

DECISION

- [1] **Crane-Scott J:** This is an action for rescission of a Conveyance made on August 25th, 1993 between the Plaintiffs and the Defendant by which the Plaintiffs conveyed to the Defendant a one-half (1/2) share in property owned by them at Lot 26A Shop Hill, St Thomas.
- [2] The parties to the proceedings are family members, the First and Second Plaintiffs being the Defendant's younger brother and sister-in-law respectively. The Plaintiffs both reside in the United Kingdom, while the Defendant resides and conducts business in Barbados as an electrical contractor trading as 'Lashley's Electrical'.
- [3] At the heart of the proceedings is the Plaintiffs' assertion that they are entitled to rescind the Conveyance which they executed in favour of the Defendant on August 25th, 1993 because, according to them, they had been induced by, and had acted to their detriment in reliance upon certain false and fraudulent misrepresentations were made to them by the Defendant at various times during the year 1992.
- [4] Needless to say, the dispute has destroyed what both parties admit was once a close relationship between them.

[5] **The Pleadings:** The dispute between these family members came to a head on November 3rd, 2006 when the Plaintiffs filed a Writ and Statement of Claim seeking the following relief:

- 1) A declaration that they have validly rescinded a Conveyance dated August 25th, 1993 by which they transferred to the Defendant, a one-half (1/2) interest in their property situated at Shop Hill, St. Thomas; or alternatively an order rescinding the said Conveyance;
- 2) The return of monies due and owing to the Plaintiffs;
- 3) Damages;
- 4) Damages for fraudulent misrepresentation
- 5) Interest and
- 6) Costs.

[6] Paragraphs 4 to 12 of the Statement of Claim have been reproduced below to provide a broad overview of the case for the Plaintiffs. The Plaintiffs' several averments as to the false and fraudulent misrepresentations which they allege were made to them by the Defendant are found at paragraphs 8 to 11 of the Statement of Claim and are highlighted below in bold print.

“4. By Conveyance dated the 19th day of March, 1991, the Plaintiffs purchased Lot 26A, consisting of 644 square metres of land situate at Shop Hill in the parish of St. Thomas in Barbados.

5. The Plaintiffs then proceeded to construct a building on the said land and the Defendant was in charge of the

construction works. Building activity reached ring beam level. At this stage the Plaintiffs started to run short of money and it became necessary to obtain a loan on the security of the said property.

6. *By a deed of charge by way of legal mortgage dated the 4th day of July, 1991 the Plaintiffs, by the Defendant as their agent and duly constituted attorney on record by Power of Attorney aforesaid “as surety”, obtained a loan from the Canadian Imperial Bank of Commerce “stamped to cover \$235,000.00” “by way of overdraft and otherwise” for the purpose of completing the said building construction which consisted of four (4) two (2) bedroom apartments.*

7. *The Plaintiffs proceeded to make prompt monthly payments at the said bank [CIBC] from the month of July 1991 right up to December, 1998.*

8. ***In or about the month of April 1992, the Defendant telephoned the Plaintiffs and in order to induce the Plaintiffs to transfer an interest or share of the Plaintiffs said property to the Defendant, the Defendant represented to the Plaintiffs that the Plaintiffs were not sending any money to Barbados to pay the mortgage and that he the Defendant, “as surety”, was making all of the repayments on the said mortgage. The Defendant then demanded a one-half share of the Plaintiffs’ said property. The Plaintiffs denied the allegation, but nevertheless increased the amount of the mortgage money they were repaying to the bank on the property from £500 per month to £600 per month.***

9. Induced however, by and in reliance upon the Defendant's representation, by letter dated the 23rd September, 1992, the Plaintiffs wrote to the Defendant thanking him for all that he had done for the Plaintiffs, including making good the "shortfall" which the Defendant claimed he was making on the Plaintiffs' behalf, the Plaintiffs therein offered the Defendant a one-third (1/3rd) share of the property. **On receipt of the Plaintiffs' said letter, the Defendant again telephoned the Plaintiffs in an angry mood, shouting loudly and demanded a one-half (1/2) share. The Defendant insisted that he did not want a one-third (1/3rd) share. He further represented that with all the work he has done on the apartments and the amount of money in making good the "shortfalls" one third (1/3rd) was not enough.**

10. Induced by and acting in reliance upon each of the representations, and in fear of losing the entire property, the Plaintiffs trusted the Defendant, who is a family member and who at the time was their agent in Barbados, with the sole control and management of the Plaintiffs' business in Barbados, they having no knowledge of what was actually taking place except as advised by the Defendant, the Plaintiffs transferred the one-half (1/2) share in the property to the Defendant as he demanded by a conveyance dated the 25th day of August, 1993 prepared by the Defendant's Attorney-at-law and sent to the Plaintiffs in England for their signature, the said transfer purporting to be for the sum of \$85,000.00, which sum was never paid by the Defendant to the Plaintiffs.

11. The Defendant made the representations fraudulently in that he knew they were false, or recklessly, not caring whether they were true or false.”

12. The Plaintiffs discovered that each of the representations was false when in August 2006 they informed the Defendant that they wanted the property sold and to receive their one-half share. The Defendant refused and the Plaintiffs then took independent legal advice. As soon as the Plaintiffs discovered the true facts, the Plaintiffs, by registered letter to the Defendant dated the 27th day of September, 2006 rescinded the said transaction or Conveyance.”

[7] Having further pleaded the existence of a Power of Attorney executed by the Plaintiffs in 1988 appointing the Defendant as their agent, the Plaintiffs also complained at paragraph 13 of their Statement of Claim that during and throughout the entire 14 years of the principal and agent relationship between the Plaintiffs and the Defendant, that the Plaintiffs had not received any moneys, accounts, record, books or receipts, or the title deeds in relation to the property.

[8] The Defendant filed a Defence and Counterclaim on May 8th, 2008 in which he expressly denied making the alleged representations to the Plaintiff as alleged or at all. Paragraphs 24 and 25 of the Defence and Counterclaim are reproduced hereunder:

“24. As to paragraphs 7, 8, 9, 10 and 11 of the Statement of Claim the Defendant denies that he made the alleged or any representations to the Plaintiff as alleged or at all. Alternatively the alleged representations complained of were true in substance and in fact and or the Defendant at the time of making of the alleged representations honestly believed the same to be true. He did not make it or them fraudulently or with any intention to defraud or deceive the Plaintiffs or either of them. The Defendant had no knowledge of the facts alleged by the Plaintiffs in paragraph 7 of the Statement of Claim.

25. If which is denied the Defendant made the alleged or any representation, the Defendant denies that he did so with the intention of inducing the Plaintiffs as alleged at paragraphs 9 and 10 of the Statement of Claim or that the Plaintiffs were induced by the alleged representations as alleged therein. The Plaintiffs and each of them agreed to and did convey a one-half share in the property at Lot 26A Shop Hill in the parish of St. Thomas in reliance upon their own judgment and inquiries and not upon any statement or representations made by the Defendant.”

- [9] The Defendant further specifically denied that the agreement between the Plaintiffs and himself to convey the half share interest in the property and/or the subsequent Conveyance of that interest in the property to him had been validly rescinded, or that the Plaintiffs were entitled to have either rescinded.

[10] He further denied that he was the Plaintiffs' agent for a) the rental of the apartments which had been constructed at Shop Hill; or for b) the collection of rents; or that c) he had received rents for and to use the use of the Plaintiffs or under any circumstances as would entitle them to recover it or any part of it from him.

[11] While denying that he had remained an agent in respect of the Plaintiffs' interest in the said property, the Defendant pleaded that if he remained the Plaintiffs' agent, insofar as he was required to render an account, produce records or to pay over any monies to them, he was required to do so only upon demand and neither Plaintiff had ever demanded him so to do.

[12] While also denying that he had remained the Plaintiffs' agent in respect of their interest in the said property, the Defendant denied that he was in breach of any duty to the Plaintiffs. Alternatively, he asserted that if he were in breach of any duty, any claim in respect of such breach was statute barred under the *Limitation of Actions Act* **Cap. 231**.

[13] In his Counterclaim the Defendant relied on matters outlined in paragraphs 2-32 of his Defence and claimed the following relief:

- 1) A declaration that he is the owner of one-half share interest in the property at Lot 26A, Shop Hill, St Thomas;
- 2) An account including an account of all monies received by the Plaintiffs since taking possession of the said property on 17 November 2007;
- 3) A one-half share of all rents collected since 17 November 2007;
- 4) Damages;
- 5) Interest;
- 6) Costs; and
- 7) Such further and other relief as the court deems just.

[14] Following delivery of the Defence and Counterclaim, the Plaintiffs filed a formal Reply and Defence to Counterclaim on June 11th, 2008 in which they joined issue with the Defendant on his Defence and denied the Counterclaim.

[15] **The applicable legal framework:** The law governing proceedings for rescission based on misrepresentation is that where one person (“the representor”) makes a misrepresentation [i.e. a false statement of fact] to another (“the representee”) which has the object and result of inducing the “representee” to enter into a binding transaction with him, the “representee” may generally elect to regard the transaction as rescinded. Furthermore, a transaction which is induced by a

misrepresentation may be rescinded or set aside irrespective of whether the misrepresentation was made fraudulently, negligently or wholly innocently. *[See Halsbury's Laws of England, 4th Edition, Volume 31, paras 701-814; Chitty on Contracts Volume I @ paragraph 6-103.]*

[16] The proper parties to proceedings for rescission are the parties to the alleged representation, that is to say, the “representee” as the person claiming relief on the one hand, and the “representor” being the person who allegedly made the representation and against whom relief is sought on the other. *[Halsbury's Laws, 4th Edition, Volume 31, paras 725 & 819.]*

[17] The law may also deem a person to be a “representee” and a proper party to the proceedings in special situations. Accordingly, where the representation is made to one person through another, but with the intention that the person through whom the representation is conveyed will also be influenced and act on it (as where the “representor” knows or believes that the two persons are partners or business associates) in such a case either or each of the persons in question, if either or each acts on the faith of the representation, is deemed a “representee”. *[Halsbury's Laws, 4th Edition, Volume 31, para 736.]*

- [18] Where a misrepresentation is alleged, the burden lies on the “representee”, as the party alleging that misrepresentations were made, to prove “that degree of falsity which is required to establish that the representation is a misrepresentation”. It is also imperative that the precise representation relied upon be distinctly stated in the pleadings. [*Halsbury’s Laws of England, 4th Edition, Volume 31, para 744; Hallows v. Fernie (1868) 3 Ch App. 467 @ 477.*]
- [19] A representation is deemed to have been false, and therefore a misrepresentation in law, if it was *at the material date* false in substance and in fact. Accordingly, it will be for the “representee” to establish that the representation relied on was false *at the date when the “representee” altered his position because of it.* [*Halsbury’s Laws of England, 4th Edition, Volume 31, para 742 and 753; Briess v. Woolley [1954] AC 333 @ 354.*]
- [20] The standard by which the truth or falsity of a representation is to be judged is that the representation is considered false, if the discrepancy between the facts as represented and the actual facts is such as would be considered material by a reasonable “representee”. Conversely, if a reasonable “representee” would not consider the discrepancy between the facts as represented and the actual facts to be material, the

representation is to be considered true. [*Halsbury's Laws of England, 4th Edition, Volume 31, para 743.*]

[21] Where the representation is alleged to have been fraudulently made, the burden will lie on the “representee”, to establish fraud by proving that the “representor” made a false representation: (i) knowingly; or (ii) without belief in its truth; or (iii) recklessly, careless whether it be true or false. [*Halsbury's Laws of England, 4th Edition, Volume 31, paras 756- 757; Derry v. Peek (1889) 14 App Cas 337 @374 per Lord Herschell.*]

[22] Where a “representee” alleges that the “representor” had or was motivated by fraudulent intention to make the representation complained of, the necessary particulars of the facts and matters relied on to establish that the Defendant had or was activated by fraudulent intention must be set out in the Statement of Claim. [*O. 18 r. 12 (1)(b) RSC, 1982*]

[23] Even if the Plaintiff has sufficiently complied with the statutory requirements, the question of proof always remains and a representation made without fraudulent intent to induce the “representee” to act on it will not suffice. [*Tackey v. Bain [1912] AC 186.*]

[24] Where fraud is alleged, if the “representor” honestly believes the truth of his statement, no matter how ill-advised, stupid, incredulous or negligent, there is no fraud. In testing honesty of his belief, his statement must not be considered according to its ordinary meaning, but according to its meaning as understood by him. [*Akerheim et anor v. De Mare et al* [1959] 3 All ER 485.]

[25] In law, no misrepresentation, however gross or fraudulent, will attract any civil consequences, unless the “representee” is able to establish that: (i) it was material in the sense that its tendency or its “natural and probable result” was to induce the “representee” to act on the faith of it in the way in which he was shown to have acted; and (ii) that the misrepresentation was intended to and did influence the mind of the “representee” so as to affect his conduct. [*Halsbury’s Laws of England, 4th Edition, Volume 31, paras 765- 780.*]

[26] **The Issues:** In the light of the applicable law and having regard to the pleadings, the evidence adduced at the trial and the submissions of Counsel for the respective parties, the Court considered that the following issues arose for its determination in these proceedings:

- 1) Who are the proper parties to the proceedings?
- 2) What representations did the Defendant as the “representor” make to the Plaintiffs as “representees”?

- 3) Were the Defendant's representations false?
- 4) If so, did the Defendant make the misrepresentations fraudulently, namely: (i) knowingly; or (ii) without belief in their truth; or (iii) recklessly, careless whether they were true or false?
- 5) If so, were the misrepresentations intended to and did influence the mind of the Plaintiffs so as to affect their conduct?
- 6) If so, were the misrepresentations false at the date when the Plaintiffs altered their position to their detriment because of them?
- 7) If so, were the misrepresentations material, in the sense that their tendency or their "natural and probable result" was to induce the Plaintiffs to act on the faith of them in the way in which they did?

[27] **Discussion:** The issues for the Court's determination will now be discussed *seriatim* under the italicized sub-headings which follow.

[28] *Issue 1- Who are the the proper parties to these proceedings? Who are the alleged "representees"? Who is the alleged "representor"?*

The law requires that the proper parties in proceedings for rescission of a transaction based on misrepresentation are the parties to the alleged representation. It will therefore be necessary for the Court to identify the alleged "representor" and the alleged "representees" and to satisfy itself that the proper parties are before the Court. [*See above*

between paragraphs [15] to [17] and also Halsbury's Laws, 4th Edition, Volume 31, paras 725 & 819.]

- [29] It was evident from paragraphs 8 to 12 of the Statement of Claim that the Plaintiffs' case was founded on misrepresentations which they allege were made by the Defendant to them during the course of 2 telephone conversations in 1992.
- [30] The Plaintiffs also allege that the representations were fraudulently made in that the Defendant knew they were false, or were recklessly made by him, not caring whether they were true or false.
- [31] It was not in dispute and the evidence of the First Plaintiff, as well as of the Defendant at the trial confirmed that the First Plaintiff and the Defendant had in fact had no less than two telephone conversations in 1992 during which the inadequacy of the Plaintiffs' remittances to Barbados to cover the amount due to the bank on the mortgage loan was discussed.
- [32] Based on the foregoing facts the Court was satisfied that the Defendant was a proper party to the action and should be regarded in law as the "representor" for purposes of the proceedings.
- [33] The Court also found that the First Plaintiff to whom the alleged representations were said to have been *directly* made, was the person

who should be regarded in law and for purposes of these proceedings, as the “representee”.

[34] Turning next to the *locus standi* of the Second Plaintiff, the Court considered that while the evidence disclosed that the Defendant had never spoken with Gloria Lashley concerning business or financial matters, it was nonetheless possible for her to be a person who could in contemplation of law also be deemed a “representee”.

[35] In this regard, the Court was satisfied that any representation which may have been made by the Defendant to the First Plaintiff regarding the unsatisfactory state of mortgage payments due on the Plaintiffs’ jointly-owned property, must inevitably have been intended by the Defendant to have been conveyed to Gloria Lashley as Sylvan Lashley’s wife, as well as in her capacity as a co-owner of Lot 26A Shop Hill, St. Thomas.

[36] Furthermore, the evidence of Sylvan and Gloria Lashley and to a lesser extent, the Defendant, revealed numerous instances in which it would have been well known to the Defendant that Sylvan Lashley never took any decision pertaining to the couple’s investment at Lot 26A Shop Hill, St. Thomas unless he had first discussed it with his wife.

[37] For the foregoing reasons, the Court had no difficulty in finding that the Second Plaintiff, Gloria Lashley, is in law, also a “representee” and a proper party to the proceedings, notwithstanding that the alleged representations had not been made to her *directly*. [See above at paragraph [17] and *Halsbury’s Laws, 4th Edition, Volume 31, para 736.*]

[38] Issue 2 - What representations did the Defendant as the “representor” make to the Plaintiffs as “representees”? The representations which the Plaintiffs allege were made to them by the Defendant and about which they complained, are particularized at paragraphs 8 and 9 of the Statement of Claim and have already been reproduced in full at paragraph [6] above. Based on the Statement of Claim, the Plaintiffs have expressly complained that 2 representations were made as follows.

[39] The first representation: As to the first representation, the Plaintiffs’ case is that in or about the month of April, 1992, the Defendant telephoned them and with the intention of inducing them to transfer an interest or share of their property to him, made the following representation to them namely, that: ***“they [the Plaintiffs] were not sending any money to Barbados to pay the mortgage and that he,***

“as surety”, was making all of the repayments on the said mortgage.”

[40] As further set out at paragraph 8 of the Statement of Claim, the Plaintiffs’ also asserted that when this particular representation was made, the Defendant had also demanded a one-half (1/2) share of their said property.

[41] As appears from paragraph 11 of the Statement of Claim, the Plaintiffs further state that the Defendant made the representation fraudulently in that he knew it was false, or was reckless, not caring whether it was true or false.

[42] While denying the truth of the Defendant’s first representation, the Court found it very significant that with effect from the month immediately following the Defendant’s representation, the Plaintiffs nevertheless increased the amount of their monthly remittances to the bank in Barbados on account of the loan from £500 per month to £600 per month. This suggested to the Court that the Plaintiffs

[43] *The second representation:* The second representation which the Plaintiffs allege the Defendant made to them, is set out at paragraph 9 of the Statement of Claim.

[44] Unlike the first representation, no particulars are given as to the exact month or year in which the second representation is alleged to have been made to them by the Defendant. Instead, the date when the second representation was made is left to be inferred from the surrounding facts.

[45] As outlined in paragraph 8 of the Statement of Claim, the Plaintiffs say that the second representation was made during the course of a telephone conversation between the 1st Plaintiff and the Defendant which took place following receipt by the Defendant of a letter which they had written to him on 23rd September, 1992.

[46] The Plaintiffs allege that (induced by and in reliance on the Defendant's first representation) they had, in their letter of 23rd September, 1992, offered the Defendant a one third (1/3rd) share of the property in gratitude for all he had done for them, including making good the shortfall on the loan payments which, according to them, the Defendant claimed he was making on their behalf.

[47] The Plaintiffs also allege that following receipt of their letter of 23rd September, 1992, the Defendant had telephoned them and had angrily rejected the one third (1/3rd) share which they had offered him and had demanded instead a one-half (1/2) share. According to the Statement

of Claim, on that occasion, the Defendant had further represented to them that: ***“with all the work he has done on the apartments and the amount of money in making good the “shortfalls” one third (1/3rd) was not enough.”***

[48] At paragraph 10 of the Statement of Claim, the Plaintiffs further allege (that by a Conveyance dated August 25th, 1993, prepared by the Defendant’s attorney-at-law and sent to them in England for their signature) they transferred the one-half (1/2) share in the property to the Defendant which he had demanded.

[49] The Plaintiffs also assert that they were induced to execute the Conveyance by the Defendant’s said representations. They state that they were in fear of losing the entire property and had placed their trust in the Defendant, who was a family member and who was also, at the time, their agent under a Power of Attorney with sole, control and management of their business in Barbados. The Plaintiffs further allege that they had no knowledge of what was actually taking place except as advised by him.

[50] As appears from Paragraph 11, the Plaintiffs generally allege that the Defendant made the representations fraudulently in that he knew they were false, or recklessly, not caring whether they were true or false.

[51] At paragraph 12 of their Statement of Claim, the Plaintiffs state that they had only discovered that the representations were false in August 2006 when they advised the defendant that they wanted the property sold and to receive their one-half share.

[52] On their having taken independent legal advice, the Plaintiffs say they rescinded the Conveyance by registered letter dated September 27th, 2006 “*as soon as they had discovered the true facts*”.

[53] Having identified the representations as disclosed in the Statement of Claim which the Plaintiffs say the Defendant made to them, the Court next considered Issue 3 and the question whether, as alleged at paragraph 11 of the Statement of Claim, the representations were false and consequently, misrepresentations in law.

[54] *Issue 3 - Were the Defendant's representations false?* The Court considered that in civil proceedings where one party seeks to be relieved from a contract on the ground that it was induced by misrepresentation, it is insufficient for that party to generally allege that the representation is false. In such a case, the precise misrepresentation must be distinctly stated together with an averment that it formed a material inducement to the Plaintiffs to act as they did.

[Hallows v. Fernie (1868) (cited above) @ p. 477.]

- [55] The Court also observed that the common law is replete with authorities which require that in civil proceedings, any charge of fraud or misrepresentation must be pleaded with the utmost particularity. *[See Davy v. Garrett [1878] 7 Ch.D. 473 @ 489; Wallingford v. Mutual Society (1880) 5 App. Cas. 685; Lawrance v. Lord Norreys (1890) 15 App. Cas. 210 @ 221. Also Bullen & Leake & Jacob's Precedents of Pleadings, 13th Edition, pp. 427-428]*
- [56] The common law requirement for particularity of pleadings in proceedings where misrepresentation or fraud is alleged, is mirrored in **Order 18 r. 12 (1)(a) RSC, 1982** which provides, *inter alia*, that full particulars of any misrepresentation or fraud on which the party pleading relies, must be given in every pleading.
- [57] Furthermore **Order 18 r. 12 (1)(b) RSC, 1982** stipulates that in civil proceedings where fraudulent intention is alleged, particulars of the facts on which the party pleading relies, must be given.
- [58] In *Wallingford's case* (cited above) the House of Lords had occasion to consider, *inter alia*, the requirement that full particulars be given in pleadings whenever fraud is alleged. The following dicta from some of the speeches (all to the same effect) largely speak for themselves:

Per Lord Selbourne L.C. @ p. 697 - "...if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice...And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent..."

Per Lord Hatherley @ p. 701 - "Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is...to point out a specific error, and bring evidence of that error and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud, without any definite character being given to those charges by stating the facts upon which they rest."

Per Lord Watson @ p. 709 - “It is a well-known and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of common law, I think the terms of O. XIV would require the parties to state a very explicit case of fraud, or rather, facts suggesting fraud because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the Defendant state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply or at least strongly suggest, that a fraud must have been committed, those facts being assumed to be true.”

[62] Having examined the Statement of Claim in the light of the foregoing principles of pleading and practice in proceedings for rescission based on alleged misrepresentation the Court found great difficulty in appreciating why the alleged representations were false and should be regarded as misrepresentations.

[63] This was because the Statement of Claim failed to disclose what the true facts were which the Plaintiffs say they discovered in 2006 and on the strength of which they issued the Notice of Rescission.

[63] Shortly put, the Court found that the Statement of Claim was defective in that the Plaintiffs failed in their pleadings to give the necessary particulars which would show in what respects each of the two representations which they attributed to the Defendant were false and which would, in consequence, be considered misrepresentations in law. *[See above at paragraph [18]; Also Halsbury's Laws of England, 4th Edition, Volume 31, para 744; Hallows v. Fernie (1868) 3 Ch App. 467 @ 477 and O.18 r.12(1)(a) RSC, 1982.]*

[64] Additionally, I was satisfied that the Statement of Claim fails to set out what facts and circumstances the Plaintiffs were relying on to establish that the Defendant had or was activated by a fraudulent intention when the two representations complained of at paragraphs 8 and 9 respectively, were allegedly made. *[O.18 r.12(1)(b) RSC, 1982]*

[58] The Defendant's response: At paragraphs 24 of his Defence, the Defendant denied making the alleged representations to the Plaintiffs as alleged or at all. In the alternative, he stated that if he had done so,

the representations were true in substance and in fact and/or the Defendant at the time of making of the alleged representations honestly believed the same to be true.

[59] The Defendant further asserted that he did not make the representations fraudulently or with any intention to defraud or deceive the Plaintiffs or either of them. He also stated that he had no knowledge of the Plaintiffs' assertion at paragraph 7 of the Statement of Claim that they had been making prompt monthly payments to the said bank [CIBC] from the month of July 1991 right up to December, 1998.

[60] At paragraph 25 of his Defence, the Defendant, while denying having made the representations complained of, expressly denies having done so with the intention of inducing the Plaintiffs to transfer an interest or share of their property to him.

[61] He further denied that the Plaintiffs had been induced by the alleged representations and stated that the plaintiffs agreed to and conveyed a one-half share in the property in reliance upon their own judgment and inquiries and not upon any statement or representations made to them by him.

[65] Notwithstanding the obvious deficiencies in the pleadings, at the trial, the Plaintiffs sought to discharge the burden which rested on them as “representees” to show that the alleged representations were made and that the representations were false and therefore misrepresentations.

[66] In his evidence-in-chief the First Plaintiff explained that at the Defendant’s request, he had travelled to Barbados in 1991 to secure financing to facilitate the completion of the apartment building which the Defendant had been building on their behalf on their property at Lot 26A Shop Hill, St. Thomas.

[67] He told the Court that the Defendant had made all the arrangements for the loan and had informed him that the loan was for \$235,000.00. He explained that apart from seeing the bank manager at the building site on the morning of the meeting, he had never met the bank manager before.

[68] He told the Court that at the meeting at the bank later that day, the bank manager had simply brought the paperwork for the \$235,000.00 loan to him for his signature. He also told the Court that he had signed the paperwork for the loan but had not read the documents.

[69] The Defendant told the Court that following the meeting at the bank, he had subsequently spoken on the telephone with someone at the

bank who had called to advise him that the bank intended to give the Plaintiffs a 7 year loan with monthly payments of \$1,800.00.

[70] The First Plaintiff further testified that during the said telephone conversation, the bank had agreed, at his request, to extend the loan period for a further 2 years with a revised monthly payment of \$1,200.00 in view of his having informed them that the suggested monthly instalment of \$1,800.00 was too high.

[71] He told the Court that the loan had been taken out in June/July of 1991 and that the Plaintiffs had commenced making their repayments on the loan in July of the same year and had done so every month thereafter in the years between 1991 and 1999.

[72] The First Plaintiff produced a bundle of International Money Orders and Receipts which was entered into evidence as “Exhibit SL4”.

[73] The Plaintiffs contend that the bundle of documents is evidence of their having sent monthly remittances to CIBC in Barbados during the period 1991 to 1999. The documents clearly show that the Defendant’s first representation to them about their not sending any money to Barbados to pay the mortgage and about his having “as surety” to make all the repayments on the mortgage were clearly false.

[74] Additionally, they contend that his subsequent representation to them about the amount of money he was paying on their behalf in making good the “shortfalls” was also false and that both statements are obvious misrepresentations.

[75] With respect to the first representation, the Court observed that under cross-examination by Counsel for the Defendant, the First Plaintiff admitted that as he and his wife had been making loan repayments directly to the bank, the Plaintiffs would have been aware at the time that representation was made to them that the Defendants’ statement was quite simply, not true.

[76] This admission satisfied the Court that both Plaintiffs knew what the true facts were and had not been deceived by the Defendant’s first representation.

[77] Based on his evidence-in-chief, it was also apparent that the First Plaintiff, with full knowledge of the true facts, had confidently rejected the validity of the Defendant’s first representation to them. Additionally, the Plaintiffs sent the Defendant photocopies of their various remittance receipts as proof of the payments which they had been making to the bank on account of the loan each month commencing in July 1991.

[78] In the light of the foregoing facts which the Court accepted, I was satisfied that while the first representation was clearly a misrepresentation in that it was not true, the Plaintiffs had not been deceived by it. Furthermore, it was clear that the Plaintiffs were aware of the real facts in April 1992 when the first representation was made.

[79] The Court was also satisfied that the Plaintiffs were aware of the untruth of the first representation, more than one year before they executed the 1993 Conveyance to the Defendant of a one-half (1/2) share in their property situate at Lot 26A Shop Hill, St Thomas.

[80] In the circumstances, since proof that a “representee” had knowledge of the untruth of a representation is a complete bar to proceedings founded on misrepresentation, the Court had little difficulty holding as a matter of law that the Plaintiffs are completely barred from relying on the first representation to ground their claim for rescission of the 1993 Conveyance. [*Begbie v. Phosphate Sewerage Co. (1875)LR 10 QB 491; Irvine v. Kirkpatrick (1850) 7 Bell App 186.*]

[81] The Court has already adverted to the deficiencies in the Statement of Claim and the Plaintiffs’ failure to particularize the facts on which they would rely at the trial to establish the falsity of the Defendant’s second representation.

[82] As the party alleging that misrepresentations were made, it was clear that the legal burden of proving the falsity of the second representation rested on the Plaintiffs. However following its review of the Plaintiffs' case, the Court found that the Plaintiffs had also failed to adduce cogent evidence from which the Court could find that the Defendant's statement that he had been making good shortages, had in fact been false.

[83] Quite the contrary, under an extremely skilful cross-examination conducted by Defence Counsel, Mr. Alert, the First Plaintiff was forced to admit that at the time the second representation was made, he was in no position to say whether the Defendant's statement was true or false since, according to him, the Defendant had all the paperwork relating to the loan.

[84] Under cross-examination, the First Plaintiff confirmed his earlier testimony given during his evidence-in-chief that the Plaintiffs had not called the bank to independently ascertain the status of the loan payments or to verify the truth of what the Defendant had told them about making good shortfalls.

[85] Under further cross-examination, the First Defendant actually agreed with Defence Counsel, Mr. Alert that if the monthly repayment on the

- loan were shown to be \$4,205.00 and the Plaintiffs had been sending monthly remittances to Barbados of £500 or £600 that there would be a shortfall.
- [86] He further agreed that in such circumstances, it would not have been dishonest nor a falsity for the Defendant to have represented to the Plaintiffs that he was making good shortfalls on the loan.
- [87] Under further cross-examination, the First Plaintiff agreed with Mr. Alert that if all of the remittances which the Plaintiffs had sent to Barbados between 1991 and 1999 were totalled they would neither have settled the loan or the interest which was due to the bank.
- [88] He also agreed that the monthly loan instalments due to the bank had been deducted from the Defendant's current account in the name of "Lashley's Electrical" and had been applied to the loan account.
- [89] Following its review of the evidence, the Court found that there was a preponderance of evidence in support of the Defence case that the Defendant's representation about making good shortfalls on the loan payments were true in substance and in fact and that at the time they were made the Defendant honestly believed them to be true.
- [90] In his evidence-in-chief, the Defendant, Azul Lashley testified that the he had obtained an estimate of \$250,000.00 to complete the apartment

building. He told the Court that the bank had declined to lend the Plaintiffs the money directly, but had agreed to extend a loan to him in the sum of \$250,000.00 for the purpose of constructing the apartments on the Plaintiffs' property at Lot 26A Shop Hill, St. Thomas.

[91] He explained that he had received a total of \$235,000.00 from the bank and confirmed that he had not used the loan proceeds for anything other than the apartments and had not put any of the loan proceeds into "Lashley's Electrical".

[92] He explained that he had agreed to take such a considerable bank loan in his name on his brother's behalf because their mother was alive at the time and she had great confidence in her 2 sons. He explained that had he refused to help his younger brother, he did not think she would live much longer.

[93] He further told the Court that following their meeting at the bank, the First Plaintiff had agreed to repay him the amount of the loan payments which he would be required to make to the bank on the loan he had taken out on Plaintiffs' behalf.

[94] The Defence also relied on the evidence of 2 CIBC employees, namely, Miss. Janice Francis and Mr. Edwin Bailey, to establish its case that the bank had in 1991 granted a loan (No: 60159859012) in

the name of Azul Lashley t/a “Lashley’s Electrical” in the amount of \$250,000.00 for the purpose of constructing an apartment building at Lot 26A Shop Hill, St. Thomas.

[95] CIBC’s Senior Manager, EWL Accounts Department, Mr. Edwin Bailey explained that the bank’s records disclosed that “Lashley’s Electrical” had operated 2 facilities at the Bank. One facility consisted of an overdraft of \$50,000 which had been secured by a second charge over the Defendant’s property at 33 Warner’s, Christ Church, while a second facility had been extended to Azul Lashley t/a “Lashley’s Electrical” covering a loan of \$235,000.00 secured by way of a first charge over the Plaintiff’s property at Lot 26A Shop Hill, St. Thomas.

[96] Referring to the Mortgage Deed (“Exhibit SL 3”) which CIBC had taken over the Plaintiffs’ property at Lot 26A Shop Hill, St. Thomas, Mr. Bailey confirmed that the Defendant, Azul Lashley was referred to in the Deed as the “Surety”.

[97] He however explained that the bank loan had been extended to Azul Lashley t/a “Lashley’s Electrical” and that the Defendant had been primarily liable to the bank for repayment of the loan despite his having been described in the Mortgage Deed as the “Surety”.

[98] With reference to the computer-generated print-out entitled “Loan Inquiry Print-Out” which had been admitted in evidence, CIBC Recoveries Manager, Miss. Janice Francis confirmed that the several amounts of \$4,205.68 appearing under the ‘Transaction Amount Column,” represented the monthly payments due to the bank under the loan. She also confirmed that the “Loan Inquiry Print-Out” showed automatic deductions which had been made from the Defendant’s “Lashley’s Electrical” current account No: 0000654028160 at the Bank.

[99] Mr. Bailey and Miss. Francis both testified that the “Loan Inquiry Print-Out” confirmed that payments towards the loan repayment had commenced on February 17th, 1993. However since the computer system at the bank prior to 2002 would not have reflected automatic deductions if these were made, the witnesses were unable to say how and by whom these payments had been made.

[100] Neither witness was aware or in a position to say whether the Plaintiffs, Sylvan and Gloria Lashley had made payments towards the loan between during the 8 year period between July 1991 to July 1999.

[101] Miss. Francis identified and produced a letter dated March 14th, 2008 (“Exhibit ADL 10”) issued under her hand at the Defendant’s request, in which she had confirmed that the bank’s records indicated that the loan of \$250,000.00 which had been granted to him in 1991 had been completely repaid on October 31st, 2003.

[102] Having considered the matter, the Court accepted the evidence adduced on behalf of the Defendant and is satisfied on the balance of probabilities firstly, that the loan had not been made to the Plaintiffs as they claimed but, quite the contrary, had been extended to the Defendant who was primarily indebted to the bank and had been personally responsible for making the monthly repayments to the bank.

[103] Secondly, the Court is also satisfied that unknown to the Defendant and in breach of the First Plaintiff’s agreement with the Defendant to reimburse him directly, the Plaintiffs then started making monthly remittances directly to the bank in reduction of the monthly loan instalments.

[104] The Court has accepted the evidence of Miss. Janice Francis that the monthly loan repayment for which the Defendant t/a “Lashley’s Electrical” was primarily responsible was \$4,205.00. The Court has

also accepted that the monthly remittances of the Barbados dollar equivalent of £500 to £600 which the Plaintiffs claim to have made to their CIBC account on account of the loan between July 1991 and July 1999 would have been insufficient to cover the monthly instalments due to the bank.

[105] As the monthly remittances which the Plaintiffs had made to Barbados were insufficient to cover the sizable monthly instalments which the Defendant had been personally obligated to pay to the bank under the loan which he had taken out on their behalf, I am satisfied on the balance of probabilities that at the time that the second representation was made to the Plaintiffs, the Defendant's statement that he had been making good the "shortfall" would have been completely true.

[106] In the circumstances, that Court finds as a matter of law that it would have been no misrepresentation for the Defendant to represent to the Plaintiffs that he had been making good shortfalls on the loan repayments due to the bank and I so hold.

[107] In summary and for the reasons which it has already outlined, the Court has found (i) in relation to the first representation that the Plaintiffs are completely barred from relying on the first representation to ground their claim for rescission; and (ii) that the

second representation was true and consequently, not a misrepresentation in law on which an action for rescission could properly be founded.

[108] Accordingly it will be unnecessary for the Court to consider the other legal issues which it had earlier identified as having arisen for final disposition of the matter.

[109] In the result, the Plaintiffs are not entitled to rescind the Conveyance on the grounds of fraudulent misrepresentation or at all and the purported Notice of Rescission issued in September 2006 is therefore invalid and of no legal effect.

[109] As the Statement of Claim did not disclose a claim for an account and no evidence was adduced at the trial as to what sums (if any) are due and owing to the Plaintiffs, the relief sought at paragraph (2) and (3) of the Statement of Claim is denied.

[110] The Plaintiffs' claims for damages for fraudulent misrepresentation and interest are also denied.

[111] **The Counterclaim:** In his Counterclaim, the Defendant sought a declaration that he is the owner of a one-half (1/2) share in the Shop Hill, St. Thomas property.

[112] The evidence before this Court is that in 1993, the Plaintiffs freely attended before a Notary Public in London, England and voluntarily executed a Conveyance to the Defendant of a one-half (1/2) share in their property at Lot 26A Shop Hill, St. Thomas.

[113] As the Plaintiffs did not succeed in their action for rescission of the Conveyance on the ground of fraudulent misrepresentation, the Defendant is entitled on his Counterclaim to the declaration confirming his ownership of a one-half (1/2) share in the property situate at Lot 26A Shop Hill, St. Thomas in accordance with the terms of the Conveyance dated 24th August 1993.

[114] The Defendant is also entitled to an account of all monies received since 17th November 2007 when the Plaintiffs took possession of the apartments and to one half (1/2) of the net rental income which the Plaintiffs have collected since taking possession of the property on November 17th, 2007 and continuing.

[115] **Disposal and Order:** For the reasons which this Court has just outlined, the relief sought by the Plaintiffs in this action is refused. Judgment is awarded to the Defendant on his Counterclaim as follows:

- 1) The Defendant is declared to be the owner of a one-half (1/2) share in the property situated at Lot 26A Shop Hill, St Thomas in accordance with the terms of

the Conveyance dated 24th August 1993 and made between Sylvan and Gloria Lashley of the one part and Azul DaCosta Lashley of the other part;

- 2) It is also declared that the respondent is entitled to a one-half share in the net income derived from the rental of the apartments situated at 26A Shop Hill, St Thomas
- 3) An account shall be taken before the Registrar of all rental income received by, and all monies expended by the Plaintiffs the said apartments since the Plaintiffs took possession of the said property on 17th November 2007;
- 4) Interest is awarded on any monies found to be due and owing to the Defendant from the date of the Registrar's findings until payment
- 5) The Defendant is awarded his costs in the action as well as his costs on the Counterclaim, certified fit for one Attorney-at-Law to be quantified, if not agreed.

Maureen Crane-Scott
Judge of the High Court