IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION
IN CHAMBERS

CAUSE NO. G49 OF 2018

BETWEEN

MCGLYNN ENTERPRISES LTD

Plaintiff

AND

MAGDA-ZOE EMBURY

Defendant

Appearances:	Mr A. Jackson and Miss A. Martin of Appleby for the Plaintiff Mr J. Chapman and Miss L. Clemens of Chapmans for the Defendant
Present:	Miss Embury
Heard:	5 September 2018
Draft judgment circulated:	17 December 2018
Judgment delivered:	22 January 2019

HEADNOTE

Summary Judgment – Breach of Trust – Professional Negligence – Attorneys – Conveyancing

JUDGMENT with Errata

1. This is the judgment on the Plaintiff's summons for summary judgment dated 30 May 2018. Given the numerous issues raised by the Defendant and her counsel, this judgment is considerably longer than would usually be the case. I thank the parties for their patience while I considered the issues.

The Parties

2. The Plaintiff is McGlynn Enterprises Ltd ("the Plaintiff"); a Cayman Islands exempted limited company.

3. Jim McGlynn Sr is the sole director and beneficial owner of the Plaintiff. Mr McGlynn Sr also owns McGlynn Enterprises LLC ("McGlynn USA"), a US-registered company. Ms Lucenti is the Plaintiff's company secretary.

4. The Defendant is Ms Magda-Zoe Embury ("the Defendant"), a Cayman Islands Attorney-at-law. At the material time she was a sole practitioner under the name Emburys Attorneys.

The Writ

5. On 19 March 2018 the Plaintiff filed a writ of summons alleging that it had engaged the Defendant to act as its attorney for the purposes of purchasing the property Rum Point Bock 33E parcel 103H16 ("the property"). In the course of that business, the Defendant provided a Completion Statement setting out the various sums necessary to complete the purchase and register the transfer with the Lands and Survey Department ("the LSD"), including -

   (a) US$48,679.94 for stamp duty
   (b) US$91.46 registration fees; and
   (c) US$24.39 to obtain a certified copy of the Land Register.

6. The Plaintiff alleges that, having transferred funds to the Defendant for these fees, the Defendant failed to pay the stamp duty and registration fee to the LSD, and as a result of the Defendant's failure, the property was not transferred to the Plaintiff. Neither did the Defendant provide the Plaintiff with a copy of the land register evidencing the transfer.

7. Upon discovering in June 2016 that the process was incomplete, the Plaintiff took steps to complete registration. In order to do so, the Plaintiff had to pay the sums due in 2012 (US$48,771.40) as well as additional fees and penalties, totalling an additional US$73,824.90.

8. The Plaintiff asserts that the Defendant was holding the Plaintiff's funds on trust, to apply them for the expressly identified purposes; her failure to apply the funds for their intended purpose (or for the benefit of the Plaintiff at all) constitutes a breach of her fiduciary duty and, consequently, the Plaintiff is entitled to repayment of those funds, with interest.

9. Furthermore, (as well as in the alternative to 7 above) the Plaintiff alleges that the Defendant owed the Plaintiff a duty of care to ensure that the stamp duty and registration fees were paid from the funds she received and that the transfer of the property to the Plaintiff was registered. The Defendant's failure to apply the sums in a timely manner or at all constitutes negligence and the Plaintiff is entitled to damages in the balance of the funds paid to the Defendant in 2012 but not applied to the transfer as well as the additional costs incurred as a result of late registration. During submissions, Mr Jackson stressed the point that the Plaintiff is not asserting that the Defendant stole the funds, but rather that, for reasons only she knows, she failed to apply the funds as she was obligated to do.

10. The Defendant filed her notice of intention to defend on 3 April 2018. The Plaintiff filed and served its statement of claim on 16 April 2018. To date the Defendant has not filed a defence nor pursued her application[1] for an extension to do so.

[1] (Summons filed with the Court on 14 May 2018)

11. On 30 May 2018, the Plaintiff filed the summons seeking summary judgment together with the affidavit from Ms Lucenti in support of the application. The Defendant filed her affidavit in reply on 30 August 2018, to which she exhibits her draft defence. While the Defendant accepts that she received funds for the closing of the property and that registration was not completed, she denied being responsible for the failure or that she was negligent in any way. The Defendant asserts that she duly paid the stamp duty and registration fees at the material time by way of bank drafts.

12. In addition to the affidavits of Ms Lucenti and the Defendant, I also considered the additional affidavit from Daniel Hayward-Hughes speaking to a narrow issue as to a process within the LSD and Yaroslav Pshenitisyn exhibiting correspondence between the parties.

The Law

13. This application is governed by GCR O. 14, r.1(1). The statement of claim was served on the Defendant on 19 March 2018 and the Defendant filed her notice of intention to defend on 3 April 2018, therefore, the requirements of rule 1 have been met.

14. Ms Lucenti's affidavit meets the requirements of O.14, r.2(1) and (2) and the affidavit and exhibits were served on the Defendant within the allotted time. Therefore, the technical requirements of Order 14 have been met.

15. In accordance with O.14, r.3(1), the burden shifts to the Defendant to satisfy the Court that judgment should not be given against her (see 1999 Supreme Court Practice, O.14/4/1 and **Lakatamia Shipping Company Ltd v SU** 2017(1) CILR 416).

16. The Defendant seeks to discharge this burden by establishing that –

(a) she has a good defence to the claims on the merits;

(b) there are multiple issues or questions in dispute which ought to be tried; and

(c) there are other circumstances showing reasonable grounds of a bona fide defence.

17. She has set out the particulars in her affidavit and draft defence.

18. There are obvious conflicts on matters of fact between the affidavits of Ms Lucenti and the Defendant. The summary judgment application is not a trial of the veracity of the affidavits. However, the court does not have to treat all affidavits filed as truthful: where the proposed defence rests on a question of fact, the court must first ask whether the evidence is credible, when considered with the plaintiff's evidence, and whether there is a fair and reasonable probability that the defendant has a *bona fide* defence (**Panier SA v Burns** 2002 CILR N-6). In **Merren v Cayman National Bank** 2008 CILR 428 Vos AJ, giving the judgment of the court, affirmed the approach the court should take when faced with conflicting affidavits (at paragraphs 5 and 6)–

> *"5. The proper approach to an O.14 application, where there is conflicting or competing affidavit evidence, was settled in England in National Westminster Bank plc v. Daniel (4), in which Glidewell, L.J. reviewed the history, and concluded by applying the dictum of Ackner, L.J. in Banque de Paris et des Pays-Bas (Suisse) S.A. v. Costa de Naray (1), where he said ([1984] 1 Lloyd's Rep. at 23):*

"It is of course trite law that O.14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence."

6. *Glidewell, L.J. himself concluded ([1993] 1 W.L.R. at 1457):*

"I think it right to ask, using the words of Ackner, L.J. in the Banque de Paris case, at p.23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd, L.J. in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?,' amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence."

19. Vos AJ summed up the issue at paragraph 8 by stating –

> *"In my judgment, the test is not really in two stages, because the two stages, as Glidewell, L.J. pointed out in National Westminster Bank plc v. Daniel (4), amount to much the same thing, because ([1993] 1 W.L.R. at 1457) "if [the evidence] is not credible, then there is no fair or reasonable probability of the defendant having a defence." No harm would be done, it seems to me, by adopting the two-stage approach, even if, in reality, a negative answer to the first question would inevitably lead to a negative answer to the second question. For my part, however, I would prefer to regard the test as simply requiring the court to ask whether the defendant has shown a fair or reasonable probability that he has a real, or bona fide, defence. It can be noted that the words used in Daniel and Banque de Paris were "real or bona fide" not "real bona fide".*

20. Given the foregoing, when I consider this application I may look at all affidavits critically to determine whether there is a reasonable probability of the Defendant having a real or bona fide defence.

21. The Defendant need not show a complete defence to the action, but the Defendant must establish that there is a triable issue, i.e. one which merits investigation at trial and which is inappropriate for summary resolution on affidavit evidence.

22. In **Miles v Bull** [1969] 1 QB 258 Megarry J examined (at 265G – 266C) the phrase "or that there ought for some other reason to be a trial" (in our O.14, r.3 "an issue or question in dispute which ought to be tried");

> *"These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff... The words "there ought for some other reason to be a trial" seem to me to give the court adequate powers to confine Order 14 to being a good servant and prevent it from being a bad master."*

23. The Vice-Chancellor in **The Lady Anne Tennant v Associated Newspapers Group Ltd** [1979] FSR 298 observed (at page 303) that –

> *"A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism."*

24. In this instance there is a plethora of emails that both parties rely upon to prove their case. The content of the emails are not disputed.

The Defendant's Arguments In Favour Of Granting Leave To Defend

The Automatic Right To A Trial

25. Mr Chapman, on behalf of the Defendant, submitted that, as a matter of principle, the fact that the Defendant is an attorney is sufficient reason to refuse summary judgment and give the Defendant unconditional leave to defend the claim. Mr Chapman argued that claims of negligence and breach of trust against members of the legal profession are so serious that justice requires such matters to be fully investigated at a trial. He went so far as to suggest that the Plaintiff would have to prove such allegations to the criminal standard of proof (beyond a reasonable doubt) rather than the civil standard.

26. Mr Chapman places this argument in the **Miles v Bull** category of "*cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial*". Mr Chapman did not provide any authorities to support his contentions. I was not persuaded that as a matter of principle justice required that attorneys be given any special status or rights above other professionals or other defendants in general in such claims. I conclude that the Defendant's status is not a basis for granting leave to defend.

The Right To Cross-Examine The Plaintiff's Witnesses

27. Mr Chapman sought to argue that leave to defend should be granted because the Defendant "has a right to" and "intends to" cross-examine the Plaintiff's officers at trial. He specifically spoke to questioning Mr McGlynn Sr about the purpose of establishing the Plaintiff company. However, the Defendant does not dispute that she received the funds in question and the purpose to which they were to be used. Unlike the circumstances in **Miles v Bull**, the pertinent information as to what happened to the funds after they were transferred to the Defendant and what if any steps were taken to ensure the transfer and registration was completed is entirely within the Defendant's knowledge. Any investigation would concern matters that were within her control and to which she would be the most likely person to be able to obtain the relevant evidence. Examination of the Plaintiff's witnesses would not likely lead to any resolution of those fundamental issues. I will return to the issue of cross-examination later when I deal with the Defendant's individual grounds.

The Defendant Paid The Funds To The LSD In 2012

28. At paragraph 12 of the Defendant's draft defence, she states that –

> *"...upon receipt [of the funds] she applied them as she was contractually obliged to do: all requisite drafts were purchased from the said funds and delivered to their holders in due course. The drafts for CI Government were drawn by HSBC Bank Cayman payable to CI Government as payee and the latter became the holder thereof upon delivery to it."*

29. This is information that would be within her knowledge, not the Plaintiffs. This positive assertion might have given rise to the possibility of a real or bona fide defence; however, the Defendant makes a number of statements in her affidavit which conflict with her stated defence. At paragraph 29 of her affidavit the Defendant states –

> *"...I do not have an independent recollection of everything that transpired in the matter. I have gathered together as many documents and correspondence as I have been able to, particularly in light of the fact that Emburys Attorneys has been defunct since 2014."*

30. This statement suggests that the evidence before me now is the full extent of the evidence which would be before the tribunal at trial, i.e. the Defendant's case at its highest. Yet in his submissions, Mr Chapman suggested that the Defendant may adduce further evidence at trial, while at the same time acknowledging that they cannot get the necessary records as both the firm and the bank have ceased trading in the Cayman Islands. Mr Chapman stressed the point that *"any evidential difficulties as a result of lack of records should not work against the defendant".*

31. What is clear is that the Defendant's case relies heavily on other sources of evidence. At paragraph 21 of her affidavit she states –

> *"Following the closing, the administrative tasks of submitting the Transfer of Land documentation, [to] the Land & Survey department would have been delegated to my administrative staff as per our standard operating procedure. I have no reason to believe that our standard procedure was not followed."* (emphasis added)

32. At paragraph 22 and 23 the Defendant states –

"In this matter, the Transfer of Land documentation was submitted to the Lands & Survey department on or about 10th December 2012..."
"When submitting a Transfer of Land to Lands & Survey, it is a mandatory requirement to submit a draft or cheque for the payment of any stamp duty owed with the Transfer of Land documentation.... The Lands & Survey department will not accept the submission...unless it is accompanied by a draft or cheque for the payment of stamp duty."

33. The Defendant exhibits an email from the LSD dated 10 December 2012 confirming submission of the relevant document.

34. In summary, to prove that the funds were paid to the LSD, the Defendant will seek to reply upon –

(a) Her usual practice;
(b) her personal belief as to the policies and procedures of the Lands and Survey Department; and
(c) an email she received from the LSD.

35. However, the email (10 December ~~2018~~ 2012) speaks only to a Transfer of Land document and a "certified copy" of an unidentified document for the property being received/lodged at the Land Registry. The email does not speak to the LSD receiving payment in any form and, therefore, does not appear to evidence what the Defendant claims it does. This is borne out by the email from Aliceann Kirchmann, Senior Land Registry Advisor (exhibited by the first affidavit of Daniel Hayward-Hughes) :

"A transfer can be submitted without the draft. The email is only acknowledging receipt of the submission."

36. Neither has the Defendant spoken to how she intends to prove that the drafts were prepared and delivered, beyond her assertion of the "usual practice". She has not spoken positively to her administrative staff being able to confirm that they did carry out these tasks on this occasion. She has not spoken to the existence of bank records, receipts or even a file note confirming the drafts were obtained and submitted. I am bound to conclude that, while the Defendant makes a positive assertion in her draft defence that the drafts were submitted in accordance with her duties, her affidavit evidence lacks credibility to persuade me that there is any evidence to support her case on this issue.

37. There is nothing but speculation to support Mr Chapman's argument that the LSD is to blame for the transfer not being completed[2] ("Government loses paper all the time") or that after two years such evidence might yet become available. The Defendant relies entirely on her own understanding of the LSD policies and procedures which is wholly inadequate.

38. Neither can I see how the trial process of disclosure, interrogatories and cross-examination might strengthen the Defendant's case as the relevant material would not be in the Plaintiff's possession or knowledge. The Defendant has had two years to obtain the relevant evidence and that which she intends to rely upon is seriously lacking.

[2] See section 83(2) of the Registered Land Law (2004 Revision) and footnote at the end of the judgment

39. The Defendant argues that the Plaintiff should take action against then bank as they were unduly enriched by the fact that the CIG did not receive/cash the cheques (paragraph 15 of the draft defence). This argument assumes that the funds are being held by the bank and at this time is mere speculation. As Mr Jackson rightly observed, the Plaintiff has no legal relationship with the bank that permits the Plaintiff to take action against the bank or to obtain evidence from it as to whether the Defendant did obtain the drafts drawn from her business account and whether the cheques were cashed. Similarly, in the absence of evidence that the CIG received/cashed the drafts, the Plaintiff is unable to take action against the CIG.

The Defendant Was Not Engaged By The Plaintiff

40. The Defendant accepts that Mr McGlynn Sr instructed her to form an exempted company, the Plaintiff, to hold the legal ownership of the property. Neither is it disputed that the funds for the purchase and all closing costs, including legal fees, originated from an account held by McGlynn USA.

41. At paragraph 14 of her draft defence, the Defendant asserts that *"the Defendant acted under her conveyancing contract with Mr McGlynn which was successfully completed with payments made by Mr McGlynn to the Defendant thereunder without any complaint."* The Defendant denies that there was any agreement between the Plaintiff and herself to act for the Plaintiff (paragraph 7 of the draft defence).

42. The *fons et origo* of an attorney's duties is the retainer (or contract of engagement) between herself and the client. The retainer may be oral or in writing. While there is no contract of engagement in this case, there are numerous unchallenged emails between Mr McGlynn Sr, Ms Lucenti and the Defendant concerning the Defendant's engagement. The Plaintiff argues that the terms of engagement, including the identity of the client, can be gleaned from the correspondence. It is necessary to examine these to assess the strength (credibility) of this potential defence.

43. On 31 May 2012 Jim McGlynn Sr, contacted the Defendant advising –

> *"I am looking at forming a Cayman LLC to own a condo at Rum Point. The LLC would be owned by a US registered LLC, McGlynn Enterprises that I am the managing partner. I would like you to inform me on what is required by Cayman Law to form this LLC." (Tab 7, page 15)*

44. The Defendant replied on 1 June 2012 providing the requested information and made the following statement –

> *"I am also able to assist with representing you and your company in the purchase of property in Cayman and perform all relevant property and associated searches and attend to the registration of the title and would be pleased to discuss that matter with you as well." (Tab 7, page 14)*

45. On 10 August 2012 Mr McGlynn Sr writes –

> *"We finally are under contract to purchase ... and would like to know what the costs are associated with the purchase using your firm to handle the transaction? Keep in mind we are still looking to register the property with our LLC in the states in Cayman!" (Tab 7, page 13)*

46. The Defendant replies on the same day:

> *"...We would be pleased to assist on the real estate transaction. Our fee will be a fixed fee of US$3000. There will also be disbursements such as stamp duty, registration fees and strata fees..." (Tab 7, page 13)*

47. Ms Lucenti enquires by a return of email an hour later whether the fixed fee includes the costs of incorporating the LLC which the Defendant confirms by email on 13 August and provides details necessary for incorporation. In a separate email, the Defendant states –

> *"If the property is to be purchased through the LLC registered as a foreign company then we should get started on that as soon as possible as it could take 3-4 weeks to complete." (Tab 7, page 11).*

48. By emails on 20 and 21 August 2012 (Tab 7, page 19) Ms Lucenti provided the necessary information and instructed the Defendant to proceed to incorporate McGlynn Enterprises which was completed on 24 August (Tab 7, page 1). On 10 September the Defendant emails the corporate documents for McGlynn Enterprises to Ms Lucenti and advises –

> *"Please note that I can sign the Transfer of Land for the condo as alternate director for Jim (if this is fine I will send documents appointing me as temporary alternate director for the purpose of the transfer of land only), otherwise it will be sent to you post closing for signature."*

49. Undoubtedly, the Defendant was communicating with the two people who were the controlling minds of the Plaintiff. However, from her first email on 1 June the Defendant confirms that that she could represent both Mr Glynn Sr and the Plaintiff once incorporated: *"I am also able to assist with representing you and your company in the purchase of property..." (emphasis added).* Thereafter there are numerous references to the Plaintiff being the purchaser of the property culminating in the Defendant offering to act as temporary alternate director for the purpose of transfer of the land.

50. Additionally, the Defendant does not dispute that she typed up the minutes of the Plaintiff's first board meeting in which it is recorded that it was resolved that –

> *"the Company purchase real property in the Cayman Islands located at Rum Point Block 33E 103H16....in accordance with the terms and conditions of the Offer to Purchase dated 9th August 2012..."*

And

> *"...Emburys Attorneys of Grand Cayman, Cayman Islands be and are appointed as the attorneys to the Company as to matters of Cayman Islands law, until further notice." (Tab 7, page 3)*

51. Although the Defendant's case is that she never agreed to act for the Plaintiff (paragraph 7 of the draft defence), she has not suggested that she voiced her objection to this resolution or sought to clarify with any of the parties that she did not consider herself to be appointed to act for the Plaintiff. Quite to the contrary, the Defendant prepares a Completion Statement addressed to *"McGlynn Enterprises Ltd (Purchasers)"* and applies to the Finance Secretary for an exemption to purchase land on behalf of the Plaintiff (letter dated 6 September 2012).

52. I do not consider that having an opportunity to cross-examine the Plaintiff's officers would take this issue of the Defendant's instructions any further. The Plaintiff's case is that the retainer was for the Defendant to act for Mr McGlynn Sr for the incorporation of the Plaintiff and then for the Plaintiff for the purposes of the transfer of the property. The Defendant's argument contradicts all of the incontrovertible evidence, including her own emails and actions. All of the available documentary evidence speaks to the Plaintiff taking on the role as purchaser and the Defendant, in full knowledge of the facts, carried out work on behalf of the purchaser. I find that there is no realistic prospect that the Defendant has a real or bona fide defence that she continued to act for Mr McGlynn Sr in his personal capacity with regards to the purchase of the property after 11 September. Whether Mr McGlynn Sr is the ultimate beneficiary and/or the "controlling mind" of the Plaintiff is not material.

53. The Defendant asserts that because the funds came from a McGlynn USA account the Plaintiff is not entitled to repayment of these funds. I found that this argument has no prospect of success either. As a new company, the Plaintiff had not yet had sufficient time to establish its own bank accounts. According to the emails, this was a fact the Defendant was well aware of. The Plaintiff was merely being put in funds by its promoter for this particular purpose. The numerous emails and the Closing Statement all refer to the Plaintiff being the intended purchaser. It is incredible to suggest that anyone other than the Plaintiff is entitled to repayment of the funds.

Breach Of Trust

54. The Plaintiff asserts that the Defendant held the transferred funds on a Quistclose trust basis and they are therefore recoverable. Lord Millett in **Twinsectra Ltd v Yardley and others** [2002] UKHL 12 at Paragraph 76 helpfully summarised the applicable principles thus -

> *"It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond mere breach of contract. As North J explained in Gibert v Gonard (1884) 54 LJ Ch 439, 440:*
>
> > *"It is very well known law that if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply it for that purpose."*
>
> *The duty is not contractual but fiduciary. It may exist despite the absence of any contract at all between the parties, as in Rose v Rose (1986) 7 NSWLR 679; and it binds third parties as in the Quistclose case itself. The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust."*

55. Mr Jackson has also provided me with extracts from *Lewin on Trusts* (19th edition).

56. The Closing Statement purports to set out the funds necessary to complete the transfer and obtain a certified copy of the Land Register evidencing the registration. The Defendant then receives those funds two days later. The Defendant argues that this transaction did not give rise to a Quistclose trust. In both **Twinsectra** and the **Quistclose** case itself the parties were in a lender-borrower relationship and the trust was a means by which the lender was able retain a "security interest" in loan monies by inserting a specific purpose clause into the loan contract. The matter before me does not fall into that category of cases.

57. On the Defendant's own case, the Defendant accepted these funds to apply them in accordance with the Closing Statement. Mr Chapman conceded that this gave rise to a resulting trust, albeit of which Mr McGlynn Sr or McGlynn USA is the beneficiary. I have already determined that the Defendant's case that she was acting for anyone other than the Plaintiff has no chance of success (see paragraphs 40 to 52) and, therefore, this argument must fail also.

58. The intention to create a trust and the terms of the settlement are documented in the numerous emails as well as the Closing Statement. By receiving those funds the Defendant accepted a fiduciary duty to apply those funds accordingly. Unless those funds are applied as intended, the Defendant remains liable to repay them.

59. As I have already stated, the Defendant has failed to identify the existence of evidence that might prove where the funds are, i.e. that the funds left the client account at HSBC, whether CIG received the drafts or that the cheques were cashed. Consequently, the Defendant has failed to establish that she has an arguable case that the funds were paid to CIG as intended.

60. Mr Chapman also suggested that the duty to pay stamp duty is upon the transferee and that the attorney is "merely an agent of the Crown collecting the duty owed" and therefore had no specific duties towards a transferee with regards to stamp duty. Once again no authorities were cited nor was the argument expanded on, and I rejected this line as being entirely without merit.

The Plaintiff Could Not Legally Hold The Property

61. The Defendant also avers that there was a legal impediment, which would have prevented the Plaintiff from holding the property, namely a lack of authority from the Finance Secretary (paragraph 10(d) of the draft defence and paragraph 15 of her affidavit). The Defendant has exhibited an email sent on 21 August informing Miss Lucenti of the need for permission as well as a letter she sent to the Department of Financial and Economic Development applying for the exemption (dated 6 September 2012). There is no evidence before me either way as to the result of that application. The Defendant has not suggested that she communicated to the Plaintiff or its officers at any time that the transfer could not proceed due to a lack of authority. Furthermore, the Defendant continued to progress the transfer process also, including offering to sign as alternate director (10 September 2012) and submitting the Transfer of Land form naming the Plaintiff as the purchaser (10 December 2012). The Defendant's stated case is once again in conflict with the Defendant's undisputed actions and leads me to conclude that her defence on this particular ground lacks credibility also.

62. It is not disputed that the Plaintiff was incorporated to hold the property. The fact that Mr McGlynn Sr and Miss Lucenti had signed the Offer to Purchase prior to the Plaintiff being incorporated does not provide a defence as the Board of Directors subsequently approved, ratified and confirmed their actions -

> *"....and IT WAS FURTHER RESOLVED that the signatures of the Director and Secretary on the said Offer to Purchase and actions of the sole Director in signing the said Offer to Purchase be and hereby are approved, ratified and confirmed, and that the sole Director and the Secretary be and are authorized to sign the Transfer of Land and any other legal or other documents prepared by the Company's Cayman Islands attorneys for the purpose of the transfer of title of the said property into the name of the Company";*

63. All of the documentary evidence, including those documents produced by the Defendant, speaks to the Plaintiff being the intended purchaser and the Defendant acting accordingly. The Defendant has not presented a cogent basis for asserting that the Plaintiff could not have legally held the property.

64. The Defendant, through her counsel, has also suggested that Mr McGlynn Sr was engaged in a tax avoidance scheme and that they would put to Mr McGlynn Sr in cross-examination that it had been in his best interests not to have the property registered and he "didn't perfect the records until it suited him to do so". This line of argument is immaterial to the question of whether the Defendant breached her fiduciary duty or was negligent and does not provide a basis for granting leave to defend.

Negligence - Duty Of Care

65. The Plaintiff's second claim is in negligence. It asserts that as its attorney, the Defendant owed it a duty of care to ensure that the transfer of the property was completed by 14 September 2012 as instructed. The standard of care to be applied is that, reasonably expected, of a reasonably careful attorney who holds himself/herself out as competent to practice in the field of law in which the client has engaged his/her services.

66. The Defendant's case is that her engagement ended upon the closing of the property purchase. At paragraph 19 the Defendant states -

> *"From a fees perspective, my engagement with Mr McGlynn ended upon the closing of the purchase of the Property. This is reflected in the wording on my Completion Statement that was provided to Mr McGlynn."*

67. She continued at paragraph 20 to explain her 'usual practice' -

> *"As a matter of course, my conveyancing engagements usually end after submission of the documents for registration...I usually require a further arrangement before I will represent the purchaser through registration disputes."*

68. As I have already stated, there is no contract of engagement which sets out clearly in one document the extent of the Defendant's engagement. I have set out the relevant evidence as to instructions at paragraphs 43 to 47 above.

69. During the course of submissions I was provided with the case of **Midland Bank Trust Co Ltd and another v Hett, Srubbs & Kemp (A Firm)** [1979] Ch 384, [1978] 3 All ER 571, [1978] 3 WLR 167. The facts of that case are not dissimilar to the one before me: W agreed to grant his son, G, an option to purchase from him a 300 acre farm which at that time was let to G at a rent of £900 per annum. They went to the defendant firm of solicitors, and S, the senior partner, drew up a document which W signed, whereby in consideration of £1 paid by G, W thereby granted to G an option of purchasing the farm at £75 per acre. The option was expressed to remain effective for 10 years. G duly paid the consideration of £1 but, unfortunately, S omitted to register the option as an estate contract under the Land Charges Act 1925. On a number of occasions, G consulted with the defendant firm on the question of whether he should exercise the option. Almost 6 years later, W discovered, through consulting with fresh solicitors, that the option had not been registered and so he sold and conveyed the farm to his wife. After the sale K, a partner in the defendant firm, sought to remedy his firm's omission by registering the option. G gave formal notice in purported exercise of the option; however, neither W nor his wife complied with the notice. Five years later, G commenced an action against the defendant firm of solicitors, claiming damages for negligence or breach of professional duty in neglecting to register the option and in failing to advise G as to the necessity of doing so. Oliver J concluded -

"the extent of his [the solicitor's] duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.

Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors – or upon professional men in other spheres – duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as (citations omitted) demonstrate that the duty is directly related to the confines of the retainer." (At page 402H – 403B)

70. With those principles in mind, this particular aspect of her defence has no real prospect of success given the available undisputed documentary evidence. It is quite untenable to argument that that the Defendant had not agreed to act until registration was complete given that -

(a) As early as 1 June 2012, during the introductory emails setting out the scope of the instructions, the Defendant states "*I am also able to assist with representing you and your company in the purchase of property ....<u>and attend to the registration of the title."</u>* (emphasis added)

(b) In an email to Miss Lucenti on 11 September 2012 the Defendant explains the scope of work to be covered by the fixed fee for the property transaction: –

> *"The fixed fee for the property includes all time spent until registration of the Transfer is completed."* (emphasis added)

(c) The Closing Statement references a fee for a certified land register that was to be *"provided after closing to show change of title"*. In order to meet this obligation, the Defendant would have to keep herself informed of the progress of the registration and obtain and supply the necessary certificate on completion to her client. Whether further fees may have been due in the event of a dispute or assessment is not relevant to whether the Defendant agreed to ensure that the necessary steps were taken to complete the transfer.

(d) The Defendant's follow-up email on 18 January 2013 with the LSD submitting a copy of the agreement is undeniable evidence that the Defendant was making efforts to complete registration, again consistent with her emails and Closing Statement that she would continue to act until registration was complete.

71. A reasonable conveyancing attorney who has agreed to act until registration is complete, has a duty to remain informed as to the progress of registration, ensure that all necessary steps are taken to complete registration, and if appropriate, advise the client that the transaction is incomplete and what further steps need to be taken.

72. The Defendant cannot positively assert that she kept herself informed, as she is not aware of the location of the funds and was unaware that the transfer had not been completed[3] until it was brought to her attention four years later. Nor can she argue that she took all necessary steps for registration, as registration was not completed and she did not advise the Plaintiff (or its officers) of this fact. The Defendant has no real or bona fide defence to the Plaintiff's claim that her handling of this transfer fell below the standards expected of her in this transaction.

73. The Defendant has made repeated reference to delegating administrative duties, such as submitting documents to the LSD to her staff: *"I have no reason to believe that our standard procedure was not followed." (paragraph 21).* A one-man firm cannot expect a lower standard of care to be applied to it merely because it delegates the conduct of its clients affairs to an unqualified member of its staff, however experienced. If the conduct of that member of staff is below the standard appropriate for an attorney, and she does not seek appropriate advice from an attorney in the firm when the need arises, then the firm cannot complain about a finding of negligence against it. (**Balamoan v Holden & Co.** [2001] EWCA Civ 1378). Any omissions by her staff would therefore not provide the Defendant with a defence either.

74. Returning to the issue of who the Defendant was acting for: even if the Defendant's engagement had been with Mr McGlynn Sr rather than the Plaintiff, the Defendant's duty of care extends to the intended beneficiary, in circumstances where the attorney could reasonably foresee that a consequence of his negligence might be a loss to the beneficiary without the beneficiary having a remedy against him (**White v Jones** [1995] 2 A.C. 207). Given the Defendant's overall brief and understanding of the transaction, she could reasonably foresee that the Plaintiff would suffer a loss as it was intended to hold the property.

[3] See section 83(2) of the Registered Land Law (2004 Revision) and footnote at the end of the judgment

Admission Of Liability

75. The most damaging evidence to the Defendant's case are a series of text messages she sent to Ms Lucenti on 15 March 2017 in which the Defendant appears to accept that she is liable to pay the funds the Plaintiff now claims -

> *"...I am sending Jim a letter and a legal document...for him to hold personally and in case of my death he can present the documents to my executor to ensure the estate reimburses him for his costs if the bank has not reimbursed me by that point... I hope that the documents I managed to locate so far will help get this resolved."*
>
> *"...Long story short Lands is not going to process nor register the documents without the stamp duty. I don't have the BA...BA...CI...Sorry"*

76. It is entirely untenable to suggest that the Defendant is not liable for the losses caused to the Plaintiff as a result of her negligence in these circumstances.

CONCLUSION

77. Given the preceding, the Defendant has failed to discharge her burden to show that she has a real or bona fide defence to the claim in negligence. For the sake of completeness, even if the Defendant had a defence to the claim in equity for the funds paid to her for the stamp duty and registration fees, she would have had no defence to the claim in negligence.

78. The Defendant is refused leave to defend. The Plaintiff's application for Summary Judgment is granted in the terms set out below. I will determine the Plaintiff's application for costs upon hearing the parties' submissions on this issue.

Interest

79. Interest on the original sums and damages is payable in accordance with the Judicature Law (2017 Revisions) and the Judgment Debts (Rates of Interest) Rules 2012. Interest shall be calculated on the original sum beginning at the date the sum should have been paid, namely 14 September 2012 to the date of judgment. Interest on damages for negligence (the additional fees incurred by the Plaintiff) shall be calculated from the date the loss was incurred, namely 28 September 2017 until the date of judgment. Post- judgment interest is awarded at the same rate for both sums until payment.

ORDER

(1) The Defendant shall pay the Plaintiff the sum of US$48,795.79 (the original payment)

(2) Interest on (1) is payable from 14 September 2012 at the rate provided for by the Judgment Debts (Rates of Interest) Rules 2012

(3) The Defendant shall pay damages to the Plaintiff in the sum of US$73,824.90 (the additional costs)

(4) Interest on (3) is payable from 28 September 2017 at the rate provided for by the Judgment Debts (Rates of Interest) Rules 2012

Hon Justice Kirsty-Ann Gunn
Acting Judge of the Grand Court

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FOOTNOTE

The parties were provided the draft judgment pursuant to GCR O.1, r.12 and Practice Direction No. 1/2004 on 17 December 2018. Counsel were given until 7 January 2019 to provide comments, which they did. The judgment was delivered in chambers on 22 January 2019. During the Defendant's application for leave to appeal, Defence counsel submitted I had fallen into error when I used the phrase "the transfer not being completed" as the transfer document had been executed. This had not been raised during the comments stage. For the avoidance of doubt, the statement was made with reference to section 83(2) of the Registered Land Law (2004 Revision) which provides that a transfer of land "shall be completed by registration of the transferee as the proprietor of the land...and by filing the instrument". The reference to the Law has now been inserted.