

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER CIRCUIT**

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

CLAIM NO. SKBHCV2012/0189

BETWEEN:

**BROWEN GLASFORD
KAREEM VINTON GLASFORD**

CLAIMANTS

and

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

DEFENDANT

Appearances: -

Mr. Emile Ferdinand Q.C. with Ms. Keisha Spence of Kelsick, Wilkin & Ferdinand, Attorneys-at-Law for the Defendant

The Claimants appear in person, unrepresented

March 2019: 1st

JUDGMENT

[1] **CARTER, J.:** The Claimants by Claim form sought a number of items of relief in this action.

[2] The claimants set out their filed Statement of claim various bases upon which they say that the actions of the defendant have caused them loss and/or damage. These included allegations of fraud, negligence, breach of fiduciary duty, breach of

confidence, breach of mandate and breach of contract all arising from the actions of the defendant.

- [3] On the day of the trial, however the claimants filed and served a Notice of Part Discontinuance, in respect of the following causes of action:
- (i) unlawful means conspiracy;
 - (ii) procuring breach of contract;
 - (iii) breach of fiduciary duty;
 - (iv) undue influence;
 - (v) breach of confidence; and
 - (vi) negligence.
- [4] The claimants therefore proceeded with the following items of claim at trial:
- Did the bank act in breach of mandate to debit monies without written signatures of the Claimants
 - Did the bank fraudulently misrepresent the mortgage arrangement in respect of the land
- [5] The following salient facts are not in dispute:
- (i) Bronwen Glasford, the 1st Claimant, is the mother of the 2nd Claimant. The 1st Claimant is and was at all material times, the sole registered proprietor of Lot No. 20 of Section DA/18 situate at Frigate Bay Development, St. Kitts that was mortgaged to the Defendant a company duly registered to operate as a Bank in St. Kitts as CIBC First Caribbean International Bank, as security for the initial loan of EC\$860,000.00, and the several subsequent loans granted to the Claimants (as co-borrowers) to assist in financing the construction of a house on the said mortgaged land, and related expenses.
 - (ii) In response to the Claimants' application to borrow the aforesaid initial sum of EC\$860,000.00, the Defendant sent the Claimants a loan facility letter dated January 18, 2005¹ and the Claimants both signed same on 19th January 2005 and returned it to the Defendant, documenting their acceptance and agreement to its terms. The Claimants also each signed:
a Joint Account Agreement dated 4th January 2004²;

¹ Exhibit "FCIB1" in Trial Bundle 2 at pages 85-103 and see also at pages 27-30 of Trial Bundle 1 where "BG1" is one of the documents that the Claimants attached to their Claim Form.

² See Exhibit "FCIB6" in Trial Bundle 2 starting at page 145.

a Cardholder Agreement;³ and
a Memorandum of Deposit of Certificate of Title⁴ on the 16th
and 22nd March 2005, respectively.

- (iii) After the initial loan of EC\$860,000.00, the Claimants borrowed additional monies from the Defendant to refinance the initial mortgage loan (and subsequent loans, also from the Defendant) and to cover additional expenses taking the new balance to EC\$973,250.00.

Breach of mandate

- [6] The first of the issues to be determined is that of the breach of mandate. The defendant's submission states the context quite clearly and succinctly: "Claims for breach of mandate usually arise either where a bank has allegedly wrongly refused to make payment or has wrongly made a payment without proper authority. Claims for breach of mandate are claims for breach of contract and/or for an account. Where it is found that a bank has wrongly paid money when it had no authority to do so, the bank will usually be treated as if it had paid using its own funds, not those of the customer. Therefore, the customer's claim will be for a declaration that the debits made to the customer's account should be reversed, and for damages to compensate the customer for any reasonably foreseeable losses incurred by the customer as a result of the bank's failure to state the balance of the account accurately."
- [7] The claimants' claim rests on their submission to this court that the contractual arrangements between the claimants and the defendant re the mortgage loan and the claimants' bank accounts required or mandated that both claimants sign written authorizations for each and every disbursement, expenditure or withdrawal of any of the monies loaned to the claimants by the defendant.

³ See page 157 in Trial Bundle 2.

⁴ See Exhibit "FCIB24" at pages 253 and 260.

- [8] The claimants submitted that the defendant made payments contrary to and/or in breach of mandate. In particular, the claimants submit that their evidence sufficiently establishes a *prima facie* case on the basis that the payments were made by the bank on unauthorised instructions as monies were debited without written authorization.
- [9] The defendant's answer to the claimants on this issue was clear, that "Nowhere in any of the loan facility letters is it stated that the Claimants signatures were required to authorize loan disbursements." In fact, the defendants contend, at the trial the 1st Claimant under cross-examination accepted that the allegation that both Claimants had to sign such written authorisations was contradicted by the documents signed by the Claimants and that these documents included the loan facility letters⁵, the related Memorandum of Deposit of Certificate of Title, and the Joint Account Agreement, each of which contained clauses stating the contrary to the Claimants' allegations.

The law

- [10] The claimants submitted that their claim that the evidence sufficiently establishes a *prima facie* case on the basis that the payments were made by the bank on unauthorised instructions is supported by the authorities in the case of *Bank of Bermuda*⁶ quoting from the judgment of Alleyne JA, that: in the BVI Court of Appeal 13:
- "Far from being unhelpful, it is my view that this affidavit, standing alone, sufficiently established a *prima facie* case for summary judgment on the basis that the payments were made by the Bank on unauthorised instructions"
- [11] The also rely on the case of *Tai Hing Cotton Mill* in the Privy Council:

"The business of banking is the business not of the customer but of the bank.

⁵ See Exhibit "BG1" at pages 27-30 in Trial Bundle 1; and Exhibits "FCIB1", "FCIB2", "FCIB3", "FCIB4" and "FCIB5" in Trial Bundle 2 at pages 85-103, pages 105-113, 115-121, 123-129 and 131-144, respectively.

⁶ *Bank of Bermuda v Pentium Ltd et al*, Civil Appeal No 14 of 2003

They offer a service, which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. **If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account.** This is a risk of the service which it is their business to offer.”⁷

Fraudulent misrepresentation

[12] The second issue at trial was the claimants’ claim for fraudulent misrepresentation. The Claimants seek relief “against the bank in respect of the land pleaded at paragraph 2 of the Statement of Claim by reason of fraudulent misrepresentation in the mortgage over the land, and therefore, set out proof of each of the 8 elements ... in *misrepresentation by deceit*”⁸

[13] The following are the matters upon which the claimants say that there is proof to support their claim in tort for damages in respect of such fraudulent misrepresentation.

- “(1) that the alleged representation consisted of something said, written or done which amounts in law to a representation;
- (2) that the defendant was the person who made the representation;
- (3) that the claimant was the person to whom the representation was made;
- (4) that the representation was false;
- (5) that the representation was a material inducement to the claimant to act on it;
- (6) that the claimant in fact altered his position by it;
- (7) that the representation was fraudulent; and
- (8) that the claimant thereby suffered damage.”⁹

[14] The claimants base their claim entirely on a letter from a representative of the defendant. “We are pleased to attach the forms, which will require yours and Kareem’s signature for the release of the loan funds. The ‘Loan Disbursement Summary’ form is to be signed for each drawing request, so please keep some copies of this form”¹⁰

⁷ Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80, HK PC, at TAB (?)

⁸ Page 13 of the Claimants’ closing submissions

⁹ Ibid.

¹⁰ Found at page 44 of Bundle 1 filed on behalf of the bank and referred to as the pleaded the Representation and Authorisation Form marked “BG3”.

- [15] The claimants urge the court to find that this is a representation as per paragraph 17 above.
- [16] The Claimants rely on the signature at “BG3” to say that the bank made the representation, and in particular, that the agent's signature is treated as being that of his principal. In particular, “For and on behalf of First Caribbean International Bank (handwritten signature) Julia Joseph”
- [17] The Claimants submit that the claimant was the person to whom the representation was made, and in particular, that “BG3”¹¹ was addressed “Dear Dr Glasford” and submit that “the 1st Claimant is representee as the person to whom the representation was physically and directly made; and, further, the Claimants rely on “BG3” referring to “Kareem” and “Kareem’s signature and submit that the 2nd Claimant is representee as the person to whom the representation is intended to be passed on.”¹²
- [18] The claimants further submitted that the Representation evidenced in “BG3” was not true in the natural sense of the words used. In particular, that the words contained in “BG3” were reasonably and naturally capable of bearing only one meaning but that that the Representation was false at the date when the Claimants altered their position because of it.
- [19] The claimants go on to argue that the false representation was a material inducement to the claimant to act on it. They claim that their evidence at trial particularly that of Dr. Glasford shows that:
- (i) “I would not have gone into a contract had I not been assured that I would sign authorisation”; and
 - (ii) (ii) “The only reason I agreed to the mortgage while living in Canada was that there was a mechanism put in place for me control debits

¹¹ “BG3” at Page 44 of Bundle 1 filed on behalf of the bank.

¹² Claimants closing submissions at page 20

from my account. The mechanism that was put in place was the Authorisation Form”

[20] They further submit that the object of the representation was to induce the Claimants to enter a mortgage with the bank while residing outside of St. Kitts. It was designed to be an inducement to the Claimants.

[21] According to the Claimants, they altered their position by the act of using land in reliance on representation. In particular, they

- (i) entered into a contract with the bank pleaded at paragraph 4 of the Statement of Claim, and
- (ii) entered into a mortgage over land pleaded at paragraphs 2 and 19 of the Statement of Claim

[22] The claimants point to proof of fraud by submitted that there were an elements of both knowledge and recklessness on the part of the Bank. In particular, they submit the following:

“(1) *knowingly* – The Claimants submit that the bank had the requisite knowledge ,that is to say “fully conscious of it...and conscious knowledge of falsity must always amount to wickedness and dishonesty...describing the sort of knowledge which is necessary”¹³; or

(2) without belief in its truth – see below;

(3) *recklessly* – The Claimants submit that the bank had the requisite recklessness, that is to say, “indifference to the truth, the moral obliquity of which consists in a willful disregard of the importance of truth”¹⁴

[23] The claimants submit that they have proved that damage was the natural and direct consequence of the misrepresentation being believed, in which intention to produce such an effect must be imputed to the bank. The claimants point to the following in proof of the fact that the damage that they say they sustained is of the kind which the law recognizes. In particular, they raised the following for the court’s consideration:

¹³ *ibid* at [258], approving *Armstrong v Strain* [1951] 1 TLR 856 at 871 per Devlin J

¹⁴ *ibid* at [257] See page 31 of the Claimants closing submissions

- “(i) The Claimants submit insurance premiums as to constitute loss of money to a third person; ¹⁵
- (ii) The Claimants submit the Claimants’ payments to the bank under the Bank Contract constitute loss of money paid to the representor himself;¹⁶ and,
- (iii) The Claimants submit that the mortgage amounts to destruction of or injury to property, that being the land pleaded in the Statement of Claim.”¹⁷

[24] The Defendant is clear in answer to these submissions: “The burden is on the Claimants, whether by direct evidence or reliance on an inference, to establish to the satisfaction of the Court that there was a representation of fact, which was false, and that the Claimants placed reliance on the representation ¹⁸ and suffered loss as a result. Although the Claimants “parroted” that they relied upon the alleged representation made by Julia Joseph re the signing of authorizations in the format of the Loan Disbursement Summary, the timing¹⁹ of such alleged representation, and the conduct of the Claimants²⁰, did not demonstrate any such reliance.”

The claimants’ evidence:

[25] **Bronwen Glasford**, the first claimant, gave evidence that she brought a piece of land the subject of the mortgage while working in St. Kitts and before she returned

¹⁵ *Halsbury’s*; 790 What actionable damage includes; at Appendix

¹⁶ *Halsbury’s*; 790 What actionable damage includes; at Appendix Further, See *Kettlewell v Refuge Assurance Co Ltd* [1908] 1 KB 545 at 550, CA, per Alverstone CJ

¹⁷ Claimant’s closing submissions at page 35

¹⁸ *William Smith v Davis Chadwick et al* (8884) 9 App Cas 187

¹⁹ The initial loan facility letter (“FCIB1”) was dated 18th January 2005 by the Defendant bank, and was signed by the Claimants on 19th January 2005. The related Memorandum of Deposit of Certificate of Title was signed on the 16th and 22nd March 2005 by the First and Second Claimants, respectively. It will thus be noted that the date of Ms Julia Joseph’s fax (page 44 of Trial Bundle 1) upon which the Claimants seek to place much reliance, was 4th April 2005.

²⁰ The Claimants have not put before the Court even a single completed and signed Loan Disbursement Summary. If they did intend to rely upon such a document to keep them informed of the mortgage loan disbursements and/or the state of their account, one would have expected them to have and produce at trial such copies. The Claimants’ testimony was that the Loan Disbursement Summaries were to have been communicated by FAX, not email.

to Barbados. In December 2004 the claimants met Julia Joseph, the defendant's representative to discuss the mortgage loan.

"One of the things in particular that came out of the meeting for which we agreed was that Ms. Julia Joseph would put a special mechanism in place for disbursement of funds regarding that property because both claimants...were not living in St. Kitts and resided in two different countries. We wanted to ensure that deductions would be authorised by the claimants so that Julia Joseph used the bank's authorization to assure us that we would have some control as well as knowledge as to what was happening to the monies we were indebted to FCIB for."

[26] At the end of the meeting the claimants were satisfied that they "would be able to control the debit of funds". She stated that the claimants discussed the used of authorization forks and that they sign signature cards which were to be matched to authorization forms "that would be sent to us and then returned to the bank."

[27] She stated that, sometime after they had entered into the contract with the bank, she noticed that she did not received authorization forms for several months.

"I was extremely concerned as to what was happening as far as the disbursement of funds."

"...I was concerned because I would not have gone into the contract with FCIB had I not been allowed to have written authorisation for disbursements from that account."

[28] She stated that the project to build the two-storey house on her land started. The work progressed satisfactorily and at intervals I was getting reports from the bank...". She was aware that at intervals monies had to be disbursed to pay contractors and creditors and that this is when she received authorization forms and signed and sent them back to the bank. In June 1006, the work on the land was abandoned. At this point Ms. Glasford stated that she tried to contact the bank

without success. She then made inquiries to have a meeting with FCIB in Barbados and she did have a meeting with a representative of the bank in or around 2011.

[29] She stated that the false representation of which the claimants complain is as regards the authorization forms. "We were assured they would be signed by us ...before the disbursement of funds. The other issue was the debit of the account without the signed authorization forms. The account was being debited by the bank without our knowledge and consent for these debits to be made and we were ignored by the bank when we made inquiries as to what was happening with the disbursement of funds."

[30] In Cross Examination Ms. Glasford was questioned about her evidence that she did not receive updates or responses from the bank with regard to her queries about disbursements. She agreed with Queen's Counsel for the defendant that she had received some information on these matters by email and that she had made no objections at the time to the information that was provided.²¹

[31] She agreed that she had agreed to the "Standard Credit Terms" attached to the offer letter from the Bank regarding the mortgage loan and that both claimants had signed to these on the 19th of January 2005. She also agreed that when further funds were sought by them on the 31st August 2006 that she knew then that some of the initial loan funds had been disbursed and or exhausted. She further admitted that by August 2008 the claimants had sought additional credit facilities from the bank to bring the loan amount to EC\$1,098,000.00, because the 860,000 was exhausted and some creditors had not been paid.

²¹ See emails at pages 221, 227, 229, 233-235 and 237 of Bundle 2 of the agreed documents.

- [32] She accepted, upon being shown the Memorandum of Deposit of Certificate of Title attached to the mortgage documents that "liability to the bank did not require both myself and the 2nd claimant to sign according to the bank's documents which I signed." She stated that up to 2007 there were no disagreements between the parties about the disbursements of the loan or of issues related to the construction of the house. She also stated that she was aware that there were a number of reasons why construction on the home was delayed. "Some of the reasons included difference or delays with shipments of building materials from Canada and the fact of a shortage of cement on the island."
- [33] The claimant stated that the house was in fact finished sometime after 2006 even after the original contractor had abandoned the project. She was shown a letter dated 12th July 2007 in which she had stated that she had approached the bank for additional funds to complete the project because the original loan had already been exhausted and that the second claimant was aware of this. She did not agree that she told her supervisor that he should stop submitting written performance reports.
- [34] **The second claimant** also gave evidence. He stood by his statement tendered as his evidence in chief. He also stated that the defendant had debited his account without his written signature, that he had only entered into agreement with the defendant because the bank had put a mechanism in place to control debits from his account and that that mechanism was the use of authorization forms. His evidence was that the authorisation form was to be signed for each drawing request made by the bank.
- [35] In cross examination, the 2nd claimant agreed that there was additional borrowing from the bank as evidence by their acceptance of the facility letter of 12th August 2008n although he disagreed that it was not originally contemplated. He did not agree that the Joint account agreement at page 145 of the agreed bundle FCIB 6 authorised withdrawals other than those signed by the himself and the 1st claimant. He stated that "the additional monies loaned by the bank I was aware that my mother had requested those monies to be added to the mortgage because I signed." He

also admitted that prior to the meeting with the bank's representative in Barbados in 2011, that he did not have evidence of any written complaints to the bank. However, he went on to state that there were emails sent to that effect although he could not produce these.

- [36] In re-examination he stated that the meeting in September 2011 came about because he of his complaints and not because he had gone to the bank to request more time to pay off the mortgage. He went on to say: "I complained at all levels, to the office n St. Kitts and the office in Barbados" and to other officials of the Bank prior to the 2011 meeting.

The defendant's evidence

- [37] The defendant called three witnesses. **Wendesdeen Small** was a manager at FCIB who dealt with delinquent clients for the bank. She stated in her witness statement, which stood as her evidence in chief, that when the claimants obtained additional mortgage loans from the defendant..."On the date on which they so applied , the initial loan sum of EC\$860,000.00 had already been fully disbursed and the claimants were aware of this fact and hence it was one reason why they required additional loan funds..."
- [38] Ms. Small detailed a history of non- payment by the claimants of their mortgage loan and the steps that the bank embarked upon in order to recover their security under the Title by Registration Act. She stated that at all times the Defendant ensure that all payments relating to disbursements ere only applied to the purpose for which they were approved in keeping with the mortgage loan agreements and that the claimants ere always made aware of each and every disbursement made in respect of the mortgage loan monies.
- [39] In Cross Examination, Ms. Small stated that the claimants first came to her attention in 2013. She testified that the mortgage documents including the signing mandate for the claimants account did not require that both claimants sign the documents.

She explained that the bank could debit monies from clients' accounts if required and that there did not necessarily have to be written instructions from the client to that effect.

[40] As far as she was concerned: "the disbursement summary form was sent to the claimants initially by J. Joseph but after that it was not a requirement to have the claimants sign off on that form for each and every withdrawal they made from the account." She stated that the use of the loan disbursement form was not customarily used. It was used initially in this case. She went on to state: "I reviewed the terms of the contract ...The authorization forms, there is no evidence on the mortgage agreement or the facility letter that they were required."

[41] However, she did admit, when it was suggested to her, that on the face of the instruction form sent by Ms. Joseph acting on the bank's behalf, it appeared that written instructions were required from the clients for each drawing request.

[42] **Douglas Gillanders** gave brief evidence of having prepared a valuation report relating to the claimants' property in August 2014.

[43] **Gerard Pereira** was the third witness for the defendant. In his witness statement which stood as his evidence in chief at trial he related that: "Ms. Julia Joseph was the Loans Officer initially assigned to manage the claimants' loan account. However, when Ms. Joseph left the Basseterre branch of FCIB, I assumed responsibility for managing the loan accounts held by the Claimants at FCIB." He went on to state that it was after the 1st claimant expressed concerns about delays that the defendant sought to assist the claimants by having the loan disbursement summaries authorised by two FCIB senior staff. He went further to state that this procedure "appeared to be acceptable during the entire time of the disbursements of the various mortgage loans that were made and also that were later refinanced at the Claimants request. The claimants did not raise any objections or concerns with me about this arrangement..."

- [44] As far as Mr. Pereira was concerned: “the defendant was not responsible for the construction of the dwelling house coming to a halt or the delay in completion of the said dwelling house. The defendant made sure all bills were paid as per the Loan Disbursement summaries. The delays regarding the construction of the dwelling house were due to various difficulties experience by the Claimants and their contractor...”
- [45] He also stated: “During the course of the construction the Claimants were provided monthly with information regarding transactions on their current account through which the loan proceeds were disbursed. In addition, the Claimants were provided with further information whenever they requested such.”
- [46] In answer to questions in cross examination by the 2nd defendant. Mr. Pereira stated that he recalled a concern being raised by the first claimant that her request for a 2nd mortgage was not being attended to by him. He was administering the account at the time. He did recall the 2nd defendant coming into the bank and expressing concerns about disbursements from the account without written signatures. He stated in relation to that concern that: “The bank debited the accounts of clients in order to facilitate the construction of their residences. It was not a haphazard act. The bank has the duty to its clients and to ensure the Bank’s assets are protected.”
- [47] He also asserted that the authorization forms were not a requirement of the mortgage file and that: “The clients resided overseas so they were not always able to sign but they were advised by emails and telephone calls. They received a complete breakdown of all disbursements related to the construction of the company.”
- [48] He went on to state: “Because the claimants resided overseas it made it very difficult for payments to continue and creditors to be paid on time. This was one of the concerns that the 1st claimant raised with us early in the process, so in order to prevent delays, cost overruns, including interest charges, the bank acted in good faith and adopted this procedure of having 2 senior officials sign the authorization forms. It was not an unusual process. The bank had done it for several clients.”

[49] He further stated that the method of requiring the claimants' signatures proved ineffective and that the bank acted for the benefit of the clients so that construction could be completed in time.

Court's conclusions

[50] I have carefully considered the evidence of the witnesses called for each part, the documentary evidence referred to at trial and the written submissions of each party.

[51] I believe the evidence of the defendant witnesses as to what transpired between the defendant and the claimants with regard to their initial mortgage and subsequent borrowings from the Defendant. I consider that they gave their evidence in an open and complete manner and there is no reason to doubt their evidence.

[52] I do not believe the evidence of the claimants as to what they believed regarding the authorization forms which were first brought to their attention by Ms. Joseph. The claimants were well aware that the authorization forms were not required for the defendant to make the disbursements that it did regarding the construction of their home. It is instructive that the claimants have not pointed to one instance in which these funds were disbursed for an improper purpose on the part of the bank or its officials. They agree that there were delays in construction largely caused by their issues with their contractor. It is evident that the actions of the bank were to protect the claimants' interests as well as the Banks, intertwined as they were in the property at Frigate Bay.

[53] I believe the evidence of Ms. Small and Mr. Pereira that the claimants were fully aware that their initial loan was exhausted and that they also knew how the monies were being spent from the loan disbursement summaries issued by the defendant.²² The 1st claimant did not dispute that she received the email of the 23rd October 2006 setting out the position with the initial loan.²³

²² See exhibit FCIB 18 and FCIB 19

²³ See FCIB17

- [54] I accept that the claimants were not only aware that disbursements were being made but they were also fully aware of how the construction of the home at Lot No. 20 of Section DA/18 of Frigate Bay Development, St. Kitts was progressing.
- [55] The evidence before the Court was that the house was built and rented. The 1st Claimant acknowledged in her evidence that she has occupied the house. The evidence of the 2nd Claimant was that he occupied the house for about six (6) months in 2008. Based on the valuation report dated 1st August 2014 prepared by the Chartered Quantity Survey expert witness, Douglas Gillanders, “a construction cost of \$960,000.00 for the building at the time of construction in or about 2006/2007 is fair and reasonable.”
- [56] I agree with counsel for the defendant that there was no evidence presented of any damages suffered by the claimant in support of the claim for breach of mandate. The onus would be on the claimants to prove some reasonably foreseeable loss in order to support a declaration or claim to breach of mandate and I find that none had been shown or proven. The claim for breach of mandate fails.
- [57] With regard to the 2nd aspect of the claim, for fraudulent misrepresentation, while I accept that any representation made by Ms. Joseph can be viewed as a representation by the defendant, Ms. Joseph being their agent in this regard, there is no evidence that she misrepresented the fact of the need for both claimants to sign the authorization forms. As the Counsel for the defendant has submitted: “if a man makes a statement, intending it to be acted upon by another, knowing it to be untrue, or has reasonable grounds to believe it to be untrue, he commits a fraud. Once the statement is made and it is shown that the defendant had no belief in it, this is affirmation which renders him liable.”²⁴

²⁴ Bevad Limited v Oman Limited, Supreme Court Civil Appeal No133/05, decision of the Court of Appeal of Jamaica: June 25, 26, 27, 2007 and July 18, 2008.

- [58] In this matter the use of authorization forms was not unusual. It is the particular position in which the claimants found themselves with regard to the construction of the house that led to these authorization forms being signed by two senior staff of the bank as needed. There was no deceit or lack of belief in Joseph's statement of the use of these forms.
- [59] On the evidence presented at trial the Claimants have not established to the requisite standard, on a balance of probabilities, that what was stated in Julia Joseph's fax dated 4th April 2005 was a contractual term of the mortgage loan. Far less then can it be relied on as the document which formed the basis of the misrepresentation complained of. The case for the claimants was further weakened by the evidence of other documents signed by the Claimants relating to the mortgage loans which were inconsistent with any such finding.²⁵
- [60] I do not find that the claimants entered into the initial mortgage agreement only on the basis that they would both be assured of signing the authorization form for each disbursement. Their actions do not bear out that this was a factor that was uppermost in their minds at the time of entering into the transactions and their actions throughout the period of the mortgage and while the funds were being disbursed for the construction of the home do not bear this out. I refer to the matters that I have already stated above at paragraph 52 above.
- [61] With regard to the matters that this court must be satisfied of in order to find this aspect of the claim proved I find that the following has not been established to the requisite standard on a balance of probabilities or at all:
- a. that the representation was a material inducement to the claimant to act on it;
 - b. that the claimant in fact altered his position by it;
 - c. that the representation was fraudulent; and

²⁵ See clauses 4 and 5 of the Joint Account Agreement "FCIB6" on page 145 of Trial Bundle 2

d. that the claimant thereby suffered damage

[62] The claim for fraudulent misrepresentation fails.

[63] In light of the foregoing, the Defendant is awarded costs to be taxed if not agreed. I agree with the submissions of Counsel for the Defendant that in view of the extreme lateness of the Claimants' filing of the "Notice of Part Discontinuance" in the Claim, such costs shall include the Defendant's costs of preparing for trial in respect of even those causes of action that were discontinued on the morning of the trial referred to at paragraph 3 herein.

Justice Marlene I Carter
High Court Judge

By the Court

Registrar