

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C L 2002/ F059

BETWEEN	ROBERT FORBES	CLAIMANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LTD	1 <sup>ST</sup> DEFENDANT
AND	NCB TRUST & MERCHANT BANK	2 <sup>ND</sup> DEFENDANT

Crafton S. Miller and Suzette Wolfe instructed by Crafton Miller & Co. for Claimant

G. Haisley instructed by Vacciana & Whittingham for both Defendants

Heard: June 27,28 and 29, and November 15, 2007

**Beswick J.**

1. Mr. Robert Forbes, the claimant, has been a good customer of National Commercial Bank for many years. His uncontradicted evidence is that he has limited reading and writing skills having left school when he was 12 years old in order to sell in the market with his parents. He is now a businessman and he says that he relies on his banker to advise him about banking matters.

2. The manager of National Commercial Bank (JA.) Ltd (NCB), Cross Roads Branch, Mr. Kimel Allen, was Mr. Forbes' good friend and handled Mr. Forbes' account. Mr. Forbes says that Mr. Allen was aware of his "literacy challenges" and that Mr. Allen would simply present him with documents and tell him that they were in respect of his account, with no detailed explanation of the documentation. Mr. Forbes would sign the documents because he trusted Mr. Allen and relied on him for much of the decision-making concerning his accounts.

3. Mr. Forbes had bought the Olympia Crown Hotel and wished to purchase furniture and fittings to make it habitable. His evidence is that he applied for a loan of \$10 million from NCB for that purpose but was told that he was not qualified for such a loan. NCB said that his income could only support a loan of \$7 million. He applied for that amount in June 1993 and in September 1994 he "secured the loan" and was able to draw down on it by issuing cheques on his chequing account though no funds were directly given to him.

4. At the request of Mr. Allen, in June 1993, Mr. Forbes had signed a "commitment letter" which he believed pertained to that \$7 million loan.

5. Still later, in March 1995, Mr. Forbes signed another "Commitment Letter" which he believed concerned the \$7 million loan. He has signed documents in blank but as far as he knew they all pertained to his \$7 million loan.

6. In early 1994 Mr. Allen had asked him for two blank signed cheques. He noticed in his January 1994 bank statement that there was a credit to his account for \$5.6 million followed by a withdrawal of the same amount on the same day. His March 1994 statement reflected another \$5.6 million credit with withdrawal the same day of the same amount. He had not written these cheques nor was he aware of having received these monies. He was therefore puzzled and asked Mr. Allen and other bank officers for an explanation. He received none.

7. On one occasion, Mr. Forbes went to make a payment towards the \$7 million loan and was informed that his loan payment had been increased. It appeared to be nearly twice the amount that he had expected to pay.

8. The bankers told him that NCB Trust & Merchant Bank (NCB Trust) had earlier issued him a loan of \$4.5 million that he had not paid and therefore a second loan for \$6.5 million had been issued to him to enable him to repay that \$4.5 million loan. That, they explained, resulted in the increased monthly payment, which had then become due. Mr. Forbes, for his part, said that he had made no application for such a loan and was unaware of receiving such funds or of such funds being put to his use.

9. Evidence from the defendants is that before the proceeds of the loan were disbursed to him, Mr. Forbes was in fact utilizing an overdraft facility that the bank converted to a commercial paper loan to help Mr. Forbes' indebtedness. After Mr. Forbes had secured the \$7 million loan, Mr. Allen, the Manager, told him that he could not service the debt and should therefore subdivide the hotel and sell half the rooms.

10. Fearing that he would otherwise lose his property, Mr. Forbes engaged lawyers to start that process. Mr. Allen assisted by engaging the services of a realtor but no lots were sold. Mr. Forbes thereafter noticed a change in Mr. Allen's attitude towards him.

11. Mr. Forbes continued to repay the \$7 million loan while requesting that NCB investigate the \$6.5 million loan about which he alleged that he knew nothing.

12. Meanwhile NCB had in its custody three Duplicate Certificates of Title for land that Mr. Forbes had given to them to provide security for the \$7 million loan that he was repaying.

13. In December 1997, Mrs. Claudette Stephens of NCB Trust asked Mr. Forbes to sign a mortgage deed for a mortgage registered on his 3 titles for \$27 million. She informed him that that was the amount that he owed the Trust. This was almost three (3) years after the letter of commitment for the \$7 million loan had been issued.

14. His evidence is that he had already contested the \$6.5 million loan and his records showed that he would have already repaid the \$7 million loan with interest. However, he signed under protest and told her that he was signing so as not to have any quarrel with them and risk losing his property. His evidence is that he told Mrs. Stephens that when the bank investigated they would see their error and would cancel the \$27 million loan. NCB Trust registered the \$27 million mortgage, some four years after Mrs. Stephen's request.

15. After sometime Mr. Forbes wished to have his Duplicate Certificates of Title returned. Entreaties to NCB to return his Duplicate Certificates of Title fell on deaf ears.

16. Consequently, Mr. Forbes filed suit and now seeks relief against NCB and NCB Trust and claims:

1. A Declaration that the Mortgage or loan of \$7 million has been fully repaid together with the interest thereon.
2. A Declaration that the alleged Mortgages or loans of \$6.5 million and \$27 million are null and void.
3. That the defendants account to the Plaintiff for all sums paid to the Defendants to liquidate the loan of \$7 million.

4. A Refund of any sum overpaid by the plaintiff to the defendants or any sum wrongfully deducted from the plaintiff's account with the defendants.

Return to the plaintiff of all securities held by the defendants as security for the said loan especially the Duplicate Certificates of Title registered at Volume 1205 Folio 388 and Volume 1200 Folios 657 and 658.

5. Interest at the Commercial Bank rate.
6. Damages for breach of the Duty of Care.
7. Costs.
8. Such further and other relief as this Honourable Court deems fit.

17. NCB & NCB Trust deny any wrongdoing and allege that Mr. Forbes was well aware of all loans granted to him, had signed for all of them and had failed to repay them. They claim that the Duplicate Certificates of Title should remain in their possession as securities for the outstanding monies owed to them by Mr. Forbes. The bank claims that Mr. Forbes received \$27 million as a mortgage, incorporating the original \$7 million and \$6.5 million loans, interest and penalty charges.

18. NCB and NCB Trust allege that Mr. Forbes has continued to default on payments on his debts and now owes them \$ 42,673,442.00, with interest and costs. They counterclaim for that sum alleging it to be the mortgage amount with interest.

19. The main issues therefore are:

- a. Was any loan made by NCB and by NCB Trust to Mr. Forbes?
- b. Was Mr. Forbes aware of any such loan(s)?
- c. If there were any such loan(s), have they been repaid?
- d. Do NCB and NCB Trust have the right to retain Mr. Forbes' Duplicate Certificates of Title ?

**A. Was any loan made by NCB and by NCB Trust to Mr. Forbes?**

**B. Was he aware of any such loan?**

**I. Loan of \$7 million**

20. It is agreed that Mr. Forbes received a loan for \$7 million from NCB Trust in September 1994. The Duplicate Certificates of Title, which the NCB Trust held, were in the possession of the Trust as security for the \$7 million loan.

**II. Loan of \$6.5 million**

21. NCB Trust alleges that Mr. Forbes did not properly service the \$7 million loan. According to Mr. Justin Seaton, Manager's Assistant of NCB, Mr. Forbes consulted with NCB and thereafter obtained a second mortgage loan of \$6.5 million from NCB Trust to clear the interest arrears on the \$7 million loan and also on an outstanding commercial paper debt of \$4.6 million.

22. NCB and NCB Trust seek to rely on three promissory notes, two dated August 17, 1993, for \$4 million and November 3, 1993 for \$1.6 million respectively and one for May 3, 1994 for \$5.6 million representing a combination of the two former notes and which the bank says was a separate indebtedness.

23. Counsel for Mr. Forbes urges the Court to reject that allegation and find that Mr. Forbes had no need for an additional loan. He argues that all promissory notes were executed after Mr. Forbes' \$7 million loan application of June 2003 when Mr. Forbes would already have had access to funds.

**Commitment letter for \$6.5 million loan**

24. Mr. Forbes agrees that he signed a commitment letter dated March 17, 1995 concerning the alleged \$6.5 million loan. Whereas Mr. Seaton testifies that Mr. Forbes signed the letter in acceptance of its terms and conditions, it is Mr. Forbes' evidence that he signed not being aware of any additional loan. His belief was that the document referred to the \$7 million loan, as he trusted his friend, the Manager, Mr. Allen, to have presented him with only papers concerning the \$7 million loan.

25. The evidence is that a condition of the commitment letter for the \$6.5 million loan was that the commitment would be automatically cancelled if it were not accepted by March 31, 1995 and fees of \$109,687.50 paid.

26. The commitment letter also specified that as security for the loan Mr. Forbes should:

- i. assign life insurance on his life
- ii. provide certificates from a land surveyor
- iii. provide certificate concerning land taxes
- iv. provide peril insurance

### **Disbursement of \$6.5 million**

27. The defendants' evidence is that NCB Trust undertook to pay NCB the sum of \$5.5 million to clear Mr. Forbes' commercial paper debt and his current account overdraft. NCB was to retain the remaining \$1 million to cover interest arrears on the initial \$7 million loan. However, according to Mr. Justin Seaton, the mortgage was never registered because of Mr. Forbes' delay in providing the life insurance policy to facilitate the registration process.

28. According to Mr. Seaton, Mr. Forbes was advised of this March 24, 1995 disbursement and was reminded of the repayment terms by letter dated November 13, 1995.

### **Failure to meet conditions for disbursement of \$6.5 million loan**

29. NCB Trust had specified conditions that were to be met before the alleged mortgage loan of \$6.5 million would be disbursed. It is agreed that Mr. Forbes had met not even one of the conditions specified, nor did he provide a solitary security for a loan other than the \$7 million loan.

30. There is no evidence of any discussions with any NCB or NCB Trust officials concerning any waiver of conditions. Indeed, there is no documentary evidence of any application for any loan besides the \$7 million loan.

31. Counsel for the Defence agrees that the \$6.5 million loan did not give rise to a legal mortgage, but argues that since Mr. Forbes had signed the commitment letter and had in fact been granted the loan, an equitable mortgage had been created. Counsel for the Defence urges the Court to find that although the conditions of the commitment were not met, the equitable mortgage still



arose because the conditions were for the benefit of the banks. The banks could, and did, choose not to enforce them.

32. Counsel further urges that even if there is no equitable mortgage, Mr. Forbes is still liable for payment of promissory notes executed by him for \$4,600,000.00.

**Unsecured loan**

33. In my view the Trust would not release \$6.5 million without ensuring that the money was properly secured. The Trust's expected interest in protecting its funds should be heightened by the fact that they had said that Mr. Forbes was already unable to properly service the \$7 million loan and previous debts. Further, NCB had also indicated that Mr. Forbes' income could not service the original amount of \$10 million that he had sought.

34. Considering that the Trust regarded Mr. Forbes as being in clear default of a \$7 million loan and at least one other, why would the Trust lend a further \$6.5 million to him without conditions being met and proper security being given?

35. I reject the evidence of the defendants that NCB Trust disbursed that additional sum of \$6.5 million to Mr. Forbes.

36. My view is fortified by the fact that up until now the Trust has not provided an explanation as to how monies were disbursed in the absence of a request for such sums and where there was a failure of the purported borrower to meet any of the conditions set. Further, no mortgage was endorsed for that amount on any of Mr. Forbes' Duplicate Certificates of Title that the bank held.

37. The Trust, for reasons best known to its officers, caused papers to be drafted and partially completed concerning a loan of \$6.5 million. The Trust acknowledges that Mr. Forbes received none of that money in his hand but they assert that it was deposited to his chequing account to which he had access. Mr. Seaton refers to correspondence about disbursement of this loan, but there is no evidence of actual deposits being made.

38. It is my view that Mr. Forbes, placing all trust in the Bank Manager, his friend, signed documents that were incomplete and that he did not know that the documents pertained to a loan other than that for \$7 million. He was unaware of any additional monies to which he might have access and he was unaware of any benefit from any such funds.

39. I accept as true Mr. Forbes' evidence that when he became aware that the Trust was claiming that there had been an additional loan, he protested this alleged loan to several officers of NCB and asked them to investigate it. They have not yet returned to him with a complete result of any investigations.

40. It follows therefore that I find that there was no loan of \$6.5million loan from NCB Trust to Mr. Forbes.

### **III Loan of \$27 million**

41. The Trust alleges that Mr. Forbes agreed to the debt he owed to the Trust being restructured and consolidated into a \$27 million mortgage. They say that Mr. Forbes' continued failure to repay his debt resulted in it escalating to \$32 million by 1997. The Manager, according to Damion Fletcher, Credit Officer of

NCB, wrote off \$5 million in interest leaving an outstanding amount of \$27 million, which the Trust regarded as a mortgage to Mr. Forbes.

Mr. Forbes' undisputed evidence is that when Mrs. Claudette Stephens of the Trust contacted him around July 1997 and asked him to sign a mortgage deed in respect of the \$27 million, she explained to him that NCB had granted a \$6.5 million loan although he had not requested it. This explanation obviously did not clarify the issue involved. This \$27 million mortgage represented a combination of the original \$7 million mortgage which had been registered on the Duplicate Certificate of Title on July 20, 1994 and the disputed \$6.5 million loan for which no conditions had been met from 1995, over six years before, along with various charges.

42. I accept as true Mr. Forbes' evidence that his repeated request for an explanation as to the state of his accounts bore no fruit.

The Trust failed to explain to Mr. Forbes how they were calculating his indebtedness. NCB and/or the Trust failed to properly investigate and respond to the queries of this longstanding customer.

43. The defendants claim that by January 2004 Mr. Forbes owed the Trust \$433,673,442.00 for which they have counterclaimed. Mr. Forbes, in my view, had done all that he could have done to dispute the alleged loans besides the \$7 million loan. The silence of the response from NCB and the Trust was deafening. He continued, according to his undisputed evidence, to pay the amounts due for the \$7 million loan. I find the evidence is overwhelming that Mr. Forbes did not apply for, nor receive proceeds for, a \$27 million loan from NCB

Trust. This amount includes a duplication of at least one other loan. The only loan for which Mr. Forbes applied and which he received was \$7 million.

**C. *Has Mr. Forbes repaid the loan?***

44. Mr. Forbes' evidence is that he has repaid the \$7 million loan. He testifies that he has paid \$16,896,044.99 and that he is of the view that the amount satisfied any amounts due on that loan. He exhibited a letter from his accountants showing the schedule of payments that totaled that amount. Further, he has asked the Bank to inform him of any amount outstanding and he has not been informed of any such amount.

45. Meanwhile NCB and the Trust maintain that Mr. Forbes has not paid off any loan that he has with them. However, they have not provided any information as to the amount owed and details of how any such amount is computed. What Counsel argues though is that in the commitment letter of June 1, 1993 Mr. Forbes agreed to repay the \$7 million loan by monthly payments of \$228,221.34 for 15 years. The loan was disbursed in September 1994, so that his repayments for the 79-month period of October 1994 to April 2001 would be insufficient.

46. According to Counsel, he would have had to pay \$18,029,486.00 up to April 2001, to be merely up to date. That would not include any penalty payments there might have been, especially when it is borne in mind that Mr. Forbes admitted to having made some late payments.

47. I concern myself with the only loan that I have found that Mr. Forbes had. He has made several requests for information on outstanding amounts, all to no

avail. It is undisputed that he has paid almost \$17million towards a \$7 million loan.

48. The figures being stated as being owed are quite varied. Mr. Fletcher, Credit Officer of NCB, in the Defence and Counterclaim filed on February 19, 2004 states that the debt as of January 28, 2004 was \$42,673,442.00. In his witness statement of 2006 he said the debt as of 1997 was \$32,000,000.00. The banks claim that up to 2001 Mr. Forbes had paid \$16,896,044.99 and also claim that he owed \$27 million as of 2001.

49. The average customer of the banking institution cannot be expected to delve into the fine details of outstanding amounts when years have passed, unless he/she is presented with information to help such a process. That is even more true of an unlettered man such as Mr. Forbes.

I accept as true the evidence that:

- (1) Mr. Forbes has paid more than 100% of the loan of which he is aware.
- (2) Mr. Forbes made every possible effort to obtain information from NCB and the Trust as to whether he owed any more, from simple oral enquiries to filing suit.
- (3) There is an absence of a computation as to how the \$27 million was arrived at other than to assert that it is a combination of \$7 million and \$6.5 million with interest and late charges.
- (4) To date, no comprehensive accounting has been presented to Mr. Forbes, not even in response to the suit. The bankers have

steadfastly refused to produce to Mr. Forbes any relevant computation.

50. I find that Mr. Forbes could have done no more in his quest for any computing that might have differed from his. He held the view that he had discharged his obligation and said so to officers of the bank and also in this suit.

The Bank did not use figures to challenge that view. In the circumstances it is reasonable for Mr. Forbes to accept that his position is the correct one. I therefore find that on a balance of probabilities he had paid the loan obligations of which he was aware and which are the subject of this suit.

### **Duty of Care**

51. Mr. Forbes also seeks to be awarded damages for breach of duty of care.

Counsel for NCB and the Trust submitted that there was no such duty and therefore no breach. Counsel argues that there was no fiduciary relationship between them and Mr. Forbes because there is no evidence that either NCB or the Trust held itself out to Mr. Forbes as being in the business of giving financial or investment advice. Further, there was no special relationship between Mr. Allen, the manager, and Mr. Forbes, creating a fiduciary relationship.

52. Counsel argued that all that the banks did was to assist Mr. Forbes by recommending ways of re-organizing his debts so as to reduce his interest payment. They submit that in fact it was in an effort to help him to reduce the interest rate of his debts that the Trust granted him the loan of \$6.5 million.

53. It is my view that NCB and the Trust, as bankers, owed a duty of care to

Mr. Forbes, their customer. He not only placed his monies with them but he also placed his trust in their advice. They were aware of his educational limitation, they handled large sums of money for him, and they instructed/advised him on financial matters including what documents to sign. He also placed reliance on their ability to maintain accurate records of his indebtedness to them and to keep him informed so as to enable him to promptly service his debts.

54. I accept as true the evidence that Mr. Forbes signed the commitment letter for the \$7 million loan on June 14, 1993 and that the loan was not disbursed until September 12, 1994. Fifteen (15) months had passed before he had access to the money from the loan. Mr. Seaton, witness for the defendants, described such a period in the circumstances as "unusually long." Mr. Forbes evidence is that the bank was aware that the money was required to complete the hotel. Witnesses for the bank indicate that the money was to service outstanding debts. Whichever be the reason, the money would have been urgently required.

55. Mr. Forbes was using money from his overdraft facility while the loan disbursement was not made, for no apparent reason.

56. However, since the bank did not disburse the mortgage loan for 15 months, Mr. Forbes was accruing an overdraft that the bank translated to commercial paper in the form of promissory notes. \$5.6 million was therefore treated as a commercial paper loan.

57. The bank was delaying the disbursement of the mortgage loan that would attract an interest rate of 39% per annum whilst charging rates of 51% and 54% per annum on the commercial paper. Yet Mr. Forbes had already signed a letter

committing to the mortgage loan at the lower rate of 39% per annum and the Bank had registered the mortgage loan on the Title on July 20, 1994, almost 2 months before giving him access to the funds as a mortgage.

58. By registering the mortgage loan, the Banks in fact were restricting the use that Mr. Forbes could make of his property and at the same time, they gave him nothing in return for that restriction.

59. At the very least Mr. Forbes would expect the banks to disburse approved loans to him within a reasonable time and to enter those loans on his title at a time proximate to the disbursement of the loan.

60. The uncontradicted evidence of Mr. Seaton, the bank officer, is that the normal time for disbursement of a loan after the execution of the commitment letter and compliance with its terms is 2 to 3 weeks. Mr. Seaton's evidence is that if a customer operates an overdraft system or uses commercial paper the bank would expedite an application for mortgage so as to give the customer the benefit of a lower interest rate.

61. The breach of the duty of care of the defendants is evident. Even up to the start of this trial, almost thirteen years since the disbursement of the loan, and with the reality of litigation, no record whatsoever, whether accurate or not, had been presented to Mr. Forbes to detail the state of his accounts. During the course of the trial, Defence Counsel made an unsuccessful attempt to introduce some documents of which Mr. Forbes' Counsel was not aware. Neither of the two bank officers has given precise, detailed or comprehensive evidence as to how much Mr. Forbes has paid or how much he owes. No demand has been



made of him to pay outstanding amounts until the filing of the counterclaim in this suit. Indeed there appears to have been no effort to exercise any power of sale.

62. It was only in the counterclaim that there was any indication that Mr. Forbes owed a specified amount of money.

63. I find on a balance of probabilities that the bank:

1. failed to explain clearly to Mr. Forbes that he was to be granted and was granted loans additional to his original \$7 million loan.
2. failed to advise Mr. Forbes of additional interest rates, penalties and charges that would apply to such an increased loan(s).
3. caused Mr. Forbes to sign a mortgage document for \$27 million without ensuring that he understood and agreed with what he signed.
4. registered on Mr. Forbes' title a \$27 million mortgage, which included a duplication of an earlier loan.
5. failed to produce proper, clear accounts for Mr. Forbes' use in a timely manner.

In **Blyth v The Company of Proprietors of the Birmingham**

**Waterworks** (1856) VOLCLV1 at 1049 Alderson B opined:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

64. The officers of NCB and NCB Trust omitted to inform and advise Mr. Forbes carefully although as bankers they should be taken as being prudent and

reasonable persons. I therefore find on a balance of probabilities that the bankers failed in the exercise of their duty of care to Mr. Forbes and thereby were negligent in their conduct to him.

**Damages for breach of duty of care**

65. Even if there were a breach of duty, the question that arises is if Mr. Forbes suffered any damage from such a breach. Mr. Forbes has neither claimed nor sought to prove any special damage that this breach of duty caused.

66. His Counsel argues that the Court should nonetheless recognize the infringement of his rights by awarding nominal damages proportionate to the wrong committed. Counsel submits that that amount should be \$6.5 million as that is the additional amount allegedly lent to Mr. Forbes and which was consolidated into the \$27 million loan.

67. His Counsel argues alternatively that if the other reliefs sought are not granted, damages for the breach of duty should be general and at large, being no less than \$42,673,442.00 with commercial interest, which is the amount being claimed in the Defence.

68. Counsel for the defence says no damage arose but argues that if the Court holds otherwise, the appropriate course would be to disallow the portion of the interest rate that was excessive.

69. Mr. Forbes' loss appears to have been monumental. The uncertainty as to the amount owed has loomed large over his head for over a decade. Further, he, a businessman, has been deprived of the use of his Duplicate Certificates of Title for the premises that could provide security for any other venture.

70. NCB and NCB Trust have shown a callous disregard for ensuring that accurate records be made available to Mr. Forbes. They have, in my view, failed miserably in the duty of care that they had to Mr. Forbes.

71. However, special damages have not been proved. I therefore award nominal damages as general damages, recognizing that Mr. Forbes has in fact suffered a loss though he has provided little evidence of the amount of the loss.

**D. Do NCB and NCB Trust have the right to retain the Duplicate Certificates of Title?**

72. NCB Trust had entered two mortgages on Mr. Forbes' titles. One was for the \$7 million loan and the second for the alleged \$27 million loan which the Trust acknowledged had included the \$7 million loan.

73. The banks would be entitled to retain the Duplicate Certificates of Title to secure outstanding debts.

In view of my finding it follows that neither NCB nor NCB Trust has the right to retain Mr. Forbes' Duplicate Certificates of Title. The bank unlawfully retained the Titles, and he would therefore be unable to freely use these titles as security from the time when the Titles ought to have been returned to him. There is no evidence of when precisely that was. I therefore use the time when the defendants were served with the Writ of Summons as being the very latest time when the defendants ought to have been aware of a demand being made on them for the return of the Duplicate Certificates of Title which they held unlawfully.

This deprivation of the use of his titles , without more, would mean that Mr. Forbes suffered some loss but I have not been presented with any evidence which could assist in quantifying and assessing such loss. Where there is damage there must be relief and I therefore seek to compute the appropriate amount for nominal damages. As a guide, I adopt a standard formula used in legal transactions for value of land and that is the gross annual value, computed as 10% of the actual value of the land.

The value of the loss of use of the land annually I compute as its gross annual value, that is 10% of the actual value. The bank had retained the titles as security for a \$7 million loan, at least. I therefore find on a balance of probabilities that that was the minimum value of the land. Its gross annual value would therefore be \$700,000.00 and consequently I use that as representing the amount that Mr. Forbes lost annually by not having the freedom to charge his land as he saw fit.

#### **Commercial Rate of Interest**

74. Mr. Forbes, in his statement of claim, seeks to be awarded interest at a commercial rate. However, there was no submission made by any counsel nor was there any evidence provided in this regard. I therefore make no finding or award under this head.

#### **COUNTERCLAIM**

75. There has been no evidence produced to support the counterclaim by NCB and the TRUST of \$42,673,442.00. The claim fails.

76. **The Orders I make are:**

1. a Declaration that the Mortgage or loan of \$7 million has been fully repaid together with the interest thereon.
2. a Declaration that the alleged Mortgages or loans of \$6.5 million and \$27 million are null and void.
3. to return to the claimant all securities held by the defendants as security for the said loan especially the Duplicate Certificates of Title registered at Volume 1205 Folio 388 and Volume 1200 Folios 657 and 658.
4. damages for breach of the Duty of Care in the amount of \$700,000.00 per year from the date of service of the Writ of Summons until the date of payment. Where damages involve a portion of a year, those damages are to be calculated per month or part of a month.  
  
Interest on the damages at the rate of 6% per annum from the date of service of the Writ of Summons until June 12, 2006 and at the rate of 3% per annum from June 13, 2006 until today.
5. Counterclaim fails. Judgment for the claimant, Mr. Forbes on the counterclaim.
6. Costs to Mr. Forbes to be agreed or taxed.

77. Mr. Forbes sought relief in the form of a refund of any possible overpayment he might have made to the bank. In view of the orders which I have made, and the fact that almost one-and-a-half decades have passed since the application for the loan, I make no order as it concerns enquiries into the possibility of overpayment by Mr. Forbes.