

**THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SLUHCV2015/0791

BETWEEN:

DR. CHARLES ISIDORE

Claimant

and

GERARD WILLIAMS

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:

Mr. Horace Fraser for the Claimant

Mr. Dexter Theodore QC with Mr. Sandy John for the Defendant

Claimant and Defendant present

2017: February 14;
May 18.

JUDGMENT

- [1] **CENAC-PHULGENCE, J:** Charles Isidore, ("Isidore") a doctor of chiropractic brought this claim against attorney-at-law, Gerard Williams ("Williams") in his professional capacity as a Notary Royal for damages and consequential loss for negligence, breach of contract and/or breach of duty in respect of services rendered to him by Williams.

Background Facts

- [2] In May 2012, Isidore entered into an agreement with the trustees for sale to purchase a property situate at Tapion, Castries ("the Dolcy Property"). In or about June 2012, after obtaining approval for a loan facility from the 1st National Bank (Saint Lucia) Limited ("1st National") on 29th June 2012, Isidore retained the services of Williams to execute the deed of sale and hypothecary obligation. The loan facility was to purchase and refurbish the Dolcy Property.
- [3] The trustees for sale, Mildred Samuel, Marlon Dolcy, Sharika Chanel Dolcy and Phyllis Dolcy all resided overseas and were represented at the time of the agreement for sale by duly constituted attorneys. Each trustee had executed his/her individual power of attorney.
- [4] Isidore pleaded that his purpose for purchasing and refurbishing the property was to establish commercial premises offering the rental of office and business space to persons and that he expressly communicated that purpose to Williams. This was vehemently denied by Williams.
- [5] In April 2013, 1st National paid the Chambers of Williams the purchase price of the property being \$650,000.00 plus legal fees in the sum of \$38,984.50. Isidore was to start construction works in June 2013 which works were to have been completed by November 2013.
- [6] In September 2013, 1st National refused to release any further sums under the loan facility to Isidore due to concerns that the loan facility was unsecured as the deed of sale and hypothecary obligation had not yet been registered. It is Isidore's case that this affected his ability to complete the refurbishment works on the Dolcy Property and to put it in readiness for business. As a result, Isidore claimed that

he defaulted on his obligation to pay the loan.

- [7] The deed of sale was submitted to the Inland Revenue Department in January 2014 and to the Land Registry on 27th January 2014. The Land Registry returned the deed of sale without registering it and with a query regarding the fact that the powers of attorney by the trustees for sale did not contain the trustees' clause as required by article 2165 of the **Civil Code**. The powers of attorney then had to be re-executed to include the trustees' clause. The deed of sale was finally registered on 12th February 2015 and the hypothecary obligation on 3rd March 2015.
- [8] Isidore claimed that the loss he suffered is as a result of Williams negligence in failing to note that the trustees clause was absent from the powers of attorney and failing to properly advise him on all matters affecting the registration of his title to the Dolcy property and the hypothecary obligation.

The Amended Defence

- [9] Williams admitted in his amended defence that Isidore expressed his intention to use the Dolcy Property as business premises for the sole purpose of his office. He averred that there was no further communication between them as to Isidore's plans to offer office space for rent to third parties.
- [10] Williams averred that the mortgage documents and deed of sale which he prepared were vetted by 1st National Bank's attorneys who approved the said documents and that 1st National acting on the strength of their attorney's approval disbursed the purchase price and legal fees.
- [11] Williams averred that he acted at all material times within the confines of his notarial duties and the deed of sale and hypothecary obligation were duly

registered in accordance with his duties and obligations.

- [12] Williams asserted that upon the issuing of the letter of undertaking to 1st National dated 18th April 2013, his duty to register the said notarial documents was owed to the bank and not to the claimant himself. He averred that any action in negligence must fail as there existed no duty between the parties with respect to the registering of the hypothecary obligation. He denied the allegations of negligence pleaded by Isidore and also averred that there was no evidence to show that he breached his duty of care or failed in his contractual duty.
- [13] Williams further averred that Isidore even after having full knowledge of the condition of the powers of attorney continued to receive without complaint further disbursements from 1st National for the purpose of the works to be conducted on the Dolcy Property.
- [14] By letter dated 19th February 2014, 1st National wrote to Williams requesting information on the registration of the documents and Williams responded by letter dated 19th October 2014, informing them that the delay was due to Isidore's refusal to pay the registration fees as required. This he advised resulted in the mortgage not being registered.
- [15] Williams averred that Isidore's inability to service his debt is of no concern to him and remained Isidore's sole responsibility regardless of the circumstances in which he found himself. He therefore denied that Isidore has suffered any loss occasioned as a result of his conduct and denies that Isidore is entitled to any damages.

Issues to be decided

- [16] The issues for the Court's determination are:
- (a) Whether a duty of care existed between Williams and his client Isidore in law.
 - (b) If so, did Williams breach the duty of care?
 - (c) Did Williams' breach of duty cause any damage or loss to Isidore and if so, was the loss foreseeable?
 - (d) Did Williams breach the contract which existed between himself and Isidore?

Whether a duty of care existed between Williams and his client Isidore in law

- [17] In his amended defence, Williams averred that once he issued the letter of undertaking to 1st National he did not owe a duty of care to Isidore to register the hypothecary obligation. Interestingly, he did not speak to his duty to Isidore as relates to the registering of the deed of sale. In cross-examination however, Williams admitted that he owed duties both to 1st National and to Isidore but denied that his primary obligation was to Isidore. There is clear authority for the fact that a lawyer can owe a duty of care to different people arising on the same transaction but the standard of care in relation to each person is the same.
- [18] It is clear that there is acknowledgement on the part of Williams that he owed a duty of care to Isidore as his client. Counsel for Williams, Mr. Dexter Theodore, QC submitted correctly that a solicitor can owe a duty of care to his client in both contract and in tort. In relation to contract, the starting point has to be the precise ambit of his instructions. Liability to a client in contract will arise by virtue of a retainer i.e. the agreement under which the solicitor is engaged to act.

[19] The standard of care and skill which is required of a lawyer is that of a reasonably competent and diligent solicitor. His duty to act with that degree of care and skill arises originally from the fact that a professional man warranted that he possessed and would exercise in the execution of the task he undertook the care and skill expected of a person practising that profession.¹

[20] Having established that Williams did owe a duty of care to Isidore as his lawyer, I proceed to the second issue.

Did Williams breach the duty of care?

[21] Isidore's case is that Williams breached the duty of care to him when he failed to appreciate that the powers of attorney which he had supplied him with were defective in that they did not contain the trustees' clause which was necessary for the sale to be effected.

Williams' evidence

[22] In his amended defence, Williams at paragraph 8 averred that 'at all material times he acted within the confines of his notarial duties and that the deed of sale and hypothecary obligation were registered in accordance with his duties and responsibilities.

[23] In his amended defence, Williams denied the allegations of negligence. The particulars of negligence as alleged by Isidore are as follows:

- (a) Failing to take note of the need for the trustees' clause to be inserted in the power of attorney instruments.
- (b) Failing to advise the claimant of the error to endeavour to correct the error

¹ Bell v Peter Browne & Co. (a firm), [1990] 3 All ER 124 at 132, per Beldam LJ.

in a timely manner.

- (c) Failing to be cognisant of the reason for the non-registration of the documents.
- (d) Failing to ascertain in a timely manner the reason(s) for the non-registration of the deed of sale.
- (e) Failing to properly advise him of all matters affecting the registration of his title to the property and the hypothecary obligation.

[24] In his witness statement, Williams says²:

“On arriving at my office, I had a cursory inspection of the document which was delivered by the Claimant. Apart from the instruction letter from the Claimant’s bank was what appeared to be a duly executed Agreement for Sale, 4 Powers of Attorneys for the vendors, all executed by different Attorneys, together with other supporting documents....”

[25] At paragraphs 9-11, Williams’ evidence is as follows:

“9. Notarial documents, once prepared by my staff, would pass these on to me for vetting and execution. This transaction was no different with the exception that it took a little longer to gather all the trustees’ clearance documents who were acting collectively as vendor. Again, this was not our responsibility but assisted the Claimant in gathering the vendor’s documents without charge. ...

10. ...

11. The Deeds with the Powers of Attorney together with the other supporting documents were forwarded to the bank’s attorneys, ...for vetting. The transaction having met the approval of the bank’s attorney was returned to my Chambers.”

[26] At paragraph 17, Williams gives evidence as follows:

“The Deed of Sale was then sent to the Land Registry for registration. About 14 days after, I was informed that the documents had been returned by the Registrar with a query with respect to the trustees’ clause

² At paragraph 8 of witness statement filed 30th June 2016.

which had been omitted in the Powers of Attorneys which was submitted by the Claimant. ...”

[27] At the trial, counsel for Williams applied for permission to amplify the evidence in relation to this paragraph. Williams in amplification then gave evidence to the effect that “it was permissible by the Land Registry to register deeds of sale accompanied by Powers of Attorney without the trustees’ clause.” The Court notes that this is the first time that Williams ever spoke of or gave evidence of this alleged ‘practice/policy’ of the Land Registry. The alleged practice/policy had not been raised in his defence or in his witness statement.

[28] Williams also gave evidence that it was not his responsibility to rectify the defects in the powers of attorney but nevertheless he assisted by contacting the vendors’ attorneys. He said that the extent to which his office went in accommodating the claimant was beyond the call of duty and that may very well be the case. Williams also said that throughout the period the claimant’s bankers kept in touch with his Chambers by telephone and in writing to be apprised of the status of their security.

[29] At paragraph 24 of the Witness Statement, Williams’ evidence is as follows:

“In reply to the bank’s regular enquiries, I updated the Securities Department on the Claimant’s conduct which resulted in my not having registered the deed to date... Naturally, the Claimant’s conduct attracted further delays considering that my letter dated 13th October 2014 did not attract a response from the Claimant until 14th December 2014 when he paid these monies into my Chambers”

[30] Williams said Isidore contracted his services to register his Deeds, which were done as soon as circumstances permitted. His duty to the bank to register its security was also done within the timeline governed by the circumstances.

- [31] Williams in his evidence in chief stated that there was no error made in the drafting of the deed of sale or hypothecary obligation.
- [32] Williams in cross-examination said that when he said that he had a cursory glance at the documents he received from 1st National he meant that he would go through to check what was included and what was omitted. He admitted that he would not go into detail into the documents at that time. He admitted that when he passed the documents to Ms. Best, his office manager he did not inspect any of the documents in detail. When asked whether he did not realise that the trustees' clause was missing at the point when he vetted the documents, he said that he was aware at that stage that it was missing from the powers of attorney.
- [33] Williams admitted that despite the fact that he knew that the trustees' clause was missing he proceeded with the transaction. He admitted that he did not call Isidore at that point to indicate that the powers of attorney were defective. Williams gave evidence in cross-examination that the problem with the powers of attorney took 5 months to be corrected and an additional 2 months to get the attorneys to come into sign the deed of sale.
- [34] In cross-examination, Williams agreed with counsel, Mr. Fraser that in the hypothecary obligation and deed of sale express reference was to be made to the powers of attorney through which the transaction was being executed. Mr. Fraser put it to Williams that his clerk prepared the documents and he did not read any of them. Williams disagreed.
- [35] In re-examination, Williams' evidence was that by the time he became aware of the absence of the trustees' clause, Isidore had taken possession of the building and since he was aware that all the trustees resided out of Saint Lucia, he decided

to proceed to have the documents processed by sending them to the Inland Revenue and Land Registry. He said he did this because **in the past he was aware that the Land Registry and he had experienced it where the Land Registry had permitted the registration of documents absent the trustees' clause.** He said he did not anticipate that the documents would have been returned.

Adjoiva Best's evidence

[36] Adjoiva Best is the Paralegal/Office Manager at Williams' Chambers for the past 6 years and has been in the legal field for 12 years and she said that she is familiar with the aspects of conveyance.

[37] At paragraph 7 of her witness statement, Ms. Best said as follows"

"Upon conducting my due diligence, it was discovered that the Power of Attorneys [sic] presented on behalf of 2 of the 4 co-owners were null and void as the Constituents had previously revoked all powers issued to Catherine Trim their Attorney as stated in the said documents."

[38] At paragraph 9, Ms. Best's evidence is as follows:

"I spent over three and a half months, consisting of lengthy telephone conversations to the United Kingdom including emails to Mrs. Andrea Dolcy, Marlon Dolcy and Chanel Dolcy in an attempt to convince them to issue new power of attorneys [sic] and to continue with the sale of the property to our then client, the Claimant. I tried enthusiastically to compel them to sell to the Claimant, seeing that he had taken up residence at the premises and had started to refurbish the said building."

[39] Ms. Best gave evidence that on or about 3rd September 2012, the powers of attorney from Marlon and Chanel Dolcy were received. She said that in the interim she prepared all deeds in anticipation of receipt of the requisite documents from

the vendors. Everything was then forwarded to 1st National's attorneys for "visae". There was no mention in her evidence of the documents being vetted by Williams before they went to "visae".

[40] Ms. Best also gave evidence that as a result of the omission of the trustees' clause which was cited in the query received from the Land Registry, new powers of attorney had to be executed and this she said proved to be one of the most tedious and overwhelming exercises.

[41] In cross-examination, Ms. Best admitted that she was not familiar with the trustees' clause at the time of this transaction. Ms. Best also said in her evidence that she had done transactions where there were trustees for sale but yet admitted that she was not familiar with the trustees' clause. Ms. Best also admitted that prior to 27th January 2014, (that is the date when the powers of attorney were returned from the Land Registry with the query) she did not indicate to Isidore that the powers of attorney had a problem. This is consistent with the Williams' evidence. She also gave evidence that prior to that date she had never indicated this to 1st National either.

Analysis

[42] The standard of care owed by a lawyer is that of a reasonably competent and diligent solicitor. The authors of **Charlesworth and Percy on Negligence**³ state that in order to prove that there has been a breach of a duty of care, it is not enough to prove that a solicitor has made an error of or shown ignorance of some particular point of law: it must be shown that the error or ignorance was such that an ordinarily competent solicitor would not have made or shown it.

[43] The learned authors further state that although the terms of the retainer are the

³ (11th edn., Sweet & Maxwell 2006) 611.

starting point when determining the scope of a solicitor's duty and the standard of care required, it behoves a solicitor to be wary and even where the retainer is capable of narrow definition a duty of care can arise, at least to warn of a problem of which there is actual or constructive knowledge, where it may prevent the ultimate object of a client being advanced.

[44] It would appear that Williams accepted his duty to Isidore to be registration of the deed of sale and in respect of the registration of the hypothecary obligation, his duty was owed to 1st National. But I must admit that I am at a loss since the registration of the deed of sale and hypothecary obligation must be done as a contemporaneous transaction. Even though the bank issued instructions with regard to registration of the hypothecary obligation to Williams, he still owed a duty to his client to ensure that both documents were registered. In fact, without registration of the deed of sale, the hypothecary obligation could not be registered. Isidore paid Williams to execute and register the two documents and he owed a duty of care in the preparation of these documents which cannot be denied.

[45] In his submissions, counsel for Williams, Mr. Dexter Theodore, QC contended that a client cannot expect a solicitor to undertake work he has not asked him to do, and will not wish to pay him for such work. Counsel relied on the case of **Midland Bank Trust Co. Ltd. et al v Hett, Stubbs & Kemp (a firm)**⁴ for his submission that the extent of a solicitor's duties depends on 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. Mr. Theodore, QC submitted that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do.

⁴ [1978] 2 All ER 571 at 583.

- [46] Mr. Theodore, QC further submitted that Isidore did not ask Williams to prepare or correct the powers of attorney or to give him advice on the suitability of the powers of attorney. In essence, he submitted that the retainer between Isidore and Williams did not extend to this. Isidore's instruction to Williams was to prepare a deed of sale and hypothecary obligation. This necessarily entailed all matters which would be incidental to the preparation of the documents. Therefore, it is a lawyer's duty to advise his client as to what is required for the proper execution of the documents. The evidence does not at all suggest that Isidore ever engaged Williams to correct the powers of attorney. How could he have done this when by Williams' and Best's own admission they did not tell Isidore about the problem with the powers of attorney when they became aware that there was a problem.
- [47] Isidore's evidence was that Williams appeared to be nonplussed as to the reason why the documents could not be registered and were returned to him - Williams had no answer for him when he asked him about the registered documents. This evidence is consistent with the testimony of Williams and Ms. Best in cross-examination when they both admitted that they did not advise Isidore of the problem with the powers of attorney before the deed of sale was rejected by the Land Registry. I believe the evidence of Isidore.
- [48] Mr. Theodore, QC contended that Isidore did not prove what he would have done had Williams given him advice that the powers of attorney did not contain the trustees' clauses and may or may not be regarded as acceptable by the Registry of Lands. I cannot agree with counsel's submission. The issue as to the implications of the presence or absence of the trustees' clause in a power of attorney and the impact on a transaction is a purely legal matter and not one which an ordinary non-legal person is expected to appreciate. It is for a lawyer to properly advise his client on the implications of the absence of the clause and

what would have to be done in the event the documents were rejected by the Land Registry. It was for Williams to inform Isidore that if the documents were rejected the powers of attorney would have to be re-executed. Reliance on advice has to be assessed in terms of the nature of the advice and all the circumstances of the case.

[49] In determining whether an error made by a lawyer is negligent, he should not be judged by the standard of what 'a particularly meticulous and conscientious practitioner' would elect to do but what 'the reasonably competent practitioner would do having regard to the standards normally adopted in the profession'.⁵ In **Sykes v Midland Bank Executor & Trustee Co Ltd**,⁶ it was held that an error by a lawyer may constitute negligence, without that error being morally blameworthy or indicative of incompetence.

[50] I find it extremely difficult to accept the testimony of Williams that he decided to send the deed of sale to be registered even though he knew that the powers of attorney did not have the trustees' clause for several reasons. In his defence Williams never even raised the practice/policy of the Land Registry as one of the reasons for his contention that he was not negligent. In his witness statement, that evidence is absent as well. It was only at trial that he sought to introduce the element of the practice/policy of the Land Registry which he says he is aware of and personally experienced. Yet, Williams brought no documentary evidence or evidence of any kind in support of this practice/policy which he ascribes to the Land Registry. In the absence of any evidence, I find it hard to believe him on this.

[51] Ms. Best never said in her testimony that Williams vetted the documents which

⁵ See *Midland Bank* at 403 per Oliver J.

⁶ [1971] 1 QB 113.

she had prepared before they went to 1st National's lawyers although Williams said that he vetted the documents before they went out and it was then he realised that the trustees' clause was absent. Ms. Best's evidence is that prior to preparation of the documents, she had through her diligence, recognised that two of the powers of attorney in relation to Marlon Dolcy and Chanel Dolcy would have had to be re-executed as the power in favour of the previous attorney Catherine Trim had been revoked. Isidore in cross-examination testified that he was not aware of this and was not informed. This was an opportunity to ensure that the trustees' clause which was necessary would have been included in the new powers of attorney. But it is clear that this was not done.

[52] Article 2165 of the **Civil Code**⁷ provides that a trustee who intends to remain out of the State for more than one month may by power of attorney duly registered delegate to any person the execution or exercise during his absence from the State of all or any trusts, powers and discretions vested in him as such trustee, either alone or jointly with any other person or persons. The article makes clear that a trustee must give specific power to an attorney to act on his behalf in relation to his powers and duties as trustee.

[53] It is clear from this article that a general power of attorney with no specific reference to the trustee's powers and duties is insufficient to give power in relation to such powers and duties.

[54] It is quite curious that a lawyer of the number of years standing as Williams knowing that this transaction involved trustees for sale would not have made it his business to ensure at the very least that he checked the powers of attorney to ensure that they contained the trustees' clause before passing them to Ms. Best

⁷ Cap.4.01, Revised Laws of Saint Lucia 2013.

for the documents to be drafted. Had he done so, then perhaps he could have advised Isidore then that the powers of attorney would need to be re-done. I do not believe that Williams knew that the trustees' clause was absent at the point when he vetted the documents. Even if he knew, he had a duty to advise Isidore of what would happen if the documents were rejected by the Land Registry which he failed to do.

[55] It has been held that compliance with accepted practice is not conclusive against negligence and if the risks are obvious then the defendant remains liable. The risks inherent in the decision made by Williams to send the documents to the Land Registry despite the absence of the trustees' clause must be considered. He ran the risk that at that stage if the documents were rejected, he would have to instruct the client that all the powers of attorney had to be re-done. This would have meant a further delay in the registration of the documents.

[56] Even if I accept Williams' evidence of the reason for his submitting the documents without the trustees' clause, which I do not, it would still not avail him. In **Edward Wong Finance Co. Ltd. v Johnson Stokes & Master**⁸ solicitors acting for mortgagees followed the usual practice of paying the purchase price to vendors' solicitors against the latter's undertaking to pay off existing encumbrances. The vendors' solicitors decamped with the money, and the mortgagees failed to get an unencumbered title. Their solicitors were held liable to them in negligence. The Privy Council accepted that they had complied with general practice of the profession but concurred with the dissenting judgment of Li JA in the Hong Kong Court of Appeal that while the evidence "goes a long way to show that [the solicitor] was not negligent, that is not conclusive." The defendants ought to have foreseen the risk of loss in the Hong Kong practice should the vendors' solicitor be

⁸ [1984] AC 296 at page 305-306.

dishonest, and should have taken precautions to avoid the risk.

[57] A lawyer has a duty to explain documents to his client and to provide information. It is therefore accepted that where a solicitor is in possession of, or comes across information while acting for his client, he must pass the information to his client in so far as it is relevant to the client's interests and the transactions in which he is interested. It is clear from the evidence that Williams failed to give Isidore any information on the absence of the trustees' clause when he found out that the clause was missing. Even in relation to 1st National, their letter of 19th February 2014 stated that they had made inquiries about the late registration of the hypothecary obligation and received various explanations. There is no evidence that 1st National was told of the problem with the trustees' clause and registering the deed of sale and the impact that this would have on the registration of the hypothecary obligation.

[58] Further, the documents were received in June 2012. According to Ms. Best's evidence after she found out that two of the powers of attorney had been revoked, she proceeded to have the two trustees execute new powers of attorney. This was executed in September 2012, some 3 months after the instructions were issued by 1st National. These two powers of attorney were registered in December 2012. Between January 2013 and January 2014, according to Ms. Best's evidence, several activities took place including "visae" of the documents by 1st National's lawyers, the submission to Inland Revenue, negotiation by Williams with Inland Revenue with regard to the value of the property, execution and radiation of an existing judicial hypothec. The deed of sale was submitted to the Land Registry in January 2014 and returned in February 2014 with the query regarding the absent trustees' clause.

[59] Thereafter, Williams had to ask the trustees for sale to execute new powers of attorney. That would have been the second time for Marlon and Chanel Dolcy. The power of attorney from Mildred Samuel was executed in June 2014, 5 months after the rejection of the document from the Land Registry. In May 2014, the power of attorney for Phyllis Dolcy was received, 4 months after. The Chanel and Marlon Dolcy power of attorney was registered in July 2014, 6 months after. I highlight this to illustrate that had Williams paid attention to the absent trustees' clause from the start, the trustees could have executed new powers of attorney by December 2013 whilst some of the other activities were being undertaken. The deed of sale would have been registered sooner as there would have been no need to battle the problem of the absent trustees' clause.

[60] I find that a reasonably competent and diligent lawyer knowing the importance of the trustees' clause in a power of attorney would have even if taking a cursory glance at the documents received, ensured that the clause was there and if it was not, advise the client of the implications and what needed to be done. Williams would have known that the transaction involved trustees for sale. Even with ordinary transactions involving attorneys acting for persons, it behoves a competent and diligent lawyer to check the power of attorney provided to ensure that the power to be exercised is adequately provided for in the power of attorney. I do not believe that Williams checked the documents for the presence of the trustees' clause. I believe he checked to ensure that the powers of attorney were there but that he did not have regard to whether the trustees' clause was specifically included.

[61] A lawyer must take care to read documents thoroughly. In the Hong Kong decision of **Hondon Development Ltd. v Powerise Investments Ltd.**⁹ solicitors

⁹ [2005] 3 HKLRD 605.

were held negligent in not spotting a discrepancy in the size of a shop unit apparent from conveyancing documents.

- [62] I therefore find that Williams breached his duty of care to Isidore and was negligent. I also find that although Isidore retained Williams to prepare the deed of sale and hypothecary obligation, this necessarily involved all matters incidental with the preparation of such documents which necessarily must mean ensuring that where a transaction is being carried out by virtue of powers of attorney, that the necessary power is contained in the power of attorney. Therefore, I also find that Williams also breached his duty of care to Isidore in contract.

Did Williams' breach of duty cause any damage or loss to Isidore, and if so, was that loss foreseeable

- [63] It is for Isidore to establish on a balance of probabilities that he has suffered loss and that loss was caused by Williams' negligence. The essential questions are what damage Isidore has suffered, what damage he seeks, and whether it can be established that the damage was caused by Williams' breach of duty. The lawyer is not responsible for all the consequences of his bad advice but for only those caused by the inaccuracy.
- [64] Mr. Theodore, QC referred to the case of **Allied Maples Group v Simmons**,¹⁰ where Stuart-Smith LJ said that what had to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depended on whether the negligence consists of some positive act or misfeasance, or an omission or non-feasance.

¹⁰ [1995] 1 WLR 1602.

- [65] Mr. Theodore, QC submitted that Isidore did not ask Williams to prepare or correct powers of attorney or to give advice on the suitability of the powers of attorney but I have found that Isidore did not ask Williams to do any of these things as he would not have known that these would have been required. However as part of Williams' duty in preparing the necessary documents, he would have had to assess the suitability of the powers of attorney. In that regard, he failed to advise Isidore properly.
- [66] Mr. Theodore, QC submitted that the first question to be answered is what would Isidore have done if he had got the advice on the powers of attorney from Williams. The onus is on Isidore to prove on a balance of probabilities that he would have taken action to obtain the benefit or avoid the risk.
- [67] Mr. Theodore, QC contended that Isidore made no effort to prove what he would have done had the defendant given him the advice that the powers of attorney did not contain the trustees' clause and may or may not be considered acceptable by the Land Registry. He argued that Isidore has failed to do so and so this is fatal to his claim.
- [68] I accept that Isidore does not give any evidence of what he would have done had Williams informed him from the start that the powers of attorney did not contain the trustees' clause and should be re-executed to include same. Assuming though that Isidore had provided evidence of what he would have done had Williams given him advice on the absent trustees' clause or informed him, the Court would have to be satisfied that the loss claimed is as result of the negligence of Williams.

The Loan

- [69] Isidore claimed that as a result of Williams' negligence he defaulted on his loan instalments and that this attracted compound interest on the loan. In this regard, he claimed interest at the rate of 14% on the loan balance from 13th February 2015 to 30th June 2016 and continuing. Was this loss caused by Williams' breach of the duty?
- [70] In Isidore's loan application dated 20th February 2012 which was tendered in evidence, it shows that he stated to 1st National that he had a monthly income of \$35,000.00 and after expenses \$30,650.00. The monthly loan payment according to Isidore's evidence was \$8,340.00. He also testified in cross-examination that although he had stated his monthly income as \$35,000.00 before expenses that figure fell to about \$22,000.00 on average. This he attributed to 'VAT etc.'. He admitted that his income had suffered a dip. He also admitted that he had not stated in his loan application that he had any other source of income, even prospective. Nowhere in his evidence did he suggest that he would be relying on income from rental of the property to pay his loan.
- [71] In cross-examination, Isidore could not remember when he started paying the loan but the loan application at page 3 states that he was to pay interest only for 3 months and thereafter, \$8,271.00 over 215 months commencing 28th May 2013. That amount seems to have increased to \$8,340.00 at some point. Payments on the loan were to commence in May 2013, almost one year after the loan was approved in June 2012. Isidore's evidence was that he was to start construction in June 2013 and end in November 2013. His loan payments were to begin even prior to the start of construction on the building. What the evidence revealed in cross-examination is that Isidore had taken possession of the Dolcy building with permission of the vendors shortly after signing the agreement for sale and that he

had done some renovation works to the building to the tune of \$200,000.00 in order to be able to move his office into the building.

[72] The evidence is that the first disbursement on the loan was on 18th April 2013 which Isidore admitted in cross-examination. When asked whether between May/June 2012 and April 2013 he undertook work from his own funds, he said no. But it is clear that there were no loan funds to be used at that time and he could only have funded the renovations from his own pocket or funds obtained elsewhere. Interestingly, this is the first time that evidence of renovation work being done on the Dolcy Property surfaced. In his evidence in chief, he had said that he began renovation works in June 2013 which was clearly not the truth.

[73] Indeed by Isidore's own admission in cross-examination, the initial renovation which he did to the building was to be a facelift but it turned out that the building was infested with termites which he did not expect and so he had to do more work. When asked in cross-examination whether he needed more money at that point, he said yes and that 'this is where his effort came in'. That 'effort' he clarified as meaning money from his income and from the rental.

[74] In **South Australian Asset Management Corporation v York Montague Ltd.**¹¹ it was held that "a person under a duty to take reasonable care to provide information on which someone else will decide a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong."

¹¹ [1997] AC 191 at 214.

[75] Where solicitors' negligence consisted of failing to inform the lender in a mortgage transaction that they did not have an official search certificate on which the lender could rely for title, it was not enough for the claimant to establish that the transaction would not have proceeded had it been informed of the true position: in fact title taken was a good one and the lender's loss arose because the borrower did not have the means to meet the instalments due under the mortgage, and that loss would have arisen in any event.¹²

[76] Mr. Fraser submitted that Isidore has made out a case for the default interest (from 8.5% to 14% under the mortgage facility) from the 13th February 2015 to 30th June 2016. With all due respect, I cannot find that a case has been made out for this loss and that it is as a result of the negligence of Williams. When 1st National wrote to Isidore on 13th February 2015 this is what was stated:

"Your loan account has not been serviced as arranged and the balance stands at \$840,361.97 of which \$35,311.50 represents arrears in excess of 4 months. ..."

[77] This means that Isidore serviced the loan from May 2013 to about September 2014. His inability to service his loan resulting in default interest being attached to the loan could not be as a result of the delay in the registration of documents or Williams not advising as to the absence of the trustees' clause. It seems more plausible that the default was due to the fact that Isidore had undertaken renovations to the building before the first disbursement of the loan in April 2013 and this affected his financial situation. Isidore was under a contractual obligation to make the loan payments as per his loan transaction with 1st National.

¹² Bristol and West Building Society v Fancy & Jackson [1997] 4 All ER 582.

Loss of income

- [78] Isidore claimed loss of income from the rental of units in the building as follows: (a) the sum of \$144,000.00 for 4 fully furnished 2/1 apartments at \$2000.00 per month for 1 year and 6 months respectively; and (b) the sum of \$36,000.00 for 2 fully furnished 1/1 apartments at \$1,100.00 per month for 1 year and 6 months respectively.
- [79] At the nub of this issue is Isidore's claim that he expressly communicated to Williams the purpose for him acquiring the Docly Property. In his evidence in chief, Isidore gave testimony that 'the reason for purchasing the building was to build and establish a commercial property to house his clinic and to rent out units to tenants wishing to conduct business/professional practice and/or residential use. He says it was a business venture.¹³
- [80] Isidore at paragraph 9 of his witness statement said that 'in discussions with the Defendant regarding his services I solicited regarding the mortgage facility, I stated to him the purpose for which I was purchasing the property, that is, to establish my private clinic and to rent units of the building to other professionals and business people.'
- [81] At trial, in amplification of his evidence in chief, Isidore testified that he had met Williams at the Dolcy property and they discussed the building and the fact that it needed renovations and Williams had indicated that he knew the building and it was an eye sore. He also testified that Williams had come to the building and saw where his office was and the fact that one of the units was vacant.

¹³ At paragraph 4 of Witness Statement of Charles Isidore filed on 30th June 2016.

[82] At paragraphs 10 and 11 of the witness statement, Isidore gave evidence as follows:

“10. In accordance with my plans for the development of the property which is to be financed by the rental of units in the property, I entered into agreements and made arrangements with third parties with respect to the rental of units at the property. ...arrangements were made with Mr. Callum De Myers for long term stay, Ms. Forever for six (6) months, Christine for six (6) months, Charles for long term stay, Teresa J long term stay, Morino Quailo for long term stay and a family with kids for long term stay.

11. The building on the property was converted to house four fully furnished [sic] 2/1 units that can attract rent in the sum of \$1800.00 per month and two (2) fully furnished 1/1 units that can attract rent in the sum of \$1000.00 per month. The monthly instalment on the mortgage is \$8,340.00 and the monthly proceeds to be obtained from the full rental of the units is \$9,200.00.”

[83] Isidore also gave evidence that as part of his plans for managing the commercial building he established and incorporated a company DYSC Incorporated on 13th July 2012 to manage its operations.

[84] Williams in his defence only admitted that Isidore had expressed his intended use of the property as business premises for the sole purpose of his office. He averred that there was no further communication between the parties as to Isidore's personal plans to offer for rent space to third parties. In his witness statement, Williams gave evidence that he met with Isidore in May 2012 at his then clinic in Tapon and they spoke about his plan of purchasing a building in Tapon and Isidore expressed his intention to relocate his clinic there. He said at that point they spoke of the legal fees and stamp duties relating to the deed of sale and hypothecary obligation and also finalised Isidore's plans to incorporate his company, DYSC Inc. under which he now operates.

- [85] Williams also gave evidence that the meeting in May 2012 was one of the few times he met Isidore in person as all other discussions were on the telephone. He said not once did Isidore ever discuss his personal plans other than the relocation of the office/clinic to the new premises once acquired.
- [86] The question therefore is whether on a balance of probabilities I can find that Isidore did tell Williams as part of the discussions he had about the services for which he retained Williams that the purpose for the building was to rent to persons and that that income would be used to pay the loan.
- [87] In cross-examination, when asked whether Williams had come to see him at Tapion to discuss incorporation of the company DYSC Inc., Isidore responded that 'often times, when he came we'd discuss both of them - the loan and the incorporation'. He insisted that the incorporation of the company was not the only topic of discussion. Isidore also admitted in cross-examination that he did not have any document in which he had expressed the purpose of the loan being to rent units.
- [88] Mr. Theodore, QC put it to Isidore that the first time that he ever made any allegation in writing that he had informed Williams that the purpose of the property was for rental of units was in his witness statement. It was also put to Isidore that the first time he ever mentioned renting the units was in his letter of 24th April 2014 where at the last paragraph he says, 'I am making effort to have work continue on the building, but my funds have been exhausted, I need about \$23,000.00 to complete it so I can allow the renters to move in.' In May 2014, 1st National had issued a letter indicating that it would not be releasing any further sums as the hypothecary obligation remained unregistered. I observed Isidore during cross-examination and he constantly did not recall details. He also did not appear to

know about the units which he said he was renting and fumbled on his answers. But he continued to disagree with counsel's suggestion that he had not told Williams that the purpose for acquiring the building was to rent to third parties in addition to moving his clinic there.

[89] Isidore admitted under cross-examination that there was a tenant in the building before he moved in, in June 2012. He said that since then he has had 5 long term tenants and many short term tenants and that he has been able to rent out 5 or 6 units. When asked whether he had received rent from units between 2012 and 2015, he appeared not to be sure and mentioned a Dr. Rocke although the lease document provided is for period 2015-2016.

[90] Williams in evidence in chief stated that he never had any discussions with Isidore as to the reasons or the purpose with respect to the entire building. He said they spoke of the legal fees, the stamp duty and the use of the clinic which he changed to the relocation of the clinic from one location to another.

[91] Williams admitted in cross-examination that he had commented that the building was an eyesore. He could not remember whether he had asked Isidore why he was buying such a building. When asked whether it was possible that Isidore mentioned to him the purpose for which the building was being bought, Williams said it was not possible, except for the indication that it was to relocate his clinic.

[92] I do not find the evidence from Isidore very compelling as although he was adamant that he had expressly told Williams about the purpose of the building being for rental, his evidence was that many times when Williams came to the building they would talk about the loan and the incorporation of the company. Williams' evidence seems credible and I accept when he says that Isidore did not

tell him that the purpose of the loan was to renovate to rent. What I am prepared to accept is that Isidore and Williams may have in conversation on one of Williams visits to Isidore at Tapion spoken of his intention to rent out units. Isidore did not suggest that he told Williams that he intended to rent the building **and** that the rent received was to be used to pay the monthly loan payments. His only contention was that he told Williams that he intended to rent the building.

- [93] I find that Isidore did not convey to Williams his specific intention to rent the building so that the rent could be used towards the loan payments. Having so found, Williams could not be held liable for loss of income from rental of the units. In addition, it would appear that the leases of the property were in the name of DYSC Inc. as lessor and so it is doubted that Isidore could even prove that he personally suffered any loss in any event. This is not a loss which could have been foreseeable by Williams.

Did Williams breach the contract which existed between himself and Isidore?

- [94] Isidore provided this Court with no particulars to substantiate his claim for damages for breach of contract. The only mention is that the deed of sale and hypothecary obligation remained unregistered for a period of 18 months after 1st National had disbursed the funds. However, Isidore has not shown that as part of his retainer, Williams was to have registered the documents within a set time frame. The retainer was to have the documents registered and that was done. There can therefore be no claim for breach of contract.
- [95] Isidore claimed \$250.00 being the additional registration fee which had to be paid but the deed of sale registered on 30th January 2015 shows a late fee of \$80.00 and not \$250.00 as claimed. There is no proof of the claim for \$250.00.

Conclusion

[96] In the premises, I find that Williams breached his duty of care to Isidore in tort and contract and was therefore negligent. I however do not find that any of the loss claimed by Isidore was as a result of the negligence of Williams. These losses were due to factors other than Williams' negligent attempt to register the deed of sale without the trustees' clause.

The claim is therefore dismissed. Isidore is to pay Williams prescribed costs in the sum of \$28,913.28, this figure to be discounted by 30% given that Williams was found to have breached his duty of care to Isidore although the loss claimed on a balance of probabilities could not have been attributable to Williams' negligence. I consider the breach of duty to be of a serious nature hence the adjustment in the costs award. The amount of prescribed costs to be paid to Williams is therefore \$20,239.30.

**Justice Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar