

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM 2008 HCV_05873

BETWEEN	CARMEN FARRELL	1 ST CLAIMANT
AND	DESMOND FARRELL	2 ND CLAIMANT
AND	WADE FARRELL	3 RD CLAIMANT
AND	CURTIS FARRELL	4 TH CLAIMANT
AND	CARL FARRELL	5 TH CLAIMANT
AND	LASCELLE REID	1 ST DEFENDANT
AND	INTERNATIONAL AIRLINK LIMITED	2 ND DEFENDANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	3 RD DEFENDANT

IN OPEN COURT

Ms. Arlean Beckford for the Claimants.

Mrs. Sandra Minott-Phillips and Mrs. Alexis Robinson instructed by Myers
Fletcher & Gordon for the 3rd Defendant.

Heard: 28, 29, 30 March, and 17th June 2011.

**POWER OF ATTORNEY-FORGERY-FRAUD- WHETHER CAPABLE OF
RATIFICATION-ESTOPPEL-WHETHER BANK'S MORTGAGE
REGISTERED ON TITLE INDEFEASIBLE- WHETHER BANK OWES
DUTY OF CARE SEPARATE AND APART FROM CONTRACTUAL
DUTIES-WHETHER SPECIAL RELATIONSHIP-WHETHER FIDUCIARY
RELATIONSHIP-EQUITABLE MORTGAGE**

Mangatal J:

1. The Claimants are the registered owners of two properties, being Lot 120 and 121, Spring Valley Estate, Tower Isle in the Parish of Saint Mary, now known as Jamaica Beach, being all those parcels of land comprised in Certificates of Title registered at Volume 966 Folio 344 and 1319 Folio 810 respectively.
2. The 1st Defendant "Mr. Reid" is a mortgage broker and according to the 1st Claimant "Mrs. Farrell", gave his address to her as being 32 Gloucester Avenue, Montego Bay in the Parish of Saint James.
3. The 2nd Defendant "Airlink" is a company duly incorporated under the laws of Jamaica and has its place of business at Sangster's International Airport in the Parish of Saint James.
4. The 3rd Defendant "NCB" is a company duly incorporated under the Laws of Jamaica with registered offices at 32 Trafalgar Road, Kingston 10, and is in the business of banking.

THE CLAIMANTS' CASE

5. In the Amended Particulars of Claim it is pleaded that in or about January of 2007 Mrs. Farrell was in the process of developing Lot 120 and this involved constructing a building comprising apartment units for rental to tourists and local residents. It was in respect of building those units, Block B, on Lot 120 that Mrs. Farrell borrowed \$20 Million from NCB in or about July 2006. An apartment Complex, Block A, was already constructed on Lot 121.
6. In January 2007 Mrs. Farrell approached Mr. Reid, who she had known before whilst she at times resided in Canada, and who had previously handled business for her in his capacity as mortgage broker. She indicated that she needed U.S. \$400,000.00 to complete the development and enquired whether he was able to obtain financing from a private individual or a company, not a bank, which was not in the business of providing loans but with funds to do so at more

reasonable rates or on better terms than those being offered by banks or other financial institutions.

7. Mrs. Farrell states that in reliance on the assurance provided by Mr. Reid, she provided him with the duplicate Certificate of Title in respect of Lot 121.
8. On or around January 31, 2007 Mrs. Farrell states that Mr. Reid provided her with the sum of US \$100,000.00, being a part of the loan that he had promised to obtain for her. She received a further sum of US \$130,000.00 from Mr. Reid on or around February 2007.
9. Mrs. Farrell also received a cheque of JA \$16,640,710.00 dated February 23 2007 drawn on an account held by Airlink at First Caribbean International Bank(Jamaica) Limited. She states however that she did not negotiate this cheque as Mr. Reid instructed her not to negotiate it. This cheque was subsequently cancelled. Mrs. Farrell states that she has received no further sums from Mr. Reid or Airlink.
10. As the cheque was drawn on the account of Airlink, Mrs. Farrell believed that it was Airlink that had provided the loan financing.
11. According to Mrs. Farrell, prior to receiving the funds she had requested from Mr. Reid details as to the loan transaction such as the name of the debtor(paragraph 12 of Amended Particulars of Claim, I think she must mean creditor) and the documents to be signed. Mr. Reid failed, neglected and/or refused to provide the information requested.
12. In or about March 2007 Mrs. Farrell tried to have the loan transaction formalized and to commence repayment so as to secure the return of the Duplicate Certificate of Title for Lot 121. She commenced repayment and paid to Mr. Reid the sum of US\$36,000.00 and J\$400,000.00 on diverse dates.
13. In or around June 2008, Mrs. Farrell attended a meeting with representatives of NCB. Mrs Farrell states that it was at that meeting

that she became aware that Lot 121 was being used by Airlink to secure loan financing from NCB.

14. Mr. Reid held himself out as being the agent of the Claimants pursuant to Power of Attorney dated 19th January 2007 and recorded at the Islands Records Office at Liber New Series 16 Folio 205.
15. The Amended Particulars of Claim state that none of the Claimants executed the Power of Attorney and at the time of the purported execution the 2nd, 3rd and 4th Claimants were not present in the jurisdiction and did not in fact sign as it purports.
16. The Power of Attorney purportedly authorised Mr. Reid to act for the Claimants specifically in relation to the property and in the names of the Claimants and on their behalf to do, perform and execute all acts and deeds which the Claimants are empowered to do, perform and execute in relation to the property, and to execute all or any of certain acts or things as Mr. Reid shall in the interests of the Claimants think proper.
17. Airlink and NCB entered into a loan agreement for the sum of US\$1,600,000.00 to be disbursed in two loans as follows:
 - (i) Loan A-Six Hundred Thousand United States Dollars.
 - (ii) Loan B-One Million United States Dollars.
18. Amongst other matters, security for Loan A, was a first legal mortgage over the property Lot 121 registered at Volume 1319 Folio 810 registered and stamped to cover US \$600,000.00 and interest (executed under Power of Attorney granted to Lascelles Reid).
19. The execution of this mortgage by Mr. Reid exceeded any authority purportedly granted under the Power of Attorney.
20. The Claimants aver that Mr. Reid and Airlink acted fraudulently and the Amended Particulars of Claim at paragraphs 24 and 25 specifies the alleged fraud and its effects as follows:

24.....

PARTICULARS OF FRAUD OF THE FIRST DEFENDANT

- (i) *Pledging the Claimants' Certificate of Title for the said land as security for loan financing from the 3rd Defendant;*
- (ii) *Holding himself out to the 3rd Defendant as being authorised to use the Claimants' Certificate of Title as security for loan financing for the benefit of the 2nd Defendant provided by the 3rd Defendant;*
- (iii) *Preparing a document containing a Power of Attorney and investing himself with powers thereunder to act on behalf of the Claimants without obtaining any express or implied authorisation from the Claimant to do so;*
- (iv) *Preparing a document containing the Power of Attorney without the Claimants' authority and forging the Claimants' signatures or causing same to be forged;*
- (v) *Representing to the 2nd and 3rd Defendants that the Power of Attorney and the signatures thereon were authentic and that he was authorized to so act pursuant to the said Power of Attorney;*
- (vi) *Representing to the 2nd and 3rd Defendants that he was authorized to use the Claimants' Certificate of Title for mortgage financing;*
- (vii) *Forging the Claimants' signatures to the Power of Attorney;*
- (viii) *Causing and /or permitting the Claimants' signature to be forged on the Power of Attorney;*
- (ix) *Causing and/or permitting the Claimants' Certificate of Title to be used as security in the loan transaction between the 2nd and 3rd Defendants.*

PARTICULARS OF FRAUD OF THE SECOND DEFENDANT

- (i) *Using causing and/or permitting the said property to be used as security for the loan from the 3rd Defendant.*

25. The Transaction between the Defendants was to the detriment of the Claimants. The Claimants did not derive a benefit from the loan financing granted by the 3rd Defendant to the 2nd Defendant.

21. In relation to NCB, this is what the Claimants set out at paragraphs 26-31 (inclusive) of the Particulars of Claim:

26. *The 3rd Defendant received the Power of Attorney and was consequently in a position to read and construe the said Power of Attorney and ascertain the scope of the 1st Defendant's authority under the said Power.*
27. *The 3rd Defendant at all material times was aware that the purpose of the loan was to benefit the 2nd Defendant and not the Claimants and that the security for the loan financing was over the Claimants said property.*
28. *The 3rd Defendant knew or ought reasonably to have known that the execution of a mortgage over the said land was detrimental to the interest of the Claimants.*
29. *The 3rd Defendant in the circumstances is deemed to have knowledge of the fact that the actions of the 1st Defendant exceeded the power purportedly granted by the Power of Attorney.*
30. *That the 3rd Defendant being in a prior fiduciary position with respect to the Claimants as bankers and mortgagee acted in breach of this relationship.*

PARTICULARS OF BREACH OF FIDUCIARY DUTY

- (i) *Mortgaging and/or dealing with the Claimants' property without any authority so to do.*
- (ii) *Proceeding to effect a mortgage over the Claimants' property of such a magnitude without assessing firsthand the Claimants' ability/or not to repay the purported loan.*
31. *That the 3rd Defendant was negligent in the manner in which it conducted its business in particular, without regard to the interest of the Claimants.*

PARTICULARS OF NEGLIGENCE OF THE 3RD DEFENDANT

- (i) *Failing to act in accordance with standard banking practices to the detriment of the Claimants;*
- (ii) *Failure to exercise due care in accepting the Claimant as guarantors when it knew or ought to have known of the Claimants inability to satisfy the guarantee in the absence of default of the 2nd Defendant.*

- (iii) *Failing to carry out the requisite due diligence prior to acting to the detriment of the Claimants;*
- (iv) *Failing to verify the Claimants' purported signature on the documents presented to it;*
- (v) *Failure to disclose to the Claimants the nature of the transaction prior to accepting the Claimants as guarantors.*

22. The Claimants then end their Statement of Case with the following claim for relief:

THE CLAIMANTS CLAIM:

- (a) *Damages against the 1st and 2nd Defendants for fraud;*
- (b) *Damages against the 2nd Defendant for breach of warranty of authority;*
- (c) *Damages against the 3rd Defendant for negligence and/or breach of fiduciary duty to the Claimants;*
- (d) *A declaration that the power of Attorney dated the 19th day of January 2007 and recorded at the Islands Record Office at Liber New Series 418 Folio 205 is null and void and/or has no legal effect;*
- (e) *Declaration that the Instrument of Mortgage dated the 3rd day of April 2007 and registered on the Certificate of Title registered at Volume 1319 Folio 810 of the Register Book of Titles is null and void and has no legal effect;*
- (f) *An order directing the Registrar of Titles to cancel the endorsement of the said mortgage on Certificate of Title registered at Volume 1319 Folio 810 of the Register Book of Titles on the basis that the said mortgage is null and void and has no legal effect;*
- (g) *Interest;*
- (h) *Costs.*
- (i) *...Further or relief....*

23. Mrs. Farrell was the only one of the Claimants to give evidence and her Witness Statement dated 30th November 2009 was, subject to a

successful application by NCB striking out paragraphs 27, and 84-98 (inclusive), ordered to stand as her examination in chief. Paragraph 26 of the Witness Statement was struck out previously at a case management conference. Ms. Beckford candidly conceded that paragraph 27 of the Witness Statement ought to be struck out as it contains hearsay. Paragraphs 84-98 of the Witness Statement were struck out on the basis that they contained facts not pleaded in the Amended Particulars of Claim, notably allegations of fraudulent conduct by Bank personnel. This offends the salutary Rule 8.9 of the Civil Procedure Rules "C.P.R.", which indicates that a Claimant cannot rely upon any factual allegation or factual argument which is not set out in the Particulars of Claim, and which could have been so pleaded, unless the Court gives permission. Ms. Beckford did not in fact seek an amendment of the pleading, but I indicated that in any event, had she done so, I would not have granted the application. The reason for this is that the matters raised amount to, and point to allegations of fraud and it is well established that fraud must be distinctly alleged, particularized and proven- **Three Rivers District Council v. Bank of England (No. 3)** [2001] 2 All ER 513, and the earlier cases there discussed. Allegations of mere negligence will not suffice. This would not be fair to NCB, as they would not have been notified that they would have to meet such serious allegations. This lack of specificity and particularization gains particular weight when one observes that there are allegations of fraud against the other Defendants, Mr. Reid and Airlink, yet none against NCB. This despite the fact that the Claimants' pleadings have even been amended previously.

DEFENCE

24. No acknowledgement of service or Defence were filed on behalf of the 1st and 2nd Defendants, the respective Affidavits of Service sworn to by Mr. Latoure Duhaney, both on the 22nd January 2009, having attested

to service on both of these Defendants. The matter therefore proceeded to trial against them in their absence.

NCB "S DEFENCE

25. In their Amended Defence, NCB state that the date of registration of the mortgage on the Title for Lot 121 is May 4, 2007. By Instrument of Guarantee dated April 3, 2007 the Claimants guaranteed repayment to NCB of the loan of US \$600,000 plus interest made by NCB to Airlink.
26. They state further that the correct reference for the Power of Attorney is Liber New Series 418 Folio 205, and they aver in Paragraph 17 that the Claimants are estopped by their conduct from denying the authenticity of the Power of Attorney. The Power of Attorney deposited at the Island Record Office and at the Office of Titles bears the signatures of all the Claimants and all of these signatures are witnessed by a Justice of the Peace.
27. NCB also state that they received a letter addressed to its Corporate Banking Division from the Claimants dated February 22, 2007 and in this letter the Claimants confirmed their awareness of the loan transaction between Airlink and NCB and that Lot 121 was being utilized as security for the loan.
28. NCB claim that by letter dated May 14, 2008 they advised the Claimants of Airlink's default in payments under the loan and on August 19, 2008, Mrs. Farrell attended a meeting at NCB's Head Office at "The Atrium" on Trafalgar Road.
29. The meeting was called to address the Claimants' default on August 8, 2008, on the loan facility extended by NCB and secured by the property Lot 120. Subsequently to discussing that facility, at that meeting NCB's personnel, including Ms. Lindsie Moseley , who was then the Manager of NCB's Debt Collection and Recovery Unit in its Credit and Risk Management Division, raised with Mrs. Farrell the issue of Airlink's

debt being in arrears, since the Claimants had guaranteed repayment of that debt.

30. Importantly, NCB allege that at that meeting Mrs. Farrell acknowledged that she had given Mr. Reid permission to pledge Lot 121 as security for a loan from NCB to Airlink.
31. At the request of Mrs. Farrell, NCB arranged a meeting at the Corporate Banking Division, Western Region for Friday August 22, 2008 for her and Mr. Levy, the principal of Airlink), to meet with Bank officials to discuss the debt owed to NCB by Airlink.
32. In a letter dated August 27, 2008 directed "To Whom It May Concern", Mrs. Farrell confirmed meeting with Mr. Levy and NCB's Mr. Purcell, and made a proposal to NCB for payment of Airlink's loan over a 6-year period by monthly payments of US \$12,000 by Airlink and herself commencing on September 10, 2008.
33. NCB in paragraph 17 particularize the estoppel which they allege as being by conduct, deed and representation as follows:
 - a. *executing a power of attorney by deed in favour of a mortgage broker allowing him to mortgage their land and execute all acts and deeds the Claimants were empowered to do and ratifying anything he purported to do;*
 - b. *Knowingly securing a loan from a private person or entity through the services of a mortgage broker (the 1st Defendant) and putting him in a position to obtain it on the security of their property;*
 - c. *Voluntarily delivering up the duplicate certificate of title for Lot 121 to the 1st Defendant intending it to be used to secure a loan;*
 - d. *Writing the letters of February 22, 2007 and/or August 27, 2008 referred to above;*

- e. *Failing to take any steps to prevent the registration of the 3rd Defendant's mortgage on the certificate of title for Lot 121 by lodging of a caveat against their title.*

By virtue of the matters aforesaid the Claimants held out the 1st Defendant as their lawful representative and this Defendant, in reliance on that deed, and/or representation and/or conduct altered its position to its detriment by loaning money to the 2nd Defendant that it thought secured by Lot 121. In acting as particularized above, the Claimants knew, or ought to have known that third parties would be relying on the aforesaid deed, conduct and representations.

34. NCB highlight the fact that under the Power of Attorney the Claimants gave their undertaking to ratify everything done by their attorney under the Power of Attorney or purported to be done by him under the Power of Attorney. NCB also denied that the authority granted under the Power of Attorney was exceeded. Alternatively they say that if the authority was exceeded, the execution of the guarantee and the mortgage that Mr. Reid purported to do under the Power of Attorney is deemed ratified by the Claimants pursuant to their undertaking given to that effect in the power of attorney.
35. NCB also indicated that they intend to rely upon the Record of Deeds, Wills and Letters Patent Act, the Record Office Act and the Registration of Titles Act.
36. NCB denies that they were in a "prior fiduciary relationship" with the Claimants. They state that there was no special relationship between the Claimants and NCB.
37. As regards the allegations that NCB was negligent, the Defence states at paragraph 31 NCB was not negligent, that NCB during the period of its contractual relationships with the Claimants, owed them a duty to perform its contractual obligations. NCB claims that it discharged that duty and owes the Claimants no other duty. NCB further avers that it acted in accordance with standard banking practices, carried out the

requisite due diligence and exercised due care in accepting the Claimants as guarantors.

38. The only witness who gave evidence for NCB was Ms. Mosely.
39. Both parties agreed that all the documents exhibited to Affidavits filed in earlier interlocutory proceedings constitute agreed documents in this trial and I have therefore treated those documents as exhibits.

ISSUES

First Issue-Whether Mr. Reid was guilty of fraud because of, amongst other matters, forging or causing to be forged, the Claimants' signature on the Power of Attorney

40. One of the first issues that arises, is for the Court to determine whether Mr. Reid was guilty of fraud. I had enquired of Ms. Beckford, Counsel for the Claimants at the start of the case whether she was proceeding against those Defendants in default at the same time as she was proceeding to trial against NCB. Reference was made to Rules 12.10(4) and 12.9 of the Civil Procedure Rules 2002 "the C.P.R." which set out the different form that default judgments may take and the different options open to the court depending on whether or not the claims were being tried separately. In my judgment, it was correct to proceed to trial against all of the parties at the same time since the case against NCB is dependant on the Claimants proving their case against the other Defendants, or at any rate, against Mr. Reid. As stated by NCB's Attorneys at paragraph 16 of their written submissions, "If Mr. Reid's actions were not fraudulent then there would have been no fraud which NCB could be alleged to have been negligent by not discovering."
41. So, therefore, were the actions of Mr. Reid fraudulent? The 1st Claimant in her evidence given in her examination -in-chief stated that she and her children did not sign a power of attorney in favour of Mr. Reid. She

did not go to Montego Bay with her children on January 19 2007 and appear before a Justice of the Peace (whose name is not printed and whose signature was illegible to me and the Attorneys), and sign any power of attorney or any other document. I enquired as to why the only Claimant to give evidence was Mrs. Farrell given that the case Management orders allowed for all five. I never really received a satisfactory answer. The Claimants however relied on pages in the passports of the 2nd, 3rd and 4th Claimants in proof of the assertion that they were not in Jamaica at the time either of the alleged signing of the Power of Attorney or of the letter dated February 22 2007. In my judgment, the passports do not without more provide proof that these Claimants were not in Jamaica on the date of the Power of Attorney or of the purported execution of the letter. This is because as far as I have been able to ascertain, there are no stamps in the passports to indicate when the respective passport holder departed from the island. The stamps only indicate when they have landed. I asked Counsel Ms. Beckford to show me exactly how I was to arrive at the conclusion which she asked me to draw, and she did not appear to be able to assist me. There was also no evidence forthcoming from anyone from the Immigration Department to assist me with official departure and landing records, or indeed any extrinsic evidence as to the date when the documents were actually signed.

42. On the other hand, I have to take a number of factors into account. Firstly, Mrs. Farrell states that she did not execute these documents and nor did she go with her children to the Parish of Saint James and sign any document before a Justice of the Peace. Therefore Mrs. Farrell is disputing the authenticity of these documents, and indeed, indicating that they are forgeries. Mr. Reid has not defended the case and so there is no evidence contravening Mrs. Farrell's position. No expert evidence as to handwriting has been put forward by the Claimants and I am not permitted to embark upon my own

comparison of the handwriting of the Claimants in the disputed documents, with their handwriting on any documents in respect of which there is no dispute. At the same time I am entitled to have regard to the evidence of one of the alleged makers of the documents, Mrs. Farrell and the surrounding circumstances.

43. I note that in her evidence in chief in her Witness Statement, at paragraph 22, Ms. Mosely states that at the meeting on August 18, 2008, Mrs. Farrell acknowledged that she had given Mr. Reid permission to use Lot 121 to secure a loan for Airlink and that at no time during the meeting did Mrs. Farrell advise the parties present that Lot 121 was not to have been mortgaged as security for a loan to Airlink. Mrs. Farrell has denied such acknowledgement and has alleged that she broke down and cried at the meeting when she was informed of the Power of Attorney and the significance of its terms. She states that she distinctly informed the meeting that she had not given permission to mortgage her property on anyone's behalf. It would appear that Ms. Mosely is saying that Mrs. Farrell acknowledged giving Mr. Reid permission to use Lot 121 but she has not said that Mrs. Farrell acknowledged executing a Power of Attorney in Mr. Reid's favour.

44. In addition, I have for consideration the letter of August 27 2008 from Mrs. Farrell headed " To Whom It may Concern " . This letter is relevant both to this issue, and to the question of ratification . This letter reads as follows:

*Aug. 27/08
24 Littleborough CRT.
Scarborough, ON
Canada*

Re: To Whom It May Concern,

This letter is to confirm the meeting that I, Carmen Farrell and Mr. Leve from International Airlink Limited had with Mr. Percell. We have made a proposal to bring to N.C.B. hoping that they will accept our proposal. Upon the 10th day of September 2008, we will start paying \$12,000 U.S.D with some changes in the Loan Conditions. Within a six year time frame, International Airlink and I, Carmen Farrell agrees to pay \$12,000 U.S.D on the 10th day of every month.

Hoping for a speedy reply, thank you for your cooperation.

Carmen Farrell

45. In my judgment, Mrs. Farrell is speaking the truth when she states that the Power of Attorney and letter dated February 22 2007 were not executed by herself and her sons. First of all, I will deal with the letter of February 22 2007. I note that it is under cover of a letter dated February 23 2007 from NCB to Airlink that it was made a condition of the credit facility approval for the loan of US\$600,000 that NCB was to be provided with proof of authorization from the owners of Lot 121 to pledge the asset in support of the loan. Oddly, the letter in fulfilment of this term is dated February 22 2007, a day before the date on the NCB letter. This after Mr. Reid had already provided a letter dated February 20 2007 indicating that he had no financial gain or interest in the loan funds, to which he added a postscript that the registered owners of Lot 121 were aware of the transaction. Portions of the wording of the letter of February 22 is quite similar to the letter dated February 20 2007 from Mr. Reid. It has no return address, the alleged signatures of the Claimants appear on a separate page from the body of the letter, and further, are allegedly witnessed by the same Justice of the Peace for the Parish of Saint James, who sports illegible handwriting. So this letter is allegedly executed by these Claimants, four of whom it would appear were clearly accepted to be living in Canada. Whilst the Power of

Attorney indicates that it was signed by the Claimants “whilst on a visit to Jamaica”, the letter does not say that. Yet here were these Claimants who visit from abroad, (and I draw the inference that “visit” means they do not live in Jamaica), executing the letter in Jamaica, but not only in Jamaica, but in a Parish where they do not reside and where the loan to Airlink was made.

46. I also accept that the Power of Attorney, which was allegedly executed in Saint James, the Parish where none of the Claimants reside, but where Mr. Reid and Airlink are located, along with the relevant branch of the NCB, is a forgery.

Second Issue-Ratification

47. The next question that arises is whether there has been ratification by the Claimants of Mr. Reid’s actions. I do not think that the averment in the Claimants’ Amended Particulars of Claim, paragraph 23, that the execution by Mr. Reid of the mortgage exceeded any authority purportedly granted by the Power of Attorney is apposite, particularly having regard to the fact that I have found that the Power of Attorney was not executed by the Claimants. Nor therefore is NCB’s Defence that, (paragraph 24 of the Amended Defence), “... if the authority granted under the power of attorney was exceeded.... The execution of the guarantee and the mortgage that the 1st Defendant purported to do under the power of attorney is deemed ratified by the Claimants pursuant to their undertaking given to that effect in the power of attorney”, applicable. I am of the view that the question arises as to whether the letter of August 27 2008 from Mrs. Farrell to NCB itself amounts to ratification. In the leading case of **Brook v. Hook** (1871) L.R.6. Ex. 89, the Headnote reads as follows:

The defendant’s name was forged, by one Richard Jones, to a joint and several promissory note for 20l, dated the 7th of November 1869, and purporting to be made in favour of the plaintiff, by the defendant and

Jones. While the note was current, the defendant signed the following memorandum, in order to prevent the prosecution of the forger, at the same time denying that the signature to the note was his or written by his authority:-“ I hold myself responsible for a bill dated the 7th of November, 1869, for 20l, bearing my signature and Richard Jones’ in favour of Mr. Brook [the plaintiff].” At the trial of an action against the defendant on the note, the judge ruled that this memorandum was a ratification, and directed the jury that the only question for them was, whether the defendant signed it. It being admitted that he did, a verdict was entered for the plaintiff:-

Held (per Kelly, C.B., Channell and Pigott B.B., Martin, B., dissenting), a misdirection:

Per Kelly C.B., Channell and Pigott B.B., that the memorandum could not be construed as a ratification, inasmuch as the act it professed to ratify was illegal and void and incapable of ratification; but that it was, in fact, an agreement by the defendant to treat the note as his own in consideration that the plaintiff would forbear to prosecute Jones, and was therefore void as founded on an illegal consideration.

Semle, that the memorandum being ambiguous in its terms, it should have been left to the jury to say what its real meaning was when looked at in connection with the circumstances under which it was signed.

48. At pages 99-100 Kelly C.B. stated:

I am of the opinion that this verdict cannot be sustained, and that the learned judge should have directed a verdict for the defendant; or at least, have left a question to the jury as to the real meaning and effect of the memorandum and the conversation taken together; and this, first, upon the ground that this was no ratification at all, but an agreement on the part of the defendant to treat the note as his own, and become liable on it, in consideration that the plaintiff would forbear to prosecute his brother-in-law Jones; and that this agreement is against public policy and void, as founded upon an illegal consideration. Secondly, the paper in question is no ratification, inasmuch as the act

done-that is, the signature to the note –is illegal and void; and that although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void.

Many cases were cited to show that where one sued upon a bill or note has declared or admitted that the signature is his own, and has thereby altered the condition of the holder to whom the declaration or admission has been made, he is estopped from denying his signature upon an issue joined in an action upon the instrument. But here there was no such declaration and no such admission; on the contrary, the defendant distinctly declared and protested that his alleged signature was a forgery; and although in the paper signed by the defendant he describes the bill as bearing his own signature and Jones', I am of the opinion that the true effect of the paper, taken together with the previous conversation, is, that the defendant declares to the plaintiff: "If you will forbear to prosecute Jones for the forgery of my signature, I admit and will be bound by the admission, that the signature is mine. " This, therefore, was not a statement by the defendant that the signature was his, and which, being believed by the plaintiff, induced him to take the note, or in any way alter his condition; but, on the contrary, it amounted to the corrupt and illegal contract before mentioned, and worked no estoppel precluding the plaintiff from showing the truth, which was that the signature was a forgery, and that the note was not his note.

49. In my judgment, on the authority of **Brook v. Hook**, Mrs. Farrell's letter does not amount to ratification because the act of forgery is a void act and cannot be ratified. Further, where someone forges another's signature they are not professing to be the agent of the person or persons whose signature is forged. Therefore the agency principles such as ratification cannot apply to forgery.

Third Issue-Estoppel

50. NCB has pleaded that the Claimants are estopped by conduct , deed and representation from denying the authenticity of the power of

attorney. They say that they relied upon the deed and/or representation and/or conduct to their detriment.

51. In **Greenwood v. Martins Bank** [1932] A.C. 51, the headnote reads as follows:

A husband and wife had a joint account with bankers who undertook to honour cheques signed by both customers. Afterwards, that account was closed and an account was opened in the sole name of the husband, the wife having no authority to draw cheques upon it. During the currency of both accounts the wife repeatedly forged her husband's signature to cheques, and drew out money which she applied to her own uses. During the currency of the sole account, the husband became aware of the forgeries, but, being persuaded by his wife to say nothing about them, he kept silent for eight months. When he finally determined to disclose the forgeries to the bank, the wife committed suicide. In an action by the husband against the bankers to recover the sums paid out of the sole account on cheques to which his signature had been forged as aforesaid:-

Held, that the plaintiff owed a duty to the defendants to disclose the forgeries when he became aware of them and so enable the defendants to take steps towards recovering the money wrongfully paid on the forged cheques; that through his failure to fulfil this duty they were prevented from bringing an action against the plaintiff and his wife for the tort committed by the wife until after her death, when any action against the husband for the wife's tort abated; and therefore that the plaintiff was estopped from asserting that the signatures to the cheques were forgeries, and was not entitled to recover.

52. In my judgment, the legal position may be summarised as follows. If a defendant signs an instrument in the claimant's name without the claimant's authority and with intent to defraud, the claimant cannot ratify the signature. But if the claimant, knowing of the forgery, induces a third party to believe that the signature is his, and if such third party acts on that belief to his detriment, then the claimant will be

estopped from denying that it is his signature in any action between him and the third person. He will also be so estopped if he, knowing of the forgery, delays in repudiating the signature, and as a result the third party's chance of recovering from the forger is materially prejudiced.

53. In my judgment, by writing the letter dated August 27 2008, in the terms in which she did so, Mrs. Farrell did induce NCB to believe that the power of Attorney was validly executed and that the signatures that it bears are those of herself and the other claimants, her sons. I prefer the evidence of Ms. Mosely to that of Mrs. Farrell and accept that Mrs. Farrell did at the August 18 2008 meeting acknowledge that she had given Mr. Reid permission to use Lot 121 to secure a loan for Airlink. I infer that NCB acted to its detriment in that it did not immediately pursue a cause of action against Mr. Reid or Airlink, and Mrs. Farrell left them to assume that they had a valid security in the form of the Mortgage and Guarantee, which they could choose to pursue as their first and primary port of call in seeking to liquidate Airlink's debt. I note that in paragraph 101 of her Witness Statement Mrs. Farrell indicated that save for service of these proceedings being effected on Mr. Reid at the address which he gave her, she has not been able to contact him. I find that Mrs. Farrell, especially after indicating in the meeting with Mrs. Mosely that she would be consulting her lawyers, in signing and delivering such a letter, is estopped from raising as against NCB that the Power of Attorney was fraudulent.

Fourth Issue-Was Airlink guilty of fraud

54. The only particular alleged as fraud against Airlink is that it caused and/or permitted Lot 121 to be used as security for the loan from NCB. In my judgment, the Claimants have not adduced any or any sufficient evidence to demonstrate that Airlink (as opposed to Mr. Reid, to whom Mrs. Farrell delivered the Duplicate Certificate of Title) caused or

permitted Lot 121 to be used as security for the loan. The case against Airlink for fraud therefore fails.

Fifth Issue- If Mr. Reid is guilty of forgery and fraud , what if any effect does that have on the Mortgage given to NCB?

55. However, even if the actions of Mr. Reid were fraudulent, and he forged or caused to be forged, the signatures of the Claimants on the Power of Attorney, and I am wrong in finding the Claimants estopped from denying the authenticity of the Power of Attorney, that fraud would not without more, and certainly would not on the case as pleaded, be capable of being attributed to NCB. It is well established that in section 71 of the Registration of Titles Act, the words “except in the case of fraud” which deals with the central principle of our registration system, indefeasibility of title, means actual fraud by the person whose title is being impeached.-Asset Company Ltd. v. Mere Roihi (1905) A.C.176, at 190-191, 194, 210. The Privy Council held that even if a transfer is obtained under a void instrument that does not mean that the registered proprietor has not acquired an indefeasible interest, subject to certain exceptions, for example actual fraud, and that fraud must be on the part of the registered proprietor himself. Asset Company v. Roihi was approved in Fraser v. Walker [1967] 1 A.C. 569. Also Willocks v. Wilson 30 J.L.R. 297, at 299 G-300D.

In our Court of Appeal ‘s decision in Horace Linton Nunes (Executor of the Estate of Lionel Coke et al) v. Roy Williams et al (1985) 22 J.L.R., 339, the Court confirmed that the Torrens system of land registration, which is the system that we have in Jamaica, is a system of title by registration and not a system of registration by title. At page 351 E- G, Campbell J.A. stated:

...the line of cases mentioned culminating in Fraser v. Walker , supra, established that whatever the cause resulting in the contract and /or instrument of transfer being rendered void or otherwise invalid, be it due to irregularity in execution or due to breach of statutory provisions the fact of the registration of any such instrument of transfer creates in the person in whose favour the instrument is executed an

indefeasible title to the land referred to in the instrument in the absence of fraud. This is so because as has been said by Lord Wilberforce at p.652 in Frazer v. Walker supra the inhibiting effect of certain sections of the New Zealand Land Transfer Act, eg. Sections 62,63(which correspond to sections 70 and 161 of our Registration of Titles Act) and the probative effect of others, eg. Section 75 (which corresponds to section 68) in no way depend on any fact other than actual registration as proprietor. "It is in fact the registration and not its antecedents which vests and divests title."

56. In Frazer v. Walker, even though the wife of the appellant, who was registered as joint owner with her husband the appellant had forged his signature on the mortgage, it was held that the mortgagee had obtained an indefeasible title by registration of their mortgage, the Privy Council having held that the protection afforded to a registered proprietor extends to a mortgagee who is the proprietor of the mortgage and who has power of sale over the fee simple.

57. It has nowhere been suggested that NCB acted with knowledge of the forgery of the Claimants' signatures and there is no allegation of fraud pleaded against NCB. There is therefore no ground for attacking the indefeasibility of NCB's mortgage.

58. Ms. Beckford very diligently referred the Court to the law in Ontario, providing excerpts from **Banking & Finance Law Review** [22 B.F.L.R.] to an article entitled **Mortgage Fraud, the Land Titles Act and Due Diligence: The Rabi v. Rosu Decision** by Jassmine Girgis, and Ms. Beckford referred to Rabi v. Rosu (2006) , 2006 CarswellOnt 6685, 48 R.P.R. (4th) 1 as discussed in this article. This was a first instance judgment of Justice Echlin where he ordered both a fraudulent transfer and mortgage to be deleted from the register. He determined that the common law rule preventing a fraudulent instrument from creating a valid interest in land prevailed over the Land Titles Act. He also ruled that the issue of indefeasibility under the Land Titles Act was subject to the theory of deferred indefeasibility, with an element of due diligence. He held that the mortgagee was unable to rely on the registration of

the fraudulent title, since it had failed to exercise the requisite due diligence, which, if exercised, would likely have uncovered the fraud.

59. I was not handed a copy of the case itself nor of the relevant Land Titles Act. However, it is clear that in our jurisdiction different concepts obtain as clearly set out in the Nunes decision and others emanating from our Court of Appeal. I am therefore of the view that the Claimants are not entitled to a declaration that the Instrument of Mortgage dated the 3rd April 2007 registered at Volume 1319 Folio 810 is null and void and has no legal effect nor are they entitled to have an order directing the Registrar of Titles to cancel the endorsement of the Mortgage on the Title.

Sixth Issue-Whether NCB guilty of negligence?

60. In order to sustain a claim in negligence against NCB, the Claimants have to prove that NCB owed them a common law duty of care and that it breached that duty, resulting in loss and damage to the Claimants.

61. The decision of the House of Lords in Junior Brooks v. Veitchi [1982] 3 All E.R. 201, at 208-209, is authority for the proposition that an action in negligence does not lie, in the absence of the requisite degree of proximity between claimant and defendant having been established, for damages for pure economic loss arising from a negligent act or omission.

62. I agree with Counsel for NCB that the contract of guarantee and the guarantors' mortgage executed on behalf of the Claimants in favour of NCB are not, without more, evidence of the requisite degree of proximity between the Claimants and NCB. I find that there is no common law duty of care extant owed to the Claimants by its bankers NCB.

63. In National Commercial Bank (Jamaica) Ltd v. Hew (2003) 63 W.I.R. 183, the Privy Council stated that the banker-customer relationship

does not fall into the category of relationships, for example, solicitor-client, medical-advisor-patient, where a relationship of “trust and confidence” or “ascendancy and dependency” may be presumed-paragraph 31 onwards. Such duties may be owed where they are pleaded, and proved, or may be presumed, but not otherwise.

64. In my judgment, there is no claim on the pleadings, and no proof has been led in the case that could establish on a balance of probabilities that there was a special relationship of trust and confidence between the Bank NCB and the Claimants. I therefore agree with Mrs. Minott-Phillips and Mrs. Robinson that the Claimants could not recover damages against NCB via a claim in negligence.

65. Though Ms. Beckford spent a considerable amount of effort in her written submissions in arguing that there was undue influence, there is no basis for such an argument, and it does not get off the ground, so to speak, since firstly, one of the essential pillars for sustaining the argument, that is, the existence of a relationship capable of giving rise to the necessary relationship, has not been demonstrated in the circumstances of this case. Secondly, there is no evidence put before the court that would be capable of amounting to abuse if even such a relationship existed. In NCB v. Hew the Privy Council made the far-reaching observation that there must be care not to confuse the question whether a loan was disadvantageous to the customer with the question whether it was unfair as between him and the bank. Further, that in the context of undue influence, the term “disadvantageous” meant disadvantageous as between the customer and the bank, and that it was not the responsibility of the bank to save its customer from embarking upon an unwise project; its sole responsibility was not to take unfair advantage of its relationship with a customer.

66. I have noted that there is curiously, no claim against NCB by the Claimants for breach of contract. However, Mrs. Minott-Phillips and Mrs. Robinson have gone on to deal with duties in the context of the

contractual duty of care. At paragraph 8 of their written closing submissions, they state:

“ However, given the similarities between the common law duty of care and the contractual duty of care and in the light of NCB’s admission to owing the Claimants a duty to perform its contractual obligations to them (notwithstanding the absence of a claim for breach of contract in the claimants’ pleading), in the event that a common law duty of care is found to exist by this court, NCB submits that it has discharged that duty as well as its contractual duty.” -paragraph 31 of the Amended Defence.

67. I have already set out above the claimants’ pleaded allegations in relation to particulars of negligence alleged against NCB-paragraph 31 of the Amended Particulars of Claim.

68. In my judgment, the Claimants have not provided the court with any or any sufficient evidence to support these allegations. In particular, Ms. Mosely’s evidence as to the bank having acted in accordance with standard banking practices has not been challenged by any other evidence.

69. The following aspects of the evidence of the Bank, put forward through Ms. Mosely which have not been challenged, which I accept, and which are conveniently summarised in NCB’s submissions are as follows, that NCB:

- (a) acted in accordance with standard banking practices by accepting the Power of Attorney without more in circumstances where the Claimants were customers of the Bank in good standing, had provided a signed letter indicating their awareness of the transaction with Airlink, had their signatures on the Power of Attorney witnessed by a Justice of the Peace and had the Power of Attorney duly stamped and registered;

- (b) did not know and could not have known of the Claimants' inability to satisfy the Guarantee because at the time that the Loan Agreement was entered into between the Bank and Airlink the Claimants were all in good standing with NCB. I in any event, accept NCB's submission that the more relevant factor was not whether the Claimants could pay, but whether the borrower Airlink, could pay and whether the Guarantee was supported by sufficient collateral, and it was.
- (c) Carried out the requisite due diligence by requesting and receiving authorisation from the owners of the property for it to be mortgaged to pledge their asset in support of the loan to Airlink;
- (d) Did not need to verify the Claimants' signature as the Power of Attorney had been witnessed before a Justice of the Peace and registered in the Island Record Office;- **Record Office Act, the Record of Deeds, Wills and Letters Patent Act, the Evidence Act and The Registration of Titles Act.**
- (e) Did receive from the Claimants confirmation of their awareness of the loan and Guarantee in letter dated February 22, 2007.

70. Though Mrs. Farrell does now challenge the authenticity of the letter dated February 22 2007, I accept that NCB would have had no way of knowing that the letter was challenged at the time and were entitled to rely upon the fact that the signatures were, on the face of the letter, affixed before a Justice of the Peace.

71. In my judgment, the Claimants have failed to prove their case in negligence or any breach of a duty of care against NCB.

Seventh Issue- Whether NCB are guilty of any breach of Fiduciary Duty?

72. In relation to this issue, I find that the Claimants have not proven that NCB was in a fiduciary relationship with the Claimants because they have not pleaded or established the special circumstances and facts that would demonstrate the existence of such a relationship. I accept that the relationship that NCB has with the Claimants is that of banker-customer, mortgagee-mortgagor, guarantee-guarantor, and creditor-debtor. None of these relationships, without more, give rise to fiduciary relationships or duties on the part of NCB. No “without more”, or “something extra” has been proven by the Claimants.

Further Considerations

73. However, even if I am wrong in my foregoing analysis and decisions, it cannot be denied that Mrs. Farrell, in fact she admits this, both on the pleadings and the evidence, delivered her Duplicate Certificate of Title to Lot 121 to Mr. Reid in his capacity as a mortgage broker to obtain funds for her on the security of her property. In other words, even if the Claimants are not estopped as against the Bank, from relying on the Power of Attorney being void, and even if the Mortgage is void, and the Claimants are entitled to an order that the endorsement of the mortgage be cancelled by the Registrar of Titles, it would not be simply a matter of setting aside the transactions. Mrs. Farrell says that she received the sums of US\$100,000 and US \$130,000 from Mr. Reid. She claims that she received these sums from Mr. Reid before the loan from NCB to Airlink was made, however, there is no evidence to support her on that point. Mrs. Farrell states that she received a cheque drawn on the account of Airlink from Mr. Reid in the sum of JA\$ 16,640,710 which she says represented the balance of the equivalent of US\$270,000 which according to her was the last of the instalments due to her in respect of US\$400,000 loan which she had requested of Lascelles Reid. Those sums would actually, total US\$500,000, not US\$400,000. Further,

although Mrs. Farrell claims that she did not negotiate the cheque of \$16,640,710, I note that the date on the cheque, i.e. February 23 2007 is the same date as the loan. On a balance of probabilities, I think it is reasonable to draw the inference that the Claimants received monies from the amounts borrowed by Airlink from NCB, or alternatively, the amounts borrowed from NCB enabled or supported Airlink and/or Mr. Reid's ability to put the Claimants in funds. Mrs. Farrell further claims to have repaid some monies to Mr. Reid but she has provided no proof of that. She indicated that she had paid back US \$36,000 and JA \$400,000 but she admitted in cross-examination that such sums do not amount to US\$230,000, the amount she claims to have received from Mr. Reid. In her Witness Statement, Mrs. Farrell states that since the cheque was drawn on the account of Airlink and under the signature of Mr. Howard Levy, she assumed that Airlink was the entity providing the loan to her. It is difficult to accept that the first knowledge that Mrs. Farrell had of the mortgage of Lot 121 was when the Bank called her to meet in relation to the loan secured by Lot 120. Further, it was Mrs. Farrell's evidence that she wanted to start repaying the loan proceeds that she had received from Mr. Reid so that she could get back the Title to Lot 121. So in any event, NCB would have an equitable mortgage, which mortgage Mrs. Farrell intended to create by handing over her title deeds to Mr. Reid to source funds. As Counsel for NCB point out, in cross-examination Mrs. Farrell did admit that the person Mr. Reid borrowed the money from would have a right to be repaid. It is clear that the Claimants did receive some benefit and this is not a situation of a straight guarantee transaction where the surety incurs a liability but obtains no benefit. It may even be argued that there would be some amount of unjust enrichment if the Claimants received monies and benefit without restitution. At the very least the Claimants would have to account for the monies received as money lent, with interest.

74. Although in the Amended Particulars of Claim, there is a claim for damages against the 1st and 2nd Defendant for fraud, Ms. Beckford did not address me on the question whether in fact damages fall to be awarded where fraud per se is claimed, as opposed to fraudulent misrepresentation, or deceit. Further, no evidence was in any event led as to what would be the quantum of such damages. There was also a claim against the 2nd Defendant Airlink for damages for breach of warranty of authority but there no proof or argument addressed to this issue and so these claims fail.
75. There will therefore be Judgment for the Claimants against the 1st Defendant Mr. Reid and the 2nd Defendant Airlink. I hereby declare that the Power of Attorney dated the 19th January 2007 and recorded at the Islands Records Office Liber New Series 418 Folio 205 is null and void on the grounds of forgery and fraud on the part of the 1st Defendant Mr. Reid. However, the Claimants are estopped by their conduct, deed and representation from denying the authenticity of the Power of Attorney as against NCB. There will be judgment for the 3rd Defendant NCB against the Claimants, with costs to be taxed if not agreed.

