IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/00429

B E T W E E N

KRISTINE SMED

Claimant

AND

PHILIP G ALLEN

First Defendant

AND

VANITA J ALLEN

Second Defendant

MIKE A KLONARIS

t/a Klonaris & Co

Third Defendant

Before the Honourable Justice Simone I Fitzcharles

Appearances: Ms Kristine Smed (Claimant Pro Se)

Mr Philip Allen (First Defendant Pro Se)

Ms Vanita J Allen (Second Defendant Pro Se)

Ms Courtney Pearce-Hanna with Ms Cheryl Cartwright and Mr Dawson Malone for the Third Defendant

Hearing: 23 March, 18 April 29-30 November 2023; 07 November 2025

WRITTEN REASONS FOR JUDGMENT

FITZCHARLES, J

Introduction

[1] This claim arose from the unsuccessful purchase by the Claimant, Ms Kristine Smed, of a house situated at Lot 84, Coral Waterways, Coral Harbour, New Providence in the Commonwealth of The Bahamas (the "Property"). The First and Second Defendants, Mr Philip Allen and Ms Vanita Jackie Allen (collectively the "Allens") were vendors of the Property. Mr Mike Klonaris of Klonaris & Co ("Mr Klonaris") acted in the preparation of the relevant transaction documents and, under the Agreement for Sale, as stakeholder for the contractual deposit.

[2] On 07 November 2025, I delivered the judgment in this matter, dismissing the claim with costs to the successful parties, and ordering that the counterclaim proceed to an assessment. I indicated that written reasons would follow. These are those reasons.

[3] The Claimant sought:

(1) the return of money paid to or for the Defendants,

(2) rescission of the lease, promissory note and Agreement for Sale,

(3) damages for breach of contract and fraud,

(4) damages for conspiracy,

(5) damages for conflict of interest,

(6) interest, and

(7) costs.

[4] The Allens counterclaimed. The remaining issue on their counterclaim is whether, notwithstanding the forfeiture of the contractual deposit, they may establish a recoverable loss beyond the deposit, caused by the Claimant's breach.

[5] The record was extensive, approaching some 2,000 pages. It included pleadings and orders, three bundles of documents, witness statements, affidavits and transcripts of the trial. At the close of the evidence the parties agreed that they would furnish their respective written Closing Submissions without awaiting the transcript. In arriving at my judgment, I considered the available transcripts, and where a usable transcript was unavailable, my contemporaneous notes, read along with the pleadings, the admitted documentary record and the parties' submissions. The parties had agreed to submit written closing submissions without awaiting the transcript.

The Issues

[6] Despite the volume of the record the determination of this matter turned on a narrow set of issues as follows:

(1) the terms of the Agreement for Sale;

(2) whether the Claimant completed, or was excused from, completing;

(3) the status of the contractual deposit;

(4) whether any actionable representation or conflict of interest was proved;

(5) the permissible scope of the Allens' counterclaim.

The Pleadings

[7] In her Statement of Claim, the Claimant pleaded that she was a tenant, holder of an option to purchase, and purchaser of the Property. The Allens were landlords and vendors of the Property. Mr Klonaris and Klonaris & Co were attorneys for the Claimant and the Allens, and stakeholder under the Agreement for Sale. The Claimant pleaded a lease and option to purchase dated 06 February 2012. She further pleaded a promissory note said to concern US$150,000 and an Agreement for Sale dated 06 March 2014 for $500,000 with a $50,000 deposit.

[8] The Claimant additionally pleaded that a representation was made to her that the Property was worth $650,000. The Claimant averred that the Property had an appraised value in February 2015 of $475,000, and that the representation as to its worth was untrue. She pleaded that there had been an anticipatory breach and fraud. As such, the Claimant pleaded that she repudiated the contract and that consideration of $127, 816 had wholly failed. This figure was comprised of sums the Claimant alleged she paid in respect of rent, deposit and other items.

[9] The Claimant further alleged that Mr Klonaris acted in a conflict of interest by giving notice to quit and notice of intended liquidation of the $50,000 deposit. She alleged the Defendants conspired with each other to defraud her of $150,000. The Allens and Mr Klonaris denied those allegations and vigorously defended them.

[10] The Allens' defence was that the Claimant did not complete the Agreement for Sale despite being afforded extensions and receiving a notice to complete. As such, the Allens pleaded that the contractual deposit was forfeited and that there was no fraud or dishonest conduct. By their original counterclaim they pleaded they were owed rent or mesne profits, possession of the Property, damages and costs. The former possession claim was earlier dealt with by the Order of *Winder J* (as he then was) given on 06 December 2017, by which the Court, inter alia, ordered that the Claimant vacate the Property by 03 February 2018.

Approach and Evidentiary Matters

[11] I considered it the Court's duty to determine this claim on the case as pleaded and the evidence properly admitted. I say this because during the course of the hearing, the Claimant advanced much wider allegations involving the history of the Property, tax treatment, prior mortgages, utility accounts, the alleged defrauding of public authorities, and a purported general real estate scheme. But those matters were not developed as coherent pleaded causes of action seeking relief in these proceedings.

[12] The Court gave clear directions about the limits of the case. I observed during the hearing that this is a civil trial, not a criminal fraud trial. The Court also held that claims for particular

expenditure, including property expenses and repairs, could not be advanced without proper pleading as special damages.

[13] The promissory note upon which the Claimant sought to rely was not stamped. This was contrary to **section 18** of the **Stamp Act, Chapter 370, LRO 1/2017**. **Sections 18** and **19** of the **Stamp Act** (then in force) provided:

> "18. No instrument which is required by any Act to be stamped shall be pleaded or given in evidence in any court unless the said instrument shall be duly stamped and the stamps thereon cancelled, except as hereinafter provided.
>
> "19. (1) Upon the production in evidence in any court or judge's chambers of any instrument required by any Act to be stamped which is not duly stamped and the stamps thereon cancelled, the judge … may impose a penalty of five hundred dollars on the person required by any Act to stamp the said instrument and on payment thereof together with the stamp duty, or upon payment of the stamp duty only at the discretion of the judge …, by such person or by the party producing such instrument the said instrument shall (saving all just exceptions on other grounds) be admissible in evidence. The judge … may in his discretion, grant any adjournment necessary for the proper stamping of any instrument." (Emphasis added).

[14] At the hearing on 23 March 2023, Ms Pearce-Hanna, Counsel for Mr Klonaris, raised the objection to the Claimant's attempt to give in evidence the promissory note which had not been stamped either at 1% of the loan amount as required by **Item 13** of the **First Schedule** of the **Stamp (Amendment) Act, 2022** (then applicable) or at all. The Court explained to the Claimant that the promissory note could not be produced or used in evidence unless stamped. I ruled that the Court would permit the Claimant a limited opportunity to inquire into the underlying structure of the sale without relying on that document. Additionally, I offered an adjournment for the purpose of allowing the Claimant to pursue the stamping of the promissory note. The statutory route to regularise the instrument, including payment of stamp duty and any applicable surcharge, was explained in open court. I refrained from imposing a penalty of $500 against the Claimant, which was within the Court's discretion. The Claimant did not regularise the document. By the resumed hearing in November 2023, it remained unstamped. The Court accordingly adhered to its ruling that it could not be received or relied upon in evidence. In my final decision, I gave effect to that ruling and consequently made no finding as to the legal effect or enforceability or purpose of the promissory note.

[15] Based on these rulings, the Court was not precluded from dealing with the essential questions raised by the pleadings. These included whether the contractual deposit was properly forfeited; whether Mr Klonaris acted in breach of a contractual, fiduciary or stakeholder duty; and whether the Allens proved a recoverable claim. Those rulings meant, however, that the case could not be enlarged through evidence and submissions into a general inquiry into criminal, regulatory, taxation or unrelated historical matters. In any event, the Claimant did not prove that the Allens lacked legal title to, or authority to contract for the sale of, the Property. The historic mortgage, registration and tax matters raised by the Claimant did not displace the operative evidence of title or establish that the Agreement for Sale was invalid.

[16] A word need be said about my impressions of the witnesses. I considered their evidence in light of the relevant documents. On the issues material to the disposition of this action, I preferred the evidence of Mr Klonaris and the First and Second Defendants to that of the Claimant.

[17] Mr Klonaris gave a clear and substantially consistent account of the preparation of the transaction documents, the extensions for completion, the Claimant's default, the notice to complete, the stakeholder arrangements and the forfeiture of the contractual deposit. His evidence was materially supported by the Agreement for Sale, the correspondence and the notices. His recall was understandably less exact on remote matters concerning former owners, historic mortgages and tax administration. Those matters were not essential to the issues I had to decide.

[18] I likewise accepted the Allens' evidence on the core matters. I accepted that they entered into the Agreement for Sale and gave the Claimant repeated chances to complete the transaction. They relied upon the default and forfeiture provisions when the Claimant did not do so. I did not make findings upon every marginal matter raised in their evidence, for example regarding historic title, taxation and property administration.

[19] The Claimant's evidence was less reliable where it conflicted with the signed instruments and contemporaneous correspondence. She accepted that she reviewed and signed the operative documents and understood that the option had a time limit. Yet, when confronted with the contractual completion obligation and the consequences of her failure to meet it, the Claimant sought frequently to shift the focus to her collateral arguments. The Claimant's evidence established that she did not have the funds necessary to complete the transaction and was dependent on the disposition of assets in Canada.

[20] I did not make these findings on demeanor alone. They were based mainly on the objective documents, the material concessions of the Claimant and the lack of evidence to support the Claimant's allegation of a collateral repayment arrangement. I also took into consideration the consistency of the evidence I accepted with the contemporaneous record.

Discussion

<u>Relevant Contractual Arrangements</u>

[21] The Claimant reviewed and signed the operative lease, option to purchase and sale documents. In cross-examination, she accepted that she agreed their terms and that the documents themselves were clear.

[22] The 2012 option to purchase was for 1 year and expired on 05 February 2013. The Claimant acknowledged at trial that she understood that term.

[23] The Agreement for Sale dated 06 March 2014 provided for a sale price of US$500,000, a contractual deposit of $50,000 and completion initially fixed for 30 June 2014. The Claimant agreed that the agreement was satisfactory before the deposit was remitted.

[24] The agreement provided that if the Claimant as purchaser did not complete, the vendors might give 7 days' notice to complete and, upon a further failure, the contractual deposit would be forfeited as liquidated damages and the agreement cancelled.

[25] The Court notes also that Clause 17 recorded the purchaser's opportunity to inspect the Property and her agreement that she entered the transaction on the basis of her own investigation and inspection, rather than in reliance on a representation or warranty by or for the vendors.

Completion, Default and Forfeiture

[26] The Claimant did not establish that the Agreement for Sale was subject to a financing condition or the sale of Canadian property or, indeed, any other condition which would permit her not to complete. Mr Klonaris' evidence was that no such condition was requested for inclusion in the documents when the agreement was prepared or reviewed.

[27] There were repeated accommodations of the Claimant's failure to complete. The original completion date was extended to 1 September 2014 and later to 31 January 2015. In October 2014, the Claimant herself stated that she was agreeable to a 31 January 2015 closing at the latest.

[28] The Claimant did not complete on 31 January 2015. The contemporaneous evidence showed that she was unable to secure sufficient funding after obtaining an appraisal. That reason may explain her failure to complete. It was a commercial difficulty for her, but it was not a contractual basis for refusing to complete.

[29] On 09 February 2015, Klonaris & Co served a notice to complete through the Claimant's attorney, requiring completion by 16 February 2015, with time made of the essence. There was no completion within that period.

[30] I therefore found that the Claimant was in breach of the Agreement for Sale. I further found that the notice to complete was validly given and that the US$50,000 contractual deposit became forfeited under Clause 9. The stakeholder's subsequent release of that deposit to the Allens followed the contractual result of the Claimant's default.

[31] This finding concerned the $50,000 held under the Agreement for Sale. The Claimant also contended that a different sum of $50,000 was paid directly to the Allens on a separate understanding that it would be repaid if the sale did not close. The Court considered that allegation without relying on the promissory note, which was excluded as it remained unstamped despite the opportunity given to the Claimant to have it stamped. I did not find that the Claimant had proven a binding collateral agreement requiring the return of that alleged payment. The contemporaneous admissible evidence did not establish sufficiently certain terms to prove a collateral arrangement requiring repayment of that alleged sum or to override or qualify the final written agreement.

Misrepresentation and Rescission

[32] The Claimant's case was that she was induced by a representation that the Property was worth US$650,000, whereas the later appraisal valued it at $475,000. A claim of misrepresentation requires proof of the actual representation, its meaning, falsity and inducement. A statement of opinion, on its own, is not usually actionable as a representation of fact. However, in context, an opinion may carry an implied representation as to the speaker's knowledge or the factual basis for that opinion. (See judgment of the Privy Council in **Bisset v Wilkinson** [1927] AC 177).

[33] I was not satisfied that the Claimant had proven an actionable representation. In particular, she did not establish that Mr Klonaris or Klonaris & Co made any statement of value of the Property. His evidence was that he did not discuss value with her and acted on the business terms agreed by the parties. The Claimant had occupied the Property since 2012. She had the opportunity to inspect it and to get an independent valuation. Moreover, she reviewed the operative sale agreement before she signed it.

[34] Further, the Claimant did not establish that either of the Allens made an actionable representation as to the value of the Property. On the evidence, the Property had been marketed at $650,000, but the price ultimately agreed in the Agreement for Sale was $500,000. The 2015 appraisal at $475,000 did not prove that an alleged representation at an earlier date, whether made by the Allens or anyone else, was false when made. Nor did it prove that the Claimant entered the Agreement for Sale in reliance upon such a representation in the face of Clause 17 (referenced in para [25] above). In my view, the Claimant had not displaced the contractual acknowledgement of independent investigation and non-reliance.

[35] Therefore, it was my finding that the misrepresentation and fraud claims must fail. It followed that the Claimant was not entitled to rescind the Agreement for Sale and could not recover the forfeited contractual deposit on that basis.

<u>Conflict, Stakeholder Duties and Conspiracy</u>

[36] The Claimant proved that Mr Klonaris initially acted for both sides in preparing the transaction documentation and that he held the contractual deposit as stakeholder. That circumstance required careful consideration. It did not, however, establish breach without proof of the allegations by the Claimant that: (1) the joint retainer was not made known, (2) one client's interests were preferred over the other, (3) he acted despite an actual conflict, (4) he misapplied stakeholder funds, or (5) he caused the Claimant loss by conduct amounting to a breach of duty.

[37] The material evidence was that the Claimant was told to obtain independent counsel if completion might not occur and the matter became contentious. The Claimant did so identify an attorney. Thereafter, Mr Klonaris stated that he would withdraw from representing the Allens because the matter had become contentious.

[38] I considered that the relationship between solicitor and client must be properly classified. It was observed by *Winder CJ* in **New Providence Development Company Limited v Windsor Field Development Ltd** BS 2024 SC 099 [at para 149] (quoting *Nugee J* (as he then was) in **Glenn v Watson** [2018] EWHC 2016 Ch) that the relationships of solicitor and client and agent and principal are among well-settled examples of fiduciary relationship.

[39] For the purposes of the present claim, the governing distinction was between a fiduciary's obligation of loyalty and ordinary shortcomings of skill or care. A fiduciary breach requires disloyalty, improper preference of one client over another, undisclosed interest, or an actual conflict of duty. Not every alleged error by a solicitor falls into that category. I considered the guidance on what a solicitor's fiduciary duty entails as set out in **Bristol and West Building Society v Mothew** [1998] Ch 1 in the speech of *Millett LJ* as follows:

> "...A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal..."
>
> "The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duty of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty...".

[40] On the evidence, the Claimant had not established that Mr Klonaris or Klonaris & Co had a proprietary interest in the property, acted dishonestly or acted in preference to the Allens' interests while continuing to owe conflicting duties to her. The steps Mr Klonaris took prior to and upon the default of the Claimant were in accordance with that which was agreed among the parties in the operative documents. Specifically, the $50,000 stakeholder deposit was handled in conformity with the forfeiture mechanism which I found was contractually engaged. In my judgment, the Claimant's claims for breach of fiduciary duty, conflict of interest, dishonesty and conspiracy against Mr Klonaris and/or Klonaris & Co were unfounded and therefore dismissed.

<u>Counterclaim of the Allens</u>

[41] The Allens submitted that their loss greatly exceeded the $50,000 deposit. Their Closing Submission identified a purported loss of $440,000 calculated as the $500,000 contract price less the $50,000 deposit and $10,000 said to have been received from the mortgagee.

[42] The starting point was that Clause 9 of the Agreement for Sale identified the contractual deposit as liquidated damages and provided for cancellation of the agreement after the purchaser's continuing default. The Clause had to be given its proper meaning. It did not follow simply from the Claimant's breach, or from the sum unpaid at completion, that the Allens should recover the balance of the price. The Allens will yet have to prove an enforceable right to damages in excess of the forfeited deposit as well as actual loss by the breach.

[43] I did not determine the quantum of the counterclaim on this record. The evidence and submissions did not permit a reliable calculation. I took into account that the parties affected by the counterclaim (the Allens and the Claimant) are pro se litigants. The Allens accepted that they had a duty to mitigate. I considered that the assessment will require evidence of the relevant mortgage arrangements, payments and arrears, possession, any surrender or arrangement with the mortgagee, repossession, sale or proposed sale, the sums actually received and whether the claimed loss was caused by the Claimant's breach rather than other matters.

[44] I considered whether the words "liquidated damages" and "without further obligation between the parties" in Clause 9 necessarily made the $50,000 the Allens' exclusive remedy. Without an inquiry into the full context of the contracts, the counterclaim and evidence concerning loss said to have followed from the breach, I declined to treat the Clause as debarring every claim

for consequential loss. I therefore directed that the Allens' counterclaim proceed to an assessment. That direction did not determine that they would recover any sums beyond the forfeited deposit. The assessment judge will determine whether Clause 9 permits further recovery and, if so, whether the Allens can prove recoverable loss after credit for the deposit and all mitigation receipts.

[45] At the assessment the Court shall determine:

(1) whether, on the true interpretation of Clause 9, and the agreement as a whole, the Allens are entitled to recover loss beyond the $50,000 forfeited deposit;

(2) if so, the heads of loss properly pleaded and proved;

(3) the loss, if any, caused by the Claimant's breach;

(4) all credits, including the $50,000 deposit and any sums received from a mortgagee, insurer, purchaser or other person in respect of the Property or the claimed loss; and

(5) whether the Allens took reasonable steps to mitigate their loss.

[46] The assessment is not to revisit liability on the Claimant's dismissed claims. It will not be used to determine the excluded promissory note, or to entertain unpleaded allegations of fraud, tax wrongdoing, theft, property damage or special damage. During the course of the trial, Ms Allen confirmed that the Allens were not seeking replacement costs for alleged damage to the Property or missing items.

[47] Before the assessment the Allens shall file and serve a detailed schedule identifying each remaining head of claimed loss, the date and calculation of the loss, all sums received or credited, and the documents relied upon. The Claimant may serve a responding schedule. The Court conducting the assessment may give further directions as necessary.

[48] In the circumstances and based upon my findings, I made the following orders:

(1) the Claimant's claim against the First, Second and Third Defendant was dismissed;

(2) the Allens' counterclaim was adjourned for assessment; and

(3) the Claimant was ordered to pay the costs of the First, Second and Third Defendants, such costs to be assessed if not agreed.

Dated 22 September 2026

Simone I Fitzcharles
Justice