[2018] JMSC Civ. 140

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 02179

BETWEEN	**KEITH ROSE**	**1st CLAIMANT**
A N D	**COLLEEN ROSE**	**2ND CLAIMANT**
AND	**FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED**	**DEFENDANT**

Miss Kashina Moore and Mr. J. Barrett instructed by Nigel Jones and Co. for the Claimants.

Mrs. Alexis Robinson and Miss Amanda Montaque instructed by Myers, Fletcher and Gordon for the Defendant.

Heard: June 11, 12, 13 and 14 and October 5, 2018.

Mortgage- Bridging loan – Negligence – Fiduciary duty – Nature of the relationship between mortgagee and mortgagor – Responsibilities of mortgagee – Classification of client's loan account – Method of calculation of interest rate – Legal costs incurred before commencement of claim.

CALYS WILTSHIRE J. (AG.)

Introduction

[1] The Claimants, a husband and wife, have brought this claim against the Defendant to recover damages for negligence and or breach of fiduciary duty in respect of the management and classification of the Claimants' loan account with the Defendant. The Claimants are seeking the following:

"1) An order for an account of sums paid by the Defendant in relation to loans bearing reference numbers 1001317262 and 1001342342;

2) An order for the rectification of the Claimant's accounts to reflect sums paid to the Defendant;

3) An order that the Defendant reverse the classification of the Claimant's loan;

4) An injunction restraining a sale of said property located at Lot 2, Battersea, off Old Kendal Road, Mandeville, Manchester registered at 1323 Folio 289:

5) Damages in excess of twenty three million two hundred and forty nine thousand one hundred and forty five dollars ($23,249,145.00)

6) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act on the amount found to be due to the Claimant at such a rate and for such periods as the Court shall think fit;

7) Costs; and

8) Such further and other relief." [as the Court deems fit]

Background

[2] In April 2005 the Claimants were approved for a loan in the sum of $6,000,000.00 from the Defendant for the purpose of constructing a house. The loan was secured by a mortgage over property at Lot 2, Battersea, off Old Kendal Road, Mandeville, in the parish of Manchester and registered at Volume 1348 Folio 327 of the Register Book of Titles. The terms of the loan were contained in a commitment letter dated April 21, 2005.

[3] The Claimants' loan accounts were classified by the Defendant as non performing in April 2009 on the grounds that the Claimants failed to make the required payments for a period of 90 days. The Claimants objected to the action taken by the Defendant and a dispute arose regarding the management of their loan accounts. The end result was the filing of this claim. The particulars of claim outlined the following:

PARTICULARS OF NEGLIGENCE OF THE DEFENDANT

(a) Failing to properly manage loan account
(b) Failing to properly calculate interest on loan account
(c) Failing to withdraw required funds necessary to service the loan account
(d) Failing to rectify the incorrect classification of the loan
(e) Misappropriating funds

By reason of the aforesaid the Claimants suffered losses and incurred expenses.

PARTICULARS OF LOSSES

Bank's legal fees	*$500,000.00*
Loss of earning	*$8,820,000.00*
Escalation in construction cost	*$3,500,000.00*
Security cost for construction site	*$505,250.00*
Rent	*$8,917,895.00*
Total	*$22,243,145.00*

1) *Due to the Defendant's wrongful classification of the Claimants' loan the Claimants found themselves borrowing from friends and this affected the Claimants negatively as this was humiliating for them and the Defendant has ruined their reputation as persons with good credit standing.*

2) *After being blacklisted as a result of the Defendant's wrongful classification the Claimants felt embarrassed and hopeless, as the Defendant was unwilling to assist them in resolving the errors.*

3) *After the Defendant threatened to exercise its power of sale over the property the Claimants were depressed and severely stressed as their efforts to resolve the situation proved hopeless.*

4) *By reason of the aforesaid the Claimants suffered personal injury and incurred expenses.*

PARTICULARS OF INJURIES

5) *The 1st Claimant, Keith Rose, who was born on June 20, 1965 displays symptoms such as depressed mood, lack of interest or pleasure in usual life*

events, depressed appetite and experience difficulty in social and occupational functioning. The 1st Claimant experienced psychomotor changes, decline in energy, memory and concentration. The following diagnosis of the 1st Claimant and further details are set out in the medical report of Dr. Terrence Bernard, dated December 15, 2015.

a. Post Traumatic Stress Disorder (PTSD)

b. Major Depressive Disorder, classified as severe

6) *The report of Dr. Terrence Bernard indicates that the 1st Claimant suffered these injuries as a result of the Defendant's conduct as it relates to the matters previously set out herein.*

7) *The 2nd Claimant, Colleen Rose, who was born on January 25, 1969 displays symptoms such as depressed mood, feelings of worthlessness, loss of interest in formerly pleasurable activities, feelings of worthlessness, tiredness, difficulty concentrating, loss of interest in formerly pleasurable activities, increased appetite, weight gain, difficulty sleeping and difficulty in social and occupational functioning. The following diagnosis of the 2nd Claimant and further details are set out in the medical report of Dr. Terrence Bernard, dated December 15, 2015.*

   a. Major Depressive Disorder, classified as severe.

8) *The report of Dr. Terrence Bernard indicates that the 2nd Claimant suffered these injuries as a result of the Defendant's conduct as it relates to the matters previously set out herein.*

9) *According to the medical report of Dr. Terrence Bernard the treatment recommendations for the 1st Claimant are 18 months of pharmacotherapy and 20 sessions of psychotherapy which are aimed at reducing the symptoms of depression and PTSD. The total estimated treatment cost is six hundred and ten thousand dollars ($610,000.00).*

10) *According to the medical report of Dr. Terrence Bernard the treatment recommendations for the 2nd Claimant are 12 months of pharmacotherapy and 12 sessions of psychotherapy which are aimed at reducing the symptoms of depression. The total estimated treatment cost is three hundred and ninety-six thousand dollars ($396,000.00).*

11) *The Claimants claim interest pursuant to the Law Reform (Miscellaneous Provisions) Act on the amount found to be due to the Claimant at such a rate and for such periods as the Court shall think fit."*

The Defence

[4] The Defendant disputed the claim and denied that it had been negligent as alleged by the Claimants or in any way at all. The Defendant stated in their defence that the Claimants" accounts had been properly managed, the interest had been calculated accurately and funds to service the loan had been withdrawn when they became available.

Claimants' Case

[5] Two affidavits and a witness statement of Keith Rose were permitted to stand as the Claimants' evidence in chief. Mr. Keith Rose testified that he and his wife received a loan from the Defendant in the sum of $6,000,000.00 to complete building their house. The loan was subject to two interest rates, 13.5% and 15.75%, and secured by a mortgage registered against the title for property located at Lot 2, Battersea off Old Kendal Road, Mandeville, Manchester.

[6] The terms of the loan required them to open an account with the Defendant from which monies would be deducted to service the loan. As a result of the different interest rates being applied, he and his wife had two loan accounts, #1001317262 and #1001342342. As it was a bridging loan they were only required to pay the interest charges. His review of a loan schedule received from the Defendant revealed that the monthly deductions covered the monthly interest charges and amounts payable which amounted to $73,125.00.

[7] On or about May 2009 he was advised by the Defendant's representative that the mortgage was classified as non-performing and needed $160,000.00 to be updated. He stated that at all material times there was money in the account to

service the loan and avoid non-performing status. He went on that the Bank of Jamaica regulations stipulate that loans are deemed non-performing if they are not serviced for 90 days and their account had never been in arrears for 90 days nor had they ever owed the Defendant any sums which would warrant their account being classified as non-performing.

[8] Mr. Rose accused the Defendant of incorrectly calculating the interest due on the loan and withdrawing less than what was needed to service the loan. He said that the Defendant also passed on to them legal fees of $500,000.00, which they incurred when they sought legal advice to resolve the matter. He also claimed that the Defendant issued a statutory demand to exercise its power of sale which it was not entitled to do as the classification was incorrect and it was their negligence that resulted in the improper classification.

[9] Mr. Rose further testified that he had taken one loan from the Defendant, although the loan was divided into two equal sums with different interest rates applied. He said he received the sums over six disbursement dates. It was also stated that the Defendant's breach of duty and negligence caused the Claimants to suffer emotional distress and damaged their reputation as persons with good credit standing.

[10] Under cross examination Mr. Rose remained adamant that there was only one loan but agreed that there were two loan accounts. He disagreed with counsel for the Defendant that more funds would have to be applied to the loan with the higher interest rate. He denied that he often paid less than the interest that was due and that there were short payments. Counsel took Mr. Rose through an exercise of reconciling the activity in his passbook with that in the bank's statement. He indicated several times that he was not in agreement with the bank's records. He however conceded that he often made late payments which would have resulted in late fees being applied and therefore he would have to pay more in subsequent

months to cover the late fees. He stated that he paid lump sums to deal with the late fees.

[11] Mr. Rose indicated that because the Defendant's method of clearing his cheques fluctuated, from 1 to 2 to 3 and sometimes 17 days he had an expectation that once he lodged a cheque the funds would be available to service the loan. He had earlier in cross examination agreed with counsel that in normal banking practice a cheque can take up to three working days to clear.

[12] Although insisting that there was something wrong with the Defendant's statement, Mr. Rose was unable to explain to the court why he held that view. In response to questions from the bench Mr. Rose explained that the interest figure had not been the same each month as he paid interest on the amount that he drew down each month but when it reached $6,000,000,00 then the figure became the same every month. He went on that both he and the bank would calculate the interest figure and then the bank would deduct the amount they needed from the passbook.

[13] Mr. Rose further stated, in response to the court's question, that the monthly interest calculated by the bank was correct but the total that they said was outstanding was incorrect. When asked by the court why he said the total outstanding was incorrect, he answered, "We need to take into consideration what was in the passbook. The bank did not deduct it."

The Defendant's Case

[14] Mr. Hugh McCalla was the sole witness for the Defendant. His two affidavits and witness statement were permitted to stand as his evidence in chief. He testified that the loan was disbursed in two equal amounts on the 24th June and August 19th, 2005. As a bridging loan it was customarily granted for a period of 12 months and during that period only interest payments are made. Thereafter it would be

converted to a mortgage and payments against interest and principal would be made.

[15] In the Claimants' case the construction which should have taken place during the year of the bridging loan was not completed up until 2008. There were irregular payments to service the loan and in order to assist the Claimants, the bank repeatedly granted extensions to the duration of the bridging loan. Loan #1001317262 was automatically classified as non-performing on April 30th, 2009 because it had not been serviced for over 90 days. Mr. McCalla acknowledged that the Claimants had made a cheque deposit of $75,000.00 on 28th April, 2009 but said funds only became available after clearance 3 days later on 1st May, 2009. After the cheque cleared, the sums were used to cover interest payments which had accrued up to January 2009.

[16] He indicated that the central bank guidelines stipulated that once a loan was designated non-performing then all other loans sharing a common security with the non-performing loan were also classified as non-performing. Consequently, loan #1001342342 was manually classified as non-performing on 19th May, 2009. He said that the Claimants had been advised on 12th May, 2009 that arrears had accrued in the amount of $184,189.11.

[17] Mr. McCalla referred to bank records which he said revealed that on several occasions the Claimants' loans were over 60 days in arrears and they only made payments to service the loans at a time when the loans were almost 90 days in arrears. Subsequent to the classification the bank made a demand on the Claimants and indicated that if the sums owed were not liquidated then there was no alternative but to take action so as to protect its interest. The bank also conducted an appraisal of the securing asset in keeping with the normal course of business prior to calling on the security.

[18] As a result of the allegations of deceit, negligent misstatement and breach of contract and threats of lawsuits made by the Claimants, the bank conducted investigations, sought legal advice and met with the Claimants and their lawyers in the presence of the bank's lawyers. Mr. McCalla said that by virtue of the commitment letter, the instrument of mortgage and standard practices of the bank, the Defendant was entitled to pass those legal costs onto the Claimants.

[19] It was stated that the Claimants had two loans with two different interest rates, monthly payments and disbursement dates. Mr. McCalla referred to clause 3(1) of the Mortgage instrument that stated that if the Claimants defaulted in making payments for two calendar months the whole principal, interest and any other sums remaining payable under the mortgage became due and payable immediately. He said that the agreement provided justification for classification of the debt.

[20] Mr. McCalla expressed the view that the Claimants' calculations of the outstanding interest betrayed their misunderstanding of the loan accounts. There were two loans, each with a different monthly payment and payments were not equally split to each account. So while both accounts were in arrears, one was significantly more in arrears than the other. Mr. McCalla stated that the Claimants' calculation of the interest was based on the repayment of the aggregate monthly sum but the loan was actually classified because it was significantly in arrears.

[21] Under cross examination Mr. McCalla agreed that the commitment letter and instrument of mortgage referred to a loan and a principal sum respectively and there was no pluralization. He also agreed that it was not uncommon for a commitment letter to be issued in relation to a loan but contain different interest rates. He however did not agree that the Defendant had issued one loan.

[22] Counsel referred to exhibit #5, the letter dated 13th May, 2009 from the Defendant to the Claimants, and took Mr. McCalla through an exercise of finding the sum of the two interest rates and multiplying same by the number of days in any given

month. Mr. McCalla agreed that the end result would solely be the interest due for 31 days.

[23] Mr. McCalla maintained that the number of days for clearing a cheque varied but it would not take less than three days. He further disagreed that in the majority of instances where the Claimants made cheque deposits, the sums were applied before 3 working days had passed. He also explained that in spite of a cheque being deposited, the bank can take the risk and pay against the funds being held to maintain good customer relations or at a client's request. The 3 day hold would not be applied when it was a cash deposit.

[24] It was pointed out by Mr. McCalla that the bank did not use a combination of the two interest rates in calculating the interest due on the loan. He said that they were calculated separately. In response to the court's question as to whether that would result in a difference in the end figure, Mr. McCalla answered, "Because there were separate loans, there could be."

Claimants' Submissions

[25] The following cases were relied on by counsel in support of their submissions:

Donoghue v. Stevenson [1932] A.C. 562

Ubacol Investments Ltd v Royal Bank 1995 CanLII 9097 (AB QB)

Barclays Bank plc v Quincecare Ltd and Anor [1992] 4 All ER 363

Bradford Joseph Seitz v Rudy Feeder Co-operative Ltd 2004 SKQB 233

Natoya Swaby and Andrew Green v Southern Regional Health Authority and the Attorney General of Jamaica [2012] JMSC Civ 151

Rainy Sky SA and Ors v Kookmin Bank [2011] UKSC 50

Parker Tweedale v Dunbar Bank plc and Ors No. 2 [1991] Ch. 26

Gomba Holdings UK Ltd and Ors v Minorities Finance Ltd and Ors (No 2) [1992] 4 All ER 588

Administrator General for Jamaica v Peoples Favourite Banking Co. Ltd. And Romaine Henry; Lyncent Smith v Romaine Henry and Peoples Favourite Banking Co Ltd [2017] JMSC Civ. 11

Brenton Hennie v Jamaica Premix Concrete Limited [2016] JMSC Civ 55

Eileen Sumintra Bankay and Ors v Sukdai Sukhdeo (1975) 24 WIR 9

Joan Morgan and Cecil Lawrence v Ministry of Health - Volume 6 Khan 220

Wilson and Anor v United Counties Bank Ltd and Anor [1920] AC 102

Kpohraror v Woolwich Building Society [1996] 4 All ER 119

Capital and Credit Merchant Bank Ltd v Real Estate Board [2013] JMCA Civ 29

[26] Counsel submitted that the Defendant had a duty of care to manage the Claimants' loan as a reasonable banker would and not so manage the Claimant's loan in a way that would deliberately or negligently cause them to fall into default. He quoted from **Donoghue v Stevenson** (supra) where Lord Atkin stated at page 580 that,

> *"The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer's question: who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*

He also cited **Ubacol Investments ltd. v Royal Bank** (supra) at paragraph 8 where Kent J held -

> *"The requirement for finding negligence in the context of the relationship between Ubacol and the bank are not difficult. There was a contractual relationship between the two. There was also a debtor/creditor relationship. Those two relationships created the requisite proximity so that the bank owed Ubacol a duty to act as a reasonable banker. A failure to do so which was the proximate cause of damage would result in a finding in favour of Ubacol. The standard of care which the bank must maintain will vary from customer to customer. With some the relationship will be embodied only in the written documents which are signed at the beginning of the relationship. With others, the contractual relationship will have been amended by the conduct of the parties throughout the relationship. That will create expectations that the bank or the customer becomes entitled to rely upon".*

[27] Counsel submitted that the Defendant's conduct of withdrawing cheque payments and applying them to the loan less than three days after the deposit led to the Claimants having an expectation that when they lodged cheques to their passbook, the funds would be applied to the loan immediately or in less than three days. Further that based on ***Ubacol*** *(supra) "a bank's duty to its customer may be modified based on the bank's conduct and a customer would be entitled to rely on the bank's conduct in its transactions with the said bank*." Therefore, the Claimants were entitled to rely on the Defendants' past conduct to expect that the sum of $75,000.00 lodged on April 28, 2009 would have been applied to their loan on or before the interest payments due for April 30, 2009. Hence the Defendants failure to apply the cheque paid on April 28, 2009 to the Claimants' loan account was a breach of the Defendant's duty to the Claimant.

Counsel stated also that according to Steyn J in the case of **Barclay's Bank plc v Quincecare Ltd. and Anor** (supra) at page 376,

> *"It is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders."*

[28] Therefore, Counsel argued, where a bank failed to properly manage a customer's loan account or accounts, in such a way that would cause the customers' account(s) to fall into arrears when it should not have been, that failure would amount to negligence. He relied on the case of **Bradford Joseph Seitz v Rudy Feeder Co-operative Ltd** (supra) to support his submission that the Defendant had a duty to apply the $20,872.82, which was in the Claimants passbook account from 1 April, 2009, to the Claimants' loan account to prevent it from going into default as they had on previous occasions applied small amounts in the account to service the loans. Further that having required the Claimants to maintain a passbook account from which the Defendant indicated the loan would be serviced, the Defendant had a duty to apply funds available in the passbook account toward the loan to avoid putting the loan account in a non-performing status.

[29] Counsel asked that the court find that the daily interest rate on the loan of $6,000,000.00 was $2,404.08. This was based on the Claimants calculating the per diem interest on the loan using the two interest rates of 13.5% and 15.75% which were applied to equal portions of the loan. Counsel asked the court to find that at April 29th 2009 the outstanding balance for the loan was 77 days interest. He then contended that at the time the loan was classified on April 30th 2009, the loan was not in arrears for 90 or 77 days but for 38 days. It was then submitted that the mortgage instrument did not allow the Defendant to classify the loan as non-performing prior to 90 days or after default for two calendar months. Reference was made specifically to Clause 3(1) of the mortgage instrument, which Counsel submitted should be interpreted using the approach in **Rainy Sky SA and Ors v Kookmin Bank** (supra). Based on that case counsel submitted that the grammatical and ordinary sense of the words used in clause 3(1) did not give the Defendant the right to classify a loan as non-performing after default for two calendar months.

Defendant's Submissions

[30] The following cases were cited in support of the submissions:

Junior Brooks Ltd v Veitchi Co. Ltd [1982] 3 All ER 201

Farrel v Reid 2008 HCV 05873 (unreported) delivered May 5, 2009

National Bank of Greece SA v Pinios Shipping Co. (No 1) [1989] 1 All ER 213

JMMB Merchant Bank Ltd. V Finzi [2014] JMCCCD 10

Addis v Gramophone [1909] AC 488

Capital & Credit Merchant Bank Ltd v Real Estate Board [2013] JMCA Civ 29

McLoughlin v O'Brien [1983] AC 410

White v Chief Constable of South Yorkshire [1999] IRLR 110 (HL)

Halsbury's Laws of England Negligence (Vol 78 (2018) para 11)

[31] Counsel submitted that the relationship between banker and customer is one of contract and therefore no action in negligence can be sustained on the facts in the case at bar. Further that the Claimants' claim for negligence can only succeed if they can prove on a balance of probabilities that the Defendant owed the Claimants a common-law duty of care which it breached thereby causing them loss and damage.

[32] It was argued that banks owed no special duties of care to their customers over and above the ordinary duty of care arising from their contractual relationship. Further that such duties may be owed where a fiduciary relationship or a relationship of trust and confidence is pleaded and proved, or presumed, but not otherwise per **National Commercial Bank (Jamaica) Ltd. v Hew** (supra) at paragraph 31 and **JMMB Merchant Bank v Finzi** (supra.)

[33] It was conceded that the duties in contract and tort were sometimes based on the same relationship but essentially the relationship of banker and customer was one of contract. Hence the relationship between the parties in this case "*without more, did not, provide evidence of the requisite degree of proximity*" required for an action in negligence.

[34] It was also argued that the case of **Ubacol Investments (supra)** cannot be relied upon as in the instant case there was no evidence of a change in the bank's policy of taking 3 days to clear cheques. The Claimant knew that the time frames fluctuated and *he could have no specific expectation of the bank*.

[35] Counsel further submitted that the **Bradford Joseph Seitz** case (supra) did not assist the Claimants in *their argument that the Defendant negligently mismanaged their loan account* as that case concerned the management of proceeds of sale when the bank handled the sale of the customer's property to satisfy a debt, which was not the case in the matter before the court.

[36] Counsel stated that in **JMMB v Finzi (supra)** Sykes J. (as he then was) said, at paragraph 18,

> *"...the banker and customer relationship is not a presumptively fiduciary such as lawyer /client, trustee /beneficiary or company/company director. The reasons are obvious. A lender and the debtor from the commencement of the relationship have two different interests. The lender is not looking out for the best interest of the debtor. He has not undertaken any obligation of fidelity and loyalty. He has not promised to look out for the best interest of the debtor. The sole interest of the lender is getting back his money with interest at the appointed time and if not, he enforces the security. The authorities show that before a lender is held to be in a fiduciary relationship with a debtor it has to be shown that the lender crossed the line from an ordinary lender and became advisor and confidante to such an extent that it can safely be said that he undertook to act for and on behalf of the debtor in a particular matter and by virtue of that decision a relationship of trust and confidence arose."*

[37] Therefore, it was submitted that as the relationship between the parties in the case at bar was that of banker/customer and lender/borrower there was no obligation

imposed on the Defendant to look out for the best interests of the Claimants. The Defendant's only interest was to recover the sums borrowed. Further that in **Capital & Credit Merchant Bank v Real Estate Board (**supra) it was held that as between mortgagor and mortgagee, the court directed an account only in actions for redemption, foreclosure, judicial sale or for the recovery of monies resulting from the exercise of a power of sale.

[38] Regarding the prayer for an injunction, Counsel submitted that same should not be granted as there was no threat of the exercise of a power of sale and even if there was, the right to exercise that power has validly arisen. Further that it would be inappropriate to grant a final injunction in respect of the bank's right to exercise its power of sale.

Issues

[39] There are both factual and legal issues that must be determined in order to bring a resolution to this matter. They are as follows:

I. Whether the Claimants were in default for 90 days.

II. What was the correct method of calculating the interest.

III. Whether the Defendant owed a duty of care in its management of the Claimants' account and if so did they breach it.

IV. Whether the Claimant suffered any loss as a result of the Defendant's actions.

V. Whether the Defendant's power of sale as mortgagee should be restrained.

Law and Analysis

[40] It is imperative from the outset that the court examines and outlines what is the nature of the relationship between banker and customer. Paget's Law of Banking 12th Edition, at page 115, stated that the relationship of banker to customer was one of contract. The author said as follows:

> *"It consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services. The essential distinction is between obligations which come into existence upon the creation of the banker-customer relationship and obligations which are subsequently assumed by specific agreement; or from the standpoint of the customer, between services which a bank is obliged to provide if asked, and services which many bankers habitually do, but are not bound to provide."*

[41] Justice Sykes pointed out in **JMMB V. Finzi** (supra) at paragraph 18 that regarding banker and customer there is no presumption of fiduciary as in the lawyer/client, trustee/beneficiary or company/company director relationships. The learned judge went on to explain that this was so because the relationship was one of a lender and a debtor and they have two different interests.

[42] I will return to the question of fiduciary duty and duty of care after a determination of the factual issues.

The Loan

[43] The parties agree that the Claimants were the recipients of a bridging loan which meant that payments must be paid only on the interest for the amount "drawn down". The defence witness Mr. Hugh McCalla had testified that the loans were disbursed in equal amounts on June 24, 2005 and on August 19, 2005. He, however, contradicted this assertion when under cross examination he admitted to the several dates of disbursements put forward by the Claimants' Attorney. The court accepts that the $6,000,000.00 was disbursed in varying amounts over a period of time. The parties agree that the loan was still a bridging loan up to the time it was classified as non-performing in 2009, so only interest payments were

due up to that point. The daily interest amount, however, was not calculated in the same way by the parties. The Claimants used a combination of the two interest rates while the Defendant treated each of the $3,000,000.00 amounts separately and applied the interest due to each one independently.

[44] The Claimants assert that there is one loan and the Defendants assert that there are two. The loan instrument (Mortgage) makes repeated mention of the loan and at item 4 of the schedule the principal amount is stated as six million dollars ($6,000,000.00) and no reference is made to two principal sums. At item 9 of the schedule the exact words used were "Rate of interest: Thirteen and One –half Per Centum (13.50%) per annum on Three Million Dollars ($3,000,000.00) of the said principal sum and Fifteen and Three-quarter per Centum (15.75%) per annum on Three Million Dollars ($3,000,000.00) of the said Principal sum**.**"

[45] Clause 1(iv) of the Mortgage agreement states that the principal sums mean the same as principal monies. Principal monies "mean the sum hereby advanced and set out in item 4 of the schedule and such further advances and re- advances of moneys as may be made by the Society to the Borrower from time and the balance for the time being remaining outstanding thereon." There is therefore reference to a sum, advances and balances but not to more than one loan amount. In addition, the letter sent from the Defendant to the Claimants dated April 21, 2005 at paragraph 1 states "Amount: to be advanced on the security will be - $3,000,000.00 + $3,000,000.00.

[46] This in the court's view refers to as it states the amounts in which the loan was to be advanced. It shows two amounts which is consistent with the mortgage instrument and with the rest of the letter and did not refer to any of these amounts as a principal sum. At paragraph 7 of the mortgage instrument it refers to "Term of loan: Repayment of principal sum (not sum**s**, indicating one principal sum and not two) shall not be required before August 30, 2035." At paragraph 8 there was

mention of a total sum for monthly repayment and an upkeep and two figures indicating different payments amounts reflecting the varied interest rates. It read: "*Monthly Payment of Principal and interest and upkeep: $36,221.24 and $41,176.01 plus upkeep of $2500.00 totalling $79,897.25 per month payable to First Caribbean Building Society*." .

[47] The court is of the view that there was one loan with two interest rates applied to each half of its principal sum.

The Arrears

[48] The Claimants' evidence is that they were advised that the arrears accrued up to the end of April 29, 2009 was $184,189.11. The Claimants assert that the said interest represented 77 days of interest and not 90. The 77 days was however based on their use of a combined interest rate calculation**.** The Claimants however, went further to state that on April 30, 2009 the loan was neither 90 days nor 77 days in arrears but only 38 days in arrears. This suggests some level of uncertainty in the Claimants' position on the number of days the interest amount represents.

[49] The effect of the calculation by the Claimants of a combined interest rate would be to nullify the intention behind the mortgage instrument which was for payment of the loan at different interest rates. There was no mention in any of the documents which bound the parties, of a combined interest rate that would be applied to each part of the $6,000,000.00 or to the $6,000,000.00 as a whole. The interest must be calculated individually for each part as per the agreement. The view of the court is that the combination of interest rates is wrong and thus the Claimants' resultant calculations are wrong.

[50] The court therefore finds that the Defendant's calculation of the interest and hence the arrears is the correct one and the number of days of interest arrears was 90. It was undisputed that under the Bank of Jamaica regulations, a loan that is not

serviced for 90 days is classified as non-performing. Therefore, there was no wrongful classification of the Claimants' account by the Defendant.

[51] The Claimants argued that there was still a wrongful classification of the loans as non-performing as the Defendant's witness testified about loan # 1001317262 as non-performing on April 30, 2009 and loan #1001342342 as manually classified as non-performing on May 19, 2009. He subsequently referred to loan #1001317262 as A and to loan #1001342342 as B but said that loan B was automatically classified as non-performing on April 30, 2009 and that loan A was manually classified as non-performing on May 19, 2009. This, according to the Claimants' attorney showed that "*the Defendant was so negligent that in its management of the Claimant's loan accounts that even on their case, they were unable to clearly identify which of the loan accounts were in arrears for 90 days (if any) on April 30, 2009. Therefore, based on the Defendant's own evidence loan B was less than 90 days in arrears on April 30, 2009 which was consistent with the Claimants claim."*

[52] It is clear from the evidence that there were separate accounts set up to deal with the servicing of the loan, each identified by a number, and one of them was past the 90 day mark. Needless to say, there was indeed a mistaken reference to which was loan account A or B. The evidence is nevertheless very clear when the accounts are referred to by their numbers. Therefore I do not find that It is evidence of the mismanagement of the loan accounts.

Fiduciary duty/ Duty of care

[53] Having found that the Claimant's loan was not wrongly classified, the question remains: Had the state of affairs resulted from a breach of fiduciary duty or the negligence of the bank in its duty to the Claimant? In Paget's Law on Banking at page 119, the author noted that regarding the duty of care owed by banker and customer to each other,

> *"……the court is concerned with the particular contract or, in the case of an alleged duty of care in tort, the proximity of the parties, reasonableness and justice on the particular facts."*

A fiduciary duty is one born out of an obligation of fidelity and loyalty. At paragraph 18, Sykes J (as he was then) stated in **JMMB v Finzi** (supra) that,

> *"The authorities show that before a lender is held to be in a fiduciary relationship with a debtor it has to be shown that the lender crossed the line from an ordinary lender and became advisor and confidante to such an extent that it can safely be said that he undertook to act for and on behalf of the debtor in a particular matter and by virtue of that decision a relationship of trust and confidence arose. "*

[54] Counsel for the Claimants relied on **Ubacol** (supra) on the issue of duty of care. The court there looked at whether the bank was negligent. It was of the view that once the Claimants' cheque was in the bank, it "had a duty to act in a reasonable manner given the *contractual relationship* between the bank and the customer." The court held at paragraph 18 that the contractual relationship between the parties in that case was more than that in the agreement because :-

> ***"****the evidence was clear that Ubacol would telephone Mr. Fink [Ubacol's account manager] every time it was about to write one of these large cheques to determine whether there was enough money to cover the cheque. A call was made before Mr. Picard [the principal of Ubacol] wrote the Ubacol cheque. He was told by Mr. Fink that there was enough money, and there was, since at the time, the certified cheque had not yet been dishonoured. We know that Ubacol's credit limit was $50,000. Mr. Fink contacted Mr. Picard when the account was over the limit on June 19 and therefore would have contacted him on June 18 with that same information. Thus, the agreement does not set out the entire relationship between the two."*

[55] There is no evidence that in the instant case the Claimants had any such relationship with any account manager at First Caribbean who called them or who they called everytime there was an issue. The court found that the bank in the **Ubacol** case (supra) was negligent because they did not do anything *about a dishonoured cheque the day it arrived at the branch, but "turned it around for processing knowing that no one in a position to take any action at the bank will*

know until the next day…." (paragraph 19). In a context where the account manager spoke to the customer so frequently, the court found that no doubt this behavior was unreasonable. Due to the practice and conduct of the claimant and the account manager, in **Ubacol** (supra) where they notified and were notified of the actions regarding the account as soon as they knew and before they acted, the contractual relationship embodied more than what was stated in the agreement regarding the operation of the account.

[56] In this case Mr. Rose testified that most of the payments were made by cheques, and on most occasions the amount deposited was withdrawn by the bank within "0 to 2 days from the date of the cheque being deposited." He said "Over 95% of our deposits to the passbook were made by cheques and a review of the passbook records from the inception of the loan in 2005 to the time of the second classification in May 2009 revealed only three instances that had a 3 weekdays interval between our deposit and the partial or total withdrawal by the Defendant six instances where the Defendant took between 4 weekdays and 25 weekdays to update the loan account with amounts deposited and the other instances were 0 to 2 weekdays between our deposit and the partial or total withdrawal by the Defendant". The witness for the Defendant under cross- examination also conceded that there were varying time periods between the deposits and when the bank withdrew money from cheque payments.

[57] In this case the Defendant had a policy of holding cheques for three days before clearing them. Despite that policy the Defendant sometimes did so earlier. They were entitled but not obligated to do so. The Defendant had no such relationship with the Claimants. Hence the **Ubacol** case (supra) can be distinguished from the instant case. The Defendant, in not clearing the cheque immediately had not acted unreasonably toward the Claimants given their contractual relationship and had not breached any duty of care to them based on the **Ubacol** (supra) test.

[58] Counsel for the Claimants submitted that the Defendant's conduct of withdrawing cheque payments and applying it to the loan less than three days after the deposit led to the Claimants having an expectation that when they lodged cheques to their savings passbook, the funds would be applied to the loan immediately. The court does not accept that this was a reasonable expectation on the part of the Claimants given Mr. Rose's own evidence that there were fluctuations in how the cheques were cleared and the funds paid to the accounts were not always applied to the loans immediately. The fact that the Defendant did so at times was never a guarantee for all times.

[59] Based on the evidence, this court cannot find that there was anything other than an ordinary lender/debtor relationship in this case. Nothing in the Defendant's conduct is suggestive of them crossing the line from an ordinary lender.

Management of loan accounts

[60] There is no dispute that the parties had agreed, pursuant to the terms of the letter of commitment dated April 21,2005 (at paragraph 22), to maintain as follows,

> *'Upkeep savings account for $50,000.00 with the Building Society hypothecated for three years. The borrower shall also maintain a share account with the Building Society from which the mortgage payments will be debited on a monthly basis.'*

[61] Counsel argued that the Defendant had not properly managed the loan accounts of the Claimants to prevent their arrears. He made reference to Steyn J in the case of **Barclay's Bank plc v Quincecare Ltd. and another** (supra) at page 376 where he said -

> *"In my judgment it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders."*

[62] This court agrees that the bank should indeed carry out their instructions properly using the requisite skill and care. The instruction given to them by the Claimants

was for the Defendant to pay from the passbook account to service the loans. There was one account for payments but two loan accounts to be serviced. The agreement and the expected condition would of course be that there were sufficient funds available in the account. The court's examination of the passbook shows that this was not always the case. Hence while the bank must carry out its orders, the orders must be doable. The understanding would have been that there was enough in the passbook account to cover the loan amounts in addition to the bank fees attached. The **Barclay's** case (supra) was about the application of loan amounts stipulated for one specific purpose, being accessed for another use. That is not the case here. In that case the bank in not following the customer's instruction was indeed in breach of its duty.

[63] Counsel for the Claimants had submitted that **Bradford Joseph Seitz v Rudy Feeder co –operative Ltd.** (supra) supported his contention that "where a bank fails to properly manage a customer's loan account or accounts, in such a way that would cause the customers' account(s) to fall into arrears when it should not have been, that failure would amount to negligence." The case report states at paragraphs 2-4 that,

> *"The defendant entered into a standard breeder agreement with the plaintiff pursuant to the Cattle Breeders Associations Loan Guarantee Regulations, 1991, R.R.S. C. F-8.001 Reg 5 and the Farm Financial Stability Act, S. S. 19 89, C. F - 8.001. The defendant pursuant to this agreement, purchased the cattle on behalf of its various members, including the plaintiff and borrowed the purchase money from a chartered bank, such loans being guaranteed by the Saskatchewan government. Cooperative members, such as the plaintiff, retained possession of the cattle and upon sale of the cattle in the name of the cooperative, moneys were paid by the cooperative on the bank loans in an orderly fashion , any balance of sales proceeds being residually paid to the individual member of the cooperative. The Rudy Feeder Co-operative continues this business operation to the present time. The plaintiff's dispute with the defendant arises out of the administration of this program of cattle purchase, sale and application of sale proceeds. The plaintiff claims that the actions of the defendant in administering the program were such as to amount to negligence, breach of contract and/or breach of fiduciary duty resulting in economic loss to him…… The defendant denies in any way having acted negligently*

or in breach of contract and/or fiduciary duty and asserts that any damages suffered by the plaintiff are not reasonably attributable to any actions of the defendant."

[64] The court there found that the plaintiff demonstrated on a balance of probabilities that the defendant acted negligently in its operation and treatment of his breeder loan accounts. The facts of that case showed that the defendant was the one who took the loans from the bank. In other words they were the borrower on behalf of the plaintiff. By virtue of their contractual arrangements with the plaintiff they had undertaken to manage those loans of the plaintiff.

[65] They, having made this undertaking, pre-paid some of the loans, let others default, did not pay others when due and transferred funds from bank accounts without consent. They were indeed negligent. They owed a duty of care to the plaintiff as they acted on his behalf and failed in their undertaking to properly manage the accounts. Allbright J. at paragraph 68 stated,

*"The standard of care owed to the plaintiff was that of a reasonable feeder co-operative in similar circumstances. The plaintiff in his dealings with the defendant was entitled to assume that the defendant would manage the accounts in question with due care and diligence**."***

[66] The case is therefore saying that a co-operative is to use reasonable business and accounting practices in relation to loans it borrows on behalf of its members, when it undertakes to manage those loans. It does not say and is not authority to say that banks must manage loan accounts to prevent their default.

Consistency in Allocation

[67] The loan statements activity was checked against the Claimants' passbook account to see if both loans were consistently paid. The activity reported in the loan statements do not indicate the amount of interest owed, it simply tells how much was paid. The amounts owed in interest of course would be related to the amount of money which had been disbursed. The payments made after April 30,

2009 did not assist the Claimants as the accounts were already classified. I bore in mind that I did not have the amount of interest owed over the entire period, in the activity statements.

[68] From April 11, 2008 to May 1, 2009 the observations from the loan activity statements for both accounts are shown in table 5 below:

Table 5 Observed loan payment pattern

Date of payment	Payment in $$ to loan #1001317262 (Interest rate 13.5%)	Date	Payment in $$ to loan #1001342342 (Interest rate 15.75%)
11.04.08	33,287.67	11.04.08	38,834.73
21.05.08	34,397.26		
5.06.08	33,287.67	5.06.08	33,287.67
5.06.08	34,397.26	5.06.08	33,287.67 reversal
5.06.08	34,397.26 payment reversal	5.06.08	38,834.73
5.06.08	33,287.67 payment reversal	5.06.08	1,294.49
5.06.08	33,287.67	5.06.08	38,834.73
5.06.08	33,287.67		
31.07.08	1,109.59	1.09.08	40,129.22
1.09.08	33,287.67	26.09.08	38,834.73
30.09.08	34,397.26	30.09.08	40,129.22
2.10.08	1,109.59	2.10.08	1,294.49
11.12.08	76,000	11.12.08	76,000
13.2.09	PAYMENT REVERSAL OF 76000	13.2.09	PAYMENT REVERSAL OF 76000
13.2.09	76,000	13.2.09	76,000
13.2.09	24,972.61	13.2.09	41,798.68
13.2.09	8,228.71		
3.03.09	25,056.96	3.03.09	38,834.73
31.03.09	34,397.26		
1.04.09	32,178.08		
		1.05.08	40,129.22

The figures reveal that there was equal treatment of the accounts despite their differences in interest rates.

[69] It is accepted that the Defendant must use skill and care in carrying out the instructions of their client to pay the loan accounts from the passbook account. From the above analysis the Defendant properly allocated the funds and did not cause the accounts to go into default.

[70] It must be noted however that the loans were disbursed at different times and in different amounts. According to exhibit 9, loan #1001317262 was disbursed in the amount of $1,978,055.10 on June 24, 2005 and loan #1001342342 in the amount of only $238,055.10 was disbursed two months later on August 22, 2005. The values by 2009, of the interest payments on the later loan were higher than the first disbursed loan account despite the low principal and being later in time. Time contributed to this no doubt in association with the higher interest rate, but it is doubtful even with the high interest rate, that arrears would have reached so great an amount.

[71] A closer look at the loan activity statements and passbook account records show what further contributed to the discrepancy in the accounts. It was observed that the Claimants often made their payments late, i.e. past the due date**.** As a result they incurred significant late fees. The accounts varied in their accumulation of these fees as it depended on how late the payments were made. The effect of the late fees was significant to reconciling the amount withdrawn from the passbook account and the amount paid towards arrears as both payment for fees and loans came from the passbook account.

[72] An example is that on May 1, 2009 the Defendant withdrew $70,503.94. The activity statement for loan #1001342342 showed loan payment of $40,129.22 and late fee payment of $30,374.72, while loan #1001317262 showed no payment for that date. The Defendant took its late fees as opposed to paying on both accounts. However, the payment of one account instead of the other was not prejudicial as the Defendant did the same thing to both accounts at times. On May 21, 2008 the

passbook account showed a withdrawal of $34,397.26. The activity statement for loan #1001342342 showed no loan payment while loan # 1001317262 showed a loan payment of $34,397.26.

[73] This may explain why the Claimants state that money was withdrawn from the passbook account but unaccounted for in payment. They would not see what the withdrawals were used for without consulting the activity loan statements. Therefore, there is no evidence of the Defendant mismanaging the Claimants' accounts and causing the loan to fall into default.

Costs incurred prior to court action

[74] Counsel for the Defendant submitted that the Defendant was entitled to add "costs, charges and expenses incurred in and about the security and in the protection of its interests to the Claimant's account". This was in response to the Claimant's seeking to recover the sum of $500,000.00 which they alleged was passed onto them by the Defendant. Clause 2(v) of the Mortgage agreement did seem to permit the Defendant to do so. It stated " *to pay the Society all costs, charges, and expenses incurred in and about this security of in relation to any default hereunder or in the protection of its enforcement of its rights hereunder with interest at the rate aforesaid from the time the same shall have been incurred*."

[75] The Claimants state that the Defendant has no right to costs generally and it must be based on the mortgage. They rely on the case of **Parker-Tweedle v Dunbar Bank Plc and Others** (supra). In that case the bank had a clause similar to the one in this case. The judge, Nourse L.J. at page 33, stated that,

> *" A mortgagee is allowed to reimburse himself out of the mortgaged property for all costs, charges and expenses reasonably and properly incurred in enforcing or preserving his security. Often the process of enforcement or preservation makes it necessary for him to take or defend proceedings. In regard to such proceedings three propositions may be stated. (1) The mortgagee's costs, reasonably and properly incurred, of proceedings between himself and the mortgagor or his surety are*

> *allowable. The classical examples are proceedings for payment, sale, foreclosure or redemption, but nowadays the most common are those for possession of the mortgaged property preliminary to an exercise of the mortgagee's statutory power of sale out of court. (2) Allowable also are the mortgagee's costs, reasonably and properly incurred, of proceedings between himself and a third party where what is impugned is the title to the estate. In such a case the mortgagee acts for the benefit of the equity of redemption as much as for that of the security. (3) But where a third party impugns the title to the mortgage, or the enforcement or exercise of some right or power accruing to the mortgagee thereunder, the mortgagee's costs of the proceedings, even though they be reasonably and properly incurred, are not allowable."*

[76] In that case the court found that the exception in (3) above, was made out. That is not our scenario. Number (2) above would not be relevant to this case either as no third party at all was involved. Proposition number (1) would be the relevant test in the instant case. The Court however cannot assess the reasonableness of the sum as no invoice was furnished in evidence.

[77] The Defendant's witness said that "as a result of the communication received from the Claimants and their various attorneys-at-law, the bank conducted investigations, sought legal advice, and also met with the Claimants and their attorneys-at-law in the presence of the bank's attorneys-at-law." He said they were threatened with legal action and had the right to seek legal advice. Their actions were not unreasonable especially in light of the classification being contested by the Claimants. The threat of a law suit of this magnitude would have prompted a reasonable man to get attorneys as the accounts were indeed in default and the defaulters seemed ready to litigate.

[78] ***"****Proceedings are started when the claim form is filed".* This is according to the Civil Procedure Rule 8.1(2). However, seeking legal advice and having a meeting or meetings are not "proceedings". The law suit was threatened, but had not yet commenced. Nothing had been filed. The court addressed this issue as it is of the view that a proper interpretation of clause 2 (v) was necessary. The legal costs having been incurred before proceedings were commenced in the court, ought not

to have been passed to the Claimants. In light of the final decision of this court, it rests on the conscience of the Defendant to abide by the true intent of the wording of clause 2(v).

Conclusion

[79] The Claimants have failed on a balance of probabilities to prove that there was any negligence or breach of fiduciary duty on the part of the Defendant. The Defendant had no duties outside of the contractual arrangement and no obligation to extend itself to meet unwarranted expectations of the Claimants. It is therefore not necessary to proceed to consider the other claim for losses and injuries and whether damages should be awarded. There is also no reason for the court to restrain the Defendant from exercising its power of sale. The court therefore orders:-

i. Judgment is for the Defendant.

ii. 95% of Costs awarded to the Defendant to be taxed if not agreed.

iii. 5% of Costs awarded to the Claimants to be taxed if not agreed.