THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

SKBHCVAP2010/0012

BETWEEN:

LEONORA L. WALWYN

Appellant

and

[1] EUSTACE ARCHIBALD
[2] RBTT BANK (SKN) LIMITED

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Terence V. Byron, with him, Ms. Talibah Byron, for the Appellant
Ms. M. Angela Cozier for the 1st Respondent
Ms. Hazelyn Ross for the 2nd Respondent

2014: July 10.
Reasons for decision

Civil appeal – Land purchased using proceeds of mortgage obtained by first respondent from second respondent – Subrogation – Equitable remedy – Whether second respondent's rights as equitable mortgagee subrogated to appellant – Breach of fiduciary duty – Limitation

The first respondent, Mr. Archibald, obtained a loan from the second respondent, RBTT Bank (SKN) Limited ("the Bank"), to purchase a lot of land in Nevis ("the Property") from a realtor. The appellant, Ms. Walwyn, was the solicitor for the Bank, but she told Mr. Archibald that she could also act as his solicitor in the purchase. At the end of May 1994, Ms. Walwyn authorised the payment of the full amount of the purchase price to the realtor. However, she allowed, without Mr. Archibald's written permission, the payment to be made to the realtor without first obtaining from him the vendor's Certificate of Title for the

Property; this was required for not only the transfer of the Property to Mr. Archibald, but also for the registration of the Bank's mortgage charge. Ms. Walwyn subsequently had great difficulty obtaining the Certificate of Title from the realtor and was only able to resolve the issue in 2001 when the court made a declaration that the undelivered Certificate of Title was lost and ordered a new one to be issued to Mr. Archibald. Meanwhile, Mr. Archibald had stopped making the loan payments about a year after he had begun, he claimed, because he had been unable to get his Certificate of Title. Ms. Walwyn, faced by a claim against her by the Bank for breach of her duty owed to it in failing to register its security interest over the Property at or before the disbursal of the loan proceeds, borrowed the sum of $326,268.62 from the Bank to pay off the amount that it was claiming. Mr. Archibald was not informed by either the Bank or Ms. Walwyn of what had happened to his loan.

Mr. Archibald was aware that he had not completed the payments on his loan, and he still had no Certificate of Title in his possession. He instructed Ms. Walwyn to find a purchaser for the Property to discharge his obligation, and on 1st November 2001, she arranged with him to sell a portion of the Property for EC$75,000.00. From the proceeds of this sale, Ms. Walwyn paid the money to her loan account at the Bank without giving any written explanation to Mr. Archibald. After the sale of the portion of the Property, Mr. Archibald, under the impression that the purchase money had gone to repay part of his loan at the Bank, requested of the Bank and Ms. Walwyn the return of his Certificate of Title. The Bank informed the new solicitor who had been retained by Mr. Archibald that it had never been in possession of the Certificate of Title, and that Mr. Archibald no longer owed it any money. No explanation, however, was given to Mr. Archibald about what had happened to his loan.

In March 2002, Ms. Walwyn sought to sell the remainder of the Property. She attempted to get Mr. Archibald to sign and return the Memorandum of Transfer which she had sent to him, but he did not do it. It was only after Mr. Archibald's new solicitor had made an application to the court for a replacement Certificate of Title to be issued to Mr. Archibald, that Ms. Walwyn wrote the new solicitor and explained that the Certificate of Title was not lost, inferring that it was in her possession.

Mr. Archibald (through his nephew who held his power of attorney) sought to recover the sum of $54,955.94 that he had already paid towards the Property to which he could not obtain title and therefore could not use. His nephew informed the Bank's manager that Mr. Archibald was seriously considering suing the Bank for this purpose. The manager gave Mr. Archibald's nephew a print-out which confirmed that Mr. Archibald owed the Bank no money, but still did not explain that Ms. Walwyn had paid the loan on his behalf or assert that the Bank's rights as equitable mortgagee had been subrogated to Ms. Walwyn.

On 18th November 2005, Mr. Archibald sued Ms. Walwyn and the Bank, seeking delivery of his Certificate of Title to the Property and for other remedies including damages for breach of fiduciary duty. Ms. Walwyn filed her defence and counterclaim, claiming $244,605.22, being the amount she said was due to her in respect of the sum loaned to

Mr. Archibald by the Bank, together with interest accrued to March 2001, and the further sum of $81,663.40 paid by her as interest to the Bank on her loan. She claimed that as a result of the payment she made to the Bank, she had become subrogated to the rights of the Bank as equitable mortgagee of the Property. Mr. Archibald filed his defence to the counterclaim denying any knowledge of any alleged refinancing of his loan, stating that he had not consented to the transfer of the remaining portion of the Property as Ms. Walwyn had clearly shown her intent to deprive him of the proceeds of sale. He objected to her claim for an order for sale, as she had not claimed nor had she pleaded any interest in the Property.

On 2nd April 2008 Mr. Archibald filed an amended claim seeking damages from the Bank for economic loss caused to him by Ms. Walwyn, who he claimed acted as the Bank's agent, in wrongfully withholding his Certificate of Title. He also claimed against Ms. Walwyn for constructive fraud in representing that she was capable of representing both him and the Bank and having then acted to his detriment in unlawfully withholding his Certificate of Title. Finally, he claimed damages for her conversion of his Certificate of Title. Ms. Walwyn filed an amended defence and counterclaim alleging that Mr. Archibald had reneged on his agreement to repay the loan and was now attempting to claim what he well knew he had not purchased. She repeated her claim that she had through a course of dealings agreed to have the loan between the Bank and Mr. Archibald "re-executed" on her account.

The learned judge dismissed Mr. Archibald's case against the Bank but gave judgment in his favour against Ms. Walwyn, ordering her to deliver the Certificate of Title to Mr. Archibald and to pay him damages of $3,500.00 in conversion. Costs were awarded to Mr. Archibald against Ms. Walwyn and Mr. Archibald was ordered to pay the Bank's costs. The judge also dismissed Ms. Walwyn's counterclaim with costs to Mr. Archibald.

Ms. Walwyn appealed, contending that the learned trial judge failed to appreciate that the Bank was an equitable mortgagee of Mr. Archibald; failed to appreciate the effect of Ms. Walwyn being required to pay off his loan; erred in finding that Mr. Archibald was entitled to the return of his Certificate of Title while he was an equitable mortgagor and in failing to appreciate that when a stranger pays off a mortgage he or she is entitled to the remedy of enforcing any claim under it; erred in dismissing Mr. Archibald's claim in contract against Ms. Walwyn for withholding the Certificate of Title when that claim was in fact one against the Bank; erred in holding that Ms. Walwyn's claim was statute-barred even though Mr. Archibald did not plead the statute; erred further in not appreciating that Mr. Archibald made a part payment which caused Ms. Walwyn's right of action to accrue afresh; erred in dismissing her counterclaim; and erred in failing to award judgment to Ms. Walwyn for the amount of the mortgage debt paid by her to the Bank.

Held: dismissing the appeal and awarding costs agreed in the sum of $1,500.00 to be paid by Ms. Walwyn to Mr. Archibald, that:

1. The equitable remedy of subrogation is available in a wide variety of different factual situations in which it is required to reverse a defendant's unjust enrichment. It is not, however, a remedy which the court has a general discretion to impose whenever it thinks it just to do so. It is not automatically recognised by the courts. The equity arises from the conduct of the parties on well-settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff. Ms. Walwyn paid the amount that was being claimed by the Bank under threat of a lawsuit by the Bank for her negligence in disbursing the loan proceeds prior to registering the Bank's security interest over the Property. In these circumstances, she could hardly claim that the Bank's remedies had been subrogated to her. She cannot be treated as an arm's length third party or stranger would be treated on her claim in unjust enrichment. Her claim for equitable relief would fail on equitable grounds. Ms. Walwyn was the author of her own loss by virtue of her failure to be open and frank with Mr. Archibald about what had transpired in relation to the Property and what she had been obliged to do in relation to the Bank. This is not a case where it can be said that the conduct of one of the parties makes it unconscionable for Mr. Archibald to be denied the proprietary interest in the property he claims. The judge was entitled to dismiss Ms. Walwyn's claim against Mr. Archibald, and to enter the judgment in favour of Mr. Archibald.

   Banque Financière de la Cité v Parc (Battersea) Ltd and Others [1998] 4 LRC 158 applied.

2. Notwithstanding that Mr. Archibald was entitled to the benefit of a limitation defence since Ms. Walwyn's claim for repayment of the money which she had paid to the Bank to allegedly discharge Mr. Archibald's loan was made some five years after the deadline for making the claim had passed, it is well established that a limitation defence needs to be specifically pleaded in a defence to a claim for repayment of a debt, failing which its benefit does not arise. Mr. Archibald having made no such pleading, the limitation defence did not, therefore, apply to him, and the judge was wrong to so find otherwise.

REASONS FOR DECISION

[1] PEREIRA CJ: These are our reasons in writing for our short oral judgment delivered on 17th October 2013 when we dismissed the appeal. We promised then that if we were so requested we would give our fuller reasons in writing, and we do

so now. All of the members of the panel have contributed to the writing of these written reasons.

[2] This is an appeal brought by Ms. Leonora L. Walwyn ("Ms. Walwyn") against RBTT Bank (SKN) Limited ("the Bank") and Mr. Eustace Archibald ("Mr Archibald"), and a counter-appeal brought by Mr. Archibald against the Bank and Ms. Walwyn, arising from a judgment delivered by Belle J in the High Court in Nevis on 28th May 2010. The counter-appeal having been withdrawn it was dismissed with agreed costs to the Bank of EC$1,500.00.[1]

The Facts

[3] The facts as found by the judge are that on 26th January 1994, Mr. Archibald agreed to purchase a lot of land in Nevis ("the Property") from a realtor named Mr. Spencer Howell ("Mr Howell"), who was the agent for the owner. Mr. Archibald paid a deposit of $26,600.00. The Bank agreed to lend Mr. Archibald $187,488.00 to complete the purchase, with the Property as security. The loan was for five years with monthly instalments of EC$4,608.11, and was due to be paid off by 30th June 1999.

[4] Ms. Walwyn was at all relevant times the solicitor for the Bank. She told Mr. Archibald that she could also act as his solicitor in the purchase. Indeed, as she pleads in her defence, she was responsible for perfecting Mr. Archibald's title and for the placing on it of the legal mortgage in favour of the Bank. At the closing at the end of May 1994, Ms. Walwyn authorised the payment of the full amount of the purchase price to Mr. Howell. Mr. Howell delivered to her a signed Memorandum of Transfer. However, he failed to deliver the vendor's Certificate of Title which was required to be cancelled before a new Certificate of Title could be issued to Mr. Archibald. As the judge found, this happened because Mr. Howell pleaded

[1] In all of the written submissions before us, the same party was sometimes confusingly referred to as a defendant, at other times as an appellant, and at yet other times as a respondent. It might be more helpful, particularly where there are appeals and counter-appeals, if the parties could be identified by name so as to avoid misnaming, and to make the argument easier to follow. We act accordingly in giving these reasons.

with Ms. Walwyn to allow him to close without it as he was leaving the island on a family vacation and needed his commission payment to do so. He gave his personal undertaking to deliver the Certificate of Title on his return. She thus paid out the total purchase price without obtaining, as she was required to do, all of the title documents needed not only for the transfer of the Property to Mr. Archibald, but also for the registration of the Bank's mortgage charge without Mr. Archibald's written permission.

[5] On Mr. Howell's return from his vacation, Ms. Walwyn pursued him about the Certificate of Title, but she was not able to obtain it from him. She submitted the Memorandum of Transfer in favour of Mr. Archibald to the Registrar, without the necessary Certificate of Title for cancellation, in an attempt to register the transfer to Mr. Archibald. She even subsequently filed a writ of summons with Mr. Archibald named as plaintiff, and the vendor and Mr. Howell as defendants, but this effort did not succeed in producing the Certificate of Title. Eventually, the vendor died.

[6] Meanwhile, in addition to the fact that Mr. Archibald did not live in Nevis, but in Puerto Rico, he had developed a debilitating illness which made it difficult for Ms. Walwyn to pursue the writ of summons. In 1997 she issued another writ of summons against Mr. Howell only. She sought the cancellation of the old Certificate of Title and the issue of a new one in Mr. Archibald's name. The Bank supported Mr. Archibald's application. Eventually, on 15th June 2001, Mr. Howell being represented by counsel, the court declared that the vendor's Certificate of Title was lost and ordered a new one to be issued to Mr. Archibald.

[7] For a year after he received the loan proceeds, Mr. Archibald made payments in the total sum of $33,355.94. Eventually, he claimed, because he was unable to get from Ms. Walwyn his Certificate of Title he stopped paying on the loan. The judge thought it more likely that he had become too ill to work and that caused him to stop paying the instalments.

[8] On or about 20th March 2001, faced by a claim against her by the Bank for breach of her duty owed to it in failing to register its security interest over the Property at or before the disbursal of the loan proceeds, Ms. Walwyn agreed with the Bank to compensate it for the loss caused by her negligence by paying off the amount claimed by the Bank of $244,605.22. She did so by borrowing $326,268.62 from the Bank to cover the loan plus interest. The Bank did not write Mr. Archibald or otherwise inform him of what had happened to his loan. Nor, the judge found, did Ms. Walwyn.

[9] Mr. Archibald was aware that he had not completed payments on his loan. He was required to pay sixty instalments on his loan and had paid only seven. He still had no Certificate of Title in his possession. Ms. Walwyn must have been in touch with him, as he instructed her to find a purchaser for his land to discharge his obligation. On 1st November 2001, she arranged with him to sell a portion of his land for EC$75,000.00. She obtained a signed Memorandum of Transfer from him in favour of the purchaser, and subsequently sent him a bank draft for the US$ equivalent of EC$10,876.00, with a statement of account of the disbursement of the balance of EC$64,200.00. She claimed that the $75,000.00 sale proceeds were disbursed with the full knowledge of Mr. Archibald. She did not produce to the judge any evidence of her having written any other disclosure to Mr. Archibald, and he denied receiving any.

[10] Ms. Walwyn claimed in her statement of claim that she disbursed the balance of the proceeds of sale in various ways which included a "realty fee" to a person whose name she did not disclose, as well as the repayment of some $52,000.00 to a loan account at RBTT Bank, which suggested it was going to Mr. Archibald's loan when in fact it was going to her loan. At the time of that sale, of course, Mr. Archibald's loan account had already been closed by the Bank. In fact, Mr. Archibald had no outstanding balance to which that payment could be paid. As

the judge found, Ms. Walwyn paid it to her loan account at the Bank without giving any written explanation to Mr. Archibald.

[11] After the sale of the portion of the Property, Mr. Archibald, under the impression that the purchase money had gone to repay a portion of his loan at the Bank, requested of the Bank and Ms. Walwyn the return of his Certificate of Title. Not hearing from them, he retained a new solicitor to obtain the return of his Certificate of Title from the Bank and Ms. Walwyn. The Bank replied to the new solicitor to the effect that it had never been in possession of the Certificate of Title, and that Mr. Archibald now no longer owed it any money. The Bank still did not give him any explanation of what had happened to his loan. Ms. Walwyn's case in the litigation was that this letter was mistaken in advising Mr. Archibald that his loan was discharged without more.

[12] In March 2002, Ms. Walwyn sought to sell the remainder of the Property. She wrote to Mr. Archibald explaining what was required for its sale. She asked him to sign and return the Memorandum of Transfer which she sent to him. She promised that after the sale he would be reimbursed for the payments he had made to the Bank in the initial purchase of the Property and that she would pursue the suit against Mr. Spencer Howell when Mr. Archibald was ready. Mr. Archibald did not sign and return the Memorandum of Transfer.

[13] In 2004, Ms Walwyn filed a claim on behalf of the Bank and served it on Mr. Archibald claiming the sum of $244,605.22 as the amount outstanding and overdue on his 1994 loan. At this point, Mr. Archibald clearly owed the Bank nothing. On receiving Mr. Archibald's defence, Ms. Walwyn discontinued the suit. There is no record that even up to this point she wrote to Mr. Archibald explaining what had happened with his loan. Indeed, although Ms. Walwyn's testimony was that at all times she kept Mr. Archibald informed of all proceedings, it is clear that the judge did not believe her.

[14] Mr. Archibald's new solicitor made an application to the court for a replacement Certificate of Title to be issued to Mr. Archibald. It was then that Ms. Walwyn wrote the new solicitor, explaining that the Certificate of Title was not lost, thereby tacitly inferring that it was in her possession.

[15] Mr. Archibald's nephew, Mr. Kevin Archibald ("the Nephew"), holding his power of attorney, visited the Bank on Mr. Archibald's instructions and informed the Bank's manager that Mr. Archibald was seriously contemplating suing the Bank to recover the sum of $54,955.94 that he had already paid towards the Property to which he could not obtain title and therefore could not use. The manager assured the Nephew that Mr. Archibald owed no money to the Bank, and gave him a print-out to that effect. The manager still did not explain that Ms. Walwyn had paid the loan on his behalf or assert that the Bank's rights as equitable mortgagee had been subrogated to Ms. Walwyn.

[16] In the lead up to the case, Mr. Archibald's new solicitor requested an explanation from the Bank. The Bank replied by a rather unhelpful letter of 14th October 2003 that the Bank's position in relation to Mr. Archibald's loan was not properly protected and it had sought recovery from its solicitor, and that by the date Mr. Archibald's Certificate of Title was issued on 28th June 2001 Mr. Archibald's loan had been closed. This bare explanation could hardly have been more obscure and confusing.

Proceedings in the High Court

[17] Mr. Archibald, on 18th November 2005, sued Ms. Walwyn and the Bank, seeking delivery of his Certificate of Title to the Property and for other remedies including damages for breach of fiduciary duty.

[18] Ms. Walwyn filed her defence and counterclaim on 13th January 2006. She claimed $244,605.22 being the amount she said was due to her in respect of the sum loaned to Mr. Archibald by the RBTT Bank together with interest accrued to

March 2001, and the further sum of $81,663.40 paid by her as interest to the Bank on her loan. Her claim was that as a result of the payment she made to the Bank she had become subrogated to the rights of the Bank as equitable mortgagee of the Property.

[19] On 6th April 2006, Mr. Archibald filed his defence to the counterclaim denying any knowledge of any alleged refinancing of his loan. He claimed that he had not consented to the transfer of the remaining portion of the Property as Ms. Walwyn had clearly shown her intent to deprive him of the proceeds of sale. He objected to her claim for an order for sale, as she had not claimed nor had she pleaded any interest in the Property.

[20] On 2nd April 2008, Mr. Archibald filed an amended claim seeking damages from the Bank for economic loss caused to him by Ms. Walwyn, who he claimed acted as the Bank's agent, in wrongfully withholding his Certificate of Title. He now claimed against Ms. Walwyn for constructive fraud in representing that she was capable of representing both him and the Bank and having then acted to his detriment in unlawfully withholding his Certificate of Title. He also claimed damages for her conversion of his Certificate of Title.

[21] On 10th April 2008 Ms. Walwyn filed a defence and counterclaim alleging that Mr. Archibald had reneged on his agreement to repay the loan and was now attempting to claim what he well knew he had not purchased. She repeated her claim that she had through a course of dealings agreed to have the loan between the Bank and Mr. Archibald "re-executed" on her account.

[22] The learned trial judge heard the witnesses on 9th and 10th November 2009, and delivered his written judgment on 28th May 2010. He dismissed Mr. Archibald's case against the Bank but gave judgment in his favour against Ms. Walwyn, ordering her to deliver the Certificate of Title to Mr. Archibald and to pay him damages of $3,500.00 in conversion. He gave Mr. Archibald his costs against Ms.

Walwyn, and he ordered Mr. Archibald to pay the Bank's costs. He dismissed the counterclaim with costs to Mr. Archibald.

The Appeal

[23] Ms. Walwyn's 11 grounds of appeal may be summarised as that the learned trial judge:

(1) failed to appreciate that the Bank was an equitable mortgagee of Mr. Archibald;

(2) failed to appreciate the effect of Ms. Walwyn being required to pay off Mr. Archibald's loan;

(3) erred in finding that Mr. Archibald was entitled to the return of his Certificate of Title while he was an equitable mortgagor;

(4) erred in failing to appreciate that when a stranger pays off a mortgage he or she is entitled to the remedy of enforcing any claim under it;

(5) erred in dismissing Mr. Archibald's claim in contract against Ms. Walwyn for withholding the Certificate of Title when that claim was in fact one against the Bank;

(6) erred in not making an order in Mr. Archibald's claim against Ms. Walwyn for constructive fraud;

(7) erred in holding that Ms. Walwyn's claim against Mr. Archibald was statute-barred even though Mr. Archibald did not plead the statute;

(8) erred further in not appreciating that Mr. Archibald made a part payment which caused Ms. Walwyn's right of action to accrue afresh;

(9) erred in dismissing Ms. Walwyn's counterclaim;

(10) erred in failing to award judgment to Ms. Walwyn for the amount of the mortgage debt paid by her to the Bank;

(11) erred in dismissing Ms. Walwyn's claim for a declaration that the lands be sold and the proceeds paid to Ms. Walwyn as equitable mortgagee of Mr. Archibald.

Limitation

[24] Mr. Archibald's obligation to pay his loan arose under his loan agreement with the Bank and the equitable mortgage held by the Bank which arose on Ms Walwyn's authorising the disbursement to Mr. Howell of the Bank's funds on his behalf on 31st May 1994 without securing the anticipated legal mortgage. Time began running against the Bank on the date of Mr. Archibald's last payment on his loan, on 2nd August 1995, and the debt would have become statute barred on 2nd August 2001. Ms. Walwyn paid the proceeds of her loan to the Bank in an alleged discharge of Mr. Archibald's loan on or about 20th March 2001, but more likely as the judge found to settle the claim that the Bank would otherwise make against her for damages for negligence. Subrogation, if it occurred, would give Ms. Walwyn the contractual rights of the Bank, no more. She filed her counterclaim for repayment (the first time she had made this claim in writing) on 17th January 2006. She did not mention that the Bank's rights against Mr. Archibald had been subrogated to her. In any event, this claim for payment was made some five years after the deadline in the Limitation Act[2] had passed. Mr Archibald was entitled to the benefit of the limitation defence which arose from this delay. However, it is well established that a limitation defence is required to be specifically pleaded in a defence to a claim for repayment of a debt, failing which its benefit does not arise. Mr. Archibald made no such pleading. The limitation defence did not, therefore, apply to him, and the judge was wrong to so find otherwise.

[2] Cap. 5.09, Revised Laws of Saint Christopher and Nevis 2009.

Subrogation

[25] In the first of a number of paragraphs dealing with subrogation, the learned trial judge stated as follows:

> "[56] But before coming to any final decision in relation to compensation or damages and other remedies I have to confront the matter of Subrogation raised by the 2nd Defendant. Firstly it is arguable that the subrogation claim is not based on the loan agreement which was repudiated in 1995, but on the arrangement entered into between the 1st Defendant and the 2nd Defendant in March 2001. The specific claim of subrogation was not claimed until 2008. However, subrogation is not a cause of action. The relevant cause of action has to be pursuant to the law of contract. Pursuant to that law the 1st Defendant's right to sue to recover the loan sum would have expired six years after the breach of the contract. Based on the evidence, that date would be 2nd August 2001. The 2nd Defendant claims to be subrogated to the rights of the 1st Defendant in March 2001. However the subrogation remedy would be subject to the limitation after August 2nd 2001, pursuant to section 4 of the Limitation Act Cap 5.09 of the Revised Laws of St Christopher and Nevis. This deals with the first argument that subrogation would have been statute barred. I therefore find that it is so barred."

There are undoubtedly some errors of fact in this paragraph. The subrogation claim was based on the Bank's rights as lender and holder of the 1994 equitable mortgage which rights Ms. Walwyn claimed were subrogated to her on her alleged payment in 2001 of Mr. Archibald's debt. The Bank's entitlement to recover the loan was based on Mr. Archibald's breach in 1995. Additionally, the limitation defence did not apply as previously explained. However, that is not an end of the matter.

[26] Ms. Walwyn claimed that Mr. Archibald had become unjustly enriched by her having been obliged by the Bank to pay off his loan. While it is true that Mr. Archibald's obligation to pay arose in contract, Ms. Walwyn did not base her claim in contract. She claimed the remedy of subrogation based on Mr. Archibald's unjust enrichment which would arise if he did not discharge his obligation to pay

under his loan agreement. Subrogation by itself does not require an agreement or a contract. It arises by operation of law. As Lord Diplock put it in his judgment in the House of Lords in Orakpo v Manson Investments Ltd and others,[3]

> "… there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law. There are some circumstances in which the remedy takes the form of 'subrogation', but this expression embraces more than a single concept in English law. It is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances."

There is no doubt that if a stranger pays off a bank loan, the bank's remedies are subrogated in favour of the stranger whether or not there is notice to the borrower or any agreement on the part of the borrower.

[27] Subrogation is an equitable remedy, and it will not be automatically recognised by the courts. The House of Lords in its decision in Banque Financière de la Cité v Parc (Battersea) Ltd and Others[4] referred with approval to the judgment of Millett LJ in Boscawen and Others v Bajwa and Another.[5] There he wrote:

> "Subrogation, therefore, is a remedy, not a cause of action (see Goff & Jones *Law of Restitution* (4th edn, 1993) pp 598 ff; *Orakpo v Manson Investments Ltd* [1977] 3 All ER 1 at 7, [1978] AC 95 at 104 per Lord Diplock and *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275 at 284 per Slade LJ). It is available in a wide variety of different factual situations in which it is required in order to reverse the defendant's unjust enrichment. Equity lawyers speak of a right of subrogation, or of an equity of subrogation, but this merely reflects the fact that it is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so. The equity arises from the conduct of the parties on well-settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff. A

[3] (1977) 3 All ER 1 at 7.
[4] [1998] 4 LRC 158.
[5] [1995] 4 LRC 435.

> constructive trust arises in the same way. Once the equity is established the court satisfies it by declaring that the property in question is subject to a charge by way of subrogation in the one case or of a constructive trust in the other."[6]

What the judge found at paragraphs 62-64 of his judgment was that he could not understand how Ms. Walwyn could claim that she wanted to convert Mr. Archibald's loan to her own benefit, since such a step would have involved a conflict of interest which required that Mr. Archibald agree to it. He found that she had not made full disclosure to Mr. Archibald, and Mr. Archibald had not agreed to the Bank assigning its loan to Ms. Walwyn. In any event, he found that the Bank had previously closed Mr. Archibald's loan account for non-payment[7] prior to its seeking compensation from Ms. Walwyn. Ms. Walwyn, under threat of a lawsuit by the Bank for her negligence, paid the amount claimed by the Bank on or about 20th March 2001. In the circumstances, Ms. Walwyn could hardly claim that the Bank's remedies had been subrogated to her. The sale of a part of Mr. Archibald's land in November 2001 and Ms. Walwyn placing the major part of the proceeds towards the payment of her loan, was done without full disclosure to Mr. Archibald and was in breach of her fiduciary duty. This was not a payment that would automatically start time running again against Mr. Archibald, or amount to an acknowledgement of his indebtedness to her, in the circumstances as found by the judge.

Breach of Fiduciary Duty

[28] It was common ground that Ms. Walwyn authorised the payment of Mr. Archibald's loan proceeds to Mr. Howell as realtor for the vendor in June 1994 without ensuring that she would obtain the necessary Certificate of Title at the time she made the payment. The result was that the Bank failed to obtain its expected security for the loan when it disbursed the funds to the realtor on the instructions of

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[6] At p. 443.

[7] i.e., sometime in 1999 as pleaded by Ms. Walwyn at para. 19 of her defence.

Ms. Walwyn. In this respect she was in breach of her duty to the Bank as her client. She was also acting as Mr. Archibald's solicitor in respect of his purchase of the land, and she owed him a fiduciary duty. She owed him a duty not to disburse the purchase money to the vendor without ensuring that she obtained the old Certificate of Title for cancellation and was able to make a valid application for the issue of his Certificate of Title. The fiduciary status of a solicitor in these circumstances cannot be doubted. As Mummery LJ said in Swindle and Others v Harrison and Another[8] when considering the cases of Nocton v Lord Ashburton[9] and Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.:[10]

> "It is possible to extract from the speeches the following principles relevant to this appeal. (1) A solicitor stands in a fiduciary relationship with his client. (2) A solicitor who enters into a financial transaction with his client is under a fiduciary duty, when advising his client, to make full disclosure of all relevant facts known to him. (3) Liability for breach of fiduciary duty is not dependent on proof of deceit or negligence. Equity imposes duties in special relationships above and beyond the minimal legal duties to be honest and to be careful. Fiduciary duties rest on the idea of trust and of conduct offensive to conscience. (4) The equitable remedies available for breach of fiduciary duty are 'more elastic' than the sanction of damages attached to common law fraud and negligence ... Payment of compensation may be ordered to put the plaintiff 'in as good a position pecuniarily as that to which he was in before the injury.'"[11]

[29] The learned trial judge made several findings against Ms. Walwyn in respect of her solicitor/client relationship with Mr. Archibald. He found that she was in breach of her fiduciary duty to him, and that she had failed to disclose the various transactions to him as her client as she was obliged to do. He speculated that Mr. Archibald should have known about the transactions that Ms. Walwyn had entered into with the Bank, but other than her evidence that she spoke to Mr. Archibald about what had happened, there was no documentary evidence supporting her testimony that she had in fact disclosed to him the various transactions she had

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[8] [1997] 4 All ER 705.
[9] [1914] AC 932.
[10] [1964] AC 465.
[11] At p. 732a-c.

entered into in relation to his land, and he denied it. Even her correspondence with Mr. Archibald which she put in evidence was misleading and did not disclose the whole story. She should have told him that she had been made personally responsible for repaying his loan. He found there should have been a frank discussion to ensure that Mr. Archibald would not be forced to pay any costs which he did not agree to pay and was not obliged to pay, and that there should have been frank disclosure as to the state of his Certificate of Title. He found that Ms. Walwyn was not entitled to hold on to it as security for her loan without Mr. Archibald's agreement. He appears to have accepted Mr. Archibald's submission that Ms. Walwyn's claim in subrogation was a last ditch attempt to recover monies which she had been required to pay to the Bank as a result of her own negligence. The claim did not appear in the pleadings, and was made only in cross-examination of the witnesses at the trial.

[30] In our view, the judge was entitled to dismiss Ms. Walwyn's assertion that she had kept Mr. Archibald informed at all times of her actions on his behalf in discharging his debt to the bank and assuming the Bank's rights against him by subrogation, and also in accounting to him for the disbursal of the proceeds of the sale of a portion of his land in 2001 for the sum of $75,000.00. In her filed defence she claimed that she had paid him $10,876.00 and disbursed the larger part of the proceeds towards his loan account with the Bank. But, as the judge found, at this point, Mr. Archibald had no loan with the Bank. She was making the payment, instead, towards her loan with the Bank. If there was ever an opportunity for Ms. Walwyn to explain in writing to Mr. Archibald that she had been threatened by the Bank with a suit for her negligence in failing to protect it by obtaining the old Certificate of Title for cancellation before disbursing the loan proceeds, and that she had been obliged to protect herself by paying off his loan, and that she claimed the Bank's right to an equitable mortgage over his property by subrogation, and that he must discharge his loan from the Bank by payment directly to her, this submitting of the statement of account to Mr Archibald was it.

However, she kept quiet about her claims in this and any other written communications she may have had with Mr. Archibald, and she was deliberately misleading in her accounting of the disbursement to the loan account.

[31] While it is true that the judge did not specifically make a finding on Mr. Archibald's claim against Ms. Walwyn for damages for fraud, it was in our view unnecessary for him to do so. The fraud that he claimed occurred was Ms. Walwyn's wrongful assurance that she would be able to represent both him and the Bank in the two related transactions of the purchase and the loan. By this pleading, Ms. Walwyn was made aware that Mr. Archibald's principal complaint against her was the breach of the duty she owed to him as his solicitor arising from the conflict of interest that arose when the Bank on her instructions paid out his loan proceeds to Mr. Howell without ensuring that he was able to get registered title to the Property. The cause of action was inelegantly pleaded, but the facts relied on were clearly stated.

Conclusion

[32] Ms. Walwyn is the author of her own loss by virtue of her failure to be open and frank with Mr. Archibald about what had transpired in relation to the Property and what she had been obliged to do in relation to the Bank. The judge was clearly right to find that the filing by Ms. Walwyn in 2004 of a claim in the name of the Bank for repayment of the 1994 loan as being due to the Bank was disturbing. As he said, it betrayed Ms. Walwyn's determination to recover the loan proceeds by hook or by crook. She should instead, from the moment she became aware of the Bank's demand against her, have been frank and up front with her client, Mr. Archibald, as equity required. Regardless of any embarrassment she may have felt because of her mistakes, she should have been careful to explain to him fully and frankly what had happened. She should have kept for her own protection any written communications to him and of his responses, if any, instead of concealing the facts from him and acting with the subterfuge she did. As a result, she cannot be treated as an arm's length third party or stranger would be treated on her claim

in unjust enrichment. Her claim for equitable relief would fail on equitable grounds as we do not consider in the circumstances that equity should come to her aid. This is not a case where it can be said that the conduct of the parties makes it unconscionable for Mr. Archibald to be denied the proprietary interest in the property he claims. The judge was entitled to dismiss Ms. Walwyn's claim against Mr. Archibald, and to enter the judgment he did against her.

[33] The appeal was therefore dismissed with costs agreed in the sum of $1,500.00 to be paid by Ms. Walwyn to Mr. Archibald.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]