

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SAINT LUCIA

CLAIM NO. SLUHCV 2022/0202

BETWEEN:

MICHAEL JOSEPH

Claimant

And

**INDRA HARIPRASHAD CHARLES
WILLIAM CHARLES**

Defendants/Ancillary Claimants

And

RBTT BANK CARIBBEAN LIMITED

Ancillary Defendants

Appearances:

Mr. Horace Fraser of Counsel for the Claimant

Mr. Dexter Theodore KC of Counsel for the Defendants/Ancillary Claimants

Mr. Mark D. Maragh of Counsel for the Ancillary Defendants

2022: May 9, 10;
2023: November 8.

Agreement for sale of land – Principal and agent – Irrevocable power of attorney authorizing agent to sell land – Agent entering into an agreement to sell land at a price lower than anticipated by principal – Whether agent exceeded its authority under power of attorney by entering into an agreement for sale with the claimant without considering a current valuation – Principal instructing agent to reconsider sale – Whether defendants in breach of contract – Whether agent liable to indemnify principal on the claim for breach of contract – Whether agent liable for breach of contract – Whether actions of agent ratified by principal – Whether breach by agent in its fiduciary duty to principal – Conflicting expert evidence – Court's approach

Agreement for sale of land – Whether claimant in breach of agreement for failing to complete sale within time specified in agreement – Whether time of the essence – Whether condition could be implied into the agreement for sale that completion was conditional on purchaser obtaining balance of purchase price on charging of property as security

JUDGMENT

- [1] **Innocent, J.:** The following facts are not in dispute. The defendants are the registered proprietors of the immoveable property registered as Block 0650E Parcels 30 and 31 ('the property'). The land was purchased sometime in the year 1995 for the sum of \$665,000.00. The land was subsequently hypothecated in favour of 1st National Bank (St. Lucia) Limited formerly Caribbean Banking Corporation Ltd ('the 'Bank'). The defendants defaulted on the hypothec in favour of the Bank.
- [2] By a power of attorney executed on 2nd April 2003 by the defendants in favour of RBTT Bank Caribbean Limited the successor to the Bank, the Bank was authorised to sell convey or otherwise dispose of all or any part of the property for such price or prices and upon such terms and conditions as the Bank shall deem fit. The Bank was also authorised to obtain a current valuation of the property to be sold or leased and to endeavour to obtain the best sale or lease price available taking the said valuation into consideration.
- [3] The claimant, wrote to the Bank by letter dated 12th June 2006 offering to purchase the property for the sum of \$400,000.00. The bank accepted the claimant's offer by letter to the claimant dated 19th June 2006. The correspondence exchanged between the Bank and the claimant made no reference to the defendants.
- [4] The claimant paid a non-refundable deposit to the Bank in the sum of \$40,000.00 towards the purchase price of the property.
- [5] The Bank offered to extend financing to the claimant for the purchase of the property. By letter dated 26th June 2006, the Bank wrote to the claimant informing him that the Bank had approved financing for the purchase of the property in the sum of \$360,000.00.
- [6] The Bank instructed the claimant's legal practitioner to prepare the hypothecary documents by the claimant in favour of the Bank.

- [7] Sometime on or about the month of July 2006, the Bank's manager in a telephone call with the first-named defendant informed her that he had obtained a purchaser for the property. At the material time, the first-named defendant was indisposed and asked that he call again. The manager did not telephone the first-named defendant after that.
- [8] In the month of August 2006, the first-named defendant became aware that the Bank was in the process of selling the property or had sold the property for the sum of \$400,000.00. She instructed the Bank's manager to reconsider the sale. These instructions were followed by a letter written to the Bank dated 7th August 2006.
- [9] On 10th August 2006, the defendants commissioned a valuation of the property. The valuation survey was duly conducted and it estimated the value of the property at \$25.00 per square foot.
- [10] The Bank's manager telephoned the claimant on 10th August 2006 and informed him that the sale was cancelled and that his deposit would be refunded. The claimant refused to accept the refund and instead initiated the present proceedings.
- [11] In fine, the claimant sought specific performance of the agreement for sale; and in the alternative, damages for loss of bargain resulting from the breach of the agreement for sale.
- [12] In his pleaded case, the claimant alleged that sometime in 2006, the defendants acting through their agent, the Bank, advertised the property for sale by auction. The claimant asserted that having evinced an intention to purchase the property he conducted a site visit of the property which was conducted by an agent of the Bank who he claimed advised him to seek the advice of a structural engineer due to the topography and lay of the property.
- [13] The claimant further alleged, that having had sight of the property he concluded that there would be challenges posed to his intended development of the property; and therefore, he sought the advice of a geotechnical engineer and an environmental

engineer. The claimant maintained that at the material time, the defendants knew or ought to have known that he intended to purchase the property with the intention of developing the same for commercial use.

- [14] The claimant also pleaded, that in breach of the agreement the defendants directed the Bank to cancel the agreement.
- [15] In a nutshell, the defendants' case was that the Bank had acted beyond the scope of its authority by failing to obtain the best price possible by taking into consideration the current market value of the property; thereby making it liable for any breach which the claimant alleged to have been committed by the defendants.
- [16] The claimant's response to the assertion of contradictory pleadings was that whether the Bank had exceeded the scope of its authority was a question of fact; and that the claimant had a right to claim relief against the defendants in the alternative.
- [17] It appears that it was on the foregoing basis that the claimant pleaded that the defendants were deemed in law to have had knowledge of his intention to develop the property.
- [18] The defendants denied authorising the Bank, or any of the Bank's agents to advise the claimant as alleged; and that any advice so given went beyond the scope of the authority given by the defendants to the Bank by virtue of the power of attorney. In the premises, the defendants contended that any expenditure incurred by the claimant as a result of any advice given to him by the Bank or any of its agents was expended by him voluntarily and without any encouragement or inducement from the defendants.
- [19] In their pleadings, the defendants also contended that the claim against them is unsustainable since the claimant failed to pay the balance of the purchase price on 19th July 2006 as stipulated by the agreement; of which time was of the essence, thereby entitling them to instruct the Bank to rescind the agreement.

- [20] The claimant denied that the defendants terminated the agreement on account of the claimant's failure to pay the balance of the purchase price within the time stipulated by the agreement; and contended that instead the defendants were not in agreement with the purchase price.
- [21] In addition, the defendant contended that payment of the balance of the purchase price was not an issue since the loan from the Bank was approved on 26th July 2006 and the funds to pay the balance of the purchase price was coming from the defendants' agent, the Bank. Accordingly, the claimant pleaded that the defendants waived their right to terminate the agreement by their lack of protest and by their lawyers continuing to vet the documents.
- [22] The claimant had caused cautions to be registered against the defendants' property. The defendants counterclaimed for the removal of the cautions. In response, the claimant contended that the Land Registration Act ('LRA') empowered him to lodge the cautions registered against the property.
- [23] In the ancillary claim, the defendants pleaded that the Bank as its duly appointed attorney was empowered only to sell the property upon obtaining a current valuation for the same while endeavouring to obtain the best price available.
- [24] The defendants contended that the Bank had breached its duty aforesaid by failing to obtain a current valuation; not endeavouring to obtain the best price; entering into an agreement to sell the property at the price of \$400,000.00 which was substantially below the current market price or substantially undervalued; and having knowledge that the property was purchased by the defendants in 1995 for the sum of \$665,000.00. In the premises, the defendants sought to recover the difference between the current market value of the property and the sale price of \$400,000.00.
- [25] In its defence to the ancillary claim, the Bank's pleaded case was that the power of attorney created joint and several obligations by the defendants towards the Bank

and that the Bank had the absolute power to sell upon such terms and conditions as it deemed fit.

[26] In addition, it appears from its pleadings that the Bank took the position that all it was obligated to do, and no more, was to endeavour to obtain the best price possible taking into consideration the valuation which it in fact did. The Bank claimed to have accepted from the claimant, after obtaining his ratification, the highest tender that it had received. The Bank contended that furthermore, it had agreed to accept the purchase price in full and final satisfaction of the defendants' indebtedness to it.

[27] In the court's view, the resolution of the following issues are dispositive of the present claim; namely: (1) whether the defendants are liable for breach of the agreement for sale of the property; if answered in the negative, then the matter ends here; however, if answered in the affirmative, (2) whether the Bank is liable for any breach of the agreement for sale since it had the power to sell under an irrevocable power of attorney, whether the defendants approved of the sale or not; if this second question is answered in the affirmative, (3) whether the Bank is liable to indemnify the defendants owing to its failure to disclose the fact that it was acting as agent at the time when the agreement was made; and (4) whether the claimant breached the agreement for sale by failing to complete the sale by 19th July 2019, time being of the essence; if this question is answered in the affirmative, then the matter ends there; however, if answered in the negative, then the court will go on to consider the questions at (1) and (2) above.

[28] For convenience and for the sake of exposition, issues (1), (2) and (4) will be dealt with jointly as they are intimately related.

[29] In a nutshell, the pith and gravamen of the defendant's claim was that the defendants were devoid of any authority to dictate that the Bank cancel the sale to the claimant. This, they said, was clearly the case because the Bank retained that power whether or not the defendants registered their objection to the sale of the property at the price and upon the terms and conditions that it deemed fit; provided that it had obtained a current valuation of the property and had endeavoured to

obtain the best price taking into consideration such current valuation. This appeared to be the defendants' starting position.

- [30] By extension, the defendants' position was that once the Bank had fulfilled its obligations under the power of attorney, by obtaining a current valuation, which the defendants disputed that it did, the Bank's decision not to proceed with the sale is not attributable to any act or omission on the part of the defendants.
- [31] The defendants took the view that if, as the defendants asserted, the valuation was only obtained as an afterthought, and in the wake of their objection, the Bank would have exceeded its authority by having entered into the agreement for the sale of the property without having first obtained a current valuation.
- [32] Mr. Theodore KC, counsel for the defendants, submitted that the defendants were not captured by Article 1616 of the Civil Code¹ in order to make them liable to the claimant. Mr. Theodore KC relied on the provisions of Article 1620 of the Civil Code to support the proposition that the Bank, having exceed its authority conferred on it by the power of attorney, the defendants could only be made liable if they had ratified what the Bank had done. According to Mr. Theodore KC, in the present case there was no evidence that the defendants had ratified the actions of the Bank.
- [33] In addition, Mr. Theodore KC also premised his argument on the provisions of Article 1604 of the Civil Code in support of his contention that the Bank was enjoined not to act beyond the authority but was obliged to perform only those acts that were incidental to the exercise of the authority conferred by the power of attorney and which were necessary for the execution of the agency thereby created.
- [34] The claimant's submissions on this point, quite expectedly, were almost consonant with that of the defendants. Mr. Fraser, Counsel for the claimant rightly pointed out that the issue turned on the construction of the power of attorney and the interpretation of clauses 2 and 8 thereof. According to Mr. Fraser, the "discord"

¹ Cap. 4.01

between clauses 2 and 8 of the power of attorney could be easily resolved if clause 8 is treated as qualifying clause 2. Therefore, according to Mr. Fraser, the Bank was required to act with prudence with respect to the sale of the property which necessitated that they first obtained a current valuation and thereafter seek to obtain the best possible price for the property. To quote Mr. Fraser: "selling the property at undervalue cannot be an act clothed with prudence".

- [35] Mr. Fraser conceded that the duty imposed on the Bank by virtue of the agency created by the power of attorney was not satisfied; and that the Bank having acted beyond the scope of the agency was obliged to indemnify the defendants against any liability to the claimant.
- [36] In support of the foregoing argument, Mr. Fraser relied on the provisions of Articles 1601, 1604, 1616 and 1617 of the Civil Code. In fine, Mr. Fraser concluded that when the Bank purported to act in its own name, it became liable to the claimant with whom it contracted and liable to indemnify the defendants having exceeded its powers under the agency and not having given the claimant notice of such.
- [37] Mr. Maragh who appeared for the Bank agreed that the power of sale contained in the power of attorney was conditional on the Bank obtaining a current valuation of the property and the Bank endeavouring to obtain the best possible price, having taken the current valuation into consideration.
- [38] According to Mr. Maragh, the Bank had not faltered, and had in fact satisfied those conditions as could be seen from the evidence. Mr. Maragh further submitted that the conditions were satisfied prior to the Bank entering into the sale agreement.
- [39] Mr. Maragh sought to address the issue on a basis not canvassed in the submissions of the other parties. Essentially, Mr. Maragh explored the issue within the context of the relationship that existed between a mortgagor and a mortgagee. According to Mr. Maragh, the Bank was exercising its power of sale under the hypothec the defendants having been in default.

- [40] The court interpreted Mr. Maragh's argument to mean that notwithstanding the existence of the power of attorney, the exercise of the Bank's power to sell the property should be examined within the context of whether the Bank properly exercised its power of sale under the hypothec.
- [41] Highlighting the duties imposed on a mortgagee, Mr. Maragh relied on the decision in **Cuckmere Brick Co. Ltd v Mutual Finance Ltd**² for the proposition that a mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property; and in determining whether the mortgagee had fulfilled that duty, the facts must be looked at broadly, and the mortgagee shall not be adjudged to be in default unless he is plainly on the wrong side of the line.
- [42] Mr. Maragh sought to address the question of what is the best possible price. In so doing, he recommended for the court's consideration the case of **Michael and Ors v Miller and Ors**³ for the proposition that such decisions inevitably involve the exercise of informed judgment on the part of the mortgagee, in respect of which there can, almost by definition, be no absolute requirements. The requirement that the mortgagee exercise informed judgment meant that a prudent mortgagee will take advice, including where appropriate, valuation advice, from a duly qualified agent.⁴
- [43] It was on this foregoing basis that Mr. Maragh submitted that the Bank had fulfilled its obligations by having considered a current valuation and had taken all reasonable steps to obtain the best price on the sale of the property.
- [44] In the court's view, although the general principles are the same with respect to the obligations of a mortgagee and an agent, the court is not quite sure that it agrees with Mr. Maragh when he takes the analysis outside the context of principal agent relationship.

² [1971] 2 WLR 1207

³ [2004] EWCA Civ. 282

⁴ Rudolph Daley v RBTT Bank (Jamaica) Limited, Claim No. 1995/D162 delivered 30th January 2007

[45] In most instances, a mortgagee exercises its power of sale under the hypothec on a sale by auction. It is necessary to avoid conflating the two situations. In the circumstances of the present case, the court is inclined to find that the granting of the power of attorney to the Bank was intended as a measure employed to compound the defendants' indebtedness to the Bank. Therefore, it cannot be said that the Bank was exercising its power of sale under the hypothecary obligation. This certainly was a creditor sale; however, the power of sale was being exercised by private treaty. In the premises, the court will confine itself to the principles that concern agency.

[46] The court agrees with the defendant's case that they did not have the authority to cancel the sale given that the Bank had acted on its own in obtaining and entering into the agreement with the claimant to sell the property, ostensibly on the strength of the irrevocable power of attorney granted to it. Therefore, the defendants could not be held liable for any decision arrived at by the Bank not to proceed with the sale.

[47] The evidence in the case revealed that the first-named defendant Mrs. Charles, after having noticed that there was some movement with respect to the sale of the property, spoke to Mr. Michael Joseph ('Mr. Joseph') who was at the time one of the managers of the Bank. She recalled that it was in this conversation that Mr. Joseph gave her details of the sale. Mrs. Charles testified essentially that hitherto Mr. Joseph had never informed her about the sale. She testified that this was the first time that she was hearing about the sale. She testified that she wrote to the Bank the following day and asked them to reconsider.

[48] In fact, the defendants' position was clearly stated in Mrs. Charles' testimony where she said:

"I could not stop the sale from going through."

In cross-examination Mrs. Charles reiterated her position and stated that she did not have a contract directly with the claimant. She testified that:

“I did not even know what the terms of the agreement were. It was only when I spoke to Mr. Joseph I got to know about the 10% deposit. I did not have any contact with the claimant. I did not even know that one of the terms was that time would be of the essence.”

[49] Mrs. Charles claimed that she did not object to the sale but took objection to the price at which the property was being sold. She said, that in her letter to the Bank she provided a number of reasons why the Bank ought to have reconsidered the sale at that price.

[50] Mrs. Charles was cross-examined by Mr. Maragh. She maintained her position that she asked the Bank to reconsider the sale. She testified that the primary reason was the sale price. She said that the Bank was aware of the value of the property. She did not object to the sale per se.

[51] It is beyond dispute that the defendants had no communication with the claimant regarding the sale of the property. In fact, Mrs. Charles maintained that she did not know what the arrangement was between the claimant and the Bank, hence she knew nothing concerning the closing date of the sale.

[52] During his testimony at the trial, the claimant agreed that the advertisement for the sale of the property in May 2006 mentioned no other entity or person apart from the Bank. He testified that he only got to know who the property belonged to when he visited the property and saw the defendants' house. He agreed that the first time that he saw the deed of sale for the property was at the first trial.

[53] When cross-examined by Mr. Maragh, the claimant testified that he was not contracting with the Charles'. In his words:

“I was contracting with the bank only. I had no contractual dealings or obligations towards them.”

He testified further that:

“When I wrote to the bank I thought I had a deal with the bank.”

[54] Perhaps, it would be beneficial to scrutinise the contents of Mrs. Charles' letter to the Bank. The court anticipates that it will be forgiven for reciting almost the entire text

of the letter. However, the court finds it necessary to do so in order to drive home the position it intends to assume regarding the same. The letter in part read:

“Last month you telephoned me in the British Virgin Islands and indicated that you have some prospective purchasers. I indicated that you should contact me by email and after I did not hear from you, I was left to assume, albeit erroneously now, that the prospective purchasers had changed their minds. I arrived in Saint Lucia on Friday last to see unauthorised persons using our private driveway to our property and from a litany of subsequent conversations with yourself and others, I learnt that your bank has received a deposit of \$40,000 for the two parcels of land which your bank intends to sell for \$400,000. From my understanding, my husband came to see you some two or three weeks ago and negotiated a way forward with respect to this loan and his personal loans and from my understanding, you did not inform him that you have a serious purchaser which I would imagine, was the most prudent thing to do.

Whilst you hold a Power of Attorney over those two parcels of land and have the power to dispose of the property in a fair manner (given the fact that your bank has already been paid most of the principal sum), I urge you to consider your decision to do so especially since the two parcels of land were bought for \$665,000 (as is evident by the Deeds of Sale) and are worth much more now. Should you still persist in proceeding with the impending sale (as I gather from our oral conversations), this letter serves as a formal objection to such a sale for the following reasons: (i) as of 15th August 2006, a banking institution will be renting our residence (contiguous to those landlocked lands) and as such, we will be able to resume loan payments to your bank shortly (ii) the sale price is inadequate given that the lands in question were purchased for \$665,000 some ten years ago and are sea-front properties in a highly residential area; (iii) the parcels of land are landlocked and there is no access to them except perhaps by sea; (iv) from June 1995 to April 2000, we paid with promptitude monthly repayments of approximately \$8,700 towards the said loan and only stopped because of financial difficulties; and (v) there is always a willingness to see an end to this loan as I wish not to be a delinquent customer given the fact that I am a holder of high judicial office in the Eastern Caribbean Supreme Court.

... As I indicated to you, a copy of the lease agreement could be made available to you and a standing order could be created in favour of your bank.

Given these reasons, I trust that you will use your good offices to reconsider your decision and that we could negotiate an amicable way forward...”

[55] It seems necessary, at first, to place the contents of the foregoing correspondence within its commercial context. The contents of the letter appear emblematic of the

commercial relationship that existed between the defendants and the Bank. Clearly, the power of attorney was granted to the Bank to forestall the prospect of foreclosure or otherwise a judicial sale of the property by auction. In large measure, it was an act of good faith on the part of the defendants.

[56] However, it would also appear from the letter itself that there had been a change of circumstances which warranted a review of the parties' relative positions regarding the defendants' indebtedness to the Bank. Mrs. Charles was well aware of the irrevocable nature of the power of attorney which the Bank held and made this quite clear in her letter.

[57] Nevertheless, it appears from the tenor of the letter that all Mrs. Charles was endeavouring to do was to invite the Bank to reconsider its position regarding the manner in which the defendants' indebtedness to the Bank would be addressed, separate and apart from the power of sale which the Bank held by virtue of the power of attorney in light of the new proposal that she described in her letter and also in light of the change in the defendants' financial circumstances.

[58] When taken in the foregoing context, it becomes quite obvious that the letter cannot be regarded as instructions to the Bank to cancel the sale. The defendants were merely inviting the Bank to reconsider its position. The posture adopted by the Bank thereafter in relation to the impending sale was entirely a matter within its discretion. Therefore, by no stretch of imagination can it be said that the Bank acted upon the defendants' instructions in cancelling the sale of the property or that the defendants instructed them to do so.

[59] It appears to the court that the context within which the court quite correctly has interpreted Mrs. Charles' letter is consonant with the evidence that she has given in these proceedings on this specific issue.

[60] The court is inclined to accept on the basis of the foregoing evidence highlighted in this judgment, that the defendants did not instruct the Bank to cancel the sale of the property. Clearly, having regard to the evidence it would appear that the Bank

cancelled the sale of its own motion after having received the correspondence from Mrs. Charles. Unfortunately, the court did not have the benefit of Mr. Joseph's vive voce evidence at the trial; therefore, what is contained in his witness statement was not tested in cross-examination. Mr. Fraser has pointed out that the Bank has presented no witness to confirm the reasons why the agreement was cancelled.

[61] This takes us to Mr. Fraser's contentions on this point. The claimant's evidence was essentially that he received a telephone call from Mr. Joseph whereby he was informed that the Bank was cancelling the agreement and that they were so directed by the defendants because the property was being sold at a price below its market value.

[62] Mr. Fraser argued that the defendants' instructions to the Bank to cancel the sale amounted to an anticipatory breach on the defendants' part notwithstanding that the Bank held an irrevocable power of attorney which meant that the bank was not obliged to carry out these instructions. According to Mr. Fraser, had the Bank refused to carry out these instructions they could incur no liability to the defendants. As Mr. Fraser rightly pointed out, this latter contention can more competently be dealt within the confines of the question whether the Bank had acted outside of the authority conferred by the power of attorney.

[63] After analysing the contents of Mrs. Charles' letter to the Bank dated 7th August 2006, Mr. Fraser took the view that there was no evidence that pointed ineluctably to the fact that the defendants issued any instructions to the Bank to cancel the agreement. Mr. Fraser's assessment of the contents of the letter dated 7th August 2006 was that it merely conveyed the defendants' objections to the sale on at least five grounds and it invited discussion with the Bank on the way forward. According to Mr. Fraser, this was the full extent of the evidence available to the court on this issue. The court agrees entirely with this submission.

[64] Therefore, in Mr. Fraser's view, the evidence suggested that the decision to cancel the sale was that of the Bank. To that extent, he submitted that the Bank was liable to the defendants for breach of the agreement while acting as the defendants' agent.

- [65] The Bank was in possession of an irrevocable power of attorney that authorised it to sell the property upon which it acted by entering into the agreement for sale with the claimant. Mr. Theodore KC adopted the posture that the sale agreement was between the Bank and the claimant; therefore, the Bank acting within the remit of the power of attorney had entered into the sale agreement with the claimant without the defendants' knowledge and in furtherance of the express authority granted to it by the power of attorney.
- [66] The defendants denied throughout the proceedings that they in fact instructed the Bank to stop the sale. In other words, their argument was that the Bank failed to act within the remit of the power of attorney; and therefore, the actions of the Bank could not bind the defendants. This could only be interpreted to mean that the Bank, having accepted that it acted beyond the scope of the power of attorney decided to cancel the sale of its own motion.
- [67] Another argument relied on was that the Bank was entitled to rescind the agreement due to the claimant's failure to complete the sale within the time stipulated by the agreement. To that extent, it appears that the defendants' position was that the Bank was entitled to cancel the sale without any instructions being given to it by the defendants to do so.
- [68] According to Mr. Maragh, the defendants would have in their second amended defence and counterclaim stated that they had properly directed the Bank to cancel the sale. Mr. Maragh took the view that the power of attorney created a relationship of agency between the Bank and the defendants which translated into the Bank having the authority to act on the defendants' behalf and thereby entering into binding legal relationships with third parties on the defendants' behalf to which the defendants were bound.

[69] Mr. Maragh relied on the decision in **Gagnon v Pritchard**⁵ for the proposition that “he who acts through another acts for himself”. The court will recite part of the passage recited in that case for the sake of exposition:

“All acts done by the attorney which are within the scope of authority conferred by the principal bind both the principal and the third parties who deal with the attorney as validly and effectively as though the principal is liable in respect of such acts to third parties dealing with the attorney on the principle *qui facit per alium facit per se*.”

[70] In support of his argument that the defendants were liable for the Bank’s cancellation of the sale, Mr. Maragh relied on an extract from Halbury’s Laws where it reads:

“If the agent is given definite instructions from his principal as to the manner in which the business is to be carried out, he must follow them strictly, provided that they are lawful; and, if he does so, he will not be liable to his principal merely because the consequences differ from those which the principal had expected. He has however, no discretion to disregard them, even though he acts in good faith in the interest of the principal.”

[71] Therefore, if the court accepts the foregoing evidence, then it is clear that the defendants had no direct contractual dealings with the claimant regarding the sale of the land. The court does not believe that this is in dispute. In the premises, the question becomes whether the defendants are liable under the principles of agency, assuming that the Bank is found to be liable to the claimant.

Whether the Bank exceeded its authority

[72] The court has pondered on the question of whether the defendants having invited the Bank to cancel the sale would have caused any significant change to the question of the defendants’ liability to the claimant or the Bank’s for breach of contract. The court has taken this into consideration in view of the fact that the defendants have alleged that the Bank had exceeded the scope of its authority under the power of attorney and, that in any event, the Bank was entitled to rescind the agreement based on the claimant’s non-fulfillment of his obligations thereunder.

⁵ Per Stinson J. at para 24

- [73] In the court's view, ultimately it matters not whether the defendants gave the Bank instructions to cancel the sale. The pertinent issue that needs to be decided is whether the Bank had followed its mandate conferred by the power of attorney in such a way as to bind the defendants. The court thinks that Mr. Maragh having recited copiously from leading treatise in the law of agency must have recognised the proviso that finds its operation in the relationship between principal and agent.
- [74] The legal principles governing principal and agent are clear; and find ample exposition in the provisions of the Civil Code the full provisions which the court does not find it necessary to recite in this judgment.
- [75] The question of the defendants' liability turns on whether the Bank had exceeded its authority under the power of attorney by failing to obtain and consider a current valuation and the best possible price for the property.
- [76] There are two critical issues that must be determined when considering whether the Bank had acted beyond the scope of its authority. On the one hand, whether the Bank had obtained a current valuation; and on the other hand, whether the Bank had obtained the best possible price having given consideration to a current valuation. The two issues are both fact sensitive; and can only be resolved upon strict scrutiny of the available evidence.
- [77] The question that arises, is whether the Bank agreed to sell the property at undervalue by failing to obtain the best price possible after considering a current valuation. In other words, had the Bank failed to fulfill its mandate under the power of attorney or had the Bank fulfilled its obligation by acting within the scope of the powers conferred on it by the power of attorney.
- [78] Mr. Theodore KC, addressed this issue from both a factual and legal standpoint. The court will deal with the legal submissions first. Mr. Theodore KC, premised his legal argument on the basis that the power of attorney did not require the Bank to "blindly" sell in accordance with a current valuation but rather they were enjoined to take the valuation into consideration. He set out the legal duties and obligations of

an agent under the Civil Code and the common law. The court adopts Mr. Theodore KC's legal arguments as a correct proposition of the law.

[79] Article 1610 of the Civil Code imposes an obligation on an agent to exercise the skill and care of a prudent administrator. Article 1610 provides:

“The agent is bound to exercise, in the execution of the agency, reasonable skill and all the care of a prudent administrator.”

[80] Mr. Theodore KC, advanced the argument that a prudent administrator would not be justified in going along with a valuation that was suspect when all that was required under the power of attorney was to consider a valuation. He submitted that the power of attorney, did not, and could not in the legal sense override the Bank's duty to exercise the degree of reasonable skill and care expected of a prudent administrator.

[81] According to Mr. Theodore KC, what was expected of the Bank as a prudent administrator would have been consideration and rejection of Mr. Andrew Kings' valuation of \$10.00 per square foot and thereafter seek a second opinion.

[82] In addition, Mr. Theodore KC imported English Law into his argument by praying in aid the provisions of article 1608A of the Civil Code which provides that:

“Subject to the provisions of this Code or of any other statute the law of England for the time being relating to the contract of agency shall extend to and apply in Saint Lucia, and articles 1601 to 1661 shall as far as practicable be construed accordingly.”

[83] Under the Law of England, an agent owes a fiduciary duty to his principal. Mr. Theodore KC, relied on a passage in the decision in **Chandler (as executor of the estate of Concetta Chandler, deceased) v Lombardi**⁶ where it is stated that:

“...the agent is bound to act in accordance with the terms of the authority given. In so doing and because the relationship is one of trust, fiduciary duties derived from equity arise, including a duty to avoid conflict of interest (unless with consent) and a duty not to profit from the position as again (again, except with consent).”

⁶ [2022] EWHC 22 (Ch.) per Jason Beer QC at para 31

- [84] Relying on the aforementioned principle, Mr. Theodore KC invited the court to find that the Bank as the defendants' agent had breached its fiduciary duty to the defendants. Mr. Theodore KC asserted that the defendants were not asked, and did not consent to the Bank placing itself in a position where its interest conflicted with its fiduciary duty owed to the defendants.
- [85] According to Mr. Theodore KC, the Bank, by entering into the agreement for sale with the claimant, and granting him a loan to purchase the property stood to make a profit for itself. The defendants would have been disadvantaged by having their property sold at a reduced price while on the other hand the Bank stood to gain by the interest payments that it stood to receive. Referencing the Bank's offer letter to the claimant, Mr. Theodore KC pointed out that the Bank stood to gain \$921,480.00 on a \$360,000.00 loan, a profit of \$561,480.00 over the during of the loan which was 3 years.
- [86] It is convenient to point out that Mr. Maragh took an entirely different view from Mr. Theodore KC in respect of this latter argument. Mr. Maragh took the view that the Bank, was in the business of money lending and earning interest on the money loaned. That the defendants owed a large sum of money to the Bank and therefore, the Bank was entitled to recoup its losses on the sale. Therefore, in any event, the defendants stood to benefit from the writing off of their indebtedness to the Bank which would have resulted in the release of their other properties. Mr. Maragh suggested that when taken in this context it cannot properly be said that there existed a conflict of interest which resulted in the Bank acting to the defendants' detriment.
- [87] The factual contentions relied on by Mr. Theodore KC in support of the argument that the Bank had breached its fiduciary duty to the claimant and had in fact acted outside of the scope of the power of attorney will now be examined.
- [88] Mr. Theodore KC took the view that the valuation of the property at \$10.00 per square foot would have been unchallengeable had property prices in the area declined in the more than a decade since the defendants had acquired the same by

purchase. However, according to Mr. Theodore KC, property values in the general area had increased over the period as shown by the evidence presented to the court. Therefore, in his view, the Bank was incapable of justifying the sale at \$400,000.00.

[89] In Mr. Theodore's view, it was not sufficient for the Bank to merely say that it had obtained a current valuation, and therefore, they took it into account when they agreed a selling price of \$400,000.00. Mr. Theodore KC, opined that such reasoning on the part of the Bank would have been severely flawed both in terms of the legal reasons already advanced by him and because of the factual circumstances which existed at the time. He alluded to the following factual bases for his conclusions.

[90] Firstly, he submitted that the evidence pointed ineluctably to the fact that Mr. King's report was not made on 14th May 2006 as is alleged. Mr. Theodore KC pointed out that when Mrs. Charles wrote to the Bank in August 2006 the Bank did not reply to say that they had procured a valuation of the property and that the price was consonant with the findings contained in that report. As Mr. Theodore KC put it that would have been an ironclad response given the terms of the power of attorney. To the contrary, the Bank's instinctive reaction was to inform the claimant three days later that the sale was cancelled.

[91] In addition, Mr. Theodore KC argued that the Bank in its pleaded case did not seek to deny that it had not acted on a current valuation, but instead, pleaded in reliance of paragraph 8 of the power of attorney that they had endeavoured to obtain the best price possible. He also observed that the Bank had failed to annex to its defence to the ancillary claim, Mr. King's valuation which obviously was necessary for its defence.⁷ In Mr. Theodore's view, the fact that the defendants had alleged in their pleadings that the Bank had exceeded its authority by failing to consider a current valuation, it was incumbent on the Bank to comply with the dictates of CPR 10.5(6). Mr. Theodore KC opined that the reason for the failure was simply that the report was not in existence at the material time.

⁷ CPR 10.5(6)

- [92] Mr. Theodore KC also alluded to Mr. King's testimony regarding the existence of a gate leading to the property at the time that he conducted the valuation. As it turned out the evidence showed that in May 2006 this gate was not in existence. According to Mr. Theodore KC, this meant that if Mr. King's evidence that he saw a gate when he visited the property is accepted, then clearly, it follows that Mr. King could not have conducted a valuation survey of the property in May 2006 and that the date stated in his report is either incorrect or false. Clearly, in order for Mr. King to have seen a gate he must have had to visit the property after 7th August 2006.
- [93] In his submissions Mr. Maragh made the point that there are conflicting expert reports and the divergence of opinions regarding the value of the property between the two reports only served to amplify the subjective nature of valuations of the reports. According, to Mr. Maragh what stands out is the fact that the Bank had obtained a valuation report from a qualified expert which meant that it had discharged its obligations under the agency created by the power of attorney.
- [94] Mr. Maragh also submitted that it was not open to the Bank to question the valuer's judgment. According to Mr. Maragh, the fact that another valuer disagreed did not render the Bank's reliance upon the valuation as wrong or actionable. He opined that the Bank, having obtained a valuation and having obtained a sale in or around the valuation price was sufficient to establish that the Bank had acted within their remit under the power of attorney.
- [95] The main criticism levelled at Mrs. Hull-Casimir's report concerned the valuation of other contiguous parcels of land and the absence of any specific valuation of the subject parcels. In the premises, Mr. Maragh urged the court to disregard her valuation as it offers very little assistance to the court in resolving the issue.
- [96] Distilled to its essence, Mr. Maragh's submission was that the mere fact of the existence of a disparity between the valuations was not sufficient for the court to find that the Bank either breached its fiduciary duty to the defendants or that it had acted outside the remit of the agency.

- [97] In support of his argument that the Bank did not breach its fiduciary duty to the defendants in failing to obtain the best price possible for the property he relied on the decisions in **Caribbean Banking Corporation v Altheus Jacob**⁸ and **Becker and Others v Bank of Nova Scotia**.⁹
- [98] Based on the foregoing authorities Mr. Maragh argued that the disparity in the valuations made at different times did not amount to proof that the Bank had failed to obtain the best price possible neither did the Bank's participation by financing the sale as this was necessary to obtain a sale. Mr. Maragh highlighted the length of time that the property had been advertised for sale, the fact that the claimant placed the highest bid, and the fact that the price offered by the claimant exceeded Mr. King's valuation, being matters that the court should consider in its determining the question of whether the Bank had breached its fiduciary duty to obtain the best price possible.
- [99] In the court's view, there is significant merit in Mr. Maragh's submission that the disparity in the valuations did not *ipso facto* lead to the conclusion that the Bank had failed to obtain the best price possible when entering into the agreement for sale. The court has taken the view that whereas this may be a relevant factor to take into account, however, the court must also be mindful to consider the conduct of the Bank in obtaining the sale. However, the difficulty which the Bank encounters is simply that there is no evidence to substantiate its conduct. The court heard no evidence from the Bank and none was presented on this issue save for the untested witness statement of the Bank's manager.
- [100] The property, which is the subject of the present proceedings comprised two parcels of land measuring in total 33,250 square feet; one measuring 18,198 square feet and the other 15,052 square feet. The defendants had purchased the property in 1995 for the sum of \$665,000.00 at the rate of \$20.00 per square foot.

⁸ ANUHCVP 2004/0010 (6th October 2008)

⁹ [1986] LRC (Comm) 638

- [101] Evidence in relation to the value of the property came primarily from two witnesses. Mr. Andrew King ('Mr. King') who was called as a witness for the Bank and Mrs. Giselle Hull-Casimir (Mrs. Casimir) who was called as a witness for the defendants. They both prepared reports which were placed before the court.
- [102] Mr. King is a Quantity Surveyor. There was no challenge to his qualification to give his evidence. In his written evidence he said that on 14th May 2006 he prepared reports with respect to both parcels 30 and 31, each comprising the property. In his report he disclosed that he visited the property on 12th May 2006. In his report, Mr. King stated:
- "There is a fair demand for such properties for residential purposes."
- [103] Mr. King then went on to state under the rubric "Structure of Demand":
- "Market research of comparable properties indicate that there has been a steady increase in the land prices over the last decade. The access to the abovementioned property is through an existing private drive way of the title holders of the adjoining property and may or may not be available to a potential buyer. There is also an existing gully which traverse the property with surface water during heavy rain falls. The existing gully does pose threats to a proposed structure if and when a developer decides to undertake the construction of a building. The land will be prone to land erosion and slippage which will eventually require retaining walls and cross over bridges. There will also be restrictions from the Development Control Authority for the gully buffer and the building setbacks from the buffer. Therefore such a property will not attract willing buyers and a high market value on the open market."
- [104] Under the rubric "Value Appraised" he said:
- "In this valuation consideration is given to location, road access and the structure of demand for land in this particular market."
- [105] According to his assessment he placed the estimated current market value of Parcel 31 at \$150,520.00 at a rate of \$10.00 per square foot and a forced sale value of \$112,890.00. Mr. King's assessment of Parcel 30 was the same in all respects as that for Parcel 31; except he gave the current market value as \$181,980.00 at the rate of \$10.00 per square foot with a forced sale value of \$136,485.00. His report was dated 14th May 2006.

- [106] Mr. King was cross-examined extensively by Mr. Theodore KC. He testified that he agreed that there was a steady increase in property values in some areas in 2006. He then sought to retract this statement and sought to rely on what was contained in his valuation report. He said that Vigie could be included as one of the areas that experienced an increase in property values at that time. He agreed that the area in question was a high income low density area.
- [107] Mr. King sought to justify his findings in relation to the value given to the property by highlighting what he perceived as diminution in value based on soil erosion and the topography of the property. Nevertheless, he testified that there was a high demand for property within the area especially in what he described as the exclusive areas.
- [108] He was cross-examined by Mr. Fraser with respect to the absence of comparable valuations with respect to properties in the general area in his report. Mr. King claimed that his report was not misleading because it did not contain values for comparable properties. However, he testified that he could not recall what the average price of properties in the area was in 2006. This clearly raised suspicion that Mr. King had not adverted his mind to other property values in the area when he compiled his report.
- [109] Mrs. Hull-Casimir is a Valuation Surveyor. She conducted a valuation of the property on 10th August 2006. She compiled a written report. She stated in her written evidence that in preparing the report she paid regard to the values of comparable properties in the general area. She also carried out a site visit. She appeared to have qualified her assessment of the value of the property when expressing the view that there is usually a range of opinion with respect to property valuations. She stated that her reason for valuing the property as she did was attributable to comparative sales and costs data.
- [110] An examination of Mrs. Hull-Casimir's report revealed that she conducted a valuation of the property en bloc. Mrs. Hull Casimir conducted a valuation of all five properties owned by the defendants which included the two subject properties and the residential building. Therefore, her valuation was not confined only to Parcels

30 and 31. Appended to Mrs. Hull-Casimir's report was a list of comparable property sales in the general area between the years 2003 to 2005. In her testimony she said that the price per square foot worked out to be \$24.00.

[111] Mrs. Hull-Casimir was cross-examined by the Mr. Maragh. She testified that the report was with respect to both house and land and the vacant land. She also testified that no separate valuation was done for Parcels 31 and 30 – she valued the entire property. Mr. Maragh's suggestion was that Mrs. Hull-Casimir's valuation was either inaccurate or otherwise unreliable because of the method employed.

[112] Mrs. Charles claimed not to have been aware that the Bank had commissioned a valuation of the property prior to the sale; and that the Bank had not pleaded that a valuation was conducted prior to the agreement for sale. She said that she believed that the valuation dated May 2006 was fabricated. On the evidence presented it appears that there may be some merit in the concerns expressed by Mrs. Charles in respect of the timing of Mr. King's report. However, this does not amount to a substantive basis for discounting his expert evidence in its entirety.

[113] Having looked at the matter related to the valuations in the round, the court has arrived at the following conclusions. It is undeniable that the two valuation reports are disparate. The question for the court is how to resolve this disparity in determining the issue of whether the Bank had acted beyond the scope of its authority by breaching its duty to the defendants.

[114] How does the court deal with competing expert reports? When faced with conflicting expert evidence, a judge must find a basis for preferring the evidence of one expert over another, such as the objectivity and responses of an expert under cross-examination. The judge must carefully weigh the evidence of the experts for the parties, and make assessments on the credibility of the conflicting expert reports.¹⁰

[115] In **Alsco Pty Ltd v Mircevic**¹⁸ Robson AJA provides useful guidance on the question of judicial resolution of conflicting expert evidence. Robson AJA stated that

¹⁰ Rawle Hannibal v The BVI Health Service Authority [2019] ECSCJ No. 394

judges are not to resolve such conflicts by purporting to develop their own expertise and substitute their own opinion for that of the experts. Instead, the judge will find a basis for preferring the evidence of one expert over another such as: which opinion best aligns with the primary facts the judge finds; which opinion appears to be more credible; a comparison of the qualifications, expertise or experience of the competing experts; which expert appeared to be the most objective and the responses of the expert under cross-examination.

- [116] The issue does not fall squarely to be resolved by paying regard to the comparative reliability of the two reports. In the court's view, there are two distinct issues which arise based on the following observations. First, it appears that the Bank would have made the decision to cancel the sale after having received Mrs. Charles' letter of 7th August 2006 and Mrs. Hull-Casimir's report. Second, it appears that both reports can be discounted owing to their respective deficiencies. In the latter regard, they appear to be at opposite ends of the spectrum.
- [117] It must be noted however, that the Bank did not adopt wholesale the price stated in Mr. King's valuation. In fact, the property was sold at a price above the figure provided by Mr. King's valuation report. To that extent it is fair to conclude that the Bank gave consideration to Mr. King's report as they were obliged to do; but did not adopt it. It must also be noted that the property was advertised for sale by the Bank for some time before they accepted what they held out to be the highest bid. In these circumstances, can it properly be said that the Bank acted unreasonably in failing to obtain the best price available on the market?
- [118] In the court's view, this ought to have suggested that in either case, it was duly warranted taking the objective view, that in neither case were the valuations reflective of the current market value of the property. This disparity, say the defendants, clearly shows that the valuation adopted by the Bank ought to have been placed under scrutiny to the extent that it ought to have excited suspicion to any reasonable person standing in the shoes of the Bank that Mr. King's valuation report required review.

- [119] The defendants' suggestion was that it can properly and appropriately be implied that the Bank given the nature of the business that it transacts would be better placed than an ordinary person to weigh and evaluate property values. Therefore, in the defendants' view, had the Bank applied the degree of skill and care, it would not have adopted such a valuation wholesale without questioning the same or reviewing the same by seeking another opinion. This is so particularly given the subjective nature of the valuation exercise of which it cannot be said the Bank was totally unaware of given the nature of the business in which it was engaged and the fact that the defendants had purchased the property for \$665,000.00 with financing from the same bank; a fact which they claimed ought to have made the Bank even more aware of its duty to obtain the best price on the market for the property.
- [120] It must be pointed out however, that Mrs. Hull-Casimir's report was submitted to the Bank only after the Bank had agreed to sell the property to the claimant. Therefore, in reneging on the sale to the claimant the Bank must have given consideration to her valuation report.
- [121] In any event, Mrs. Hull-Casimir's report was not commissioned by the Bank; and the court has concluded that the purpose of the report was clearly to bring home to the Bank the new financial position of the defendants in light of their indebtedness to the Bank. Taken in this context, Mrs. Hull-Casimir's report, by its mere existence cannot lead inexorably to the conclusion that the Bank had breached its duty to the defendants.
- [122] In the case of **Scott Hauser (Executor of the estate of Richard Hauser, deceased) and another v National Bank of Anguilla Ltd**¹¹ the court had to determine the issue of whether a bank was in breach of its fiduciary duty in agreeing to sell property in the circumstances in which it did. The claimants in that case argued that the bank owed a general duty in equity, to act in good faith and to take reasonable care to obtain the best price reasonably obtainable for the property.

¹¹ [2012] ECSCJ No. 201

[123] In the present case, the defendants have put forward the argument that insofar as the Bank was financing the sale, it had the burden of ensuring that it took steps to comply with that duty. In **Hauser v NBA Ltd**, the claimants' complaint was that the bank had sold to its subsidiary and therefore was under a similar duty.

[124] Like in the present case, the claimants in **Hauser v NBA Ltd** claimed that the Bank in agreeing to sell the property at the price it did failed to secure the best price and that in financing the sale, the bank failed to have regard to the conflict or potential conflict of interest. The defendants in the present case claimed that if specific performance is granted in favour of the claimant, they were entitled to recover damages against the Bank for losses incurred on the sale of the property.

[125] The court in **Hauser v NBA Ltd** reiterated and reaffirmed the general principles of law and equity applicable on creditor sales. Justice Blenman as she then was said, relying on several decisions on the point:

"It is the law that the duty of the chargee is clearly stated in section 75(1) of the Registered Land Act of the Laws of Anguilla. In a word, the chargee has a duty to act in good faith and have regard to the interest of the chargor. I also equally accept that it is the duty to take reasonable care to obtain the proper price, or the best price reasonably obtainable on sale. See *Downsview Nominees Ltd v First City Corporation Ltd*. I am however, not of the view that the additional principle that was ascribed to the Privy Council in *Downsview Nominees Ltd v First City Corporation Ltd*, namely, there is no general duty to take reasonable care, should form the basis of the court's determination. It seems to me that the justice of cases such as these, require the chargee to take reasonable care in its exercise of its power of sale. See *Credit Suisse AG Cayman Islands Branch v Anguilla*. This much is agreed by both sides."¹²

[126] Notwithstanding, the learned judge's pronouncements on the law in **Hauser v NBA Ltd**, it appeared that she took cognizance of the need to have regard to the factual issues in arriving at a determination on the question of whether the defendant had failed to act in good faith by obtaining the best price available on a creditor sale. To that extent any such determination is clearly fact sensitive.

¹² At para 101

- [127] Relying on the case of **Michael v Miller** the court in **Hauser v NBA Ltd** held that so long as the bank had achieved such a price and in so doing it had obtained valuations as to the prices which might reasonably be achieved, it would have satisfied this aspect of its duty. Also, relying on **Downsview Nominees Ltd v First City Corporation Ltd** that once the bank had acted in good faith, as it did, it cannot be condemned merely because it has not realized the price that is desired by the subsequent encumbrancer. The court found no basis to conclude that the bank acted in any way improperly.
- [128] Essentially, the defendants' argument in the present case was that the Bank, having acted as they did failed to have regard to the legitimate interest of the defendants and therefore, acted outside the scope of the agency.
- [129] To the contrary, Mr. Maragh appeared to have taken the view that the Bank's duty to obtain the best price available or the true market value of the property at the time of sale, is qualified by the Bank being under a duty to act in good faith for the purpose of obtaining repayment. To that extent it cannot be said that the actions of the Bank amounted to a breach of its fiduciary duty to the defendants. The court is inclined not to agree entirely with this view.
- [130] Mr. Theodore's argument was that the Bank, in exercising its power of sale under the agency, was required to act based on informed judgment whether as to market conditions or as to some other matter attending the sale. However, in the court's view, there simply is no compelling evidence that the Bank failed to do so. Viewed objectively it appears that the defendants are relying solely on the disparity between the two valuations and the price which the defendants had initially purchased the property. These matters by themselves cannot support the inescapable assumption that the Bank had failed to act in good faith.
- [131] Having looked at the two valuations, it is the court's view that the use of a margin of error must be available to the court as a means of assessing whether the Bank had failed to exercise that judgment reasonably.

- [132] In the present case, the Bank had acted reasonably by assessing the market value of the property by obtaining the informed judgment of a qualified valuator as to the market value. To that extent it cannot be said that the Bank had acted unreasonably by agreeing to sell the property at the price which it did.
- [133] The parties have each relied on disparate valuations in support of their case. The quality, reliability and content of both reports have been challenged. The court in assessing the two valuation reports has taken into account the possible range of market prices for the properties therein.
- [134] In assessing the range of market prices obtainable on a sale at that time, it cannot be said that the Bank had exercised its judgment and power of sale unreasonably. Therefore, it is the court's view that the Bank had done all that was reasonable to obtain the true market value at the time of the sale.
- [135] It has been held that valuation is not an exact science so that the mere fact the valuation obtained from the Bank's valuer differed significantly from that of the defendants' was not conclusive evidence of negligence and that there was no duty on the Bank to seek a further valuation so as to comply with their duty to the defendants.¹³
- [136] As in the present case, the appellant in **Caribbean Banking Corporation v Jacob** argued that the disparity in the valuations at the time of the sale meant that the Bank should have been put on inquiry and required confirmation of the values of the properties from an independent valuer and that its failure to do so was in breach of its duty to act in good faith and to have regard to the appellant's interest.¹⁴
- [137] The question, therefore, is whether the Bank breached its duty to the defendants in accepting and acting on Mr. King's valuation and whether Mr. King was negligent in his valuation.

¹³ Caribbean Banking Corporation v Altheus Jacob

¹⁴ At paras [11] and [12]

- [138] In **Caribbean Banking Corporation v Jacob**, the court held, relying on the dicta in **Cuckmere Brick Co.** that the mere fact that the valuation differed significantly from that of another valuer is not conclusive of any breach of duty. The court found that the argument that the fact that the properties were sold at a under value because of the disparity in the valuation was circular and did not accept them. Accordingly, the court declined to arrive at the conclusion that the bank acted in breach of its duty by failing to seek a further valuation. The court opined that once there was no reasonable basis on which the valuation could be challenged, a bank acting reasonably would not need to disregard it and as a consequence seek a further valuation.¹⁵
- [139] The appellate court also found that the respondent had not demonstrated that the appraiser was negligent in conducting his valuation; and as a consequence they found that there was no duty on the part of the bank to seek further valuation of the property in order to comply with its duty to act in good faith and to have regard to the respondent's interest.¹⁶
- [140] The court has already highlighted the challenges with both valuations. The fact that Mr. King had not considered the values of comparative properties in the vicinity cannot lead ineluctably to the conclusion that he acted negligently. In the court's view, this omission may be accounted for by the methodology applied by Mr. King in arriving at his valuation for the property. The court is not imbued with the technical expertise to assess whether Mr. King's failure to consider the value of comparable properties amounted to negligence on his part. In stating as it has, the court is mindful of the fact that valuation is a subjective exercise and that there are many variables, permutations and combinations involved in the process.
- [141] What the court is concerned with is the conduct of the Bank; and to that extent has scrutinised the evidence presented to ascertain whether any of the claims made by the defendants have been made out. In the present case, the defendants have failed

¹⁵ At paras [14], [15] and [16]

¹⁶ At para [17]

to establish on the evidence presented that Bank had breached its fiduciary duty to them by failing to obtain the best price available or the market value of the property. Also, the defendants have not demonstrated by the evidence presented that the Bank's decision to sell the property at the agreed price was the result of any conflict of interest. Therefore, the court finds that the Bank did not act outside of the scope of the power of attorney granted to it and that the defendants have not made out their case in that respect.

Rescission

[142] Having concluded that the Bank had not gone beyond the scope of the authority granted to it under the power of attorney, and that the Bank had not breached its fiduciary duty to the defendants, the court will now examine the question of whether the agreement for sale having expressly stated that time was of the essence, the Bank was at liberty to exercise its right to rescind the agreement for failure on the part of the claimant to complete the sale at the specified time.

[143] Otherwise than an exercise in mere pedantry, it will be necessary to set out the terms of the Bank's offer letter to the claimant in full. By letter dated 19th June 2006, the Bank wrote to the claimant in the following terms:

"We refer to your offer received on June 12, 2006 to purchase the above at a price of \$400,000.00 and confirm our willingness to accept same.

The conditions of sale will be a non-refundable down payment of 10% (\$40,000), immediately on acceptance of this offer with the balance due and payable no later than July 19, 2006 time being of the essence of this agreement.

We confirm that the property will be sold free of encumbrances and with vacant possession ...

Kindly sign the attached duplicate indicating your clear understanding and agreement of the above."

[144] The letter of 19th June 2006 was duly signed by the claimant and the date 22nd June 2006 appears below his signature. It can be inferred that this was the date that he acknowledged the terms of the offer letter.

- [145] By a letter dated 26th June 2006, the Bank issued instructions to the claimant's legal practitioner instructing him to prepare a Mortgage Debenture stamped to cover \$360,000.00 presumably to secure payment of the balance of the purchase price on the sale of the property. The Bank's vetting attorneys in this case was Mc Namara & Company. The claimant's legal practitioner acknowledged receipt of this letter of instruction having signed the same on 27th June 2006.
- [146] The claimant did not complete the sale on 19th July 2006 as stipulated in the Bank's offer letter of 19th June 2006.
- [147] In order to place the claimant's submissions on this point into perspective it will be necessary to examine the chronology of events upon which he relied in furtherance of his claim that the Bank had not been entitled to rescind the agreement for sale. The claimant took the view that there were certain judicial hypothecs that affected the property which had to be radiated and involved obtaining a power of attorney from the judgment creditor in order to execute the necessary radiation and discharge of the judicial hypothec. It appeared that it was on this foregoing basis that Mr. Fraser argued that these events demonstrated that the delay in completion was not attributable to any fault on the part of the claimant and that the Bank was either aware or ought to have been aware of these challenges. This submission necessitates the court embarking on an excursion into what obtains as conveyancing practice in this jurisdiction.
- [148] Mr. Fraser extended this argument having adopted the view that the Bank's attorneys continued the vetting process even beyond the time fixed for completion of the sale; a fact the existence of which he said the Bank ought to have been aware.
- [149] By extension, Mr. Fraser took the position that whereas the balance of the purchase price was to be funded by a loan facility from the Bank, no evidence was presented to show that the loan facility had been cancelled or recalled; and that in any event the Bank, by its conduct demonstrated that it was fixed with knowledge of the reasons for the delay in completion of the sale.

[150] It appeared with respect to Mr. Fraser's submissions summarised in the two preceding paragraphs of this judgment that he also relied on these matters in relation to his argument on the Bank's waiver of the claimant's breach of the provisions as to the date for completion in the agreement for sale. The claimant appeared to have found support for the foregoing contentions in the evidence of Ms. Clarita Henry-Collymore where she stated that:

"On or about 13th August 2006 RBTT Bank Caribbean Limited's solicitors, McNamara and Company sent us a list of judgments registered against Michael Joseph. I had a conversation with our client Mr. Michael Joseph concerning the said judgments and he therein indicated certain things to me. I then drafted a statutory declaration which was sworn by Mr. Michael Joseph on the 15th August 2006 and duly executed on that date."

She went on further to state:

"At all material times after 19th July 2006 the RBTT Bank Caribbean Limited acting through its solicitors continued with the agreement as existing without any protestation."

[151] It court does not accept that the preceding evidence is sufficient to find that the Bank had waived its right to rescind the sale. The acceptance of any such a proposition presupposes that the Bank had communicated its position to its solicitors on or after 10th August 2006 or that the Bank's solicitors were aware of the position that the Bank had adopted with regard to the sale. To hold otherwise would be purely engaging in speculation. In any event, the duty and obligation that the Bank's solicitors owed to the Bank existed within the boundaries of the Bank's solicitor's ostensible or otherwise expressed authority and mandate to ensure that the Bank obtained adequate security for the grant of the loan to the claimant on the registration of the hypothec. It was not part of the Bank's solicitors to inquire into the Bank's position regarding the sale. Furthermore, the mere fact that the Bank had purportedly rescinded the sale rendered the vetting of the hypothec and its approval by the Bank's solicitors entirely superfluous as there would have been no property upon which the Bank's charge could have been secured. In the premises, the court does not accept that the evidence presented by the claimant could by any means amount to either an implied or unequivocal act of waiver.

- [152] In what appeared to be a second limb of the foregoing argument, Mr. Fraser submitted that a reasonable inference can be drawn from all the circumstances surrounding the agreed sale that the balance of the purchase price was ostensibly paid on 26th June 2006 and therefore, the completion of the sale was conditional on the vetting and approval of the hypothecary instrument by the Bank's attorneys. The court finds no merit in this argument and fails to appreciate its cogency in light of the issues to be decided in the present claim.
- [153] Therefore, Mr. Fraser took the view that the Bank had failed to give the claimant notice of its intention to rescind the agreement for sale on account of the claimant's non-completion within the stipulated time and therefore the claimant was entitled to treat the agreement as still subsisting. According to Mr. Fraser, in the Bank's communication to the claimant wherein the claimant was informed that the sale could no longer go through and that his deposit would be returned, the Bank made no mention of the reasons for its decision to rescind the sale or that its rescission was due to the claimant's failure to complete the sale by 19th July 2006.
- [154] Mr. Fraser argued that had the Bank considered that the claimant had breached the agreement for sale it was obligated to have communicated that fact to him. In the court's view, the mere fact remained that the Bank communicated its intention not to proceed with the sale. The court does not think that it was a prerequisite to the Bank exercising its right to rescind the agreement that it was obliged to state specifically and explicitly its reasons. The parties had agreed that time was of the essence of the agreement and the time for completion had passed; a fact which was well within the contemplation of the parties at the time they entered into the agreement.
- [155] The court does not see any merit in Mr. Fraser's argument. The claimant was well aware of the fact that the time for completion had passed. The mere fact that the Bank had offered to refund the deposit paid pursuant to the agreement for sale ought to have driven home to the claimant that the Bank had decided to rescind the sale. In the premises, when these two facts are juxtaposed they point squarely to the fact

that the claimant must have been aware of the reasons why the Bank had adopted the position that it did. The claimant's evidence given under cross-examination at the trial points inexorably to the fact that he must have been aware that the time for completion had passed and that he had breached his obligation under the agreement which entitled the Bank to rescind the agreement.

[156] Mr. Theodore KC challenged the claimant's foregoing argument by taking the view that in relying on the foregoing submission that the claimant obviously had uppermost in his contemplation that in the Bank's communication to him on 10th August 2006 wherein the Bank gave its reasons for the cancellation of the sale the fact that the defendants considered the price to be below market value.

[157] Having identified the main supposition on the part of the claimant in support of his argument, Mr. Theodore KC relied on the principle of law that if a party refuses to perform a contract, and gave a wrong or inadequate reason or no reason at all, he may subsequently justify his refusal if there were facts in existence at the time which would have provided a good reason. Therefore, argued Mr. Theodore KC, the fact that the reason given by the Bank was the objection raised by the defendants to the purchase price was not a bar to the Bank presenting other defences as long as the facts upon which those other defences were premised were in existence at the time when the first reason was given.

[158] Mr. Theodore KC at the very least conceded that where time is of the essence of a contract, delay may be waived. Mr. Theodore KC placed reliance on the learning contained in Halsbury's Laws of England where it states:

"Waiver may be express or implied from conduct, but in either case it must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. Furthermore, it seems that for a waiver to operate effectively the party to whom the concession is granted must act in reliance on the concession."

[159] Having relied on the aforementioned statement of legal principle, Mr. Theodore KC adopted the view that there was no waiver of the delay. Mr. Theodore KC's basis for arriving at this conclusion was that there was no express waiver by the Bank of

the claimant's delay in completing the sale. In order for there to have been such a waiver there ought to have existed some positive or intentional act with knowledge of all the material circumstances on the part of the Bank which amounted to an unambiguous representation; and in this case there was none.

[160] The court sees the merit in Mr. Theodore KC's argument that the claimant has not shown demonstrably either in his pleadings or by way of evidence that there was some unambiguous representation by the Bank that amounted to waiver. In fact, the court agrees that separate and apart from any unambiguous representation, the claimant had relied on no representation at all made by the Bank to the effect that it had waived any breach by the claimant of the stipulation in the agreement that time was of the essence. The court also accepts Mr. Theodore KC's observations regarding the claimant's testimony under cross-examination wherein he admitted that he had made no request to the Bank for an extension of time to complete the sale or that the reasons for the delay had been communicated to the Bank.

[161] Furthermore, there was no evidence of any exchanges or communications between the claimant and the Bank regarding the delay in processing the hypothecary instruments for the reasons that the claimant has highlighted in his submissions which are discussed below. The court is of the view that the claimant's submissions on this point are defeated by the evidence presented at the trial.

[162] Ultimately, Mr. Fraser posited that the claimant could not have committed a repudiatory breach of the agreement for sale by not having completed the same by 19th July 2006 in circumstances where the claimant's non-performance was justifiable by some reasonable or lawful excuse such as the occurrence of the intervening events to which he had already alluded that interfered with his performance of his obligations under the agreement for sale. In the premises, Mr. Fraser submitted that the Bank was not permitted to rescind the agreement for sale in such circumstances.

[163] In support of the foregoing proposition, the claimant appeared to have relied on the testimony of Ms. Henry-Collymore to substantiate what he described as the

intervening circumstances that were not attributable to any fault on his part to complete the sale at the stipulated time. In fine, Ms. Henry Collymore sought to express her opinions and give explanations regarding the length of time that it would have taken for all the procedural steps in a transaction such as the present one to have been completed. This evidence was not all together alien to the vagaries of normal conveyancing practice.

[164] Ms. Henry Collymore was at the material time employed by the claimant's attorney-at-law as office manager and her duties entailed the drafting of deeds and hypothecary obligations, mortgage debentures among other duties. In her written evidence she stated that on 26th June 2006, Mr. Fraser handed her a letter from the Bank which contained instructions for the preparation of a mortgage on behalf of the claimant and the signing of a letter of undertaking. Thereafter she caused a search to be undertaken at the Land Registry and the Registry of Deeds and Mortgages. She said that upon completion of the search she discovered that there was a judicial hypothec registered against the property. She stated that she proceeded to prepare the deed of sale, the hypothec and two radiations which she completed on 3rd July 2006. She said that the judgment creditor's attorney-at-law responded to her on 7th July 2006 regarding the radiation of the judicial hypothec. According to her evidence a power of attorney was required in order to have the radiation in question executed on behalf of the judgment creditor. She stated that the power of attorney was registered on 26th July 2006 and submitted to the claimant's attorney-at-law sometime thereafter.

[165] Ms. Henry Collymore attributed the delay in completion of the sale to the time and effort spent on radiating the judgment debt. She stated in her written evidence that having regard to the said delays it was impossible to complete the work required of the claimant's attorney-at-law on or before 19th July 2006 and that the said delay was not that of the claimant or his attorney-at-law. What is noteworthy however, in terms of Ms. Phillip's evidence is that nowhere did she allude to the date on which the relevant documentation was submitted to the Bank's solicitors for vetting.

- [166] The tenor of Ms. Henry Collymore's evidence seemed to have attempted to place the cause for the delay squarely at the feet of Mr. Charles owing to his indebtedness. She testified that "Any delay in the completion of the notarial work in relation to the agreement was caused by the time and effort spent on radiating the judgment debt of Mr. William Charles, a principal of RBTT Bank Caribbean Limited". The court declines to accept that this was a reasonable explanation for the delay or that the cause for the delay laid at the feet of Mr. Charles and the Bank for the following reasons.
- [167] The transaction involved was what has been termed a contemporaneous transaction as far as conveyancing practice in this jurisdiction is concerned. All that the Bank would be concerned with was that its security over the property was duly registered as a first existing charge against the property. In order for that to occur the radiation would have to be registered either before the deed of sale and hypothec or presented for registration together with the deed of sale and the hypothec. This is not an unusual practice but indeed a common practice. All that was required at the vetting stage was approval of the hypothec, the deed of sale and an approved draft of the radiations.
- [168] In as much as the claimant has sought to have the court adopt the inference that the delay was attributable to Mr. Charles' indebtedness or that the Bank was somehow responsible by failing to adhere to its undertaking in the agreement to convey the property free and clear of all encumbrances, the court finds any such inference untenable. The judicial hypothec would obviously have had to be discharged from the proceeds of the sale. In any case, it would not have been necessary for the radiation to have been signed at that stage. Indeed the radiation would have only been signed upon the judgment creditor receiving payment. Furthermore, it did not appear to be the responsibility of either Mr. Charles or the Bank to obtain a radiation since clearly the claimant's legal practitioner had assumed the responsibility of their own initiative for securing the same.

[169] In support of his argument, the claimant appeared to have been relying on the decision in **Thomas v Kensington**¹⁷ where it was held that where a vendor fails to complete a contract for the sale of real property owing to the fact that there remains a mortgage on the property, the case is not one where the failure is due to a defect in the vendor's title and the liability to the purchaser is not limited to the costs of investigating title, but the purchaser is entitled to damages for loss of bargain, and this is so, although the purchaser knew, when he entered into the contract, that the land was mortgaged. However, the above cited decision does not avail the claimant. The decision in **Thomas v Kensington** is distinguishable from the present case to the extent that in the present case the claimant had assumed the responsibility of obtaining the discharge of the judicial hypothec whereas in **Thomas v Kensington** it was proved that the two mortgages were still subsisting and there was no evidence that the defendant had made any effort to persuade the mortgagees to release the property to be sold.

[170] The challenge which the claimant suggested that he faced with regard to the radiation and the apparent delay caused thereby could have been alleviated by the submission of a letter of undertaking to the Bank to secure the release of the proceeds of the hypothec pending registration of the same and the registration of the deed of sale on the strength of such letter of undertaking. No evidence has been presented of the claimant's legal practitioner having sent a letter of undertaking to the Bank. In the court's considered view, the challenge which the claimant relied on as being the cause for the delay could have been alleviated by communication with the Bank.

[171] However, what stood out, in the court's view, is Ms. Henry-Collymore's testimony in cross-examination where she testified that she had never seen the Bank's offer letter of 19th June 2006 and that she was not aware of the closing date of the sale. What was even more relevant was her testimony that the documents were completed for registration long after 19th July 2006.

¹⁷ [1942] 2 KB 181

- [172] However, the court is reminded of the claimant's testimony in cross-examination where he claimed not to have been aware that the hypothecary instruments had not been submitted to the Bank by 19th July 2019. However, he went on to agree that the mortgage documents had not been submitted to the Bank by 19th July 2006. Furthermore, in light of all the reasons which the claimant has presented as the cause for the delay in completion, no evidence was presented of any attempt made to communicate the reasons for the delay to the Bank and to seek an extension of time for completion.
- [173] The circumstances of the present case brings to mind the facts in **Brickles v Snell**¹⁸ where the purchaser under an agreement for the sale of land, which made time of the essence, was in default at the date fixed for completion, and the vendor thereupon cancelled the agreement. At that date there was a small mortgage upon the land. The mortgagee had consented and was willing to accept repayment upon the completion taking place; the purchaser had been informed that the mortgage would be paid off upon the completion and had raised no objection. The Privy Council held that the vendor was able and willing to convey at the date fixed for completion, and that the purchaser being in default was not entitled to specific performance.
- [174] The facts in **Brickles v Snell** are illuminating in terms of the issue raised by the claimant herein. The undisputed facts in **Brickles v Snell** are summarised herein purely for the sake of exposition. The purchaser's solicitors, did not prepare the deed of conveyance, nor, apparently, did they claim or intend to do so. The vendor's solicitors, took the matter in hand, and the purchaser and his solicitors apparently acquiesced in that arrangement. The vendor's solicitors wrote to the solicitors of the purchaser and enclosed a draft deed for approval. The vendor's solicitors again wrote to the purchaser's solicitors, enclosing a corrected description of the lands to be conveyed, and requesting them to detach the first page of the copy deed sent the previous day and to replace it with the page enclosed. Subsequently, the

¹⁸ [1916] 2 AC 599

vendor's solicitors sent to the same firm a third letter to the following effect: "Would you please return draft deed herein approved, with your objections to title, as our client will be in the office on Saturday." The purchaser's solicitor commenced examination of the vendor's title and he had completed the searches and was ready to accept the title. There remained, however, one matter to be cleared up, in reference namely, the existence of an undischarged mortgage of the property sold. The purchaser's solicitor informed the vendor's solicitor that the title was satisfactory, but that there was a mortgage which should be discharged. The vendor's solicitor replied that he would have it discharged on closing. The purchaser's solicitor apparently took ill and did not return the draft deed and was only able to do so after the date fixed for closing. The purchaser's solicitor subsequently informed the vendor's solicitor that they were ready to close. The vendor's solicitor replied the draft deed had not been returned and that under the agreement, in every respect time was to be strictly of the essence thereof; and that the vendor has now instructed them to that on account of the purchaser's solicitor's default the vendor would not carry out the contract, and that the same was now rescinded.

[175] The facts in **Brickles v Snell** clearly illustrate the strictness with which the courts are ready to apply the time of the essence clause in agreements for sale of land; even in the case where the fault is on the part of the solicitor. Therefore, the court has formed the view that the circumstances highlighted by the claimant as giving rise to the delay in completing the sale do not avail him and do not entitle the court to declare that he is entitled to specific performance of the agreement.

[176] In addition, it did not appear on the evidence that the claimant at any time after 19th July 2006 or prior to 10th August 2006 had made any attempt at completing the sale by payment of the balance of the purchase price to the Bank which the Bank refused. Therefore, in the court's view, the Bank was entitled to rescind the agreement for sale at any point subsequent to 19th July 2006. On the evidence

presented it cannot be said that the Bank had waived its right to rescind the agreement where time was of the essence.¹⁹

[177] In the present case there can be no dispute that time was indeed of the essence. In addition, there appeared to be no disagreement between the parties that this was indeed the case. The court is fortified in this view having regard to the evidence presented at the trial. It was clear, and the court has no doubt that the claimant understood his obligations under the agreement for sale; that the balance of the purchase price had to be paid by 19th July 2006. The claimant initially claimed under cross-examination by Mr. Theodore not to have understood the meaning of the term “time of the essence”. He later testified that he understood it to mean that time was important and that he also understood it to create a “deadline”. He also testified that he had not sought legal advice as to the meaning of the term “time of the essence” as he had not thought it necessary.

In addition, the claimant testified that:

“It is my understanding that I would breach the contract if I did not close by paying the balance.”

He also said:

“I did not request an extension of time and I made no effort to seek an extension of time...I never sought an extension of time to complete the sale”

In summary, claimant testified essentially that he understood the Bank’s offer letter and that there was nothing contained therein that was unclear to him. He understood every single word of it. He also testified that he understood where it said that the balance was to be paid by 19th July 2006. He also claimed to have understood where it said time of the essence.

[178] Now Mr. Fraser took the view that since the agreement for sale contained no provision for the requesting or granting of an extension of time to complete there was no obligation on the part of the claimant to seek such an extension. Quite arguably the reasons for Mr. Fraser’s stance with regard to this point was that the

¹⁹ Union Eagle v Golden Achievement Ltd [1997] AC 514

agreement contained the entire bargain between the parties by which they were bound. The court does not accept that this provided adequate grounds or explanation for the claimant failing to seek an extension for the time for completion given the nature and reasons for the delay which became apparent according to the evidence for the claimant his attorneys-at-law would have been aware of prior to the time fixed for completion. Just for the sake of argument it would have been unreasonable for the Bank to have refused such an extension in light of the extant circumstances; and in any event, it would have been opened to the claimant to have challenge such refusal on equitable grounds given the fact that he had partially performed the agreement.

[179] In the present case there had been no agreement to extend time, nor anything that amounted to waiver of the right to treat time as of the essence. Therefore, a decree of specific performance cannot be granted as the parties had expressly provided in their agreement that time was to be of the essence of their agreement.

[180] Therefore, in the court's view, the only salient issue which remains for the court's having regard to the submissions of the parties is whether the court can imply a term into the agreement for sale between the Bank and the claimant that completion was conditional upon the claimant being able to charge the property by way of security for the purchase price; and whether such term was necessary to give business efficacy to the agreement for the sale of the property. This was a most vexing and troubling issue for the court.

[181] It appeared to the court based on Mr. Fraser's submissions that the claimant had assumed the position that the offer letter and the mere fact that the instruction letter to prepare the hypothecary obligation as a charge against the property ought to be read together so that it can be implied somehow that completion of the sale was contingent on the claimant obtaining the necessary financing from the Bank.

[182] However, an examination of the letter of 19th June 2006 which for all intents and purposes constituted the agreement between the parties does not show that it was an express or implied term of the agreement that the claimant's obligation to pay

the balance of the purchase price by 19th July 2006, was dependent upon his being able to charge the property to secure such price.

[183] Neither does the court consider that it can be implied into the agreement that the completion of the sale was contingent on the claimant obtaining such financing. The method by which the claimant obtained the financing was clearly of no concern to the Bank. In any event, it was not part of the written agreement between the parties that the sale would be completed upon the claimant obtaining financing and therefore so no such term could be enforced against the Bank.

[184] As the court has indicated above, the agreement between the parties as evidenced in the letter of 19th June 2006 appeared to have been a complete agreement. Could therefore terms be implied that completion by the claimant depended on his ability to secure the sale price on the property and more so merely because the Bank itself had agreed to grant him a mortgage debenture for that purpose?

[185] The claimant's argument brings into sharp focus the provisions of Article 956 of the Civil Code which provides that the obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature. In the present case the claimant has failed to direct the court's attention to any principle of law, equity or established usage that were incidental to the agreement for sale.

[186] In the present case the agreement for sale was a complete contract. The general principle for implying terms into a complete contract is where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms; this is very common in mercantile contracts where there is an established usage; in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work.²⁰

²⁰ Liverpool City Council v Irwin and Another [1977] A.C. 239

[187] It does not appear clear in the instant case the circumstances that lead to the claimant obtaining an offer of loan financing from the Bank to purchase the property except from what is contained in the claimant's written evidence. In his witness statement the claimant stated:

"I immediately applied to the RBTT Bank Caribbean Limited in order to secure a loan facility in the sum of \$360,000.00 to settle the balance of the purchase price for the said land. The loan was approved by the Defendant on the 26th June, 2006."²¹

[188] In the court's view, the foregoing evidence is insufficient to establish that it was a condition precedent to the closing of the sale that the claimant would obtain loan financing. The mere fact that the Bank had agreed to provide financing to the claimant on his application is not enough to imply a term into the agreement that completion of the sale was contingent on the claimant obtaining loan financing. There simply is no evidence to even suggest that the Bank agreed to finance the sale of the property upon the acceptance of the claimant's offer to purchase. As a matter of fact, the claimant could have applied to any other financial institution to obtain financing to pay the balance of the purchase price. It was his choice to select the Bank for that purpose. Instructions were given to the claimant's solicitor to prepare the mortgage deed and not to the Bank's solicitors. It appears from the evidence that the claimant's solicitors were clearly responsible for the default in completion having been aware that the time for completion and that the time was of the essence of the agreement.

[189] Therefore, the court is compelled to find that no such term can be implied into the agreement to give efficacy to it or to permit it to work. No such term being capable being implied into the agreement, the court finds that the claimant had breached a fundamental term of the agreement and that the Bank was entitled to rescind the same. On that basis the claim for specific performance cannot succeed.

[190] The court is fortified in its view having considered the approach and reasoning of the Court of Appeal in the case of **Lyra Sewer Collazo v Percival Williams**²² where

²¹ At para 10

²² [2008] ECSCJ No. 90; per Carrington JA (Ag) at paras 22 – 31

it was held that the courts will not imply a term into a contract for sale of land that completion was conditional upon the purchaser being able to charge the property by way of security for the purchase price as such a term was not necessary to give business efficacy to a contract for sale of land.

Conclusions

[191] Having regard to all of the foregoing the court has arrived at the following conclusions based on the pleadings, evidence and the submissions presented on behalf of the parties:

- (1) The Bank having held an irrevocable power of attorney was entitled to enter into the agreement for sale of the property.
- (2) At the time that the Bank entered into the agreement for sale with the claimant, the Bank was acting as the defendants' agent and the general principles of agency would have applied.
- (3) Under the law of agency the defendants would have been held liable for any liability incurred by the Bank while acting in the capacity as agent for the defendants under the irrevocable power of attorney.
- (4) The defendants would not incur liability in respect of acts performed by the Bank if the Bank had acted outside the scope of the agency created by the power of attorney.
- (5) In the present case, the Bank had not acted outside the scope of the agency; and therefore, was not liable to indemnify the defendants in respect of any liability incurred in the execution of the agency.
- (6) As a result of the Bank having acted within the scope of the agency, the defendants would have been liable to the claimant on account of the Bank's rescission of the agreement for sale if it were found that the Bank was not entitled to rescind the sale and the claimant was entitled to specific performance.
- (7) The claimant having failed to establish that he was entitled to specific performance of the agreement for sale and it having been established that the

Bank was entitled to rescind the sale, neither the Bank nor the defendants could incur any liability to the claimant.

- (8) In any event, it having been found that the defendants had not instructed the Bank to stop the sale, the defendants could not be held directly liable to the claimant for breach of contract and specific performance of the agreement for sale. The defendants' liability would have only arisen if the Bank was found liable. In the present case, the claimant proceeded almost on the basis that the defendants had been a party to the agreement for sale and had seemingly overlooked the existence of the agency created by the power of attorney. The defendants could only have been held liable under the principles of agency.
- (9) The defendants having failed to establish that the Bank had acted outside the scope of the agency by acting in breach of its fiduciary duty to the claimant by failing to obtain the best price possible or the market price of the property on the basis of the Bank's obligation under the power of attorney cannot succeed in their ancillary claim against the Bank.

Costs

- [192] Although the parties had not made any submissions with respect to the question of costs and they had not been invited to do so, the court will now deal with the question of costs having decided the matter in the manner in which it has. With respect to the substantive claim, the court thinks that the defendants are entitled to prescribed costs on the basis of CPR 64.6 and CPR 65.5(1). With respect to the costs to be awarded on the ancillary claim the court makes the following observations. Whether the defendants or the Bank or both of them were held liable to the claimant was not dependent on the determination of the ancillary claim filed by the defendants. As in the present case, where the ancillary claim is a claim for indemnity it only becomes relevant if liability is found on the underlying claim; the ancillary claim had no bearing on the outcome of the underlying claim. In this instance, the underlying claim was dispositive of the dispute between the claimant and the defendant and the issues on the ancillary claim were merely canvassed by the court for the purposes of completeness. Therefore, notwithstanding that the defendants unsuccessful on the

issue of whether the Bank had acted outside the scope of its authority under the power of attorney, the court sees no reason to make an award of costs in favour of the Bank. This latter issue would have only been significant if the claimant had succeeded in his claim against the defendants.

Order

[193] In light of the reasons given and the conclusions arrived at in this judgment the court makes the following orders:

- (1) The claimant's claim against the defendants is dismissed in its entirety.
- (2) The ancillary claimant is entitled to retain the non-refundable deposit of \$40,000.00 paid by the claimant pursuant to the agreement of 19th June 2006.
- (3) The defendant's ancillary claim is dismissed in its entirety.
- (4) The defendants' counterclaim against the claimant is allowed to the extent hereinafter appearing.
- (5) The claimant not having succeeded in his claim for specific performance, and the defendants having succeeded in their counterclaim, the claimant is therefore ordered to remove the cautions dated 18th August 2006 registered against the defendants' property registered as Block 0650E Parcels 30 and 31 forthwith.
- (6) The claimant shall pay prescribed costs to the defendants in the sum of \$15,082.17 unless otherwise agreed within 21 days.
- (7) The court makes no order with respect to costs on the ancillary claim.

Shawn Innocent
High Court Judge

By the Court



Dp. Registrar