

**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**SAINT VINCENT AND THE GRENADINES**

**SVGHCV1995/0148**

**BETWEEN:**

**MABEL CAMBRIDGE**

**(By her Personal Representative Alinda Harry appointed pursuant to  
Order of the court dated March 26, 2015)**

**-AND-**

**ALINDA HARRY**

**CLAIMANTS**

**- AND -**

**R. THEODORE L. V. BROWNE**

**-AND-**

**LAURA BROWNE**

**DEFENDANTS**

Appearances: Mr. Samuel E. Commissiong for the Claimants, Mr Parnel R. Campbell  
Q.C. and Mr Jonathan Lewis for the Defendants.

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2015: Jul. 21  
      Sept. 29  
      Nov. 9  
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**Decision on No Case Submission<sup>1</sup>**

**BACKGROUND**

- [1] **Henry, J.:** This dispute involves a lawyer, Mr Theodore L. V. Browne and two of his former clients, Mrs Alinda Harry and her aunt Mrs Mabel Cambridge. Mrs Cambridge is deceased and Mrs Harry represents her estate in this suit. Mrs

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<sup>1</sup> Re-issued on December 18, 2015, with corrections to paragraph [56].

Alinda Harry<sup>2</sup> alleges that Mr Browne<sup>3</sup> fraudulently deprived Mabel Cambridge deceased,<sup>4</sup> of the true value of land he contracted to sell on her behalf. Mrs Harry claims further that Mr Browne fraudulently presented his mother Clarice Conliffe as the buyer to conceal that he was the real purchaser. She alleges also that from the proceeds of that sale, Mr Browne deducted unspecified legal fees for an unrelated transaction<sup>5</sup>, without providing a detailed bill of costs. Mrs Harry initiated this claim,<sup>6</sup> in her personal capacity and also as lawful attorney for Mabel Cambridge.<sup>7</sup> Mr Browne's wife, Mrs Laura Browne<sup>8</sup> is named as a co-defendant.

[2] Mrs Harry<sup>9</sup> claims that Ms Cambridge retained Mr Browne to represent her in an action for recovery of land from a third party. She deposed that Mr Browne obtained a default judgment against the third party and afterwards demanded 10% of the value of the subject land as legal fees, which he quantified as \$30,000.00. Mrs Harry testified that her aunt decided to sell land to obtain the fees. She asserts further that as lawful attorney for Ms Cambridge, she contracted Mr Browne to be the sales agent responsible for identifying a buyer and arranging the sale. Mrs Harry contends that Mr Browne arranged for sale of 2 ½ acres of the land to his mother, Clarice Conliffe at a price of \$175,000.00 without consulting her or Mrs Cambridge. Further, Mrs Harry claims that she became aware of these details only when Mr Browne presented her with the

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<sup>2</sup>Referred to also as the second named plaintiff.

<sup>3</sup> Referred to also as the first named defendant.

<sup>4</sup> Referred to also as the first named plaintiff.

<sup>5</sup> For preparation of Deed No. 1183 of 1992 between Mabel Cambridge and Alinda Harry.

<sup>6</sup> April 21, 1995.

<sup>7</sup> The Power of Attorney having lapsed on Mrs Cambridge's death, Ms Harry was appointed personal representative of Mabel Cambridge's estate pursuant to order of court dated March 26, 2015.

<sup>8</sup> Referred to also as the second named defendant.

<sup>9</sup> References to Mrs Harry hereafter includes reference to Mrs Cambridge as co-claimant unless the context otherwise suggests otherwise.

Deed of Conveyance to sign. She alleges that she raised objections regarding the amount of land being sold and the price at which it was being sold, but reluctantly signed the Deed when Mr Browne told her that he was not accepting less than 2 ½ acres of land. Mrs Harry averred that three days after that Deed was registered, the default judgment against the third party was overturned and the property returned to him.

[3] Mrs Harry claims that within 11 months of registration of title in her name, Clarice Conliffe transferred the said lands to Mr Browne. She alleges that Mr Browne immediately gifted the land to his wife and himself, and they mortgaged it a few days later for \$325,000.00. Alinda Harry contends that:

1. The transfer to Clarice Conliffe was arranged by Mr Browne to conceal the fact that he was personally interested in the subject property; and he failed in his duty as sales agent and solicitor to:
  - a) disclose all the knowledge he had;
  - b) disclose his interest to them; and
  - c) require them to obtain independent legal advice;
2. The price paid by Clarice Conliffe was below market value and Mr Browne failed in his duty to tell them about this.

[4] Mrs Harry claims further that Mr Browne was instructed to prepare a Deed of Gift<sup>10</sup> of land at Diamond from her aunt Mabel to her. She indicates that Mr Browne paid the registration charges of \$38,005.75 from his own funds. She explained that he deducted that sum and also the \$30,000.00 from the purchase price paid by Clarice Conliffe. She stated that Mr Browne also withheld an additional sum “*for all the work he had done*” and presented her with a cheque for \$20,000.00 representing the balance of the purchase price he received from Mrs Conliffe. She claims that Mr Browne neither specified the additional sum he deducted nor presented her with a detailed bill of costs for his services.

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<sup>10</sup> Deed No. 1183 of 1992.

[5] Alinda Harry on her behalf and on behalf of Mabel Cambridge's estate seeks:

1. a declaration that Mr Browne in breach of his fiduciary duty as agent for sale is the *de facto* purchaser of the subject land;
2. a) an order setting aside the Mortgage and the Deeds of Conveyance to Clarice Conliffe, then to Theodore Browne and subsequently to Mr Browne and Mrs Browne; or  
b) an order that Mr and Mrs Browne pay a fair market value for the land;
3. damages for deceit;
4. such further and other reliefs; and
5. costs.

[6] Mrs Harry testified and she was cross-examined. She called no witnesses. Although they filed a joint defence,<sup>11</sup> the Brownes filed no witness statements.<sup>12</sup> Learned Queens Counsel, Mr Campbell made a no case submission in which he contends that Mrs Harry has failed to make out a *prima facie* case against Mr and Mrs Browne. He also informed the court that the Brownes would stand by their election.

### Preliminary Observations

[7] The court is mindful that it is accepted practice that a judge seldom entertains a no case submission in a civil case. This was articulated by Mitchell J.A. (Ag.) (as he then was) in **Calvin Todman v Marguerite Hodge**<sup>13</sup> where he stated:

“As Brown LJ explained in the **Benham Limited**<sup>14</sup> case, and

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<sup>11</sup> On December 1, 2005.

<sup>12</sup> It was subsequently confirmed that Mr Browne filed a witness statement on May 27, 2011. However, by electing to stand by his no case submission, Mr Browne withdrew it from consideration. The contents would therefore not have affected the case's outcome.

<sup>13</sup> **BVIHCVAP2012/002 at para. [10]**.

which explanation we happily accept, rarely if ever should a judge trying a civil action without a jury entertain a submission of no case to answer. Almost without exception the dangers and difficulties involved will outweigh any supposed advantages. It may be that some flaw of law or fact may have emerged in the case for the claimant for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail. It may then save significant costs if a determination is made at that stage. Plainly, that will hardly ever be the case. Any temptation to entertain a submission should almost invariably be resisted."

In the circumstances of this case where the Brownes have not filed witness statements, there is no opportunity for them to give evidence. That principle is accordingly inapplicable in the case at bar for obvious reasons.

[8] By order dated March 26, 2015, Alinda Harry was substituted in these proceedings<sup>15</sup> as personal representative for the claimant Mabel Cambridge on condition that she filed a written consent to the appointment on or before April 9, 2015. Mrs Harry did not file such consent until April 13, 2015 and she made no application for extension of time within which to do so. Mrs Harry's failure to comply with the timeline specified by the order, does not invalidate the late-filed consent unless the court orders.<sup>16</sup> Further, the court may of its own volition make an order to put things right.<sup>17</sup> In determining whether to do so, the court must give effect to the overriding objective to deal with the case justly.<sup>18</sup>

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<sup>14</sup> **Benham Limited v Kythira Investments Ltd & Another [2003] EWCA Civ 1764.**

<sup>15</sup> Pursuant to CPR 2000 Part 19.3(1), 19.2(5), 21.7(1) and (3).

<sup>16</sup> See rule 26.9 (2) of the CPR which provides:

"An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings unless the court so orders."

<sup>17</sup> See rule 29.6(3) and (4) of the CPR which states:

[9] The issues which arise in this case involve matters of general public importance and interest which have remained unresolved for over 20 years. It would be prejudicial to Mabel Cambridge's estate if an order is not made to put things right. Any prejudice caused to Mr and Mrs Browne by making such an order can be offset through their defence, which from the inception of this lawsuit, they evinced an intention to make. In all the circumstances, justice is better served by making an order to put things right than not. I now do so by directing and ordering that the consent filed by Alinda Harry is deemed properly filed.

## ISSUES

[10] The issues are:

1. Whether Mrs Harry has made out a *prima facie* case that Mr Browne in breach of his fiduciary duty, overcharged her and Mrs Cambridge for work not competently done and failed to provide them with a detailed bill of costs for work done as their solicitor, and if so to what remedy they are entitled?
2. Whether Mrs Harry has made out a *prima facie* case that Mr Browne in breach of his fiduciary duty as Mabel Cambridge's
  - a) agent for sale, or
  - b) her solicitor:is the *de facto* purchaser of the subject land, as result of which they are entitled to an order setting aside the Deeds of Conveyance or an order for payment of fair market value?

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"(3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put things right.

(4) The court may make such an order on or without an application by a party "

<sup>18</sup> See rule 1.2 of the CPR which provides:

"1.2 The court must seek to give effect to the overriding objective when it-

(a) exercises any discretion given to it by the Rules; or  
(b) interprets any rule."

3. Whether Mrs Harry has made out a *prima facie* case that Mr Theodore Browne or Mrs Laura Browne is liable in damages for deceit?

## ANALYSIS

**Issue No. 1 – Whether Mrs Harry has made out a *prima facie* case that Mr Browne in breach of his fiduciary duty, overcharged her and Mrs Cambridge for work not competently done and failed to provide them with a detailed bill of costs for work done as their solicitor, and if so to what remedy they are entitled?**

[11] The test to be applied when the court is considering a no case submission, has been enunciated in a number of appellate decisions, notably **Miller (t/a Waterloo Plant) v Cawley**<sup>19</sup> cited with approval by Mitchell JA (Ag.) (as he then was) in **Calvin Todman v Marguerite Hodge**<sup>20</sup> case. In this regard, the court is concerned with determining whether the claimant has “*established his claim on the balance of probabilities.*”<sup>21</sup> The court must also be mindful that the claimant may surmount this challenge by doing no more than establishing “*a weak prima facie case*”<sup>22</sup> which is then “*strengthened to the necessary standard of proof by adverse inferences*”<sup>23</sup> drawn from the defendant’s silence. The court is permitted to draw adverse inferences from such silence, where it is naturally expected that the defendant would have material evidence to give in response to unfavourable evidence tendered against him on an issue before the court. However, if a defendant has proffered an acceptable explanation for his silence no adverse inference may be drawn.<sup>24</sup>

[12] In assessing the weight to be given to evidence in a trial, the court should be guided by general principles of “*common sense*,” and be cognizant that “*the weight*

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<sup>19</sup> [2002] All ER (D) 452, [2002] EWCA Civ 1100.

<sup>20</sup> Ibid. at para. [7].

<sup>21</sup> Supra. see **Todman v Hodge**, per Mitchell JA (Ag.) at para. [7].

<sup>22</sup> Supra. see **Todman v Hodge**, per Mitchell JA (Ag.) at para. [7].

<sup>23</sup> Supra. see **Todman v Hodge**, per Mitchell JA (Ag.) at para. [7].

<sup>24</sup> See **Elena Collongues v Andrew Lynch et al BVIHCVAP2007/001** (unreported).

*of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately.*"<sup>25</sup> These guiding principles will be applied to determination of the issues in the instant case.

[13] Mr Browne contends that Mrs Harry has failed to make out a *prima facie* case. In his general submissions he argues that her case does not establish the central allegations in the case. He contends that Mrs Harry's case is far from coherent, consistent and credible. He argues that there is a divide between the allegations in the statement of claim and the oral evidence. Mr Browne contends further that Mrs Harry's demeanour affects the reliability which can be attached to her testimony, particularly in relation to the crucial details she provides regarding her execution of the Deed of Conveyance. In this regard, he alludes to the fact that Mrs Harry was a trained teacher and nurse who is an educated and experienced person.

[14] Mr Browne submits further that Mrs Harry has not established even a weak *prima facie* case, which can be bolstered by any adverse inference to be drawn from his election. He posits that Mrs Harry's case is "so manifestly weak" and has been so thoroughly discredited in cross-examination that there is "no coherent case for him to answer". He contends that Mrs Harry's evidence should be approached with "manifest skepticism" since it was "riddled with contradictory statements on matters which went to the heart of the case ..." with distressing gaps between her pleadings, witness statement and answers in cross-examination". That was the extent of Mr Browne's no case submission in response to the claim that he overcharged his former clients for legal work not competently done. Mr Browne added that no relief has been claimed in respect of this allegation.<sup>26</sup> While it is true that no specific relief was sought, Mrs Cambridge and Mrs Harry have included an omnibus relief clause

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<sup>25</sup> **Lord Advocate and the Trustees of the Clyde Navigation v Lord Blantyre and Another (1879) 4 App Cas 770 at 792, per Lord Blackburn**; cited with approval by **Baptiste JA in Todman v Hodge** *supra*.

<sup>26</sup> See paragraphs 10 and 19(c) of the Defendants' No Case Submissions.

for “such further and other reliefs” which captures all such other reliefs which arise from the proven facts. The court is empowered to grant all such reliefs to which a party is entitled even if not expressly requested.<sup>27</sup>

[15] There is no Legal Profession Act or similar legislation which codifies the several obligations and fiduciary duties owed by a solicitor to his client. However, a solicitor practising before the High Court of Justice in the State of Saint Vincent and the Grenadines is bound by and subject to the law and practice in force in England.<sup>28</sup> The existing law and practice governing a solicitor’s obligations and fiduciary duties towards his client arise in equity, at common law and from statute. These several duties will accordingly be considered in accordance with legislative mandate. A solicitor has a fiduciary duty in equity, to treat his client fairly and with openness. He also has an obligation at common law to be careful and skillful in the discharge of his client’s work and to utilize his skill and knowledge for his client’s benefit.<sup>29</sup> If he fails to do either, he may be liable in negligence for loss suffered by his client, and he may also be liable for breach of contract.<sup>30</sup>

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<sup>27</sup> See section 20 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act Cap. 24 of the Revised Laws of Saint Vincent and the Grenadines, 2009 which provides:

“The High Court ... in the exercise of the jurisdiction vested... by this Act, shall in every cause or matter pending before the court, grant either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided.”

<sup>28</sup> See section 78 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act Cap. 24 of the Revised Laws of Saint Vincent and the Grenadines, 2009, which provides:

“78. Subject to rules of court, the law and practice relating to solicitors, taxation and the recovery of costs in force in England shall extend to and be in force in Saint Vincent and the Grenadines and apply to all persons lawfully practicing therein as solicitors of the Court.”

<sup>29</sup> **Spector v Ageda** [1973] Ch 30, [1971] 3 All ER 417.

<sup>30</sup> **Nocton v Lord Ashburton** [1914] AC 932 at 965, HL; **Re Burford, Burford and Clifford** [1932] 2 Ch 122, CA.

[16] A solicitor who undertakes contentious legal work without executing a business agreement, has a duty to provide his client with a bill of costs specifying either a gross sum or itemized details of the fees.<sup>31</sup> If he presents a gross sum bill he must provide a detailed bill if his client requests one.<sup>32</sup> If he fails to provide this information the gross sum bill is void.<sup>33</sup> In either event, the bill of costs must include all fees, charges and disbursements with corresponding entries in respect of the specific subject matter to which each item relates. Furthermore, professional charges must be entered separately.<sup>34</sup>

[17] Mrs Harry pleads<sup>35</sup> that she and Mrs Cambridge are “lay persons without knowledge or familiarity with the law” while Mr Browne is a “Barrister-at-law and Solicitor of the Eastern Caribbean Supreme Court, St. Vincent and the Grenadines circuit of many years standing” who held the post of Registrar of the High Court of Justice for several years. The court takes judicial notice that Mr Browne was admitted as a barrister to the bar on December 5, 1975<sup>36</sup>. He is therefore entitled to practice as a solicitor.<sup>37</sup> It is also a matter of record that Mr Browne served as Registrar of the High Court for many years. I therefore find that in 1992, Mr Browne was a solicitor with 17 year’s post call experience.

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<sup>31</sup> See Halsbury’s Laws of England 4<sup>th</sup> Ed. Vol 44. Para. 167. See also **Re A Solicitor, Re A Taxation of Costs [1955] 2 QB 252, [1955] 2 All ER 283, CA**

<sup>32</sup> Made within 3 months from delivery of the bill of costs.

<sup>33</sup> Solicitor’s Act 1974, s. 64(2). See also **Carlton v Theodore Goddard & Co. [1973] 2 All ER 877.**

<sup>34</sup> See Halsbury’s Laws of England 4<sup>th</sup> Ed. Vol. 44 para. 168.

<sup>35</sup> See paragraph 1 of the Statement of Claim.

<sup>36</sup> As recorded in the Roll of Barristers, for the State of Saint Vincent and the Grenadines.

<sup>37</sup> See section 73 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, Cap 24 of the Revised Laws of Saint Vincent and the Grenadines, 2009 which states:

“...every person enrolled as a barrister shall be entitled to practise also as a solicitor, and to sue for and recover his taxed costs as such, but if he practises as a solicitor, he shall be subject to all the liabilities which is attached by law to a solicitor.”

[18] Essentially, Mrs Harry alleges that the events in this case began to unfold when Mrs Cambridge discovered that one Michael Cambridge was the registered owner of a house and land belonging to her<sup>38</sup>. Mrs Harry testified that Mr Browne was retained to initiate court action to recover title to the said property. The complete account surrounding this incident is contained in the statement of claim and in her witness statement and oral testimony. Mr Browne's sole attack on this aspect of Mrs Harry's case is based on assertions of incoherence and inconsistency. For this reason and for completeness, it is advisable to juxtapose the relevant pleadings against Mrs Harry's written and oral testimony to better assess their consistency and coherence or lack thereof and to determine if a *prima facie* case is made out on this issue. Mrs Harry relies on the same facts to establish breach of fiduciary duty by Mr Browne as agent for sale and solicitor.

[19] The background is outlined in the statement of claim.<sup>39</sup> In it Mrs Harry and Mrs Cambridge assert:

"In or about the month of January 1992, the plaintiffs sought legal advice of the said first defendant. The plaintiffs had recently become aware that a purported Deed of Gift had been registered in the Lands Registry which recited that the first plaintiff had given 24, 635 square feet of land with all buildings and erections thereon and situate at Diamond, Saint Vincent and the Grenadines to her deceased husband's grandson, Michael Cambridge. This purported Deed of Gift was registered at the lands registry of the State of Saint Vincent and the Grenadines as Deed Number 2985 of 1990.

The first named plaintiff denied knowledge of this deed and sought the first-named defendant's advice on recovering the said property. The said defendant took instructions from the plaintiffs and stated that the land could be recovered by applying to the High Court to have the

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<sup>38</sup> Mabel Cambridge.

<sup>39</sup> At paragraphs 4, 5, 6 and 7 of the statement of claim.

said Deed cancelled. He then accepted a retainer to recover the said land but made no mention to the plaintiffs of his legal fees for so doing.

On the 16<sup>th</sup> day of January, 1992, the first-named defendant acting as the first named plaintiff's Solicitor, commenced High Court Suit Number 30 of 1992 and applied ex parte to the court to have the said Deed number 2985 of 1990 cancelled.

On 17<sup>th</sup> January 1992, the first-named defendant's ex parte application came up for hearing before the Honourable Madam Justice Joseph who granted the application and ordered the said Deed cancelled. Immediately upon obtaining the said order the said defendant informed the plaintiffs of his success and demanded 10% of the value of the land involved. The first-named defendant told the plaintiff that the said property was worth \$300,000.00 and therefore his legal fees was \$30,000.00."(Underlining mine).

[20] Mrs Harry describes these events in her witness statement indicating that they happened in the early 1990s after she returned to Saint Vincent and the Grenadines. She explained:<sup>40</sup>

"As soon as I returned I was confronted with a problem involving 24,635 square feet of land and a 3-bedroom wall building thereon at Diamond, Saint Vincent and the Grenadines. The problem arose when a relative of hers called Michael Cambridge alleged that Aunt Mabel had conveyed 24,635 square feet of land to him, and had a Deed No. 2985 of 1990. Aunt Mabel was quite certain that she had given no land to Michael Cambridge and she asked her lawyer, Theodore Browne Esq., to bring proceedings against Mr Cambridge to recover the land.

I called Mr Browne to Aunt Mabel's house and we discussed the

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<sup>40</sup> At paragraphs 4 and 5 of Alinda Harry's witness statement filed on April 14, 2005.

problem. He agreed to do the case. For reasons I understood afterwards the case apparently went undefended and Mr Browne as Aunt Mable's Solicitor obtained default judgment against Michael Cambridge.

Mr Browne charged a fee of \$30,000.00 for that case. The fee was presumably based on a 10% value of the property (valued at \$300,000.00) Michael Cambridge had taken from Aunt Mable."

[21] Under cross-examination, she explained:

"When I took over and started to do things for Mrs Cambridge was 1993. This problem was in 1993. The problem with Michael Cambridge did not come up in 1990. As far as I am concerned the problem only surfaced in 1992. It was not Dr Reeves who got in touch with Mr Browne and brought him to the premises to discuss that. Dr Reeves Laws was already dead. Mr Browne had done the power of attorney. He undertook the litigation with Michael Cambridge."

[22] There is little inconsistency or incoherence between the pleadings and Mrs Harry's testimony on the matters described in the preceding record. Although she stated under cross examination that "the problem was in 1993", she was clear that the issue with Michael Cambridge arose in 1992 and that Mr Browne was retained to represent Mrs Cambridge which he did. I find that this is what happened. I also accept Mrs Harry's uncontroverted account that Mr Browne obtained a default judgment against Michael Cambridge for the recovery of land belonging to Mrs Cambridge and I so find. Mrs Harry was not questioned about the sum charged as legal fees for this litigation. Her unchallenged recollection is therefore accepted and I find that Mr Browne billed Mrs Cambridge \$30,000.00 to undertake the litigation to recover the lands from Mr Cambridge.

[23] Mrs Harry alleges that the victory was short-lived because Mr Cambridge soon secured an order setting aside the default judgment. As chronicled in the pleadings:<sup>41</sup>

“Three days after the Deed of Conveyance number 1471 of 1992 was registered, the said Michael Cambridge, through his solicitors... applied to the High Court seeking to reverse the Order dated 17<sup>th</sup> January 1992, ... This application was heard in chambers on the 21<sup>st</sup> May 1993 ... and by consent the said order made on 17<sup>th</sup> January 1992, was set aside and an injunction was granted restraining the second-named plaintiff whether by herself or her servants or agents from dealing with the said land described in the schedule to Deed number 2985 of 1990.”

[24] Mrs Harry elaborated<sup>42</sup> in her testimony:

“To my regret I found out from Mr Browne that the writ that was issued against Michael Cambridge had never been served on him; and according to legal advice I had obtained from another lawyer, there was never any case against Michael Cambridge as the writ had never been served on him. That turned out to be absolutely correct, even though Mr Browne had assured me that the case against Michael Cambridge was bound to succeed. Upon these facts the judge refused to cancel the deed Michael Cambridge had for the property in dispute. Michael Cambridge quickly sold the land to a third party...”.

[25] In response to questions under cross-examination she stated that Mr Browne:

“...did not serve the party for the 24, 635 sq ft land and he went back to court for it and he never stood up for us.”

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<sup>41</sup> See paragraph 17 of the Statement of Claim.

<sup>42</sup> See paragraph 8 of Alinda Harry's witness statement.

Mrs Harry's testimony is in accord with her pleadings and it was not challenged or compromised. Mrs Harry has established that when Mr Browne obtained the default judgment he did not serve the application and supporting documentation. Michael Cambridge was therefore not notified of the proceedings and given an opportunity to defend himself. Under the rules of court which existed then, a defendant was entitled to be served with notice of an application before it is heard by the court. A diligent and competent solicitor would have ensured that Mr Cambridge was served in this manner. No such opportunity existed for service and passage of the requisite length of time as the application was disposed of *ex parte* one day after it was filed. In the circumstances, Mrs Harry has satisfied this court on a balance of probabilities that Mr Browne failed to observe the applicable rules of court mandating service of process and he was thereby in breach of his fiduciary duty to use care, skill and knowledge in the discharge of his client's work as a result of which the proceedings were unsuccessful.

[26] There is no evidence that the order was made after a full hearing on the merits of the assertions that Mrs Cambridge had not transferred the property to Mr Cambridge. I accordingly accept Mrs Harry's testimony that the default judgment was set aside for failure to serve process on Mr Cambridge and I so find. I also believe and accept Mrs Harry's testimony that Michael Cambridge recovered the land and house and sold them.

[27] I am aware that there might have been other compelling reasons why no further action was taken after the default judgment was set aside. None were proffered by Mr Browne and the court will not speculate. Suffice it to say, that a solicitor of Mr Browne's then experience, would have been expected to take greater care in prosecuting the claim and advising his clients than he in fact did. He was in a position to appreciate that the *ex parte* order was not a final order of the court and he would have been expected to alert his clients to this and advise them of possible consequences. On the undisputed facts, Mr Browne did not do so and his failure can only be described as inexplicable, inexcusable and negligent. It is obvious that

he did not fulfill his duty to apply his skill and knowledge to Mrs Cambridge's benefit. He should not expect to be nor should he be rewarded for this less than acceptable representation. Minimally, Mrs Cambridge's estate should recover a figure representing the loss she bore through payment of the legal fees. I make no award for cancellation of the Deed of Conveyance 1471 of 1992 for reasons provided later.

[28] Mrs Harry asserts that Mr Browne did not present a bill outlining the work he had done and she considers the fee charged and collected by Mr Browne to be excessive. The pleadings express it as follows:<sup>43</sup>

"The plaintiffs never expected that the said defendant's fees would be so exorbitant but were overjoyed that they had "recovered" their land which he claimed was worth \$300,000.00.

They agreed to pay him the \$30,000.00 but told him that in order to pay him, they would have to sell a parcel of land.

The first-named defendant presented her (Harry) with a personal cheque for \$20,000.00. He told ... (her) that he had deducted monies which he had paid on registering and preparing the said Deed of Conveyance number 1183 of 1992 and also deducted the aforesaid \$30,000.00 along with an amount for "all the work he had done". He did not specify this amount. At no time did the said defendant present to the second-named plaintiff a detailed bill of costs for work done on her behalf or on behalf of the first-named plaintiff."

[29] Further elaboration is provided in the Reply which contains additional details:<sup>44</sup>

"The Second Claimant states that she had never anticipated that the First

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<sup>43</sup> See paragraphs 8, 9 and 15 of the statement of claim.

<sup>44</sup> See paragraphs 6 and 9 of the Reply.

Defendant's legal fees for the prosecution of High Court Suit No 30 of 1992 and related matters could be as excessive as \$30,000.00. The Second Claimant was very surprised by the charge and told him that she did not immediately have that kind of money to pay him his legal fees. She accepted to pay the invoice with considerable reluctance.

The First Defendant paid to the Second Claimant a cheque for \$10,000.00 and \$10,000.00 in cash. He told her that he had deducted monies which he had paid in the preparation and registration of Deed of Conveyance No. 1183 of 1982 and had deducted his legal fees of \$30,000.00 along with an amount for "all the work he had done". He omitted to specify what he meant by "all the work he had done", and most serious of all he omitted to render to her as his client an invoice which should have detailed precisely what work he had been done and the cost of doing so.... It was also important that the First Defendant should have presented a detailed bill of cost for the work done for the First Claimant.

...In so acting he acted negligently and led the Second Claimant to believe that he had succeeded in recovering the said land when in fact that was not the case. the Second Claimant was therefore concerned that he had charged her legal fees for legal work he had failed to do properly resulting in a loss to the Second Claimant "

[30] Mrs Harry's written testimony is of similar effect. In her witness statement she indicates:<sup>45</sup>

"Aunt Mabel had worth in land but no ready cash to pay that bill, and so he suggested that Aunt Mable could sell a portion of the land to pay his fees. I told him he could make arrangements to sell enough land to cover the fee of \$30,000.00. Mr Browne had previously prepared and requested a Power of Attorney from Aunt Mable for me to act on her behalf because of her poor health.

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<sup>45</sup> See paragraphs 5, 6, 8 and 9 of Alinda Harry's witness statement.

...I discovered that Mr Browne had found a buyer to purchase the land so he prepared a Deed for 2 ½ acres of land to be sold for \$175,000.00.

...there was never any case against Michael Cambridge as the writ had never been served on him... even though Mr Browne had assured me that the case against Michael Cambridge was bound to succeed. Upon these facts the judge refused to cancel the deed Michael Cambridge has for the property in dispute.”

With that development serious complications arose for Mr Browne. Thus far he had misled me about the case against Michael Cambridge. He had charged \$30,000.00 for useless work. He had refused to withdraw his bill for that work although I was willing to pay him for other legal work he had done. In the result, Mr Browne got 2 ½ acres of Aunt Mable’s land for \$175,000.00 and he made me lose valuable property Michael Cambridge had obtained from Aunt Mabel.”

[31] Under cross-examination Mrs Harry stated:

“Mr Browne has been paid the fees of \$30,000.00. He took lands which paid him those fees. He paid himself. He took 2 ½ acres of land including including 24,635 sq. ft. that he had recovered. The 24,635 sq. ft. Mr Mr Cambridge ultimately ended up with, that land. It is correct to say that Michael Cambridge got the lands. I say that Mr Browne got the 24, 635 sq. ft of land as part of his payment. It is the truth. Mr Browne paid himself out of what he sold. I did not receive a cheque from Mr Browne for \$20,000.00. I paid back the \$38,000.00 to Mr Browne through the 2 ½ acres of land. That was part of the money he took from the \$175,000.00. ...This statement of claim was filed in 1995 when matters were fresher in my mind.” (underlining mine)

[32] Except for one area of her testimony, Mrs Harry's evidence corresponds with the pleadings. It is puzzling and incredible that on the one hand, Mrs Harry is contending that Mr Browne got the 24,635 parcel of land as part of his payment and on the other hand that Mr Cambridge got the lands. It does not make sense. I therefore reject that part of her testimony. Although it conflicts with another part of her testimony, I do not think that Mrs Cambridge was seeking to mislead the court on that issue. I can neither understand nor rationalize this inconsistency. However, having regard to the totality of the evidence, including the fact that Mrs Harry was not challenged at all regarding the payments which Mr Browne allegedly deducted from the sale price of \$175,000.00, I accept the rest of her evidence on this issue.

[33] I am satisfied that Mrs Harry has proved on a balance of probabilities that Mr Browne billed her \$30,000.00 as legal fees in the civil lawsuit against Michael Cambridge and deducted that figure from the purchase price for the land. I find as a fact therefore, that Mr Browne did not provide Mrs Harry or Mrs Cambridge with a bill of costs as he had an obligation to do. I find too that having regard to the scale of fees which obtained at the relevant time, Mr Browne's fees exceeded the reasonable range for that type of legal work. A significantly lesser amount would have been adequate and very reasonable as payment for the work he did in the civil suit against Michael Cambridge including his preparation of documents and appearance in court. I find that his bill of \$30,000.00 was excessive. He is not entitled to recover fees for work not done competently. He must reimburse Mrs Harry those charges for the benefit of Mabel Cambridge's estate. Mr Browne's no case submission on the issue of his failure to provide a bill of costs is therefore dismissed. Accordingly, I order that he repays Mrs Harry in her capacity as personal representative for Mabel Cambridge's estate, the \$30,000.00 with interest at 5 % from the date of judgment until payment.<sup>46</sup>

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<sup>46</sup> Pursuant to section 7 of the Judgments Act Cap. 227 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

[34] I also find as a fact, that Mr Browne not only recouped the sums of \$38,005.75 as reimbursement for registration fees but that he deducted a further sum of \$86,994.25<sup>47</sup> from the \$175,000.00 as unspecified legal fees for “all the work he had done” and failed to provide any bill for this work. He is not permitted to do this. Presumably this additional work relates to the role he played as sales agent in arranging the sale to Mrs Conliffe. Mrs Harry has conceded that Mr Browne is entitled to reasonable fees for any such work and she has indicated that she is prepared to pay him. An appropriate order in the premises is for Mr Browne to submit his bill of costs as sales agent to be assessed by the court and I so order.

**Issue No. 2 - Has Mrs Harry made out a *prima facie* case that Mr Browne in breach of his fiduciary duty as Mabel Cambridge’s agent for sale and solicitor is the *de facto* purchaser of the subject land?**

[35] Ms Harry claims that Mr Browne breached his fiduciary duty as agent for sale and solicitor to her and Mrs Cambridge in several respects, some of which overlap. The fiduciary duties of an agent for sale are not codified in any statute. However, as is the case with solicitors, equity and the common law imposes certain obligations on an agent for sale. They will be applied to the facts of this case as the court is enjoined<sup>48</sup> to have regard to relevant equitable and common law principles.

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<sup>47</sup> Based on mathematical calculation.

<sup>48</sup> See sections 14, 15, 19 and 20 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act Cap. 24 of the Revised Laws of Saint Vincent and the Grenadines, 2009; which state respectively:

“14. If a plaintiff or a petitioner claims to be entitled to any equitable estate or rights, or to relief on any equitable ground against any deed, instrument or contract or against any right, title, or claim whatsoever asserted by any defendant or respondent in the cause or matter, or to any relief founded upon a legal right which before the 1<sup>st</sup> November, 1875, could in England only have been given by a court of equity, the court or Judge shall give to the plaintiff or petitioner the same relief as would be given by the High Court of Justice in England in suit or proceeding for the same or a like purpose.

15. If a defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract or against any right, title or claim asserted by any plaintiff or petitioner in the cause or matter,

[36] Mrs Harry contends that Mr Browne was the *de facto* purchaser of the subject property and that he offered it for sale to his mother at a price below the market value. She submits that as the agent for sale and solicitor, Mr Browne had a fiduciary duty to disclose these details to them and all other knowledge he had about the sale.<sup>49</sup> She argues also that Mr Browne had a fiduciary duty as their solicitor, to require that they obtain independent legal advice regarding the sale to Mrs Conliffe.<sup>50</sup> Mrs Harry contends that Mr Browne failed to discharge these duties and that these failures render the sale to Mrs Conliffe and the subsequent transfers to Mr and Mrs Browne<sup>51</sup> voidable. Mrs Harry submits that the Deeds of Conveyance<sup>52</sup> should be set aside or alternatively that Mr Browne should be

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or alleges any ground of equitable defence to any such claim of the plaintiff or petitioner, the court or Judge shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence such and the same effect by way of defence against the claim of the plaintiff or petitioner as the High Court of Justice in England would give if the like matters had been relied on by defence in any suit or proceeding instituted in that court for the like purpose.

19. Subject to the provisions of this Act for giving effect to equitable rights and other matters of equity, the High Court and the Court of Appeal, and each judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom, or created by any statute, in the same manner as these matters have hitherto been recognized and given effect to.

20. The High Court and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, shall in every cause or matter pending before the court, grant, either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided."

<sup>49</sup> See para. 19 of the Statement of Claim and paras. 7, 10, 13, 16, 18 and 20 of the Reply.

<sup>50</sup> See para. 19 of the Statement of Claim and paras. 8 and 9 of the Reply.

<sup>51</sup> Including the Deed of Gift from Clarice Conliffe to Theodore Browne and the Deed of Conveyance from Mr Theodore Browne to Theodore Browne and Laura Browne.

<sup>52</sup> I.e. Deed No. 1183 of 1992.

ordered to pay her an amount representing the fair market value of the subject property.

[37] For his part, Mr Browne relies on the submissions he made in respect of the first issue. He submits that the pleadings contain no allegation that Mrs Harry was unaware of the identity of the intended purchaser when she signed the deed and did not know that it was Clarice Conliffe. Mr Browne contends further that the “valuation certificates from the Inland Revenue Department (“IRD”) is a complete answer” to the allegation that the property was sold to Mrs Conliffe at an undervalue.<sup>53</sup>

[38] Mr Browne urged the court to compare the unchallenged evidence of the valuations of \$175,000.00 and \$380,000.00 respectively given by the IRD in relation to the 2 ½ acres and the transfer to Mrs Harry of the lots comprising (a) 6 acres and 13 poles and (b) 24,635 sq. ft. (including a house). He contends that this comparison will reveal that the subject property was not undervalued having been sold at \$70,000.00 per acre. That was the extent of Mr Browne’s no case submission in response to the allegation that he breached his fiduciary duty towards Mrs Cambridge as agent for sale and solicitor and towards Mrs Harry as solicitor. I shall deal first with the claim against Mr Browne as agent.

#### Duty as agent

[39] In order to succeed in establishing a *prima facie* case against Mr Browne for breach of fiduciary duty as agent, Mrs Harry must establish that Mr Browne owed the alleged duties to either her or Mrs Cambridge, and that he failed to discharge those obligations. The relationship of principal and agent arises when the parties agree that the agent shall act on the principal’s behalf. When acting as agent for his client, a solicitor operates under the obligations imposed by the contract of agency between them, and he is bound by its express terms and conditions. Further,

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<sup>53</sup> See paragraph 17 of the written submissions.

certain other rights and duties may be implied and imported into the agreement.<sup>54</sup> If there is no written contract, the rights and duties which flow from the relationship will be those that are implied in equity and under the common law. During the currency of the relationship, the agent owes his principal certain fiduciary duties,<sup>55</sup> chief of which is to carry out the functions he contracted to perform.<sup>56</sup>

[40] The agent is obliged to make full disclosure to the principal of any personal interest he has in the transaction, which is likely to conflict with the principal's.<sup>57</sup> He is required to act in good faith and provide the principal with all material information in his possession which "would be likely to influence" the principal's conduct.<sup>58</sup> If he makes full disclosure and the principal consents to the transaction being consummated, the agent fulfills his fiduciary duty of disclosure. However, he does not discharge this duty merely by indicating that he has an interest without providing details of his interest,<sup>59</sup> or by making statements which simply put the principal on inquiry. If the agent fails to make full disclosure, it is immaterial that the transaction was consummated on fair terms and conditions. In such a case, the transaction is

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<sup>54</sup> See Halsbury's Laws of England 4<sup>th</sup> Ed. Vol 1. para. 770. See also **Pole v Leask (1863) 33 LJ Ch 155, HL.**

<sup>55</sup> **Parker v McKenna (1874) 10 Ch App 96 at 119.**

<sup>56</sup> See Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 1 para. 772. See also *Turpin v Bilton* (1843) 5 Man & G 455.

<sup>57</sup> **North and South Trust Co. v Berkley [1971] 1 W.L.R. 470; New Zealand Netherlands Society "Oranje" Inc. v Kuys [1973] 1 W.L.R. 1126.**

<sup>58</sup> See Bowstead on Agency, 15<sup>th</sup> Ed. (1985) at Article 47. See also **Demerara Bauxite Company v. Hubbard [1923] A.C. 673.**

<sup>59</sup> See Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 1 para. 787. See also **Imperial Mercantile Credit Association v Coleman (1873) LR 6 HL 189; and Alexander v Automatic Telephone Co [1900] 2 Ch 56, CA.**

still voidable at the principal's option<sup>60</sup> and he is entitled to have the transaction rescinded or he may recover damages.<sup>61</sup>

[41] Mrs Harry's uncontroverted and unchallenged testimony is that:

1. Mr Browne as Mrs Cambridge's agent for sale arranged for sale of the subject land to his mother Mrs Clarice Conliffe;
2. Mrs Conliffe transferred it to Mr Browne within 11 months in consideration of natural love and affection.

Mrs Harry testified that she served as Mrs Cambridge's lawful attorney for the purposes of the sale to Mrs Conliffe. She indicated that she knew that Mrs Conliffe was the buyer but did not know that her name "was only a screen for him to put the land in his name ultimately."<sup>62</sup> Under cross-examination, she said:

"Mr Browne sold it to himself. I accept that there was a person in existence called Clarice Conliffe because Mr Browne said it but I never saw the person. I cannot deny that Clarice Conliffe is Mr Browne's mother."

Mrs Harry testified also that she might not have minded that the buyer was Mr Browne's mother once she got a good price for the land. She insisted that the sale price of \$175,000.00 was an undervalue. She explained further that Mr Browne had written a letter to the government<sup>63</sup> on her behalf in which he quoted a price of \$7.00 per sq. ft. for land at Diamond. Under cross-examination she admitted that the parcel of land referenced in that letter is different from the land which is the subject of the instant claim.

[42] Mrs Harry's evidence falls short of establishing that the subject property was under-valued. She did not present testimony of an independent qualified land

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<sup>60</sup> **Houldsworth v City of Glasgow Bank (1880) 5 App Cas 317 at 323, HL, per Lord Cairns.**

<sup>61</sup> **Armstrong v Jackson [1917] 2 KB 822.**

<sup>62</sup> See para. 6 and 9 of Alinda Harry's witness statement.

<sup>63</sup> See page 71 of the trial bundle. Letter addressed to the Chief Surveyor dated 6<sup>th</sup> May, 1992.

valuator or other compelling evidence to establish this element of her claim. She has failed to make out a *prima facie* case that the price of \$175,000.00 was less than the market value. I therefore make no finding that the price paid by Mrs Conliffe was less than the market value of the subject land.

[43] Mrs Harry's pleaded case corresponds with her testimony regarding her allegations of non-disclosure by Mr Browne as agent for sale. She testified that she became angry when she found out that Mr Browne had found a buyer and prepared a Deed for 2 ½ acres of land to be sold for \$175,000.00.<sup>64</sup> She said:

“I became very angry and asked why so much land had to be sold for so little money. I remained very uncomfortable about the transaction and continued to protest to Mr Browne when I found out that the buyer was his mother. I smelled a rat there.”

Mrs Harry testified that Mr Browne failed to inform her and Mrs Cambridge that he was interested in owning the subject land<sup>65</sup> and had presented Mrs Conliffe as a prospective purchaser to conceal this fact. I accept this uncontroverted and unchallenged testimony.

[44] I am led inexorably to agree with Mrs Harry by a convergence of factual circumstances. I believe Mrs Harry when she said that Mr Browne presented one prospective buyer who was his mother; and that he became the owner of the subject land less than a year after it was conveyed to Mrs Conliffe. This strikes me as more than mere coincidence and I draw the irresistibly and reasonable inference that Mr Browne was the real purchaser of the subject land and that he used Mrs Conliffe's name purely to conceal this fact. Mr Browne's election to remain silent in the circumstances is suspect and I am fortified in my position having regard to that posture.

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<sup>64</sup> See para. 6 of Alinda Harry's witness statement.

<sup>65</sup> See para. 6 of Alinda Harry's witness statement.

[45] I accept Mrs Harry's testimony that Mr Browne did not tell her or Mrs Cambridge that he was the real purchaser of the property, which he had a duty to do. Accordingly, I find that Mrs Harry has established a *prima facie* case that Mr Browne failed to discharge his fiduciary duty as sales agent by disclosing all material details to Mrs Cambridge and Mrs Harry. They are therefore entitled to have the transaction rescinded. However, having regard to the lengthy passage of time since the events unfolded, and the absence of evidence regarding current ownership and interests in the subject property, the court cannot be sure that rescission is possible. The appropriate remedy in all the circumstances is an order for payment of damages by Mr Browne to Mrs Cambridge's estate.<sup>66</sup>

#### Duties as solicitor

[46] The relationship between a solicitor and his client is a fiduciary one which imposes certain duties on the solicitor particularly when he represents a client in the sale of property. In this regard, the solicitor must make full disclosure to the client of all relevant matters within his knowledge.<sup>67</sup> If the solicitor is the prospective purchaser of property being sold by his client, the solicitor should not act for both parties and he should ensure that the client is advised by an independent solicitor who must be furnished with all material facts. This is the usual accepted practice and approach which is adopted to avoid conflict between the solicitor's interests and duties.<sup>68</sup> These principles apply equally where the buyer is the solicitor's near relative as in the case at bar.<sup>69</sup>

[47] The solicitor's duty to make full disclosure is identical to the duty of an agent described earlier. For the reasons advanced above, it follows and I find that Mrs

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<sup>66</sup> **Urquhart v MacPerson (1878) 3 App Cas 831, PC.**

<sup>67</sup> **Davies v London and Provincial Marine Insurance Co (1878) 8 Ch D 469; Nocton v Lord Ashburton [1914] AC 932 at 965, HL.**

<sup>68</sup> **Gregg v Kidd [1956] IR 183.**

<sup>69</sup> **Willis v Barron [1902] AC 271 HL.**

Harry has established on a balance of probabilities that Mr Browne failed as Mrs Cambridge's solicitor, to make full disclosure that he was the *de facto* purchaser of the subject property. Mrs Harry testified that she was "very uncomfortable about the transaction and continued to protest" when she found out that the buyer was his mother. Despite her reservations and reluctance, she eventually executed the transfer because of the trust and confidence she reposed in Mr Browne. She alleged in her pleadings<sup>70</sup> that she did not have the benefit of independent legal advice. Her evidence is that she signed the Deed at Mr Browne's office in his and Mrs Browne's presence.

[48] Under cross examination Mrs Harry said that no one else was there. She testified that she was presented with the Deed by Mr Browne and after reading it she signed it. The circumstances of execution as described by Mrs Harry were at times confusing as she insisted on occasions that she signed a blank piece of paper with nothing else on it while elsewhere in her testimony she admitted to signing the Deed. Mrs Harry was clear that the "document" was signed in Mr Browne's office. Mr Browne did not refute this and Mrs Harry acknowledged the signature on the Deed to be hers. Although she said she did not sign the Deed, she later recanted and stated that her case as set out in paragraph 14 of the statement of claim is correct. She testified:

"I am now saying that I read the Conveyance but it did not have the price or the 2 ½ acres. When I inquired he came over and wrote them in. The rest of the paragraph is correct. ...I am now saying I signed the Deed. I am now referring to the blank piece of paper I signed as a Deed. I do not know if it was a Deed of Gift."

[49] Mrs Harry's insistence at points in her testimony that she signed a blank piece of paper and not the Deed of Conveyance is puzzling as it conflicts with paragraph 15

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<sup>70</sup> Para.19 of the statement of claim and paras. 8 and 9 of the Reply.

of her statement of claim in which she acknowledges signing the Deed of “Gift” with reluctance after reading it. It also conflicts with paragraph 8 of her Reply and paragraph 6 of her witness statement where she admits that she signed the Deed. The court also takes note of the Deed of Conveyance which was exhibited and which Mrs Harry agreed contained her signature. In the face of this evidence, I reject Mrs Harry’s testimony that she did not sign the Deed. I am satisfied that she signed the Deed in Mr Browne’s office in the presence of Mrs Browne and Mr Browne, after a discussion with Mr Browne. This evidence is unchallenged. I am also satisfied that Mrs Harry did not consult with another counsel before executing the deed. She therefore did not have the benefit of independent legal advice. In addition, I accept Mrs Harry’s testimony that she received a total of \$20,000.00 from Mr Browne as the sale price, after he had deducted his legal fees and other unspecified expenses. Clearly, this demonstrates that the bargain was unfair as Mrs Harry did not receive the benefit of the agreed purchase price.

[50] In the premises, Mr Browne failed to discharge his duty to Mrs Harry to ensure that she was independently advised by counsel who possessed all pertinent details surrounding the transaction. This requirement assumes greater significance and urgency in face of the reality that Mr Browne purported to act for both seller and purchaser and was closely related to the named purchaser. Mrs Harry has therefore established a *prima facie* case that Mr Browne did not perform his fiduciary duty to her by ensuring that she had separate counsel to advise her. Mr Browne’s no case submission on the issue of breach of fiduciary duty as agent and solicitor is therefore dismissed. Mrs Harry is therefore entitled to have the sale to Mrs Conliffe and subsequent transfers to Mr and Mrs Browne set aside. Such an order can be properly made if the court has before it all of the facts regarding the current interests, rights and title in the property. There is limited evidence before the court in this regard. The proper order would therefore be an order for damages to be assessed. A relevant consideration during the assessment of damages phase is that Mr Browne is liable both as agent and solicitor in respect of identical

misconduct arising from the same facts. Appropriate adjustments will be necessary in those circumstances.

**Issue No. 3 - Has Mrs Harry made out a *prima facie* case that Mr Theodore Browne or Mrs Laura Browne is liable in damages for deceit?**

Laura Browne

[51] Mrs Harry and Mrs Cambridge allege that Mr Browne conveyed the subject property to his wife and himself.<sup>71</sup> They make no further allegations against Mrs Browne in the pleadings. Furthermore, Mrs Harry gave no evidence that Mrs Browne was party to any other part of the transactions complained about. Indeed, she does not accuse Mrs Browne of deceit either in the pleadings or her testimony. Under cross examination she stated: “I protested in his office. I protested loudly to him and his wife in their office. I protested to the wife because she was there. They were the only two people and I in the office.” There is not one scintilla of evidence against Mrs Browne in this regard. Accordingly, I find that Mrs Harry and Mrs Cambridge have failed to establish a *prima facie* case against Mrs Laura Browne for deceit. They are not entitled to damages from Mrs Browne. The claim against Mrs Laura Browne is accordingly dismissed with costs awarded to her pursuant to CPR 65.5. I therefore order that Mrs Harry in her personal capacity and as personal representative for Mabel Cambridge’s estate shall pay to Mrs Laura Browne costs of \$7500.00.

Theodore Browne

[52] In the common law action of deceit, actual fraud must be proved.<sup>72</sup> In order to establish a *prima facie* case of deceit against Mr Browne, Mrs Harry must prove on a balance of probabilities that Mr Browne knowingly or recklessly made a false

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<sup>71</sup> See para. 20 of the Statement of Claim.

<sup>72</sup> **Derry v Peek (1889) 14 App Cas 337.**

representation to her which she accepted and acted on.<sup>73</sup> If Mr Browne did in fact make such false representation knowing or believing that it was not true, or recklessly without caring whether it was true or false, he would be liable to pay damages for deceit or have the contract rescinded. In order to succeed, she must prove that she acted in reliance on Mr Browne's misrepresentation. If she would have done the same thing in the absence of the alleged fraud her claim will fail. Mrs Harry relies on the pleadings and facts rehearsed above to prove that Mr Browne fraudulently informed her that the subject land was being sold to his mother Clarice Conliffe when in reality he was the *de facto* purchaser.

[53] Under cross examination Mrs Harry stated that she is aware that her case is that Deed 1471/1992 was obtained by deceit. She testified further that she was deceived by Mr Browne because he did not have the amount of land written on the document she signed, he took too much land, they trusted him and he never consulted with them, he did not serve Michael Cambridge and he went back to court and did not properly represent them. She insisted that she was deceived in all of those ways. She added:

“I would not have minded that the buyer was his mother once I got a good price for the land. She had the right to buy the land. I am not saying that Mrs Conliffe was part of the deceit. I am not saying that part of the deceit is because Mrs Conliffe bought the land. The deceit had to do with the money, the amount of land and lies.”

Mrs Harry also testified that the price of \$175,000.00 was an undervalue as the same land was mortgaged for \$325,000.00. She claims that Mr Browne was supposed to pay her the difference between those two prices.

[54] I do not accept that Mr Browne did not have the amount of land written on the document that Mrs Harry signed. The weight of the evidence is against such a

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<sup>73</sup> **East Pine Management Limited v Tawney Assets Limited, Oldril Holdings Limited and Guildron Trading Limited BVIHCVAP2012/0035.**

finding. Mrs Harry's testimony that her claim for deceit is founded on her allegations that:

“Mr Browne took too much land, they trusted him and  
he never consulted with them, he did not serve Michael  
Cambridge and he went back to court and did not properly  
represent them”

suggests a merging of her respective claims for deceit and breach of fiduciary duty. The court has already addressed the latter. The factual background underpinning that claim does not support a charge of deceit. For the reasons outlined above, I find that Mrs Harry has failed to establish that Mr Browne deceived her about the real price of the subject land and arranged the sale at an undervalue. I note also that it was no part of Mrs Harry's pleaded case that she was deceived into signing a blank Deed. I therefore make no finding about that. In addition, it was not part of Mrs Harry's case that she was at any point deceived about the amount of land proposed to be sold. I therefore make no finding of deceit regarding that.

[55] Mr Browne submits that it appears that during her cross-examination on the first day of trial Mrs Harry appears to have abandoned the complaint that Mr Browne deceived them “by being the actual purchaser of their land, using his mother's name without having disclosed the connection.” Mrs Harry's evidence supports this contention. She stated categorically that part of the fact that Mrs Conliffe bought the land was no part of the deceit. There is no other factual basis on which to make a finding that Mr Browne deceived Mrs Harry and/or Mrs Cambridge. I therefore find that Mrs Harry has failed to establish deceit against Mr Browne on a balance of probabilities. Mr Browne's no case submission on the issue of deceit is therefore upheld. Mrs Harry is not entitled to damages from him. The claim of deceit against Mr Browne is accordingly dismissed with costs pursuant to CPR 65.5. I therefore order that Mrs Harry in her personal capacity and as personal representative for Mabel Cambridge's estate shall pay to Mr Theodore L. V. Browne costs of \$7500.00.

## ORDERS

[56] It is accordingly ordered:

1. The no case submission by Mr Theodore L. V. Browne regarding Mrs Harry's claim that he breached his fiduciary duty to her by overcharging her and Mrs Cambridge for work not competently done and failing to deliver a bill of costs is dismissed.
2. Mr Theodore L. V. Browne shall reimburse Mrs Harry the legal fees of \$30,000.00 with interest at 5 % from the date of judgment until payment.
3. Mr Theodore L. V. Browne's no case submission regarding the claim that he breached his fiduciary duty to Mrs Harry and Mrs Cambridge as their agent for sale and solicitor is dismissed and Mr Browne shall pay damages to Mrs Harry as Mabel Cambridge's legal personal representative to be assessed on application by the claimant to be made on or before December 9, 2015. Damages as assessed are to be adjusted taking into account the sums paid into court by Mr Browne.
4. Mr Browne<sup>74</sup> shall on or before November 30, 2015 file his bill of costs and expenses as sales agent to be assessed by the court.
5. Mrs Harry as Mabel Cambridge's legal personal representative shall pay to Mr Theodore L.V. Browne fees and expenses in relation to the work undertaken by him as agent and/or solicitor to be assessed.
6. Mr Theodore L. V. Browne shall pay to Mrs Alinda Harry, personal representative of Mabel Cambridge's estate costs of \$12,875.00 pursuant to CPR 65.5.

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<sup>74</sup> Corrections made pursuant to Rule 42.10(1) of the CPR:

- a) clause 4 – name corrected; and
- b) clause 5 – repeated sentence deleted.

7. The no case submission by Mrs Laura Browne in respect of the claim in deceit is upheld. Mrs Alinda Harry in her personal capacity and as personal representative for Mabel Cambridge's estate, shall pay costs of \$7500.00 to Mrs Laura Browne in respect of the claim in deceit, pursuant to CPR 65.5.

8. The no case submission by Mr Theodore L.V. Browne in respect of the claim in deceit is upheld. Mrs Alinda Harry in her personal capacity and as personal representative for Mabel Cambridge's estate, shall pay costs of \$7500.00 to Mr Theodore L.V. Browne in respect of the claim in deceit, pursuant to CPR 65.5.

[57] The court is grateful to both counsel for their submissions.

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**Esco L. Henry**  
**HIGH COURT JUDGE**