[2021] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 123 & 124/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**DELROY HOWELL**	**APPELLANT**
AND	**ROYAL BANK OF CANADA**	**1ST RESPONDENT**
AND	**SAMUEL BILLARD**	**2ND RESPONDENT**
AND	**RAYMOND CHANG**	**3RD RESPONDENT**
AND	**GREG SMITH**	**4TH RESPONDENT**
AND		
BETWEEN	**OCEAN CHIMO LIMITED**	**APPELLANT**
AND	**ROYAL BANK OF CANADA**	**1ST RESPONDENT**
AND	**SAMUEL BILLARD**	**2ND RESPONDENT**
AND	**RAYMOND CHANG**	**3RD RESPONDENT**
AND	**GREG SMITH**	**4TH RESPONDENT**

Ransford Braham QC instructed by Braham Legal for Delroy Howell

Roderick Gordon and Miss Kereene Smith instructed by Gordon|McGrath for Ocean Chimo Limited

John Vassell QC, Mrs Julianne Mais-Cox and Mrs Trudy-Ann Dixon-Frith instructed by DunnCox for the respondents

4, 5, 6, 7, 8, 25, 27 February 2019 and 26 March 2021

PHILLIPS JA

[1] This consolidated appeal challenges the decision of Edwards J (as she was then), given on 18 November 2015, granting summary judgment on two separate claims filed by Ocean Chimo Limited (Ocean Chimo) and Delroy Howell against the Royal Bank of Canada (the RBC), Samuel Billard, Raymond Chang, and Greg Smith (the respondents). The learned judge found that the claims made by Ocean Chimo and Mr Howell against the respondents regarding negligence, breach of contract, fraud, conspiracy to interfere with business relations, loss of reputation and breach of fiduciary duties were hopeless, without merit and devoid of any real prospect of success. Ocean Chimo and Mr Howell contend that the learned judge had erred in making that finding and she had also erred in her interpretation and application of Part 15 of the Civil Procedure Rules (CPR); in her understanding and application of principles relative to summary judgment applications; and her assessment of the law and evidence before the court.

Background

[2] In August 2005, RBTT Bank (Jamaica) Limited and RBTT Bank Limited (the lender banks) granted a loan to Ocean Chimo in the sum of US$20,000,000.00, which was increased to US$32,000,000.00 in April 2008. The loan was secured by, inter alia, a mortgage over property located at 77 Knutsford Boulevard, Kingston 5 (the Hilton Hotel, as it was then); a debenture over Ocean Chimo's fixed and floating assets; and an assignment of peril insurance and income payments to the lender banks. Mr Howell, Ocean Chimo's chairman and director, guaranteed the loan. Commitment letters were

issued (dated 2 August 2005 and 18 April 2008) and the parties executed loan agreements (dated 16 September 2005 and 28 April 2008).

[3] The lender banks claimed that the loan was in arrears, and so they effected a provision, contained in Ocean Chimo's commitment letter, which enabled them to increase the applicable interest rate. Ocean Chimo denied the lender banks' claim that it was in arrears and stated that they were wrong to increase or vary the interest rate. Thereafter, several disputes ensued between the lender banks and Ocean Chimo. The inability to solve those disagreements led to the filing of two claims.

[4] The first claim was filed by Ocean Chimo against the lender banks on 27 May 2010. It sought, inter alia, an injunction restraining those banks, their directors, servants, or agents from appointing a receiver until the final determination of the action; damages for conspiracy to interfere with business relations; and costs. That claim was amended and filed on 8 June 2010 to include orders for various declarations. The final amendment to Ocean Chimo's claim form was filed on 30 November 2012. It changed the names of the lender banks to RBC Royal Bank (Jamaica) Limited and RBC Royal Bank (Trinidad and Tobago) Limited. Ocean Chimo also included the RBC as the 3rd defendant and Messrs Billard, Chang and Smith as the 4th, 5th, and 6th defendants (the respondents in this appeal). It was generally agreed that the RBC is the parent company of those subsidiary banks. Messrs Chang and Smith were referred to as employees of the lender banks, and Messrs Billard, Chang, and Smith as the servants and/or agents of the RBC and the lender banks. Ocean Chimo sought the following orders:

"1. Damages for fraud and/ or negligence arising out of the manner in which the [respondents] administered and conducted the affairs of the [lender banks] which resulted in the loss of the valuable property belonging to [Ocean Chimo].

2. Damages for Breach of Contract and/or Unjust Enrichment.

3. Damages for conspiracy to interfere with business relations.

4. Damages for loss of reputation.

5. Damages for breach of fiduciary duty.

6. Aggravated Damages.

7. Exemplary Damages.

[8.] Costs and attorneys-at-law fees.

[9.] Such other relief as this Honourable Court may deem just." (Underlined as in original)

[5] The second claim was filed on 26 November 2012 by Mr Howell against the respondents to this appeal. In that claim, Mr Howell sought damages for, inter alia, fraud and/or negligence (save and except against RBC); conspiracy to interfere with business relations; loss of reputation; and breach of fiduciary duty. Mr Howell made claims similar to those in Ocean Chimo's action, only he did so in his capacity of guarantor of the loan granted 28 April 2008. He claimed that on the basis of trust and reliance between himself and the respondents in the administration of the loan, they owed him a duty as guarantor of the loan.

[6] In response to the claims filed by Ocean Chimo and Mr Howell, the respondents filed notices of application for summary judgment in both claims on 5 November 2013.

They sought orders requesting that summary judgment be entered against Ocean Chimo and Mr Howell, respectively, in their favour and costs. The sole ground of those applications was that Ocean Chimo and Mr Howell had no real prospect of succeeding in their respective claims against the respondents.

[7] There were several issues raised on the pleadings and affidavits filed in support of and in opposition to the claims and the applications for summary judgment. However, in an effort not to make these reasons for judgment longer than they appear that they may ultimately be, I intend only to refer to, highlight and comment on those aspects that appear relevant and important for the purposes of the determination of the applications, and consequently, the appeal.

The case for Ocean Chimo and Mr Howell

[8] In the claim by Ocean Chimo and that of Mr Howell, the contention was that at no time in June or October 2008 was Ocean Chimo's payment on principal or interest outstanding. In fact, the increased charges of interest stated in the pleadings were done in breach of the loan documents and without any notification to Ocean Chimo or Mr Howell as guarantor. There were particular provisions in the loan agreement requiring the lender banks to advise Ocean Chimo of any increase or modification to the interest rates. Ocean Chimo claimed the loan had been disbursed late (in three tranches on 15, 16 and 22 May 2008), in breach of the loan agreement, and excessive charges had been debited from Ocean Chimo's account. The lender banks, they contended, had failed to comply with the strict terms of the loan agreements which was agreed in good faith. To

the contrary, the lender banks had acted unlawfully and arbitrarily and sought to profit from their actions undertaken in bad faith.

[9] Ocean Chimo and Mr Howell claimed that the respondents had negligently and fraudulently conducted the affairs of the lender banks in relation to Ocean Chimo's loan. The respondents had never given Ocean Chimo or Mr Howell an account of how the sums paid on the loan had been applied and so the parties were uncertain as to whether the sums had been applied to interest or principal.

[10] Complaints were made regarding the interest rate on the loan. The interest rate on the loan was based on the London Interbank Offer Rate (LIBOR) of 2.64% plus a fixed spread of 4.5%, thus making the overall interest rate payable on the loan 7.14% per annum. Without consultation or notification, immediately after the commitment letter was issued and the loan was disbursed, the interest rate was increased to 7.39% in May 2008, and then further increased to 9.25% in December 2008. This resulted in Ocean Chimo paying a sum of US$458,000.00, well above the contracted rate of US$351,530.00 in respect of principal and interest. The excessive charging of the interest rate negatively affected Ocean Chimo's bank balances and forced it to be in default.

[11] Ocean Chimo further contended that after two years of charging the excessive interest rate, those rates were subsequently reversed, but the lender banks continued to charge the default rate on the alleged arrears. The lender banks knew that LIBOR had not increased in 2008 and that those rates had fallen between January to May 2010. However, the lender banks did not respond to Ocean Chimo's letters enquiring about the

increased rates being applied. It was also contended that the loan agreement did not provide for a weighted average interest rate which was at that time being used by the lender banks.

[12] Ocean Chimo wrote to RBTT Bank (Jamaica) Limited requesting a moratorium on the payment of the principal due to the global economic crisis, and the negative effect it had had on the hotel and tourism industry. Although the lender banks were offering concessions to other customers, the request for similar concessions to be made to Ocean Chimo was refused.

[13] Due to the increased interest rates and the position adopted by the lender banks, Ocean Chimo sought refinancing from another financial institution, the National Commercial Bank Jamaica Limited (NCB). However, when the negotiations were well advanced toward securing the financing, Ocean Chimo claimed that the respondents communicated unsolicited information to NCB, not relevant to the financing, which caused NCB to terminate the discussions with Ocean Chimo.

[14] As the lender banks were threatening the appointment of a receiver and Ocean Chimo was unable to service the debt due to the lender banks' actions, Ocean Chimo decided to sell the hotel by private treaty. The appraised value of its real estate was US$67,442,812.38 (excluding furniture, fixtures, and artwork at the hotel). However, the total indebtedness to the RBC was US$29,500,000.00 (less than 50% of the value of its real estate). A buyer was identified and introduced to the lender banks. A meeting was held on 25 July 2011, in Miami, Florida in the United States of America, to negotiate this

endeavour. Ocean Chimo posited that the respondents had given it and Mr Howell assurances that any agreement reached at the Miami meeting would be carried into effect. They maintained that there was no agreement for the potential purchaser's financier to be present at the meeting.

[15] Jorjev Investments LLC (Jorjev) was identified as the potential purchaser of 80% shares in Ocean Bay Limited (which owns Ocean Chimo). Mr Anthony Lee, president of Jorjev, deponed in an affidavit that a meeting was requested with a Jorjev representative, but he was apprehensive about attending as it was not the norm, in negotiating the purchase of any property, that he would meet with the vendor's bank. However, he attended the meeting in Miami although Jorjev's financiers did not, as, in Mr Lee's view, the attendance of Jorjev's financiers to a meeting of that nature was also not the norm. Messrs Billard, Chang, and Smith, he said, supervised the meeting and at its conclusion, it was agreed that the lender banks would ensure a smooth transition and an extension of time was agreed at the meeting for sale by private treaty. Mr Lee was instructed to provide a letter confirming financing at a later date.

[16] However, Ocean Chimo stated that after the meeting and upon return to Jamaica, the lender banks introduced a condition that Ocean Chimo should abandon the then current claim (then only against the lender banks). Ocean Chimo refused. When its refusal was communicated to the lender banks, the lender banks appointed a receiver/manager, the purchaser lost interest, and the sale of the hotel was aborted. Mr Lee stated that he was shocked when the lender banks changed their stance to take control of Ocean

Chimo's assets, and he was disappointed that he had not heard further from the lender banks and their representatives.

[17] Ocean Chimo and Mr Howell also claimed that the lender banks had conspired with each other, the respondents, and the Hilton International Management LLC (Hilton LLC) to appoint a receiver/manager of the Hilton Hotel for their own selfish and/or improper motives, without proper regard to the duties owed to Ocean Chimo. Hilton LLC had dictated onerous and unreasonable conditions which required Ocean Chimo to spend US$15,000,000.00 within a brief period.

[18] Consequently, Ocean Chimo removed Hilton LLC's flags from the premises and entered into negotiations with Wyndham Hotel Management (Wyndham, another hotel chain), as Wyndham had not made similar demands. Ocean Chimo said that the lender banks were concerned about the effect the removal of the Hilton flag from the premises would have had on the value of the Hilton Hotel. Ocean Chimo's numerous attempts to obtain approval from the lender banks to enter negotiations with Wyndham proved futile. Indeed, Ocean Chimo sought declarations in its claim amended 8 June 2010, that the lender banks unreasonably withheld their approval in that regard; and further declarations stating that Wyndham was a suitable replacement for Hilton; and that Ocean Chimo was at liberty to finalise the contract with Wyndham.

[19] Ocean Chimo claimed that in order to further facilitate this conspiracy, the lender banks threatened to appoint a receiver if, inter alia, US$1,692,983.02 (representing outstanding interest at the end of April 2010) was not paid on or before 30 April 2010.

Ocean Chimo claimed that it had attempted to tender a cheque to the RBC's attorneys-at-law in the amount of US$1,700,000.00, but its cheque had not been accepted as proper payment, although the lender banks had previously accepted loan payments by cheque. It had also attempted to tender other cheques, in the requested amounts, that had never been accepted.

[20] Claims were also made that the respondents had breached the contract and had been unjustly enriched. It was alleged that the RBC and the lender banks had received the benefit of the earnings of the hotel, at the expense of Ocean Chimo, having placed Ocean Chimo in receivership, and rejecting the cheques sent by Ocean Chimo to the lender banks.

[21] Since the lender banks became a part of the RBC when the increases were implemented, Ocean Chimo claimed that the respondents controlled the process and had not only been participants or agents for the lender banks. Mr Howell had deponed that Messrs Billard, Chang, and Smith had told him on at least two occasions that they had the power and authority to speak on behalf of the lender banks, and that they would instruct the lender banks to abide by any decisions they had made. Mr Howell also contended that given the supervisory and senior roles Messrs Billard, Chang, and Smith held, and Mr Billard's senior position at the RBC, they had considerable influence over the lender banks. Mr Billard gave legal advice and tendered legal fees which were duly paid by Ocean Chimo, despite Mr Billard not being admitted to practise law in Jamaica, and in the absence of any provision in the loan agreement for any special counsel from Canada.

[22] Ocean Chimo and Mr Howell, therefore, claimed that the respondents owed a duty of care to them that included a duty to inform Ocean Chimo of any changes in the rate of interest charged on the loan, and any other changes in the arrangements of the loan, which may adversely impact Ocean Chimo. Had the respondents advised the lender banks to comply with the terms of the loan agreements, Ocean Chimo would also have been able to comply with its obligations. Ocean Chimo and Mr Howell contended that the respondents had also breached their fiduciary duty as they had placed trust, reliance, and confidence in the respondents, and at the minimum, the events as they unfolded, including the unlawful interest charges, were all orchestrated with the respondents' consent and approval.

[23] Ocean Chimo and Mr Howell asserted and gave particulars that their reputation had been severely damaged due to the fraudulent and malicious actions of the defendants. They said that they had lost the ability to enter into business relations and Ocean Chimo was forced into receivership which had adversely affected the reputation of Ocean Chimo and Mr Howell.

[24] Ocean Chimo and Mr Howell claimed aggravated damages because of the way the respondents had acted throughout which had resulted in losses. Also, the reputation and standing of Ocean Chimo as a viable company had been injured by the respondents' actions. Ocean Chimo also claimed that exemplary damages were due to it, as the respondents' conduct was calculated to make a profit for themselves, in excess of any compensatory damages that a court of competent jurisdiction could make payable by the respondents to Ocean Chimo. Ocean Chimo also pleaded that the lender banks increased

the interest rate and appointed a receiver over Ocean Chimo's property in order to gain a profit for the lender banks, also in excess of any possible compensatory damages that a court could award.

[25] In all the circumstances, Ocean Chimo and Mr Howell stated that a trial of the issues was critical to determine the multiple claims, as Mr Howell deponed, "that are in some parts sinister, or at least inexplicable, as good faith conduct, and best practice on the part of the [respondents]".

The respondents' case

[26] The respondents denied that Ocean Chimo was entitled to any relief claimed or at all. They identified the status of the respondents and indicated that Mr Billard was a Canadian attorney (retained in January 2010) who had not been admitted to the Roll of Attorneys in Jamaica. At all material times, he acted as external counsel to the RBC and special counsel to the lender banks. His role was to give advice, and he denied that he had ever said that the RBC was bound to accept his advice. Mr Chang was the Vice President for Group Risk Management for the RBC. Mr Smith was the senior manager of the RBC's Special Loans Group. Messrs Chang and Smith were both employees of the RBC in its Special Loans Group which provides advisory services to the RBC and assumes risk management authority in relation to large non-performing loans (such as the loan to Ocean Chimo). At all material times, Messrs Chang and Smith were acting as agents of a disclosed principal. They were never employees of the lender banks.

[27] The respondents stated that they did not become involved with Ocean Chimo until October 2009 and the matter was formally referred to the Special Loans Group on or around 1 December 2009. From then on, since the loans had been identified as problem loans, the lender banks had been authorised to take advantage of the resources available through the RBC's special loans advisory services.

[28] The respondents pointed out that they had only been joined in the claim after the appointment of the receiver. They indicated that the RBC acquired control of RBTT Bank Limited on 16 June 2008. However, the majority ownership of RBTT Bank (Jamaica) Limited remained vested in RBTT International Limited. In 2011, RBTT Bank (Jamaica) Limited was renamed RBC Royal Bank (Jamaica) Limited. They deponed that the RBC was a separate entity from the lender banks and specifically denied that Messrs Billard, Chang, and Smith controlled the lender banks. They claimed that the lender banks were not under their common control, as the lender banks had their own independent board of directors, were independently managed and regulated. The credit facilities which had been afforded Ocean Chimo by the lender banks were matters between Ocean Chimo and the lender banks, and created contractual relations between them, but did not give rise to any cause of action between Ocean Chimo and the respondents. The respondents owed no duty to offer any advice or to apprise Ocean Chimo of any updated information, and moreover, at all times, Ocean Chimo was represented by counsel.

[29] Messrs Billard, Chang, and Smith averred that they had no role or input in the interest rate discussions and decisions of the lender banks as those issues predated their involvement in the matter. There was also no communication from Messrs Billard, Chang

and Smith to Ocean Chimo and Mr Howell regarding the changed interest rate, as that took place in 2008. The respondents had not issued the loans and were not responsible for their administration. The issue as to the LIBOR rate or otherwise were matters between Ocean Chimo and the lender banks.

[30] The respondents deponed that the principal liability on the loan was US$32,000,000.00 and Ocean Chimo would have been in default of interest since June 2008 and in respect of principal, at least by October 2008, but potentially even before then. Since the loan was disbursed in three tranches, the weighted average six month LIBOR rates had been calculated and applied. The interest rates had been computed on a 365-day year basis in keeping with the loan agreements. The LIBOR rates published in Bloomberg for the period May to November 2008 were exhibited to affidavits filed in the summary judgment application. The table exhibited showed that the prevailing rate of LIBOR in the market at the time when the commitment letter was issued by the lender banks to Ocean Chimo was 2.64%. Based on the application of the 365-day period, the weighted average rate was 7.41%.

[31] The respondents claimed that once a monthly loan payment had been made after the due date, additional amounts would be due, and interest would be calculated on a higher principal sum for those additional days. The loan agreements permit the lender banks to charge compound interest and to calculate interest at the lead lender's United States dollar prime lending rate once the debtor was in default. The six-month LIBOR rate, which was the applicable rate, was calculated at the beginning of the relevant six-month period (although interest was payable in arrears). Since Ocean Chimo was in

default at the end of the first interest period, the lender banks were entitled to increase the interest rate.

[32] It is the respondents' further contention that although the rate on the loans was LIBOR plus 4.5%, the lender banks made a decision in November 2008, that as of December 2008, they would charge a fixed rate of 9.25% (based on a 365-day year), instead of LIBOR plus 4.5%. This was owing to the continuing default of Ocean Chimo, and a concern that the resulting interest rate did not reflect the RBC's cost of funds in the existing market conditions and considering further default by Ocean Chimo. In any event, in the pleadings, the lender banks asserted that any increase in the interest rate was fully authorised by the loan agreements and based on Ocean Chimo's continuous default since June 2008. That, notwithstanding, the respondents deponed that for the purposes of the litigation, the lender banks prepared an accounting and reversed the rate of 9.25% and applied the rate of 7.14% for the period December 2008 to February 2009, which, in any event, disclosed that Ocean Chimo would still have been in default. Ocean Chimo was therefore in default on the payment of interest as at June 2008 and of principal as at October 2008.

[33] The respondents claimed that the letters written by Ocean Chimo about the interest calculations did not come to the attention of the account manager of the lender banks, and accordingly, there was no response to Ocean Chimo in relation to those letters. The respondents acknowledged that a request for a moratorium on the interest was made to RBC (Jamaica) Limited, but indicated that that request was refused, as a condition of the same was that Ocean Chimo should first become current with its interest

payments, which had not occurred. Moreover, of significance, the respondents deponed that the request for a moratorium was made in December 2008, prior to the involvement of Messrs Billard, Chang, and Smith in the matter. As a consequence, Messrs Billard, Chang, and Smith denied that they were involved in any way in the consideration or rejection of the requested moratorium. They were merely employees of the RBC, and no request had been made to them in their personal capacities.

[34] The respondents denied that there had been any unlawful communication to NCB. They pleaded specifically that any communication with NCB was indeed lawful and had been made at NCB's request relating to the proposed refinancing of Ocean Chimo's indebtedness. The information was conveyed to NCB by the lender banks on the basis of due diligence and at Ocean Chimo's request. Moreover, the respondents had no reason to thwart alternate financing as ultimately that would have been beneficial to the lender banks.

[35] They specifically denied the allegations of negligence, fraud, and unjust enrichment, and stated that the allegation of conspiracy among themselves and with the lender banks and the Hilton LLC, with the intent and purpose of injuring Ocean Chimo, had not been made out and were "frivolous and scandalous". They also denied that they were in any way responsible for the default of Ocean Chimo on its loan with the lender banks.

[36] On the issue of the Miami meeting, the respondents claimed that Ocean Chimo was engaged in protracted negotiations which related not to the sale of the hotel or any

other of its assets, but to the sale of 80% shares of Ocean Chimo's parent company. While the respondents admit that the Miami meeting occurred, they denied Ocean Chimo's claims in relation thereto. The respondents state that the lender banks agreed to meet with the potential purchaser (Jorjev) on the expressed condition that Jorjev was present with its lenders to verify its ability to fund its obligations under the sale agreement. Jorjev did not attend with its lenders nor did it provide any correspondence from its lender confirming the interest to purchase.

[37] It was the lender banks' position that the proposed purchaser had not been able to obtain or show proof of financing during the period of the negotiations with Ocean Chimo and had also not made an offer in response to any query from the receiver in the process of the sale of the hotel. The arrangements coming out of that meeting, they stated, have been described by Brooks J (as he then was) who heard the application for an injunction in the court below, as a "tentative accord" to be approved by the respective principals, which confirmation had not occurred.

[38] The respondents contended that RBC (Jamaica) Limited offered a 60-day extension of time to facilitate the sale of the hotel, on the basis that information on the financier of the potential purchaser, Jorjev, was to be provided, which term was not accepted or acted upon by Ocean Chimo. After eight months of negotiation with Ocean Chimo, Jorjev was still unable to provide proof of financial support to complete the purchase of the shares in Ocean Bay Limited. This remained a concern to the lender banks which, coupled with Ocean Chimo's default on the loan, resulted in the appointment of a receiver/manager.

[39] On 15 October 2010, Ocean Chimo agreed to withdraw its claim against the lender banks accepting that it was a distraction and unhelpful with the negotiations in train. However, subsequently, Ocean Chimo indicated at the Miami meeting on 25 July 2011, that it was unwilling to withdraw the claim. The receiver/manager was appointed on 19 August 2011.

[40] The respondents expressly denied the particulars of any conspiracy, with one another, the lender banks and Hilton LLC, or any related entities to agree to appoint a receiver of the hotel which could result in the sale of the hotel thereby depriving Ocean Chimo of its main asset. Messrs Billard, Chang, and Smith stated that they met with Hilton LLC at Ocean Chimo's request, on 27 April 2010, as Ocean Chimo was of the view that Hilton LLC's actions or inactions were the cause of their difficulties. The actions of the respondents were with the approval of Ocean Chimo, and the respondents were indemnified by the letter dated 13 April 2010. They attached the said letter dated 13 April 2010, which released the affiliates, agents of the lender banks from all claims actions damages liability whatsoever in connection with those discussions. In any event, the management agreement between Ocean Chimo and Hilton LLC ended due to Ocean Chimo's failure to comply with the property improvement plan agreed between Ocean Chimo and Hilton LLC.

[41] The respondents pointed out that Ocean Chimo did not require consent to enter into negotiations with Wyndham, the loan documents did not preclude it, and Ocean Chimo had done so, although ultimately Ocean Chimo had defaulted on that agreement also. Indeed, Wyndham had managed the hotel from July 2010 up until it was sold by

the receiver. The receiver, however, was not appointed until August 2011. The respondents contended that the only motive of the lender banks was to see that the loans were paid. The receiver was appointed by the lender banks as they were entitled to do under the terms of their agreements with Ocean Chimo.

[42] The respondents were added to the claim on 30 November 2012. Additionally, the acts Ocean Chimo pleaded as being done by the respondents, allegedly grounding the claim for conspiracy to interfere with business relations, were requests made by RBC (Jamaica) Limited (not the respondents) to bring the interest payments on the loans current and to ensure that the hotel did not end up unbranded and unmanaged, which would have reduced its value as collateral.

[43] The respondents stated that they obtained a valuation from Colliers International which advised that the correct way to determine the market value of a hotel was based on revenue-earning potential. The hotel was valued, as at 11 June 2008, at US$30,200,000.00, as part of the Hilton LLC, which took into consideration the property improvement needed to be effected. It was, however, no longer part of that chain. The respondents did not therefore accept the valuation done by David Delisser & Associates Limited, who made his valuation by assessing the replacement value for the hotel, namely US$67,442,812.38, which the respondents contended was inappropriate for those purposes.

[44] The respondents pleaded the importance of being part of a Hilton branded hotel, which, as stated by the valuers, Collier International, had a broader distribution network

than that of a Wyndham branded hotel. Also, the fact that the hotel had been so branded and managed, was a determining factor that had affected the interest rate charged and whether the loan itself would have been disbursed. The respondents' concern was to endeavour to ensure that the hotel remained branded. Holding the Hilton flag was imperative, as collateral, as the average room rate of a Hilton property was within the range of US$145.00 per night, as against the average Wyndham room rate per night, which was in the range of US$115.00, which would therefore impact the value of the collateral.

[45] The respondents stated that the RBC was not in the business of acquiring or managing hotels, and the remaining respondents were even less interested in doing so. The respondents' objective was to endeavour to keep the loans current, to secure the repayment of sums due and to ensure that the value of the security was not prejudiced. In fact, they were informed and verily believed that the hotel was sold by public auction to an unconnected third party (communicated to Ocean Chimo by way of a letter of 29 April 2010). Consequently, the respondents contended that the claim of conspiracy was devoid of any legal or factual basis.

[46] The respondents stated that a cheque that had been sent by Ocean Chimo to the lender banks' attorneys-at-law, was sent on the condition that the notice from the lender banks to appoint the receiver be withdrawn. That condition was unacceptable. The cheques were not deposited. The lender banks and the respondents also contended that on 17 May 2010, in the afternoon, an individual from Ideal Finance Corporation attended on the Crossroads Branch of RBC (Jamaica) Limited and indicated that he wished to make

a deposit to Ocean Chimo's account. He stated that he had one cheque in his possession and was awaiting receipt of another. He left the branch but did not return before the close of business. In any event, Ocean Chimo later stopped payment on one of the cheques.

[47] The respondents asserted that save for the payments made between 20 May and 27 August 2010, no other payments had been made by Ocean Chimo on account of principal or interest, and so Ocean Chimo remained in arrears. Additionally, the lender banks had not refused to accept any payments from Ocean Chimo. There was a cheque delivered in the amount of US$600,000.00, but it was dishonoured by the issuing institution.

[48] The respondents denied any breach of contract and the particulars stated in the particulars of claim and that they had been unjustly enriched. They pleaded that the lender banks had allegedly gained assets, being the loans to Ocean Chimo, which had not been serviced since August 2010, and the primary security, the hotel, was worth less than the amount outstanding due to the unauthorised and reckless actions of Ocean Chimo. The respondents expressly denied the particulars of damage to reputation, breach of fiduciary duty, aggravated and exemplary damages. In fact, the lender banks denied that any duty in contract owed to Ocean Chimo had been breached and that there was any fiduciary duty owed by any of the respondents to Ocean Chimo.

[49] The respondents denied that Ocean Chimo was entitled to any damages in contract, restitution, trust, defamation or any other area of law or equity. In all of the

above circumstances, the respondents indicated that an order granting summary judgment was appropriate.

The decision of Edwards J

[50] The applications for summary judgment were heard over several days before Edwards J. The matters were consolidated, with the agreement of the parties and the court's approval, as the claims shared common parties and common issues of law and fact. The learned judge gave a comprehensive detailed judgment. I intend to set out the conclusions she arrived at on the various issues of controversy as they formed the basis of the contentions on appeal and will have to be dealt with in that context. I hope I do no injustice to the very thorough effort done by her.

[51] The learned judge set out the background facts of the matter and the details of the claims by Ocean Chimo and Mr Howell, which have been set out previously. Ocean Chimo and Mr Howell took a preliminary point in the court below that the respondents had not complied with the requirements of rule 15 of the CPR, in that, the notice did not set out in specific detail, the issues in respect of which the respondents stated that they were entitled to summary judgment. The respondents maintained, to the contrary, that they had complied with the rule. The learned judge gave her interpretation of the specific rule and stated that if the summary judgment application was based on there being no real prospect of success on the whole claim, then statements of issues did not need to be set out. She also found, after canvassing the submissions and the authorities relied on, mainly, **Margie Geddes v Messrs McDonald Millingen** [2010] JMCA Civ 2 and **Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd**

[2008] EWHC 3029 (TCC), that such an omission, if it was one, was not substantive given that the rules provide that the court can, at a case management conference, hear and determine, by its own motion, an application for summary judgment, without any such notice. The preliminary point therefore failed.

[52] The learned judge then addressed the issue as to whether the claims, the subject of the application, were suitable for summary judgment. She once again canvassed the submissions and noted that she had read all the numerous authorities submitted. She acknowledged that the case had some conflict of facts but stated that was not determinative of the matter. She set out nine principles which she said that she had applied in making her determination on whether summary judgment should be considered in the instant case. As understanding the applicable principles, and whether they were correctly applied by the learned judge is crucial for the resolution of this appeal, I will set out below the principles that the learned judge said that she had considered in her deliberations:

> "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 [sic] it is not an appropriate case for summary judgment."

[53] She also referred to Professor Stuart Sime's, A Practical Approach to Civil Procedure, 14th edition, at paragraph 21.20, dealing with summary judgment applications when there are some disputed facts. This is what the learned author said:

> "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 (*Three Rivers District Council and others v Bank of England (No 3)* [[2001] 2 All ER 513]) …"

[54] The learned judge also referred to the oft-cited excerpt of the speech of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, dealing with the proper exercise of the court's powers in a summary judgment application, and addressing the English equivalent to part 15 of the CPR, at page 94, namely that:

> "It is important that judges in appropriate cases should make use of the powers contained in 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 interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's 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] The learned judge then queried what approach ought the court to take in dealing with the application. She stated that the main issue to be determined in the applications was whether the claims had any real as opposed to fanciful prospect of success. In making that determination, she stated that "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". She referred to Lord Hope's seminal speech in **Three Rivers District Council and others v Bank of England (No 3)** [2001] 2 All ER 513. She canvassed other authorities and concluded that in the exercise of her discretion she could assess the evidence to ascertain whether it was, prima facie, plausible and merited

further enquiry at a trial as to its veracity, or whether the case was entirely fanciful with no real prospect of success. She therefore decided to examine the different causes of action pleaded, the essential elements needed to establish them, and the evidence put before the court, without any further prospect of evidence emerging in discovery or cross-exanimation, to see whether there was any merit in the applications.

[56] She examined the claim for breach of contract and acknowledged that there was no claim for breach of contract in Mr Howell's claim. As there was no contract between Ocean Chimo and the respondents, she stated that Ocean Chimo had relied on the tort of inducing breach of contract to attach liability to them for breach of the loan contract, being the unjustified hike in the interest rates and the failure to adhere to the LIBOR rate in the contract, and to notify Ocean Chimo and Mr Howell of the increased rate. However, she stated that the tort involved knowing interference with contractual relations and that was not evident in the instant case, as the alleged breach took place before the respondents entered the picture. Additionally, as employees, if acting in the course of their employment, if they procure a breach of contract between the employer and a third party, they are not personally liable. This would also apply to agents, the learned judge said, as they (employees and agents) are treated as one. Their actions (employees and agents) are treated as those of the employer.

[57] The learned judge pointed out that there was also no contract arising out of the Miami meeting with the respondents and no evidence of inducement to breach one either. There was also no contract between Ocean Chimo and NCB, so no actions of the respondents could have induced a breach of it.

[58] The learned judge indicated that there was undisputed evidence that the RBC became the parent company of the lender banks, but there was no evidence that there was any loan contract between the RBC and Ocean Chimo. The RBC did not, as the parent company, become vicariously liable for any breaches of its subsidiary. They are separate legal entities. There was no evidence, the learned judge stated, that the said lender banks were agents of the RBC. The breaches alleged by Ocean Chimo also occurred before the RBC became the parent company. There was also no evidence whatsoever that the respondents exercised excessive control authorising the lender banks to appoint the receiver. The argument that the respondents took over the loan contract and administered the same was not sustainable. Ultimately, the learned judge found that the cause of breach of contract, or inducing breach of contract, had no real prospect of success.

[59] The learned judge referred to the claim for conspiracy. She noted that Ocean Chimo's contention was based on the alleged increased interest rates which were "at the heart of the action for conspiracy". Messrs Chang and Smith entered the picture in 2009 and Mr Billard in 2010 (although the RBC became a parent Company in 2008) after the alleged increase, so the issue was whether the respondents could be a part of the alleged conspiracy in some way, actively or passively, subsequently. The further acts complained of were also the appointment of the receiver, and the actions to interrupt the refinancing with NCB. The learned judge set out the law and the principles relevant to the cause of action gleaned from the authorities and stated that to succeed on this cause of action, Ocean Chimo needed to show that there was a combination, and what the real purpose

of the combination was. She stated, with clarity, that "[i]n the case of lawful acts or lawful means conspiracy, [Ocean Chimo and Mr Howell] must show that the predominant purpose of the conspiracy was to injure economic interest. In the unlawful means or unlawful acts conspiracy, [Ocean Chimo and Mr Howell] must show that there was intent to [injure] whether or not it was the predominant purpose".

[60] The learned judge examined the pleadings of Ocean Chimo and Mr Howell. Her focus was to ascertain whether this cause had any real prospect of success. She relied on the principles expressed in **Normart Management Limited v West Hill Redevelopment Company Limited et al** [1998] CanLII 2447 (ON CA) and stated that at paragraph [116] that:

> "… 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 [Ocean Chimo and Mr Howell] by these [respondents]…"

[61] She referred to the affidavits of Messrs Chang and Smith indicating that they were part of the Special Loans Group, Mr Billard was special counsel to the group, and that Ocean Chimo's loan had been brought to their attention because it was in default. Messrs Billard, Chang, and Smith, she noted, communicated to third parties on behalf of the lender banks. Ocean Chimo's contention was that they joined in and furthered the conspiracy through the continued increased interest rates, causing the lender banks' refusal to permit a moratorium of the principal, and causing the lender banks to breach

the agreement for more time to sell the shares in Ocean Chimo's parent company. It was therefore a lawful and unlawful means conspiracy. As indicated, Ocean Chimo, she stated, alleged that the heart of the conspiracy was the increase in the interest rate that it said was unlawful and unjustified. Mr Howell's claim was that the conspiracy was the combination of the parties to call the guarantee and force the sale of the main asset, the hotel. The conspiracy was between the lender banks, Hilton LLC, and the respondents.

[62] The learned judge examined the allegations. She noted that Messrs Billard, Chang, and Smith were a legal consultant and employees, respectively. They acted on instructions in respect of a difficult loan portfolio. They obtained a waiver of liability to meet with Hilton LLC. There was no evidence that the increase in the interest rate was done in combination with the respondents. There was no basis to conclude that the respondents had any authority or control over the lender banks, who had full corporate status. In fact, the respondents were agents of the lender banks and, in law, as indicated, their actions were those of their principal.

[63] With regard to the meeting in Miami, the learned judge noted that the proposed purchaser (Jorjev), having failed to meet certain conditions made by the lender banks, Ocean Chimo was given an extension of time to comply with their demand for payment, but the claim before the court was to be withdrawn. That was refused by Ocean Chimo. If there was no agreement, but a "tentative accord", that could not be the basis for a conspiracy to cause harm. Furthermore, the judge said that the request was in keeping with a normal business approach, namely "a legitimate pursuit of a defendant's interest in return for giving up some other right".

[64] The claim for a conspiracy with Hilton LLC, Messrs Billard, Chang and Smith, and the lender banks, to appoint a receiver likely to sell the hotel, and deprive Ocean Chimo, did not find favour with the judge. She found it an "implausible and fanciful claim". She added that having a meeting and appointing a receiver pursuant to a debenture were lawful acts, done by the lender banks, and there had been no pleading that there was a predominant purpose being exercised to injure Ocean Chimo. The demand for payment was pursuant to a legitimate business interest, and the demand being made by the agent (the respondents), principal and agent being viewed as one, cannot conspire in law.

[65] The court noted that the timelines were important. The loan went into default in 2008 and the receiver was not appointed until 2011. There was evidence that no payment had been made on the loan since 2010, and the call on the guarantee had been ignored. The evidence also supported the difficulties Ocean Chimo had been experiencing in undertaking the property improvement plan of the Hilton Hotel, which created the danger of losing the Hilton flag and resulting in a reduction in the value of the security. There were conditions imposed, and Ocean Chimo had not complied, with them. This too, the learned judge said, was done in exercise of normal legitimate business relations. So too, the conditions placed by the lender banks on the offer of a moratorium which Ocean Chimo refused to accept. Those were all the actions of the lender banks, the learned judge said, not the respondents. The learned judge concluded that there was no evidence "from which an inference may be drawn that [the respondents] conspired with each other and with [Hilton LLC] or anyone else".

[66] The claim that the lender banks refused to approve the negotiations with the Wyndham for use of their flag, as a replacement flag, the learned judge said, was not connected with the respondents at all, and, in any event, the Wyndham flag was eventually utilised.

[67] In relation to Mr Howell's claim, the learned judge noted that there was no evidence of any loss suffered by him as a result of any acts allegedly done by the respondents. She reiterated that all the actions about which he complained were done by the lender banks. She rejected the submission made on behalf of Ocean Chimo that an agent could be found liable with his principal as a joint tortfeasor. She reiterated that the unlawful increase in the interest rates could not succeed because of the timeline as previously stated. The learned judge also stated that the claim in relation to the refinancing of the loan with NCB was not substantiated, as the information submitted, other than the letters from the lender banks giving the information requested in normal banking practice, was third-hand hearsay and inadmissible.

[68] The learned judge concluded that there were no acts done by the respondents, either collectively or individually, which were sufficient to "'excite suspicion' when the full picture was considered, even though the actions taken individually were not by themselves suspicious", as occurred in **Edwin Dyson & Sons Limited v Time Group Limited** [2001] EWCA Civ 1845. The learned judge stated that having regard to the necessity for there to be either a conspiracy by unlawful means or acts, calculated to injure, in her opinion, that cause of action had no real chance of success.

[69] In Mr Howell's claim, the learned judge opined that there being no loss alleged to have been suffered by Mr Howell from the conspiracy, as the acts pleaded to support that cause related to Ocean Chimo, not to Mr Howell, which is a separate entity not related to Mr Howell, that cause, in that claim, had even less real chance of success.

[70] The learned judge examined the claim for breach of fiduciary duty. The claim by Ocean Chimo was that there was a relationship of trust and reliance between the respondents and Ocean Chimo in the administration of the loan, and that the respondents owed it a duty of care in that administration.

[71] The learned judge referred to the English Court of Appeal case **Bristol and West Building Society v Mothew (t/a) Stapley & Co** [1996] 4 All ER 698, which dealt with the equitable claim of fiduciary duty. The learned judge observed that "not every breach of duty by a fiduciary was a breach of fiduciary duty". She stated that what was clear was that fiduciary relations must first exist before they can be breached, and that "[t]he role of a fiduciary arises not from the status of the parties but from the circumstances of the relationship through which their actions flow". She stated further 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". Additionally, the learned judge added that "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", but she cautioned that he could do so,

if he obtained the consent of both parties, although he must act in good faith, in the interest of both.

[72] The learned judge pointed out that there was not an automatic relationship of trust and reliance between a banker and its customer nor does a fiduciary duty exist between them, unless they have undertaken some acts which give rise to that special relationship. The judge found that there was no evidence that a banker and customer relationship existed between the RBC and Ocean Chimo and Mr Howell. There was also no evidence pointing to the fiduciary relationship which was supposed to exist with the respondents. Mr Billard had no relationship with Ocean Chimo or Mr Howell. The learned judge said that there was no evidence that the respondents gave any advice to Ocean Chimo or to Mr Howell. There was no evidence to suggest that the respondents assumed the role of advisor in any matter so that Ocean Chimo and Mr Howell could have placed faith, trust, and reliance on them. What occurred was that they were advised as to the lender banks' position on various matters.

[73] The learned judge explained that the respondents could not have acted in breach of any fiduciary duty for failure to notify Ocean Chimo and Mr Howell of the alleged increase of interest as that was a matter of contract between the lender banks and Ocean Chimo. In the meeting in Miami, as indicated, the respondents acted as agents of the lender banks, so their presence there could not have been in relation to fiduciary duties to Ocean Chimo and Mr Howell. In fact, the learned judge found that the duties that were alleged to have been broken were all "born out of a contractual relationship". In fact, she concluded that she could not agree with Ocean Chimo and Mr Howell that there was a

relationship of trust and confidence between the respondents and Ocean Chimo and Mr Howell in relation to how the loan was administered. The respondents could not hold any fiduciary duties to Ocean Chimo and Mr Howell in the light of the relationship with the RBC as employees and agents, respectively. The learned judge therefore found that the relationship which existed between the respondents and Ocean Chimo and Mr Howell "did not fall within the scope and nature of a fiduciary relationship". The cause of action therefore, she stated, had no real chance of success at trial in either claim.

[74] The learned judge considered the claim for fraud. She noted that it had been alleged in both claims and that it must be distinctly alleged, distinctly proved, and it must be supported by particulars. She also stated that there was "no generalised tort of fraud known to the common law". She also stated further that "[f]raud 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". The learned judge also pointed out that "it [was] not open to the court to infer dishonesty from facts which have not been pleaded or from facts which have been pleaded but [which] are consistent with honesty".

[75] The learned judge examined the particulars of fraud claimed by Ocean Chimo and Mr Howell, set out herein, and stated that there was no evidence to support any of the assertions made in the claims against the respondents. She reiterated her earlier position that the acts complained about were those of the lender banks. She concluded that based on the information before the court, no amendments could give Ocean Chimo or Mr

Howell a real prospect of success at trial. She further concluded that there was no evidence "of equitable fraud, unconscionable bargain or unconscientious use of power against [the respondents]" and, in any event, there was no such pleading. She stated that there was no evidence that the RBC forced the lender banks to call in the loan and appoint a receiver, and she therefore rejected the submission that this issue could not be disposed of summarily.

[76] The learned judge then dealt with the claim for negligence. She stated that the starting point of the analysis on this claim was the well-known House of Lords' case of **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] AC 465. She discerned six principles emanating from the speeches of the Law Lords in that case. They are set out below:

> "[I]. 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.
>
> [II]. 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.
>
> [III]. 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.
>
> [IV]. In that regard there may be an expressed undertaking or warranty or an implied undertaking or warranty.

> [V]. 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.
>
> [VI]. If a service is performed, even if performed gratuitously, an action in tort may succeed if it is performed negligently."

[77] So, the learned judge stated that for Ocean Chimo and Mr Howell to succeed on this cause, they would have to show that the respondents owed a duty or had assumed a duty to them, had breached that duty, and that they had suffered loss as a result. They would also have to show that they had acted below an acceptable level of competence of ordinarily skilled men. Additionally, as there was no contract between the respondents and Ocean Chimo and Mr Howell, and the normal good neighbour duty (as in **Donoghue (or McAlister) v Stephenson** [1932] AC 562) did not exist between the parties, it would be necessary to show an assumption of personal responsibility, so as to create a special relationship between the respondents and Ocean Chimo and Mr Howell, and that they had relied on that assumption of responsibility. So, the respondents acting as members of the Special Loans Group, would have had to have assumed a duty of care to create a special relationship and to apply their skill not to cause loss.

[78] She referred to the case of **Sealand of Pacific Ltd v Robert C McHaffie Ltd and others** [1974] 6 WWR 724 (given the role of Messrs Chang and Smith as employees of the RBC, and with Mr Billard as an agent of the lender banks), for the principle that the duty in contract owed by a company cannot be imposed on an employee in tort. Their duty was therefore owed to the banks and not Ocean Chimo. They had not undertaken to apply their skill for the benefit of Ocean Chimo and Mr Howell. There was no evidence

that Mr Billard assumed any responsibility for the interest of Ocean Chimo and Mr Howell. Nor was there any evidence to support any reliance by them of any such assumption of responsibility. The learned judge found that the cause of action against the respondents had no real chance of success.

[79] The learned judge examined the claims and stated that the breach of the alleged agreement in Miami could only be a breach of contract, and with regard to the alleged interference with the refinancing, a duty of care would first have to be shown to exist or the claim could not be one in negligence. With regard to the claim by Mr Howell as a guarantor, the learned judge analysed the authorities submitted and the submissions made thereon and concluded that "[i]n the 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".

[80] As the learned judge had indicted, Mr Howell had, in the contract of guarantee signed by him, waived the requirements for the banks to proceed against the borrower in the event of default, before proceeding against him. He also waived any rights which may have been inconsistent with the banks right to enforce the guarantee. There was also no term in the contract of guarantee for any notice, as claimed by him, to be given. She also queried whether notice of demand to Ocean Chimo would not, in any event, be sufficient notice to Mr Howell, the CEO of the borrower that was in default. Indeed, it

could hardly be, the learned judge said, "just or reasonable to impose a duty of care to notify in circumstances where the party already knew or ought to have known".

[81] Additionally, the learned judge noted that the reliance on section 4 of the Mercantile Law Amendment Act was misplaced, as that section deals with circumstances when the guarantor has paid off the debt, and is entitled to be indemnified by the borrower, and to have his claim subrogated to that of the creditor, with a right to take over the security, which is not the situation in the instant case.

[82] The learned judge dealt with the claim for loss of reputation. Both claims alleged loss of reputation. The learned judge stated that on the basis of the authorities submitted, damages for loss of reputation were only recoverable in a defamation suit and specifically referred to the House of Lords' speeches in **Lonrho plc and others v Fayed and others (No 5)** [1992] 1 AC 488. In **Lonrho**, the learned judge noted that "damages to reputation carries certain connotations and is in a field of its own, with established principles which could not be sidestepped by alleging a different cause of action". Ocean Chimo could not succeed on its claim as pleaded. Mr Howell claimed that he had suffered the loss of valuable property, namely, the hotel, but as the learned judge made clear, he had no locus standi to bring such a claim in his personal capacity, because a shareholder cannot bring an action to recover losses suffered by a company. He had not suffered as a guarantor as he had not paid on the guarantee. He had ignored the call on it. The learned judge therefore concluded that no evidence had been put forward that Ocean Chimo or Mr Howell had any real prospect of success on the claim for loss of reputation and it should be struck out at the preliminary stage.

[83] The learned judge dealt with the claim for unjust enrichment. The learned judge stated that there was no evidence to support the claim that Mr Billard was unjustly enriched by the earnings of the hotel and the proceeds of the sale of the hotel. The learned judge noted that the earnings of the hotel went to the owners of the hotel, prior to receivership, and subsequent to that, it went to pay the debts of Ocean Chimo in receivership, with any surplus going to the owners of the hotel. There was no evidence of any surplus going to Mr Billard. This claim, the judge said, was bound to fail. There did not seem to be any likelihood of any other evidence turning up at trial. She referred to **Fashion Gossip Limited v Esprit Telecoms UK Ltd and others** [2000] All ER D 1090, for the principles relative to unjust enrichment, namely, it being unjust for a person to retain the benefit, at the expense of another, if he had no legal basis to do so. The learned judge concluded that there was no evidence of unjust enrichment against any of the respondents. The cause was therefore unsustainable with no real prospect of success.

[84] The learned judge addressed the claim of estoppel. The learned judge said that estoppel did not form a part of the pleadings in either claim, but, in any event, there was no basis on which a court could find that a claim of estoppel existed in this case.

[85] In conclusion, the learned judge stated that the applications for summary judgment were in order, and it was unnecessary for the respondents to state all the issues that were in controversy on the claim. The various matters were canvased in detail by all the parties which were consistent with the principles set out in **Margie Geddes**.

[86] The claims against the respondents were suited for summary judgment as it was also unnecessary to decide those facts that were in conflict, as even if the court were to accept the claims as posited, and the evidence adduced before the court in support thereof, the claims were unsustainable, with no prospect of success, and ought not to waste the court's time in a trial. Mr Billard was entitled to act as agent to the RBC's subsidiary without incurring liability unless he stepped out of the role of agent and assumed liability to Ocean Chimo and Mr Howell. The learned judge was clear that the remaining respondents were employees and/or agents of the RBC, carrying out instructions within the course of their employment or agency, with no privileged positions and no power or authority over the lender banks. There was no evidence that they were acting outside of those respective positions. The issues of controversy between the parties were between Ocean Chimo and Mr Howell and the lender banks. The learned judge therefore made her orders accordingly. They are set out below:

> "1. Paragraph 4 of the Affidavit of Barbara Hume filed herein on September 16, 2014 beginning at 'I was' and ending at 'Mr. Howell' is struck out.
>
> 2. The [respondents'] Application for Court Orders filed November 5, 2013 in Claim No. 2010 HCV 02413 is granted.
>
> 3. There be summary judgment for [the respondents] in Claim No. 2010 HCV 02413.
>
> 4. Costs of the Application to be the [respondents] to be agreed or taxed.
>
> 5. Leave to Appeal granted."

The appeal and the issues therein

[87] Ocean Chimo and Mr Howell filed notices of appeal. There were several grounds. Ocean Chimo relied on 19 grounds of appeal, whilst Mr Howell relied on 14. The grounds overlapped and, in my view, three fundamental issues can be distilled therefrom. Those issues are as follows:

(i) Did the learned judge err in her interpretation of rules 15.4(4); 15.2(a) and (b) of the CPR in relation to the notices of application for summary judgment filed herein (the preliminary point) (Ocean Chimo - grounds (a) – (d) and Mr Howell - ground (ii))?

(ii) Did the learned judge err in the exercise of her discretion in her consideration of the established principles relative to applications for summary judgment (Ocean Chimo - grounds (e)-(g) and Mr Howell ground (i))?

(iii) Did the learned judge fail to properly assess the law, evidence, and material before the court within the context of summary judgment principles (Ocean Chimo grounds (h)-(s) and Mr Howell grounds (iii)-(xiv))?

Issue 1: The preliminary points (Ocean Chimo - grounds (a)-(d) and Mr Howell - ground (ii))

Whether the appeal on the preliminary point was properly before the court

[88] Mr John Vassell QC, in his submissions on issue 1 relating to whether the notice of application for summary judgment had been properly before the court having failed to comply with order 15 of the CPR, raised a further preliminary point. He submitted that as the order made by Edwards J on that issue was an interlocutory order, and the appellant having failed to obtain permission to appeal that specific order, and the time to do so having long expired, the appellant was prohibited from proceeding to argue that point in the current appeal.

[89] Queen's Counsel relied on section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act (JAJA) which required permission from a Supreme Court judge or the Court of Appeal to first be obtained in order to appeal an interlocutory order (save for certain exceptions not applicable here). He also relied on the principles emanating from the authorities **Moncris Investments Ltd, Allan Deans and Reynu Deans v Lans Efford Francis, Carol Marie Francis and The Registrar of Titles** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 80/1992, judgment delivered 23 June 1992 and **Wilmot Perkins v Noel B Irving** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 80/1997, judgment delivered 31 July 1997. The question in those cases was whether the decision made by the court was an order or a ruling, as the former was appealable and a mere ruling was not, and the challenge was whether the court had jurisdiction to hear the appeal given the provisions of section 10 of JAJA, which speaks to orders and judgments being subject to appeal. Queen's Counsel also

relied on **Ronham & Associates Ltd v Christopher Gayle et al** [2010] JMCA App 17, which states that if the appeal is interlocutory, then permission to appeal is, in fact, a precondition to the jurisdiction of the court.

[90] In the instant case, Queen Counsel's focus was on whether the order was interlocutory. Queen's Counsel submitted that the decision was an order, it was interlocutory, permission was required, first in the court below and then, if not obtained, it would be necessary to do so in the Court of Appeal (see rule 1.8 of the Court of Appeal Rules). The appellant had done neither and the appellant could therefore not proceed to argue that point in the appeal. There did not seem to be any response on this point from Ocean Chimo or Mr Howell.

[91] In my opinion, the court in **Garth Dyche v Juliet Richards and Michael Banbury** [2014] JMCA Civ 23, referring to the abovementioned authorities, clearly stated that in deciding whether a decision is appealable the court looked at the stage the proceedings had reached at the time the decision was made, and whether the decision was based on the issue in the trial of which an order was made for its determination. Although this issue was raised at the commencement of the applications for summary judgment, there was no indication that an adjournment was taken thereafter, and it was clearly raised during those proceedings. The learned judge made her ruling and the applications proceeded thereafter. There was no mention of the ruling in the final order drawn up by the court and signed by her and leave to appeal was granted by the learned judge from her decision made on the applications for summary judgment. The orders

granting summary judgment on the claims were interlocutory and required permission to appeal, which had been given.

[92] It seems to me that that was the end of the matter, and no further permission was required in respect of the earlier ruling by the court, as the permission to appeal made on the substantive applications for summary judgment would have embraced that earlier ruling. That would therefore dispose of that preliminary point.

Whether the notice of application for summary judgment was properly before the court

Submissions

[93] It is necessary therefore to examine the respective submissions on issue 1 relating to whether there was compliance with rule 15 of the CPR.

[94] Mr Roderick Gordon, counsel for Ocean Chimo, and Mr Ransford Braham QC for Mr Howell submitted that the learned judge was wrong to exercise her discretion to hear the application. In reliance on **Margie Geddes**, counsel submitted that the issues on which the application for summary judgment were to be considered must be identified and stated and that any failure to do so was fatal to the application. Mr Gordon relied further on the dictum of K Harrison JA that the purpose of rule 15 was to allow the court and the party meeting the application to have adequate notice of the issues raised by the application. Additionally, by the use of the word "must", the language used in the rule was mandatory.

[95] Counsel referred to **Adolph Brown v West Indies Alliance Insurance Company Limited** (unreported), Supreme Court, Jamaica, Claim No 2007 HCV 03483,

judgment delivered 4 June 2010, in which Mangatal J followed the reasoning of K Harrison JA in **Margie Geddes**. Counsel submitted that the position taken by the learned judge that, as the application stated that the entire claim had no merit, and so the several issues raised did not have to be delineated, was, bearing in mind the above dictum and ruling in **Margie Geddes**, "judicial activism at its highest". The rule must be given, counsel stated, its natural and ordinary interpretation. Counsel further submitted that because the application as drafted failed to give proper notice of its intent, the hearing of the same turned into a mini-trial, and took several days to be completed, which the rules endeavoured to avoid. The application, he stated, was "anything but summary", and should have been refused, the preliminary point should have been upheld and the case referred to trial for full adjudication on the merits.

[96] Mr Vassell argued that on a proper interpretation of rule 15.2 and 15.4(4) of the CPR, there is provision for summary judgment to be sought on the entire claim in an action, or on one or more issues in the claim, which would not entirely dispose of the action. He drew an analogy to the UK equivalent of the CPR and the commentary of the same in the White Book 2017, Volume 1, Section A – Civil Procedure Rules 1998 and Practice Directions, Part 24, Summary Judgment, and submitted that "it was patent that the rules make a distinction between 'claim' and 'issue', a claim being the whole case in question, while an issue is one of several causes of action or a preliminary matter". He submitted that it was only where summary judgment was being sought on a particular issue that the issue needed to be specifically identified (see **R (On the Application of Corner House Research and Campaign Against Arms Trade) v The Director of**

the Serious Fraud Office and another [2008] EWHC 246 (Admin)). He submitted that, in that regard, the case of **Margie Geddes** was distinguishable.

[97] In any event, Mr Vassell argued that if there had been an error of procedure or a failure to comply with the rule, as there was no sanction stated therein, rule 26.9 of the CPR was applicable, and any such error of procedure or failure to comply would not nullify the application, but any such error or failure could be rectified by the court. He relied on the United Kingdom Court of Appeal decision in **Steele v Mooney and others** [2005] 1 WLR 2819 for the definition of "an error of procedure", and several cases from this court for the application of rule 26.9, namely: **Chester Hamilton v Commissioner of Police** [2013] JMCA Civ 35; **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37; and **Bupa Insurance Limited (t/a Bupa Global) v Roger Hunter** [2017] JMCA Civ 3. He submitted, in conclusion, that if there had been a failure to comply with the rule, it was a procedural error, and the court had exercised its discretion correctly to hear the application.

Discussion and analysis

[98] Rule 15.2 of the CPR sets out the grounds for summary judgment. It reads:

> "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 the issue."

[99] Rule 15.4 of the CPR states in part that:

"...

(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."

[100] In the notices filed on behalf of the respondents, the order sought was for summary judgment to be entered against Ocean Chimo and Mr Howell, in favour of the respondents, on Ocean Chimo and Mr Howell's claims. In the Atkin's Court Forms, Volume 13(2), No 163, the application for summary judgment made under part 24 of the UK CPR (similar to Part 15 of the CPR), if for the whole claim, is drafted similarly.

[101] In **R (On the Application of Corner House Research) v Director of the Serious Fraud Office**, Collins J accepted that in construing the rules, one should adopt a purposive approach, and once the court was persuaded that a particular construction was appropriate, then the court should apply it. In this case, the learned judge pursued that approach.

[102] In **Margie Geddes**, the question related to whether, on the evidence, there was a lawful contingency agreement and whether the agreement was enforceable by summary proceedings. There was a further issue as to whether there was a failure to comply with rule 15.4(4) of the CPR. I accept that K Harrison JA said that there was merit in the submission from the applicant, that issues must be identified, and that the purpose

of the rule was to allow the party meeting the application to have adequate notice of the issues raised in the application. It was desirable and necessary, he said, as the court had to consider the appropriateness of the application. However, K Harrison JA also acknowledged the submissions from counsel for the respondent that the issues could be gleaned from the affidavit evidence. But, he said, in that case, the affidavits did not state, with the clarity demanded by the rules, any of the issues which arose for consideration by the court. He said there were emails, verbal discussions, and the wider context in respect of which the matter had taken place. The court did not say, however, that the absence of the identified issues in the notice of application was fatal to the application.

[103] Indeed, K Harrison JA went on to consider whether rule 26.9 of the CPR was applicable and said that the case was not a proper one for the court to have exercised its discretion to use its general powers to rectify matters where there was a procedural error. The court did not say that the failure to comply with rule 15.4(4) was substantive and not procedural, and also did not say that rule 26.9 could not be utilised in an appropriate application for summary judgment.

[104] In **Steele v Mooney**, Dyson LJ, on behalf of the court, in defining a procedural error stated that it can take many forms and that rule 3.10 of the UK CPR (similar to rule 26.9 of the CPR), although not an exhaustive definition, included a failure to comply with a rule or practice direction. The court went on to say that the phrase "error of procedure" should not be given a narrow meaning, in fact, a broad common-sense approach was what was required. In rule 26.9, given the wording of 26.9(1) and the heading of the rule, it seems the failure to comply with a rule, practice direction or order will embrace

an error of procedure. What is clear is that it gives the court a wide discretion to put matters right once there is no sanction under any other rule.

[105] It is important therefore to mention the approach that has been taken by this court utilising that provision. In **ASE Metals NV V Exclusive Holiday**, the fact that there was an alleged defective affidavit, lacking an English translation and containing defective identification of exhibits, contrary to section 22(4) of the Judicature (Supreme Court) Act, and rule 30.5(4) of the CPR, respectively, did not preclude the court from making an order for summary judgment. Brooks JA (as he then was) stated, on behalf of the court, that "[t]his procedural breach should not cause the deprivation of an otherwise deserved order". ASE, he said, should not have the affidavits excluded from consideration because of technical breaches. They were entitled to have an order rectifying the situation.

[106] In **Chester Hamilton v Commissioner of Police**, in circumstances where the applicant failed to file an affidavit in support of the fixed date claim form, having obtained leave to proceed to judicial review, but having only filed the claim intending to rely on the affidavit filed in support of the application for leave, the claim was declared a nullity. The applicant succeeded on appeal as the court held that rule 26.9 of the CPR permitted the court to make an order to put matters right, and that the court below could have ordered that the affidavit be re-filed, and the fixed date claim form be re-served with it.

[107] In **Bupa Insurance Limited v Roger Hunter**, although there had been non-compliance with rules 11.5 and 11.16(3) of the CPR, this court upheld the order of Sykes J (as he then was) in the court below in deciding to apply rule 26.9 and put matters right.

The court stated that there was no evidence that Bupa had been prejudiced by the breach of the rules, nor that the rectification would lead to injustice in the conduct of the proceedings.

[108] In conclusion, it is apparent that rule 15.1 of the CPR permits a claimant to file an application for summary judgment if he can demonstrate that the claim has no real prospect of success. He can do so in respect of a particular issue or issues as well. Rule 15.4(3) addresses the filing of the notice, and 15.4(4) states that one must identify the issues in the notice, so it is desirable if one intends to obtain an order for summary judgment on the claim, to still endeavour to set out as many issues as one can in the notice of the application, However, in my opinion, if the issues and the questions on the application can be discerned from the affidavits in support, I do not think that the applicant could not still be successful on the application. The real concern is always prejudice and that one must act in the interests of justice. This is particularly so given the fact that rule 15.4(5) permits the court to consider the application at a case management conference without any notice whatsoever.

[109] As a consequence, at best, in this matter, although no issues were identified in the notice itself and the application could be considered to have failed to comply strictly with rule 15.4(4), it is important to note that the several contentions of the respondents were set out in the affidavits in support of the notice, and Ocean Chimo and Mr Howell could not have said that they were taken by surprise at the hearing of the application. Additionally, as no sanctions are stated in the rule, the application could not be invalidated by that failure and the court could put matters right. As indicated, in this case, the court

permitted sundry affidavits to be filed and the matters were examined and deliberated on, and all issues in controversy between the parties were canvassed in detail and at length. One could not claim that anyone was prejudiced. These grounds must fail.

Issue 2: Did the learned judge err in the exercise of her discretion in her consideration of the established principles relative to applications for summary judgment (Ocean Chimo - grounds (e)-(g) and Mr Howell – ground (i))?

Submissions

[110] Mr Gordon submitted that summary judgment ought only to be granted if the court is confident that the claimant has no real prospect of successfully bringing its claim. Indeed, he submitted that the court "must determine that the claimant's case is unwinnable in all circumstances and is completely without merit before it can grant summary judgment". Counsel relied on the case of **Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others** [2006] All ER (D) 389 (May), to submit that where there are disputes as to fact on relevant issues, the case is not one suitable for summary judgment. Additionally, evidence ought only to be considered if the court is satisfied as to its credibility, particularly if there is no documentary evidence to corroborate the credibility of disputed evidence. The decision to choose between one version of events, as against another, is that of the trial judge and ought not to be done on an interim application, unless, counsel submitted, there was "some inherent improbability in what is being asserted or [there is] some extraneous evidence which would contradict it".

[111] Counsel referred to certain disputes as to fact which essentially dealt with the reason for the increased interest rate, which oscillated over time, and other conflicts in the evidence such as the date that the loan went into default. Counsel warned that "perhaps upon the appropriate application for specific disclosure documents pertinent to the material dispute as to facts may yet be produced that would prove helpful in assisting the court in making its determination on the conflicting issues". Counsel said that despite warnings, the learned judge had embarked on the inquiry in the face of the conflicting facts, stating that she was acting within the principles settled in **Three Rivers District Council v Bank of England (No 3)**, which, counsel said, she had misapplied. Indeed, counsel said the learned judge had engaged in a mini-trial, examining each cause of action pleaded, endeavouring to apply all the authorities cited by counsel. It was submitted that the authorities urge against the court undertaking such an extensive exercise in the preliminary stages of the proceedings.

[112] Mr Vassell submitted that the scope of the power to grant summary judgment as outlined in Part 15 of the CPR, is formulated in several authorities. He set them out, referring specifically to the dictum of Brooks JA in **ASE Metals NV v Exclusive Holiday**. He submitted that that case makes it clear that the court will look critically at the evidence before it and will not send a matter to trial simply because a conflict as to fact has been raised by the parties. If, he submitted, the case "is implausible or incredible or plainly does not make sense, the court will grant summary judgment, even if that involves wading through voluminous paperwork".

[113] Mr Vassell also submitted that Ocean Chimo and Mr Howell were asking the court to accept a conspiracy theory that the lender banks and the respondents were engaged in a combined effort to wrest the hotel from them, in circumstances where there was not "one shred of evidence" produced to make that case plausible. He stated that it was "an incredible theory and should be rejected". Ocean Chimo and Mr Howell, having elected to swear to affidavits on the application, had generated substantial documentation which might appear to make the case look like it was complicated, but it was not in fact so at all. It is incumbent on them, counsel argued, to demonstrate, at least, credible evidence in relation to each cause of action pleaded. In the case of the claim for fraud, he stated that the threshold is high, but they have failed to show any basis at all in respect of any of the causes of action to resist the application, whereas the respondents had made a compelling case indicating that Ocean Chimo and Mr Howell had no real prospect of succeeding on any of the pleaded claims. As a consequence, Queen's Counsel submitted, the matter was suitable for the grant of summary judgment and the order made by the learned judge was correct and ought to be upheld.

Discussion and analysis

[114] It appears to be well settled now that the burden of proof on an application for summary judgment rests on the applicant to prove that the respondent's case has no real prospect of success. However, once the applicant asserts their belief on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case that is better than merely arguable (**ED&F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ 472). The defendant must then show that

he has a real prospect of success (**Swain v Hillman**). It is also well settled that "real" means just that, "real" and not "fanciful", but not real and substantial, nor does it mean that the application will only be granted if the claim or defence is bound to be dismissed at trial. The threshold standard of "an arguable case" will definitely be considered too lax or too low (see A Practical Approach to Civil Procedure, 14th Edition, paragraphs 21.17-21.18).

[115] It is very clear to me that the learned judge understood, as she set out with clarity, the respective cases of the parties and also the competing submissions on the part of the respondents as to why the matter was suitable to summary judgment, and on behalf of Ocean Chimo and Mr Howell, why it was not. She acknowledged that the matter did have some factual conflicts, and she dealt in great detail with the principles relative to the grant of summary judgment which I set out earlier in paragraph [46] herein, and which I agree with entirely. She noted that the court would go behind written evidence to ascertain if it is credible and will disregard fanciful claims and defences (see A Practical Approach to Civil Procedure, 14th Edition, paragraphs 21.17-21.20). She also noted Lord Woolf's directions in **Swain v Hillman** that the court ought to use the summary process and the overriding objective to save expense, achieve expedition and not permit its resources to be used up in cases that serve no purpose, and the parties should know as soon as possible if the case is without merit and will not succeed.

[116] Indeed, the learned judge also noted the seminal speech of Lord Hope in **Three Rivers District Council v Bank of England (No 3)**, where he gave guidance as to

how to go about the inquiry to ascertain if the summary process was applicable in the circumstances of any particular case. This is how he put it at paragraphs 94 and 95:

> "94 … 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 to be the scope of that inquiry?
>
> 95 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-recognised 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 the remedy that 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…"

So, the approach the learned judge took to endeavour to assess whether the trial of the facts would be a waste of time was in keeping with the dictum of high authority.

[117] In the Judicial Committee of the Privy Council case of **Eng Mee Young and others v Letchumanan S/O Velayutham** [1980] AC 331, a case on appeal from the Federal Court of Malaysia, the Board commented on the circumstances where the application was being made to the court to remove a caveat by the registered proprietor of the land, and the caveator had to show that there was a serious issue to be tried in order to retain the status quo until trial, which situation was usually shown by affidavit

evidence. The court noted that although it is normally inappropriate to resolve such issues on affidavit evidence, the judge was entitled to consider whether the plausibility of the evidence merited further investigation and if in the exercise of its discretion, the court found that the caveator's evidence lacked credibility, the appellate court would not interfere with that decision.

[118] Of course, it was also stated by Lord Woolf MR in **Swain v Hillman** that the summary process in Part 15 of the CPR ought not to be pursued if doing so and proceeding without the usual pre-trial procedures is likely to run a real risk of producing summary injustice. It is also true that the court will hesitate in making a final decision on a summary judgment application, without trial, if there is obvious conflict of facts at the time of hearing the application, and that further investigations could alter the evidence available to a trial judge and affect the outcome of the case. It has also been stated clearly that "the court's duty was to keep considerations of procedural justice in proper perspective. Appropriate procedures must be used for the disposal of cases. Otherwise, there is a serious risk of injustice" (see paragraph 12 of **Bolton Pharmaceutical Co 100 Ltd v Doncaster**).

[119] It is, however, incumbent on the court to examine whether the defences posited are "rubbishy" defences and should be subject to summary disposal in the interests of justice, and also to examine whether the defendants are trying to make matters look complicated, and unsuitable for summary determination when, if they underwent investigation by the court would be found not to be really complicated at all (see **Bolton Pharmaceutical Co 100 Ltd v Doncaster**).

[120] In the UK Court of Appeal case of **Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)** [1989] 3 All ER 74, the court made the statement that the summary procedure (then order 14) applications, should not be used to determine points of law which may take hours or even days, and the citation of many authorities before it would be in a position to arrive at a final decision. That approach would be allotting such proceedings, in effect, an immediate trial of the action.

[121] Finally, in the line of cases on this point, I must mention the Privy Council case on appeal from Jamaica, **Sagicor Bank of Jamaica Limited v Taylor-Wright** [2018] UKPC 12. In that case, the Board addressed the issue of whether there ought to be a trial of the claim by the bank against the defendant for sums loaned to her. The bank's pleadings indicated that it was relying on the loan and a promissory note. The defendant was relying on the note simpliciter, which she said had been forged. The issue was whether the note was relevant at all, as the defendant had signed other contemporaneous documents when the funds were loaned to her and had admitted receiving certain funds and that there were funds outstanding. The court found that the matter was one suitable for summary disposal and agreed with the first instance judge, allowing the bank's appeal. They had this to say in paragraph 17 of the judgment:

> "There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense."

[122] So, in the light of the above, the position is that on the one hand, the court must examine whether utilising the summary process will bring about summary injustice, or on the other hand, whether "rubbishy" defences which though they may appear complicated at first, are not so at all, and so ought not to be permitted to go to trial unnecessarily. It is clear that in this case, the learned judge canvassed all the relevant authorities, and she indicated that the conflicts in the evidence were not enough to preclude her from investigating each and every alleged pleaded cause of action to assess if there was any real prospect of success in bringing the claim. And on that basis and on the voluminous material before her, she proceeded to do just that. I cannot say, that in adopting that approach, she exercised her discretion wrongly.

[123] It is necessary to examine her reasons and deliberations on the competing contentions of the parties' various causes of action to see whether the claims against the respondents are plausible and without attempting a mini-trial, assess whether on the issues joined between them, any further investigation at trial was necessary. I am consistently reminded of the role of the appellate court in reviewing the exercise of discretion by a single judge in dealing with an interlocutory order. Lord Diplock has made that approach very clear in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, and his guidance has been followed in several cases in this court, including in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, where at paragraph [20] Morrison JA (as he then was) said:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge

> of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

In my view, her decision to conduct the analysis was correct. Grounds (e)-(g) for Ocean Chimo and ground (i) for Mr Howell must therefore fail.

Issue 3: Did the learned judge fail to properly assess the law, evidence, and material before the court within the context of summary judgment principles (Ocean Chimo - grounds (h)-(s) and Mr Howell - grounds (iii)-(xiv))?

Submissions (Ocean Chimo - grounds (h)-(l) and Mr Howell – grounds (iii)-(iv))

[124] Mr Gordon submitted, on grounds (h)-(l), that the learned judge erred when she found that the respondents could not be liable for breach of contract. She had reasoned, he said, that as Ocean Chimo had not entered into any contract with the respondents and the contract was with the lender banks, the respondents could only be found liable on the tort of procuring a breach of contract. But, counsel submitted, the respondents were acting as agents for the lender banks, having the authority to make decisions on their behalf, so, counsel argued, it was also possible, as agents for the respondents, to be sued as joint tortfeasors with the principals, and in breach of contract, particularly if in their capacity as agents, they acted with wilful misconduct and gross negligence (see **Henderson and others v Merrett Syndicates Ltd et al** [1995] 2 AC 145).

[125] In addition, with their knowledge of the facts, it was reasonable to conclude that the respondents were the masterminds in the events relevant to the action, which exposed them to a claim of procurement of breach of contract. Counsel submitted that

the learned judge erred when she found that the agents could not be subject to liability with their principal. Additionally, counsel argued that since the RBC had knowledge that and had expressly agreed for its employees (Messrs Chang and Smith) and Mr Billard, external counsel, to provide service to the lender banks directly, the respondents owed a duty of care in tort and negligence, which may result in liability from the parent company to the employees of its subsidiary (see **Chandler v Cape plc** [2012] 3 All ER 640).

[126] Counsel submitted that these positions required further investigation and discovery, from which "sheets of evidence" could emerge with regard to the duty owed.

[127] With regard to the Miami meeting, counsel argued that there was discord as to whether an agreement was reached and whether the respondents breached the terms, which could constitute a breach of contract for which they would be liable. Discovery too could result in more evidence of this contract being available at trial.

[128] Mr Vassell submitted that the claims against the respondents were all hopeless and a sham. The only real dispute was between Ocean Chimo and Mr Howell, on the one hand and the lender banks on the other. He submitted that "bringing in the respondents was a barely disguised tactical ploy and was an abuse of the process of the court". The challenge to the learned judge's ruling and decision was without merit. The learned judge had indicated often, he said, that she accepted that she should approach the application for summary judgment with caution, and she had done so. But, he said, as the claims were "inherently implausible, fanciful, baseless in law, and as such, would arouse significant judicial scepticism", it was reasonable for her to "navigate through the

admittedly large volume of paperwork" to assess the weaknesses in the claims. Queen's Counsel submitted that there was no claim for inducement of breach of contract, and the respondents had no contract with Ocean Chimo, so that claim was "utterly hopeless". The principles applied by the learned judge, he submitted, were correct.

[129] He submitted that once the employees were acting in good faith within the scope of their authority, even if they procured a breach of contract between their employer and a third party, they were not liable in any action of tort for inducing breach of contract. Equally, another principle that was applicable, given the position adopted by Ocean Chimo, was that for a director or employee to be personally liable, he/she would have to have assumed personal responsibility, so as to create a special relationship deduced by things said and done by him/her, and that that assumption of responsibility had been relied on. Queen's Counsel submitted forcefully that there was no evidence to support the latter position, and there was never a claim that the respondents had not been acting in good faith. The learned judge had found that the general principle was that directors or officers, or other agents would not be found liable in tort, unless their actions were tortious in themselves, and were separate and independent from that of the company, so as to make the actions their own.

[130] The plea therefore in contract was without merit and the learned judge was correct to say that there was no real prospect of success with regard to it. No further investigation was required, and discovery could not assist the respective claims.

Discussion and analysis (Ocean Chimo - grounds (h)-(l) and Mr Howell – grounds (iii)-(iv))

[131] It is pellucid that Ocean Chimo and Mr Howell did not have any contract with any of the respondents, and there was no claim for inducing breach of contract. In this action, Messrs Chang and Smith were employees of the RBC. That was never in dispute. Mr Billard was acting as counsel deployed by the RBC on behalf of the lender banks. That was not in dispute either. They did not act on behalf of Ocean Chimo or Mr Howell. Ocean Chimo and Mr Howell did dispute whether the loan was in default in March 2009, and when it may have fallen into default, namely June - December 2008 or March 2009. One thing is clear, all the respondents (save the RBC) came into the picture in the latter part of 2009 subsequent to those potential dates. Although the RBC became the parent company of the lender banks in 2008, in this matter, it acted through the special loans group, which became involved in October 2009, and specifically, when the loan was formally referred to them in December 2009.

[132] The learned judge had found that breaches alleged by Ocean Chimo occurred before the RBC became the parent company of the lender banks (see paragraphs [58]-[59] herein). However, the complaint that the learned judge may have gotten the particular dates wrong, does not affect the relevant principles in law in relation to employees, namely, Messrs Chang and Smith, once they were acting in good faith, and as agents acting on behalf of the disclosed principal, the lender banks. In **Said v Butt**, [1920] 3 KB 497, the court clearly stated, at pages 505-506, that:

> "... the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different

> position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the *Lumley v. Gye* [(1853) 2 E&B 216] principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract."

[133] A further issue which Ocean Chimo endeavoured to rely on was that Messrs Chang and Smith, at the Miami meeting, somehow spearheaded the agreement and then engineered its breach through their special authority and assumption of responsibility. But, as indicated, the only evidence produced to date was that they were acting on behalf of the RBC and the lender banks. There was no evidence whatsoever that their skill had ever been deployed for Ocean Chimo and Mr Howell, nor was there any indication that any further investigation would have advanced their case or would have affected the outcome of the matter at all (see **Sealand of Pacific Ltd v Robert C McHaffie**). This principle applied to the evidence of the substitution of the Hilton flag, as well as the appointment of the receiver. It was not in dispute that the debenture gave the lender banks authority to appoint a receiver, and there was indisputable evidence that the loan was in default at the time of appointment of the receiver. The lender banks would therefore clearly have had the authority to act as they did. As the learned judge found, the appointment of the receiver could not be evidence of any alleged exercise of excessive control or authority by any of the respondents. I agree with her. Those were all actions of the lender banks, assisted by the respondents.

[134] It is of significance also that the RBC acquired control of RBTT (Jamaica) Limited subsequent to the loan contract between Ocean Chimo and the lender banks and

assumed no responsibility or control of it. Additionally, contrary to the facts in **Chandler v Cape**, there was no evidence that the RBC ever assumed responsibility for the care, control and/or welfare of the employees of its subsidiary. The claim in contract, in my view, as so carefully analysed by the learned judge, had no prospect of success. Grounds (h)–(l) in Ocean Chimo's claim and (iii)-(iv) in Mr Howell's claim must also fail.

Submissions (Ocean Chimo - grounds (m)-(s) and Mr Howell grounds (v)-(xiv)

[135] Mr Gordon submitted on grounds (m)-(s) for Ocean Chimo and Mr Braham on grounds (v)-(xiv) starting with the position that the learned judge had misdirected herself with regard to the legal principles governing the claim for conspiracy. Mr Gordon indicated that he had submitted to the learned judge that the tort required two or more persons, acting in concert, intending or in fact causing injury, and that the tort can be in two forms: by the use of independently unlawful means, or by the use of lawful means. He submitted further that unjustified interference with contractual relations, is a violation of a legal right and when done knowingly is an unlawful act (see **British Motor Trade Association v Salvadori and others** [1949] 1 All ER 208). He related this to the role the respondents played in what he said was the unlawful manipulation of the LIBOR rates and other acts which caused Ocean Chimo's loan to go into default with disastrous consequences, which was sufficient, he argued, to establish a conspiracy by unlawful means.

[136] Mr Braham and Mr Gordon argued, alternatively, that there was sufficient evidence to support a claim of conspiracy by lawful means and submitted that the real and predominant purpose of the actions by the respondents was to cause damage to Ocean

Chimo, by causing the loan to go into default, and thereby causing it to lose its main asset (the hotel). It was further submitted that the privileged position of authority and control afforded the respondents the "opportunity to execute their conspiracy".

[137] Mr Gordon relied on **Fashion Gossip Ltd v Esprit Telecoms UK** to support the submission that the tort of conspiracy raises complex issues that ought not to be tried summarily. One ought to rely on the concept that the development of legal principles is best left to analysis after the facts have been established at a trial. He referred to **Edwin Dyson v Time Group Ltd** in further support of that proposition where the Court of Appeal of England and Wales allowed an appeal from an order for summary judgment indicating that although there may have been serious doubts as to whether the counterclaim would succeed at trial, the order made in the court below for summary judgment was wrong. Counsel therefore argued that even if the claims by Ocean Chimo and Mr Howell appeared weak, they ought not to have been disposed of summarily, when there was a chance that further evidence would be available at trial after discovery, and the court would be able to test the respondents' evidence under cross-examination. The court must always consider, not only evidence before it, but evidence that could reasonably be expected to be before it at trial. The learned judge also erred, counsel submitted, in finding that even if the respondents had manipulated the interest rates there was no remedy against them in conspiracy, bearing in mind the gravamen of the complaint, and the importance to the claims made by Ocean Chimo and Mr Howell.

[138] With regard to the breach of fiduciary duty and fraud, counsel seemed to concede that they were susceptible to more scrutiny on the application but submitted that the

learned judge should have permitted more evidence to have been adduced later. Also, the claim for fraud fell within the conspiracy already described, and the "trickery" of the respondents relating to their manipulation of the interest rates. The respondents also assumed a responsibility through the special loans group to review the interest rate and so, at least from April 2010, counsel posited, they owed Ocean Chimo and Mr Howell a duty of care, which they failed to act on.

[139] Mr Vassell addressed the issues raised by counsel for Ocean Chimo and Mr Howell and submitted that the learned judge had correctly stated and analysed the law on conspiracy, and also correctly applied the law to the pleadings and the facts before her. He stated that the claim by Ocean Chimo and Mr Howell for conspiracy was "bereft of merit" and had no real prospect of succeeding. He stated that, as the learned judge had correctly held, an employee or agent cannot conspire with the employee or principal as they are treated as one. The particulars of conspiracy, Queen's Counsel said, did not support a claim for conspiracy, and it was unclear on the pleadings in either action, whether Ocean Chimo and Mr Howell were relying on unlawful means conspiracy or conspiracy to injure.

[140] The claim in conspiracy by Mr Howell, Queen's Counsel submitted, related to the call of the guarantee by the lender banks without notice, and the claim by Ocean Chimo, related to the alleged unlawful increase of the interest rates. The particulars of conspiracy in both claims, however, Queen's Counsel argued, were the same, and related to actions flowing from the Miami meeting between the lender banks, the respondents and thereafter with Hilton LLC to appoint a receiver. It was interesting, Queen's Counsel

stated, that initially in the pleadings, the conspiracy was only between the lender banks and Hilton LLC, and then later included the respondents, who were part of the special loans group, called in so much later (in the latter part of 2009) because of the defaulting loan. The special loans group were called in with the consent in writing of both Ocean Chimo and Mr Howell (see letter of 23 April 2010). Their actions, as agents of the lender banks and pursuant to the authority of Ocean Chimo and Mr Howell, counsel submitted, were to find a resolution, and were in the best interests of the hotel, and could hardly support a claim for conspiracy, which the learned judge so rightly found.

[141] Additionally, Queen's Counsel submitted, the conspiracy pleaded in Mr Howell's suit was not maintainable as he suffered no loss. The loss suffered was to Ocean Chimo. The allegation that the RBC acted in breach of the guarantee was also not sustainable, as the RBC was not a party to the guarantee. The other claims in relation to the combination to manipulate the interest rates, frustrate the alleged agreement arrived at in the Miami meeting, and the alleged unsolicited evidence given to NCB, were all equally unsustainable, Queen's Counsel argued, which the learned judge had also correctly found. The RBC also acquired control of RBTT (Jamaica) Ltd subsequent to the loan contract between Ocean Chimo and the lender banks. There was also no evidence that the lender banks ever acted as agents for the RBC.

[142] Mr Vassell submitted that although the word "fraud" has been used throughout the pleadings, the particulars stated were not particulars of fraud. Indeed, the same particulars have been used indifferently as particulars of negligence, breach of contract and breach of fiduciary duty. He submitted that the only difference was a sprinkling of

the words "knowingly" and "intentionally". However, he submitted, fraud described dishonesty, and ought not to be pleaded unless counsel has clear evidence of actual dishonesty (see **Armitage v Nurse and others** [1998] Ch 241) which, Queen's Counsel submitted, does not exist in the instant case. As indicated, counsel argued, the respondents were not involved with the increase of the interest rates, or the appointment of the receiver, which were also mentioned as acts of fraud. Those, Queen's Counsel stated, were all acts of the lender banks.

[143] Mr Vassell underscored the duty of the fiduciary as set out in great detail by the learned judge (see **Bristol and West Building Society v Mothew**). He referred to the undertaking to act in that relationship with trust and confidence and with an obligation of loyalty. He stated that the respondents were not fiduciaries. The alleged "duties" owed, according to the pleadings, which had been broken, were all contractual duties, not undertaken by the respondents. There was no evidence, and there were no facts pleaded to demonstrate that there was any relationship of trust and confidence between the respondents and Ocean Chimo and Mr Howell.

[144] Queen's Counsel asserted that a relationship of trust and confidence does not automatically exist between a bank and its customer (see **National Commercial Bank (Jamaica) Limited v Hew and others** [2003] UKPC 51), and even less so, counsel stated, does it arise between the employees and agents of the bank, acting in their personal capacity, in the course of their employment to the clients or customers of their employer. Their fidelity and loyalty would be owed to their employer, in this case, the RBC. There would be contractual duties existing between the lender banks and Ocean

Chimo and Mr Howell under the commitment letter, instrument of guarantee and other documentation, but that would not lead to the inference that any fiduciary duty exists between the respondents, Ocean Chimo and Mr Howell, which could be claimed to have been broken. Equally, in the Miami meeting, Messrs Chang and Smiths' fidelity and loyalty would be owed to the RBC as employees, and Messrs Billard, Chang, and Smith to the lender banks as agents.

[145] Mr Vassell submitted that his arguments against the cause of action relating to negligence were the same. The cause was without merit and could not succeed. The respondents could have no liability in negligence unless they had assumed a duty of care, actual or implied, to Ocean Chimo or Mr Howell (see **Williams v Natural Life Health Foods Ltd and another** [1998] 1 WLR 830) and there was no evidence of that whatsoever. The particulars of negligence related to the alleged unlawful interest charges, which, as previously stated, were not acts with which the respondents had been involved, and so no negligence could be attributed to them in that regard.

[146] The particulars in relation to the Miami meeting, Queen's Counsel submitted, were also without merit, as they do not relate to careless acts or omissions and so are not referable to negligence at all. The affidavit evidence in relation to the withdrawal of the action in order to stay the appointment of the receiver does not fall within the rubric of negligence, and, in any event, were not the acts of the respondents, but those of the lender banks. The respondents acted as their agents. These submissions, Queen's Counsel stated, applied equally to the alleged interference with the refinancing of the loan with NCB. Queen's Counsel submitted that the learned judge dealt with the issue of

negligence thoroughly and was correct. He asserted that there was no prospect, let alone any "real" prospect of success on the claim for negligence against the respondents.

Discussion and analysis (Ocean Chimo - grounds (m)-(s) and Mr Howell – grounds (v)-(xiv)

[147] In **Lonrho plc v Fayed**, Lord Bridge in delivering the main judgment of the court said this about the tort of conspiracy at pages 465-466:

> "Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful."

[148] I agree with Queen's Counsel for the respondent that it is unclear on the pleadings whether Ocean Chimo and Mr Howell were relying on the unlawful means conspiracy, or conspiracy to injure. There is no pleading of the predominant purpose of the combination and if there is reliance on an unlawful act there should be identification of it. If the heart of the alleged conspiracy is the increased interest rates, Messrs Billard, Chang, and Smith had not yet been engaged and were not a part of the picture at the date when Ocean Chimo says the increase to the interest rates were imposed, either in December 2008 or in March 2009. The other acts allegedly unlawfully done by the respondents which were the subject of complaint by Ocean Chimo and Mr Howell were also done as employees of the RBC and agents to the lender banks.

[149] In Winfield and Jolowicz on Tort, 18th Edition, 2010, the learned authors stated the following at paragraph 18-25:

> "… There must be concerted action between two or more persons, which includes husband and wife. It seems that there can be no conspiracy between employer and his employees, at least where they merely go about their employer's business and it is submitted that directors who resolve to cause their company to break its contract do not commit conspiracy by unlawful means against the other contracting party, for they are identified with the company for this purpose; if that were not so there would be an easy way to outflank the denial of liability for inducing breach of contract in such circumstances..."

[150] The allegations of conspiracy, therefore, against Messrs Billard, Chang, and Smith with the RBC, and by extension the lender banks, does not seem arguable once they were acting bona fide at all material times within the course of their duties. There has been no suggestion that they were not acting as such in this case. It is therefore not surprising that the learned judge found that the claims of conspiracy were without foundation, had no real prospect of success and that there was no indication that discovery would take the matter any further.

[151] With regard to the claim for breach of fiduciary duty, Millett LJ in **Bristol and West Building Society v Mothew** made several statements shining a light on the meaning of the duty and its applicability. He said at page 710:

> "The expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this

> sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty."

[152] He stated later in the judgment at page 711-712:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* (1977) p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

[153] He also stated at page 712 that:

> "The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect several aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty."

[154] The description of the fiduciary leads one to the dictum of Lord Millett again, this time in the Privy Council case on appeal from this court, **NCB v Hew**, where he stated, on behalf of the Board, quite clearly, that the relationship of banker and customer is not one of those relationships that are presumed to generate the necessary influence of trust and confidence or of ascendency and dependency. He stated though that a special

relationship can exist, but it must be proved as a fact in any particular case. I agree with the position taken by Queen's Counsel for the respondents, which the learned judge clearly accepted, that the respondents were not fiduciaries in this case. In relation to Ocean Chimo and Mr Howell, there was no evidence, whatsoever, of any special relationship between them and the respondents, and as the learned judge said, any loyalty and fidelity owed by the respondents would have been to the RBC as employees, and as agents to the lender banks. There was clearly no real prospect of success on that cause.

[155] In **Armitage v Nurse**, Lord Millett reiterated a principle that is well-known but as it was stated with such clarity, it bears repetition. With regard to pleadings on fraud he said this at page 256:

> "The general principle is well known. Fraud must be distinctly alleged and as distinctly proved: *Davy v Garrett* (1878) 7 Ch D 473, 489 per Thesiger LJ."

[156] Lord Millett stated that it was not necessary to use the word "fraud" or "dishonest" if the facts complained of are pleaded. But he referred to the words of Buckley LJ stated in **Belmont Finance Corporation Ltd v Williams Furniture Ltd and others (No 2)** [1979] Ch 250, as being apt and giving guidance. It read at page 268 that:

> "An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must necessarily be used: see *Davy v. Garrett* 7 Ch D 473, 489, *per* Thesiger L.J. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon

> the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

[157] The pleadings in this case did not contain the words "fraud" or "dishonest". The particulars, as indicated, are the same as those pleaded for breach of contract, conspiracy, and breach of fiduciary duty. The particulars are therefore equivocal, and with regard to relying on the plea of fraud, would be fatal. The learned judge found that the cause of fraud had no real prospect of success. Given the circumstances of this case and the allegations against the respondents in their personal capacity, in my view, she cannot be faulted in that regard.

[158] The particulars of negligence also related to the interest rates: increasing them, failure to give notification of the increase, or to reset the LIBOR rates, and also, the appointment of the receiver and the communication of the alleged unsolicited information to the NCB. However, in this instance, the plea claiming negligence in respect of the latter allegations, was that the actions had been wantonly and recklessly undertaken.

[159] The learned judge set out the law with clarity, itemising the principles gleaned from the locus classicus of **Hedley Byrne v Heller**. No useful purpose would be served from repeating them. They are well known and accepted. I refer to her analysis as set out in paragraphs [76]-[79] herein and agree totally with her conclusion that the tort of negligence had no real chance of success.

[160] The learned judge's analysis with regard to the claims for loss of reputation, unjust enrichment and estoppel is also noteworthy and cannot be faulted. These claims were not referred to with any vigour by counsel for Ocean Chimo and Mr Howell. There was no plea at all in respect of estoppel. They were all, in my view, unsustainable. Grounds (m)-(s) in Ocean Chimo's claim and (v)-(xiv) in Mr Howell's claim are devoid of merit and so must fail.

Conclusion

[161] As can be seen from the detailed analysis that was given by the learned judge in the court below, of the principles applicable to the disposal of proceedings summarily on a summary judgment application, in respect of the various claims pleaded, and the voluminous affidavit evidence with exhibits and additional material, it was clear that the claims against these respondents were entirely without merit and have no real prospect of success at trial. In the words of Lord Woolf MR in **Swain v Hillman**, it is in the interest of justice, if the claims are bound to fail, that the claimants know as soon as possible, hence the order for the summary disposal of the same.

[162] This was a case that demanded a close examination of the pleadings and the evidence in support of and in opposition to the application, in order to assess whether this was an appropriate case for summary judgment. There was nothing relating to the allegations against the respondents in this matter that discovery could have assisted. And, in any event, I take heed of the words of Lord Briggs in the Privy Council case, **Sagicor v Taylor-Wright**, that a defendant seeking to resist summary judgment must put their cards on the table rather than keep them up their sleeve. It is not enough, in

my view, to put forward as an argument for a matter to be set down for trial, that there is a chance that evidence will become available, and that there will then be an opportunity to cross-examine on it if it does.

[163] I therefore would refuse the consolidated appeal with costs to the respondents. I also wish to apologise profusely for the delay in delivering the judgment in this matter, which although unavoidable given the exigencies that we deal with in this court, is nonetheless deeply regretted.

F WILLIAMS JA

[164] I have read the judgment of my learned sister. I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[165] I too have read the judgment of my learned sister. I agree with her reasoning and conclusion and there is nothing that I could usefully add.

PHILLIPS JA

ORDER

1. The appeals of Mr Delroy Howell and Ocean Chimo numbered 123 and 124/2015, respectively, are dismissed.
2. Costs are awarded to the respondents to be taxed if not agreed.