

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**COMMON LAW & EQUITY DIVISION
2007/CLE/gen/00657**

BETWEEN:

WEST ISLAND PROPERTIES LIMITED

Plaintiff

AND

SABRE INVESTMENT LIMITED

First Defendant

AND

GRUNTSFIELD LIMITED

Second Defendant

And

**(1) SARAH SMITH FARRINGTON
(2) MICHAEL R. SCOTT
(3) COLIN E. CALLENDER
(all carrying on the practice of Counsels
And Attorney under
The name of Callenders & Co.)**

Third Defendants

Before: Stephen G. Isaacs J.

Appearances: Gail Lockhart-Charles and Tracy Wells for Plaintiff
Brian Moree Q.C., Diane Stewart and Sean Moree for Defendants

Hearing Dates: 28 April, 21, 22 & 23 October and 27 November 2009

R U L I N G

By a specially endorsed Amended Writ of Summons filed 12 June 2007 the Plaintiff has prayed for the following reliefs:

- (1) repayment by the First Defendant of the said sum of ~~\$250,000~~ \$300,000 for moneys had and received as alleged in paragraphs 6 and 22.
- (2) Damages as against the First and Second Defendants for deceit and/or misrepresentation as alleged in paragraphs 15 and 16.
- (3) A declaration that the Third Defendants are guilty of improper conduct and/or of conduct unbefitting a counsel and attorney within the meaning of *section 29* of the 1992 Act having regard to *Rules II, III, IV, and V* of the said Regulations in force thereunder.
- (4) Damages as against the Third Defendant **SSF** for breach of duty and confidentiality, and for deceit and conversion as alleged in paragraphs 9, 10 and 22.
- (5) Damages as against the Third Defendant **SSF** for breach of duty and/or negligence as alleged in paragraphs 9, 10 and 24.
- (6) Damages as against the Third Defendant **MRS** for breach of duty as alleged in paragraphs 8, 9 and 19.
- (7) Damages as against the Third Defendant **CEC** for breach of duty as alleged in paragraphs 9, 10 and 22.
- (8) An Order under *Section 21 (1) of The Supreme Court Act, 1996* or under the Court's inherent jurisdiction, restraining the law firm of Callenders & Co., whether by the Third Defendants SAF (*sic*) and/or MRS and/or CEC or otherwise howsoever, from acting as Attorneys for either of the First and Second Defendants against the Plaintiff on the grounds that so to act constitutes (*inter alia*) a breach of the attorney's duty of loyalty they continue to owe to the Plaintiff as a former client of theirs and the said firm; and that the said Attorneys being officers of the Court, it is

subversive of the fair and impartial administration of justice that they and/or their said Firm be permitted to act for either of the said First and Second Defendants against the Plaintiff in adversarial proceedings with respect to transactions giving rise to this action for and which they were once engaged as attorneys by the Plaintiff to represent it.

- (9) Special damages.
- (10) Interest on the said damages pursuant to provisions of *The Civil Procedure (Award of Interest) Act, 1992*.
- (11) Further or other relief as to the Court seems just.
- (12) Costs.

2. Each of the Defendants have filed a Summons on 25 June 2007 under Rules of the Supreme Court Order 18 rule 19 to have the Writ and Statement of Claim struck out, and the action dismissed. The Summonses are supported by five Affidavits two by Colin E. Callender filed 29 May and 15 December 2008 respectively, two by Lester B. Smith filed 29 May and 15 December 2008 respectively, and one by Leonard Smith filed 29 May 2008. In opposition the Plaintiff has filed two Affidavits, one by Vanessa Carlino filed 18 November 2008 and one by Dale Bronstein filed 14 November 2008.

3. The First Defendant has applied under O.18 r.19 (1) (a) (b) and (d), the Second and Third Defendants have applied under O.18 r.19 (1) (b) (c) and (d)

Order 18 r.19 provides as follows:

"19 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that

- (a) it discloses no reasonable cause of action or defence, as the case may be; or***

- (b) it is scandalous, frivolous or vexatious**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court"**

4. Of course, as the Plaintiff has submitted the Court's powers under this rule should only be exercised in plain and obvious cases, a minute and protracted examination of the documents and facts of the case to determine whether or not the Plaintiff really has a case ought not be conducted. (*see Wentlock v Moloney et al [1965] 2 AER 871.*)

5. Bearing in mind the limits of an O.18 application, the submissions made must still be judicially considered, for there is no blanket rule that a lengthy application can never succeed.

6. A brief summary of the background facts reveals that the Third Defendants are lawyers in the firm of Callenders & Co. In early 1996 West Island Properties Limited (W.I.P.) agreed to purchase several parcels of land from Gruntsfield subject to certain conditions over a five year period (the Option Agreement). The price was fixed provided W.I.P. met certain minimum annual purchase quotas. W.I.P. was to subdivide and develop the property for sale to sub-purchasers. By clause 28 of the Option Agreement, the construction of a house was to be completed within three years, or a construction contract to build a residence had to be entered within three years (*see page 1 of Exb. LES 1 of the Lester Smith's Affidavit filed 29 May 2008*).

7. By a Supplemental Agreement the permitted number of lots in the development was reduced from 55 to 45 (*see page 33 of Exb. LES 1 of Lester Smith's Affidavit filed 29 May 2008*)

8. *Callenders representing both parties made it clear that Lester Smith and the Second Defendant were its clients and in the event of a conflict it reserved the right to withdraw as counsel for any of the parties (see letter at page 1 of Exb. CEC 1 of the Callender Affidavit filed 29 May 2008).*

9. *By letter of 9 April 1997 Sarah Farrington on behalf of Callenders fixed the legal fees on each completed home sale at 1.25% on the condition that Callenders would represent W.I.P. on conveyances throughout the development, as well as in connection with related building contracts (see letter at page 29 of Exb. CEC 1 of the Callender Affidavit of 29 May 2008).*

10. *On 16 November 1999 W.I.P. and Gruntsfield agreed in writing that W.I.P. exercise its's option in any order, and that Sarah Farrington would conduct all the legal work (see page 42 of Exb. CEC 1 of the Callender Affidavit filed 29 May 2008.)*

11. *On 29 August 2001 W.I.P. requested conveyances for four remaining lots without naming sub-purchasers, purchase price or building contract price to be inserted into the conveyance as required under clause 28 of the Option Agreement. The Option Agreement was to expire in December 2002.*

12. *Gruntsfield agreed to waive the requirement relating to sub-purchasers under clause 28 provided all parties were fully paid for their work and mutual releases were exchanged. In March 2002, as part of the settlement, W.I.P. represented by independent counsel, released Gruntsfield and Callenders from all actions, proceedings, demands or claims relating to, inter alia, the agreements between Gruntsfield and W.I.P. and the representation of W.I.P. by Callenders (see pages 60 – 62 of Exb. CEC 2 of the Callender Affidavit filed 29 May 2008.)*

13. *There have been two earlier actions by W.I.P. against Sabre, Sarah Smith Farrington, Leonard Smith and Steven Murtz canvassing essentially the same matters*

now set out in the Amended Statement of Claim. In action No. 186 of 2005 W.I.P. sought to join Colin E. Callender, Michael Scott, Callenders, Gruntsfield and Lester E. Smith as Defendants, which application was dismissed. The action itself was eventually dismissed under O.18 r.1 for failure to serve a Statement of Claim. Mr. Lindroth, as the proprietor of W.I.P., was roundly criticized by Lyons J., for launching an action alleging fraud without the particulars required to establish deceit or fraud as a cause of action, particularly against Attorneys who rely on their reputations to practice their profession.

14. In action No. 1221 of 2003 W.I.P. was one of three Plaintiffs' against Gruntsfield seeking declarations and injunctions in respect of a certain right-of-way over a roadway arising out of the option agreement.

15. W.I.P. now raises other issues relating to that right-of-way and it is submitted that under O.18 r.19 the instant action is an abuse of process.

Order 18 r.19 provides under rubric 18/19/9 of the 1992 white book that:

"It is an abuse of process of the Court to raise in subsequent proceedings matter which could and should have been litigated in earlier proceedings."

16. The cases of *Henderson v Henderson (1843) 3 Hare 110* and *Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd (1975) AC 581* support this principle.

The Sabre Application

17. W.I.P. has alleged at paragraph 15 of its amended Statement of Claim that

"Sabre, through its principles and/or agents Leonard Smith and Steven Murtz represented to the Plaintiff that it also held an option from Gruntsfield to purchase as having a right to sell."

18. At paragraph 16 W.I.P. alleges that it agreed to buy out Sabre's option for \$300,000 in reliance on, inter alia, this representation. This matter is mentioned in paragraph 22(i), but is pleaded as one of the particulars of the alleged breach of duty claims against Callenders.

19. Nowhere is it pleaded that the alleged representation is false or untrue.

20. At paragraphs 1 and 2 of the prayer W.I.P. claims the \$300,000 based on money had and received, and for deceit and misrepresentation respectively, but there are no facts pleaded to make Sabre's receipt of the money a receipt to the use of W.I.P. as required (see rubric 18/12/22 of the 1992 white book), nor are there particulars of either the deceit or of misrepresentation relative to Sabre.

21. Given the above, the claim against Sabre is struck out under O.18 r.19 (1)(a) and (d), there being no reasonable cause of action disclosed against Sabre and the claim being an abuse of the process of the Court.

The Gruntsfield's Application

22. Gruntsfield has submitted that the claim against it for deceit and/or misrepresentation is caught by the release document of 20 March 2002 referred to above.

23. W.I.P. does not attempt to impeach the release document or claim any relief related thereto. It does not seek to set the document aside or to exclude its' claim from the provisions thereof.

24. Further there is no allegation that the representation at paragraph 15 is untrue or false, and there are no particulars to support the allegations of deceit and misrepresentation.

25. The right of Gruntsfield to transfer the right of way cannot now be an issue as W.I.P. and Gruntsfield agreed to provide an alternative means of access.

26. For these reasons the claims against Gruntsfield of fraud and misrepresentation is struck out as being frivolous, vexatious and an abuse of process.

The Third Defendants (Callenders) Application

27. It is submitted that all of the claims against Callenders are covered by the Deed of Release between W.I.P. and Callenders.

28. W.I.P. does not seek to avoid the deed or to set it aside. There are two references to the release, one at paragraph 12 and the other at paragraph 22 (x). At paragraph 12 W.I.P. complains that it did not release Callenders from their statutory duty as counsel and attorneys to comply with the professional standards imposed on them.

29. At the very outset of the professional relationship between W.I.P. and Callenders it was made clear to W.I.P. that Gruntsfield and Lester Smith were existing clients of the firm. Callenders were then instructed to represent W.I.P.'s interest in respect of the arrangement with Gruntsfield. Callenders were not instructed to provide any opinions on title to any of the subject land. Callenders advised W.I.P. that should a conflict arise, it reserved the right to withdraw as counsel for any of the parties (see page 1 of Exb. CEC 1 of Colin E. Callender's Affidavit filed 29 May 2008).

30. At paragraph 22(X) W.I.P. complains, as part of the alleged breach of duty, that Callenders coerced the execution by W.I.P. of the Deed of Release. W.I.P. however was represented by independent counsel who negotiated the Deed of Release on their behalf. There is no allegation that the Deed of Release is invalid or unenforceable, nor does W.I.P. seek any release in respect thereof.

31. Further on the claim of deceit/fraud against Callenders relative to the payment of \$300,000 for the last four lots to Sabre, and the granting of a right of way to sub-purchasers by Gruntsfield, Callenders never gave W.I.P. an opinion on title, and W.I.P. cannot bring a claim on behalf of sub-purchasers.

33. The fee charged by Callenders in respect of the last four lots was negotiated and the terms set out in writing (see page 34 of Exb. CEC 1 of the Affidavit of Colin Callender filed 29 May 2006.)

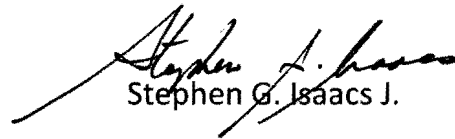
33. Callenders has also fully accounted to W.I.P. for the other amounts paid to the firm (see pages 51 – 55 of Exb.. CEC 1 of Colin Callenders Affidavit of 29 May 2006.)

34. For the reasons above the Amended Statement of Claim is struck out against Callenders for being scandalous, frivolous and vexatious and an abuse of the process of the court.

35. In the result the Amended Statement of Claim and the action is struck out as against all of the Defendants with costs to be taxed if not agreed.

36. Costs of the application are awarded to the Defendants to be taxed if not agreed.

Dated the 10th day of August A.D. 2010.



Stephen G. Isaacs J.