[2015]JMCC Comm. 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2010 HCV 02413

BETWEEN	**OCEAN CHIMO LTD**	**CLAIMANT**
AND	**ROYAL BANK (JAMAICA) LTD (RBC)**	**1ST DEFENDANT**
AND	**ROYAL BANK (T &T) LTD (RBC)**	**2ND DEFENDANT**
AND	**ROYAL BANK OF CANADA**	**3RD DEFENDANT**
AND	**SAMUEL BILLARD**	**4THDEFENDANT**
AND	**RAYMOND CHANG**	**5TH DEFENDANT**
AND	**GREG SMITH**	**6TH DEFENDANT**

AND

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2012 HCV06552

BETWEEN	**DELROY HOWELL**	**CLAIMANT**
AND	**ROYAL BANK OF CANADA**	**1ST DEFENDANT**
AND	**SAMUEL BILLARD**	**2ND DEFENDANT**
AND	**RAYMOND CHANG**	**3RD DEFENDANT**
AND	**GREG SMITH**	**4TH DEFENDANT**

IN CHAMBERS

Mr. John Vassel, Q.C., Mrs. Julianne Mais-Cox and Mrs. Jennifer Scott-Taggart instructed by Dunn Cox for the Applicants

Mr. Roderick Gordon and Ms. Kereene Smith instructed by Gordon McGrath for the Respondent Ocean Chimo

Mr. Douglas Leys, Q.C. and Ms. Kimone Tennant instructed by Leys Smith for the Respondent Delroy Howell

HEARD: January 19th, 20th and 21st; March, 10th, 11th, 13th, 18th, 19th, and 27th and November 18, 2015

CIVIL PROCEDURE AND PRACTICE–APPLICATION FOR SUMMARY JUDGEMENT-WHETHER APPLICATION NOTICE COMPLIES WITH THE RULES-WHETHER FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE RULES IN THE NOTICE FATAL TO THE APPLICATION- WHETHER A CLAIM WITH DISPUTED FACTS AND VOLUMINOUS PLEADINGS IS AMENABLE TO SUMMARY JUDGEMENT-WHETHER ISSUES NARROW REGARDLESS OF VOLUME OF DOCUMENTS- PART 15, RULE 15. 4 AND 15.2 OF CIVIL PROCEDURE RULES;

AGENCY-CLAIM AGAINST BANK EMPLOYEES AND AGENTS FOR NEGLIGENCE, CONSPIRACY, FRAUD AND BREACH OF FIDUCIARY DUTY-WHETHER SUCH A CLAIM AGAINST EMPLOYEES AND AGENTS IS SUSTAINABLE;

BANKING-CLAIM BY GUARANTOR AGAINST THE BANK-GUARANTOR CLAIMING LOSS AS A RESULT OF ALLEGED ACTIONS OF BANK EMPLOYEES AND AGENTS TAKEN AGAINST THE BORROWER-NO PAYMENT MADE BY GUARANTOR AND NO PERSONAL LOSS SUFFERED BY HIM-GUARANTOR THE CHAIRMAN AND CHIEF EXECUTIVE OFFICER OF THE BORROWER-WHETHER BORROWER'S LOSS IS GUARANTOR'S LOSS-WHETHER CLAIM BY GUARANTOR AGAINST THE PARENT BANK OF THE LENDERS, ITS EMPLOYEES AND AGENTS IS SUSTAINABLE.

EDWARDS, J

Background to the Applications

[1] Over several days I heard applications for summary judgment made in two separate actions filed herein. The matters were consolidated as they had not only common parties but also common issues of law and fact. It was agreed by all the parties that, with the court's approval, these matters could and should be addressed together.

[2] The applicants are the 3rd, 4th, 5th and 6th defendants (hereinafter referred to collectively as "the defendants") in the action filed by Ocean Chimo

Limited (hereafter referred to as “the Ocean Chimo suit”) and all the defendants in the suit filed by Mr. Delroy Howell (hereafter called “the guarantor suit”).

[3] The matters come against the background of an arrangement between Ocean Chimo Limited (Ocean Chimo) and RBC Royal Bank (Jamaica Limited) and RBC Royal Bank (Trinidad and Tobago Limited) (hereinafter together referred to as the lender banks) for what has been referred to in the loan agreement of 2008 as a “syndicated loan” to be made to Ocean Chimo. This loan totaled approximately US$32 Million dollars and was contracted over two periods. The first was in August 2005 and that credit facility was increased in April 2008. Both banks contributed to the total sum of the loan in amounts set out in the agreement.

[4] The loan was secured by a mortgage and a debenture over the property and the fixed assets of Ocean Chimo which was the then Hilton Kingston hotel and the assignment of the Fire and Allied Perils insurance over the buildings and assets of the hotel. The loan was also guaranteed by Mr. Delroy Howell (Mr. Howell) who was also the Chief Executive Officer and Chairman of Ocean Chimo.

[5] Interest on the loan was agreed to be calculated on the basis of six months London Inter Bank Ordinary Rate (LIBOR) plus a fixed rate of 4.5%. Interest was therefore, to be reset every six months based on the prevailing LIBOR rate. The terms of the loan were set out in a commitment letter and a loan agreement dated April 28, 2008. A provision in the commitment letter was to the effect that, if the borrower went into default, the bank was entitled to adjust the interest rate in a manner, which in its discretion, it deemed justified. The borrower, on the lender banks’ account, went into default in the first interest period and they, purporting to act in accordance with the terms of the loan contract, came off LIBOR rates and applied a fixed rate of interest.

[6] There was some issue with the lender banks disbursing the funds in May 2008 over a three day period when LIBOR rates were different for each

day. This meant that a weighted average LIBOR rate was applied to the sums disbursed for the first interest period. It is now disputed as to how the prevailing rate of interest was then arrived at by the lender banks and the legal basis and or authority for applying a weighted average rate. However, the lender banks, having determined that the loan payments had subsequently fallen into arrears, increased the interest rates as per the provision in the agreement. When there was continued default in the payment of the arrears, they then exercised their rights under the debenture and placed Ocean Chimo into receivership. Subsequently, they also called on the guarantee, which call was ignored.

[7] For the uninitiated, LIBOR, according to the British Bankers' Association, refers to "the rate at which an individual contributor panel bank could borrow funds were it to do so by asking for and then accepting interbank offers in reasonable market size just prior to 11.00 a.m. London time" (See **Graiseley Properties Limited & ors v Barclays Bank PLC** [2013] EWCA Civ 1372).

[8] On the lender banks case the loan was in default in the first interest period ending November 30th 2008 and it was thereafter that the interest rate was duly adjusted in accordance with the loan contract. This exercise of its discretion by the lender banks in and of itself raised numerous disputed issues. Some of these issues surrounded whether:

a) Ocean Chimo was in fact in default at the end of the first interest period of the loan;
b) the lender banks were wrong in adjusting the rates in a manner which saw them coming off LIBOR rates and instead applying a fixed rate of interest of 9.25%;
c) the lender banks were wrong to increase or vary the interest rates at all if the borrower was not in default;
d) the parent company of the lender bank played any part in the increase in the interest rates on the loan resulting in loss to the claimants;

e) the activities of the employees and external counsel of the parent bank in the administration of the loan resulted in direct loss to the claimants; and

f) whether such activities gave rise to personal liability on the part of the employees and external counsel to the alleged parent bank who acted as agents of the lender banks.

[9] The fallout from these disputed issues resulted in numerous court battles being fought between the main protagonists. The earlier ones were as a result of the lender banks appointing a receiver over the assets of the borrower, which was the hotel. The hotel was eventually sold by the banks acting under the debenture in 2014. Ocean Chimo and Mr. Howell both sued the lender banks in separate claims. The claim by Ocean Chimo commenced from as far back as 2010. Since then there have been several interlocutory applications and the matters are nowhere near ready for trial.

[10] The loans were originally taken out when the banks operated under the name RBTT. That name was changed to RBC Royal Bank (Jamaica) Limited and RBC Royal Bank (Trinidad and Tobago). Although it is unclear from the records what the corporate relationship was between these banks and the 3rd defendant Royal Bank of Canada (RBC Canada) it was generally agreed and accepted that RBC Canada became the parent company of these subsidiary banks by 2009.

[11] RBC Canada has become gripped in this vortex of litigation because of the activities of what is known as its Special Loans Advisory Group (the loans group) and because the lender banks are alleged to be its subsidiaries. The defendants Raymond Chang (Mr. Chang) and Greg Smith (Mr. Smith) are members of the loans group. Samuel Billiard (Mr. Billiard) was RBC Canada's external counsel.

[12] No one is disputing that the actions brought against the lender banks should proceed to trial. The issue here is whether there should be summary judgment in favour of RBC Canada, its employees Mr. Chang and Mr. Smith

and external counsel Mr. Billiard, on the basis that Ocean Chimo and Mr. Howell's actions against them have no real prospect of succeeding.

[13] This loans group existed in RBC Canada to provide assistance to subsidiary banks, at their request, that were having problems/issues with large loans, especially those that had gone into default. Both claimants contended that the activities of the defendants were such as to rise to the level of conspiracy, fraud, breach of fiduciary duties, negligence and unjust enrichment. In a nutshell both claimants contended that the defendants conspired together and with the lender banks to unlawfully increase the interest rate under the loan agreement and that the object of the conspiracy was to ultimately "wrest" the hotel away from the borrower and call on the guarantee.

[14] The defendants on the other hand submitted that these claims have come very late in the history of the case and are without merit and therefore doomed to fail. The original action filed by Ocean Chimo was against the lender banks and was filed in 2010. There were several amendments made to that initial action but it was only in 2012 that these defendants were joined and the list of causes of action expanded.

The Ocean Chimo Claim

[15] The original claim brought by Ocean Chimo was against the lender banks. By way of Further Amended Claim Form filed November 30, 2012, a claim was brought against the defendants for damages for fraud and/or negligence arising out of the manner in which the applicants administered and conducted the affairs of the lender banks which resulted in loss of valuable property belonging to the claimant; breach of contract and or unjust enrichment, damages for conspiracy and breach of fiduciary duty.

[16] The grounds upon which these claims were mounted were extensive; however, I will summarize them as best as possible hereafter. In respect to the allegation of fraud and negligence, it was asserted in the Ocean Chimo suit that the defendants fraudulently and or negligently conducted the affairs

of the lender banks in respect to the loan. It was also claimed that at all material times the lender banks were under the common control of RBC Canada. Further, it was alleged that subsequent to the disbursement of funds to Ocean Chimo and without consultation or communication, there was an increase in the interest rate on the loans well above the contracted rate, this while there had been no corresponding increase in LIBOR rates.

[17] Ocean Chimo contended that there continued to be further increases despite its attempts to query the basis of the increases. It also sought a moratorium on the payments, as by late 2008 the hotel had been affected by the global economic crisis, which in turn affected operations at the hotel. No answers were forthcoming and no such concession was extended to it. It therefore sought financing from another bank but due to the alleged improper relaying of confidential information to that bank by the defendants, this financing was denied.

[18] It also averred that it consequently took steps to sell the hotel by private treaty. One of these steps was the holding of a meeting in Miami where representatives of the defendants were in attendance and where, according to the claimant, it was agreed that the appointment of a receiver over the hotel would be delayed pending the private sale of the hotel. However, again according to the claimant, upon returning to Jamaica, the defendants sought to impose conditions which were hitherto not agreed to and which frustrated the sale of the hotel.

The Guarantor claim

[19] In respect of the guarantor suit, the particulars are in *pari materia* to that filed in the Ocean Chimo suit. In essence, the remedies sought by Mr. Howell were in effect based on the same set of facts but applied in respect to his personal guarantee given for the loans.

The preliminary point

[20] The claimants, in resisting this application for summary judgment, submitted that the application did not comply with the requirements prescribed

by the Civil Procedure Rules 2002 (CPR), specifically Rule 15.4 (4) which provides that;

> *The notice under paragraph (3) must identify the issues which it is proposed that the court should deal with at the hearing.*

[21] They pointed out that this application did not identify or particularize the issues and that the failure to do so was fatal to the application. They relied on the judgment of the Court of Appeal in **Margie Geddes v Millingen McDonald** [2010] JMCA Civ 2 and in particular the dicta of Harrison J.A. and the first instance decision in **Adolph Brown v West Indies Alliance Insurance Company Limited**, Claim No. 2007 HCV 03483 delivered June 4th, 2010. In the first of these cases, the applicant merely stated that the "application is made pursuant to Rule 15". In the latter case the application set out in the grounds the fact that the claimant had no real prospect of success, the terms of the policy contract relied on and the fact that the case was statute barred.

[22] I believe the answer to this conundrum is to be found in the Rules itself. The power to grant summary judgment is given in Part 15, rule 15.2 of the CPR which states;

> "*15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-*
>
> *(a) the claimant has no real prospect of succeeding on the claim or issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or issue."*

[23] *The procedure is outlined in rule 15.4. Rule 15.4 (3), (4) and (5) states;*

> *(3) Notice of an application for summary judgment must be served not less than 14 days before the date fixed for hearing the application.*
>
> *(4) The notice under (paragraph 3) must identify the issues which it is proposed that the court should deal with at the hearing.*

> *(5) The court may exercise its powers without such notice at any case management conference.*

The applicant must file affidavit evidence in support with the application and the respondent who wishes to rely on evidence must file affidavit also.

[24] In my view there seems to be a misunderstanding of the operation of Rule 15 by the claimants as well as a misunderstanding of the decision in **Margie Geddes.** Rule 15 provides an applicant, whether defendant or claimant, with two options. The first is to apply for summary judgment on the entire claim and the second to apply for summary judgment on a particular issue or issues in the claim. In my view the requirement for identification of the issues in the notice only applies when the applicant is exercising the second option.

[25] The court has the power to give summary judgment on the whole claim or on an issue of fact or law in the claim. It seems to me that where the applicant is asking for summary judgment on the claim, the applicant need state no more than that the application has no real prospect of success, for then the sole issue would be whether there is any merit in the entire claim. In a simple case with only one issue, for instance where claim is statute barred the notice may so state, or if there is a fully executed contract relied on or absence of one, again it may so state. If there is a statutory provision which entirely determines the matter, it may also so state. Otherwise, in either case, the respondent already knows what the claim is and if the entire claim is being challenged, the applicant need not state all the issues in the notice. It is to the affidavit evidence that the respondent and the court will look for the supporting evidence as to why the applicant claims there is no real prospect of success with the entire claim. If the applicant requires one of several issues in the claim to be decided, it is then he must state which of the issues the court is to determine, because otherwise the respondent will not know in time which issue is being challenged.

[26] This is the approach taken by the English courts under their Rule 24. The applicant can elect under Rule 24 PD.2 (3) to identify (**in the application notice or the evidence contained or referred to in it)** any point of law or provision in a document he intends to rely on **and/ or** state that the application is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue (as the case may be) or of successfully defending the claim or issue. So the applicant under English rules has the option whether he is challenging an issue or the whole claim.

[27] In keeping with the overriding objective the courts are to avoid applying an unnecessarily restrictive and technical approach. A purposive approach should be taken to the interpretation of the rules. **See (YD (Turkey) v Secretary of State for the Home Department** [2006] 1 WLR 1646 and **R (Corner House Research) v Director of the Serious Fraud Office** [2008] EWHC 246. Any other interpretation, other than the one I have suggested would make the rule nonsensical. This is especially so, since the rule also gives the court the power to grant summary judgment at Case Management Conference without the notice under paragraph 3 being given at all.

[28] In **Margie Geddes** Cooke J.A. in his judgment found the claim and the issue to be whether there was an unquestionable legally enforceable contingency agreement within the meaning of section 21 (8) of the Legal Profession (Amendment) Act of 2001. In overturning the first instance decision granting summary judgment to the claimant he found that there was no conclusive documentary proof of an agreement.

[29] There had also been an application for summary judgment by the defendant which more specifically stated that the claimant had no real prospect of succeeding on the claim as there was no proof of a contingency agreement and that even if one existed, the transaction on which it was based never occurred. The claim and the issue in that case was a simple one of whether there was a contingency agreement, the basis on which the claimant could claim payment. Neither side was in doubt of it.

[30] Cooke J.A. made no mention of Rule 15 in his judgment. Harrison J.A. with whom Dukharan J.A. agreed, dealt with the appeal under two heads; firstly, the failure to comply with Rule 15 and secondly; whether there was a contingency fee agreement. The learned Judge of Appeal found that the purpose of the rule was to allow the court and the party meeting the application to have adequate notice of the issues raised in the application and that it was not only desirable but necessary. He also went on to state that the affidavit did not state with the clarity demanded by the rules any of the issues which arose for consideration. He also agreed with Queens Counsel's submissions, that it was not a proper case for the court below to exercise powers under rule 26.9 of the CPR to rectify procedural errors. The learned Judge of Appeal however, did not go on to state why this was so. Although one may surmise that it was because, as he said, the application was dependent on the construction of several emails, verbal discussions as well as an understanding of the wider context in which the matter took place.

[31] In **Adolph Brown** the learned judge found that the application had sufficiently identified the issues by outlining in the grounds, the nature of the policy contract between the parties and that it was statute barred, even though the word "issues" was not used, which made the case entirely distinguishable from **Margie Geddes.**

[32] Queens Counsel had argued in **Margie Geddes** that the requirement in Rule 15 was substantive and not merely procedural. In making his submissions to the Court of Appeal he relied on the authority of **Balfour Beatty Construction Nothern Ltd v Modus Corovest (Blackpool) Ltd** [2008] EWHC 3029 (TCC). In that case, during the hearing of an application for summary judgment the point was taken that none of the statements served by the applicant contained the statement of belief that there was "no real prospect of succeeding on the claim". Counsel for the respondent submitted that based on the absence of that statement of belief, the part 24 claim must fail. The court held that whilst the omission was more than technical, it was merely procedural rather than substantive. Based on that ruling, the learned judge exercised his power to rectify matters where there has been an error of

procedure such as defects or omissions in the documents supporting an application found in rule 3.10 (our rule 26.9). The learned judge also went on to note that the statements provided by the applicants made it clear that they had reason to state that the respondents had no defence to the claims and for that reason the omission of the statement of belief was not fatal. He therefore went on to allow the applicant to provide a statement in compliance with Rule 24.2.

[33] The fact that Queens Counsel relied on **Balfour Beatty** in his submissions to the Court of Appeal in **Margie Geddes**, raises three issues. The first is that this case is not an authority for stating that omitting the issues from the notice is a substantive defect. Secondly, nowhere in his judgment did Harrison J.A. state the omission was substantive rather than procedural. Neither did he note any differences in the circumstances of the two cases which would cause him to disagree with the designation of procedural error in **Balfour Beatty**. What Harrison J. A. agreed to was the necessity to have notice of the issues raised by the application and the fact that the affidavit evidence filed in **Margie Geddes** did not assists in identifying what the issue was. Thirdly, nowhere in the judgment of Harrison J.A. did he state that where there was an omission to state the issues in the notice, the court could never exercise its powers to rectify under rule 26.9. The learned Judge of Appeal merely stated that in the particular circumstances of that case, it was not a proper case for that power to be exercised.

[34] For my part I cannot see how such an omission could be substantive since the court at Case Management Conference may hear and determine by its own motion an application for summary judgment without any such notice. If the court were to treat it as substantive, it would mean the rule had two approaches; one substantive when the application was made by notice and one procedural when the court exercised its powers at Case Management Conference, without notice. This could never be and in any case an applicant would therefore, only need ask the court to exercise its power at Case Management Conference in order to avoid the pitfall of a defective notice.

[35] Therefore, from the case of **Balfour Beatty**, **Margie Geddes** and **Adolph Brown** it is clear that each case depends on the particular set of facts. The case of **Margie Geddes** is distinguishable on the facts from the case at bar. In that case the application merely stated that it was pursuant Rule 15. There was no way for the applicant or the court to know whether it was based on an issue in the claim or on the entire claim. In this case it was made clear in the application that the challenge was against the entire claim. The affidavits also painstakingly set out the various causes of action and the reason the applicant considers each had no real prospect of success. I cannot see how it would serve the overriding objective to consider the application fatal because all the causes of action in the claim and the reason each would fail was not set out in its entirety in the application notice. Again, I state the respondents know what their claims are and therefore what the court was being asked to decide.

[36] The approach to the interpretation of the rules which I have suggested and the approach by the Court of Appeal in **Margie Geddes** and the English authority of **Balfour Beatty** are not at odds. The preliminary point fails.

Is this a matter suitable for summary judgment?

The Defendants' submissions

[37] Each side cited several cases. I have read them all. If I have not referred directly to one or the other directly, counsel may be confident that whatever principle can be gleaned from them have been applied in this case. Where principles overlap, I have tried to refer to the most recent or one which establishes a precedent. I am indeed grateful for counsels' diligence in this regard.

[38] The defendants based their submissions on a number of legal and factual contentions. The first of these was that the loans went into default by the end of November 2008, which was the first interest period. The lender banks thereafter, exercised their right under the contract to vary the interest rate; that at the time this was done the defendants were not yet acting as

agents for the lender banks and therefore no claim could succeed against regarding any unlawful increase in interest rates.

[39] It must be noted at the outset, that this is challenged by Ocean Chimo which contended that it was not in default at the end of the first interest period and therefore the lender banks had no right to vary the interest rate, but that is as between them and the lender banks in that claim.

[40] The defendants further contended that despite the divergence in views as to when the default in the repayment took place, it is unmistakable that there had been a failure to, even now, repay the principal. It was argued that despite there being a dispute relating to the interest rate, the claimants have not made payments, even on account of the principal as a signal of good faith.

[41] Each of the different causes of action was dealt with by the defendants and submissions were made as to the prospect of succeeding in these causes of action. Indeed, they have submitted that the claims lack bona fides and have perhaps been brought for 'tactical considerations'. In fact, the defendants contend that not only do the causes of action lack bona fides, but they were also unsustainable against these particular defendants.

[42] Therefore, the defendants and in particular Mr. Chang, Mr. Smith and Mr. Billiard, took issue with the fact that despite being employees and agents, respectively, of RBC Canada at all material times, claims were instituted against them in their personal capacities. It was their submission, that they being employees and agents, acting in the course of their employment in the loans group, no sustainable claim could and ought to be brought against them for work done in that capacity. The submission in essence, was that they acted in the course of their employment, as agents of the lender banks and were not personally liable for the work done on their behalf. Mr. Billiard proffered this submission on the basis that he acted as external counsel to RBC Canada and special counsel to the lender banks and owed no duty to the claimants.

The Claimants' submissions

[43] The claimant's met the applications with fulsome and at times passionate pleas to have the applications dismissed. They advanced many submissions in support and the court will now seek to reproduce the most substantial and relevant aspects thereof.

[44] Counsel for the claimants contended that their case as pleaded and the evidence advanced in meeting these applications have exceeded the threshold of having a real prospect of success. It is also relevant that both counsel for the claimants adopted each other's submissions in all material respects, so I feel justified in dealing with them as one and where applicable I will point out any differing submission made by each of them.

[45] Both counsel reminded the court, that summary judgment was a serious step and one which must be taken only where it was absolutely clear that a litigant had no real prospect of success. Counsel submitted that the test was of a "gargantuan threshold" and was only satisfied upon the most cogent of evidence being adduced. From the outset, counsel also submitted that such applications should, and are usually made after the normal processes of discovery and interrogatories have been completed. Counsel however, conceded that there were circumstances which may warrant a summary judgment application prior to these processes, where to do so would be expedient and a valuable use of judicial time. In fact, counsel submitted examples of such circumstances; firstly where as a matter of law it was evident at the outset that a litigant would not be entitled to the remedies being sought or where the factual basis of a claim was fanciful.

[46] Reliance was however placed on the warning given by Judge LJ in **Swain v Hillman** [2001] 1 All ER 91 at 96, where he stated that:

> *"To give summary judgment against a litigant without permitting him to advance his case before the hearing is a serious step."*

Counsel for Mr. Howell also indicated that the approach to be taken in summary judgment applications was to have regard to the overriding objective

of dealing with cases justly. Counsel cited the judgment of Danckwerts LJ in **Wenlock v Moloney** [1965] 2 All ER 871 where he opined that:

> *"…this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."*

[47] Basing his submissions on this statement counsel asked the court to accept that there were substantial disputes as to facts which, in of itself rendered this case not suitable for summary judgment. They submitted further that summary judgment was inappropriate in cases such as this, where a number of developing areas of law would be argued at trial and which were relevant to the just disposal of this case. It was also submitted, that where there were so many inconsistencies on the defendant's evidence as presented, it was inappropriate to grant summary judgment at this juncture; that resolution of the inconsistencies could only be achieved through the regular course of trial. Further, the claimants' submitted that much of the evidence relied upon by the defendants was based on second and third hand hearsay which, it was argued, was rather tenuous evidence upon which to grant summary judgment.

[48] Counsel for the claimants' further submitted that the individual defendants had all based their defences on evidence which was in dispute. They suggested that the evidence in which the defendants find support was not credible enough to give this court comfort that summary judgment could be granted at this stage. Counsel urged this court to refuse the summary judgment applications where in effect the court would be granting "summary injustice". (See **Fortress Value Recovery Fund I LLC and others v Blue Skye Special Opportunities Fund LP (a firm) and others** [2013] EWHC 14 (comm.)) They submitted that the defendants were necessary for the just

disposal of the matters at trial. The claimants further described the defendants' evidence before the court as "dodgy" and asserted that on a balance of probability, it leaned towards something that was "not straight" as the inconsistencies were more grave and replete on the defendants' case.

[49] Counsel also relied on the judgment of Parker LJ **in Home and Overseas Insurance Co. Ltd v Mentor Insurance Co (UK) (in liq)** [1989] 3 ALL ER 74, where it was held that applications under the rules (in this case RSC ORD 14 of the English rules as they then were) should not be used to determine points of law which may take hours or even days and the citation of many authorities before a court is in a position to arrive at a final decision. The court noted that if this was permitted the proceedings would be allowed to become a means of obtaining an immediate trial of the action. Parker LJ noted that where the defendant's defence was based on a point of law which can be seen at once to be misconceived the plaintiff was entitled to judgment; also, even if at first sight a point appears to be arguable, if with relatively short argument it could be shown to be unsustainable the plaintiff was entitled to judgment.

[50] Finally counsel noted that the claims raised complex issues of law and facts and should not be determined in a summary way after prolonged arguments, relying on dicta in **RG Carter Ltd v Clarke** [1990] All ER 209 at 213. Counsel also noted that there existed in this case novel and developing areas of law for which summary judgment was inappropriate, relying on the case of **Alfa Telecom Turkey Limited v Cukurova Finance International Limited** et al VG [2009] HC 1, a case from the High Court of British Virgin Islands (judgment of Hariprashad-Charles J). In that case it partly involved a new concept of appropriation introduced through a series of legislative measures and regulations over which there had been some divergence in views. No such situation exists in this case.

The Principles

[51] This is a case which involves some conflict of facts. Summary judgment applications should not be allowed to degenerate into mini trials of

disputed facts. In this application I was presented with voluminous material in the form of affidavit after affidavit from all sides. The claimants have however, attempted to convince me that despite the massive amount of paper and the appearance of conflicts in the evidence, the issues which I have to consider in making a determination whether the claimants' case has any prospect of success, are fairly simple. They also point to the fact that some of the issues involve construction of a contractual document and was therefore amenable to summary judgment.

[52] The principles that I have applied in making my determination on whether summary judgment should be considered in a case such as this may be summarized as follows:

I. Defendants may apply for summary judgment in cases where the claimant's case is obviously and patently weak. It may also be used to cull issues in a complex case and simplify the trial.

II. The court may grant summary judgment to a defendant where the claimant's case has no real prospect of succeeding on the claim or issue.

III. On an application by a defendant, that defendant must show why he considered that the claimant's case had no real prospect of success.

IV. Once the applicant has asserted and shown that there are grounds to believe that the respondent's case has no reasonable prospect of success, the respondent is then required to show that he has a case which is more than merely arguable and which has a realistic as opposed to a fanciful prospect of success.

V. The test of whether the case has any real prospect of success must be applied having regard to the overriding objective of dealing with the cases justly.

VI. In order to have a real prospect of success the case must carry some degree of conviction and be better than merely arguable.

VII. The court must be cautious in granting summary judgment in certain types of cases, especially those where there are conflicts of facts on the relevant issues which have to be resolved before any judgment can be given.

VIII. Where a clear-cut point of law or construction is raised by the applicant in support of the application the court should decide the issue, even if it appears complex and requires full argument.

IX. The court hearing the application must be cognizant of the fact that merely because an application takes days to argue with the submission of several cases does not necessarily means it is not an appropriate case for summary judgment.

[53] In Stuart Sime's "A Practical Approach to Civil Procedure" 12th edition, at paragraph 21.21 it was recognized that although summary judgment applications are decided in cases which have very little disputed facts, it does not mean that if there are disputed facts summary judgment cannot be considered. There the learned author states;

> *"Most summary judgment applications are decided on the basis of the facts which are not disputed by the respondent, together with the respondent's version of the disputed facts (HRH Prince of Wales v Associated Newspapers Ltd. [2008] Ch 57] This does not mean that filing a witness statement will prevent summary judgment being entered. This is because there are as discussed at 20.58, cases where the court will go behind written evidence which is incredible, and the court will also disregard fanciful claims and defences. A claim or defence may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based...."*

[54] In referring to how he considered that judges should properly exercise their powers to grant summary judgment Lord Woolfe in **Swain v Hillman** [2001] 1 All ER 91 speaking of the English equivalent to part 15 stated at page 94 at Para. (b) that;

> *"It is important that a judge in appropriate cases should make use of the powers contained Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt.1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interest of justice. If a claimant has a case which is bound to fail, then it is in the claimants interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."*

[55] He went on to say however at page 95 Para. b that;

> *"Useful though the power is under Pt. 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial."*

What is the approach this court should take?

[56] The main issue to be determined in these applications is whether these claims have any real as opposed to a fanciful prospect of success. In making that determination the court must look at the evidence presented in these proceedings taking into consideration the possibility of any further and better evidence turning up at trial. The defendants have submitted that the question was whether there was one iota of merit in the claims made against any of them. They contended that not only were the issues simple but the answer was patently clear.

[57] In determining whether a case has a real prospect of success the court must embark on an enquiry. Just what is the nature of such an enquiry was considered by Lord Hope in the House of Lords in the **Three Rivers District Council v Bank of England (N0. 3)** [2001] 2 All ER 513, where he opined at page 542;

> *"But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is-what is the scope of the enquiry? I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well recognized exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to all the remedy he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the*

> *claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based."*

[58] It would appear from the authorities that the court is entitled to look behind the apparent conflicts in the case to see if the respondent's case has any credibility or any reasonable prospect of success. It is not enough for a respondent to point to factual circumstances in affidavits. The court can look beyond this to see whether the claim is real, credible and bona fide and whether the evidence is so plausible as to require further investigation.

[59] In giving the decision of the Privy Council in **Eng Mee Yong v Letchumanan** [1980] AC 331 Lord Diplock had this to say about the treatment of apparent conflicts and disputed facts in affidavit evidence;

> *"Although in a normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."*

[60] I take all this to mean that even though a case may appear, on the affidavit evidence, to raise conflicting issues and disputed facts, I am not forced to accept that this is so beyond the face of it. In exercising my discretion whether or not to grant summary judgment, I am entitled to look at the evidence presented and assess whether it is prima facie plausible and merit further enquiry at a trial as to their veracity. This approach in my view is as true for a judge making an order as he thinks fit on application by a party, as it is for a judge deciding whether or not to grant summary judgment, strike out a claim or set aside a default judgment.

[61] In **Eng Mee Yong** the judge had heard an application to dismiss a caveat on affidavit evidence only. The caveator's assertions in the affidavits

were found by the judge to be so vague, equivocal and inconsistent with contemporary documents so as not to raise any serious issue to be tried. The Privy Council in approaching the matter on appeal begun on the basis that if there were conflicts in the evidence which were not on the face of it implausible it ought not to be disposed of on affidavit evidence only; on the basis that such conflicts leave a serious question to be tried. However, having examined the evidence, the Privy Council agreed that the facts were so vague, self-contradictory and implausible as to raise no real conflict on the relevant facts at all.

[62] A similar approach was taken by the English Court of Appeal in **National Westminster Bank PLC v Daniel and others** [1993] 1 W.L.R. 453 albeit it was a summary judgment decision under the old R.S.C. Ord. 14. In that case the court asked itself whether what the defendant said was credible. If it was found to be credible then it meant there was (as was necessary under the old rules) a fair or reasonable probability of the defendant having a real or bona fide defence. My own view is that if a court is able to state confidently and justly that on the material before it at the summary hearing, the apparent conflict in the evidence is baseless, it should exercise its power under the CPR Part 15.

[63] Counsel in the guarantor suit, for his part, advanced that the groundnorm from which the court's summary jurisdiction emanates is section 48 of the Judicature Supreme Court Act. I accept the submission of counsel for the defendants however, that the section merely recognized that with the advent of fusion (of law and equity) the Supreme Court was now empowered to grant to a litigant all legal and equitable remedies to which he is entitled in a particular case without requiring him to bring a multiplicity of actions.

[64] Whilst this court makes no finding upon learned silk's submission as to whether the rules have been properly promulgated in our jurisdiction, the Judicature (Rules of Court) Act gives the Rules Committee the power to make procedural rules to govern the exercise of the powers of the Supreme Court. The Civil Procedure Rules 2002 (CPR) and Part 15 in particular was made to

provide the procedural basis for the applications herein. Until its validity is successfully challenged it must be taken to have been validly made.

[65] The advent of the CPR saw a new dispensation in the realms of civil litigation. The CPR dictates that each court must be mindful of the incurring of excessive and avoidable costs associated with prolonged litigation. It has been said before but must be restated, that the main feature of the CPR is the system of case management which seeks "to ensure that disputes progress as expeditiously and economically as possible to a fair settlement."

[66] As part of this active management of cases, Rule 1.1 establishes that the rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly. It must be noted that to deal with cases justly has been interpreted to include the practice of not preventing a litigant from pursuing his claim merely because of a breach of the procedural rules but instead, to as far as possible, determine cases on their merits.

[67] In summary judgment applications such as this one, the court must look not only on whether the claimant's case has a real prospect of success on the issues but also at whether there is real prospect of success against the defendants which have been brought before the court. The aim is therefore, to come to a fair determination, either by discontinuing the claim or part thereof or allowing the claim to proceed to trial, after considering the evidence before the court and assessing whether the claims have a realistic prospect of success. The burden of proof rests on these defendants. For a court to find that a case has any real prospect of success it must find that the claim is better than merely arguable; that it carries some degree of conviction, is prima facie plausible and capable of belief.

[68] The test of real prospect of success was reiterated in **Sasha-Gaye Saunders v. Michael Green et al** (Claim No. 2005 HCV 2868). There Sykes J, relying on the dicta in **ED&F Man Liquid Products v Patel** [2003] EWCA 472, highlighted that:

> *"Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the court, where available, prospect is real."*

In seeking to apply that test, the court is and should always consider whether the claims against the applicants are implausible. In doing so, the court is entitled to and ought to look at the entirety of the case without attempting to conduct a mini trial. The case of **National Westminster Bank v Daniel** [1993] 1 WLR 1453 speaks to this approach.

[69] McDonald-Bishop J (as she then was) in the unreported Judgment of **Surrey Paving & Aggregate Company Limited v Diamond Property Development Company Limited** Claim No. 2008 HCV 04570 delivered on September 9, 2010 relied on the formulation of the test by the Court of Appeal in **Gordon Stewart v Merrick (Herman) Samuels** SCCA no. 2/2005 delivered November 18, 2005. In that case the court of appeal approved and endorsed the distinction drawn in the English authorities between a real prospect of success as opposed to a fanciful prospect. In that regard Harrison J.A. (as he then was) noted;

> *"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a "real prospect" not a "fanciful one". The judge's focus is, therefore, in effect directed to the ultimate result of the action as distinct from the initial contention of each party. Real prospect of success is a straight forward term that needs no refinement of meaning."*

[70] McDonald Bishop J then went on to assess the defence in the case of **Surrey Paving** and its prospect of success. In doing so the learned judge made it clear that whilst she was not intending to conduct a mini trial, in order to arrive at a position as to the prospect of success of the defence, it was open to her to form a provisional view of the case in order to determine its likely outcome. This of course is the necessary and correct approach even in cases which involve disputed facts.

[71] I am always mindful of the need to manage cases actively and justly. This application may appear to some, because of the time it took to argue and the volume of material, to be tethering on the brink of a mini trial. But there was no danger of that. None of the authorities say that a court should only exercise its discretion where there are no disputed facts or to do so only in rare or exceptional circumstances where disputed facts exists. The court's approach should be in line with the underlining principles and spirit of the CPR to treat with cases justly and allot each case its appropriate share of the courts resources. If the court considers the evidence presented in these proceedings, the pleadings and any evidence which could reasonably be expected to be available at trial and finds that the claim or issue has no realistic prospect of success at trial, then the court ought to exercise its discretion and dispose of it summarily.

[72] Counsel for the defendants tried to convince the court that despite the volume of evidence the issues for consideration on this application are fairly simple. The question of whether a point is plain and obvious does not depend on the length of time it takes to argue. The court must ask itself the question: "are the issues inherently difficult to address summarily?" (see **Lonrho Plc v Fayed** [1991] 3 ALL ER 303 at 313).

[73] It seems to me that the various issues raised by the defendants fall in varying degrees in one or other of the three limbs of Lord Hope's examples in **Three Rivers**. I will, therefore, follow the example of counsel and examine the different causes of action pleaded and the essential elements needed to establish them and see whether there are any issues of facts joined between the parties; or whether the applicant has successfully shown that on the available material, without any prospect of further evidence emerging in discovery or on cross examination, the claimants' case against these defendants who have made this summary judgment application is fanciful with no real prospect of success.

The claim for breach of contract

[74] There is no claim for breach of contract in the guarantor suit. Ocean Chimo brought a claim for breach of contract against the 3rd, 4th, 5th and 6th defendants even though there was no contract between them for a loan. The particulars of claim in the Ocean Chimo case seem to be alleging that the defendants are responsible for the lender banks' alleged breach of contract with them when it raised the interest rates and did so without notice to the borrower. Counsel for Ocean Chimo submitted that these defendants were the driving force behind the decisions and actions concerning the increase in interest rates; the negotiations with the attempted sale of the hotel, the manipulation of LIBOR and the appointment of a receiver. Counsel asserted that Mr. Chang, Mr. Smith and Mr. Billiard were in a "privileged position of authority and control which gave them the opportunity to execute their conspiracy". They ask the court not to allow them to "hide behind the veil of the bank."

Analysis

[75] The particulars aver that it was the unlawful and unjustified hike in interest rate which led to Ocean Chimo's default on the credit facility and that this, as well as the failure to adhere to the LIBOR component of the contract and the failure to advise it of the variation in the interest rate, was in breach of the contract. Since there is no actual contract between the parties, with respect to the 4th, 5th and 6th defendants, Ocean Chimo must rely on the tort of inducing or procuring a breach of contract to attach liability to them for any breach of the loan contract.

[76] In **British Motor Trade Association v Savadori and others** [1949] 1 All ER 208 it was held that a defendant was guilty of procuring breaches of contract where with knowledge of a covenant he took active steps to facilitate a breach of that covenant. The tort involves the knowing interference with contractual relations. In this case the alleged breach took place before the defendants entered the picture and there is no evidence that they had any knowledge of a breach of contract with the claimants.

[77] In **Said v Butt** [1920] 3 K.B. 497 it was held that an employee acting bona fide within the scope of his employment who procures a breach of contract between his employer and a third party, is not personally liable for inducing breach of contract at the suit of that third person. The reasoning in that case would extend the principle to agents and principal as the basis of the exception is the fact that employee and employer are to be treated as one under the principle. Liability attaches only to strangers. So where the employee or agent acts, his actions are deemed to be the actions of the principal or employer so that his procuring the breach of contract is as if the master or principal breached the contract himself. Any action against the agent under the principle must fail (see **Said v Butt** pages 505-506). That is a total answer to this claim against the 4th, 5th and 6th defendants in the Ocean Chimo suit. Even if it were not, even on the claimant's case the contract would purportedly have been breached before the 4th, 5th and 6th defendants came into the picture.

[78] The particulars also aver that there was a breach of an agreement arising from a meeting between the parties in Miami, more often referred to as the "Miami meeting or the Miami accord". There is no evidence of any contract arising out of the so called "Miami accord" with the defendants.

[79] It was also alleged that the defendants gave unsolicited information to the National Commercial Bank (NCB) causing it to terminate refinancing discussions with Ocean Chimo. Since Ocean Chimo had no contract with NCB, the defendants, by their purported actions, could not have procured a breach of contract between NCB and Ocean Chimo.

[80] With respect to the 3rd defendant, the letters of commitment dated August 2005 and April 2008 list the borrower as Ocean Chimo and the lender as RBTT Bank (Jamaica) Limited and/or other subsidiaries within the RBTT Group. The loan agreement interprets the banks to mean RBTT Jamaica and RBTT Trinidad and Tobago and their respective successors in title and assigns for the time being participating in the loan. At the time of the loans we know of the inclusion of RBTT (Trinidad and Tobago) Limited. There has

since been a name change. It was changed to RBC Royal Bank (Jamaica) Limited and RBC Royal Bank (Trinidad and Tobago) Limited. It was tacitly accepted that these two formed subsidiaries within the RBTT group and continue to do so within the RBC group.

[81] The question is whether RBC Canada falls within the category described in the definition of lender in the commitment letter and loan agreement. Though the exact relationship with RBC Canada is sketchy, what is clear is that it does not fall into the definition of lender in the commitment letter and the claimant's have not claimed that it did.

[82] Counsel for the defendants exhibited, by way of affidavit, documents filed with the Registrar of Companies up to 2009 showing RBTT International to be the major shareholder. Nothing was presented to the court for any period thereafter. However, it seems to have been commonly accepted that sometime in 2009, RBC Canada became the parent company. In 2009 RBC Canada engaged its staff in the loans group to begin acting on behalf of the lenders. The evidence is that RBC Canada felt it necessary to have a department with special responsibility and oversight of the special loans portfolio of the Caribbean region. What this meant in terms of the internal relations of the banks is unclear but what is clear is that the 3rd defendant had no loan contract with Ocean Chimo.

[83] The claimants have not pleaded that the veil of incorporation should be lifted. They seem to have measured the success of their claim on the bedrock of control, that is, that the parent company was responsible for its subsidiary and ought to have exercised control over its activities with the claimants. In Company law this line of argument has proven time and time again to be fallacious. In Company law there is an assumption of autonomous corporate legal personality. The lender banks are limited liability companies separate and distinct from their shareholders, whether, wholly owned or by majority. So that when a shareholder, whether a wholly owned or majority shareholder attempts to exercise direct and all pervasive control over its subsidiary without regard for the subsidiaries legal independence, such conduct by the

shareholder will attract condemnation expressed in strong language by the courts.

[84] A parent company is not liable for the misconduct or breaches of its subsidiary even if that parent is alleged to have had knowledge of it and failed to exercise control to stop it. A failure to exercise control over a subsidiary does not create vicarious liability in the parent for the breaches of the subsidiary. See the American case of **American Honda Motor Company Inc. Dealership Relations Litigation** 958 f Supp. 1045, 1051-1052 (D. Md. 1997). In that case it was held that a subsidiary was presumed to possess a free will, separate from its parent, arising from its legal separate status, even when it "sins". It also held that if the courts were to adopt an approach of "knowledge in the parent and failure to act" in order to impose liability on the parent to provide a remedy to a third party, it would destroy the legal fiction of separate entity. With this I entirely agree; the law cannot have it both ways.

[85] Though not specifically spelt out, the claimant seemed also to be alleging that the 3rd defendant and the 4th, 5th and 6th defendants as well, by acting as the agents of the claimant were automatically subject to liability along with their principal. This is also a fallacy. For the acts of the lender banks to become the acts of the RBC Canada, the lender banks would have had to be acting as the agents of RBC Canada in the Caribbean, so that their actions were in effect the actions of RBC Canada. It does not work the other way around. That is why the veil of incorporation is often lifted on the basis of agency, where the subsidiary is found not to be independent but was acting as the agent of the parent, its alter ego, so to speak. So that when the lender banks entered into the contract with the claimants, if they were the agents of the parent in doing so, then the contract would be the parent's contract. This is not the situation in this case.

[86] Even in cases where the subsidiary was alleged to have been in breach, it cannot be held to be the agent of the parent in committing that breach where the breach took place before the parent acquired the subsidiary. In this case, the lender banks increased the interest rates before

they became members of the RBC group. That is not in dispute. At the same time it complained of a failure to control the lender banks alleged unlawful increases, Ocean Chimo also complained that the 3rd defendant exercised excessive control in authorizing the lender banks to appoint a receiver knowing that the increases in interest rates were unlawful. This is a mere assertion unsupported by any whiff of evidence. Since the 3rd, 4th, 5th, and 6th defendants were dependent on what was told to them by the lender banks and based on the affidavits of the staff of the lender banks and 4th, 5th and 6th, defendants, they were being told different things at different times, so that there is nothing from which to conclude that they had conclusive knowledge of wrongdoing. There is also no evidence that they authorized the appointment of the receiver.

[87] I have also considered the fact that the claimant alleged that the loan was administered by the loans group, somehow inferring that they took over the loan contract. This is an unsustainable argument. Firstly, there is nothing wrong in principle for a parent and a subsidiary to enter into an arm's length agency agreement, where the parent provides services to the subsidiary. It is no different from an agreement between the subsidiary and a totally unrelated entity to provide the same services. It does not in and of itself, infuse the agent with liability for the subsidiary's actions simply because it is related to the subsidiary, where it would not if they were totally unrelated. Secondly, no one becomes a party to a fully executed contract merely by taking actions purporting to be in performance of the contract unless the contract had been assigned or transferred by some operation of law.

[88] No matter which approach the court takes, this cause of action has no real prospect of success against any of these defendants.

The claim for conspiracy

[89] I believe it is correct to say that the main substratum of the claims is the loan contract between Ocean Chimo and the lender banks. A common thread running through the pleadings concerns the question of whether the interest rates were lawfully increased. It is the root from which it was alleged

“all evil sprung”. It was suggested that the increase in the interest rates was the catalyst for all the ensuing court actions. What is apparent is that the lender banks derived their authority to increase the rates from contract. However, under the contract, before the rates could be varied, the borrower must have firstly defaulted on the repayment of the loan and secondly there should have been notice to the borrower of this default and the impending variation of the interest rate. There was no contractual requirement for notice to be given to the guarantor.

[90] The evidence as to the default in payment is, generously put, hotly contested. The defendants claim that there was a default in the first interest period. The claimants deny this but even though the loan was clearly in default they have not put forward an alternate period for the default. It is clear to me that the loan went into default in 2008 between March and June, as to the exact date when that was is a matter which is best reserved for trial where the affiants who have given evidence as to that may be present for cross-examination. The defendants accept this position except to say they posit that the proper parties to this dispute are the claimants and the lender banks and not these defendants.

[91] In respect to notifying the borrower, it is unquestionably that there was no such notice given. Was the increase therefore unlawful because no notice was given? Even if it is accepted at this juncture that this omission made the increases unlawful, in the sense that it was a breach of contract, a trial court would be constrained to impute motive or cause in the absence of cogent and convincing evidence. The defendants have argued that the claimants’ assertion of a conspiracy to unlawfully increase the interest rates is fanciful. This takes us to the issue of whether the claim of a conspiracy has any real prospect of success.

[92] At the heart of the action for conspiracy is the alleged unlawful and unjustified increase in interest rates. This increase has been described as the ‘axis of the conspiracy’. The defendants submit that this cause of action is bound to and in fact must fail because they were never involved in the

application of the interest rates as they were only brought into the scheme of things in 2009. The interest rate was raised in 2008.

[93] It was submitted that if the defendants and in particular RBC Canada were not involved in the increase in interest rates, then there is clearly ground to find, even at this stage, that this cause of action is unsustainable and has no real prospect of success, as the allegations of conspiracy against them would disappear. To my mind this falls squarely in the first of Lord Hope's examples in **Three Rivers**, so that if all the facts were proved by the claimants regarding the interest rates, they would still have no remedy against these defendants, as they would not have been involved in the increase of the interest rates.

[94] It was also submitted that, if the court looks at the fact that the loans were in default before the interest rates were increased, then summary judgment should be granted as the claimant would have no reasonable prospect of success. In essence, if the court were to find at this stage that the increase of interest rates was not unlawful, then there would be no basis to find a conspiracy based on an unlawful act.

[95] Further, the defendants submit that the commitment letter which was executed gave the lender banks the authority to, upon default by the borrower, come off LIBOR and apply a fixed rate of interest. This they submit they did, while applying a rate lower than that allowable based on the commitment letter. Consequently, no allegation of lawful means conspiracy could or ought to be raised nor would any such conspiracy be sustainable. Summary judgment, it was therefore submitted, should be granted based on this point.

[96] The defendants further submitted that the question of their involvement with the loans had been addressed in the joint affidavit of Chang and Smith and throughout several other documents filed in these claims. It was submitted that the defendants and other affiants have given evidence that the defendants did not enter the fray of things until 2009, as the loans were

not referred to the loans group of RBC Canada until that time. If the court accepts this averment at this stage as uncontroverted evidence, then the conspiracy claim must come to an end.

[97] The claimants on the other hand argued that the essence of a conspiracy is an intention to injure by either lawful or unlawful means. They submitted that it was not necessary for every conspirator to partake in every act which was done to cause injury; what was required was that the acts done must be done pursuant to the conspiracy. They pointed out that the very nature of a conspiracy suggests that there may and often will not be any formal or informal expressed agreement between the conspirators.

[98] They further submitted that what was necessary to ground a conspiracy was participation, whether active or passive which was in concert with a common intention to injure. Counsel also submitted that it was not necessary for all the conspirators to join the conspiracy at the same time once they all shared the common intention.

[99] It is based on these principles that the claimants submitted that there were elements of both lawful and unlawful means conspiracy in the defendants' involvement with the loans. They argued that the common intention to injure was the intent to "wrest" the hotel from Ocean Chimo and to put pressure to bear on the guarantor.

[100] They argued further that the unlawful increase in interest rates and the appointment of the receiver were acts done which were calculated to plunge the borrower into default and initiate the calling of the guarantee. Counsel submitted that the continued application of the unlawful and unjustified interest rate by the defendants, despite the known 'precarious financial position' of the borrower was calculated to pave the way for the acquisition of the hotel. It was therefore submitted that the particulars pleaded in the claims, such as the unlawful increase of interest rate, if proved at trial, will provide a basis upon which it can be inferred that there was a conspiracy.

[101] In those circumstances, the claimants submitted that the issue of whether the increase in interest rates was justified will be an important matter to be determined at trial. They further submit that at trial, the court would have to determine whether the increase was deliberate, negligent or fraudulent. All these facts they say, coupled with the fact the guarantor was never notified of the Increase, are conflicts, which showed that summary judgment on this point, particularly at this stage, was inappropriate and ought to be refused.

[102] One other noteworthy submission made by counsel in respect to the allegation of conspiracy relate to the events surrounding the ill-fated proposed refinancing by NCB. It was submitted that the affidavit of an officer of that bank, sworn September 16, 2014 provided evidence that this bank had issued a letter signaling its intention to provide financing. The officer in her affidavit stated that despite the signaled intention, after someone at the bank spoke with Mr. Chang there was a retraction and subsequent refusal of the bank to commit to refinancing. These assertions have importantly been denied by Mr. Chang. It was therefore submitted, that this was a triable issue which goes to the root of the allegation of a conspiracy and which ought to proceed to trial and the application ought to be refused.

The law

[103] A conspiracy consists in an agreement between two or more to do an unlawful act or to do a lawful act by unlawful means. A conspiracy to do an unlawful act may result from the participants in the conspiracy combining together to perform unlawful acts. There may also be a combination of persons agreeing to do an act, in and of itself not unlawful, but which is agreed to be done for or the object of which was for the sole or predominant purpose of causing injury, harm or loss to the claimant. See Bullen and Leake & Jacob's Precedents of Pleadings (16th Ed.; Vol 11) Para 51-01 to 51-08.

[104] For the tort of conspiracy to succeed there must be an agreement; an intent to cause injury loss or damage, certain acts being carried out pursuant to the agreement and the resulting injury, loss or damage. In the tort of

conspiracy damage must be proven and the acts relied on must be clearly set out in the particulars of claim.

[105] The claimants allege a conspiracy to interfere with business relations and this may be interpreted to mean an allegation of the civil tort of conspiracy to injury commercial interests. In such a case the claimant must show the unlawful acts or unlawful means relied on with intent to injure the claimants or the lawful acts or lawful means relied on coupled with a predominant purpose to cause injury to them and was not to protect or further the interest of the defendants (see **Lonrho plc v Fayed** at pp 465-466 per Lord Bridge of Harwich). Therefore, if the claimant alleges that the lender banks unlawfully increased the interest rates with the intention to injure their commercial interests; this may be a breach of contract and an unlawful act or unlawful means conspiracy if done in combination with deliberate intent to injure. It would be no defence to state that their purpose was to protect their own interest. If the increase in interest rates were lawful but done in combination, the predominant purpose must be to injure the claimants for it to be actionable. Of course there must be a combination, because it is in the combination that the act becomes liable for otherwise it is not actionable if done by one person acting alone.

[106] Of course it would be for a court to determine whether a deliberate breach of contract is an unlawful act for the purposes of this conspiracy to injure. Usually the acts complained of are intimidation, deception, fraud, violence, misrepresentation, molestation and obstruction. All have been found to be unlawful means when done in combination with intent to injury. A breach of contract is actionable at the suit of the innocent party and it may perhaps be that if the breach is done in combination, deliberately with intent to injury, then it is actionable as an unlawful means conspiracy. The claimant would have the evidential burden at trial. In **Total Network SL v Her Majesty's Revenue and Customs** [2008] UKHL 19**,** at para.91, Lord Walker was prepared to hazard a guess that breach of contract and breach of fiduciary duty could be legally defined as unlawful. Also see Lord Devlin in **Rookes v**

Barnard [1964] AC 1129 at 1209. It is not necessary for me to make such a determination, in that regard, at this stage.

[107] To succeed at trial the claimants must show that there was a combination. Then they must show what the real purpose of the combination was. In the case of lawful acts or lawful means conspiracy the claimants must show that the predominant purpose of the conspiracy was to injure economic interest. In the unlawful means or unlawful act conspiracy the claimants must show that there was intent to injury whether or not it was the predominant purpose.

Ocean Chimo's pleadings

[108] The particulars of conspiracy filed by Ocean Chimo is that, in part, the defendants:

> Conspired with one another and with Hilton International management ("the Hilton") which resulted in the 1st Defendant entering into an agreement with the Hilton in which agreement the Lenders have appointed a Receiver/Manager of the Hotel which will cause the Receiver manager to sell the Hotel and the assets therein, so as to deprive the Claimant of its assets and pursue such sale for their own selfish and/or improper motives without proper regard to the duties owed to the claimant.
>
> The 4th 5th and 6th defendants because of their privileged positions and authority in the 3rd defendant and in order to carry out this conspiracy, on the 29th April, 2010 (after visiting the office of the Hilton on Tuesday April 27th, 2010) threatened the Claimant that it would appoint a Receiver/Manager over the Claimant's undertaking, property and assets if the claimant did not on or before close of business on May 12, 2010:
>
> I. Pay to the lenders all outstanding interest owing to them being US$1,692,983.02 as at the end of April 2010;
>
> II. Deposit in a blocked account with the 1st Defendant, not less than US$3,000,000.00 to be used exclusively for the refurbishment of the Hotel; and
>
> III. Provide a letter of credit in the amount of US$12,000,000.00 or "other evidence satisfactory to" the 1st Defendant, that the Claimant "has available to it not less than an additional US$12, million to complete the property improvements from sources other than RBTT".

[109] The particulars go on to allege other overt acts that Ocean Chimo intended to rely on to prove the alleged conspiracy. It alleged for instance that it delivered a cheque of $US 1.7 Million payable to the lenders that would have satisfied the payment demanded by them on the 29th April 2010 and which would have covered outstanding interest up to April 30th 2010 but Mr. Billiard rejected the cheque in the face of a practice by the claimant to make payments to the lender banks by cheque and for them to accept it. The demand for payment of interest was increased by the lender banks with the advice that they intended to appoint a receiver. This letter they claimed was written by Mr. Billiard on behalf of RBTT Canada in circumstances where Ocean Chimo had no contract with RBTT Canada the 3rd defendant. Another cheque was tendered in an amount over that demanded which was again rejected by the 3rd Defendant.

[110] It was also alleged that the 1st defendant, the lender bank, offered a loan to insure the hotel at usurious rates which was rejected and at the same time attempted in a "most unprofessional and conspiratorial manner" to offer the claimant's insurance brokers to pay the insurance premiums on the hotel on the condition that the claimant was not told that they did so. They further alleged that the claimant requested approval to enter into negotiations with Wyndham for the hotel to become a Wyndham hotel but the 1st defendant failed to grant its approval.

[111] The uncontroverted evidence is that Mr. Chang and Mr. Smith are employees of RBC Canada. RBC Canada through its loan group acted as agent of the lender banks. Mr. Billiard was external counsel to RBC Canada and special counsel to the lender banks and therefore acted as their agent. Ocean Chimo is alleging that that they, as agent and employees of RBC Canada, conspired together with their principals and others to have the lender banks increase interest rates in breach of contract thus placing the borrower in default and resulting in loss to the claimant.

[112] It is also alleging that as employees and agents they conspired together and with their principal and employer and others and caused the

lender banks to refuse an application for a moratorium on the principal sum. The allegations also raised the issue of whether at a meeting held in Miami with the loans group an agreement was reached to allow Ocean Chimo time to locate a suitable buyer for the hotel and whether they conspired together to cause or induce the lender banks to breach that agreement.

Pleadings in the Guarantor suit

[113] Mr. Howell alleged that there was a conspiracy amongst the defendants themselves and with the Hilton Management resulting in an agreement between the lenders and Hilton to have the lenders appoint a receiver manager and cause that receiver/manager to sell the hotel and so deprive him of his rights to the assets of Ocean Chimo. He also alleged a threat to him as chairman of Ocean Chimo to appoint a receiver manager if he did not comply with the conditions highlighted in Ocean Chimo's claim. He also pointed to the refusal to accept the tendered cheques as proof of the conspiracy as well as the failure to approve the change in the hotel's flag. All this he alleged caused him loss including the loss of shares he had to sell in order to meet the lender banks' requirements on behalf of Ocean Chimo.

[114] It was submitted by counsel for Mr. Howell that the basis for this cause of action pleaded was both unlawful and lawful means conspiracy. That the defendants used both elements of lawful and unlawful means to "wrest" the hotel from the borrower and bring pressure to bear on the guarantor so as to gain control of the borrowers' property and deter the borrower from pursuing its law suit. The submission was that the unlawful increase in interest rate would result in the borrower going into default and the guarantee would be called.

[115] The conspirators, it was claimed, well knew the borrowers financial position; they knew after the global financial crisis that the borrower had requested a moratorium which was refused. It was argued that in those circumstances the pursuit of the unlawful interest rate could only have one result. It was also claimed that the appointment of the receiver was to achieve only one result, to gain control of the property and pressure the guarantor thus

paving the way for the acquisition of the property. It was pointed out that the allegations contained in the pleadings could cause a court to draw the inference that there was a tacit agreement among conspirators to achieve their objective of gaining control of the borrower's property by calling the guarantee. It was also alleged that RBC Canada breached the contract of guarantee (to which it was not a party) and that the defendants gave unsolicited information and made unwarranted statements to NCB causing it to terminate refinancing discussions with Ocean Chimo.

Analysis

[116] The question at this stage is whether the allegations of a conspiracy made against these defendants have any real prospect of success. The enquiry is whether the claimants' statement of case and the evidence in these proceedings provide a basis for the court to find that an action in conspiracy against the defendants has any real prospect of success. I will begin the enquiry with a broad statement of general principle. Employees and agents cannot be held liable for the actions of their principals unless their actions are tortuous in themselves or exhibit separate independent actions and interests in and of themselves such as to make those actions, their own actions and not that of their principal. The decisions taken by the principal or employer cannot amount to a conspiracy to injure the claimant by these defendants. (See **Normart Management Limited v West Hill Redevelopment Company Limited et al** [1998] 37 O.R. (3d) 97)

[117] The loans group to which the defendants were attached did not become involved in the loan agreement between the lender banks and Ocean Chimo until late 2009. The loan was brought to the group's attention because it was a large defaulting loan. Mr. Billiard was retained with respect to the loan in January 2010. The evidence of what this loan group was required to do is to be found in the affidavits of Mr. Chang and Mr. Smith. The group had oversight of the special loans portfolio for the Caribbean region and they provided advice on being requested to do so, on those loans.

[118] The loans group was asked to provide input regarding the borrower's deteriorating financial position. Mr. Billiard acted as external counsel to RBC Canada and special counsel to the lender banks and in that capacity he communicated with third parties on their behalf, including to the claimant. Does this fact alone make them liable for any alleged unlawful increase in interest rates by the banks? Is there evidence from which a trial court could infer that they, as agents along with their principal conspired with each other and a third party to interfere with the business relations of Ocean Chimo and/or Mr. Howell?

[119] The claimants' case in effect is that these persons by conspiracy caused the lender banks to increase the interest rate, and even if they were not a party to the initial conspiracy to increase the rates, they joined in the conspiracy and furthered its objectives by causing the lender banks to continue with the unlawful increases, causing the lender banks to turn down an application for principal moratorium and causing the lender banks to breach an agreement for more time to sell the hotel. The sole object of this conspiracy being to take the hotel from Ocean Chimo. The claimants contend that the claim for conspiracy has both elements of lawful and unlawful means conspiracy.

[120] Ocean Chimo alleged that at the heart of the conspiracy was the increase in interest rates which they contend was unlawful and unjustified. In the guarantor suit it was alleged that the conspiracy was to call the guarantee issued by him with a view to pressuring Ocean Chimo so as to acquire the sole asset which was the hotel. The conspiracy was therefore alleged to be between the lender banks, the Hilton and these defendants to appoint a receiver to sell the hotel.

[121] Having examined the pleadings and the affidavit evidence it is difficult for the court to get beyond the obvious. Firstly, that two of the defendants were a part of the loans group of RBC Canada. They were therefore mere employees. Secondly, the group is a department in RBC Canada. Thirdly, that the lender banks are limited liability companies with all ramifications attendant

to that designation, including but not limited to separate legal status. Fourthly, that the group was mobilized in 2009 to assist with what was undeniably a difficult loan portfolio. The rates were increased in December 2008 after the first interest period ended in November of the same year. Fifthly, that at the time they were called in the loan was already in trouble, that part of the mandate of the loan group was to deal with troubled loans is not in dispute. Sixthly, that one of the actions of the group was to meet with Hilton at the request of and with the consent in writing of both claimants and both claimants signed a waiver of liability against all the defendants for anything arising from that meeting. The meeting itself cannot therefore form the basis of a conspiracy.

[122] The increase in interest rate was done by the lender banks and there is no evidence to support or from which any inference can be drawn that this was done in combination with the defendants. No amount of discoveries and disclosure can create a fact which clearly does not exist. The claimants in answer to the timeline of the increases say it was a continuing conspiracy joined and furthered by the defendants using their privileged positions and exerting their control over the lender banks.

[123] It would be impossible for any court to say, that the defendants Mr. Chang, Mr. Smith and Mr. Billiard, common sense aside, exercised any authority or control over the lender banks which had full corporate status, they being merely employees of RBC Canada and an independent contractor subject to authority, control and instructions, respectively, themselves. It therefore defies common sense to accept that they exerted authority and control over the banks forcing or inducing them to continue the unlawful increase.

[124] The defendants were agents of the lender banks and in law one and the same as their principal. So that their actions were the actions of the principal. They cannot conspire with themselves. Agents cannot act contrary to their principal's directions.

[125] The alleged overt act of the unlawful increase was already complete when these defendants came into the picture. Mr. Chang and Mr. Smith as employees of RBC Canada, acting as agent, they were not in a position to tell their employer's principal what to do but could only merely carry out the instructions of the principal or to proffer advice to the principal as per their mandate. The position of Mr. Billiard as external counsel was no different. He also was in no position to exert authority and control over a limited liability company. So to say they joined an existing conspiracy and furthered it is unsustainable. In any event, as I said earlier, they legally cannot combine as in law they were one and the same.

[126] The allegations that the meeting in Miami in 2011 was pursuant to a conspiracy the object of which was to wrest the hotel from the claimants is not supported by the evidence. The meeting in Miami was between the claimants, the lender bank's representatives and a proposed purchaser of shares in the holding company that owns Ocean Chimo. Arising out of the failure of the proposed purchaser to meet certain conditions set by the lender banks (being holders of the debenture over the asset sought to be sold by the borrower), the lender banks proposed an extension of time for the borrower to meet its demand for payment in return for which Ocean Chimo would withdraw its claim it had already filed against the lender banks. This was refused by Ocean Chimo.

[127] It is hard to see how this formed the basis of a conspiracy. What I can say is that, if Ocean Chimo had agreed, it would have formed the basis of an agreement, there being offer, acceptance and consideration. It having not been concretized into an agreement, it still remained at best as was described in other proceedings" a tentative accord". This "tentative accord" could not form the basis of a finding of conspiracy. The mere fact that the lender banks asked for the claim to be discontinued is not evidence of a conspiracy. It is something that is done every day in legitimate pursuit of a defendant's interest in return for giving up some other right.

[128] There is also an alleged conspiracy with the Hilton Management, as explained by the claimants, for the defendants to appoint a receiver who would give Hilton a favourable management agreement on terms and conditions burdensome to the claimant. The agreement as alleged is for the receiver to sell the hotel and its assets in order to deprive the claimant. The overt act alleged was the threat by the lender banks to appoint a receiver. This is mere assertion and makes no commercial sense. As pointed out by counsel for the defendants, the appointment of the receiver would be under the terms of the debenture which would signal the pending sale of the hotel for the lender to realize its investment and would result in the termination of the management contract with Hilton rather than an extension of it. I cannot see how such an agreement with Hilton Management would benefit Hilton. It is an implausible and fanciful claim.

[129] In any event this allegation is of conspiracy to injury or lawful means conspiracy, as it is not unlawful to have a meeting nor to exercise the right to appoint a receiver contained in the debenture deed. For such an allegation to be sustainable there must be evidence of, or from which inference can be drawn that there was an agreement in combination; that actions were taken pursuant to this agreement the predominant purpose for which was to injure the claimants economic interest and not to promote legitimate economic interest.

[130] I have to tread carefully here because of the undisputed pending litigation between the claimants and the lender banks. Suffice it to say the appointment of a receiver is at the instance of the lender banks and not these defendants.

[131] The particulars of the overt acts relied on to ground the alleged conspiracy includes the demand for the payment of interest which was owed. This was done by the agents on behalf of the principal. There is nothing to ground the foundation of any conspiracy or from which a conspiracy may be inferred. These actions were plain and overt and there is nothing to show that

the predominant purpose of the demand for payment was not the pursuit of a legitimate business interest and the demand being made by the agent, principal and agent being viewed as one, cannot conspire in law The loan went into default from 2008, the receiver was not appointed until 2011 and this after no payment was made on the loan by Ocean Chimo and the call on the guarantee was ignored.

[132] The evidence also is that Hilton Management had an agreement for a property improvement plan with Ocean Chimo. The demand that Ocean Chimo comply with that agreement could never be properly viewed by a court as anything else than being in pursuit of a legitimate business interest. The hotel was in danger of losing the Hilton flag because of the admitted failure of the Ocean Chimo to comply with the property improvement plan. In April 2010 Mr. Howell wrote to both Hilton management and RBTT admitting that Ocean Chimo was in default under the property Improvement Plan and consequently the management agreement, as well as under the credit facility provided by RBTT. It was in this letter that it requested a meeting, waived its right to confidentiality at the meeting and indemnified the parties from any claims arising from the meeting.

[133] After that meeting, a letter was written on behalf of RBTT Jamaica Limited, identifying the issues regarding the default in the credit facilities and the property improvement plan and the consequences of both. One of the consequences identified was the removal of the Hilton flag and the effect on the value of the security. On that basis RBTT proposed to take certain actions to protect its security. It placed two conditions, one the payment of outstanding interest and the other the provision of sums to meet the requirements of the property Improvement plan. Ocean Chimo meeting those conditions would result in the Hilton flag remaining and RBTT would extend a moratorium on the principal. A failure to meet the conditions however, would see RBTT appointing a receiver. There is no basis for viewing the actions of the defendants on behalf of the lender banks as suspicious or sinister.

[134] The refusal to accept personal cheques tendered by Mr. Howell on behalf of the claimant Ocean Chimo, by itself, is not inferentially available to a claim for conspiracy. These cheques were personal cheques from Mr. Howell and the lender banks were entitled to refuse payment by personal cheques. This seemed to have been accepted by Mr. Howell on behalf of Ocean Chimo when after the cheque was rejected he offered to make good the payment through a third party bank cheque from the Cayman Islands but was unable to do so within the time stipulated by the lender banks.

[135] The offer to lend the claimant sums at a high interest rate to pay the insurance again is not in and of itself a sign that there is a conspiracy. It is not unlawful to lend at high interest rate and it is not an unlawful means of doing business. It is also a legitimate pursuit of business interest. The offer to pay the insurance cannot be interpreted as calculated to injure the claimants business, since it would in actuality assist the claimant. Neither the fact that the 1st defendant wanted it secreted. In any event the insurance was assigned to the lenders as part of the security for the loan and it was therefore in their interest to protect their security. Also there is no evidence that the 3rd, 4th, 5th, and 6th defendants were involved with or conspired in these decisions.

[136] The lender banks refusal or omission to respond to a request to approve negotiations with the Wyndham Management for their flag to replace the Hilton's has not been shown to be connected in any way to the defendants. In any event Ocean Chimo successfully negotiated to have the hotel fly the Wyndham flag without any evidence of interference from the defendants. That flag seemed to be entirely acceptable to the lender banks, as this flag continued to operate even under the receiver's management.

[137] In 2010 the lender banks offered the borrower a moratorium on the principal if it paid the outstanding interest and kept its agreement with the Hilton for the property improvement plan. The claimant refused to accept those terms. This offer by the lender banks cannot be placed at the feet of the defendants. The participation by these defendants in the meeting in Miami

was as agents of the lender bank. The subsequent actions taken by the banks were not the actions of these defendants and no claim that they induced these actions can succeed against them.

[138] One question raised by the claim of conspiracy is whether an agent can conspire with his principal. In **Crofter Hand Woven Harris Tweed Company Ltd v Veitch** [1942] AC 435 it was held that an agent cannot conspire with his principal because both are treated as one and the same. Also see Winfield and Jolowitz on Tort 18th ed. (2010) para.18-25. There is no evidence from which an inference may be drawn that they conspired with each other and with the Hilton or anyone else.

[139] In the case of the guarantor suit, there is no evidence of any loss suffered by Mr. Howell as a result of any overt or covert acts done by the defendants. On the evidence presented all the actions taken were taken by the lender banks. The agent/ principal liability in tort is not as joint tortfeasors, but the principal's liability for his agent is as respondeat superior. There is no corresponding liability of the agent for his principal. The agent must be found liable in his own right. I, therefore, disagree with counsel for the guarantor that an agent may be held liable as a joint tortfeasor with the principal. In any event they could not be so held liable in an action for conspiracy as they cannot conspire with each other and in this case conspiracy with a third party has not been made out on the evidence.

[140] Finally the reliance on the unlawful increase in interest rate as the unlawful act cannot succeed against the defendants as the evidence is that the special loans group only became involved after the rates were raised by the lender banks so even if the agent could conspire with the principal they could not have been a party to such a conspiracy at that time. I agree with counsel for the defendants that the disputed issue of whether Ocean Chimo was actually in default when the rates were increased and whether the act of increasing the rates was a breach of contract is between the lender banks and the claimant. There is no evidence of a conspiracy begun by the defendants

or any evidence that they joined an existing conspiracy to further its objectives.

[141] The claim also raises the issue of whether the affidavit of Barbara Hume filed in the guarantor suit is evidence of a conspiracy. Parts of the affidavit from Barbara Hume carries hearsay statement and those aspects fall to be struck down on the defendant's application in any event. Mr. Howell alleged that NCB would have provided refinancing if there had not been unlawful interference by the defendants in making unsolicited statements about him to NCB. Both claimants allege that adverse statements were made to the bank regarding Mr. Howell's credibility. There is no such evidence in the affidavit of Barbara Hume. Ms. Hume states that she was advised that a named person had received a call from Mr. Chang and that matters raised in that conversation necessitated further discussions with Mr. Howell.

[142] Ms. Hume does not indicate the source of that advisory, neither does she indicate that she herself spoke to the named person who received the call as to the content of the call. It is therefore hearsay of the worse kind, being third hand. Though the affidavit spoke to a subsequent meeting with Mr. Howell, he has not given any evidence that the so called information has to his credibility allegedly given to NCB was relayed to him or the nature of it. Neither has he given evidence that he was told this was the reason for the decision not to refinance the loan. Ms. Hume affidavit does not state that the information was the reason the bank decided not to proceed. What she does state is that following the meeting with Mr. Howell and further internal deliberations NCB decided not to proceed.

[143] What is in evidence are two letters, one dated 2009, and one dated 2010 from the relationship manager of RBTT to the NCB indicating that a request was made by Mr. Howell for RBTT to provide information to NCB and which provided the requested information, along with what some would consider a good reference as to character and requesting "any courtesies extended". There is nothing to indicate that Mr. Howell or Ocean Chimo was

the subject of badmouthing by Mr. Chang or anyone else to NCB, thus preventing the refinancing by that entity.

[144] The aspects of the Ms. Hume's affidavit (last three lines of paragraph 4) making hearsay reference is liable to be struck out as hearsay evidence. In any event in august of 2010, Mr. Howell was instructing Mr. Smith by email update that, firstly, the hotel was rebranded with the Wyndham brand on an interim basis, secondly, and most important to this claim of conspiracy he states that they "continue to pursue the financing of the RBTT facility with a loan from NCB. However, little has happened since the brand change, as NCB is awaiting the finalization of the permanent management team .As mentioned above, that process should be completed by September to enable the reengagement of this process." Since this is after the alleged improper communication, this attitude of optimism seemingly months after the alleged improper communication is inconsistent with the claim.

[145] Mr. Billiard in his evidence indicated that he had raised certain questions with Mr. Howell as regards the knowledge by NCB of certain facts. Emails show that after the questions were raised by Mr. Billiard, Mr. Howell authorized Ms. Hume to confirm by email that she was aware of the information and that NCB was still processing the refinancing request. This fact is indicated in paragraph 3 and 4 of her affidavit. Ms. Hume affidavit does not put forward any reason for the refinancing not being approved, nor does it state that it was given other information by anyone which caused it to not approve said financing. This therefore cannot be evidence of a conspiracy. In any event this affidavit by Ms. Hume is insufficient to establish a cause of action in conspiracy.

[146] In **Edwin Dyson & Sons v Time Group Limited** [2001] EWCA Civ 1845 Lady Justice Arden in overturning the decision to grant summary judgment in a claim for conspiracy came to the conclusion that there was sufficient to "excite suspicion" when the full picture was considered, even though the actions taken individually were not by themselves suspicious. In this case neither collectively, nor individually are the actions of the defendants

such as to “excite suspicion” and cause a court to be able to infer the existence of a conspiracy.

[147] Having appreciated the necessity for there to be either a conspiracy by unlawful means or an unlawful act which is calculated to injure, this court finds that this cause of action has no real prospect of success. Not only has the claimants failed to provide any evidence which may support the allegation, but there is nothing that has been presented from which the court can draw such an inference if the matter was allowed to proceed to trial. In the case of **Edwin Dyson & Sons v Time Group Limited.** There the courts refused summary judgment on the basis that it did not have a full picture to determine whether there was a conspiracy or not. In this situation the picture presented so far does not point to any evidence of conspiracy which may be further flushed out at trial.

[148] In the case of the guarantor suit I would go further to indicate that no loss to Mr. Howell is alleged in the particulars of claim resulting from the alleged conspiracy. The guarantor suit alleges that RBC Canada acted in breach of the terms of the guarantee albeit that RBC Canada was not a party to the guarantee. It also alleged that the RBC Canada acted for the sole purpose that Ocean Chimo would withdraw its suit. That is an effect on Ocean Chimo in which Mr. Howell has no standing. Ocean Chimo is a separate legal entity from its chairman, directors, chief executive officers and shareholders.

[149] In the final analysis when I examine what is available against the pleaded case it is clear that even with the usual fact finding mission of pre-trial discoveries and cross examination of witnesses it will not place the issue on any firmer footing.

The claim for breach of fiduciary duty

[150] Ocean Chimo claimed that there was a relationship of trust and reliance between it and the defendants in the administration of the loan and that a duty of care was owed to it in respect to the administration of the loan. This involved the duty to inform of any change in the interest rate; any change

in arrangements between the borrower and lender which would be detrimental to the borrower. It alleged that the fiduciary duty was breached by the authorizing of the increase in interest rate; by the failure to notify of the increases; the failure to adhere to LIBOR; wantonly and recklessly introducing a condition in the agreement to extend time to sell the hotel, wantonly and recklessly relaying unsolicited information to NCB, carelessly and arbitrarily applying a self-imposed interest rate.

[151] In respect to this cause of action, the defendants submitted that there is no reasonable prospect of successfully sustaining a claim for breach of fiduciary duty. They submitted that the pleadings and facts do not show a fiduciary duty in relation to the defendants and the claimants. They asserted that it followed that they were in no fiduciary position to the claimants and the duties which were alleged to be broken were not fiduciary duties.

[152] It was further submitted that there were no facts pleaded which would bring the defendants into a position of trust and reliance *vis-a-vis* the claimants. They urged the court to consider the nature of a fiduciary and the nature of fiduciary duties, as has been established in the case of **Bristol and West Building Society v Mothew** [1996] 4 All ER 698. It was also submitted that the mere relation of banker and client does not without more, create a relationship of trust and reliance nor does it give rise to a fiduciary relationship.

[153] They argued that something more was needed, such as the existence of a special relationship between banker and client. They pointed to the principles which were established in **National Commercial Bank (Jamaica) Limited v Hew & Others** [2003] UKPC 51 and which were recognized and applied by Sykes J in **David Wong-Ken v Jamaica Development Bank Ltd** [2012] JMSC 32.

[154] In the circumstances, it was submitted that it was far-fetched to believe that these defendants could be fiduciaries of the claimants in circumstances where they were at the same time agents of the lender banks. They pointed

out that at no point did they step out of that role to independently assume any personal liability to Ocean Chimo or Mr. Howell, so as to assume any fiduciary duty towards them.

[155] Counsel for the defendants suggested that the word fiduciary may have simply been thrown into the pleadings and submitted further that, at this juncture, the pleadings fail to raise a case of fiduciary duty which had any real prospect of success; consequently, summary judgment was appropriate for this cause of action.

[156] Counsel submitted finally, that if it was alleged that the defendants were in a fiduciary relationship with Ocean Chimo and Mr. Howell, it would mean that they would have to put the interests of Ocean Chimo and Mr. Howell ahead of the bank's interest. It was therefore submitted that such an assertion was clearly absurd, without merit and had no prospect of success, if it proceeded to trial.

[157] The particulars for breach of fiduciary in the guarantor suit, are the same as that for negligence and are particularized in the alternative. It was submitted by both claimants that the defendants owed a fiduciary duty to all its borrowers. In particular, they asserted that this loan was a "large loan" which was administered differently and that the defendants assumed a different type of liability because of the special LIBOR rates and responsibilities associated therein. In fact, counsel argued that it was Mr. Howell's evidence before this court that the lender bank would call and inform him how much to repay each month on the loans. Mr. Howell's further evidence was that he also relied on Mr. Billiard when the loans group entered the picture.

[158] Counsel submitted, strenuously, that Mr. Billiard was not simply an attorney acting in his office; he was billing a Jamaican bank and had direct relations with the lender banks. Mr. Billiard, they contend, not only expressed himself as counsel for RBC Canada, he was working for RBC Jamaica; a practice the claimants have asserted was not only improper but illegal, as Mr. Billiard was and is not licensed to practice in Jamaica.

The Analysis

[159] Where a bank gives a customer advice on his financial affairs it may give rise to several actions against the banks. The first may be an action with regards to the customer's contractual rights; secondly it may give rise to an action based on a common law duty of care; and thirdly it may give rise to a breach of fiduciary duty. See Halsbury Laws of England 4th Ed. 1989 Vol 3 (1) Banking Para 259.

[160] In the case of banker customer relationship the usual case is one where the bank is merely a financier, in which case it may have a keen self interest in the customer's business. The question would then become, when and if, in view of the banks own self-preservation and self-interest, it crossed over the line and assumed fiduciary responsibilities to its client.

[161] In **Bristol and West Building Society v Mothew** at 711-712 the English Court of Appeal considered the requirements for the equitable claim of breach of fiduciary duty. In defining the term the court said it was best to confine the term to those duties which were peculiar to fiduciaries, the breach of which would result in legal consequences different from the consequences resulting from other breaches. From this the court observed that not every breach of duty by a fiduciary was a breach of fiduciary duty. This definition may be circuitous but what is clear is that fiduciary relations must first exist before it can be breached and even if the fiduciary relationship existed and the fiduciary breached a duty it was not to be seen as inevitable that the duty which was breached was a fiduciary duty.

[162] The role of a fiduciary arises not from the status of the parties but from the circumstances of the relationship through which their actions flow. It is the fact that one party to the relationship assumed a responsibility to or for the affairs of the other which rendered them liable if they carelessly administered those affairs. There is a requirement of trust and confidence imposed on a fiduciary so that a person becomes a fiduciary when he or she or it undertakes to act for or on behalf of another in circumstances which give rise to a relationship of trust and confidence and there is reliance.

[163] A fiduciary is obliged to be loyal and act with fidelity. He is in breach if he is disloyal or acts with infidelity but not if he is incompetent. Therefore, a fiduciary may not act for two different principals, for then he runs the risk of disloyalty and conflict of interest. He may however, do so if he acquires the informed consent of both and even then he must still act in good faith in the interest of both. He cannot act to further the interest of one to the detriment of the other.

[164] Since no automatic fiduciary relationship exist between a bank and its customers, for this cause of action to have a real prospect of success the claimants would have to show at trial that the defendants were subject to fiduciary obligations in respect of them. They would have to show that the defendants had undertaken to act for and on their behalf in the matter of the loan in a manner giving rise to a relationship of trust and confidence. They must have come to expect a degree of loyalty from the defendants based on that relationship. The resulting consequence of such a relationship is that the fiduciary is expected to act in good faith, not make secret profits from his position of trust, must not have any conflict of interest and must not act for his own benefit or benefit of a third person without his principals informed consent. See Millet LJ in **Bristol and West Building Society v Mothew** at 711-712. Equitable relief is only available if, where the relationship of trust and confidence exits, it is abused.

[165] What have the claimants averred to have given rise to a fiduciary relationship between them and the defendants? The claimants point to the contractual relationship between themselves and the lender banks. There is no automatic fiduciary relation between banker and customer. The relationship of banker and customer does not generally give rise to a relationship of trust and confidence although the assumption of such a relationship may be proved as a fact in particular circumstances. See **National Commercial Bank (Jamaica) Ltd v Hew and Hew** [2003] UKPC 51 (30 June 2003) Privy Council Appeal No. 65 of 2002; **Financial Institutions Services Ltd. v Negril Holdings Ltd and another** [2004] 65 W.*R. 227* and

David Wong Ken and others v National Investment Bank Jamaica Ltd. [2012] JMSC 32 at Para 100. It follows therefore that RBC Canada would not have a fiduciary relationship with the claimants and neither would its employees in the special loans group, simply from the fact that the claimants were customers of the lender banks.

[166] There is also no evidence that there was a relationship of banker/ customer between RBC Canada and the claimants. There was no established special relationship between the claimants and the defendants and no evidence has been shown which could lead a trial court to such a conclusion. There are indeed some established relationships that give rise to a relationship of trust and confidence. For example an attorney-at-law and his client, trustee and beneficiary, agent and principal, employee and employer. There was no such relationship here. The claimants do not point to the nature of the relationship which gave rise to a fiduciary relationship and the breach of fiduciary duties and the court in looking at the factual matrix can find no circumstances which would give rise to a relationship of trust and confidence between the claimants and the defendants.

[167] In the case of Mr. Billiard there was no relationship between him and the claimants of whatever nature. His activities were conducted on behalf of those who hired him and not for the benefit of the claimants. His fiduciary relationship was with his clients and if he negligently advised them, then it was to them that he is liable.

[168] The question a trial court would have to ask is whether the defendants or any one of them acted as advisor to the claimants? The claimants have not shown on the evidence any proof or potential proof of any such advise being given. The second question would be whether the applicants or any one of them assumed the role of advisor in any matter in which the claimants placed complete faith, trust, confidence or reliance on them. There is again no evidence of this on the claimants' case. Neither claimant has shown by way of evidence any advice given to them in the arrangement of their commercial affairs by any of these defendants on which they relied. There is no evidence

that Mr. Howell asked for any advice or received any communication which he could have and did regard as advice. What the evidenced showed is that Mr. Howell and Ocean Chimo were advised as to the lender banks position on various matters and advised as to the actions the lender banks would likely take if certain things were done or not done.

[169] In **David Wong Ken** Sykes J in referring to cases such as **Commonwealth Bank of Australia v Smith** 42 FCR 390 and **Golby v Commonwealth Bank of Australia** 72 FCR 134, noted that to hold a bank liable for breach of fiduciary obligations something more was required. He helpfully reproduced a list of activities a bank may undertake which might suggest the existence of a fiduciary relationship. The list was reproduced from an article entitled *Investment Banks as Fiduciaries: Implications for Conflicts of Interest* written by Mr. Andrew Tuch and published in the Melb. U.L.Rev at 478. I do not think any harm will be done if I also reproduce it here. There Mr. Tuch stated:

> *"Financial advisory services involve all or some of the following activities: advising on the merits and wisdom of entering into the proposed transaction; providing valuation analyses for the proposed transaction; evaluating and recommending financial and strategic alternatives; advising as to the timing, structure and pricing of the transaction; analyzing and advising on potential financing for the transaction; assisting in implementing the transaction; assisting in preparing an offering document or other materials, as required; and assisting in negotiating and consummating the proposed transaction."*

[170] This list was made in the context of a bank providing financial and investment advisory services to a customer. There is no such evidence of that occurring in this case. Sykes J spoke to evidence of the bank acting as a "coach", "trusted confidant" such that the customer was in a position to rely on and act on the advice given. There is no evidence presented in this case that the defendants or any one of them acted as a coach, trusted confidant or trusted advisor.

[171] The claim by Mr. Howell that the defendants were in breach of their fiduciary duty in failing to notify Ocean Chimo of any change in the interest rate, is a matter of contract between Ocean Chimo and the lender banks and not only does not raise any fiduciary implications with the defendants but is also not a claim open to Mr. Howell in the guarantor suit since he was not a party to that contract. There was also no such duty owed to Mr. Howell under the contract of guarantee.

[172] As regards the meeting in Miami, the only question this raises is on whose behalf the defendants attended the meeting. Did they attend as agents of the bank or agents of the claimants? All the evidence presented thus far on both sides indicate without controversy that they were there as agents of the banks. How then would it fall on a court to find that their presence there and decisions made and activities arising from it, could possibly result in fiduciary duties towards the claimants?

[173] I am of the view that the duties which it was alleged were broken were born out of a contractual relationship. In **Bristol and West Building Society v Mothew** the court declared that it was wrong to import a breach of fiduciary duty into a breach of contract or tort.

[174] I cannot say that I am moved to agree with the claimants that there was a relationship of trust and reliance between the parties in relation to how the loan was administered. In fact, even Mr. Howell's evidence that he was informed of the monthly payments and that he placed much trust and reliance on the defendant Mr. Billiard, is a mere assertion and is not enough for a trial court to find that a relationship of trust and confidence existed. The fact that the type of loan and interest concerned necessitated the bank informing the borrower each month what to pay, if this was even proven true at trial could not cause a court to say that this inevitably meant that there was anything fiduciary with nature in respect to this.

[175] Certainly, neither the individual members of the special loans group nor Mr. Billiard could hold fiduciary duties towards Ocean Chimo or Mr. Howell in

the face of the relationship between the RBC Canada and its employees and agents respectively. Something more would have to be shown by the claimants which is absent from the evidence. This cause of action does not, therefore, attain the relevant threshold of reasonable prospect of success at trial in either suit.

[176] In respect of this cause of action, it is the court's finding that the relationship which existed between the defendants and the claimants did not fall within the scope or nature of a fiduciary relationship. Counsel for the claimants constantly asserted that if the matter went to the discovery stage this or that may pop up to make their case stronger. No court however, can be expected to act on something which is totally supposition and surmise and which in all probability will never happen.

The claim for fraud

[177] Fraud is alleged in both claims. It was submitted by the defendants that the particulars which are set out in the claim are not particulars of fraud even though the word fraud is used. The defendants submitted that the particulars pleaded are instead similar to that for negligence or breach of contract. Counsel submitted that the words "knowingly" and "intentionally" have simply been "sprinkled" into the particulars that allege fraud. Counsel submitted that an allegation of fraud however, connotes dishonesty and therefore, unless clear evidence of actual dishonesty was shown, the allegations of fraud were without merit and ought to be dismissed at this juncture.

[178] Counsel argued further that the allegations of fraud surround the increase in interest rates by the lender banks and therefore, the defendants having not been involved in the increase of interest rates, could not have acted fraudulently. In those circumstances, it was submitted by counsel that the allegation, as pleaded, has not attained the threshold of reasonable prospect of success at trial and ought to be struck out.

[179] The claimants in response argued that the basis of the cause of action of fraud rests on the allegations that RBC Canada in particular, because of its

size, power and influence in comparison with the claimant, caused the claimant to suffer great injury through the calculated actions of the other defendants. The claimants submitted that there were genuine issues to be tried as to how RBC Canada allegedly used its position as parent to the lender banks. Counsel submitted that the court needs only to look at the inconsistencies present in the supporting affidavits being relied upon, particularly between the affidavits of Natasha O'Neil, Petti-gaye Williams and the members of the loans group. It was submitted, that these inconsistencies in the evidence which the defendants rely on are reasons enough to refuse the applications. It was also submitted that the power that RBC Canada wielded over the claimants could not be dealt with on a summary basis. It was alleged that the defendants used and abused their power and influence in their relationship with the lenders and the debtor.

Analysis

[180] There is no generalized tort of fraud known to the common law. Fraud may refer to actual fraud in the sense of dishonesty or deceit or it may refer to equitable fraud in the sense of unconscionability**.** Actual fraud requires evidence of dishonesty and an intention to deceive. Evidence of gross negligence is not enough to establish actual fraud. Because actual fraud may take several actionable forms, the dishonesty relied on must be particularized. See **Armitage v Nurse** (1998) Ch 241 at 256-257 and Bullen and Leake and Jacobs Precedents of Pleadings 16th ed. Vol. 11.

[181] Fraud must be distinctly alleged and distinctly proved. In **Wallingford v Mutual Society** [1880] 5 App Cas 685 at 697 Lord Selborne LC noted that the settled principle regarding fraud is that it was insufficient to make general allegations of fraud no matter how strongly worded and a court will take no notice of such allegations. A very explicit case of fraud or facts suggestive of fraud must be stated. The language used must be unequivocal and not consistent with innocence, accident or negligence. The allegation of fraud must be supported by particulars.

[182] It is not open to the court to infer dishonesty from facts which have not been pleaded or from facts which have been pleaded but are consistent with honesty. The court cannot infer that innocent acts were done with fraudulent intent. An allegation of fraud must be proved to a high standard and there must be a clear and plain case in the face of a denial of all the allegations.

The Guarantor suit

[183] In the guarantor suit the claim is for damages for fraud and or negligence in the manner in which the defendants administered the affairs of the lender banks resulting in loss of valuable property belonging to the claimant. There is also a second particular of fraud, breach of fiduciary duty and or negligence. It was alleged that in furtherance of an improper objective which was to get Ocean Chimo to drop the suit filed against the lender banks, the defendants acted fraudulently to get Ocean Chimo to withdraw the suit.

[184] The particulars of the fraud alleged by Mr. Howell include knowingly instructing the lenders to increase the interest rates at a time when LIBOR was falling; causing the lenders not to notify the claimant of the increase in the interest rate; conspiring with the lenders to conceal the increases; conspiring with the lenders and intentionally failing to adhere to LIBOR so as to deprive the claimant of the benefit thereof, authorizing and instructing the lenders to place the Ocean Chimo in default and conspiring with the lenders to call the loan and the guarantee and appointing a receiver knowing that the increase in interest rates were unlawful and in breach of contract; intentionally conspiring with the lenders to apply a self imposed interest rate; intentionally causing lenders to call on the guarantee when it was clear that the calling was as a result of the defendant's malicious motive.

[185] Counsel for Mr. Howell contended that the allegations that the lenders were instructed by the defendants to maintain the unlawful interest rate even after it was clear to them that it was incorrect, raised the issue of fraud. The assertion therefore, is that the interest rates were fraudulently increased and that the increase was fraudulently maintained.

The Ocean Chimo suit

[186] In the Ocean Chimo Suit the same allegations are made, the basis of the allegations in the pleadings being the same as those made for negligence, breach of contract and breach of fiduciary duties. The gravamen of the charge of fraud is the increase in interest rates and the appointment of a receiver. In respect to this cause of action in the Ocean Chimo suit, the claim surround the defendants knowingly increasing interest rates at a time when LIBOR was falling; failing to notify of the increase in interest rate; concealing the increase intentionally failing to adhere to LIBOR in order to deprive the claimant of the benefit; authorizing and placing the claimant in default, calling in the loan and appointing a receiver/manager when they knew the increase was unlawful and intentionally applying a self-imposed interest rate.

[187] There is however, no evidence to support any of these assertions in either of these claims against the 3rd, 4th, 5th and 6th defendants. It has already been determined that they had nothing to do with the increase in the rates and the non adherence to LIBOR. In those premise, they would not have been in a position to notify anyone of those increases. There is no evidence that the defendants, as agents, instructed the lenders, as principals, to maintain the level of interest rate.

[188] On the lender banks case, the interest rate was changed when the alleged event default occurred and purportedly as of contractual right. Whether this was so or not is a matter to be determined by a trial court. Whether the increase was fraudulent, negligent, deliberate or accidental is not a question applicable to these defendants who were not in the picture when that took place. What is clear as at the present is that the particulars of fraud against the 3rd, 4th, 5th and 6th defendants have not been properly pleaded. I have considered whether an amendment would cure this defect but based on the state of the evidence against these defendants, even if amendments were to be permitted and made to the pleadings, there is no likelihood of this cause of action against these defendants in either claim having any real prospect of success at a trial.

[189] There is no evidential basis for a claim for equitable fraud, unconscionable bargain or unconscientious use of power against the 3rd, 4th, 5th and 6th, defendants and it was not pleaded although submissions were made on it. There is no evidence that the 3rd defendant forced the lender banks to call in the loan and appoint a receiver. I reject any notion by the claimants that this point cannot be decided on a summary basis. I will venture to attempt an adaptation of the words of the learned judge Millett L.J. in **Armitage v Nurse** at page 263 para E, that a charge of fraud against independent professional men acting as agents in the absence of some financial or other incentive, is inherently implausible.

The claim in negligence

[190] With respect to this cause of action as pleaded, the defendants submitted that they owed no personal duty of care to either Ocean Chimo or Mr. Howell particularly in relation to the application and notification of increases in interest rates which represents a significant base of the claimants' pleadings in negligence. Having not owed any such duty, the defendants submitted that this cause of action has no realistic prospect of success at trial.

[191] The defendants also submitted that the issues surrounding the Miami meeting did not come within the ambit of the law of negligence and should be dismissed. Counsel therefore submitted that there was no evidence presented which supported the allegations of negligence and in those circumstances the issue ought not to proceed to trial, as there was no real prospect of it succeeding.

The Guarantor suit

[192] The particulars of negligence given by Mr. Howell include ; authorizing and instructing the unlawful increase in interest rate in breach of the contractual guarantee with him as to how such increases would be calculated; without due regard to the interest of the claimant under the guarantee allowed and authorized the increases at a time when LIBOR was decreasing; failing to notify of the increases and the basis thereof; failing to ensure the lenders

adhere to LIBOR and passed the benefits to the claimant; recklessly introducing a condition after agreement was reached for extension of time to sell the hotel; causing or instructing the lender to appoint a receiver/manger for the hotel; recklessly relaying and communicating unsolicited information concerning Ocean Chimo and the claimant thereby frustrating a genuine refinancing offer; causing the lenders to apply a self-imposed interest rate thereby facilitating the calling of the claimant's guarantee.

[193] The defendants sought to explain the connection between Mr. Howell, Ocean Chimo and its parent company during the course of these applications. What can be gathered and perhaps what the defendants wished to impress upon this court, is that Mr. Howell was not even a direct shareholder of Ocean Chimo Ltd. It was submitted that Ocean Chimo Ltd is owned in its entirety by Ocean Bay Ltd, a Bahamian company which has 80% of its shares owned by FFC Ventures Ltd, a Caymanian company which is owned or controlled by Mr. Howell. Counsel for the defendants therefore submitted that, Mr. Howell's claim has no real prospect of success, as he is in no position to properly ground the claims he has advanced.

[194] In fact, it was submitted that a shareholder cannot bring proceedings to recover losses of the company of which he is shareholder even if by virtue of the losses his shares are diminished in value. His loss in value of his shares is merely reflective of the losses of the company. If a shareholder cannot do it, then Mr. Howell, who happens to be a shareholder of FFC Ventures Ltd. which owns 80% of Ocean Bay Limited, which wholly owns Ocean Chimo Ltd., cannot do it. Counsel placed reliance on the House of Lords decision in **Johnson v Gore Wood** [2001] 1 All E.R. 481 as also the case of **Stein v Blake** & ors [1998] 1ALL ER 724 which it submits are instructive.

[195] The principles outlined in those case are that; (a) where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss; (b) a party should not be allowed to recover losses that another party had suffered; (c) if the loss claimed was merely a reflection of

the company's loss it should not be recoverable by a shareholder; (d) the principle of company autonomy should be respected; (e) the court should ensure that a company's creditors were not prejudiced by the actions of shareholders; (f) a shareholder may only sue for loss reflective of a company's loss if the company has no cause of action to do so but the shareholder does; and (g) If the company and the shareholder both suffer loss separate and distinct from each other both may sue on their own independent cause of action but neither can recover for loss caused to the other.

[196] The defendants contended that the losses pleaded in the guarantor suit would be losses incurred by Ocean Chimo and not by Mr. Howell in either his personal capacity as a shareholder or as guarantor for the loans. It is for this reason that the defendants seek summary judgment on that point as they urge the court to accept that there is no real prospect of successfully advancing this claim.

[197] Rather late in the day and over the objections of claimant's counsel, counsel for the defendants pointed the court to the case of **Mauri Garments Trading and Marketing Limited v Mauritius Commercial Bank Limited** [2015] UKPC 14, a judgment of the Privy Council which was delivered in the Hillary term. Despite counsel's objections however, I allowed it because it was not delivered until after the hearing was over and counsel for the claimant had adequate time to respond and did so fulsomely.

[198] The essence of the judgment is that the contract of indemnity is a separate and distinct contract from the contract of sale and was between different parties so that there can be no cross pollination giving rise to a claim in tort by a party to the contract of sale. The Privy Council in fact stated that:

> *"Where parties have, as here, entered into carefully structured contractual arrangements, involving two separate autonomous contracts each between different parties to the other, it is impossible for the law to recognize tortuous duties outside and cutting*

and cutting across the terms and performance of those contracts."

[199] The Privy Council held that the issue was one of law as to whether the bank under its contract of indemnity was liable to a claim in tort to prevent it from claiming its indemnity from a party to the underlying contract based on the banks knowledge of the state of account between the parties to the underlying sale and purchase contract. The answer was in the negative. Counsel for the claimants contended that the situation in the above case is different as the terms of guarantee were impacted and varied by the course of dealings between the defendants and the Mr. Howell and the parties had direct legal obligations to each other. Counsel for Mr. Howell also alleged that the course of dealings gave rise to certain duties on the part of the defendants which were breached.

[200] The essence of that decision is the recognition that, as in this case, the guarantor cannot claim for tortuous wrongs under a contract between lender and borrower and vice-versa. So the fact that the guarantor happened to be the chairman and CEO of the borrower is irrelevant to any assumption of tortuous duty to him arising from the contract between the borrower and the lender.

The Ocean Chimo suit

[201] The particulars of negligence in this suit include; the authorizing of and the increases in the interest rates without lawful justification and in breach of contract; doing so when LIBOR was decreasing which the defendants knew or ought to have known; failing to notify the claimant of the increases and the basis or bases of such increases; failing to adhere to LIBOR and to pass the benefits thereof to the claimant; wantonly and recklessly introducing a condition after agreement without regard to the claimant's legitimate expectations and appointing a receiver thus frustrating the sale of the hotel; wantonly and recklessly communicating to a third party bank unwarranted and unsolicited information concerning the claimant and its principal officers thereby frustrating a refinancing offer and carelessly and arbitrarily applying a

self-imposed interest rate without regard to the detrimental effect on the claimant.

[202] To ground the cause of action of negligence, both claimants pointed to the manner and fact of the increase in the interest rates. Counsel submitted that both Ocean Chimo and the guarantor should have been informed of the default and subsequent increase in the interest rate and the lender banks had the obligation or duty to inform the claimant Mr. Howell so that he could take steps to remove the 'cloud' from over his head, especially before the debt ballooned out of control.

[203] Counsel submitted that RBC Canada, who was the parent of the lender banks, must have known about this large loan and debt and had an obligation to notify Mr. Howell and not let the loan balloon out of control. Counsel for Mr. Howell in particular, submitted that RBC Canada knew and was in touch with him and should have informed him and therefore cannot take a "hands-off" approach as there was a voluntary undertaking of responsibility.

[204] It was argued therefore, that in the circumstances, this court should allow these issues to be ventilated at trial and not allow the case to be shut out at this stage. In fact, they contended that at this stage when we were still uncertain as to the relationship between RBC Canada and the lender banks, because the affidavits have not disclosed the exact parameters of this relationship, it was important that the court should look at how the defendants carried out their duties as bankers at a trial. They further asserted that upon the evidence before the court, they had a real prospect of success at trial.

[205] They relied on the reasoning in the case of **Customs and Excise Commissioners v Barclays Bank plc** [2006] UKHL 28 where the head note reads:

> *"That the test used in considering whether a defendant sued as causing pure economic loss owed a duty of care disclosed no single common denominator by which liability could be determined and the court would focus its attention on the detailed*

circumstances of the case and the particular relationship between the parties in the context of their legal and factual situation taken as a whole".

Analysis

[206] The starting point of this analysis is the decision of the House of Lords in **Hedley Byrne & Co. Ltd v Heller & Partners Ltd.** [1964] A.C. 465. That case established the principle that in certain particular instances a duty of care may arise from words spoken or actions in respect of pure economic loss. The principles outlined in the speeches of the Law Lords in that case may be summarized thus:

X. If a person possessed of a special skill undertakes to apply that skill to assist another person who relies on that skill, a duty of care will arise.

XI. If a person gives advice or information to or allows such advice or information to be passed on to another who he knows or ought to know will rely on it in circumstances where the advisor is in such a position that others could reasonably rely on his judgment, skill or abilities to make careful inquiry, a duty of care will arise.

XII. Special relationships which may give rise to a duty of care is not only restricted to contractual relationships but also includes relationships where there is an assumption of responsibility, in circumstances where but for the lack of consideration there would have been established a contract.

XIII. In that regard there may be an expressed undertaking or warranty or an implied undertaking or warranty.

XIV. It is a responsibility that is voluntarily accepted or undertaken generally in a general relationship such as banker/customer, solicitor/client or specifically in relation to a particular transaction.

XV. If a service is performed, even if performed gratuitously, an action in tort may succeed if it is performed negligently.

[207] For the claimants to succeed in a claim for negligence in this suit against these defendants they would have to prove at trial that the defendants had a duty or assumed a duty of care towards them and that there was a breach of that duty; what that or those breaches were and that as a result of

the defendants breach they suffered loss. They would also have to show that the defendants acted or omitted to act in a manner which was below the required level of competence expected of ordinarily skilled men exercising and professing to have that special skill.(See **Royal Brompton Hospital NHS Trust v Hammond (No 5**) [2001] EWCA Civ 550.

[208] In the particular circumstances where there is not a duty of care under the **Donoghue v Stevenson** good neighbour principle and there is no concurrent contract between the parties, to hold the defendants liable in the tort of negligence for pure economic loss it must be shown that they fell into one or more of the categories of tests of duty of care (see **Customs and Excise Comrs v Barclays Bank plc**). The first test is whether they had assumed personal responsibility so as to create a special relationship between them and the claimants.

[209] The claimants would have to show by objective evidence, things said or done by the defendants which could amount to such an assumption of responsibility and that the claimant could reasonably have relied and did rely on such assumption of responsibility. See also **Williams v Natural Life Health Foods Limited** [1998] 1W.L.R. 830, where it was held that to establish the personal liability of a director or employee there had to be an assumption of responsibility such as would create a special relationship between the parties; the test being an objective one.

[210] The assumption of responsibility test being the most applicable in this case, I need not mention the other two which refer to proximity and forseeability and the incremental test. In any event, if there is found to be an assumption of responsibility it would provide the necessary proximity and forseeability. Therefore, the claimants would also have to show that the defendants, while operating as members of the special loans group had assumed responsibility towards them giving rise to a relationship which created a duty of care towards them to apply their skill for their benefit so as not to cause them loss.

[211] See also the case of **Sealand Pacific Ltd v Robert C. McHaffie, Ocean Construction Supplies Ltd** [1974] Carswell BC 229; 6 W.W.R 724. In that case it was held that an employee by his act or omission which results in his employer breaching a contract may also result in a personal liability but only if that employee was also in breach of a duty of care towards the third party independently of the contract. This case made it clear that the duty in contract owed by a company cannot be imposed on an employee as a duty in tort.

[212] The affidavit evidence from either side does not suggest the defendants were acting in their personal capacity or held themselves out at any time as accepting a personal commitment to the claimants. They worked for the RBC Canada and were agents of the lender banks, thus their duty was owed to the banks and not the claimants. They did not undertake to the claimants to apply their skill for the benefit of the claimants. Even if RBC Canada (for argument sake) owed a duty in tort to the claimants it is not a duty that can be transposed unto its employees or agents unless they themselves assumed a responsibility independent of their contract of employment or agency to RBC Canada.

[213] There is no affidavit evidence on either side that the loans group or Mr. Billiard assumed any responsibility towards the claimants' interest. The pleadings also do not contain any averments of facts capable of supporting that conclusion. It is unclear what exactly Mr. Billiard for example was supposed to have been negligent about, in terms of how that word is defined, in respect to professional men, or what responsibility he assumed towards the claimants.

[214] Reliance would also have to be proved. Mere assertion of reliance is insufficient. If reliance is not proved then the causative effect goes through the window. In this case there is no evidence other than bare assertion that there was reliance. The test for reliance is reasonableness, that is, whether the claimants could reasonably rely on an assumption of personal responsibility by the person who performed the services on behalf of the

principal, employer or company. See **Edgeworth Construction Ltd. V N.D. Lea & Associates Ltd** [1993] 3 S.C.R. 206 applied in **Williams v Natural Life Ltd**.

[215] Since there is no just and reasonable policy consideration for imposing an additional duty of care, whether incrementally or otherwise, the primary focus of the enquiry is on whether there exists anything said or done by the defendants or on their behalf in their dealings with the claimant which would suggest an assumption of personal responsibility and reliance by the claimants.

[216] The claimants have sought to rely on the ruling in **Henderson v Merrett Syndicate Limited** [1995] 2 AC 145. However, that case had to do with contracts of agency and sub-agency with named principals, in which the agents were held liable to the principal in tort with who they had a direct contract and also liable in tort to principals for whom they had sub-contracted the agency activities. The decisions still rested on the **Hedley Bryne's** principle of assumption of responsibility. The court in **Henderson** was also at pains to indicate that the situation was highly unusual and cannot be cited as a general principle that sub-agents will always be directly liable to the agent's principal in tort.

[217] This cause of action against all three defendants has no likelihood of success. There is no allegation that RBC Canada, the members of the loans group or Mr. Billiard undertook any responsibility towards the claimants for which they were required to act with skill and care. Neither is there any evidence that they were the agents or sub-agents of the claimant's. Neither was there any contract between the parties from which the court could imply any term to exercise due skill and care.

[218] The particulars of negligence averred by the claimants relate to the increase in interest rates and the failure to notify of the increase. Again this was done by the lender banks. There is no evidence of any duty under a contract or any independent duty of care in tort on the part of these

defendants to notify of the increase in interest rates or any evidence of any duty to ensure that any increase by the lender banks was done lawfully.

[219] The claimants also raised the consequences of the Miami meeting to ground the claim in negligence. However, it seems to me that the claimants base their claim on the fact of an agreement arising out of the Miami meeting and the defendants having breached that agreement. Unless there was a concurrent duty then even if there was a breach, it was not a negligent breach but a breach of contract. Whilst there can be a concurrent breach of contract and tortuous liability, the claimants would still have to past the hurdle of establishing a duty of care arising from the alleged agreement coming out of the Miami meeting. It is that which would attract a tortuous liability to the defendants. In **Sealand of the Pacific Limited** Seaton J.A. giving judgment in the British Columbia Court of Appeal explained it this way; he said;

> *"An employee's act or omission that constitutes his employers breach of contract may also impose a liability on the employee in tort. However, this will only be so if there is a breach of a duty owed (independently of the contract) by the employee to the other party. Mr. McHaffie did not owe the duty to Sealand to make inquiries. That was a company responsibility. It is the failure to carry out that corporate duty imposed by contract that can attract liability to the company. The duty in negligence and the duty in contract may stand side by side but the duty in contract is not imposed upon the employee as a duty in tort."*

[220] As for the allegations that they interfered with the claimants attempts at refinancing, again without a duty of care existing this cannot fall to be determined under the law of negligence.

[221] In respect to the guarantor suit, I cannot say that I find merit in the contention that the defendants were negligent in not informing the guarantor of either the increase in the interest rates or not informing the guarantor that the loans were in arrears. Mr. Howell has not shown where such a duty would arise or even more importantly, that it has any real prospect of success. Counsel relied on the case of **Thomas v Nottingham incorporated Football**

Club [1972] Ch 596, and on an extract from **Lingard's Bank Security** Documents pages 327-329**.** In my view, the **Thomas** case is not applicable to the instant case and is easily distinguishable.

[222] The principle from the **Thomas** case is that a guarantor is entitled to require the debtor to pay off the debt once it becomes due regardless of whether the creditor made a demand for repayment from the debtor. The principle in **Lingard** on the rights of the guarantor begins with the assumption of law that a bank is under a duty not to prejudice the rights of a guarantor. But what are those rights and when are they prejudiced? The guarantor has a right to be indemnified by the principal debtor, a right to contribution by any other co-surety and a right to the security once he has met his obligation under the guarantee in full. Neither **Thomas case** nor **Lingard's** is an authority for any requirement for the creditor to notify the guarantor of default by the debtor in making the payments.

[223] There may well be a duty to make a demand on the borrower once he is in default and not wait until he is a bankrupt and then make the demand on the guarantee in an attempt to recover from him; for in that case the bank may be held to have deprived the guarantee of his rights against the borrower by its failure. Nothing in the **Lingard's** or **Thomas case** indicates any obligation on the part of the creditor to notify the guarantor of the debtors default. If the intent of counsel is to have the court make a leap from the principle in **Thomas** that the guarantor is entitled to bring proceedings against the principal debtor to have the debt paid off once it becomes due, to a principle that in order that the guarantor may so exercise that right the creditor must inform him of the debtors default, it is not one that a court can make.

[224] Although the surety is entitled to "remove the cloud" hanging over him, there is no duty in the creditor to notify him of the need to do so. I also agree with the defendants that the claimant Mr. Howell has not pleaded a failure to notify him of the default. It is also a curious claim by Mr. Howell as the guarantor, since he was also the chairman and chief executive officer of the borrower and should know it was in default. Mr. Howell also claimed the bank

failed to inform him of the increase in interest rate, although he, as chairman of the borrower, wrote to the bank with respect to the increase in the rates a mere 22 days after the rate was increased. The claim by Mr. Howell of not being informed of the increase in rates is at best artificial. He relied on the case of **Van Wart v Wooley** 3 B. & C. 439 and the decisions cited therein for the proposition that the defendants were in breach for want of notice.

[225] The first case was an action by an agent of a disclosed principal against his own bankers who he employed to present a bill, for failing to give notice to him that the bill drawn in his favour by his principal on the drawer bank was dishonoured on presentation by his bank to the drawees. This failure to notify him delayed his action against the principal and the drawer before the drawers became bankrupt. It was held that the bank he employed was negligent and liable to him in damages.

[226] In the course of argument the situation of the agent's principal was likened to that of a guarantee of the bill. The court went on to consider the cases brought against a guarantee in such situations. The court held from the decisions cited that it all depended on the nature of the transaction and the circumstances of the particular case. In one case payment was not demanded from the guarantee until many months after the bill was dishonoured and no notice of the dishonour was given to the guarantee of the bill until the drawers and acceptors became insolvent. Under those circumstances, because the necessary steps were not taken to obtain payment before bankruptcy the court held the guarantee to be discharged. See (**Phillips v Astling** (2 Taunt. 206)).

[227] On the other hand, in circumstances where the acceptors were insolvent before the bill fell due, it was not presented for payment when due, neither was any notice of non-payment given to the guarantee although he was asked to accept a new bill and refused. The bill would not have been paid if presented and the guarantee suffered no loss. In those circumstances the court refused to discharge the guarantee: (**Holbrow v Wilkins** (1 B. & C. 10).

[228] Incidentally, in the contract of guarantee signed by Mr. Howell he waived the requirements for the banks to proceed against the borrower in the event of default before proceeding against him. He also waived his rights as surety whether at law or in equity that may be inconsistent with the rights of the banks to enforce the guarantee. There is no clause in the guarantee for the notice averred in the claim to be given.

[229] Any notice Mr. Howell was entitled to as guarantor if any, would be notice of the default in payment by the borrower as a result of which he would have lost his right against the borrower to have the borrower pay up the debt. In any action for want of notice he would have to prove loss as a result of the failure to notify, as he, being chairman and CEO of the borrower was in a position to know and did know without such notification being made. The trial court would have to determine in those circumstances whether the demand for payment made by the lender banks for the arrears in interest payment was in any event sufficient notice to the guarantor who was chairman and CEO of the borrower that it was in default. No court could justifiably state that it would be fair, just and reasonable to impose a duty of care to notify in circumstances where the party already knew or ought to have known.

[230] Counsel for Mr. Howell also relied on the Mercantile Amendment Act, s. 4 but this deals only with the right of the guarantor who has paid off the debt to be indemnified by the borrower and to have his claim against the borrower subrogated to the creditor's claim, with an entitlement to the security documents in the creditors hands.

[231] In absence of any general principle in the law of tort for notification to the guarantor that the debtor was in default or that there was an increase in interest rate, it becomes a matter of contract. There was no contractual term for such information to be given. No liability in tort can arise from a breach where no such duty exists in law.

[232] The claimant Mr. Howell also relied on the decision in **Henderson v Merrett Syndicates Ltd** but as Lord Hoffman stated in that case a duty of

care generally arises from something the defendant decided to do the general principle being the law does not impose tortuous liability for mere omission.

[233] In any event, these defendants as agents of the lenders had no personal duty to notify and therefore cannot be held liable. The threefold test and the incremental test outlined in the case of **Custom and Excise v Barclays** if applied takes the claims no further.

Loss of Reputation

[234] Both claimants allege loss of reputation. In the Ocean Chimo suit it is alleged that its reputation in the community had been severely damaged by the fraudulent and malicious actions of the defendants; that it has lost the ability to enter into business relations because of damage to its reputation and that being forced into receivership affected its reputation adversely.

[235] The defendants submitted that in respect to this cause of action, the case of **Lonhro plc et al v Fayed et al (No. 5)** [1994] 1 All ER 188 is instructive. In that case, an amendment was sought by the claimant where an action for conspiracy to injure was pleaded. Counsel pointed out that the Court of Appeal held that damages to reputation could only be recovered in defamation actions. It therefore, followed that any claim for alleged damages to the claimants' reputation in this current suit has no real prospect of success.

[236] Counsel submitted that one factor which this court may be minded to consider was the bona fides of the actions. Counsel submitted that this court ought to take a critical look at the evidence before it and ought not to send the claims and or issues joined to trial simply because there are disputes as to facts. Therefore, where a case is implausible or incredible, the defendants argued that the court should be minded to grant summary judgment. They asked the court to find that the evidence adduced by the claimants has not been credible and does not surpass the threshold for having the claims proceed to trial. In concluding on this issue, counsel argued that the claims on a whole were fanciful and without real prospect of success. Indeed, counsel

pointed out that the only aspects of the claims which should proceed to trial were in respect to the disputes between the claimants and the lender banks.

Analysis

[237] By virtue of the authorities it would appear that damages for loss of reputation are only recoverable in a defamation suit. As noted in **Lonrho plc et al v Fayed et al** damage to reputation carries certain connotations and is in a field of its own, with established principles which could not be side stepped by alleging a different cause of action. Neither could it be allowed as a parasite to the recovery of damages for pecuniary losses.

[238] As was noted in that case also, justification/truth was an absolute defence to a claim for defamation. Where there was a combination to tell the truth about a claimant that destroyed his undeserved reputation, if he were allowed to recover damages for pecuniary losses in a claim for conspiracy on that basis, then to tell the truth would be found to be wrongful. This would be the inevitable result if injury to reputation were allowed to be claimed in a lawful conspiracy suit or as in this case a loss of reputation suit.

[239] The gravamen of Mr. Howell's claim is that because of the actions of the defendant he has suffered loss of valuable property (that is the hotel). However Mr. Howell has no locus standi to bring such a claim in his personal capacity or as a guarantor. A shareholder cannot bring action to recover losses suffered by a company. Only a company can do so. See **Johnson v Gore Wood &Co 2001 1 All ER 481 and Stein v Blake et al** [1998] 1 All ER 724.

[240] Mr. Howell personally guaranteed the loan to Ocean Chimo but has not suffered any loss under the guarantee since the call was made to him to pay up under the guarantee and he ignored it. No payments were made and therefore no loss was suffered. This cause of action must also fail in the face of the absence of evidence to substantiate any pleaded losses.

[241] No evidence was put forward in this regard upon which it could even be inferred that the claimants have any real prospect of success. Again in **Lonhro plc et al v Fayed et al** it was stated at page 210, (and since I cannot improve upon the statement I will quote it in full), that;

> *"Unless the plaintiffs allege and prove the kind of damage which forms part of the factual situation giving rise as a matter of law to the cause of action upon which they rely, then their claim will fail; and unless they allege such damage, their claim in my judgment can be struck out at the preliminary stage".*

The Claim for Unjust Enrichment

[242] Ocean Chimo alleged that the 3rd defendant, along with the lender banks, received the benefit of the earnings of the hotel unjustly and at the expense of the claimant. That they unjustly enriched themselves by placing the claimant in default of the loan and calling in the loan and by appointing a receiver manager in order to unjustly benefit and profit from its loss of the hotel. It also asserted that the 3rd defendant's motive in refusing the cheque payments made by Ocean Chimo was due to a motive of unjust enrichment.

[243] Ocean Chimo is thereby alleging that RBC Canada was unjustly enriched by the earnings of the hotel and the proceeds of the sale of the hotel. This claim for unjust enrichment is bound to fail. There is no evidence to support it, no evidence from which such a thing could be inferred and no likelihood that any such evidence will turn up at trial. The earnings of the hotel would obviously have gone to the owners of the hotel prior to receivership and after receivership it would have gone to pay the debts of the company in receivership. Any surplus would go to the owners of the hotel. There is no evidence that after the sale and distribution by the receiver there was a surplus retained by the 3rd defendant.

[244] In **Fashion Gossip Limited v Espirit Telecoms UK Limited and others (**unreported case No. QBENI 2000/0229/A2) delivered July 27, 2000 in the English Court of Appeal, it was noted that the essence of the principle of unjust enrichment is that it was unjust for a person to retain a benefit which he has received at the expense of another without any legal basis for retaining

that benefit. There is no evidence that these defendants were unjustly enriched in the manner claimed. This cause of action against the 3rd Defendant or any one of them is not sustainable and has no real prospect of success.

Estoppel

[245] Counsel for the claimants cited the case **ING Bank NV v Ros Roca SA** [2011] EWCA Civ 353, a case dealing with the construction of a contract and estoppel by conduct. Though submissions were made based on estoppel, it does not form part of the pleadings in either case. However, suffice to say there is no material upon which a court could find the existence of any basis to make a finding on estoppel, notwithstanding the dicta in paragraph [112] of the judgment in **ING Bank NV v Ros Roca SA**.

Conclusion

[246] The application for summary judgment was properly made as it prayed for judgment on the entire case and not on any particular issue. It would have been completely impractical and unnecessary for the applicants to list all the issues in the case which they required the court to make a determination on. The issue for the court to determine is whether there is any merit in these claims and that is no different from a determination as to whether the claims have any real prospect of success. It is not in every case that the failure to list the issues to be determined will be considered fatal. The circumstances of every case must be considered on its own merit. Once the claimant has indicated that the claim has no real prospect of success, if the affidavit in support of the notice clearly specifies the grounds for so stating, then that is sufficient indication. This is not inconsistent with the reasoning in **Margie Geddes** which is distinguishable from the facts in this case.

[247] Despite the appearance of conflicts in the evidence, this was a case which was amenable to summary judgment. The issues raised in the claim separate and apart from the facts pleaded in the statement of case are all covered by authority and are all hopeless against these defendants. I have considered the body of evidence presented in these proceedings and it is

plain that there is no real prospect of success against any of these defendants. There was very little reason for this court to determine much of the conflicts in the evidence because I found that even if the claimants were to succeed in proving all the facts alleged in the claim I have no doubt they still would not succeed against these defendants on those facts. It was clear that the pleaded claim and the evidence in support did not make out a case against the defendants with respect to negligence, breach of contract, fraud, conspiracy to interfere with business relations, loss of reputation, breach of fiduciary duties or unjust enrichment.

[248] There were no novel or new points of law in this case contrary to counsels' claims and it would not be fair to either side or consistent with the overriding objective to allow the claimant's to go to trial to "try a thing" and see what emerges.

[249] There can be no doubt in looking at the claimants' statement of case that there was a desire to convert what is clearly a straightforward case between the claimant borrowers and the defendant lenders into a personal action against the agents and employees. There is no evidence that these defendants were acting outside of their position as employees and agents. The actions of these individuals were not unlawful on the face of it, they are not parties to any contract with the claimants, they have no personal obligations to the claimants and no basis in law for a tort of conspiracy has been established against them.

[250] The 3rd defendant was entitled to act as agent to its subsidiary without incurring liability to itself, unless it stepped out of the role of agent and assumed liability to the claimants. The employees were merely the instruments through which the 3rd defendant carried out its actions. They, the employees are themselves mere creatures of instructions, subject to lawful orders. They had no privileged positions, power, authority or control over the 3rd defendant or lender banks and are not independently liable for any actions carried out in the course of their employment or agency. The same applies to the 4th defendant as external counsel and agent.

Orders

[251] It is hereby ordered that:

1. Paragraph 4 of the affidavit of Barbara Hume filed September 16, 2014 beginning at “I was”… and ending at “Mr. Howell” is struck out.

2. The 3rd, 4th, 5th and 6th defendants’ application by way of Notice of Application for Court Orders filed November 5, 2013 in Claim No. 2010 HCV 02413 is granted.

3. There be summary judgment for the 3rd, 4th, 5th and 6th defendants in Claim no. 2010/HCV02413.

4. The costs of this application to the defendants to be agreed or taxed.

5. The 1st, 2nd, 3rd and 4th defendants’ application by way of Notice of Application for Court Orders filed November 5, 2013 in Claim No. 2012 HCV 006552 is granted.

6. There be summary judgment for the 1st, 2nd, 3rd and 4th, defendants’ in Claim No. 2012 HCV006552.

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7. The cost of the claim and the cost of this application to the defendants to be agreed or taxed.