situation must, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide."

[38] At paragraph 44 of the same judgment, the Court stated that this issue can be taken one step further by the tests enunciated by the Judicial Committee of the Privy Council in the appeal from Hong Kong in ***Edward Wong Finance Co Ltd v Johnson Stokes & Master* (*a firm*)** 1984 AC 296. Lord Brightman said:

> 'In assessing whether the respondents …. fell short of the standard of care which they owed towards the appellants, three questions must be considered: **first, does the practice, as operated by the respondents in the instant case, involve a foreseeable risk? If so, could that risk have been avoided? If so, were the respondents negligent in failing to take avoiding action?'**

[39] The tripartite criteria could only be answered if there was expert evidence from this jurisdiction in relation to real estate business here in Belize. In **Fong Maun Yee**, it can be seen that the court restricted its analysis on the applicable standard of care for a reasonable competent conveyancing solicitor in Singapore. The reason being that practices may vary from jurisdiction to jurisdiction. Abel J had absolutely no evidence as to how real estate agents operate in Belize and therefore there was no assessment of the standard of care by him on the practice in this jurisdiction. As stated above, there are no regulations in Belize, but there is an Association comprising of real estate agents and other professionals. There was no evidence as to how they operate in their practice here in Belize. Also, there are experts in the field of technology in this jurisdiction but the judge did not have the benefit of such evidence.

[40] Mr. Reyes relied on the case of **Caparo** where the three step criteria to test for a duty of care is that there must be foreseeability, proximity and it must be fair, just and reasonable. In my view, while the test may be applicable, a more appropriate test should be applied in a case of tortious negligence involving data breach. In **Midland Bank Trust** (page 591), it is shown that the principle in **Hedley Byrne & Co. Ltd. v Heller & Partners Ltd,** of tortious negligence arising out of a relationship which gives rise to a duty is a general one. Therefore, a more appropriate test for duty of care could be applied in the instant matter.

[41] In my opinion, the tripartite test applied in **Fong Maun Yee** (as stated by Oliver J in **Midland Bank Trust** and Lord Brightman in **Edward Wong Finance Co Ltd v Johnson Stokes & Master (a firm)** [1984] AC 296 at 306), would have been useful. Even if I am wrong and the test in **Caparo** was appropriate in this case, there was a failure by Mr. Presas to prove by relevant expert evidence that all three criteria in that case had been satisfied.

[42] For the sake of argument, the test as applied in **Fong Maun Yee,** would be applied to the instant matter. The first criterion was whether the business of real estate involves a foreseeable risk. I agreed with the appellant that Ambergris Seaside's real estate practice involves a foreseeable risk that internet frauds such as occurred in

the instant matter, where the fraudster intercepted communications between the parties, could occur.

[43] The second criterion was whether the risk could have been avoided. There was no expert evidence before the trial judge as to whose email server was hacked. It follows that Presas could not prove that the risk could have been avoided. The trial judge's conclusion that the "*fraud could simply have been avoided by the existence of simple verification measures ..*" was arrived at without considering the entirety of the evidence before him and he sought to solve a complex information technology problem with a simple answer. The fraudster cleverly communicated with both parties and BCIL using fraudulent email addresses as shown at paragraph 31 above.

[44] The third criterion as to whether Ambergris Seaside was negligent could only be answered in the negative. Since there was no evidence as to whether the risk of the hacking could have been avoided, there could not be a finding of failure to take avoiding action. The Court is cognizant of the fact that when Ambergris Seaside discovered the fraud, Joshua assisted in the recovery of a part of the purchase price prior to the commencement of the claim.

Conclusion

[45] For all those reasons, I was of the opinion that the trial judge erred in fact and law in concluding that Ambergris Seaside was negligent.

Whether there was contributory negligence by Presas

[46] Ambergris Seaside argued that the trial judge erred in fact and law in finding that there was no contributory negligence by Presas and by finding further that contributory negligence could not be claimed as there was no counterclaim. Counsel further argued that the judge failed to apply the legal principle that the court has the power to make any order whether pleaded or not, whether by a counterclaim or not.

[47] The trial judge at paragraphs 91 to 94 of his judgment concluded that there was no contributory negligence by Presas as there was no answer as to how the fraudster found out the details of the account. Further, there has been no claim for contributory

negligence since there was no counterclaim and it was only raised as a defence. He stated the following:

> "[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 (Presas) 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."

[48] I agreed with the submission for Ambergris Seaside that contributory negligence need only be specifically pleaded for the court to look at the issue. See the matter of **Cruz v Alvarenga and Anor**, Civil Appeal No. 15 of 2011 at paras 74-81. Mr. Reyes had agreed that a claim for contributory negligence need not be the subject of a counterclaim and must be specifically pleaded in a defence.

[49] Nevertheless, the judge found that there was no contributory negligence by Presas. He stated that "*If this question could be answered that might well supply an answer to the question whether AP might have contributed to the negligence."* Likewise, in my opinion, that there was no evidence to establish negligence or contributory

against Ambergris Seaside or Presas. The million dollar question was never answered as acknowledged by the trial judge as to whose account was hacked.

[50] In any event, even if there was evidence of contributory negligence by either party, damages would have been equally attributed to either side. See **Halsbury's Laws of England**/*Negligence (1) The Burden of Proof/ Negligence of the Claimant*. Both parties received emails from the fraudster who was using fraudulent email accounts. Neither party thought of checking the new email addresses because of excuses given by the fraudster as to difficulty in receiving emails. However, negligence had not been proven against the appellant nor the respondent because of the lack of expert evidence. What had been proven was that the fraudster compromised the email communications of the parties and BCIL. The judge had no evidence to conclusively make a finding that there was no contributory negligence by Presas. The learned judge therefore, erred in his finding.

The Power of Attorney point

[51] Mr. Courtenay argued that the trial judge misdirected himself in fact and erred in law in failing to find that Presas had no right or cause to commence and or continue a claim in his name as no cause of action vested in Presas, although given a Power of Attorney. The matter proceeded in the court below, on the basis that the power of attorney was valid and that Presas had the capacity to commence legal proceedings. In my view, since no challenge was made in the court below and the matter proceeded as if it was proper for the representative party to bring an action by way of Power of Attorney, the claim would be so treated and likewise the appeal. Ambergris Seaside was satisfied that the Power of Attorney was valid and had not concerned itself with whether Presas could have brought the claim in his name as agent for Elizabeth and Susan. Even if I am wrong, there would be no prejudice to Ambergris Seaside as it had succeeded in this appeal.

[52] This issue needs to be properly ventilated on another occasion. The **Belize Supreme Court (Civil Procedure) Rules, 2005, Part 21 ('CPR')** does not address representative parties to conduct legal proceedings in the ordinary sense. It provides for class action claims. Other jurisdictions in the Caribbean have addressed representative parties in the ordinary sense and an application has to be made to the court to be a representative party and not just in class action proceedings.

[53] Rule 21 of the Belize CPR provides:

> 21.1 (1) This Rule applies to any proceedings, other than proceedings falling within Rule 21.4, where five or more persons have the same or a similar interest in the proceedings.
>
> (2) The court may appoint -
>
> (a) one or more of those persons; or
>
> (b) a body having a sufficient interest in the proceedings; to represent all or some of the persons with the same or similar interest.
>
> (3) A representative under this Rule may be either a claimant or a defendant.

[54] The procedure for such appointment is provided for at Rule 21.2 of the CPR. However, Rule 21 is not applicable to the instant matter as stated by Mr. Reyes.

Point on action against fraudster and unjust enrichment

[55] Ambergris Seaside argued that the trial judge erred in law by failing to take account of the fact that the proper cause of action vests in the principals of Presas against the known fraudster in United States of America. Further, by the decision the court has effectively put the principals of Presas in a position of becoming unjustly enriched as that route of action still exists.

[56] Presas stated in its submissions that the fraudster had been identified as Azubuine Oji Esaba and criminal proceedings are pending. It has been proven also that some of the monies had been recovered from the fraudster. It was therefore open for the the trial judge to consider that cause of action vests in the owners of MYBELPAR, against

the known fraudster in the United States of America, in which case the issue of unjust enrichment would have been raised.

Conclusion

[57] It was for the above reasons, that I agreed with the order made on 20 October 2020, that the appeal be allowed and the judgment of the trial judge set aside. I also agreed that costs be awarded to the appellant in this Court and in the court below. The costs in the court below was BZ$15,000.00 as agreed by the parties.

[58] The costs order for this Court is provisional, to be made final after seven days. In the event either party should apply for a contrary order within the period of seven days from the delivery of this judgment, the matter of costs shall be determined on written submissions to be filed by the parties in ten days from the date of the application.

_____

HAFIZ-BERTRAM JA

DUCILLE JA

[59] I have read the draft judgment prepared by Hafiz-Bertram JA and I am in agreement with the reasons for the order made by this Court on 20 October 2020, allowing the appeal of Ambergris Seaside Real Estate Limited. I can add nothing further.

_____

DUCILLE JA