

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0211

BETWEEN

STANDARD GROCERY LIMITED
STANDARD ENTERPRISE LIMITED
NEW MONTROSEAPARTMENT HOTEL LIMITED

CLAIMANTS

AND

BANK OF ST. VINCENT AND THE GRENADINES LTD.

FIRST DEFENDANT

PHILLIPS & WILLIAMS LAW FIRM (L.A. DOUGLAS WILLIAMS AND ZOE WILLIAMS)

SECOND DEFENDANT

Appearances:

Mr. Michael Wyllieof counsel for the claimants.

Mr. Jadric Cummings with him Ms. Anique Cummings of counsel for the first defendant.

Mrs. Zhing Horne-Edwards with her Ms. Chelsea Alexander of counsel for the second defendant.

2023: May 2 & 4
Jun. 20 & 22
Dec. 5
2024: Jan. 18
Feb. 21

JUDGMENT

INTRODUCTION

[1] **Henry, J.:** This case concerns a business transaction by which a bank in Saint Vincent and the Grenadines granted credit facilities to the claimants, (a group of three related companies) which the

claimant companies seek to have rescinded. The companies – Standard Grocery Limited, Standard Enterprise Limited and New Montrose Apartment Limited – sued the bank, FirstCaribbean International Bank Limited ('FCIB') for misrepresentation, negligence and undue influence. Among other things, they claim that the bank acted in breach of its fiduciary duty to act in good faith towards them and was negligent in a number of respects. They have also sued the law firm Phillips and Williams for breach of professional negligence and breach of fiduciary duty for allegedly representing them and the bank simultaneously while failing to inform them of this alleged conflict of interest and for not advising them to seek independent legal advice.

- [2] The claimants asserted that there was no meeting of the minds and they were mistaken about aspects of the transaction. Consequently, the Facility Letters and Mortgage Debenture No.4529 of 2006 ('Mortgage Debenture') that were executed are void and unenforceable. They submitted that they are therefore not indebted to the bank. They seek damages and rescission of the mortgage debenture.
- [3] FCIB opposed the claim and countered that the claimants have failed or neglected to liquidate the loans although demand has been made of them in terms of the Mortgage Debenture. They filed a Counterclaim in which they seek from the claimants payment of outstanding balances of \$5,934,517.65; \$2,074,753.77 and \$1,344,466.12 respectively with interest at the annual rate of 10% up to the date of satisfaction and costs. FCIB has since transferred its assets and liabilities to Bank of Saint Vincent and the Grenadines Limited ('BOSVG'). BOSVG has replaced FCIB as the first defendant in these proceedings.
- [4] The claimants claimed that at all material times they were legally represented by the Law Firm of Phillips and Williams (L. A. Douglas Williams and Zoe Williams), who failed in their fiduciary duty by among other things, not providing them with legal advice regarding the nature of the Mortgage Debenture which was signed at their chambers; by acting for the bank without informing them or obtaining their informed consent; by knowingly and intentionally preferring the bank's interests over theirs; and by acting for the bank even though its interests conflicted with theirs.

- [5] They pleaded that the partners in the Law Firm, and specifically Mr. L.A. Douglas Williams was negligent towards them by not exercising the due care, skill and diligence to be expected of a reasonably competent conveyancing solicitor in the performance of his duties and obligations; and misrepresented that the document was a legal first mortgage when in fact it was a mortgage debenture. They claim that because Phillips and Williams' legal practitioners did not read the mortgage debenture to them and explain its contents and the effects, the directors who signed it on their behalf neither appreciated that they were signing a mortgage debenture nor the implications of breach of its terms and therefore signed it based on the mistaken belief that it was a legal first mortgage. They contended further that they reposed considerable trust and confidence in Mr. Williams as their family lawyer and signed the mortgage debenture by reason of presumed undue influence.
- [6] The claimants sued Phillips and Williams for breach of professional negligence, undue influence, mistake, misrepresentation and breach of fiduciary duty. Phillips and Williams denied all elements of the claim and assert that in any event, all of the causes of action are statute barred by virtue of the **Limitation Act**¹.
- [7] The claimants claimed damages for loss of goodwill, damages for professional negligence, breach of fiduciary duty, mistake, non-disclosure, undue influence and misrepresentation; an order staying foreclosure or other proceedings against them; a declaration that the Mortgage Debenture is void *ab initio* by reason of mistake, undue influence and lack of independent legal advice; a declaration that Phillips and Williams by acting as legal practitioner for both them and the bank, created a situation of conflict of interest; a declaration that the Mortgage Debenture is void because the claimants did not have independent legal advice; a declaration that clause 5 of the Mortgage Debenture could not encapsulate the floating assets or on-call assets; a declaration that Phillips and Williams was negligent by reason that they did not adequately advise the claimants; an injunction restraining the bank from offering for sale or selling any of the properties or assets which

¹ Cap. 139 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

are subject to foreclosure; an account of all monies received by the Receiver for and on the bank's behalf and costs.

[8] I have found that the claimants have not made out the claims against the bank or Phillips and Williams. The claimants are therefore not entitled to any relief and their claims are dismissed. Judgment is entered for the bank on its counterclaim.

ISSUES

[9] The issues that arise for consideration are: -

1. Whether BOSVG is liable to the claimants for mistake, undue influence, breach of fiduciary duty, negligence or misrepresentation?
2. Whether Phillips and Williams is liable to the claimants for breach of fiduciary duty, negligence, undue influence, mistake or misrepresentation?
3. Whether the claimants are liable to pay BOSVG the sums claimed under the referenced loans?
4. To what remedies if any, are the claimants or BOSVG entitled?

FACTUAL BACKGROUND

[10] The claimants Standard Grocery Limited, Stangro Enterprises Ltd and New Montrose Apartment Hotel Ltd are registered companies incorporated under the Companies Act and operating in Saint Vincent and the Grenadines. The shareholders and directors of the three companies are the Reddock siblings, including Ronald Reddock, Roger Reddock, Claudette Reddock and Beverly Reddock. BOSVG is a commercial bank operating in Saint Vincent and the Grenadines. The second defendant is the law firm of Phillips and Williams which comprises the father/daughter duo of Mr. L.A. Douglas Williams and Ms. Zoe Williams.

[11] Sometime in 2005, a commercial building in Kingstown, Saint Vincent known as the M&G Building was put up for sale by auction. Stangro Grocery Ltd caused a bid to be prepared and the directors arranged for Mr. Williams to submit it on their behalf to Mr. Brian Glasgow, the Liquidator of M&G Enterprises Ltd who is also one of the partners at KPMG. The bid of \$3,469,125.00 was successful. Stangro Grocery Ltd was notified by letter dated June 30th 2005. The claimants approached their bankers RBTT Bank to obtain a loan of \$180,000.00 for the downpayment to

purchase the building. They were turned down. They then went to FCIB where the New Montrose Apartment Hotel Ltd maintained a current account and a savings account. FCIB gave favourable consideration to the loan application for the downpayment, conditioned on the presentation of a loan proposal regarding the purchase of the M&G building.

[12] The claimants engaged their accountant KPMG to prepare the proposal. Mr. Reuben John, the other partner in the accounting firm prepared the proposal. In it, the M&G Building and the Stangro Grocery Property were offered as security for the loan. That proposal did not find favour with the bank. It requested another proposal with additional securities. The second proposal was prepared and included the New Montrose Apartment Hotel as a further security. This formed the basis of continued negotiations between the claimants' directors Ms. Beverly Reddock and Ms. Claudette Reddock with Mr. Elroy John Corporate Relationship Manager at the bank. The Bank Manager Mr. Earl Crichton was also engaged from time to time.

[13] On receipt of the second proposal and arising from further negotiations, the bank approved a loan of \$5,955,000.00 for the purchase of the M&G Building and working capital. The claimants allege that the bank insisted that the approval was conditioned on the transfer from RBTT to FCIB of other facilities and loan obligations held at that bank by the claimants. The claimants agreed. Consequently, the bank assumed responsibility for a loan of \$505,000.00 originally held by New Montrose Apartment Hotel Ltd with RBTT; and a loan of \$5,450,000.00 with respect to a loan facility held by Stangro Enterprise Ltd with RBTT and the purchase price for the M&G building. The claimants maintain that throughout the negotiations with the bank they kept Mr. Williams apprised of those discussions and sought his advice. It is common ground that he did not participate in the negotiations.

[14] By three facility letters dated August 2nd 2006, addressed to the claimants, the bank offered the claimants certain loan facilities. The second facility letter offered an overdraft facility of \$500,000.00, a demand loan in the sum of \$4,000,000.00 to purchase the M&G building, to repay a loan to RBTT, settle associated legal fees and costs and as working capital; and another demand

loan of \$950,000.00 to assist with the purchase of the M&G building and associated expenses. The Facility Letters set out the terms on which the loans were being offered to the claimants. A condition precedent was included in the second facility letter and is relied on by the claimants to void the loan agreement and will be addressed later in the judgment.

[15] The claimants were directed by the Facility Letters to consider the terms and conditions set out in them and to indicate on or before August 31st 2006 whether they accepted the terms. They were required to sign them to signify acceptance of the terms and conditions. The claimants' directors discussed those offers privately among themselves. About two to three weeks later, on August 31st 2006, the directors Ms. Claudette Reddock and Mr. Ronald Reddock signed the Facility Letters signifying the claimants' acceptance of the offers outlined in them.

[16] Thereafter, by letter dated 11th September, 2006², the bank wrote to Phillips and Williams instructing them to prepare a Mortgage Debenture in respect of the loan facilities that were offered to the claimants and accepted. It was signed by Mr. Elroy John. The terms and conditions of the Mortgage Debenture were set out in the letter from the bank and incorporated the offer made in the second facility letter. Mr. Williams produced the original letter: It states in part:

‘... As security for the above facilities, we propose to obtain a Mortgage Debenture over the fixed and floating assets of Standard Grocery Ltd incorporating (i) a first legal mortgage over the existing business property at Middle Street, Kingstown, Lot £69, registered and stamped to cover continuing advances of EC\$950,000.00 (ii) a first legal mortgage over the property being purchased and housing the “M&G” building at Middle and Melville Streets, Kingstown registered and stamped to cover continuing advances of EC\$2,011,000.00 (iii) a Mortgage Debenture over the fixed and floating assets of New Montrose Apartment Hotel Ltd incorporating a first legal mortgage over the New Montrose Apartment Hotel property at New Montrose, registered and stamped to cover continuing advances of EC\$2,994,000.00. This security, that is item (iii) above will be held to simultaneously secure the facilities of Stangro Enterprises Ltd and New Montrose Apartment Hotel Ltd.’

²Pg. 541 of TB1.

[17] Mr. Williams prepared the Mortgage Debenture based on those instructions. The claimants were invited to his law chambers to sign it. Ms. Beverly Reddock and Ms. Claudette Reddock signed on behalf of the three claimants. The Mortgage Debenture dated October 16th 2006 was registered as Deed No. 4529 of 2006. The introductory clause commences:

‘THIS MORTGAGE DEBENTURE is made the 16th day of October in the year of Our Lord Two Thousand and Six BETWEEN STANDARD GROCERY LIMITED a company incorporated and existing under the Companies Act... (hereinafter referred to as “the MORTGAGOR”...) of the First Part STANGRO ENTERPRISES LIMITED a company also incorporated and existing ... (hereinafter referred to as “the BORROWER NUMBER ONE”...) of the Second Part NEW MONTROSE APARTMENT HOTEL LIMITED a company also incorporated and existing ... (hereinafter referred to as “the BORROWER NUMBER TWO”...) of the Third Part AND FIRSTCARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED a company incorporated in Barbados and registered in the State of Saint Vincent and the Grenadines as an external company and carrying on banking business ... (hereinafter referred to as “the BANK”...) ...’

[18] Clause 5 is the impugned provision. It states:

‘The MORTGAGOR and the BORROWERS hereby charge with the payment and discharge of all moneys and liabilities intended to be hereby secured (including any expenses and charges arising out of or in connection with the acts or matters referred to in Clause 10 hereof) all their undertakings goodwills and other property whatsoever and wheresoever both present and future including their respective uncalled capital (if any) for the time being. The charge hereby created shall be affixed first charge on the goodwill and assets of the MORTGAGOR and the BORROWERS and shall be a fixed first charge by way of legal Mortgage over the said hereditaments TO HAVE and TO HOLD the same UNOT and TO THE USE of the BANK For Ever subject to the proviso for the redemption hereinafter contained and as to all other assets hereby charged shall be a floating security but so that the MORTGAGOR is not to be at liberty to create any mortgage or charge upon and so that no lien shall in any case or in any manner arise on or affect any part of the said other assets either in priority to or paripassu with the charge hereby created it being the intention

that the MORTGAGOR and the BORROWERS shall have no power without the consent of the BANK to part with or dispose of any part of such other assets except by way of sale in the ordinary course of business. Any debentures, mortgages or charges hereafter made or given by the MORTGAGOR or the BORROWERS (otherwise than in favour of the BANK) shall be expressed to be subject to this Debenture. The MORTGAGOR and the BORROWERS will deposit with the BANK and the BANK during the continuance of this security shall be entitled to hold and retain all deeds and documents of title relating to the MORTGAGOR and the BORROWERS' property (and the insurance policies thereon) for the time being...'. (Emphasis added)

- [19] The claimants are adamant that throughout the negotiations with the bank and at the time they signed the mortgage debenture, it was their understanding that they were agreeing to grant a First Legal Mortgage over only three of their properties (the M&G Building and the Standard Grocery Building on Middle Street, Kingstown and the New Montrose Hotel). They insisted that they were not told by the bank or Mr. Williams that other properties were to be charged and they did not agree to offer any other properties as security for the loans.
- [20] They maintained that neither the bank nor Mr. Williams told them that the Mortgage Debenture charged all of the other properties and assets owned by Standard Grocery Ltd and any of the other entities that are party to the Mortgage Debenture. They stated that no other properties or assets were discussed or agreed to be security for the loan facility. They asserted that the directors felt that the bank's demand for the New Montrose Hotel to be added as security was far in excess of what was necessary to secure the loan and was unfair and unconscionable. Therefore they did not intend to and did not make any concessions to FCIB in that respect.
- [21] As far as they were concerned and aware, the only properties charged were the 3 listed in the Schedule to the Mortgage Debenture. They claimed that neither the bank nor Mr. Williams explained otherwise to them or explain any clause in the Mortgage Debenture. They averred that they relied completely on Mr. Williams' professional skill, competence and expertise to advise them legally of the consequences of the Mortgage Debenture and only in 2017 discovered that it was a

Mortgage Debenture over all the assets of Standard Grocery Ltd and not a first mortgage over the three referenced properties as agreed.

[22] The claimants indicated that in 2006 and 2007 the businesses did well financially and they were able to meet the financial obligations under the Mortgage Debenture. However, in 2008 the local economy was impacted by the crash of the US financial market (as did businesses and markets worldwide) and Standard Grocery's sales and profitability suffered. This affected its ability to service the loan which eventually fell into arrears.

[23] By letter dated March 6th 2017, Mr. Brain Glasgow as receiver appointed by FCIB³ over the assets and undertaking of Standard Grocery Ltd, wrote to the Directors of Standard Grocery Limited informing them of the arrears on the loan. He also advised that pursuant to the Mortgage Debenture the Receiver was appointed to assume the powers of the directors as they relate to the charged property and that the addressee directors would no longer be able to exercise those powers. Further, he advised that the security interest conferred by the Mortgage Debenture had become enforceable. In his capacity as Receiver, he took control of the companies and assets and has remained in control since then.

[24] The claimants averred that this was the first time that they were learning that the loan agreement was a Mortgage Debenture over all of Standard Grocery Ltd.'s assets and not a first mortgage. Soon after receiving that letter, Ms. Reddock went to Mr. Williams to seek clarification. According to her, he confirmed that the three properties in the Schedule were the only charged properties. Mr. Williams claimed that he told her at that time that the Mortgage Debenture charged all fixed and floating assets as stated in clause 5.

[25] By Claim Form and Statement of Claim filed on December 19th 2019, the claimants brought these proceedings. They filed an Amended Statement of Claim ('ASOC') on June 6th 2020 which was served on the defendants. They sought unspecified general damages and other remedies against

³On March 6th 2017.

each defendant. The bank and Phillips and Williams filed their respective Defences to the ASCO on July 13th 2020. In its counterclaim, the bank claimed payment of \$5,934,517.65, \$2,074,753.77 and \$1,344,466.12 as outstanding balances on the loan facilities granted to the claimants. The claimants denied liability. On July 31st 2020, the claimants filed their response to the second defendant's

Defence and on August 14th 2020 the filed a response to the banks Defence and Counterclaim.

Liability of BOSVG - Mistake, Breach of Fiduciary Duty, Undue Influence, Negligence and/or Misrepresentation

Mistake- BOSVG

[26] The claimants pleaded that there was no meeting of the minds as to the terms of the agreement regarding what properties were to be the subject of the loans; the facility letters and the Mortgage Debenture. They claimed that only three properties were offered and agreed by them as security for the loans; The the M&G Building, the New Montrose Apartment Hotel and the Stangro Building. They maintained in their pleadings and evidence that the other properties and assets described in the second and third FCIB facility letters dated 3rd August 2006 and in clause 5 of the Mortgage Debenture were not offered by them as security; or discussed in negotiations or agreed to be included in the agreement. Therefore, those facility letters and the Mortgage Debenture were void *ab initio* and should be rescinded.

[27] The bank submitted that the rule in **L'Estrange v Graucob**⁴ places at a premium on securing a signature to a contract. Where a contract is reduced to writing and signed, the party signing it will be bound by all the terms in it whether or not he has read them or appreciated their legal effect. It contended that the claimants admitted that their directors read 'the premises' which described the document as a Mortgage Debenture, even though they claimed they were more concerned with the amounts stated in it. The bank submitted further that the claimants have not alleged fraud or pleaded their case in such terms and they are therefore bound by the agreement. They cited **Peekay Intermark Ltd and another v Australia and New Zealand Banking Group Ltd**.⁵

⁴[1934] ALL ER 16.

⁵[2006] EWCA Civ 386.

DISCUSSION

[28] The law recognizes different types of mistakes. In certain circumstances, a mistake of fact or a mistake of law may entitle a party to a contract to vitiate it on the basis that it is a nullity, by reason of his mistaken belief as to the character of what he signed. As articulated by the learned authors of **Halsbury's Laws of England**:

'Mistakes may arise from ignorance, misconception, or forgetfulness. Generally speaking, in considering the consequences of mistake, no distinction is drawn by the law between these different sources.

Mistakes may be divided into:

- (1) those which prevent there being an effective consent to a particular transaction; and
- (2) those which consist in a failure to express correctly in a written document the intention of the parties with regard to a particular transaction.

Mistakes within head (1) above may be further subdivided according to whether they are mistakes as to law, or mistakes as to fact. Mistakes as to private rights historically were classed rather among instances of error in fact than among instances of error in law, even where there are no circumstances of circumvention or fraud. This distinction is now less important.

Mistakes of fact may be divided into:

- (a) mistakes as to the nature of the transaction;
- (b) mistakes as to the identity of the other party to the transaction; and
- (c) mistakes as to the subject matter or other terms of the transaction, which may be either as to the identity of, or as to some fact materially connected with, the subject matter of the transaction, or as to the terms of the transaction.⁶

[29] In relation to the bank, the claimants pleaded that the mistake arose even before they signed the facility letter or the mortgage debenture. This is the effect of their pleading that 'there was no meeting of the minds'⁷ as to which properties were being mortgaged and further they did not offer or agree that the properties mentioned in the second and third Facility Letters were to be the subject of

⁶Volume 77 (2021), para.6.

⁷At para.43(1) of the Amended Claim Form.

the mortgage agreement. The testimony of Claudette Reddock and Beverly Reddock were to similar effect.

[30] In light of the learning outlined above, the claimants are in essence asserting a mistake of fact although not expressly pleaded as such. Such a pleading is usually raised as the common law defence of *non est factum* 'it is not my deed', in response to a claim for breach of contract

[31] The plea of *non est factum* as advanced by the claimants conveys the notion that when the directors signed the impugned facility letters and Mortgage Debenture, they laboured under a mistake of fact regarding the nature of the transaction being undertaken. A successful plea of *non est factum* would render the agreement or promises in it void *ab initio* due to the absence of consent by the signatories to the obligations ostensibly created by the signature.

[32] It is now established that the plea of *non est factum* can be relied on only by someone of full age and capacity, and is often invoked by blind or illiterate persons. It is, however, open to persons without such physical limitations but in those cases will be kept within narrow limits. The general rule is that a person whose signature appears on a document is estopped from denying that it is his deed and that he agreed to be bound by it.⁸ The onus rests on the signatory who wishes to avoid the contract; and he has to prove that he acted with reasonable care. If he signed inadvertently, the plea would not assist him. He has to prove further that what he signed was substantially different from what he thought he signed: **Saunders v Anglia Building Society**⁹.

[33] The authors of **Halsbury's Laws of England** make the observation that:-

'The plea of *non est factum* is normally made where a third party is involved: either a third party fraudulently induces one contracting party to sign a contract, the other contracting party being unaware of the fraud; or the other contracting party fraudulently induces the signature on a document relied on by a third party. Where no third party is involved, it has

⁸Lady Naas v Westminster Bank Ltd [1940] AC 366, HL.

⁹[1971] AC 1004.

been said that, instead of pleading non est factum, it may be preferable to proceed on some other ground [**Lloyds Bank plc v Waterhouse** [1993] 2 FLR 97].¹⁰

[34] The claimants admitted that their directors Claudette Reddock and Ronald Reddock signed the facility letters. They were produced by the banks' witness Ms. Roxanne Roach. Beverly Reddock testified that before the execution of the facility letters she and Claudette discussed with the bank the terms of the loan that the claimants were seeking.

[35] Curiously, although the claimants alleged mistake in their pleadings in relation to the facility letter, they made no averments in their witness statements or examination in chief regarding the circumstances under which it was signed. Those details were elicited only during the cross-examination of Claudette Reddock. She indicated that she first saw the facility letters at Mr. John's office at the bank and he brought them to their (the claimants') office at New Montrose about two to three weeks later. She stated that during the intervening period, she discussed with the other directors the contents of the facility letters, including the amounts and the security set out in them. During that time she did not seek clarification from Mr. John in relation to the contents of the facility letters. She claimed that she did not read the facility letters in their entirety. She averred that she and Ronald Reddock were the directors who signed the facility letter on behalf of the company. The facility letters contain Ronald Reddock's signature and I accept that he signed them.

[36] Ms. Reddock testified that she understood the purpose of signing the facility letters. She explained that it was to agree that the bank was giving the claimants a loan facility and the terms of the facility agreed upon. She said that she did not understand that the terms in the facility letters would be included in the legal documents for the loan and security.

[37] No evidence was presented by the claimants' regarding the state of mind of the other signatory (Ronald Reddock) regarding his knowledge of the contents and import of the facility letters. It would have been proper for his account to be placed on the record. However, it is evident from Ms.

¹⁰Vol. 22 (2019) para. 85.

Reddock's account if it is to be believed, that she was careless about familiarizing herself about the legal implications of the facility letter although she had ample opportunity (as did the other directors) to seek legal or other advice within the 2 to 3 weeks that intervened before they were executed. For what it is worth, the claimants' evidence is that Ms. Claudette Reddock did not read them.

[38] Apart from Ms. Reddock's assertion that she spoke with accountant Mr. Reuben John about the loans, there is no evidence as to what action if any, she or the other directors took to gain an understanding of the legal consequences to which they were exposing the claimants by negotiating and formalizing the disputed loans. Indeed, they led no evidence that they sought clarification prior to 2017 of any concerns, misgivings or misunderstanding that they may have had about the documents.

[39] The legal position is that the presence of the directors' signatures on it creates an estoppel against their refutation that they were not aware of the contents of the facility letters and in particular, regarding the properties. Further, that by signing, they agreed with the offer terms that the properties and assets of the signatories would be the subject of a mortgage debenture. I reject their contrary assertions on that issue. I am satisfied that they were not mistaken about the nature and content of the facility letters and are therefore bound by the terms and conditions in them. Their assertions that the bank is liable to them for a mistake of fact in relation to their execution of the facility letter is not made out. I find that they knew what they were signing or at the very least had the opportunity to satisfy themselves and were careless in not making inquiries. It is unnecessary for me to address mistake of law since it was not pleaded.

BOSVG - Negligence and Breach of Fiduciary Duty

[40] In relation to the allegations of negligence, the claimants charged that the bank owed them a duty at common law to exercise the care, skill and diligence to be expected of reasonably competent bankers in the performance of their obligations; to ensure compliance with the terms and conditions of the mortgage and to take all necessary steps to protect the claimants' position as its proposed mortgagors. The claimants pleaded the following particulars as constituting negligence:

(i) The First Defendant, in a letter dated 11th September 2000, falsely instructed the Second Defendant to “prepare the conveyance from the Liquidator to Standard Grocery Ltd. along with the Mortgage Debenture in the bank’s favour over the fixed and floating assets of the said company.”

(ii) They failed to adequately explain to the Claimants that they were signing a Mortgage Debenture, and not a first legal mortgage, and the legal implications of a Mortgage Debenture.

(iii) The First Defendant misrepresented to the Second Defendant that the three properties listed in the Schedule (New Montrose Hotel building the M&G Building and the Standard Grocery Building) and all other properties and assets referenced in Clause 5 of the Mortgage Debenture were Security for the loans.

(iv) The Defendant failed to inform the Claimants that the Second Defendant represented the Bank in the transaction, which might reasonably have a bearing on the Claimants interest, and to seek independent advice.

(v) The First Defendant failed to exercise skill and diligence to be expected of reasonably competent bankers in the performance of their obligations to a customer.’¹¹

[41] As to breach of fiduciary duty, the claimants asserted that the bank owed them a duty to act in good faith; to not place themselves in a position where their own interests or the interests of others might conflict with those of the claimants’; to act at all times in the best interests of the claimants and to not prefer their interests or that of any other party over the claimants’ or to their detriment; and in the event of conflict of interests between the bank and the claimants’ or their benefits to advise the claimants of such conflict.

[42] The claimants pleaded that in breach of its fiduciary duty to them, the bank failed to inform them that Phillips and Williams was their legal representative in the transaction and that they should get independent legal advice; knowingly and intentionally preferred its interests over the

¹¹Paragraph 43(i) through (v) under the rubric ‘Particulars of Negligence’.

claimants';deliberately conceal the true nature of the transaction from them by failing to explain the true nature and implication of the Mortgage Debenture. They are therefore entitled to rescission of the contract.

Claimants' submissions

[43] The claimants made no submissions on the issues of breach of fiduciary duty or negligence. They, however, made a general submission as to the state of the evidence. In this regard, they contended that it is disheartening that the bank did not allow its employees Mr. John or Mr. Crichton to testify. They invited the Court to draw adverse inferences on the ground that there were certain matters that were exclusively within the knowledge of those employees. Citing **Herrington v British Railways Board**¹², the claimants commended the Court's ruling that while a failure to call certain witnesses is a legitimate tactical move:

' ... a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold'.

They argued that the bank did not tender those witnesses because it was fearful that their testimony would have been far more favourable to the claimants and asked that this court makes such a finding.

They also relied on **Donovan Crawford and Others v Financial Institutions Ltd**¹³.

[44] In relation to that submission, I am mindful that the banking business formerly owned by FCIB has been transferred to BOSVG. No evidence was led as to whether Mr. John or Mr. Crichton was absorbed by BOSVG as part of its staff or whether they migrated, changed jobs or were unwilling to testify or unavailable for some other reason. In light of those more favourable inferences that are open to the court, I draw no adverse inference from Mr. John's or Mr. Crichton's absence as witnesses.

BOSVG submissions

¹²[1972] AC 877.

¹³[2005] UKPC 40.

[45] BOSVG contended that no fiduciary duty arises in the ordinary course of banking. It submitted that it did not provide advice to the claimants and this was admitted by Ms. Beverly Reddock in cross-examination when she acknowledged that Mr. Elroy John was the bank's representative with whom the claimants dealt for purposes of securing the impugned loans and they did not seek guidance from him in relation to the transaction. BOSVG reasoned that being astute businesspersons the claimants' directors sought a loan from the bank and did what they considered necessary in the exercise of their duties as directors. Further, the facility letters signed by the directors refer to a mortgage debenture over the claimants' fixed and floating assets to secure the loans. The directors did not rely on advice from the bank when executing the facility letters or question FCIB about the term 'mortgage debenture' in it and thereafter executed the mortgage debenture without inquiry or complaint. Accordingly, no fiduciary relationship existed between the bank and the claimants, no duty was breached and no damage could result therefrom.

[46] As to the allegations of negligence, BOSVG contended that FCIB had no such duty towards the claimants that was breached. Relying on **Caparo Industries Plc v Dickam**¹⁴, BOSVG submitted that a three-step test must be satisfied to establish negligence: existence of a duty, breach of the same and resultant damage. BOSVG pointed to the claimants' evidence that they understood the terms of the facility letters, that the directors discussed it among themselves before it was signed, they did not rely on the bank to give them advice and further even if a relevant duty of care existed, there was no breach.

DISCUSSION

[47] As to whether a banker owes a fiduciary duty to its customer, the learning is summarized by the learned authors of **Halsbury's Laws of England** as follows:

'The banker owes his customer a contractual duty of secrecy. The relation of banker and customer may also give rise to a contractual or tortious duty of care or a fiduciary duty where the banker gives his customer advice;' but where the parties are in a contractual

¹⁴[1990] 2 A.C. 605, HL.

relationship, it is not to the advantage of the law's development to search for liability in tort, particularly in a commercial relationship.¹⁵

The authors explained:

'Where it is within the scope of a bank's business to advise on financial affairs, it owes a customer to whom it offers such advice or assistance a contractual duty to exercise reasonable skill and care; If the customer is advised in a matter in which the bank has conflicting interests, the conflict should be fully disclosed.'¹⁶

[48] The Court of Appeal pronounced on this principle in **Chemical Manufacturing and Investment Company Limited and Another v First Caribbean International Bank (Barbados) Limited**.

Webster JA made the point that the learned trial judge was correct to rule that a bank by lending to customers does not, without more, thereby owe a duty to advise such customer or assume responsibility for their property or affairs or to take care of their interests. He set out the judge's conclusion and adopted the learning, which he then applied to the facts in the case under appeal:

[59] "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."

[60] I agree with and adopt the trial judge's conclusion. The facts of this case disclose an uncomplicated relationship of banker and customer with the customer incurring charges on its credit card without making any arrangements to settle the charges. There is nothing in the facts that casts any fiduciary obligation on the Bank to look after the appellants' interests.¹⁷

[49] In the case at bar, the claimants attempt to confer on the bank a fiduciary duty and a duty at common law to advise them regarding the transaction that they entered into for the impugned

¹⁵Vol. 48 (2021), at para. 116.

¹⁶*Ibid.*, at para. 223.

¹⁷SLUHCM2021/0003, at paras. 59-60.

loans, by protecting the claimants' interest among other things. The law is settled that these are not duties that a banker owes its customers at common law in the normal course of business. The bank's instructions to Phillips and Williams are no different in substance from the contents of the facility letters that the claimants executed and thereby signified their acceptance of the offer and agreement and offered no demurrer. They were duty bound to advise themselves of what they were agreeing to and if necessary to seek independent legal advice without prompting from the bank. They chose not to do so. The bank cannot be held responsible for this breach of their obligations as directors.

[50] In any event, the issuance of the instructions to prepared a Mortgage Debenture cannot in the circumstances of this case place a fiduciary duty on the bank. I find that in the case at bar, the bank had no fiduciary duty to the claimants to advise them and guide them in relation to the facility letters or the mortgage debenture.

[51] Regarding negligence, the Court of Appeal in **Clement Lawrence and Cleopatra Ballantyne v First St. Vincent Bank Ltd** set out the three-part test for determining whether a duty of care exists in negligence. As reflected in the headnote:

'The test to determine whether a duty of care exists in negligence is a three-way test. There must be (i) reasonable foreseeability of damage; (ii) a relationship characterised by proximity or neighbourhood between the wrongdoer and the person damaged; and (iii) that the law would consider it fair, just and reasonable to impose a duty of care.

Karak Rubber Company Limited v Burden and Others (No. 2) [1972] 1 All ER 1210 applied; **National Commercial Bank (Jamaica) Limited v Hew and Others** [2003] UKPC 51 applied; **Donoghue v Stevenson** [1932] AC 562 considered; **Caparo Industries Plc v Dickman and Others** [1990] 2 AC 605 applied.¹⁸

¹⁸SVGHCVAP2014/0016.

[52] Applying that test to the circumstances of this case, I am mindful of the evidence before the court. For example, Ms. Beverly Reddock testified that she is Managing Director of the claimants and has held that post for some 20 years. She averred that she oversees the operations of the businesses, receives reports and makes decisions collectively with the others as to how the businesses operate. Her duties include day-to-day management of the company. I consider that although the bank and the claimants were in a contractual relationship as between intended mortgagor and intended mortgagee, this was not reason to foresee that the claimants would have suffered damage of the kind they now allege has befallen them.

[53] Moreover, the claimants' directors being businesspersons of some years of experience would reasonably have been expected to be alive to the consequences of a default in servicing their mortgage obligations and would have reasonably been expected to conduct their own due diligence as to any potential obligations and consequences for default. Moreover, their evidence is that they neither sought nor obtained advice from the bank on those matters.

[54] I am satisfied that the transaction in this case imposed no duty at common law or otherwise on the bank to advise the claimants on the legal implications of the facility letters, mortgage debenture or any other aspect of the transaction or even to advise them to seek independent legal advice. Neither the pleadings nor the evidence support the claimants' assertions of the existence of the alleged fiduciary duties or other common duty on which to ground a claim in negligence against BOSVG. I therefore make no finding that a duty of care flowed from the bank towards them to take reasonable care of their interests in the properties which were the subject of the mortgage debenture. The claimants have not established a *prima facie* case of negligence. Their claim against BOSVG in negligence is dismissed.

BOSVG – Undue Influence and Misrepresentation

[55] The claimants alleged further that the bank exerted undue influence on them to get them to agree to secure the loan from it. They claimed that there was a relationship of trust and confidence between them as banker and customer. They contended that this relationship was characterized by unequal bargaining power, the bank being the dominant party, in whom the claimants reposed trust and

confidence, and which was exploited by the bank without ensuring that they obtained independent legal advice.

- [56] The claimants alleged that they were not exercising their own independent will and judgment with a full appreciation of the nature and effect of the transaction because they put their complete trust and confidence in the bank to explain to them the implications of the terms of the agreement, the consequences of a Mortgage Debenture and what properties were to be security for the loans. They pleaded that the bank actually did and is presumed to have exerted influence over them.
- [57] They claimed further that they never agreed to offer any other security beyond the three properties mentioned in the Schedule of the Mortgage Debenture and it is inconceivable that anyone would agree to offer all of their properties wherever situated, present and future. They asserted further that the Mortgage Deed No. 4529 of 2006 was never agreed or intended by them to be a mortgage debenture.
- [58] They pleaded and testified that in their first proposal to the bank they offered only two properties as surety for the loan – the M&G Building and the Stangro Building which they felt was adequate security, however, the bank demanded and unduly influenced them to add the New Montrose Apartment Hotel as security. The allegations of misrepresentation against the bank are particularized under the Rubric 'Particular of Negligence: First Defendant' and have already been rehearsed.
- [59] The bank denied exercising undue influence over the claimants, instead asserting, that they acted of their own free will and were not influenced in any way by the bank. It countered that they agreed to the terms of the loan as set out in the second facility letter in which the terms of the loan including the security were outlined. Further, the claimants have not denied that they signed these second facility letters or challenged the terms in them and from 2006, did not question the Mortgage Debenture. The bank asserted that the claimants approached the bank for the loans and readily and voluntarily agreed to the terms and conditions under which the loans were being offered by the bank. Furthermore, the claimants have affirmed the Mortgage Debenture by making payments

under it and after default,(based on advice from their independent accountant)by making an offer to the bank's receiver to purchase properties described in the Schedule to the Mortgage Debenture and referred to in clause 5.

[60] In their Reply to the bank's Defence, the claimants denied affirming the Mortgage Debenture. They asserted that they mistakenly made payments on the loans although the loan agreement was *void ab initio* for the mistake; and secondly,'as per the terms of the ConditionsPrecedent in the second facility letter'the agreement never took effect because the terms of the conditions precedent were not fulfilled. They contended that the offer to purchase some of the properties was not confirmationof the Mortgage Debenture but merely in response to their accountant Mr. Peter Alexander's advice to try and avoid the sale of the properties.

[61] The claimants led no evidence in support of their claim that they were unduly influenced by the bank. In fact, they maintained that in their dealings with the bank they were adamant that they would not be acceding to the bank's request that the New Montrose Hotel be added as a security for the loan. Ms. Beverly Reddock averred that 'the directors felt that FCIB demands for the New Montrose Hotel to be added as security for the loan was far more than the security necessary to secure the loan and that it was unfair and unconscionable. Therefore, we were not going to make, nor did we, make further concessions to FCIB for the loan. No further security was ever discussed or agreed. The valuation of all three properties offered by the Claimants totaled(sic) \$9,600,000.00, which is far in excess of the amount of the loans and the operating lines of credit totaling \$5,955,000.00'¹⁹.

[62] Her sister Claudette Reddock made the identical assertion in her witness statement.²⁰ This suggests that not only were they challenging the fact and effect of the Mortgage Debenture, they were refuting that that item in the Facility Letter was negotiated and agreed, even though by signing they accepted that it was.

¹⁹Para. 16 of Beverly Reddock's witness statement filed on 30th December 2020.

²⁰ At paragraph 17 of her witness statement filed on 3rd February 2021.

Claimants' Submissions

[63] On the issue of misrepresentation, the claimants' submissions were brief. They submitted that the two types of misrepresentation are fraudulent and non-fraudulent. Further that in fraudulent misrepresentation, fraud is in the execution and in the inducement. Within nonfraudulent misrepresentation are negligent misrepresentation and innocent misrepresentation. They concluded that the bank's misrepresentation was clearly fraudulent and this renders the contract void.

[64] With respect to the undue influence claim, the claimants submitted that the bank exerted undue influence over them by inducing them to offer the New Montrose Apartment Hotel as additional security for the loan, as evinced (sic) in the second proposal when the M&G Building and the Middle Street Building were more than adequate security for the loan.

BOSVG's Submissions

[65] The bank submitted that neither Claudette Reddock nor Beverly Reddock supplied evidence that the bank exerted any pressure on them to enter into the loan agreement or to sign the mortgage debenture but rather testified that they entered into the agreement voluntarily after holding meetings with the claimants' other directors. There was accordingly no pressure exerted on them by the bank's lawyers to sign the mortgage debenture. Citing **Eustace Gordon v Antigua Investment Bank**²¹, it contended that this is not a situation in which presumed undue influence can be relied on.

[66] In relation to the allegation of misrepresentation, the bank denied inducing the claimants to enter into an agreement. It argued that no evidence has come from the claimants that the bank's agents told them that only the properties in the Schedule to the Mortgage Debenture would stand as security for the loan; and as a result they executed the facility letters or the Mortgage Debenture. The bank also denied making any negligent misrepresentation.

DISCUSSION

²¹ ANUHCv1995/062 and ANUHCv1996/0089

Undue Influence

[67] The law recognizes two types of undue influence - actual and presumed. The presumed category encompasses two distinct classes – 2a and 2b. Sir Vincent Floissac CJ articulated the concept of undue influence in **Murray v Deubery and Another** as follows:

‘The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another party (the complainant) to enter into the transaction. According to the doctrine, if the transaction is the product of undue influence and was not the voluntary and spontaneous act of the complainant exercising his own independent will and judgment with full appreciation of the nature and effect of the transaction, the transaction is avoidable at the option of the complainant. This means that the complainant may elect to have the transaction rescinded if he has not in the meantime lost his right of rescission.

The modern tendency is to classify undue influence under two heads, namely class 1 (actual undue influence) and class 2 (presumed undue influence). Class 2 is further classified under two sub-heads. The first sub head is class 2(A) which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitor and client, medical adviser and patient, parent and child and clergyman (or religious adviser) and parishioner (or disciple). The second sub-head is class 2(B) which is descriptive of the legal presumption which arises from a relationship whereunder the complainant generally reposed trust and confidence in a dominant party.’²² (Emphasis added)

[68] It is a question of fact whether undue influence was the determining factor in bringing about the impugned transaction. Among other things, the Court will examine the relationship between the parties to the transaction, the nature of the transaction and the alleged undue influence, the parties’ personalities and the circumstances surrounding which the transaction was crystallized, to assess the extent to which it cannot be accounted for by the ordinary motives of the persons in the relationship. A contract that has been brought about through undue influence is liable to be set aside.

²² (1996) 52 WIR 147 at p. 151.

[69] In the second category of cases (presumed undue influence) what must be established is that the nature of the relationship between the parties immediately before the impugned contract was formalized, was such that it gives rise to the presumption of undue influence, without the need to prove actual undue influence. In **Barclays Bank Plc v O'Brien and Another** it was described thus:

'In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. ...once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:

Class 2A. Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

Class 2B. Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.²³
(Emphasis added)

[70] The authors of **Halsbury's Laws of England** provide useful guidance as to what constitutes actual and presumed undue influence. In relation to actual undue influence they state:

'Actual undue influence does not depend upon a pre-existing relationship between the two parties though it is most commonly associated with and derived from such a relationship.

²³[1993] 4 All ER 417 at pg. 423, per Lord Browne-Wilkinson.

The party who alleges actual undue influence must prove affirmatively that he entered into the impugned transaction not of his own will but as a result of actual undue influence exerted against him. He must show that the other party to the transaction, or someone who induced the transaction for his own benefit, had the capacity to influence the complainant; that the influence was exercised; that its exercise was undue; and that its exercise brought about the transaction. It is not necessary, however, to show domination.²⁴

[71] As to presumed undue influence, they write:

'Presumed undue influence arises out of a relationship between two persons where one person has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. In these cases the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The typical case is where one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. The principle is not confined to cases of abuse of trust and confidence; other expressions used in an endeavour to encapsulate the essence include reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other, but none of these descriptions is perfect. ...

It should be added that although legitimate commercial pressure brought by a creditor, coupled with proper feelings of family loyalty and a laudable desire to help a husband or son in financial difficulty, may be difficult to resist, it has been said that such pressure will not constitute undue influence unless the wrongdoer's importunity has left the complainant with no will of her own. [Royal Bank of Scotland v Etridge (No 2) [1998] 4 All ER 705 at 712–713, CA, [1998] 3 FCR 675 at 684, CA, per Stuart-Smith LJ, giving the judgment of the court.] ...

The presumption does not arise from the normal relationship of banker and customer, [Lloyds Bank Ltd v Bundy [1975] QB 326, [1974] 3 All ER 757, CA; National Westminster Bank plc v Morgan [1985] AC 686] ...²⁵

²⁴Vol. 47 (2021) para. 19.

²⁵Vol 47 (2021) para. 20.

- [72] Applying those principles to the instant case, on examination of the pleadings, the claimants have by the particulars, articulated a case of presumed undue influence of the category 2B kind. It is not clear from the pleadings or the evidence which of the bank's agents it is alleged exerted this undue influence. The Reddock sisters indicated that they were holding discussions with Mr. Elroy John and the bank's Manager Mr. Earl Crichton at the bank, but mainly with Mr. John.
- [73] Beverly Reddock testified that Mr. John and she were both members of the Lions Club and she was therefore well-acquainted with him. Her testimony is that he encouraged her to have the claimants consider purchasing the M&G building. Both she and Claudette indicated that the deal for purchasing the M&G building with a loan from FCIB materialized after the claimants had approached the RBTT bank and were turned down. Undeterred, they went over to FCIB who facilitated the purchase by granting the claimants a loan for the downpayment on the M&G Building. They pursued the purchase even when the bank required that they essentially bring over from RBTT all of their banking business including loans they already had with RBTT. These matters were discussed with the other directors of the claimant companies and they agreed to proceed.
- [74] Beverly Reddock testified that she had been a businessperson for several years even before her father died and assumed the role of Managing Director after he passed. She and Claudette stated that they had obtained mortgages previously but insisted that they had not dealt with a mortgage debenture and did not know what it signified or entailed. Other than indicating that Roger/Ronald Reddock signed the facility letters and that discussions were held among the directors, they led no evidence regarding the roles played by the other directors, either before or after the Mortgage Debenture was formalized.
- [75] The claimants did not suggest in their pleadings that the relationship between the claimants and the bank was such that the claimants did not willingly enter into the agreement evidenced by the facility letters or the Mortgage Debenture. In fact, the Reddock sisters averred that they entered into the transaction voluntarily. They denied that pressure was brought to bear on them by Mr. John with respect of the execution of the facility letters.

[76] To my mind, there is nothing in the pleaded case or evidence from which to objectively, reasonably or justifiably conclude or infer that the bank's servants or agents exploited the claimants' directors by pressuring them into entering into the transaction and/or inducing them to offer New Montrose Hotel and other assets as an additional security. It strikes me as a commercial business transaction gone wrong, due in large measure to the downturn in the local and international economies. But for that, it appears there would have been no dispute between the parties. I find therefore that there was no actual or presumed undue influence from the bank, its servants or agent that was operating on the claimants when their directors executed the impugned facility letters.

Misrepresentation

[77] In contract law, misrepresentation at common law (otherwise referred to as 'deceit' or 'fraud') is established if the claimant (representee) proves that the defendant (representor) made a false representation to him (representee) and did so knowingly, without belief in its truth, or recklessly (i.e. being careless as to whether it is true or not)²⁶. It must be proved that the misrepresentation was made with the objective of inducing the representee to act on it, to his detriment. Misrepresentation may be communicated by words, in writing or through the representor's conduct.

[78] Fraudulent misrepresentation may be either actual or constructive. It has been said that 'constructive fraud' involves the exertion by the perpetrator of 'unconscientious use of power', 'victimisation', the 'active extortion of a benefit' or 'the passive acceptance of a benefit in unconscionable circumstances.'²⁷ The learning from **Halsbury's Laws of England** is that in proceedings for deceit the representee has the onus of alleging and (unless expressly or impliedly admitted before or at the trial) proving that:

'the alleged representation consisted of something said, written or done which amounts in law to a representation; the defendant was the representor; the claimant was the

²⁶ Derry v Peek (1889) 14 App Cas. 337; at pg. 374.

²⁷ Hart v O'Connor [1985] 2 All ER 880.

representee;the representation was false;materiality and inducement;alteration of position;
[and if fraud is alleged] fraud; and damage.’²⁸

[79] Further, on the matter of inducement, the authors make clear that:

‘No misrepresentation, however gross or fraudulent, draws with it any civil consequences unless it was material and was intended to, and did, influence the mind of the representee so as to affect their conduct. Inducement in fact and materiality are distinct and separate matters, and in any form of proceedings for misrepresentation it is necessary to establish both. A court may infer inducement from materiality, although such an inference is rebuttable.

Actual inducement must be shown, irrespective of materiality. In other words, however probable it may have been in any case that the misrepresentation alleged would influence a normal person to take just the steps which the representee did, yet, if in fact they were not so influenced, they have no cause of action.’²⁹ (Emphasis added)

[80] In addition, they opine that:

‘A representation is material when its tendency, or its natural and probable result, is to induce the representee to act on the faith of it in the kind of way in which the representee is proved to have in fact acted.’³⁰

They added in a footnote that ‘Materiality’ is a distinct thing from inducement. Each is a question of fact, if there is any evidence at all, and each must be separately proved, although in certain cases inducement may be inferred, as a fact, from manifest materiality.’

[81] In essence, the claimants’ contention on the matter of misrepresentation is that the bank misled them regarding the nature of the transaction they were entering, by leading them to believe that they were concluding a first legal mortgage when in actuality the transaction was a Mortgage

²⁸Vol. 76 (2024) 789.

²⁹Vol. 76 (2024) 764.

³⁰Vol. 76 (2024) para. 767.

Debenture. They alluded to fraud in their written submissions. However, fraud must be expressly pleaded and it was not.

[82] Notwithstanding, to the extent that the claimants rely on their averments to establish fraudulent misrepresentation, I consider it appropriate to consider those allegations. This cause of action is said to arise in relation to the bank. An evaluation of the text of the impugned facility letter is critical. The facility letters were produced by Ms. Roxanne Roach as part of 'ex. RR1'. It is necessary to set out the text for ease of reference.

[83] The last page of the facility letter contains the directors' signatures on behalf of Stangro Enterprises Ltd. The date appearing at the top of the first page is 2nd August 2006. The material parts state:

'Dear Sirs,

We First Caribbean International Bank Limited ("the Bank"), are pleased to establish the following Credit(s) to you, our customer,

Credit A: Operating Line

Credit Limit: East Caribbean \$500,000.00 (Five hundred thousand dollars)

Description and Rate: A revolving demand credit, for general business purposes, having the following parts:

East Caribbean dollar overdrafts. The Interest Rate is as follows: Prime Rate per year.

Credit B: Demand Instalment Loan

Loan Amount: East Caribbean \$4,000,000.00 (Four million dollars)

Purpose: To assist with the purchase of a commercial property on Middle Street Kingstown owned by M&G Enterprises Ltd, facilitate the cost of improvements to the property, repay loan at RBTT Bank Caribbean Ltd, settle the associated legal fees and assist with inventory purchase.

Interest Rate: Prime Rate per year.

Scheduled Payments: Unless we make demand, you will pay the Bank as follows:

There will be a moratorium on principal payments for a period of six months. Thereafter, the loan will be repayable in 180 regular blended monthly payments of \$42, 984.21.00 each. The first regular monthly payment will be due on expiration of the 6 months moratorium on principal payments, that is 6 months after the initial disbursement of this loan. The last payment, plus any outstanding principal and interest together with any other amount due under this Agreement, will be due 180 months after the expiration of the moratorium period.

Credit C: Demand Instalment Loan

Loan Amount: East Caribbean \$950,000.00 (Nine hundred and fifty thousand dollars)

...

Security

The following security is required:

Guarantee and Postponement of Claim: Grocery Limited in the sum of \$5,450,00 supported by a mortgage debenture over the fixed and floating assets of the company incorporating a first legal mortgage over commercial properties at Middle street and Melville & Middle streets registered and stamped to cover advances of EC\$2,961,000.00 (Middle street EC\$0.95m and middle & Melville Streets EC\$2.011m) plus acknowledged assignment of fire and all other risks/perils insurance, with loss payable to the Bank as 1st mortgagee

Guarantee and Postponement of Claim: Apartment Hotel Limited in the sum of \$5,450,00 supported by a mortgage debenture over the fixed and floating assets of the company incorporating a first legal mortgage over hotel's property at New Montrose, registered and stamped to cover advances of EC\$2,994,000.00 This security is being held to simultaneously secure the facilities of Stangro Enterprises Ltd EC\$2.489m and New Montrose Apartment Hotel Ltd EC\$0.505m plus acknowledged assignment of fire and all other risks/perils insurance, with loss payable to the Bank as 1st mortgagee

Postponement of Claim: Postponement of claim from the Directors Ada Reddock, Beverly Reddock, WildaReddock, Claudette Reddock-Lewis, Ruth Reddock-Knights, Ezra Reddock, Roger Reddock and Ronald Reddock in the sum of \$611,918.00

Conditions Precedent

Your formal undertaking to dispose of the Middle Street property, within a period not exceeding 12 months, to liquidate Credit C above. Meanwhile, you will effect monthly interest payments to the said loan until liquidation.

Conditions

- (i) A list of prospective tenants together with an assignment of rental income.
- (ii) A letter of undertaking from the New Montrose Apartment Hotel Ltd to cover any shortfall in loan payments should Stangro Enterprises Ltd be unable to do so.
- (iii) Drawdown on the EC\$380,000.00 portion of the facility for improvements to the building to be made against Quantity surveyor's certificates / invoices / estimates. Cost overruns, if any, are to be borne by yourselves.

Covenants

...

Reporting Requirements

...

Fees

...

Other Provisions

Default Interest Rate: The rate for that credit plus 10% per year. ...

Current Prime Rate: The current Prime Rate at date of this agreement is: 10%. ...

Please indicate your acceptance of these terms by returning a signed copy of this Agreement. If we do not receive a signed copy by 31st August, 2006, then this offer will expire.

Yours truly

FirstCaribbean International Bank (Barbado) Limited

By: Elroy R. John

Title: Corporate Relationship Manager

....

Acknowledgment: The undersigned certifies that all information provided to the Bank is true, and acknowledges receipt of a copy of this Agreement (including any Schedules referred to above)

Accepted this 31³¹ [handwritten] day of August, 2006

Customer name: Stangro Enterprises Ltd

By: _____

³¹ The date '31' and month 'August' and year '2006' appear to be handwritten.

[Signatures]³² (Emphasis added)

- [84] In the face of the Facility Letter, the court has to decide whether there is credible evidence that the banks' servants or agents misrepresented to the claimants a state of affairs which is materially different to what the claimants' directors acknowledged by their signatures to be the representations made by the bank. I take into consideration Claudette and Beverly Reddock's testimony that before the facility letters were signed signifying the claimant's acceptance of the offer, the directors discussed them and by implication, the contents.
- [85] I do not believe Claudette Reddock's averments that she did not read the facility letter. She did not claim to be illiterate and she demonstrated during the trial that she could read. She reasonably would have been expected to at least read the facility letters before signing them, even if, and especially if she thought that they were just securing a 1st legal mortgage on the properties. Moreover, her averment that she just read the amounts does not make sense because the amounts appear in different sections of the letter. She therefore would have had to at the very least peruse other parts of the facility letters to isolate the amounts. It is not feasible that her eyes selectively honed in on just those parts that she wishes the court to believe she selected to read.
- [86] It seems to me that her insistence that she did not read the facility letters is an attempt by her to avoid having to respond to questions about the contents, especially since it clearly stipulates the terms and conditions on which the credit facilities were being offered. I therefore reject the claimants', Claudette Reddock's and Beverly Reddock's contentions that Mr. John and/or Mr. Crichton innocently, negligently or fraudulently misrepresented to them that the bank required as security for the loans, a legal first mortgage over the three properties in the Schedule, when in fact the facility letters make this abundantly clear and was signed and accepted by the claimants. Further, the mortgage debenture over all fixed and floating assets of the respective companies merely crystallized the agreements captured in the signed facility letters long before the Mortgage

³² Two signatures, the second of which reads 'Ronald Reddock' are inscribed below the blank line.

Debenture was executed and registered. I therefore dismiss the claimant's claim against the bank for misrepresentation, whether innocent, negligent or fraudulent.

Phillips and Williams - Mistake

[87] The claimants did not allege either expressly or implicitly that any mistake of fact or mistake of law is attributable to Phillips and Williams' conduct. However, among the reliefs claimed is 'Damages for professional negligence, breach of fiduciary duty, mistake, non-disclosure, undue influence, and misrepresentation to be quantified.'³³ To the extent therefore that the claimants rely on this prayer as a basis to recover damages from Phillips and Williams for mistake of fact or law, it has to be addressed.

[88] The claimant's ASOC contains no allegations that are referable to a mistake in fact or in law by Phillips and Williams. In their Reply³⁴ to Phillips and Williams' Defence³⁵, the claimants' set out allegations on which they rely to establish mistake in relation to Phillips and Williams. They pleaded:

'15. ... the Claimants' assertions at paragraph 20 of the Amended Statement of Claim that the Second Defendant did not inform the Claimants that the Mortgage Debenture gave FCIB charge over other properties and assets owned by Standard Grocery Ltd refers to the period before May 2017. ...

19. ... reference is made to paragraph 15 above, with respect to the nature and details of the conversation between the Second Defendant/Douglas Williams and Ms Beverly Reddock in October 2006 when she went to sign the agreement in his office. In May 2017 ... The Second Defendant did not say that the security for the loan extended beyond the three properties listed in the schedule, including the First Claimant's assets.

25. Paragraph 35 of the Defence is denied. The Claimants do have a cause of action against the Second Defendant for negligence, mistake, ...

³³Sub-paragraph (iii) (sic) of the reliefs sought.

³⁴Filed on 31st July 2020.

³⁵Filed on 13th July 2020.

32. As to paragraph 42 of the Defence, the Claimants have suffered loss and damages as a result of the ... Second Defendants (sic) mistakes, negligence ...

37. Second, it is only in 2017 that the Claimants discovered the mistake and misrepresentation, which was within six years before the commencement of this action. Moreover, the Claimants could not through the exercise of reasonable diligence have discovered and had not the means of identifying the mistake and misrepresentation of the Second Defendant until within six years ...

42. The Claimants assert that the Second Defendant is liable for ... mistake, ... causing the Claimants to suffer loss and damages. The Claimants reasserts that the Mortgage Debenture is void ab initio. The agreement is void because there never was any meeting of the minds concerning the securities that were agreed. ...³⁶

[89] Deconstructing these pleadings reveals that paragraph 15 of the Reply is a response to paragraph 17 of Phillips and Williams' Defence. In it, they set out their defence to the claims made in paragraph 20 of the ASOC. It is instructive to set them out in sequence. The Claimants pleaded at paragraphs 19 and 20 of the ASOC:

'19. It was the directors (sic) understanding, throughout their discussions with the First Defendant and at the time of signing the conveyance in the Offices of their Lawyer Mr. Douglas Williams, that it was a First Mortgage on the three properties offered as Security in the transaction as stated in the Schedule of Deed of Conveyance No. 4529/2006. ... The Claimants were not advised otherwise by the Second Defendant of the First Defendant. The fact that the First Defendant only requested valuation reports for the M&G building, the Standard Grocery building and the New Montrose Hotel building confirmed in the minds of the directors that those were the only three properties that were security/collateral for the loan. ...

20. At no time were the Directors told by FCIB or Mr. Douglas Williams that the "Mortgage Debenture" agreement gave FCIB charge over other properties and assets owned by Standard Grocery Ltd. or any of the other entities that are part of the transaction. No other property or assets

³⁶Paras. 15, 19, 25, 32, 37 and 42 of the Reply to Defence.

were discussed or agreed for the loan facility with the FCIB. ...No further security was ever discussed or agreed.' (Emphasis added)

[90] Phillips and Williams responded to paragraph 20 of the ASOC by pleading:

'17. As to paragraph 20 of the Amended Statement of Claim, it is denied that Mr. Douglas Williams, at no time, told the Directors that the Mortgage Debenture gave the First Defendant charge over other properties and assets owned by the First Claimant and any of the other entities that are parties thereto. Sometime in or about 2017, Ms. Beverly Reddock, a director of the Claimants, visited the Chambers of the Second Defendant and enquired of Mr. Douglas Williams about the extent of the security given under the Mortgage Debenture that had been signed in 2006. Mr. Douglas Williams, at that time, confirmed that the security covered other properties and assets owned by the Claimants. Save as aforesaid, paragraph 18 of the Amended Statement of Claim is not admitted. The Second Defendant was not privy to any discussions between the Claimants and the First Defendant regarding the subject transaction and therefore can neither admit nor deny the content thereof of the thoughts of the Claimants' directors in relation thereto.'

[91] What emerges from these pleadings is that the claimants originally alleged (para. 20 of ASOC) that Phillips and Williams never told them that the mortgage debenture 'gave FCIB charge over [their] other properties and assets.' This follows their assertion in the preceding paragraph that they always understood that they were executing a First Mortgage only on 'the three properties offered as Security ... in the Schedule of Deed of Conveyance No. 4529/2006.' Immediately following, in paragraph 21 of the ASOC, the claimants rely on the contents of paragraphs 19 and 20 to ground their cause of action for professional negligence. However, no mention is made of mistake of fact or law attributable to Phillips and Williams. Indeed, the complaint was not of mistake but of professional negligence. Moreover, in none of the subsequent paragraphs of the ASOC is mistake pleaded.

[92] The next instance of the assertion that Phillips and Williams did not explain that the Deed was a mortgage debenture, surfaces in paragraph 19 of the Reply. There, the claimants zero in on May

2006 as the timeto which they were referring at paragraph 20 of the ASOC³⁷. However, they make no averment that this constituted or led to a mistake of fact or of law resulting from Mr. Williams' conduct. It is not pleaded and is not implicit in that statement.

[93] Paragraphs 25, 32, 37 and 42 of the Reply take the claimant's case no further in relation to their contention that they have laid out a pleaded case of either mistake of fact or law against Phillips and Williams. Applying the principles already enunciated in relation to mistake and non est factum as a defence, it suffices to say that there is no pleading by the claimants as against Phillips and Williams on that basis. Their purported claim against Phillips and Williams based on mistake is non-existent, having not been pleaded. It must therefore be dismissed.

Phillips and Williams - Breach of Fiduciary Duty and Negligence

[94] As they did with the bank, the claimants pleaded that Phillips and Williams owed to them a fiduciary duty to act in good faith, not to place themselves in a position where their interests conflict; not to act for a third party without their informed consent; to act in their best interests at all times and in preference over others; to advise them of any conflict and to decline to act for one of the parties in such conflict. They claimed that Phillips and Williams acted in breach of those fiduciary duties.

[95] As regards negligence, they averred that Phillips and Williams owed them a duty at common law to exercise the care, skill and diligence to be expected of a reasonably competent conveyancing solicitor in the performance of his obligations. They averred that Phillips and Williams did not advise them that they were signing a Mortgage Debenture and not a first legal mortgage; or about the implications of executing a Mortgage Debenture. They pleaded that Phillips and Williams included in the Mortgage Debenture the clause '... all their undertakings goodwills and other property whatsoever and wheresoever both present and future including their respective uncalled capital (if any) for the time being although it was not included in the letter of instructions from the bank.' They implied that this was unnecessary in a first legal mortgage or mortgage

³⁷ With respect to the pleading that 'at no time were they told' that it was a mortgage debenture over other assets.

debenture. During cross-examination by the claimants' lawyer, Mr. Williams pointed out that such a clause is standard in a mortgage debenture.

[96] Phillips and Williams cited **Caparo Industries Plc v Dickman** as authority for the proposition that lawyers owe duties to their clients if the three-pronged test (referred to earlier) is satisfied. However, as a general proposition, a lawyer owes no duty to their client's opposite party: **Ross v Caunters** [1980] Ch 297; or to non-clients: **Steel v NRAM Ltd** [2018] UKSC 13.

[97] They submitted that the evidence from the claimants on these two issues differs. However, the court should prefer Phillips and Williams evidence over the claimants. They argued that contrary to the claimants' assertions that Phillips and Williams were their family lawyer, having represented their deceased father before them and the claimants and their directors over the years, the reality was that he had no perpetual retainer or any retainer and merely worked on an ad hoc basis as and when they needed his legal services. In this regard, Ms. Beverly Reddock was adamant that Mr. Williams was the Reddock family lawyer, implying that they had an enduring retainer with his chambers. They produced no documentary proof of such retainer.

[98] Mr. Williams accepted that he prepared deeds of conveyances for the directors' father George Reddock and for Beverly and Claudette Reddock. However, he was not under a perpetual retainer or any retainer from the family or the claimants. Phillips and Williams contended that what is relevant is the status of the relationship between the claimants and the law firm during the transaction and preparation and execution of the Mortgage Debenture.

[99] Phillips and Williams submitted that no lawyer/client relationship existed between them at that time and that they represented only the bank. They highlighted Claudette and Beverly Reddock's testimony that Phillips and Williams had 'no direct involvement' in the negotiations for the loan from the bank although he was aware that they were taking place and was apprised as the negotiations progressed. Mr. Williams testified likewise that he had no direct involvement. He stated that he became aware of the details of the loan agreement when he received instructions from the bank by

letter dated September 11th 2006 to prepare the Mortgage Debenture. He did not receive instructions from the claimants to prepare any such document. The Reddocks averred that they thought that the bank would send the instructions to their lawyer to prepare the mortgage on their behalf.

DISCUSSION

[100] Claudette Reddock's and Beverly Reddock's accounts during cross-examination is quite enlightening on these issues. Claudette Reddock stated that from the beginning Mr. Williams' role was in representing the claimants in the particular transaction and to guide them through the process. She said that they asked him to advise them as they went along. She averred that during the course of the transaction, they informed him at material times as to what was happening. She accepted that she did not personally instruct Mr. Williams to act on the claimants' behalf in the transaction and it was her sister Beverly who did but she did not witness this herself. Notwithstanding, she averred that part of Mr. Williams' role included preparing legal documents but she did not personally instruct him to prepare such documents in this transaction.

[101] Ms. Reddock accepted that it would have been necessary for him to know the contents of the facility letters in order to prepare the legal documents. She did not personally share that information with him. She said that this was because the bank did not share the facility letters with them. She denied knowledge of what the facility letters contained and says that looking back, she was not aware back then of the contents of the facility letters. However, immediately after she asserted that she knew from the facility letter what was the interest rate. She added that she did not personally inform Mr. Williams of the interest rate. She alluded to Mr. Williams' assistance to them when they made a bid to purchase the M&G building. She asserted that he represented the claimants in that endeavour.

[102] Ms. Beverly Reddock testified that Mr. Williams was the Reddock's family lawyer. She said that because he did all of their transactions prior to this purchase in this dispute, and they went to no one else when they wanted legal advice in any matter. She remarked that their father died and left them in Mr. Williams' hands with all of their legal transactions and with a personal good

relationship. Like her sister Claudette she said that she did not actually instruct Mr. Williams to act for the claimants in 2006 with FCIB. She and Claudette went to him in 2005 when they got a document from Mr. Brian Glasgow that stated they had won the bid for the M&G property. They asked him then on the claimants' behalf to guide them through the process of doing the legal work to get the loan. She explained that before the sales agreement for that property was finalized, they had a meeting in his office with Mr. Glasgow 'to put together all the necessary steps that they had to take in presentation to Mr. Glasgow and the bank.' She denied that Mr. Williams merely accommodated the meeting in his chambers. She asserted that they held many meetings in Mr. Williams' chambers.

[103] She averred that she paid Mr. Williams for acting in the loans transaction in 2006. She testified that the money was paid to him when the loan transaction was finalized but she could not remember how much was paid or whether he was paid before or after execution of the mortgage debenture in his office. They did not receive an invoice from him but she recalled that the amount was set out in the loan proposal. She explained that a line item in the loan proposal prepared by their accountant Mr. Reuben John addressed legal fees. She eventually acknowledged that the claimants did not actually take money out of their pockets to pay Mr. Williams. Rather, part of the loan proceeds was applied to him as counsel.

[104] Ms. Reddock averred that when the need arose to find out certain things they asked Mr. Williams for advice during the negotiation stages in 2006 as they proceeded. She claimed that they always sought his advice. She indicated further that she did not include this averment in her witness statement because maybe seeking the advice was too informal. She denied that he was told only informally about such matters. She stated that she knows how to retain a lawyer to do work. She understood that to mean keeping in touch with him and having a legal arrangement with him and if necessary paying a fee. She could not remember if any fee was paid to Mr. Williams apart from the mention of a fee in the loan proposal. She said that she was unaware that no retainer was paid by the claimants to Phillips and Williams for the loan transaction in 2006.

[105] She thought that he was representing the claimants when they went to his office to sign the mortgage debenture in September 2006. She learnt subsequently (in 2018) after their lawyer Mr. Wyllie wrote to Mr. Williams that he was actually representing the bank in 2006. She immediately contradicted herself by saying that after the receiver was appointed, they consulted another lawyer and did not go to Mr. Williams because they knew that he was representing the bank and not them. She said that he never told them that, however, they of their own accord they chose to go to another lawyer and not their family lawyer because they needed clarification. Ms. Reddock explained that shortly after the receiver was appointed she and the other directors attended a meeting where they were represented by a lawyer other than Mr. Williams. She said that this meeting took place before they realized that Mr. Williams did not represent them in the Mortgage Debenture transaction with the bank. I must confess that the reasoning in those statements elude me.

[106] Ms. Reddock claimed that she did not read the Mortgage Debenture before signing it. She denied having any responsibility to herself or the claimants to read it before signing it. Despite this, she acknowledged that she is aware of her duties as a company director and is aware that when she signed the document it was binding on the company. She maintained nonetheless that she did not have a responsibility to read the document before signing it. Like her sister Claudette, she said that she did not show the facility letter to Mr. Williams. She stated that notwithstanding, she relied on him to explain the terms of a document (facility letter) that she negotiated with the bank without his input. She added that she relied on him throughout.

[107] She acknowledged that Claudette and Ronald bound the company by signing the facility letters. However, she denied that what was in the Mortgage Debenture was what the claimants agreed with the bank. She maintained that there had to be negligence by Mr. Williams in relation to what was in the agreement. While acknowledging that the claimants' directors were all experienced business persons she averred that they were not lawyers. She added that because of the confidence they had in dealing with their lawyer for so many years, he gave them a document to sign and they signed it not expecting that it was something different from what they had agreed.

[108] She was adamant that there was lawyer/client relationship between the claimants on the one hand and Mr. Williams and Ms. Zoe Williams in relation to this transaction. Further, Mr. Williams had a duty to advise them in relation to this transaction. Incredibly, she asserted that as experienced business people the directors did not exercise their own free will in applying for this loan, negotiating the terms of the loan or in finalizing the terms of the loan. She stated that they had lawyers for that purpose.

[109] Having listened to the respective parties, I formed the opinion that Mr. Williams was a truthful witness.

His testimony had the ring of truth to it. He admitted not being able to remember some of the minute details of the events that transpired in 2005/2006 when the circumstances surrounding the negotiation for and finalization of the loan took place. His testimony was that he has been a friend of the Reddock family for years and that he provided legal advice to the patriarch Mr. George Reddock for many years and did so on an ad hoc basis for the children and the claimant companies before and after the father's demise was not contradicted by the claimants' witnesses. The variance in the parties' accounts centred on whether or not Phillips and Williams had either an enduring retainer from the claimants or a retainer specific to the Mortgage Debenture.

[110] For their part, the claimants insisted that Phillips and Williams was the family lawyer and that the law firm was on retainer by the claimants. At the same time the claimants averred that they did not instruct Phillips and Williams to prepare the Mortgage Debenture, did not provide the specifics of the terms and conditions of the facility letters to the law firm or share those documents with the firm. They acknowledged too that neither Phillips and Williams nor Mr. Williams was involved in negotiating the terms and conditions of the credit facilities with the bank, that this was relayed second hand to Mr. Williams during the course of negotiations and eventually after the loans were secured by the execution of the facility letters without Mr. Williams' involvement. In addition, they were unclear about the terms of payment for services rendered by Phillips and Williams for preparation of the Mortgage Debenture, indicating only that this was included in the proposal for the loan prepared by their accountant and in the instructions from the bank to Phillips and Williams.

- [111] It strikes me that the scenario painted by the claimants' witnesses as summarized in the preceding paragraph illustrates that Mr. Williams is correct that he did not receive instructions from the claimants and was not acting on their behalf when he prepared the Mortgage Debenture. In fact, he produced the original letter from the bank in which the instructions for preparation of the Mortgage Debenture were set out. It is striking that the claimants' directors have by their own admission taken a stance that they are not responsible for the actions they took in negotiating the terms of the loans with the bank as evidenced by the facility letters which clearly state that the claimants were granting a charge to the bank over all their fixed and floating assets.
- [112] It has not gone unremarked that the facility letters were executed on August 31st 2006 well in advance of the preparation and execution of the Mortgage Debenture in October 2006. The uncontroverted testimony of the parties is that Mr. Williams and Phillips and Williams played no role in negotiation of the terms and conditions of the transaction that were cemented in the execution of the facility letter. I find that the law firm did not. It follows that the claimants through their directors must take full responsibility for any and all legal consequences that flow from that agreement evidenced as it was and is by the facility letters. He could not be their lawyer because on their own admission they gave him no instructions. I find that the claimants did not instruct Phillips and Williams to prepare the Mortgage Debenture and that when Phillips and Williams did so, it was acting on instructions from the bank and not from the claimants.
- [113] Furthermore, I find that Phillips and Williams was not retained by the claimants in relation to any aspect of the negotiations for the loan facilities that are evidenced by the facility letters and the Mortgage Debenture No. 4529 of 2006. There is no substantive or adequate evidence to support a finding that it was. I find that Phillips and Williams was neither on an enduring nor a specific retainer from the claimants with respect to the preparation of the Mortgage Debenture or any related legal matters. Consequently, Phillips and Williams had no professional or fiduciary duty to provide legal advice to the claimants' principals about the implications of signing the Mortgage Debenture or otherwise and could not and did not act in breach of the alleged duties. I therefore dismiss the claimants' claim against Phillips and Williams for breach of professional negligence and breach of fiduciary duty.

Phillips and Williams – Undue Influence and Misrepresentation

[114] In relation to Phillips and Williams, the claimants pleaded that a relationship of trust and confidence existed between them and Mr. Williams of Phillips and Williams by virtue of the fact that he was their lawyer. They asserted that the presumption of undue influence arises from the mere existence of that relationship. They submitted that they were not exercising their own independent will and judgment with a full appreciation of the nature of the transaction and were unaware that Phillips and Williams was retained by the bank.

Phillips and Williams' submissions

[115] Having already found that Mr. Douglas Williams and Phillips and Williams were not engaged by the claimants as their lawyer, it follows that the relationship of lawyer/client did not exist between them. Mr. Williams as their friend, could have told the claimants' directors to seek independent legal advice but he had no duty to do so. In all the circumstances, I make no finding that he exerted actual undue influence over the claimants' directors and that the presumption of undue influence does not arise in relation to their interactions regarding the execution of the mortgage debenture.

Misrepresentation

[116] As indicated earlier, fraudulent misrepresentation is not pleaded as a cause of action. No such cause of action was pleaded in relation to Phillips and Williams. The matter naturally ends there. However, I propose to briefly address the relevant evidence.

[117] I accept Mr. Williams' testimony that it was only in 2017, for the first time that Ms. Beverly Reddock asked him whether properties other than the three scheduled properties in the Mortgage Debenture, were charged to the bank under the Mortgage Debenture. I am satisfied that this issue never arose before then in conversation between either partner at Phillips and Williams on the one hand and Ms. Beverly Reddock or any of her siblings and co-directors on the other hand. The claimants' case against Phillips and Williams on this score stands or falls on this singular contention. I therefore make no finding the Phillips and Williams or either of its two partners is liable to the claimants for fraudulent, innocent or negligent misrepresentation.

Miscellaneous

Conditions precedent clause

[118] The claimants made heavy weather of the existence of the conditions precedent clause in the facility letter. Learned counsel Mr. Michael Wyllie submitted that a condition precedent clause is a specific event that is listed in a contract and that before this event takes place the contract is not in effect. He argued that if there is a failure to satisfy the condition the contract or certain contractual obligations will not come into force and in some instances, failure means that there is no binding contract. He submitted that there is no duty of performance and no breach by non-performance until the condition precedent is either performed or excused. He cited **Lee-Parker v Izzet (2)**³⁸, **Pym v Campbell**³⁹ and **Aberfoyle Plantations Ltd v Cheng**⁴⁰.

[119] He submitted that a condition precedent may be waived so that an agreement subject to contract becomes legally binding. He relied on **RTS Flexible System Ltd v Molkerei Alois Muller GmbH & Co KG**⁴¹, **Bieder v Teathers Ltd**⁴², **Wood Preservation v Prior**⁴³, **Heron Garage Properties v Moss**⁴⁴ and **Global Asset Capital Inc v Aabar Block Sarl**⁴⁵.

[120] The bank's legal practitioner did not address this issue. It may be dealt with summarily. It is trite law that the term 'subject to contract' conveys the idea to the intended parties and third parties that the terms and conditions appearing in a document are not intended to create binding legal obligations on the intended parties unless and until a formal contract has been finalized (usually in writing). The term is defined in **Osborn's Concise Law Dictionary**⁴⁶ to mean that 'no legally binding

³⁸[1972] 2 ALL ER 800.

³⁹ [1956] 6 E&B 370.

⁴⁰[1960 AC 115

⁴¹ [2010] UKSC 14.

⁴² [2014] EWHC 4205 (Ch).

⁴³ [1969] 1 ALL ER 364

⁴⁴ [1974] All ER 421.

⁴⁵ [2017 EWCA Civ 37

⁴⁶7th Edn. by Roger Bird (1983).

agreement or contract shall exist until a formal contract (usually in or recorded by writing) has been completed.'

[121] It is important to note that the facility letters did not include a condition precedent that the terms and conditions set out in them were 'subject to contract'. The condition precedent that appears in the facility letter is set out at paragraph [83] above. Nothing in that clause or elsewhere in the facility letters could be construed the way contended by the claimants. This simple fact distinguishes the instant case from those referred to by the claimants in which the contractual obligations being contemplated the parties were all made subject to contract and therefore did not create legally binding agreements

until formalized by a contract. This argument does not assist the claimants.

Limitation Act and Application to omit exhibits

[122] The issues joined between the respective parties have been fully explored and determined without the necessity of considering the defendant's contention that the claims against Phillips and Williams are statute-barred. Similarly, the defendant's submissions regarding the admissibility of documents tendered and produced by the claimants that were not unauthenticated as required by law, does not need to be resolved in order to determine the issues among the parties. I therefore refrain from considering them for present purposes.

Claimants' Liability to BOSVG

[123] BOSVG's claim against the claimants is an ordinary mortgage claim. Proceedings for such claims are governed procedurally by Part 66 of the CPR 2023. It provides that a claimant who seeks to recover a mortgage debt must outline in its pleadings and evidence information exhibiting the original mortgage; and setting out the amount advanced; the interest payable; the amount of periodic payments to be made including interest; the amount of money already repaid; the amount of repayments or money due under the mortgage and the daily rate of interest, if any. The bank satisfied those requirements.

[124] In their Defence and Counterclaim, they pleaded that certain loan facilities were made to the claimants respectively consisting of a \$305,000.00 demand instalment loan and operating line of credit of \$200,000.00; the claimant Stangro Enterprises Ltd was granted a loan of \$5,450,000.00 to assist with the purchase of a commercial property on Middle Street, comprising an operating line of \$500,000.00, (being loan number 106828835) repayable on demand at 10% annual interest; a Demand Installment Loan totaling \$4,000,000.00 (being loan number 106624259) repayable in 180 regular blended monthly payments of \$42,984.21 at 10% per annum; and a Demand Instalment loan of \$950,000.00 (being loan number 106624275) repayable in 12 monthly interest payments with interest at 10% per annum.

[125] They claimed that in respect of loan number 106624259 an outstanding balance⁴⁷ of \$5,934,517.65 inclusive of the principal sum of \$2,260,855.07 and interest of \$3,673,662.58 remained with interest accruing at the annual rate of 10% and continuing by a daily factor of \$619.41234; that in respect of loan number 106624275 the total amount outstanding⁴⁷ at that time was \$2,074,753.77 inclusive of the principal sum of \$935,000.00 and interest of \$1,139,753.77 remained with interest accruing at the annual rate of 10% and continuing by a daily factor of \$256.16438; and loan number 106828835 had an outstanding balance⁴⁷ of \$1,344,466.12 (being a converted overdraft) inclusive of the principal sum of \$621,807.12 and interest of \$722,659.00 remained with interest accruing at the annual rate of 10% and continuing by a daily factor of \$170.35811.

[126] The overall outstanding amount was said to be \$9,290,359.66 of which collections of \$996,048.13 were received from Standard Grocery Limited; and \$703,597.72 were collected from New Montrose Hotel. BOSVG's Senior Manager of Special Loans in the Credit Risk Management Department Ms. Roxanne Roach exhibited the facility letters and the Mortgage Debenture as proof of the original sums and statements outlining progress payments by the claimants, interest and other charges which were admitted into evidence as part of 'ex. RR1'.

⁴⁷As at the date of filing of the counterclaim.

[127] BOSVG outlined in its counterclaim that in relation to loan number 106828835, Stangro Enterprise Ltd made two payments totaling \$2,509.93, leaving a total outstanding balance of \$1,344,466.12; and had made 124 payments totaling \$2,553,066.18 towards loan number 106624259 leaving a balance of \$5,934,517.65; and towards loan number 106624275 had made 23 payments totaling \$170,617.03 leaving a balance of \$2,074,753.77. Ms. Roach's testimony confirmed these averments. However, she did not provide an updated statement of accounts in respect of any of the loans to reflect any further payments that may have been received from the claimants or other charges or interest that may have accrued since the filing of the counterclaim.

[128] In response to these claims, the claimants admitted that the loans were advanced but repeated their assertion that the agreement was a Mortgage Debenture. They neither denied nor admitted the details of what has been paid and what remains outstanding. They asserted that they were therefore only liable to repay the amounts actually advanced since the Mortgage Debenture is void and should be rescinded as a nullity. They relied on the condition precedent to the effect that it should be interpreted as if it contains or conveys the idea 'subject to contract'.

[129] The claimants have not advanced a viable defence which absolves them from the obligations imposed under the terms and conditions of the facility letters or the Mortgage Debenture under which the parties agreed as alleged by BOSVG. I am satisfied that the claimants are indebted to the BOSVG in relation to the obligations arising pursuant to the second and third facility letters dated 2nd August 2006 signed by them and the Mortgage Debenture No. 4529 of 2006 as alleged and established by the bank. BOSVG is entitled to recover the outstanding loan amounts as pleaded, inclusive of interest and charges, less any additional amounts paid towards the respective loans by Stangro Enterprises Ltd or other claimant since the date of filing of the Defence and Counterclaim ('Claim')⁴⁸ by BOSVG.

REMEDIES

⁴⁸ 13th February 2020.

- [130] The claimants have wholly failed in establishing any of the claims made against BOSVG or Phillips and Williams. They are therefore entitled to none of the reliefs prayed for in their ASOC.
- [131] Having established on the evidence that the bank advanced to the claimants the total sum of \$9,290,359.66 under loans numbered 1006624259; 106624275 and 106828835 as claimed in the counterclaim and that a considerable amount of the loans remains outstanding, BOSVG is entitled to recover from the claimants all outstanding balances on the referenced loans. In the absence of updated evidence as to any actual downward or upward adjustments in the figures claimed, I make the observation that BOSVG is entitled to recover only the amount due and payable as at the date of judgment, with interest that has accrued or will accrue before satisfaction of the debt.
- [132] It is appropriate to require BOSVG to prepare and supply to the claimants a statement of accounts in relation to the status of each loan. I consider three months (up to the end of May 2024) to be a reasonable period within which this can be completed. The claimants will be expected to pay the outstanding balances within 6 months thereafter (beginning of December 2024) or on or before any extended deadline agreed to by the parties in writing or ordered by the court. For enforcement purposes, it is usual to stipulate that a penal notice be appended to the order and will be ordered in this case.

Costs

- [133] The successful party is as a general rule entitled to his/her/its costs.⁴⁹ Costs are awarded based on the nature of the claim. A claim for a specified sum of money such as BOSVG's attracts prescribed costs under CPR 65.5(2)(b)(i) calculated as a percentage of the amounts claimed. It is not at this stage definitive what amounts of the loans remain unpaid. Those figures will have to be aggregated and used as the basis for arriving at the prescribed costs due and payable to BOSVG.
- [134] The claim against Phillips and Williams was for an unspecified sum as damages. CPR 65.5(2)(d) provides that in such cases, prescribed costs is to be calculated as if the amount claimed was \$50,000.00. Where the dispute proceeds to trial and ends with a judgment after a full trial, the successful party is entitled to receive 15% of that amount - \$7,500.00.

⁴⁹Civil Procedure Rules 2023 ('CPR') 64.6(1).

DISPOSITION

[135] It is ordered:

1. The claimants' claim against Bank of Saint Vincent and the Grenadines Limited is dismissed.
2. The claimants' claim against Phillips and Williams is dismissed.
3. The claimants are liable to repay to the Bank of Saint Vincent and the Grenadines the sums claimed of \$5,934,517.65 in respect of loan number 1006624259; \$2,074,753.77 in respect of loan number 106624275 and \$1,344,466.12 in respect of loan number 106828835 with interest at the agreed annual rate of 10% up to today's date, less any payments made by the claimants towards those amounts since the date of filing of the counterclaim⁵⁰.
4. The Bank of Saint Vincent and the Grenadines Ltd shall on or before May 31st 2024 provide to each of the claimants a statement of accounts outlining all payments made and credited to the respective loan accounts, all interest accrued, the daily rate of interest and the outstanding balances as at February 21st 2024.
5. The claimants shall within 6 months of receipt of the statement of accounts from the Bank of Saint Vincent and the Grenadines under sub-paragraph 4 of this order, or on or before December 2nd 2024 (whichever is later) pay Bank of Saint Vincent and the Grenadines the outstanding balances referenced in sub-paragraphs 3 and 4 of this order together with interest.
6. The claimants shall pay Bank of Saint Vincent and the Grenadines Ltd prescribed costs pursuant to CPR 65.5(1) and (2)(b)(i) to be calculated based on the aggregated outstanding balance of the respective loans referenced in sub-paragraph 3 of this order.
7. The claimants shall pay Phillips and Williams prescribed costs of \$7,500.00.
8. A penal notice in terms of CPR 53.3(b) applicable to a body corporate is to be attached to this order in respect of the claimants' obligations under subparagraphs 3, 5, 6 and 7 of this order.

⁵⁰On 13th July 2020.

[136] I am grateful to the legal practitioners for their submissions and cooperation.

PENAL NOTICE

Limited to paragraph three, five, six and seven(3, 5, 6 and 7)

If you fail to comply with the terms of this Order, proceedings may be commenced against you for contempt of Court and you may be liable to be imprisoned.

**Esco L. Henry
HIGH COURT JUDGE**

By the Court

Registrar