In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 318

BETWEEN:-

FREDERICK MATTHEWS
(As Receiver for Earlston Wentworth Matthews)

Plaintiff

-and-

(1) AMY TROTT
(2) DAUNETTE BEAN
(3) WESTPORT TRUST COMPANY LIMITED
(4) THE PROPERTY LAW GROUP LTD
(5) KIEVA (MARONIE) DURHAM

Defendants

JUDGMENT
(In Court)

Date of hearing: 2nd – 4th March 2015
Date of judgment: 10th April 2015

Mr Richard Horseman, Wakefield Quin Limited, for the Plaintiff
Mr Henry Tucker, Appleby (Bermuda) Limited, for the First and Second Defendants

Ms Lauren Sadler-Best, Trott & Duncan Limited, for the Third Defendant

Mr Jaymo Durham, Amicus Law Chambers Ltd, for the Fourth and Fifth Defendants

Introduction

1. This is a case about the duties of an attorney asked to act for both sides to a conveyancing transaction.

2. Earlston Wentworth Matthews ("Mr Matthews") conveyed his valuable interest in a property to the First and Second Defendants for nominal consideration. The Plaintiff, who brings the action on behalf of Mr Matthews, claims that the transaction was manifestly disadvantageous to Mr Matthews.

3. The Plaintiff has settled the claim against the First and Second Defendants. He no longer seeks relief against the Third or Fourth Defendants. The trial concerned his claim against the Fifth Defendant. She acted for all three parties to the transaction. The Plaintiff claims that she should not have done so as there was a conflict of interest between the First and Second Defendants on the one hand and Mr Matthews on the other.

4. The Plaintiff alleges that the Fifth Defendant did not, as he says she should have done, advise Mr Matthews as to the existence of the conflict and obtain his informed consent before acting for him as well as the other parties. Neither did she advise him as to the wisdom of what is said to be an obviously disadvantageous transaction or suggest that he obtain independent legal advice.

5. Had Mr Matthews been properly advised, the Plaintiff submits, it is inconceivable that he would have entered into the transaction without obtaining fair value for his interest. He claims damages assessed at the value of Mr Matthew's interest in the property at the date of the conveyance.

The parties

6. The Plaintiff is the court appointed receiver of his brother Mr Matthews. Mr Matthews is 87 years old. He was at all material times physically frail. At trial, the Plaintiff did not pursue his pleaded allegation that when Mr Matthews entered into the transaction that it is the subject of this dispute he lacked the mental capacity to understand it. I shall therefore proceed on the basis that he did have the mental capacity to understand it. However Mr Matthews has since been diagnosed as suffering from senile dementia and incapable of managing his own affairs. That is why the action is brought not by him but by the Plaintiff on his behalf.

7. The First Defendant is Mr Matthew's sister. She is also a senior citizen. The Second Defendant is the First Defendant's daughter and Mr Matthew's niece.

8. The Third Defendant is a trust company. It has been joined to these proceedings in its capacity as trustee of the Cherry Blossom Trust ("the Trust"). The settlors and beneficiaries of the Trust are the First and Second Defendants.

9. The Fifth Defendant is an attorney. She was called to the Bar in Bermuda in 2008. She completed her articles at the law firm Trott & Duncan and in the latter part of 2009 she left the firm to set up practice as a sole practitioner. In March 2010 she incorporated the Fourth Defendant, and thereafter practised as its principal.

10. The Fifth Defendant subsequently joined Amicus Law Chambers Ltd and on 4th December 2013 the Fourth Defendant was struck off the Register of Companies: something of which the Plaintiff and the First and Second Defendants were unaware until shortly before trial. Unless and until the Fourth Defendant is restored to the Register it has ceased to exist as a legal person and has no standing in these proceedings.

The Conveyance

11. Upon his mother's death Mr Matthews inherited an undivided quarter share in the property known as 4 Frog Lane, Devonshire ("the Property"). His sister Pearl Philip ("Ms Philip") inherited another undivided quarter share and the First Defendant inherited an undivided half share. These interests were conveyed to them by the First Defendant as executrix of their late mother's estate by a vesting deed dated 30th March 1992.

12. The Property consisted of a main house and an upper and lower apartment. The First Defendant took the main house and Ms Philip and Mr Matthews took the upper and lower apartment respectively. The lower apartment was in a basement.

13. In around 2003 – 2004, following a stay in hospital, Mr Matthews came to live in the lower apartment. Previously he had lived in an apartment at Unit 9, 7 Cedar Park Road, Devonshire ("the Unit"), for which he held a long lease. It appears that he had got into financial difficulties. By a voluntary assignment of the lease dated 10th February 2006 he assigned the lease to the Second Defendant and she assumed responsibility for payment of the mortgage. The principal sum remaining on the mortgage was $46,426.50.

14. On 20th November 2009 the Second Defendant assigned the lease to a third party for $300,000. The attorney for the Second Defendant with respect to the assignment of the lease was the Fifth Defendant. The assignment was not the focus of these proceedings. However during the course of the proceedings, if not earlier, the question of whether Mr Matthews was entitled to all or any part of the proceeds of the assignment became a bone of contention between him and the Second Defendant.

15. By late 2009, Mr Matthews was no longer able physically to take care of himself. The First Defendant used to cook for and take care of him, but due to her advancing years she no longer felt able to take on this responsibility. Meanwhile the Property was in urgent need of renovation. The basement in particular was virtually uninhabitable. As the Fifth Defendant stated: "*The*

pit was sinking in, the Plaintiff's ceiling was sinking in and there was no way to fix it all with him living in there."

16. It was against this background that in or about December 2009 the Second Defendant approached the Fifth Defendant and instructed her to prepare a document conveying Mr Matthews' interest in the Property to her for nominal consideration, with the First Defendant as a life tenant. The plan as the Fifth Defendant understood it was that the Second Defendant would fund the renovations to the Property and that Mr Matthews would move permanently into a rest home where he could receive the support that he needed. The Fifth Defendant gave evidence that she had discussed the cost of the transaction with the Second Defendant and the time within which it could be completed, but not much more.

17. As instructed by the Second Defendant, the Fifth Defendant obtained a valuation for the Property. She engaged Bermuda Realty Company Limited ("Bermuda Realty") for this purpose. By cover of a letter dated 21st December 2009 Bermuda Realty enclosed a report stating that the market value of the Property as at 11th December 2009, which was the date on which they had inspected it, was $890,000. The Plaintiff contends – and this was not disputed – that the value of Mr Matthews' share in the Property was one quarter of this figure, ie $222,500.

18. The Fifth Defendant gave evidence that she had several meetings with Mr Matthews. They all took place in his basement apartment as he had difficulty moving about. She said it was more than likely that the Second Defendant had arranged the first such meeting, at which both the First and Second Defendants were present. But that subsequently she had met Mr Matthews when he was alone.

19. The Fifth Defendant said in evidence that she had found Mr Matthews very talkative. He appeared lucid to her and she stated that she had no reason to suspect that he did not understand the nature of the transaction. She went through the contents of the draft conveyance with him and told him what the legal effect of the document was but did not discuss the wisdom of the

transaction. She stated that Mr Matthews had decided to check himself into the Sylvia Richardson Care Facility voluntarily without any coaxing from her or the First or Second Defendants. She said that this was because he did not want to burden the First and Second Defendants and wanted to go to a place where he had assisted living.

20. The Fifth Defendant gave evidence that she was not aware of Mr Matthews' financial circumstances and did not inquire whether he owned any property or other assets. However she admittedly knew that he did not have any funds to contribute to the upkeep of the Property. Indeed she stated in her witness statement: "*Part of the reason [Mr Matthews]wanted to leave was because the house required so much work and he recognised that he could never contribute to fix it.*" However she said that she did not discuss with Mr Matthews how he was going to pay the fees for the rest home as those discussions were not her responsibility.

21. On 14th December 2009 the Fifth Defendant sent two letters to the parties to the proposed conveyance. They were both headed "*Re 4 Frog Lane Devonshire DV1 ('the Property')*". One letter was addressed to Mr Matthews and copied to the First and Second Defendants. It read as follows:

> "*We refer to the recent meeting between you, Ms. Amy Trott and the undersigned [ie the Fifth Defendant] with respect to the Property.*
>
> *As per your instructions to us, we have completed the deed of Voluntary Conveyance from you to Ms. Amy Trott and her daughter Mrs. Daunette Trott-Bean. Ms. Trott has retained a life interest in the Property.*
>
> *Please note that when you give away property without reserving a life interest in it you are giving away all control over that property as you no longer own it. We understand that this is your intention as you will shortly be placed in the Sylvia Richardson care facility. If you are content to do this stamp duty would be payable on the value of your 25% share of the Property.*
>
> *In order to protect your right to reside in the Property until you are placed in the Sylvia Richardson care facility, we will draft a Lease for Life. The Lease will entitle you to remain in the Property for the duration of your natural life time, or until such time as you decide to vacate the Property.*

Once the Lease has been drafted, the undersigned will contact you to arrange an appointment for you, Ms. Trott and Mrs. Trott-Bean to sign the same.

In the meantime should you have any queries please do not hesitate to contact the undersigned."

22. The other letter was addressed to the First and Second Defendants but not copied to Mr Matthews. It read in material part:

"*As discussed with the undersigned, Mr Matthew (sic) needs to retain a right to reside in the Property until he can be placed in the Sylvia Richardson care facility. In that regard, instead of Mr Matthew (sic) retaining a life interest in the Property, you instructed us to draft a lease for life. As per your instructions, we will begin drafting the said Lease and arrange an appointment for you, your daughter and Mr Matthew (sic) to sign the same.*"

23. The Fifth Defendant gave evidence that she had drafted a lease for life. She said that she could not remember what steps, if any, she had taken to get it signed and that getting it signed was not her responsibility. It is common ground that no such lease was ever signed.

24. Mr Matthews and the First and Second Defendants duly executed a voluntary conveyance dated 15th December 2009 by which Mr Matthews divested himself of his interest in the Property ("the Conveyance"). This was the document drawn up by the Fifth Defendant. It provided in material part:

"*... in consideration of the natural love and affection which the Grantor [ie Mr Matthews]bears towards the Life Tenant [ie the First Defendant] and the Grantee [ie the Second Defendant] and in further consideration of the sum of one dollar ($1.00) paid by the Life Tenant and the Grantee to the Grantor (the receipt of which the Grantor hereby acknowledges) the Grantor as beneficial owner* ***HEREBY CONVEYS*** *unto the Grantee and the Life Tenant his one-quarter (¼) share or interest in the Property* ***TO HOLD*** *the same* ***UNTO*** *the Life Tenant for the duration of her natural life without impeachment of waste and after her death* ***UNTO*** *the Grantee in fee simple.*"

25. Under Head 14 of the Schedule to the Stamp Duties Act 1976 ("the 1976 Act") the Conveyance should have been stamped within 30 days after execution. However as at the date of trial it had not been stamped. This did not deprive the Conveyance of its legal effect. But until such time as it was

stamped it could not be registered and, more to the point, it was inadmissible as evidence in the trial. See section 9 of the 1976 Act, which is clear and unambiguous on the point. I therefore received evidence of the Conveyance *de bene esse*, having been informed that the First and Second Defendants would take the steps necessary to regularise the position. The Conveyance has now been stamped, so I have been able to take it into account when preparing this judgment.

26. On 27th January 2010 Mr Matthews was admitted to the Sylvia Richardson Care Facility for respite care. He was discharged and returned to the Property on 17th February 2010. The respite care was paid for by the Second Defendant.

27. On or about 12th July 2010 Mr Matthews was admitted to the Lefroy House Care Community, where he has lived to this day. The First Defendant signed a pro forma document also dated 12th July 2010 undertaking to pay $45 per day towards his accommodation and care. It is disputed whether Mr Matthews realised that having relinquished his interest in the Property he had no right to return home.

28. The First Defendant held a power of attorney for Mr Matthews. Had the Plaintiff's action against the First Defendant not settled, there would have been a dispute as to how she funded those $45 payments. The Plaintiff would have contended that the First and/or Second Defendants made them from their own resources. The First and Second Defendants would have contended that the First Defendant made the payments pursuant to her powers of attorney from Mr Matthews' pension.

29. On 24th December 2010 Mr Matthews executed a document whereby he purported to convey a one quarter interest in the Property to the Third Defendant ("the Purported Conveyance"). The Purported Conveyance was drafted by the Fifth Defendant. She gave evidence that she took Mr Matthews through the document and was present when he signed it. She explained to him that the Property was being put in trust as the First and Second Defendants did not want it in their names. She told him that this was

to avoid double liability for stamp duty. Of course the Purported Conveyance had no legal effect as under the Conveyance dated 15th December 2009 Mr Matthews had already divested himself of his interest in the Property. It is not clear how the Fifth Defendant came to overlook this.

30. The recitals to the Purported Conveyance stated that Mr Matthews had agreed to sell his quarter interest in the Property for $217,250 and that he acknowledged receipt of that sum. No money had in fact changed hands. The Fifth Defendant explained that this was a drafting device and that none of the parties had understood that any payment would actually be made. She stated she had believed that a conveyance drafted like that would attract less stamp duty than a voluntary conveyance. That belief was erroneous.

31. I accept that $217,250 fell within a reasonable range of valuations of a one quarter interest in the Property, although based on the valuation previously obtained a more accurate figure would have been $222,500. Thus I accept that this conveyancing device was not underpinned by any dishonest intent. Nonetheless the statements that consideration had been both agreed and paid were untrue and should not have appeared in the instrument. I need hardly add that were a conveyance materially to understate the value of a property in order to avoid payment of the amount of stamp duty properly due on the transaction then the consequences for all involved could potentially be very grave indeed.

32. By a conveyance which was undated, but which by reference to emails relating to the transaction can be dated to around February 2011, Ms Philip, whom it will be recalled was a sibling of Mr Matthews and the First Defendant, conveyed her one quarter interest in the Property to the Third Defendant for $165,000. She was represented in the transaction by counsel independent of the First through Third Defendants and the sale price was actually paid to her or her estate. The Fifth Defendant gave evidence that the sale price was calculated by giving credit of roughly $60,000 for past expenses with which the Second Defendant had assisted Ms Philip.

33. The Fifth Defendant said in evidence that she could not recall whether any written retainer was executed in relation to the Property. There was none on file, although her electronic files had been corrupted by a virus and could not be retrieved. However she stated she understood that she was acting for all three parties in relation to the Conveyance, although she was only acting for the First and Second Defendants in relation to the Purported Conveyance. Whether she explained to Mr Matthews that she was no longer acting for him in relation to the latter transaction she did not say. However she did not look to Mr Matthews for her fees. She invoiced the First and Second Defendants for her fees in relation to the Conveyance and the Second Defendant in relation to the Purported Conveyance.

34. In around September 2011, Mr Matthews fell out with the First and Second Defendants. By letter dated 14th September 2011, the Fifth Defendant wrote to Mr Matthews at Lefroy House as follows:

> "*We understand that our clients have previously taken on the responsibility for payment of your residence fee and other ancillary services. Through your recent actions you have formally revoked the Power of Attorney that you gave to Ms. Amy Trott and in addition Ms. Trott has resigned as your legal Power of Attorney. In that regard as of September 30th 2011 our clients will no longer be responsible for you or any payments that must be made on your behalf.*"

35. Mr Matthews gave affidavit evidence that the monthly cost of staying at Lefroy House was $1,395. He had a Government pension of $1,014.73 per month which was paid automatically to the care home and a monthly private pension of $1,208.71. His Government Employee Health Insurance is deducted from the private pension each month, leaving a balance of $911.86. After payment of the balance due to Lefroy House of $380.27 Mr Matthews is left with only $531.59 each month for his personal needs and entertainment. He feels that this sum is wholly inadequate. No doubt for that reason he has fallen into arrears in paying the fees for the care home. As of 4th February 2015 there was a balance of $4,563.59 outstanding.

Breach of duty

36. I am satisfied that the Fifth Defendant was acting as attorney for all three parties to the Conveyance or that, put another way, they were all three of them her clients. That was her evidence, and it accords with the two letters dated 14th December 2009, one of which refers to instructions from Mr Matthews, and the other one to instructions from the First and Second Defendants. I do not consider that the attorney/client relationship between the Fifth Defendant and Mr Matthews was negatived by the fact that the transaction proceeded on the basis that it was the First and Second Defendants and not Mr Matthews who would be responsible for payment of the Fifth Defendant's fees.

37. An attorney's duty to her client is primarily contractual although it is impressed with fiduciary characteristics. The content of the contractual duty will be informed by the fact that it is rooted in the parties' relationship of trust and confidence. See the leading speech of Lord Walker in Hilton v Barker Booth and Eastwood [2005] 1 WLR 567 HL(E) at paras 28 – 30.

38. An attorney is under a duty to act for her client with reasonable care and skill. As Oliver J (as he then was) stated in Midland Bank v Hett, Subbs & Kemp [1979] Ch 384 Ch D at 403 B: "*The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession*".

39. An attorney also owes a duty of single-minded loyalty to her client's interest. This frequently makes it professionally improper and a breach of duty to act for two clients with conflicting interests in the transaction in hand. But if an attorney does put herself in the position of having two irreconcilable duties it is her own fault. *Per* Lord Walker in Hilton v Barker Booth and Eastwood at paras 31 and 41. As Lord Walker went on to state at para 44:

"*Mr Gibson submitted that a solicitor who has conflicting duties to two clients may not prefer one to another. That is, I think, correct as a general rule, and it distinguishes the case of two irreconcilable duties from a conflict of duty and personal interest (where the*

solicitor is bound to prefer his duty to his own interest). Since he may not prefer one duty to another, he must perform both as best he can. This may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other. But in any case the fact that he has chosen to put himself in an impossible position does not exonerate him from liability."

40. The Fifth Defendant submits, however, that in the present case no question of irreconcilable duties arose because she was merely instructed to draft a conveyance and a lease for life and advise the parties as to the consequences, which she did. That, she submits, was the limit of her duties. She submits in particular that she had no duty to enquire into the background to the transaction or advise any of the parties as to its wisdom.

41. The Fifth Defendant relies upon Clark Boyce v Mouat [1994] AC 428 PC. The facts, as summarised in the headnote, bear repeating in full.

"*The plaintiff agreed to mortgage her house to secure a loan to her son of $110,250. She was unaware that the son's own solicitor had declined to act in the matter, and was informed by a partner in the defendant firm of solicitors who had agreed to act for both parties in the transaction that her position as mortgagor providing the security was substantially different from that of her son as guarantor and recipient of the loan, that she ought to obtain independent legal advice and that he could arrange for her to see a lawyer at a neighbouring firm if she wished. He also pointed out that she would lose her house if her son failed to meet the mortgage payments. The plaintiff declined to see another lawyer and the partner thereupon acted for both the plaintiff and her son and completed the mortgage transaction. The son later became bankrupt with the mortgage payments in arrears and the plaintiff was left with a liability to repay the principal sum. She commenced proceedings against the defendants for damages for breach of contract, negligence and breach of fiduciary duty for, inter alia, failing to decline to act for the plaintiff when they were acting for her son, failing to disclose that the son's former solicitor had declined to act and failing to advise her that it was not in her interests to sign the mortgage.*"

42. The Privy Council found for the defendant. Lord Jauncey, giving the judgment of the Board, summarised the applicable principles thus:

"*There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting.*

Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other. If the parties are content to proceed upon this basis the solicitor may properly act [435 G].

. . . . .

In determining whether a solicitor has obtained informed consent to acting for parties with conflicting interests it is essential to determine precisely what services are required of him by the parties [436 E].

. . . . .

When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors [437 D]."

43. Applying these principles to the facts, the Board found at 437 B – C:

"*Their Lordships are accordingly satisfied that Mrs. Mouat [the plaintiff] required of Mr. Boyce [the defendant] no more than that he should carry out the necessary conveyancing on her behalf and explain to her the legal implications of the transaction. Since Mrs. Mouat was already aware of the consequences if her son defaulted Mr. Boyce did all that was reasonably required of him before accepting her instructions when he advised her to obtain and offered to arrange independent advice. As Mrs. Mouat was fully aware of what she was doing and had rejected independent advice, there was no duty on Mr. Boyce to refuse to act for her. Having accepted instructions he carried these out properly and was neither negligent nor in breach of contract in acting and continuing to act after Mrs. Mouat had rejected his suggestion that she obtain independent advice. Indeed not only did Mr. Boyce in carrying out these instructions repeat on two further occasions his advice that Mrs. Mouat should obtain independent advice but he told her in no uncertain terms that she would lose her house if Mr. R. G. Mouat [the brother] defaulted. One might well ask what more he could reasonably have done.*"

44. The Fifth Defendant also relied upon Pickersgill v Riley [2004] UKPC 14; [2004] PNLR 31. The plaintiff was a businessman who sued the solicitor whom he had instructed in relation to a commercial transaction. The plaintiff alleged that the defendant solicitor was negligent in that he had

failed to advise the plaintiff on the commercial wisdom of the transaction. The Privy Council held that the solicitor was not negligent as he had not been asked to give any such advice.

45. Lord Scott, giving the judgment of the Board, commented at paras 7 – 8 on the scope of a solicitor's duty of care to her client.

"*It is plain that when a solicitor is instructed by a client to act in a transaction, a duty of care arises. But it is also plain that the scope of that duty of care is variable. It will depend, first and foremost, upon the content of the instructions given to the solicitor by the client. It will depend also on the particular circumstances of the case. It is a duty that it is not helpful to try to describe in the abstract. The scope of the duty may vary depending on the characteristics of the client, in so far as they are apparent to the solicitor. A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering into a commercial transaction that it would be pointless, or even sometimes an impertinence, for the solicitor to offer to an obviously experienced businessman.*

As to the extent to which a solicitor should make enquiries or investigate matters that he has not been asked to enquire into or investigate, their Lordships think that para.10–160 in Jackson & Powell on Professional Negligence (5th ed., 2002) correctly states the position:

'In the ordinary way a solicitor is not obliged to travel outside his instructions and make investigations which are not expressly or impliedly requested by the client.' "

Lord Scott cited a number of authorities in support of the extract from Jackson & Powell, amongst which was Clark Boyce v Mouat.

46. The Plaintiff, on the other hand, referred me to various cases which suggested that an attorney's duty of care may go beyond the express terms of her retainer in the case of an inexperienced or vulnerable client.

47. In Carradine Properties Ltd v DJ Freeman & Co (a Firm) [1955 – 95] PNLR 219 EWCA the plaintiff sued a defendant who turned out to be uninsured and not good for any judgment. Two years later the plaintiff made a claim on its own insurance policy. Its managing director claimed that the reason for the delay was that he had only just remembered the existence of the

policy. The claim was rejected due to late notification. The plaintiff sued the solicitors who had acted for it in the claim, alleging that they should have asked the plaintiff whether it carried insurance on which it could claim. The action was dismissed. So too was the plaintiff's appeal. The Court of Appeal held that as the managing director was an experienced businessman with knowledge of insurance matters the solicitors owed the plaintiff no duty to enquire about its insurance cover.

48. However Lord Denning MR stated *obiter* at para 12-10 that in some cases with clients who were ignorant or inexperienced it might be the duty of the solicitor to enquire of the client whether or not he was insured against the risk. Similarly, Donaldson LJ (as he then was) stated *obiter* at para 12-13:

> "*A solicitor's duty to his client is to exercise all reasonable skill and care in and about his client's business. In deciding what he should do and what advice he should tender the scope of his retainer is undoubtedly important, but it is not decisive. If a solicitor is instructed to prepare all the documentation needed for the sale or purchase of a house, it is no part of his duty to pursue a claim by the client for unfair dismissal. But if he finds unusual covenants or planning restrictions, it may indeed be his duty to warn of the risks and dangers of buying the house at all, notwithstanding that the client has made up his mind and is not seeking advice about that. I say only that this* may *be his duty, because the precise scope of that duty will depend* inter alia *upon the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client.*"

49. Clark Boyce v Mouat and the dictum of Donaldson LJ in Carradine Properties Ltd were both cited in Mahoney v Purnell [1996] 3 All ER 61 QB. The plaintiff sold his shares in a company to the first defendant, who was his son-in-law, at an undervalue. As at the date of the transaction, when he was 69 years old, the plaintiff had been in business for 40 years and had been involved in a number of property transactions. The Court found that as at the date of the trial, by which time he was 77 years old, the plaintiff was a man of common sense, shrewd intelligence, and quick-minded by any standard. However he showed little or no sense of understanding financial details. He depended upon and trusted the defendant.

50. May J (as he then was) held on the authority of Barclays Bank plc v O'Brien [1994] 1 AC 180 HL *per* Lord Browne-Wilkinson at 189 that there was a presumption that the plaintiff had been induced to sell his shares under the undue influence of the first defendant. This was because there was a relationship of trust and confidence between the plaintiff and the first defendant of such a nature that it was fair to presume that the first defendant abused that relationship in procuring the plaintiff to sell his shares by way of a transaction that was manifestly disadvantageous to him. As the first defendant was unable to rebut the presumption May J found that the plaintiff's claim for undue influence succeeded. He ordered that the first defendant pay equitable compensation to the plaintiff, giving appropriate credit for monies which the plaintiff had already received, assessed at the value of the shares as at the date of sale.

51. The case is relevant because the plaintiff also sued as fourth defendants the company's solicitors. The fourth defendants accepted that they had acted for the plaintiff, the first defendant and the company on the transaction. The plaintiff alleged that the fourth defendants owed him a duty of care to give him proper advice about the transaction. The fourth defendants disagreed, submitting that their retainer was limited to preparing the relevant documents; that they had expressly declined to advise the plaintiff as to whether the transaction was fair and reasonable; and that they had advised the plaintiff to seek independent legal advice.

52. May J found that the nature of the fourth defendants' historic relationship with the parties was such that the parties would expect the fourth defendants to act generally in relation to the transaction and that they would implicitly engage to do so unless they limited their retainer on this occasion quite specifically, which they did not do. The plaintiff was therefore entitled to assume that the fourth defendants were acting for him generally in relation to the transaction.

53. May J further found that the plaintiff was in the category of inexperienced, or perhaps vulnerable, clients such that the scope of the fourth defendants' retainer was broader than it would have been for a more experienced client.

They explained the nature of the transaction to him, but the Court was not satisfied that he understood the finer details. Although they declined to advise as to whether the transaction was fair, they did give some advice about it. Although they advised him of his right to seek independent legal advice, they did not impress on him that he should do so. All this in the context of a transaction which the fourth defendant realised was potentially disadvantageous for the plaintiff. May L found that the fourth defendants were in breach of their duty of care to the plaintiff.

"*Mr Howe [of the fourth defendants] was not obliged to give commercial advice, but he was obliged in the circumstances to give strong explicit advice which fully explained the conflict and told Mr Mahoney [ie the plaintiff] that he should get independent advice, failing which Mr Howe would be obliged to withdraw. At the very least it is in my judgment clear that Mr Howe did not fulfil his Clark Boyce obligations. A solicitor who realises that a proposed transaction is potentially disadvantageous to one of his clients is, in my judgment, obliged to give more than the muted advice which Mr Howe gave in this case, the more so when that client is at a disadvantage. The possibility that giving such advice might be seen as a breach of his duty to Mr Purnell [ie the first defendant] only emphasises the perils which a solicitor acting for more than one party can encounter.*"

54. I was also referred to the Canadian case of Panko v Simmonds, 1982 699 (BC SC). The elderly plaintiff's daughter and her son-in-law got her to transfer title to her home to them. She thought that the transfer was for a limited period to assist her son-in-law in the arranging of a small loan. She did not realise that the transfer was permanent and never contemplated that her son-in-law would, as he did, take out a mortgage for $100,000 secured against the property. The lender commenced foreclosure proceedings. The plaintiff brought an action in negligence against the attorney who had handled the conveyance and won.

55. It was accepted that the defendant owed the plaintiff a tortious duty of care. However the defendant submitted that the only duty cast on him was to ensure that the plaintiff appreciated that she was transferring the property to her daughter and son-in-law. He further submitted that, even if she had

taken independent legal advice from another solicitor, that other solicitor's duty would have been no wider. The Court did not agree. McKay J stated:

"*[14] The circumstances were such that warning lights should have been flashing.*

> *1. The instructions for the transfer were given to the solicitor by the son-in-law. The plaintiff took no part in those instructions. That being so, the solicitor was unable to assess the plaintiff's appreciation of what was going on.*
>
> *2. It should have been obvious to the solicitor that the plaintiff was an elderly, unschooled and unsophisticated person.*
>
> *3. The property was valued at $160,000 but no money was to change hands.*
>
> *4. The relationship of the parties was known to the solicitor. It is unfortunately not at all uncommon for sons and daughters to take advantage of elderly parents — particularly in the transferring of property.*

[15] The solicitor, faced with the above, should have immediately been alerted to the possibility that the plaintiff was either about to do something that was foolish and contrary to her best interests or that she was being defrauded by an unscrupulous daughter and son-in-law. Even the most rudimentary questioning would have elicited that the plaintiff merely wanted to assist her son-in-law in the arranging of a "small loan" and that she never contemplated the complete and final transferring of her home — at most the transferring, in her mind, was to have been for a limited period. She never contemplated the possibility of a mortgage of $100,000 on property which she still considered to be hers.

[16] The solicitor undertook the responsibility of effecting the conveyance and he should have known that the plaintiff was relying on him to protect her interest. He failed to recognize the obvious danger signals. He failed to follow the ruling of the Law Society as to the responsibilities of a solicitor in a transaction such as this. He breached his duty to the plaintiff and liability must follow."

56. Returning to the present case, I am satisfied that the Plaintiff was a vulnerable and inexperienced client. I take account of his advanced age and physical frailty; his lack of business experience; his dependence upon the First Defendant to look after him; and the fact that the Second Defendant was to fund the renovation of the Property, which might have made him feel

beholden to her. Although undue influence was pleaded, it was not argued before me, so I need not consider the facts from that perspective.

57. Mr Matthews' attorney was in the circumstances under a duty to advise him as to the wisdom of the transaction. On the particular facts of this case, that entailed that she explain to him so that he understood: (i) the value of his interest in the Property; (ii) that he was under no obligation to relinquish it; (iii) the transaction was to his manifest disadvantage in that it involved relinquishing his valuable interest in the Property for nothing; and (iv) that he would have no right to return to the Property once he had relinquished his interest in it and moved out.

58. Mr Matthews' attorney was further under a duty to discuss with him (a) how he was going to fund his proposed lifelong stay in a care home; and (b) how his interest in the Property could be used to help fund that stay – eg by realising its value through a partition action or by retaining his interest in the Property – or maybe for suitable consideration a life interest in it instead – and renting out his renovated apartment.

59. In order for the Fifth Defendant to obtain Mr Matthews' informed consent to her acting for him in relation to the transaction she should have advised him in the strongest terms to obtain independent legal advice. If he was unwilling or unable – eg because he couldn't afford it – to take independent legal advice, then she should have advised him as to the matters set out above and explained the nature of the conflict between his interests on the one hand and those of the First and Second Defendants on the other. If she concluded that she was unable to do so because that would have conflicted with her duties to the First and Second Defendants then she should have declined to act for Mr Matthews in relation to the transaction and made sure that he understood that she was not his attorney. I need not consider what in those circumstances the ambit of her tortious duty of care to Mr Matthews would have been.

60. The Fifth Defendant did not do all these things. It is true that in her letter to Mr Matthews of 14th December 2009 she advised him that when he gave

away his property without reserving a life interest in it he would be giving away all control over that property as he no longer owned it. But that advice was not sufficient to discharge her contractual duties of care and loyalty towards him.

61. Indeed the Fifth Defendant's evidence was that she did not act with single minded loyalty towards Mr Matthews. She stated that if he had retained a life interest in the Property he would have been entitled to collect rents, and that that would not have been fair to the First and Second Defendants as he could not afford to contribute to the upkeep of the Property. From this I conclude that, perhaps unconsciously, when acting with respect to the Conveyance she prioritised their interests over Mr Matthews'.

62. In the premises I find that the Fifth Defendant was in breach of her contractual duties to act for Mr Matthews with reasonable care and skill and to represent his interests with single-minded loyalty.

Causation

63. In order to obtain damages for breach of contract the Plaintiff must establish that the breach has caused Mr Matthews loss. I am satisfied that it has. Had Mr Matthews been properly advised by his attorney then in my judgment he would not have relinquished his interest in the Property without securing its market value as the price of the transaction.

Damages

64. The relevant date for the assessment of contractual damages is generally the date of the breach, although this rule is not inflexible. As Lord Wilberforce, giving the judgment of the House of Lords, stated in Johnson v Agnew [1980] AC 367 at 400 H – 401 A:

"*The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally*

leads to assessment of damages as at the date of the breach … . But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances."

65. Here, the loss caused by the breach was the value of Mr Matthews' interest in the Property as at the date of the Conveyance. I assess that value in the amount, which was not disputed, of $222,500. That is the amount of damages which I find that the Fifth Defendant must pay to the Plaintiff.

Summary

66. I accept that the Fifth Defendant started out with the intention of acting in the best interests of all three parties to the Conveyance. However in trying to do that she ended up breaching her contractual duties to act for Mr Matthews with reasonable care and skill and with single-minded loyalty. I am satisfied that her breach of those duties caused him loss. The amount of the loss was the value of his interest in the Property as at the date of the Conveyance, namely $225,000. I order that the Fifth Defendant pay damages to the Plaintiff in that sum.

67. I shall hear the parties as to costs and interest.

Dated this 10th day of April, 2015

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Hellman J