

IN THE SUPREME COURT OF GRENADA

**AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2023/0015 (formerly CLAIM NO. GDAHCV2015/0303)

BETWEEN:

**SUNSYSTEMS LIMITED
PHILLIP DAVID
SONIA DAVID**

Claimants

and

**GRENADA CO-OPERATIVE BANK LIMITED
LEWIS & RENWICK (A FIRM)
TREVOR ST. BERNARD
(Personal Representative of the Estate of Cosmo St. Bernard, deceased)**

Defendants

Before:

The Hon. Justice Raulston L.A Glasgow

High Court Judge

Appearances:

Mr. Keith Scotland K.C. and Mrs. Melissa Modeste – Singh for the Claimants
Mr. Sydney Bennett K.C. with Mr. Alban John, Mrs. Hazel Hopkin – La Touche
and Ms. Chandelle Denzil – Bartholomew for the 1st Defendant
Mr. Paul Dennis K.C. with Mr. Ian Sandy and Ms. Ssavanna Seales for the 2nd
and 3rd Defendants

2023: November 22nd, 23rd, 24th
2024: May 17th

JUDGMENT

Background

[1] **GLASGOW, J.:** This claim involves an unfortunate state of events resulting from the breakdown in the relationship of banker and customer.

[2] The 1st claimant, Sun Systems Limited (“SSL”), is a limited liability company incorporated on the 24th November, 1997 in the state of Grenada. The 2nd and 3rd claimants, Phillip and Sonia David (collectively “the Davids”) are a married

couple, and the sole shareholders and directors of SSL. SSL owned and operated a business which traded as 'Sun Motors'. SSL's principal business was the importation, sale, and rental of luxury branded vehicles such as Volkswagen and Land Rover in Grenada. In or around 2003, SSL approached Grenada Co – operative Bank for the purposes of opening accounts for the operations of the business of SSL.

[3] The 1st defendant, Grenada Co – operative Bank ("the Bank") is a licensed banking institution established in 1932 in Grenada, and is Grenada's only indigenous bank. In 2003, the Bank provided SSL with 4 accounts for the operations of its business.

[4] The 2nd defendant, Lewis & Renwick ("the Law Firm") is one of the oldest law firms in Grenada, and at one point, the Law Firm was exclusively retained to do all of the Bank's commercial and conveyancing work. The 3rd defendant, Mr. Cosmos St. Bernard was one of the senior partners of the Law Firm. He passed away on 4th October, 2021, prior to the commencement of the trial and his son, Mr. Trevor St. Bernard, was substituted as 3rd defendant¹.

CLAIMANTS' STATEMENT OF CASE

[5] The claimants plead that they first approached the Bank in 2003, and within 30 minutes of meeting and without signing any formal contractual documentation governing the banking relationship, one of the Bank's employees, a Mr. DeFreitas approved the Davids' opening of 4 accounts at the Bank for SSL. These 4 accounts covered SSL's Land Rover sales, Land Rover servicing and parts, Volkswagen sales and Volkswagen servicing and parts. The accounts opened for SSL were credit accounts on overdraft, with no fixed overdraft limits or interest rates provided by the Bank.

[6] The relationship between the Bank and the claimants continued in this manner, and the claimants claim that the Bank applied and capitalized interest

¹ Order of 8th July, 2022 of this Court.

on the overdrafts with no contractual reference point. By 2008, the claimants say that SSL had incurred significant indebtedness to the Bank. Sometime during 2008, the claimants claim that the Bank offered SSL a restructuring proposal. The claimants allege that this restructuring proposal would have the effect of converting the overdraft balance owed by SSL into a loan of \$3.8 million and also provide SSL with approximately \$1.2 million in working capital. The claimants explain that this proposal by the Bank was conditional on the Bank obtaining some form of security from SSL, as up to 2008, SSL's overdraft facilities were being operated without any form of security.

- [7] The Claimants claim that many discussions took place between the Davids' and the Bank on the appropriate security to be offered after the proposal was made. The Claimants claim that the Davids wished to offer property situated at Maurice Bishop Highway, St. George's as security, but the Bank indicated that they preferred property owned by the Davids situated at Point Saline, St. George's. There was some back and forth between the parties on this point, culminating with the title deed for the Point Saline property being taken by the Davids to Mr. DeFreitas at the Bank, and lodged with him in April, 2009.
- [8] Thereafter, the claimants state that the Bank offered restructured facilities formally to SSL by letter dated 6th April, 2009. This offer letter proposed a loan of \$3.8 million dollars for a term of 15 years, and an 'overdraft facility/letter of credit' of \$1.2 million dollars, and was conditional on "security being provided in the form of a fixed and floating charge over the assets of SSL of the property at Point Salines, St. George's – recently conveyed" to the Bank. The claimants claim that they understood this offer letter to be on the same terms of the Bank's proposal in 2008 and executed same.
- [9] The claimants utilize the definition of restructured facilities in the Eastern Caribbean Central Bank's (ECCB) Prudential Credit Guidelines, and the terms 'overdraft and/or letters of credit' as contained in the 2009 offer letter to support this assertion of their understanding of the proposal. The claimants' case is that if working capital was not provided, SSL could not operate, and the restructured facilities would have been doomed to fail from the outset, as

all that would have happened is that the Bank would have obtained security, while the Bank's customer was misled.

[10] After execution of the offer letter of 30th April, 2009, SSL's accounts at the Bank were credited, the claimants' say, which cleared off the overdrafts owing on 3 of the 4 accounts. This left SSL with 1 overdraft account at the Bank with a balance of \$1,292, 865.24. Sometime before receiving a letter from the Bank dated 22nd May, 2009, the claimants say that the Davids came to the realisation of the effect of the Bank's restructuring, as the application of the loan had the effect of denying SSL the \$1.2 million working capital as contemplated in the 2008 proposal and contained in the April 2009 offer letter.

[11] By the time the Davids realized the actual operation of the restructurings in May, 2009, the claimants say that SSL's accounts had already been credited, but no security had been put in place by the Davids, outside of the title deed to the Point Saline property being lodged with Mr. DeFreitas at the Bank. The claimants explain that these security arrangements were not formalized until the Davids' executed the mortgage documents on 29th July, 2009. The claimants allege that in this interim period, the property at Point Salines, which was owned personally by the Davids', was transferred to SSL on 28th July, 2009, without the Davids' knowledge. The claimants insist that they were completely unaware of this transaction (the Voluntary Conveyance).

[12] On 29th July, 2009, the Davids' attended the Law Firm and Ms. Deborah St. Bernard, an attorney at the Law Firm provided them with what they refer to as "a lot of documents". The claimants aver that Ms. St. Bernard said nothing about the documents, other than they were "okay to sign", so they executed the documents. The claimants further claim that the Davids knew nothing about the Voluntary Conveyance, so they assume that the Davids must have signed the Voluntary Conveyance on that occasion, as the Law Firm never explained to the Davids what they were signing.

[13] The claimants indicate that they felt secure, as while it was widely known in Grenada that the Law Firm acted for the Bank, the Law Firm also acted for the

Davids, so they assumed that the Law Firm was looking after their interest. The claimants also state that they knew Mr. Cosmos St. Bernard was a senior partner at the Firm and chairman of the Bank, but they did not know he was also a significant shareholder of the Bank. The claimants assert that had SSL been aware of Mr. St. Bernard's interest in the Bank, the Davids would have acted differently by obtaining separate advice.

[14] The claimants contend that neither Ms. St. Bernard nor anyone else at the Law Firm advised the Davids to seek independent legal advice. Also, they say that the Bank and the Law Firm were aware that the Davids had no independent advice, given that they were relying on the Law Firm. The claimants' case is that what occurred in 2009 was:

- (1) SSL had passed a resolution approving an arrangement in 2008 which was to procure \$1.2 million in working capital;
- (2) An offer of restructuring was made in April 2009 that appeared to replicate the 2008 proposal;
- (3) By 2009, there was no intention by the Bank to provide \$1.2 million in working capital, but the claimants were unaware of this;
- (4) The Davids attended the Law Firm to sign for the loan but were merely providing security to the Bank for a set of arrangements that were doomed to fail, and the Bank was aware of all of the above.

[15] The claimants further state that sometime in May, 2009, Mrs. David went to Mr. DeFreitas and informed him that he had effectively tied up SSL. They allege that Mr. DeFreitas said that if additional security was given to the Bank over the Maurice Bishop Highway property, then working capital would be provided, along with additional financing for SSL's operations. The claimants complain that this meeting with Mr. DeFreitas marked a 2-year period where the Bank was slow in making payments on SSL's account, causing the Davids to finance SSL's business from other sources. Mr. DeFreitas passed away in 2010, and SSL's accounts were then managed by Mr. Leon Moses.

[16] The claimants allege that they held several conversations with Mr. Moses about security proposals to be offered to the Bank, given that the Bank continued to offer support to SSL on overdraft. By 2011, SSL's accounts were stressed and fluctuating beyond the limits agreed in 2009, due to the absence of working capital provided by the Bank in 2009, even though all loan payments were kept up to date. The Bank proposed another restructuring of SSL's accounts in 2011.

[17] By letter dated 29th August, 2011, the claimants say that the Bank offered to subsume the first loan to SSL of \$3, 656,000.00 and offered a further loan of \$3, 639,000.00 for SSL's operations, \$500,000.00 for a floor loan, and \$200,000.00 for a security bond, totalling the sum of \$7, 995,000.00. In this offer letter, they say that the Bank requested security by a further charge over the Maurice Bishop Highway property owned by SSL, 9, 912 square feet of land situate at Grand Anse, St. George's (Grand Anse property) owned by Mr. David personally, and 2 Acres 3 Roods and 13 Poles of land situate at Grand Anse Estates, St. George's (Grand Anse Estates property) which was owned by Mr. David, Peter David, Patrick David and Paul David (the David brothers). In addition, personal guarantees were requested from each of the Davids in the sum of \$7, 995,000.00.

[18] The claimants state that the Davids received a call from the Law Firm on 28th September, 2011, informing them that the loan documents were ready for signing, and the Davids attended the Law Firm to execute the documents. The claimants say that when the Davids got to the Law Firm, the only advice offered by Mr. Trevor St. Bernard, who worked at the Law Firm, was that they were signing for the loan, and the documents "were routine". The claimants again complain that the Davids were not advised to seek separate representation.

[19] The claimants maintain that the Law Firm were the Davids' lawyers, looked after their interest, and would have given the Davids any advice if it was required. With this knowledge, the claimants assert that the Davids signed the mortgage documents. The claimants further claim that the Davids had not

agreed to provide personal guarantees, none were offered for their signature, and the Davids signed the mortgage, having been told by the Law Firm that it was just a mortgage. The claimants also say that it was not brought to the Davids' attention that there was anything in the agreement which conferred personal liability, as the Davids were preoccupied with obtaining the financing offered, and believed that they were simply signing the loan.

[20] The claimants allege that contrary to the representations made by the Bank and the Law Firm in 2011, the mortgage executed in 2011 created personal liability, not only against the Davids but also Mr. David's brothers, who were co – owners of the Grand Anse Estates property. They contend that the 2011 mortgage describes Mr. David in the capacity of surety, but it appeared that the Bank was attempting to create a principal debtor. The claimants further contend that neither the Bank nor the Law Firm advised the Davids to obtain independent legal advice, even though the Bank and the Law Firm were each aware that the Davids had no independent advice and were relying on the Law Firm for advice.

[21] The claimants further contend that the Davids did not wish to provide personal guarantees or enter into personal liability as principal debtor, and further that Mr. David never agreed to do so. They allege that the assurance by Mr. Trevor St. Bernard that the 2011 mortgage was just a mortgage was a false statement, which induced the Davids to enter into the security arrangements. The claimants allege that if the true position had been clear to the Davids that they were subjecting themselves to liability as principal debtors, they would not have signed the mortgage documents. The claimants state that the Davids' main bank was Scotiabank, and the Davids would have refinanced their facilities elsewhere without incurring personal liability.

[22] The claimants' case is that the 2011 mortgage was more than just a mortgage, and in the absence of any advice to the contrary, was entered into by the Davids based on a misrepresentation to its nature. They further claim that this misrepresentation by the Bank's agents was not innocent, and accordingly the claimants' claim to be entitled to both rescission and damages. Further, the

claimants allege that the Bank failed to give statements showing how their indebtedness had accrued to \$3.6 million dollars, or how the \$3.6 million dollars loaned in 2009 had been applied to SSL's bank accounts, despite numerous requests in writing. The claimants say this caused the Davids to be unable to verify SSL's account balances or form a view on any demands being made for repayment by the Bank.

[23] The claimants also ask the court to find that the Law Firm was for all practical purposes an arm of the Bank, which aided in the Bank's misrepresentations to the Davids. They charge that the Law Firm and the Bank failed to disclose that Mr. Cosmos St. Bernard was the chairman and a significant shareholder of the Bank, and this failure also amounted to a breach of the ECCB Guidelines and the Banking Act, as Mr. Cosmos St. Bernard was required to disclose his beneficial interest in the Bank.

[24] The claimants acknowledge that the Law Firm acted as the Bank's principal lawyers for several years, but they say that the Law Firm frequently acted on both sides of a transaction, and that it did do so in this case. It is on this basis that the claimants' claim that the Law Firm was the agent of the Bank during the completion of the 2009 and 2011 transactions, and as such the Bank is also liable for the Law Firm's misrepresentations. The claimants also allege that these factors constitute an obvious conflict of interest. The claimants say that given that the Bank was aware of the conflict of interest, the Bank is also liable for any incorrect advice given by its agents.

[25] The claimants also complain that further to the mortgage being procured by misrepresentation, they were technical defects therein. The claimants allege that the Grand Anse property was owned by South Winds Limited and not Mr. David personally, and South Winds Limited was not a party to the 2011 mortgage. They further allege that the Grand Anse Estates property was owned by the David brothers, who were also not parties to the 2011 mortgage. The claimants further charge that there was no Power of Attorney conferring authority upon the Davids to make the David brothers parties to the 2011 mortgage.

[26] The claimants claim that if the Davids' signatures were effective to create security or personal liability over the Grand Anse Estates property, which the Davids deny, then the Bank and the Law Firm were aware that the Davids were acting beyond the scope of their actual authority, due to the lack of a Power of Attorney. The claimants claim that both the Bank and the Law Firm were aware of this, and the Bank and the Law Firm were guilty of knowingly assisting in procuring a breach of fiduciary duty, and breach of trust. The claimants say that the Grand Anse Estates property would have to be reconveyed to the David brothers, and the Bank would be prevented from relying on any personal liability, were it to arise. Lastly, the claimants charge that the absence of a Power of Attorney conferring authority on them to enter into the 2011 facility caused them to be unable to accept the terms of the Bank's offer contained in their letter of 29th August, 2011.

[27] These circumstances led the claimants to bring this action against the Bank and the Law Firm, and the claimants collectively claim:

(1) against the Bank:

- i. An order for the taking of an account;
- ii. A declaration that the 2009 and the 2011 facilities and Indentures are unenforceable;
- iii. Further and/or alternatively rescission of the 2009 and the 2011 facilities;
- iv. Further and/or alternatively rescission of the 2009 and 2011 Indentures;
- v. An order for re-conveyance, so far as the same may be necessary of the properties comprising the security in the 2009 and 2011 Indentures;
- vi. Further and/or alternatively damages for misrepresentation;
- vii. Interest on damages;
- viii. Costs.

(2) Against the Law Firm and Mr. Cosmos St. Bernard:

- i. Damages for breach of duty;
- ii. Further and/or alternatively damages for misrepresentation;

- iii. Further and/or alternatively damages arising from the unlawful means conspiracy between all three Defendants or any of them;
- iv. Interest on damages, and
- v. Costs.

[28] The Davids also personally claim as against the Bank:

- (1) Damages for breach of fiduciary duty;
- (2) An account of profits;
- (3) Interest; and
- (4) Costs.

THE BANK'S FURTHER AMENDED DEFENCE & COUNTERCLAIM

FURTHER AMENDED DEFENCE

[29] The Bank strenuously opposes the claimants' claim, and filed a Further Amended Defence and Counterclaim on 25th June, 2018. The Bank denies any implication that the Law Firm was its general agent over and above being the Bank's legal counsel, but admit that Mr. Cosmos St. Bernard retired as the Bank's chairman in 2010. The Bank admits that the claimants' opened accounts in 2003 which provided very liberal financial facilities, but denies that the Bank made the 2008 proposal as claimed by the claimants. The Bank avers that it offered the claimants' a restructuring proposal by offering a loan of \$3.8 million, as at the time of the proposal, the claimants' owed the Bank in excess of \$5 million. The Bank avers that the proposal was to convert \$3.8 million of the \$5 million into a term loan, and the other \$1.2 million was to be kept on overdraft, operating as a revolving loan, with a ceiling of \$1.2 million.

[30] The Bank's position is that this \$1.2 million ceiling had already been reached by the time the proposal was finalized, as the claimants had already used the monies, and owed the Bank a total debt in excess of \$5 million dollars. The Bank denies making any representation to the claimants that they would provide any additional money under the restructuring. The Bank argues that

the claimants could not have reasonably believed that the offer letter in April 2009 constituted a promise or offer of additional money, as the claimants were well aware that their indebtedness was in excess of \$5 million. The Bank further states that if additional monies were provided to the claimants as alleged, the existing indebtedness of the claimants to the Bank would have risen to nearly \$6 million.

[31] The Bank says that their proposal/offer was clear on its terms in relation to the fact of the claimants' indebtedness of \$5 million. The Bank avers that it was for the claimants to adequately manage the \$1.2 million overdraft facility, by reducing its balance, which would have allowed the claimants to use that overdraft to finance SSL's affairs. The Bank relies on the fact that the claimants were mature, qualified and experienced businesspersons, with qualifications in accounting and financial management, based on the application for the registration of the business name 'Sun Car Rentals' dated 23rd May, 1997, wherein Mr. David is described as an 'accountant/businessman' and Mrs. David is described as an 'engineer/financial manager'. On this basis, the Bank says that claimants ought to have understood that the \$1.2 million dollar overdraft ceiling had been reached in 2009, and no additional money was being provided.

[32] The Bank also denies owing any special or fiduciary duties to the claimants, as the relationship between them was always that of banker and lender. The Bank says that it never purported to be a business advisor to the claimants, and was not required to advise the claimants to seek independent legal advice with regard to negotiating the loans or any of the transactions. The Bank also says that it did not owe the claimants any duty to secure the best or even a favourable deal for them, as it was entitled to look after its own interests and obtain security for the monies used by the claimants, which was in jeopardy, as best as the Bank could. The Bank refutes that it acted in breach of the ECCB guidelines or the Banking Act as alleged by the claimants, as all of its actions were guided by the Act and guidelines. The Bank avers that the Bank has since 2010, disclosed in its financial statements the shareholdings of its directors.

[33] The Bank further denies that the Law Firm acted for the claimants and the Bank, as the Law Firm acted only for the Bank, in its capacity and with the Bank's authority as the Bank's legal representatives. Further, the Bank submits that if attorneys from the Law Firm told the Davids that the mortgage documents were okay to sign or routine, which the Bank does not admit or deny due to lack of knowledge, the terms and conditions of the loans and the security to be obtained were already negotiated and finalized as between the Davids and the Bank. The Bank submits that these negotiations were concluded prior to the Davids attending the Law Firm to execute the security documents.

[34] The Bank further avers that the claimants' claim is statute barred, as they entered into contractual relations with the Bank on 23rd April, 2009, more than 6 years before the claim was brought by the claimants. The Bank relies on the offer letter dated 6th April, 2009 and signed by the claimants on 23rd April, 2009 for this assertion, and further states that the Point Salines property was clearly identified in the offer letter as part of the property owned by SSL to be mortgaged to the Bank. Further, the Bank contends that the resolution of 19th October, 2008 authorized SSL to borrow the sum of \$5 million, and the Bank's loan provided SSL with that sum. The Bank also says that the claimants recognized the terms of the agreements and affirmed them by utilizing the Bank's monies over the years, and therefore ought to be estopped from now seeking to set the transactions aside for misrepresentation.

[35] The Bank says that as early as 23rd April, 2009, the claimants were aware that the \$1.2 million in the restructured facility represented an overdraft and not fresh working capital, or should have understood this as qualified and experienced business persons. The Bank further asserts that even if the Davids only became aware in May, 2009, which the Bank denies, the Davids were seized of the facts for more than 6 years before bringing the claim. The Bank denies freezing SSL's facilities, averring that the history reflects that the Bank facilitated SSL's business operations over the years, even after the April 2009 restructuring.

[36] In relation to the 2011 facilities, the Bank's position is that they were prepared to more offer money to the claimants, but like any prudent banker, required additional security for fresh money. The Bank denies that the claimants did not agree to execute the 2011 security documents, submitting that the Davids' executed the 29th August, 2011 offer letter on 2nd September, 2011. The Bank further says that if, which the Bank neither admits nor denies due to lack of knowledge, Mr. Trevor St. Bernard made the statements as alleged, the terms and conditions of the 2011 security were already negotiated and finalized as between the Bank and the claimants by that time.

[37] The Bank also denies the claimants' claim that they lacked knowledge about the personal guarantees, as the letter of 29th August, 2011 made specific reference to personal guarantees, which they signed on 2nd September, 2011. The Bank refutes the charge that it was under any obligation during their negotiations with the Davids to advise them to obtain independent legal advice, and equally refuted the contention that it made any misrepresentations to the Davids. The Bank further denies that it failed to provide the claimants with proper accounting of their financial standing, as the claimants had been doing business with the Bank for over 10 years, and were always provided with regular updates of their financial standing with the Bank. The Bank also explains that the claimants were free at all times to reject the offers made by the Bank, but once the offers were accepted, they became binding on the claimants.

[38] The Bank denies that the Law Firm was a virtual arm of the Bank, and submits that the Bank is a commercial entity involved in banking, and the Law Firm had no actual, implied, ostensible or other authority to act on behalf of the Bank, outside of acting as the Bank's legal representatives. The Bank says that it carries on its own negotiations to settle the terms of its commercial transactions, and merely contracts the legal services of the Law Firm to close transactions on its behalf. The Bank says that the Law Firm's purpose was to put the already agreed contractual obligations into legal form to provide adequate security for the Bank.

[39] The Bank rejects the argument that the 2011 mortgage was procured through misrepresentation and charges that it was Mr. David who misrepresented to the Bank that he was the sole owner of the Grand Anse property, by delivering the original title deed for that property in his name. The Bank says these actions by Mr. David deceived the bank and buttressed his oral misrepresentation of sole ownership. In relation to the Grand Anse Estates property, the Bank says that Mr. David said that he was a part owner of an undivided quarter share of that property.

[40] The Bank alleges that Mr. David represented to them that he possessed a Power of Attorney authorizing him to mortgage the Grand Anse Estates property, and therefore denies knowing that the Davids did not have the authority to enter into the 2011 mortgage. The Bank relies on the Power of Attorney dated 29th December, 1999 granted by Peter David, Patrick David and Paul David to Mr. David to show the requisite authority. The Bank asserts that the issue of whether and to what extent the David brothers are liable is a matter of law to be determined by the Court, but denies that it has actual or other knowledge that the Davids were acting beyond the scope of their actual authority in relation to the 2011 transactions. They say that these matters raise issues of law to be determined by the court on legal and equitable principles of unjust enrichment.

THE BANK'S COUNTERCLAIM

[41] The Bank recites the fact that the 2011 mortgage contained a warranty that Mr. David had the authority to execute, deliver and perform the obligations under the facility, and by signing, he was bound by that warranty. The Bank says that by the warranty, Mr. David warranted that he had the authority to put up as security both the Grand Anse property and the Grand Anse Estates property, which authority, by Mr. David's own admissions, he did not possess. The Bank insists that the Grand Anse property and the Grand Anse Estates property were part of the security used to secure the Bank's loan under the 2011 mortgage.

[42] The Bank claims that after SSL defaulted in payment of their obligations, the Bank sought to exercise its statutory power of sale and entered into an agreement to sell the Grand Anse property for \$130,000.00. A copy of the sale agreement is attached to the counterclaim. It was then discovered that SSL had no authority to mortgage that property as Mr. David had represented and warranted. The sale was abandoned, and the purchaser's deposit returned. The Bank also valued the Grand Anse Estates property in April 2011, and a value of \$4, 435, 000.00 was determined. A copy of the valuation for the Grand Anse Estates property is attached to the counterclaim.

[43] The Bank further claims that the Davids each executed personal guarantees limited to the sum of \$7,000,000.00 on 10th February 2011, jointly and severally guaranteeing SSL's indebtedness to the Bank. The Bank says that these personal guarantees contained a clause that provided – 'no suit shall be initiated pursuant to the guarantees until demand shall have been made in writing to the guarantor'. The Bank says it made that demand by letter of 5th August, 2015, notifying the Davids of SSL's loan default, and demanding that the guarantees be honoured and the Bank paid. The Bank says that the Davids' refused to pay the demands under the guarantees and there are therefore liable to repay the Bank. As of 16th March, 2016, the Bank claims that SSL owed it the sum of \$9, 671, 503.30, and due to Mr. David's breach of warranty and the Davids failure to honour the personal guarantees, the Bank has suffered loss and damage.

[44] The Bank counterclaims:

- (1) For a declaration that, in all the circumstances, Mr. David was at all material times, empowered by virtue of the 1999 Power of Attorney to convey the Grand Anse Estates property by way of mortgage to the Bank;
- (2) For a declaratory order that the Grand Anse Estates property was in fact effectively conveyed in the Deed of Further Charge and the Supplemental Deed of Further Charge to the Bank;

- (3) For a declaration that in any event, the 1999 Power of Attorney evinced a clear intention by the other co – owners, namely Peter David, Patrick David and Paul David, that the Grand Anse Estates property be used as it was in fact used in the Deed of Further Charge and the Supplemental Deed of Further Charge, the subject of this Claim;
- (4) For an order that, in the circumstances, the Bank is entitled both in law and in equity, to exercise its power of sale in respect of the Grand Anse Estates property;
- (5) In the alternative and failing the aforesaid declarations, as against SSL, the sum of \$4, 560, 000.00 for breach of warranty;
- (6) As against the Claimants jointly and severally the sum of \$9, 671, 503.30, inclusive of the sum claimed for breach of warranty;
- (7) Interest on the above sum awarded at such rate and for such period as this Honourable Court orders pursuant to its powers under section 27 of the West Indies Associated States Supreme Court Act, Cap. 336 of the 2010 Edition of the laws of Grenada; and
- (8) Costs.

THE LAW FIRM'S DEFENCE

[45] The Law Firm also vigorously defended itself against the claimants' claim that it acted for the Davids, averring that they acted solely as solicitors for the Bank. Equally, the Law Firm denies owing any fiduciary duty to the Davids on any of the transactions in question, since they were retained and instructed by the Bank to prepare mortgage documents for signature. These mortgage documents, the Law Firm says, had previously been agreed to between the claimants and the Bank. As far as the Law Firm was aware, the Davids were informed by the Bank that the Law Firm would be acting for the Bank. The Law Firm says that they were never retained exclusively by the claimants to deal

with financial transactions, as the claimants have raised financing and executed mortgages with other lending institutions and never retained the Law Firm to provide them with any advice.

[46] The Law Firm also rebuffs the claim that there were misrepresentations made by their attorneys, and rejects the claimants' charge that the 2009 mortgage was voidable for misrepresentation on their part. The Law Firm insists that the Davids were aware of the Voluntary Conveyance in 2009, since it was prepared with their knowledge and consent. In addition, the Law Firm maintains that the Davids knew that the Voluntary Conveyance was necessary in order for the claimants to comply with their obligations to the Bank to effect the 2009 mortgage. The Law Firm further says that as the sole shareholders and directors of SSL, the Davids' transferred the Point Saline property from themselves personally to SSL, and that the Voluntary Conveyance formed part of the mortgage from SSL to the Bank. Further, the Law Firm indicates that the claimants were required to pay and did pay \$13,199.00 in stamp duty to the Government of Grenada to register the Voluntary Conveyance.

[47] The Law Firm submits that the Davids were given an opportunity to peruse all documents before executing them, and did so as their own voluntary acts. Further, as astute businesspersons who ran a large commercial enterprise with access to attorneys, the Law Firm states that the Davids chose not to seek advice prior to entering into their arrangements with the Bank and execution of the mortgage documents. The Law Firm disagrees with the claimants' view that there was an obligation placed on them to advise the Davids that they should seek independent legal advice. The Law Firm says that any alleged statements made by the attorneys, which the Law Firm denies were made, could only have referred to the arrangements already entered into between the Bank and the claimants.

[48] In relation to the 2011 mortgage, the Law Firm says that it received instructions in September, 2011 from the Bank about preparing a deed to secure 3 properties, which included the Grand Anse property and the Grand Anse Estates property. The Law Firm says that the instructions expressed that

the Grand Anse property and the Grand Anse Estates property were both owned by Mr. David, and the Grand Anse Estates property was mortgaged to Scotiabank. The Law Firm also explains that 2 copies of deeds accompanied the instructions, being a deed in the name of Mr. David for the Grand Anse property, and a mortgage in favour of Scotiabank over the Grand Anse Estates property. A copy of this letter of instruction was attached. The Law Firm duly prepared the documents and say that the Davids attended the Law Firm on 28th September, 2011 and executed same without complaint.

[49] The Law Firm denies that Mr. Trevor St. Bernard made any representations or offered any advice to the Davids about the documents. It further denies the Davids' allegations about the personal obligations in the mortgage documents. The Law Firm explains that:

- (1) the Davids' had already entered into personal guarantees with the Bank in the sum of \$7 million on 10th February, 2011, which carried an interest rate of 9.5% per annum,
- (2) The Davids' were aware that they signed a loan agreement with the Bank in August, 2011 wherein they had agreed to provide personal guarantees in the sum of \$7, 995, 000.00 as security for the advances;
- (3) The Davids executed a Deed of Further Charge on 28th September, 2011 wherein Mr. David was listed as the first surety.

[50] Based on these matters, the Law Firm says that the Davids were always aware of their personal liability for the indebtedness to the Bank. The Law Firm further explains that it was not aware that the Davids' did not have independent legal advice or that that the Davids' were relying on them to advise them about same. The Law Firm contends that the Davids are established businesspersons who never indicated the need for clarification or advice from the Law Firm.

[51] The Law Firm explains that Mr. Cosmos St. Bernard retired as chairman and director of the Bank in December, 2009, but remained a shareholder of the Bank. The Law Firm denies that Mr. Cosmos St. Bernard breached the ECCB

guidelines as alleged, and says that even if there was a failure, that did not give rise to liability to the claimants. The Law Firm also refutes that any agency existed as between the Bank and itself as alleged by the claimants, saying that it had no authority to make any representations or assurances on behalf of the Bank. The Law Firm says that they always held themselves out to be no more than the Bank's solicitors, who received instructions to prepare specific documents only. The Law Firm also says that no conflict of interest arose, as the Law Firm was not retained by the claimants in relation to the 2009 and 2011 transactions as alleged.

[52] The Law Firm also indicates that Mr. David made misrepresentations about the true ownership of the Grand Anse property, and that he fraudulently delivered the original title deed for the Grand Anse property to the Bank, reflecting himself as owner. The Firm explains that this misrepresentation was not discovered during their searches of title at the Deeds and Land Registry. It was only subsequently discovered that the Grand Anse property had been sold and conveyed to South Winds Limited since 1989, which at the time of sale, Mr. David and his father were the sole shareholders thereof.

[53] The Law Firm says that when the Bank attempted to sell the Grand Anse property, and discovered it could not do so, it made a demand for compensation on the Law Firm for their oversight in the title search. The Law Firm says that the Davids knew that Mr. David was not the owner of the Grand Anse property, and that it was sold to Southwinds Limited. They further say that Mr. David used his close connection with Southwinds Limited to retain the original title deed, which he used to manipulate and deceive the Bank as to his ownership, to the Bank's detriment.

[54] In respect of the Grand Anse Estate's property, the Law Firm claims that that property is owned by the David brothers as tenants in common. By virtue of a Power of Attorney dated 29th December, 1999, Mr. David was authorized by the David brothers to 'raise an unspecified sum of money at his discretion and to secure the repayment thereof with interest by a mortgage of the Grand Anse Estates property'. A copy of this Power of Attorney was attached to the Law

Firm's defence. The Law Firm points out that the monies advanced to the claimants by the Bank under the 2011 mortgage was used to settle a mortgage which the David brothers owed to Scotiabank.

[55] The Law Firm submits that the claimants are disingenuously attempting to rely on the Law Firm's clerical inadvertence when the Law Firm erroneously referred to the wrong Power of Attorney in the 2011 mortgage documents. The Law Firm indicates that the Power of Attorney used in the 2011 mortgage documents relates to another lot of land situate in Grand Anse, which bore similar Liber numbers to the Grand Anse Estates property all owned by the Davids and their immediate family. The Law Firm says that the claimants are seeking to rely on this error to escape their liability to repay the Bank. The Law Firm submits that Mr. David was in fact empowered by the correct Power of Attorney to mortgage the Grand Anse Estates property, and in any event, when Mr. David executed the mortgage on behalf of the David brothers, it created a charge over the property. The Law Firm therefore asks that the claimants' claim be dismissed as being without merit both in fact and in law.

THE CLAIMANTS' REPLY TO THE BANK'S AMENDED DEFENCE & DEFENCE TO COUNTERCLAIM

REPLY TO AMENDED DEFENCE

[56] The claimants deny that the amount owed to the Bank at the date of the first proposal was in excess of \$5 million as alleged, averring that the total amount owing on SSL's four accounts was \$3, 705, 121. 00 as of February, 2008. The claimants also say that the 2009 mortgage was executed pursuant to a resolution made on 19th October, 2008 to secure \$5 million; for SSL to secure fresh money. The claimants further response is that the 2008 proposal was formalized and implemented in 2009, by which time interest has accrued to such an extent that the envisaged working capital was exhausted, and the Bank was aware of this. The claimants assert that as SSL received no new money, SSL was denied the opportunity to adequately manage its business and the overdraft facility.

[57] The claimants emphasize that the Point Saline property referenced in the Bank's offer letter of 6th April, 2009 was not vested in SSL on that date, as the Voluntary Conveyance is dated 28th July, 2009 as recited in the 2009 mortgage. The claimants point to the fact that the Voluntary Conveyance was prepared by the Law Firm on behalf of the Davids as evidence that the Law Firm acted for the claimants and the Bank in the transactions. In relation to the 2011 facilities, the claimants reply that the personal guarantees of 10th February, 2011 predate the 2011 offer letter and no personal guarantees were entered into consequent upon the offer letter. With respect to the Grand Anse property, the claimants say that Mrs. David always conducted the banking affairs of SSL, and she was unaware of the true title of the Grand Anse property. The claimants indicate that Mr. David had no recollection of transferring title to the Grand Anse property and that they only became aware of the true title to the Grand Anse property when legal advice was sought in these proceedings.

[58] The claimants further assert that the Bank had constructive notice of the defect in title of the Grand Anse property through the Law Firm. Further, the Bank had actual notice through the Law Firm that the Power of Attorney on its face did not authorize the execution of the 2011 mortgage. The claimants further aver that Mr. David never represented that he was the owner of the Grand Anse Estates property, and before any monies were disbursed, the Bank was aware that the Grand Anse Estates property did not belong to either of the Davids but was jointly owned by the David brothers.

[59] The claimants go on to explain that when the facility was negotiated, the Davids informed the Bank that they had no other property to give as security, and the Bank asked them to bring in the assets of the family. The Bank thereafter invited the Davids, and Mr. David's father, Charles David Sr. to a meeting, but he did not attend, as the claimants say he needed to be protected. At that meeting, the Bank made repeated requests for additional security, and indicated that it wanted the Grand Anse Estates property. The Bank also offered to pay off the Scotiabank mortgage, and then use the Grand

Anse Estates property as security. The claimants point out that the entire transaction was handled by the Bank and the Law Firm, which process included the title deeds and the Power of Attorney.

CLAIMANTS' DEFENCE TO BANK'S COUNTERCLAIM

[60] The claimants defence to counterclaim is that the charge created by the 2011 mortgage was defective and ineffective. They claim that had the Davids known of the defect they would not have executed the mortgage. However, they executed same due to the Law Firm's representations. The claimants further state that they now have sight of the personal guarantees attached to the counterclaim but could not admit or deny the authenticity of the documents in the absence of the originals.

[61] The claimants admit receiving the demand letter sent in relation to the personal guarantees but deny that they are in breach of their obligations under the guarantees. The claimants also admit the existence of the 1999 Power of Attorney attached to the Bank's counterclaim, but make no admission on the legal effect or consequences flowing therefrom, as these are matters of law for the court. No admission is made as to any alleged loss or damage suffered by the Bank.

THE BANK'S REPLY TO CLAIMANT'S DEFENCE TO BANK'S COUNTERCLAIM

[62] The Bank states that the negotiations to restructure SSL's indebtedness to the Bank commenced on 24th November, 2008, and at the time, the proposal was made to convert \$3.8 million of SSL's indebtedness to a long term loan to allow for an overdraft facility of \$1.2 million. The Bank specifies that SSL's total indebtedness as at 24th November, 2008 was \$4, 667, 932. 68. The Bank submits that these negotiations ripened into their offer letter dated 6th April, 2009 to the claimants, which the Davids accepted by signing on 23rd April, 2009.

[63] The Bank states that during the negotiations and prior to the offer letter, SSL was allowed by the Bank to continue using the overdraft facilities. By 23rd April, 2009, when the claimants accepted the 6th April, 2009 offer, the overdraft facility was already over the \$1.2 million limit. The Bank, in an effort to assist the claimants, extended the overdraft, and by 30th April, 2009, the overdraft limit was exceeded by \$1, 641, 094. 74 of what negotiated, and this excess was consolidated into the long-term loan of \$3. 8 million. The Bank states that this brought SSL's total indebtedness to the sum of \$5, 140, 186. 31 to the Bank by 30th April, 2009. In relation to the 2011 facilities, the Bank states that in addition to the guarantees dated 10th February, 2011 signed by the Davids, the Davids did on 28th September, 2011 each execute personal guarantees in the sum of \$7, 995, 000.00. Copies of these guarantees were attached.

CLAIMANT'S EVIDENCE

[64] The Claimants called 3 witnesses in support of their case, being themselves and Mr. Garvey Louison, a certified financial accountant.

SUMMARY OF PHILLIP DAVID'S WITNESS STATEMENT

[65] Mr. David testifies that he dealt with SSL's operations, while Mrs. David engaged with all financial matters. Mr. DeFreitas, now deceased, was the manager of commercial credit at the Bank who opened SSL's accounts. He was the Davids' only point of contact within the Bank until his passing. When SSL began its banking relationship with the Bank in 2003, Mr David states that Mrs. David requested the limits and rate of interest on each of the 4 accounts, but Mr. DeFreitas told them that he needed to gauge SSL's operations and he would thereafter set the limits and interest rates. No contractual documents were presented to them.

[66] In July, 2004, the Davids' approached the Bank for a loan to finance repairs due to hurricane damage and for tax paying purposes. Mr. David explains that Mr. DeFreitas told them to simply write cheques for the amounts they needed, and that it would be converted to a loan later. By August 2004, limits still had

not been set on the 4 accounts. Mr. David states that SSL's requests for drawdowns on the overdraft were being accommodated at a high rate of interest without a contractual reference point. Mrs. David was concerned about the interest rates and wrote to Mr. DeFreitas about her concern.

[67] By 2006, Mr. David's further evidence is that SSL's accounts were severely stressed. It felt as if SSL was being micro-managed by the Bank because SSL's accounts manager had to get approval from the Bank's board each time SSL purchased vehicles, which impeded SSL's operations. In 2006, Mr. David states that he provided the Law Firm with a cabinet conclusion authorizing sale of the Maurice Bishop Highway property to him, and instructed the Law Firm to prepare the deed while he sought funding from RBTT Bank. Mr. David testifies that the Law Firm subsequently got the Maurice Bishop Highway property conveyed to SSL.

[68] In 2008, Mr. DeFreitas invited the Davids' to a meeting and explained the \$5 million dollar facility for which approval was received, which included the conversion of SSL's indebtedness to a loan. Working capital of \$1.2 million was being provided, but Mr. DeFreitas requested security over the Point Saline property to the Bank. Mr. David expresses reluctance to use the Point Saline property as that property was acquired by the Davids with help from Mr. David's father, Mr. David Sr., for Sun Motor's car rental operations.

[69] On 6th April, 2009, Mr. David indicates that the Davids took the title deeds for the Point Saline property to the Bank, and at some time unknown to them, the property was transferred to SSL by the Law Firm. Mr. David states that there was never any intention for the Davids to convey the property and that they paid for the transfer on blind faith. They only became aware of the transfer when the property tax notice was received. Mr. David alleges that neither he nor his wife signed the Voluntary Conveyance, and that the document is fraudulent.

[70] In relation to the 2009 facilities, Mr. David says that he understood the offer letter of 6th April, 2009 to repeat the proposal made by Mr. DeFreitas in 2008,

which he understood to have included working capital for SSL's operations. Shortly before receiving a letter from the Bank on 22nd May, 2009, Mr. David realized that even though the title deed for the Point Saline property was lodged with the Bank, no working capital was being provided to SSL. On 29th July, 2009 the Davids executed the 2009 mortgage at the Law Firm, under the impression that the title deed for the Point Saline property was still in the Davids' personal names and not SSL. Mr. David testifies that no one informed the Davids' to seek independent legal advice.

[71] Mr. David contends that the 2009 mortgage gave effect to a set of contractual arrangements that were void or voidable, due to Mr. DeFreitas' misrepresentation about the Bank's intentions and the Law Firm's misrepresentation that the mortgage documents were okay to sign when they were not. Further, Mr. David points out that the 3rd recital on the 2009 mortgage specifically refers to a shareholder's resolution by SSL dated 19th October, 2008 permitting SSL to borrow \$5 million through a mortgage, which was based on Mr. DeFreitas' proposal. Mr. David states that there may have been no authority from SSL to enter into an arrangement which deprived SSL of working capital. This in view of the fact that SSL's borrower's resolution \$5 authorised raising capital of \$5 million dollars, and the Bank was aware of this.

[72] Sometime in 2011, the Davids were called to a meeting at the Bank and were asked to bring Mr. David Sr. They did not bring him, as he was 89 years old and needed to be protected. Mr. David states that they were met by the entire senior commercial staff and the Managing Director of the Bank and 4 external consultants. At that meeting, Mr. David recounts that they were told that SSL's account had become a problem for the Bank, and the Davids' should engage the extended David family in securing the debt. The Davids resisted this, and after many discussions, Mr. Davids decided to transfer property which was secured to Bank of Nova Scotia to the Bank. The Managing Director of the Bank offered to pay off the Bank of Nova Scotia to facilitate this transfer. After the meeting, the Bank also offered to fund the building of SSL's showroom if the Davids' used the Bank's account to purchase SSL's equipment. Mr. David recounts that the Bank's attorney, Mr. Cosmos St. Bernard, unbeknownst to

the Davids', was still one of the Bank's biggest shareholders and the Davids' trusted attorney, and that Mr. St. Bernard became obsessed in safeguarding his investment.

[73] Mr. David states that the Bank thereafter offered the 2011 restructuring by letter of 29th August, 2011. On 28th September, 2011 the Davids' attended the Law Firm to sign the mortgage documents, and Mr. David admits that they did execute same, after Mr. Trevor St. Bernard told them the documents were routine. Mr. David states that the Davids were under the impression that the loan was with SSL alone, and were not aware of any personal guarantees made by them or the David brothers through the execution of the 2011 mortgage. Mr. David says that he understood the reference to 'personal guarantees of \$7.9 million dollars' in the offer letter to mean that the personal family assets were being used to secure SSL's debt. Mr. David says that he did not knowingly sign any personal guarantees, and the Law Firm never explained the personal guarantees to him or presented them to him to sign.

[74] After Mr. DeFreitas died, Mr. David testifies, the staff at the Bank did not understand that SSL never received working capital and asked SSL to pay down on the facility to reduce their indebtedness. This demand adversely affected the business. Since the restructuring of the loans, SSL's operations were significantly hampered, and the restructurings were impossible to pay off. Mr. David laments that the Bank did not serve the Davids or SSL with a demand letter prior to attempting to sell the claimants' property, and did not afford Mr. David the opportunity to switch banks before advertising all of the properties which were secured.

[75] In relation to the Law Firm, Mr. David recalls that the Law Firm had been the claimants' trusted attorneys since 1997, with the Davids' relying on them for guidance. Mr. David insists that there was a conflict of interest between the Law Firm and the Bank as they provided advice to the Bank and also to SSL. Mr. David concluded that the Davids' wished to pay a sum which was justly owed to the Bank in the sum of \$3, 073, 377.33, which did not include the high

amounts of interest which came about as a result of the misrepresentation by the Bank.

SUMMARY OF SONIA DAVID'S WITNESS STATEMENT

[76] Mrs. David's evidence mirrors Mr. David's in most material respects, but she offered further explanations about SSL's indebtedness and the Bank's actions which she claims led to it. She confirms that she was the point of contact within the Bank, as she dealt with SSL's finances and engaged with Mr. De Freitas. Mrs. David testifies that she sought to have the Bank restructure SSL's overdraft accounts between 2004 – 2006, as the interest rates being applied were unclear, and she had to calculate the interest rates being applied by the Bank on her own. By 2006, Mrs. David says that SSL's accounts were so stressed that she requested that SSL's operating accounts be cleared, as \$1 million dollars was required for the purchase of vehicles and parts. However, the Bank refused to provide an overdraft limit for SSL's working capital or to convert SSL's long-term spending to a loan.

[77] Mrs. David confirms the meetings with Mr. DeFreitas in 2008 when the restructuring proposal was made, and the discussions which led up to the 2009 lodging of the Point Saline property with the Bank. Mrs. David also confirms that the Davids never intended to transfer the Point Saline property from themselves to SSL, as they agreed to do so. In fact, they were not even aware of the Voluntary Conveyance until the property tax notice was received. When Mrs. David executed the April 2009 offer letter, she claims that she also understood it to be a repeat of the 2008 proposal made by Mr. DeFreitas. When the restructuring was done by the Bank in April 2009, Mrs. David confirms that no working capital was made available for SSL's operations, and it was impossible for SSL to operate.

[78] Mrs. David says she expressed her disappointment about the lack of working capital to Mr. DeFreitas, given that the Bank had received its security at a great cost to SSL. She claims that Mr. DeFreitas responded that the Bank's board relied on the Bank's managing director, Mr. Duncan who knew nothing

about banking. Mr DeFreitas then promised that if more security was provided by SSL, he would make a proposal to the Bank and straighten everything out. After complaining to the Bank about the lack of working capital and its effect on SSL, for the next 2 years, Mrs. David says that the Bank was slow in making payments on SSL's accounts and SSL was forced to find other financing.

[79] At the meeting in early 2011 requested by the Bank, Mrs. David recounts the conversation between the Davids, the Bank's managing director and Mr. Deon Moses, wherein promises were made to provide additional financing if the Bank's funds were used to purchase SSL's equipment. The Bank later made the offer of 29th August, 2011, but Mrs. David recalls that with respect to the personal guarantees requested by the Bank, she was under the impression that the personal assets of the family were being used to secure SSL's debts. Mrs. David also says that she did not sign any personal guarantees, and claims that the Law Firm never explained the personal guarantees to her or presented them to her to sign when she attended the Law Firm to execute the 2011 mortgage.

[80] Mrs. David repeats the conflict-of-interest contention about the Bank and the Law Firm as raised by Mr. David, and relays that the Law Firm were the Davids' trusted attorneys since 1997, with the Davids' relying on them for guidance, and completely trusting them. Mrs. David also concludes that the Davids' wished to pay a sum justly owed to the Bank of \$3, 073, 377.33, which did not include the high amounts of interest which came about as a result of the misrepresentation by the Bank.

SUMMARY OF GARVEY LOUISON'S WITNESS STATEMENT

[81] Mr. Louison is Chartered Certified Accountant and CEO of Louison Consulting Ltd. He is engaged in the field of accounting for 32 years and a Chartered Certified Accountant for 22 years. He provides a wide range of financial services to clients including analytical review of accounts and financial statements. Mr. Louison served as SSL's auditor since 2012 and examined the

available records of SSL's loan balance with the Bank between February 2008 and July 2009. During that time, he says that the circumstances of SSL's account at the Bank changed considerably with the growth of outstanding interest on the overdraft facility.

[82] Mr. Louison explains that the application of the loan in accordance with the terms of the 2009 offer letter left SSL with no working capital, as the overdraft facility was absorbed in the application of the full loan amount. The 2009 mortgage cleaned up the hardcore overdrawn state of SSL's affairs, says Mr. Louison, without addressing SSL's need for working capital injection into its business. Mr. Louison states that at the point of disbursement of the loan in April 2009, the Bank had not ascertained SSL's financial condition, and he estimates that the delay in granting the loan to SSL between February 2008 and the disbursement of the funds in April 2009 cost SSL approximately \$1.2 million dollars in liquidity for its operations. Thus, by the time the disbursement was made, Mr. Louison says that SSL had no extra funds to use in its operations.

[83] During this period, Mr. Louison testifies, SSL serviced its mortgage with the Bank, but was unable to operate its bank account, since the new arrangement commenced with the allowed overdraft facility operating over its limit. In Mr. Louison's opinion, during the period under review, the Bank violated several of the ECCB Prudential Guidelines. He alleges that the Bank failed to ensure that adequate security was taken at all times, accounts were allowed to be overdrawn without limits being set and monitored, and loans were not properly classified. Mr. Louison suggests that SSL's debt amount ought to be eliminated based on the application of the ECCB Prudential Guidelines. Mr. Louison also prepared a report which was annexed to his witness statement, outlining how the ECCB guidelines applied to SSL and the Bank.

THE BANK'S EVIDENCE

[84] The Bank called 3 witnesses in support of their case, who are all employees of the Bank – Mr. Deon Moses, the Chief Operating Officer, Mrs. Nadia Francis

– Sandy, the Executive Manager of Corporate & Commercial Banking and Ms. Jennifer Robertson, the Executive Manager of Risk.

SUMMARY OF MR. DEON MOSES' WITNESS STATEMENT

[85] Deon Moses has been employed with the Bank since April 2011. His testimony states that the Bank is a wholly owned and operated local commercial bank regulated by the Banking Act and the ECCB. He testifies that the Bank is fully aware of ECCB Guidelines, with which it complies, and Mr. Cosmos St. Bernard is not a significant shareholder of the Bank. In April 2011, at SSL's request, Mr. Moses states that the Bank agreed to extend to SSL a bridging demand loan in the sum of \$281,000.00 to purchase from Volkswagen four vehicles for resale locally. Mr. Moses says that security was already in existence by SSL, which included an existing mortgage, a promissory note and joint and several personal guarantees executed by the Davids in the sum of \$7,000,000.00 on 10th February, 2011. These terms were set out in a letter dated 26th April, 2011 from Mr. Moses to the Davids, which Mr. Moses indicates was signed by the Davids, and the seal of SSL was affixed thereto on 28th April, 2011.

[86] On 23rd September, 2011, Mr. Moses wrote to the Law Firm, instructing them to prepare a Deed of Further Charge to secure the sum of \$2,970,000.00 for monies advanced to SSL. Mr. David's siblings – the David brothers were to join with Mr. David as sureties for the loan. Mr. Moses states that additional security was to be given to the Bank to secure this loan. Critically, the 3rd additional security, the Grand Anse Estates property owned by the David brothers was at the time mortgaged to another bank. In this regard and to facilitate the proposed exercise, the Law Firm was instructed to secure the reconveyance of the Grand Anse Estates property from Scotiabank to the David brothers.

[87] By letter dated 29th August, 2011, the Bank wrote to SSL and the Davids, offering a restructured loan facility comprising an existing mortgage loan of EC\$3,656,000.00, a new mortgage loan of EC\$3,639, 000.00, plus an existing

floor plan loan of \$500,000.00 and a customs bond coverage of EC\$200,000.00, altogether totalling \$7, 995,000.00. The purpose of this combined facility was clearly stated in the letter. Mr. Moses explains that the letter included paying for importation of vehicles, consolidating and capitalizing all outstanding indebtedness and interest, refinancing overdrafts, described as “hard-core”, paying off of the loan at Scotiabank and assisting with legal fees. This letter stipulated that personal guarantees would be received from the Davids. Mr. Moses confirms that these personal guarantees were in fact given to the Bank on 28th September, 2011.

[88] Mr. Moses further testifies that the letter of 29th August, 2011 also showed SSL representing and warranting to the Bank that it had the power and authority to execute, deliver and perform its obligations under the facility letter and any related documents. The letter also provided for a number of default events. Mr. Moses is of the view that factually, SSL and the Davids have committed acts of default and breached their undertakings. By their own claim, Mr. Moses claims, the Davids represented to the Bank that they had the capacity to give the securities at the time that were given. Mr. Moses points out that the Davids now claim they did not have the capacity to give such guarantees. Mr. Moses asks the court to find that this was an egregious breach of trust and contractual misrepresentation, entitling the Bank to the engagement of its default rights contained in the letter of 29th August, 2011.

[89] Mr. Moses also asks the court to find that the suggestions by the Davids that they did not know what they were signing when they attended the Law Firm on 28th September, 2011 lacks credibility. Mr. Moses reminds the court that at the relevant time, the Bank was in the process of paying off another loan held by the Davids brothers with another bank, which transaction was for benefit of the Davids. That loan, Mr. Moses says, amounted to \$272, 601.20, and this transaction was being conducted simultaneously with the Bank’s conversion to a loan facility of SSL’s already overdrawn accounts, which at the time were overdrawn to the tune of EC\$3, 366,398.72.

[90] Mr. Moses explains that the Bank duly paid off SSL's and the David brothers' mortgage loan with the other bank, and then made a consolidated loan disbursement to SSL. As no other shareholders of SSL were pleaded, Mr. Moses states that the Bank is entitled to ask – who but the Davids benefited from the sums advanced to SSL. Upon review of the documents from the Bank's employees to SSL, Mr. Moses indicates that these documents show drawings on the earnings of SSL's business nearly exceeding total turnover for the period December 2010 to January 2011. Mr. Moses rejects the Davids' contention that they had no wish to provide personal guarantees to the Bank, as the record shows that they did so for personal consideration directly received, as well as indirectly through the advances to SSL and the drawings made on the income of the business of SSL to feed the Davids' lifestyle.

[91] Mr. Moses states that the claimants now desire to leave the Bank without security to cover its exposure, and this would be nothing less than an unjust enrichment of SSL and the Davids at the expense of the Bank and its shareholders. The Bank asks the court to reject SSL and the Davids' position as an unconscionable position, which if upheld, will amount to facilitation of their breach of contract and their unjust enrichment. Mr. Moses also recounts that the Law Firm acted for the Bank pursuant to instructions given. Any dealings with the Law firm, SSL and the Davids were on the Bank's instructions, and Mr. Moses confirms that the Law Firm never acted as an agent of the Bank to make any misrepresentations to procure the transactions, as the Law Firm only ever acted as the Bank's lawyers.

[92] Mr. Moses says that the only misrepresentation which took place was by SSL and the Davids misrepresenting their affairs and the facts to the Bank. Mr. Moses points to Mr. David's assertion that he does not recall transferring title of the Grand Anse property to a 3rd party prior to the Davids offering the same property as security to the Bank. The clear implication, Mr. Moses puts forward, is that SSL and the Davids are seeking to escape liability for this alleged lapse in memory, but the Bank should be made to go without repayment of its monies advanced to SSL and the Davids. Mr. Moses asks the court to reject the position taken by SSL and the Davids with respect to the

security given, dismiss the claim, and enter judgment for the Bank on the counterclaim.

SUMMARY OF MRS. NADIA FRANCIS – SANDY WITNESS STATEMENT

[93] Mrs. Francis – Sandy is employed with the Bank since 12th September, 2012 and she is a career banker, having held several positions in commercial lending. She is not aware of any significant shareholding by Mr. Cosmos St Bernard in the Bank. Mrs. Francis – Sandy testifies that the Bank has always provided SSL and the Davids with statements. In fact, by letter dated 4th July, 2014, she outlines how the loan of \$3.6 million was arrived at, and how it was applied to SSL accounts. This letter was the subject of a meeting held at SSL's former attorneys' office, which was attended by the Davids, their legal counsel and Mrs. Francis – Sandy. Mrs. Francis Sandy explains that this letter of 4th July, 2014 conveyed the Bank's agreement to waive significant interest on one of SSL's loan accounts, and also indicated the fulfilment of the Bank's promise to stop further advertising the mortgaged properties pending receipt of the amount which the Bank was prepared to accept as settlement. Mrs. Francis – Sandy says that the Davids chose instead to bring this claim.

[94] Mrs. Francis – Sandy refutes the claimant's assertion that the ECCB Guidelines were breached. Instead, she claims, the Bank's struggle was to keep the Davids from dragging the Bank into breach of the ECCB guidelines with SSL's ever increasing demand for financing, persistent failure to provide the necessary financial information to the Bank, and failing to properly service the accounts. Mrs. Francis – Sandy reiterates that the Bank remains minded to resolve the matter out of court, but claims that SSL and the Davids took the view that they were entitled to have received generous financial support from the Bank, notwithstanding their failure to service their loans as per the agreed terms and conditions. Mrs. Francis – Sandy is of the view that this was an unconscionable position for the claimants to adopt, and a breach of their undertaking to the Bank. She asks the court to dismiss the claim and enter judgment for the Bank on its counterclaim.

SUMMARY OF MRS. JENNIFER ROBERTSON'S WITNESS STATEMENT

[95] Mrs. Robertson has been employed with the Bank since 3rd July, 1995. She knew and worked closely with Mr. De Freitas at the Bank for a number of years until he died in 2011. According to the Bank's records, the Davids were the signatories to SSL's accounts, and the main business of SSL was the importation of vehicles into Grenada from Germany for commercial resale in Grenada. Mr. Robertson indicates that SSL operated out of a property at Point Salines, St. George's. Mrs. Robertson is also familiar with Mr. Cosmos St. Bernard, who for many years had been the head of the Law Firm. As far as Mrs. Robertson is aware, the Law Firm acted for the Bank in a legal advisory capacity from time to time and did legal work on behalf of the Bank. Mr. Cosmos St. Bernard was for some time, chairman of the Board of the Bank until he retired from that capacity in the year 2010.

[96] For the purposes of SSL's business, Mrs. Robertson states, SSL from time to time made requests of the Bank for loans and credit advances which were generally granted by the Bank. She testifies that the Bank provided SSL with liberal financial assistance in the very early period of the banking relationship, but the Bank struggled to obtain necessary financial information from the claimants to properly monitor and control their account. In this regard, the Banks' concerns about the handling of the SSL's accounts were a constant theme in letters exchanged between Mr. DeFreitas and the Davids. Mrs. Robertson recalls that Mr. DeFreitas confronted the Davids' about their failure to provide audited financial statements to the Bank, despite frequent requests. During those discourses, Mr. DeFreitas pointed out that the Davids' conducted SSL's business in a very ad hoc fashion and warned that the Bank would not continue to pay SSL's suppliers at a moment's notice. By 2009, the Davids' still had not provided financial statements to the Bank. Mrs. Robertson testifies that Mr. DeFreitas wrote to the claimants, reminding them of the Bank's high exposure by their requests for funding which remained unsecured and lamenting the fact that the Bank was unaware of SSL's financial standing.

[97] Mrs. Robertson explains that it was as a result of Mr. DeFreitas' insistence that the claimants agreed to convey the Point Salines property as security to secure the Bank's exposure, which by 2009 was \$5 million. This property was transferred from the Davids to SSL, and then to the Bank to secure the \$5 million dollars owed by SSL at that time. Mrs. Robertson testifies that the instructions for this transaction were given to the Law Firm by Mr. DeFreitas. Mrs. Robertson also points out that the Bank made the offer of restructuring in 2008, but that the Davids did not provide financial statements or security to the Bank until 2009. This failure by the claimants, Mrs. Robertson says, caused the arrangements proposed in 2008 not to be put in place until 2009.

[98] When the Davids' first commenced doing business with the Bank, Mrs. Robertson testifies, they did so as ordinary customers, and they never sought financial or business advice from the Bank. In this regard, the Bank never adopted the role of business and financial advisor, but was merely a lender. Mrs. Robertson recounts that the Davids professed to be educated businesspeople, as Mr. David was an accountant/businessman and Mrs. David an engineer/financial manager. She confirms that they were always in control of SSL's financial affairs, and hired people to manage SSL. Mrs. Robertson recalls that the Bank made it plain to the claimants that it did not permit restructurings more than twice in a five-year period. Thus, with the fresh start afforded to SSL by the Bank, the claimants should have been able to manage their affairs with prudence to avoid operational problems.

[99] As to the 2011 restructurings, when the offer of a second loan was made to SSL, Mrs. Robertson says that the Bank sent the claimants an offer letter which was signed by the Davids and sealed by SSL. Mrs. Robertson notes that the Davids signed personal guarantees as additional security for \$7.9 million dollars in the later months of 2011. Mrs. Robertson asks the court to reject the argument that the Davids did not know or understand what they were doing when they visited the Law Firm, and that they did not agree to provide personal guarantees.

[100] As to the allegation that the Bank failed to advise the Davids to obtain independent legal advice, Mrs. Robertson relies on the records show that throughout the Bank's long relationship with the claimants, there was never any complaint when the claimants were receiving substantial loans unsecured. Mrs. Robertson recalls that the claimants would simply call or send a brief note to the Bank requesting advances, which the Bank honoured and the Davids' used for their benefit. At all times, the Davids' dealt with the Bank on an equal footing, and Mrs. Robertson recites that there was never a situation where any of the claimants was the sole customer of the Bank.

[101] In fact, Mrs. Robertson says, the Bank never sought to obtain security for sums advanced to a sole customer by using property which was in the joint names of 2 customers, to the detriment of either. Equally, the Davids' were on equal footing, as they both jointly owned SSL, and they suffered no detriment by any action taken by the Bank. As far as Ms. Robertson is aware, the Davids enjoyed an attorney/client relationship with the Law Firm prior to becoming customers of the Bank, and for these reasons, she rejects any suggestion that the Bank owed a duty to the claimants to advise them on the need for independent legal counsel, which it failed to discharge.

[102] Mrs. Robertson testifies that the Bank's concern with the claimants has always been centred on the manner in which the Davids' handled SSL's business affairs, as the Bank struggled with the Davids' poor financial management, and inexplicable use of SSL's income. Mrs. Robertson is of the view that the Bank could only conclude that the Davids never wanted to provide security for the monies advanced by the Bank to SSL. She prays that the claimants' claim is dismissed, and judgment be given on the counterclaim. She points out that the amount owing to the Bank as of 12th January 2018 was \$10, 934, 987. 97, inclusive of interest.

THE LAW FIRM'S EVIDENCE

[103] The Law Firm called 3 witnesses in support of their case, Mr. Cosmos Allan St. Bernard, Ms. Deborah St. Bernard, and Mr. Trevor St. Bernard.

SUMMARY OF MR. COSMOS ST. BERNARD'S WITNESS STATEMENT

[104] Mr. St. Bernard was an attorney and head of the Law Firm since 1977. He was the longest serving practitioner in Grenada, having been called to the bar in 1951, and appointed Her Majesty's Counsel in 1996. Since the opening of the Bank, he testified that the Law Firm has always been the Bank's attorneys and until 2012, the Law Firm solely handled the preparation of all the Bank's mortgage documents. Shortly after being appointed Her Majesty's Council, Mr. St. Bernard gradually delegated responsibility regarding the preparation of mortgage documents for the Bank to his son Mr. Trevor St. Bernard.

[105] Having delegated this responsibility, he was not involved in the day-to-day matters relating to instructions for preparing mortgage documents, and would only intermittently acquaint himself with same. Mr. St. Bernard said that the Bank would issue instructions to the Law Firm, and the Law Firm would conduct the requisite searches at the relevant registries to ascertain the sufficiency of title of the securities offered by mortgagees. Mr. St. Bernard also confirmed that he served on the Bank's Board of Directors for 34 years, and in the last 9 years as Chairman. In his capacity as director of the Bank, he also confirmed that he was part of the decision-making arm of the Bank which determined the viability of applications for loans. However, the loan approval process was based on the unanimous approval of the Bank's board, guided by the recommendations made by the loans committee and submitted to the board of directors.

[106] During his tenure as director of the board of the Bank, Mr. St. Bernard said that he never unilaterally decided or influenced any approvals for loans for any applicant. During his tenure at the Bank, and in his 87th year as an attorney, Mr. St. Bernard stated that his reputation has never been sullied and he has never been brought before any disciplinary committee or judicial body for any allegation of any nature, save and except the case at bar. He expressed that Mrs. David and his daughter, Ms. Deborah St. Bernard are

siblings, but denied that the Law Firm was retained by SSL and the Davids to prepare the mortgage documents in favour of the Bank. Mr. St. Bernard denied that he or the Law Firm owed SSL and the Davids any duty, fiduciary or otherwise, and he also denied the allegation of misrepresentation and conspiracy as pleaded by SSL and the Davids. He closed with stating that the claim against himself and the Law Firm was without merit and ought properly to be dismissed.

SUMMARY OF MS. DEBORAH ST. BERNARD'S WITNESS STATEMENT

[107] Ms. St. Bernard is an attorney, who joined the Law Firm after her retirement from the Grenada Public Service in February 1999. She has practiced at the Law Firm for the last 19 years. She states that she is responsible for instituting litigation on behalf of the Bank's loan recovery department. In her capacity as an attorney, Ms. St. Bernard testifies, Mrs. David requested that she assist with the preparation of letters and other documents from time to time, but the Law Firm was never retained by either SSL or the Davids, as this was never discussed between them or considered.

[108] Sometime prior to March 2009, Ms. St. Bernard recalls that the Bank requested that she prepare a conveyance of property situate at Point Saline, St. George's from the ownership in the name of the Davids to SSL. Ms. St. Bernard testifies that the instruction letter received by the Law Firm from the Bank referenced the Bank's understanding that the Davids' wished to convey the Point Saline property to SSL and then to execute a mortgage over same. Ms. St Bernard states that it is grossly disingenuous for the Davids to allege that they were completely unaware of the Voluntary Conveyance. Indeed, she recalls that Mrs. David got irritated with her about that conveyance, and complained that she was not promptly preparing it.

[109] Prior to being served with this claim, Ms. St Bernard recalls that she was very close to Mrs. David, as they have the same mother, who is now deceased. She is Ms. St Bernard's only sister residing in Grenada. Prior to the claim, Ms. St. Bernard recites that on Sundays, Mrs. David drove to her home

before 7 am to pick her up for their beach stroll, which she cherished. Ms. St. Bernard was of the view that Mrs. David also cherished those walks as a time for physical exercise and bonding between them. Ms. St. Bernard indicates that she last visited the Davids home in August 2015, and just about 2 weeks later, the Davids filed the claim herein. She does not remember receiving any hint from the Davids that the claim was being filed, not only against the Bank but also against the Law Firm, of which herself and her father, who was then 90 years at the time, were members. Ms. St Bernard laments that these actions were not only inexplicable, but also enervating.

[110] Ms. St. Bernard also testifies that the matter of the Davids nonperforming mortgage loans with the Bank were sometimes brought up by her sister. On each occasion, Ms. St. Bernard explains that she told her sister that the matter was not one to be fought as a battle with the Bank, as what was required were discussions for a resolution. Ms. St. Bernard says she told Mrs. David that an amicable resolution with the Bank should be her focus but reminded her that since the Law Firm acted for the Bank, she could not advise her more than that. On behalf of the Law Firm, Ms. St. Bernard denies that the Firm was involved in any misrepresentation or conspiracy against the claimants.

SUMMARY OF MR. TREVOR ST. BERNARD'S WITNESS STATEMENT

[111] Mr. St Bernard is an attorney, who joined the Law Firm in September 1995, and has remained with the Law Firm for the last 22 years. As a member of the Law Firm, Mr. St. Bernard is primarily involved with the oversight and handling of its conveyancing and mortgage document portfolio with the Bank. He testifies that the Bank issues instructions to the Law Firm to prepare mortgage documents. The Law Firm, in turn, would conduct the requisite searches at the various registries to ascertain the marketability of the securities offered by the proposed or intended mortgagors.

[112] Mr. St. Bernard recalls that the Law Firm received a letter from the Bank in 2008 with the caption "**Sun Systems Ltd./Phillip & Sonia David**",

instructing the Law Firm to prepare a mortgage over the fixed and floating assets of SSL to cover \$5 million dollars. The instructions confirmed that the Bank had in its possession as security for the mortgage, the original title deed for the Point Salines, St. George's, and that Mr. David would "provide all necessary information directly...to speed up the process of perfection of the security."

[113] Mr. St. Bernard states that the searches done by the Law Firm revealed that the property proposed for the mortgage was not owned by SSL, but by the Davids jointly, and the Bank was informed of this. The Bank sent subsequent instructions in relation to the preparation of the mortgage for SSL, says Mr. St. Bernard, referencing the initial instructions and confirming that the Davids were willing to convey the Point Saline property to SSL to enable SSL to thereafter execute the mortgage. Mr. St. Bernard confirms that the Davids were required to and did in fact convey the Point Saline property to SSL.

[114] The mortgage was thereafter prepared and it was duly executed by the Davids. Approximately 2 years into the subsistence of the mortgage, he says that the Law Firm received instructions from the Bank to prepare a Deed of Further Charge (DFC) for SSL to cover the sum of \$2,970,000.00 on the existing subsisting securities contained in the mortgage and to include the properties identified in the letter of instruction as additional security. Mr. St. Bernard states that the additional facility was negotiated and agreed by the Davids and the Bank. The Davids never sought advice from the Law Firm when negotiating the terms of the DFC. The properties securing the DFC were identified as a property in St. George's in SSL's name, the Grand Anse property owned by Mr. David and the Grand Anse Estates property jointly owned by the David brothers.

[115] Mr. St. Bernard also testifies that the instruction letter indicated that the Grand Anse Estate's property was mortgaged to another lending institution, and requested that a reconveyance of the property be prepared in favour of the David brothers. Given the instructions for the preparation of the DFC, the Law Firm conducted the required searches at the relevant registries.

In addition to the subsisting mortgage at Scotiabank in relation to the Grand Anse Estate's property, the Law Firm's searches confirmed the sufficiency of the title of the Grand Anse Estate property and the existence of a subsisting Power of Attorney from the David brothers to Mr. David, authorizing him to raise money at his discretion on the security of the David brothers' property.

[116] Mr. St. Bernard recalls that the Law Firm's searches also revealed that Mr. David was empowered by that Power of Attorney to mortgage the property. The search also revealed that the Grand Anse Estate property was in fact mortgaged to another lending institution as security for a mortgage loan for SSL, that mortgage being settled in 2005. With respect to the Grand Anse property, Mr. St. Bernard explains that the Law Firm's searches failed to discover that Mr. David had previously sold and conveyed the Grand Anse property to a company in which he was one of 2 shareholders.

[117] Mr. St. Bernard insist that what he views as a fraudulent misrepresentation by Mr. David with respect to the Grand Anse property, which the Law Firm relied on to its detriment, caused the integrity of the Bank's additional security to be comprised. Having regard to the Bank's inability to pursue its power of sale in respect of that property, he says that the Law Firm was required to pay the Bank compensation in the sum of \$130,000.00. Mr. St. Bernard acknowledges that the Law Firm acted on behalf of the claimants in the past, but denies that it has ever been retained exclusively by the Claimants. He also acknowledges that the Law Firm is in the peculiar situation of having entwined familial relations, as one of its members is a sibling of Mrs. David, but the Law Firm was never consulted or retained with respect to any banking transactions by the Claimants.

[118] Mr. St. Bernard maintains that it is not unusual, during the Law Firm's receipt of instructions from the Bank, to be provided with the telephone contacts for the intended mortgagor. Having regard to the close familial relationship between the Firm and the Davids, he says it was not unusual or uncommon to inform SSL through its representatives that the mortgage

documents were ready for execution. Upon preparation of the mortgage in 2011 done by Mr. St. Bernard, he recounts that the Davids were informed that the mortgage was ready for signing. The Davids' attended the Law Firm for the purposes of executing the mortgage, and were always given an opportunity to peruse the documents, and they thereafter executed them. With respect to the preparation of the mortgage documents, though the wrong Power of Attorney regarding Mr. David's authority to use the Grand Anse Estates was quoted, Mr. St. Bernard testifies that the correct Power of Attorney subsisted, and a portion of the proceeds of the mortgage were used to settle the Scotiabank mortgage over the Grand Anse Estates property. On behalf of the Law Firm, Mr. St. Bernard also denies that the Law Firm was involved in any misrepresentations or conspiracy against the claimants as alleged.

ISSUES

[119] At the end of the trial of this matter which lasted 3 days, and concluded on 24th November 2023, I invited counsel for the parties to file closing submissions on all of the factual and legal issues raised for the court's consideration. All parties duly complied, with the 1st defendant filing their submissions on 3rd January 2024, while the claimants and the 2nd and 3rd defendants filed their submissions on 5th January, 2024. Subsequently, the 1st, 2nd and 3rd defendants filed responses to the claimants' submissions on 16th January 2024, and the claimants filed responses to the defendants' submissions on 25th January, 2024.

[120] On my review of all the documentation filed, I found the following issues were to be considered and determined:

- (1) Whether the Bank owed the claimants any duties, fiduciary or otherwise, and if so owed, whether there was a breach of these duties;
- (2) Whether the Firm owed the claimants any duties, fiduciary or otherwise, and if so owed, whether there was breach of these duties;
- (3) Whether there was an unlawful means conspiracy by the Defendants against the claimants;

- (4) Whether the credit facilities, specifically the mortgages in 2009 and 2011 and personal, joint and several guarantees in 2011 were procured through misrepresentation;
- (5) Whether the claimants are entitled to any of the relief sought; and
- (6) Whether the Bank is entitled to the relief sought in their counterclaim.

Each of these issues will be considered and addressed seriatim.

DISCUSSION & ANALYSIS

WHETHER THE BANK OWED THE CLAIMANTS ANY DUTIES, FIDUCIARY OR OTHERWISE, AND IF SO OWED, WAS THERE A BREACH OF THESE DUTIES?

[121] Before addressing the claimants' allegations against the Bank, it is prudent to ascertain the scope of the Bank's duty to the claimants. The law in relation to banks and their customers is primarily based on contract and is traditionally recognized as being that of debtor and creditor². There is consensus that at the inception of the banking relationship between the claimants and the Bank, no formal contract setting out the scope of the Bank's duty had been agreed or made. Nonetheless, counsel for the claimants submitted in closing submissions that the Bank owed 2 duties to the claimants – to advise them of the nature and effect of the transactions in 2009 and 2011, and a duty to inform the claimants to obtain independent legal advice prior to the Davids' entering into the transactions.

THE DUTY TO ADVISE ABOUT THE NATURE OF THE TRANSACTIONS

[122] The duty to advise about the nature of the transactions will be addressed first. This duty to advise about the nature of the transactions as submitted by the claimants arose due to the fact that SSL was already indebted to the Bank, and hamstrung in its ability to function in 2009. The claimants also submit that the duty arose due to the fact that the claimants did

² Foley v Hill [1843] ALL ER Rep 16.

not know or understand the practical and legal effects of the transactions, more particularly, the personal guarantees which they entered into in 2011.

[123] Counsel for the claimants submits that the Bank's failure to advise on the nature and effect of the transactions is highlighted by the fact that, at the time of the execution of the personal guarantees, the legal effect was not explained to the Davids. As such there was a breach of duty by the Bank. Counsel posits that even if the court takes account of the Davids' professions, qualifications, and experience, it does not detract from the Bank's duty to explain the nature of the documents and to advise the Davids of the effect of those documents. No legal authority was presented to buttress this proposition.

[124] Notwithstanding the fact that no authority was presented by the claimants on this issue, the law on a bank's duty to advise and/or explain to clients about the nature and effect of transactions entered into is quite uncontroversial. **Warne & Elliot** in their **Banking Litigation** text explain the principle quite clearly:

"A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. **If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given.**³" (bold emphasis mine)

[125] **Paget's Law of Banking** recites the principle thusly-

"It is important to keep in mind the fact that a bank only incurs liability if it actually undertakes to advise and it does so advise (a failure to advise would only potentially be actionable as a breach of a contractual obligation to advise, or if it was part of a rare duty to advise on an ongoing basis). The mere fact that a bank offers or

³ (1999) at p 28.

provides a financial product to its customer does not give rise to a duty to give advice or an explanation in relation to that product or more generally.⁴ **Paget's Law of Banking** further explains that –

“a bank is under no general obligation to advise on the prudence of lending or any commercial project for which a bank is to lend.”⁵

[126] In this context, the law acknowledges that a bank's duty to advise can arise either on the express or implied terms of the banker/client contract or on basic principles of tort at common law. In the former context, the rule is that the usual rules of interpreting a contract apply. **Paget's Law of Banking** however explains that:

“the context of the relevant financial industry may affect the meaning of particular express terms. Further it may be the case that compliance with particular regulatory obligations are expressly imported as terms of the contract, rendering them actionable.”⁶

[127] Where the common law duty of care is to be presumed in the circumstances of banker/client relationship, the duty of care may arise in tort under the **Hedley Byrne v Heller**⁷ principle of assumption of responsibility and the three-part test in **Caparo Industries plc v Dickman**⁸ of foreseeability, proximity and it being fair, just and reasonable to impose the duty of care. Lastly, a tortious duty may be concurrent and consistent with a contractual duty⁹, but may also be wider where there is an extra-contractual assumption of responsibility and the duty in tort is not limited or excluded in the contract¹⁰.

[128] Where the duty of care in giving advice is to be assumed, whether by contract or in tort, the duty is to “to use reasonable skill and care, even if the advice is gratuitous”. In **Banbury v Bank of Montreal**¹¹, Lord Finlay LC said:

⁴ John Odgers KC and Ian Wilson KC, *Paget's Law of Banking* (15th Edition).

⁵ John Odgers KC and Ian Wilson KC, *Paget's Law of Banking* (15th Edition).

⁶ John Odgers KC and Ian Wilson KC, *Paget's Law of Banking* (15th Edition).

⁷ [1964] AC 465

⁸ [1990] 1 All ER 568

⁹ Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1979] Ch. 384.

¹⁰ Ross Craston, *Principles of Banking Law* (2nd Edition).

¹¹ [1918] AC 626.

“While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business...if he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently.”

[129] The Bank has denied that it owed such a duty to the claimants. The Bank referred the court to **Barclays Bank plc v Khaira**¹², where Thomas Morison Q.C restated the principle in this manner:

“In the normal course of events, the Bank owed no duty of care in tort or contract to proffer explanations or to advise the taking of independent legal advice to those who come to their premises to sign securities. That said, banks would be well advised to ensure that wives who sign documents for their husband’s benefit should routinely be asked to take independent legal advice since otherwise they will be exposed to the risk of being saddled with a charge which in equity the court is not prepared to enforce because of the husband’s undue influence... Further, ... banks should be encouraged, as a matter of good business practice to explain to those who have come to their premises to sign securities, the nature and effect of the document to be signed without laying themselves upon the charge that they had a legal duty to do so... Many banks undertake the task of explaining the effect of documents to prospective guarantors...**However, it is with respect, logically fallacious to say that because banks routinely do offer explanations, they are under a legal duty to do so.**” (Bold emphasis mine)

[130] The question of whether such a responsibility or duty to advise has been assumed and the extent of such a duty depends on the facts of each

¹² (1992) 1 WLR 623.

case¹³. In **Crestsign Ltd v National Westminster Bank plc and another**¹⁴, while the court found that the Bank owed no duty to give advice in light of an express disclaimer of responsibility, the court also found that:

“the banks had owed, in the first instance, no duty to explain the nature and effect of the proposed transactions. **However, the manager had come under a duty to explain fully and accurately the nature and effect of the products in respect of which he had chosen to volunteer an explanation.** He had come under a duty to explain their effect accurately, without misleading. **However, the duty has not extended as far as a duty to educate, in the sense of giving a comprehensive tutorial and satisfying himself that the customer had correctly understood the information provided to him, or its implications or consequences, or to ensure that he had taken an informed decision.** However, the duty would extend to correcting any obvious misunderstandings communicated by the customer and answering any reasonable questions he might ask about those products in respect of which the manager had chosen to volunteer information.¹⁵” (Bold emphasis mine)

[131] From the evidence presented, there is concurrence by all parties that the Bank did not undertake to advise the claimants about either the nature or legal effect of the personal guarantees or of the other transactions which they entered into in 2009 or 2011. In my opinion, there is no evidence or basis that has been presented for the contentions that the bank had a duty to advise the Davids about the nature of the transactions or the nature and effect of the personal guarantees. There is also no evidence to suggest that they sought such advice from the Bank at any material time, or that they indicated their misunderstandings of the nature and effect of the transactions and were given false or misleading information.

¹³ Ross Craston, *Principles of Banking Law* (2nd Edition).

¹⁴ [2015] 2 ALL ER (Comm) 133.

¹⁵ [2015] 2 ALL ER (Comm) 133 at 153 – 155.

[132] The Privy Council in **National Commercial Bank v Hew**¹⁶ further elucidates this proposition:

“...the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less advice, that the lender thinks that the purpose for which the borrower intends to use it is sound.”

[133] At trial, the Davids alluded to their understanding of how a personal guarantee operates in law, explaining that they felt that the personal guarantees were the property assets that the Bank requested of them. This, among many other assertions made by the Davids to which I will refer later in this judgment, is an assertion that strains believability. This is since the evidence in this case does not suggest that the Davids were inexperienced or unlearned investors/business people. In terms of implying a duty to advise, the law suggests that something more than the assertion that the Bank ought to have assumed the credulity of such experienced persons would be necessary in the circumstances.

[134] As was the case with sophisticated investors in the case of **JP Morgan Chase Group v Springwell Navigation Corporation**¹⁷, I find that the Davids are sophisticated businesspeople, trained in business and financial management. More tellingly, the evidence indicates that the Davids are operators of multimillion dollar enterprises and have been engaged with financial transactions of the sort in question both with the Bank and other banks. On the facts, they have not shown that they requested that the Bank advise them at any time, how the bank assumed any responsibility to advise them, or how any such responsibility could be implied in the circumstances.

¹⁶ (2003) 63 WIR 183.

¹⁷ [2008] EWHC 1186 (Comm)

DUTY TO ADVISE TO OBTAIN INDEPENDENT LEGAL ADVICE

[135] On this issue, Counsel for the claimants contends that the Bank was obligated to at least inform the Davids of their right to obtain independent legal advice, to enable the Davids to at least have the transactions fully explained to them by someone who was competent to do so. The claimants sought to underpin this assertion by relying on the learning in **Inche Noriah binte Mohamed Tahir v Shaik Allie bin Abdullah Bahashuan**¹⁸.

[136] While the court accepts that a fiduciary duty to advise of the right to obtain independent legal advice can arise, this fiduciary obligation only arises in certain limited circumstances in the context of the banker/customer relationship, where the court finds that there is unconscionable conduct, inequality of bargaining power or undue influence. In **Lloyds Bank Ltd v Bundy**¹⁹, Lord Denning stated that:

“English law gives relief to one who without independent legal advice enters into a contract upon terms that are very unfair, or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired because of his needs or desires, or his ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of another.²⁰”

[137] Millet J gave a definition of a person in a fiduciary position as:

“someone who has undertaken to act for the benefit of another in a particular circumstance giving rise to a relationship of trust and confidence, with the distinguishing obligation being the obligation of loyalty.²¹”

¹⁸ [1928] ALL ER Rep 189

¹⁹ [1975] QB 326

²⁰ [1975] QB 326 at 339

²¹ *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18

Lord Millet in **National Commercial Bank v Hew**²² gave further elucidation on fiduciary duties:

“The necessary relationship is variously described as a relationship of trust and confidence, or of ascendancy or dependency, and such a relationship can be proved or presumed. Some relationships are presumed to generate the necessary influence; examples are solicitor and client, and medical adviser and patient. The banker-customer relationship does not fall within this category, but the existence of the necessary relationship may be proved as a fact in any particular case.”

[138] The case law supports the proposition that fiduciary duties are only placed on banks in special circumstances, as the common understanding is that commercial banks act for profit and are entitled to look after their own interests²³. In **Chemical Manufacturing Company Limited and another v First Caribbean International Bank (Barbados) Limited**²⁴, Webster JA confirmed the trial judge’s finding that no fiduciary duty was owed by the Bank to its customer as:

“The Bank, in lending to the defendants, whether in respect of the demand loan or the overdraft did not undertake to act on their behalf. The Bank, at all material times was acting on its own behalf and in its own interest. It did not owe the defendants a duty to advise them, it did not assume responsibility for their property or affairs or otherwise owe them a duty to take care of their interests.²⁵”

[139] The case of **Inche Noriah** presented by the claimants does not assist their case, as it related to a voluntary gift of property by the donor, the widow and aunt of the donee, who was illiterate, did not speak English, and was

²² [2003] UKPC 51.

²³ Ross Craston, *Principles of Banking Law*, (2nd Edition, Oxford University Press, 2002).

²⁴ SLUHCMAP2021/0003.

²⁵ SLUHCMAP2021/0003 at 59 – 60

infirm and unable to easily move about at the time the deed of gift was made. The circumstances of the execution raised a presumption of undue influence against the receiver of the gift, and the court held that independent legal advice is not the only way the presumption of undue influence can be rebutted. The court further stated that it is equally necessary for the donee to prove that the gift was the result of the free exercise of independent will on the part of the donor. In this regard, the court found that the donee must establish that the gift had been made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person. This case is entirely dissimilar to the factual matrix being assessed on the claimants' case.

[140] The other case referenced by the claimants of **Cresswell v Potter**²⁶ also is of no assistance to their argument, as this case dealt with whether a deed of release had been properly executed by a wife after she divorced her husband, and the courts were tasked with determining whether the release ought to be set aside due to the unconscionability of the bargain. Megarry J referenced Lord Selbourne L.C's exposition in *Earl of Aylesford v Morris* (1873) 8 Ch. App 484 at 491 where the judge laid down 3 requirements –

“What has to be considered is, first, whether the plaintiff is poor and ignorant; second, whether the sale was at a considerable undervalue; and third, whether the vendor had independent advice. I am not, of course, suggesting that these are the only circumstances which will suffice; thus there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity. But in the present case only these three requirements are in point.”

Megarry J ultimately set aside the release signed, finding that the wife was a telephonist, far from well off, had no conveyancing knowledge, and had only signed the release because she thought it released her of her liability for the mortgage of the property. She never received any payment from her ex-husband, and she had no independent legal advice about the transaction, so

²⁶ [1978] 1 WLR 225.

the court found that the release ought to be set aside on the basis of unconscionability.

[141] The same cannot be said about the Davids in any material way. Even if it was so pleaded, this court finds that in this case, there was no undue influence by the Bank or an inequality in bargaining power by the Bank over the Davids. Without deciding the point, it would seem to me that the Davids and the Bank were at equal arms in terms of conducting their affairs. The Davids in particular do not appear to have been hapless journeymen in this affair since, among other things, they were savvy enough to procure financing from the Bank to the tune of millions of dollars without providing a single form of security for a number of years.

[142] When determining whether a duty to obtain independent legal advice arises, the court is required to examine the circumstances in which the documents were signed to determine if the duty arose²⁷. In the circumstances of this case, for the reasons recited above, I find that no such duty arose since

—

- (1) there are no facts to show that anything existed outside of normal commercial dealings between qualified business people and a bank that would obligate the bank to advise that the businesspersons to seek independent legal advice;
- (2) there are no facts to support an inequality of bargaining power or any unconscionable or other oppressive conduct by the Bank as against the Davids collectively or individually;
- (3) Both of the Davids were involved in the taking of security over the properties in question.

[143] Specifically, the Davids cannot attempt to resile from the facts, as they have tried to, that they are seasoned businesspeople who have entered into several mortgage arrangements with the Bank and other financial institutions. All parties were well aware of these facts, and this again buttresses the point

²⁷ *Turnbull & Co v Duval* [1902] AC 429.

that the Bank was under no duty to the Davids that went beyond the regular relationship of lender and borrower to either advise them of the nature of the transactions they entered into, or to advise them of their right to obtain independent legal advice prior to entering into the transactions.

WHETHER THE LAW FIRM OWED THE CLAIMANTS ANY DUTIES, FIDUCIARY OR OTHERWISE, AND IF SO OWED, WHETHER THERE WAS BREACH OF THESE DUTIES

[144] In relation to the Law Firm, the claimants submit that the Law Firm was SSL's principal attorneys, and the Davids are of the view that the Law Firm owed them duties on this basis. In light of this, the claimants complain that the Law Firm did not advise them of their right to seek independent legal advice, especially when the documents being executed by the Davids had the effect of piercing SSL's veil of incorporation. They also submit that the Law Firm, being instructed by the Bank, without the instruction or the knowledge of the claimants, acted as the Bank's general agents. It was also submitted that there was a conflict of interest, in that Mr. Cosmos St. Bernard was the principal of the Law Firm and at the same time, the largest individual shareholder in the Bank. They also say that the Law Firm was seeking the interests of both SSL and the Bank, and that this further showed a conflict of interest.

[145] At the trial of the matter, Mrs. David sought permission to amplify her witness statement, and with no objection by the Defendants, she was permitted to so do. This amplification was for the purposes of producing documentation which Mrs. David says showed that the Law Firm acted for SSL and the Davids. She presented 8 documents, being:

- 1) SSL's Business Name Application dated 11th December 1997;
- 2) Sun Car Rentals Certificate of Business Registration dated 26th May 1997;
- 3) SSL's Certificate of Incorporation dated 24th November, 1997;
- 4) a Conveyance from James Eddy to the Davids in 1997;

- 5) a Reconveyance from the Bank of Nova Scotia to Colin David and Sonia David in 2002;
- 6) a Conveyance from the Government of Grenada to SSL in 2006;
- 7) a Mortgage from Colin David, Sonia David and SSL to RBTT Bank in 2006; and
- 8) a High Court Claim between Colin David and SSL.

In their witness statements, the Davids assert that the Law Firm was the Davids' trusted attorneys since 1997 and that the Davids relied on the Law Firm for guidance. The Davids say that they completely trusted the Law Firm. This was the extent of the Davids' evidence to found the attorney/client relationship.

[146] The claimants concede that there was no written retainer agreement as between the SSL and the Law Firm, but Counsel for the claimant also asks the court to take note of the familial relationship as between the parties, and to consider the nature of the acts performed by the Law Firm in relation to SSL and the Davids. Counsel for the claimants also rely on the Legal Profession Act (LPA) ²⁸ to posit that the Law Firm failed to adhere to the appropriate standard of professional conduct. The claimants' case in this regard rests particularly on section 26 of the LPA which reads:

“(1) An attorney – at – law may represent multiple clients only if he can adequately represent the interests of each, and if each consents to such representation, after full disclosure of the possible effects of multiple representation.

(2) In all situations where a possible conflict of interest arises, an attorney – at – law shall resolve all conflicts by leaning against multiple representation.

(3) Notwithstanding any paragraph of this Part, no attorney – at – law shall represent both the –

(a) mortgagor and mortgagee; or

²⁸ Cap 167A of the laws of Grenada.

(b) vendor and vendee, except where both parties seek independent legal advice and present evidence of the written consent of both parties to such joint representation. “

[147] The Law Firm in submissions accepts that a retainer agreement may be in writing or inferred by acts of the parties²⁹, but relied on Lightman J's ruling in **Dean v Allin & Watts (a Firm)**³⁰ where he stated:

“...As a matter of law, it is necessary to establish that A&W by implication agreed to act for Mr Dean: an implied retainer could arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly to be imputed to the parties...**No such retainer should be implied for convenience, but only where an objective consideration of all the circumstances make it so clear an implication that the solicitor himself ought to have appreciated it.**” (bold emphasis mine)

[148] In these circumstances, the Law Firm submits that there was a lack of evidence to support the claimants' contention that the Law Firm acted as their solicitors in either of the impugned transactions in 2009 or in 2011. While the Law Firm acknowledges that they acted for the claimants generally in the past, they submit that none of the documents presented, even when Mrs. David's witness statement was amplified, showed that the Law Firm acted for the claimants. The Law Firm claims that all the documents reflect a series of disparate and unconnected transactions.

[149] The Law Firm submits that since there is no such thing as a general solicitor, a solicitor must be retained or employed to perform a particular task. They rely on **Saffron Walden Second Benefit Building Society v Rayner**³¹, where Lord James stated:

²⁹ Morgan v Blyth [1891] 1 Ch 337.

³⁰ [2001] EWCA Civ 758.

³¹ [1880] 14 Ch. D. 406 at 409.

“I have had occasion several times to express my opinion about the fallacy of supposing that there is such a thing as the office of solicitor, that is to say, that a man has got a solicitor not as a person whom he is employing to do some particular business for him, either conveyancing, scrivening, or conducting an action, but as an official solicitor, and that because the solicitor has been in the habit of acting for him, or been employed to do something for him, that solicitor is his agent to bind him to anything he says, or to bind him by receiving notices or information. There is no such officer known to law. A man has no more a solicitor in that sense than he has an accountant, baker or butcher. A person is a man’s accountant, baker or butcher when the man chooses to employ him or deal with him and the solicitor is his solicitor when he chooses to so employ him and in the matter in which he is so employed.”

[150] The Law Firm submits that they were never consulted or retained by the claimants in their relationship with the Bank, as all instructions came from the Bank and not the claimants. The Law Firm maintains that they were paid by the Bank, and in the totality of the circumstances, they were never retained by the claimants to act in the transactions. Having perused the documents presented, I have not found that the claimants have proven that these documents support their contention that the Law Firm acted for SSL or the Davids in relation to the 2009 and 2011 transactions. The claimants argue that throughout their negotiations with the Bank, they kept the Law Firm apprised of those discussions and sought the Law Firm’s advice, but no evidence has been presented to the court to support this contention.

[151] Equally, no evidence has been presented that the claimants sought the advice of the Law Firm about any of the matters or relied on them for any advice. It is equally not evident that the Law Firm was involved in the negotiations of the facilities, particularly the personal guarantees which conferred personal liability on the Davids. What is clear is that the Law Firm received written instructions from the Bank, not SSL or the Davids.

[152] I will add that the complaint from Mrs. David to Ms. St Bernard about the time being taken to prepare the facility documentation does not assist the claim that the Law Firm was engaged as the claimants' solicitors on the transactions. This testimony could certainly be said to be evidence indicative of the particularly close familial relationship which the sisters shared at that time. That evidence may also demonstrate the kind of familiarity that may have existed between Mrs. David and Ms. St. Bernard due to the fact that Ms. St. Bernard performed legal services for the Davids and SSL in the past. All in all, this evidence, at its highest, indicates that Mrs. David and Ms. St. Bernard were friendly with each other prior to and during the period of the transactions, and that Mrs. David sought to use that relationship to speed up the process. I can see no attorney client relationship being indicated on this evidence.

[153] With respect to the allegations of conflict of interest raised by the claimants, a conflict of interest could only arise if the Law Firm acted for both the claimants and the Bank. If there was evidence of those facts presented, then the conflict of interest point may have had some merit. In **Re A Firm of Solicitors**³², it was held that there was no general rule that a firm of solicitors who had acted for a former client could never thereafter act for another client against the former client, but if there was a danger that information gained while acting for the former client would be used against him, or there was some degree or likelihood of mischief, and the solicitor may be precluded from so acting by the court.

[154] It is beyond dispute that the Law Firm acted for the Bank in the transactions with the claimants in 2009 and 2011, which is accepted by the Davids. A conflict does not seem to arise because, even I accept that the Law Firm acted for the Davids in the past, again, I do not find that they acted for the Davids in relation to the 2009 and 2011 transactions. As stated in **Prince Jefri Bolkiah v KPMG (A Firm)**³³,

³² [1992] QB 959.

³³ [1999] 2 AC 222.

“The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor owes no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.”

[155] All in all, since no attorney client relationship in relation to the 2009 and 2011 facilities has been proven by the claimants, the Law Firm owed no duties to the claimants outside of the continuing duty of confidentiality. As such, I do not find that the Law Firm was under a duty to either to advise the claimants on the nature or effects of the documents, or to advise the claimants that they ought to seek independent legal advice. I also pause to comment that I do not find that the Law Firm was involved with or had any duties to the Davids with respect to the personal guarantees which they signed in 2011.

WHETHER THERE WAS AN UNLAWFUL MEANS CONSPIRACY BETWEEN THE BANK AND THE LAW FIRM AGAINST THE CLAIMANTS

[156] There were no submissions on the unlawful means conspiracy point pleaded by the claimants, and this aspect of the claim seemed to have totally abandoned at the trial. The unlawful means conspiracy point also was not addressed in submissions by the Bank. The Law Firm addressed the unlawful means conspiracy pleading by referring the court to the case of **Kuwait Oil Tanker Co SAK and another v Al Bader & Others**³⁴, which describes the concept as:

“A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss and damage as the result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by

³⁴ [2000] 2 ALL ER (Comm) 274.

unlawful means, whether or not it is the predominant purpose of the defendant to do so.³⁵

[157] The Law Firm also referred the court to the case of **FM Capital Partners Ltd v Marino**³⁶ where Cockerill J set out the elements of unlawful means conspiracy which must be proven –

“The elements of the cause of action are:

- (i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of.
- (ii) An intention to injure another individual or separate legal entity, albeit with no need for there to be a sole or predominant intention.
- (iii) Use of unlawful means as part of the concerted action, but there is no requirement that the unlawful means themselves are independently actionable.
- (iv) Loss being caused to the target of the conspiracy.”

[158] The Law Firm submits that there was no pleaded case of unlawful means conspiracy against it, and there was no reference to this cause of action on the evidence provided to the Court. I agree with this assertion, as it is not clear to the court what is the unlawful action in this case that the claimants are asserting, or what loss the claimants’ suffered as a result of the

³⁵ [2000] 2 ALL ER (Comm) 274 at 108.

³⁶ [2018] EWHC 1768 (Comm).

purported unlawful acts between the Bank and the Law Firm on this cause of action.

WHETHER THE CREDIT FACILITIES, SPECIFICALLY THE MORTGAGE FACILITIES IN 2009 AND 2011 AND PERSONAL JOINT AND SEVERAL GUARANTEES EXECUTED IN 2011 BY THE CLAIMANTS WERE PROCURED THROUGH MISREPRESENTATION

[159] **Halsbury's Laws of England** gave a concise definition of a misrepresentation as –

“A positive statement of fact or law, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently.³⁷”

[160] **Paget's Law of Banking** provides explication of the law on misrepresentation in the banker/client relationship as –

"In particular, the provision of information together with or as part of any advice may involve false statements giving rise to a cause of action in misrepresentation, negligence or deceit. These causes of action are all based upon showing a statement was made that was one of fact, not of opinion, and the statement must be false in a material respect.³⁸"

[161] It was difficult to ascertain from the claimants' pleaded case which form of misrepresentation they were claiming against the Bank and the Law Firm. Though not specifically pleaded, from the factual matrix and the evidence recited, the claimants appear to be alleging fraudulent misrepresentation. This view of their case is borne out by the fact that, among other things, in relation to the 2009 mortgage, the Davids indicate that they relied on the Bank's proposal in 2008, which they saw as a representation that did not bear fruit.

³⁷ Halsbury's Laws of England (5th edn, 2021), Vol. 76, paragraph 701.

³⁸ John Odgers KC and Ian Wilson KC, *Paget's Law of Banking* (15th Edition).

[162] Further, the Davids deny knowledge of or execution of the Voluntary Conveyance in their witness statements, with Mr. David even charging that the Voluntary Conveyance was a fraudulent document. With respect to the 2011 mortgage and personal guarantees, the Davids state that they did not intend to sign any personal guarantees, and did not in fact sign any. The Davids' also charge misrepresentation in the instance when the lawyers of the Law Firm informed them that the mortgage documents were standard for signing, when they were not.

[163] It appears that the Defendants also accept that the claimants' charge was residing in fraudulent misrepresentation, as both the Bank and the Law Firm filed extensive submissions with respect to the law on fraudulent misrepresentation.

[164] In closing submissions however, the claimants seemed to have abandoned the above foundations, as they maintain that that the Bank's failure to advise the Davids that they should seek to obtain independent legal advice, amounted to negligent misrepresentation by omission³⁹. The claimants also make the same charge of negligent misrepresentation by omission against the Law Firm as agents of the Bank⁴⁰. In this latter regard, the claimants submit, relying on **Barclays Bank v O'Brien**⁴¹, that where a creditor appoints an agent to obtain a guarantor's signature the creditor will be liable for any misrepresentations made, or undue influence exercised by the agent.

[165] This change in posture by the claimants may be due to what transpired at trial, where the Davids both accepted that they signed all of the mortgage documents, including the Voluntary Conveyance. It was also revealed at trial that the Davids' signed personal, joint and several guarantees holding themselves personally liable for SSL's debts, not once, but twice, on 10th February, 2011 and again on 28th September, 2011. Mr. David sought to avail himself of the plea that his wife was the person that dealt with the

³⁹ See paragraph 112 of the claimants' closing submissions.

⁴⁰ See paragraph 90 of the claimants' closing submissions.

⁴¹ [1994] 1 AC 180.

financial matters with the Bank, so he could not speak to certain matters. Even if true, it is irrefutable that his signatures and that of his wife appeared on all of the documentation in the transactions.

[166] I pause at this juncture to remind legal practitioners of the requirements and rationale of pleadings under the CPR. As stated by Ward JA in **National Lotteries Authority v Jerome De Roche**⁴²:

“In short, therefore, the claimant **must plead the essential facts that constitute its case**, and those facts must be sufficient to establish a cause of action **and to enable the other side to know the case it has to meet in sufficient detail**. CPR 8.7A prohibits reliance on allegations or facts not pleaded unless the judge gives permission, or the parties agree...⁴³” (bold emphasis mine).

Lord Woolf in **McPhilemy v Times Newspapers Ltd & Others**⁴⁴ found:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statements will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. **Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.**” (bold emphasis mine)

⁴² GDAHCVAP2021/0025.

⁴³ GDAHCVAP2021/0025 at 38 – 39.

⁴⁴ (1999) 3 ALL ER 775

[167] Given the lack of clarity on what exactly is the case for the claimants on the question of misrepresentation, and further to the submissions presented by the defendants, I will examine the law on both fraudulent misrepresentation and negligent misrepresentation.

FRAUDULENT MISREPRESENTATION

[168] **Halsbury's Law of England** provides in relation to fraudulent misrepresentation that:

“Where misrepresentation is fraudulent, the remedy lies in a claim in the tort of deceit for rescission of the contract and damages. The onus is on the party who alleges fraud to prove fraud. The burden of proof is onerous and so it is more common to treat the misrepresentation as having been made negligently ...the alleged misrepresentation must consist of something said, written or done which amounts in law to a representation to the claimant which was false materially which caused an inducement or alteration of position based on that fraud⁴⁵”

[169] This form of misrepresentation is established if the claimant proves that the defendant made a false representation to him or her and did so knowingly without belief in its truth, or recklessly without caring whether it is true or not⁴⁶. The law is well settled that allegations of fraud carry a heavy burden⁴⁷, and a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent⁴⁸. It must also be proved that the claimant sustained some damage by acting upon the false statements⁴⁹.

⁴⁵ Halsbury's Laws of England (Volume 23 (2023))458

⁴⁶ Derry v Peek (1889) 14 App Cas 337 at 374.

⁴⁷ Markel v Higgins [2009] EWCA 790.

⁴⁸ Three Rivers District Council v The Governor and Company and the Bank of England No. 3 [2003] 2 AC 1.

⁴⁹ Bradford Third Equitable Benefit Building Society v Borders [1941] 2 ALL ER 205.

NEGLIGENT MISREPRESENTATION

[170] As it relates to negligent misrepresentation, however, this form of misrepresentation arises where a duty is implied as being placed on a party in making the representation. As held in **Hedley Byrne & Co. Ltd v Heller & Partners**⁵⁰,

“a negligent, though honest, misrepresentation, spoken or written may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment.”⁵¹

[171] The Bank helpfully submitted the case of **InstaGroup Limited v David Carroll & Others**⁵², where Nigel Cooper KC stated:

“A contract can be rescinded for both negligent misrepresentation and fraudulent misrepresentation. For both forms of misrepresentation, the person seeking to rescind the contract must establish (i) a statement of fact amounting to a representation, (ii) the statement is false, and (iii) the statement must be by or known to the other contracting party.”

SAGA OF THE 2009 FACILITY

[172] Much of the alleged misrepresentation relied upon by the claimants in relation to the 2009 arrangements seems to have arisen as a result of statements alleged to have been made by Mr. DeFreitas, an employee at the Bank. Mr. DeFreitas was deceased by the time these proceedings were instituted. However, I believe the Davids as it relates to the conversations they

⁵⁰ [1964] AC 465.

⁵¹ [1964] AC 465 at 486.

⁵² [2022] EWH 464 (QB).

alleged that they had with Mr. DeFreitas about what facilities the Bank was willing to give the claimants in early 2008.

[173] This is based on the claimants' evidence on how the initial banking relationship began, and how their accounts were operated from 2003 until 2009. The claimants were permitted to open accounts without submitting any formal financial documentation, and to draw down on their overdraft to the tune of \$3.8 million without any formal security being in place. Given this *laissez faire* and accommodating approach to the parties' affairs by the Bank, I do not doubt what is alleged to have been said by Mr. DeFreitas to the claimants, even with the lack of documentation.

[174] However, even when the foregoing approach to the evidence in this case is adopted, I cannot attach myself to the claimants' contention that the statement made by Mr. DeFreitas was false, fraudulent or negligent in any way. The documentation filed in this claim speaks volubly in this regard. In early 2008, SSL was indebted to the tune of \$3.8 million dollars to the Bank. The Bank was understandably concerned about this state of affairs, due to the Bank's lack of security. I acknowledge that Mrs. David appears to have been equally disturbed about aspects of the banker/client dealings as is shown, for instance, by her insistence, on more than one occasion that the Bank provide the basis on which interest was being charged on the 4 facilities and for the facilities to be converted to loans.

[175] In the foregoing context and having regard to the manner in which the banker/client relationship was already proceeding with excessive generosity, the testimony that the Bank was prepared in early 2008 to give the claimants \$1.2 million is quite believable. I think though that this is where the breakdown occurred in this case. The Davids' seem to have formed the view that the Bank was going to give them cash of \$1.2 million, regardless of the financial state of SSL. The evidence suggests and it is clear that the Bank held another view.

[176] I find that the Bank was prepared to make the \$1.2 million available by way of an overdraft credit facility which SSL could use as working capital if

they cleared the overdraft that was owing. I am satisfied that this was made sufficiently clear to the Davids. This is since, they both knew that at the time of their discourse with Mr. DeFreitas, SSL was already indebted to the tune of \$3.8 million. The offer of \$1.2 million through the overdraft facility was actualised by the Davids use of the proposed overdraft facility after the proposal was made in 2008. This fact is demonstrated by evidence that the claimants made several demands to the Bank on the overdraft facility after 2008, which demands the Bank fulfilled.

[177] By April, 2009, SSL had used up the \$1.2 million overdraft facility, but its total debt to the Bank had by then exceeded the sum of \$5 million dollars. What is interesting and on some levels disturbing, is that from the time of the 2008 proposal, the Bank continued in the usual manner of allowing the claimants to use its money without an insistence on such matters as security. Had the Bank stopped extending its funds to the claimants in 2008 when it made the proposal or in fact insisted that they sign an agreement letter in 2008 before giving any more of the bank's monies to the Davids, much of the arguments in this case would have been avoided.

[178] Curiously though but hardly surprisingly, prior to the signing of the 2009 facility agreement, the Bank had allowed the claimants to use up the full sum of the \$1.2 million on overdraft, without signing a single document or putting up any security. In this context, the Bank allowed the claimants to use the \$1.2 million facility while working out matters such as finalising security and asking the Davids to present SSL's audited financial statements. By that time, 2009 had rolled around and it was only then that an agreement letter was signed.

[179] By that time, the Davids and SSL had already spent all the money proposed under the \$1.2 million capitalisation facility. The documentary evidence is clear that between 2008 and April 2009, the Davids made several drawdowns on their overdraft accounts for SSL's operations, and the Bank though concerned, honoured these drawdowns. As sloppy and reckless as all

of these facts appear, such are indeed the facts. But none of it shows that in 2008 or at any point thereafter, that the Bank or its agent misrepresented to the Davids and SSL in any manner how much money it was prepared to give them or the manner in which the Bank intended to do so.

[180] Further, any oral representation made by Mr. DeFreitas was clearly superseded by the written contractual arrangements which the claimants entered into with the Bank in 2009. The Davids themselves admit that in May, 2009, they knew that working capital would not be provided. With this knowledge, the Davids' still executed the 2009 mortgage some months later. Having accepted that they signed the facilities, after initially denying that they in fact signed the Voluntary Conveyance, Mrs. David then said that they felt compelled to sign because of the financial situation they found themselves in.

[181] The fact the Davids were in a position in 2009 that they felt that they had no choice but to sign the agreement letter may be quite understandable. They and their company had racked up millions of dollars in debt to the Bank. But none of this is dispositive of the fact that they knew what they were getting themselves into and that there was no misrepresentation whatsoever by the Bank to them of the nature of the deal, and there was definitely no detriment suffered by the Davids.

[182] As stated above, the seeming lack of transparency from the Davids is borne out for instance by their assertion that the Bank never requested audited financial statements from them or SSL at any time. Emails were in evidence which showed the Bank's requests, and Mrs. David promising to provide them. I find that if the audited financial statements and the security had been provided in a timely manner after the 2008 proposal, much of the concerns about whether Mr. DeFreitas' statements meant fresh cash or that it meant the extending of an overdraft facility would have been obviated since, among other things, the process of signing the facility setting out the explicit terms of the propose arrangement would have been concluded earlier than July 2009. The fact though that this was not done until July 2009, as I have repeatedly stated

above, does not suggest that the Davids did not have knowledge of the exact terms of the arrangement. In fact, as I have also stated above, they acted consistently with the terms of the arrangement by accessing the \$1.2 million overdraft facility and indeed used it up in its entirety by the time they signed the facility letter in 2009.

WHAT OF THE 2011 FACILITY?

[183] In relation to the 2011 facilities, obfuscation, obscurity, inadvertence and opaqueness of dealings seem to underlie what transpired with the Davids as it relates to the Grand Anse property and the Grand Anse Estates property. When confronted with all the issues surrounding these properties, the Davids then fell back on the arguments of the lack of independent legal advice. As discussed before, there was no such duty either on the Bank or the Law Firm, and as such that defective cause of action of alleged negligent misrepresentation must here fail again.

[184] There is simply no evidence of any duty owed by either the Bank or the Law Firm giving rise to a finding of negligence, and there is equally no finding of any fraudulent misrepresentation by either the Bank or the Law Firm on these facilities. The Davids' individual understanding or misunderstanding as to how the 2011 facilities worked has not been shown to be attributable to anything said or omitted to be said by either the Law Firm or the Bank.

[185] Equally, the Davids' made much ado about what they understood the facility letters and personal joint and several guarantees to mean, but what is patently clear is that their understandings were not attributable to the Bank or the Law Firm's actions or to any actionable omissions on either the Bank or the Law Firm's part. The law is clear that when a contract is reduced to writing and signed, the party signing it will be bound by the terms in it, whether or not he or she has read them or appreciated their legal effect.⁵³ To succeed they

⁵³ L'Estrange v Graucob [1934] ALL ER 16.

must show some actionable act, fraud, omission or negligence by the defendants. This they failed to do.

[186] In the circumstances, having found that there was no proven misrepresentation which induced the claimants to execute the security documents, neither against the Bank nor the Law Firm, there is no basis to order the recession of any of the security documents which were executed by the Davids in their personal capacity and as shareholders/directors of SSL. As stated in **Allcard v Skinner**⁵⁴, equity does not save people from the consequences of their own actions; it acts to save them from being victimised by other people. There was no victimization of SSL or the Davids to be found in this case.

WHETHER THE CLAIMANTS ARE ENTITLED TO ANY OF THE RELIEF SOUGHT?

[187] On the basis that no misrepresentations could be found in this case, I decline to make any order of recession of the facilities or reconveyance of the indentures in relation to the 2009 and the 2011 transactions. On the issue of the Voluntary Conveyance of the Point Salines property to the Bank, the Davids accepted at trial that these documents were signed by them. I have not been able to find from the evidence that there was any undue influence or duress in the signing of this documentation for an order of rescission. This transaction cannot be said to have been disadvantageous to the Davids in any way, as without it, the evidence shows that the 2009 facility would not have occurred at all.

[188] The Davids also sought to say that there may have been no authority for SSL to enter into the 2009 transactions, as the 2008 company's resolution only authorised the raising of a loan of \$5 million. I have not been shown how this issue of SSL's internal management correlates with or vindicates any of the claims being made by the claimants. But my own assessment of it in any event suggests that it is patently untenable, in light of the fact that the Davids

⁵⁴ (1887) 36 Ch D 145.

executed the 2009 mortgage documents, both as individuals and on behalf of SSL. They did so even after becoming aware as early as May 2009 that no further working capital was being provided by the Bank, which they claimed to have thought they were going to receive.

[189] The claimants have also requested an order for an account against the Bank, but in perusing the documentation filed by the claimants, it is unclear why these order were sought, as there was a plethora of accounting provided by the Bank about SSL's accounts throughout the banking relationship. As stated above, I find that the 2009 and 2011 facilities are valid as they were not procured through misrepresentation, so there is no basis for rescission or rectification. I also reiterate that there is no finding that the Bank or the Law Firm held a duty to advise the claimants on any of these documents or to advise them to seek independent legal advice.

[190] I also decline to award any damages for breach of fiduciary duty, as the Bank owed no such duty to the claimants. As to the claimants' request for an account of profits, no evidence was led regarding the basis of this relief and as such no order is made in respect of the same. The same holds for the claim for unlawful means conspiracy. No relief will be granted as the claimants have failed to establish the claim for unlawful means conspiracy.

[191] I wish to point out one additional matter. The claimants provided evidence by Mr. Garvey Louison about the ECCB Guidelines which it alleges that the Bank breached. This issue is immaterial to the claim, as the ECCB Guidelines are not law governing the agreement between the parties, but rather policies made by the ECCB for good corporate governance of banks. They do not have the force of law as confirmed by Webster JA in the case of **Chemical Manufacturing and Investment Limited and the Roserie Company Limited v First Caribbean International Bank (Barbados) Ltd**⁵⁵.

⁵⁵SLUHCMAP2021/0003 at 41 – 44.

WHETHER THE BANK IS ENTITLED TO THE RELIEF SOUGHT IN THEIR COUNTERCLAIM?

[192] On their counterclaim, the Bank has sought various declarations as it relates to the Grand Anse Estates property and the ability of the Bank to exercise its power of sale in relation to this property. The evidence on this issue shows that all of the mortgage documents in relation to the Grand Anse Estates property recited the wrong Power of Attorney, being the Power of Attorney dated 31st October, 2001 which related to another property in Grand Anse, instead of the Power of Attorney dated 29th December, 1999 between Peter David, Patrick David and Paul David to Mr. David which allowed Mr. David to mortgage that property as he saw fit.

[193] **Halsbury's Laws** provide:

“An agent acting under a power of attorney should, as a general rule, act in the name of the principal...A deed executed in pursuance of such a power is properly executed in the name of the principal or with words to show that the agent is signing for the principal...Any instrument executed or thing done...is as effective as if executed by the donee in any manner which would constitute due execution of that instrument by the donor (except in the case of an instrument executed by the donee in a manner which would constitute due execution of it as a deed by the donor only if it is executed in accordance with the appropriate statutory requirements).⁵⁶”

[194] I find that as the 1999 Power of Attorney did exist at the time of the execution of the 2011 mortgage and that Mr. David had the authority to mortgage the Grand Anse Estates property by virtue of that power, irrespective of the technical defect in the recital of the mortgage. What is clear from all of the 2011 deeds, is that Mr. David signed in his personal capacity and in his representative capacity as attorney for the Davids brothers. Had this 1999

⁵⁶ Halsbury's Laws of England, Agency (Volume 1 (2022))45.

Power of Attorney not been in existence, or if evidence had been provided that the 1999 Power of Attorney was revoked at the material time, my finding may have been different.

[195] Counsel for the claimants submits that the court did not have the ability to hear any evidence from the other co – owners of the Grand Anse Estate's property. Consequently, counsel says, the court should be hard pressed to infer any intention that the co – owners wished to mortgage the property. While attractive, the facts show that the 1999 Power of Attorney was in fact in existence at the time, and Mr. David had the power from the David brothers to execute the mortgage by virtue of that deed. I find that, as I have stated above, the parties are bound by what they signed for its full force and effect. In this instant case, what is material is that a 1999 Power of Attorney did in fact exist where the legal owners, in this case, the David brothers authorised Mr. David to execute a legal charge over the property and secure it by way of mortgage.

[196] I do not believe that it would be just and equitable for the claimants to rely on what is clearly a clerical error in the mortgage deed to avoid or evade their contractual obligations. I would therefore grant the following orders and declarations and orders with respect to the Grand Anse Estate's property –

- (1) The 2nd claimant (Phillip David) was at all material times, empowered by virtue of the 1999 Power of Attorney to convey the 2 Acre parcel by way of mortgage to the 1st Defendant (The Bank);
- (2) the 1999 Power of Attorney evinced a clear intention by the other co – owners, namely Peter David, Patrick David and Paul David, that the 2 Acre parcel be used as it was in fact used in the Deed of Further Charge and the Supplemental Deed of Further Charge, the subject of this Claim;
- (3) The 1st Defendant (the Bank) is entitled both in law and in equity, to exercise its power of sale in respect of the 2 Acre parcel. In that regard, the parties are to sign a deed of correction of the mortgage deed to reflect the correct Power of Attorney, which deed of correction

must be signed by the claimants within 14 days of the presentation of the same to them by the Bank;

- (4) The Bank may apply for an assessment of damages in the event that the claimants fail or refuse to sign the Deed of Correction as herein ordered.

[197] I make the above orders and declarations in light of the law on breach of warranty as sought by the Bank, as defined in **Halsbury Laws of England**

“A breach of one of the warranties given in a title guarantee is actionable as a breach of contract. Once completion has taken place, or a third party has acquired an interest in the property, for example, a lender, rescission will not normally be granted. Damages will therefore be the usual remedy, although the seller may be ordered to execute documents to perfect a defective title.”⁵⁷

[198] On Mr. David’s own evidence in this claim more particularly, he breached the warranty that he gave to the Bank that he had the capacity to enter into the 2011 transactions. I do not believe Mr. David’s evidence that he was unaware of the transferal of the property or the issue affecting the Power of Attorney. Consequently, the Bank suffered loss, which was proven to the court of the inability or difficulty with being able to sell the mortgaged properties. This is an actionable loss flowing from the breach of which the Bank is entitled to its compensation, in the event that the Claimants refuse to sign the deed of correction as ordered.

[199] On the issue of interest, the Bank only sought post judgment interest in accordance with the court’s statutory powers under the **West Indies Associated States Act**.⁵⁸ I am minded to award post judgment interest on the judgment sum at the usual rate of 6%.

⁵⁷ Halsbury’s Laws of England; (Volume 23 (2023) 184.

⁵⁸ Cap 336 of the laws of Grenada.

COSTS

[200] The Law Firm and Mr. Cosmos St. Bernard applied to the court on 6th July, 2018 for the value of the claim to be determined as EC\$9, 671, 503. 30 for the purposes of prescribed costs in accordance with CPR Part 65.5. This application was granted by Order of this court on 20th July, 2018. These costs will be payable by the claimant, being the unsuccessful party in this claim to the defendants, and as the matter went to trial, 100% of the costs are awardable. These costs are calculated as follows:

Value of Claim: EC\$9, 671, 503.30		
Cumulative Calculation	CPR 2023 percentages	Totals
Not exceeding \$50,000	20	10,000
Exceeding \$50,000 but not exceeding \$100,000	15	7, 500
Exceeding \$100,000 but not exceeding \$250,000	12.5	18, 750
Exceeding \$250,000 but not exceeding \$500,000	10	25, 000
Exceeding \$500,000 but not exceeding \$1,000,000	7	35, 000
Exceeding \$1,000,000 but not exceeding \$2,500,000	3	45, 000.00
Exceeding \$2,500,000 (9, 671, 503.30 – 2, 500, 000)	0.5	35, 857. 52
Total		\$177, 107.52

CONCLUSION

[201] It is therefore ordered and declared as follows:

- (1) The claimants' claim against the defendants is dismissed;

- (2) The 2nd claimant (Phillip David) was at all material times, empowered by virtue of the 1999 Power of Attorney to convey the 2 Acre parcel by way of mortgage to the 1st defendant (The Bank);
- (3) the 1999 Power of Attorney evinced a clear intention by the other co – owners, namely Peter David, Patrick David and Paul David, that the 2 Acre parcel be used as it was in fact used in the Deed of Further Charge and the Supplemental Deed of Further Charge, the subject of this claim;
- (4) The 1st defendant (the Bank) is entitled both in law and in equity, to exercise its power of sale in respect of the 2 Acre parcel. In that regard, the claimants are to sign a deed of correction of the mortgage deed to reflect the correct Power of Attorney, which deed of correction must be signed by the claimants within 14 days of the presentation of the same to them by the Bank;
- (5) The 1st defendant may apply for an assessment of damages in the event that the claimants fail or refuse to sign the Deed of Correction as herein ordered;
- (6) The claimants are liable to the 1st defendant in the sum of \$9, 671,503. 30 and the claimants are jointly and severally liable to pay the 1st defendant the sum of \$9, 671, 503. 30;
- (7) The claimants shall pay prescribed costs to the 1st defendant in the sum of \$177, 107.52.
- (8) The claimants shall pay prescribed costs to the 2nd and 3rd defendants in the sum of \$177, 107.52;
- (9) Interest is awarded on the judgment sum inclusive accruing from the date of judgment at the rate of 6% per annum until the date of payment

[202] I also take this opportunity to thank counsel for their fulsome and engaging written and oral submissions, and their patience in awaiting the ruling in this claim.

Raulston L.A. Glasgow

High Court Judge

By the Court

Registrar