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

CLAIM NO. 812 OF 2019

BETWEEN

(RODNEY ZIMMERMANN	**CLAIMANT**
(	
(AND	
(	
(MACKINNON BELIZE LAND &	
(DEVELOPMENT LTD.	**1st DEFENDANT**
(GRIFFIN BELIZE INC.	**2nd DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Decision Date:

19th May 2022

Appearances:

Mrs. Ashanti Arthurs-Martin, Counsel for Claimant.

Ms. Lisette Staine, Counsel for 1st Defendant.

Mrs. Andrea McSweeney-McKoy, Counsel for 2nd Defendant.

KEYWORDS: Land - Contract - Agency - Fraudulent Misrepresentation - Purported Title Owner not Title Owner in Fact - Breach of Contact - Closing Agent's Title Search Erroneous - Negligence - Negligent Misrepresentation - Contract Completed - Conveyance Registered - Conveyance Set Aside - Damages

JUDGMENT

1. Everything that could go wrong went very wrong. The Claimant owned land in the seaside village of Placencia. He desired to purchase the vacant adjacent lots as well. So, at his request, his real estate agent, Daniel Dunbar, made inquiries of James Parker, a Director of the First Defendant, as to the ownership and availability of the Lots.

2. He says that James Parker subsequently represented to Mr. Dunbar that the Lots were indeed available and that the First Defendant was the owner. Based on what Mr. Dunbar told the Claimant, he was induced to enter in an Offer to Purchase Agreement.

3. Mr. Dunbar continued to act as his broker throughout and advised the Claimant to retain the services of the Second Defendant to close the purchase, which he did.

4. The Second Defendant was to ensure that the Lots were free and clear of all encumbrances, then draft and file the transfer documents. The Second Defendant was paid in full for its services and advised the Claimant that the First Defendant had good, free, and unencumbered title to the Lots.

5. Based on the representations by both Mr. Parker and the Second Defendant, the Claimant wired the purchase price to the First Defendant. A Deed of Conveyance was signed on 21st February 2017 and filed accordingly. The Claimant then proceeded to develop the land by filling it and constructing a concrete fence with gate.

6. In October 2018, he received correspondence from an attorney which indicated that he was trespassing and must remove any improvements he had made. That letter also indicated the title reference of the owners.

7. When searches were conducted, it was revealed that the owners were as stated in the letter, and they had acquired ownership through transfer from the First Defendant since December 2005.

8. The Claimant insists that the First Defendant breached their contract, and its representation as to ownership had been made either fraudulently or negligently as they knew or ought to have known that they no longer had title.

9. The Deed to the actual owners had been signed by James Parker, as Director of the First Defendant, who had also signed the Claimant's Deed. A reasonable and diligent search by the First Defendant would certainly have revealed that the First Defendant was no longer the registered proprietor of the Lots.

10. Equally, a proper search by the Second Defendant would also have revealed this. The Second Defendant was, therefore, negligent and had breached its duty of care causing the Claimant to suffer loss.

11. The Claimant now seeks damages for fraudulent or negligent misrepresentation as well as breach of contract against the First Defendant, and for negligence and negligent misrepresentation against the Second Defendant.

12. The First Defendant admits that when it entered the Offer to Purchase Agreement with the Claimant, it no longer had title to the Lots. However, it was Mr. Dunbar who had informed Mr. Parker that the First Defendant was the owner on record. And their own records did not reflect a sale to the registered proprietors.

13. Moreover, they had informed Mr. Dunbar that the Lots were in fact owned by Mr. Rodney Bruck with whom Mr. Dunbar subsequently began to directly communicate and negotiate the sale. The First Defendant acted solely as agent for Mr. Bruck and executed the Deed of Conveyance as such.

14. The closing statement was addressed to Mr. Bruck and the First Defendant and had been executed by the First Defendant, Mr. Bruck and Mr. Dunbar. In any event, the Claimant had retained the services of the Second Defendant to verify ownership of the Lots and it is really that report on which the Claimant had relied.

15. More importantly, a proper search by the Second Defendant would also have revealed the same. The Second Defendant was, therefore, negligent and had breached its duty of care causing the Claimant's loss.

16. The Second Defendant does not deny culpability but admits financial loss suffered by the Claimant of only $3,450.00 for investigation of title and legal costs. It maintains that it had been diligent and had acted reasonably and prudently in making its enquiries.

17. The title search was not intended to defraud, deceive nor induce the Claimant into purchasing the property. The blame for the Claimant's loss lay mainly with the First Defendant.

The Issues:

1. Whether the First Defendant made a fraudulent misrepresentation to the Claimant?
2. Whether the First Defendant made a negligent misrepresentation to the Claimant?
3. Whether the First Defendant breached the Offer to Purchase Agreement?
4. Whether the Second Defendant owed a duty of care to the Claimant, and if it did, did it breach its duty of care?
5. Whether the Second Defendant made a negligent misrepresentation to the Claimant?
6. Is the Claimant entitled to damages, in what quantity and should it be proportioned between the Defendants and how?

Whether the First Defendant made a fraudulent misrepresentation to the Claimant?

Claimant's Submissions:

13. The Claimant relied on the explanation of the law of fraudulent misrepresentation as presented by Justice Jackson-Haisley of the ***Jamaican Supreme Court in Claim No. 2014HCV04646*** at paragraph 53:

> *"Fraudulent Misrepresentation is referred to as the Tort of Deceit. The elements of Fraudulent Misrepresentation are set out in Derry v Peek (1889) 14 App. Cas. 337. Harrison J in the Jamaican case Bevad Limited v Omad Limited SCCA No 133/05 at page 8 of the judgment after discussing Derry v Peek synopsized the elements of the tort in these terms:*
>
> 1. *There must be a false representation of fact. This may be by word or conduct;*

2. *The representation must be made with the knowledge that it is false, that is, it must be willfully false or made in the absence of belief in its truth. Derry Peek (supra); Nocton v Lord Ashborne [1914-1915] All E.R. 45.*
3. *The false statement must be made with the intention that the claimant should act upon it causing him damage.*
4. *However, it must be shown that the claimant acted upon the false statement and sustained damage in so doing. Derry v Peek (supra.); Clarke v Dickson [1858] 6 C.B.N.S. 453; 35 Digest 18,100."*

14. She then sought an elaboration of what constitutes knowledge of falsity of a statement from Chitty on Contracts, 32nd ed, Vol 1 paragraph 7-050:

> *"The requirement of the absence of honest belief does not, however, mean that the claimant must prove the defendant's knowledge of the falsity of the statement. It is enough to establish that the latter suspected that his statement might be inaccurate, or that he neglected to inquire into its accuracy, without proving that he actually knew it was false."* [emphasis added]

15. She concluded that once the primary elements of fraud have been established there is no need to establish an intention to defraud but kindly reminded that each case turns on its own facts.

16. On the issue of agency, Counsel highlighted the Claimant's testimony that he knew nothing of the First Defendant's purported agency. The Offer to Purchase and Conveyance were both signed by the First Defendant as seller. The name of Rodney Bruck does not appear at all. She surmised that for all intents and purposes, the First Defendant was the contracting party, and the issue of agency did not arise.

17. Counsel relied on ***Higgins and Others v Senior [1835-42] ALL ER Rep 602*** and the rule stated therein that a party is bound by a written contract which they have signed. He can not be discharged from liability by proving the agreement

was made with the authority of and as agent for another or that the contracting party was aware of this fact when the agreement was signed.

18. Moreover, the Claimant's actual or attributed knowledge of the existence of Mr. Bruck was irrelevant, since it would not affect the First Defendant's representation that it owned the Lots, which was not true and in which the First Defendant's witness, Mr. Parker, admitted Mr. Bruck played no role.

19. By executing the Offer to Purchase as well as the Conveyance, the First Defendant represented that it owned the Lots, they were for sale, and they were free and clear of any encumbrances.

20. Counsel for the Claimant also referred to an email dated 22nd December 2016 (annex 3 of Daniel Dunbar's witness statement) in which Mr. Parker confirmed to Mr. Dunbar that Mr. Bruck did not have title in his name *"I explained to him according to the paperwork he never applied for title transfer… he wants me to represent him in this as I still have the title…."*

21. She reflected on Swift J's comment in ***Matthews and Smith [2008] EWHC 1128 (QB)*** pgs 137-139:

> *"A false statement made through carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. If it was made in the honest belief that it was true, it would not be fraudulent. It is, however, important to consider in each case whether there were reasonable grounds for the maker of the statement to believe in its truth, and also to examine the means of knowledge that were possessed by the maker of the statement at the material time. If that person shut his eyes to the fact, or deliberately abstained from enquiring into them, he would be guilty of fraud, in just the same way as if he had made the statement knowing it to be false.*
>
> *The Appellant must also be able to establish that he acted in reliance on the Respondent's misrepresentation(s). The misrepresentation(s) need not have been the sole cause of him acting as he did, provided that he was materially influenced by the misrepresentation(s).*

The burden of proof is, of course, on the Appellant. Given the seriousness of the allegations he makes, he must establish his case by reference to the high civil standard."

22. Counsel also found the case of ***Wee Chiaw Sek Anna [2013] SGCA 36*** at para. 30 to be instructive. Here the Singapore Court of Appeal opined:

"It is, in our view, of the first importance to emphasise right at the outset the relatively high standard of proof which must be satisfied by the representee (here, the appellant) before a fraudulent misrepresentation can be established successfully against the representor (here, the deceased). As V K Rajah JA put it in the Singapore High Court decision of Vita Health Laboratories Pte Ltd v Pang Seng Meng [2004] SGHC 158, [2004] 4 SLR 162 at [30], the allegation of fraud is a serious one and that '[g]enerally speaking, the graver the allegation, the higher the standard of proof incumbent on the Appellant'. If an allegation of fraud is successfully made, the representor would be justifiably found to have been guilty of dishonesty. Dishonest is a grave allegation requiring a high standard of proof. In a similar vein, this court in Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict [2005] SGCA 27, [2006] 3 LRC 19 observed thus (at [14]):

'[W]e would reiterate that the standard of proof in a civil case, including cases where fraud is alleged, is that based on a balance of probabilities; but the more serious the allegation, the more the part, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case.' (Our emphasis)"

First Defendant's Submissions:

23. Counsel for the First Defendant commenced by explaining that the email on which the Claimant relied for the fraudulent misrepresentation had in fact been misconstrued. The statement had not been made to Mr. Dunbar, rather, it was simply an explanation ton him of what Mr. Parker had told Mr. Bruck. This, Counsel says, is important because a Claim in misrepresentation can only succeed if the representation was made to the Claimant.

24. Additionally, there were conversations between Mr. Dunbar and Mr. Parker leading up to the email which caused Mr. Parker to state that the Lots remained with the First Defendant.

25. Mr. Parker had informed Mr. Dunbar that his records showed that title had not been transferred to Mr. Bruck, but he had cautioned that his records were not complete as he was in the USA and the records were in Belize.

26. A few days later, it was Mr. Dunbar who then informed Mr. Parker that he, Mr. Dunbar, had searched the public records at the Land's Department and the Lots were in fact not in Mr. Bruck's name but remained in that of the First Defendant.

27. Counsel asked the Court to reject Mr. Dunbar's version of events where he asserted that it was Mr. Parker who had first confirmed orally that title to the Lots remained in the First Defendant's name and after email discussion between them had once again confirmed this by the 22nd December 2021.

28. She said this was never pleaded. She also pointed to certain inconsistencies in Mr. Dunbar's testimony, particularly as to whether he had in fact conducted a title search before the execution of the Purchase Agreement, an issue that was raised in the First Defendant's Defence.

29. Mr. Dunbar's testimony, on the other hand, shifted from his notes not indicating that he had commissioned a search, to the notes stating that he did not feel a need to commission one. It was strange that he did not exhibit these notes which he said were in the form of emails with the title researcher.

30. Counsel also drew the Court's attention to the fact that Mr. Dunbar had stated that he was not part of the negotiations with Mr. Bruck with whom he only communicated concerning ownership of the Lots.

31. However, he later admitted to telling the Claimant by email that he had tracked down the owner of the Lots who was interested in selling (23rd December), who was excited about selling the Lots (30th December). Eventually, he informed that the owner was getting antsy, and he had no information to share with them (6th January) and finally, that he was dealing with a crazy guy.

32. All this, she submitted, leads to the conclusion that it was more probable than not that Mr. Parker had informed Mr. Dunbar that his records were incomplete. So, that after Mr. Bruck himself questioned his ownership, Mr. Dunbar decided to perform a title search to confirm ownership.

33. When Mr. Parker told Mr. Dunbar that he had explained to Mr. Bruck in that email of the 22nd December that title remained with the First Defendant, it was based on Mr. Dunbar's prior representation to Mr. Parker.

34. There was really no reliance by the Claimant on the First Defendant's statements or conduct as to ownership of the Lots to complete the sale or to release the funds from Escrow. He had admitted repeatedly that he had relied on the title search done by his closing agent. This meant that the Claimant had not altered his position or suffered any detriment by entering into the Purchase Agreement, and certainly not to the amount being claimed in damages.

35. They submitted further that there was no evidence of fraud. The fact that the statement was untrue was insufficient. All that was left was the fact that it was Mr. Parker who had signed the transfer instrument to the current owners, the Paliottas. Mr. Parker had no intention to defraud or deceive the Claimant. That transaction had occurred some 12 years prior, and he did not have access to all

of his records which related to the sale of over 300 Lots in that subdivision. His testimony in this regard had not been discredited.

The Second Defendant's Submissions:

36. This issue did not directly concern this Defendant but there was presented a definition of fraudulent misrepresentation ***Caye International Ltd v Tommy Lynn Haugen Belize Civil Appeal No. 8 of 2016*** which relied on ***Derry v Peek (ibid)***. Counsel then respectfully submitted that the First Defendant had made a fraudulent misrepresentation as to ownership to the Claimant.

The Court's Consideration:

37. The misrepresentation being considered formed part of the eventual contract and therefore became a term to be remedied by a claim in breach of contract if the contract was not completed and breach of vendor's covenant if there was a conveyance, but not misrepresentation. Misrepresentation does not remain actionable once it becomes a promise in the contract as it does under the Misrepresentation Act 1967 (UK).

38. The First Defendant, however, has not taken this point. The parties submitted extensive submissions on this issue so the Court will continue to consider whether there had in fact been a fraudulent misrepresentation.

39. The Court of Appeal in ***Belize Pickwick Club Hotel Ltd & Anor v Princess Entertainment Ltd & Ors Belize Civil Appeal No 5 of 2017*** also cited ***Derry v Peek (ibid)*** with approval and quoted from ***Matthews v Smith [2008] EWHC 1128 at paragraphs 137 to 139*** as follows:

"[137] A false statement made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. If it was made in the honest belief that it was true, it would not be fraudulent. It is, however, important to consider in each case whether there were reasonable grounds for the maker of the statement to believe in its truth, and also to examine the means of knowledge that were possessed by the maker of the statement at the material time. If that person shut his eyes to the facts, or deliberately abstained from enquiring into them, he would be guilty of fraud, in just the same way as if he had made the statement knowing it to be false.
[138] The Claimant must also be able to establish that he acted in reliance on the Defendant's misrepresentation(s). The misrepresentations(s) need not have been the sole cause of him acting as he did, provided that he was materially influenced by the misrepresentation(s).
[139] The burden of proof is, of course, on the Claimant. Given the seriousness of the allegations he makes, he must establish his case by reference to the high civil standard.'
[68] If a statement made by a representor is found to be untrue, a claim for fraudulent misrepresentation will fail if at the time he made the statement he believed it to be true. See Foster and another v Action Aviation Ltd [2013] 2439 (Comm), page 86."

40. I find this to be a most concise and precise statement of the requirements of fraudulent misrepresentation. Following its guide, the Court will first enquire whether a false statement was made by the First Defendant to the Claimant.

41. Mr. Parker, as representative of the First Defendant, in an email to Mr. Dunbar (the Claimant's agent) on the 22nd December stated that he had told Mr. Bruck (the equitable owner) that the First Defendant still had title. He said, *"I explained to him according to his paperwork he never applied for title transfer…. he wants me to represent him as I still have the title…."* The statement, *"I still have the title"* is one of fact which has been proven to be false.

42. While the First Defendant denies making a representation of ownership, I find this to be preposterous. They say that Mr. Parker was simply disclosing to Mr. Dunbar what he had told Mr. Bruck. He had not been confirming that the First Defendant was the owner of the Lots. They urge with insistence that the

distinction is important as the misrepresentation must have been made to the Claimant (or his agent).

43. This seems to be a splitting hair where hairs need not and can not be split. It is clear from that email of December 18th, 2016, from Mr. Parker to Mr. Dunbar, that Mr. Dunbar had been enquiring as to the Lots. Mr. Parker himself admits this in his evidence-in-chief.

44. In this email, Mr. Parker said he had found the hard file on 127 and 126. He not only quoted the lot numbers but said he spent considerable time trying to track down Mr. Bruck who had purchased the properties in 2001.

45. So when Mr. Parker emailed Mr. Dunbar on December 22nd, 2016 and said *"…. I still have the title…"* whether he was repeating a statement he had made to someone or otherwise that email is addressed to Mr. Dunbar and the statements made therein are in fact statements made to Mr. Dunbar, agent for the Claimant.

46. For what it's worth, this Court does not believe that Mr. Parker had made any number of previous statements to Mr. Dunbar that the First Defendant owned the said property. Those statements ought to have been pleaded clearly and would have been relied on heavily if this were so. Nor does the Court believe that Mr. Dunbar had made any searches and informed Mr. Parker that the first Defendant continued to be the owner on record.

Was the statement fraudulently made?

47. There can be no doubt that a misrepresentation had been made to the Claimant. But the prevailing circumstances point definitively towards fraudulent

misrepresentation. There is to begin with the First Defendant's knowledge that the Lots were a part of a development. There were many sales and transfers over the many years. This alone should have alerted Mr. Parker that he could not simply rely on part of his records to make the statement he made.

48. Then there were instances when land was sold but no transfer was done. Mr. Parker was well aware that this had been done with the Lots. They had originally been sold to Mr. Bruck but had not been legally transferred. This too should have sounded a strong alarm that making a statement as to title without a proper search was indeed quite reckless.

49. The reason for or legality of keeping property in the Company's name after it had been sold is not important here. But one must understand that every action has its consequences, both positive and negative. One must always be prepared to bear the consequences.

50. Although Mr. Parker said he indicated to Mr. Dunbar that his records were incomplete, he himself preferred to rely on some email records (never exhibited) and information he said he had received from Mr. Dunbar - the purchaser's agent (which the Court rejects as untrue) and Mr. Bruck (who is noticeably absent from these proceedings).

51. This information had not been properly verified by the First Defendant, yet he said it was sufficient to convince him that the representation he was making was true. This is incredible to me.

52. The First Defendant, having chosen to conduct business as it did (no transfer when sold), can not now rely on the assertion that it did not have access to all its records and that was made clear to the Claimant. It ought, in the circumstances, as have been outlined above and prior to stating that it continued to hold title, to have said I am not sure. Then, verify it appropriately.

53. It is also strange that the email to Mr. Dunbar did not say, *"I told him, as you had informed me, that I still have title …"* There are no words which qualify the statement at all. This is very different to the way Mr. Parker in the same email speaks to Mr. Bruck never having applied for title transfer. He qualifies that with *"…. according to his paperwork…."*. It seems more likely than not to me that Mr. Parker relied on his own investigation to reach his conclusion.

54. Nowhere in all the email back and forth between Mr. Dunbar and Mr. Parker does either of them say anything about a search having been conducted at the Land Registry prior to entering into the Agreement for purchase. Yet, Mr. Parker sought to lay blame at Mr. Dunbar's feet for his belief that the Lots were still titled to him.

55. Lots that he himself had already transferred to a third party long before Mr. Zimmerman tried to purchase, and which could have been revealed had a proper search been conducted. The evidence also revealed that his attorney could have provided the necessary information but Mr. Parker's investigation for some unknown reason never extended that far.

56. This Court simply can not, in those circumstances, hold that the First Defendant had an honest belief in the statement made. It appears to me that Mr. Parker

deliberately abstained from making the necessary enquiries and then recklessly made that statement as to title. This is tantamount to fraud and the Court so finds.

57. Having found fraudulent misrepresentation, there is no need to discuss whether the First Defendant's misrepresentation was negligently made as this could only possibly be an alternative finding. With that Issue two (2) falls away.

58. We move now to consider whether the Claimant relied on the First Defendant's fraudulent misrepresentation to enter into the Offer to Purchase Agreement and completion of sale.

Reliance:

59. This is not a difficult question to answer. The law, as I understand it, is that even where there may be other matters on which the Claimant has relied, once the fraudulent misrepresentation is a material one, then the tort is complete.

60. There is no doubt that the Claimant relied on the First Defendant's confirmation that it continued to be the registered proprietor. Not only does the Claimant say this, but his conduct very soon after that statement was made demonstrates his reliance.

61. He unhesitatingly entered into an Agreement to purchase the Lots on the 14th January, 2017. The Court also notes that the only land title search in evidence purportedly conducted by Ms. Sharon Lamb is dated 23rd January 2017, more than a week after the agreement had been signed.

62. Mr. Dunbar, at the time the agreement was signed, knew that Mr. Bruck did not have title, but the First Defendant said it did. The First Defendant was the only one who could transfer full title and estate. He was willing to do so while Mr. Bruck was willing to sell at the offered price.

63. The First Defendant's statement as to title and ownership was indeed material to the Claimant entering into that agreement and it was certainly relied upon. It follows easily that a fraudulent misrepresentation had been made by the First Defendant to the Claimant.

Whether the First Defendant breached the Offer to Purchase Agreement?

The Claimant's submissions:

64. The Claimant submitted that by signing the Purchase Agreement, the First Defendant represented itself to be the seller. Then by virtue of clause 3 of that Agreement the First Defendant was under a duty to provide *"good, sufficient and clear title, free from any and all liens and encumbrances."*

65. The Deed of Conveyance which the First Defendant executed in the Claimant's favor could not legally transfer title to the Lots as the First Defendant no longer had any title to convey.

66. Together, these amounted to a breach of the agreement for which damages ought to be awarded to compensate for the true loss suffered by the Claimant (***Robinson v Hartman (1848) 154 ER 363***). This sum should rightly include his reliance interest where he incurred some expense or loss in reliance on the promised performance.

The First Defendant's Submissions:

67. The First Defendant concedes that on the face of the Agreement and by signing the conveyance, it appears that it was indeed the contracting party. Nonetheless, it insists that it was only an agent of Mr. Bruck and contracted solely on his behalf. As such, it can not be held liable since it is only the principal who may sue and be sued.

68. Counsel reminded that *"(i)n the absence of any other indications, when an agent makes a contract, purporting to act solely on behalf of a disclosed principal, whether named or unnamed, he is not liable to the third party on it. Nor can he sue the third party on it… The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and if so the extent of his liability, depends on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances…"* Bowstead on Agency, 15th Ed p 424-426.

69. Heavy reliance was placed on ***Boles v St. Kitts-Nevis Trading and Development Co. Ltd Court of Appeal, St Christopher, Nevis and Anguilla No 4 of 1977***, for the principle that an agent need not indicate the fact of its agency to the third party where the third party already knows.

70. Counsel urged that Mr. Dunbar, the Claimant's agent, was well aware of the existence of Mr. Bruck, the purported equitable owner of the Lots. That knowledge ought properly to be imputed to the Claimant whether or not he had actually heard of him prior to the conveyance. `

Court's Consideration:

The Court will begin with the agency issue.

71. There is no doubt in my mind that the First Defendant acted as agent for Mr. Bruck. That is certainly borne out in the evidence from both the Second Defendant and Mr. Dunbar.

72. But the First Defendant also contracted on its own behalf because Mr. Bruck did not have the paper or legal title. He did not have the full power to convey the whole interest which was agreed to be sold. Since he lacked the power, he could not donate it to an agent.

73. When the First Defendant decided to keep the titles in its name, there were risks, responsibilities, or consequences which this attracted. The Company remained to the world for all intents and purposes the legal owner. It held the property on trust for the purchaser. While the purchaser could assert a proprietary claim to it or hold a lien over the property for the purchase price paid, he could not convey what had been agreed to be sold.

74. The Claimant, through his agent Mr. Dunbar, is imputed with the knowledge of the purported existence of the equitable interest held by Mr. Bruck. Prior to signing the Agreement, the agent secured the legal owner's consent and that of the beneficial owner's as well. That was surely the sensible thing to do. But that does not in any way make the legal owner a mere agent.

75. The First Defendant was a full and necessary party to the transaction and there was no way the transaction could have been consummated without its participation beyond an agency.

76. Further, Mr. Parker was the representative of the First Defendant, and it was the First Defendant who entered into the agreement for sale of the land with the Claimant. He also signed with Mr. Bruck on the closing statement. Why would that be necessary if he was only Mr. Bruck's agent at that time? If he believed his Company's involvement was only as Mr. Bruck's agent, why then did he find it necessary to sign alongside Mr. Bruck?

77. The Court notes that the closing statement was clearly addressed to both Mr. Bruck and the First Defendant. Mr. Parker freely signed that document. Moreover, he consistently signed as a director of the First Defendant only, never as Mr. Bruck's agent. Those are the circumstances which this Court must consider in making its determination.

78. So, it appears to me that the First Defendant entered this Agreement as legal owner or paper title holder of the Lots as well as agent for the equitable owner whom he asserted to be Mr. Bruck. The Company is, therefore, personally liable for any breach. The First Defendant may perhaps pursue his principal if it deems that necessary, but it will not be allowed to hide behind its claim of agency.

Did the First Defendant breach the Purchase Agreement?

79. A vendor is under a duty to prove good title in the absence of an expressed stipulation to the contrary (***Leominster Properties Ltd v Broadway Finance Ltd (1981) 42 P.&C.R. 372 at 380***). This means that we must first look to the Agreement to see what had in fact been agreed. Clauses 3, 6 and 7 of the Agreement read:

"3. A copy of the Deed conveying good, sufficient and clear Title, free from any and all liens and encumbrances shall be delivered to the office of the closing agent for the Purchaser within 10 business days of the signing of this contract by both parties. If the seller has a mortgage on the property, then a copy of the mortgage contract must be delivered in lieu of the deed.

6. *Should the Seller be unable to produce good and sufficient proof of ownership, (to the satisfaction of the Purchaser's closing agent), free from all liens and encumbrances, all deposits and payments paid by the Purchaser shall be refunded in full, less any incurred legal or due diligence related fees incurred by the Purchaser, with no recourse to the Seller, within 10 business days from notice.*
7. *Seller further agrees that in the event that the property cannot be transferred to the buyer due to legal restrictions during the final registration/ transfer process, then Seller shall be responsible for all legal responsibilities to the purchaser."*

80. There is no doubt in my mind that the First Defendant contracted to convey good freehold title to both the legal and the equitable interest free from all encumbrances. Having entered into the Agreement but prior to closing, proof of title was limited to as much as was needed to satisfy the Purchaser's closing agent.

81. The duty to provide proof of ownership has two purposes at this stage. According to Megarry and Wade's The Law of Real Property, 6th ed at paragraph 12-074, it is mainly: -

"to persuade the purchaser that the vendor owns the land; and to give the purchaser his opportunity to inquire about the existence of equitable interests by which, if he made no inquiries, he would be bound. For the first purpose the vendor's title deeds are merely evidence; it is possible that owing to fraud, forgery or mistake he is not really the true owner, so that the purchaser will not obtain a good title. For the second purpose the proof of title is conclusive: if the purchaser has made all reasonable inquiries and found nothing, he is safe from all equitable interests except such as are registered.

For the purpose of proving title the parties may agree on as much, or as little, disclosure of documents as they wish. For the purpose of searching for equities the purchaser is required to search back for a certain period. If he fails to do so, he has constructive notice of anything he would have discovered by doing so."

82. It, therefore, appears to me that the First Defendant produced some proof which the Claimant's closing agent (the Second Defendant) found to be sufficient as the Claimant proceeded to pay the deposit. There was no breach there. It was then incumbent on the purchaser to make reasonable inquiries to ensure that the First Defendant had the title for which it had provided evidence.

83. The Claimant did this through the services of the Second Defendant. If the search conducted by the Second Defendant could have revealed that the First Defendant was no longer the title holder to the Lots, then the Claimant is fixed with constructive notice if it somehow failed to reveal this. This shall be determined when the claim against the Second Defendant is discussed.

84. More importantly, however, is the fact that the contract had already been completed by the time the problem with ownership and title was discovered. Be reminded that principle obligations end on completion.

85. For unregistered land completion takes place when title has been accepted (as was done by the purchaser's agent), the conveyance is executed and delivered (as was done by the First Defendant, in fact, the conveyance had already been recorded at the land registry) and the purchase price has been paid in full (as was done by the Claimant).

86. On completion, the obligations of the contract merge into the conveyance. In these circumstances, it is the conveyance which one should seek to set aside, and this could be done only through proof of fraud, misrepresentation, common mistake or on some equitable ground.

87. The conveyance before the Court states the parties to be the First Defendant and the Claimant with the recitals that the First Defendant (the Grantor) has agreed with the Claimant (the Grantee) for sale to him of the lots with which the Grantor is seised *"for an estate in fee simple free from encumbrances"*. There could be no issue that this is what the First Defendant attempted to convey.

88. Implied in these recitals are the covenants that the Grantor has the right to dispose of the property as he is purporting to do, free from all encumbrances and third-party rights other than those which are known to the Grantee or which he ought to have known about.

89. In this case, the Grantor had no right to dispose of the Lots since it did not own them. That is a clear breach of the covenant.

90. Moving on, there are certain clauses of a contract, however, which may survive completion such as clause 7 of this Agreement (reproduced above) which extends as far as the final registration or the transfer process. This assures the purchaser that he will be reimbursed by the seller for all his legal losses save and except legal or due diligence related fees. The Court interprets this to mean that the First Defendant would right the wrong done to the Claimant as far as the law required.

91. The fact is that the conveyance, though registered, actually transferred nothing to the Claimant, the transfer process was therefore thwarted. The Lots could not be transferred to the Claimant at all because they were not the seller's or the Grantor's, i.e. the First Defendant's to transfer whether as agent or in its own

capacity as legal owner. This is perhaps as great a legal restriction as one could ever imagine.

Whether the second Defendant made a negligent misrepresentation to the Claimant?

Whether the Second Defendant owed a duty of care to the Claimant and if it did, did it breach its duty of care?

Claimant's Submissions:

92. The Claimant relied on Chitty on Contracts, Volume 1 at paragraph 7-086:

> *"Since the decision in Nocton v Ashburton and Hedley Byrne & Co Ltd v Heller & Partners Ltd it is clear that an action will lie in tort for negligent misrepresentation causing loss to the representee where the relationship of the parties is such as to give rise to a duty of care. The former case establishes that such a duty may arise (even apart from contract) out of fiduciary relationship, such as that of solicitor and client, principal and agent, or trustee and beneficiary, the latter case establishes that such a duty may also arise in other circumstances."*

93. His Counsel asked the Court to find that a special relationship existed between the Claimant and the Second Defendant as his closing agent which gave rise to the requisite duty of care. The Second Defendant was engaged, in part, to verify that the First Defendant had a good, free, and unencumbered title to the Lots. It very well knew that the Claimant would be relying on the search results it provided to complete the Agreement.

94. The Second Defendant, by agreeing to the task, not only assumed responsibility for any information which it tendered to the Claimant but was expected to have the specialized skill to investigate the title. It also had a duty to exercise proper diligence, care, and skill.

95. In failing to find that the Lots were no longer owned by the First Defendant, the Second Defendant had breached this duty and made a false representation to the Claimant. The Claimant suffered loss for which the Second Defendant ought to be made to compensate him.

The Second Defendant's Submissions:

96. The Second Defendant admits its duty of care to the Claimant but says it conducted the search with reasonable skill and competence and in accordance with the standard of care of known real estate industry standards.

97. They had contracted a title researcher to carry out a manual search at the land registry for the seventeen-year period. That resulting report was erroneous and although the information communicated to the Claimant was also erroneous, it was its honest belief formed through the contents of that search report.

98. In any event, they submitted, the agreement *"limited the scope of the second Defendant's duties"* (parag 37). By Clause 7, the First Defendant assumed legal responsibility for all legal restrictions on transfer or registration of the Lots including the legal restriction which prevented the transfer of the Lots. The clear words of section 7 excluded or limited any consequences incurred from a breach of duty of care.

Court's Consideration:

99. The Second Defendant has admitted its duty of care owed to the Claimant but insists that it did not breach that duty. This Court, having considered the evidence, finds that there was indeed a breach.

100. As a prudent purchaser, the Claimant engaged the Second Defendant to do the requisite due diligence. He, however, never involved legal Counsel which may well prove to be to his own detriment.

101. There is no doubt that the closing agent knew why he had been engaged by Mr. Zimmerman. In his email to him dated January 18th, 2017, Mr. Rinehart informed Mr. Zimmerman that he would complete the due diligence as soon as the deposit funds were received. He subsequently invoiced Mr. Zimmerman for USD$2,850.00 for preparation and registration of transfer and USD$300.00 for title search and report.

102. He said that in reliance on that title search, he gave erroneous information to Mr. Zimmerman. Mr. Zimmerman had not engaged anyone else to conduct his due diligence so if there was someone else involved that person must have been an agent of the Second Defendant and the Court so finds.

103. In his email to Mr. Zimmerman dated 23rd January 2017, Mr. Rinehart revealed that the First Defendant did have good title free of encumbrances and there was no transfer found for the Lots since 19th September 2000 to date. This has been proven to be false.

104. Mr. Rinehart, under cross-examination, also admitted that the search could have found the transfer to the true owners. Nonetheless, he maintains that there was no breach of duty as he had done all he reasonably could and displayed diligence and skill in doing so. With this, I can not agree either.

105. Firstly, the person who conducted the search never testified. This unexplained absence of such a key witness allows the Court to draw certain adverse inferences that perhaps her testimony would not have been helpful or favorable to the Second Defendant.

106. Secondly, the report was admittedly factually untrue without proper explanation. The Court is left to conclude that had that search been conducted with the proper diligence, care, and skill the transfer lodged in 2006 would have been found.

107. Without more, the Court must find that the First Defendant's representation to the Claimant was made without the benefit of a proper search, was false and was done in breach of its duty of care owed to the Claimant.

108. Mr. Rinehart knew that the Claimant would rely on what his due diligence revealed and would certainly not have paid the balance of the purchase price without a favorable report. In ***Shaddock & Associates Pty Ltd v Parramatta City Council (1980-1981) 150 CLR 225***, Gibbs CJ stated at **231**:

> *"It would appear to accord with general principle that a person should be under no duty to take reasonable care that advice or information which he gives to another is correct, unless he knows, or ought to know, that the other relies on him to take such reasonable care and may act in reliance on the advice or information which he is given, and unless it would be reasonable for that other person so to rely and act".*

109. The Claimant, in reliance on this information received from the Second Defendant, has now suffered loss. He has paid over the entire purchase price and received nothing but a worthless piece of paper. The Second Defendant now attempts to deny responsibility to compensate the Claimant through clause 7 of the Agreement.

110. This defence was however never pleaded and formed no part of the issues outlined in the Joint Pre-trial Memorandum. In fact, the Pre-trial Memorandum, like the pleadings, asked only that any liability attributed should be limited to US$3,450.00 (investigation of title and legal cost paid) or an amount reflecting the proportion of the loss or damage that the court considers just. There was no mention whatsoever that this had to do with an exemption of liability pursuant to the agreement.

111. The other parties to the matter, therefore, had no opportunity to properly confront this allegation and it is most improper and unacceptable to attempt to raise a wholly new issue in submissions. This Court does not consider this to be an issue for determination.

112. But in the event that I am wrong, I rely on the Second Defendant's own quotation from ***Hedley Byrne v Heller [1964] AC 465 at pg 587*** which reiterated that adequate words are to be used if a party is to be exempted from liability. I do not find that the words of clause 7 are sufficient to do this.

113. I am strengthened in my view because it is the Second Defendant who prepared the Agreement. Certainly, he would have made that intention pellucid. The clause excludes a certain responsibility on the First Defendant's part, but it also limits its responsibility to all legal responsibilities to the purchaser. That is most definitely not all that is covered by a finding of liability for negligence or negligent misrepresentation on the part of the Second Defendant.

114. With that said, the Court finds that the Second Defendant, having breached its duty and having made a negligent misrepresentation to the Claimant, has a responsibility to compensate the Claimant for his loss flowing from that breach.

Remedies:

115. Let us now consider what the Claimant is entitled to. He can not and has not sought specific performance. As the Lots do not belong to the First Defendant that would be an exercise in futility. They have not sought recission either. Instead, he seeks damages.

Submissions:

116. The Claimant says he is entitled to full compensatory damages including his reliance interest. The First Defendant says his damages, if any, ought to be limited to the actual fees it earned since it is the Second Defendant's title search and report which caused the Claimant to authorize the release of the purchase funds and complete the sale. The Second Defendant says it should pay either $3,450.00 or what the Court deems just.

The Court's Consideration:

117. The First Defendant has been found liable for fraudulent misrepresentation and breach of contract merged into the covenant. In ***Smith New Court Securities Ltd v Scrimeour Vickers (Asset Management) Ltd [1997] AC 254 at 267***, the applicable principles in assessing damages for fraudulent misrepresentation which induced the purchase of property was summarized thus:

> *"(1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) <u>in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him</u>, but he must give credit*

for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively state, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, <u>the plaintiff is entitled to recover consequential losses caused by the transaction</u>; (7) the plaintiff must take all reasonable steps to mitigate his loss once he had discovered the fraud." [emphasis added]

118. Damages are also compensatory for breach of contract as the editors of Chitty on Contracts, 32nd Edition, Volume 1 at para 26-019 explain:

"The victim of a breach of contract has a number of interests which may be protected by an award of damages. First, he may have paid money or conferred some benefit on the other party, and he will have an interest in recovering the money or the value of the benefit conferred. This had been termed the 'restitution interest' and there is a very strong moral argument for protecting it, as it represents both a loss to the claimant and a corresponding gain to the defendant. Secondly, the victim may have incurred expense or loss in reliance on the promised performance and which is wasted by the defendant's breach. This is termed the 'reliance interest' of the claimant; and it merits protection because it represents the extent to which the victim is left worst off than before the contract was made. Thirdly, the victim has an expectation interest, i.e. that gains or benefits which he is expected to receive from the completion, but which were in the event prevented by the breach of contract committed by the latter… damages for breach of contract will in principle compensate the victim for loss of expectation, as well as protecting his restitution and reliance interest."

119. This Court has found the Second Defendant liable for negligence and negligent misrepresentation. ***Esso Petroleum Co Ltd v Mardon [1976] 2 ALL ER 5*** demonstrated that the same principle is applied in a claim for negligent misrepresentation as did ***Livingstone v Rawyards Coal Co. [1880] 5 App Cas 25*** in negligence cases. The wronged party must be made whole. This means that the Defendant's submission for damages limited to either the fees they earned or the legal and investigation of title costs are rejected in the round.

120. The contract also states that if the Lots can not be transferred, the First Defendant would be reimbursed for all legal responsibilities to the Claimant. Those legal responsibilities are as this Court finds them to be.

121. The First Defendant's misrepresentation did cause the Claimant to enter into the agreement, but it was the Second Defendant's breach of duty and consequential misrepresentation to the Claimant which caused the sale to be completed and the purchase price to be paid out.

122. It also means that if the Second Defendant had conducted that search diligently, the sale to the third party would have been discovered so the Claimant is deemed to have notice of this. The Claimant, because of his closing agent, loses the ability to say that he had no notice.

123. But this matter does not simply concern a flaw in the title or an issue with the property itself. The property itself could not have been conveyed.

124. In ***Emmanuel Yao Voado v Chun-Hung Kuo Claim No 387 of 2006***, the parties to the sale agreement thought the land being sold was situated other than it was. In fact, the physical land which was purported to have been sold did not belong to the seller at all. The transaction had proceeded beyond the contract for sale, been conveyed to the claimant and registered before the mistake was realised.

125. At page 28, during its discussion of ***Svanosio -v- Mcnamara (1956) 96 CLR 186*** (a case with similar facts) the court stated, *"The other three Justices McTiernan, Williams and Webb JJ, had this to say at page 206:……*

'The vendor contracts to sell the land on the basis that he has a good title to the whole of it and the purchaser contracts to purchase it on that basis. If the vendor cannot make title he commits a breach of the contract and, apart from special conditions, the purchaser is entitled to repudiate it. If the contract states that certain premises are erected on the land sold, that is a representation that the vendor will make title to land on which those premises are erected. The representation becomes a promise contained in the contract and no longer be relied on as an independent ground for rescission: Pennsylvania Shipping Co. v. Compaigne Nationale de Navigation (1936) 155 LT 294. If the premises are not erected wholly on the land sold the vendor will fail to fulfill the promise or in other words will fail to make a good title to the whole of the land described in the contract'."

126. The Learned Judge then found that the contract was not void but that equity would step in to right the wrong by setting the conveyance aside. At page 35 he stated, *"(t)he mistake was so fundamental that there was a total failure of consideration. Equally, this is also a case closely akin to a defendant committing a breach of a stipulation as to title. The mistake in this case is so fundamental that, although the contract is not void equity will supplant the law so as not to allow the parties to enforce their contract."* He ordered repayment of the purchase price in full along with costs of development incurred on the warranty of title given by the Defendant and he set aside the conveyance.

127. This Court recognizes that this is not a claim in mistake, but the principles relied on to find a remedy is instructive. There was a complete failure of consideration and that places responsibility on the seller. Had the First Defendant conducted a proper search, the error would have been realised very early. But there was also fault on the Claimant, through the negligence of his closing agent. Together they need to place the Claimant in the position he would have been in had he not bought the Lots.

128. This Court in its equitable jurisdiction will set aside the useless Conveyance and order that it be removed from the record. Having struck down the

conveyance, there remains the First Defendant's breach of contract and fraudulent misrepresentation and the Second Defendant's negligence and negligent misrepresentation which will be remedied in damages as requested by the Claimant. This requires the assessment and apportionment of those damages.

Assessment and Apportionment of Damages:

129. In the case at bar, the Claimant seeks the full purchase price he paid - US$190,000.00, closing costs - US$3,450.00, stamp duties and filing fees to secure the Conveyance - US$9,008.50, a sum for improvement to the Lots - US$45,818.00 and property taxes - BZ$353.38. If he is able to prove the sums claimed, he is entitled to have those sums in damages.

130. The Claimant has proved payment of all the sums associated with the purchase itself and there seems to be no dispute with any of them. Nor was there a dispute with the property taxes. However, the sum of US$45,818.00 is not directly associated with the purchase but which the Court finds, if proven, to be a sum wasted in consequence of the Defendants' breach and on the warranty of title given by the First Defendant.

131. Mr. Zimmerman testified to filling the Lots and he presented photographs and bills for items all ordinarily associated with this process. Those he said totaled $20,175.00. My calculations seem to be different since my total was in excess of that figure. Since that is what he claimed, and he has proven more, he will be allowed that sum. He also produced receipts for trees and flowers he planted in, which totaled $1,060.00, and to which he is found to be entitled.

132. He said he paid a hired help $250.00 for cleaning and cement work. This was supported by the evidence of his caretaker. I find this to be reasonable in the circumstances and will allow it. His purchase of topsoil and manure - $225.00 has been proven and will be included.

133. He constructed a fence which no one disputed (photographs provided), and for which he paid $42,206.00. He has presented those receipts and they will also be included. He also bought a gate for $2,500.00. He will also have that as payment has been proven.

134. He also testified that his caretaker worked landscaping and maintaining the Lots for 14 months at approximately $19,200.00. The caretaker also testified that he worked for 14 months at $610.00 per week. But what causes me some concern is that he was not just a gardener, he was also a caretaker of the property. This means that the salary he earned covered more than simply landscaping.

135. No evidence was provided as to what part of the salary was attributable to what duties. His weekly salary was simply broken down into an hourly rate which was used to calculate the overall sum for the number of hours he said he had worked. The Court finds it unfair in those circumstances that the Defendants should be made to reimburse this entire sum.

136. Since I am left to make a determination, I shall award one half of the overall sum as damages in this regard being $9,600.00. This figure covers a period of 14 months from 2017 to July 2018 when the caretaker says he was informed that the Lots may have belonged to someone else.

137. The $3,050.00 claimed for maintenance work done after the defect was discovered is rejected since in mitigation of damages, the Claimant ought to have discontinued this type of activity until he was sure. The Defendants can not reasonably be held responsible for his persistence.

138. The total sum of BZ$76,316.00 is assessed for improvements to the Lots. Total damages are, therefore, US$202,458.50 and BZD$76,669.38.

139. This brings us now to the most difficult aspect of this decision and the one with which I grappled: how are the damages to be apportioned between the two Defendants?

140. I find the First Defendant to be most culpable, so he must be burdened with the greater part being 70% of the damages while the Second Defendant must bear 30%. The Court has included in this consideration what is excluded for payment by the First Defendant by clause 7 of the Agreement.

Determination:

1. Judgment to the Claimant.
2. The Conveyance dated 21st February 2017 between the First Defendant and the Claimant is set aside and must be struck from the Register.
3. Damages are awarded to the Claimant in the sum of USD$202,458.50 and BZD$76,669.38 to be apportioned between the two Defendants being 70% to the First Defendant and 30% to the Second Defendant.
4. The damages will attract interest assessed at the rate of 3% from the date of service of the final amended Claim Form to the date of judgment and thereafter at the statutory rate of 6% until payment in full.

5. Costs to the Claimant from each Defendant in the sum of $25,000.00 as agreed.

SONYA YOUNG

SUPREME COURT JUDGE