

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/00437

BETWEEN

LAURIE HILL AND DONA HILL

Plaintiffs

AND

J. MICHAEL SAUNDERS

(t/a MICHAEL SAUNDERS & CO. A FIRM)

Defendant

Hon. Mr Justice Ian R. Winder

Appearances: Raynard Rigby for Plaintiffs

Kenneth Wallace Whitfield for the Defendant

31 July 2018, 18 September 2018 and 11 November 2018

JUDGMENT

**WINDER, J.**

This is a claim in breach of a contract for the provision of professional legal services by the defendant (Saunders) in the plaintiffs' (the Hills) purchase of a condominium unit.

1. The claim of the Hills (who are husband and wife) is set out in their statement of claim which sets out, in part, as follows:
  3. On or about the 26<sup>th</sup> August, 2010 the Plaintiffs retained the Defendant to prepare to the Plaintiffs favor a Conveyance of the property described as "Unit No. 505, Ocean Place at the Harbor Condominium, Paradise Island, The Bahamas" ("the said property"). The terms of the agreement between the Plaintiffs o required the Defendant to apply for a Permit from the Bahamas Investment Board. The Plaintiffs provided the Defendant with a copy of the Cash Purchase Agreement ("the Agreement") duly executed by them on 26<sup>th</sup> March, 2010.
  4. The Defendant was also retained by the Plaintiffs to investigate title to the said property so as to ensure that the Plaintiffs had a good and marketable title to the same.
  - ...
  6. In discharge of their obligations under and pursuant to the said Cash Purchase Agreement, and the Plaintiffs instructing email to the Defendant on or about 21<sup>st</sup> October, 2010 the Plaintiffs forwarded to the Defendant the total sum of \$161,935.00 representing the payment of the 12% Stamp Duty to the Bahamas Treasury (\$159,560.00), and \$2,600 as and for the balance of legal fees owed to the Defendant.
  7. On or about 9<sup>th</sup> December, 2010 the Defendant confirmed to the Plaintiffs that title had been investigated and that the Plaintiffs would receive good and marketable title thereto. The Defendant undertook to forward to the Plaintiffs the relevant receipts to confirm that the stamp duty payable to the Public Treasury was duly paid in respect of the title documents, particularly the Indenture of Conveyance.
  - ...
  12. The said payment of \$161,935.00 made by the Plaintiffs to the Defendant were funds advanced to the Defendant for a specific purpose and thereby the Defendant had a duty to pay out the said sums for the expressed and intended purposes.
  - ...
  14. The Defendant owed a duty of care to the Plaintiffs to safeguard the said sums of monies and undertook to pay them out for legitimate purposes

relating to the said property's acquisition and the recordation thereof unto the Plaintiffs.

17. The Defendant also agreed to take immediate steps to secure and obtain title insurance over and in respect of the said property so as to safeguard the Plaintiffs' rights and title therein.

2. The Hills say that Saunders breached his obligations to them in that he:
  - a) Failed to tender payments to the Public Treasury to secure the payment of the stamp duty payable on the transaction;
  - b) Failed to lodge the title deeds of the said property for recording at the Registry of Records;
  - c) Failed to retain the funds in its client account to the order of the Plaintiffs and to only pay the same out to effect payments relating to the transaction;
  - d) Failed to take steps to secure title insurance over the property to the order of the Plaintiffs;
  - e) Failed to apply for Investment Board approval and the approval of the Central Bank; and
  - f) Failed to act as a prudent and competent Attorney in the discharge of the retainer and the undertakings in the said transaction.
  
3. The Hills seek the following relief against Saunders:
  - a) the sum of \$161,935.00 representing the stamp duty paid to the Defendant;
  - b) the sum of \$6,300.00 paid by the Plaintiffs to King & Co to address closing matters for the transaction;
  - c) the sum of \$7,108.50 to secure title insurance;
  - d) interest on the said sum of \$161,935.00 at the commercial rate from October 2010 to present at the rate of 4.75%; in the amount of \$54,201.64;
  - e) interest on the judgment amount of \$229,545.14 at the statutory rate and pursuant to the Civil Procedure (Award of Interest) Act.
  
4. Saunders' Defence was mostly a bare denial. He denies the claim and specifically avers that he was never engaged by the Hills to act for them as purchasers in respect to Condominium Unit 505 Ocean Place (the Condominium Unit), Paradise Island. In the Defence Saunders admits to meeting the Hills at one time only at the behest of their then representative, he says, to deliver a document for their signature and to witness the execution of the document by them.
  
5. In the Defence, Saunders also denies preparing any Conveyance at the behest of the Hills and further denies entering into, receiving or reviewing any Cash

Purchase Agreement relative to the Hills. In the Defence Saunders also denies being retained to investigate any title on behalf of the Hills. He also claims that the dispute had been compromised prior to the commencement of this action.

6. Saunders also make a counterclaim alleging defamation and claims the return of title documents given to attorneys for the Hills at a time when he sought to compromise the dispute.
7. Dona Hill gave evidence and called Attorney Michelle Cartwright as a witness in the Hills' case. Saunders was the only witness in his case.
8. The basic facts which I have found on the evidence are as follows:
  - (1) There was no formal written agreement or contract for services between the Hills and Saunders setting out duties and obligations (if any) with respect to the transaction.
  - (2) The sale of the Condominium Unit proceeded substantially directly between the Hills and the Vendor Peace Holdings and was well underway before any involvement of Saunders. The purchase price for the unit was initially \$1,500,000. The transaction was governed by a Cash Purchase Agreement dated 2 April 2010 which was negotiated directly between the Hills and the Vendor's agent. The purchase of the Condominium Unit was by way of a phased construction with scheduled payments of 10%, 25%, 25% and 40%. The Hills had already paid \$900,000 directly to the Vendor prior to the involvement of Saunders.
  - (3) Saunders was first recommended to the Hills on 2 April 2010 by Robert Rose, an agent acting for the Vendor when the Hills first negotiated the transaction. The email recommendation, as it relates to Saunders, appeared to be limited to an application for residency and setting up a company to hold the property. The email noted that "it is at your discretion if you decide to use an attorney for the closing of the property, [the Vendor, Peace Holdings] already provide title insurance for each individual home

owner, so the main thing you have to be concerned with in the purchase of any real estate – making sure you have clean title- is already covered.”

- (4) The Cash Purchase Agreement provided that “The Vendor shall cause an owner’s policy of insurance to be issued for the property at the Vendors expense by a title insurance company of the Vendor’s choosing, showing title vested in the Purchaser subject only to the Permitted Exceptions”.
- (5) Saunders first became involved in the transaction in August 2010 when he sent an email proposal, through Robert Rose, setting out the terms upon which he would be engaged to process the Hills application for an Investment Board Permit, and to provide general oversight of the matter. This email was sent to the Hills. An email directly to the Hills in August also described the assistance to be offered as assisting with general closing procedures. The full fee for the service offered was \$9,500 and he required 75%. In late August 2010 Saunders received 75% of the fee (\$9500) in the amount of \$7,125 as agreed.
- (6) The Cash Purchase Agreement was amended by an addendum on 20 October 2010 to take the agreement from a gross purchase to a net purchase. The negotiation with respect the addendum was also negotiated between the Hills and the Vendor’s agent without any involvement of Saunders. At the execution of the addendum the Hills had already paid \$900,000 directly to the Vendor leaving the balance due of \$600,000. The terms of the addendum, converting the transaction to a net transaction, called for a new purchase price of \$1,329,666.67 and a reduced balance instead of \$429,666.67. The Hills were now solely responsible for the payment of the stamp duty at 12%.
- (7) On 20 October 2010, Robert Rose instructed the Hills to forward cheques for stamp duty and other payments to Saunders.
- (8) On 21 October 2010 or 22 October 2010 the Hills sent the cheques to Saunders by Fed-Ex courier. The courier package included the following cheques:

Stamp Duty & balance owed to Saunders

(\$159,560 + \$2,375)	\$162,160
Reimbursement of Vendors Stamp Tax	\$ 10,222
Residential Automation	\$ 50,333.33
Seaview Properties Commission	\$ 30,000
Balance of Purchase Price	\$429,666.67

The cheque in the amount of \$161,935.57 was identified as for stamp duty and Saunders' legal fees. This cheque was made payable to Saunders. Saunders deposited and negotiated this cheque at his bank.

- (9) On 2 November 2010 Saunders wrote to the Hills confirming receipt of the cheque, advising that the permit application was submitted to the Investments Board and that he was awaiting the final draft of the conveyance.
- (10) Saunders met the Hills on one occasion only when he witnessed the execution of the conveyance of the property to the Hills. The conveyance had been sent to Saunders by Graham Thompson, attorneys for the Vendor, for execution. The signed conveyance was delivered to Saunders by Graham Thompson, in escrow, on 28 January 2011. This only meeting between the Hills and Saunders, which took place at the condominium unit, must have occurred after 28 January 2011.
- (11) Saunders did apply for and obtain the Investment Board Approval for the Hills.
- (12) The executed conveyance remained in Saunders' possession after execution by the Hills. It had been mislaid by him for a period but ultimately found and delivered to the Hills' new attorney Michelle Cartwright. The conveyance was not stamped or lodged for recording until Cartwright saw to it. Title insurance had not been obtained as Saunders, despite the requests of the Vendor, did not accommodate their requests. The Vendor never provided title insurance or paid for it.
- (13) No money had been requested of the Hills nor had any been advanced by them for the recording of the conveyance.

(14) The Property went into receivership and ultimately the Vendor's lender foreclosed on the property.

#### The Arguments of the parties

9. Saunders says that,

[I]t is beyond doubt that the Cash Purchase Agreement governed the nature and extent of the respective legal and financial obligations of the Hills as Purchasers to and from the Vendors (Peace Holdings Limited); and accordingly thereby established the parameters of the respective duties required from the Vendors and their Attorneys and also from the Purchasers and their Attorneys (if any). The Cash Purchase Agreement expressly provided that:-

- Para 1 (a) Purchaser shall pay Purchase Price and Closing Costs to the Vendor
- Para 1 (b) Vendor shall be entitled to use funds received in and towards the construction
- Para 1 (c) Balance of Purchase Price (40% - \$600,000) Plus all Closing Costs and all other amounts which are the responsibility of the Purchaser under this Agreement which have not been paid by the Purchaser in advance shall be paid by Purchaser when Certificate of Occupancy has been Issued
- Para 3 Closing shall take place Thirty (30) Days from Completion of the Condominium when the Recognized Architects (Leslie Johnson) Certify that the Building is Complete At Closing, the Vendor shall Transfer Title of the property to the Purchaser & the Purchaser shall pay to the Vendor the Balance as described in 1 (c) above Government Stamp Tax shall be paid Equally by the Vendor & the Purchaser
- Para 5 (a) Cost of all matters of Title Clearance, Preparation & Obtaining any necessary Permit or Certificate as may be required by the International Persons Landholding Act, Application to the Central

Bank of the Bahamas for "Approved Investment Status", One Half (1/2) the Government Stamp Tax, the Premium for the Owner's Policy of Title Insurance (to be issued pursuant to Para 4(b)) shall be paid from the Vendor's Proceeds at Closing

Para 5 (b) In Addition to the (Balance of the) Purchase Price, At Closing, the Purchaser shall pay all Closing Costs (other than those described in Para 5 (a)) & One Half (1/2) the Government Stamp Tax

10. Saunders argues that the Hills never made enquiry of or requested payment from the Vendor or from Graham Thompson & Co (the Attorneys who had acted for the Vendors in relation to preparing the Conveyance) of the said sum of \$161,935 received by Robert Rose (the Vendor's agent), nor of the funds expressly agreed to be paid by the Vendor for the cost of Title Insurance by Cash Purchase Agreement (Para 5 (a)) in the claimed sum of \$7,000. Saunders further argues that the Hills have failed to establish (to the requisite standard or at all) that any loss suffered by them was caused by him. In particular, he says that the Hills have failed to establish (to the requisite standard or at all) that any loss suffered by them was caused by him whether by breach of the claimed retainer agreement or of the claimed undertaking.

11. The Hills say

The Court is invited to note the clear references in the letters and emails written by Saunders along with his conduct which all show that he was acted on behalf of the Hills in the transaction.

- a) Email of 2<sup>nd</sup> April, 2010 from Robert Rose to the Plaintiffs recommending the Defendant as an Attorney to represent the Plaintiffs because he "has done a good job with clients..."
- b) Email of 20<sup>th</sup> October, 2010 from Robert Rose to the Plaintiffs, copied to the Defendant, where instructions were given to send the sum of \$161,935.00 to the Defendant via Fedex.
- c) The Defendant received the cheque and deposited it to his account.



- d) Letter dated 7<sup>th</sup> December, 2010 shows that the Defendant applied for a Permit for the Plaintiffs and received approval for the same.
- e) The Defendant's receipt of the original conveyance and agreement to hold it in escrow.
- f) The Defendant also witnessed the Plaintiffs' signature on the Conveyance.
- g) The Defendant's letter dated 4<sup>th</sup> April, 2011 states very clearly that "... we represent and we are instructed to respond to yours...". Throughout the letter the Defendant refers to the Plaintiff as "our client". The words suggest and confirm that the Defendant acted for the Plaintiffs and took instructions from them.
- h) The evidence before the Court in the documents produced by the Plaintiffs show that there were numerous email communications between the Plaintiffs and the Defendant to manifest that the Defendant was engaged by the Plaintiffs to represent them in the purchase of the property.
- i) For the purposes of the creation of a contract between the Plaintiffs and the Defendant, it is submitted the conduct of the parties evidenced a contract where the Defendant was paid fees and admitted that he carried out some services on the Plaintiffs' behalf.

12. The Hills say that the uncontroverted evidence before the Court is that: Saunders applied for the permit and received the funds intended to settle the stamp duty on the conveyance; Saunders admitted that he did not stamp the Conveyance and he acknowledged that he accepted the cheque for that purpose which was processed through his account; Saunders transferred the funds to Mr. Rose who can't be found; and, Saunders confirmed that he never got instructions from the Hills to pay the cheque to Mr. Rose. Counsel for the Hills also submits that the evidence was clear that the cheque was paid to Mr. Saunders and that upon his receipt he deposited it to his account and thereafter paid its proceeds to Mr. Rose, without the permission and consent of the Hills and thereby in breach of the purpose for which it was intended and expressly paid to him.

13. The Hills argue that the evidence also confirmed that it was due to the Saunders' failure in producing the stamped conveyance and other matters that the Vendor's obligation to pay the title insurance was lost. This they say led them to pay a fee of \$7,000 for the insurance. Further they say that it should also follow that the Plaintiffs are entitled to recover the funds paid to King & Co. to attend to the "closing" matters that the Defendant neglected to address in the amount of \$6,300.

#### Analysis and Disposition

14. The singular issue for determination in this dispute is what, if any, are the terms of the engagement between the Hills and Saunders with respect to their acquisition of Condominium Unit No. 505 Ocean Place on the Harbor Condominium, Paradise Island. The Hills says that the Defendant was engaged by them for the purposes of representing them in the closing of the transaction between themselves as Purchaser and Peace Holdings as Vendor for the acquisition of the condominium unit. Saunders says he was engaged by Robert Rose for the limited purpose to make an application for the Investment Board Permit for the Hills. Saunders says that he was not engaged at all by the Hills but that he was retained by Rose to provide some assistance to them.

15. Having considered the material before me and after hearing the witnesses and observing them as they gave their evidence, I make the following findings:

- a) I am satisfied that Saunders was engaged by the Hills to assist them with matters arising post the closing of the sale. Specifically he was engaged to make an application for a permit and to provide general oversight of the matter. By the time Saunders had become involved the transaction was almost concluded, as all negotiations were done directly with the Vendor and the Hills and substantial moneys had already been paid. Saunders was paid \$9,500 for this service.
- b) Dona Hill's evidence was that they hired Saunders "to represent them on closing which would include making sure that it was registered, if the property tax or stamp tax was done and the title was clean, and that it is purchased in

their name". I did not accept this entirely as Dona Hill was clearly answering as to what she now understood, on advice, an attorney would do if he acted for them on the purchase of property. I do not accept the Hills case that Saunders had been engaged to give advice on title in the ordinary sense, but his undertaking to provide general oversight did extend some obligation by him to the Hills

- c) As Michelle Cartwright's evidence revealed, the structure of the transaction was to make the process seamless and easy for the Hills as Purchasers. The Vendor did most of the legal work that a Purchasers attorney would normally do. The structure was that the Purchaser's need for their own attorney was optional. Further, the use of title insurance obviated the need for any title investigations or advice on title.
- d) The obligation was on the Vendor (Peace Holdings who were represented by Graham Thompson) not the Hills to obtain the title insurance. Further whilst Saunders wrote on 9 August 2010 to offer to assist in the general closing procedure, other than the application of a permit, his obligation in this area was limited.
- e) I accept that Graham Thompson understood that Saunders was the attorney for the Hills on the transaction and Saunders at times held himself out in that capacity. Various bits of evidence speaks to this, which include but was not limited to the following:
  - (i.) Communicating with Graham Thompson on some issues on the Hills' behalf relative to the draft conveyance;
  - (ii.) Graham Thompson forwards the executed conveyance to the Condominium Unit to him for execution by his clients;
  - (iii.) The making of inquiries and demands of the Condominium Developer as to the proper assessment of maintenance fees on behalf of his clients, the Hills;
  - (iv.) Applying for and securing the Investment Board Permit;
  - (v.) Graham Thompson writing to Saunders seeking copies of the executed documents and the Permit in order to proceed with the title insurance; and

- (vi.) Writing to the Developer, Peace Holdings seeking to obtain a re-signed conveyance for his clients, the Hills.
- f) Whilst there may have been complaints about the payment of the stamp duty, there is no complaint in this action that the conveyance was not properly executed or that title did not pass to the Hills as a result of any assistance provided to them by Saunders.
- g) There is nothing to suggest that Saunders was engaged to assist with or acquire the title insurance. All of the available evidence suggest the Vendor or their attorneys were, under the terms of the agreement, obligated to secure this and not the Hills or their attorneys. The complaint here is that due to Saunders' failure in producing the stamped conveyance and other requested documents the Vendor's obligation to pay the title insurance was lost. Whilst there was indeed inaction by Saunders I am not satisfied that it is appropriate that he should bear the costs of what was otherwise a responsibility of the Vendor or whoever its successor in title, after the foreclosure, may be. I was not satisfied, on the evidence, that this was lost or even aggressively pursued. I am therefore also not satisfied that the Hills are entitled to recover all of the funds paid to King & Co. Such sums which the Hills are able to recover ought properly to be recoverable as costs properly incurred prior to the commencement of the action.
- h) It is clear that Saunders assumed the responsibility to pay the stamp duty with respect to the conveyance of the Condominium Unit. He says that Rose had instructed him to pay these moneys, to him prior to the arrival of the funds. I did not accept this explanation as I was satisfied that Saunders was aware, having received the earlier email of Rose as well as the breakdown from the Hills, that the funds were air marked for payment of Stamp Duty.
- i) The funds were sent to Saunders for a specific purpose and he failed to make the payment as indicated. Instead, he forwarded the moneys to Robert Rose. I am satisfied on the evidence which I accept, that Saunders was responsible to pay the stamp duty on behalf of the Hills as this was the reason the funds were sent to him and in his name. The same package also contained other cheques,

and disbursements as well as the balance of the purchase price. Other cheques in the package were made out directly to the Vendor Peace Holdings, making it clear that these funds were not directed to Robert Rose or the Vendor. The amount of \$161,935.00 air marked for Saunders comprised legal fees (\$2,375) and stamp duty (\$159,560). The \$2,375, as indicated, represented the 25% balance of the \$9,500 charged by Saunders for obtaining the permit and providing general oversight. Having agreed to provide oversight with respect to the closing, and accepted the moneys due for stamp duty, Saunders was obligated to stamp the conveyance on their behalf. Having failed to do so, he is liable to repay these moneys to the Hills.

Was there a binding Settlement entered into by the parties

16. Saunders argued that, without accepting liability, he made an offer to settle the Hills' claims "to avoid reputational damage" and the perceived threat of expensive and uncertain litigation. He says that the offer of settlement did result in a concluded agreement to settle the claim by his sale of certain in Village Estates and the repayment from the proceeds of sale, of the Stamp Duty funds. This agreement, he says caused him to deliver his original title documents pending sale.
17. The Hills say that there was merely an attempt to settle the dispute which never materialized as to date the funds have not been repaid.
18. Having considered this issue I am satisfied the evidence does not lead me to determine that there was any binding settlement entered into between these parties (in 2015) which would make this trial an abuse by the Hills. It is true that there was an attempt to settle and for which title documents were forwarded to the attorneys for the Hills but no such settlement, in my view, materialized and to date the sums agreed to be paid have not been paid. Saunders however is entitled to the return of the title documents which were forwarded in support of the proposed agreement.

Without Prejudice Communication

19. The parties disputed the admissibility of a letter dated 15 August 2015 arising from a meeting of 4 May 2015 which Saunders says was a "without prejudice" meeting. For the avoidance of doubt I have not utilized this document in coming my determination in this matter.

Conclusion

20. In the premises therefore, I will make the following Order:

- a) Saunders do repay to the Hills the sum of \$161,935 representing the stamp duty and legal fees paid to him in or about October 2010. Notwithstanding only \$159,560 was stamp duty, the entire amount of the cheque ought to be repaid as Saunders breached the obligation to pay the stamp duty as required.
- b) Interest on the said sum of \$161,935.00 at the rate of 2% from February 2011 to the date of judgment and to accrue thereafter in accordance with the provisions of the Civil Procedure (Award of Interest) Act. Although the funds were sent in October 2010 and the conveyance was dated December 2010, the conveyance was not delivered to Saunders until late January 2011 and could not have been stamped until then.
- c) The Hills do return to Saunders any title documents which were forwarded in support of the proposed settlement agreement. The counterclaim is otherwise dismissed.
- d) The Hills to have their reasonable costs of this action to be taxed if not agreed.

Dated the 24<sup>th</sup> day of July 2019



Ian R. Winder

Justice