

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE, A.D. 2021

CLAIM No. CV511 of 2021

BETWEEN

BEULAH SIKAFFY

Claimant

and

[1] MICHAEL FEINSTEIN

First Defendant

[2] LAS PALMAS LIMITED

Second Defendant

Appearances:

Mr. Andrew Bennett for the Claimant

Ms. Magalie Perdomo for the Defendants

2024: October 23rd;
 November 21st;
 December 10th.

JUDGMENT

Trial – Claim for Breach of Oral Agreement – Fraudulent Misrepresentation – Terms of Oral Agreement Disputed – Whether Investment was for Purchase of Land and a 50% Share of Proceeds of Sale or for Shares in Company – Whether a Term of Agreement was to Record Ownership of Land in Second Defendant's Name Until Sale – Whether Shares in Second Defendant to be Held in Trust for Claimant – Whether There was Failure to Pay the Full Purchase Price of Land or Shares – Whether There was a Breach of Fiduciary Duty in Not Informing Claimant of Sale of Land – Effect of Return of Investment Monies – Measure of Damages for Fraudulent Misrepresentation.

- [1] **ALEXANDER, J.:** This trial relates to a claim for breach of contract and fraudulent misrepresentation arising from an oral agreement between the parties. The parties initially entered the agreement sometime in 1993 (“the agreement”) and then in 2017 agreed to the repayment of the claimant’s investment (“the 2017 agreement”). The agreement involved an alleged investment into the purchase and re-sale of land for a 50% proceeds in the sale. The claimant seeks to recover the 50% proceeds in the sale of the land and/or alternatively her full investment sum.
- [2] The first defendant acknowledges the existence of the agreement but disputes that it was for an investment into the purchase and re-sale of land for a profit. Instead, the first defendant claims that the investment was for the purchase of his shares in the second defendant company. The claimant claims that the agreement was never for the *purchase* of shares in the second defendant, as that is a contract that she would never have agreed to or entered. Further, the claimant acknowledges that the first defendant had agreed to transfer his shares in the second defendant to the claimant but only as a form of security for the land investment. However, he had failed or refused to do so and declared himself as trustee for the shares for the benefit of the claimant.
- [3] Based on the agreement made in 1993, the land was to be recorded in the name of the second defendant who would hold it for re-sale at a profit, with a 50% share of the proceeds of sale to go to the claimant. After more than 23 years of holding the property, the first defendant approached the claimant sometime in September 2017 and represented to her that the land was not sold and offered to repay her investment monies. The parties entered into the 2017 agreement, which was a second verbal agreement, whereby the claimant agreed to a refund of her investment monies. Pursuant to the 2017 agreement, she was only partially repaid her investment monies.
- [4] The claimant subsequently discovered that the land was sold on 8th September 2017 for BZ\$1,180,000.00. She did not receive her 50% share of the proceeds of sale of the land. She did not receive a return of her full investment monies.

- [5] The claimant's claim is, therefore, grounded in fraudulent misrepresentation.
- [6] She claims that pursuant to the 2017 agreement, she was fraudulently induced into accepting the return of her investment monies, without being told that the land was sold, and in any event, she did not receive her full investment sums.
- [7] I grant the claimant judgment on her claim. I am satisfied on the evidence that the defendants were both parties to the agreement made in 1993. I find also that the claimant did enter into the 2017 agreement pursuant to which she accepted and received a large partial repayment of her investment. She was not told of the sale of the land when the 2017 agreement was made. I find, therefore, that the claim of fraudulent misrepresentation is made out on the evidence before me.
- [8] I order that the claimant is entitled to recover her full monetary investment in the project entered into with the defendants, as proved on the evidence. There was no evidence produce reflecting loss of investment opportunities, and I was not prepared to presume the occurrence of this.
- [9] I will refer to the claimant as "Mrs. Sikaffy", the first defendant as "Mr. Feinstein" and the second defendant as "Las Palmas" and together "the defendants".

Background

- [10] It is necessary to give a short context to the claim for understanding as to why parties would have entered into an *oral* agreement involving such a significant sum of monies, whether for purchase of land or of shares.
- [11] Prior to the oral agreement, Mrs. Sikaffy and Mr. Feinstein shared a close family friendship. This led to the informality of the agreement that they had entered. Mrs. Sikaffy made substantial payments by instalments, fees and land taxes, with informal communications between the parties about the distribution of the monies passing

between them. However, following a private arrangement between the parties to refund the investment sums and a full refund not being realised, the friendship ended and Mrs. Sikaffy approached the court to resolve the dispute.

[12] Mrs. Sikaffy pleaded by an amended claim form and statement of claim filed on 8th March 2023 that the first defendant as principal of the second defendant made representations that led her to enter what was advanced to her as a lucrative investment project. She invested substantial sums and waited to realise the profit from her investment. She was then fraudulently induced by the first defendant into accepting the return of her investment monies by instalments, when he told her that the land was not sold. She discovered that the land was sold for a profit. She brought the claim to recover her 50% share in the proceeds of the sale of the land (“her 50% share”) or alternatively, her complete monetary investment in the project.

The Claim

[13] Mrs. Sikaffy claims against the defendants the sum of BZ\$288,535.00 as the balance of her 50% share of the sale of the land. She also makes a claim in the alternative for a return of her investment funds. The land in question comprises 10.26 acres of sea front property shown in Plan No. 123 of 1994 and is described in Minister Fiat Grant No. 123 of 1994 (“the land”). The agreement included the payment of fees associated with company search, preparation, and filing of annual summaries for the years 1993 to 2007 for Las Palmas, and land taxes for the land itself.

The Defence

[14] Mr. Feinstein disputes the claim in its entirety and asks that it be dismissed. According to Mr. Feinstein, he and Mrs. Sikaffy did enter into the agreement, but his understanding of its terms was different. He had agreed only to sell Mrs. Sikaffy the shares that he held in Las Palmas, for the purchase price of BZ\$350,000.00. Essentially, Mr. Feinstein stated that the parties entered into a share purchase

agreement and not a land investment agreement. He stated further that there was no agreement to record ownership of the land in the name of Las Palmas and to hold and then sell the land at a profit for the benefit of Mrs. Sikaffy. At the time, Las Palmas did not own any land but was in the process of acquiring land. Thus, Mrs. Sikaffy bought shares from him, which were held in trust by him for Mrs. Sikaffy pursuant to their share purchase agreement.

- [15] In further answer to the claim, Mr. Feinstein contended that Mrs. Sikaffy had failed to pay the full purchase price for the shares, so he was not bound by the agreement. He admitted that he had offered in 2017 to refund Mrs. Sikaffy the monies she had paid for the shares, and having done so in the sum of BZ\$352,000.00 (i.e. in excess by BZ\$10,000.00) he asked that her claim be dismissed.
- [16] The second defendant in the claim is Las Palmas. Las Palmas disputes the claim in its entirety. First, Las Palmas averred that it did not enter into any agreement with Mrs. Sikaffy for purchase of the land or to record ownership of the land in its name for the purpose of holding and, later, selling the land at a profit. It also had no agreement with Mrs. Sikaffy that involved her being entitled to a 50% share upon sale of the land. In fact, at the time that the agreement was entered, Las Palmas had no property in its name so Las Palmas could not have promised Mrs. Sikaffy to provide a 50% share in the sale of an asset that it did not own.
- [17] Las Palmas stated further that it was aware that the land was recorded in its name on 12th October 1994. The land was then conveyed to Hallmark Advisory Limited in 2017. However, Mrs. Sikaffy was a stranger to the transaction between Hallmark Advisory Limited and Las Palmas. Las Palmas also denied that its officers, servants or agents had made any representation to Mrs. Sikaffy, as claimed by her, and stated that fraudulent misrepresentation was woefully pleaded.

Evidence

[18] There was a volume of documentary evidence provided by Mrs. Sikaffy, specifically showing the financial transfers to the defendants. These included fees paid on behalf of Las Palmas. The defendants also came armed with documents in support of their case.

Issues

[19] I identify the main issues for the court's determination are as follows:

1. Whether the claimant entered into an agreement with the defendants to invest in the purchase of land for a 50% share in the proceeds of its sale or to purchase the first defendant's shares in the second defendant?
2. Whether there was fraudulent misrepresentation and/or breach of fiduciary duty by the defendants?
3. Whether the claimant is entitled to the reliefs sought?

The Law on Fraudulent Misrepresentation

[20] Fraudulent misrepresentation occurs when a false statement is dishonestly made to a party and that party relies on it, enters into the deal and then suffers a loss as a result. A court will presume that the false representations operated to induce the claimant to enter the contract and so caused the claimant to suffer loss.

[21] The test for fraudulent misrepresentation¹ comprises of specific elements that must be proved. As was outlined in **Eco3 Capital Limited et al v Ludsin Overseas Limited et al**, these elements include:

¹ [2013] EWCA Civ. 413, per Jackson LJ at paragraph [77]. Also, see 1000425140 Ontario Inc. v 1000176653 Ontario Inc. (Ont. CA, 2024) where the Ontario Court of Appeal similarly set out the test for fraudulent misrepresentation.

1. The defendant makes a false representation to the claimant.
2. The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.
3. The defendant intends that the claimant should act in reliance on it.
4. The claimant does act in reliance on the representation and in consequence suffers loss.

[22] Fraudulent misrepresentation would be established where the above four elements exist and are proved. Generally, the statement will be false if it has an element of deception, deceit, dishonesty or fraud or it is misleading. Moreover, a misrepresentation can involve an overt statement of fact, half-truths or representations coloured by what is left unsaid or where the circumstances raise a duty on the representor to state certain matters if they exist.²

[23] The court will decide on a balance of probabilities, based on all the circumstances of the case, if fraud has taken place. Evidence as to what transpired before the claimant entered into the contract will be needed.

Discussion

Whether the Claimant Entered into an Agreement with the Defendants to Invest in the Purchase of Land for a 50% Share in the Proceeds of its Sale or to Purchase the First Defendant's Shares in the Second Defendant?

[24] The first issue, when distilled, contains three distinct parts. These included: (i) the existence of an agreement; (ii) who are the parties to the agreement; and (iii) what was the purpose of the investment, as agreed to by the parties.

² Robert van Kessel & Paul Rand, *The Law of Fraud in Canada* (Toronto: LexisNexis Canada Inc., 2013) at 2.69 and 2.72.

(i) Agreement & Parties

- [25] Both Mrs. Sikaffy and Mr. Feinstein admitted that there was a verbal agreement that they had entered into sometime in or about September 1993 involving a monetary investment. It is the terms of the agreement and the parties to it that are in dispute.
- [26] Mrs. Sikaffy stated that Mr. Feinstein had entered into the agreement both in his personal capacity and as principal officer of Las Palmas. The agreement was forged at Mrs. Sikaffy's home, when Mr. Feinstein offered her an opportunity to invest in one of his projects. At the time, Mr. Feinstein was, and to date he remains, a director of Palmas. The offer required her to invest the sum of BZ\$400,318.90 overtime, which she did through instalments. The investment was for use towards the purchase of the land, and payment of land taxes. It also included fees paid on behalf of Las Palmas at the company's registry.
- [27] Mrs. Sikaffy averred that the defendants, through Mr. Feinstein, represented that the land was a lucrative property that would be purchased from the Government of Belize ("GOB") and that it would be held in the name of Las Palmas until it was sold for profit. Once sold, Mrs. Sikaffy would be given her 50% share of the proceeds of sale. Mrs. Sikaffy's case, therefore, is that the investment was specific to securing her 50% share and that the parties were the defendants and her.
- [28] Mr. Feinstein stated that the investment was to purchase his shares in Las Palmas, which were not fully paid for by Mrs. Sikaffy. She having not completed payment of the full purchase price, he viewed the agreement as terminated.
- [29] The agreement was made orally, in undocumented conversations some years ago, so there were no terms settled in written form or any electronic footprint before me. I resorted to the use of objective means to decipher the intentions of the parties. This was done by me objectively scrutinising the conduct of parties and/or their oral

exchanges to glean their intentions. I also considered any subjective understanding of the parties as to the agreement they had entered.

[30] In **Blue v Ashley**,³ the court stated that the test for an oral agreement is objective:

“... but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis. In the case of an oral agreement, unless a recording was made, the court cannot know the exact words spoken nor the tone in which they were spoken, nor the facial expressions and body language of those involved. In these circumstances, **the parties’ subjective understanding may be a good guide to how, in their context, the words used would reasonably have been understood.** It is for that reason that the House of Lords in *Carmichael v National Power Plc* [1991] 1 WLR 2042 held that evidence of **the subjective understanding of the parties is admissible in deciding what obligations were established by an agreement.**” [My Emphasis].

[31] The first step was to look at the evidence of the parties’ conduct. Mrs. Sikaffy stated that she was unaware of the existence of Las Palmas before September 1993 and only heard of the company when Mr. Feinstein approached her with the investment opportunity. Las Palmas was the conduit through which the land would be secured, held and sold. On Mr. Feinstein’s representations, she had entered the agreement and made payments towards liquidating Las Palmas’ debts and to help it to regain a good legal standing. Based on her conduct, Mrs. Sikaffy was acting to protect Las Palmas from failing, so that she would keep her investment secured. I accepted her evidence.

[32] I also accepted Mr. Feinstein’s evidence in his witness statement that he was a director and shareholder of Las Palmas from 1992 to present and in charge of its day-to-day operations including its contractual agreements. Mr. Feinstein’s evidence here was not mutually exclusive to that as given by Mrs. Sikaffy.

³ [2017] EWHC 1928 (Comm) para. 64.

[33] During cross-examination, Mr. Feinstein sought to deny that he was a director of Las Palmas. He conceded this point only when he was shown his witness statement, which clearly stated that he was a director and shareholder of Las Palmas with the responsibility for its day-to-day operations and contractual agreements. As a witness, Mr. Feinstein failed to maintain a straight story but presented a rehearsed narrative that aimed to exclude the role of Las Palmas in the agreement. Despite the creative attempts by Mr. Feinstein, during cross-examination, to redefine his role, position and authority in Las Palmas, the incontrovertible evidence was that he had made the verbal agreement with Mrs. Sikaffy for the investment project and he did so with the authority to bind Las Palmas to the agreement. Mr. Feinstein's trouble with the truth did not affect my conclusions as to the existence of an agreement and its parties.

[34] I, therefore, find that when Mr. Feinstein approached Mrs. Sikaffy with the investment project, he did so both in his personal capacity and as a director and shareholder of Las Palmas. Moreover, I find that he had full authority to bind Las Palmas to the agreement that the defendants entered into with Mrs. Sikaffy, and he did so bind Las Palmas.

[35] I find, therefore, that the parties to the verbal agreement were Mrs. Sikaffy and the defendants.

(ii) What was the Purpose of the Investment, as Agreed to by the Parties?

[36] While parties have taken entrenched positions on the ***purpose*** of the investment project, their intentions are clear from their conduct.

[37] The clear evidence was that Las Palmas purchased the land for BZ\$55,695.70 and became proprietor on 12th October 1994. Mrs. Sikaffy paid BZ\$20,000.00 towards this purchase price. There was no evidence provided of any other purpose or function of Las Palmas, and I did not assume any. Las Palmas was in arrears of BZ\$45,852.00 (later reduced to BZ\$11,750.00) for failure to submit annual returns, so Mrs. Sikaffy paid that sum as well as land taxes. She provided receipts for all monies expended.

She stated that she was never interested in buying shares in Las Palmas and would never have invested her monies in acquiring Las Palmas' shares. Her investment was to secure her 50% share from the sale. I accepted her evidence as truthful.

[38] I also accepted Mrs. Sikaffy's evidence that after her initial downpayment of BZ\$200,000.00 in 1993, she made a further instalment payment of BZ\$175,000.00 as well as she contributed monetarily to keep Las Palmas in good standing with the company registry. Pursuant to her total investment of BZ\$400,318.90, she was kept apprised over the years by Mr. Feinstein on her investment in the land including about prospective sales. For several years, Mr. Feinstein would visit her at home, or her office, to keep her updated on persons who had expressed interest in buying the land.

[39] Mr. Feinstein maintained Mrs. Sikaffy entered the agreement to buy his shares in Las Palmas for the sum of BZ\$350,000.00, which she paid in instalments totalling BZ\$342,000.00. This sum fell short of the purchase price for his shares. Pressed during cross-examination, however, Mr. Feinstein admitted that it was possible that Mrs. Sikaffy had paid him BZ\$375,000.00. He was adamant that the agreement was not a tri-party agreement, and the defendants never received any sums from Mrs. Sikaffy towards the purchase price of the land. The land was purchased by Las Palmas. He simply *oversaw* the transaction together with Ms. Diana Marin, the other director and shareholder at the time but he had no communication with the purchaser. Mr. Feinstein also denied ever receiving monies from Mrs. Sikaffy towards the payment of land taxes and claimed that all land taxes were paid by Las Palmas. During cross-examination, Mr. Feinstein conceded that Mrs. Sikaffy, who had the original receipts for the land taxes, might have made all the payments for land taxes on behalf of Las Palmas. He then asserted that Mrs. Sikaffy had settled the outstanding fees owing to the registry by Las Palmas at her own expense. He, therefore, sought to delink these payments from the investment project.

[40] I did not accept Mr. Feinstein's evidence as truthful. Mrs. Sikaffy's investment was substantial. Over the course of several years, she made huge instalment payments and paid fees owing by Las Palmas to the company's registry to ensure that Las

Palmas regained a good standing with the registry. Thereafter, she waited to realise the benefit of her investment. Mr. Andrew Bennett's submissions were that, objectively, "it begs the question, why would Mrs. Sikaffy want to buy shares in a company that had no business, no land, that was delinquent and was in peril of being struck off the register. **The only logical explanation goes back to the lucrative investment in the land with a high resale value.**" [My Emphasis]. I agree.

[41] I rejected Mrs. Perdomo's submissions that the objective evidence overtime, including words and conduct as well as documentary evidence, supported a finding that the agreement was for the purpose as stated by Mr. Feinstein. According to Mrs. Perdomo, any other conclusion would involve the court engaging in a re-write of a bad bargain between parties, which the court is not empowered to do. Mrs. Perdomo also argued that there was no evidence that the elements of a contract existed and that Las Palmas, an entity with its own legal personality, was involved in the transaction.

[42] In my view, when Mr. Feinstein first approached Mrs. Sikaffy to enter the investment project, Las Palmas was a recently incorporated entity and unknown to her. Based on representations, she made the initial payment of BZ\$200,000.00 of which she provided contemporaneous evidence. I, therefore, accepted her evidence as truthful that she had accepted the opportunity to be part of a lucrative investment by the principal of Las Palmas, and that Las Palma was the vehicle through which the investment would be channelled. Further, Mr. Bennett submitted that the investment could not be for shares, as clause 14 of the articles of association for Las Palmas restricted transfer of shares to non-members so long as any member is willing to purchase same. Regarding this submission, I had no evidence of the willingness or unwillingness of other shareholders to purchase shares in Las Palmas, and did not factor this argument into my decision.

[43] Regarding Mr. Feinstein's claim that the investment agreement was for BZ\$350,000.00 to buy his shares in Las Palmas, the evidence belies this defence. First, Mr. Feinstein did not call any other director, shareholder or officer of Las Palmas to corroborate this claim. Secondly, Mr. Feinstein stated that upon receipt of the first

instalment sum of BZ\$200,000.00 and pursuant to the share transfer agreement between the parties, he executed a share transfer instrument to transfer his shares numbered 7501 to 10,000 to Mrs. Sikaffy. He then decided to withhold this share transfer instrument, allegedly, because Mrs. Sikaffy did not pay the full purchase price of BZ\$350,000.00 or, possibly, BZ\$375,000.00. The evidence simply did not support the defence of Mr. Feinstein.

- [44] I find it convenient to set out the portion of the share transfer instrument that shows the consideration, which was signed by attorneys representing parties in the matter:

In consideration of the sum of two thousand five hundred dollars (\$2,500.00) paid to me by **BEULAH SIKAFFY** of 2 Bishop Street, Belize City, Belize, (hereinafter called "the Transferee") (*sic*) **DO HEREBY TRANSFER** to the Transferee the shares numbered 7,501 to 10,000 inclusive in the undertaking called LAS PALMAS LIMITED ... [Emphasis Original].

- [45] The above statement on the share transfer instrument shows three things: (i) that if the agreement concerned the sale of shares, then the sale price was BZ\$2,500.00, and not BZ\$350,000.00 as claimed by Mr. Feinstein; (ii) that from the outset, Mrs. Sikaffy's payment of BZ\$200,000.00 far exceeded the purchase price for the shares and (iii) that Mr. Feinstein had placed his signature on the document, which raises the question as to why he would have done so if Mrs. Sikaffy did not pay the purchase price in full.

- [46] I have considered the evidence of Mr. Feinstein and find that it is punctuated with inconsistencies and roundabout explanations to simple questions. I do not believe his evidence that the oral agreement, whose first instalment was the sum of BZ\$200,000.00, was for the purchase of his shares in the recently incorporated Las Palmas. I also do not accept his claim (i.e. defence) that in total he had only received the sum of BZ\$342,000.00, and that Mrs. Sikaffy had become illiquid so had instructed him to loan her brother BZ\$40,000.00 so he in fact only received for his shares the sum of BZ\$302,000.00. In fact, Mrs. Sikaffy kept records and provided documents

evidencing her payments, including lump sums and other sums paid towards Las Palmas' annual fees at the registry.

[47] I have also juxtaposed the evidence of the parties and find Mr. Feinstein's evidence to be marred with inconsistencies whilst Mrs. Sikaffy's evidence was clear and supported by receipts.⁴ Both receipts for the two payments totalling BZ\$375,000.00 were issued by Mr. Feinstein's hand and followed closely on the heels of the verbal agreement. I accepted the evidence of the sums paid of BZ\$375,000.00 and that it meant that by 1st November 1994, Mrs. Sikaffy had made an overpayment for Mr. Feinstein's shares if I were to accept his evidence. Despite this, Mr. Feinstein had not transferred his shares to her. In fact, he testified that he had directed his attorney-at-law not to issue the share transfer instrument because the purchase price was incomplete. Further, he failed during cross-examination to convince me that his explanation of the BZ\$175,000.00 was credible. He stated that Mrs. Sikaffy had directed him to loan BZ\$40,000.00 to her brother, Mr. Neil McKay, hence the shortfall in the investment sums received by him. The sum for the transfer of shares had to be discounted by this loan amount. In fact, Mr. Neil McKay gave evidence at the trial that conflicted with that of Mr. Feinstein. Mr. Feinstein, therefore, failed to prove his claim of advancing any loan to Mr. Neil McKay. I find that Mr. Feinstein was adept at coming up with creative explanations for what transpired between the parties including that it was Mrs. Sikaffy's attorney-at-law at the time who had the answer as to why his shares were not transferred to Mrs. Sikaffy.

[48] I find that Mrs. Sikaffy entered a verbal agreement with Mr. Feinstein to invest monies, for the purpose of acquiring land to make a profit through its future re-sale. Pursuant to the agreement, her share was agreed as a 50% share. Mrs. Sikaffy invested the total sum of BZ\$408,318.90 in exchange for her share of the investment. The investment project was not for purchase of shares in Las Palmas. I also accepted that the land was agreed to be recorded in Las Palmas' name, and Mrs. Sikaffy was offered

⁴ The payments of \$200,000.00 and \$175,000.00 were supported by receipts dated 6th September 1993 and 1st November 1994.

the security of Mr. Feinstein's shares so that when the land was acquired, she would have equal control over the business dealings involving the land.

Whether there was fraudulent misrepresentation and/or breach of fiduciary duty by the defendants?

[49] The test for fraudulent misrepresentation is set out at paragraphs 21 and 22 above.

[50] Generally, the statement of misrepresentation need not be in writing and can be made verbally, by gesture, by conduct or by failure to advise the other party of certain facts. The representation can relate to future conduct or be of an intention to use finances for a certain purpose when this was never the intention. Critical to a finding of fraudulent misrepresentation is showing that the representor knew whether partly or wholly that he was inducing the claimant to enter the agreement on a false statement and the claimant acted in reliance on the false statement.

[51] Evidence of the surrounding circumstances that led to the representation(s) and decision to act on them would be critical in order for a court to be satisfied that there was fraud, dishonesty and a deceit knowingly perpetrated by a defendant and that a claimant acted on the representation and so suffered loss.

[52] Mrs. Sikaffy averred that it was based on the representations of Mr. Feinstein, a close family friend, that she had agreed to the investment for the 50% share. Although she stated that Las Palmas was a newly formed entity and she would not have invested such significant funds into it, there was evidence that the receipt evidencing her first payment of BZ\$200,000.00 was imprinted with a brief statement that the monies were received for 2500 shares. The receipt was dated 6 September 1993 and issued by the hands of Mr. Feinstein. Subsequently, a share transfer instrument was executed by Mr. Feinstein and her, in consideration of the payment of BZ\$2,500.00. Mr. Feinstein then stopped the actual transfer, did not appoint Mrs. Sikaffy a director of Las Palmas and declared himself trustee for the shares on behalf of Mrs. Sikaffy. Mrs. Sikaffy

continued to uphold her side of the land investment agreement as evinced by paying the further sum of BZ\$175,000.00 on 1st November 1994. She provided receipts of all the monies invested.

[53] Mrs. Sikaffy says that the statements on her receipts that she was buying shares, were incorrect since her investment was specific to her 50% share. Mrs. Sikaffy averred further that although she is now, as at the trial date, aware that Las Palmas was incorporated in July of 1992, she knew nothing of Las Palmas until September 1993, when Mr. Feinstein first approached her about the investment project. At that point, there was nothing attractive or profitable about Las Palmas to make her invest such a significant sum for its shares.

[54] Sometime in September 2017, Mr. Feinstein informed her that the land was still not sold and offered to pay her BZ\$450,000.00 for her investment. She countered with BZ\$500,000.00 which he refused, and it was settled between them that she would be paid the sum of BZ\$450,000.00 for her investment. She received some of the repayment sums in both cash and cheques and kept a record. The total repayment sum amounted to BZ\$312,000.00. After 25th September 2020, Mr. Feinstein refused or neglected to pay the balance of BZ\$138,000.00. There was evidence that unknown to her, the land was sold to Hallmark Advisory Limited for BZ\$1,180,000.00 on 8th September 2017. This sale was never disclosed to Mrs. Sikaffy until she conducted a search that revealed it. She claimed fraudulent misrepresentation by Mr. Feinstein.

[55] The allegation of fraudulent misrepresentation is against a respected figure within the Belizean society. It was supported by strong evidence against Mr. Feinstein. A finding of misrepresentation can be made on the conduct, actions and even failure of a party to advise the other party of certain facts. Fraudulent misrepresentation can exist where the representor knew whether partly or wholly that he was inducing the other party to enter the agreement on a false statement. In the present matter, Mrs. Sikaffy acted in reliance on the misleading representations of Mr. Feinstein. He knowingly and dishonestly misled her into believing that the investment would benefit her and not

cause her loss but when the benefit arrived, he again represented to her that the land was not sold. She acted on that fraudulent representation and so suffered loss.

[56] I was not satisfied on the evidence that Mr. Feinstein answered the case put to him. I rejected Mr. Feinstein's claim of having nothing to do with negotiating the sale of the land nor of communicating with the buyer. Throughout the period of holding onto the investment sums, Mr. Feinstein had kept Mrs. Sikaffy apprised of the progress on potential sales, specifically of persons who had expressed interest in its purchase. I do not believe that he would have been uninvolved in the sale in 2017. I also rejected Mr. Feinstein's evidence that the refund of the investment monies for the share capital was a gesture of good faith and because of their families' close friendship.

[57] While I accepted that there was indeed a close family friendship between the parties, I find that Mr. Feinstein used this to induce Mrs. Sikaffy to make the investment. Mrs. Sikaffy had money to invest and expected her close family friend, Mr. Feinstein, to deal with her investment honestly and in good faith. He did not. He should have spoken up and informed her that the land was actually sold when he offered to repay the investment sum.

[58] I find on the facts that the defendants offered Mrs. Sikaffy an investment opportunity that did not materialise. In 2017, Mr. Feinstein knowingly offered to repay her investment, without telling her that the land was already sold or without disclosing the particulars of sale.

[59] I find that all the elements of fraudulent misrepresentation exist and are satisfied on the facts before me.

Breach of Fiduciary Duty

[60] A short issue that arises on the facts is whether Mr. Feinstein took on a fiduciary duty to Mrs. Sikaffy when he declared that he had no beneficial interest in the shares numbered 02 and 5002 to 10,000 but held those shares on trust for Mrs. Sikaffy. Mr.

Bennett argued that Mr. Feinstein was under such a duty and remained so to keep Mrs. Sikaffy informed of all developments regarding Las Palmas including its asset, which was the land. Mr. Feinstein kept her updated in some respects, including informing her of the death of his partner and offering her the remaining shares in Las Palmas for BZ\$250,000.00. There was no evidence of this latter occurrence.

[61] In 2017, when without disclosing the sale of the land, he offered to give her back her investment, Mrs. Sikaffy claims that he breached his fiduciary duty as Mr. Feinstein was her trustee in the transaction. Mr. Bennett advanced that the first defendant breached his fiduciary duty to Mrs. Sikaffy in three ways:

- 1) Failing to inform her of that the land was sold and in what amounts.
- 2) Failing to disclose the particulars of sale of the land; and
- 3) Failing to pay out her share of the proceeds of sale.

[62] Ms. Perdomo advanced that there was no breach of fiduciary duty, as no trust was registered with the Registrar within six months, as required by the Trust Act Chapter 202 of Belize.⁵ I agree.

Whether the Claimant is Entitled to the Reliefs Sought?

[63] Mrs. Sikaffy sought the relief of her 50% share or, alternatively, a return of her full investment.

[64] I have found that there was fraudulent misrepresentation related to the 2017 agreement between the parties, as he did not disclose to her that the land was sold. Instead, he represented that the land was not sold. However, Mrs. Sikaffy accepted the repayment offer of BZ\$450,000.00 from Mr. Feinstein for her investment into the project. Ultimately, she received only the sum of BZ\$312,000.00.

⁵ Trust Act Chapter 202 of Belize R.E. 2020 s. 65J. 5.

[65] I considered whether this 2017 agreement, based as I have found on fraudulent misrepresentation, ought to be vitiated. I will not vitiate the agreement. I have also considered the measure of damages for fraudulent misrepresentation.

[66] The question here is whether the tort of fraudulent misrepresentation allows for the recovery of profit in damages and, if so, how.

[67] Ms. Perdomo argues that the loss of profits is not recoverable as damages in the instant case. To recover loss of profits, Mrs. Sikaffy would have had to show the loss of the opportunity of investment and there was no evidence that pointed to this.

Measure of Damages for Fraudulent Misrepresentation

[68] Generally, in claims for fraudulent misrepresentation, the measure of damages applied is the tort and not the contract measure. The aim of the award is to restore the injured party to the position in which he was before the tort was committed, not to put him into the position in which he would have been if the contract had been performed (the contract measure).

[69] The effect of applying the tort measure is that an injured party would not recover damages for loss of profits, but this is not always so as seen in **East v Maurer**.⁶ To recover damages for loss of profits, Mrs. Sikaffy would need to lead evidence showing some investment opportunity that she had lost. In the present matter, no such evidence was led, and the court would not presume such loss in order to make the award to recover the profits. If such losses were suffered, Mrs. Sikaffy should have brought the evidence and not rely on a judicial sleight of hand to grant the unproven relief.

⁶ [1991] 2 All ER 733.

[70] I find Mrs. Sikaffy is entitled to the alternative relief as claimed and I award the sum of BZ\$138,000.00 which is the difference in the sum agreed to and actually repaid under the 2017 agreement.

Costs

[71] I have considered the issue of costs and the relevant rules. Mrs. Sikaffy is the successful party and is awarded her costs of the trial.

Disposition

[72] It is hereby ordered as follows:

1. Judgment on liability is granted to the claimant.
2. The defendants are to pay the sum of BZ\$138,000.00 to the claimant with interest of 6% from 8th September 2017 to the date of judgment and thereafter statutory interest of 6% until the debt is paid in full.
3. The defendants are to pay the claimant's costs on the prescribed basis.

Martha Lynette Alexander

High Court Judge