



[2013] JMSC CIV. 104

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**SUIT NO. 2008 HCV 5934**

<b>BETWEEN</b>	<b>SYLVIA STEENS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>NATIONAL COMMERCIAL BANK OF JAMAICA LIMITED</b>	<b>DEFENDANT</b>

**Lord Anthony Gifford Q.C. Attorney-at-Law instructed by Gifford, Thompson and Bright for the Claimant**

**Mrs. Sandra Minott-Phillips and Miss Kay-Ann Taylor Attorneys-at-Law instructed by Myers Fletcher and Gordon for the Defendant**

**Banker/Client relationship – Whether advice given by employee of defendant – whether advice given in a friendly capacity – whether advisor knew that she was being trusted or that reliance was placed on her skill – whether duty to exercise care imposed on person giving advice – whether defendant vicariously liable**

**Heard on : March 14, 2011, April 1, 2011 and August 5, 2013**

**THOMPSON-JAMES J.**

**Introduction**

[1] The Claimant Miss Sylvia Steens was a customer of the Defendant. Miss Sandra Cunningham a long-time friend of the Claimant was employed to the defendant and was personal banker to Miss Steens. Miss Cunningham resigned from the bank in November 2007. Miss Steens had savings of over Euro 100,000.00 at National Commercial Bank (NCB) Capital Markets Limited. She claims that in May and June 2007 Sandra Cunningham gave her unsolicited advice that she should invest funds in an investment programme which would earn her more money than would be earned on the Euro account.

- [2] In reliance on this advice the Claimant signed certain documents presented to her by Miss Cunningham and endorsed a cheque payable by the defendant NCB to her and gave this cheque to Miss Cunningham. Miss Cunningham, she claims, used part of the proceeds of the cheque to invest in Higgins Warner, an unregistered investment scheme. Miss Steens claimed that she suffered loss of \$2,004,475.28 plus interest.
- [3] The Defendant contends that any advice that Miss Cunningham may have given was not given in her capacity as an employee of NCB. In any event the advice could not have been relied on by Miss Sylvia Steens to place deposits with Higgins Warner because the first of the deposit was placed with Higgins Warner long before the proceeds of the loan was secured.
- [4] If the first deposit was placed before the advice given, the second could not have been as a result of the advice given. The express purpose of the loan was to purchase real estate and for personal expenses. This does not encompass depositing money in an unregistered scheme. Miss Steens did accept the proceeds of the loan and therefore must be obliged to repay it on the terms set out in the commitment letter.

### **The Claim**

- [5] The Claimant Sylvia Steens claims against the Defendant National Commercial Bank Jamaica Limited, a company duly registered under the laws of Jamaica with registered office at the Atrium, Kingston in the parish of St. Andrew. She Claims:
- (1) Damages in the sum of \$2,004,475.28
  - (2) Interest on the said damages from October 1<sup>st</sup> 2008 at such rate as the Court may think fit.

### **The Defence**

- [6] Among other things the Defendant avers that Sandra Cunningham, to the knowledge of the Claimant, was only authorized by the Defendant to convey information about the Defendant's services and to act on the Defendant's behalf in relation to the Defendant's banking transaction with the Claimant.
- [7] The Defendant denies that Sandra Cunningham gave the Claimant investment advice in her capacity as a servant of the Defendant as alleged in the Particulars of Claim as she had no authority to give such advice in that capacity, a fact that was known to the Claimant.
- [8] If the Claimant has suffered any loss or damage as alleged in the Particulars of Claim, which is neither admitted nor denied, such loss is not attributable to any act or omission of the Defendant and the Defendant denies that it is liable.
- [9] To the extent that the Claimant sought, in making her investment, to carry out an illegal transaction, the Defendant says the Claimant cannot recover from the Defendant for the losses suffered by reason of the illegality.

#### **The Claimant's Account**

- [10] Miss Sylvia Steens testifies that when she was about 14 years old she lived in the parish of St. Thomas for about 2 years. During that time she met Sandra Cunningham. Their friendship continued. Miss Cunningham later became an employee of National Commercial Bank (NCB) in Morant Bay. She had banked with NCB from she was in school.
- [11] Between 1994 to 2004 she lived in Germany. During that time Miss Cunningham was assigned as her personal banker. They would see each other from time to time. When Miss Steens visited Jamaica she would make lodgments to her account. The account was a Euro account. She also had a US dollar account, several Jamaican dollar accounts as well as a Capital Market account.

[12] When she returned to live in Jamaica in 2004 she had Euro 130,000.00 in the account. She maintained her accounts with NCB Morant Bay despite residing in Portland and the Defendant continued to be her personal banker and friend. In May 2004 she saw Miss Cunningham at NCB Morant Bay where she had gone to pay some bills. Miss Cunningham told her about an investment scheme and told her that she could make more money with this programme than with the Euro Account. She told her that the investment was sure and that she has nothing to be afraid of because she would not lose her money. She agreed to accept the advise as Miss Cunningham was her personal banker and she trusted her.

[13] Miss Cunningham told her that she would arrange for her to take a loan from the bank for Six Million Dollars (\$6m) and the funds in the Euro account would be used as collateral. The funds from the loan would be used to invest in the investment programme in the witness' name.

[14] Miss Cunningham gave her a number of documents to sign and she signed them. She received no copies of the documents. She has since seen the following documents which bear her signature:-

- (a) an authority to hypothecate the sum of Euro 100,000.00 in her Euro account dated 20<sup>th</sup> June, 2007.
- (b) a letter dated 25<sup>th</sup> June, 2007 advising the approval for her application for a loan of \$6m;
- (c) a deed of Indemnity dated 26<sup>th</sup> June, 2007 addressed to NCB Capital Markets Limited;
- (d) a document headed "World Football Idol" dated 27<sup>th</sup> June, 2007 referring to an investment of US\$40,000.00;
- (e) a cheque in the amount of \$6M from NCB to herself which she endorsed and handed to Sandra Cunningham.

She did not need any funds to cover personal expenses and she did not see this at the time. Nor did she intend to purchase any land.

- [15] Sometime after this she received a call from Miss Cunningham indicating that she is no longer working at the bank and that she is accused of fraud.
- [16] In March 2007 she went to NCB Morant Bay and spoke with the Manager there who gave her the telephone number of Mr. Parchment, an Investigator for NCB, who told her about fraud at the bank as well as about Higgins Warner. She later learnt that Higgins Warner had closed down and left Jamaica. Further she received a letter from NCB indicating that she owed the bank \$6M Dollars which she had to pay back and that Miss Cunningham had acted outside the scope of her authority.
- [17] Subsequently she visited Miss Cunningham, earlier efforts to contact her by telephone had proved futile and got documents related to "World Football Idol" Miss Cunningham told her she had borrowed money from her. She gave Miss Cunningham no permission to borrow any part of her money. April, 29, 2008 following on a text from Miss Cunningham she went to NCB Bank Morant Bay and found out that Miss Cunningham had made payments that she was unaware of to the bank in the sum of \$544,000.00 Jamaican. Later still she received further communication that there was a cheque for her at the bank in the sum of \$2,650,000.00 Jamaican. She gave instructions for this to be placed in an account opened in her name.
- [18] In relation to the Defence, that to her knowledge Sandra Cunningham was only authorized to convey information about the Bank services and to act in relation to banking transactions, she testifies that she was never given any such information. Rather she trusted Miss Cunningham as her personal banker to give her advice about everything.
- [19] In **cross-examination** she testifies that in relation to the document and what appears to be US\$4,000.00 and what appears to be US\$40,000.00 this constitutes part of her claim that she was an ordinary customer of NCB as well as

a customer of NCB Capital Market where she has two (2) investment businesses. She did not know about Higgins Warner (see exhibit 2A and 2B) and at all times she knew that NCB was in the business of banking only.

[20] In order to pledge her Euro Investment with NCB Capital Market as security for the loan she got from NCB, she instructed NCB Capital Market to give relevant information in relation to her Euro Investment to the NCB. In relation to her NCB Capital Market Asset Portfolio (Exhibit 1) she indicates that there are two investments, one in US Dollars and the other in Euro Investment. This Euro Investment she has always had with NCB Capital Market. She did not understand the Capital Market to be a separate legal entity. She thought it was the same bank. She did not physically take this money from the bank to place in the Capital Market.

[21] In relation to the Gleaner's "Public Notice Unregistered Investment" ("Exhibit 1") she testifies that she has seen notices like that many times. She has also heard comments on radio about investing in unregistered schemes but it was after this issue that she had with the bank that she knows that NCB is registered to do the banking business.

[22] In relation to "World Football Idol" guaranteed contract (see "Exhibit 1") she testifies that she does not recognize the signature at the bottom of the document. However, she admits that she signed a similar document on June 22, 2007. In relation to this second document and this question put to her by Learned Counsel Mrs. Minott-Phillips – "Did you intend to invest \$40,000.00 and to collect 20% interest of US\$8,000.00 for each month for a period of six months?" Her response was that she signed and agreed to the document but she did not read it. She did not concern herself with whether or not Higgins Warner Group S.A. was registered to conduct Investment business but she knew NCB Investments was registered to carry on investment business.

[23] In relation to her NCB Capital Investment dated January 20, 2009 (Exhibit 1-61) she admits that the amount that she would receive would be \$12,014,484.63 purchase cost being \$112,450.00, accrued interest being \$9,867.12. Her loss would be \$14,100.00 resulting in the sum of \$108,217.12. Along this line she states that you can make and sometimes you can lose money. She did not take her money and place it with Higgins Warner. At this point in time her investment was losing money. She was not unhappy with NCB. She understands Higgins Warner is now closed down.

[24] Sandra Cunningham was her friend for fourteen (14) years. Their relationship started before she started working at NCB. They were close. They grew up together in the same community. She knew most of Miss Cunningham's family and friends. They maintained this relationship and interacted as close friends over the years. So close were they that she even allowed Miss Cunningham to live in her house rent free for a time whilst she still worked at NCB. It is fair to say that her relationship with Miss Cunningham had nothing to do with her working at NCB.

[25] In relation to her US Savings Account at NCB she admits that an entry indicates that Higgins Warner is paying money into her account by way of salary. She is receiving a payment designated as salary into her account from Higgins Warner.

[26] In relation to a document signed by Sandra Cunningham and herself, the sum of US\$40,000.00 deposited to Higgins Warner and Miss Cunningham promise that if the sum of US\$40,000.00 are not received before the end of May 2008, she will return the said sum and accrued interest before May 2008. Miss Steens admits that the signature below Miss Cunningham's is her signature. By this document she admits a loan of \$40,000.00 from herself to Miss Cunningham. She further agrees that a loan does not constitute misappropriation of funds.

- [27] In relation to a document dated April 29, 2008, its reference to a cheque numbered 021978 and the sum of \$2.650M, Miss Steens agrees that Miss Cunningham is suggesting that she is making all payment in relation to a loan from her to Miss Cunningham. Further the cheque represents a payment from Miss Cunningham. This has been deposited to her account. She admits instructing the bank to pay this money into her fixed deposit and it is correct that Miss Cunningham repaid this money to her.
- [28] She keeps the passbooks to her US and Jamaican dollar savings accounts. She did not get a statement from the bank. All her statements went to Miss Cunningham. She used to give Miss Cunningham the yellow slips so she could deposit the money into her account.
- [29] In relation to her US Dollar account number 646499976 and with reference to Higgins Warner repaying on this account before March 2007 that is before she spoke to Mr. Parchment, her testimony is that she did not know about Higgins Warner before she secured the loan proceeds of \$6M. On her JMD statement she has seen the date June 27, 2007. The proceeds of the \$6M was disbursed and she remembers the contract that she signed on May 22, 2007. It is after she got US\$36,000.00 that Higgins Warner closed down. She did not get anymore money from them. She has not sued them.
- [30] Although not mentioned in the pleadings she gave Miss Cunningham a Power of Attorney to deal with her account.
- [31] With reference to her loan application for \$6M Jamaican she agrees that her signature is on the document but maintains that she signed without reading and in answer to the suggestion that the reason why she borrowed \$6M is to purchase land and to cover personal expenses, her response was "I did it based on what she told me".

[32] NCB has accounted to her for every cent that she has put into it. NCB disbursed the loan she requested for the purpose of acquiring land and to cover personal expenses. All disbursements were done on her signature or direction. She testifies that she cannot answer that at no time did NCB misappropriate an amount of her money. Neither can she answer that such arrangements that she had with Higgins Warner were entered into before she received the loan funds of \$6M.

[33] NCB is engaged in the business of banking, Higgins Warner is not engaged in the business of banking. It is based on what Miss Cunningham said to her why she invested in Higgins Warner. Her relationship with Miss Cunningham is independent of a relationship with NCB. In **re-examination** she testifies that she keeps her passbook to her savings account at her home in Portland. Between May and November 2007 she did not visit Morant Bay very often. She has never loaned Sandra Cunningham any money.

#### **The Defendant' s Account**

[34] Miss Paulette Forsythe, Operations Manager of Morant Bay Branch, NCB, testifies that she has access to the records of NCB relating to the accounts held by Miss Steens at the branch and is authorized to give evidence on behalf of the bank. NCB is licensed under the Banking Act of Jamaica to carry on business as a Commercial Bank (copy of NCB License under the Banking Act produced). The only activities of NCB are that of a Commercial Bank and its employees can only give advice relating to the services offered by the bank. The bank is not licensed to nor is it in the business of giving investment advice.

[35] Miss Steens was the holder of several accounts at the branch. She was listed as one of the banks first class customers and as such had Miss Sandra Cunningham, who resigned from NCB on March 23, 2007, assigned to her as her personal banker at the time of the incidents which are the subject of the claim. The accounts held included account Number 646499976 and 644055566. These

accounts were closed on January 15, 2009 and new accounts were opened at the Port Antonio branch at Miss Steens' request.

- [36] Miss Steens was also a customer of NCB Capital Market Limited, a member of NCB Group of Companies which is in the business of giving investment advice. Her account with NCB Capital Market was opened January 24, 2005 when Miss Steens purchased Euro 100,000.00 Global bank (account number 704425).
- [37] In or about June 2007 Miss Steens applied to NCB for the purpose of acquiring real estate and personal expenses. A commitment letter was issued and Miss Steens signed agreeing to the terms. Collateral for the loan proceeds was agreed to be the hypothecation of the Euro \$100,000.00 invested. June 27, 2007 a cheque was made payable and issued to her representing the loan proceeds of \$6M. The records of the bank do not show what Miss Steens did with the proceeds of the loan.
- [38] Between July 2007 and August 2008 Miss Steens repaid a total of \$2,508,797.66 and on October 1, 2008 she liquidated the said loan by making a final payment of \$4,727,387.34. This loan account was closed.
- [39] The first time the bank was aware that Miss Steens had lost funds invested in Higgins Warner Scheme (listed by the FSC as an unregistered alternative investment scheme) was when she made a complaint to the bank through her attorneys claiming that Miss Sandra Cunningham had given her negligent advice, telling her to invest with Higgins Warner.
- [40] NCB has no affiliation or relationship with Higgins Warner and from notices she has seen in the press and issued by the FSC Miss Forsythe states that she knows that Higgins Warner is an unregistered alternative investment scheme. It is not and never has been the practice of NCB to advise its customers in relation to products and services not offered by the bank.

- [41] If Miss Cunningham offered any advice in relation to Higgins Warner or any advice in relation to products or services, not offered by NCB, to Miss Steens such advice was given in her personal capacity as Miss Steens relationship was not confined to her dealings with the bank. They were personal friends.
- [42] In **cross-examination** she testifies that the evidence in her statement in relation to Miss Steens' dealings with the bank is what she has gathered from the bank records. She worked at the Morant Bay branch in 2007 and she would see Miss Steens at the bank from time to time but she had no direct dealings with her.
- [43] The duty of a personal banker is to give advice on NCB products and loans and to give that personal touch to the customer while they are enjoying this exceptional personal service. To open accounts on behalf of the customers and to prepare Manager's cheques or drafts and whatever else the NCB offers. This exceptional service is given to a limited number of persons. The intention being that the customer and the personal banker should develop a personal relationship. It is expected by the bank that the customer will trust the personal banker in relation to the business of the bank.
- [44] NCB Capital Market is a subsidiary of NCB. There is an office in Morant Bay. The same premises as NCB. If a customer wishes to invest with NCB Capital Market the personal banker's role is to refer the customer to the NCB's Capital Market representative who is authorized to deal with this.
- [45] Employees of NCB cannot give advice as to unregistered financial institutions. Higgins Warner is an alternative investment scheme.

### **The Claimant's Submission**

- [46] Learned Counsel for the Defendant Lord Anthony Gifford Q.C. in his closing submission points out that the issues for the determination of the court are:-

- (1) Did Sandra Cunningham advise the Claimant to invest money into Higgins Warner Scheme?
- (2) Did the Claimant act in reliance upon the advice?
- (3) Was the advice negligent?
- (4) Is the Defendant liable to the Claimant for any damage caused by the advice whether
  - (a) in contract or
  - (b) in tort
- (5) Damages suffered by the Claimant.

[47] In relation to the advice given he states that the only direct evidence in relation to this advice is that given by Sylvia Steens. Miss Cunningham has not been called. She resigned after investigations had started into her activities. The only evidence led on behalf of the Defendant is that of Miss Forsythe saying that Miss Cunningham is not authorized to give that advice.

[48] However in letters written by Miss Cunningham (Exhibits 1-20 and 1-24) she admits depositing funds to Higgins Warner and in Exhibit 1-24 she claimed that this is a loan. The picture created by these letters is that she had received the Claimant's money and used it in various ways. Highly unusual conduct for a personal banker but it is the Claimant's account that trusting in her personal banker she endorsed over the cheque of \$6M to Miss Cunningham to invest in an investment programme.

[49] The court, he submits, can infer that Miss Cunningham was a dishonest bank employee who abused the trust that her customer placed in her and had links with the Higgins Warner scheme. If the Claimant had simply wanted to invest in an unregistered scheme with the hope of quick profit she could have done so. She had the Euro funds in her account there was no reason to borrow on that account and use Miss Cunningham's services as intermediary. Nor was there

any reason to lend Miss Cunningham money. The whole series of transactions smacks of manipulation by someone who has banking knowledge.

[50] The Defendant relies on the fact that one of the Higgins Warner document bears the date May 22, 2007. A date before the loan date. The Claimant cannot explain this. Her testimony is that to the best of her recollection she signed all the documents on the second visit to the bank. The difficulty is that she signed the documents without reading them. This happens when a person trusts the profferer of a document. She affixed her signature to documents of which she has no understanding. The issue is not whether the documents are legally binding, the Claimant in repaying the loans has accepted this. The issue here is whether the evidence, such as a whole, points to the Claimant having acted rashly but trustingly on the basis of her personal banker's advice. It is submitted that the evidence points plainly to that conclusion.

[51] It is further submitted that the Claimant acted on Miss Steens advice to put the money into the investment programme. The cheque for \$6M according to Miss Cunningham's letters was used partly to pay Higgins Warner and partly as loan. Some of which was paid back to Miss Steen by Miss Cunningham. This, he submits, is wholly inconsistent with proper dealings on the part of a personal banker, and wholly consistent with the Claimants claims that Miss Cunningham abused her position for her own use.

[52] Although the Claimant and Miss Cunningham were friends the evidence points to the advice given, as was given by Miss Cunningham in her position as personal banker and was given at the bank. The defence has adduced no evidence to prove knowledge on the part of the Claimant that Miss Cunningham was only authorized to convey information about the Defendant's services.

[53] The court is asked to find that the Claimant signed the various documents and handed over the cheque that she had endorsed because she was advised by

Miss Cunningham that her money would be placed in an investment programme which was secure and which would make her more money than in the Euro Account.

[54] There can be no doubt that the advice was negligent. The Defendant has adduced evidence of the FSC (Exhibit 1-62) to the effect that Higgins Warner was unregistered. It was plainly foreseeable that a person investing in such a scheme was undertaking an hazardous investment and could lose their money.

[55] In relation to the Defendants liability, reliance is placed on the principle in Banbury vs Bank of Montreal 1918 A.C. 626:

- This principle it is submitted was upheld in National Commercial Bank vs Hew (2003) 63 WIR 183 and Woods v Martins Bank (1958) 3 A.E.R 166.

[56] It is further submitted that the bank is also vicariously liable for the negligence of its employee even if they act beyond the scope of their authority. If the court finds no liability in contract, it should find liability in tort. The principle of vicarious liability which applies to circumstances of wrong doing by an employee were set out in Bernard vs Attorney General (2006) 65 WIR 245 and in Dubai Aluminum v Salaam (2003) 2 A.C. 366 page 377.

[57] He concludes that the advice given by Miss Cunningham was given as a personal banker to the Claimant who trusted her. It was confirmed by Miss Forsythe that the Bank expects personal bankers to develop relationship of trusts with customers. The wrongful conduct of Miss. Cunningham was closely connected with the acts she was authorized to do.

**The Defendant's Submission**

[58] After (a) outlining the claim (b) pointing to the two documents signed by Miss Steens in relation to Higgins Warner (c) The Claimant admitting to knowing Miss Cunningham since she was a child (d) the sum claimed by Miss Steens (e) NCB

in its defence relying on the terms of the commitment letter (accepted by Miss Steens) (f) The entire loan proceeds having been paid directly to Miss Steens (g) and suggesting that any placement of funds with Higgins Warner was done by the Claimant herself, Learned Counsel (as she was then) Mrs. Minott-Phillips submits that the issues before the courts are:-

- (i) Did Sandra Cunningham negligently advise Miss Steens to invest in Higgins Warner?
- (ii) If so was such advice given by Miss Cunningham in her capacity as an employee to NCB or in the capacity as a long standing friend?
- (iii) If given in her capacity as an NCB employee, did it fall within the scope of banking business and can NCB therefore be held vicariously liable for the advice?
- (iv) Alternatively in placing the money with Higgins Warner, was Miss Steens aiding and abetting an illegal enterprise with the consequence that the court will not lend her its aid in seeking to recover her loss.

[59] She submits that on a balance of probabilities the evidence adduced by the Claimant falls well short of what would be required in law to establish liability on the part of the Defendant.

[60] In relation to what amounts to negligent advice she asserts that the law as regards liability for a negligent statement is for the most part settled and cited the case of Hedley Byrne vs Heller and Partners Ltd (1963) 2 A.E.R 575 and after outlining the facts of the Hedley Byrne case and the principle, as laid down by the House of Lords, she further asserts that as there was clearly no obligation on Miss Cunningham or the bank to provide the alleged advice, such a duty would require the Claimant to establish that there existed a special relationship between both parties.

[61] The authorities suggest that in deciding whether there is a special relationship there, it is useful to use the three-fold test:-

- (i) Whether there is sufficient proximity between the parties.
- (ii) Whether it is reasonably foreseeable by the representor that the representative will rely on the statement.
- (iii) It must be just and reasonable for the law to impose the duty.

[62] The Learned Counsel submits that to establish a special relationship the Claimant has to establish this between herself and the bank. The law does not presume the existence of this special relationship in the ordinary banker/customer relationship (National Commercial Bank Jamaica Limited vs Hew). She further proposes that such proximity as there was existed between Miss Steens and Miss Cunningham as longstanding friends and did not arise as a consequence of the latter's employment with the bank.

[63] She asserts that the fact that Miss Cunningham was a personal banker did not convert the ordinary banker client relationship into a special relationship in law.

[64] It is further submitted that the evidence shows that Miss Steens first investment with Higgins Warner preceded her receipt of the loan proceeds in relation to which she contends, Sandra Cunningham's advice was negligently given.

[65] In relation to if advice was given, it was not given within the course of Miss Cunningham's employment or within the ambit of her ostensible authority, it is submitted that the law recognizes that an employer will only be liable for any (alleged) tort committed by its employee in the course of its employment. Even if the employee is liable in her personal capacity for the tort the employer does not have to shoulder the servants' liability.

[66] In deciding whether the employer is liable, she argues that the court must consider whether the employee had the authority (actual, apparent or ostensible) to give the advice as to be taken as acting within the scope of her employment. NCB submits that Miss Cunningham is not to be taken as having so acted. Citing

Diplock L.J. in *Freeman & Lockyear vs Bruckhurst Park Properties* (1964) 2Q.B. pg 503.

- [67] With regard to the Claimants reliance on the Privy Council decision of *Bernard vs Attorney General of Jamaica* (204) 65 W.I.R. 245 she submits that their Lordship of the Privy Council states that in deciding whether an employer is liable for the acts of its employee, it is necessary to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether it is just and reasonable to hold the employer vicariously liable.
- [68] She further submits that Miss Cunningham was an employee of National Commercial Bank, the bank was not in the business of giving investment advice. The Claimants testimony is that she did her investment business with NCB Capital Markets. The evidence before the Court does not support a finding that it is just and reasonable to hold NCB liable for the alleged negligence of Miss Cunningham.
- [69] There is no evidence, she asserts of misappropriation of funds. The hand written documents relating to monies owed to Miss Steens by Miss Cunningham illustrate that such loans owed by Miss Cunningham were owed by her personally and not NCB. Referring to the case of *Bazley vs Curry* which was cited in the *Bernard* case it is submitted that if the court finds that a wrong was committed by Miss Cunningham it was not committed within her employment such that it can be said that NCB introduced the risk of the wrong.
- [70] In relation to whether Miss Steens is barred from recovering from NCB in any event because of her involvement in doing business with an illegal Investment Scheme, it is submitted that in placing her money with Higgins Warner, Miss Steens aided and abetted its criminal act. In support of this stance Lord Diplock

statement in *Mackender v Felida* [1967] 2 QB 590 at pg 601 is cited. Succintly stated thus:

A contract tainted by illegality is wholly unenforceable by both parties to the contract.

Subsequently no rights could have been acquired by Miss Steens under her contract with Higgins Warner.

[71] It is further submitted that Miss Steens has admitted that she has not brought a claim against Higgins Warner. She therefore seeks to circumvent the illegality of her transaction with Higgins Warner by bringing this action against NCB. The court ought not to entertain it. If rights could have been acquired under this contract, her obligation to take reasonable steps to mitigate her loss would arise. If she had a right to recover from Higgins Warner, NCB if liable at all would only be liable for the amount she could not recover.

[72] The illegality of the contract with Higgins Warner further supports NCB's submission that if there was any negligent advice given by Miss Cunningham it could not have been given within the course of her employment with NCB, as there is no evidence that she was authorized by NCB to give advice in relation to any illegal activity. Therefore the court ought to enter judgment for the Defendant.

### **The Applicable Law**

#### **Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd 1963 2 A.E.R. 575**

"If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person

replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damages result.

**Banbury v Bank of Montreal 1918 A.C. pg. 626 at pg 654 per Lord Finlay L.C.**

While it is not part of the ordinary business of a banker to give advice to a customer as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business.

A banker may as such give advice on investments to a customer who consults him, or, indeed, to anyone who comes to him for advice and who he chooses to advise. If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise but if he takes upon himself to do so, he will incur liability if he does so negligently.

Now negligence in a case of this kind involves a breach of duty. There can be no negligence in law unless it is the failure or omission to perform or discharge some duty which is imposed upon you. If there is a duty, then the defendant's servant would be bound to discharge that duty with ordinary reasonable care and skill such as a man would have the right to expect in the circumstances.

**National Commercial Bank (Jamaica) Limited vs Hew (2003) 63 W.I.R. p 183**

**..... - pg 188 per Lord Millett:-**

“a banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given.

(Warne & Elliot : Banking Legislation (1999) pg 28)

**Woods v Martins Bank Ltd & Another [1958] 3 A.E.R. pg 166 per Salmon J.**

“I find that it was and is within the scope of the defendants banker’s business to advise in all financial matters and that they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions

**pg 174**.....as he chose to advise him, the law in those circumstances imposes an obligation on him to advise with reasonable care and skill.”

**Bernard (Clinton) v Attorney General [2004] W.I.R. 245**

In the case of intentional wrongs, the correct approach to determine whether the employer is liable ----- is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether it is just and reasonable to hold the employer vicariously liable.

**Dubai Aluminium Co. Ltd. vs Salaama & Others 2003 2 A.C. 366**

A was acting in his capacity as a partner, his assistance in the fraudulent scheme by drafting the necessary agreements was so closely connected with the acts which he was authorized to do that for the purpose of the firms’ liability he could fairly and properly be regarded as having acted in the ordinary course of the firms’ business; that the assistance coupled with the dishonesty was sufficient to give rise to equitable liability on A’s part and that accordingly the defendant’s firm was vicariously liable for A’s conduct.

**Bazley vs Curry (1999) 174 DLR (4<sup>th</sup>); 45 /per/ Mclachin J at pg 62**

“The policy purposes underlining the imposition of vicarious liability on employees are served only when the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong and is thereby fairly and usefully charged with its management and minimization.”

**Salmon and Heuston on the Law of Tort 19<sup>th</sup> Ed. Pg 233**

Hedley Byrne affirms and extends the principle that a duty to be careful (as distinct from a duty to be honest) may exist in other than those in which there is a contract between the parties. It affirms that this duty may

exist where there is a fiduciary relationship. It extends that principle by suggesting that the duty extends to all relationships where the inquirer was trusting the other to exercise a reasonable degree of care, and when the other knows or ought to have known that the inquirer was relying on him.

### **Inconsistencies in Miss Steens evidence**

In relation to the document entitled "World Football Idol guaranteed contract" Miss Steens testified that she signed the document but she did not read it. In relation to her intention she stated "I can't answer if I intended to".

When Miss Steens was asked in cross-examination, "you would have no difficulty accepting that it is normal for close friends to give each other advice?" Her response was, "It depends on the advice." She then went on to testify that it is normal for close friends to give each other advise.

Of interest, is the fact that in an undated letter signed by Miss Cunningham and Miss Steens, Miss Cunningham is indicating that if funds of US\$40,000.00 plus interest is not paid before May 2008, Miss Cunningham will return the US\$40,000.00 plus accrued interest. It seems to me that Miss Steens is admitting a loan from her to Miss Cunningham.

Initially, Miss Steens told Learned defence Counsel that she signed a document dated May 22, 2007. Later it was suggested to her; you told the claimant today that you signed this document on May 22, 2007. Miss Steens responded, "I don't recall". The following suggestion was put to her; you told me that this is your signature and I said you signed it on May 22, 2007 and you said yes. To this Miss Steens responded "I now recall".

In relation to documents concerning Higgins Warner which Miss Steens admits bear her hand writing dated May 22, 2007 Miss Steens states that the first time she heard about Higgins Warner was in March 2007 when she spoke to Mr. Parchment, the NCB Investigator. Her bank statement however shows that the loan proceeds that of \$6M was disbursed on June 28, 2004. Her testimony however is that she did not read the documents that she signed on May, 22, 2007.

### **Findings of Facts**

- [73] It is not in issue that Miss Steens was a customer of the defendant, NCB and held several accounts at the Morant Bay bank one being a Euro Account. Miss Cunningham was employed to NCB, and was at the pertinent time attached to the Morrant Bay branch of the bank and was Miss Steens' personal Banker. Further during the period 1994 to 2004 Miss Steens lived in Germany. Miss Steens signed documents at the bank relating to loan of \$6M and repaid this loan. Showing that the documents that she signed were legally binding. A portion of money from Miss Steens account was invested in an unregistered Investment Scheme, Higgins Warner. Miss Cunningham later resigned from the bank under the shadow of allegations of dishonesty.
- [74] On a totality of the evidence I accept Miss Steens' testimony and find as a fact that in May 2004 on a visit to the bank Miss Cunningham told her about an investment programme, stating that the investment was secure. She had nothing to be afraid of because she would not lose her money. I accept Miss Steens testimony and find as a fact that she agreed to accept the advice as Miss Cunningham was her personal banker and she trusted her.
- [75] I accept Miss Steens' testimony and find as a fact that Miss Cunningham told her to take a loan of \$6M from the bank and the Euro Account would be used as collateral and the funds from the loan to invest in the programme. I accept Miss Steens' testimony and find as a fact that she did in fact sign documents but received no copies of these documents and that she sign the various documents without reading them. This is highly probable in light of the personal banker relationship that existed between Miss Steens and Miss Cunningham. I find that she did not see at the time that the purpose of the loan was to cover personal expenses and to purchase land.

- [76] I find as a fact and accept Miss Steens' testimony that she later received a call from Miss Cunningham indicating that she was no longer working at the bank as she had been accused of fraud. I accept her testimony and find as a fact that it was in March 2007 that she first became aware of Higgins Warner through NCB's investigator Mr. Parchment. She in fact maintained this position in cross-examination when she testified that the reference to Higgins Warner appearing in her US Dollar savings account number 64699976 was before November when she spoke to Mr. Parchment and prior to receiving the loan proceeds of the \$6M.
- [77] I accept Miss Steens' testimony when she states that she was never given any information in relation to Sandra Cunningham only having the authority to convey information about the banks services and to only act in relation to banking transactions. Further she trusted Miss Cunningham as her personal banker to give her advise about anything. She maintained this position in cross-examination when she testified she did not know that Miss Cunningham was not permitted to advise her in relation to investments.
- [78] It is Miss Forsythe's testimony that the duty of a personal banker is to give advice on NCB products and loans and to give that personal touch to the customer where they can enjoy this exceptional personal service. To open accounts on behalf of the customer and to prepare managers cheque ad drafts and whatever else the NCB offers (**emphasis mine**). I appreciate that Miss Steen testimony is that she dealt with NCB and NCB Capital Market but this does not in any way affect my finding in this respect. I accept her testimony when she said that she did not understand the Capital Market to be a separate legal entity. She did not take the Euros from the bank to place in the Capital Market. She did not know that they were different.
- [79] I accept her testimony when she said in cross-examination that she used to give Miss Cunningham the yellow slips so she could place the money in her account so that she would not have to travel to Morant Bay that often. That was how

much she trusted Miss Cunningham. I find that it is highly probable that she did not read the documents that she signed bearing in mind the trust she reposed in her personal banker, Miss Cunningham.

[80] I am aware also that her testimony is that she did not concern herself with whether Higgins Warner Group S.A. was registered to conduct investment business. I find this behaviour quite consistent with the trust and confidence that she placed in the advice given by Miss Cunningham and find it quite telling that whilst Miss Steens kept the pass books to her savings account, her bank statements went to Miss Cunningham. I accept her evidence in this respect.

[81] I accept her testimony that it is based on what Miss Cunningham said to her why she invested in Higgins Warner. I accept her testimony and find as a fact that she did not loan Sandra Cunningham any money. I take note of Miss Forsythe's the Operations Manager at NCB Morant Bay branch, testimony that the only activities of NCB are that of a Commercial Bank and its employees can only give advice relating to the services offered by the bank. It may well be so but I find that this did not prevent Miss Cunningham from giving Miss Steens advice in relation to Higgins Warner.

[82] It seems to me that NCB is not categorically denying that Miss Cunningham gave advice to Miss Steens but is arguing that if she did so this was done in her personal capacity and as a friend. For as Miss Forsythe testifies, "If Miss Cunningham offered any advice in relation to Higgins Warner or any advice in relation to product and services not offered by NCB, to Miss Steens such advice is given in her personal capacity".

[83] Miss Forsythe's testimony, it is interesting to note, is that the exceptional service given by a personal banker is given to a limited number of persons. The intention being that the customer and the personal banker should develop a personal relationship. It is expected by the bank that the customer would trust

the personal banker in relation to the business of the bank. Of course, her testimony also is that the personal banker gives advice about bank products not subsidiary companies. Despite this rider I find this bit of evidence telling as it seems to support the position that Miss Cunningham was placed in a fiduciary position in relation to Miss Steens, holds a position of trust in relation to her and must therefore act for her benefit. I cannot therefore find that in her dealings with Miss Steens accounts and giving her the advice in relation to Higgins Warner she acted for Miss Steens benefit.

Miss Forsythe's testimony is that NCB employees cannot give advice re unregistered Financial Investments, this I find did not prevent Miss Cunningham from giving advice in relation to Higgins Warner to Miss Steens.

[84] I find exhibit 1-20, a letter written by Sandra Cunningham quite instructive as she is admitting that US\$40,000.00 was deposited to Higgins Warner and upon receipt of the said amount, the sums will be returned to Sylvia Steens along with interest accrued on the said sum, on bank loan will also be repaid to Sylvia Steens and undertook to repay the sum of funds not received from Higgins Warner.

[85] Exhibit 1-24 is also instructive. In this document Miss Cunningham admits that the sum of over \$2M Jamaican loaned to her by Miss Steens is part of a NCB loan. Exhibits 1-20 and 1-24 lead me to agree with Lord Gifford Q.C. that a picture has been created that Miss Cunningham received the Claimant's money and used it in various ways.

I also lean towards the learned Queens Counsel's submission that if Miss Steen had simply wanted to invest in an unregistered scheme in the hope of quick profit, she could have done so. She had funds in the Euro Account. There was no reason for her to borrow on the Euro Account and use Miss Cunningham as an intermediary nor was there any reason for her to lend money to Miss Cunningham. The whole series of transactions speaks of manipulation by someone who has banking knowledge.

[86] I find that there was indeed a legally binding contract between Miss Steens and the defendant in relation to the \$6M loan which Miss Steen did in fact repay but this I do not find alter the fact that Miss Steens acted on the trust and confidence she placed in Miss Cunningham. This also despite the fact that Miss Steens action were indeed “rash” to quote Lord Gifford.

[87] I find therefore on a balance of probability that the advice given by Miss Cunningham was given in her capacity as a personal banker and given at the bank. Further in the circumstances Miss Cunningham’s dealings are wholly inconsistent with proper dealings on the part of a personal banker. Miss Cunningham used her position to her own ends. I agree with Lord Gifford Q.C. that the Defendant has adduced no evidence to show that Miss Steens knew that Miss Cunningham was only authorized to convey information about different services and not authorized to give investment advice. I find therefore that Miss Cunningham used her position in NCB in an unreasonable, manipulative and perhaps dishonest manner and I am attracted to Lord Gifford’s submission in this respect.

[88] I am afraid I could not find as Learned Counsel Mrs. Minott-Phillips suggests that Miss Steens placed the funds with Higgins Warner. I also fully appreciate that some of the funds invested with Higgins Warner was invested prior to the receipt of the loan funds but I have found that Miss Steens signed all the documents together on the said occasion that she attended at the bank in relation to the investment. Further I cannot agree with Mrs. Minott-Phillips that the fact that Miss Cunningham was a personal banker means nothing more than that she offered banking services for those customers and the only difference between ordinary banker / client relationship being that the client does not have to wait in line. With Miss Cunningham’s portfolio as it is Miss Forsythe’s testimony is that this is a relationship of trust.

[89] I cannot agree with Mrs. Minott-Phillips that if the court finds that a wrong was committed by Miss Cunningham, it was not committed within the employment such that can be said that NCB introduced the risk of the wrong.

I appreciate that there are inconsistencies on Miss Steens' testimony but on a balance of probabilities I am prepared to rely on her testimony, for I believe that in the main she is speaking the truth.

### **Application of the Law to the Findings of Facts**

[90] I have found that Miss Cunningham was placed in a fiduciary position in relation to Miss Steens, holds a position of trust in relation to her and must therefore act for her benefit. I have also found that in her dealings with Miss Steens accounts and giving her advice in relation to Higgins Warner Miss Cunningham did not act for Miss Steens benefit. I have also found that the advice given was given at the bank and in the capacity of a personal banker. Further Miss Cunningham's dealings are wholly inconsistent with proper dealings on the part of a personal banker. I also agree with Lord Giffords submission that the bank has adduced no evidence to show that Miss Steens knew that Miss Cunningham was only authorized to convey information about the bank's services and not authorized to give investment advice.

In *Hedley Byrne & Co. Ltd. vs Heller & Partners Ltd* it was pointed out that;

If in the ordinary course of business or professional affairs, a person seeks information or advice from another who is not under contractual or fiduciary obligation to give the information or advice in circumstances in which a reasonable man so asked would know that he was being trusted or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for failure to exercise care on action for negligence will lie if damages result.

[91] In this case have found no evidence on a balance to indicate that Mss Cunningham clearly or otherwise qualified her advice or her information as to show that she was not accepting responsibility. Therefore she has a legal duty to exercise such care as the circumstances require in giving the advice or information.

**Salmon and Heuston on the Law of Tort 19<sup>th</sup> Edition pg 233;**

Hedley Byrne affirms and extends the principle that a duty to be careful (as distinct from a duty to be honest) may exist where there is a fiduciary relationship. It extends that principle by suggesting that the duty extends to all relationship where the inquirer was trusting the other to exercise a reasonable degree of care, and when the other know or ought to have known that the inquirer was relying on him.

Further in ***Banbury vs Bank of Montreal*** Lord Findlay L.C. propounds;

“while it is not part of the ordinary business of a banker to give advice to a customer as to investments generally, it appears to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business--- a banker may as such give advice on investments to a customer who consults him, or indeed, to anyone who comes to him for advice, and when he chooses to advice. If he undertakes to advice, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise but if he takes upon himself to do so, he will incur liability if he does so negligently.

[92] I have no hesitation in holding that Miss Cunningham in the context of a client and personal banker relationship owed a duty to exercise reasonable care and skill in giving the advice to Miss Steens but she omitted to do so and was indeed negligent in giving the advice. It even goes beyond that. I find on a balance of probability that not only did Miss Cunningham use her position at NCB in an unreasonable manner but also in a manipulative and perhaps dishonest manner. In ***Banbury vs Bank of Montreal*** Lord Findlay L.C. further propounds;

Negligence in a case of this kind involves a breach of duty. There can be no negligence in law unless it is the failure or omission to perform or disclose some duty which is imposed upon you.

Further in **National Commercial Bank (Jamaica) Ltd. vs. Hew** at p 188 it is stated;

A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so.

This I find is not Miss Cunningham's position.

[93] Further *in Woods vs Martins Bank Ltd.* Salmon L.J. states at page 173:

I find that it was and is within the scope of the defendant's bank business to advise on all financial matters and that they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions-----

“

- **Page 174** -

-----as he chose to advise him, the law in those circumstances impose on him to advise with reasonable care and skill.

[94] Can NCB be held vicariously liable for the advice? I have found that Miss Cunningham gave advice in her capacity as Miss Steens' personal banker and that a wrong was committed by Miss Cunningham in her employment. I have also found that in the circumstances NCB introduced the risk of the wrong. I therefore cannot agree with Learned Counsel Mrs. Minott-Phillips that if such a negligence existed It would not be just and reasonable to hold NCB liable for Miss Cunningham's negligence.

In the case of **Bazley vs Curry**, McLachin, J states;

The policy, purposes underlying the imposition of vicarious liability on employer are served only when the wrong is so connected with the employment that it can be said that the employer has introduced the risk

of the wrong (and is thereby fairly and usefully charged with its management and minimization)

Further in ***Bernard (Clinton) vs Attorney General*** it is stated that;

In the case of intentional wrongs, the correct approach to determine whether the employer is liable---is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether it is just and reasonable to hold the employer vicariously liable.

[95] This to me was further extended in ***Dubai Aluminium Co. Ltd. vs Salaama & Others*** even to the extent where the partner was dishonest.

It was held:

-----A was acting in his capacity as a partner, his assistance in the fraudulent scheme by drafting the necessary agreement was so closely connected with the acts which he was authorized to do that for the purpose of the firms' liability he could fairly and properly be regarded as having acted in the ordinary course of the firm's business; that the assistance coupled with the dishonesty was sufficient to give rise to equitable liability on A's part and that accordingly the defendant's firm was vicariously liable for A's conduct.

[96] I have no hesitation in holding that for the purpose of liability, Miss Cunningham's act may fairly and properly be regarded as done by her while acting in the course of the banks' ordinary business and that NCB is liable because of Miss Cunningham's fault. Further as pointed out at page 388 of the Judgment in ***Dubai Aluminium Co. Ltd vs Salaama & Others***:

The vicariously liable employer has in law the same responsibility as his employee.

In ***Banbury vs Bank of Montreal*** it was pointed out at page 654:

- If there is a duty the defendant's servant would be bound to discharge that duty with ordinary reasonable care and skill such as a man would have the right to expect in the circumstances.

**Damages**

[97] I am aware that Miss Steens testimony is that NCB has accounted to her for every cent she has put in it. In her particulars of claim Miss Steens claims that the proper measure of her loss is such an amount which would restore her to the position in which she would have been had there been no loan, no negligent advice, no investment in Higgins Warner and no conversion by Sandra Cunningham.

She outlined the loss thus:

Credits paid prior to October 2008	-	\$2,511,962.02
Credit paid to liquidate loan account	-	<u>\$4,727,387.38</u>
		\$7,239,349.38
Less received from Higgins Warner (US\$36,000.00 converted at \$70.00 - \$1.00		\$2,520,000.00
Less received for Sandra Cunningham plus interest earned		<u>\$2,714,874.10</u>
		\$2,004,475.28

In ***Hadley and Another vs Baxendale and Others (1843-60) A.E.R.*** pg 460 at pg 465 per Alderson, B.

- Where two partners have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arriving naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

[98] In this case I find that the sum claimed by Miss Steens is such that as may fairly and reasonably be considered as arising.

[99] I have also found the case of *Junior Books Ltd. vs Veitch Co. Ltd* at pg 204 useful where it was pointed out that;

The injury to the respondents was a direct and foreseeable result of negligence by the appellants.

**Page 205** ----- The scope of the duty has, however, been developed so as to cover the situation where pure economic loss is to be foreseen as likely to be suffered by one standing in the requisite degree of proximity.

*(Hedley Byrne & Co. Ltd. vs Heller & Partners Ltd.)*

### **Conclusion**

[100] The proximity between Miss Steens and Miss Cunningham was sufficiently close for Miss Cunningham to owe a duty of care to Miss Steens. In giving her the advice and in her dealings with Miss Steens, Miss Cunningham was negligent resulting in a breach of this duty. The loss to Miss Steens was a direct foreseeable result of Miss Cunningham's negligence. Further it is just and reasonable to impose the duty.

Miss Cunningham acted within the scope of her duty. Therefore her employer the defendant NCB is vicariously liable for Miss Cunningham's actions and is therefore liable to Miss Steens for her loss. Accordingly I enter judgment for the Claimant in the sum of \$2,004,475.28 plus interest.

### **Order**

- (i) Judgement for the Claimant against the defendant in the sum of 2,004,475.25 plus interest
- (ii) Costs to the Claimant to be agreed or taxed.

