

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. 61 of 2020**

B E T W E E N

**DONNA DORSETT-MAJOR
(Trading as Dorsett Major & Co, a firm)
Appellant**

AND

**ALLAN R. CRAWFORD
SHARON M. CRAWFORD
Respondents**

BEFORE: **The Honourable Sir Michael Barnett, P
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Bethell, JA**

APPEARANCES: **Ms. Krysta Mason-Smith, Counsel for the Appellant**

 **Mrs. Giahna Soles-Hunt with Mr. Glen Curry, Counsel for the
Respondents**

DATES: **25 March 2021; 14 June 2021; 1 September 2021; 13 January 2022**

Civil appeal – Negligence - Professional negligence –Breach of fiduciary duty – Findings of fact made by a trial judge – Judicial deference - Duty of care – Breach of duty of care – Pleadings - Whether the appellant acted for both parties in the sale of land transaction – Whether the appellant owed the respondents a duty of care - Whether the appellant breached her duty of care owed to the respondents

The appellant is a counsel and attorney-at-law. Her client, Christopher Stubbs, and his company, Shanna’s Cove Estate Company Ltd. (Shanna’s Cove) (the vendors) agreed to sell a parcel of land in Cat Island to the respondents (the purchasers). A draft conveyance was prepared upon which handwritten amendments were made and agreed to; the conveyance was executed by the parties and payment was made by the respondents. Following the sale of the land a dispute arose regarding construction by Stubbs which encroached on an access road bounded by property belonging to Stubbs and Shanna’s Cove and the property purchased by the respondents which, according to the respondents, it was agreed to by the vendors and the purchasers to remain unobstructed.

As a result, the respondents commenced this action against the appellant on the basis of professional negligence and breach of fiduciary duty. The respondents submit that the appellant acted for both the vendor and the purchaser in this transaction and failed in her duty to properly advise them causing them loss and damage. The appellant submits that she acted only for the vendor. The outcome of an action against Stubbs and Shanna's Cove is the subject of a separate appeal.

The judge below found that the appellant acted for both parties to the transaction, that the appellant did not ensure the respondents received adequate legal advice, that as a result the respondents purchased land that did not meet the boundary specifications they intended, that the land was not properly surveyed by a licensed surveyor and that the appellant did not advise the respondents about the weight and effect of verbal agreements relative to the access road. Consequently, the judge found the appellant liable for the loss and damage suffered by the respondents and ordered damages to be assessed. Dissatisfied with the judge's findings the appellant launched this appeal.

Held: appeal dismissed. The parties will be heard on the issue of costs on 27 January 2022.

The proper approach to the review by an appellate court of the trial judge's findings of fact is that an appellate court should only interfere with those findings if it is satisfied that the trial judge was plainly wrong. In her judgment the judge identified various pieces of undisputed evidence to support her finding that the appellant acted on behalf of the respondents. As such, there is no basis to interfere with the judge's finding that the appellant acted for the respondents and, therefore, owed them a duty of care. The duty of care owed to the respondents was that of a "reasonably competent practitioner". On the evidence, the appellant failed to meet that standard and therefore breached her duty of care to the respondents.

Bahamasair Holdings Ltd. v Messier Dowty Inc. [2018] UKPC 25 applied

J U D G M E N T

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an appeal by a counsel and attorney of this Court against a finding of professional negligence made against her by a trial judge.
2. The claim arises out of a real estate transaction whereby the respondents purchased a parcel of land in Cat Island from the appellant's clients, Christopher Stubbs and his company, Shanna's Cove Estate Company Limited (Shanna's Cove).

3. The judge found that the appellant represented both the respondents as purchasers and the vendors, Stubbs and Shanna's Cove. The judge found that the appellant breached her duty of care to the respondents and such breach caused them damages, which she ordered to be assessed.
4. This appeal is against the finding of liability.

THE FACTS

5. In the summer of 2010, Mr. Stubbs agreed with the respondents to sell to the respondents property in Cat Island owned by his company Shanna's Cove. On 30 August 2010, the parties attended the office of the appellant to have the formal agreement for sale prepared and executed. A draft conveyance (not an agreement for sale) was presented to the parties for their review and approval. The respondents reviewed the draft conveyance and made several handwritten amendments which Mr. Stubbs subsequently agreed to, provided that the respondents paid for resurveying the property. The property was resurveyed, but when the final version of the conveyance was prepared, the written description of the property did not match the plan which was attached to the conveyance.
6. Subsequently, a dispute arose between the parties principally with respect to a 15-foot access road between the property purchased by the respondents and property owned by Stubbs and Shanna's Cove. It escalated when Stubbs commenced construction of a building allegedly encroaching on the access road. The respondents contended that there was an oral agreement between the parties that the access road between the parties' respective properties would remain unobstructed. Despite requests by the respondents that Stubbs and Shanna's Cove cease construction on the access road, he refused to do so. Stubbs and Shanna's Cove also constructed a septic tank on their property, but very close to the ocean and directly in front of the respondents' property without inspection access covers and in contravention of the rules and regulations governing the placement of a septic tank.
7. The respondents commenced an action against Stubbs and Shanna's Cove as well as against the appellant. The outcome of that action is the subject of a separate appeal.
8. As against the appellant, the respondents claimed that she acted negligently when she failed to properly advise them in the execution of a conveyance that did not accurately reflect their negotiations with the first appellant.
9. The pleaded case was as follows:

“4. During the summer of 2010, in a series of meetings and telephone calls between the Crawfords and Mr. Stubbs, it was agreed in principle that the Crawfords would purchase a parcel of real estate within Shanna's Cove (hereinafter referred to as “Parcel A”) from SCEC

for a price of One Hundred Fifty Thousand Dollars (\$150,000.00), with the Crawfords to be responsible for the payment of the applicable stamp duty and their own legal fees. Mr. Stubbs suggested that the parties be jointly represented in the transaction by an attorney who customarily acted for himself and SCEC, Mrs. Donna Dorsett Major of the firm Donna Dorsett Major & Co. The Crawfords agreed to this suggestion and confirmed their agreement to Mrs. Dorsett-Major in a subsequent telephone call. It was further agreed that the parties would meet at Mrs. Donna Dorsett-Major's chambers on the 30th of August 2010 to finalize the terms and complete the transaction.

5. During the meeting on the 30th of August 2010, Mrs. Dorsett Major produced a draft Conveyance for Parcel A with a plan of the property attached. In the presence of Mrs. Dorsett Major the Crawfords requested that the northern boundary of Parcel A be increased from the 60 feet shown on the plan to 75 feet in order to allow space for the construction of a separate garage on the property. Mr. Stubbs agreed to this on the condition that the Crawfords pay for the property to be resurveyed. The Crawfords agreed to this condition and paid the cost of the new survey to Mr. Stubbs then and there. Mr. Crawford and Mr. Stubbs then sketched corrected property lines and wrote corrected measurements for the property lines onto the plan attached to the Conveyance. These hand-drawn corrections were then initialed by the Crawfords. All of the aforementioned discussions and negotiations and the drawing of the proposed new boundary lines took place in the presence, and with the participation of Mrs. Dorsett Major.

6. The effect of the widening of the northern boundary of Parcel A from 60 to 75 feet was to decrease the size of a parcel of land shown on the plan as running along the eastern boundary of Parcel A and marked "ACCESS RD" (hereinafter called the "Access Road") from approximately 90 feet x 90 feet x 15 feet x 25 feet to a regular 90 x 15 foot rectangle. In the discussions and negotiations that followed the hand-drawn corrections to the plan, Mr. Stubbs agreed that the Access Road was already provided for in the title documents of other

purchasers in Shanna's Cove and would never be built upon or obstructed in any way. Mr. Stubbs stated that the Access Road would a) provide other property owners with the beach access promised to them, b) would provide the Crawfords with easy and permanent vehicular access to the back portion of Parcel A and c) would serve as a buffer between Parcel A and the parcel of land shown on the plan and marked "B".

7. Following the hand-drawn corrections to the plan and the aforementioned agreements and assurances, the Deed of Conveyance was executed by both parties and payment was made by the Crawfords.

8. On a date uncertain several weeks after the meeting and execution of the Conveyance, Mrs. Dorsett Major forwarded to the Crawfords a draft Agreement for Sale to which was attached a plan of Parcel A that appeared to have been corrected in accordance with the hand-drawn corrections on the original plan, but was otherwise the same as the original plan attached to the Conveyance. Specifically, the corrected plan showed the 15 foot wide Access Road along the eastern boundary of parcel A, although the written description of the property still described the Access Road as being 25 feet wide. The survey plan was later determined to have been prepared incorrectly and by someone other than a licensed surveyor.

9. Mrs. Dorsett Major asked the Crawfords to execute the Agreement for Sale and return a signed copy to her, which they did. At the same time, Mrs. Dorsett Major sent an invoice for her fees and expenses for the transaction, which invoice the Crawfords paid immediately. Copies of the Agreement for Sale, the Deed of Conveyance, the plans attached thereto and the aforementioned invoice will be relied on at trial for their full content, meaning and effect.

10. By reason of the matters aforesaid, Mrs. Dorsett Major is liable to the Crawfords for professional negligence and breach of fiduciary duty.

Particulars of Negligence

i. Failing to advise the Plaintiff's adequately or at all that the verbal assurances given by Mr. Stubbs were insufficient without more to create or vest in the Plaintiffs any legal or equitable right or interest over the Access Road as promised by Mr. Stubbs or at all.

ii. Encouraging and advising the Crawfords to execute a Deed of Conveyance before any binding written agreement to purchase Parcel A had been made between the Crawfords and Mr. Stubbs.

iii. Failing to advise the Crawfords that they ought not execute the Deed of Conveyance before Parcel A had been properly surveyed by a licensed surveyor and the new boundaries set out on a survey plan to be attached to the Deed of Conveyance.

iv. Failing to note or to advise the Crawfords that neither the original survey nor the survey paid for by the Crawfords had been prepared by a licensed surveyor.

v. Failing to advise the Crawfords that Parcel A did not have the benefit of any restrictive covenants or any other legal or equitable right by means of which commercial developments would be prevented on the surrounding land."

10. In her defence, the appellant pleaded:

"4. Save and except that it is denied that the First Defendant suggested that the Third Defendant represent the Plaintiffs in this transaction or that there was ever any confirmation of any such agreement to the third Defendant via telephone or otherwise, Paragraph 4 is admitted.

5. Third Defendant avers that on 30th day of August, 2010 while at her office, in the presence of the First Defendant acting as director for the second Defendant, and prior to execution of the agreement of sale, she advised the Plaintiffs that they get an attorney, to which the first Plaintiff responded that they did not have the time as they were scheduled to return to Texas the following day and

wanted this conveyance completed before their departure, neither was any money paid by the Plaintiffs to instruct an attorney.

6. The third defendant nevertheless advised the Plaintiffs in the presence of the first Defendant to seek independent legal advice to which the first Plaintiff declined further indicating that they did not need any attorney because they knew the First Defendant very well and friends of theirs had purchased property from him before coupled with the fact that they frequented Cat Island and were familiar with the property.

7. The Third Defendant therefore contends that she did not represent the Plaintiffs in this matter and that her instructions came from the first and second Defendants alone. That the only legal fees invoiced by and paid to her by the Crawfords were on behalf of the Second Defendant as per clause ten of the agreement for sale. Further and/or alternatively, if, which is denied, the Third Defendant did represent and or owed a fiduciary duty to the Plaintiffs as alleged no such duty was breached as the instructions received by the third Defendant from the first and second Defendants were discussed in detail in the presence of the Plaintiffs while in her office on 30th August, 2010.

8. Save and except that the defendants and each of them deny that the Plaintiffs made any mentioned of any garage or gave a reason for requesting the additional fifteen feet save for the fact that it was a little narrow, paragraph 5 of the amended statement of claim is admitted.

9. Save and except that the widening of parcel A as per the amended agreement effectively and proportionately reduced the size of the said parcel of land marked "Access Rd", paragraph 6 of the amended statement of claim is vehemently denied.

10. The Defendants and each of them contend that no such assurances covenants were ever given to the Plaintiffs orally or otherwise neither were any discussions had at any time pertaining to the parcel of land marked "Access Rd." save and to the extent of the amended agreement as is alleged in paragraph 6 of the amended

statement of claimant (sic) denying (sic) each and every allegation therein and puts the Plaintiffs to strict proof thereof. The Third Defendant contends that each and every term of the amended agreement for sale and subsequent conveyance are reflected in the agreement and conveyance documents. The Third Defendant, understanding that the Plaintiffs were unrepresented explained the agreement in layman's terms to the Plaintiffs in discharge of her duty of care to them.

11. Save and except that any reference to assurances as are mentioned in paragraph 6 of the amended statement of claim are categorically denied in response to which paragraph 9 above is repeated, the Defendants admit paragraph 7 of the amended statement of claim.

12. Save and except that there were a series of meetings and telephone calls between the Plaintiffs and the First Defendant wherein it was agreed in principal that the Plaintiffs would purchase a parcel of land within Shanna's Cove for a price of one hundred and fifty (sic) (\$150,000.00) and the Plaintiffs would be responsible for the applicable stamp duty, paragraph 4 of the Plaintiffs' statement of claim is denied.

13. Paragraph 8 of the amended statement of claim is denied. The Defendants contend that the Plaintiffs are in full possession of the property as per the terms of the amended agreement and the amendments of the attached plan.

14. Paragraph 9 of the amended statement of claim is admitted save and except that the third Defendant denies any inference that the agreement for sale and conveyance were executed on a date other than 30th August, 2010 and that any legal fees were paid to her or invoiced by her for representing the Plaintiffs.

15. Paragraph 10 of the amended statement of claim is denied and the above paragraphs repeated. Further the third Defendant denied that she breached any duty to the Plaintiffs, be it professional, fiduciary or otherwise."

11. In short, the appellant's case was that she did not represent the respondents in the transaction, she owed no fiduciary duty to them and in any event even if she did, she was not in breach of that duty.

12. In her judgment the trial judge indicated that she preferred the evidence of the respondents over that of the appellant. She accepted the evidence of the respondents as being truthful. See paragraphs 50 and 57 of the judgment:

“50 Having had the opportunity to observe the witnesses as they testified, I found Mr. Stubbs to be an unimpressive and inherently unreliable witness. With respect to Mrs. Major, I found some parts of her evidence to be reliable and other parts not to be. I did not believe when she testified that she did not represent the Crawfords. I shall return to this issue momentarily.

...

57 All things considered, I preferred the evidence adduced by the Crawfords to that of Mr. Stubbs and Mrs. Major. I find, as a fact, that Mr. Stubbs agreed that the 15-foot access road that divided the two lots was to remain unobstructed.”

13. With respect to this appeal, as against the appellant, the judge identified the issues to be determined as:

“15 ...

4. Whether any of the conduct of Mr. Stubbs and/or the Company complained of by the Crawfords has been otherwise unlawful or gives rise to any cause of action or claim for relief on the part of the Crawfords against any of the Defendants?

5. Whether Mrs. Major owed a duty to the Crawfords and if so, whether there was a breach of that professional/fiduciary duty?...”

14. She then made her findings as follows:

“Issues 4 and 5

119 These two issues are dealt with together. The Crawfords sued Mrs. Major for professional negligence. She was the only attorney involved in the transaction. The Crawfords alleged that Mrs. Major was also their attorney. They next alleged that she was negligent in that she did not properly advised (sic) them as to the implications of the transaction they were involved in with Mr. Stubbs and the Company. They say that, due to her

negligence, they suffered damage as they did not receive what they bargained for. They further alleged that although there was no written retainer as between themselves and Mrs. Major, based on the conduct of the parties, an implied retainer can be inferred. To sum up, the Crawfords alleged that had it not been for the negligence of Mrs. Major, this “chaotic” situation would not have existed.

120 Mrs. Major's (sic) contended that she never represented the Crawfords in the transaction. She said that she only requested further details from Mr. Crawford in order to prepare a draft agreement for sale including the name and address of his attorney. It was at that time that Mr. Crawford informed her that he did not need an attorney because he was familiar with the property and that several of his friends had purchased property from Mr. Stubbs. Also, it was a cash sale. Subsequently, on 30 August 2010, while at her office, she again informed the Crawfords to get an attorney. Mr. Crawford insisted that he did not need an attorney.

121 Mrs. Major emphasized that she was never retained by the Crawfords neither did she represent them in this transaction. Her instructions came from Mr. Stubbs and the Company; not from the Crawfords. She said that the only legal fees invoiced by and paid to her by the Crawfords were on behalf of Mr. Stubbs and the Company as per the Sale and Purchase Agreement. She insisted that she did a “favour” for the Crawfords for which they have been relentlessly ungrateful.

122 Mr. Newbold submitted that in order to establish professional negligence, the Crawfords have to prove that Mrs. Major represented them. This is correct. He further submitted that, aside from the Sales and Purchase Agreement, it is unclear whether Mrs. Major represented them as there was no retainer. According to Mr. Newbold, the only evidence of a retainer is that of Mr. Stubbs whom Mrs. Major represented in the transaction. Notwithstanding, says Counsel, Mrs. Major went at great lengths to protect the Crawfords and ensure the integrity of the transaction.

123 Mr. Newbold next submitted that when the Crawfords realised that their claim was bound to fail, they turned their fury to Mrs. Major. According to him, the Crawfords took over nine months to amend their claim to join her as a party. Procedurally, a plaintiff could amend their claim so nothing really turns on this point.

124 The account given by Mr. Crawford is diametrically opposite to that given by Mrs. Major. Mr. Crawford said she represented them. Mrs. Major says she did not. However, it is not in dispute that Mrs. Major was the only attorney involved in the transaction. In addition, it cannot be disputed that Mrs. Major did the following things namely:

- 1. she invoiced the Crawfords for the fees for the transaction and they paid her;**
- 2. she secured a Report on Title for the Crawfords (something that the vendor of property does not generally require) but which she says she always does to protect herself;**
- 3. she assured the Crawfords that ‘the title was good’;**
- 4. she prepared affidavits of citizenship for the Crawfords and;**
- 5. she sent the Conveyance for recording after the transaction (which is always the obligation of the attorney representing the purchasers).**

125 According to Mr. Sweeting, if Mrs. Major genuinely was not representing the Crawfords, she was certainly aware that they were foreign purchasers of Bahamian Real Estate, entirely unrepresented, then the least that could be expected of her would be that she would ask them to sign a disclaimer confirming that they knew she was not acting for them and that she had cautioned them to secure legal representation. This is especially so in circumstances where the Crawfords had agreed to pay her fees for the transaction. In-stead, says Mr. Sweeting, Mrs. Major shrugged her shoulders and;

(a) allowed the parties to sign a Deed of Conveyance with a plan attached that was not signed by a licensed surveyor or, for that matter, any surveyor;

(b) allowed the parties to sign a Deed of Conveyance with a plan attached that had been hand-corrected by the parties;

(c) allowed the parties to sign a Deed of Conveyance with a legal description of the property set out in it that did not correspond with the plan attached which was expressly incorporated into it; and

(d) sent for recording the Deed of Conveyance.

126 Mr. Sweeting submitted that Mrs. Major appeared to have no appreciation of her duties as a Counsel and Attorney-at-Law and a member of the Bar in this jurisdiction. She simply did what Mr. Stubbs instructed her to do without any concern as to the legality or even the fundamental task of ensuring that a clear and sound title was passed from Mr. Stubbs and the Company to the Crawfords.

127 Having carefully considered the facts relating to this issue of whether Mrs. Major represented the Crawfords in this transaction, I prefer the evidence of Mr. Crawford that Mr. Stubbs introduced him to Mrs. Major who was his lawyer. During the telephone conversation, Mrs. Major told Mr. Crawford that she could handle the sale of the property and there would be no conflict.

128 I therefore find that Mrs. Major acted as attorney for the Crawfords despite the fact that there was no written retainer.

Applicable legal principles — negligence

129 The next question to be asked is whether Mrs. Major was negligent in her professional duty to the Crawfords.

130 In Rankine v Garton Sons & Co. Ltd [1979] 2 All E.R. 1185, it was held that in an action founded on negligence, a plaintiff is not entitled to succeed unless he could prove two necessary components namely: (i) that the defendant had been negligent and (ii) he suffered damage as a result of that negligence.

131 Counsel for the Crawfords, Mr. Sweeting argued that due to the negligence of Mrs. Major, they were not properly advised as to the implications of the transaction they were involved in with Mr. Stubbs and the Company resulting in damage since they did not receive what they bargained for.

132 To reiterate some facts, in or about August 2010, the Crawfords agreed to purchase land from Mr. Stubbs and the Company. The parties used the same attorney to complete that transaction, that is, Mrs. Major. At no time did Mrs. Major ensure that the Crawfords received adequate legal advice in the matter. Her own evidence is that Mr. Crawford said that he did not need an attorney. At that point, she should have told them clearly that she cannot not (sic) proceed with the transaction.

133 The Crawfords purchased the land which did not meet the boundary specifications they intended. The land was never properly surveyed because the attached plan did not mark the exact boundaries as orally agreed between the parties.

134 Further to this, Mrs. Major did not advise the Crawfords about the weight and effect of verbal agreements in reference to access to the “access road” as shown on the plan. Here, I am unable to accept her evidence. The plan clearly depicts a 15-foot access road. In my opinion, in serious transactions such as this one, Mrs. Major should have ensured that all agreements entered into between the parties be reduced to writing to ensure not only that the parties received that which they bargained for but to ensure that there was definitive proof of the existence of such an agreement. In this way, she would also have been protected. Mrs. Major's failure to do so can only be described as negligent. She owed a duty of care to the Crawfords. The standard of care is that of a reasonably competent solicitor.

135 It was admitted by the Crawfords that there was no written retainer. The Court has already found that, based on the conduct of the parties, an implied retainer can be inferred: *Blyth v Fladgate* [1891] 1 Ch. 337. In *Blyth*, it was held that though there had not been an express retainer, the relationship of solicitor and client might be

inferred from the acts of the parties; that it subsisted between the firm and the trustees, and that the firm were liable in damages for the negligence of S. for failure in discharge of the duty which had been undertaken to the clients.

136 Having established the existence of an implied retainer, the Crawford (sic) submitted that there was no proper legal advice given to them in relation to this matter. They relied on the case of *AW Group Ltd v Taylor Walton* [2013] All ER (D) 10 (Oct). This was a professional negligence claim against a firm of solicitors who failed to advise the purchasers of the property that the property was conveyed without all necessary planning consents and that had the plaintiff known, it would not have completed the conveyance. The Court held that there had been a breach of duty on the part of the defendant however that breach had not caused any loss or damage to the plaintiff as it would have gone ahead with the conveyance in any event. The Court held:

‘A solicitor owed his client a duty of care in both contract and in the tort of negligence to exercise reasonable skill, care and diligence in relation to the work he undertook. The extent of a solicitor's responsibilities was derived from his retainer. It was right that he was under no general obligation to expend time and effort on issues outside the scope of his retainer. But if, in the course of doing that for which he was retained, a solicitor becomes aware of a risk, or a potential risk, to his client which it was reasonable to assume the client did not know about it was the solicitor's duty to inform the client. The standard expected of a solicitor in the performance of that duty was to be assessed against the reasonably competent practitioner having regard to the standards normally adopted in his profession.... It was not an excuse for a solicitor to say that he did not know his client's intentions; it was up to him to find out. It was the duty of a solicitor to ask the client appropriate questions designed to ensure that the solicitor was aware of the client's relevant circumstances and intentions, and that the client

had all the relevant information and did understand the legal consequences.’

137 The Court concluded that, on the facts, the defendants were in breach of duty in failing to give proper advice as to the planning status of the Packhorse Place site.

138 The Crawfords asserted that, in the present case, Mrs. Major's failure to give proper advice as to the effect of oral assurances operated to their disadvantage. Mrs. Major should have been aware of the real risk of relying on oral assurances alone in lieu of a written agreement.

139 The Crawfords fortified their assertion that Mrs. Major was negligent by relying on the case of *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571. The brief facts of this case is that a father agreed with his son to offer an option to purchase land. They went to the defendant firm of solicitors to put the agreement in writing. Upon executing the deed, the solicitors failed to register the deed as they ought to have done. The father sought counsel from fresh attorneys and, upon the new attorneys revealing the error, sought to sell the land to his wife, which he did. Upon learning of the error, the original firm of solicitors sought to register the deed. The son then served notice to exercise the option, but neither of his parents acknowledged the notice. The son then brought an action against his parents claiming a declaration that the option was valid and sought specific performance. He also brought an action against his original solicitors for professional negligence for their failure to register the deed. In relation to the claim for professional negligence, the court held that the solicitors were not liable under a general retainer since the extent of a solicitor's duties to his client depended on the terms and limits of his retainer.

140 It was also held that:

‘The solicitors were however liable to the plaintiffs in tort because under the general law the relationship of solicitor and client gave rise to a duty on a solicitor to exercise the care and skill on which he knew that his client would rely, and to a duty not

to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do'.

141 Oliver J stated, at page 583:

'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 on solicitors — or on 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 interest, take it upon himself to pursue a line of enquiry 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 *Duchess of Argyll v Beuselinck*, *Griffiths v Evans* and *Hall v Meyrick* that demonstrate that the duty is directly related to the confines of the retainer.'

142 Mr. Sweeting further argued that Mrs. Major ought to have explained to the Crawfords the consequences of relying on oral assurances and the fact that it would not invest any legal or equitable interest in the access road. To that extent, I agree that Mrs. Major should be held liable for failure to give proper advice as the Crawfords no longer have access to the access road.

143 Mr. Sweeting next argued that Mrs. Major did not exercise reasonable skill, care and attention which can only be seen as professional negligence. Further to that, Mrs. Major allowed the Crawfords and Mr. Stubbs to execute a conveyance before signing an agreement for sale. Failure to do so has caused the Crawfords to execute a document which did not accurately reflect what they agreed to during initial discussions and negotiations with Mr. Stubbs.

144 Mrs. Major also failed in her duty to advise the Crawfords that there were no restrictive covenants or any other legal or equitable right which would prevent a commercial enterprise from being built near their house. Due to the lack of such advice, the Crawfords were forced to bring proceedings against Mr. Stubbs and the Company to prevent the impending nuisance. The Crawfords have incurred substantial loss based on the need to retain legal counsel and pursue this matter at their own expense.

145 From the testimony given by the Crawfords, it was evident that they did not understand the conveyance. It was the attorney to ascertain that the client understands what the conveyance is about. In this regard, the Crawfords relied on the case of *Meadows v Meadows* (1853) 51 ER 833. In that case, the court stated:

‘The usual practice is, on the execution of a deed, for the solicitor either to read or explain it to the persons who have to execute it, or the solicitor informs them that the deed is in accordance with some draft or copy previously explained or submitted to them, and the parties usually trust their solicitors.’

146 In *Meadows*, the plaintiff sought to have a resettlement set aside on the ground that it had been prepared either fraudulently, or from a gross misapprehension, and had been executed by the plaintiff in ignorance of its true effect.

147 Mr. Sweeting submitted that based on Mrs. Major's negligence, she should be made to pay damages.

148 Applying the above principles to the facts of this case, I find that Mrs. Major was negligent and as such, she is liable to pay damages to the Crawfords; for the loss which they have incurred. Such damages will be assessed on Wednesday, 17 June 2020 at 11.00 a.m.”

15. The appellant attacks that finding of liability on the following grounds:

“1. The Learned Judge erred in law and in fact in finding the Appellant acted for the Respondents in the sale of the land and that she committed professional negligence and a breach of fiduciary duty.

2. The Learned Judge in the Court below erred in law and in fact in associating Mr. Stubbs and Shanna's Cove Estate Company Limited as being one and the same, and in her assessment of the evidence before the Court below, which error affected the Appellant as to or in respect of her duty to the seller, and in particular the identity of (sic) seller.

3. The Learned Judge erred in law and in fact in making findings against the Plaintiff on matters not found in or covered by the Writ of Summons in the Court below and/or which were not mentioned or pleaded in the Writ of Summons against her and/or relying on matters contained in the Statement of Claim or Amended Statement of Claim which were not based or rooted or pleaded in the Writ of Summons.

4. The Learned Judge erred in law and in fact in relying on matters that were not pleaded or rooted and/or particularly pleaded in the Writ of Summons or the Amended Statement of Claim, and in particular (sic) matter of negligence and the alleged breach of pecuniary duty on the part of the Appellant to the Respondents.

5. The Learned Judge erred in law and in fact and misdirected herself in a) showing during the trial bias against the Appellant and an unreasonable amount of sympathy for the Respondents; and b) that she could not have been fair and objective in assessing the evidence and in her judgment and in failing to consider that there was no evidence to support the conclusions she arrived at and/or that the evidence did not warrant or reach the standard required to support such conclusions.

6. The Learned Judge erred in law and in fact in using and or relying on facts or evidence which were not adduced at the trial or a part of the evidence of the trial.

7. The Learned Judge erred in law and in fact in finding that there was an agreement between the parties regarding the access road or that it (the access road) was a part of the agreement for the purchase of the land by the Respondents and in failing to take into consideration applicable principles of law relative to the sale of land and conveyancing matters; and in fact principles which if they

had been applied would have produced different conclusions and which would have been favourable to the Appellant.

8. The Learned Judge erred in law and in fact in finding that the other Defendants in the Court below created a nuisance upon their property for the Respondent (sic) and in her interpretation and application of the law of nuisance, which finding related to the claim against the Appellant by the Respondents in the Court below.

9. The Learned Judge erred in law and in fact in she did not give satisfactory reasons for her conclusions, and that she has not taken proper advantage of having seen and heard the witnesses.

[...Additional / supplemental grounds...]

1. The judge erred in law and/or in fact in that She failed to consider that according to the Crawfords pleadings at paragraphs 5, 6 and 19 there were Two (2) agreements; the first, a written agreement for the sale of Parcel A and the second, an oral agreement pertaining to the “access road” and that in respect of either agreement there must be consideration.

2. The judge erred in law and or in fact in that She failed to consider the Crawfords pleadings at paragraphs 5 and 6 that all discussion, negotiation and agreement pertaining to the access Road followed the agreement for the sale of parcel A, therefore, the Crawfords by their pleadings offered no consideration for the alleged agreement pertaining to the “access road” in the absence of which there could be no agreement.

3. The judge erred in law and/or in fact in that She failed to consider that at paragraph 19 of their pleadings the Crawfords contended that the consideration for the access road was the purchase of Parcel A, which is contradicted by their pleadings at Paragraph 6 that the discussion and negotiation for the access road followed the agreement for Parcel A.

4. The judge erred in law and in fact in that she failed to consider that in light of the Crawford’s pleadings at paragraph 6, they could not have relied upon any verbal

assurances given by Mr. Stubbs concerning the access road as any such discussion and/or negotiation pertaining to said access road would have taken place following the agreement for the sale of Parcel A.

5. The judge erred in law and/or in fact in that She failed to consider that by the letter dated 10th October, 2014 from the Crawfords attorneys (“GSO”) to the Appellant, the only right over the “access Road” asserted by Counsel for the Crawfords was that it would be left as a buffer.

6. The judge erred in law and in fact in that She failed to attach any relevance to the decision by the Crawfords not to initially join the Appellant to the action.

7. The judge erred in law and in fact in that she failed to consider or to attach sufficient weight to the viva voce evidence of Mrs. Crawford that the “access road” was for the “off water lots” in the subdivision to get access to the beach, which contradicts their pleadings that it was agreed that the access road would provide easy and permanent vehicular access to the back portion of their property and would serve as a buffer between parcels A and B.

8. The judge erred in law and/or in fact in that She failed to consider that if the other property owners in the subdivision had a pre-existing right of access over the “access Road”, the creation of a buffer between Parcel A and B was coincidental thereto and not intended to vest any legal or equitable interest in the Crawfords.

9. The judge erred in law and/or in fact in that She failed to consider that the road marked access had no practical vehicular purpose for the Crawfords or anyone else as the “Access Road” led only to the beach.

10. The judge erred in law and in fact in that She failed to consider that as parcel A and Parcel B were originally one parcel, the Crawfords Pleadings at paragraph 6 to the effect that the Access Road was already provided for in the title documents of other purchasers in Shanna's Cove was an impossibility as it was accepted during the trial that the survey Plan which reflected the Access Road was prepared solely to facilitate this transaction.

11. The judge erred in law and/or in fact in that She failed to consider that at Paragraph 6 of the Crawfords' pleadings there was a contradiction between their contention that on 30th August, 2010, there was an existing agreement between Mr. Stubbs/SCEC and the other property owners to the effect that the access Road would never be built upon or obstructed in any way and the fact that the Crawfords had just purchased a portion of the very access Road.

12. The judge erred in law and/or in fact in that She failed to consider the fact that even if it is accepted that there was a breach of agreement/negligence by the Appellant to the Crawfords relative to the access road, it was not pleaded by, neither argued on behalf of the Crawfords neither did the Court find that there was any causal link between any alleged breach of agreement/negligence by the Appellant and any damage complained of by the Crawfords.

13. The learned judge erred in law and in fact, and/or acted unreasonably in that She did not permit Mr. Newbold to thoroughly cross-examine Mr. Crawford as to his credibility.

14. The judge erred in law and/or in fact in that at critical points during the trial, She failed to appreciate that Mr. Newbold also represented the Appellant and that Mr. Crawford's credibility was relevant to the Appellant's defence, in particular, the question of whether while at her office, verbal assurances were given by Mr. Stubbs to the Crawfords concerning the access road thereby placing a duty upon her to advise the Crawfords that such verbal assurances were insufficient without more to vest in them any legal or equitable rights over the access road.

15. The learned judge erred in law and/or in fact and/or acted unreasonably in that She took irrelevant matters into consideration such as a withdrawn cease and desist letter from the Planning Authority as well as letters from Counsel for the Respondents, which letters were of no relevance to the issues to be decided.

16. The learned judge erred in law and in fact and/or acted unreasonably in that She took irrelevant matters

into consideration such as Her belief/finding that Mr. Stubbs threatened the lives of the Crawfords and their dog.

17. The judge erred in law and in fact in finding the Appellant responsible to pay damages to the Crawfords for breach of duty and/or professional negligence in the absence of any causation given that She found that the damage complained of was caused by Mr. Stubbs' decision to build on the access road which decision She found to be as a reaction to the Crawfords building two feet away from their boundary lines without seeking Mr. Stubbs' prior approval.

18. The judge erred in law and/or in fact in that She failed to consider notwithstanding Her finding that the Appellant acted for the Crawfords that the Appellant acted first and foremost for Mr. Stubbs/SCEC and unless the Appellant had common and unconflicting instructions from Mr. Stubbs/SCEC and the Crawfords, her advising the Crawfords of any failure by any oral agreements to vest any proprietary right or interest in the Crawfords would have amounted to a conflict of interest.”

16. Beside the points arising out of the pleadings, the appeal in fact raises two grounds. They are (i) that the judge erred in finding that the appellant acted for the respondents as well as Mr. Stubbs and Shanna's Cove in the transaction and therefore owed a duty of care to the respondents; and (ii) that the appellant breached her duty of care to the respondents and therefore caused the respondents loss and damage for which she is liable.

17. I will deal with each in turn.

Whether the judge erred in finding that the appellant acted for both parties in the transaction and therefore owed a duty of care to the respondents

18. In my judgment, once the judge accepted the evidence of Mr. Crawford over that of Mrs. Dorsett-Major the finding that Mrs. Dorsett-Major acted on behalf of the Crawfords was inevitable. Mr. Crawford in his evidence said:

“5. On or about June of 2010, I was informed that there was property for sale in Shanna's Cove. I was given a telephone contact for Mr. Stubbs to pursue the matter. After initial contact with Mr. Stubbs, my wife (the Second

Plaintiff in these proceedings) and I were told of two lots, one of which was for sale. I told Mr. Stubbs that we were interested. He recommended that Mrs. Major represent me, my wife and Mr. Stubbs in the transaction.

6. I was given Mrs. Major's phone number to start coordinating the purchase. She said she could handle the sale of the property. To show intent to purchase, I told her I would send \$15,000 as a down payment. She gave me her wiring instructions to wire the money, which I did before meeting her in August of 2010. I was not aware of all the procedures involved in buying property in The Bahamas, but I wanted to make sure that the transaction was done properly. I specifically asked Mrs. Major to ensure that The Company was legally able to sell the property. Accordingly, I requested she perform a title search and have a Title Company ensure the property was "free and clear" of liens and that it was not family land. I received a "Report On Title" from Mrs. Major. The Title Report indicated that Mr. Stubbs did own the property.

7. I received an email from Mrs. Major that Mr. Stubbs had to do some paperwork to bring The Company in compliance and that they were working on it. On the 8th August, I received a fax from Mr. Stubbs that he was now in compliance and a surveyor was to complete the survey the following week. He was ready to close.

8. We set a closing date of 30th August, 2010 in Mrs. Major's office and was told to bring the remaining funds of \$150,545.00 to cover the remaining balance due for the purchase of the property, her legal fees and the Stamp Duty fee for recording the conveyance.

9. On or about 30 August 2010, my wife and I, met in Mrs. Major's office to discuss the sale of the property with Mr. Stubbs. This was the first time we saw that the survey on Lot "A" was not regular in shape.

10. We negotiated with Mr. Stubbs to make the lot 75 feet at the back of the lot instead of 60 feet. In the discussion we all agreed to leave the 15 foot "Access Road" between

the two lots as a “Buffer” between the lots and also to provide beach access for the other owners of Shanna (sic) Cove. This would also provide access to the front of our lot for building and once completed, vehicular access to our front yard and the beach. We made corrections on the survey that reflected the changes and initialed them. Mr. Stubbs also stated that he was going to keep Lot “B” for his daughter to build a house on at a later date. This made our lot 75 feet x 90 feet by 75 feet x 90 feet. Mr. Stubbs agreed to the changes on the condition that I paid for the survey, which I did. I paid Mr. Stubbs in cash for the survey at the end of the meeting. I also asked Mr. Stubbs if there were any restrictions on the building, e.g. covenant not to perform masonry, restrictions on color or square footage of buildings built on the property, etc. He said no.

11. Mrs. Major had us draw and initial the changes on the survey, which we did. After the corrections were made, we signed all the documents for filing. Mrs. Major said it takes weeks or months to get the papers properly filed but she could expedite the filing if we paid her an extra \$100 cash, which I did before leaving her office.

12. One issue that was brought up during closing was that she never received the \$15,000 deposit that I had wired her weeks before. This concerned me, because wiring usually only takes a day, two days at the most to be deposit (sic) in the account.

13. Another issue that Mrs. Major was unaware of was that the Stamp Duty fee had increased the year before and I owed more money to cover her mistake in figuring that in the closing costs.

14. I kept in touch with her almost on a daily basis to ensure that the \$15,000 made it to the appropriate account. I did not want to lose the deal because of this.

15. After receiving no response from Mrs. Major concerning the missing funds, I emailed the Minister of Finance about my concerns with the lost money and provided the Minister with the wiring documents from

the bank. I copied Mrs. Major on the email. That night I got a call from Mrs. Major, quite irate over the fact that I contacted the Minister of Finance regarding the missing funds. She used abusive Language and I simply listened with no comment.

16. The next day I was informed that the money was there all along. It was put in her personal account.

17. After that ordeal was sorted, I received a copy of the new survey with the new dimensions as agreed upon. I went to the lot with the new survey and, with the help of Mr. Stanley Webb, the general contractor for building the house (hereinafter referred to as “Mr. Webb”) we measured the new pin locations noting that the pins shown on the survey were in fact as agreed upon in the meeting as 75 feet x 90 feet by 75 feet x 90 feet.” [Emphasis added]

19. The judge made the following findings:

“127 Having carefully considered the facts relating to this issue of whether Mrs. Major represented the Crawfords in this transaction, I prefer the evidence of Mr. Crawford that Mr. Stubbs introduced him to Mrs. Major who was his lawyer. During the telephone conversation, Mrs. Major told Mr. Crawford that she could handle the sale of the property and there would be no conflict.

128 I therefore find that Mrs. Major acted as attorney for the Crawfords despite the fact that there was no written retainer.”

20. It is settled law that an appellate court will not lightly interfere with findings of fact made by a trial judge. This is particularly so where the findings are based on disputed evidence and the credibility of witnesses, whom the trial judge had the benefit of observing, is material.

21. In Bahamasair Holdings Ltd. v Messier Dowty Inc. [2018] UKPC 25 the Privy Council said:

“The proper approach to the review by an appellate court to the findings of a trial judge:

[32] As was observed in DB v Chief Constable of the Police Service of Northern Ireland [2017] UKSC 7, [2017]

NI 301, [2017] 3 LRC 252, para [78] the United Kingdom Supreme Court on a number of occasions recently has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. And, as was said in that case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of McGraddie v McGraddie [2013] UKSC 58, [2013] 1 WLR 2477, 2014 SC (UKSC) 12.

[33] In para [1] of his judgment Lord Reed referred to what he described as 'what may be the most frequently cited of all judicial dicta in the Scottish courts'—the speech of Lord Thankerton in Watt (Or Thomas) v Thomas [1947] 1 All ER 582, [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's comprehensive and authoritative discussion ranged over the speech of Lord Shaw of Dunfermline in Clarke v Edinburgh & District Tramways Co Ltd 1919 SC (HL) 35 at 36–37, where he said that an appellate court should intervene only if it is satisfied that the judge was 'plainly wrong'; the judgment of Lord Greene MR in Yuill v Yuill [1945] 1 All ER 183 at 188, [1945] P 15 at 19, and the speech of Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd [2003] UKHL 45, 2004 SC (HL) 1, 2003 SCLR 765, para [17] where he stated that:

'It can, of course, only be in the rarest of occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.'

[34] Lord Reed then considered foreign jurisprudence on the subject in paras [3] and [4] of his judgment as follows:

'[3] The reasons justifying that approach are not limited to the fact, emphasised in Clarke's case and Thomas v Thomas, that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court

in *Anderson v City of Bessemer* (1985) 470 US 564, 574–575:

‘The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the “main event” ... rather than a “tryout on the road.” ' ... For these reasons, review of factual findings under the clearly erroneous standard—with its deference to the trier of fact—is the rule, not the exception.’

Similar observations were made by Lord Wilson JSC in *[Re B (a child) (care order: proportionality: criterion for review)]* [2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911, para [53]].

[4] Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in *[Housen v Nikolaisen 2002 SCC 33, [2002] 2 SCR 235, para 14]*:

‘The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is

much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'

[35] The Board adopts a similar approach. In their work, Privy Council Practice (2017), Lord Mance and Jacob Turner at paras 5.46–5.53, state that the Judicial Committee of the Privy Council has the power to review factual findings. It will, however, review findings of fact based on oral evidence with great caution, and will not normally depart from concurrent findings of fact reached by the courts below.

[36] The basic principles on which the Board will act in this area can be summarised thus:

1. '... [A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere ...'—Central Bank of Ecuador v Conticorp SA [2015] UKPC 11, [2016] 2 LRC 46, [2016] 1 BCLC 26, para [5].

2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination—Anderson v City of Bessemer, cited by Lord Reed in para [3] of McGraddie.

3. The principles of restraint 'do not mean that the appellate court is never justified, indeed re-quired, to intervene.' The principles rest on the assumption that 'the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities.' Where one or more of these features is not present, then the argument in favour

of restraint is reduced—para [8] of Central Bank of Ecuador.

[37] The Board considers that the Court of Appeal in the present case should have operated on these principles in reviewing the Chief Justice's findings made at first instance.Given that there was material before the Chief Justice on which he could make the factual findings which he did and that the inferences which he drew from them could properly be drawn, and that none of his conclusions was 'plainly wrong', the Court of Appeal should not have conducted its own analysis.”

- 22.** In this case in paragraph 124, the trial judge identified some undisputed pieces of evidence that support a finding that the appellant was acting on behalf of the respondents. She said:

“124 ...In addition, it cannot be disputed that Mrs. Major did the following things namely:

- 1. she invoiced the Crawfords for the fees for the transaction and they paid her;**
- 2. she secured a Report on Title for the Crawfords (something that the vendor of property does not generally require) but which she says she always does to protect herself;**
- 3. she assured the Crawfords that ‘the title was good’;**
- 4. she prepared affidavits of citizenship for the Crawfords and;**
- 5. she sent the Conveyance for recording after the transaction (which is always the obligation of the attorney representing the purchasers).”**

- 23.** In the circumstances, there is simply no basis for interfering with the finding by the trial judge that the appellant agreed to act for the respondents and owed a duty of care to them.

Was the trial judge wrong to find that the appellant was negligent and breached her duty of care?

- 24.** The judge made the following material findings of negligence:

“134 Further to this, Mrs. Major did not advise the Crawfords about the weight and effect of verbal agreements in reference to access to the “access road” as

shown on the plan. Here, I am unable to accept her evidence. The plan clearly depicts a 15-foot access road. In my opinion, in serious transactions such as this one, Mrs. Major should have ensured that all agreements entered into between the parties be reduced to writing to ensure not only that the parties received that which they bargained for but to ensure that there was definitive proof of the existence of such an agreement. In this way, she would also have been protected. Mrs. Major's failure to do so can only be described as negligent. She owed a duty of care to the Crawfords. The standard of care is that of a reasonably competent solicitor.

...

142 Mr. Sweeting further argued that Mrs. Major ought to have explained to the Crawfords the consequences of relying on oral assurances and the fact that it would not invest any legal or equitable interest in the access road. To that extent, I agree that Mrs. Major should be held liable for failure to give proper advice as the Crawfords no longer have access to the access road.

...

144 Mrs. Major also failed in her duty to advise the Crawfords that there were no restrictive covenants or any other legal or equitable right which would prevent a commercial enterprise from being built near their house. Due to the lack of such advice, the Crawfords were forced to bring proceedings against Mr. Stubbs and the Company to prevent the impending nuisance. The Crawfords have incurred substantial loss based on the need to retain legal counsel and pursue this matter at their own expense.” [Emphasis added]

25. It is difficult to see how a complaint can be made of these findings of negligence.
26. The access road was clearly an important part of the transaction. It was identified on the plan. In his Witness Statement Mr. Crawford said:

“10. ...In the discussion we all agreed to leave the 15 foot “Access Road” between the two lots as a “Buffer” between the lots and also to provide beach access for the other owners of Shanna (sic) Cove. This would also provide access to the front of our lot for building and once

completed, vehicular access to our front yard and the beach. We made corrections on the survey that reflected the changes and initialed them...”

27. The access road was meaningless unless the right of access could be enforced. As the attorney for the respondents, the appellant was obliged to advise them that unless there was a covenant in writing preventing Mr. Stubbs and Shanna’s Cove from blocking the access, the provision of an “access road” on the survey plan, it would be difficult to prevent the owners for the access road from fettering the access.
28. Moreover, any reasonable attorney acting for the respondents would advise of the existence or non-existence of restrictive covenants concerning the use of the properties in the area where the respondents were purchasing land.

Pleadings Issue

29. I now turn to the “pleadings issue”. It is difficult to understand these grounds. It appears that the appellant is arguing that according to the pleadings the issue of the access road came up after the agreement to purchase the land and any agreement between Mr. Stubbs and Shanna’s Cove with respect to the access road was not part of the transaction to purchase the land. Her instructions and retainer were limited to the purchase of the land and did not in any way relate to the access road. With respect, this cannot be a correct analysis of the transaction. The issue of the access road was clearly part of the transaction. The survey plan attached to the conveyance was indeed modified to reflect its materiality to the conveyance. In paragraph 6 of the statement of claim the respondents pleaded:

“6. The effect of the widening of the northern boundary of Parcel A from 60 to 75 feet was to decrease the size of a parcel of land shown on the plan as running along the eastern boundary of Parcel A and marked "ACCESS RD" (hereinafter called the “Access Road”) from approximately 90 feet x 90 feet x 15 feet x 25 feet to a regular 90 x 15 foot rectangle. In the discussions and negotiations that followed the hand-drawn corrections to the plan, Mr. Stubbs agreed that the Access Road was already provided for in the title documents of other purchasers in Shanna's Cove and would never be built upon or obstructed in any way. Mr. Stubbs stated that the Access Road would a) provide other property owners with the beach access promised to them, b) would provide the Crawfords with easy and permanent vehicular access to the back portion of Parcel A and c) would serve as a

**buffer between Parcel A and the parcel of' land shown on
the plan and marked "B"."**

30. In her defence the appellant denied that paragraph, but the trial judge accepted the evidence of the respondents. There is simply nothing in the pleadings point.
31. In the circumstances, there can be no criticism of the finding of negligence. What damages flowed from those findings of negligence was the subject of an assessment and a separate appeal. We were asked not to hear that quantum appeal at this time as there may not be a need to pursue that appeal by the appellant.
32. I would dismiss this appeal. The parties will be heard on the issue of costs on 27 January 2022.

The Honourable Sir Michael Barnett, P

33. I agree.

The Honourable Mr. Justice Evans, JA

34. I also agree.

The Honourable Madam Justice Bethell, JA