[2022] JMCC COMM. 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2019 CD00231 (formerly C.L. 2005HCV1884)

BETWEEN	**CARICOM INVESTMENTS LIMITED**	**CLAIMANT**
AND	**CARICOM HOTELS LIMITED**	**2nd CLAIMANT**
AND	**CARICOM PROPERTIES LIMITED**	**3RD CLAIMANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**RIO. BLANCO DEVELOPMENT LIMITED (in Receivership)**	**2ND DEFENDANT**
AND	**ESTATE OF KARL AIRD (deceased) (Receiver of Rio Blanco Development Limited)**	**3RD DEFENDANT**

IN OPEN COURT

Mr Ransford Braham QC, Mrs. Caroline Hay QC, Ms Melissa McLeod and Mrs Tereese Campbell instructed by Braham Legal, Attorneys-at-Law for the Claimants,

Mr Charles E Piper QC, Ms Carlene Larmond QC and Mr D'Angelo Foster instructed by Charles E Piper & Associates, Attorneys-at-Law for the Defendants

Heard: Feb 1,2,3,4,5,18,19; April 20, 21; May 5,6,7, 27,28; July 1, 2; September 28, 29; October 5, 6, 7; November 12, 2021; and January 7, 2022

Misrepresentation-Whether there were false assertions by the receiver and/or the mortgagee appointing him that, inter alia, the duplicate certificates of titles for lots were lost or misplaced

Agency- Whether the receiver is the agent of mortgagee

Credibility- Assessment – absence of contemporaneous documents- effect

Breach of Contract – Whether breach of contract in, *inter alia*, not providing duplicate certificates of title

Damages- Quantum – Whether negotiating damages appropriate – Basis of award of damages where Court finds that damages were not proved but the claimant did not receive what was contracted for

LAING J

Contents

The Background

[1] The Claimants are companies duly registered in Jamaica. Mr Richard Lake is a shareholder and director of the Claimants.

[2] The 1st Defendant, National Commercial Bank Jamaica Limited, (referred to herein as "NCB" or "the Bank") is a commercial bank operating in the island of Jamaica. It was at all material times the holder of a debenture over the assets of Rio Blanco Development Company Limited dated 7th August 1989 ("the Debenture") and was the mortgagee in respect of certain properties registered in the name of that company.

[3] Pursuant to the Debenture, NCB appointed one of its employees, Mr Karl Aird ("Mr Aird") as Receiver/ Manager of Rio Blanco Development Company Limited ("Rio Blanco"). Mr Aird is deceased and his estate is the 3rd Defendant. Accordingly, wherever there are references to the conduct of the 3rd Defendant, these are to be understood to be references to the acts and actions of Mr Aird. Mr Aird's witness statement and his oral evidence including his cross examination have been admitted as his evidence for purposes of this trial.

[4] On or about the 3rd May 1993, Mr Aird acting as the Receiver of Rio Blanco executed two agreements with the 1st Claimant, Caricom Investments Limited ("Caricom Investments"). These were:

1. An Agreement for Sale of Land dated the 3rd May 1993 ("the Agreement for Sale"); and

2. An Agreement for the Sale of Chattels and Property.

[5] Caricom Investments took delivery of the chattels and was put into early possession of the lands which were comprised in the Agreement for Sale ("the Lots"). Prior to entering into the Agreement for Sale, Mr Aird had been advised by Messrs Robinson, Philips & Whitehorne, Attorneys-at-Law then acting for Rio

Blanco that some of the Lots were not part of the security given to NCB. The lots which are the subject of this case are the following:

(i) Lot 41 registered at Volume 1230 Folio 801 of the Register Book of titles ("Lot 41");

(ii) Lot 1 registered at Volume 1220 Folio 921 of the Register Book of Titles ("Lot 1");

(iii) Lot 51 registered at Volume 1230 Folio 811 of the Register Book of Titles ("Lot 51"); and

(iv) Lot 52 registered at Volume 1230 Folio 812 of the Register Book of Titles ("Lot 52").

(These four lots will together be referred to herein as "the Disputed Lots").

[6] The essence of this claim is that the purchaser Caricom Investments did not get the duplicate Certificates of Title for the Disputed Lots as it had contracted for pursuant to the Agreement for Sale. The Claimants have accordingly claimed specific performance of the Agreements for sale and damages for breach of contract.

[7] It is not of significance save for the purpose of avoiding confusion, but it should be noted that the Agreement for Sale provided for the Disputed Lots to be transferred to the nominee of the vendor Caricom Investments Limited and as a consequence Caricom Hotels Limited was endorsed as transferee on the Original Certificates of Title held by the Registrar of Titles ("The Registrar").

[8] At the heart of this case is the distinction between the Original Certificate of Title and a duplicate Certificate of Title. It is helpful to appreciate the difference between the two from the outset. The Original Certificate of Title is the Certificate of Title held by the Registrar. The Registrar creates a duplicate of the Original Certificate

of Title and this duplicate Certificate of Title is what is kept by the owner of the relevant property. In the event of a sale of the property, in the usual course, the duplicate Certificate of Title is surrendered to the Registrar who will note the transfer on the Original Certificate of Title and on the duplicate Certificate of Title. The new owner will be provided with the Duplicate Certificate bearing his name as transferee and proprietor of the relevant interest which he acquired. There is also the authority of the Registrar to dispense with the notation of a transaction on the duplicate Certificate of Title and this power is relevant and will be explored as this judgment develops.

[9] Subsequent to the execution to the Agreement for Sale, Rio Blanco filed Claim number CLR021/1994 ***Rio Blanco Development Company Limited v National Commercial Bank (Jamaica) Limited and Karl Aird***. By a judgment delivered on 25th January 2006, the Honourable Mr Justice James found that the Disputed Lots did not form a part of the security given to NCB ("the James J Rio Blanco Judgment"). The Claimants subsequently filed the claim herein.

[10] There was a trial of the claim ("the First Trial") which commenced on 3rd May 2010. A judgment was delivered by Mr Justice Anderson on 20th September 2013. The judgment was appealed on the ground that the learned Judge had already retired at the time of the handing down of the judgment. In granting the appeal, the Court of Appeal ordered a retrial. Following the decision of the Court of Appeal, the Claimants filed an application to amend their statement of case which was refused by this Court. This decision was appealed and reversed by the Court of Appeal. Accordingly, given the history of the claim, there were multiple iterations of the pleadings and therefore the current claim is now represented by the 4th Amended Claim Form and 4th Amended Particulars of Claim filed on 7th April 2020.

The Preliminary issue

[11] There was a difference of opinion between the parties as to the effect of the Rio Blanco Judgment.

[12] As a consequence, I decided to have that issue tried as a preliminary issue. This was not a preliminary issue determination in the classic sense of the trial of an issue which might by itself determine the claim, but it was nevertheless necessary to adopt that route in order to narrow the issues on which the Court had to decide. The Court considered whether the finding in the James J Rio Blanco Judgment– and in particular, the finding that the four (4) properties in dispute (the Disputed Lots) did not form a part of the security given to NCB by Rio Blanco Development Limited, is final and conclusive and therefore binding on this Court.

[13] I had also framed two (2) other sub-issues related to the impact of the case of ***Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others*** [2018] JMCA App 7 but in any event both parties agreed that it is not being contended that the Judgment was handed down after the retirement of Mr. Justice James and therefore the ***Paul Chen-Young*** case (supra) is inapplicable. It is only relevant to the extent that it establishes that there is nothing else which Justice James can now do in relation to the James J Rio Blanco Judgment, in order to make it final, if it is not in law a final judgment as the Defendants contend.

[14] I found that a useful starting point is to review the claim that was made in the claim by Rio Blanco before Mr Justice James and the final version of the pleadings therein. I have looked at the claim in its final form, the defence and the counterclaim and used that as a backdrop against which to consider the James J Rio Blanco Judgment. I concluded that Mr Justice James clearly recognized the importance of the Court identifying the property given by the Claimant, Rio Blanco to NCB as security for the loans and at paragraph 3 the learned Judge states the following:

> *(a) It will be evident from the following examination of documentary and other evidence that it is the sale of the Claimant's assets to Caricom Investments Limited in its purported exercise of its powers of sale in accordance with the terms of the Debenture that has resulted primarily in the filing of the suit.*
>
> *It may be convenient to determine what comprised the property given by the Claimant to the 1st Defendant as Security for the loans.*

[15] The entire James J Rio Blanco Judgment is relevant of course, but pages 3 and 4 where the learned Judge interrogates some of the issues, is particularly instructive. But perhaps the most important portion of the Rio Blanco Judgment, is where the Judge, having analyzed the issues, made a number of findings at pages 11 and 12 of the judgment as follows:

> *1) On the evidence before me I am satisfied that the facts relied on by the Claimant have not shown that any fraud was perpetuated by either of the Defendants.*
>
> *2) I find the following:*
>
> *(a) that at the date of the appointment of the Receiver full drawn down had taken place more than 12 months earlier*
>
> *(b) that the 27 acres of undeveloped lands. Registered at Vol. 1229 Folio 161 formed a part of the security given to the 1st Defendant by the Claimant.*
>
> *(c) That Lot 1, registered at Vol. 1220 Folio 921 $2,000,000.00*
>
> *Lot 41, " " Vol.1230 Folio 801*
>
> *Strata Lot 51 " "Vol. 1230 Folio 811 $1, 200, 000.00*
>
> *Lot 52 " " Vol. 1230 Folio 812 950,000.00*
>
> *Land " " Vol. 1222 Folio 860*
>
> *did not form part of the security given to the 1st Defendant by the Claimant.*
>
> ***(d)** In respect of the five (5) lots above listed not forming part of the security, three of which have been valued should be valued at their market price as at 3rd May, 1993 and such value be credited to the Claimant's loan account. **I am of the view that the purchasers, CARICOM Investments Limited being purchasers for value without notice would have a good title.*** (emphasis supplied)
>
> *(e) Section 9 of the Money Lending Act does not, because of the exemptions under section 13 apply to the 1st Defendant.*
>
> *(f) That interest in excess of 16% as provided was charged on the NDB loan. The interest on this loan should be recalculated at the 16% p.a. made to the Claimant's Account.*
>
> *…*

> *(i) That the 2nd Defendant-on the receipt of the sum of $41,850,000.00 being deposit and further payments in accordance with the provisions for payment contained in the Agreement for Sale between himself as Receiver and CARICOM Investments Limited ought to have credited it to the Claimant's accounts. This is especially so in light of the fact that interest on the loan to the Claimant was much higher than that obtained on the sum when placed in deposit.*

[16] It is clear that the issue of whether Rio Blanco was charged the correct interest on what was described as the NDB loan, was one which occupied the Court during the trial resulting in the ruling at subparagraph (f) above. It was pleaded by the Claimant that one of the facilities extended to it by the 1st Defendant, was for a National Development Bank (NDB) Loan in the sum of $3,500,000.00 which was at 16% per annum.

[17] The issue of the deposit which was paid towards the purchase of the Property belonging to Rio Blanco, as well as the timing of that deposit and the account to which it should have been credited, were also issues which occupied the Court's time. That explains the inclusion of subparagraph (i). Therefore, an important portion of the judgment is the portion where the Court addresses the fact that Rio Blanco complained bitterly in relation to the rate of interest charged by the 1st Defendant on the loans. The Learned Judge continues in the final paragraph where it is stated as follows:

> *Order that after the adjustments are made including a recalculation of the interest on the NDB loan at 16% p.a. and interest on the principal sum due after deducting the $41M plus being deposits and further sums paid in accordance with the Agreement for Sale, the Attorney-at-Law for the parties shall file joint affidavits showing the result of the exercise referred to above for my approval as the final judgment.*

Accordingly, as Queens Counsel, Mr Braham submitted, it is primarily this final sentence and reference to a final judgment which has perhaps created the difficulty which faced this Court and the parties in this claim, in deciding whether the James J Rio Blanco Judgment is final and conclusive.

[18] The issue to be resolved by this Court is, what is the status of the James J Rio Blanco Judgment? The Defendants submitted that the James J Rio Blanco Judgment is an incomplete judgment and is of no effect. Consequently, it has no force and cannot be appealed. Accordingly, any of the issues which were raised in that claim and which are now being raised by the Defendants in the instant case, in particular, the issues relating to the status of the four (4) Disputed Lots, remain for determination by this Court.

[19] Mrs. Hay, Queen's Counsel submitted on behalf of the Claimants that the final paragraph commences with the word "order" and there is nothing to prevent a party from appealing that order. I agree with her in that regard.

[20] However, the Defendants submitted that the James J Rio Blanco Judgment did not resolve all the relevant claims by the parties and it was necessary to have had a final judgment in which the Court would indicate how it was ruling in relation to each of the reliefs that were claimed.

[21] The Defendants relied on the case of ***VRL Operators Limited v National Water and Others*** [2015] JMCA 69 and reference was made in particular to paragraph 24

> *In applying the dictum of McIntosh JA to this case, the second judgment could not properly be regarded as separate from the first; but was a continuation of the proceedings. Bearing particularly in mind paragraph [1] of the costs judgment, it becomes clear that the issue of costs flowed directly from the application; and the learned judge, exercising his discretion, decided to deal with the question of costs at a further sitting. The learned judge having instructed the parties to make written submissions on the issue of costs, the court's jurisdiction continued in the matter. Consequently, both judgments ought to be viewed as two points on one and the same continuum; and not as being separate and discrete. Therefore, this court would have the jurisdiction to hear this appeal, as permission to appeal had been granted in respect of the order of B Morrison J.*

[22] Mrs. Hay QC identified an important distinction between this case before this court and ***VRL*** which is, that further submissions were requested in ***VRL***. In contrast, in the James J Rio Blanco Judgment, the Judge provided a framework for the parties

to arrive at the figures and did not invite additional submissions. I accepted that this is an important distinction and for that reason I did not find ***VRL*** to be instructive or of particular assistance.

[23] Mr. Braham QC also submitted on behalf of the Claimants that on the face of the Rio Blanco Judgment, the Judge made settled findings of facts in respect of the titles for the four (4) Disputed Lots after receiving evidence at trial. No further submissions were invited on this or any other issues and indeed the Judgment was neither interim nor interlocutory. I accepted the submission of Mr. Braham on this point.

[24] I find that the reasonable construction to be placed on the learned Judge's words having regard to the usual practice in the Courts is that he would subsequently make final orders addressing the additional points in respect of which he sought assistance. I accept that it is conceivable that the Judge for the purposes of good form, may have made a composite final order, including, where necessary, his findings in the Judgment and also adding the calculations derived from Counsel's joint affidavit.

[25] Nevertheless, it is my conclusion that the findings of the Judge as pronounced and as contained in the James J Rio Blanco Judgment did not require the production of orders in a final form for them to have binding legal effect.

[26] The course adopted by the Judge is not an unusual one, especially where complex calculations are required following the substantive and primary findings of fact. It is an option which has also previously been utilized by this Court.

[27] In my opinion, in considering the legal effect of the primary findings, a useful analogy can be drawn between the situation where the right of the plaintiff is established at trial by judgment on liability but the quantum of damages sustained by him is not ascertained and left to be determined. I do not accept that such a judgment on liability would be of no effect without the subsequent assessment being conducted.

[28] Assuming, without deciding, that the learned Judge did not address and record all his findings in respect of the various release claims in an ideal manner, I find that there is absolutely no indication in the James J Rio Blanco Judgment that he proposed to do so in a final judgment. It seems clear to me from the content of the Judgment that the Judge intended the findings therein to be final and binding on the parties.

[29] It is clear from the James J Rio Blanco Judgment that the learned Judge decided several issues save and except for the calculations in respect of which he sought Counsels' assistance to determine the final figures. To the extent that the final figures were not yet ascertained that portion of the judgment was not yet final. However, it was a final judgment delivered by the Judge. In my opinion, it would be unreasonable and inaccurate to suggest that the written judgment produced by the Judge was a mere draft which did not have any binding effect whatsoever and was subject to the production of a separate final document incorporating all that was said in the judgment. The reasonable construction to be placed on the learned Judge's words, having regard to the usual practice in the Courts, is that he would subsequently make a composite list of final orders, (including if necessary, his findings in the judgment) and also add the calculations derived from Counsels' joint affidavits. Nevertheless, the findings of the Judge as pronounced and contained in the James J Rio Blanco Judgment did not require the production of orders in a final form in order to have legal force.

[30] The implication of my conclusions above is that the principle of *Res Judicata* applies. Recently in the UK Supreme Court case of ***Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)*** [2013] 3 WLR 299 the court conducted a review of the applicable principles and at page 310 Lord Sumption JSC made the following observations:

> ***17*** *Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in*

> *subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see* ***Conquer v Boot [1928] 2 KB 336.*** *Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see* ***King v Hoare (1844) 13 M & W 494, 504*** *(Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties:* ***Duchess of Kingston's Case (1776) 20 State Tr 355****. "Issue estoppel" was the expression devised to describe this principle by Higgins J in* ***Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561*** *and adopted by Diplock LJ in* ***Thoday v Thoday [1964] P 181, 197–198.*** *Fifth, there is the principle first formulated by Wigram V-C in* ***Henderson v Henderson (1843) 3 Hare 100, 115,*** *which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.*

[31] I do not think it is necessary for me in the context of the preliminary issues determination to make any findings as to the consequences of those issues which were not finally determined and were subject to the additional calculations as requested by the Judge.

[32] Having found that the James J Rio Blanco Judgment was final as it relates to the finding of the learned Judge that the four (4) Disputed Lots did not form part of the security given by Rio Blanco to the 1st Defendant NCB in that claim, the learned Judge by his finding resolved an issue which is common to both that earlier case, and the instant case before me. I find that it was decided with sufficient finality on the earlier occasion and is therefore binding on the parties to this claim even

though the cause of action is not the same, and notwithstanding the fact that the Claimants herein were not parties to that claim. I am firmly of the opinion that this is a classic case of issue estoppel.

[33] I was helpfully provided with the judgment in ***Fletcher against Billy Craig*** **[2012] JMSC Civil 12,** and in particular, paragraphs 45 to 52 which were read by Mr. Braham, Queen's Counsel, and which provide as follows:

> *45. The estoppel as formulated in **Halsbury's Laws of England**, 4th edition, Vol. 16 paragraph 1530 (based on the authority cited therein) is this: a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different the findings on a matter which came directly (not collaterally or incidentally) in issue in the first action and which is embodied in a judicial decision, that is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision is one of the fact or law or a mixed question of fact and law.*
>
> *[46] What is seen from the foregoing authorities, as a point of interest, is that the principle is explained as requiring, among other things, that the issue in question must have been decided between the same parties or their privies before the estoppel can arise. In **North West Water v Binnie & Partners**, however, in which the question as to whether a claim was res judicata on the basis of issue estoppel was considered, it was noted by Drake, J that the authorities on the subject have revealed two schools of thought as to the limit which should be put on the application of this form of estoppel.*
>
> *[47] His Lordship noted that one school of thought (the broader approach) holds that the true test of an issue is whether for all practical purposes the party seeking to put forward the issue has already had the issue determined against him by a court of competent jurisdiction even if the parties are different. The other conflicting approach, he explained, is to confine issue estoppel to those species of estoppel per rem judicatum that may arise in civil actions between the same parties or their privies.*
>
> *[48] For the latter approach, the dictum of Lord Diplock in **Hunter v Chief Constable of West Midlands** [1981] 3 All ER 727 was cited as indicating support for this narrower view. It follows from this that issue estoppel may be said to operate or not operate in cases involving a new party to the proceedings depending on which approach is adopted.*
>
> *[49] In this case, Mr. Hylton, Q.C., in embracing the broader approach, did make the point that the fact that the parties are different does not preclude the operation of issue estoppel. He uses as his support the decision of the*

> *Privy Council in* ***Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd.*** *[1975] AC 581 in which it was held that res judicata applied even though one of the parties in the second action was not a party in the earlier action.*
>
> *[50] I do share that view (as I accepted as a better view the broader approach endorsed by Drake, J.) that issue estoppel should apply in situations where the parties are different provided the person against whom the estoppel is being sought to be invoked in the subsequent proceedings was a party to the earlier proceedings in which the point in issue was determined against him. It would follow from this line of thinking that the fact that in this case the second defendant was not a party in the earlier proceedings should not, of itself, preclude the invocation of the doctrine.*
>
> *[51] The material question, instead, would be whether the claimant in the current proceedings is seeking to put forward an issue that was determined against it in the earlier proceedings even if the parties to the two actions are different.*
>
> *[52] I understand Mr. Hylton, Q.C. to be saying, within this context, that the validity and hence the enforceability of the mortgage was fundamental to the court's decision in the earlier claim when it granted the first defendant possession of the property. The gravamen of his argument, as I see it, is that for the court to have made an order as it did in the earlier judgment, giving the first defendant the right to possession of the property as mortgagee, it must have been satisfied that the mortgage was valid. In other words the validity of the mortgage would have been a necessary and, therefore, fundamental pre-requisite for the order for recovery of possession to be granted. The court, therefore, would have acknowledged the validity of the mortgage by its order giving the first defendant possession.*

[34] I confirm that I am in total agreement with the analysis of Justice McDonald Bishop (as she then was), and that I wholly accept that the broader approach identified there is preferable. It is the approach that I adopt and which I utilize. Accordingly, I find as a preliminary issue that the determination as contained in the Judgment of Justice James as it relates to the Disputed Lots and in particular his finding that they were not part of the security given to NCB by Rio Blanco is a finding that is binding on the parties in the instant case before me.

[35] Having so found, it was unnecessary for me in the context of the preliminary issues determination, to make any findings as to the consequences of those issues which were not finally determined but which were left for subsequent determination on receipt by the judge of the additional calculations which he requested.

The Claim

[36] The Claimants assert that the Defendants agreed to sell and Caricom Investments agreed to buy the properties described in the Schedule to the Agreement for Sale. It was agreed between the parties that at the time of the sale of the said lands the purchase price was $61,500,000.00 and the purchase price of the chattels was $3,500,000.00

[37] The Claimants aver that during the negotiations in order to induce the Claimants to enter into the Agreement for Sale, the Defendants made the following representations, partly orally and partly in writing to the Claimants, which the Claimants assert were false and/or amounted to false and/or negligent misstatements:

a. By advertisement published on or about February 1993 the Defendant or Defendants stated that the lands were "*suitable for resort development*". The Claimants averred that the said lands were not suitable for resort development.

b. In the Agreement for Sale which was signed by the parties on 3rd May 1993, the Defendants described the said lands as "Hotel Property". The Claimants averred that the said lands were not in fact "Hotel Property" as described by the Defendants in the Agreement for Sale.

c. By the terms set out in the Agreement for Sale the Defendants represented that they were the beneficial owners of the Lots and had a right to sell the Disputed Lots. The Claimants averred that the Defendants were not the beneficial owners of the Disputed Lots and had no right to sell and/or had no right to exercise powers of sale over the Disputed Lots.

d. The Lots were free from incumbrances other than the restrictive covenants and easements (if any) endorsed on the Certificate of Title and such easements as are obvious and apparent.

e. That the duplicate Certificate of Title for the Disputed Lots were lost. The Claimants averred that the duplicate Certificates of Title for the Disputed Lots were not lost.

f. That immediately after registration of the ownership of the said lands to the Claimants, the Defendants would at their expense apply for new Certificates of Title to be issued for the Disputed Lots which are referred to in Special Conditions 4 and 5. The Claimants averred that the Defendants either were incapable of applying or did not at their expense apply for new Certificates of Title to be issued for the Disputed Lots.

[38] The Claimants case is that the Defendants made the representations knowing that they were false or reckless, not caring whether the said representations were true or false and/or acted in bad faith with respect to the representations and/or in the performance of the Agreement for Sale. The Claimants also claim further, or in the alternative, that the Defendants were guilty of negligence in making the said representations.

[39] The Claimants also assert that by the decision of Mr. Justice James in the Rio Blanco Judgment, his Lordship found that the Disputed Lots did not form a part of the security given to NCB.

[40] The Claimants averred that at all times material to the making of the representations, the Defendants intended, and they knew or ought to have known that the Claimants would rely on their representations and would be induced into signing the Agreement for Sale. As a consequence, the Defendants were under a duty of care in making the said representations to the Claimants and/or to act in good faith in their performance of the said Agreement for Sale.

[41] The Claimants further averred that they were induced by and acted in reliance on each of the representations and/or acted in good faith on the said representations and entered into the Agreement for Sale with the Defendants and paid the full purchase price.

[42] It is also the Claimants' position that NCB had a duty to act in good faith in the performance of the Agreement for Sale, in circumstances where NCB and/or Mr Aird (as employee of NCB for the purpose of vicarious liability or otherwise and/or as agent) was exercising its power (and/or purported power of sale) over the Disputed Lots and whilst acting as the banker for the Claimants to finance the purchase of the Lots which were the subject of the Agreement for Sale.

The Defence

[43] As it relates to the advertisement, the Defendants response is that it was published at least as early as 10th January 1993 and shows that the sale was conducted under powers of sale by the 1st Defendant, then as mortgagee of the property identified therein. It was averred that the contents of the advertisement were true and accurate and limited the property that was suitable for resort development to the 29 acres of land comprised in the title registered at Volume 1229 Folio 161 of the Register Book of Titles only.

[44] NCB asserts that it is not a party to the Agreement for Sale and is incapable of making the representation which the Claimants allege to be in the terms and conditions of the Agreement for Sale, that is, that the property is legally and beneficially that of the vendor Rio Blanco. Furthermore, Rio Blanco was the legal and beneficial owner of the said lands at all material times and so warranted.

[45] The Defendants also argued that the Agreement for Sale was entered following the culmination of negotiations between the respective Attorneys-at-Law for the parties and was not as a result of the alleged representations or any representations or the alleged inducements thereon.

[46] It was the Defendants' case that the representations on which the allegations of misrepresentation are based were never made. They asserted that all of the Lots were free from encumbrances other than the restrictive covenants and easements endorsed on the Certificates of Title and such easements as were obvious and apparent. Importantly, the Defendants contend that no representation was made that the duplicate certificate of title for the Disputed Lots were lost.

[47] The Defendants concede that immediately after registration of the Disputed Lots to the Claimants as owners, as provided for by Special Condition 15 of the said Agreement for Sale, the 2nd and 3rd Defendants were incapable of applying for new certificates of title to be issued in light of the provisions of section 81 of the Registration of Titles Act which gives the right of application for new Certificates of Title to the Claimants.

[48] The Defendants posit that both parties to the Agreement for Sale mistakenly agreed to the terms and effect of Special Condition 15 in the event that the circumstances arising occurred, which in fact did occur. They submitted in the alternative, that the Claimants took no steps in mitigation by failing to apply for the new certificates of title in order to avoid the losses which they alleged have been sustained by the failure to obtain new certificates of title.

[49] NCB averred that it was not a party to the Agreement for Sale and therefore it was not under any duty and/or obligation in respect of its performance. It asserted that it was a mortgagee of Rio Blanco which it placed in receivership. It also indemnified Mr Aird against claims against him as receiver, save of course for claims for which he becomes liable on account of negligence in the performance of his duties in that office. It was submitted that Mr Aird exercised all duties in his capacity as receiver, as agent of Rio Blanco and accordingly, vicarious liability does not arise and is inapplicable in such circumstances.

[50] The Defendants also averred that the Agreement for Sale sets out the terms and conditions under which the Lots were being sold and the representations that were made by Mr Aird, were made by him acting as Receiver for Rio Blanco.

Mr Lake's evidence of the involvement of NCB in the sale of the Lots

[51] Mr Lake stated that in early 1993 he noticed an advertisement in the Gleaner Newspaper about the sale of Rio Blanco Village (Resort Complex) and the Lots by auction on the 11th February 1993 under power of sale contained in the mortgage.

[52] Representatives of the Claimants attended the auction and submitted a bid which although it represented the highest bid was not accepted because it was below the reserved market value of the Property. Mr. Lake said he contacted Mr Ivan "Mitch" Stephenson, General Manager, Corporate Division at NCB and expressed Caricom Investments' interest in purchasing the Lots. On 26th February 1993 on behalf of the Caricom Investments, Mr Lake said he wrote a letter making an offer of $65,000,000.00 for all the assets which were held by NCB in connection with Rio Blanco and indicating terms on which the purchase would be made. On 2nd April 1993 and 5th April 1993 he again wrote to NCB setting out a revised offer which was accepted. The letter of the 5th is in the following terms:

> *"We refer to our letter of April 2, 1993, and your acceptance of our offer for the purchase of all the assets presently held by the National Commercial Bank in connection with the Rio Blanco Project.*
>
> *Pursuant to our Agreement we are pleased to enclose our deposit of J$10 Million*
>
> *We wish to take control of the premises on Thursday, April 8, 1993 and hereby provide you with irrevocable undertaking for J$32 Million in order to meet our component of the total purchase consideration.*
>
> *(a) Deposit of J$10 Million*
>
> *(b) A further deposit of J$12 Million which will be paid tomorrow, April 6, 1993. This amount is to be placed on 30-day deposit with your bank. The deposit will be under your control, and this serve as your authority to apply same at the end of thirty (30) days towards the purchase of the property in keeping with our agreement.*

> *(c) Certificate of Deposit currently being held with Crown Eagle Life Insurance Company Limited. Certificate of Deposit No. 4820 of J$10Million.*
>
> *By copy of the attached letter, we have given Crown Eagle Life Insurance Company Limited irrevocable instructions to pay the proceeds of this deposit to you on maturity which is April 17, 1993.*
>
> *This amount is also to be placed on escrow with the J$12 Million to be applied to the purchase price as per our agreement.*
>
> *(d) The remaining purchase money will be available from the proceeds of your loans on the completion of the necessary documentation.*
>
> *We have no doubt also that we can depend on your cooperation to have Mr. Karl Aird made available to provide us with the necessary information in his possession on this project.*
>
> *We trust that the above meets with your approval and look forward to a smooth hand over of April 8, 1993 with the appropriate authorised documents.*

[53] It is not in dispute that the discussions as to the purchase of the property and the terms started with Mr Lake representing Caricom Investments having a conversation with Mr Ivan "Mitch" Stephenson, the then senior manager of the bank. This continued and eventually resulted in a concluded Agreement for Sale.

Mr Lake's evidence on the chronology of events

[54] Mr Lake asserted in his first witness statement that during the contract stage, NCB "advised" that the receiver did not yet have all the titles in his possession, but that he expected to obtain them shortly. He said he insisted on the Agreement for Sale including special conditions to address this difficulty, which would allow Caricom Investments to cancel the Agreement for Sale if the vendor was unable to deliver all the Duplicate Certificates of Title which were identified as lost. He said that this was particularly important because one of the titles he had not received concerned the portion of land located at the entrance to the Hotel, Lot 1. He said he insisted that NCB had the clear responsibility to deliver all the titles and this was covered in clause 15 of the Agreement for Sale. He indicated that he was advised by NCB that providing the titles would not be a problem so he should pay the purchase price in full without deduction.

[55] On 3rd May 1993 Caricom Investments and Mr Aird (representing Rio Blanco) executed an agreement for sale of land in respect of the Lots with the purchase price stipulated as $61,500,000.00 ("the Agreement for Sale"). On the same day Caricom Investments and Mr Aird (representing Rio Blanco) executed an agreement for sale of chattels related to the Property, for purchase price of $3,500,000.00 ("the Agreement for Sale of Chattels").

[56] By letter dated 19th October 1993 NCB confirmed to Messrs Myers Fletcher & Gordon the approval of a foreign exchange loan facility to Caricom Investments in the amount of US$1,250,000.00, which was secured in part by a mortgage over the Lots. Mr. Lake said Caricom Investments also borrowed funds from investors at commercial bank interest rates to purchase the Property.

[57] Mr Lake accepted that the transfer of the Lots was effected on 23rd August 1993 and the mortgage registered on 13th September 1994.

[58] Mr Lake said that while he was in the process of developing the Lots he retained Mr Stewart, chartered land surveyor to do a boundary check of the site and he found that the size of one lot registered at Volume 1229 Folio 161 noted to be 29 acres, was smaller than what had been advertised and was actually 27 acres. He brought this to the attention of NCB and on 18th April 1995, Caricom Investments and NCB agreed to a formula for pro-rating the purchase price if this assertion was correct. He received a copy of the valuation of the Property by Allison Pitter & Co on the 2nd June 1995 which confirmed the correctness of Caricom Investments' assertion, resulting in it being given a credit.

[59] Mr Lake stated that the Claimants were advised by NCB that the loans which had been made to Caricom Investments Limited and Caricom Hotels had been sold and/or assigned to The Financial Sector Adjustment Company Limited ("FINSAC"). In or around 12th July 1999 during the process of providing payment to FINSAC in exchange for duplicate Certificate of Titles, it was discovered that the duplicate Certificate of Titles in respect of the Disputed Lots and Volume 1229 Folio 161

were unavailable and were the subject of a court action, namely, ***Rio Blanco Development Bank Company Limited v National Commercial Bank (Jamaica) Limited, and Karl Aird*** Suit Number 021 of 1994. This is the claim that resulted in the James J Rio Blanco Judgment.

The Special conditions 3, 4, 5 and 15

[60] These special conditions feature prominently in the Claim and it is worth reproducing them at this juncture.

> *SPECIAL CONDITIONS: (3) Subject to the provisions of Special Conditions (4) and (5) the Vendor hereby covenants and undertakes to effect a transfer of ownership in the property to the Purchaser pursuant to the terms hereof.*
>
> *As soon as the Vendor is in a position to provide:-*
>
> *(a) the duplicate certificates of Title for the various parcels of land (other than the parcels of land comprised in Certificates of Title referred to in Special Conditions (4) and (5), making up the property together with Instrument(s) of Transfer of land capable of registration at the Office of Titles; and*
>
> *(b) the Purchaser's Attorney-at-Law with confirmation from the Registrar of Titles of her agreement to dispense with the production of the duplicate Certificate of Title referred to in Special Conditions (4) and (5) and to register pursuant to Section 81 of the Registration of Titles Act a transfer of the parcels of land comprised in the Certificates of Titles aforesaid in favour of the Purchaser by endorsement on the original Certificates of Title for the respective parcels of land so as to effect a change in the ownership of the property in favour of the Purchaser the Vendor shall by notice to the Purchaser delivered at its address herein stated advise the Purchaser of its readiness to complete the sale hereunder and the vendor shall require the Purchaser to pay the balance purchase price payable hereunder within 7 days of the date of service of such notice.*
>
> *(4) Notwithstanding any provision to the contrary in this Agreement if the Vendor is unable to transfer Lot 41 registered at **Volume 1230 Folio 801** to the Purchaser within **45** days from the date hereof the Vendor may require that the Purchaser pay such part of the price as shall not include the amount of **$950,000** representing the market value of Lot 41 aforesaid and the Purchaser shall not be required to account for this amount unless and until the Vendor shall be in a position to procure that the Purchaser be registered as the proprietors of Lot **41** aforesaid under the Registration of Titles Act.*

(5) (a) Notwithstanding any provision to the contrary in the

Agreement if the Vendor is unable to:

(i) transfer Lots 1, 51 and 52 registered at Volume 1220 Folio 921; Volume 1230 Folio 811 and 812 respectively; and/or

(ii) procure that the occupants of the cottage on lands comprised in Certificate of Title at Volume 1229 Folio 161 deliver up possession of the cottage aforesaid to the Purchaser

within 45 (or any greater period as the parties may agree in writing) days from the date hereof the Purchaser may elect to cancel this Agreement for Sale by giving to the Vendor 7 days notice in writing of cancellation whereupon all monies pad herein by the Purchaser shall be refunded to the Purchaser and further, the Vendor shall pay to the Purchaser interest (net of withholding taxes) on all monies (save any amount applied for the payment of Transfer Tax and Stamp Duty on this Agreement) paid hereunder by the Purchaser to the Vendor up to time of cancellation of this Agreement calculated at a rate equivalent to the best deposit rate of National Commercial Bank Jamaica Limited then prevailing on deposits as to amount similar to the amount being refunded the Purchaser.

(b) In the event that the Purchaser falls and/or neglects to serve on the Vendor a notice of cancellation of this Agreement as contemplated by paragraph (a) of this special condition then the Vendor may require the Purchaser to pay such part of the price for the property as shall not include the market value of such of the lots referred to in paragraph (a) aforesaid as the Vendor shall be unable to transfer at the time fixed for completion and for the purposes of this provision the market values of these lots are agreed as follows:-

Lot 1	*-*	*$2,000,000*
Lot 51	*-*	*$1,200,000*
Lot 52	*-*	*$ 950,000*

The Purchaser shall not be required to account for the amounts declared to be market values of these lots or any of them unless and until the Vendor shall be in a position to procure that the Purchaser be registered as the proprietor of the respective lot(s) aforesaid under the Registration of Titles Act.

15. Immediately after registration of the ownership by the Purchaser of the lands comprised in the Certificates of Title referred to in Special condition (4) and (5) the Vendor shall at its expense apply for new Certificates of Title to be issued for these lands which Certificates of Title shall be duly registered in the Purchaser's name."

Completion

[61] The Agreement for Sale had a clause in respect of completion which was in the following terms:

> *COMPLETION: On or before the expiration of seven (7) days from the Vendor providing to the Purchaser the notice referred to in special condition (3) hereof on payment of all outstanding amounts payable by the Purchaser hereunder in exchange for proof of the ownership by the Purchaser of the parcels of land comprised in the certificate of Title referred to in Special Conditions (4) and (5) and the duplicate Certificate of Title for the remaining lands part of the property, together with Instrument(s) of Transfer of land capable of registration at the office of Titles effecting a change in the ownership of these lands part of the property and each part thereof in favour of the Purchaser and/or its nominee(s).*

[62] The Defendants averred that Mr Aird as receiver for Rio Blanco sold the Lots on this provision as to completion which on a true construction of the Agreement for Sale provided that completion would occur:

(a) At least 7 days after Rio Blanco provided the notice referred to in Agreement for Sale;

(b) On payment of all outstanding amounts payable by Caricom Investments in exchange for proof of the ownership by Caricom Investments of the Disputed Lots

(c) In exchange for the duplicate Certificates of Title for the remaining lots, together with Instruments of Transfer in relation thereto, capable of registration at the Office of Titles effecting a change in ownership in favour of Caricom Investments or its nominees.

[63] The Defendants asserted that Mr Aird effected transfers in accordance with the terms of the Agreement for Sale and notified Caricom Investments by letter dated 15th September 1993 from his Attorney-at-Law to Caricom Investments' then Attorneys-at-Law and called upon Caricom Investments to pay the balance purchase price.

[64] The Defendants argued that the completion clause and Special Conditions 3, 4 and 5 of the Agreement for sale show that the parties to the agreement were concerned as to whether Mr Aird would be in a position to procure that the transfer to the Claimants could be registered on the duplicate certificate of title of the Disputed Lots. These special arrangements reflected the fact that the Vendor may not have been able on completion to:

(a) procure that the Purchaser be registered on the duplicate certificate of title as the proprietor of Lot 41 registered at Volume 1230 Folio 81;

(b) procure a transfer of the lands registered at Volume 1220 Folio 921 (Lot 1), Volume 1230 Folio 811 (Lot 51) and Volume 1230 Folio 812 (Lot 52) of the Register Book of Titles;

(c) secure registration of the lands described in special conditions 4 and 5 of the Agreement for Sale, on the respective duplicate Certificates of Title, and for that reason the Purchaser would accept transfer and registration of change of ownership be endorsed on the original Certificates of Title for the said lands (and not on duplicate certificate of titles).

What did Mr Aird know about the duplicate certificates of titles for the Disputed Lots?

[65] A useful starting point for this analysis is the admission of Mr Aird during cross-examination that from as early as 15th January 1993 Messrs Robinson, Phillips & Whitehorne wrote a letter which was copied to him. The firm was writing to D. C. Tavares & Finson Company Ltd, on behalf of its clients Dr. A. C. Paul Marsh, his sisters Ms Hope Marsh and Mrs Winsome Kerr, Rio Blanco Development Company Limited and the executive committee of P. S. P. No. 441. The letter was also copied to Ms Sharon Evans, the Attorney-at-Law for NCB. It is observed that the letter referred to the notice advertising the sale of the Lots by public auction on the 11th February 1993 and questioned, *inter alia*, on whose authority the public

auction was being conducted. This letter was relatively innocuous because it was not being asserted therein that there was the lack of authority to sell any particular, identified lot.

[66] Mr Aird wrote a letter to Messrs Robinson Phillips & Whitehorne dated 23rd February 1993, which reads as follows:

> *Dear Sirs,*
>
> *As you are no doubt aware I am the duly appointed Receiver/Manager of Rio Blanco Development Limited.*
>
> *I have observed from the Company's records that the duplicate Certificate of Title registered at Volume 1220 Folio 921 in respect of Lot 1, part of the White River Sub- division (containing the Restaurant, Water Treatment Plant and Tennis Courts) is in your possession. I am in urgent need of the said document and shall be obliged if you will deliver same to the bearer of this note who has been instructed to wait for delivery of the said duplicate Certificate of Title.*
>
> *Thanking you for your usual kind cooperation.*
>
> *Yours sincerely,*
>
> *KARL AIRD*
>
> *RECEIVER /MANAGER*

[67] Messrs Robinson Phillips & Whitehorne responded by letter dated 4th March 1993 and stated the following:

> *…We have carefully checked the several documents relating to the Mortgage and Debenture by the Company in favour of National Commercial Bank Jamaica Ltd. to sent us by the Bank by letter dated 23rd. November, 1992 and can find no reference to the said Title being included in the Security given to the Bank which has appointed you as the Receiver/Manager.*
>
> *In the circumstances we are unable to deliver the duplicate of the said Certificate of Title to you at this time.*

> *We will bring your request to the attention of our client for further instructions, if any.*
>
> *Yours very truly,*
>
> *ROBINSON PHILLIPS & WHITEHORNE*

[68] There was a second letter dated 4th March 1993, addressed to Mr Aird from Messrs Robinson Phillips & Whitehorne, the contents of which are also relevant. It states as follows:

> *We refer to your discussion with us on the 2nd instant in which you enquired for the Titles for Strata Lots 51, 52 and 41 of the Rio Blanco Development Company Ltd. complex.*
>
> *We have checked the several documents including the Mortgage and Debenture given by the Company and note that in respect of Lots 51 and 52 – comprised respectively in Certificates of Title registered at Volume 1230 Folios 811 and 812 respectively that these are excluded from the list of Titles forming part of the Security.*
>
> *In reference to Lot 41 this is already the subject of an agreement for sale which preceded the Company's dealings with the Bank.*
>
> *We take this opportunity of recording also that by an error in the description Strata Lots 9 and 10 are likely to be the subject of a needed exchange of Titles which we are at present investigating for correction.*
>
> *We will bring the above to the attention of our clients for their further instructions.*

The evidence is therefore conclusive that by this second letter of 4th March 1993, Mr Aird was aware that it was being positively asserted that not only Lot 1, but all four Disputed Lots were not part of the security that was given to NCB.

[69] Based on the response of Messrs Robinson Phillips & Whitehorne, there would have been no proper basis for Mr Aird to have concluded that the duplicate Certificate of Titles were not being held by that law firm and were lost. Similarly, there would have been no proper reason for Mr Aird to have indicated to Mr Lake, Caricom Investments Limited or their Attorneys-at-Law that the duplicate Certificates of Titles for the Disputed Lots could not be located.

What did NCB know about the duplicate certificates of titles for the Disputed Lots?

[70] By letter dated 27th of November 1992 D F Handy Assistant General Manager of NCB wrote to Messrs. Robinson Phillips & Whitehorne asking for confirmation of the sale of certain lots. The final paragraph states:

> *We understand that you hold the Titles for lots 41, 51, 52 and we enquire whether arrangements for sale are pending. If not, we would be obliged if you would send them to us as soon as possible.*

This letter confirms that, as at the date of the letter, it was recognized that the duplicate certificates of title for three (3) of the four (4) Disputed Lots, (Lot 1 was not mentioned), were not in the possession of NCB. It is unclear whether Messrs Robinson Phillips & Whitehorne responded to this letter. It is also unclear whether Messrs Robinson Phillips & Whitehorne, indicated to NCB at any time prior to its letter of 4th March 1994 to Mr Aird, that Rio Blanco was asserting that the Disputed Lots were not part of the security offered to NCB.

[71] It is noteworthy that Mrs CM Schwab, the Account Executive in the Corporate Division of NCB, in an internal memorandum to Ms Sharon Evans Dated 5th April 1993 stated that the bank had accepted an offer for *"the purchase of the real estate holdings and chattels of Rio Blanco from Caricom Investments or its nominee".* She continued by raising the following possibility:

> *"If the Bank sold as mortgagee, we may be able to negotiate the stamp duty payable in light of the loss which will be incurred. Can the Receiver successfully negotiate such a reduction? In the event that the Receiver cannot negotiate a reduction in stamp duty, should we do 2 agreements for sale, one covered by the specific charges, to be signed by the Bank as mortgagees and one covering the uncharged properties to be signed by the Receiver? We require your guidance in this matter."*

[72] This appears to reflect an appreciation that some of the Lots which were being offered for sale were not expressly given to NCB as security. This position would be expected because Allison Pitter & Co., Chartered Surveyors, prepared a Report and Valuation on the Lots dated 2nd February 1993 ("the Allison Pitter Valuation"). The valuation commences with its instructions and states that Mrs C.M Schwab,

Account Executive NCB confirmed instructions by fax message dated 29th December 1992 for this valuation as at January, 1993 to fix the value for the purpose of disposal by way of public auction sale. Interestingly, at pages 5 and 6 of valuation, the following is noted:

> *We have not inspected all the titles involved in the complex, but have observed-*
>
> 1. *That the title to Lot 1 (Volume 1220 Folio 921) is not endorsed with any mortgage.*
>
> 2. *That the titles to Strata Lots 51 and 52, that is the 2 bedroom and penthouse apartments in Block "E" upstairs the administrative office and laundry are free of any mortgage.*

[73] Mr Braham has submitted that the reasonable inference to be drawn in the circumstances of this case from the Caveat dated 9th March 1993, in respect of the Disputed Lots, is that NCB was aware as at that date that Rio Blanco was asserting that the Receiver did not have the legal right to sell those Lots. I accept that this is a reasonable inference.

The Law on Misrepresentation

Fraudulent Misrepresentation

[74] The elements of fraudulent misrepresentation were discussed by Harris J.A in the Jamaican Court of Appeal decision of ***Bevad Limited v Oman Limited*** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2005. The learned judge of appeal at page 8 summarized the law as follows:

> *"… In **Derry v Peek** ['1886-90] All E.R. 1 the Locus classicus on the tort of deceit, Lord Herschell speaking over a hundred years ago, stated that for an action to lie in the tort it must be shown that the statement was not only false but was "made knowingly, or without belief in its truth, or recklessly, carelessly, whether it be true or false". In that case it was held inter alia, that a false statement made carelessly, without reasonable belief in its truth did not amount to fraud but may furnish evidence of it.*
>
> *Four principal elements of the tort must be established:*
>
> *(i) There must be a false representation of fact. This may be by word or conduct.*

(ii) The representation must be made with the knowledge that it is false, that is, it must be willfully false or made in the absence of belief in its truth. ***Derry v Peek*** *(supra);* ***Nocton v Lord Ashborne*** *[1914 -1915] All E.R. 45.*

*(iii) The false statement must be made (****Ashbourne****) with the intention that the claimant should act upon it causing him damage.*

(iv) However, it must be shown that the claimant acted upon the false statement and sustained damage in so doing. ***Derry v Peek*** *(supra);* ***Clarke v Dickson*** *[1859] 6 C.B.N.S. 453; 35 Digest 18,100*

[75] As it relates to the head of the inducement, Chitty on Contracts 31st Edition Volume 1 pages 202-204 paragraph 6-039 states the position as follows:

> *Once it is proved that a false statement was made which is "material' in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent. There is no set list of matters that might rebut the presumption which arises from a fraudulent statement. One is to show that the misrepresentee had already firmly made up his mind, but even then the misrepresentation might have induced him not to change his mind.*

[76] The Claimants relied on the case of ***Spice Girls Ltd. v Aprilia World Service*** [2002] WL 451 21 at paragraph 70, it was explained that:

> *"It is sufficient that the misrepresentation is a material inducement, it does not have to be the only one. In* ***Smith v Chadwick*** *(ibid.) page 196 Lord Blackburn said: "I do not think it is necessary, in order to prove [damage], that the plaintiff should always be called as a witness to swear that he acted upon the inducement. At the time when* ***Pasley v Freeman*** *was decided, and for many years afterwards he could not be so called. I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, it is a fair inference of fact that he was induced to do so by the statement."*
>
> *Lord Blackburn went on to point out that the inference was one of fact not law and that if no evidence is given as to reliance in fact that was ground for not drawing the inference.*

Negligent Misrepresentation

[77] The tort of negligent misrepresentation is also a category of misrepresentation. In the case of ***Hedley Byrne & Company Ltd v Heller & Partners Ltd*** [1963] 3 WLR 101 the Court held that an action would lie for the tort of negligent misrepresentation where there was a negligent, though honest misrepresentation to the representee and there was a "special relationship" between the parties, even in the absence of a contractual relationship between them. Interestingly, in the case of ***Esso Petroleum v Mardon*** [1976] 2 All ER 5 at pg 17 Lord Denning noted that in ***McInerny v Lloyds Bank Ltd*** *([1974] 1 Lloyd's Rep 246 at 253),* he had said that *"if one person, by a negligent mis-statement, induces another to enter into a contract—with himself or a third person—he may be liable in damages.'*

[78] The Claimants' case is that both NCB and Mr. Aird are guilty of misrepresentation. It was submitted that NCB is directly liable for its own misrepresentations. Furthermore, to the extent that NCB is to be regarded as Mr. Aird's principal, it is liable for his misrepresentations and conduct by reason of agency.

[79] The fraudulent representations on which the Claimants rely were that:

i. the duplicate certificates of title for the Disputed Lots were lost or misplaced; and
ii. there were no incumbrances.

The Claimants asserted that there were negligent representations that:

iii. NCB was the beneficial owner of the Disputed Lots and/or had the right to sell them; and
iv. the Rio Blanco properties were "suitable for resort development" or that the said Rio Blanco properties are Hotel Property,

Was there a representation that the duplicate certificates of title for the Disputed Lots were lost or misplaced?

The Court's analysis of the evidence of misrepresentation

[80] There are two positions being advanced. The first is by Mr. Lake that he was told that the duplicate Certificates of Title to the Disputed Lots were lost. This is denied by the Defendants. The Defendants averred in paragraph 12 of their Defence that by letters dated 4th March 1993 and 21st May 1993, Messrs Robinson Phillips & Whitehorne alerted Mr Aird of actual or potential claims to the Disputed Lots. It is further averred that these claims were communicated to Caricom Investments' then Attorneys-at-Law during negotiations for the purchase of said lands.

[81] The second position, which is being advanced by the Defendants as pleaded in paragraph 19 of the Defendants 4th Further Amended Defence is that Caricom Investments:

> *… had actual notice of adverse claims or potentially adverse claims to the lands the subject of these proceedings, by the following clauses of the Agreement for Sale of Land:*
>
> *A) The clause describing the Vendor:*
>
> *B) the clauses relating to "Completion" and "Possession";*
>
> *C) The clause relating to "Incumbrances, Reservations, Restrictions and Easements"; and*
>
> *D) Special Conditions (3), (4), (5), (15) and (16) of the Agreement for Sale of Land.*

[82] In this case the credibility of the witnesses and of Mr Lake in particular, is crucial in resolving this issue of fact based on the evidence. This is so because other than the witness statements and evidence of Mr Aird at the First Trial, and the evidence of Mr Donovan Jackson, the Court did not have the opportunity to hear from or consider the evidence of the other persons who played a major role in the transaction such as Mr Ivan Stephenson and Ms Sharon Evans. One of the most well-known judicial statement on assessing credibility is to be in the dissenting

speech of Lord Pearce in the House of Lords in ***Onassis v Vergottis*** [1968] 2 Lloyds Rep 403 at p 431:

> *"Credibility involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."*

[83] This statement has been approved and amplified by Lord Goff in ***Armagas Ltd v. Mundogas S.A. (The Ocean Frost)***, [1985] 1 Lloyd's Rep. 1, p. 57 where he stated that:

> *"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is*

> *a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth." [emphases added].*

[84] This paragraph has also been cited with approval in the Privy Council case of ***Villeneuve and another v Gaillard and another*** 2011 UKPC 1 which was an appeal from the Commonwealth of the Bahamas in which Lord Walker at paragraph 67 stated the following:

> *"The Board concurs, with regret but with no hesitation, in the Court of Appeal's view that the judge failed to perform his duty of checking his impressions of the witnesses by reference to contemporaneous documentary evidence, and the probabilities of the situation. That duty was described by Robert Goff LJ in a well-known passage in* ***Armagas Ltd v Mundogas SA*** *(The Ocean Frost) [1988] 1 Lloyd's Rep 1, 57."*

[85] It is of tremendous significance in this case in assessing the credibility of Mr Lake, that the evidence of Mr Aird in his witness statement at paragraph 7 is capable of supporting the evidence of Mr Lake in one material particular, where he said that:

> *"Prior to entering into the Agreements for Sale both Sharon Evans and I brought to the attention of Caricom Investments Limited's (Caricom) Attorneys-at-Law that there were difficulties with some of the Duplicate Certificates of Title to the lands the subject of the sale. Initially they were advised that the Duplicate Certificates of Title for the subject properties could not be located and later they were told that Rio Blanco's Principals were claiming to be entitled to retain Titles which were in the possession of their lawyers Messrs. Robinson Phillips and Whitehorn."*

[86] The enquiry which is naturally raised is why would Mr Aird and Ms Evans initially tell the Attorneys-at-Law for Caricom Investments that the duplicate Certificates of Title for the Disputed Lots "could not be located". Is this evidence of a deliberate scheme to deceive the Claimants and their Attorneys-at-Law? And if so, is Mr Aird to be believed when he says they (presumably the Attorneys-at-Law for Caricom Investments) were later told "*that Rio Blanco's Principals were claiming to be entitled to retain Titles which were in the possession of their lawyers Messrs. Robinson Phillips and Whitehorn.*"?

[87] Mr Aird's evidence at the First Trial is also important when he admitted that it is possible, but he could not recall whether Mr Mitch Stephenson said to Mr Lake that the titles for the Disputed Lots were lost because at the time the lawyers were contemplating a lost title approach to the titles that they did not have.

[88] It is also of significance that there is no document in writing which has been put in evidence in which NCB, Mr Aird or Attorneys-at-Law acting on their behalf expressly assert to Caricom Investments Limited and/or Mr Lake that the duplicate Certificates of Title for the Disputed Lots were lost. However, this fact must be analysed in light of the other evidence before the Court.

[89] It has been judicially recognised that the absence of evidence can be as significant as the presence of it. The observations of Arden LJ in ***Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others*** [2011] EWCA Civ. 61 has been often quoted where he stated:

> *11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.*
>
> *12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not*

> *be familiar. These situations can present particular dangers and difficulties to a judge.*
>
> *…..13*
>
> *14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.*

[90] It is noteworthy that the Disputed Lots were not included in the advertisement. The advertisement declared that the sale was "…*under powers of sale contained in a mortgage…*" The reasonable inference to be drawn from the omission of the Disputed Lots is that there was an acknowledgment by NCB that they were not the subject of a mortgage. This would have been consistent with the information provided by the Allison Pitter Valuation which identified the fact that the Certificates of Title of at least 3 of the Disputed Lots, including Lot 1, did not have a mortgage endorsed thereon.

[91] Conspicuously missing from Mr Lake's witness statements and amplification of his witness statement or cross examination is any detailed explanation as to the process by which the Disputed Lots came to be included in the sale even though they were not included in the Advertisement as properties which were being sold. Mr Lake said the property purchased was what was negotiated with Mr Ivan "Mitch" Stephenson of NCB Bank. He said that when he went to meet with Mr Stephenson they discussed "the context of everything" and the other lots that were not in the advertisement but were included in the sale.

[92] Mr Lake was cross examined about a memorandum to NCB corporate division, Mr Ivan Stephenson dated 13th April 1993, captioned "*Purchase of Rio Blanco Village & Lands Part of White River, St. Mary*" which reads as follows:

> *Further to telephone conversation (Stephenson/Hamilton) earlier today, Mr. Richard Lake has asked that we write to confirm that arising out of the meeting which he had with your Mr. Stephenson earlier today, it was confirmed that the assets being purchased by CARICOM Investments Limited in this matter extend to "all the assets of the company over which NCB and or the Receiver has authority".*
>
> *We have been asked to prepare an additional agreement to ensure that the intention of the parties regarding the sale of the assets (not presently described in the existing draft Agreement) is properly reflected in the contracts covering the transaction.*
>
> *It is going to be necessary for us to revise further the documents returned to Ms. for. Evans on Thursday last and we will also let you have tomorrow a draft of the additional agreement which our client has requested that we Prepare.*

[93] This memorandum demonstrates that there had been a draft agreement prepared which it appears did not include the Disputed Lots. There is no evidence as to how the issue of the inclusion of the Disputed Lots was raised and the expansion of the property being sold to include "*all the assets of the company over which NCB and or the Receiver has authority*".

[94] It is revealing that there is no documentary evidence of communication from the Attorneys-at-Law representing Mr Aird and NCB to the Attorneys-at-Law for Caricom Investments and /or Mr Lake of the adverse claim by Rio Blanco. The fact that Rio Blanco was asserting a right to the Disputed Lots, which includes Lot 1, was a matter of tremendous significance. Having regard to the value of this transaction I do not accept that such an important fact would only have been communicated orally. It seems reasonable that such a fact would have been communicated to Caricom Investments' then Attorneys-at-Law in writing. Furthermore, I would expect that this information would in the ordinary course of such a transaction, have generated a substantial amount of communication in writing between the parties in relation to this issue. Numerous documents have

been exhibited in this case, but there has not been one page produced in support of the assertion by Mr Aird of this communication having been made to Mr Lake's/ Caricom Investments' Attorneys-at-Law. The absence of such communication in writing is a fact which I will take into consideration.

[95] However, in addition to these observations, I have determined that it is necessary for the Court to examine Special Conditions (3), (4), (5), (15) and (16) as contemporaneous documents to determine whether they can assist in determining this issue of credibility of Mr Lake as to what was communicated to him, Caricom Investments or their Attorneys-at-Law.

The importance of the Disputed Lots

[96] The importance of the Disputed Lots and in particular Lot 1, to the Rio Blanco hotel as it existed at the time that Caricom Investments was negotiating with NCB for its purchase cannot be gainsaid and was not in issue. In conducting this analysis, it is necessary to appreciate this point. Lot 1 was of particular importance because as the Allision Pitter report confirmed it contained some shared facilities such as a restaurant, sewage plant, reserve water tank, tennis court, service building with storeroom and standby generator. This explains why Mr Lake and Caricom Investments would have wanted to purchase it although to was not initially listed for sale.

The lost title approach

[97] Mr Aird's evidence at the First Trial, to which reference has already been made, was that the lawyers were contemplating a lost title approach to the titles that they did not have. He explained that the lost title approach involved making an application to the registrar on the grounds that the titles were lost.

[98] The lost title approach must be viewed against the backdrop of section 58 of the Registration of Titles Act ("RTA") which states the general position that registration requires endorsement on both the duplicate and the original certificate of titles.

Section 58 is subject to section 81 which provides that the Registrar can dispense with production of the duplicate certificate and issue a new certificate.

[99] Section 58 provides that:

> *"Every duplicate certificate of title shall be deemed and taken to be registered under this Act when the Registrar has marked thereon the volume and folium of the Register Book in which the certificate is entered; and every instrument purporting to affect land under the operation of this Act shall be deemed and taken to be registered at the time when produced for registration, if the Registrar shall subsequently enter a memorandum thereof as hereinafter described in the Register Book upon the folium constituted by the existing certificate of title and also upon the duplicate…"*

[100] This lost title approach and the insertion of special condition 3(b) which contemplates an application and "*…confirmation from the Registrar of Titles of her agreement to dispense with the production of the duplicate Certificate of Title referred to in Special Conditions (4) and (5) and to register pursuant to Section 81 of the Registration of Titles Act*" is odd. I agree with the submission of the Claimant that it is clear from the RTA that an application to dispense with the production of duplicate certificates of title should not be made when a person other than the applicant is holding or has the right to hold the titles. Similarly, when one reads sections 81 and 82 of the RTA together, it is evident that a lost title application is contemplated when the applicant is the party entitled to hold the title and has lost it. Both an application for lost title and an application to dispense with production of title are not intended to circumvent the right of the proper holder of the titles or to defeat a lawful assertion of the right to hold such titles.

[101] Section 81 of the RTA, provides as follows:-

> *"81.- (1) Whenever any transaction or transmission under this Act is proposed to be registered, and it is required by this Act that a memorandum of such transaction or transmission shall be endorsed upon the duplicate certificate of title, the Registrar may dispense with the production of such duplicate and the making of such endorsement thereon.*
>
> *(2) In every such case, upon the registration of the transaction or transmission the Registrar shall notify, in the memorandum in the Register Book, that no entry of such memorandum has been made on the duplicate,*

> *and such transaction or transmission shall thereupon be as valid and effectual as if such memorandum had been entered thereon.*
>
> *(3) Provided always that the Registrar before registering such transaction or transmission shall require proof to his satisfaction by statutory declaration that the duplicate is not deposited or held as security or otherwise, and whether it is subject to any lien, and shall give at least fourteen days' notice of his intention to register such transaction or transmission in at least one newspaper and such other notice, if any, as he may think fit."*

Section 82, which addresses lost titles provides as follows:

> *82.-(1) Whenever a duplicate certificate of title or special certificate of title is lost or destroyed the registered proprietor of the land or some person claiming through him may apply to the Registrar to cancel the certificate of title…*
>
> *(3) An application under this section may be combined with an application under section 81 to dispense with the production of a duplicate certificate."*

[102] It appears to me that because Mr Aird managed to succeed on his application to dispense with notation on the duplicate Certificates of Title for the Disputed Lots without an assertion that the said duplicates were lost, he could not have at the same time applied for new titles under section 82 of the RTA. This is because the application for new titles would have failed without a positive assertion that the duplicates were lost.

[103] Mr Braham submitted that in reliance on sections 81 and 82, that there was an implied representation made to Caricom Investments by NCB whether directly or indirectly, that the duplicate Certificate of Titles for the Disputed Lots were lost. Counsel posited that the RTA contemplates cancellation and issuing of a new certificate of title without the production of a certificate in four circumstances. He examined the other relevant sections of the RTA namely sections 87, 155 and 158 and submitted that none of these sections arise at all on the facts of the present case.

[104] It should be noted that Mr Braham, no doubt unintentionally, neglected to also identify section 154 of the RTA as another provision which permits the Registrar to issue a new certificate. Section 154 is in the following terms:

> *Upon the appearance before the Court or a Judge of any person summoned or brought up by virtue of a warrant as aforesaid, it shall be lawful for the Court or Judge to examine such person upon oath and, in case it shall seem proper, to order such person to deliver up such certificate of title or instrument as aforesaid and, upon refusal or neglect by such person to deliver up the same pursuant to such order, to commit such person to prison for a period not exceeding six months unless such certificate or instrument shall be sooner delivered up; and in such case, or in case such person cannot be found so that a requisition and summons may be served upon him as hereinbefore directed, the Registrar shall, if the circumstances of the case require it, issue to the proprietor of the land such certificate of title as is herein provided to be issued in the case of any certificate of title being lost or destroyed, and shall enter in the Register Book notice of the issuing of such certificate, and the circumstances under which the same was issued, and thereupon the certificate of title or instrument as aforesaid, so refused or neglected to be delivered up as aforesaid, shall be deemed for all purposes to be null and void as far as the same shall be inconsistent with the certificate or instrument so issued in lieu thereof.*

[105] I have highlighted this section because in the memorandum of Ms Evans to Mr Ivan Stephenson dated the 17th June 1993, she indicated that she had spoken to Mr Donovan Jackson who had recommended two alternatives (already contemplated by "us" (I understand this to mean by NCB), which involve applying for a Court Order either directing the Attorneys to deliver up the duplicates or instructing the Registrar to cancel the said Titles and issue replacements. I shall have reason to again refer to this memorandum subsequently.

[106] The Agreement for Sale in special condition 4, provides that in the event of the Vendor not being able to transfer Lot 41 within 45 days, there would be a reduction in the purchase price based on a predetermined value of the lot.

[107] Special Condition 5 provides that the purchaser may cancel the agreement by giving the Vendor 7 days' notice in writing if the Vendor was unable to transfer Lots 1, 51 and 52 within 45 days of the Agreement.

[108] Special condition 15 provides for the vendor to apply for new titles. The Defendants in their written submissions at page 24 have made the following argument in respect of special condition 15:

> *Special Condition 15 taken literally, is clear. However, the question arises as to what is the true meaning of the words used in light of the circumstances of the case. It is obvious from a review of the terms of the Agreement for Sale of Land that both Vendor or and Purchaser proceeded to draft same on the basis that the Duplicate Certificates of Title for the lands dealt with under Special Conditions (4) and (5) were not available and would not be available to be submitted with the other titles when the lands were being transferred. It is also clear, that if the titles were known by the Attorneys-at-Law for the parties to have been lost, provision for lost titles application could easily have been inserted in Special Condition 15. This was not done. The provision is that there is an application for "new certificates of Titles to be issued for those lands…" registered in the Purchaser's name. It is also clear from Special Condition 15 that the lands were already in the Purchaser's nominee's name, and the reasonable inference on the facts is that any application in relation to new titles could only have properly been made by the Purchaser, now the registered proprietor, and not by the Vendor.*

[109] This argument does not assist the Defendants. The fact is that the duplicate Certificates of Title for the Disputed Lots were not lost and Special Condition 15 was not appropriate having regard to the dispute surrounding the right of the vendor to sell the Disputed Lots. If the Attorneys-at-Law for the Claimants knew that the duplicate Certificates of Title were not lost, then it would have been patently clear to them that the inclusion of special condition 15 was a potentially worthless exercise unless circumstances changed. It is unlikely that they would have agreed to its insertion in those terms without more. On the other hand, NCB and Mr Aird both knew that the duplicate Certificates of Title were not lost and as a consequence the inclusion of special condition 15 was of no practical value. In my opinion, since the inclusion of special condition 15 was of no practical transactional value having regard to the fact that the duplicate Certificates of Title were not lost, the purpose of its inclusion is limited. I have concluded that in these circumstances the inclusion of special condition 15 is more consistent with a situation where the Claimants were told that the Duplicate Certificates of Title. Accordingly, the inclusion of special condition 15 would have served to reinforce

the mistaken belief, held by the Claimants which was based on the representation that had been made to them.

[110] I find on a balance of probabilities that the insertion of special condition 15 and the other reasons which I have previously stated have steered me to the conclusion that Mr Lake was told by Mr Aird and NCB that the Duplicate Certificates of Title was lost and that Mr Lake, nor the Claimants were not advised of the real state of affairs and the assertion being made by the Attorneys-at-Law for Rio Blanco. Having regard to the importance of Lot 1 I find that the absence of any documentary trail between the Attorneys-at-law for the parties indicating that the duplicate Certificates of Title for the Disputed Lots were being held by Messrs Robinson Phillips and Whitehorne to be "*conspicuous by its absence*". I have drawn the reasonable inference and I have concluded on a balance of probabilities, that there is no written evidence of such communication, because NCB or Mr Aird did not advise the Claimants or their Attorneys-at-Law of the position that was being asserted by Messrs Robinson, Phillips and Whitehorne and that what NCB and Mr Aird told the Claimants was that the duplicate Certificates of Title for the Disputed Lots were missing or lost.

[111] Having regard to this finding and my analysis of the lost title approach, I have accepted the evidence of Mr Lake and I have concluded that Mr Aird and NCB did represent to Mr Lake and by extension to Caricom Investments that the duplicate Certificates of Title for the Disputed Lots were lost or missing. I have accepted the evidence of Mr Aird which supports this conclusion and I have rejected the evidence of Mr Aird that the Attorneys-at-Law for Caricom Investments were subsequently told of the challenge to the right to sell the Disputed Lots.

[112] The distinction between "lost" and "missing" was highlighted by Mr Piper, however, I do not find this to be of much significance. This is really a matter of semantics. Whereas in ordinary usage "missing" in relation to a thing means that a thing is not able to be found because it is not in its expected place, both "lost" and "missing" used in the context of the transaction between the parties, would have indicated to

the recipient of such communication that the duplicate Certificates of Title for the Disputed Lots could not be found. The reasonable extrapolation that would result in the mind of the recipient of such information, caused by the use of either word, is that the duplicate Certificates of Title were previously in the possession of NCB and/or Mr Aird but that they could not now be located. This is markedly different from the true situation which is that it was known by the communicators of the information that they were not previously in the possession of NCB and that they were being held by the Attorneys-at-Law for Rio Blanco.

The evidence of partial non-disclosure

[113] The Claimants rely on Mr Lake's evidence as contained in paragraph 12 of his first witness statement which states that:

> *"The Bank advised during the contract stage that the Received [sic] did not yet have all the titles in his possession, but the Received [sic] expected to get them shortly.*

[114] The Claimants submitted that this was a half-truth. Reliance was placed on the learned authors of Common Law Series, Law of Contract, who describe half-truth as follows:

> *"4.29 Implication*
>
> *A statement of fact which, when read in isolation, appears to be true may be untrue in context in view of what it implies. This is the case of the half truth. For example, if a drink is simply stated to contain tomato juice, the implication is that it contains nothing else of any significance (such as vodka).*
>
> *Examples from the cases include Cazenove, in which Pollock CB pointed out that it is untrue 'when a person is asked how old he is, and he states, in answer, a number of years less than his true age [and it is nonsense] to say that that is a true answer which requires something to be added to it to make it true'. In Butler, the seller's solicitor, stating to the buyer that he was not aware of any covenants restricting the use of the land as a brickyard, implied that he had checked the matter. In* ***Curwen****, one person, who induced another to buy shares by stating that he was buying the shares too, failed to mention that he was part owner of land*

> *which the company was about to acquire. Just as misleading was the statement in **Galle Gowns**, that the insurance applicant had traded in the past under one name, without mentioning another. A prominent recent example is that of the cost of the payment protection insurance being sold along with a loan."*

[115] In **Chitty** 31st ed at paragraph 6-020 it is also accepted that a partial non-disclosure may amount to misrepresentation:

> *"Partial Nondisclosure.*
>
> *Although total nondisclosure does not amount to a misrepresentation, a partial nondisclosure may do so. This may happen in a number of different ways. Thus a statement may be a misrepresentation even though it is literally true if it implies certain additional facts which are themselves false. A striking instance of this possibility is Goldsmith v Rodger in which the Defendant who was negotiating for the purchase of the plaintiff's yacht, informed the plaintiff, after paying a visit to the yacht, that she had rot in her keel. The Court of Appeal held that this statement implied that the defendant had actually examined the keel, and as he had not done so, this was itself a misrepresentation, whether or not the yacht did have rot in her keel. Again, a statement may amount to a misrepresentation if facts are omitted which render that which has actually been stated false or misleading in the context in which it is made. So, for example, where a shop assistant told a customer that a receipt for the cleaning of a dress which she was required to sign excluded liability for damage to beads and sequins, and in fact the receipt excluded all liability, this was held to be a misrepresentation. It will be observed that these cases of partial non-disclosure can either be explained as cases of actual misrepresentation, or as cases in which there is a duty to disclose certain facts by reason of the facts actually stated… "*

[116] The statement that "*the Receiver expected to get them shortly*" is an assertion by Mr Stephenson as to his belief of Mr Aird's expectation and by extension, Mr Aird's state of mind. This in my view cannot amount to a statement of fact for purposes of misrepresentation.

Was there a representation that there were no incumbrances?

[117] Section 3 of the RTA defines incumbrance as-

> *"incumbrance" shall include all estates, interests, rights, claims and demands, which can or may be had, made or set up, in, to, upon or in respect of the land adversely and preferentially to the title of the proprietor;…"*

[118] The Claimants have submitted that the evidence disclosed that, at the time of execution of the Agreement for Sale, Rio Blanco had a "claim" which "can or may be had, made or set up" in respect of the Disputed Lots and in those circumstances, the relevant titles were encumbered.

[119] The relevant clause in the Agreement for Sale entitled "Incumbrances, reservations Restrictions & Easements" reads:

> *Free from incumbrances other than the restrictive covenants and easements endorsed on the Certificates of Title and such easements as are obvious and apparent*

[120] The Defendants have maintained their position and pleaded at paragraph 6(4) ii of their 4th Further Amended Defence that:

> *"All the said lands were free from incumbrances other than the restrictive covenants and easements endorsed on the Certificates of Title and such easements were obvious and apparent"…*

[121] Mr Lake insisted that the representation that there were no incumbrances was one of the misrepresentations made to the Claimants. In his evidence during the trial Mr Lake sought to go a step further and he asserted that although the restrictive covenant was not endorsed on the titles, the titles referred to the Strata Plan. He asserted that the covenant that *"No waste or sewage water or effluent waste shall be continued to be discharged onto any road or any part of the adjoining lands or to any river or stream"* was an incumbrance which applied to all the Lots. This position was also advanced by Counsel for the Claimants on the closing submissions. During cross examination Mr Lake was asked to look at the Certificates of Title for the strata lots and indicate where he saw the restrictive covenants endorsed and he conceded that none of the strata titles have restrictive covenants endorsed.

[122] It has been submitted on behalf of the Claimants that the reasons stated in relation to the challenge to the right to sell the Rio Blanco Lots also support the assertion that NCB and Mr Aird misrepresented that the titles were all unencumbered.

[123] I accept the submissions of the Claimants that at the time of the execution of the Agreement for Sale the retention of the duplicate Certificate of Titles by Rio Blanco and its assertion that it did not form part of the security given to NCB satisfies the definition of incumbrance as stated in section 3 of the RTA. Rio Blanco's entitlement to the Disputed Lots was a claim which was being made or set up. Accordingly, this claim amounted to an incumbrance and the clause in the Agreement for Sale entitled "Incumbrances, Reservations Restrictions & Easements" was therefore inaccurate in its omission of the claim being asserted by Rio Blanco.

Is the restrictive covenant an incumbrance?

[124] As a general rule, restrictive covenants exist for the benefit of the neighbouring land. This is evident from many of the decisions relating to applications to modify or discharge restrictive covenants. In the Privy Council case of **McMorris v Brown and Another** (1998) WIR 261 at page 270 their lordships accepted that it was legitimate to "*have regard to the scheme of the covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme."*[1]

[125] In this case, Caricom Investments was the purchaser of the Strata Lots. It was also the purchaser of Lot 1. Caricom Hotels was entered on the respective Certificates of Title as transferee. Accordingly, Caricom Hotels was the primary beneficiary of the covenant that *"No waste or sewage water or effluent waste shall be continued to be discharged onto any road or any part of the adjoining lands or to any river or stream".* However, I do appreciate that there may be other beneficiaries entitled to protection against a discharge into the nearby river.

---

[1] Adopting Bernard Marder QC, President in ***Re Snaith and Dolding's Application*** (1995) 71 P & CR 104 and 118 an application to the Lands Tribunal in England but the Privy Council took the view that similar principles ally in Jamaica as in England on this issue

[126] Although “Incumbrance” in section 3 of the RTA is defined in terms of what it includes and therefore, presumably, is not exhaustive, in my opinion, (and in the absence of any clear authority on the point), a restrictive covenant does not automatically constitute an incumbrance in every case. I am cognisant of the fact that the relevant restrictive covenant in this case is a restriction on the user of the strata lots but I do not consider that this *ipso facto* makes it an incumbrance. I am of the view that to be considered an incumbrance, there ought to be two conditions. Firstly, there must be some legally enforceable right in the owner of the adjoining property or one of “the beneficiaries of the scheme”, of the particular covenant or covenants as a whole. Secondly, the restrictive covenant is only an incumbrance if the beneficiary thereof insists on its observance. This seems consistent with the definition of Incmbrance as defined in the RTA,

[127] In the instant case there is no party, regulatory authority or otherwise insisting on the observance of the covenant not to discharge. The Strata Plan was registered 16th November 1990 so the authorities are presumed to have appreciated that the sewage from the units was going to the sewage plant which was on Lot 1. Nevertheless, they approved the plan. For this reason, the inclusion of the particular restrictive covenant appears prima facie, to be odd although admittedly, the Court has not had the benefit of evidence as to the considerations involved in the approval process of strata plans.

[128] Because Caricom Hotels was the owner of Lot 1 with the sewage plant to which there was a discharge by itself as owner of the strata lots, I do not accept the submissions of Counsel for the Claimants that there was an incumbrance in respect of the Disputed Lots or the strata Lots arising from the restriction on discharge of waste.

[129] The wording of the Agreement for Sale is clear in its references to restrictive covenants and easements endorsed on the Certificates of Title. I do not accept that the Strata Plan can be used to displace or expand the clear reference to

restrictions on the Certificates of Title, so as to enable a finding that there was a misrepresentation.

[130] Even if I am wrong on my conclusion that the restrictive covenant does not constitute an incumbrance, having regard to the absence of any legal authority that it is an incumbrance, I find that a failure to disclose this covenant would amount to an innocent misrepresentation at the highest.

Was there a representation that the Receiver had the right to sell the Disputed Lots?

[131] I have framed this issue in this manner as this is how I have found the representation to have been made.

[132] At paragraph 6(4) iii of their 4th Further Amended Defence, it is asserted that Rio Blanco was the legal and beneficial owner of the Lots at all material times and so warranted. At paragraph 6(4) iv. It is pleaded that:

> *Contrary to the allegations contained in paragraph7.4(c)[of the 4th Amended Particulars of claim], the 2nd Defendant in a Receivership, which had title to the said lands, had the right to sell the said lands having regard to the undisputed default under its mortgage to the 1st Defendant and the right to exercise the power of sale arising under the Debenture.*

[133] Whereas Rio Blanco was the legal and beneficial owner of the Disputed Lots and had a right to sell its property, the Court has found by the James J Rio Blanco Judgment that there was no corresponding right of the Receiver to sell the Disputed Lots. This is because the Disputed Lots had not formed a part of the security under the mortgage. This is what was decided by the Court. To the extent that NCB and Mr Aird by virtue of the sale process represented that the Receiver had the right to sell the Disputed Lots, I find that there was nothing negligent in maintaining that position.

[134] I am not in any way questioning the correctness of the James J Rio Blanco Judgment since I have accepted in considering the preliminary issue that the finding that the Disputed Lots do not form a part of the security given to NCB by

Rio Blanco Development Limited, is final and conclusive and therefore binding on this Court. The purpose of the preliminary issues determination was to avoid a re-litigation of that issue. Nevertheless, this does not prevent this Court from considering the judgment in assessing the position that was held by NCB.

[135] I have noted the clause 2.(i) of the Debenture to which Mr Piper referred Mr Lake (although I then expressed reservations as to the relevance of Mr Lake's response). Clause 2.(i) provides as follows:

> *As security for the payment of principal interest and all other moneys intended to be hereby secured the Company as beneficial owner hereby charges its undertaking and all its property and assets both present and future including its uncalled capital and goodwill. The said charge is to be a first specific charge on the real and leasehold property now belonging to the Company and a first specific charge on all book and other debts and on after-acquired real and leasehold property and on the Company's goodwill and uncalled capital and the first floating charge on all the other assets of the Company.*

[136] Without ruling on the effect of this clause, I find that it provides the basis for a finding that NCB was not negligent in arriving at its conclusion that the Disputed Lots did form part of the security provided to NCB and accordingly the receiver appointed pursuant to the Debenture had the right to sell the disputed lots.

[137] NCB has asserted the right of the receiver to sell the Disputed Lots based on a view of the law which the Court subsequently found to be wrong. However, that view could not be considered to have been unreasonable. A misrepresentation in this respect (if any) would be purely innocent. This of course does not mean that NCB's position was correct in law.

Was there a representation in the Agreement for sale as to "Hotel Property" and/or a representation in the advertisement that the Rio Blanco properties were suitable for resort development?

(a) The agreement for Sale - Hotel Property

[138] During cross examination it was pointed out to Mr Lake and he agreed, that in the Schedule to the Agreement for Sale there are two separate portions, one which reads "Hotel Property" and the other portion at the bottom reads, "Other Properties". He agreed that the properties under Hotel Property are the strata lots and includes the Disputed Lots. He admitted that the schedule separated the developed lands from the underdeveloped lands under two separate headings. He admitted that the underdeveloped 29[2] acres of lands have not been developed since the Claimants took possession.

[139] I do not accept that there was any misrepresentation in this regard. The schedule clearly differentiated between the portion of the property that was being operated as a hotel (and which continued to be operated as a hotel by the Claimants) and the "other properties" which were undeveloped lands and remain undeveloped.

(b) The Advertisement

[140] Mr Lake admitted that the Disputed Lots are not in the advertisement that was prepared for the auction pursuant to the powers of sale contained in the mortgage. Mr Lake stated that the words that appear in the advertisement which read "*suitable for resort development"*, were understood by him to apply not only with respect to the 29 acres of lands registered at 1229 Folio 161, but referred to

[2] Throughout the trial reference was made to this lot as containing 29 acres and 27 acres. In this judgment, I have repeated these references as each was stated at the appropriate portions of the evidence. However, as is disclosed at paragraph 57 herein, it was discovered that there was an error in the description and the actual size is 27 acres.

suitability for resort development for the entire complex. He said that it was advertised as a complex and he considered all the titles and holdings to be one.

[141] He agreed that in the advertisement there is the word "*and*" there but opined that its presence does not change the meaning of the words. He did not accept that "*suitable for resort development*" follows upon the description of the 29 acres of land and asserted that it follows on the total description of the land. Mr Piper asked Mr Lake whether the words that follow "suitable for resort development" which read "*registered at Vol.1229 Folio 161*" is a reference to the 29 acres of land, to which Mr Lake's response was that it was a reference to everything.

[142] It was submitted by Counsel for the Claimants that this representation that the property was suitable for resort development was false because the sewage plant for the entire development is located on Lot 1 and because there is restrictive covenant 7 on each Strata title, barring the disposal of sewerage (effluent or wastewater) on any other adjoining Lot. Therefore, in order to develop the remaining property as a resort, the developer or title holder must breach this restrictive covenant to use Lot 1's sewerage treatment plant and facilities.

[143] It is noted that the advertisement is headed "*Rio Blanco Village (Resort Complex) & Lands*" which suggests that there was (a) a Resort Complex and (b) lands. The advertisement also states that, "*The Resort is located one and a half miles east of Ocho Rios, along the White River, and in close proximity to the beach*".

[144] The main text of the advertisement is also visually separated into two parts. The first lists the Lots and describes the buildings and facilities which comprise the existing resort. There is the word "AND" in a line by itself which effectively separates the description of the facilities from the second portion of the advertisement which describes the 29 acres. The words "*SUITABLE FOR RESORT DEVELOPMENT*" follows immediately on the description of the 29 acres and I find that any reasonable reader of the advertisement would understand these words to refer to the immediately preceding description of the 29 acres. There is

no evidence to support a finding that the 29 acres is not suitable for resort development and that the statement is false or inaccurate. Based on my finding elsewhere in this judgment that the non-inclusion of Lot 1 in the strata plan is not a bar to the sale of the strata lots, one can reasonably conclude that the suitability of the 29 acres for development would not be prevented by any issues having to do with Lot 1 and the disposal of sewage.

[145] It was submitted that no resort can be developed without facilities to manage sewage. Whereas this may be true in principle, in the context of this case I have found that that is not the case. Even if the Claimants were correct that there is no access to the sewage plant (which submission I have rejected), "suitable for resort development" suggests that one can take steps to develop it and inherent in this is the implication that one can construct whatever one determines is needed or necessary. This would include a sewage plant if there is no access to one. This position is no different than that which an investor would have to do on any undeveloped land which is purchased for the purpose of being used as a resort. There was no evidence led as to why such development was not or is not possible. Obviously, there is the issue of the cost that would be involved but that issue was not explored during the trial.

[146] In any event, even if those words referred to all the Lots, that would not change my conclusion that this was not a misrepresentation. I have described elsewhere in this judgment that I do not find that the fact that Lot 1 was not included in the strata plan to be detrimental to the operation or development of the resort. The fact is that the resort did have access to the sewage plant on Lot 1.

Was the receiver the agent of NCB?

Mr Braham's submissions on agency

[147] Mr Braham submitted that on the evidence, Mr Aird's role prior to signing the Agreement for Sale was minimal. Counsel highlighted the fact that in the First Trial on 9th June 2011, Mr Aird admitted that Mr Lake had meetings with Mr Stephenson

and that it was possible that he only attended one meeting with them. Counsel submitted further that the only significant step taken by Mr Aird was in respect of execution of the sale agreements in that he signed them.

[148] Mr. Braham also submitted that even after the Agreement for Sale was signed it was NCB and not the Receiver that assumed the direct responsibility for the conclusion of the sale in fulfilment of the vendor's responsibilities. He pointed to the fact that when the issue arose as to the exact acreage of the undeveloped land (whether 29 or 27), this was dealt with by Mr Giddare who was by then, the Senior Assistant General Manager of the Corporate Division of NCB.

[149] Mr Braham argued that similarly, it was NCB that actively sought a solution to the issue of the unavailability of the duplicate Certificates of Titles for the Disputed Lots and there is no evidence of any attempt by Mr Aird after signing the Agreement for Sale, to fulfil the vendor's obligations.

[150] The essence of Mr Braham's submissions was that the negotiations at the beginning was with NCB, and the principal and basic terms of the Agreement for Sale were agreed by NCB. Mr Aird at all times remained in the background. He posited that NCB interfered by taking over the responsibilities of the Receiver. Accordingly, its actions had the effect of overriding the Receiver's discretion and superimposing NCB's functions and operations on him.

[151] Consequent on these submissions, Mr Braham argued that in such circumstances, should the Court find that Mr Aird is liable on any of the issues raised, then there should be no difficulty finding NCB liable for his acts or omissions by virtue of the fact that Mr Aird was the Bank's agent.

The Court's analysis of the issue of whether Mr Aird is the agent of NCB

[152] In the Privy Council case of ***Downsview Nominees Ltd and another v First City Corp Ltd and another*** [1993] 3 All ER 626 at page 633 Lord Templeman made the following observation:

> *A mortgage, whether legal or equitable, is security for repayment of a debt. The security may be constituted by a conveyance, assignment or demise or by a charge on any interest in real or personal property. An equitable mortgage is a contract which creates a charge on property but does not pass a legal estate to the creditor. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court. All this is well settled law and is to be found in more detail in the textbooks on the subject and also in 32 Halsbury's Laws (4th edn) paras 401ff.* ***The security for a debt incurred by a company may take the form of a fixed charge on property or the form of a floating charge which becomes a fixed charge on the assets comprised in the security when the debt becomes due and payable. A security issued by a company is called a debenture but for present purposes there is no material difference between a mortgage, a charge and a debenture. Each creates a security for the repayment of a debt.*** *(emphasis supplied).*

[153] Because of the similarity between a mortgage and a debenture, the authorities which address the position of the receiver when exercising his powers under a mortgage are of assistance. One such case is ***American Express v Hurley*** [1985] 3 All ER 564 in which Mann J examined a number of authorities, (albeit in the context of the mortgagee's duty to obtain the true market value when selling mortgaged property) and concluded that: "*…The mortgagee is not responsible for what a receiver does whilst he is the mortgagor's agent unless the mortgagee directs or interferes with the receiver's activities. (iv) The mortgagee is responsible for what a receiver does whilst he is the mortgagee's agent and acting as* such."

[154] The borrowing company usually gets the loan on terms of the debenture which will state the powers of the receiver or manager. One such term is that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and of management pending sale, and with full discretion as to the exercising of those powers. In the usual course, the receiver or receiver and manager is usually appointed when the borrowing company is in financial difficulties.

[155] It should be observed that material portions of the Debenture in this case include the following and importantly, an express provision that a receiver appointed

thereunder shall be the agent of the company (the company being the borrower Rio Blanco in this case):

> *"(1) In this debenture any reference to a Receiver shall be deemed to include reference to a receiver and manager.*
>
> *(2) The Bank may at any time after the principal moneys hereby secured shall have become payable by writing under the hand of any Manager, Assistant Manager, Accountant, Agent or Attorney-at-Law of the Bank appoint any person whether an officer of the Bank or not to be receiver of the property hereby charged and may in like manner from time to time remove any Receiver so appointed and appoint another in his stead."*

Clause 14 of the Debenture is also of relevance and provides as follows:

> *"A receiver so appointed shall be the Agent of the Company and shall have power to:-*
>
> *…*
>
> *(c) Forthwith and without any restriction or notice statutory or otherwise to sell or concur in selling and to let or concur in letting any or all of the property hereby charged including a sale of the undertaking of the Company as a going concern,*
>
> *…*
>
> *(g) To do all such other acts and things as may be considered to be incidental or conducive to any of the matter or powers aforesaid and which he or they lawfully may or can do as agent or agents for the Company."*

[156] In ***Standard Chartered Bank Ltd v Walker and another*** [1982] 3 All ER 938, at 943) Lord Denning made the following observations confirming that the receiver is the agent of the borrower:

> *So far as the receiver is concerned, the law is well stated by Rigby LJ in* ***Gosling v Gaskell*** *[1896] 1 QB 669, a dissenting judgment which was approved by the House of Lords (see [1897] AC 575, [1895–9] All ER Rep 300). The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company (of which he is the agent) to clear off as much of its indebtedness to the bank as possible, but he also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor.*

> *It may be that the receiver can choose the time of sale within a considerable margin, but he should, I think, exercise a reasonable degree of care about it. The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor.*

[157] In ***Standard Chartered*** (supra) the UK Court of Appeal considered whether the defendants who were guarantors of a company's debts ought to have been granted leave to defend a claim against them by the lender. The claim was for the amount which remained unsatisfied on the Company's overdraft after the receiver sold the relevant property pursuant to a debenture which provided that the receiver was the agent of the company. The Court also held that there were triable issues of fact as to:

> *(a) whether the bank could be liable for the conduct of the receivership, (b) whether the bank had interfered, by giving instructions to the receiver, in the conduct of the receivership in respect of the sale of the company's assets, so as to make the receiver its agent, and (c) whether the receiver had been negligent in the conduct of the sale so that the bank, on the basis of principal and agent, was liable for his negligence.*

It should be noted that the issue of the bank's possible interference and whether that constituted the receiver its agent for purposes of liability, was considered in the context of an obligation of the bank to a guarantor. In the case before me, the issue is being raised in order to affix liability to NCB for the actions of the receiver to the extent that such actions have affected a third party purchaser. The question then is whether the receiver can be held to be the agent of the bank for purposes of affixing the bank with liability to third parties, such as a purchaser, whose interests may be adversely affected by the actions of the receiver in effecting a sale of security covered by the Debenture.

[158] The Claimants have submitted that the liability can be so extended for the benefit of a third party and have relied on ***Bicester Properties Limited, Bicester Properties (Acton) Limited v West Bromwich Commercial Limited*** 2012 WL 4866878 in which, Bowles MR stated the following:

> *"14. Although, in general terms, the receiver is, either pursuant to statute or the express terms of a given mortgage, charge, or debenture, the agent of the mortgagor, where, in carrying out his duties as receiver, a receiver acts under the instruction or direction of the mortgagee, or allows the mortgagee to interfere in the performance of his duties, then, to the extent that the receiver acts in that way he will be regarded as the agent of the mortgagee, such that if, in so doing, the receiver acts in breach of his duty to the mortgagor, then the mortgagee will also be liable.*
>
> *15. This agency will be a very limited agency. It will be limited to the situation or circumstances where the receiver acts on the direction or instruction of the mortgagee, or, at the lowest, where the receiver acquiesces in the wishes of the mortgagee without himself exercising any independent discretion. The circumstances must be such that the receiver is, in a real sense and in respect of the act complained of by the mortgagor, acting at the bidding of and on behalf of (hence as agent for) the mortgagee. Where that can be demonstrated, then, notwithstanding that, in respect of his duties and obligations generally, the receiver will be acting as agent for the mortgagor, he will, in respect of particular conduct carried on at the behest of the mortgagee be, rightly, regarded as the mortgagee's agent and the mortgagee will be liable for that conduct."*

[159] It is noteworthy that in ***Bicester*** the issue concerned the liability of the bank to two borrowers that were companies. Pursuant to the terms of loan agreements, mortgages were executed over three properties. The bank had appointed a receiver pursuant to the mortgages and gave him instructions in carrying out his duties. The claimants argued that the bank was accordingly liable for the actions of the receiver in breach of his duties to take a proper account and/or causing two of the properties to be sold at an undervalue.

[160] The Claimants also relied on the case of ***Edmonds v Westland Bank Limited*** [1991] 2 NZLR 655. In that case the principal asset of the company was a hotel which was given as security for a loan by a first ranking debenture and first mortgage. The Appellants were directors of the company and were required to join both securities as guarantors. A receiver was appointed under the debenture and a land agent who was a trustee or director of the bank placed an advertisement in the press in relation to the sale of the hotel. The Court found that there was an arguable defence against the bank, by way of counterclaim that by its interference in the sale of the hotel, the Receiver became its agent. This case concerned the possible liability of the bank for alleged negligence which resulted in a sale at less

than the true market value of the hotel. It is noteworthy that the appellants had been sued as principal debtors under the debenture after notice of demand had been made against them for payment of the principal sum in full. This was not a claim by a purchaser of the hotel asserting that the receiver was the agent of the bank.

[161] The Claimants also relied on ***Morgan and Another v Lloyds Bank plc*** [1998] Lexus citation 2378 a decision of the English Court of Appel. The Court accepted the statement of Mann J in ***American Express*** (supra) as to the mortgagee's duties and liabilities once a receiver had been appointed. Here the facts concerned a claim against a bank, by the owners of a property, where the property had been sold by a receiver appointed by the bank. The claimants sought to re-amend its statement of claim to assert that the bank interfered with the sale and the Court considered the meaning of interference but having regard to the highly specific context of the facts in that case, I find that it is unhelpful for purposes of this judgment.

[162] There are two issues to be considered. The First has to do with whether the Receiver can be considered the agent of the appointing lender. The second has to do with which party may be able to successfully claim against the lender based on this agency of the Receiver. The first issue appears to be settled but the second does not seem to be clear. There are many examples of borrowers claiming against the lender because the Receiver was found to be its agent. However, it is striking that in none of the cases to which the Court has been referred, has the principle of agency been extended to affix the lender or holder of the debenture/mortgage with liability to a third-party purchaser on the basis that the receiver is the lender's agent arising, from the lender's interference with the receiver in the carrying out of his duties.

The Court's conclusion that Mr Aird was the Agent of NCB

[163] Notwithstanding the absence of any case law authority of which the facts are on all fours as the instant case, I am of the view that once an agency relationship is established on the evidence (as it has been done in this case), there is no legal justification for limiting the application of the agency principle based on the identity of the party asserting such agency. Accordingly, in this case, Mr Aird would be found to be the agent of NCB for purposes of liability based on his conduct if such conduct amounts to a misrepresentation.

Against whom is relief for misrepresentation available?

[164] Based on the Court's finding that Mr Aird was the agent of NCB, NCB would therefore be liabile for misrepresentation by its agent Mr Aird, if the Court finds that Mr Aird is liable for misrepresentation.

[165] The Claimants have submitted that NCB is directly liable for its own representations. Furthermore, to the extent that NCB is to be regarded as Mr Aird's principal, it is liable for Mr Aird's representations and conduct by reason of agency. Accordingly, both NCB and Mr Aird are guilty of misrepresentation.

The possibility of liability of NCB for misrepresentation

[166] The effect of NCB's representation is not at all straightforward. The relevant law in relation to the source of the misrepresentation can be found in Chitty on Contracts 27th edition (General Principles) paragraph 6-014, page 343:

> ***The representor.*** *In order to ground relief to a person who has entered into a contract as a result of a misrepresentation, it is normally necessary that the misrepresentation should have been made either by the other party to the contract, or by his agent acting within the scope of his authority, or that the other party knew of the misrepresentation. A person who has been induced to enter into a contract with A as a result of a misrepresentation made to him by B and not known to A has no ground of relief against A unless B were A's agent. It is, however, not necessary to show that the misrepresentor was the agent of the other contracting party for the purpose of concluding the contract, or even for the purpose of conducting negotiations; it is sufficient if the misrepresentor was the agent*

> *of the other contracting party simply for the purpose of passing on the misrepresentation to the misrepresentee.*
>
> *Although, apart from cases of notice or of agency, a misrepresentation made by one person will not found relief against another, nevertheless where the representee has been induced to enter into a contract with a third party, the representor may himself be liable in damages to the representee, either in tort, if the misrepresentation was fraudulent or, in some cases, negligent or on the grounds of a collateral contract between the representor and the representee.*

Was NCB Rio Blanco's agent for the purposes of conducting negotiations or concluding the Agreement for Sale or contract?

[167] The evidence of NCB's role in conducting the negotiations and concluding the Agreement for Sale is not in dispute. Much of this evidence has already been referred to and there is no need for me to repeat it here. I have examined the authorities which support the position that the debenture holder's interference in the sale of assets covered by a debenture may be sufficient to make the receiver appointed under such a debenture the agent of the debenture holder. However, I have not been referred to any authority which establishes that such interference can make the debenture holder the agent of the company over which the debenture is held. Even if this were the case in law, (of which I am not convinced), I am not of the view that such a principle would hold in this case. This is because in this case Rio Blanco and NCB had an antagonistic relationship fuelled by their disagreement in respect of the Disputed Lots. The exchange of correspondence is evidence of this and if further proof is needed, their adversarial positions resulted in the Claim. In such circumstances, I do not accept that NCB was an agent of Rio Blanco.

Was NCB Rio Blanco's agent for the purpose of passing on the misrepresentation to Caricom Investments?

[168] For the same reasons stated above, I do not find that NCB was Rio Blanco's agent for a more limited and specific purpose of passing on the misrepresentations to Caricom Investments. Rio Blanco was at all material times asserting that the

Disputed Lots did not form part of the security covered by the Debenture and accordingly there was no right of NCB to sell the Property by exercising its power of sale under its mortgage.

[169] It is therefore illogical to suggest that while Rio Blanco was asserting this position, NCB was Rio Blanco's agent while it was simultaneously advancing a diametrically opposed view.

The possibility of liability of Mr Aird and Rio Blanco for misrepresentation

[170] The Court has found that Mr Aird made a representation that was false, namely that the duplicate Certificates of Title were lost. Rio Blanco is the vendor and the other party to the Agreement for Sale. I find that pursuant to the terms of the Debenture Mr Aird is the agent of Rio Blanco and his representation, if it amounts to a fraudulent misrepresentation, was made while he was acting within the scope of his authority. Accordingly, such misrepresentation would be sufficient to ground Rio Blanco with liability on the basis of agency. At paras 18-29 and 18-30 of Clerk & Lindsell on Torts, 19th edition the issue of the source of the representation is stated in this manner:

> *"A representation made to the Claimant directly causes no problems. But a representation made to a third party with intent that it be passed on to the Claimant to be acted on by him will equally suffice. Thus in* ***Swift v Winterbotham*** *a Plaintiff who gave credit on the basis of a fraudulent banker's reference successfully sued in deceit even though the reference had been sent not to him but to his own bank. All that is required for these purposes is that the representation be intended, in one way or another, to reach the Claimant in order to induce him to act on it."*

[171] Therefore, in light of the Court's findings in respect of Rio Blanco's liability as a consequence of Mr Aird's misrepresentations, in order for there to be liability of Rio Blanco, there does not also need to be a finding that the misrepresentation of NCB can be attributed to Rio Blanco. However, that could potentially be an alternative basis on which Rio Blanco's liability can be grounded.

The inducement

[172] It is settled law that if the misrepresentation is to ground liability in law it must have operated on the mind of the representee. The foundation of the Claim is that the Claimants would not have entered into the Agreement for Sale even with the special conditions which were supposed to offer some measure of protection, had it not been for the misrepresentation that the titles were lost (as opposed to being held by the Attorneys-at-Law for Rio Blanco). Although, Mr Lake's evidence is that the Claimants were interested in purchasing the Lots as offered at the auction, which did not include the Disputed Lots, I am prepared to accept the evidence of Mr Lake that had it not been for the representation that the Duplicate Certificates of Title were lost or missing, Caricom Investments would not have entered into the Agreement for Sale, which included the Disputed Lots among the subject property.

Did the claimants suffer any losses as a result of the false representations?

[173] A significant feature of the defence is that the failure to deliver the duplicate Certificates of Title in respect of the Disputed Lots did not prevent the Claimants or any of them from dealing with those lots. It was submitted that the terms of the Agreement for Sale specifically provided for completion upon the registration of the transfers to the purchaser on the Certificates of Title and with dispensation of the production of the duplicate Certificates of Title for the purposes of registration. It was highlighted that transfers to the Claimants were registered in July and August 1993 and endorsements with respect to the dispensation by the Registrar of Titles with the production of the subject Duplicate Certificates of Title were duly noted. Furthermore, it was argued that section 81(2) of the RTA provides that these endorsements are as valid and effectual as if made on the duplicate Certificates of Title and that this was demonstrated by the fact that NCB's interest as Mortgagee was endorsed on the Certificates of Title on 13th September 1994.

The Reason for the losses - Mr Lakes complaints about the titles.

[174] Mr Lake admitted that Caricom Investments purchased the Rio Blanco property without obtaining a surveyor's identification report. He admitted that he saw the property and was satisfied at what he saw on the basis that he/the purchaser was going to get the duplicate Certificate of Titles to Lot 1. He said that he would not have been satisfied had he been told that the purchaser could not get them, but the Agreement for Sale provided for the purchaser to get them so there was no potential problem. He explained that the duplicate Certificate of Title is the "*marketable, bankable title*", the Original Certificate of Title is not bankable. Consequently, he would need the duplicate Certificates of Title to be able to obtain financing and transact business. He explained that whereas he did obtain a mortgage from NCB using that Original Certificate of Title as security, that situation was special because Caricom Investments was purchasing the property from NCB at the time, so NCB provided the mortgage to facilitate the purchase without telling him that they had not gotten the duplicate Certificates of Title for the Disputed Lots.

[175] In cross examination, Mr Lake was directed to copies of the Original Certificates of Title in respect of the Disputed Lots which were in evidence. He admitted that the transfers to Caricom Hotels Limited were recorded thereon. He also agreed that in respect of the transfers to Caricom Hotels Limited it was noted on the Original Certificates of Title that "*No entry has been made on the duplicate of this Certificate of Title same having been dispensed with by Miscellaneous No.767787*".[3] He accepted that NCB was able to endorse their mortgage on all the Original Certificates of Title for the Disputed Lots.

[176] Mr Lake's evidence was that improvements were made to the hotel including the pool deck and pool bar and air-conditioning. There was a new kitchen and new

[3] The Court notes that the entry on the Original Certificate of Title for Volume 1230 Folio 812 (Lot 1) omits the word "by" before miscellaneous which is insignificant.

dining room. These developments were undertaken shortly after the property was purchased. After being shown certain documents, he agreed that the work commenced in December 1993 and ended or about May 1994. He said that the value of the work done was $5,794,056.00. He also said that there was re-roofing in 2009 and again in 2019.

[177] Mr Lake admitted that he had the caveat lodged by Rio Blanco against the 27 acres removed and was able to borrow funds against that title from a related company of the Claimants.

[178] Inextricably linked to the ability to use the duplicate Certificates of Title to obtain financing is the assertion by the Claimants that the absence of the duplicate Certificates of Title for the Disputed Lots, (and Lot 1 in particular), prevented the development of the Lots for purposes of a timeshare resort as the Claimants had intended.

[179] Mr Lake did not accept that the reason the timeshare industry in Jamaica is not developed was an absence of the statutory framework before 2016. Mr Lake asserted that timeshare sales existed prior to The Timeshare Vacations Act, 2014 on a right to use basis, rather than ownership of a fraction of the property itself. He explained that how it operated prior to the Act was that the owner leased the property for a specific period, such as 20 years. The fact that certain resorts offered timeshare products as described by Mr Lake was not contested. In fact, a significant portion of the trial involved evidence on both sides as to what existing property that offered timeshare units would have provided a suitable comparable to the units Mr Lake said the Claimants intended to offer for sale.

[180] Mr Lake asserted that he was unable to develop the strata lots and offer timeshare units for sale because all the strata titles are “encumbered” and therefore the Claimants are unable to obtain financing in the usual way to proceed with the development, because they are all in breach of the covenants. The particular covenant that he opined was breached, was:

7. "No waste or sewage water, or effluent waste shall be committed to be discharged on the said land onto any road or any part of the adjoining land or into any river or stream".

[181] Mr Lake asserted that Lot 1 on which the entrance to the property is located is not included in the Strata Plan. He explained that the Strata Plan which contains the 64 strata titles, adjoins Lot 1. Lot 1 contains the entire entrance of the property and is also the lot on which the sewage plant is located. Consequently, without the duplicate Certificate of Title for Lot 1, all the titles comprising the strata plan are compromised and in breach of covenant 7. This is because waste or sewage water runs from the strata lots onto the adjoining Lot 1 Vol. 1220, 921 which is the subject of a dispute.

[182] Mr Lake admitted that he obtained a Surveyor's Report in relation to the undeveloped land only from Mr Stewart about June 1995 or a couple of months before. He also received a Surveyor's Report dated 6th April 2009 produced by Mr Illinois Jones which was the first such report that was obtained since the Lots were purchased and related only to Lot 1. In reference to the sewer lift pump on the diagram contained in that report, he said he could not say whether it was above or below ground. He said he knew before Mr Jones' survey that the sewage plant was on Lot 1 but thought that the Claimants had undisputed ownership of Lot 1 pursuant to the "contract" (Agreement for sale). He confirmed that when the Claimants took possession of the Hotel Property the buildings and the apartments of the strata lots disposed of their sewerage on Lot 1.

[183] Mr Lake explained that the Titles Office is responsible for issuing strata titles and would issue those titles consistently with an approved Strata Plan. The Strata Plan would be approved by the Titles Office. He stated that the Town Planning Department does not have any input because it is the Parish Council where the respective development takes place that approves a subdivision, whether lots or strata. A surveyor then prepares a strata plan and submits that plan along with the conditions of approval to the Titles Office in keeping with the conditions of approval through the Parish Council or KSAC. The Conditions of Approval come from the

Parish Council or KSAC. He further stated that at the time of these submissions there would have been a Surveyor's Identification Report and the Surveyor would prepare a Strata Plan. Mr Lake indicated that he had seen the Strata Plan for this development, and it did not show where the sewage plant was located, which exclusion he asserted was an error.

[184] Mr Lake agreed that the Survey Plan was approved by the St. Mary Parish Council with the sewage plant in its position on Lot 1, but said it ought not to have been approved because having regard to the covenants listed it breaches the covenants. He conceded that he never obtained a surveyor's identification report that said that there was a breach.

[185] He said that the surveyor's report of Mr Illinois Jones which states: *"restrictive covenant numbers 1 to 8 as endorsed on the Certificate of Title were checked all have been complied with*" is only in reference to Lot 1, and it speaks to the strata at point 4 where it says, "*Strata lot has no interest in Vol 1220 Folio 921, strata titles should not have been issued without its own sewage plant*". However, he conceded that that was Mr Jones' professional opinion.

Inability to develop

[186] Mr Lake explained in response to Mr Piper that in paragraph 21 (e) of his first witness statement when he stated that: "*The Claimant was never able to develop the property for the purpose for which the Claimant purchased it due to the default of the National Commercial Bank Limited*", the default to which he referred was twofold. Firstly, all the strata titles are encumbered because of their lack of access to sewage. Secondly, not having control of Lot 1 which is the entire frontage of the property which gives access to all the services of the property, the Claimants could not sell the development with that encumbrance. He admitted that the Claimants did not attempt to sell the property but that this was on their lawyer's advice and he would have been committing a fraud. He also admitted that neither Caricom Investments nor any of the Caricom companies attempted to sell any of the strata

units. Similarly, he admitted that none of the Claimants ever attempt to sell any of the Disputed Lots.

Timeshares

[187] Mr Lake explained that Resorts Condominium International is the largest timeshare company in the world. They market and exchange time shares. He said that they approved and accepted the Caricom Hotels' proposal for a timeshare development in 1995/1996. He said that their representative came, inspected, and approved the property and indicated the upgrades the Claimants needed to make.

[188] During cross examination, Mr Lake said the Claimants contemplated the timeshare operations even before the property was bought and initially expected to start in or about 1995, however, the economy "went down" in 1995/1996. When asked if he was sure that it was not planned to start in or around 1999 his response was:

> *A: Well, I wouldn't dispute 1999, because I said planned to start, we were preparing to start by upgrading the property then the economy went south and we held back for a little. So, it could be have been '99 after 1996…*

[189] Mr Lake repeatedly stated that the absence of the duplicate Certificate of Title for Lot 1 compromised the entire development because the Claimants did not know who would own it having regard to the litigation at that time, although Caricom Hotels was registered as proprietor on the Original Certificate of Title. He explained that the Claimants could not get financing on the 64 titles (minus of course the 6 or 7 of the strata units which are owned by individuals and not by the Claimants).

[190] He explained that the Claimants' objective was to buy and resell the units, or more accurately the right to 'use of' the units. He opined that if the Claimants were to prepare an agreement for sale it would be apparent that the sewage plant is not part of the strata plan and that all the strata units were in breach of covenant 7 not to discharge. Consequently, the Claimants would be selling property that would be in breach of the covenant. He opined that those sale transactions would not

proceed because banks do not finance properties that are in breach of covenants, and purchasers do not buy properties that are in breach of covenants.

[191] Mr Lake admitted that a feasibility study was not done in relation to a timeshare development at Rio Blanco Village. He explained that when he said the plan was written “at the back of an envelope”, that is a standard term used in business which applies even for billion-dollar investments and it was not actually on the back of an envelope. It was placed in writing on paper. Mr Lake referred to his summary of claims. He suggested that a lot more work would have been done in establishing the selling prices and the detailed operating cost, but at the end of the day the summary would look similar to the exhibit. He indicated that the details of Bill of Quantities, marketing data, and information to substantiate these figures are not included.

[192] It can be observed that the summary produced by Mr Lake was indeed very skeletal and did not disclose a fairly developed plan for the sale of timeshares save for a very high-level calculation of projected sales and profits which was grossly lacking in any detail.

Caveat on Volume 1229 Folio 161

[193] Mr Lake said BRC Steel, an associated company of the Claimants was seeking to exploit an opportunity to purchase steel at a special price and the Claimants were unable to obtain financing using the 27 acres of undeveloped land as security because of the caveat on the title. The company was seeking that financing from Pan Caribbean Bank Limited. He said that Pan Caribbean Bank Limited approved the loan but the Claimants were not able to implement it although there were no covenant breaches on the 27 acres, because of the caveat which they had to get removed. That loan should have been in 2008 and the caveat was removed a few months later. He said the Claimant could not use the property not only because of the persons who placed the caveat on it, who were the Directors of Rio Blanco Development Company Limited, but also because NCB, and Mr Aird as receiver

did nothing to remove it. It was Caricom Investments Limited which took steps to remove it.

The Court's analysis and conclusion on the evidence as to whether there is proof of any losses by reason of the false representations

[194] In the scheme of the Torrens system of land registration as we have in Jamaica, the Original Certificate of Title can be considered to be the master document. It is certainly superior to the duplicate Certificate of Title, because, *inter alia*, there are instances where the Registrar may dispense with the production of the duplicate Certificate of Title and register dealings with the property on the Original Certificate of Title only. That has been clearly demonstrated in his case. It is for this reason that it is not prudent for a person to rely wholly on the duplicate Certificate of Title and it is usual for persons dealing with the proprietor as represented on the duplicate Certificate of Title to conduct a title search at the Office of Titles. The purpose of this is in order to determine what is entered on the Original Certificate of Title. Mr Lake admitted that the property was initially operated as a hotel resort by Caricom Hotels. He confirmed that it operated both as an all-inclusive and with guests on the European Plan for the period 1993 to 2000.

[195] Mr Lake admitted in cross examination that no one ever sued any of the Claimants alleging that they were not entitled to the Disputed Lots. He also admitted that all three Claimants remained in possession of the Disputed Lots from 1993 and are still in possession.

[196] I am unpersuaded that a reasonable financial institution would not accept evidence of the identity of the ownership as disclosed on the Original Certificate of Title in order to provide financing because the duplicate Certificate of Title is not available. This is especially so because as lender its interest can still be protected by the registration of a mortgage or caveat on the Original Certificate of Title only.

[197] Mr Lake's assertions provides the only evidence as to the alleged inability to obtain financing and the inability to develop the property. There were no other witnesses

qualified to speak on this issue that supported Mr Lake. I do appreciate and I have considered the fact that Mr Lake is an experienced entrepreneur and served as a director of a subsidiary or related company of NCB. Having regard to the importance of this point it is necessary for the Court to interrogate the evidence of Mr Lake in detail.

[198] Mr Lake admitted that Caricom Investments purchased the Rio Blanco Hotel as a going concern and in fact had to pay ten percent (10%) of the receipts when (Caricom Hotels Limited) went into early possession. He confirmed that by 1999 the property was being operated as an apartment and bed and breakfast. There was no evidence of any issues being raised by any regulatory or municipal authority arising from the fact that Lot 1 was not included in the strata plan. In fact, there is no evidence other than Mr Lake's opinion, that the non-inclusion of Lot 1 was reflective of an error in the approval of the strata plan, as opposed to it being a deliberate decision by the authorities having due regard to the layout and common ownership of the majority of the lots comprising the property. Accordingly, the Court does not have sufficient evidence on which it could conclude that there is indeed an issue which would be raised by the relevant authorities, for which there could potentially be adverse consequences. In any event, there is no evidence that could lead the Court to conclude that any issue (if so raised), would not have been easily resolved since Mr Lake's evidence is that the approval of the strata plan without Lot 1 was the error of the St Mary Parish Council.

[199] On the evidence, I do not accept that the absence of Lot 1 from the strata plan is a factor which prohibited the development of the property by the Claimants or any of them.

[200] Caricom Hotels Limited was the registered proprietor of Lot 1. I am therefore unable to accept that there was a real risk that the potential breach of covenant 7 would have been a reasonable point of contention for any purchaser of a timeshare unit or lender for such purchase, if there were appropriate provisions indicating that Lot 1 was not included in the strata plan. There could also be other appropriate

provisions for example a warranty that the proprietor of Lot 1, Caricom Hotels would take no issue with the discharge from the strata lots, onto Lot I and into the sewage plant situated thereon.

[201] Mr Lake indicated that neither Caricom Investments Limited nor any of the Claimants, attempted to sell the properties because they would be committing fraud. Subject to full disclosure and appropriate provisions being included I am unable to accept that a properly structured sales agreement with full disclosure could be found to be fraudulent.

[202] I therefore find that the Claimants have produced insufficient evidence to support the assertions that they suffered any loss which is attributable to the fact that they did not receive the duplicate Certificates of Title for the Disputed Lots.

[203] As it relates to the caveat lodged against Volume 1229 Folio 161, This was lodged after Caricom Hotels Limited had its name endorsed on the Original Certificate of Title by the Directors of Rio Blanco. Any loss resulting therefrom would have been attributable to the caveator and not to NCB or Mr Aird as Receiver.

The Court's conclusion on whether the Claimants received good title

[204] It was submitted by the Defendants that on completion, Caricom Investments as the purchaser and its nominee Caribbean Hotels Limited, received good title.

[205] It is my considered finding, that the Claimants received transfers of the Disputed Lots that were registered *"under the Registration of Titles Act*" in accordance with Special Condition 5(b) of the Agreement for Sale. In this regard, section 58 of the RTA cannot be considered in isolation. Section 81 of the RTA provides a mechanism for registration without the duplicate Certificates of Title, the benefit of which Rio Blanco (and or the Defendants collectively) managed to secure. I will put to the side the issue of the integrity of the challenge by Mr Lake to the integrity of the process by which the application for such registration was made. However,

it is worth noting that the application to dispense with the production of the duplicates in respect of the Disputed Lots stated:

> *2. That the above-mentioned duplicate Certificates of Title are not held as security by any firm or company and are not the subject of any lien to the best of information, knowledge and belief of the Applicant.*

This was the sole requirement of section 81 (3) and whether this assertion in paragraph 2 as quoted was accurate or not is of no significance to the determination of this Claim.

[206] It is interesting however, that the application in respect of Volume 1230 Folios 823 and 824 (which were not Disputed Lots) in contrast, in addition to containing a similar paragraph 2, included a paragraph explaining the absence of the duplicates as follows:

> *3. That the duplicate Certificates of Title were deposited at the Office on the 16th day of June, 1993 4 registration of Receiver/Manager and the Transfer and the same were never returned by the Office of Titles and I am informed same have been mislaid in your office.*

This additional information is required by section 82(1) where an application for a new title is being made.

[207] In my opinion, the "marketability" of a transfer endorsed only on the Original Certificate of Title held by the Registrar pursuant to section 81 of the RTA *vis a vis* a transfer noted on a duplicate Certificate of Title is not in issue. There was no term expressly stated in the Agreement for Sale that the endorsement on the Original Certificates of Title needed to be "marketable". What is required is for the purchaser to obtain a title transferred in accordance with the Agreement for Sale. In the circumstances of this case and having regard to the clear terms of the Agreement for Sale I find that there is no basis for the Court to imply a term as to "marketability" into the Agreement for Sale.

[208] Section 68 of the RTA provides that a certificate of title is conclusive evidence that the person named therein, as proprietor of any estate or interest is seised or

possessed of such estate or interest as indicated thereon. It is trite law that under the Torrens System of land registration such as we have here, this registered title confers on the proprietor of real property, indefeasibility of title, except where fraud is established. This likewise applies to a proprietor noted as proprietor only on the Original Certificate of Title, by a registration under section 81 of the RTA. It is also well settled that fraud that must be proven is actual fraud, that is, dishonesty of some sort (see ***Assets Company Ltd. v Mere Roihi*** [1905] AC 176). On the evidence, the Caricom Hotels Limited is the registered proprietor on the Original Certificate of Title. A search of Office of Titles would be available to any lender who wishes to use the Disputed Lots as security and a certified copy of the Original Certificate of Title can be obtained.

[209] I acknowledge that there is a possibility that a lender may perceive that there is a greater risk to the lender where the duplicate Certificates of title are not available. This is because a party may have given the duplicates to a third party to hold as security. In the English Court of Appeal case of ***Swiss Banking Corporation v Lloyds Bank Ltd and Others*** [1982] A.C. 584 at page 595 to 596, the Court noted the following:

> *An equitable charge may, it is said, take the form either of an equitable mortgage or of an equitable charge not by way of mortgage. An equitable mortgage is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee, or in other words evidences a contract to do so: see* ***Fisher and Lightwood's Law of Mortgage****, 9th ed. (1977), p. 13.*

[210] In the case ***Fitzritson v Administrator General*** (1969) 11 JLR 288; (1969) Graham Perkins J (as he then was) confirmed that one method by which an equitable mortgage may be created is "*by delivery to the lender of the title deeds relating to the borrower's land, accompanied by a demonstrably clear intention to treat land as security for monies advanced*". Accordingly, in the absence of a good and cogent explanation for the unavailability of the duplicate Certificates of Title, a

lender might adopt the position that it would not be prepared to accept evidence of the Original Certificate of Titles for the Disputed Lots without the Duplicate Certificates of Title.

[211] Critical to my finding on this issue is the fact that save for Mr Lake's bald assertion as to what a bank would do, he has led no evidence to support his assertion. Importantly, there was no evidence produced to show that the claimants attempted to obtain financing but were prevented from so doing because the intended source of such financing, refused to advance funds because of the absence of the duplicate Certificates of Title for such Lots. In such circumstances, I am not prepared to accept that the Claimants were prevented from obtaining financing because of the absence of the Duplicate Certificates of Titles for the Disputed Lots.

[212] Until there is a finding by a competent Court that the registration of Caricom Hotels Limited on the Original Certificates of Title as proprietor of the Disputed Lots is set aside, then the interest of Caricom Investments as purchaser and Caricom Hotels Limited, its nominee, are secure. There has not been a setting aside of the transfers by any Court.

[213] Nevertheless, it has been submitted by the Claimant that in this regard the finding of the Court in the James J Rio Blanco Judgment is important and they are relying on the ruling of the Court in the judgment that the Disputed Lots did not form a part of the security given to NCB. However, I find that the legal and practical value of the endorsement of Caricom Hotels Limited as transferee on the Original Certificates of Title is not diminished in any manner by this finding. This is because of the terms of the Court's Order, the appropriate portion of which I again reproduce for convenience:

> *In respect of the five (5) lots above listed not forming part of the security, 3 of which have been valued should be valued at their market price as at 3rd May, 1993 and as such value will be credited to the Claimant's loan account.* ***I am of the view that the purchasers, Caricom Investments Limited being purchasers for value without notice would have a good title.*** (my emphasis)

[214] The key effect of the James J Rio Blanco Judgment is that it has effectively extinguished the right of Rio Blanco to subsequently assert ownership of the Disputed Lots. Rio Blanco by the Court's order has been credited in the accounts of NCB with the value of three of the four Disputed Lots as follows:

Lot 1 - $2,000,000

Lot 51 - $1,200,000

Lot 52 - $ 950,000

[215] These are the same values as determined in the Agreement for Sale. It is noted that although the Agreement for Sale fixed a price for Lot 41 at $950,000.00, the learned Judge did not make a specific order for the crediting of that sum. That does not change the main effect of the order however, in restricting Rio Blanco in the future from asserting a right to the four (4) Disputed Lots. The interest of Caricom Hotels Limited and its legal right to the Disputed Lots as endorsed by the Registrar pursuant to section 81 of the RTA is consequently unassailable. The effect of the James J Rio Blanco Judgment is that the Claimants obtained the right to get the Registrar to cancel the existing duplicate Certificates of Title and issue replacements. Accordingly, there is no reasonable basis for the argument that the Claimants were prejudiced because they did not receive good title. Nevertheless, despite these findings, the issue of the failure of Rio Blanco to procure new Duplicate Certificates of Titles pursuant to special condition 15 remains for determination.

[216] I noted that Mr Piper pursued a line of questions in his cross examination of Mr Lake which ended with the suggestion that the purchaser did not at any time before the expiration of forty-five (45) days give notice of cancellation of the Agreement for Sale in accordance with special condition 5. Mr Lake's response was that there was a notice for specific performance but in any event the commencement of this suit in 1999, albeit initially by Caricom Investment only up to May 2009, would have provided notice of cancellation.

[217] A very important point made by Mr Braham was that although special condition 5 allowed the purchaser to terminate the Agreement for Sale, the impact of the misrepresentation was to effectively negate the intended protection of special condition 5 because the purchaser would not be worried about the difficulties associated with the absence of the duplicate Certificate of Titles, having regard to the misrepresentation that they were lost.

[218] I fully accept Mr Braham's submissions on that point, and I have not placed any weight on the fact that Caricom Investments did not issue a notice to terminate. There is a significant practical difference between purchasing Disputed Lots in respect of which the duplicate Certificates of Title have been lost, missing or cannot be located, and Disputed Lots in respect of which there is a challenge to the vendors right to sell such property. In the former, the purchaser's risk is that the process of acquiring a replacement of the title for his interest to be noted thereon will take longer than the usual time for that process. In the latter scenario, the risk is that the party which challenges the vendor's right to sell the Disputed Lots may succeed, in which case the vendor will be unable to lawfully transfer the Disputed Lots.

[219] At the crux of the case is the question of what was it that the Claimants wanted to obtain by entering into the Agreement for Sale? The answer in my view is simple. They wanted to purchase the Lots as originally offered at the auction and the Disputed Lots which were subsequently added. They wanted the rights which accompany being legally recognized as owners in fee simple of these properties. The complaint is that they also wanted the duplicate certificates of Title for the Disputed Lots which they did not receive. For the reasons I have stated earlier, I have not found sufficient evidence to convince me on a balance of probabilities that the inability to obtain the duplicate Certificates of Title caused any loss. Accordingly, an important condition of the law of misrepresentation as pleaded, whether fraudulent or negligent, has not been satisfied and the prayer for relief based on these heads of claim fails.

Breach of Contract

[220] The Claimants have submitted that if the Court finds that there was no actionable misrepresentation, the Court is urged to find that at the very least, there was a breach of contract. It should be noted at the outset that the contracting party to the Agreement for Sale is Rio Blanco which is the entity that would be liable for any breach of contract.

Whether the Defendants, jointly or severally, breached the Agreement for Sale by failing to deliver duplicate Certificates of Title for the Disputed Lots.

Whether the Defendants breached an implied warranty that the Claimants would receive good and marketable titles for all the properties.

[221] The Claimants submitted that giving good title meant that the Defendants should have received a duplicate certificate of title to all lots set out in the Agreement for Sale, including of course, the Disputed Lots. The Claimants further submitted that:

> *"… having regard to the words of the Agreement for Sale, in the context of the factual matrix within background and knowledge available to the parties to this claim, it is clear that the disputed hotel lots were crucial to the purchase and therefore failure to deliver good marketable title for them was a substantial breach which went to the root of the contract.*

[222] An overarching submission of the Claimants is that the words in the final paragraph of Special Condition 5(b), that the Vendor was to procure registration *"under the Registration of Titles Act*" are of relevance when one examines section 58 of the RTA which provides as follows:

> *"58. Every duplicate certificate of title shall be deemed and taken to be registered under this Act when the Registrar has marked thereon the volume and folium of the Register Book in which the certificate is entered; and every instrument purporting to affect land under the operation of this Act shall be deemed and taken to be registered at the time when produced for registration, if the Registrar shall subsequently enter a memorandum thereof as hereinafter described in the Register Book upon the folium constituted by the existing certificate of title* ***and also upon the duplicate****; and the person named in any certificate of title or instrument so registered as the proprietor of, or having any estate or interest in or power over, the land therein described or identified, shall be deemed and taken to be the*

duly registered proprietor thereof, or as duly registered in respect of such estate, interest or power…" (emphasis supplied)

[223] The Defendants contend that with the exception of special condition 15 of the Agreement for Sale, the Agreement for Sale and the Agreement for Sale of Chattels have been performed in accordance with their terms. I agree with those submissions.

[224] Having regard to my findings as indicated earlier that the Claimants received good title by the endorsement of Caricom Hotels Limited as transferee on the Original Certificate of Title for the Disputed Lots, I find that there is no basis for a finding that there was a breach of an implied warranty that the Claimant would receive good title.

Breach of Special Condition 15

[225] Special condition 15 provides for the vendor to apply for new certificates of title "*Immediately after registration of the ownership by the Purchaser"* of the Disputed Lots. The Defendants concede that this special condition has not been performed. However, they have presented arguments as to why this should not be of any real significance for the purposes of liability.

[226] The Defendants have submitted at paragraph 6 (4) of their Further Amended Defence that "*… both parties to the Agreement for Sale of Land mistakenly agreed to the terms and effect of Special Condition 15 in the event that the circumstances arising therein occurred which, in fact, did occur*." I have found that Caricom Investments agreed the Agreement for Sale and special condition 15 thereof because of the representation to it that duplicate Certificates of Title for the Disputed Lots were lost or misplaced. Accordingly, the issue of mistake does not arise on the part of Caricom Investments. Furthermore, Rio Blanco knew of the factual circumstances that the certificates were not lost or misplaced and accordingly cannot rely on mistake.

[227] At paragraph 43 of their written closing submissions the Defendants have expressed their position in the following manner:

> *We submit therefore that Special Condition 15, as drafted, against the background of the facts known before and after the execution of the Agreement for Sale, (whether those facts be that the Duplicate certificates of Title were known to be lost or to have been held by Mr. Whitehorne) cannot reasonably be performed in accordance with its terms. We submit further that against the background of the known facts it was the intention of the parties that at such time as the Duplicate Certificates of Title were secured by the Second Defendant, they would be delivered to the First Claimant.*

[228] It has also been submitted by the Defendants, that:

> *… the delay in delivering the Duplicate Certificates of Title to the Claimants cannot reasonably be a breach of the Agreement for Sale of Land since the Claimants themselves, by the very terms of that Agreement, foresaw the delay, accepted the fact that the said titles were unavailable and agreed to await their availability.*

I accept that the Claimants agreed to await the availability of new Certificates of Title but I find that a reasonable period would have been contemplated and ought to be implied. I have found that there was a representation to the purchaser Caricom Investments that the duplicate Certificates of Title for the Disputed Lots were unavailable because they were lost or misplaced and Caricom Investments' agreement to await the obtaining of new titles was premised on that representation. The Agreement for Sale contemplated that the Claimants would have received new Duplicate Certificates of Title for the Disputed Lots and Special Condition 15 also specifically provided that the Vendor shall have the responsibility, at its expense, of applying for these new duplicate Certificates of Title.

[229] The Defendants have posited that in light of the fact that the duplicate Certificates of Title were neither lost nor destroyed, no application for new duplicate Certificates of Title could properly be made.

[230] I accept that no application for new duplicate Certificates of Title for the Disputed Lots could properly have been made pursuant to section 82 of the RTA

"*Immediately after registration of the ownership by the Purchaser"* of the Disputed Lots, because the duplicate Certificates of Title were not lost or destroyed.

Impossibility of performance

[231] The Claimants have submitted that as a matter of law, even if the Defendants are correct that Special Condition 15 could not be performed, they are nevertheless bound by it and are liable for any breach of it. In support of this proposition, the Claimants rely on comments in **Construction of Contracts, Interpretation, Implication and Rectification** 2nd ed 2011, by Gerard McMeel at page 283 where he states that proposition relying on the English Court of Appeal case of ***Eurico S. P.A. v Phillipp Brothers*** **(The Epaphus)** [1987] 2 Lloyd's 215 (Unreported transcript, shorthand notes, Royal Courts of Justice, Friday 15, May, 1987 at page 6E) in which Sir John Donaldson MR delivering the judgment of the Court said:

> *"My starting point is that parties to any contract are free to agree upon any terms which they consider appropriate, including a term requiring one of the parties to do the impossible, although it would be highly unusual for parties knowingly so to agree. If they do so agree and if, as is inevitable, he fails to perform, he will be liable in damages. That said, in a court will hesitate for a long time before holding that, as a matter of construction, the parties have contracted for the impossible, particularly in a commercial contract. Parties to such contracts can be expected to contemplate performance, not breach.*
>
> *The tools available to a court in this exercise of reluctance to accept that the parties have contracted to do the impossible are those of construction of the express terms used by the parties and of implying a term which qualifies, but does not contradict, the express terms. In many, and perhaps most, cases it may be debatable whether the court is giving the words are "commercial construction" or whether it is implying a qualifying term and I cannot think that it matters. What does matter is that in its struggle to make common sense prevailed, the court cannot say that the parties agreed upon something, however sensible, whether their chosen words show clearly that they agreed the exact opposite.*

[232] The Claimants argue that the Defendants specifically contracted to obtain new titles, including new duplicate Certificates of Title. It was submitted that the fact that it may be impossible is of no moment and as a matter of law, the Defendants

failure to do so still amounts to a breach of contract. This is because the Courts accept that in commercial contracts the parties are entitled to create any obligations they wish.

[233] I do not find that the parties have contracted to do the impossible. Even if it was impossible to apply for new Certificates of Title for the Disputed Lots, pursuant to section 82 of the RTA, special condition 15 did not require the vendor to apply for new Certificates of Title specifically on the basis that the duplicate Certificates of Title were lost.

[234] I have previously made reference to section 154 of the RTA and the memorandum of Ms Evans to Mr Ivan Stephenson dated the 17 June 1993, in which she indicated that she had spoken to Mr. Donovan Jackson who had recommended two alternatives (already contemplated by us) which involve applying for a Court Order either directing the Attorneys to deliver up the duplicates or instructing the Registrar to cancel the said Titles and issue replacements. The memorandum illustrates the consideration by NCB (albeit not by Rio Blanco) of an alternative possible route to obtaining new duplicate Certificates of Title. The James J Rio Blanco Judgment does not establish conclusively that such a route could not have succeeded or was impossible. The judgment does suggest that if such an alternative was attempted, it may not have succeeded based on the learned Judge's view of the evidence that the Disputed Lots did not form a part of the security given to NCB. The correctness of this finding stands since it has not been tested and found to be wrong by the Court of Appeal.

[235] In any event, the James J Rio Blanco Judgment has itself provided, albeit belatedly, an alternate route for Caricom Hotels Limited to obtain new titles. The RTA section 158 (2) provides as follows:

> *(2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar-*

> *(a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or*
>
> *(b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge.*

[236] In my opinion, Rio Blanco could have made an "application in relation to land" (the land being the Disputed Lots), to the Court, seeking an order directed to the Registrar for the cancellation of the duplicate Certificates of Title for the Disputed Lots and the issuing of new titles in order to give effect to the Rio Blanco Judgment. I have earlier opined that the James J Rio Blanco Judgment extinguished the right of Rio Blanco to continue to claim an interest in the Disputed Lots. In such circumstances, the Court could make an order directed to the Registrar to regularize the position in respect of the Disputed Lots by the issuing of new titles to the purchaser Caricom Hotels Limited, which the learned Judge in the James J Rio Blanco Judgment stated had received good title as a purchaser for value without notice. Admittedly, the purchaser Caricom Investments was not a party to the claim. Additionally, this comment by the learned Judge was *obiter*, but nevertheless, it ought to be given due weight by a Judge considering the issue on an application as described herein, especially having regard to the fact that the James J Rio Blanco Judgment was never appealed.

[237] In any event, this Court is empowered to make such an order. I will explore that possibility further when I address the issue of remedies.

Was there a waiver by Mr Donovan Jackson?

[238] The Defendants also assert that in any event, if it were possible for an application to be properly made to the Registrar of Titles for new Duplicate Certificates of Title, the Claimants by their Attorney-at-Law Mr Donovan Jackson agreed in writing to make that application.

The evidence of Mr Donovan Jackson

[239] CPR 29.8(2) provides that where a witness is called to give oral evidence under paragraph (1) his or her witness statement shall stand as evidence in chief unless the Court orders otherwise. Prior to Mr Jackson being sworn, Mrs Hay indicated that on a review of his witness summary and his witness statement, as well as in preparation with him, it was clear that he intended to say certain things that would indicate his non-reliance or otherwise on certain aspects of his witness statement. Based on this, Mrs Hay sought the leave of the Court to depart from the usual practice. Counsel proposed that instead she would lead the evidence from Mr Jackson's witness summary and tender his statement as an exhibit and not have it stand as his evidence in chief. The Court refused the application on the basis that it was open to the witness to disassociate himself from any portion of the witness statement and accordingly the reason given was insufficient to justify departing from the usual procedure. Consequently, Mr Jackson was sworn and after he identified his witness statement dated 6th April 2010, it was ordered that it would stand as his evidence in chief.

[240] At the time of signing his witness statement, Mr. Jackson was an Attorney-at-Law and a Partner in the firm of Nunes, Scholefield. DeLeon & Co. He stated in paragraph 2 of his witness statement, that between the years 1993 and 1994, he had been an Attorney-at-Law and associate in the legal firm of Myers, Fletcher & Gordon and worked with Mr Arthur Hamilton (also formerly of that firm) on files on which he was handling including the transaction by which the 1st Claimant acquired the premises the subject of this action from the Defendants.

[241] Mr. Jackson indicated in paragraph 6 of the witness statement, that at the time of negotiations with the Vendor's Attorney-at-Law in 1993, apart from the information as to lost titles, NCB did not give any indication that there was a difficulty arising from the fact that there was a dispute between Rio Blanco and NCB concerning the Disputed Lots.

[242] Paragraph 9 of his witness statement reads as follows:

> *The allegation that Mr. Hamilton and I were aware by my letters of 3rd November, 1993 and 4th January 1994 of the difficulties being experienced in obtaining Duplicate Certificates of Title for the subject lands, is not accurate as the "difficulties" of which I am aware occurring at the time of execution of the sale agreements in May 1993 were in relation to Mr. Whitehorne withholding the titles not the difficulties which I am no led to understand later emerged to do with a dispute between NCB and the 2nd defendant as to NCB's right to possession and ownership of the subject properties which, the 1st claimant discovered from Messrs. Crafton Miller & Co., Attorneys-at-Law for Rio Blanco Development Limited Suit No. 1994/R 021 led that company lodging a Caveat numbered 1060272 against Certificate of Title registered at Volume 1229 Folio 161.*

[243] Mr Jackson stated in paragraph 10 of his witness statement that:

> *at no time did the client either waive his right to insist on the contractual obligation imposed on NCB by virtue of Special Condition 15 of the sale agreement to secure new Certificates of Titles or to seek a court order compelling Rio Blanco's Attorneys-at-Law to deliver up the titles, nor did I receive any instructions from the client to waive or unilaterally vary the contractual obligations required of NCB contained in Special condition 15 of the sale agreement.*

In amplification of his evidence Mr Jackson confirmed that between the years 1993 and 1994, he was an Attorney-at-law and associate in the legal firm of Myers Fletcher & Gordon. During that period, he was familiar with Mr Arthur Hamilton who was then an Attorney-at-law in the same law firm. Mr Jackson indicated that he did not stand by all the contents of his witness statement because it had a premise which was flawed. Mr Jackson indicated that the files that Mr Hamilton was handling included the transaction by which Caricom Investments acquired the Disputed Lots from the Defendant. However, the incorrect premise to which he refers is that he worked with Mr Hamilton on the transaction. He confirmed that Mr Hamilton represented the purchaser on that transaction.

[244] Accordingly, Mr Jackson confirmed that insofar as a number of paragraphs of his witness statement suggested that he had worked with Mr Hamilton on the transaction, those portions of his witness statement are incorrect, including paragraphs 2,4,5,6,8, and 9. Mr Jackson was asked to and he identified in respect

of each paragraph the relevant portions which were inaccurate because they were founded on the incorrect premise of which he gave evidence. However, I do not find it necessary to reproduce each seriatim. He admitted that in paragraph 9 where he makes reference to two letters, 3rd of November 1993, and the 4th of January, 1994, these two letters were written by him.

[245] He explained that Sharon Evans was the Attorney-at-Law employed to NCB which was his client. NCB had approached him in relation to an issue surrounding securing Certificates of Titles that related to the property which had been sold by a Receiver appointed by them. They were having difficulty producing the titles and they had approached him for advice in relation to securing those titles. His involvement was to be limited to securing new Certificates of Title for the properties already transferred. His understanding was that those titles were held by Messrs. Robinson Phillips & Whitehorne which is a law firm.

[246] Mr Jackson was shown a letter from Sharon Evans of NCB that was dated 18th June 1993 which included enclosures and he admitted having received the letter. He also admitted receiving a letter dated 3rd September 1993 from her. He admitted that he signed a Letter dated 20th September 1993 from Myers Fletcher & Gordon to Sharon Evans with the caption "*Rio Blanco Development Co. Ltd.(In Receivership) to Caricom hotels Ltd. & Caricom Properties Ltd*." He also admitted receiving a letter dated 22nd October 1993, from Mrs Sharon Evans to his attention at Myers Fletcher & Gordon concerning the same caption and enclosing a photocopy of a letter dated 11th October 1993, from Messrs Robinson Phillips and Whitehorne which she said was self-explanatory. He also admitted receiving a letter dated 28th December 1993 from Miss Sharon Evans which makes reference to a copy letter dated 17th December 1993, that she received from Messrs. Robinson Phillips & Whitehorne.

[247] Mr Jackson indicated that whereas he had seen these letters when they were sent originally in 1993, he did not have them at his disposal when he wrote his witness statement in 2010 because at that time, he was working at a different law firm and

did not have access to the file that had been assigned to him when he was an associate at Myers Fletcher & Gordon.

[248] Mr Jackson concluded that Arthur Hamilton had nothing to do with the June 1993 letter sent to him to secure documentation following on discussions with Sharon Evans of NCB, and subsequent correspondence leading up to his letter of 4th January 1994. He said that Mr Arthur Hamilton was not involved in that correspondence at all. Mr Jackson explained further that Mr Hamilton was handling the transaction and he was focused on the issue concerning the titles that had been transferred in which National Commercial Bank had an interest.

[249] In cross examination Mr Jackson stated that in 2010 he had been practising for approximately 27 years having been admitted to the Bar in 1983 and at the time he signed his witness statement he was aware of how important a witness statement is but he did not have the file on the matter. He admitted that he did not request a file, nor did he ask Messrs Grant Stewart & Phillips to see if they could procure a file for him. He accepted that a certificate of truth is on his witness statement and that by signing to the document with the Certificate of Truth, he was signing to the truth of the contents of the witness statement. He also accepted that at the time when he signed his witness statement, he recognized that it was to be used in the course of these proceedings. He stated that the statement that he had worked with Mr Hamilton on the transaction was a mistake and was a mistake that he repeated several times.

[250] Mr Piper during his cross examination dealt with specific statements made in the witness statement in order to highlight his suggestion that they could not be relied on. The responses of Mr Jackson are duly noted, however, I will not repeat that portion of the witness' evidence since it follows naturally from his initial concession that he is now asserting that he did not work on the transaction concerning the purchase of the Lots with Mr Hamilton and consequently he was incapable of giving evidence in respect of the procedural and other components of the transaction.

[251] He was asked about the letter from Ms Evans dated 3rd September 1993 asking him to comment on a letter dated 3rd August 1993 from Messrs Robinson Phillips and Whitehorne, to the Receiver/Manager, a copy of which was enclosed, and which dealt with a request for the contract of sale and other matters concerning the sale of the Rio Blanco property. He admitted that he responded to Ms Evans advising her and the receiver to provide an account.

[252] He also admitted that Ms Evans' letter to him dated 22nd October 1993 enclosing a photocopy of a letter from Robinson, Phillips and Whitehorne dated 11th October 1993 and agreed that in paragraph 3 of that enclosed letter, Robinson, Phillips and Whitehorne are asking for a copy of the Sale Agreement dated 3rd May 1993, with the following paragraphs asking about the payment of the purchase money and the purchasers having been in possession. Mr Jackson admitted that in his response he advised that at the time they were not entitled to a copy of the Agreement for Sale and addressed securing new titles and the application to dispense with the production of the duplicate Certificates of Title.

The Court's conclusion on Mr Jackson's evidence

[253] The stance adopted by Mr Jackson in amplification of his witness statement and during cross examination amounted to an almost complete *volte face*. The premise on which his witness statement was based, was that he worked with Mr Hamilton on the transaction which was the reason for Agreement for Sale. He has said that that premise was incorrect. Mr Jackson's explanation of the errors in his witness statement which ensued as a result of that incorrect premise is difficult to accept, having regard to the fact that he admitted that at the time of making the witness statement he was an experienced Attorney-at-Law who had been practising for approximately 27 years. He appreciated the importance of a witness statement and the certificate of truth endorsed thereon, but nevertheless did not take adequate steps to verify the accuracy of the information which he was presenting to the Court as true and correct. This was a truly unfortunate occurrence and I find

that the evidence of Mr Jackson in this case is unreliable. As a consequence, I do not place much weight on it.

[254] Nevertheless, the correspondence between Mr Jackson and Ms Evans of NCB is more consistent with the assertion of the Claimants that he was being instructed by NCB and not by the Claimants. There is no indication in his letter to Ms Evans dated 3rd November 1993 that he was acting for the Claimants when he stated the following:

> *"For the time being, we will limit any application to secure new certificates of title. However, we would be obliged to request the titles from Messrs. Robinson, Phillips & Whitehorne."*

[255] I therefore accept the submission of the Claimants that in the context of the previous letters, it is clear that by this statement Mr Jackson, was commenting on the previously discussed application to secure the titles which he had with Ms Sharon Evans at the Bank. I find that the intention of Ms Evans to retain Mr Jackson is clearly demonstrated in her internal memorandum to Mr Ivan Stephenson dated 17 June 1993 in which she stated the following:

> *"It is now time to proceed with whatever maybe necessary to resolve the issue of the duplicates which are not in our possession. In this regard, I spoke to Mr Donovan Jackson of Myers, Fletcher & Gordon who specialises in the court aspect of conveyancing and he has recommended two alternatives (already contemplated by us) which involve applying for Court Order either directing the Attorneys to deliver up the duplicates or instructing the Registrar to cancel the said Titles and issue replacements.*
>
> *Mr. Jackson has indicated he would need to look at the relevant documentation to properly advise us and we are therefore asking your permission to retain Myers, Fletcher & Gordon for the aforesaid purpose inclusive of any court application."*

[256] I therefore conclude that the actions of Mr. Jackson are unable to constitute a waiver by the Claimants' of the obligations of Rio Blanco pursuant to special condition 15.

Whether the defendants jointly or severally, breached special conditions 4, 5, 12 and 15 of the Agreement for Sale.

Special conditions 4 and 5

[257] These special conditions have been reproduced earlier in this judgment. In essence special condition 4 provides for a reduction in the purchase price of $950,000.00 in the event that the Vendor was unable to transfer Lot 41 within 45 days of the Agreement for Sale.

[258] Special condition 5 provides that (subject to the purchaser cancelling the Agreement by giving the vendor 7 days' notice in writing) in the event the Vendor was unable to transfer Lots 1, 51 and 52 within 45 days of the date of the Agreement for Sale, the purchaser would not be required to pay the market value of these Lots as agreed as follows:

Lot 1 - $2,000,000

Lot 51 - $1,200,000

Lot 52 - $ 950,000

[259] The Claimants submitted that:

> *… given the fact that the Claimants were not aware of the fact that there was a contending claim for the titles, they would have been unable to exercise their rights to cancel the Agreement for Sale within the 45-day period and as a result, the Claimants have had properties which they in essence could not develop in the way intended and should be compensated for such losses.*

[260] I have found that the vendor was able to transfer the Disputed Lots and accordingly I do not find that there has been a breach of these special conditions.

Breach of special conditions 12

[261] Special condition 12 is the vendors warranty that it is the beneficial owner of the property and has the right to sell the property.

[262] The breach of this special condition has already been substantially addressed in relation to breach of warranties. This warranty in the context of the sale must not be construed in the limited sense to mean that Rio Blanco was the beneficial owner, which it obviously was, but that Mr Aird exercising his powers as Receiver had the right to sell the property including the Disputed Lots pursuant to the exercise by NCB of its powers

[263] of sale under the mortgage.

[264] I therefore find that there has been a breach of this warranty.

The Court's conclusion as to whether there has been a breach of contract

[265] Having regard to my findings indicated above I conclude that the vendor Rio Blanco as the contracting party to the Agreement for Sale is liable in breach of contract, in particular for breach of special conditions 12 and 15.

Mitigation

[266] The Claimants accept that in claims for damages, there is a general requirement for mitigation. However, Mr Braham submitted that the Court is not required to consider this head unless the Defendants had in fact pleaded in their defence the requirement to mitigate, giving particulars as to the nature and type of mitigation being relied on. He argued that the Defendants did not sufficiently plead to the issue save for paragraph 6(4)(ix) of the Defendants' Further Amended Defence to the Claimants' Fourth Amended Particulars of Claim which is in the following terms:-

> *"If which is denied, the Defendants or any of them was capable of applying for new certificates of title yet failed to do so, the Defendant [sic] will say that the Claimants took no step in mitigation to avoid losses as alleged to have been sustained by such failure, by themselves applying for the said new certificates of title."*

[267] In support of his submission Mr Braham relied on the Privy Council decision in ***Geest plc v Lansiquot*** [2002] UKPC 48 and the following statement:

> *"[16] The evidence need not have been so limited. This assessment proceeded without any pleading and without any evidence beyond the plaintiff's affidavit and oral evidence. This is not unusual. Many such assessments proceed in a relatively informal manner. The object is to ascertain the plaintiff's medical history since the accident and to assess the plaintiff's continuing symptoms and long-term prospects, with a view to putting a money value on the plaintiff's pain and suffering, loss of amenity and financial loss. Had there been pleadings, however, it would have been the clear duty of the company to plead in its defence that the plaintiff had failed to mitigate her damage and to give appropriate particulars sufficient to alert the plaintiff to the nature of the company's case, enable the plaintiff to direct her evidence to the real areas of dispute and avoid surprise:see Bullen & Leake & Jacob's Precedents of Pleadings, 14th ed (2001), vol 2, p 1103, para 71-13; Rules of the Supreme Court, Ord 18 r 12(1)(c), Ord 18 r 8(1)(b); The Supreme Court Practice 1999 (published September 1998), vol 1, paras 18/7/4, 18/7/11, 18/8/2, 18/12/2, 18/12/13). In this instance, no complaint was made by the plaintiff's leading counsel when counsel for the company advanced this argument, perhaps because he had been warned in advance, and no point was taken in the Court of Appeal or before the Board on the procedure adopted. It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter."*

[268] I accept that this statement from ***Geest*** (supra) is an accurate statement of the relevant law. I also find that the Defendants' pleading on this issue was deficient and did not sufficiently particularize the alleged failure to mitigate in a manner that identified precisely what the failure was. By way of example, was it physically and economically feasible to have relocated the sewage plant that is on Lot 1. As a consequence of the Defendants' omission, the Claimants were not given a fair opportunity to respond and the Court was deprived of the opportunity to make a proper assessment of the alleged failure, which would have required interrogation of the relevant evidence including quite possibly, expert evidence.

[269] I am therefore unable to find that there was a failure of the Claimants or any of them to mitigate their damages.

Damages

[270] Whereas loss or damage is a prerequisite for liability in misrepresentation, there is no such requirement for breach of contract. Where there is a breach of contract however, it is necessary to determine what remedy is appropriate. The Claimants' complaint is that they have not obtained duplicate Certificates of Titles for the Disputed Lots. I am of the opinion that this can be remedied at this stage by an order of this Court directed to the Registrar.

[271] A second issue to be determined is, whether the Claimants should be compensated in damages for the delay in obtaining duplicate Certificate of Titles and if so, what is the correct measure of such damages.

[272] Considerable evidence has been led from Mr Lake and the expert accountant Mr Hylton, on behalf of the Claimants of the damages they allege were suffered by them. These damages have all been premised on the assumption that such losses were as a result of the inability to use the Disputed Lots due to the absence of the duplicate Certificates of Title for the Disputed Lots. I have found on a balance of probabilities that this premise was incorrect and without merit. The evidence of Mr Lake and the expert Mr Hylton is therefore unhelpful in this regard. For this reason, I have not found it necessary to rehearse the evidence of these experts and their detailed analyses.

[273] The Claimants have submitted that if the Court grants damages for breach of contract the following heads of losses would apply:

i. Losses from the inability to repay loans from investors;

ii. Operational expenses;

iii. Opportunity losses-BRC Steel;

iv. Losses from not being able to implement the timeshare development.

Considerable evidence detailing the calculation of these expenses have been provided to the Court. However, for the reasons I have previously indicated, I have found that there was insufficient proof on a balance of probabilities that these losses arose from the absence of the Duplicate Certificate of Titles for the Disputed Lots.

[274] Reference has been made by the parties to the English House of Lords case of ***Bain v Fothergill*** [1874] LR 7 HL from which the rule of the same name had its origin. The rule in ***Bain v Fothergill*** provides, in essence, that a purchaser under a contract for the sale of land is not entitled to compensation by way of damages for the loss of his bargain where this has resulted from the vendor's inability to complete the contract due to a defect in title. In such cases the purchaser is only entitled to recover his deposit, interest on the deposit and his expenses incurred in investigating title. There has developed exception which include cases of fraud and where the vendor knew of the defect at the time the contract was entered into. The rationale for the rule has its roots in the difficulty in 1874 England to establish title by the production of deeds. This is not a problem in Jamaica today having regard to the Torrens System of land registration which we have adopted. It is therefore debatable whether the rule ought to continue to apply. However, it should be emphasized that the rule applies only to breaches of contract arising out of defects in title and the normal measure of contractual damages are available where the vendor has provided good title but is liable for some other breach. I have already found that the Claimants received good titles and accordingly there is no basis for the Court to consider the application of the rule or its exceptions.

[275] Counsel for the Claimants have referred to the decision of the United Kingdom Supreme Court in ***One Step (Support) Limited v Morris-Garner & Anor*** [2019] AC 649 and its discussion on damages and "negotiating damages". However, it was clearly expressed by Mr Braham that in his view this case does not involve any question of damages to be assessed on the basis of negotiating damages. He indicated that ***One step*** was relied on for its statement of general principles such as the following statement at page 671 to 672:

> ***31*** *It is necessary next to consider some basic principles of the law relating to damages for breach of contract: principles which it will be necessary to bear in mind at a later stage of this judgment, when considering* ***Attorney General v Blake*** *[2001] 1 AC 268 and its aftermath. Damages in contract serve a different remedial purpose from damages in tort, reflecting the different nature of the obligation breached by the wrongdoer in each case. The law of tort is concerned with civil wrongs, that is to say with breaches of duties imposed by the law, sometimes generally and sometimes on those who are party to particular relationships or have assumed particular responsibilities, which protect the interests of others in respect of such matters as their bodily integrity, their liberty, their property, their privacy and their reputation. Damages in tort are generally intended to place the claimant as nearly as possible in the same position as he would have been in if the tort had not been committed. The law of contract, on the other hand, gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed.*

[276] In Stair Memorial Encyclopaedia the learned authors state at volume 7 paragraph 7:

> *In certain cases, principally concerned with wrongs against property… English law has developed a type of damages, the measure of which is based upon what the innocent party would have reasonably required as a payment for permitting what otherwise would have been a breach of contract, or of a breach of what in Scots law would be described as a land obligation, or of a breach of duty in delict. In such cases it is often the position that the victim is unable to demonstrate any loss actually incurred or damage sustained. The amount of the damages is based on a reasonable price for a waiver of the wrong produced by hypothetical negotiations. This measure is regarded as compensatory in that the damages are the redress for loss of the economic value of the right to allow what would otherwise be a wrong.*

[277] Although Mr Braham indicated that the Claimants are not relying on negotiating damages, I have nevertheless considered whether such damages might be appropriate in this case. In ***One Step*** (supra) having conducted a scholarly analysis of numerous judgments Lord Reed JSC arrived at the following conclusions in relation to the limits of negotiating damages at page 688:

> ***91*** *The use of an imaginary negotiation can give the impression that negotiation damages are fundamentally incompatible with the compensatory purpose of an award of contractual damages. Damages for breach of contract depend on considering the outcome if the contract had*

been performed, whereas an award based on a hypothetical release fee depends on considering the outcome if the contract had not been performed but had been replaced by a different contract. That impression of fundamental incompatibility is, however, potentially misleading. There are certain circumstances in which the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset. The imaginary negotiation is merely a tool for arriving at that value. The real question is as to the circumstances in which that value constitutes the measure of the claimant's loss.

***92**. As the foregoing discussion has demonstrated, such circumstances can exist in cases where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. Such cases share an important characteristic with the cases in which Lord Shaw's "second principle" and Nicholls LJ's "user principle" were applied. The claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment.*

***93** It might be objected that there is a sense in which any contractual right can be described as an asset, or indeed as property. In the present context, however, what is important is that the contractual right is of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way. That is something which is true of some contractual rights, such as a right to control the use of land, intellectual property or confidential information, but by no means of all. For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such as a loss of profits and goodwill, which is measurable by conventional means, but in the absence of such loss, it is difficult to see how there could be any other loss.*

***94** It is not easy to see how, in circumstances other than those of the kind described in paras **91**–**93**, a hypothetical release fee might be the measure of the claimant's loss. It would be going too far, however, to say that it is only in those circumstances that evidence of a hypothetical release fee can be relevant to the assessment of damages. If, for example, in other circumstances, the parties had been negotiating the release of an obligation prior to its breach, the valuations which the parties had placed on the release fee, adjusted if need be to reflect any changes in circumstances, might be relevant to support, or to undermine, a subsequent quantification of the losses claimed to have resulted from the breach. It would be a matter for the judge to decide whether, in the particular circumstances, evidence of a hypothetical release fee was relevant and, if so, what weight to place upon it. However, the hypothetical release fee would not itself be a quantification of the loss caused by a*

> *breach of contract, other than in circumstances of the kind described in paras **91**–**93** above.*

[278] In the recent decision of ***Guardian Life Limited v Catherine Allen*** [2021] JMCC COMM. 45, this Court made an order for negotiating damages. However, that was a claim for, *inter alia,* breach of confidentiality which falls squarely within the ambit identified by Lord Reed JSC in paragraphs 91 to 93 of ***One Step*** reproduced in the previous paragraph herein. In the case before me, the claim is not one identified in those paragraphs by Lord Reed. Furthermore, there is no evidence of any negotiations between the parties as to a release fee in the event that the relevant special conditions (which the court found were not satisfied) were breached. Whereas it would have perhaps been more desirable to have negotiating damages assessed as to a hypothetical release fee, I am of the view that it would be an unjustifiable extension of that method of assessing damages to apply it to this case.

[279] Nevertheless, there is authority which establish that the Claimants' claim for damages will not fall into a void incapable of determination. At pages 674 to 675 of ***One Step***, Lord Reed made the following observation which is apt:

> ***39*** *There are also many breaches of contract where the loss suffered by the claimant is not economic. At one time, this was thought to present a problem for the award of damages, unless it was possible to identify some form of physical detriment, on the view that placing a person in the same situation, so far as money can do it, as if the contract had been performed meant placing him in as good a situation financially. A wider view was however taken by the Court of Appeal in **Jarvis v Swans Tours Ltd** [1973] QB 233, and was confirmed by the House of Lords in **Ruxley Electronics and Construction Ltd v Forsyth** [1996] AC 344, where the defendant's loss was the difference to him, in terms of satisfaction and pleasure, between the swimming pool for which he had contracted and the one which he received, and it was therefore necessary to place a reasonable monetary value on that difference. Lord Mustill stated, at pp 360–361:*
>
> *"the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess … is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away … in several fields the judges are well accustomed to putting*

> *figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands."*
>
> ***40*** *That approach is consistent with the logic of damages for breach of contract: they are a substitute for the end-result of performance, not for the economic end-result of performance. It is therefore necessary in cases of non-economic loss, as in cases of economic loss, to identify the difference in the claimant's situation resulting from the non-performance of the obligation in question, and then to place a reasonable monetary value on that difference, provided that the loss or damage in question is of a kind for which the law provides monetary compensation.*

[280] In ***Ruxley Electronics and Construction Ltd v Forsyth*** [1996] AC 344, the plaintiffs in a consolidated claim had contracted to build a swimming pool for the defendant with a diving depth of 7 feet 6 inches deep. The completed pool was suitable for diving but the diving area was only 6 feet deep. There was no adverse effect on the value of the property but it would have cost £21,560.00 to rebuild the pool to the specified depth. The plaintiffs succeeded on their claim for the balance outstanding on the contract price save for an award to the Defendant of £2,500.00 on his counterclaim for breach of contract and loss of amenity. The Court of appeal allowed the appeal holding that the defendant's loss was the amount required to place him in the same position as if the contract was performed. At page 343-344 of the judgment of Lord Mustill in the House of Lords, the learned Judge identified the difficulty in this way:

> *There are not two alternative measures of damage, at opposite poles, but only one; namely, the loss truly suffered by the promisee. In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the "consumer surplus" (see for example the valuable discussion by Harris, Ogus and Philips (1979) 95 L.Q.R. 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away. The lurid bathroom tiles, or the grotesque folly instanced in argument by my noble and learned friend, Lord Keith of Kinkel, may be so discordant with general taste that in purely economic terms the builder may*

> *be said to do the employer a favour by failing to install them. But this is too narrow and materialistic a view of the transaction. Neither the contractor nor the court has the right to substitute for the employer's individual expectation of performance a criterion derived from what ordinary people would regard as sensible.*

[281] Whereas the case before me is not one dealing with a construction contract, the same principles are applicable. I appreciate that I need to exercise care in applying ***Ruxley*** (supra) having regard to its particular facts, however, I am guided by the general principles accepted by the Court in that case. In ***Ruxley*** the award by the Judge at first instance was for loss of amenity. Lord Mustill observed that the Judge took the view that the contract was "*for the provision of a pleasurable amenity*" and the Judge was entitled to conclude that the pleasure to be derived by the homeowner would have been greater at the contractually specified depth. Nevertheless, I do not see a reason in principle why there ought not to be compensation for a non-personal amenity such as the expectation of the relevant Claimants in this case that they would obtain what they had contracted for. This expectation is not diminished simply because there may have been a predominantly commercial purpose. The dilemma faced by this Court in assessing the level of compensation in this case, albeit on different facts, is illustrated by Mustill J as follows:

> *That leaves one last question for consideration. I have expressed agreement with the judge's approach to damages based on loss of amenity on the facts of the present case. But in most cases such an approach would not be available. What is then to be the position where, in the case of a new house, the building does not conform in some minor respect to the contract, as, for example, where there is a difference in level between two rooms, necessitating a step. Suppose there is no measurable difference in value of the complete house, and the cost of reinstatement would be prohibitive. Is there any reason why the court should not award by way of damages for breach of contract some modest sum, not based on difference in value, but solely to compensate the buyer for his disappointed expectations? Is the law of damages so inflexible, as I asked earlier, that it cannot find some middle ground in such a case? I do not give a final answer to that question in the present case. But it may be that it would have afforded an alternative ground for justifying the judge's award of damages. And if the judge had wanted a precedent, he could have found it in Sir David Cairns's judgment in* ***G.W. Atkins Ltd. v. Scott****, 7 Const.L.J. 215, where, it will be remembered, the Court of Appeal upheld the judge's award of £250 for defective tiling. Sir David Cairns said, at p. 221:*

> *"There are many circumstances where a judge has nothing but his common sense to guide him in fixing the quantum of damages, for instance, for pain and suffering, for loss of pleasurable activities or for inconvenience of one kind or another."*

[282] It is incontrovertible that obtaining of the duplicate Certificates of Titles for the Disputed Lots was important to the Claimants, although I have found that they have placed an unwarranted and undue level of importance on them. Caricom Investments the purchaser contracted for new titles pursuant to special condition 15 and is entitled to same within a reasonable time. In my opinion, one year would have been a reasonable time to produce them and accordingly, I find that Caricom Investments Limited and its nominee Caricom Hotels Limited have been unreasonably deprived thereof since on or about 3rd May 1994.

The quantum of compensation on the basis of *Ruxley*

[283] The Court having made a provisional determination that compensation on the basis of ***Ruxley*** would be appropriate, the Court invited Counsel to make further submissions to the Court since neither party had identified or relied on that case during the trial.

[284] The Claimants have submitted that special conditions 4, 5 and 15 give guidance as to how the Claimants should be compensated for the four Disputed Lots and the values that the parties agreed were reasonable. These values totalling $5,100,000.00 were:

a. Lot 41: $950,000.00 ;

b. Lot 1: $2,000,000.00 ;

c. Lot 51: $1,200,000.00; and

d. Lot 52: $950,000.00.

[285] It was also submitted that special condition 5 offered guidance on the rate of interest agreed by the parties. It was posited that this rate should be applied by the Court for the 27 years that the Defendants remained in breach. Using this formula, and applying the suggested rate of 2.4166% compounded monthly for 27 years to the total value of the Disputed Lots of $5,100,000.00, the Claimants submitted that this amounts to $11,680,647,995.00.

[286] An issue explored at trial was the applicable rate of interest to be applied to the damages claimed by the Claimants. I do not think it is necessary to make a finding on that interest rate because having regard to the basis on which damages are being awarded in this case, interest will not be applied to a specific sum and therefore it is not necessary to make a determination as to what was the contractual interest agreed by the parties. It must be appreciated that the Court is not awarding damages to the Claimants for not having received the Disputed Lots. The Court has found that the Disputed Lots were duly transferred to Caricom Hotels. Therefore, awarding damages in the amount of the value of the Disputed Lots as a starting positon, to which interest is applied, would involve a flawed methodology.

[287] Having regard to the basis on which the Court is awarding compensation it is similarly inappropriate to make an award for the pro-rated costs on the transaction which the Claimants have calculated to be $1,115,564.00 and to which if the same interest rate compounded monthly is applied, it is submitted by the Claimant's Counsel amounts to $2,555,022,039. For the same reason, I do not accept that the Claimants ought to receive the pro-rated amount of $683,884,537.00 which it has been submitted represents capital expenditure and interest cost.

[288] The Defendants on the other hand, have submitted that ***Ruxley*** is inapplicable and in support of this argument have relied on the UK House of Lords decision of Farley v Skinner [2001] UKHL 49 and in particular the following paragraphs:

> ***[79] Ruxley's*** *case establishes, in my opinion, that if a party's contractual performance has failed to provide to the other contracting party something*

> *to which that other was, under the contract, entitled, and which, if provided, would have been of value to that party, then, if there is no other way of compensating the injured party, the injured party should be compensated in damages to the extent of that value. Quantification of that value will, in many cases be difficult and may often seem arbitrary. In* ***Ruxley's*** *case the value placed on the amenity value of which the pool owner had been deprived was £2,500. By that award, the pool owner was placed, so far as money could do it, in the position he would have been in if the diving area of the pool had been constructed to the specified depth.*
>
> ***[80]*** *In* ***Ruxley's*** *case the breach of contract by the builders had not caused any consequential loss to the pool owner. He had simply been deprived of the benefit of a pool built to the depth specified in the contract. It was not a case where the recovery of damages for consequential loss consisting of vexation, anxiety or other species of mental distress had to be considered.*
>
> *…*
>
> ***[86]*** *In summary, the principle expressed in* ***Ruxley Electronics and Construction Ltd v Forsyth*** *should be used to provide damages for deprivation of a contractual benefit where it is apparent that the injured party has been deprived of something of value but the ordinary means of measuring the recoverable damages are inapplicable. The principle expressed in Watts v Morrow should be used to determine whether and when contractual damages for inconvenience or discomfort can be recovered.*

[289] Counsel for the Defendants have submitted that this is not a case where the ordinary means of measuring the recoverable damages are inapplicable. It is one where the ordinary measure was advanced, considered and applied but that the Court found that the Claimants did not produce sufficient evidence to support assertions that they have suffered any loss, due to the fact that they did not receive the duplicate Certificates of Title. Furthermore, the non-receipt of titles is not a separate issue from delay in proving them.

[290] I respectfully do not find that the case of ***Farley*** affects the applicability of ***Ruxley*** in this case. Counsel for the Defendants accept that the principles in Ruxley can be of more general application and that this was recognized in ***Farley***. At the risk of being repetitive, I have found that there was a breach of the Agreement for Sale and that the ordinary means of recovering damages are inapplicable because of the nature of the loss which the court has found is the Claimants' disappointed expectation. This is in contradistinction to the losses which the court found were

not proved such as those which would flow from the inability to develop the Lots which formed a major plank of the Claim.

[291] I also do not find any merit in the submissions by Counsel for the Defendants that an order that the Defendants (or any of them) bear the costs associated with the cancellation of existing Certificates of Title for the Disputed Lots and the issuing of new ones to Caribbean Hotels would suffice because this can be considered damages for the delay in obtaining same. In my opinion this is a separate relief consequent upon the Court's primary order directed to the Registrar which is aimed at ending the delay occasioned by the Defendant's and in particular, Rio Bueno's, actions. If the order achieves the desired objective, the delay would still remain uncompensated.

[292] Following the guidance of Lord Reed in ***One Step*** and the house of Lords in ***Ruxley***, I am fortified in my opinion and find that Caricom Investments Limited and Caricom Hotels Limited should be compensated with a reasonable monetary sum for the period for which they have been deprived of the duplicate Certificates of Title for the Disputed Lots. I find that this period should commence on or about 3rd May 1994 and extend to the date of this judgment. Assessing that sum is obviously a difficult task but I have considered in the round a number of factors such as the value of the Disputed Lots as a percentage of all the Lots that were purchased and the considerable length of time for which Caricom Investments and Caricom Hotels were deprived of the enjoyment of the duplicate certificate of Titles. I have made an adjustment in acknowledgment of the submissions of the Defendants that the resolution of this matter has been affected by the need for a retrial through no fault of the Defendants. I do not propose to attempt to outline a clear methodology applying mathematical precision because that was not my route to determining a figure. I am satisfied that this is one of those many circumstances "*where a judge has nothing but his common sense to guide him in fixing the quantum of damages*". I have accordingly applied my judicial experience and common sense in determining what is a reasonable figure and I have concluded that the amount of Two Million Five Hundred Thousand Jamaican Dollars ($2,500,000.00) provides

reasonable and appropriate compensation for Caricom Investments and Caricom Hotels.

Costs

[293] The Claimants have acknowledged the general rule in CPR 64.6 (1) that the general rule is that if the Court decides to make an order about the costs of any proceeding, Court must order that the unsuccessful party to pay the costs of the successful party. The Defendants have submitted that the exceptions in CPR Rule 64.6 do not arise. It was also submitted that the Claimants were successful in their claim and although not successful on every issue, the issues on which the Claimant's did not succeed did not materially lengthen the time taken for the presentation of the case.

[294] It was further submitted that having regard to the Court's findings that NCB and Mr Aird made representations which were false it was not unreasonable to have brought the claim with respect to representation and seek the consequential reliefs which would flow therefrom.

[295] The Claimants have urged the Court to consider the complexity of the case and the importance of the matter to the parties. In light of this, is was submitted that it is reasonable for the Court to grant a special costs certificate for the four Attorneys-at-Law who appeared for the Claimants including two Queen's Counsel.

[296] The Defendants have also acknowledged the general rule in CPR 64.6(1) but have noted that costs are discretionary with the Court having the flexibility to depart from the general rule where circumstances so warrant, considering the factors in CPR 64.6(2).

[297] The Defendants argued that a considerable amount of preparation and time during the trial was devoted to the issues arising from the claim for damages for fraudulent and negligent misrepresentation and this was not proved. It was also advanced

that the Defendants never resiled from the fact that there was non-compliance with special condition 15.

[298] It was therefore submitted that an appropriate costs order is for the Defendants to recover 80% of their Costs from the Claimants.

[299] This was a complex case. Nevertheless, it is demonstrably correct that a considerable portion of the trial was occupied by the issue of misrepresentation. The Claimants did not succeed on this issue because the Court found that there was insufficient evidence of any loss occasioned by the relevant statements which the Court found were false. The evidence relied on was that of Mr Lake which the Court finds was not sufficiently cogent and did not convince the Court on a balance of probabilities of loss arising from the statements. However, whereas I do not go so far as to conclude that it was unreasonable to have pursued the claim for misrepresentation, it is relevant that the Claimants did not succeed on that particular element of their claim and in the exercise of my discretion having Considered all the factors in CPR 64.6, I find that there should be an adjustment of the general rule in consideration of that fact.

[300] I do not accept the submissions of the Defendants that the failure on that head of claim justifies the Court awarding the Defendants 80 percent of their Costs, although it was the losing party. I have concluded that the appropriate adjustment is to award Caricom Investment and Caricom Hotels 80% of their costs and grant a special costs certificate for the four Attorneys-at-Law who appeared for these Claimants.

Summary of main findings

[301] I do not propose to rehearse all my findings which have already been disclosed. However, there are a number of key conclusions which have determined the outcome of this claim which are worth summarising as follows:

(a) Mr Aird was the agent of NCB arising from NCB's interference with the exercise of his duties in conducting the sale of the Lots, and accordingly NCB is liable for the representations made by him and for NCB's independent representations;

(b) The false representations made to Caricom Investments as purchaser by Mr Aird and by NCB were neither fraudulent not negligent;

(b) The Claimants have not established by cogent evidence that they have suffered any damage as a result of these false representations and accordingly they have not made out a claim in fraudulent or negligent misrepresentation.

(c) The Claimants have established a claim in breach of contract for, *inter alia*, the failure of the vendor Rio Blanco to provide duplicate Certificate of Titles for the Disputed Lots within a reasonable time;

(d) The Court is empowered to make appropriate orders to enable the Caricom Hotels to obtain duplicate Certificates of titles in its name in respect of the Disputed Lots; and

(e) Notwithstanding the fact that the Claimant but have not proved the quantum of damages for breach of contract, the Court is empowered to award damages, on the principles as outlined in ***Ruxley***.

Disposition

[302] For the reasons stated herein I make the following orders:

1. The Registrar of Titles is directed to cancel the duplicate certificates of title in respect of the following lands:

    (i) Lot 41 registered at Volume 1230 Folio 801 of the Register Book of titles;

    (ii) Lot 1 registered at Volume 1220 Folio 921 of the Register Book of Titles;

(iii) Lot 51 registered at Volume 1230 Folio 811 of the Register Book of Titles; and

(iv) Lot 52 registered at Volume 1230 Folio 812 of the Register Book of Titles;

and the Registrar is directed to register in place of such duplicate Certificates of Title, new certificates in duplicate, in the name of Caricom Hotels Limited, the proprietor as currently reflected on the Original Certificates of Title held by the Registrar.

2 Any cost associated with the implementation of order 1 herein is to be borne by Rio Blanco Development Company Limited (in Receivership), the 2nd Defendant.

3 Damages are awarded to the 1st and 2nd Claimants, Caricom Investments Limited and Caricom Hotels Limited, against Rio Blanco Development Company Limited (in Receivership) the 2nd Defendant in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00).

4 Eighty percent (80%) of the Costs of the Claim are awarded to the 1st and 2nd Claimants, Caricom Investments Limited and Caricom Hotels Limited, against Rio Blanco Development Company Limited (in receivership) the 2nd Defendant, to be taxed if not agreed.

5 Subject to the order 4 herein, the Court grants a special costs certificate and certifies costs to be fit and payable for the four Attorneys-at-Law inclusive of two Queen's Counsel at the trial.