[2026] JMCC Comm 25

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2025CD00002

BETWEEN	**DAVID HUNTER**	**CLAIMANT**
AND	**RADIANT MUTUAL LIMITED**	**1ST DEFENDANT**
AND	**ULTRA FINANCIER LIMITED**	**2ND DEFENDANT/ ANCILLARY CLAIMANT**
AND	**MARLON PLUMMER**	**ANCILLARY DEFENDANT**

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant.

Mrs. Daniella Gentles-Silvera KC and Ms. Analiese Minott instructed by Livingston, Alexander & Levy, Attorneys-at-law for the 2nd Defendant/Ancillary Claimant.

Civil procedure - Whether fraud, actual fraud or wilful blindness has been proven - Whether negligence has been proven - Damages for wrongful encumbrance and loss of opportunity - Nominal damages

IN OPEN COURT

Heard on: 13th, 14th April, 3rd June and 16th September 2026

STEPHANE JACKSON-HAISLEY J.

BACKGROUND

[1] The Claimant David Hunter is one of the registered proprietors of lands at Lot 54, Part of Maverly Mountain in the parish of Saint Andrew registered at Volume 1533 Folio 89 of the Register Book of Titles (the property). In or around April 2024, Mr. Hunter applied for a loan in the sum of Five Million Dollars ($5,000,000.00) from the 1st Defendant Radiant Mutual Limited (Radiant). As a part of the requirement for obtaining the loan, he was asked to provide some sort of security and as such, he delivered the title for the property to Radiant.

[2] Mr. Hunter did not receive the loan as expected and as time passed, he made some investigations which revealed that Mortgage No. 2540321 was endorsed on the title to the property in favour of the 2nd Defendant Ultra Financier Limited (Ultra) for Forty Million Dollars ($40,000,000.00) for which he did not give permission. He had never applied for or received any loan from Ultra nor had any dealings or contract with them.

[3] Radiant was never served with the Claim. Ultra was served and filed a Defence denying all allegations of fraud and instead countered that Mortgage No. 2540321 was lawfully registered on the title to the property on behalf of Mr. Marlon Plummer and Mr. Hunter and his wife Esmine Jennifer Walker- Hunter who agreed to act as guarantors of the loan.

[4] By Amended Claim Form filed February 11, 2025, Mr Hunter sought the following orders and declarations:

(i) *A Declaration that Mortgage No. 2540321 which is endorsed on Certificate of Title registered at Volume 1533 Folio 89 is fraudulent and/or illegal and/or unlawful.*

(ii) *That Mortgage No. 2540321 be immediately revoked on the grounds of Fraud and Breach of section 103 of the Registration of Titles Act.*

(iii) *That the Registrar of Titles removes Mortgage No. 2540321 which is endorsed on Certificate of Title registered at Volume 1533 Folio 89 of the Register Book of Titles from the said Certificate of Title.*

(iv) *That the 2nd Defendant delivers over Duplicate Certificate of Title registered at Volume 1533 Folio 89 of the Register Book of Titles to the Claimant free of Mortgage No. 2540321.*

(v) *An injunction restraining the Defendants whether by themselves, their servants and/or agents from selling, transferring or otherwise disposing of All that Parcel of Land being Lot 54, Part of Maverly Mountain in the parish of St. Andrew registered at Volume 1533 Folio 89 of the Register Book of Titles.*

(vi) *An Injunction restraining the Defendants whether by themselves, their servants and/or agents from interfering in any way whatsoever with the quiet enjoyment possession and occupation of the Claimant in respect of All that parcel of Land being Lot 54, Part of Maverly Mountain in the parish of St. Andrew being ALL THAT PARCEL OF LAND registered at Volume 1533 Folio 89 of the Register Book of Titles.*

(vii) *That the Claimant is entitled to Damages for the wrongful registration of Mortgage No. 2540321 on Certificate of Title registered at Volume 1533 Folio 89 of the Register Book of Titles against the Defendant.*

(viii) *Damages for Trespass to Property.*

(ix) *Damages for Breach of the Registration of Titles Act.*

(x) *Damages for Negligence.*

(xi) *Aggravated Damages.*

(xii) *Exemplary Damages.*

(xiii) *Vindicatory Damages.*

(xiv) Such further and/or other relief as this Honourable Court deems just.

[5] Ultra denied all allegations of fraud and pointed out that Mr. Plummer failed, neglected and/or refused to pay the monthly instalment. By Ancillary Claim Form filed February 18, 2025, Ultra claimed against the Ancillary Defendant, Marlon

Plummer for breach of contract for the sum of Forty-Eight Million, One Hundred and Ninety-Seven Thousand, Six Hundred and Sixty Dollars ($48,197,660.00) plus interest on the principal sum of Thirty-Three Million, Two Hundred and Ninety-Seven Thousand, Six Hundred and Sixty Dollars ($33,297,660.00) at the rate of 70.01% per annum from the date of filing of the Defence and Counterclaim until payment.

[6] Mr. Plummer admitted liability of the Ancillary Claim and Judgment was entered against him.

CLAIMANT'S CASE

[7] Mr. Hunter averred that in or about November 2023, he applied for a loan to assist with expenditure in a construction development. He approached Radiant and it was agreed that he would use his title as security for the loan which was handed over to Radiant in December 2023. On several occasions he followed up with Ms. Brown-Knight who indicated that the loan was being processed and he eventually signed the Loan Agreement on April 11, 2024. However, during cross-examination, Mr. Hunter denied that he signed a loan agreement even when it was pointed out to him that he said so in his witness statement.

[8] He continued that he received countless excuses regarding the delay in disbursement of the loan and the suspicious delay caused him to investigate in May, 2024. Those investigations revealed that Mortgage No. 2540321 was endorsed on the title to the property for the sum of Forty Million Dollars ($40,000,000.00) to Ultra.

[9] Mr. Hunter stated that he has never had any dealings with Ultra, did not release his title to Ultra and did not authorise Radiant to release his title to Ultra. He did not sign any documentation in favour of Ultra, had never requested a mortgage from Ultra and did not receive the benefit of a mortgage from Ultra. He asserted that Mortgage No. 2540321 is fraudulently, illegally and unlawfully registered on his title.

[10] Upon discovering the fraud, he demanded that the mortgage be removed from the title and his title returned free from all encumbrances. He eventually reported the matter to the Fraud Squad of the Jamaica Police Force when his title was not returned. Mr. Hunter asserted that he waited until the end 2024 to see if an arrest leading to prosecution would be made however, nothing was done and since his property remained vulnerable to the mortgagee, he lodged a caveat.

[11] Mr. Hunter contended that in September, 2024 he received several offers from developers who were interested in purchasing the property and he quoted One Million, Five Hundred Thousand United States Dollars (US$1,500,000.00) as one of the offers. He was unable to follow through with any of the sales as the mortgage was endorsed on the title which was in Ultra's possession. He was also offered a joint venture opportunity with several developers who were interested in paying the sum of One Hundred Million Jamaican Dollars (J$100,000,000.00) and he would be given one of the units, but that opportunity also had to be shelved. During cross-examination, Mr. Hunter accepted that he had none of these offers in writing, that he did not instruct any lawyers to prepare any Agreement for Sale and that he received no deposit from anyone. When pressed by King's Counsel about attempts to obtain other loans, he asserted that he went to several places but was informed that he needed to bring in the title as a copy was insufficient.

[12] In his 2nd Witness Statement filed September 26, 2025, Mr. Hunter asserted that he obtained the assistance of Mr. Dwayne Dobbs for investments purposes which included advertising the property for development of rental homes. He asserted that the property was listed on the Marketplace listing and several persons expressed an interest however, they had to be rebuffed as he was not in a position to enter into an Agreement for Sale. He contended that he lost the opportunity to have the use of his property as collateral for a loan and he was also unable to dispose of the property by sale. The mortgage was discharged and the title returned to his Attorneys-at-law on September 9, 2025 however, he has not been compensated for the loss and damage.

[13] Mr. Hunter also contends that he was deprived of the chance of obtaining a mortgage on the property to assist with alleviating the financial pressures he was undergoing. He continued to suffer loss and damage by the refusal to remove the fraudulent mortgage from his property. In cross-examination, Mr. Hunter denied King's Counsel's suggestion that he suffered no immediate loss, he however, countered that he suffered a stroke because he was worried about the use of his title.

2ND DEFENDANT'S CASE

[14] Mr. Mario Brown, the Vice President of Sales for Ultra was the sole witness for the 2nd Defendant. He asserted that in or around December, 2023, Mr. Marlon Plummer approached Ultra for a loan in the sum of Fifty Million Dollars ($50,000,000.00) for capital injection into development projects which he was to carry out for the National Housing Trust, University of Technology and the Ministry of Economic Growth and Job Creation. He informed Mr. Plummer that he needed evidence of his ability to repay the loan and Mr. Plummer submitted the application form together with bank statements and government contracts as his ability to repay the loan. Mr. Plummer also indicated that Mr. David Hunter and his wife Esmine Jennifer Walker-Hunter agreed to guarantee the loan by mortgaging their property in exchange for Mr. Plummer developing the property. Mr. Plummer gave him a valuation report dated December 15, 2023 as well as copies of driver's licences for Mr. and Mrs. Hunter.

[15] Mr. Brown averred that an offer letter dated December 15, 2023 was given to Mr. Plummer and the loan was approved on the condition that he would sign the offer letter within fourteen (14) days, complete the security documentation, sign a promissory note and have Mr. & Mrs. Hunter execute a Note of Consent and Mortgage Instrument. He contended that on or around December 29, 2023, Mr. Plummer delivered to Ultra the executed offer letter, Promissory Note, Mortgage Instrument, Note of Consent and the Duplicate Certificate of Title for the property and upon receiving the executed documents, the mortgage was registered for the sum of Forty Million Dollars ($40,000,000.00) together with interest at the rate of 70.01%. The sum of Thirty-Three Million, Two Hundred and Ninety-Seven Thousand, Six Hundred and Sixty Dollars ($33,297,660.00) representing the difference after deducting the first three (3) months interest in the sum of Four Million, Two Hundred Thousand Dollars ($4,200,000.00) was disbursed to Mr. Plummer's company, MEP Construction Limited.

[16] The loan was to be repaid initially by way of six (6) monthly instalments in the amount of One Million, Four Hundred Thousand Dollars ($1,400,000.00) thereafter in five (5) equal monthly instalments of Eight Million and Sixty-Six Thousand, Six Hundred and Sixty-Seven Dollars ($8,066,667.00). Since disbursing the loan, Mr. Plummer failed to make any of the loan payments despite several demand letters sent to him and the Hunters by registered mail demanding the sum of Fifty-Three Million, One Hundred and Fifty-Three Thousand Five Hundred and Fifty Dollars ($53,153,550.00) representing the principal, interest and fees. Having not received a response, the property was advertised in the Jamaica Gleaner for sale by public auction on December 6, 13, 2024, January 5 and 7, 2025, however, there were no successful bids.

[17] He contended that there was no reason to believe anything improper about the mortgage until Mr. Hunter visited Ultra's offices in April 2024 and requested a return of the title as there was no reason to believe that the signatures on the various documents were not genuine. Mr. Brown asserted that Ultra discharged the mortgage on the property on August 25, 2025 and returned the title to the Hunters' Attorneys-at-Law on September 5, 2025.

[18] During cross-examination, Mr. Brown accepted Counsel's suggestion that the Hunters did not apply for or receive disbursement of a loan in the sum of Forty Million Dollars ($40,000,000.00) and that the mortgage was incorrectly drafted to give the appearance that the Hunters were borrowers. He also accepted that the proper Know Your Client (KTC) procedure was not followed for the Hunters as Ultra did not obtain their telephone numbers, their correct residential address or obtained a picture ID of either of them. Mr. Brown asserted that in hindsight, Ultra could have done more. He also admitted that the Hunters' property was at risk being a collateral for the loan if there was no repayment of the loan.

[19] Mr. Brown denied Counsel's suggestion that Ultra did not carry out all the necessary due diligence prior to approving and disbursing the loan to Mr. Plummer to ensure the transaction was not fraudulent.

CLAIMANT'S SUBMISSIONS

[20] Mr. Kinghorn argued that the issues on liability for the Court to consider can be broken down under two (2) headings, namely fraud and negligence. The Claimant submitted that Ultra is liable as its conduct amounts to fraud, actual fraud and/or wilful blindness or in the alternative that Ultra owed a duty of care to the Claimant and is now in breach.

[21] With respect to liability for fraud, Counsel on behalf of the Claimant placed reliance on **Assets Company Limited v Mere Roihi** [1905] AC 176 and **Foreign Options Ltd. v Messado, Jennifer et al** [2018] JMCC Comm 38 where Laing J reaffirmed the principle that actual fraud is required is required to prove fraud. Mr. Kinghorn argued that the distinction is important as a mere failure to verify may ground negligence but where the party knows the facts and nonetheless prepares and registers a document that misrepresent the facts, the case is capable of supporting a finding of actual fraud.

[22] On the issue of negligence, Mr. Kinghorn submitted that Ultra owed the Hunters a duty of care as they were the owners of the collateral and the mortgage instrument was intended to affect their title. He contends that Ultra breached its own KYC procedure by failing to obtain sufficient evidence on the guarantors, including failing to obtain independent legal advice in circumstances of a married co-owner of the property. He urged upon the Court **Sheila Rose-Green v Patrick Rose-Green and Bank of Nova Scotia Jamaica Limited** Supreme Court Civil Appeal Np. 52/00, judgment delivered 31 July 2002 and **Barclays Bank plc v O'Brien** [1993] 4 All ER 417 which made it clear that where a wife or married co-owner gives security in circumstances involving her husband's benefit or risk of her interest, the bank or lender must take reasonable steps to ensure that her consent is properly and independently obtained.

[23] On the issue of damages, Mr. Kinghorn asserted that the property was not dormant, nominal or speculative. He contends that it is valuable, marketable, financeable and developable land valued by VB Realty Co. Ltd. in 2023 at Ninety Million Dollars ($90,000,000.00) with a forced sale value of Seventy-Two Million Dollars ($72,000,000.00). The property is approximately thirteen (13) acres in size and is located in an established upper-income residential neighbourhood with good and steady development. A second valuation done in 2024 valued the property at Seventy-Five Million Dollars ($75,000,000.00) with a recommended reserve price at Fifty-Eight Million Dollars ($58,000,000.00).

[24] He contends that the wrongful mortgage impaired the Claimant's ability to exploit a real economic asset and deprived him of the ordinary ability to present the property to purchasers, developers and lenders as clean and unencumbered and an immediately usable title. He further advanced that the Claimant lost his opportunity to sell, mortgage or otherwise dispose of the land as a result of the wrongful endorsement. He argued that the Claimant's evidence on the loss of opportunity to sell, mortgage, develop, joint venture and otherwise use the property was not materially challenged in cross-examination and the authorities have found that where the Claimant's evidence on a material issue had not been challenged the trial judge was entitled to accept it. He referred the Court to **Brown v Dunn** (1893) 6 R 67 and **Attorney General of Jamaica v Phillip Granston** [2011] JMCA Civ 1 in support of his submissions.

[25] Counsel argued that loss of opportunity is recognized as a compensable head of damage. He pointed the Court to **Leighton McKnight and Novelette McKnight v Jamaica Mortgage Bank** [2012] JMCA Civ 44 where the Court considered damages arising from a wrongful caveat. Counsel argued that the Court acknowledged loss of opportunity while cautioning that the Court must not speculate and must be satisfied on the evidence that real damage was sustained. He contended that loss of opportunity does not require proof that the hoped for transaction was guaranteed, however, the Court's task is to assess whether a real and substantial chance was lost and if so, to value that loss in a principled and non-speculative way. Counsel also pointed the Court to **Soares v Duncan** [2011] JMCA Civ 45 where the Court of Appeal assessed the Respondent's real prospect in the lost action and reflected that assessment in the award. Mr. Kinghorn argued that the later discharge of the mortgage does not extinguish the loss already suffered.

[26] He contends that the appropriate method for assessing the loss of opportunity is to begin with the agreed valuation evidence and then apply a fair discount for imponderables. He suggests that the more principled approach is to use the forced sale value of Seventy-Two Million Dollars ($72,000,000.00) as the conservative starting point then apply a fifty percent (50%) discount for imponderables.

[27] Mr. Kinghorn contends that, using the principles in **Leighton McKnight and Novelette McKnight v Jamaica Mortgage Bank,** the Claimant is entitled to General Damages in the sum of Thirty-Six Million Dollars ($36,000,000.00) for the wrongful encumbrance of the property and deprivation of the ordinary incidents of ownership. He further contends that the Court should reject any suggestion that the Claimant suffered no real damage because the title was eventually returned.

2ND DEFENDANT'S SUBMISSIONS

[28] Counsel for the 2nd Defendant, King's Counsel Mrs. Daniella Gentles-Silvera relied on the provisions of the Registration of Titles Act, in particular, sections 68, 70, 71 and 161(d) and asserted that a registered title is indefeasible and a Court cannot go behind it unless fraud is proved. Mrs. Gentles-Silvera, King's Counsel contended that fraud by a person from whom the registered owner claims does not affect him unless knowledge of it is in fact brought home to him. She further contended that the fact that he might have found out about the fraud if he had been more vigilant and made further inquiries is not sufficient and does not prove fraud unless it can be shown that his suspicions were aroused and he abstained from making inquiries for fear of learning the truth. King's Counsel pointed the Court to the principles in **Assets Co. Ltd. v Mere Roihi** [1905] AC 176, **Frazer v Walker and Others** [1967] 1 All ER 649, **Carmen Farrell et al v Lascelle Reid et al** (unreported decision delivered June 17, 2011) to support her position.

[29] King's Counsel accepted that although Ultra may not have carried out proper due diligence with respect to KYC procedures as it relates to the Hunters by failing to obtain their phone numbers and proper proof of address, this does not rise to the level of wilful blindness but rather carelessness.

[30] On the issue of negligence, King's Counsel submitted that Ultra owed the Hunters no duty of care as the Claimant has not pleaded that there existed any special relationship between Ultra and the Claimant. King's Counsel relied on several authorities to include **P & P Property Ltd v Owen White & Catlin LLP** [2018] EWCA Civ 1082 and **Carmen Farrell et al v Lascelles Reid et al** (unreported decision delivered 17 June 2011) to support her position that in the absence of proof of the existence of any special relationship between the Claimant and 2nd Defendant, no duty of care is owed to Hunters.

[31] On the issue of damages, King's Counsel contended that as there is no evidence of fraud, the Claimant would only be entitled to nominal damages on the basis that there is no diminution in value of the property and since the Duplicate Certificate of Title was returned with the Mortgage discharged, the Claimant cannot get the capital value of the property as that would amount to overcompensation. King's Counsel also submitted that the other pecuniary losses should be proved. She urged upon the Court the Eastern Caribbean Supreme Court authority of **Eustace Archibald v RBTT (SKN) Limited and Leonara L. Walwyn** Claim No. NHCV 2005/0133 to support her position. She submitted that the arguments posed by the Claimant amount to no more than hearsay, as not only did the persons who allegedly made statements of offers to purchase and participate in the joint venture not attend to give evidence at the trial, but the Claimant tendered no evidence to support these allegations. King's Counsel contended that the allegations are unreliable as Ultra was unable to verify the accuracy of the statements.

[32] On the issue of aggravated, exemplary damages, King's Counsel submitted that the case does not fall within any of the three (3) categories outlined in **Rookes v Bernard** [1964] AC 1129.

ISSUES

[33] The issues for the Court to consider can be summarized as follows:

(i) Whether Ultra's preparation and registration of the mortgage instrument on the duplicate certificate of title amounted to fraud, actual fraud or wilful blindness?

(ii) Whether Ultra was negligent in preparing and registering the mortgage instrument on the duplicate certificate of title?

(iii) Whether the Claimant is entitled to damages and if so how should damages be computed?

(iv) Whether there is any basis to make an award for aggravated damages, vindicatory or exemplary damages?

DISCUSSIONS AND ANALYSIS

Whether Ultra's preparation and registration of the mortgage instrument on the duplicate certificate of title amounted to fraud, actual fraud or wilful blindness?

[34] In order to establish fraud, certain elements must exist. This includes the need to particularize the allegations of fraud in a party's statement of case. This was discussed and referred to in the consolidated matter of **Harley Corporation Guarantee Investment Company Limited et al v Estate Rudolph Daley et al** and **RBTT Bank Jamaica Limited and Estate Rudolph Daley and Ors** [2010] JMCA Civ. 46 where at paragraph 53 Harris JA extrapolated as follows:

> *"In placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud".*

[35] Having examined the detail with which the Claimant set out what he alleged to be the fraudulent conduct by the 2nd Defendant, I am of the view the Claimant has satisfied the requirement to sufficiently plead fraud. The real question is whether the evidence led supports the allegations of fraud.

[36] Ultra's sole witness Mr. Marlon Brown accepted that the Hunters were not borrowers as stated in the Mortgage Instrument, that they did not request a loan from Ultra and that no money was advanced to the Hunters. On behalf of the Claimant, it was contended that Ultra's conduct in this regard is not mere carelessness but a deliberate decision to proceed without regard to whether the registered document reflected the true position. Counsel on behalf of the Claimant submitted that on these facts, the Court is entitled to find actual fraud.

[37] In contrast, King's Counsel Mrs. Gentles-Silvera asserted that the absence of any evidence as to Ultra's involvement in the alleged fraud should be considered against the admission of the Ancillary Defendant, Mr. Marlon Plummer who acted on his own accord and wholly undermines the allegation of actual fraud against Ultra. King's Counsel submitted that there is no evidence that Ultra acted with any deceit or dishonesty in endorsing the mortgage on the title and from the evidence of Ultra's sole witness, Mr. Mario Brown, it is clear that Mr. Plummer was the borrower as he executed the Promissory Note. She urged the Court to find that Mr. Brown is a credible witness and that he did not draft the mortgage instrument. King's Counsel contended that Mr. Brown is not a handwriting expert to consider that the signatures on the mortgage instrument were unusual or unreasonable and having complied with all the requirements of the institution, the loan was approved and disbursed to Mr. Plummer.

[38] The Privy Council decision of **Assets Co. Ltd. v Mere Roihi** was relied on by both parties and provides useful guidance on the question of fraud. The Privy Council considered the issue of what is fraud and extrapolated that fraud meant actual fraud, that is, dishonesty of some sort, not what is called constructive or equitable fraud. At pages 27 & 28 of that judgment, Lord Lindley provided a definition of fraud as follows:

> *'Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects 46, 119, 129 and 130 of the Land Transfer Act, 1870 and the corresponding sections of the Act of 1885 (viz sections 55, 56, 189 and 190) appear to their Lordships to shew that by fraud in*

these Acts is meant actual fraud, i.e dishonesty of some sort; not what is called constructive or equitable fraud, an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquires which he omitted to make does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused and that he abstained from making inquires for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

[39] In the Particulars of fraud, it is asserted that the 2nd Defendant colluded to deprive the Claimant of his property by fraudulently registering a false mortgage on his title and proceeding to dispose of the property. The Court must therefore scrutinize whether there is evidence capable of supporting these allegations of fraud.

[40] The uncontested evidence of Mr. Hunter is that the 2nd Defendant represented to the Registrar of Titles that he had received the sum of Forty Million Dollars ($40,000,000.00) but up to that point he had never had any dealings with the 2nd Defendant and did not give them his title and never received any sums from them. It was the Claimant's contention that Ultra prepared and registered a mortgage document which misrepresented the facts.

[41] It is true that the mortgage instrument does represent that the Claimant and his wife were the borrowers and in fact, the instruments were purportedly signed by both of them in the presence of a Justice of the Peace. When taxed in cross-examination about whether the Hunters were borrowers, Mr. Brown insisted that in their capacity as guarantors they were borrowers but the distinction was that they were indirect borrowers. He further explained that based on his understanding the title is in the name of David and Esmie so their names should be the only ones affixed to the document and that is why they used a Note of Consent. This Note of Consent was also purportedly witnessed by a Justice of the Peace.

[42] Based on the evidence of Mr. Hunter, which I accept, he never gave Mr. Plummer the authority to use his title to secure a loan and did not sign any Consent documents. There is no challenge to the fact that Mr. Plummer committed a fraud upon Mr. Hunter and his wife. In fact, if Mr. Plummer's affidavit evidence were to be accepted, this depicts a situation where Mr. Plummer acted on his own accord.

[43] There is no evidence led that Ultra knew that the Note of Consent was not signed by the Hunters so as to find that they were complicit with Mr. Plummer in this regard. In light of this, the 2nd Defendant has asked me to find that Ultra was not involved in any fraud. However, what is clear is that the fraud committed upon the Hunters could not have been completed without Ultra, taking into account the fact that it was Ultra that prepared and registered the mortgage instrument. The actions of Ultra on its own have to be examined to determine whether their actions could amount to actual fraud.

[44] The Promissory Note described the borrower as Mr. Plummer but there is no evidence that this Promissory Note was presented to the Titles Office. What was presented to the Titles Office was the Mortgage Instrument. The Mortgage Instrument made no reference to Mr. Plummer, yet it stated that it was "*pursuant to the Promissory Note dated the 15th day of December, 2023 the Borrower is the registered proprietor of an estate in fee simple in the lands more particularly described in Item 1 as* "*ALL THAT parcel of land part of Maverly Mountain in the parish of St. Andrew being Lot numbered Fifty Four on the plan of part of Maverly Mountain of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in Certificate of Title registered at Volume 1533 Folio 89".*

[45] It went on to say that the “Borrower has requested of the Lender to extend to it the loan….” With reference to the Intention of the Parties, the following was stipulated:

> *“That the true intention and meaning of these presents is that the Mortgaged Premises shall be a continuing security for the Principal Sum, Interest thereon and other monies hereby secured to any extent the same shall be at any time owing by the Borrower to the Lender*”

[46] This mortgage instrument not only incorrectly represented that the Hunters were the borrowers but also that they received the sum lent. The evidence of Mr. Brown was that at the time Ultra drafted the document they were aware that Mr. Hunter and Mrs. Hunter did not request this loan. He also accepted that it was not correct that the principal sum was lent at the request of the borrower despite that being indicated in the mortgage document. The mortgage instrument was signed by the Hunters as borrowers although Ultra knew that they were not in fact the borrowers. It was further accepted that at the time Ultra registered the instrument at the Titles Office, Ultra was aware that the Hunters had not received any money. They knew that the direct borrower was Mr. Plummer. Despite that knowledge, they went ahead and registered the instrument containing these falsehoods. Had they not done so, the fraud commenced by Mr. Plummer would not have been perpetuated.

[47] The evidence extracted from Mr. Brown clearly contradicts a position that the Hunters were borrowers. Mr. Brown accepted that based on his knowledge of the transaction, the Hunters would be guarantors, not borrowers, however, when asked if to have described them as borrowers would be inaccurate, he denied this. He explained that essentially, a borrower is direct and a guarantor is an indirect borrower. The evidence of Mr. Brown on this point was self-contradictory. When asked if he had ever drafted documents for a guarantor in the course of his tenure at Ultra, he said no. When asked if the intention was to treat Mr. and Mrs. Hunter as guarantors, he at first said no then changed to yes and then explained that this was not in isolation and that it was with the Note of Consent.

[48] He sought to point out, with reference to the Hunters, that they would not hand over a title if they did not intend to assume some responsibility. However, there was no evidence that the Hunters handed over their title in furtherance of a transaction with Ultra. He thereafter accepted that it was not true that the borrowers, Mr. and Mrs Hunter requested of Ultra to extend to them the loan and that at the time Ultra drafted this document, Ultra was aware that they did not request a loan from Ultra.

[49] I have found the evidence of Mr. Brown to be self-contradictory and in some instances lacking in veracity. It was clear to me that Ultra knew that the true position was that the Hunters were not the borrowers but that they were merely the Title owners. The dishonestly was perpetuated against not only the Hunters but also the Titles Office. In these circumstances, I find that Ultra was in fact dishonest. I do not agree with King's Counsel that there is an absence of any evidence of Ultra's involvement in the fraud. The clear intention of Ultra was to deceive the Titles Office into registering their mortgage on the Hunters' title. I find this constitutes an act of deceit sufficient to amount to actual fraud.

[50] In the event I am found to be wrong in finding that Ultra was part and parcel of the fraud, then the question of whether Ultra is guilty of wilful blindness has to be resolved. In order to prove wilful blindness, the Claimant would be required to prove more than just that Ultra failed to make inquiries. There must be proof that Ultra's suspicions were aroused and that they abstained from making inquiries for fear of learning the truth.

[51] Mr. Hunter, when taxed in relation to whether he has any evidence that Ultra participated in any fraud or forgery or that any employee acted dishonestly, responded repeatedly that he did not know. Based on the evidence of Mr. Hunter, he never gave Mr. Plummer the authority to use his title to secure a loan and did not sign any consent documents and so it is clear that Mr. Plummer committed a fraud upon Mr. Hunter and his wife. The only evidence as to how the transaction unfolded emanated from the 2nd Defendant and it is that Ultra relied on the representation of Mr. Plummer that the Hunters had offered the title for the property as security for the loan. Further, that based on what Mr. Plummer advised, the Hunters appeared to be getting some financial or personal benefit from the transaction.

[52] Although there is no direct evidence that Ultra was aware of what Mr. Plummer was up to, Ultra had its own obligations as the lending institution. When presented with the consent document, Ultra did not seek to verify that the Hunters had in fact consented, but rather they went ahead and prepared documents that reflected that the Hunters were the actual borrowers which they knew was untrue.

[53] The **Assets Co Ltd** case clearly stipulates that the mere fact that if they had made enquiries they would have found out the fraud is not sufficient evidence to prove the fraud. In order to prove knowledge of fraud under these circumstances, the Claimant would have to prove that Ultra's suspicions were aroused and they abstained from making inquiries for fear of learning the truth. Ultra was aware that the Hunters were not in fact the borrowers. In order for the transaction to be registered with the Titles Office, they were required to demonstrate to the Titles Office that the title owners had consented. So as found by Lord Lindley "a *person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon".*

[54] The state of mind of the person presenting the document to be registered is therefore relevant. It was not the Consent that was registered with the Titles Office, it was the mortgage instrument. It is clear that at the time Ultra presented the mortgage instrument to the Titles' Office they knew that it did not accurately represent the facts. They could not then be said to have harboured any honest belief that it was a genuine document. Taken at its lowest, it is clear that Ultra had no honest belief that the documents were genuine and in that regard, would have wilfully blinded their eyes to the fraud that was taking place against the Hunters.

Whether Ultra was negligent in preparing and registering the mortgage instrument on the duplicate certificate of title.

[55] Alternatively, the Claimant has alleged that Ultra was negligent in registering the mortgage instrument. In order to establish negligence on the part of Ultra the Claimant has to prove that there existed a duty of care, breach of that duty, causation and damage which is not too remote. According to the 2nd Defendant, Ultra owed no duty of care to the Claimant as no special relationship existed between the Claimant and the 2nd Defendant and there was absent the requisite degree of proximity. Reliance was placed on the case of **Carmen Farrell et al v Lascelles Reid et al**.

[56] The facts of **Carmen Farrell** are very similar to the instant case. In that case, the Claimants were registered owners of Lots 120 and 121 Tower Isle, Jamaica Beach, St. Mary. They obtained a loan from the 3rd Defendant using Lot 120 as security. However, they needed further financing and as they did not wish to go through a recognized financial institution, they handed the title for Lot 121 to the 1st Defendant to source alternate funding through private financing. The Claimants received cash in two (2) separate tranches of One Hundred Thousand United States Dollars (US$100,000.00) and One Hundred and Thirty Thousand United States Dollars (US$130,000,00) as well as a cheque in the sum of Sixteen Million, Six Hundred and Forty Thousand, Seven Hundred and Ten Jamaican Dollars (J$16,640,710.00) but were informed by the 1st Defendant not to cash the cheque. They were unaware that the 1st Defendant used the title for Lot 121 as security to obtain a mortgage from the 3rd Defendant, pursuant to a power of attorney, which was allegedly signed by the Claimants.

[57] In these circumstances, Mangatal J. found, inter alia, that there is no common law duty of care owed to the Claimants by its bankers. The learned Judge also found that on a balance of probabilities, there was no special relationship of trust and confidence between the 3rd Defendant and the Claimants and that the relationship of banker/customer, mortgagee/mortgagor, guarantee/guarantor did not without more establish a fiduciary relationship. The learned Judge ordered Judgment for the Claimants against the 1st and 2nd Defendants however, the Claimants were estopped by their conduct, deed and representation from denying the authenticity of the Power of Attorney against the 3rd Defendant.

[58] The **Carmen Farrell** case was used to support the 2nd Defendant's position that the relationship between banker/customer, mortgagee/mortgagor did not without more establish a fiduciary relationship. The Claimant however argued that once Ultra elected to deal with the Claimant's registered land as security, a duty of care arose in relation to the verification, preparation, approval, registration and attempted enforcement of the mortgage transaction.

[59] I find the **Carmen Farrell** case to be distinguishable for several reasons. Among them is the fact that the Defendant had in hand a Power of Attorney from the Claimants. There was no duty on the part of the bank to look behind that. In the instant case, there was no such Power of Attorney and on the face of the documents, the Hunters were the borrowers. Further, in this case, the evidence led supported a finding that Ultra did not follow the standard procedures that should be followed. In those circumstances, it was reasonably foreseeable that the Hunters' property could be sold to settle any outstanding sums consequent on the loan to Mr. Plummer.

[60] Reasonable foreseeability is a relevant consideration for the Court. This is reflected in the **Leighton McKnight and Novelette McKnight v Jamaica Mortgage Bank** case where the Court found that the test for liability is reasonable foreseeability. It must also be shown that damage was either reasonably foreseeable or ought to have been foreseeable. What is reasonably foreseeable is dependent upon the actual or implied knowledge of the parties or that of the party who committed the breach. I agree with the Claimant that once Ultra made a decision to accept the property of a title owner as security for a loan, it was reasonably foreseeable that if there was a default in the loan payment the Claimant's property could be subject to a power of sale and so a duty of care arose between the bank and the Claimant.

[61] The case of **P & P** relied on by the Claimant also set out a similar test for establishing a duty of care which is that the duty was foreseeable, proximate, fair, just and reasonable. This case related to a case between a solicitor and a third party who was not the solicitor's client and was clearly distinguishable.

[62] In the instant case, even if Ultra's case were to be accepted without more, Ultra was of the view that the Claimant had agreed to guarantee the loan by mortgaging their property. Mr. Brown's evidence in this regard is instructive, particularly in his explanation that in essence the Hunters being guarantors were indirect borrowers. In order for the transaction to proceed they required the consent of the Claimant and his wife, in their capacity as registered owners of the property. According to Ultra, the Claimant and his wife were treated as borrowers.

[63] It was the agreement that if Mr. Plummer defaulted on the loan the property owned by the Hunters could be used to settle any outstanding amounts and in furtherance of that, when Mr. Plummer defaulted, a formal notice was issued to the Hunters demanding payment. When the Hunters did not respond, Ultra instructed its auctioneers to sell the Hunters' property at a public auction. All of this within the contemplation of Ultra when they proceeded with the transaction to loan the sum to Mr. Plummer and to use the Hunters' property as security. In those circumstances damage to the Hunters was reasonably foreseeable.

[64] It was foreseeable that a wrongfully registered mortgage could impair the Hunters' title and expose their property to a power of sale. The Mortgage instrument was always intended to affect the title. In those circumstances, it was just, fair and reasonable to impose a duty on Ultra because they were responsible for preparing the mortgage instrument and for registering it. It is clear that Ultra owed a duty of care to the Hunters. What then was the ambit of the duty of care?

[65] During cross-examination of Mr. Brown, he accepted that in a situation where a direct borrower is using collateral owed by another person, Ultra was therefore obliged to take steps to know their client in accordance with the KYC requirements. Ultra was required to carry out KYC in relation to the owner of the collateral they were accepting as security for the loan. They claimed that this was done in relation to the Hunters. However, the evidence extracted from Mr. Brown did not support this.

[66] Ultra admitted that they never spoke to the Hunters and that they did not require them to attend the branch. Mr. Brown, however, accepted knowing that the Hunters wanted to get into real estate, but did not have an income, however, when asked if when he approved the loan he did that knowing that this money was to go to the Hunters for their real estate transaction, he said no. He accepted that a part of the procedure was to obtain proof of address and that they did secure this, however, the proof of address indicated a Havendale address but yet the Mortgage instrument reflected a Norbrook address.

[67] The short time within which the mortgage was processed also supports the Claimant's assertion of a lack of due diligence. It is accepted that Mr. Plummer applied for the loan on December 14, 2023 and by December 15, 2023, Mr. Plummer was provided with an Offer Letter. It is clear from the evidence led that Ultra failed to verify the consent of the owners. It is also clear that Ultra unreasonably relied on Mr. Plummer. Mr. Plummer has not done any previous transactions with Ultra. As the lender it would have been important to verify the authority of a third-party collateral owner. Mr. Plummer was the one seeking to benefit from the loan and he was the one providing the consent from the owners. That situation begged for some independent verification which Ultra failed to secure.

[68] The Claimant's submission in reliance on the **Sheila Rose-Green v Patrick Rose-Green and Bank of Nova Scotia Jamaica Limited** case has some merit. As the Hunters were a married couple the bank was expected to conduct an independent verification that Mrs Hunter's consent was properly and independently obtained. They also failed to do this. The way in which the entire transaction was conducted smacks of a lack of due diligence on the part of Ultra.

[69] In all the circumstances, Ultra breached the duty of care to the Hunters resulting in the Hunters being deprived of their property for a period of time and so are liable to the Claimant in Negligence.

Whether the Claimant is entitled to Damages and if so, how is damages to be computed?

[70] The Claimant seeks General Damages for wrongful encumbrance and deprivation of ownership rights and for loss of opportunity. A claimant seeking an award of damages for wrongful interference of property would normally be entitled to damages reflecting the residual difference between the value of the owner's position before the fraud and after restoration, as well as the costs associates with undoing the fraud or regaining the Certificate of Title and any other losses suffered during the period the land was encumbered. There is no evidence here of any diminution in the value of the Claimant's property.

[71] The Claimant in asserting his right to Damages relied on the case **Leighton McKnight and Novelette McKnight v Jamaica Mortgage Bank** where at paragraph 30, the Court stated:

> *"A claimant who seeks to obtain damages arising from a defendant's wrongful entry of a caveat against his title must establish certain facts. In the New Zealand case of Savill v Chase Holding, cited by Mr McBean, the court was concerned, among other things, with the question as to whether a company was entitled to damages if certain caveats on an instrument of title were removed. On appeal, the Privy Council upheld a decision of the High Court and the Court of appeal. In the High Court, Tipping J at page 287, pronounced the criteria as to proof of damages to be as follows:*
>
> > *"A person claiming damages under this section must prove three things; firstly that there has been a caveat lodged by the defendant, secondly that such caveat was lodged without reasonable cause, and thirdly that he has sustained damages thereby...The onus of proof in all respects is on the person who seeks compensation."*

[72] This underscores the point that the Claimant is required to prove his loss to the satisfaction of the Court. In addition, it provides guidance on how to evaluate loss of opportunity and causation where at paragraph 34 the following is said:

> "*However, in evaluating the loss, the court will not engage in any speculative exercise. The court will only embark on an evaluation as to loss if the claimant adduces evidence on which, on the balance of probabilities, it can find that damages were sustained*".

[73] This case was a clear demonstration of the rigor that a court should undertake in evaluating damages for loss of opportunity. Despite the appellants' argument that the JMMB's caveat stopped them from getting new loans to build and sell townhouses, the court found that the bank could not reasonably foresee that the caveat would block the proposed development. The Court in coming to its decision took into account the fact that the appellant had not set up the right steps to secure financing.

[74] Counsel for the Claimant has submitted that the evidence led satisfies what he refers to as the **Leighton Mcknight** threshold as the Claimant is not asking the court to speculate about an imaginary possibility but is relying on objective value, actual market interest, actual proposed transactions and the ordinary commercial utility of a clean title.

[75] The authorities demonstrate that the evaluation of a loss of opportunity must be met with caution. The Claimant must prove that the lost opportunity had real and substantial prospects of success, which must be supported by credible evidence. Further, that such an evaluation must not be based on mere speculation but on some concrete evidence from the Claimant about the loss of opportunity and the circumstances leading thereto. It is important to examine the evidence of Mr. Hunter in that regard.

[76] According to Mr. Hunter, the fraudulent endorsement resulted in him suffering great loss and damages. In September 2024, he received several offers to purchase this property, in particular developers were interested in purchasing the property from him. Having quoted the sum of United States One Million Five Hundred Thousand Dollars (US$1,500,000.00) as the purchase price, he recalls that at least two (2) persons indicated that they would purchase the property at this price. He stated that he was also offered a joint venture opportunity with several of the developers who engaged him about his property. These developers were interested in paying over to him the sum of One Hundred Million Jamaican Dollars (J$100,000,000.00) and were willing to agree that he would be given one of the units that they proposed to construct. He was also deprived on the chance of obtaining a mortgage on the property to assist with alleviating some of the financial pressures he was undergoing.

[77] King's Counsel submitted that the Claimant's evidence amounts to hearsay as the persons who made the promises to him did not give evidence. I do not agree with this position as the Claimant should be able to give evidence of any offers made to him whether in writing or otherwise. What would have strengthened his case, in the sense of providing support for his viva voce evidence, is if he had the offers in writing. Whether the offers were in writing or not they would still have to be subject to scrutiny to determine whether they meet the threshold of taking this outside mere speculation or conjecture. For example, if he had some documentary proof of any offers made, the amount of the offer, the date this was made and the developer who made it, this would show that the developers were serious about proceeding with the transaction and take it outside a mere possibility to being more probable than not.

[78] The Claimant's evidence in this regard was sketchy and came across as being speculative. When taxed in cross-examination he failed to supply the name of the company that made this offer to him explaining that he doesn't know if the company wanted exposure. He accepted that he could not say if any sale or financing or development could have proceeded to completion or even that these alleged developers had the wherewithal to proceed beyond preliminary discussions.

[79] What the cases have demonstrated is that in evaluating the loss of opportunity, there must be some concrete evidence of any profit that would have been likely. Simply to say that there were offers to purchase at a particular price would not be sufficient as this alone does not establish the value of the lost opportunity.

[80] The Claimant has not relied on any expert evidence to demonstrate what this loss of opportunity would translate to in terms of profit or benefit to him or what exactly he lost out on. Having assessed the evidence led on behalf of the Claimant, I do not agree that it satisfies the **Leighton McKnight** threshold.

[81] The Claimant also relied on **Soares v Duncan** to suggest that the Court can make a practical evaluation assessment of the value of the lost opportunity and use the forced sale value of Seventy-Two Million Jamaican Dollars (J$72,000,000.00) as a conservative starting point then apply a fifty percent (50%) discount for imponderables thereby arriving at a figure of Thirty-Six Million Jamaican Dollars (J$36,000,000.00) as a proper award for loss of opportunity. He says this approach accords with the **Leighton McKnight** case. On my reading of these two (2) cases, I do not agree with that interpretation.

[82] I find the evidence presented by the Claimant to be too uncertain to provide me with the material to arrive at a figure that reflects loss of opportunity or the wrongful encumbrance on the Title. However, the Claimant having been deprived of the Title to his land for a period of a year and a half, he is entitled to an award for nominal damages.

[83] This is reflected in the Eastern Caribbean Supreme Court case of **Eustace Archibald v RBTT Bank** KN 2010 HC 10 where the Court awarded nominal damages where it found that the Claimant failed to prove how he would have benefited from some kind of profit on the land. The Court determined a sum of Five Hundred Dollars ($500.00) per year as being appropriate to meet the inconvenience of being deprived of the Certificate of Title.

[84] In awarding nominal damages, the Court took into account the entire circumstances, bearing in mind that nominal damages in one case may be different from nominal damages in another. Based on the Court's decision in the **Eustace Archibald** case, it appears that even the time over which the Claimant's property was wrongly encumbered can be a factor to be taken into account. In this case the Title was encumbered from March 19, 2024, to around September 2025, a period of almost eighteen (18) months and so I am of the view that an appropriate sum would be One Million Dollars ($1,000,000.00).

Whether there is any basis to award Aggravated, Exemplary and Vindicatory Damages?

[85] The Claimant also seeks awards for Aggravated, Exemplary and Vindicatory Damages however, in the submissions relied on by the Claimant he did not rely on any arguments to support these heads of damages. Not only are there no arguments to support any additional award but there is also no evidence to demonstrate any aggravated way in which the Claimant's right to his Title was infringed or any oppressive arbitrary or unconstitutional actions on the part of the 2nd Defendant to merit any award over and above the damages already set out.

[86] My Orders are as follows:

1. Judgment for the Claimant against the 2nd Defendant.
2. The Claimant is entitled to nominal damages in the sum of One Million Dollars ($1,000,000.00).
3. Stay of execution of the Judgment is granted for 30 days.
4. Costs to the Claimant to be taxed if not agreed.

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Stephane Jackson-Haisley

Puisne Judge