

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MRS JUSTICE G FRASER JA**

SUPREME COURT CIVIL APPEAL NO 110/2018

BETWEEN	KEITH ROSE	1st APPELLANT
AND	COLLEEN ROSE	2nd APPELLANT
AND	FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED	RESPONDENT

AND

SUPREME COURT CIVIL APPEAL NO 111/2018

BETWEEN	FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED	APPELLANT
AND	KEITH ROSE	1st RESPONDENT
AND	COLLEEN ROSE	2nd RESPONDENT

Ms Kashima Moore and Nigel Jones instructed by Nigel Jones & Co for Keith Rose and Colleen Rose

Mrs Alexis Robinson and Joshua Page instructed by Myers Fletcher & Gordon for First Caribbean International Bank (Jamaica) Limited

4, 6 February 2025 and 16 October 2026

Negligence – Banking law – Mortgage - Banker and customer – Lender and borrower – Fiduciary duty – Whether ordinary banker-customer relationship gives rise to fiduciary obligations – Whether fiduciary relationship established – Mortgage facility administered through passbook/share account – Duty of bank to exercise reasonable care and skill – Classification of loan as non-performing – Whether bank mismanaged accounts or misapplied funds – Whether negligence established – – Construction of mortgage agreement –

Whether mortgagee entitled to recover pre-litigation legal fees — Legal fees incurred in relation to disputed default and protection of mortgagee's interest

P WILLIAMS JA

[1] I have read the judgment of my sister, Dunbar Green JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

DUNBAR GREEN JA

Introduction

[2] This is an appeal and cross appeal from the judgment of Wiltshire J (Ag) (as she then was) ('the learned judge'), delivered orally on 5 October 2018 and in written reasons on 31 October 2018, with neutral citation [2018] JMSC Civ 140. Judgment was entered for First Caribbean International Bank (Jamaica) Ltd ('the bank') (defendant in the court below), along with 95% of costs. The remaining 5% costs were awarded to Keith Rose and Colleen Rose ('the Roses') (claimants in the court below).

[3] The Roses' claim was for negligence and/or breach of fiduciary duty, and concerned, among other things, the bank's management of their passbook/share account and loan accounts, the calculation and application of interest, the classification of its loan to the Roses as non-performing and the passing on to them of pre-litigation legal fees.

[4] The learned judge found, among other things, that there was a single loan with two interest rates; there had been no mismanagement of the share or loan accounts; the bank's calculation of interest and arrears was correct; the classification of the loan as non-performing was justified; the ordinary relationship of lender and borrower did not give rise to a fiduciary relationship; and there had been no demonstrable negligence by the bank.

[5] The Roses challenged those findings by way of 15 grounds of appeal (Supreme Court Civil Appeal No 110/2018) ('the Roses appeal').

[6] The bank resisted the Roses' appeal and cross appealed the learned judge's determination concerning pre-litigation legal fees and the consequential costs order in favour of the Roses (Supreme Court Civil Appeal No 111/2018) ('the bank's appeal'). That costs order arose from the learned judge's finding that legal fees of approximately \$500,000.00, incurred by the bank before the commencement of court proceedings, ought not to have been passed on to the Roses pursuant to clause 2(v) of the mortgage agreement ('clause 2(v)').

[7] Opposed to the learned judge's finding that the loan facility was a single loan bearing two rates of interest, the bank maintained that the loan facility is properly characterised as comprising two loans secured by a single mortgage. However, the bank did not advance any separate ground of appeal directed at that issue.

Factual background

The loan facility (alternatively, 'the loan')

[8] Before us, and in the court below, the parties disputed whether there were two loans or a single loan, but for convenience, I will refer to the loan facility as 'the loan', except where the context requires otherwise.

[9] By facility letter (the commitment letter), dated 21 April 2005, the bank offered the Roses mortgage financing totalling \$6,000,000.00 to facilitate the construction of a house. The facility letter referred to two sums of \$3,000,000.00 each, with interest at rates of 13.5% and 15.75% per annum, respectively. The monthly payments were stated as \$36,221.24 and \$41,176.01, together with upkeep of \$2,500.00, resulting in a total monthly payment of \$79,897.25. The facility letter also required the Roses to open and maintain a share account (also referred to as a passbook account) with the bank from which the mortgage payments would be debited monthly.

[10] A mortgage agreement secured the principal sum of \$6,000,000.00 and similarly provided for interest at a rate of 13.5% per annum on one half of the principal sum (\$3,000,000.00) and 15.75% per annum on the other half (\$3,000,000.00). The loan

amount was secured by a mortgage over the Roses' property at Lot 2, Battersea, Mandeville, in the parish of Manchester, registered at Volume 1348 Folio 327 of the Register Book of Titles ('the property').

[11] The Roses were not initially required to service the loan strictly in accordance with the repayment terms set out in the facility letter because it was treated as a "bridging" or "bridge" loan during the construction phase which was expected to last for a period of 12 months. During that period, only interest payments were required. Thereafter, the loan was to be converted into a mortgage requiring payments of principal and interest. However, up to the commencement of the claim in the Supreme Court, the loan remained a bridging loan due to extensions to the initial 12-month period by the bank.

[12] The principal sum of \$6,000,000.00 was disbursed through two loan accounts: (i) loan account numbered 1001317262 ('loan account A'); and (ii) loan account numbered 1001342342 ('loan account B'). Half of the principal sum (\$3,000,000.00), disbursed through loan account A, was advanced in two tranches, on 24 June 2005 and 22 August 2005. The applicable interest rate was 13.5%, resulting in a daily interest charge of \$1,109.59. The second half of the principal sum (\$3,000,000.00), disbursed through loan account B, was advanced in multiple tranches between 22 August 2005 and 22 June 2006. The applicable interest rate was 15.75%, resulting in a daily interest charge of \$1,294.49.

[13] In April 2009, loan account B was automatically classified as non-performing on the basis that, according to the bank, the required interest payments had not been made for 90 consecutive days (30 January 2009 to 30 April 2009). That classification triggered a manual classification of loan account A, which, according to the bank, had been in default for 61 days (28 February 2009 to 30 April 2009).

The demand letter

[14] Accordingly, on 13 May 2009, the bank issued a demand letter stating that, in relation to loan account A, the principal balance was \$3,000,000.00 and the accrued

interest to 13 May 2009 was \$82,109.59. In relation to loan account B, the principal balance was \$2,999,931.50 and the accrued interest to 13 May 2009 was \$133,332.56. The demand letter also stated the applicable per diem interest rates referred to in para. [12] above. Additionally, it indicated that failure to repay the outstanding balances with interest would leave the bank with no alternative but to “proceed with such legal action [as was] necessary to protect its interest”.

The dispute and claim in the Supreme Court

[15] A dispute subsequently arose concerning, among other matters, whether the bank had properly debited and applied available funds from the Roses’ share account, whether the loan accounts had remained in arrears for the requisite periods, and whether the 2009 classification of the loan as non-performing was justified.

[16] Consequently, on 12 August 2009, the Roses wrote to the bank indicating that legal proceedings would be commenced if, within seven days, it did not acknowledge alleged mismanagement of their accounts. In response, on 16 October 2009, the bank wrote to the Roses’ attorneys enclosing a detailed loan schedule. Further correspondence and meetings followed.

[17] The dispute culminated in the filing of a claim, in negligence and/or breach of fiduciary duty, in the Supreme Court, by the Roses, on 8 July 2016. They alleged that the bank had failed to properly manage the share and loan accounts, had incorrectly calculated interest on the loan, had failed to withdraw sufficient funds from the share account to service the loan, and had failed to rectify what they contended was an incorrect classification of the loan. They also alleged misappropriation of funds and claimed that as a consequence of the wrongful classification, they suffered losses and incurred expenses, including legal fees charged by the bank in the amount of \$500,000.00, loss of earnings, increased construction costs, security expenses, and rent. They further claimed damages for personal injuries, alleging that the first appellant suffered from post-traumatic stress disorder and major depressive disorder while the second appellant suffered from major depressive disorder.

[18] Accordingly, they sought the following relief:

- “(i) An [o]rder for an account of sums paid by the [Roses] in relation to loans bearing reference numbers 1001317262 and 1001342342;
- (ii) An [o]rder for rectification of the [Roses’] accounts to reflect sums paid to the [bank];
- (iii) An [o]rder that [the bank] reverse the classification of the [Roses] loan;
- (iv) An injunction restraining a sale of said property located at Lot 2, Battersea, off Old Kendal Road, Mandeville, Manchester registered at [Volume 1348 Folio 327];
- (v) Damages in excess of ...\$23,249,145.00;
- (vi) Interest ...; and
- (vii) Costs.”

The bank’s defence to the claim

[19] The bank disputed the claim. It denied that it had been negligent, whether as alleged or at all, and denied owing any fiduciary duty to the Roses. Its defence was that the Roses’ accounts had been properly managed, interest had been accurately calculated, and funds had been withdrawn from the share account to service the loans whenever those funds became available. The bank also denied any misappropriation of the Roses’ funds. Its position was that the classification of the loan as non-performing was justified.

The trial

[20] The trial, between 11 and 13 June 2018, proceeded on affidavit evidence, witness statements, and *viva voce* evidence.

Summary of the evidence

The Roses’ evidence

[21] The affidavits and witness statement of Mr Keith Rose were admitted as the evidence of the Roses. Mr Rose was also cross-examined.

[22] In summary, Mr Rose's evidence was that he and his wife obtained a single loan of \$6,000,000.00. The loan carried two different interest rates and was distributed equally between two loan accounts. He stated that he became aware of the existence of the two loan accounts approximately one and a half years after he began making deposits into the share account. As the loan was a bridging loan, only interest payments were initially required. Pursuant to the terms of the loan, he opened a share account to facilitate deductions by the bank. His review of the loan schedule provided by the bank, disclosed monthly interest charges of approximately \$74,000.00.

[23] In May 2009, he was advised by a representative of the bank that the loan had been classified as non-performing, as at 30 April 2009, and required approximately \$160,000.00 to be brought current. He subsequently received a demand letter requiring repayment of the outstanding loan balance, together with interest. In his view, the bank had wrongly classified the loan as non-performing because of errors in its interest calculations and because it had withdrawn less than the required amounts from the share account established to service the loan.

[24] While acknowledging that, under the Bank of Jamaica's banking guidelines, a loan is deemed non-performing after 90 consecutive days of delinquency, Mr Rose maintained that the threshold period had not been reached at the date of classification. He insisted that the bank's statement of account was incorrect. He disputed that a greater proportion of the monthly payments should have been applied to loan account B, the portion of the loan carrying the higher interest rate. His position was that, because there was only one loan, the two daily interest figures should have been combined (\$2,404.08), thereby producing what he described as "the daily average interest rate", and then multiplied by the number of days in the relevant month to determine the interest payable.

[25] Although Mr Rose accepted the accuracy of the bank's underlying interest figures, he disagreed with its method of calculation and computation of the period of delinquency. Whereas the bank asserted that, as at 30 April 2009, interest on loan account B was

outstanding for 90 consecutive days and interest on loan account A for 61 days, he contended that the total outstanding interest represented only 77 days.

[26] Mr Rose further stated that, at all material times, sufficient funds were available in the share account to service the loan. He, nevertheless, accepted that there were occasions when deposits fell below the required monthly amount of \$74,500.00, occasions when no deposit was made at all, and occasions when deposits were made late.

[27] Under cross-examination, Mr Rose agreed that, in ordinary banking practice, a cheque may take up to three working days to clear and stated that he had personally experienced clearance periods ranging from one to 17 days. He, nevertheless, maintained that a cheque for \$75,000.00, deposited on 28 April 2009, two days before the classification, ought to have cleared immediately.

[28] Mr Rose also asserted that the bank had issued a statutory demand notice with a view to exercising its power of sale when it was not entitled to do so, because the classification of the loan as non-performing was incorrect and resulted from the bank's negligence. He maintained that the alleged wrongful classification damaged the Roses' creditworthiness, impeded their ability to obtain financing from other institutions, delayed the construction project, exposed them to additional expenses, and caused significant distress and depression.

[29] Mr Rose further alleged that the bank improperly passed on to him and his wife, legal fees of \$500,000.00 incurred in obtaining legal advice concerning the classification dispute.

The bank's evidence

[30] The bank's sole witness was Mr Hugh McCalla, manager of the Receivables Unit. His two affidavits and witness statement stood as his evidence in chief. He was also cross-examined.

[31] Mr McCalla testified that the Roses obtained a loan in the principal sum of \$6,000,000.00, secured by a single mortgage. The loan was administered through two loan accounts, loan accounts A and B, each carrying a different interest rate. As the loan was a bridging loan, only interest payments were required during the construction phase, which ordinarily lasted 12 months. The Roses, however, made irregular payments and, to assist them, the bank repeatedly extended the bridging period. Nevertheless, on 30 April 2009, loan account B, which carried the higher interest rate, was automatically classified as non-performing because required payments had not been made for 90 consecutive days. Loan account A was, thereafter, manually classified as non-performing. According to Mr McCalla, this was consistent with the Bank of Jamaica's banking guidelines, which require that once a loan is designated non-performing, all loans sharing a common security be similarly classified.

[32] Mr McCalla explained that the classification was also consistent with the mortgage agreement. He relied on clause 3(1), which provides that where the mortgagor defaults in payment for two calendar months, the principal sum, together with interest and all other sums secured by the mortgage, becomes immediately due and payable.

[33] Mr McCalla acknowledged that the Roses deposited a cheque for \$75,000.00, on 28 April 2009, but stated that the funds became available only after clearance on 1 May 2009. He maintained that those funds were insufficient to satisfy the amounts then due, substantial arrears having accrued together with late fees payable pursuant to clause 3 of the facility letter. He further stated that, once cleared, the funds were applied to interest that had accrued between January 2009 and 30 April 2009.

[34] With respect to cheque clearance, Mr McCalla stated that clearance times varied but would not ordinarily be less than three days. He disagreed with the suggestion that the Roses' cheque deposits were generally applied before the expiry of the three-working-day period and stated that there were numerous occasions when their cheques were held for clearance for the full three days.

[35] Mr McCalla asserted that the Roses' calculation of the outstanding interest reflected a misunderstanding of how the loan accounts operated. He explained that each account carried a distinct monthly repayment obligation arising from the different interest rates and that the payments were, therefore, not allocated equally between the accounts. Although both accounts were in arrears, loan account B was significantly more in arrears than loan account A. He stated that the Roses' method of calculation, based on combining the two interest rates and multiplying that figure by the number of days in the month, could affect the resulting figure and differed from the bank's approach, which calculated interest separately for each account. He further explained that the Roses frequently deposited cheques when the arrears were already approaching 90 days without taking account of the cheque-clearance period.

[36] Under cross-examination, Mr McCalla accepted that both the mortgage agreement and the facility letter referred to "a loan" and "a principal sum" rather than loans and principal sums. He also agreed that it was not unusual for a facility letter relating to a single loan to contain different interest rates.

[37] Mr McCalla further stated that, in response to allegations of deceit, negligent misstatement, and breach of contract, as well as threats of legal proceedings by the Roses, the bank undertook investigations, obtained legal advice, and attended meetings with the Roses and their attorneys in the presence of the bank's attorneys. He maintained that, under the facility letter, the mortgage agreement, and accepted banking practice, the bank was entitled to pass on the resulting legal fees to the Roses.

The learned judge's decision and consequential orders

[38] Consistent with the findings summarised at para. [4] above, the learned judge made the following orders:

- "i. Judgment is for [the bank].
- ii. 95% of costs awarded to [the bank] to be taxed if not agreed.

iii. 5% of costs awarded to the [Roses] to be taxed if not agreed.”

[39] I will address the Roses’ appeal first.

The Roses’ appeal

[40] On 1 March 2023, the Roses filed an amended notice and grounds of appeal as reproduced below:

“(1) The learned trial Judge erred in failing to appreciate that the [Roses] obtain [sic] the loan of Six Million Jamaican Dollars (J\$6,000,000.00) from the First Caribbean Building Society and not the [bank].

(2) The learned trial Judge erred by misunderstanding the [Roses’] case as to the nature of the relationship between the [Roses] and the [bank], which was that of a banker and a customer and not a lender and borrower.

(3) The learned trial Judge erred by finding that the combination of interest rates by the Roses was wrong and thus the [Roses’] resultant calculations were wrong, in circumstances where the said learned Judge found that there was only one loan.

(4) The learned trial Judge erred by failing to appreciate the distinction between combining the interest rates for the purpose of calculating the interest payments due and combining the interest rates for the purpose of calculating the number of days’ of interest outstanding on the singular loan obtained by the [Roses].

(5) The learned trial Judge erred by treating the two separate loan accounts created by the [bank] as two separate loans, for the purpose of calculating the number of days’ of interest due.

(6) The learned trial Judge erred by finding that the evidence was clear that one of the loan accounts created by the [bank] had passed the 90 day threshold.

(7) The learned trial Judge erred by failing to appreciate that it was not necessary to establish a fiduciary relationship between a banker and a customer before a bank can be found to be negligent.

(8) The learned trial Judge erred by finding that a condition for the [bank] to service the loan obtained by the [Roses] was that the passbook account must have had sufficient funds available to cover the entire payments due.

(9) The learned trial Judge erred by failing to appreciate the nature of loan account #1001342342 and account #1001317262 which were internally created by the [bank].

(10) The learned trial Judge erred by finding that it was not prejudicial to the [Roses] that the [bank] made payments to one loan account instead of the other loan account.

(11) The learned trial Judge erred by finding that the [Roses] failed on a balance of probabilities to prove that there was any negligence on the part of the [bank] in circumstances where:

a. The learned trial Judge held that the [bank] had a duty to use skill and care in carrying out the instructions of their client to pay loan accounts from the passbook account;

b. The learned trial Judge held that there was one loan taken by the [Roses];

c. It was agreed by the parties that under the Bank of Jamaica regulations, a loan that is not serviced for 90 days is classified as nonperforming;

d. The arrears of \$184,189.11 allegedly due on April 29, 2009 represented 77 days of interest on the singular loan obtained by the [Roses];

e. The amount of \$184,189.11 claimed to be owed by the [Roses] on April 29, 2009, did not include the \$20,872.82 left back in the passbook account as a result of the [bank] not fully servicing the loan from deposits made in February and March, 2009; nor did it

include the deposit of \$75,000 to the passbook account on April 28, 2009;

f. The [bank] classified the loan account [1001317262] as nonperforming, notwithstanding the days of interest being less than 90 days.

(12) The learned trial Judge erred by failing to order an account of sums paid by the [Roses] in relation to the loan accounts bearing reference numbers 1001317262 and 1001342342, in circumstances where the learned Judge found that legal fee of \$500,000.00 incurred by the [bank] should not have been passed on to the [Roses].

(13) The learned trial Judge erred in finding that the [Roses'] evidence suggested some level of uncertainty in the [Roses'] position on the number of days of interest the amount of \$184,189.11 represents.

(14) The learned trial Judge failed to give due consideration to the [Roses'] evidence explaining the reason why their position was that the arrears due at the time of the classification of the loan as non-performing was 38 days of interest.

(15) The learned Judge erred in making findings of fact for which there was no or no sufficient evidence in support.

Issues

[41] For convenience, the grounds of appeal will be addressed under issues, consistent with how they were advanced by counsel. At the hearing, ground 1 was abandoned. Ground 2 was considered separately; grounds 3, 4, 5 and 13 were argued together; grounds 6, 8, 9, 10 and 14 were grouped; grounds 7 and 11 were addressed together; and ground 15 was considered separately.

[42] I, gratefully, adopt the issues identified by counsel for the Roses, with slight modification, as follows:

1. What was the nature and scope of the relationship between the Roses and the bank? (Ground 2)

2. How was the interest to be calculated in relation to the loan? (Grounds 3, 4, 5, and 13)
3. Whether the evidence established that one account was in arrears for at least 90 days (Grounds 6, 8, 9, 10, and 14)
4. Whether the bank was negligent in its dealings with the Roses (Grounds 7 and 11)
5. Whether the learned judge erred in failing to order an account of sums paid by the Roses on loan accounts 1001317262 and 1001342342, despite finding that the bank's \$500,000 legal fee should not have been passed on to them (Ground 12)
6. Whether findings of fact were unsupported by the evidence. (Ground 15)

Role of the appellate court

[43] The approach of this court to findings of fact is well settled. Where findings are based substantially on the assessment of credibility, this court will not interfere unless satisfied that the judge was plainly wrong (see **Clarence G Royes v Carlton Campbell and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005). Otherwise, it must be shown that the judgment discloses a material error of law, a misapprehension of the evidence, or a conclusion that no reasonable tribunal could properly have reached. This principle was reaffirmed by the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 and, more recently, by this court in **Branch Development Limited (Trading as Iberostar Rose Hall Beach and Spa Resort) v Kieron Thomas** [2025] JMCA Civ 33.

[44] The instant case turns largely on documentary evidence, including the facility letter, the mortgage agreement, the share account records, loan account statements, the delinquency report, and correspondence between the parties. It also involves evidence from witnesses explaining those documents and the bank's internal treatment of the share and loan accounts. Accordingly, while this court is entitled to scrutinise the evidence closely, it will, nevertheless, be slow to disturb evaluative findings of fact unless they are unsupported by the evidence or are plainly wrong.

Issue (i): What was the nature and scope of the relationship between the Roses and the bank? (Ground 2)

Summary of the Roses' submissions

[45] Relying on the Privy Council decision in **Commissioners of Taxation v English, Scottish & Australian Bank Ltd** [1920] AC 683, Ms Moore submitted that the learned judge erred in characterising the relationship between the parties as one of lender and borrower rather than banker and customer. Counsel referred to Lord Dunedin's observation, in that case, that a banker-customer relationship arises once a bank accepts deposits and undertakes to honour cheques. She also relied on the mortgage agreement in support of her submission that the relationship between the parties was not one of creditor and debtor but of banker and customer. Counsel explained that the mortgage agreement, together with the evidence of Mr McCalla, made it clear that the loan was issued by First Caribbean Building Society ('the building society') and secured by a mortgage in its favour rather than that of the bank.

[46] Also citing **Commissioners of Taxation v English, Scottish & Australian Bank**, counsel further submitted that the banker-customer relationship was established by the opening of the share account. Accordingly, she argued that the relationship imposed a duty of care on the bank to manage the Roses' account and service the loan with the available funds in a manner that protected the Roses' interests, including ensuring that the loan was not improperly classified as non-performing.

[47] Relying further on **Barclays Bank plc v Quincecare Ltd and another** [1992] 4 All ER 363, **Ubacol Investments Ltd v Royal Bank** [1995] CanL II 9097 (AB CB), and **Bodenham v Hoskins** [1843-60] All ER Rep 692, Ms Moore submitted that it was an implied term of the contract between the parties that the bank would exercise reasonable skill and care in carrying out the Roses' instructions. According to counsel, the bank failed to do so.

[48] Ms Moore also relied on **Ubacol Investments Ltd v Royal Bank** as authority for the requirements applicable to a finding of negligence in the context of a banker-customer relationship. She submitted that these include the conduct of the parties throughout the relationship, which may create expectations upon which either the bank or the customer is entitled to rely. In that regard, counsel referred to affidavit evidence suggesting that a loan officer of the bank had assured the Roses that an additional loan would be forthcoming. Counsel argued that the Roses were, therefore, entitled to rely on that representation as evidence of a relationship extending beyond that of an ordinary lender and borrower. By failing to consider that evidence in determining whether the relationship had evolved beyond an ordinary lender-borrower relationship, the learned judge was said to have erred.

[49] Additionally, Ms Moore argued that **JMMB Merchant Bank Ltd v Winston Finzi and another** [2014] JMCCD 10, relied on by the learned judge, dealt principally with the existence of a fiduciary duty in a creditor-debtor relationship and, therefore, did not assist in determining whether a duty of care in negligence or a fiduciary relationship arose on the facts of the instant case.

Summary of submissions for the bank

[50] Counsel appearing for the bank, Mrs Robinson, submitted that ground 2 was founded on a mischaracterisation of the parties' relationship. She emphasised that the relationship was one of lender and borrower. Counsel noted that the Roses had pleaded that they obtained a loan from the bank (and not the building society)) and should not now be permitted to depart from that position. In any event, she submitted that the

distinction was immaterial because the evidence established that, before the commencement of the claim, the mortgage had been lawfully transferred from the building society to the bank. Upon acquiring the mortgage by transfer, the bank assumed the role of lender. Counsel further submitted that the distinction was of limited utility, since the two forms of relationship are not mutually exclusive. She observed that one of the primary functions of a bank is the provision of financial products, including loans.

[51] Mrs Robinson further submitted that the Roses' contention that a banker-customer relationship imposed a duty on the bank to manage their accounts and service their loans "in such a manner as to ensure that the Roses' best interest was served" was misconceived in law. Counsel argued that banks owe no special duty of care to their customers beyond the ordinary duty arising from the contractual relationship and that, in the ordinary course of business, the interests of the bank and its customer are frequently divergent. She also submitted that no fiduciary relationship, or relationship of trust and confidence, was pleaded or established that could oblige the bank to act in the Roses' best interests. Accordingly, the classification of the loan as non-performing on 30 April 2009, arising from the Roses' default, did not constitute a breach of any duty owed by the bank.

[52] Mrs Robinson noted that the learned judge properly considered whether any duty of care existed beyond the parties' contractual relationship. She submitted that **Ubacol Investments Ltd v Royal Bank**, upon which the Roses relied, was distinguishable because, in the instant case, there was no evidence of a relationship with an account manager capable of rendering the bank's adherence to its three-day cheque-holding policy unreasonable. Although the bank had occasionally cleared cheques before the expiration of that period, such conduct did not create any obligation or reasonable expectation upon which the Roses could rely. Counsel emphasised that the evidence demonstrated that cheques were sometimes cleared early but were frequently held for the full three days and, on occasion, for significantly longer periods, up to 17 days according to the Roses' own evidence. In those circumstances, the Roses could not reasonably have expected earlier clearance.

[53] Finally, Mrs Robinson submitted that, in considering whether a fiduciary duty existed, the learned judge correctly applied the reasoning in **JMMB Merchant Bank Ltd v Winston Finzi and another**, where it was stated (at para. [18]) that a lender owes fiduciary duties to a borrower only where it moves beyond the role of creditor and assumes the position of adviser, thereby creating a relationship of trust and confidence. Counsel submitted that no such circumstances existed in the instant case and that the learned judge's finding that no fiduciary relationship arose between the parties was unassailable.

Discussion and disposal of issue i/ground 2

[54] The Roses were required to maintain a share account from which mortgage payments were to be debited. The relationship between the parties was, therefore, not confined to the loan facility. However, the legal consequences which the Roses seek to derive from that relationship do not inevitably follow. Ordinarily, the banker-customer relationship is contractual in nature and generally encompasses one of creditor and debtor. That was, in substance, the nature of the relationship in the instant case.

[55] As regards the question of fiduciary duty, the learned judge held that no fiduciary relationship existed between the bank and the Roses. Relying on **JMMB Merchant Bank Ltd v Winston Finzi and another**, she concluded that a fiduciary duty arises only where a lender assumes the role of adviser or confidant and that no such circumstances were present here. On the evidence, she found that the relationship was no more than an ordinary creditor-debtor relationship.

[56] Authorities such as **National Commercial Bank (Jamaica) Ltd v Hew and Another** [2002] UKPC 51, **JMMB Merchant Bank Ltd v Winston Finzi and another**, and **Carmen Farrell and others v Lascelle Reid and others** (unreported), Supreme Court, Jamaica, Claim 2008 HCV05873, judgment delivered 17 June 2011, establish that a bank does not ordinarily become a fiduciary merely because it acts as banker, lender, mortgagee, or creditor.

[57] In **National Commercial Bank (Jamaica) Ltd v Hew and Another**, Mr Hew, a businessman and long-standing customer, obtained an overdraft facility from the bank to finance a residential development project. The facility was secured by mortgages over his properties and operated jointly with his son. The project failed, and the indebtedness increased substantially. When the bank sued to recover the debt, Mr Hew defended the claim and counterclaimed, alleging, among other matters, negligence. He contended that the branch manager had induced him to develop one property instead of another and had failed properly to advise him as to the viability of the project. The Privy Council held, among other things, that a bank does not ordinarily owe its customers a duty to advise on the wisdom or commercial viability of projects for which financing is sought. Such a duty arises only where the bank undertakes to provide advice.

[58] In **JMMB Merchant Bank Ltd v Winston Finzi and another**, Mr Finzi sought an injunction restraining the bank from exercising its power of sale over his house, contending that the loans had been repaid and that the bank had misapplied funds in breach of a fiduciary duty. The bank maintained that there were two categories of loans: loans made to a company, which had been satisfied from land-bond proceeds, and personal loans made to Mr Finzi, which remained outstanding. The court found that no fiduciary relationship existed between the parties, observing that the banker-customer relationship is not inherently fiduciary, and further held that the funds had been properly applied pursuant to the company's written instructions.

[59] Neither of the relationships identified in the cases above, without more, imposes duties on a bank beyond those arising from contract. A fiduciary or special duty may arise in circumstances, but it is not presumed. Put differently, the relationship may be affected by the conduct of the parties over time to create expectations upon which either party is entitled to rely (see **Ubacol Investments Ltd v Royal Bank** and **Barclays Bank plc v Quincecare Ltd and another**). Accordingly, while the relationships of banker-customer and creditor-debtor may coexist, that fact alone does not convert the relationship into a fiduciary or advisory one unless the bank expressly assumes such a

role (see **Halsbury's Laws of England**, Vol. 48 (2021), paras. 114–116 and **Ubacol Investments Ltd v Royal Bank**).

[60] The evidence does not support a finding that the bank assumed any fiduciary duty towards the Roses. The learned judge, therefore, did not err in concluding that the relationship was an ordinary lender-borrower relationship and that no fiduciary relationship existed between the bank and the Roses, although, as the authorities indicate, that relationship may coexist with that of banker and customer. Ground 2, therefore, has no merit.

[61] The question of whether a duty arose in negligence will be addressed under issue iv.

Issue (ii): How was the interest to be calculated in relation to the loan? (Grounds 3, 4, 5 and 13)

Summary of submissions for the Roses

[62] Ms Moore contended that the Roses obtained a single bridging loan in the amount of \$6,000,000.00, secured by one mortgage, and submitted that the bank's internal division of the loan into two loan accounts ought not to have produced an unfair calculation of arrears. Counsel further submitted that the Roses had demonstrated, and the bank accepted, that the daily interest charge on the entire facility was \$2,404.08. This figure was derived by combining the agreed daily interest amounts attributable to the interest rates of 13.5% and 15.75% and applying the result to the \$6,000,000.00 loan facility. On this basis, counsel submitted that, as at 30 April 2009, the sum of \$184,189.11, which the bank claimed was outstanding, represented 77 days' interest at the combined daily rate. Accordingly, she contended that the loan had not reached the threshold for classification as non-performing and that the learned judge ought so to have found.

Summary of submissions for the bank

[63] Mrs Robinson rejected the Roses' contention that the interest applicable to the two portions of the principal sum should have been combined for the purpose of calculating the number of days' interest outstanding. She submitted that the bank's witness did not accept that \$2,404.08 was the applicable daily interest rate. Rather, he explained that this figure could be obtained only by adding the two separate daily interest charges referred to in the demand letter. Counsel further submitted that, during re-examination, the bank's witness clarified that the bank calculated interest on each account separately and did not combine the rates, a methodology that could produce a different result.

[64] Mrs Robinson maintained that there were two loans carrying different rates of interest, each applicable to a distinct portion of the principal sum. She submitted that this was borne out by both the loan documentation and the conduct of the parties. There was, therefore, no basis for combining or averaging the interest rates for the purpose of calculating outstanding interest. Counsel asserted that the separate rates had been applied to the loan facility since 2006 and that this was known to the Roses. Further, the existence of two loan accounts and two distinct interest rates supported the conclusion that there were two loans. Neither the loan documents nor other evidence, counsel argued, therefore justified combining the interest rates to calculate the number of days' interest outstanding. Accordingly, the learned judge was correct to conclude that such an approach would not give effect to the intention reflected in the loan documentation.

[65] Mrs Robinson further submitted that the Roses' calculation was flawed because it ignored late fees arising from repeated late payments, including delays attributable to cheque-clearance periods under the bank's established policy. Counsel argued that dividing the total sum due, as at 30 April 2009, by a combined daily interest figure in order to arrive at 77 days' interest was both incorrect and misleading. She submitted that the Roses' method of aggregating the sums and dividing them by an average rate was impermissible because the two loans were disbursed at different times and attracted late fees in differing amounts. She also noted that the Roses improperly relied on the

uncleared cheque for \$75,000.00, deposited on 28 April 2009, notwithstanding the bank's three-day cheque-clearance policy.

[66] Mrs Robinson contended further that the learned judge erred in finding that there was a single loan merely because the loan documents employed the singular form "loan", "principal", and "sum". Counsel argued that this reasoning overlooked clause 1(vii) of the mortgage agreement, which expressly provides that words importing the singular include the plural, where the context permits, and vice versa. She maintained that the facility letter contemplated two loans secured by a single mortgage. According to counsel, this is reflected in the existence of two separate interest rates and two separate monthly payments expressly set out in both the facility letter and the mortgage agreement and was operationally reflected in the maintenance of two distinct loan accounts.

[67] Finally, counsel submitted that the Roses had failed to demonstrate that the learned judge's ultimate findings on this issue were plainly wrong.

Discussion and disposal of issue ii /grounds 3, 4, 5 and 13

[68] These grounds challenge the learned judge's acceptance of the bank's method of calculating interest separately on the two loan accounts. Whereas the Roses calculated interest by combining the two interest rates, the bank treated each half of the principal separately and calculated interest independently on each loan account. This difference in approach explains the divergent delinquency periods advanced by the parties as at 30 April 2009: 90 consecutive days according to the bank and 77 days according to the Roses.

[69] The difficulty confronting the Roses is that the facility letter identified two sums of \$3,000,000.00; two interest rates, namely 13.5% and 15.75% per annum respectively; and two monthly repayment figures (see paras. 1, 2 and 8 of the facility letter). Similarly, the mortgage agreement provided for the application of the two interest rates to separate portions of the principal amount. The advances were administered through loan accounts A and B and, according to Mr Rose's own evidence, he had been aware of that

arrangement since 2006 or 2007. Interest was calculated on the amounts disbursed. Loan account A was fully disbursed on 22 August 2005 and, thereafter, attracted daily interest of \$1,109.59 at 13.5%, while loan account B was fully disbursed on 22 June 2006 and, thereafter, attracted daily interest of \$1,294.49 at 15.75%.

[70] The bank's position, therefore, finds clear support in the contemporaneous documentary evidence. Both the loan documents and the operational treatment of the accounts support the conclusion that the loan facility comprised two components, each bearing its own interest rate and repayment obligation, including separate monthly payment amounts. Therefore, the Roses' contention that there was a single loan carrying a combined daily interest rate is unsustainable.

[71] Relying principally upon the mortgage agreement, the learned judge found that there was one loan in the sum of \$6,000,000.00 rather than two loans, albeit that the loan facility was disbursed in stages and that different interest rates applied to each half of the principal sum. She further found that:

"[t]he effect of the calculation by the [Roses] of a combined interest rate would be to nullify the intention behind the mortgage instrument which was for the payment of the loan at different interest rates." (para. [49] of the judgment)

Although the learned judge concluded that there was one loan, she nevertheless recognised that two distinct interest rates applied to separate portions of the principal sum. She, therefore, rejected the Roses' method of calculating interest, having regard principally to the terms of the loan documents.

[72] In my view, the learned judge was correct to accord decisive weight to the documentary evidence rather than to a method of calculation dependent upon assumptions unsupported by the contractual arrangements. There is no provision in either the facility letter or the mortgage agreement requiring the bank to combine or average the two interest rates for the purpose of calculating arrears. Both the facility letter and the mortgage agreement contemplate separate interest rates and separate payment

obligations. Therefore, the Roses' combined-rate methodology finds no support in the governing documents.

[73] The learned judge observed, at para. [49], "the combination of interest rates is wrong and thus the [Roses'] resultant calculations are wrong". That conclusion was open to her on the evidence, particularly in circumstances where the Roses' methodology also failed to account for late fees and the effects of cheque-clearance delays. The two portions of the principal sum were not only disbursed on different dates, but late payments resulted in late fees being applied differently to each account. Moreover, the bank's evidence identified cheque-clearance delays and payment shortfalls which also had to be considered.

[74] In the circumstances, I accept the bank's submission that the amounts due could not properly be aggregated and then divided by an average daily interest rate to determine the number of days' outstanding interest. The Roses have, accordingly, failed to demonstrate that the learned judge's findings regarding the calculation of interest were plainly wrong.

[75] In the light of the conclusions reached on those grounds, it is unnecessary to determine whether the loan facility should properly be regarded as one loan or two loans secured by a single mortgage. Whether characterised as one loan or two loans, the operative payment and interest obligations were plainly stated separately. Further, as previously stated, that point of dispute was not pursued by the bank as a distinct ground of appeal and, in any event, its resolution would have no material impact on the outcome of either the appeal or cross appeal.

[76] For those reasons, grounds 3, 4, 5 and 13 fail.

[77] For convenience, and given the close relationship between them, the following issues will be considered together.

Issue (iii) Whether the evidence established that one account was in arrears for at least 90 days (Grounds 6, 8, 9, 10 and 14)

Issue (iv): Whether the [bank] was negligent in its dealings with the Roses (Grounds 7 and 11)

Summary of submissions for the Roses

[78] Ms Moore submitted that, although the bank classified the Roses' loan as non-performing on 30 April 2009, the evidence did not establish that the loan had in fact been in arrears for 90 consecutive days. While accepting that, under the Bank of Jamaica banking guidelines, a loan in arrears for 90 consecutive days may properly be classified as non-performing, she contended that the factual threshold had not been met. Counsel referred to the bank's witness, who testified that loan account B was automatically classified as non-performing on 30 April 2009, and questioned whether that could properly have occurred in the light of a redacted delinquency report, dated 29 April 2009, which was exhibited to Mr McCalla's affidavit. That report recorded loan account B as being 89 days in arrears. Counsel argued that this report constituted a clear indication that the account had not yet reached the requisite 90-day threshold.

[79] Ms Moore further submitted that the bank failed to apply available funds in the Roses' share account to reduce the indebtedness below \$184,189.11, which, on the Roses' calculation, represented 77 days' interest. She argued that, even if her primary contention were rejected, funds remained available in the share account, exclusive of the cheque deposit of \$75,000.00, which could have been applied to reduce the arrears. According to counsel, if the cheque deposit was disregarded, there, nevertheless, remained \$20,872.82 in the share account, as at 30 April 2009, from which deductions could have been made, thereby reducing the indebtedness and shortening the period of delinquency.

[80] Counsel also relied on what she described as the bank's established practice of honouring deposited cheques before the expiration of the three-day clearance period and submitted that the Roses were entitled to rely on that course of conduct. Had the cheque for \$75,000.00 been applied, she argued, the arrears would have represented only 38 days' interest. Counsel emphasised that it was the bank which created the two loan

accounts and determined both the amounts deducted from the Roses' account and the allocation of those deductions. Accordingly, to the extent that funds were available to reduce the arrears, the bank was under a duty to apply them. At the very least, it was obliged to manage the share account properly. Counsel further submitted that there was no basis for implying a term requiring the Roses to deposit the full amount due before the bank could make deductions to service the loan. The learned judge therefore erred, she argued, in concluding otherwise.

[81] As previously submitted, Ms Moore contended that the relationship between the parties, being one of banker and customer, gave rise to a duty of care. That duty, she argued, required the bank to manage the Roses' accounts as a reasonable banker and to avoid the wrongful classification of the loan as non-performing. In support of that submission, she relied on **Donoghue v Stevenson** [1932] AC 562 and Lord Atkin's formulation of the neighbour principle, as well as **Ubacol Investments Ltd v Royal Bank**, where Kent J recognised that the contractual and debtor-creditor relationship between a bank and its customer could furnish sufficient proximity to ground a duty of care.

[82] Counsel also relied on **Barclays Bank plc v Quincecare Ltd and Another**, where Steyn J held that it is an implied term of the banker-customer contract that a bank will exercise reasonable skill and care in executing its customer's instructions and that such obligations may sound both in contract and in tort.

[83] Ms Moore submitted that mismanagement of a customer's loan account resulting in wrongful arrears or default may constitute negligence. In that regard, she drew an analogy with **Bradford Joseph Seitz v Rudy Feeder Co-operative Ltd** [2004] SKQB 233, in which the defendant's mishandling of loan proceeds was found to amount to negligence. Counsel noted that the court there held that the co-operative owed a duty to employ reasonable business and accounting practices in administering the plaintiff's loan accounts.

[84] Given those authorities, Ms Moore argued that the bank mismanaged the Roses' loan accounts and wrongfully classified them as non-performing, on 30 April 2009, thereby causing loss, damage, and injury. She urged this court to award damages for negligence and, relying on **Capital & Credit Merchant Bank Limited v Real Estate Board** [2013] JMCA Civ 48, invited the court to order an account of the sums paid by the Roses.

[85] On the discrete issue of whether the learned judge ought to have found that the bank breached the duty of care owed to the Roses, Ms Moore submitted that the learned judge erred in treating a fiduciary duty as a prerequisite to a finding of negligence.

Summary of submissions for the bank

[86] Mrs Robinson submitted that the evidence established that loan account B was properly classified as non-performing on 30 April 2009, as it reflected accrued interest arrears extending over 90 consecutive days. She relied on the calculations contained in the bank's letter of 13 May 2009, which she submitted the Roses accepted as accurate. In relation to loan account A, the daily interest charge was \$1,109.59 and the outstanding interest at 30 April 2009 was \$67,684.92. In relation to loan account B, the daily interest charge was \$1,294.49 and the outstanding interest was \$116,504.19. Dividing the latter figure by \$1,294.49 yielded a delinquency period of 90 days.

[87] Mrs Robinson reiterated that the mortgage agreement expressly provided for repayment of the principal sum at two separate interest rates. The Roses' attempt to aggregate the loans and apply an average interest rate, as argued before, was therefore misconceived. She further submitted that the Roses improperly relied on the uncleared cheque for \$75,000.00 deposited, on 28 April 2009, notwithstanding the bank's established three-day clearance policy. Those funds, she argued, were unavailable to satisfy the sums then due.

[88] Mrs Robinson submitted that the learned judge was entitled to reject the Roses' position, particularly in the light of Mr Rose's inability to explain why he considered the

bank's statements inaccurate, despite having accepted the correctness of the underlying interest calculations. Counsel maintained that the contention that the arrears represented only 38 days' interest was unsustainable and that the learned judge correctly concluded that the arrears represented 90 days' interest.

[89] Counsel further submitted that Mr Rose admitted, under cross-examination that, as at the relevant date, the share account did not contain sufficient funds to service the loans. She argued that the challenge to the learned judge's finding that the share account had to contain sufficient cleared funds before repayments could be applied was unlikely to succeed, since withdrawals could only be made where adequate funds were available.

[90] Mrs Robinson rejected the contention that the learned judge failed to appreciate the nature of the loan accounts. She submitted that the learned judge examined both the loan account statements, and the share account records, recognised the significance of the differing interest rates, and noted that late payments attracted late fees, thereby creating disparities between the accounts. Counsel explained that the Roses frequently made late payments, resulting in both late fees and insufficient funds to service the loan accounts. In those circumstances, the bank often applied available funds to one account to minimise the extent of delinquency, a practice which benefited the Roses.

[91] Counsel further submitted that, although the learned judge considered fiduciary duty and duty of care together, she did not treat a fiduciary duty as a prerequisite to a finding of negligence, as argued by the Roses. Rather, at paras. [61] and [62] of her judgment, she expressly recognised that the bank was obliged to carry out instructions with reasonable skill and care. Counsel noted that the learned judge identified the relevant obligation as paying from the share account to service the loans, provided sufficient funds were available. Having found that this condition was not always satisfied, and that the bank's instructions had to be "doable", the learned judge was entitled to conclude that negligence had not been established.

[92] With respect to the finding that negligence had not been proved, counsel submitted that the learned judge's conclusion was correct. She argued that the banker-customer relationship is fundamentally contractual; that claims in negligence for pure economic loss or psychiatric injury require a sufficient degree of proximity; that the relationships of banker-customer, creditor-debtor, and mortgagee-mortgagor do not, without more, establish such proximity; that banks owe no special duty beyond their ordinary contractual obligations unless a fiduciary or equivalent relationship is pleaded and proved; and that no breach of duty arose from the classification of the loan as non-performing.

[93] Counsel, therefore, submitted that there was no basis upon which the bank could be found to have breached any duty of care in relation to the classification of the loan accounts in April 2009.

Discussion and disposal of issues iii and iv/ grounds 6, 7, 8, 9, 10, 11 and 14

[94] These grounds partly challenge the learned judge's finding that one account had fallen into arrears for at least 90 consecutive days. Additionally, ground 11, which is central to the appeal, raises the issue of whether negligence in the classification process was established, while ground 7 requires consideration of whether the learned judge treated the existence of a fiduciary duty as a prerequisite to a finding of negligence.

[95] The Roses disputed that the delinquency period had reached 90 days. They relied primarily upon the entries in the share account and the funds deposited therein, particularly the cheque for \$75,000.00 deposited on 28 April 2009 but also on their method of calculation of the delinquency period. They further contended that the bank's loan statements demonstrated that the bank's own timing and allocation of withdrawals had produced the delinquency.

[96] It is worth repeating that Mr Rose testified that he had known since 2006 or 2007 that there were two loan accounts and understood that monthly interest of approximately \$74,500.00 was payable at the end of each month. He also accepted the figures contained

in the demand letter as accurate. The real points of dispute, therefore, are the calculation of the delinquency period, the expectation that the cheque would have cleared immediately, and the contention that the available funds in the share account should have been applied to reduce the arrears.

[97] The bank's answer was that Mr Rose accepted its interest calculations which demonstrated that the 90-day threshold had been reached in relation to loan account B. It relied on the demand letter and the applicable daily interest figures, both of which Mr Rose accepted under cross-examination. On the bank's calculations, after deducting interest attributable to the period 1 to 13 May 2009, the position, as at 30 April 2009, demonstrated that loan account B had reached the requisite level of delinquency.

[98] The bank maintained that the cheque for \$75,000.00 remained uncleared as at 30 April 2009. The evidence was that cheque deposits were subject to clearance and that previous deposits had taken as long as 17 days to clear. Accordingly, the bank submitted that it was under no obligation to treat those funds as available or to apply insufficient funds to avert classification of the loan as non-performing.

[99] As previously explained, the loan facility carried two different interest rates and required two monthly payments. Interest, therefore, had to be assessed separately. Mr Rose was aware that there were two loan accounts approximately three years before the demand letter. There is no need to revisit the position relating to loan account A. It is sufficient to note that Mr Rose accepted that the arrears on that account were as stated in the demand letter. As regards loan account B, the account in dispute, the demand letter reflected outstanding interest of \$133,332.56 as at 13 May 2009. On the bank's calculations, that amount represented 103 days' interest. Accordingly, as at 30 April 2009, the arrears stood at \$116,504.19, representing 90 days' interest.

[100] Mr Rose accepted the amounts stated in the demand letter as owing on each account, as at 30 April 2009. This was revealed in the following interchange at pages 53 and 54 of the notes of evidence:

"Q. In fact you were advised of total arrears of both accounts in the sum of \$184,189.11.

A. No Miss.

...

You received a letter dated 13/05/09 from [the bank]?

A. Yes, Miss.

(Shown exhibit 4)

Q. You rely on this document?

A. Yes.

Q. And your only challenge is the breaking up of the account but not the figures? You had no difficulty with the overall figure.

A. Yes, Miss.

Q. In your own evidence you pointed out that the interest to 13/05/09 less 13 days of May calculated per diem daily interest rate results in the total due as at 30/04/09?

A. Yes, Miss.

Q. So, if we do that for each of these two separate mortgages - the two different interest rates, we arrive at \$67,684.92

A. Yes, Miss.

Q. And doing the same for the higher interest rate mortgage, we arrive at \$116,504.19?

A. Yes, Miss.

Q. So, looking at the passbook you will agree with me that the sum of \$116, 504.19, you will agree that that sum was not in the shared account to service the loan on the 30/04/09? You will agree that looking at the passbook there was only \$96,591.86.

A. Yes, Miss."

[101] This is evidence in support of the bank's position that its calculation of the outstanding interest and delinquency period of 90 consecutive days, in respect of loan account B, was accepted by the Roses as accurate, and the said account had been properly classified as non-performing.

[102] Among the evidence the learned judge considered, were the mortgage agreement, the facility letter, the demand letter, the arrears calculations, the interest rates, the operation of the accounts, the redacted delinquency report, and the basis for the non-performing classification. Having done so, she rejected the Roses' assertion that the loan had been classified as non-performing while in arrears for fewer than 90 days. Instead, she found that the arrears stood at 90 days as at 30 April 2009. A central aspect of her reasoning was that the Roses relied upon a combined-rate calculation that was unsupported by the loan documents. She further accepted the bank's computation as correct and held that the classification comported with the Bank of Jamaica banking guidelines. In her opinion, the disparities in the accounts were attributable to the Roses' repeated late payments and the resultant accumulation of late fees.

[103] This court, too, had an opportunity to review the evidence. A careful review of the account statements and passbook entries revealed a recurring pattern of deposits that were insufficient to satisfy the obligations on both accounts, including late fees. Inevitably, this resulted in shortfalls. There were also instances in which the bank seemed to have made deductions notwithstanding that the passbook balance was below the amount otherwise required. For example, on 31 July 2008, \$1,120.69 was deducted, of which \$1,109.59 was applied to loan account A and \$11.10 represented a late fee. Similarly, on 2 October 2008, \$2,404.08 was deducted and allocated between loan accounts A and B.

[104] Contrary to Mrs Robinson's submission, those entries demonstrate that deductions could be made notwithstanding the existence of a limited balance. Nevertheless, the evidence clearly demonstrates that the Roses did not consistently meet their monthly payment obligations. The passbook and loan statements indicated that, excluding the

cheque deposit of \$75,000.00 made on 28 April 2009, the balance standing to the credit of the share account, on 30 April 2009, was \$20,872.82. But there was also evidence of an assessment of late fees in the amount of \$30,332.28, on 29 April 2009, which, if accurate, would have exceeded the balance in the share account. Further, as noted previously, the documentary evidence supported the bank's separate calculation of the interest payment in the two loan accounts and its position that at least one account had reached the requisite level of delinquency.

[105] In the light of the evidence accepted by the learned judge, it cannot be said that she was plainly wrong in finding that loan account B had reached the 90-day threshold on 30 April 2009.

[106] Although the learned judge referred to the redacted delinquency report, she did not make a definitive finding on the alleged inconsistency concerning the period of delinquency reflected therein. However, having regard to Mr Rose's acceptance of the calculations contained in the demand letter, which substantiated a 90-day delinquency period for loan account B, the absence of a specific finding on that issue does not undermine her material findings.

[107] The next question raised by these grounds is whether the learned judge correctly concluded that the bank did not mismanage the Roses' accounts.

[108] The learned judge found that there was no evidence that the bank mismanaged the loan accounts or caused them to fall into default. She concluded that the mortgage agreement contemplated that the Roses would maintain sufficient funds in the share account to service the loan and that her review of the passbook demonstrated that this was not always the case. She further found that the bank properly allocated the funds available in the share account and that the arrears resulted from late payments and insufficient balances rather than any act or omission on the part of the bank.

[109] As previously noted, the passbook and loan statements revealed a recurring pattern of deposits that were insufficient to satisfy the interest obligations and associated

charges due on the loan accounts. As at 30 April 2009, excluding the cheque for \$75,000.00 deposited on 28 April 2009, the balance standing to the credit of the share account was \$20,872.82. There was, however, evidence of assessed late fees amounting to \$30,332.28 as at 29 April 2009. Although there were occasions when the bank applied available funds notwithstanding that the balance in the share account was insufficient to satisfy fully the obligations due, that practice did not create an obligation on the bank to continue doing so. Nor did it oblige the bank to treat uncleared funds as available funds for the purpose of servicing the loan accounts.

[110] The Roses placed considerable reliance on the cheque for \$75,000.00 deposited on 28 April 2009. However, the evidence accepted by the learned judge was that the cheque had not cleared by 30 April 2009. Mr Rose himself acknowledged that cheque-clearance periods varied and could extend well beyond three business days. In those circumstances, any expectation that the cheque would be treated as immediately available was unreasonable.

[111] The Roses also contended that the bank's allocation of available funds between the two loan accounts caused or contributed to the non-performing classification. The bank's answer was that, where available funds were insufficient to service both accounts, it was entitled under the mortgage arrangements to appropriate those funds in the manner it considered appropriate.

[112] The learned judge examined the loan statements and share account activity and found that there had been no improper allocation of funds. She observed that the account activity revealed no unequal treatment of the two accounts notwithstanding their differing interest rates. Importantly, the Roses did not establish that any alternative allocation would have prevented the non-performing classification, given the extent of the arrears existing on both accounts, the uncleared funds standing in the share account, and the assessment of late fees at the relevant date.

[113] The Roses contended that, absent a fiduciary duty, the bank owed a duty to exercise reasonable skill and care in operating the share account and applying funds in accordance with the agreed arrangements. That proposition is correct. However, it does not follow that the bank was thereby required to act generally in the Roses' best interests. The learned judge rejected the contention that the bank's handling of cheque deposits created an expectation that uncleared funds would be immediately applied to the loan accounts. She found that, on the evidence, cheque-clearance periods varied and that the bank's policy permitted cheques to be held for three days. Although some cheques had, on occasion, been cleared earlier, the bank was under no obligation to continue that practice.

[114] The learned judge distinguished **Ubacol Investments Ltd v Royal Bank**, observing that the heightened duty of care identified in that case arose from the close and continuous communication between the bank and the customer. She noted that the bank in **Ubacol Investments Ltd v Royal Bank** was found to have acted unreasonably because it failed to take any action in relation to a dishonoured cheque on the day it arrived at the branch and instead processed it in circumstances where no one capable of responding would become aware of the issue until the following day. Against that factual background, the court concluded that the bank's conduct was unreasonable. The learned judge, therefore, concluded that, given the ordinary contractual relationship between the parties, the bank's failure to clear the Roses' cheque immediately was not unreasonable and did not constitute a breach of any duty of care under the **Ubacol Investments Ltd v Royal Bank** principles.

[115] That conclusion is supported by the evidence. The bank was contractually obliged to withdraw and apply deposits made to the share account in accordance with the terms of the facility letter and mortgage agreement. Correspondingly, the Roses were contractually obliged to ensure that sufficient cleared funds were available in the share account on the due dates to satisfy their interest and other payment obligations. The evidence disclosed that, at the time the loan accounts were classified as non-performing, the cleared funds standing to the credit of the share account were insufficient to satisfy

the interest obligations on either account. Further, there was an assessment of late fees which was more than the available cleared funds. Mr Rose also acknowledged that he was aware of the bank's policy of holding cheques for three business days and that, on occasion, clearance periods ranged from one to 17 days. Against that background, the Roses' expectation that the cheque for \$75,000.00, deposited on 28 April 2009, would be immediately cleared was not a reasonable one.

[116] The legal principles governing the negligence issue are not in dispute. A bank owes a duty to exercise reasonable skill and care in carrying out its customer's instructions. Thus, in **Barclays Bank plc v Quincecare Ltd and another**, Steyn J held that it is an implied term of the banker-customer relationship that a bank will observe reasonable skill and care in and about executing its customer's orders. Likewise, **Ubacol Investments Ltd v Royal Bank** recognises that the contractual and debtor-creditor relationship between a bank and its customer may provide the requisite proximity for a duty of care to arise. The latter case further recognises, however, that the content of that duty depends upon the relationship and circumstances.

[117] Neither authority supports the proposition advanced by the Roses that the bank was obliged to manage their affairs to ensure that they did not fall into arrears. The duty to exercise reasonable skill and care in carrying out instructions is not equivalent to a duty to protect a borrower from the consequences of failing to meet repayment obligations.

[118] The Roses also relied on **Bradford Joseph Seitz v Rudy Feeder Co-operative Ltd**. In that case, the defendant was found liable because it had assumed responsibility for administering and allocating loan proceeds and had repeatedly misapplied funds between accounts, overpaid certain loans, and thereby caused another loan to fall into arrears.

[119] The instant case is materially different. There was no finding, nor any evidence, that the bank misapplied the Roses' funds, overpaid one account at the expense of

another, or otherwise caused the delinquency. The learned judge found that the arrears arose from late payments and insufficient funds in the share account.

[120] In my view, the evidence was insufficient to establish any breach of the bank's duty to exercise reasonable skill and care. The bank was not obliged to treat uncleared funds as cash, to apply insufficient funds to prevent a classification, or to exercise forbearance whenever the Roses failed to maintain adequate balances. Nor was the bank under a duty to act in the Roses' best interests. As already indicated, the relationship remained that of banker-customer and creditor-debtor in the ordinary sense. No facts were established giving rise to any advisory, fiduciary, or protective obligation. The learned judge, therefore, did not err in concluding that the bank had not breached any duty owed to the Roses, whether in contract or in tort.

[121] Further, contrary to the Roses' submission, the learned judge did not treat the absence of a fiduciary duty as fatal to the negligence claim. Instead, she separately considered whether the bank had properly discharged its obligation to operate the accounts and apply funds from the share account and concluded that it had done so. Those findings included that the bank's calculation of interest and arrears was correct, that the classification of the loan as non-performing was justified, and that there had been no mismanagement of the loan accounts. Those findings were open to her on the evidence. In all the circumstances, therefore, the negligence claim was properly rejected.

[122] So, whatever description was adopted, banker-customer or lender-borrower, the bank's obligation was to manage the Roses' accounts with reasonable care and skill. In the light of the evidence, the learned judge was entitled to conclude that there was nothing in the bank's conduct that was "suggestive of [it] crossing the line from ordinary lender". In the absence of evidence giving rise to either a fiduciary obligation or a duty to act in the Roses' best interests, she correctly rejected both propositions. Those findings were plainly open to her.

[123] Accordingly, grounds 6, 7, 8, 9, 10, 11 and 14 fail.

Issue (v): Whether the trial judge erred in failing to order an account of sums paid by the Roses on loan accounts 1001317262 and 1001342342, despite finding that the bank's \$500,000 legal fee should not have been passed on to them (Ground 12)

Summary of submissions for the Roses

[124] Ms Moore submitted that the learned judge erred in failing to order an account of the sums paid into the loan accounts in circumstances where she had found that the legal fees incurred by the bank ought not to have been passed on to the Roses. Counsel further argued that having found that the bank was not entitled to recover the sum of \$500,000.00, the learned judge ought to have made a definitive order to that effect.

Summary of submissions for the bank

[125] Mrs Robinson submitted that the Roses' complaint concerning the failure to order an account was distinct from, and bore little relation to, the learned judge's ruling on the legal fees. Counsel pointed out that, acting in accordance with rule 8.1(2) of the Civil Procedure Rules, 2002 ('CPR') and the authority of **Parker-Tweedale v Dunbar Bank Plc and Others (No 2)** [1991] Ch 26, the learned judge determined that those legal fees should not have been charged to the Roses. The effect of that ruling, counsel submitted, was that the Roses were relieved of any obligation to repay the bank the sum of \$500,000.00, with the result that the amount ought not to have been included in any calculation of their indebtedness. Counsel maintained that any necessary adjustment arising from that finding was straightforward and did not, without more, require the taking of an account of the loan accounts. Further, it was submitted that, as between mortgagor and mortgagee, the court will ordinarily direct an account only in proceedings for redemption, foreclosure, judicial sale, or the recovery of monies arising from the exercise of a power of sale. Accordingly, the request for an account was said to be wholly inapplicable in the instant case.

Discussion and disposal of ground 12

[126] On the issue of the legal fees incurred by the bank prior to the commencement of proceedings by the Roses, the learned judge held that, although the mortgage agreement

permitted the recovery of costs reasonably incurred in enforcing the bank's security, pre-litigation expenses, such as legal fees for advice and meetings, were not recoverable. Accordingly, she concluded that those fees ought not to have been passed on to the Roses.

[127] I accept Mrs Robinson's submission that the learned judge's ruling on the legal-fees issue did not, as the Roses contend, provide a sufficient basis for ordering an account of the sums paid into the loan accounts. An order for an account would ordinarily arise where there is uncertainty as to whether the Roses' deposits had been properly reflected in the loan accounts or whether sums had been misapplied. No such uncertainty was established. The learned judge made no finding of any misapplication of funds or erroneous calculation of interest. An order for an account is not granted as a matter of course; rather, there must be a sufficient evidential basis for such relief. Any adjustment required because of the legal-fees issue could have been addressed separately. It does not follow that an account of the loan accounts was necessary. For these reasons, ground 12 fails.

Issue (vi): Whether findings of fact were unsupported by the evidence (Ground 15)

[128] This ground alleges, in general terms, that the learned judge made findings of fact unsupported by the evidence. It may be disposed of shortly. The Roses failed to identify any specific finding said to be unsupported by the evidence, the evidence said to contradict it, or the way any alleged error affected the outcome of the case. Having reviewed the record, I am satisfied that the material findings challenged by the Roses were open to the learned judge on the evidence. Ground 15, therefore, fails. Nothing in the record discloses a finding that was plainly wrong or unsupported by the evidence.

[129] I have found no merit in any of the grounds of appeal advanced by the Roses. Their appeal should, therefore, be dismissed with costs to the bank to be taxed if not agreed.

The bank's cross appeal

[130] Although successful in resisting the Roses' claim, the bank challenged the learned judge's determination that legal fees incurred before the commencement of proceedings, in the sum of \$500,000.00, were not recoverable from the Roses under the mortgage agreement. The bank also challenged the consequential costs order by which the learned judge awarded 5% of the costs to the Roses.

[131] The bank advanced the following grounds of appeal:

i. The learned judge erred by exercising her discretion and awarding costs of 5% to the [Roses] in circumstances where they were not successful on any aspect of their pleaded case.

ii. The learned judge erred by exercising her discretion and awarded costs of 5% to the [Roses] based on her findings on the issue that the bank's legal fees of \$500,000.00 should not have been passed to the [Roses] when they ought not to have succeeded on that issue.

iii. The learned judge erred by misunderstanding the relevant law and evidence in that she:

a. incorrectly interpreted clause 2(v) of the mortgage agreement as being conditional upon commencement of proceedings despite no wording to that effect in the mortgage agreement;

b. failed to appreciate that costs, charges and expenses incurred by a mortgagee "in about [its] security or in relation any default hereunder or in the protection of its interests or enforcement of its rights" as provided for in the Mortgage Agreement, may be incurred without the institution of Court proceedings.

c. incorrectly applied the case of **Parker-Tweedale v Dunbar Bank plc (No 2)** by failing to appreciate the differences between the clause and circumstances under consideration in **Parker-Tweedale v Dunbar Bank plc (No 2)**.

d. incorrectly interpreted **Parker-Tweedale v Dunbar Bank plc (No 2)** as establishing a general

principle that costs, charges and expenses recovered by a mortgagee are conditional on the taking or defending of proceedings; and

e. failed to appreciate the [bank's] contractual right to be paid by the mortgagor for "*all costs, charges and expenses incurred or to be incurred... in the protection of its interests or enforcement of its rights hereunder*" as distinct from a mortgagee's common law right to reimburse itself out of mortgage property for all costs, charges and expenses reasonably and properly incurred in enforcing or preserving its security.

iv. The learned Judge erred by considering particulars of loss, namely the \$500,000 in legal fees incurred prior to the commencement of proceedings and passed on to the [Roses], in circumstances where there was no finding of liability against the [bank].

v. The learned Judge erred by making a declaration that the bank's legal fees of \$500,000 should not be passed to the [Roses] by the [bank] in circumstances where there was no relevant pleading, no such relief claimed and no applicable law or evidence to give rise to the declaration."

[132] The cross appeal raises questions concerning the proper construction of the mortgage agreement, the recoverability of legal expenses incurred by a mortgagee before litigation, and the propriety of the costs order made below. The bank distilled the grounds into the following issues, which I, gratefully, adopt:

"1. Whether the learned judge erred when she considered general principles of law in *Parker Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26 in circumstances where the Mortgage Agreement contained clear and unambiguous wording to govern the situation in which legal fees were incurred by the Bank? (Ground iii)

2. Whether the learned judge erred in considering the [Roses'] pleaded loss in circumstances where she did not make a finding of liability against the Bank? (Grounds iv and v)

(3) Whether the learned judge erred in awarding 5% costs to the [Roses]? (Ground i and ii)"

[133] Of those issues, the principal question concerns the proper construction of the mortgage agreement and whether clause 2(v) entitled the bank to recover legal costs incurred before the commencement of proceedings. The resolution of that issue lies at the heart of the bank's challenge to both the learned judge's ruling on the legal-fees issue and the consequential costs order.

Issue (i) Whether the learned judge erred when she considered the general principles identified in *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26 in circumstances where the mortgage agreement contained clear and unambiguous wording governing the recovery of legal fees incurred by the bank. (Ground iii)

[134] Mrs Robinson submitted that the learned judge erred in construing clause 2(v) of the mortgage agreement as making the recoverability of legal costs contingent upon the commencement of court proceedings. Counsel argued that the clause expressly entitled the bank to recover costs, charges, and expenses incurred in relation to the security, any default by the mortgagor, and the protection or enforcement of the bank's rights. In those circumstances, legal fees incurred in investigating the Roses' allegations, obtaining legal advice, and responding to threatened litigation fell squarely within the scope of the contractual entitlement.

[135] Mrs Robinson emphasised that the principle entitling a mortgagee to add properly incurred costs, charges, and expenses to the secured debt is firmly embedded in the law and underlies express contractual provisions. Relying on **Gomba Holdings (UK) Ltd and Others v Minorities Finance and Others (No 2)** [1993] Ch 171, counsel submitted that a mortgagee's entitlement to recover costs, charges, and expenses is governed primarily by the terms of the mortgage instrument. She argued that the learned judge, therefore, erred by:

- (a) misinterpreting clause 2(v) as conditional upon the commencement of proceedings, despite no such wording in the agreement;

- (b) failing to appreciate that costs may be incurred without litigation, provided they are in relation to the security, default, or protection of the mortgagee's interests;
- (c) misapplying **Parker-Tweedale v Dunbar Bank plc and Others (No 2)** by overlooking the differences between the clauses and circumstances in that case and the present matter;
- (d) treating **Parker-Tweedale v Dunbar Bank plc and Others (No 2)** as establishing exceptions to a general principle, thereby wrongly concluding that recoverable costs are conditional on proceedings; and
- (e) overlooking the bank's contractual right to reimbursement under clause 2(v), which is distinct from the common law right to recover costs reasonably incurred in enforcing or preserving security.

[136] Counsel further submitted that the learned judge's interpretation of clause 2(v) would produce a commercially unrealistic result, excluding many categories of costs that are routinely and properly incurred by mortgagees before litigation, including valuation fees, receivers' fees, auctioneers' charges, and expenses associated with the preservation or enforcement of security. Such an approach, she argued, is inconsistent both with established mortgage law and with the language chosen by the parties in the mortgage agreement.

[137] Mrs Robinson noted that the learned judge herself acknowledged, at para. 75 of the judgment, that the bank's entitlement to recover costs derived from the mortgage agreement. Counsel, therefore, argued that it was unnecessary to resort to general principles of mortgage law to qualify or restrict clear contractual language. Moreover, she submitted that the observation of Nourse LJ in **Parker-Tweedale v Dunbar Bank plc and Others (No 2)** that proceedings are "often" required in the enforcement or preservation of security does not support the proposition that proceedings are always

required. The learned judge, therefore, erred in concluding that legal costs could only be recovered after the commencement of proceedings within the meaning of the CPR.

[138] Finally, counsel submitted that, even if the recoverability of the legal fees depended on their reasonableness, the learned judge erred in concluding otherwise on the evidence before her. Again, relying on **Gomba Holdings (UK) Ltd v Minorities Finance Ltd and Others (No 2)**, she argued that the bank's evidence, which was unchallenged, established that it investigated the Roses' complaints, obtained legal advice, and engaged with the Roses and their attorneys in circumstances where serious allegations had been made and litigation threatened. No evidence was adduced to suggest that the sum of \$500,000.00 was incurred in bad faith, was unreasonable in amount, or was otherwise improperly charged.

Summary of submissions for the Roses

[139] The Roses resisted the bank's cross appeal. Ms Moore referred to clause 2(v) of the mortgage agreement which requires the mortgagor to pay the bank "all costs, charges and expenses incurred in and about this security or in relation to any default hereunder or in the protection of its interests or enforcement of its rights hereunder". She submitted that, properly construed, the clause did not entitle the bank to recover legal fees incurred before the commencement of proceedings in circumstances where the Roses had merely sought a review of the classification of their loan.

[140] Ms Moore argued that, consistent with the principle articulated in **Parker-Tweedale v Dunbar Bank plc and Others (No 2)**, recoverable costs must be connected with the enforcement or preservation of the security, matters which generally arise in the context of proceedings. A request for a review, absent enforcement action or actual litigation, did not, she submitted, fall within the scope of clause 2(v). Counsel further contended that the clause under consideration was broader and less specific than the clause considered in **Gomba Holdings (UK) Ltd v Minorities Finance Ltd and Others (No 2)** and, therefore, could not be interpreted as automatically entitling the bank to recover costs incurred in the absence of proceedings.

[141] Ms Moore also submitted that the learned judge was entitled to award the Roses 5% of the costs by reason of their success on the legal-fees issue and, further, ought to have ordered an account in relation to those fees.

Discussion and disposal of ground iii

[142] This issue arises from the Roses' successful challenge at trial to the passing on of legal fees in the amount of \$500,000.00. The learned judge considered that issue separately and concluded that, because proceedings are commenced only upon the filing of a claim form, those pre-action legal fees could not properly be recovered from the Roses. On that basis, she awarded 5% of trial costs to them.

[143] The bank contended that the learned judge erred in law by treating the bank's entitlement to recover legal fees as dependent on the prior commencement of court proceedings. The bank maintained that the mortgage agreement expressly permitted recovery of costs incurred "in and about" the security, "in relation to any default" or "in the protection of its interests or enforcement of its rights".

[144] In resisting the bank's cross appeal, the Roses principally relied on **Parker-Tweedale v Dunbar Bank plc and Others (no2)** and contended that clause 2(v) did not extend to legal fees incurred merely in relation to discussions or requests for a review of the loan accounts before the filing of court proceedings. They also contended that the learned judge was entitled to award them 5% trial costs because they succeeded on that issue.

[145] The learned judge accepted the bank's evidence that it had sought legal advice and attended meetings in response to allegations made by the Roses and their attorneys, in circumstances where litigation had been threatened. She found those steps to be reasonable. Nevertheless, she held that they did not amount to "proceedings" within the meaning of rule 8.1(2) of the CPR and that, because proceedings had not been commenced, the fees could not be passed on to the Roses under clause 2(v). In reaching

that conclusion, she relied on the well-known passage from **Parker-Tweedale v Dunbar Bank plc and Others (No 2)** in which Nourse LJ stated at page 33:

“A mortgagee is allowed to reimburse himself out of the mortgaged property for all costs, charges and expenses reasonably and properly incurred in enforcing or preserving his security. Often the process of enforcement or preservation makes it necessary for him to take or defend proceedings ...”

[146] Of the three propositions identified by Nourse LJ in the case, the learned judge considered only the first proposition, namely the recoverability of costs incurred in proceedings between mortgagee and mortgagor, to be potentially applicable. Since no proceedings had been brought, she concluded that the legal fees were irrecoverable.

[147] Before considering whether the learned judge erred in her interpretation of the statement in **Parker-Tweedale v Dunbar Bank plc and Others (No 2)**, it is necessary to examine the contractual provisions themselves. Clause 2(v) provides that the Roses covenant:

“to pay the Society all costs, charges and expenses incurred or to be incurred by the Society in and about this security or in relation to any default hereunder or in the protection of its interest or enforcement of its rights hereunder ...”

[148] Clause 4, which is also material, provides that the Roses shall pay on demand the Society’s expenses incurred in relation to the security. The expression “Society’s expenses” is defined to include expenses incurred in connection with “considering or enforcing or attempting to enforce” the Society’s rights and powers under the mortgage. As previously clarified, the mortgage was transferred from the building society to the bank, so, the references to the society apply equally to the bank.

[149] Clause 2(v) is expressed in broad terms. Its language is not confined to litigation costs nor restricted to expenses incurred after the institution of proceedings. Properly analysed it entitles the bank to recover costs, charges and expenses incurred or to be incurred:

- (a) in and about the security;
- (b) in relation to any default;
- (c) in the protection of its interests; and
- (d) in the enforcement of its rights.

In my view, the contractual language is sufficiently broad to permit recovery, in principle, of legal fees reasonably incurred prior to litigation. The clause extends beyond “enforcement” and expressly embraces expenses incurred “in and about” the security, “in relation to” a default, and “in the protection” of the bank’s interests. Those words can encompass legal consultations, investigations, meetings, and advice obtained in response to disputed defaults and threatened litigation.

[150] The learned judge, therefore, erred in confining the operation of clause 2(v) to costs incurred after the commencement of proceedings. The evidence accepted by her was that serious allegations had been made against the bank and that litigation had been threatened. In response, the bank investigated the matter, obtained legal advice, and attended meetings with the Roses and their attorneys. The learned judge expressly found that those actions were not unreasonable.

[151] The difficulty confronting the Roses is that clause 2(v) is not confined to litigation costs. Liability ultimately depends upon the contractual bargain struck by the parties. It extends to reasonable costs incurred in relation to a disputed default and in protection of the bank’s interests. Clause 4 reinforces that interpretation by expressly referring to expenses incurred in “considering” or “attempting to enforce” the mortgagee’s rights. The learned judge, therefore, erred in construing the bank’s right of recovery as dependent upon the commencement of proceedings.

[152] The clause considered in **Parker-Tweedale v Dunbar Bank plc and Others (No 2)** provided that: “All costs, charges and expenses properly incurred hereunder by [Dunbar] ... shall be charged on the mortgaged premises”. This case concerned a

mortgagee's attempt to add to the security costs incurred in defending proceedings brought by a third party who challenged the mortgagee's exercise of its power of sale. The mortgagee's application failed. The circumstances were, therefore, materially different from those arising here.

[153] More importantly, **Parker-Tweedale v Dunbar Bank plc and Others (No 2)** does not establish that recoverable mortgagee costs must invariably be litigation costs. Nourse LJ merely observed that proceedings are "often" necessary when a mortgagee is enforcing or preserving its security. The decision recognises that costs may be incurred outside litigation in the process of preserving or enforcing a security.

[154] That understanding is reinforced by **Gomba Holdings (UK) Ltd and Others v Minorities Finance Ltd and Others (No 2)**, where Scott LJ observed that the principle permitting a mortgagee to add properly incurred costs, charges, and expenses to the secured debt is firmly embedded in mortgage law and underlies express contractual provisions of the kind under consideration. The mortgagee's entitlement is determined, in the first instance, by the contractual language employed by the parties.

[155] The Roses sought to distinguish **Gomba** on the basis that the relevant mortgage in that case contained a more specific indemnity clause. That distinction does not affect the underlying principle that non-litigation costs may be recoverable where the mortgage agreement so provides. Clause 2(v), although not identical to the provision considered in **Gomba**, is plainly broader than a clause confined to costs of proceedings.

[156] Accordingly, I conclude that the learned judge misapplied **Parker-Tweedale v Dunbar Bank plc and Others (No 2)**. That decision does not preclude the recovery of pre-litigation legal costs incurred by a mortgagee pursuant to an appropriately worded mortgage agreement.

[157] The conclusion that the mortgage agreement entitled the bank, in principle, to recover non-litigation costs does not mean that every amount charged was automatically recoverable. As **Gomba Holdings (UK) Ltd and Others v Minorities Finance Ltd and**

Others (No 2) makes clear, a broadly worded costs clause does not entitle a mortgagee to recover costs that were unreasonably incurred or unreasonable in amount. However, that question does not arise for determination in this appeal. The learned judge did not reject the bank's claim because the amount charged was unreasonable or because the bank had failed to prove the quantum of its expenditure. Rather, she concluded that the legal fees were irrecoverable as a matter of law because proceedings had not been commenced. For the reasons already given, that conclusion was wrong. The issue before this court is, therefore, one of contractual entitlement only, not the reasonableness of the amount claimed. The learned judge erred in holding that non-litigation fees were irrecoverable under clause 2(v) of the mortgage agreement. Accordingly, ground iii succeeds.

Issue (ii) Whether the learned judge erred in considering the Roses' pleaded loss in circumstances where she did not make a finding of liability against the bank? (Grounds iv and v)

Summary of submissions for the bank

[158] Mrs Robinson submitted that para. 46 of the Roses' particulars of claim pleaded "legal fees – \$500,000.00" under the heading "Particulars of Losses". However, counsel contended that the learned judge erred in considering the sum of \$500,000.00, representing legal fees allegedly passed on to the Roses before the commencement of proceedings, in circumstances where she made no finding of liability against the bank and had expressly stated that: "[i]t is therefore not necessary to proceed to consider the other claims for losses and injuries and whether damages should be awarded".

[159] Counsel further submitted that the learned judge erred in declaring that the bank's legal fees of \$500,000.00 ought not to have been passed on to the Roses when no such relief had been pleaded, no declaration had been sought, and there was no applicable evidential or legal basis for such an order.

Summary of submissions for the Roses

[160] Ms Moore, relying on **Parker-Tweedale v Dunbar Bank Plc and Others (No. 2)**, submitted that the bank's entitlement to recover legal fees arose under the mortgage agreement and did not extend to matters concerning the management of the Roses' accounts. Counsel argued that having found that the sum of \$500,000.00 ought not to have been passed on to the Roses, the learned judge ought also to have ordered an account. She maintained that this ground of appeal could not succeed.

Discussion and disposal of grounds iv and v

[161] While the learned judge was entitled to consider the legal-fees issue because it was pleaded as an item of loss and fully argued by the parties, there is merit in the bank's submission that, having found no liability on the substantive claim, she could not properly treat the \$500,000.00 legal fees as a recoverable head of loss. Having expressly concluded that the Roses had failed to establish negligence or breach of fiduciary duty, and having dismissed the substantive causes of action, the learned judge could not properly treat that pleaded item as recoverable damages.

[162] Her error also lay in making a finding adverse to the bank's contractual entitlement and then relying on that finding to justify a costs order in favour of the Roses.

[163] Grounds iv and v, therefore, succeed.

Issue (iii): Whether the learned judge erred in awarding 5% costs to the Roses (Ground i and ii)

Summary of submissions for the bank

[164] Mrs Robinson submitted that the general rule governing costs is contained in rule 64.6(1) of the CPR, which provides:

"If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."

[165] Counsel further submitted that the rule is subject to the exceptions contained in rules 64.6(2), (3), and (4). Rules 64.6(3) and (4) require the court, in determining liability for costs, to consider all the circumstances, including whether a party has succeeded on particular issues even though unsuccessful overall. Counsel argued that the learned judge failed to identify any circumstance falling within rule 64.6(4) that justified departing from the general rule that the unsuccessful party, namely the Roses, should bear the bank's costs. She pointed out that the only finding made against the bank was that it was not entitled to pass on the legal fees, a matter that was not reflected in the pleaded relief.

[166] On that basis, counsel submitted that the learned judge erred in awarding the Roses 5% of the costs in circumstances where they had not succeeded on any aspect of their pleaded case. She further contended that the learned judge erred in awarding those costs because of her finding concerning the legal fees, since the Roses ought not to have succeeded on that issue.

Summary of submissions for the Roses

[167] Ms Moore submitted that the learned judge was entitled to award the Roses 5% of the costs because she found in their favour on the legal-fees issue. Counsel also reiterated her submissions that the bank had wrongly classified the loan as non-performing and had negligently managed the account, although those contentions were rejected by the learned judge.

[168] Relying again on **Parker-Tweedale v Dunbar Bank Plc and Others (No. 2)**, counsel submitted that the bank's right to recover legal fees was grounded in the mortgage agreement and did not extend to matters connected with the management of the account. She, therefore, argued that the learned judge was entitled to conclude that the \$500,000.00 ought not to have been passed on to the Roses.

Discussion and disposal of grounds i and ii

[169] Section 28E of the Judicature (Supreme Court) Act ('the Act') provides that the costs of all civil proceedings in the Supreme Court are within the discretion of the court.

The Act also empowers the Rules Committee to prescribe the circumstances in which one party may be ordered to pay another's costs. Those statutory provisions are supplemented by the CPR, which set out the principles governing the exercise of the court's discretion in relation to costs.

[170] Rule 64.6 of the CPR establishes the general rule that the unsuccessful party must pay the costs of the successful party. The court, nevertheless, retains a discretion to depart from that rule and may order a successful party to bear all or part of another party's costs or make no order as to costs. In exercising that discretion, the court must consider all the circumstances, including whether a party has succeeded on particular issues. A party who achieves success on a discrete issue may, in an appropriate case, be awarded a proportion of the costs even though unsuccessful overall. However, that presupposes genuine success on an issue properly determined in that party's favour.

[171] In the instant case, the only discernible basis upon which the learned judge awarded 5% of the costs to the Roses was her finding that the bank ought not to have passed on the legal fees of \$500,000.00. For the reasons already given, that conclusion was founded upon an erroneous interpretation of clause 2(v) of the mortgage agreement and a misapplication of **Parker-Tweedale v Dunbar Bank plc and Others (No 2)**. Once that finding is set aside, the foundation for treating the Roses as successful on a discrete issue disappears. In those circumstances, there is no basis for the award of 5% of the costs to the Roses. Given that conclusion, there should be no need for this court to treat with the bank's further submissions. Accordingly, grounds i and ii succeed.

[172] Having concluded that the grounds advanced by the bank have merit, the bank's cross appeal succeeds.

Costs

[173] The bank having succeeded on the appeal and its cross appeal is entitled to the costs of the appeal, its cross appeal, and full costs in the court below, to be taxed if not agreed.

Disposition

[174] I would, therefore, propose that the final order of this court be made, dismissing the Roses' appeal and allowing the bank's cross appeal with costs of both appeals and the costs of the proceedings below to the bank to be agreed or taxed.

G FRASER JA

[175] I, too, have read the draft judgment of Dunbar Green JA. I agree with her reasoning and conclusion.

P WILLIAMS JA

ORDER

Supreme Court Civil Appeal No 110/2018 (the Roses' appeal)

- i) The appeal is dismissed.
- ii) Order i of Wiltshire J (Ag), dated 5 October 2018, is affirmed.
- iii) Costs of the appeal to the bank to be agreed or taxed.

Supreme Court Civil Appeal No 111/2018 (the bank's cross appeal)

- i) The cross appeal is allowed.
- ii) Orders ii and iii of Wiltshire J (Ag), dated 5 October 2018, are set aside.
- iii) Costs in the court below to the bank to be agreed or taxed.
- iv) Costs in the cross appeal to the bank to be agreed or taxed.