

**COMMONWEALTH OF THE BAHAMAS**  
**IN THE SUPREME COURT**  
**Common Law and Equity Division**

**2015/CLE/gen/00765**

**BETWEEN**

**(1)ALAN R. CRAWFORD**  
**(2)SHARON M. CRAWFORD**

**Plaintiffs**

**AND**

**(1)CHRISTOPHER STUBBS**  
**(2)SHANNA'S COVE ESTATE COMPANY LIMITED**  
**(3)DONNA DORSETT MAJOR**  
**(Trading as Dorsett Major & Co., a firm)**

**Defendants**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Glen Curry of Ginton Sweeting O'Brien for the Plaintiffs  
Ms. Latia Williams of Ducille Chambers for the Third Defendant

**Hearing Date:** 28 August 2020

**Negligence – Professional negligence – Solicitor- Assessment of damages – Measure of damages – Remoteness – Causation – Proximity – Foreseeability**

After the trial of this action and the Court ruling wholly in favor of the Plaintiffs, the Court ordered the Third Defendant to pay damages to be assessed for her professional negligence. The Plaintiffs provided contemporaneous documentary evidence of all costs incurred as a result of the Third Defendant's professional negligence to (i) properly advise the Plaintiffs about the consequences of oral agreements (ii) properly advise the Plaintiffs of the ramifications of physical descriptions in conveyances (iii) properly advise the Plaintiffs of the ramifications of plans attached to conveyances; and (iv) to ensure the Plaintiffs' conveyance and plan accurately reflected that which they bargained for.

**HELD: Damages are assessed in the amount of \$17,810.53 to be paid by the Third Defendant on or before 25 October 2020. Cost of this assessment of \$3,500 is awarded to the Plaintiffs. The issue of costs of the action is to be taxed by the Registrar; if not agreed.**

1. A party who suffers loss resulting from the negligence of another ought to be put in the position as if the injury never occurred: **Hayes v Dodd** [1990] 2 All ER 815 applied.
2. The assessment of damages at common law is subject, in every case, to the overriding principle that the damage in respect of which compensation is sought must not be too remote from the solicitor's breach of duty. Broadly speaking, this means that (a) the breach of duty must have "caused" the damage and (b) the damage in question was foreseeable. The law has developed so that there is a third requirement, which it is convenient if technically wrong to discuss under the heading of remoteness. This is (c) the loss must be within the scope of the duty: **Jackson and Powell on Professional Negligence 5<sup>th</sup> edition** at paragraph 10-233 relied upon.
3. The general rule is that damages are generally assessed as at the date of the breach, unless justice requires that some other date should be taken: **Amerena v Barling** (1995) 69 P. & C.R. 252.
4. The Affidavit of Jamie Taylor outlines, quantifies and evidences all expenses incurred by the Plaintiffs in remedying the issues directly emanating from the Third Defendant's negligence. Accordingly, the award of damages is based on such contemporaneous documentary evidence and the principles of law relating to remoteness, causation, proximity and foreseeability.
5. Instances regarding mitigation must be within the context of a claimant's lifestyle and standard of living. As the Plaintiffs are used to and are able to afford a certain lifestyle, mitigation of damages is not appropriate in the instant case. You "*take your victims as you find them*" is a well-established doctrine in English criminal and tort law.

## **RULING**

**Charles J:**

### **Introduction**

[1] In a judgment delivered by the Court on 01 May 2020 ("the Judgment"), Alan Crawford and Sharon Crawford ("the Crawfords") were wholly successful on all claims made against the Defendants including the Third Defendant, Donna Dorsett Major ("Mrs. Major"). Specifically, in paragraph 154 of the Judgment, it was adjudged, that:

**"As against Mrs. Major, damages for professional negligence and breach of fiduciary duty....."**

[2] Accordingly, on 10 August 2020, the Crawfords filed a Summons for the assessment of damages against Mrs. Major. The Summons was supported by the

Affidavit of Jamie Taylor also filed on 10 August 2020 and evidencing five exhibits: JT1 to JT5.

- [3] The Court observes that there is an extant appeal of the Judgment by Mrs. Major. However, since there is no stay of the Judgment by this Court or the Court of Appeal, I shall carry on with the assessment of damages.

### **Assessment of damages**

- [4] In assessing damages, Staughton LJ in **Hayes v Dodd** [1990] 2 All ER 815 stated at pages 818 to 819:

**“The first question in this appeal relates to the basis on which damages should be assessed. Like Hirst J. I start with the principle stated by Lord Blackburn in *Livingstone v. Rawyards Coal Co.* (1880) 5 A.C. 25 , at page 39:**

**You should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.**[Emphasis added]

- [5] Put differently, one must consider the actual situation of the Crawfords and compare it with their situation if the negligence had not occurred.

- [6] The learned authors of **Jackson and Powell on Professional Negligence, 5<sup>th</sup> Ed.** at para 10-249 state:

**“Whether the claim is brought in contract or tort, the fundamental principle governing the measure of damages is that the claimant should be put, so far as money can do it, and subject to the rules as to remoteness.....in the position he would have occupied if the solicitor had discharged his duty.** Broadly speaking, this may be achieved in one of two ways, depending upon the particular facts of the case: (i) by paying to the claimant the monetary equivalent of any benefits of which he has been deprived; or (ii) by indemnifying the claimant against any expenses or liabilities which he has incurred....”[Emphasis added]

[7] Further, **Jackson and Powell** [supra], at para 10:231 had this to say:

**“...the principles to be applied to all breaches of fiduciary duty were the same as for fraud at common law, requiring that the fraud induced the transaction and the loss flowed directly from that transaction, but not that the losses were reasonably foreseeable.”**

[8] These general principles will guide the court to properly assess and determine the quantum of damages owed to the Crawfords. The following elements must be proved namely (1) remoteness; (2) causation; (3) proximity; and (4) foreseeability.

[9] In relation to remoteness, **Jackson and Powell** at para 10-233 opined:

**“The assessment of damages at common law is subject, in every case, to the overriding principle that the damage in respect of which compensation is sought must not be too remote from the solicitor’s breach of duty. Broadly speaking, this means that (a) the breach of duty must have “caused” the damage and (b) the damage in question was foreseeable. The law has developed so that we should add a third requirement, which it is convenient if technically wrong to discuss under the heading of remoteness. This is (c) the loss must be within the scope of the duty.”**

[10] With respect to causation, **Jackson and Powell** at para 10-234 addressed it in this manner:

**“Whether the claim is brought in contract or tort, it is first necessary to determine whether the solicitor’s breach of duty was “the cause” of the alleged damage. The burden of proof is on the claimant to prove causation. Clearly, the breach of duty was not the cause if the damage would have occurred in any event.”**

[11] Another relevant element is proximity. **Jackson and Powell** at paras 10-235-236 stated:

**“Assuming that the claimant overcomes this hurdle, he will still fail if the causal link between the solicitor’s breach and the subsequent damage is too tenuous.....a distinction must be drawn between a breach which gives the occasion for the loss and one which is the substantial cause of the loss....”**

[12] Then there is the element of foreseeability. The resulting injury/loss incurred by the claimant must have been foreseeable. **Jackson and Powell** at para 10-240 opined:

“In order to succeed, the claimant must establish not only that the damage was caused by the solicitor’s breach of duty, but also that it was foreseeable. If the claim is brought in contract, then at the time the contract was made the damage must have been “reasonably foreseeable as liable to result from the breach.”... the event must be “not unlikely” and “a type of damage which was plainly foreseeable as a real possibility but which would only occur in a small minority of cases cannot be regarded as arising in the usual course of events. If the claim is brought in tort, then at the time the breach of duty was committed the damage (or at least the type of damage) must have been reasonably foreseeable as a consequence.....In many cases, of course, foreseeability poses no problem for the claimant, since the solicitor has special knowledge of his client’s intentions.” [Emphasis added]

[13] Also, the general rule is that damages are generally assessed as at the date of the breach, unless justice requires that some other date should be taken. This principle is illustrated by a number of cases including **Amerena v Barling** (1995) 69 P. & C.R. 252. In **Amerena**, the defendant solicitors negligently granted an option over shares in a company without the plaintiff’s authority, which would not have been forthcoming. The Court of Appeal summarized the law as follows: damages will normally fall to be assessed at the date when the cause of action arose; but this principle will not be applied mechanistically in circumstances where assessment at another date may more accurately reflect the overriding compensatory principle. The Court held:

**“Where an option had been granted which, but for a breach of contract or negligence of solicitors, would not have been granted, the ordinary rule that one assesses the loss at the date of the accrual of the cause of action should not apply. In the instant case, therefore, the date for the assessment of damages would not be the date when the option became exercisable, but would be the date when, in breach of their instructions, the defendant authorised the exchange of contracts for the grant of the option to purchase the plaintiffs’ shares in C....”**

[14] Further, in **Jackson and Powell** at para 10-268, the learned authors stated:

**“The normal rule. Where the purchaser’s solicitor errs in his advice he gives or in the investigations which he makes on the client’s behalf, the property may prove to be less valuable than was assumed at the time of purchase. The normal measure of damages in such circumstances (as in the cases on surveyors’ negligence) is the amount by which the sum paid by the client exceeds the true value of the property at the date of purchase....In the majority of cases, the courts are ready to accept that the purchase price represents the value of the property in the condition described by the solicitor. Where, however, the purchase price corresponds with the value of the property in its actual condition, then the purchaser suffers no loss and will be entitled to no more than nominal damages.”**

[15] At para 9:136, **Jackson and Powell** opined that the usual formulation of the measure of damage is the difference between the value of the property as it was described in the surveyor’s report; and its value as it should have been described.

### **The facts revisited**

[16] The Crawfords are from Texas, USA. They came to The Bahamas, and more specifically, to Cat Island, in 2010. They fell in love with the Island and decided to purchase a property there. They learned from a friend that the First Defendant (“Mr. Stubbs”) was selling one of the properties owned by the Second Defendant (“the Company”). The Crawfords were interested in Lot A (“the property”). The parties came to an agreement on the phone and agreed to meet in Nassau to close the deal. The price was negotiated at \$150,000.00. The Crawfords had very little knowledge of Bahamian law and they did not know any attorney here. Mr. Stubbs suggested that his attorney, Mrs. Major could close the transaction for them. The Crawfords agreed to this. Mr. Crawford then contacted Mrs. Major who agreed that she would represent both parties without any conflict of interest.

[17] At that meeting, which took place in Mrs. Major’s office on 30 August 2010, the Crawfords saw the survey plan (“the plan”) of the property for the first time. After reviewing it, they realised that the property was irregularly-shaped. The Crawfords did not want to purchase an irregularly-shaped property so they negotiated to purchase an enlargement to the property. They requested the length of the

northern boundary to be increased from 60 feet to 75 feet. The enlargement to the property was agreed. Mr. Stubbs and Mr. Crawford hand-drew amendments on the plan attached to the Conveyance. The new dimensions were initialled by the Crawfords on the plan. Mr. Stubbs' single condition for the enlargement of the property was for the Crawfords to pay the cost of \$1,500 to have it resurveyed. The Crawfords agreed to that sum which was paid to Mr. Stubbs then and there. The discussions and negotiations of the new proposed boundary lines took place in Mrs. Major's office in her presence.

- [18] Running along the southeastern boundary of the property that the Crawfords were purchasing, was a piece of property marked "Access Road" ("the access road"). The agreed adjustment of the boundaries of the property also had the effect of making the access road a regular rectangle, 90 feet long and 15 feet wide along its entire length. Mr. Stubbs stated that the access road was already provided for in the title deeds of other purchasers in Shanna's Cove and would never be built upon. It was also agreed that the access road would be a "buffer" between the two lots. Mr. Stubbs only changed his mind about the access road when the Crawfords built their residence a few feet from the eastern boundary for which they subsequently obtained planning approval.
- [19] After the handwritten changes had been made to the plan in the presence of Mrs. Major, she changed the written description of the boundaries of the property and told the Crawfords and Mr. Stubbs to sign the conveyance which they did.
- [20] Several weeks later, Mrs. Major sent to the Crawfords an Agreement for Sale of the property which was dated 30 August 2010. It bore the same date as the 30 August Conveyance which they had already signed in her office on 30 August 2010. They were asked to sign it and return it to her. She also sent to the Crawfords a copy of her Statement of Account dated 30 August 2010 addressed to "Mr. Christopher Stubbs/Mr. Alan Crawford". The Crawfords signed the Agreement and arranged for payment of the Statement of Account.

[21] The Crawfords then proceeded to build a house and separate garage upon the property. The buildings were constructed within the space bounded by the survey pins they found upon the property. However, when the foundation of their house was being built, their contractor made a mistake and the length of the house was accidentally increased by 5 feet over the length shown on the plans for which they had received a building permit. This meant that the footprint of the house was still within the boundaries indicated by the survey stakes but not within the usual statutory setbacks of 5 feet. The Crawfords immediately applied for and were granted a variance on their building permit.

[22] In the middle of September 2014, the Crawfords learned that Mr. Stubbs and the Company had begun constructing a building right next to their property and where the access road was located. Despite several requests by the Crawfords and their attorneys to cease and desist all construction on the access road, Mr. Stubbs and the Company failed and/or refused to heed any of the warnings.

[23] The parties were unable to resolve their dispute amicably. The Crawfords then sued all of the Defendants including Mrs. Major who was sued for professional negligence for her failure to ensure the conveyance and plan accurately reflected what the parties agreed to.

### **Submissions by Counsel**

[24] Learned Counsel Mr. Curry who appeared for the Crawfords properly submitted that, due to the negligence of Mrs. Major, the Crawfords were forced to correct all issues with the faulty conveyance and plan. This included, not only hiring new attorneys to handle the matter, but they also had to deal with a potential boundary dispute with their neighbour, Mr. Stubbs. The Crawfords also had to endure obstruction of the access road as the right of way was not made clear in the conveyance which Mrs. Major prepared. Not only that, but the Crawfords also had to face the many challenges brought upon by the failure of Mrs. Major to ensure the plan and conveyance accurately reflected that which the Crawfords bargained for. As Mr. Stubbs has property right next to the Crawfords and there was a



boundary issue (resulting from the erroneous conveyance) the Crawfords were faced with construction of an unsightly building very near to their property as well as loss of enjoyment of their property as the conveyance they had, gave them less land than what they actually paid for.

[25] Mr. Curry next submitted that the Court found that, due to the negligence of Mrs. Major, the Crawfords were not properly advised as to the implications of the transaction they were involved in with Mr. Stubbs and the Company. Further to this, Mrs. Major failed to advise the Crawfords about the weight and effect of verbal agreements in reference to access to the “access road” as shown on the plan.

[26] Mr. Curry further submitted that Mrs. Major should have ensured that any agreements as between the Crawfords and Mr. Stubbs and the Company should have been made in 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. Mrs. Major’s failure to do so amounted to negligence.

[27] Mr. Curry argued that Mrs. Major should be made to pay the costs for having the property re-surveyed (inclusive of the preparation of the survey report and plan), and the legal fees as well as all incidental costs, fees, and transfer taxes (if any) in relation to the preparation of the confirmatory conveyance required to remedy the defects in the initial conveyance. In that regard, he relied on the Affidavit of Mr. Taylor and more specifically to paragraphs 12, 15, 16, 17 and 19 which detailed the damages that the Crawfords are claiming as shown below.

### **Exhibit JT 1**

#### **Legal fees of \$3,500**

[28] Ms. Williams who appeared as Counsel for Mrs. Major correctly argued that there is nothing in law to refund legal fees paid as claimed in paragraph 12 of Mr. Taylor’s affidavit. This amount is disallowed as only a confirmatory conveyance is required to correct the mistake and it is claimed in Exhibit JT3.

## **Exhibit JT 2**

### **Survey Service from Donald E. Thompson & Associates - \$5,600.00**

[29] Ms. Williams argued that this includes fees for a survey inclusive of placing boundary markers, report and plan. The only thing that the Judgment entitled the Crawfords to was a proper plan to be included in the conveyance and therefore the additional services, namely the re-surveying of the property and the survey report are private matters between the Crawfords and the surveyor for which Mrs. Major ought not to be charged. She suggested a reasonable cost for the survey plan to be \$3,000. This submission of Counsel is nothing more but a guesstimate. On the other hand, the Crawfords have produced contemporaneous documentary verification of the payment of \$5,600: see paragraphs 13 to 15 of Mr. Taylor's affidavit. I will allow the sum of \$5,600.

## **Exhibit JT3**

### **PGF Realty Limited – Cost of Appraisal Report and airline ticket - \$1,680.00**

[30] Learned Counsel Ms. Williams challenged the appraisal report and submitted that this is a private matter between the Crawfords and their appraiser as nowhere in the Judgment is an appraisal ordered nor is it necessary for the confirmatory conveyance. In paragraph 16 of Mr. Taylor's affidavit, he stated that this is a quote from the appraiser evidencing costs that would be incurred in providing an appraisal of the property. I will allow the sum of \$1,680 for the appraisal report which will be necessary and which could have been circumvented had Mrs. Major done the correct thing in the first place.

## **Exhibit JT4**

### **Costs associated with the preparation of Confirmatory Conveyance by Pelago Law - \$1,350**

[31] It appears from the written submissions of Ms. Williams that Mrs. Major found the sum of \$1,350 to be more than reasonable since she was offering to pay \$1,750. I will allow the sum of \$1,350.

**Exhibit JT5**

**Expenses incurred by the Crawfords**

[32] There are four invoices attached to Exhibit JT5. The invoices relate to expenses incurred by the Crawfords in attempting to remedy the issues which ensued as a result of Mrs. Major’s negligence. These expenses are fully elucidated in paragraphs 18 and 19 of Mr. Taylor’s affidavit.

Invoice 1	\$3,049.95
Invoice 2	\$ 777.35
Invoice 3	\$3,102.30
Invoice 4	\$2,250.93
<b>Total (four invoices)</b>	<b>\$9,180.53</b>

[33] Ms. Williams fought hard to scale down the expenses in the invoices particularly as it relates to the Crawfords’ lunch at Café Matisse and their stay at Atlantis. She suggested that in the ordinary course of things, they would have had to eat irrespective if they came over for the trial or not and they could have stayed at a cheaper resort than Atlantis. While I admire the valiant efforts of Counsel in her attempts to reduce the quantum of damages, the Crawfords have produced invoices to substantiate what they expended. I have accepted the amounts shown in the invoices including the cost of lunch and their stay in New Providence. There is no good reason to reduce any of these expenses which were incurred as a consequence of the negligence of Mrs. Major.

[34] Further, and as Mr. Curry opined, the Crawfords are used to and are able to afford a certain lifestyle. They travel in their own plane. Indulging in lunch at Café Matisse and staying at Atlantis are not extravagant for people of their financial wherewithal. Accordingly, mitigation of damages under this head is not appropriate in the present case. I am reminded of the legal maxim “*take your victims as you find them*” which is a well-established doctrine in English criminal and tort law.

[35] All things considered, damages are assessed in the total amount of \$17,810.53 to the Crawfords to be paid on or before 25 October 2020. Cost of this assessment of \$3,500 is also awarded to the Crawfords. This represents reasonable costs.

### **Costs in the action**

[36] In accordance with the Directions Order, the parties were to transmit their Bill of Costs to the Court before the Judgment is rendered. Paragraph 153 of the Judgment states:

**“The Crawfords seek costs in the amount of \$152,924.91. Counsel for the Crawfords shall submit their Bill of Costs to the Defendants within 21 days hereof by electronic transmission. The issue of costs will also be heard on Wednesday 17 June 2020 at 11.00 a.m.”**

[37] Since the delivery of this Judgment, the Court has been inundated with a miscellany of other applications including my recusal from a further hearing of this action. As I am unable to hear the issue of costs, I will now order that it be taxed by the Registrar if not agreed.

**Dated this 25<sup>th</sup> day of September, A.D. 2020**

**Indra H. Charles  
Justice**