

**EASTERN CARIBBEAN SUPREME COURT  
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. SLUHCV2014/0542**

**BETWEEN:**

**[1] JONES BICETTE  
[2] MARIE BISCETTE**

Claimants/Respondents

**and**

**BANK OF SAINT LUCIA LIMITED**

Defendant/Applicant

**Before:**

Agnes Actie

Master

**Appearances:**

Mr. Winston Hinkson for the Claimants/Respondents

Mr. Leslie Prospere for the Defendant/Applicant

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2015: July 22.

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**JUDGMENT**

*Case management powers – Trial of preliminary issues- Breach of contract- Whether attorney was acting as agent for bank in a loan agreement - Ratification of contract --Rule 26(1)(2) (i)of the Civil Procedure Rules 2000 (CPR 2000)*

**Introduction**

[1] **ACTIE, M.:** The defendant/applicant has asked the court to dismiss the claim against the defendant after determining the following preliminary issues pursuant to CPR, Rule 26.1(2)(i). The question are as follows:

- (i) Whether the claimants'/respondents' Statement of Claim discloses a sustainable cause of action against the defendant; or

- (ii) Whether the claimants'/respondents' pleadings can result in legal liability to the defendant.

### **Background facts**

- [2] Mr. Jones Biscette and his wife, Mrs. Marie Biscette (the "claimants") were interested in purchasing a property consisting of a concrete dwelling house and land situated at Garrand in the Quarter of Castries and registered in the land registry as Block 1448 B Parcel 358 (the "Property"). They approached the Bank (the "Defendant") for a mortgage to purchase the property, pay insurance and legal fees as well as pay off an existing loan of \$56,000.00 owing to 1<sup>st</sup> National Bank (Saint Lucia) Limited.
- [3] The claimants are existing customers of the defendant. The claimants were interviewed by an officer of the defendant in relation to their application for the mortgage. Their application was successful and the defendant agreed, via commitment letter dated 10<sup>th</sup> September 2007 to loan the claimants EC\$280,000.00 as requested. The security for the loan was a Hypothecary Obligation over the property in the defendant's favour registered in the land registry on 7<sup>th</sup> February 2008 as instrument No. 794/2008. The claimants used the services of Francis & Antoine, Attorneys-at-Law, (for the purposes of securing the loan with the defendant).
- [4] It was later discovered after the transaction was completed that a part of the dwelling house on the Property encroached onto an adjoining property belonging to Angella Eugene-Flood registered in the land registry as Block 1448B Parcel 28. The claimants communicated this to Francis & Antoine, Attorneys-at-Law, via letter dated 14<sup>th</sup> November 2012. The claimants wished to have the matter investigated by the defendant and financial assistance to purchase the parcel of land from Ms. Eugene-Flood, who agreed to sell the area of approximately 1,800 square feet to the claimants. The defendant agreed to provide the claimants an

additional loan to purchase the additional property comprising the area of the encroachment from Ms. Eugene-Flood.

[5] The claimants aver that the officer who interviewed them “*advised*” that if they used the services of Francis & Antoine, Attorneys-at-Law, their legal fees “would be less than if they used the legal skills of their usual independent legal advisors”.

[6] The claimants filed a claim against the defendant for damages for breach of contract.

[7] The claimants in their amended statement of claim filed on 27<sup>th</sup> January 2015 alleged that it was the custom of the defendant bank that it would provide advice so that the loan provided by the bank to customers is properly secured with the property offered by the customer as security. The claimants aver that it was their legitimate expectation that they could rely on the professional advice of the defendant bank to ensure that proper security was offered for the loan advanced. The claimants submit that their usual attorney is of other chambers but they were directed by the defendant “to use the legal services of Francis & Antoine and also advised that by the employment of the legal services of Francis & Antoine, the claimants legal charges and expenses would be less than if they used the legal services of their usual independent legal advisors. In addition, the claimants state that they “*duly hired the services of the Chambers of Francis & Antoine who put themselves out to be proficient and competent at their trade on profession*”. The claimants submit that the defendant bank’s failure to enquire into the title of the vendor’s land resulted in the claimants not having title to all the land for which they accepted the loan and the land that they purchased, in that one half of the claimants’ house falls upon lands belonging to one Angella flood.

[8] The claimants in their submissions stated that:

- (1) the defendant/applicant breached the terms of the loan agreement with the claimants/respondents when it failed to exercise reasonable care, skill,

diligence and competence in ensuring that the claimants/respondents had obtained good legal title to the property;

(2) the defendant/applicant disappointed their legitimate expectation to have been provided with professional advice on their legal title to the property being used as security for the loan; and

(3) the defendant/applicant deprived them an opportunity to obtain independent legal advice when it inappropriately directed them to its own attorneys, Francis & Antoine, for the preparation and filing of the Hypothecary Obligation over the property.

[9] The claimants further submit that the defendant bank directed the claimants to use the services of Francis & Antoine, their in house lawyers, not only to visae the documents but also to draw up the Deed of Transfer and Hypothecary Obligation. The claimants contend that Francis & Antoine, Attorneys-at-Law, were also the attorneys for the defendant.

#### **Defendant's submissions**

[10] The defendant submits that the court should direct its mind to the following germane issues in its determination of the preliminary issues:

(1) what test should court consider when determining the preliminary issues arising in these proceedings;

(2) did the defendant/applicant breach its contractual loan arrangement with the claimants/respondents;

(3) did the claimants/respondents have a legitimate expectation to have been provided with professional advice by the defendant/applicant on their legal title to the property being used as security for the loan; and

(4) was the defendant/applicant under a legal duty to require the claimants/respondents to seek independent legal advice prior to contracting for the loan.

[11] The defendant submits that it fulfilled its obligations under the loan commitment agreement when it advanced the loan to the claimants. The defendant contends that neither in the terms of the loan commitment letter, the Hypothecary Obligation and/or the claimants'/respondents' pleadings is there any express undertaking by the defendant to exercise reasonable care, skill, diligence and competence in ensuring that the claimants/respondents had obtained good legal title to the property.

[12] The defendant referred the court to **Chitty on Contracts**<sup>1</sup> to illustrate the legal principles that a term will be implied if it is necessary, in the business sense, to give efficacy to the contract:

"A term will be implied if it is necessary, in the business sense, to give efficacy to the contract. The general principle of law was thus stated by Bowen L.J. in *The Morecock*; "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have been. In this situation, although there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work."

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<sup>1</sup> 26<sup>th</sup> Edition Para 905.

### **Obvious inference from agreement.**

A term which has not been expressed may also be implied if it was so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract. Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, "oh, of course." A term will not, however, be implied unless the court is satisfied that both parties would, as reasonable men, have agreed to it had it been suggested to them..."

- [13] The defendant/applicant submits that prior to granting the claimants the loan, it was concerned with satisfying itself that the property was adequate to secure its lending to the claimants and that the claimants had a valid title over the property. The defendant states that at no time whatsoever did it provide its customers with advice on the matter of the legal validity of title over the property.
- [14] The defendant submits that there is no legal basis whatsoever for the court to imply that the defendant exercise reasonable care, skill, diligence and competence in ensuring that the claimants had obtained good legal title to the property into the contractual relationship between the parties.
- [15] The defendant claims that it "informed the claimants/respondents that they had had the option of retaining Francis & Antoine or their personal attorney(s) to prepare and file the Hypothecary Obligation to secure its lending to them and that they may have benefitted from a discount on their legal fees had they opted to retain Francis & Antoine". In addition, the defendant argues that the pleadings however fail to establish how the above arrangement has resulted in any form of the legal liability being attributed to the defendant by the claimants.

[16] The defendant further contends that that the issue of legitimate expectation pleaded by the claimant is a legal principle known only to public law and as such is entirely inapplicable to this alleged private law dispute.

### **Law and Analysis**

[17] The defendant seeks to invoke the court's case management powers pursuant to CPR 26.1(2) (i). CPR 26.1(2) (i) provides that, except where these rules provide otherwise, a court may dismiss or give judgment on a claim after a decision on a preliminary issue.

[18] The determination of a preliminary issue is a case management tool designed to identify issues that may be determinative of a case at an early stage of the proceedings in an effort to save time and costs. In **Craig Reeves v Platinum Trading Management Ltd**<sup>2</sup> Barrow JA stated:

“That is a procedure that the court employs when costs and time can be saved if decisive issues can be tried before the main trial. **Blackstone's Civil Practice 2006** indicates there are three types of orders that can be made: (a) for the trial of a preliminary issue on a point of law; (b) for the separate trial of preliminary issues or questions of fact; and (c) for separate trials of liability and quantum.”

[19] Barrow JA at paragraph 17 stated:

“Wasting rather than saving time, complicating rather than simplifying issues, and engaging in mini-trials with no true justification for doing so, are among the risks that require careful consideration before a court decides to order the trial of a preliminary issue”.

[20] Barrow JA made reference to the dicta of Lord Roskill in **Allen v Gulf Oil Refining Ltd**<sup>3</sup> where he stated:

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<sup>2</sup> SKBHCVAP 2008/004 delivered on

<sup>3</sup> [1981] AC 1001 at 1021-1022.

“5... your Lordships' House has often protested against the procedure of inviting courts to determine points of law upon assumed facts. The preliminary point procedure can in certain classes of case be invoked to achieve the desirable aim both of economy and simplicity. But cases in which such invocation is desirable are few. Sometimes a single issue of law can be isolated from the other issues in a particular case whether of fact or of law, and its decision may be finally determinative of the case as a whole. Sometimes facts can be agreed and the sole issue is one of law...”

[21] The court is to now determine whether the interest of justice would be better served in the determination of the preliminary issues identified by the defendant at this interlocutory stage and dismiss the claim or whether the matter should proceed to trial for a determination of the substantive issues .

#### **The Claimants' Argument**

[22] The essence of the claimants' argument is that: first, they entered into the contract with Francis & Antoine, Attorneys-at-Law, because they were directed and/or advised to do so by the defendants. Second, Francis & Antoine, Attorneys-at-Law, failed to discover the encroachment on the property of Angela Flood. Third, Francis & Antoine, Attorneys-at-Law, had an obligation to the defendant to investigate title to the property to be purchased to ensure that it is free from any encumbrances whatsoever; or if so, to take the necessary steps to ensure that at the time of the transfer of title, the property is unencumbered. Fourth, consequently, Francis & Antoine, Attorneys-at-Law, were the agents of the defendant when it undertook to investigate title on behalf of the defendants.

[23] The question that will have to be determined at trial with proper submissions and authorities is what was the nature of the relationship of Francis & Antoine, Attorneys-at-Law, whether they were acting as agents on behalf of the defendant. Agency “is a commonplace word which is used to describe the relationship that arises where one man is appointed to act as the representative of another”: **Cheshire, Fifoot and Furmston's Law of Contract**<sup>4</sup>. The text **Roy Goode, "Commercial Law"** states that “Agency is the relationship arising where one

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<sup>4</sup>(Oxford: Oxford University Press, 2012, 15th edition)



person, the principal, appoints another, the agent, to bring about, modify or terminate legal relations between the principal and one or more third parties<sup>5</sup>.

[24] Francis & Antoine, Attorneys-at-Law, were employed by the claimants for the purpose of the loan transaction. The scope of the duty owed by Francis & Antoine, Attorneys-at-Law, to the claimants would first depend on the retainer agreed between them. In **Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp**<sup>6</sup>, it was stated that the extent of a duty owed by a solicitor to his client “depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.”

[25] It cannot be said that by entering into a contract for the provision of professional legal services relating to the loan, Francis & Antoine, Attorneys-at-Law, were acting as the representative of the defendant. The claimant will have to prove to the court that the established methods by which agency can be created whether by express appointment or estoppel apply in the instant case. In my view these are issues to be determined at trial.

[26] The claimants in their submissions rely on agency by ratification, which applies where without prior authority a party purports to contract with a third party for and on behalf of the Principal and the Principal later adopts the contract. The claimants submit that ratification is a legal principle which need not be pleaded in the claim but will arise at trial. The claimants argue that the “tort committed by Francis & Antoine in declaring the adequacy of the security for the loan to the claimants by the defendant bank was ratified by the bank by its acceptance of the finding of Francis & Antoine and more particularly by the disbursement of the proceeds of the loan to the claimants.” The claimants submit that the firm of Francis & Antoine was also the visaeing Attorneys for the bank and approved the inadequate title for the defendant bank.

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<sup>5</sup> (Penguin, 3rd Edn, 2004) 164.

<sup>6</sup> [1979] Ch. 384, 402

[27] Agency by ratification requires the defendant to have ratified a contract entered into by Francis & Antoine, Attorneys-at-Law on the defendant's behalf. The claimants' argument could only be sustained if it is accepted by the trial judge that the defendant was in the business of providing legal services, and Francis & Antoine, Attorneys-at-Law, were contracting on behalf of the defendant to provide professional legal services to the claimants. Those are all issues to be determined at a trial and not at this interlocutory stage.

[28] It is not unusual for the same attorneys to act on behalf of the lender/mortgagor and borrower/mortgagee. The applicable principles as stated by Millet LJ in **Mortgage Express Ltd. v. Bowerman & Partners**<sup>7</sup> are as follows:

A solicitor who acts both for a purchaser and a mortgage lender faces a potential conflict of duty. A solicitor who acts for more than one party to a transaction owes a duty of confidentiality to each client, but the existence of this duty does not affect his duty to act in the best interests of the other client. All information supplied by a client to his solicitor is confidential and may be disclosed only with the consent, express or implied, of his client. There is, therefore, an obvious potentiality for conflict between the solicitor's duty of confidentiality to the buyer and his duty to act in the best interests of the mortgage lender.

[29] An attorney who acts for both the borrower and lender in a property transaction would owe each of them a duty of care to ensure that both acquire good and marketable title to the property, which might safely be accepted as security. In **Halifax Mortgage Services Ltd v S & S (A Firm)**<sup>8</sup>, His Honour Judge Humphrey Lloyd, Q.C. stated that:

The solicitor is to exercise his skill and judgment in carrying out the normal duties of a solicitor when instructed to investigate title. ... those duties include a duty to inform the lender of facts discovered in the course of investigating title which a reasonably competent solicitor would realise might have an effect on the valuation of the security upon which the lender has relied when deciding to offer the advance.

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<sup>7</sup> [1996] 2 All E.R. 836

<sup>8</sup> [1998] P.N.L.R. 616.

[30] The security of knowing that the title is good and the property is free of encumbrances is what the client purchases when he retains an attorney to search title for him. Oliver J In **Midland Bank Trust Co. Ltd. and Another v Hett, Stubbs & Kemp (A Firm)**<sup>9</sup> stated that:

“the extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do. ... the test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession”.

[31] Counsel for the claimants states that the extent of the encroachment was obvious as it was delineated on the survey plan presented to Francis & Antoine. The claimants on the facts as pleaded seem to be suggesting lack of due diligence on the part of Francis & Antoine, Attorneys-at-Law, to identify and advise on the blatant encroachment on the property of Ms. Eugene-Flood, as shown on the survey plan. The court notes that Francis & Antoine, Attorneys-at-Law, were not made a party to the claim. The claimants’ claim is for breach of contract against the defendant for the actions or inactions of Francis & Antoine. The precise scope of the relationship and the duty of care and skill to the defendant and/or claimants in relation to Francis & Antoine are in my considered view all issues to be determined at trial.

[32] In the course of a transaction for transfer or sale of land it is the responsibility of the purchaser to ensure that the vendor has a valid title by a simple inspection of the land register. The land register mirrors the title of the registered proprietor of the parcel under the **Land Registration Act**. The survey plan reflects the dimensions, any structures and other physical encumbrances on the said parcel. The purchaser would usually formally seek information from the vendor about the land and his title to it.

[33] The claimants do not argue that the Francis & Antoine, Attorneys-at-Law, knew about the encroachment and had failed to inform them. The claimants in their

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<sup>9</sup> [1979] Ch. 384

claim state that it was an implied term and condition of the contractual relations between the claimants and the defendant bank, that the defendant would exercise all reasonable care skill diligence and competence in ensuring that their customer had a good title in the land offered for security for the loan. The claimants seem to be asserting that in giving advice, Francis & Antoine, Attorneys-at-Law, were providing advice on title to the defendant. This they were contractually bound to do by the terms of any retainer they would have with the defendant bank. The nature of the retainer, if any, would assist the court at trial to determine the extent of liability, if so found, on the evidence at trial.

- [34] The claimants submit that the defendant owed to them a duty of care not to make a misrepresentation as to the efficacy of the security and also a duty of care arising from the assumption of responsibility for putting in place an effective security, and that the defendant was in breach of both these duties. The court will have to make a determination whether the law can and should impose a duty of care on the defendant to the claimant in respect of the provision of an effective security, the benefit of which to his knowledge was fundamental to the loan transactions. The court would have to determine whether there was the necessary foreseeability of damage and the necessary relationship of proximity for the law to impose such a duty of care and it is fair, just and reasonable that such a duty should be imposed.
- [35] The encroachment of the dwelling house on the property purchased by the claimant onto the property owned by Ms. Eugene Flood affected the security provided by the defendant. It is arguable that in such circumstances a duty of care on the defendant would only exist if it is determined at trial that Francis & Antoine were acting on behalf of the defendant.
- [36] In their Statement of Claim, the claimants are effectively arguing that the defendant is liable for the actions of Francis & Antoine, Attorneys-at-Law in not advising them of and/or taking steps to ensure that the claimants received good

title at the time of purchase. The liability Francis & Antoine, Attorneys-at-Law, could be based on their duty to: (1) the claimant as borrower; and (2) the defendant as lender. The claimants do not argue that Francis & Antoine, Attorneys-at-Law, were liable qua attorney for the defendant. They argue that, since they (the claimants) used the attorneys suggested by the defendant, the defendant is liable for the alleged negligence of Francis & Antoine, Attorneys-at-Law.

[37] The issue to be determined as alleged is whether the defendant exerted undue influence to cause the claimants to use Francis & Antoine. It is question of fact whether the defendant merely advised the claimants to use Francis & Antoine, Attorneys-at-Law, or whether, in the circumstances, the claimants felt they had no choice but to use the attorneys suggested by the defendant, or whether notwithstanding the advice the claimants used the Francis & Antoine, Attorneys-at-Law, of their own free will. The fourth part relates to the detriment to the claimants caused by using the attorneys suggested by the defendant. The application of these principles to the facts (to be decided) cannot be determined without a trial.

### **Conclusion**

[38] A determination of a preliminary issue prior to trial is a procedure used by the court to save time and costs in circumstances where decisive issues can be determined in advance. This is all in keeping with overriding objectives of the Civil Procedure Rules. In deciding whether to try preliminary issues in advance of the substantive trial the court views the case in the context of the need to administer justice in the entire circumstances of the case. The court is to consider whether the preliminary issues are readily capable of determination in isolation of the other issues in dispute between the parties.

[39] **Craig Reeves v Platinum** and authorities referred therein have protested against the procedure of bringing, except in clear and simple cases, points of law for preliminary decision. There facts as pleaded before this court are not that straight

forward to admit of a clear-cut solution in advance. On the facts, the claimants must prove their case by first establishing that the firm of Francis & Antoine was either impliedly, expressly or by estoppel acting on behalf of the defendant. It may be difficult at this interlocutory stage to give a final decision on what in essence would be the substantive issue(s) to be determined at a trial. The burden lies on the claimants to prove the existence of the relationship between the defendant and Francis & Antoine, sufficient to establish a breach of that duty and the resultant loss suffered by the claimants. On the other hand, it would be for the defendant to establish that such a nexus did not exist between the parties and to clear itself of any duty owed to the claimants as a result. It follows that an affirmative answer now given to the prescribed questions can only be tentative as the question on these issues turns on the ascertainment of nexus between the parties giving rise to the alleged breach of contract and loss suffered by the claimants.

[40] The proofs necessary to establish the nature of the contractual relationship between the claimants, defendant, Francis & Antoine and the loss suffered by the claimants are all so intricately entwined. A determination of the preliminary issues at this stage would undermine the strength of the claimants' case, or the response which the defendant might make to it.

[41] The defendant in submissions and during the oral hearing challenged the issue of legitimate expectation stated at paragraph 5 of the statement of claim. Counsel for the claimants at the oral hearing conceded that the issue of legitimate expectation was inappropriate in a civil claim and should be expunged. The court ought to bear in mind that so long as the statement of claim or the particulars disclose some cause of action, or raises some question fit to be decided by the judge the mere fact that the case is weak and not likely to succeed is no ground for dismissing or striking it out. The court has the power of correcting any defect or error in proceedings or to order either that the pleading be amended or that the objectionable matter be struck out. Accordingly paragraph 5 of the amended statement of claim is struck out. The claimants are granted leave to file a further

amend statement of claim to reflect the stance taken at the oral hearing within 14 days of today's date.

[42] Having reviewed the facts and authorities presented, I am of the view that the pleadings and the evidence before the court raise issues of mix facts and law which should be ventilated at trial with proper evidence. I am of the view that the facts and the issues arising are not appropriate for a preliminary determination at this interlocutory stage. Accordingly the application to determine the preliminary issues and to dismiss the claim is refused. I take into consideration that the defendant had partial success on the issue of legitimate expectation and accordingly make a nominal order for costs in the sum of \$350.00

#### **Order**

[433] In summary it is ordered as follows:

- (1) The defendant's application to determine preliminary issues and to dismiss the claim is refused with costs in the sum of \$350.00 to the claimants.
- (2) Leave is granted to the claimants to further amend the amended claim form filed on 27<sup>th</sup> January 2015.
- (3) The claimants shall file and serve the amended statement of claim within 14 days of today's date.
- (4) The defendant may file and serve an amended defence, if necessary, within 14 days of service by the claimants.
- (5) Thereafter the matter shall proceed in accordance with CPR 2000.

**Agnes Actie**  
Master