IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 1998/B-240

BETWEEN	BANK OF NOVA SCOTIA JAMAICA LIMITED	CLAIMANT
AND	PATRICK ROSEGREEN	FIRST DEFENDANT
AND	SHEILA ROSEGREEN	SECOND DEFENDANT
AND	KENNETH GRANT	THIRD ANCILLARY DEFENDANT

Maliaca Wong and Lisa Russell instructed by Myers Fletcher and Gordon for Claimant.

Raphael Codlin instructed by Raphael Codlin & Company for first Defendant.

John Graham & Analiesa Lindsay instructed by John Graham & Company for second Defendant.

Vinnette Grant instructed by HG Bartholomew & Company for third Ancillary Defendant

Heard: May 14, 15, 16, 17, 18, July 3, 4, 2007 and November 10, 2008

JONES, J:

[1] Debt has existed from the earliest of times. The first recorded laws had to do with repayment of debt and seizure and sale of debtors' property for the benefit of creditors'. It has always, however, depended on universal concepts of fairness: to borrow and refuse to pay back is dishonourable, so too is a heartless lender. This is the discrete backdrop against which the battle between the bank and its customer over his indebtedness took place. Greasing the floor, for

good measure, are charges and counter charges of deception, fraud, collusion and improper lending practices

[2] In one corner is the Claimant, Bank of Nova Scotia Jamaica Limited (BNS) ('the Bank') which is at all material times a bank licensed under the Banking Act to transact business as bankers through various branches in Jamaica. In the other corner is Mr. Patrick Rosegreen, the first Defendant, who is a Businessman from Montego Bay and was a customer of the Claimant's Sam Sharpe Square, Montego Bay Branch. Skipping in and out of the fray is Kenneth Grant The third Defendant/ Ancillary Defendant, a Businessman who purchased the first Defendant's mortgaged property, registered volume 1091 folio 391 of the Registered Book of Titles (11 Union Street, Montego Bay), from the Claimant. He was brought into this suit by the first Defendant because of that transaction. At ringside is the second Defendant Mrs. Sheila Rosegreen, former spouse of the first Defendant Patrick Rosegreen, who executed an unlimited guarantee on 14 October 1994, for the first Defendant's indebtedness. After a brief skirmish with the Claimant the matter against her was settled.

[3] The central issues governing the case are:

a) whether the first Defendant, Mr. Patrick Rosegreen is indebted to the Claimant in the amount claimed and;

b) whether the Claimant's power to sell the mortgaged property to the third Defendant/Ancillary Defendant was fraudulent or was at an undervalue.

THE ACTION

[4] By a writ of summons dated August 13, 1998, the Claimant commenced proceedings against the first Defendant. The Claimant contends that the first Defendant is indebted to them in the sum of Twenty Eight Million, Five Hundred and Sixty-one Thousand, Six Hundred and Eighty Six Dollars and Seventeen Cents ($28,561,686.17) and interest pursuant to the instrument of guarantee dated October 14, 1994.

[5] Further, the first Defendant counterclaims against the Claimant for the account of all monies in relation to the loan; full costs or such costs of the property of the first Defendant, sold by the Claimant arising out of false accounting; refund of such sums, as the true accounts will show are owing by the Claimant to the first Defendant; and such other relief as the honourable court deems fit.

[6] Additionally, the first Defendant counterclaims against the third Defendant/Ancillary Defendant for damages for fraud; alternatively a declaration that the Title issued to the Ancillary Defendant having been procured by fraud, is null and void, and an order that it be cancelled and a new Title issued in the name of Patrick Rosegreen; damages for conspiracy to defraud; interest; costs; such further or other relief that the Honourable court deems fit.

THE BACKGROUND

[7] In 1994, the Claimant Bank of Nova Scotia Jamaica Ltd ('the Bank'), instituted proceedings against the first Defendant Patrick Rosegreen. The Bank submits *inter alia*:

- The first Defendant was at all material times a customer of the Claimant. The first Defendant received loans from the Claimant and the said loans were secured by promissory notes signed by the first Defendant;
- The said loans were further secured by mortgage;
- The first Defendant has failed and/or neglected to repay the said loans and the first Defendant is now indebted to the Claimant as follows.

Particulars of Debt

SPL # 14109

Principal	$ 650,000.00	
Interest to July 30, 1998	$ 66,419.86	
Amount owing as at July 30, 1998		$716,419.86

SPL # 18465

Principal	$ 750,000.00	
Interest to July 30, 1998	$ 474,676.86	
Amount owing as at July 30, 1998		$1,224, 676.86

SPL# 60611

Principal	$ 2,200,000.00	
Interest to July 30, 1998	$ 711,054.38	
Amount owing as at July 30, 1998		$2,911,054.38

SPL# 15709

Amount owing as at July 30, 1998 $ 66,684.34

MasterCard # 5436-4002-1000-1256
Amount owing as at July 30, 1998 $50,638.38

Other loan facilities
Principal $19,697,150.00
Interest to July 30, 1998 $ 3,895,062.35
Amount owing as at July 30, 1998 $ 23,592,212.35

Total amount as at July 30, 1998 **$ 28,561,687.17**

[8] The Particulars of Claim further outlined that interest will be claimed at the rate of 38.082% per annum on SPL# 14109; at the rate of 41.274% per annum on sum SPL # 18465; rate of 30.131 % on the sum owing at SPL# 60611; rate of 46.751% per annum on sum owing on SPL# 15709 ; at the rate of $56,6949 per diem on the sum owing on Mastercard #5436-4002-1000-1256 and at the rate of $18,456.35 per annum on the other loan facilities, until judgment or sooner payment.

Claimant's case

[9] The evidence that was presented on behalf of the Claimant was given by Mr. Finnikin, the Loan Recoveries Manager responsible for recovering outstanding loans and has been with the Bank for over 35 years. The former Manager Mr. Gladstone Wright, who had responsibility for the disbursement of the loans to the first Defendant, would have been better able to give a more detailed account of the disbursements. However, since leaving the bank, he cannot be located and the evidence relied on from the Claimant was given by their sole witness, Mr. Finnikin.

[10] In his Witness Statement filed March 14, 2007, and tendered into evidence, Mr. Finnikin gave evidence of the first Defendant's

indebtedness to the bank. It was disclosed that numerous loans were granted to him. These were as follows:

a) $650,000 on 13th August, 1993;

b) $ $150,000 on 2nd December, 1993;

c) $750,000 on the 14th October, 1994;

d) $3.2M on 17th November, 1994;

e) $2.2M on 28th September, 1995;

f) $3.5M on 30th May 1997;

g) $5.5M on 30th May 1997 and

h) $12.5M on 19th March 1998.

These are all supported by promissory notes and loan application forms.

[11] There were also current accounts for the first Defendant which he identified as A/C #'s:

a) 387614;

b) 3881-14;

c) 384216.

[12] There was also a MasterCard # 5436-4002-1000-1256.

[13] There were also disbursement slips signed by the first Defendant showing the disbursement of the $3.2M and $5.5M loans to the first Defendant's current account. There was also a Statement of Affairs signed by the first Defendant acknowledging the loans of $2.2M, $5.5M and $3.5M.

[14] In response to the first Defendant's Amended Defence the Claimant in its Amended Reply to the Defence and Counterclaim

filed June 2, 2006, agreed that the first Defendant borrowed principal sums of $650,000.00, $750,000, but their record does not reveal the sum of $50,000.00. Their record revealed other loans. As of July 30, 1998, there was a balance of $50,638.38 outstanding on the first Defendant's Mastercard and the sum of $150,000.00, which were joint loans with the second Defendant. In addition there were demand loans:

i. # 800031 dated 17/11/94 for $3,300,000;
ii. #800114 dated 30/5/97 for $5,500,000;
iii. #800070 dated 30/5/97 for $3,500,000; and
iv. # 800279 dated 19/3/98 for $12,500,000

The Claimant further stated and is adamant that the interest charged was agreed and lawfully charged by calculating it over the period and adding it to the principal. The total sum of principal and interest is divided by the term of the loan, and was payable monthly.

[15] The Claimant denied that it wrongfully and/or fraudulently debited the first Defendant's accounts between the period alleged or at all. All debits were for the loan amounts, which were in arrears, save for the debit of $66,666.96, which was made to the account of Lester Smikle for which the first Defendant accepted responsibility in a letter sent to the Bank. He admitted on cross-examination that he only wrote the letter to assist Lester Smikle because they were in business together.

[16] The Claimant further admitted that there was a mortgage over the first Defendant's property, which was sold for Eleven Million Dollars

($11 M). However, the Claimant denied it had no right to sell the property and the particulars of fraud and conspiracy alleged to have been conducted between itself and the Ancillary Defendant.

[17] The Claimant counterclaimed denying the first Defendant is entitled to an account, as the first Defendant was always provided with regular statements showing the amount owed.

Defendant's case

[18] In his Amended Defence filed March 14, 2006, the first Defendant claimed that the Claimant was not entitled to recover the sum claimed or any sum at all. He further submitted that the Claimant wrongfully and fraudulently debited his account in the sum of $2,776,671.20 over a given period to service other loans. Additionally, it was pointed out that when the Claimant was unable to service the loans, it tacked late payments and other charges to the first Defendant's account, which also contributed in very large measure to him being called upon to pay a large sum.

[19] The first Defendant further submitted that the Claimant charged interest on the principal sum, and compounded that interest with the principal, called the compound sum principal and then purported to charge interest again on the compounded sum.

[20] The first Defendant admitted in paragraph 9 of his Amended Defence that he borrowed the sum of $650,000.00, $750,000.00 and $50,000.00 and that those sums represented the only principal sum for which he was ever liable.

[21] The Claimant through the Manager, Mr. Gladstone Wright (no longer employed to the Bank) served a Notice of Demand upon the first Defendant on the first occasion when the payment on the sums admitted fell into arrears. This Notice as suggested by the first Defendant amounted to a change of relationship between the Claimant as banker and first Defendant as customer. The relationship had shifted to one of debtor and creditor with the result that the Claimant was not entitled to claim interest.

[22] As for the mortgage that was granted over the first Defendant's property registered at Volume 1091 Folio 391 of the Register Book of Titles, the first Defendant alleged that on the basis of fraudulent and false accounting the Claimant sold his property for Eleven Million Dollars ($11 M) at an undervalue. The force sale value was said to be Sixteen Million Dollars ($16M) and the market value was at a sum in excess of Twenty Million Dollars ($20M).

[23] The Ancillary Defendant was brought into the claim by the first Defendant to answer to allegations of fraudulent conduct as it related to the purchasing of the property at an undervalue. The first Defendant alleged that the Ancillary Defendant had knowledge that the property was subject to a lawsuit and that it was valued at Twenty Million Dollars ($20 M). He also alleged that the Ancillary Defendant colluded with the Claimant and fraudulently purchased the said property for Nine Million Dollars ($9M) (below the market value) and Five Million ($5M) (below the force sale value).

ISSUES

[24] The main issues are:

a) Whether the first Defendant is indebted to the Claimant for the sum claimed. To answer this question I will look at three sub-issues. The first is whether the first Defendant is liable for signing in blank; second, whether the first Defendant's loan account was debited unlawfully and third, whether interest rates were unlawfully charged to his account;

b) Whether the transaction to sell the mortgaged property to the Ancillary Defendant was fraudulent or at an undervalue. The focus here is whether the Claimant properly exercised its powers of sale under the mortgage and sold the property to the Ancillary Defendant by private treaty; whether the Claimant wrongfully sold the mortgaged property for less than the market value and the force sale value; and whether the Ancillary Defendant was aware of and ought to have been aware of the market value and/or the force sale value of the mortgaged property.

ISSUE #1:

WHETHER THE FIRST DEFENDANT IS INDEBTED TO THE CLAIMANT FOR THE SUM CLAIMED, WITH INTEREST.

I. Is the first Defendant liable to the Claimant for signing in blank?

[25] The leading authority on signing in blank relied on by the Claimant in the instant case is the English Court of Appeal decision of ***Gallie v Lee and Another*** **[1969] 1 All E.R. 1062.**

[26] In ***Gallie v Lee***, the plaintiff signed the document without reading it, as she was relying on the assurance of the first Defendant that it was a deed of gift. The information was already written in. It was held that (per Lord Denning MR) (as he was then), at page 1062, that:

> *"the plaintiff cannot say that the deed of assignment was not her deed; she signed it without reading it, relying on the assurance of the first Defendant that it was a deed of gift to P; it turned out to be a deed of assignment to the first Defendant, but it was obviously a legal document: she signed it, and the building society advanced money on the faith of its being her document; accordingly, she could not later be allowed to disavow her signature".*

[27] The important principle to be garnered from this case is that the law does not protect individuals who purport to sign in blank, and refuse to take responsibility for their actions. Here is how Lord Denning in ***Gallie*** put it:

> *"Whenever a man of full age and understanding, who reads and writes, signs a legal document which is out before him for signature- by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences- then if he does not take the trouble to read it but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document. By his conduct in signing it he has represented, to all those into whose hands it may come, that it is his document; and once they act on it as being his document, he cannot go back on it and say that it was a nullity from the beginning. If his signature was obtained by fraud, or under the influence of mistake, or something of the kind, he may be able to avoid it up to a point- but not when it has come into the hands of one who has in all innocence advanced money on the faith of its being his document, or otherwise has relied on it as being his document."*

Lord Denning continued at page 1067, to explain the legal effect of signing in blank: In such a case:

> *"In such a case, the legal effect is one of two: Either the deed is not his deed at all (non est factum): Or it is his deed, but it was induced by fraud or mistake (fraud or mistake). There is a great difference between the two. If the deed was not his deed at all, (non est factum) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document. On the other hand, if the deed was his deed, but his signature was obtained from him by fraud or under the influence of mistake (fraud or mistake), the document is not a nullity at all. It is not void ab initio. It is only voidable; and in order to avoid it, the person who signed the document must avoid it before innocent persons have acquired title under it. If a person pays out money or lends money on the faith of it, not knowing of the fraud or mistake, he can rely on the document and enforce it against the maker. It avails the maker nothing, as against him, to say it was induced by fraud or mistake".*

[28] In the instant case, Mr. Patrick Rosegreen, the first Defendant signed a blank document. The information as to the loan amount was not written on the paper that he signed. This is unlike in ***Gallie*** where the information was written in; it was just not read. The evidence given in this case was unequivocal. The first Defendant admitted that the signatures on the promissory notes were his. He also admitted signing the disbursement slips showing how the loans

were applied and statement of affairs with the amount stated thereon. This is who the first Defendant put it in cross-examination, "I sign a number of documents in blank". However, he contended that those documents did not authorize the bank to make him liable.

[29] The first Defendant also stated that he did not refuse to sign the form because of the relationship that he had with the bank and he believed that everything was taken in good faith. He said on oath that he had known Mr. Gladstone Wright (the former Manger) for 35 years. They went to primary and high school together. He also stated that he had known him since twelve (12) years old and that there was a time he would describe him as a friend.

[30] The first Defendant also admitted that he requested his wife to sign the documents so as not to get Mr. Gladstone Wright into problems. The first Defendant admitted that it was explained to him, that the documents he signed in blank, were loans that would consolidate other loans. He also admitted that he did not know about the credits as he ceased to examine his monthly statements. Mr. Finnikin in examination in chief said that from the records he examined Mr. Rosegreen did sign the documents.

[31] Under cross-examination, Mr. Finnikin said that the bank has guidelines about customers signing in blank. He said that all documents are to be completed in respect to the loan amount and the rate of interest and that it would be an indictment if a customer were asked to sign in blank.

[32] It is not disputed that the first Defendant Mr. Rosegreen signed the bank documents in blank. What is being disputed is whether he is liable for signing in blank. It cannot be disputed that a man who signs in blank without a proper defence, is liable for the contents of the document he signs to. Consequently, in my judgment the first Defendant having admitted to signing the documents in blank is liable for whatever he signed.

II. Did the Claimant debit the first Defendant's accounts unlawfully?

[33] The three judges in the Jamaican Court of Appeal case of ***Morrell (Gifford), Morrell (Fiona) v Workers Savings and Loan Bank*** **SCCA 123/98** delivered November 4, 2004, arrived at different conclusions as it relates to unlawful debits. Downer JA dissenting, cited ***Catlin v Cyprus Finance Corporation (London) Ltd*** **[1983] 1 All ER 809** and ***Joachimson v Swiss Bank Corporation*** **[1921] All ER Rep 92** which concluded that written authorization was necessary for withdrawals from bank accounts. That is, a bank could only properly debit the account of a customer on their written mandate.

[34] The majority consisting of Walker JA and Bingham JA supported the ruling of Cooke J (as he then was) from the court below, that oral instructions and mandates that are clear, precise and free from ambiguity are capable of debiting an account. Walker JA concluded:

> *"Indeed, if Mr. Morrell were now to be allowed to retain money he has in fact already received from the bank, and in addition be adjudged entitled to receive further payment from the bank on the basis of debit memos for debits for which the bank cannot produce his written authorization but which in truth were*

authorized by him, Mr. Morrell would be unjustly enriched at the expense of the bank".

[35] On appeal to the Privy Council (PC Appeal no 20 of 2006) delivered 18 January 2007, the matter was dismissed. The PC agreed with the majority in the Jamaican Court of Appeal that oral instructions are capable of authorization. The Board said in paragraph 10 of the judgment that:

> *"...a customer's irrevocable authority to a bank to accept a document signed by a particular undersigned attorney or agent without any further signature or consent does not preclude the actual customer from giving or the bank from accepting and acting upon oral instructions from that customer accepting. Similarly, the fact that a customer* ***impliedly promises to repay any amount due against the written order from the customer addressed to the bank at the branch does not exclude either the possibility of an oral order or the bank's right to be indemnified in respect of an oral order, if it can show that such was given by the customer or with his authority****..."*

[36] Although oral instructions are capable of debiting an account that does not mean written instructions are outdated. Both are applicable.

[37] The evidence presented in the instant case does not indicate or disclose unlawful debits on the part of the bank. The debits to the first Defendant's account were loans that were borrowed by him to service other loans and this is indicated by his signature on the documents. The fact that his signature appeared on various notes and documents is an indication that he has given instructions for the debits. This was a *"mandate from him, which was clear, precise and*

free from ambiguity". In my judgment, the first Defendant, Mr. Rosegreen authorized the debits from the accounts.

III. Did the Claimant unlawfully charge compound interest to the first Defendant?

[38] In ***Financial Institutions Services Limited (substituted for Century National Bank Ltd) v Negril Holdings and Negril Investment Co. Ltd*** **SCCA 1031/1997** delivered March 22, 2002, a customer challenged the way in which banks charge interest on customer accounts, in particular, the banker's right to compound interest, to vary interest rates, and to charge penal rates of interest on overdrafts. When the matter came before Ellis J at first instance, he held that a special relationship existed between the bank and the respondent's companies. He took the view that the bank had no power to compound interest or vary the rate of interest until demand had been made, after which its power to charge interest is governed by the terms of the mortgage. He ordered that the Appellant Bank render an account and repay interest wrongly retained at the rate of 52% per annum and that two unspecified Registered Titles were be returned.

[39] On appeal, the Jamaican Court of Appeal took the view that the imposition of penalty rates and compound interest were unjustly charged and should be set aside. Harrison and Langrin JJA, concluded that there was a special relationship between the parties, which was relied upon to the loss of the respondent. Such a relationship was unfavorable to them and the interest rates charged were manifestly disadvantageous. They also took the view that a custom and usage of charging compound interest was not established. Additionally, the agreement to pay a penal rate of

interest must be an expressed one and any attempt to include such a term by reference to "the usual rate of interest" will fail. The rate of interest payable on overdrafts must be communicated to the customer and particularly where that interest is sought to be compounded.

[40] The Privy Council, (judgment delivered on July 22, 2004), varied the order of the Court of Appeal. Lord Walker of Gestingthorpe delivered the decision. The Privy Council placed reliance on the decision of ***Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd (No. 1)*** **[1986] A.C. 80** and stated that it was unconscionable that a bank had allowed two corporate clients' overdrafts to increase whilst treating them as unauthorized overdrafts and charging a very high rate of interest. In such a case, the bank is seen as taking advantage of the special relationship, which existed between it and the companies by failing to fix a formal limit sooner and continuing to charge penal interest rates on the basis that the customer's overdrafts were unlawful. On the other hand, they found that the Bank had not taken unfair advantage of the customer by charging compound interest and that the custom and usage of using compound interest was established. There is no evidence that the bank relied on contract rather than practice to justify compound interest. They stated:

> "This evidence presented established, with striking unanimity, that interest on overdrafts with commercial banks was calculated on a daily basis and charged to the account on the last working day of the month. This produced the effect of compound interest, although not all the witnesses used that particular form of words to describe it. The Privy Council in only one case (the NCB) was it clearly established that this practice was, at the material time, covered by an express contractual term"

[44] Under XXD Mr. Finnikin on behalf of the Claimant said:

> "The $2.399 million is the cost of the amount loaned. The balance on this loan; he would pay $918,747.90 for 35 months. On the 36th month, his balance would be $2,231,244.90. There is a rebate factor that would be applied, and so he would not pay the full amount for 120 months. The cost of the loan is taken into account. The cost of the loan is interest and bank charges, in this case, 32%. This is computed up to 120 months"..."the penal rates at the time went up to 75%. Persons who exceeded the agreed limit are subject to pay a penalty rate which is higher than the regular rate"..."Patrick Rosegreen was a customer that consistently had to pay a penal rate. I would believe that at one stage the collateral was not sufficient and therefore there was an up stamping."..."it was a consolidation of debt to have a structured monthly payment. BNS had reporting requirements to the Bank of Jamaica. This is so for loans over 90 days. The interest cannot be brought into the profits. The loan would therefore be a new loan and the problem with the Bank of Jamaica would go away. The promissory notes 38, 39, 40, and 41 were to properly structure the debts. They went bad after."

[45] The first Defendant, Mr Rosegreen in his evidence said:

> "if my overdraft had exceeded the limit, I would be asked to get a loan to bring down the overdraft. The overdraft was used to service the loan". He also pointed out on cross examination that "the overdraft kept climbing and the overdraft was used to service the loans with high penalties. I had an overdraft of $500,000.00. The overdraft reached $2 million. I was written demanding that I fulfil my obligation. I was not able to fulfil my obligation. I

[41] The Privy Council also took the view that there is nothing oppressive in the bank seeking security for the companies' rapidly-increasing overdrafts by means of 'all moneys' mortgages; but, any demand must be in clear and unconditional language if it is to be effective. They said that the bank was entitled to interest at a reasonable commercial rate on the overdrawn balances from time to time due, with unpaid interest added to the overdrawn accounts at monthly intervals.

[42] In the instant case, the Claimant has denied that it unlawfully charged interest to the first Defendant's account. The interest charged (it stated) was agreed on by the parties. Although the first Defendant Mr Rosegreen and Mr Wright (former Manager of BNS) had known each other for many years, there is no indication from the evidence that he had relied on him to his disadvantage. That is, there was no undue influence, as the first Defendant was informed frequently through letters from the Claimant about the status of his loan.

[43] The letters exhibited in this case, make it plain that the Claimant acting through Mr Gladstone Wright sent letters to the first Defendant Mr Rosegreen on January 3, 1994, May 18, 1994, November 30, 1995, and December 22, 1995, informing him that the base rate of interest on the demand loans had increased to 55% and the rate applicable to him would at the time have increased by 5%. The correspondence also made it clear that the account was in overdraft and it was necessary to clear his account, failing which, the matter would be referred to its attorney for legal action.

ISSUE #2:
WHETHER THE TRANSACTION TO SELL THE MORTGAGED PROPERTY TO THE ANCILLARY DEFENDANT WAS FRAUDULENT OR WAS AT AN UNDERVALUE

[48] There are three sub-issues to determine the main issue of whether the sale of the property was fraudulent or at an undervalue:

a) whether the Claimant properly exercised its powers of sale under the mortgage when it sold the property to the Ancillary Defendant by private treaty;

b) Whether the Claimant wrongfully sold the mortgaged property for less than the market value and the force sale value;

c) Whether the Ancillary Defendant was aware of and ought to have been aware of the market value and/or the force sale value of mortgaged property.

I. **Whether the Claimant properly exercised its powers of sale under the mortgage when it sold the property to the Ancillary Defendant by private treaty.**

[49] The onus is on the mortgagee (in this case the Claimant) to show on balance that the sale was *bona fide* and that he took precautions to obtain the best price reasonably obtainable.

[50] It was discussed in ***Financial Institutions Services Ltd v Negril*** (CA) (supra) that the usual course where bank lending is secured by a mortgage is that the bank takes the initiative to enforce the mortgage. In the instant case, this is what happened. Numerous demand letters were sent to the first Defendant on November 30,

was later given evidence that showed that the money was illegally debited. This evidence showed that this was between 1996 and 1998. The overdraft reached $6 million and then $12 million. The interest charged on the overdraft for what I owed and what was not my responsibility accounted for that". He stated that he "did not agree to pay interest on interest; I agreed to pay interest on overdraft account".

[46] The first Defendant admitted receiving a demand letter from the bank on June 6, 1996, setting out the amounts owing on his loan accounts, but showed no evidence of any queries made. Additionally, the demand letter from the Claimant's attorney dated June 30, 1998, suggests that the interest rate would continue to accrue at a rate of $18,456.35 per diem.

[47] From the facts it is clear that the first Defendant Mr Rosegreen borrowed extensively from the bank. The bank has a right to charge interest. By charging compound interest the bank has not taken unfair advantage of the first Defendant. As stated in the ***Financial Institutions*** case at paragraph 38, "*the mortgages were granted to give the Bank security for the Companies' rapidly-increasing overdrafts, and there was nothing oppressive in the Bank seeking security. That part of the Court of Appeal's order must be set aside.*" As I said before the Privy Council also found that the custom and usage of using compound interest was established. From the evidence presented in this case, the Claimant is entitled to compound the interest on the basis that it is an established practice for securing loans.

sell the mortgaged property had lawfully arisen under the Registration of Titles Act.

[54] The issue raised by the first Defendant, is whether the Claimant properly exercised its power of sale. In addition to statute, the common law has outlined the duty of care of a mortgagee as it relates to the exercise of its power of sale. Most of the cases in this area have concentrated on fair price, valuation and proper advertising, to determine whether the power of sale is properly exercised.

[55] A mortgagee is a trustee of the proceeds of sale, but he is not a trustee of the power of sale, which he is entitled to exercise in his own interest. In ***Cuckmere Brick Co. v Mutual Finance Ltd* [1971] 2 All ER 633 at 643**, this principle was stated as follows:

> "it is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor, and where there is a conflict of interest, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale in exercising his power of sale. However, the mortgagee was not merely under a duty to act in good faith, i.e. honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell."

[56] In ***Moses Dreckett v. Rapid Vulcanizing Company Limited* (1988) 23 JLR 130**, it was stated that relying solely on the valuation without taking other steps namely to advertise and to ask real estate agents to do so, fell far short of the duty of care.

1995, and December 22, 1995. He failed to respond promptly, and if a demand is made and not responded to within a reasonable time, the mortgagee is entitled to enforce the mortgage.

[51] The registered property on 11 Union Street, St James was subject to a mortgage (security for the loans). Section105 of the **Registration of Titles Act** states, *"If there is a default in payment by the mortgagor the mortgagee ... may give to the mortgagor notice in writing to pay the money owing on such mortgage"*. This notice in writing was given to the first Defendant by the Claimant's Attorney in a demand letter dated June 30, 1998, demanding payment of the debt. It expressed that the first Defendant should pay the sum owed within 30 days and if not, the Claimant would exercise its power of sale over the property.

[52] Furthermore, section 105 is bolstered by section 106 of the same Act, which states, *"If there is a default in payment for one month after the service of the notice then the mortgagee may sell the mortgaged property altogether or in lots by public auction or by private contract without being liable to the mortgagor for any loss occasioned..."*

[53] The first Defendant had been in default for an extended period and had not remedied the problem of non-payment, despite repeated requests from the Claimant to do so. The Claimant's power became exercisable when notice requiring repayment had been served on the first Defendant and he defaulted. He had exhibited neither the willingness nor the capability to pay the sum claimed by the Claimant. It can be concluded from the fact of the demand letter being sent from the Claimant's Attorney, together with the first Defendant's default in payment that the Claimant's power of sale to

[57] In ***Zachariah Shareif v National Commercial Bank Ltd*** **(1994) 31 JLR 304 (SC)**, the court made it clear that:

> "It is settled law that a mortgagee must exercise the power of sale in a prudent way with due regard to the interest of the mortgagor in the surplus sale money. A mortgagee is not a trustee of the power of sale but in exercising the power of sale he must bear in mind the interest of the mortgagor and that he is a trustee of the proceeds of the sale and so is ordinarily bound to account to the mortgagor for any surplus money remaining after his mortgage has been discharged."

[58] In ***Joan Adams v Workers Trust & Merchant Bank Limited*** **(1992) 29 JLR 447 (SC)** it was concluded that where there is a conflict of interest, a mortgagee is entitled to give preference to his own over those of the mortgagor in deciding on the timing of the sale, in exercising his power of sale; however, a mortgagee was under a duty to act to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell. Factors which are taken into consideration to determine whether the mortgagee has failed in his duty are; omission to ensure a fair price, failure to get a proper valuation, and failure to advertise.

[59] In the case of ***Pendlebury v. Colonial Mutual Life Assurance Society Limited*** **[1912] 12 C.L.R. 676** cited in ***Joan Adams***, the mortgagee was held liable for loss occasioned by the sale. The factors which influenced the decision were:

- omission to take obvious precautions to ensure a fair price;

- getting proper valuation;
- failing to adequately advertise the sale.

[60] In this case, the Claimant listed the property at 11 Union Street for sale at private treaty with a number of realtors. The Claimant then sold the property to Kenneth Grant, the Ancillary Defendant for Eleven Million Dollars ($11M) by Agreement for Sale dated November 5, 2003. It said that this was the highest offer it had received.

[61] The first Defendant relied on a valuation of Twenty Three Million Dollars ($23M) and a force sale price of $18.5M done by George Gregg on June 25, 2004, and alleged conspiracy between the bank and Mr. Grant. However, the onus is on the first Defendant to prove conspiracy; so far, the evidence presented does not show the conspiracy. Furthermore, in an affidavit filed in December 2004, the first Defendant stated in paragraph 11 that he was not given any notice by the bank or Mr. Kenneth Grant that the property was sold prior to Mr. Grant visiting him. Such language verges on the silly, the demand letter sent from the bank and the attorney for the Claimant were notices clearly indicating that unless there was repayment the bank would exercise its power of sale.

[62] Additionally, the first Defendant has not given any concrete evidence to dispute the Claimant's case (that it sold the property at the best price), apart from the valuation (done in 2004) and produced during the trial, one year after the property was sold. There is no basis on which this court can accept one valuation and reject the other. The Claimant on the other hand has shown that it obtained a proper valuation report from DC Tavares & Finson Co Ltd,

which report has not been brought into disrepute. It has also shown that it went to public auction before selling at private treaty; sale listing with realtors was done prior to sale and it was advertised. The valuation on behalf of the Claimant was done in 2001, two years prior to the sale. Furthermore, the property was sold at a price of $11M, $1M less than the force sale price, which (as a last resort) is a fair price. One has to examine the facts in the round. In my judgment, the Claimant has fulfilled its duty of care owed to the first Defendant and has properly exercised its power of sale.

ii. Whether the Claimant wrongfully sold the mortgaged property for less than the market value and the force sale value

[63] In ***International Trust and Merchant Bank Ltd v Gardiner***, the case of, ***Moses Dreckett v Rapid Vulcanising Company Limited*** **[1988] 25 JLR 130** was relied on for the proposition that "a mortgagee in exercising its power of sale does not owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property on the date on which he decides to sell it."

[64] Further in ***Tse Kwong Lam v Wong Chit Sen and others*** **[1983] 3 All ER 54** it was concluded that (1) there was no inflexible rule that a mortgagee exercising his power of sale under a mortgage could not sell to a company in which he had an interest. However, the mortgagee and the company had to show that the sale was made in good faith and that the mortgagee had taken reasonable precautions to obtain the best price reasonably obtainable at the time, namely by taking expert advice as to the method of sale, the steps which ought reasonably to be taken to make the sale a success

and the amount of the reserve. The mortgagee was not bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss, but sale by auction did not necessarily prove the validity of a transaction, since the price obtainable at an auction which produced only one bid might be less than the true market value.

[65] In ***Rudolph Daley v RBTT(Jamaica Ltd)*** **CL 1195/D162** delivered January 30, 2007 at page 58, Sykes, J concluded that:

> "The bank misdirected the property such that had the auction gone through the price would have been much less than the true value. When selling by private treaty it failed to secure a current valuation. It failed to act in a businesslike manner. The bank did not act with a view to obtaining as large a price as may fairly and reasonably, with due diligence and attention be under the circumstances attainable. "

[66] In the instant case, as I have said before evidence was given that prior to the sale of the property by private treaty the Claimant went to public auction in September 1998. The Claimant obtained and exhibited proof that it obtained a valuation on the property dated March 2001 from DC Tavares & Finson Co Ltd showing a force sale value of Twelve Million Dollars ($12M)and a market value of Sixteen Million Dollars ($16M). Although a valuation two years prior to the sale cannot be considered to be current, this by itself is not evidence that the sale was at an undervalue. Taking all the circumstances into consideration, the Claimant acted in a reasonable manner in trying to obtain the best price possible at the time. From the evidence, the

purchaser offered Eleven Million Dollars ($11M) which is very close to the force sale price, on that basis it cannot be said that the property was sold at an undervalue as the bank accepted the closest price to the force sale value after refusing two other earlier offers from the Ancillary Defendant.

[67] Mr. Finnikin was unable to recall the actual date of the auction, but it is clear from the evidence that the auction was held on September 17, 1998, at their Auction Room by D.C. Tavares where there was no bidding. The evidence indicates that reasonable steps were utilized to get the best price and, as a result, the property could not be regarded as being sold at an under-value.

iii. whether the Ancillary Defendant was aware of and ought to have been aware of the market value and/or the force sale value of mortgaged property

[68] There are allegations of fraud (dishonest/sham) levied against the Ancillary Defendant. It is the first Defendant's contention that the Ancillary Defendant colluded with the Claimant and committed fraud against him in relation to the sale of 11 Union Street, Montego Bay.

[69] Section 106 of the **Registration of Titles Act** states that:

> "no purchaser shall be bound to see or inquire whether such default aforesaid shall have been made and have happened or have continued or whether such notice aforesaid shall have been served or otherwise into the proprietary or regularity of such sale...any person damnified by an unauthorized improper or irregular exercise of the power shall have his remedy

only in damages against the person exercising the power."

[70] As pointed out by Sykes, J. in ***Rudolph Daley v RBTT (Jamaica Ltd)*** (cited earlier) at page 58 where Section 106 makes reference to a purchaser not making enquiries:

> "that does not mean that if the purchaser in fact has knowledge of the type identified in this case and continues with the purchase, he is immune from a charge of dishonesty. All section 106 does is to relieve the purchaser of the need to make the enquiries but it does not say what the result is to be, if he makes the enquiries and finds out the things that he did in this case and continues with the purchase or what the position is if he is faced with certain facts and refrains from making the enquiries an honest person similarly placed would have made."

[71] Sykes J further pointed out that "contrived ignorance or willful blindness amount to fraud under the RTA". In ***Rudolph's case***, Harley Corporation knew (a) that the property it saw did not match the description in the newspaper advertisement (b) the property was obviously significantly improved and occupied by persons claiming to have purchased the property from the previous registered owner (c) that the property was valued at much more than the $200,000 it was told was the selling price. An honest man similarly placed would have made further enquiries. Harley Corporation knew that its conduct failed to meet the standards of the reasonable and honest purchaser.

[72] In this case, to prove the fraudulent sale that is alleged the first Defendant must prove that:

- there were forged documents;
- there were unauthorized debits;
- there were fraudulent loans or mortgages;
- he did not benefit from the loans;
- the sale of 11 Union Street was not properly conducted;
- the sale was at an undervalue; and
- the bank did not take reasonable steps to obtain the highest price.

[73] It is the first Defendant's contention that the Ancillary Defendant Mr. Grant knew the price on the property before it was sold. The witness statement of Mr. Grant filed on December 15, 2006, revealed that in 2003 when he met with the first Defendant Mr. Rosegreen, he was already in negotiations with the National Commercial Bank to pay for the property.

[74] This is explained in the witness statement of John Grant, the son of Kenneth Grant filed on December 15, 2005, where he stated that his father approached him about May 2003 and told him that he was in the process of purchasing the property at 11 Union Street. In November of the same year, his father told him that the transaction to purchase 11 Union Street was almost complete and he asked him to accompany him to Mr. Rosegreen because he did not know him. I believe both of them; there is no inconsistency here.

[75] It is argued that, the Ancillary Defendant knew Mr. Brooks Ives and was told the price of the property. But knowledge by itself does not connote fraud. It is what the party does with that information that is

important. Even if he knew the price, that knowledge does not change the price of the property and there is no evidence of any common intention to defraud.

[76] Furthermore, there is no direct evidence that the Claimant told the Ancillary Defendant Mr. Grant what offer to make. The Ancillary Defendant had this to say: "I had made two offers which were rejected before I made the $11M offer which was accepted by the bank".

[77] Mr. Vernon Brooks Ives stated in his Witness Statement filed December 15, 2006, that the Claimant had listed properties with him and that he has been a realtor for over 18 years and through him Mr. Grant made an offer of $9m on 11 Union Street, which was refused by the Claimant. He said, Mr. Grant then increased the offer to $10M, which was also refused by the Claimant, and then Mr. Grant offered 11M, which was accepted by the Claimant.

[78] The evidence presented is clear. Mr. Grant wanted to purchase 11 Union Street. He made an offer, which was accepted for $11M. There is no indication from the evidence that he colluded with the bank and obtained his certificate of Title by fraud. In my judgment, he acted honestly and in good faith.

[79] This court concludes, as a matter of law that the bank in selling the property has done all that is reasonable for a mortgagee to do. The first Defendant has not proven his case. He has not established that there was fraud, collusion and conspiracy as he asserts. Accordingly, there was no fraudulent activity between the bank and the third

Defendant, which denied the first Defendant his title. For these reasons, the answer to the second issue of whether the transaction to sell the mortgaged property to the Ancillary Defendant was fraudulent or at an undervalue is categorical: no.

DISPOSITION

[80] For all the above reasons there shall be judgment for the Claimant against the first Defendant on its claim as follows:

a) **SPL # 14109**

Principal	$ 650,000.00	
Interest to July 30, 1998	$ 66,419.86	
Amount owing as at July 30, 1998		$716,419.86

Interest at 38.082% from July 30, 1998 to November 10, 2008

b) **SPL # 18465**

Principal	$ 750,000.00	
Interest to July 30, 1998	$ 474,676.86	
Amount owing as at July 30, 1998		$1,224, 676.86

Interest at 41.274% from July 30, 1998 to November 10, 2008

c) **SPL# 60611**

Principal	$ 2,200,000.00	
Interest to July 30, 1998	$ 711,054.38	
Amount owing as at July 30, 1998		$2,911,054.38

Interest at 30.131% from July 30, 1998 to November 10, 2008

d) **SPL# 15709**

Amount owing as at July 30, 1998 $ 66,684.34

Interest at 46.751% from July 30, 1998 to November 10, 2008

e) **MasterCard # 5436-4002-1000-1256**

Amount owing as at July 30, 1998 $50,638.38

Interest at $56.6949 per diem from July 30, 1998 to November 10, 2008

f) **Other loan facilities**

Principal	$19,697,150.00
Interest to July 30, 1998	$ 3,895,062.35

Interest at $18,456.35 per annum from July 30, 1998 to November 10, 2008

[81] There shall be judgment for the Claimant and Ancillary Defendant on the first Defendant's counterclaim with cost to the Claimant and Ancillary Defendant to be agreed or taxed.