[2017] JMCC Comm. 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2017CD00167

BETWEEN	**SAGICOR BANK JAMAICA LIMITED (formerly RBC Royal Bank (Jamaica) Limited**	**CLAIMANT**
AND	**LAKELAND FARMS LIMITED**	**DEFENDANT**

Mr Emile Leiba and Mr Jonathan Morgan instructed by Dunn Cox, Attorneys-at-law for the Claimant

Mr Ian Wilkinson QC and Mr Lenroy Stewart instructed by Wilkinson law, Attorneys-at-law for the Defendant

Heard: 18th, 19th, 20th and 21st September and 8th November 2017

Agency- Requirements - Scope - Whether an employee is authorised to contract with third party bank

Banking - Scope of duty of care owed by bank in encashing cheque made payable to it drawn on a third party bank

Interest - Whether claimant bank entitled to commercial interest

Negligence - Whether bank negligent in permitting signatory on account at third party bank to encash cheque drawn on that account before cheque is cleared in the ordinary course

Restitution - Whether payment made on dishonoured cheque recoverable as money had and received - Principles relating to payment of money under a mistake of fact

LAING, J

The Claim

[1] The Claimant claims against the Defendant to recover the sum of Six Million One Hundred and Ninety-three Thousand Two Hundred and Seventy-six Dollars ($6,193,276.00) being money had and received by the Defendant, to the use of the Defendant together with interest and cost.

[2] In the alternative, the Claimant claims pursuant to the Bills of Exchange Act against the Defendant as holder in the due course and/or alternatively as the holder for value of cheque numbered 687636 for the sum of Six Million One Hundred and Ninety-three Thousand Two Hundred and Seventy-six Dollars ($6,193,276.00) dated 27th April 2007 ("the Cheque") or replacement cheque numbered 687641 in the same sum dated 2nd May 2007 ("the Replacement Cheque"), each drawn by the Defendant on its account at the National Commercial Bank Jamaica Limited ("NCB").

The Claimant's Case

[3] The Claimant avers that the Defendant has been a customer of the Claimant at its Spanish Town, St Catherine Branch since March 2006. There was an arrangement between the Claimant and the Defendant whereby the Claimant would make a cheque payable to the Claimant, drawn on the Defendant's account at NCB's Spanish Town Branch and the Claimant would expedite the encashment of such a cheque and pay the proceeds in cash to the Defendant (the "Agreement"). This was not a gratuitous service and the Claimant received the agreed fee pursuant to the Agreement.

[4] On 27th April, 2007 the Defendant presented the Cheque to the Claimant pursuant to the Agreement. The Cheque was duly encashed and was sent through to NCB to obtain reimbursement through the clearing process that banks utilize. The Claimant received a notification that the Cheque was dishonoured by NCB on the ground that there were insufficient funds in the Defendant's account.

[5] The Replacement Cheque was provided to the Claimant but that too was dishonoured by NCB on similar grounds.

The Defence

[6] The Defendant denied that there was the Agreement. It averred that any such agreement to provide this expedited encashment service would have amounted to the provision of a credit or overdraft facility by Claimant and there was no such request for such credit or overdraft facility by the Defendant. It asserted that the Cheque and the Replacement Cheque (together referred to herein as "the Cheques ") were fraudulently issued by Alicia Brown who it initially claimed was a former employee of the Defendant, but sought at trial to resile from this position. The Defendant argued that the Claimant was the author of its own misfortune on a number of bases, because, *inter alia*, it failed to contact Mr Richard Lake the Managing Director or any other authorised officer of the Defendant to verify the legality or authenticity of the transactions involving the Cheques, and further failed to follow proper banking procedures which included confirming that there were sufficient funds in the relevant account before encashing the Cheques or waiting for the Cheques to clear.

[7] The Defendant also asserted that it was the Bank's conduct which facilitated the fraud which was perpetrated against the Defendant and there was an apparent conspiracy between Alicia Brown and agents or employees of the Claimant who facilitated the fraud. However there was insufficient evidence on which a finding of conspiracy could have been properly grounded. :

Was Alicia Brown an employee of the Defendant?

[8] The evidence of Mr Lake was that the account on which the Cheques were drawn was opened on his authority as the Managing Director of the Defendant on 21st November, 2005. He confirmed that the signing mandate required only one signature for cheques. Alicia Brown was as at 1st April 2007, a signatory on the NCB account and there was another supervisor who may have also been a

signatory but this he could not confirm. He said that he had never signed a cheque drawn on that account for daily operations of the Defendant and might have only done so after 27th April 2007 when he took charge of the account and the cheque book.

[9] Mr Lake's evidence is that when his cambio operations started they were operating under the Western Union brand and he decided to obtain a cambio licence for "Best Rate Cambio" so that it could operate on its own without the assistance of Western Union. He said that because Best Rate Cambio (Limited) was a new company with no fixed assets the Bank of Jamaica wanted a more established company to which to issue the licence. On the 31st March 2000 the Bank of Jamaica acting on behalf of the Minister of Finance and Planning issued a Certificate of Approval for the Defendant to operate a Cambio at Shop 78, Lake's Plaza, Spanish Town Bus terminus, Spanish Town, St. Catherine. Best Rate Cambio Limited was incorporated in November 2000.

[10] A letter exhibited, dated 22nd November, 2000 from the Defendant, signed by its Director Mr Lake addressed to "The Manager of Best Rate Cambio Ltd." confirming the agreement for Best Rate Cambio Ltd. to use the Defendant's cambio licence for a fee of Three Million Dollars ($3,000,000.00) or Best Rate Cambio's operational profit (whichever is lower). The Court was also presented with a letter dated 26th June, 2009 from Hamiton, Hall & Co. In which they confirmed that they are Auditors of the Defendant and that although the cambio licence was issued in the Defendant's name "...*the daily operations of cambio was undertaken by Best Rate Cambio Limited, a company incorporated in November, 2000*". Mr Lake's evidence was that the Defendant "outsourced" the operations of the cambio.

[11] There was no evidence before the Court to support the position that Best Rate Cambio Limited was authorised by the Bank of Jamaica to operate a cambio as a business wholly independent of the Defendant while using the Defendant's licence in the manner which seems to have been contemplated by the

Defendant's letter to Best Rate Cambio Ltd.. It seems to me that such authorisation would have been required given the nature of licences generally and especially those granted in the financial sector having regard to the special care which is required. In fact, if the reason the Bank of Jamaica was not prepared to give the licence to Best Rate Cambio Limited was because it was a new company devoid of assets as Mr Lake said, it seems nonsensical that the Bank of Jamaica would consent to what could be loosely described as a form of assignment or sub-licencing of the Defendant's licence to Best Rate Cambio Limited for a user fee. Whatever the label placed by Mr Lake on the relationship it seems reasonable to conclude that Best Rate Cambio Limited could only have operated the cambio as an agent of the Defendant which was, on the evidence before the Court, the only Bank of Jamaica authorised licensee.

[12] The evidence of Mr Lake was that he was the sole shareholder of Best Rate Cambio Limited and also the Managing Director but his brother was also a Director because at that time a company was required to have two directors. He explained that Ms Brown was introduced to him by the previous manager of Best Rate Cambio Limited as a member of the team she had recruited. In his witness statement he stated that Ms Brown was employed to Best Rate Cambio for in excess of seven years and was the Manager for about two of those years. Mr Lake was unable to confirm whether Ms Brown started her employment prior to the incorporation of Best Rate Cambio Limited. Mr Lake's explanation to the Court was that persons (which I understood to include Ms Brown) were initially employed personally by the former manager of Best Rate Cambio Limited but not on behalf of a corporate entity. Their employment was later regularised with contracts of employment as between themselves and Best Rate Cambio Limited.

[13] Mr Lake was adamant that although Ms Brown was a signatory on the Defendant's NCB account she was not an employee of the Defendant but was in fact employed to Best Rate Cambio Limited. Mr Lake went further in cross examination to assert that Ms Brown was never an employee or former employee of the Defendant. Mr Lake was allowed to refresh his memory using his affidavit

of 5th February 2008 and he confirmed that he had previously referred to Ms Brown as a former employee of the Defendant. He explained that his counsel was then just recently retained and the details were not clear at the time. Furthermore, since it was a setting aside application he did not peruse it with the rigour that he usually does and that that statement and others were erroneous.

[14] Mr Lake was also confronted with paragraph 6(b) of his Further Amended Defence in which Ms Brown was described as a former employee of the Defendant and gave no satisfactory response as to why that statement was inaccurate.

[15] The Court finds that Ms Brown was an employee of the Defendant at all material times. Mr Lake has been discredited in relation to his evidence that Ms Brown was never an employee of the Defendant. No credible explanation has been given by the Defendant as to why Ms Brown would be a signatory on the Defendant's NCB Account while she was not an employee of the Defendant. I also note that there is no documentary evidence of Ms Brown being paid by Best rate Cambio Limited although such evidence should have been very easy to come by. In the premises I reject Mr Lake's evidence that Ms Brown was not an employee of the Defendant at the time of the transactions involving the Cheques.

Was Ms Brown an agent of the Defendant who was entitled to enter into the Agreement with the Claimant?

[16] In **Bowstead and Reynolds on Agency 17th Ed page 1** the general features of the agency relationship are described as follows:

> *"Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts. The one on whose behalf the act or acts are done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party".*

[17] It is settled law that the authority of an agent may be actual (express or implied) or apparent. Implied actual authority refers to the authority of an agent to do whatever is necessary for or ordinarily incidental to the effective execution of his express authority in the usual way. Apparent authority arises where because of the relationship and dealings between the principal and the agent, the law regards the authority as having been given to the agent by the principal. As put in **Bowstead and Reynolds** (supra) at paragraph 3-024:

> *"An agent who is authorised to conduct a particular trade or business or generally to act for his principal in matters of a particular nature, or to do a particular class of acts, has implied authority to do whatever is incidental to the ordinary conduct of such trade or business, or of matters of that nature, or is within the scope of that class of acts, and whatever is necessary for the proper and effective performance of his duties: but not to do anything that is outside the ordinary scope of his employment and duties."*

[18] Although the Court has found that Ms Brown was an employee of the defendant, employment is not a necessary prerequisite. It is in the context of the law relating to agency that the conduct of the parties must be examined and the conduct of the Defendant and Ms Brown points conclusively to a relationship of agency. Mr Lake explained that there were two Directors of the Defendant, himself and his brother Michael Lake. He said that he had set up "the business" (here again, the Court understood this to mean the business of the Defendant) so it could be run independently of him. The Business had three sources of income. The first was the Cambio which bought and sold foreign exchange. It was provided with a float of Two Million Dollars ($2,000,000,00) with which to operate and thereafter needed no additional funds. The second was the Bill Express bill payment service in which Best Rate Cambio Limited acted as agent of Bill Express. Customers would make payments in respect of various bills and the payments would be electronically entered in respect of the various companies. The third was the Western Union wire transfer service. In his witness statement at paragraph 20 Mr Lake confirms that "*As Manager, her responsibilities were to operate the business of all three operations in accordance with the approved budget.*" Having regard to Mr Lake's evidence as to the three sources of income

for "*the business*" (which the Court finds to mean the business of the Defendant) this is further evidence which the Court finds is corroborative evidence of Ms Brown having been an employee of the Defendant.

[19] In the operation of the Western Union arm of the business, Mr Lake stated in his Amended Witness Statement that the Best Rate Cambio started with a float of Six Million Dollars ($6,000,000.00). Each day it pays out money to persons who receive remittances and the following day it is reimbursed by Western Union for the funds it paid out. Mr Lake asserted that Western Union previously transported cash to the location but needed an account to transfer these funds and it is in this context that the NCB account of the Defendant was provided "*to receive and collect Western Union transfers – nothing else.*" The Court finds it rather curious that the NCB Account statements were addressed to "*The Managing Director, Lakeland Farms Limited-Cambio*". I doubt that NCB would have gratuitously inserted the word "cambio". However Mr Lake explained that this was a pre-existing account which he offered for use. Although the Court finds that the name of the account is not, *per se*, conclusive proof that it was related to the cambio operations it supports the Court's finding that the Defendant was the entity responsible for the cambio operations.

[20] Although Mr Lake was the Managing Director of the Defendant, the evidence before the Court is that he or the other Director Michael Lake had no active input in the day to day management of the Defendant. It is particularly telling that Mr Lake's evidence is that he did not draw a cheque on the Defendant's NCB account until after the dispute had arisen in respect of the Cheques.

[21] It is common ground that Ms Brown had signing authority in respect of the Defendant's NCB account and accordingly could draw cheques against that account and encash those cheques. This is an activity which she had done numerous times. If it was not intended that she would do so then it is difficult to fathom why this signing authority which did not even require her to obtain a second signatory, would have been given to her. In those circumstances the

Court finds that Ms Brown whose responsibilities Mr Lake said were to operate the business of all three operations, as manager, would also have the implied authority to make the Agreement with the Claimant for the expedited encashment before lodgement and clearance of cheques in general. This authority would naturally extend to the encashing of the Cheque.

[22] I therefore do not accept the submissions of learned Queen's Counsel made on behalf of the Defendant that:

> *"For the said Alicia Brown to have that authority, the Defendant's Articles of Association would have had to have given her the authority to cash cheques on behalf of the Defendant and/or to deal with the Defendant's account at the Claimant bank. In other words, the articles would have had to have named her as one of the individuals authorised to conduct business on behalf of the Defendant. This was not the case. Underwood (supra) and Royal British Bank v Turquand 6 E. & B. 327."*

I did not find the case of ***A.L. Underwood Ltd. v Barclays Bank Ltd*****.** [1924] 1 KB 775) to be of assistance given its special facts and did not find that ***British Royal Bank*** supported Counsel's argument. In fact what has become known as the rule in ***Royal British Bank v Turquand***, as stated in *Palmer's Company Law* (21st edn, 1968) p 245. is as follows:

> *"According to this rule, while persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called,[3] "the indoor management" – and may assume that all is being done regularly ("omnia praesumuntur rite ac solemniter esse acta")."*

[23] It is implicit in Queen's Counsel's submissions that the Defendant was capable of authorising Ms Brown to draw and encash cheques on its behalf. In these circumstances the Claimant is fixed constructively with this knowledge and must be taken to know this. Accordingly the Claimant is entitled to assume that Ms Brown was duly authorised to so act (without inquiring into the Defendant's internal proceedings) having regard to the fact that by allowing Ms Brown to be

able to sign and encash cheques drawn on the NCB account, the Defendant was representing her as its agent for those purposes.

Did the Claimant extend an overdraft facility to the Defendant?

[24] Ms Hope Hamilton gave evidence on behalf of the Claimant. She said that she started working in the banking industry in 1990 and when she left the Claimant in 2013 she was a relief Branch Manager. She was the acting Branch Manager of the Claimant's Spanish Town Branch on the 27th April, 2007 when the Cheques were presented. She explained that where there is a cheque with the receiving bank named as the payee as occurred in the case of the Cheque there are two main options available to the bank. The first would be to deposit the Cheque in an account belonging to the payee bank or the bank could go to NCB for the proceeds of the cheque on a direct presentation. However, both would involve the clearing process. On a direct presentation, if the payee is a bank (as opposed to an individual or corporate entity) it would not be usual for the payee bank to receive cash but there would be an advantage in that clearing would probably take place on the same day as opposed to the usual 3 days.

[25] She asserted that on the presentation of the Cheque to the Claimant, she made a call to the telephone number of a Mr Peter Jennings at NCB who confirmed that there were sufficient funds to clear the Cheque. It was suggested to her that this was not true and she denied this suggestion. Her evidence on this point must be treated with caution because she had never spoken to the person she refers to as Mr Jennings before and accordingly was unable to make a voice identification. She indicated to the Court that bankers respond in a particular way by their training in stating their name etcetera, so having spoken to him she was satisfied. She said that this was something that banks do every day, but conceded that there is not usually more than the word of the person confirming on the other end but that is a standard banking practice. She also conceded that in paying the proceeds of the cheque before the cheque was lodged [and cleared], the bank took a risk but it was a routine transaction.

[26] Based on the Court's acceptance of Ms Hamilton's evidence of the procedure which ought to be employed in confirming that adequate funds were available in the appropriate account of the Defendant with NCB, the Court finds that the Agreement per se, does not necessarily amount to the extension of credit or an overdraft facility to the Defendant by the Claimant. However, the question is raised as to whether there might be such an extension of credit if the Claimant or its agents knew that there were insufficient funds in the NCB account but nevertheless encashed the Cheque.

[27] In cross examination Ms Hamilton was directed to the statement of accounts in respect of the relevant NCB account and agreed that on 27th April, 2007 the account was in deficit in the sum of negative Three Million One Hundred and Twenty-two Thousand One Hundred and Twenty-three Dollars and Forty-three Cents (-$3,122,123.43). There was a deposit to the account on that day of Three Million Two Hundred Thousand ($3,200,000.00) which resulted in teh account being in credit in the amount of Seventy-seven Thousand Eight Hundred and Thirty-six Dollars and Fifty-seven Cents ($77,836.57) but the Cheque in the sum of Six Million One Hundred and Ninety-three Thousand Two Hundred and Seventy-six Dollars ($6,193,276) placed the account in, "a minus balance", (to use Ms Hamilton's preferred term), in the amount of negative Six Million One Hundred and Fifteen Thousand Three Hundred and Ninety-nine Dollars and Forty-three Cents (-$6,115,399.43).

[28] As it relates to the Replacement Cheque, Ms Hamilton was similarly directed to the statement of account in respect of the 3rd May 2007 and the fact that the Replacement Cheque would have placed the account in "a minus balance" of Six Million and Forty-eight Thousand One Hundred and Eighty Dollars and Seven Cents (-$6,048,180.07).

[29] There is therefore an issue of fact as to whether Ms Hamilton obtained confirmation that there were sufficient funds to cover the Cheque although the documentary evidence demonstrates that that the funds were not adequate.

Learned Queen's Counsel submitted that the more sensible explanation is that the Claimant acted negligently in encashing the cheque without receiving the proper authorisation from either NCB or Mr Lake or without first waiting for the cheque to be cleared. The question as to whether Ms Hamilton received authorisation from NCB is a difficult one for the Court to resolve. This is particularly so, having regard to the fact that the Court has not heard from Mr Peter Jennings the person to whom Ms Hamilton asserts that she spoke. However, in any event, for reasons which will become apparent later in this judgment when I address the claim in restitution, I do not think that it is necessary for the Court to make a finding on this fact in order to determine the Claim.

The Claim in Restitution

[30] The Claimant has based its claim in the alternative on the cause of action of money had and received. In **Goff & Jones Law of Restitution**. 5th Ed at pg 15 the law is summarised as follows:

> *"As might be expected a close study of the English decisions, and those of the other common law jurisdictions, reveals a reasonably developed and systematic complex of rules. It shows that the principle of unjust enrichment is capable of elaboration and refinement. It presupposes three things. First, the defendant must have been enriched by the receipt of a benefit. Secondly, that benefit must have been gained at the plaintiff's expense. Thirdly, it would be unjust to allow the defendant to retain that benefit."*

Did the Defendant receive a benefit?

[31] Learned Queen's Counsel attacked the Claimant's case and submitted that one of these stated fundamental pillars of the unjust enrichment claim was not proved, in that there was no credible evidence elicited to establish on a balance of probabilities that the Defendant received the funds in question. This submission was founded on the element of the defence which asserted that the Defendant was defrauded by Ms Brown. I did not understand the Defendant to be alleging that the proceeds of the cheques were appropriated by the couriers who collected it from the Claimant since there was no issue raised on this point. This

conclusion is supported by the Claimant's witnesses Ms Hamilton and Mr Seford Johns, who both gave evidence of a meeting between themselves as representatives of the Claimant on the one hand and Ms Brown and Ms Sonia Lopez (who Mr Lake says is a supervisor of Best Rate Cambio Limited) as representatives of the Defendant. I accept their evidence that at that meeting there was no issue raised as to whether the Defendant received the proceeds of the Cheque from the courier.

[32] Heavy reliance is placed on Mr Lake's evidence that the funds disbursed by the Western Union transfer operations are usually reimbursed the following day. His evidence was that if the proceeds of the Cheque were received by the Defendant and utilised in the Western Union operations then they would have been replenished and there would have been no shortfall. He explained that because the funds were not utilised in the cambio there was no money to pay out the following day and "they" came for more money and the operations were shut down.

[33] The Defendant also called Ms Pauline Dillon as a witness. Ms Dillon was instructed in June 2007 by Grace Kennedy Remittance Services Limited ("GKRS") to conduct an assessment of the Bill Express and Western Union operations which featured in this case, for the period 1st January 2006 to 3rd May 2007. She had prepared a report dated 28th June 2007 (the "2007 Report") which was tendered as a part of her evidence in this case. She conceded that at the time that she prepared the 2007 report she was not certified by any external bodies as an auditor. She conceded that she was unable to provide to the Court some of the source material used in the preparation of the 2007 report as required by the **Civil Procedure Rules** because she did not have access to them. She admitted during cross examination that the 2007 Report was prepared without bank statements and that if she had been provided with information in relation to the withdrawals, the financial picture might have been different.

[34] In the audit report that was presented to GKRS and Mr Lake, Ms Dillon identified a number of weaknesses in the operations of the Bill Express and Western Union operations. These weaknesses were highlighted by Mr Leiba in cross examination and I do not think it is necessary for me to similarly explore each of them in detail. However by way of example Ms Dillon found that there was co-mingling of funds. Cash was sourced from undisclosed persons on numerous occasions and the business was expanded to include other, what she terms, "non-traditional activities" such as bus park ticket sales and sales from "fish fry". She noted that the absence of proper book keeping made confirmation and repayment of these funds from other activities questionable. She also indicated, in answer to the Court that she also found evidence of co-mingling in relation to the cambio operation.

[35] Ms Dillon's evidence is that she understood that Ms Brown was a supervisor employed to the Defendant. There must have been sufficient and reasonable evidence on which Ms Dillon as the person doing a audit of the operations to have arrived at this conclusion and the Court finds that this supports the evidence which has been previously referred to that Ms Brown was in fact employed to the Defendant. Ms Dillon also concluded that the supervisors either deliberately or inadvertently failed to follow double entry accounting requirements especially as it related to funds transferred between the cambio and the main vault which resulted in shortages totalling millions. She determined that the branch had an unusually high number of "reinstates" each month. She explained that reinstates occur when a customer complains that he/she did not receive the money sent to him/her but the system showed that there was a payment for that transfer. This payment still has to be made to the client and the agent is responsible for any discrepancy.

[36] Ms Dillion found shortages of Nine Million Fifteen Thousand Sixty-three Dollars and Eighty-nine Cents ($9,015,063.89) for the documented period. She agreed in cross examination that she did not put forward any documentary evidence to reflect that Ms Brown took funds from the Defendant, Lakeland Farms, and

pocketed them or used them for her own use and benefit. Mr Lake conceded in cross examination that other than Ms Dillon's statement he had no way of saying what money was received or where it went. The Court therefore finds that on the evidence there is no sufficient basis for a finding that Ms Brown defrauded the Claimant of the proceeds of the Cheque.

[37] If as a result of the Defendant's poor management and accounting systems it is unable to trace those funds, that is a matter which is irrelevant for purposes of ascertaining whether the proceeds of the cheque amounted to a benefit. On the evidence the Court finds on a balance of probabilities that the Defendant did receive the benefit of the proceeds of the Cheque.

Payment by mistake

[38] In paragraph 9 of its "Second Further Amended Particulars of Claim" the Claimant pleaded s follows:

> *"In the premises, the Claimant states that it made the payment of $6,184,000.00 aforesaid to the Defendant as a result of a mistake of fact on the part of the Claimant in thinking that there were sufficient funds standing to the credit of the Defendant's account at NCB, Spanish Town to meet the cheque drawn by the Defendant on the said account and that the Defendant as had and received the said sum to the use of the Defendant."*

[39] In ***R. E. Jones Limited v. Waring and Gillow Limited*** [1926] AC 670, Lord Shaw of Dunfermline examined the principles relating to cases of refund on account of mistake and at page 688 of the judgment, his lordship quoted extensively from the statements of Parke B in ***Kelly v. Solari*** **(1841) 9 M&W 54, 152 ER 24** case which I believe is worth reproducing as follows:

> *...Said that very learned judge.*
>
> > *"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will be lie to recover it back, and it is against conscience to retain it; though a*

> *demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cited. to have been founded on the dictum of Mr. Justice Bayley in the case of* ***Milnes v. Duncan*** *(2); and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact to be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."*

[40] Lord Shaw went further and opined as follows:

> *"It is quite true that various attempts have been made, not to attack the elementary rule set forth in the first portion of the citation, but to set up a species of estoppel by reason of the carelessness of the person who was misled into the mistake in fact. I am not aware that in the whole course of the decisions such an assault upon* ***Solari's*** *case (1) has over been successful, and since its date in 1841 it has, I believe, remained of paramount authority as part of the law of England. In fact language, for instance, of Lord Lindley in* ***Imperial Bank of Canada v. Bank of Hamilton****(2): As regards negligence in paying the cheque: It cannot be denied that when the Bank of Hamilton paid the cheque on January 27 it had means of ascertaining from its own books the that the cheque had been altered. But means of knowledge and actual knowledge are not the same; and it was long ago decided in* ***Kelly v. Solari*** *(1) that money honestly paid by a mistake in facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since."*

[41] These principles are alive and well. In ***Quilvest Finance Limited and Others v Fairfield Sentry Limited*** **(In Liquidation)** 2014 UKPC 9 (a consolidated claim) the Privy Council considered the claim of Fairfield Sentry Limited (In liquidation) an investment fund which had made payments to various shareholders which had redeemed their shares on a Net Asset Value of such shares which was subsequently proved to have been grossly wrong. The mistake arose because unknown to Fairfield Sentry the entity with which it had invested a substantial portion of its funds was a ponzi scheme operated by Bernard L. Madoff which

were essentially lost from the date of the investment and the entity collapsed shortly after the payments to the redeeming shareholders were made by Fairfield Sentry. The Privy Council reaffirmed the position that the paying party can recover money paid under a mistake of fact. However, the Court held that the paying party will not be able to recover money paid under a mistake of fact where the payer had received good consideration or the payment discharges a contractual debt (which was the position advanced by the various Defendants in the case). In this case before the Court there was no good consideration provided by the Defendant nor was the payment in discharge of a contractual debt owed to the Defendant.

The Claim for breach of statutory warranty

[42] The Claimant claims in the alternative for breach of a statutory warranty. It asserted that the Cheque is a Bill of Exchange pursuant to the definition contained in the **Bills of Exchange Act** ("the Act"), section 3 as follows:

> *"A bill of exchange is an unconditional order in writing , addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a certain sum of money to or to the order of a specified person, or to bearer."*

[43] There are potentially three different types of holder of a bill of exchange with a different status accorded to each namely;

(1) a mere holder;

(2) a holder for value; and

(3) a holder in due course.

[44] The Claimant in its statement of case claims against the Defendant as holder in due course and/or alternatively as a holder for value of the Cheque for the sum of Six Million One Hundred and Ninety-three Thousand Two Hundred and Seventy-six Dollars ($6,193,276.00) or the Replacement Cheque. The Claimant relied on

Section 2 of the Act which defines "holder" as the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof, in conjunction with section 30 of the Act which provides as follows:

> *"Every party whose signature appears on a bill is Prima facie deemed to have become a party thereto or value. Every holder of a bill is prima facie deemed to be a holder in due course, but if in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected by fraud, duress, or force and fear, or illegality the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."*

[45] The Claimant also relied on section 29 of the Act which provides as follows:

> *A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely-*
>
> *(a) that he became the holder of it before it was over-due, and without notice that it had been previously dishonoured, if such was the fact:*
>
> *(b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he has no notice of any defect in the title of the person who negotiated it.*
>
> *In particular the title of a person who negotiates a bill is defective, within the meaning of this Act, when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud*

The Claimant asserted that it is deemed to be a "holder in due course" and a "holder for value" and the burden is placed on the Defendant to displace same.

[46] In the case of ***R. E. Jones Limited v. Waring and Gillow Limited*** (supra) the House of Lords held that the original payee of a cheque is not a "holder in due courses" within the meaning of the English **Bills of Exchange Act, 1882**. Viscount Cave L.C. expressed the position at page 680 as follows:

> *"I do not think that the expression "holder in due course" includes the original payee of the cheque. It is true that under the definition clause in the Act (s. 2) the word "holder" includes the payee of a bill unless the context otherwise requires; but it appears from s. 29 sub-s 1, that a "holder in due course" is a person to whom a bill has been "negotiated"*

> *and from s.31 that a bill is negotiated by being transferred from one person to another and (if payable to order) by indorsement and delivery. In view of these definitions it is difficult to see how the original payee of a cheque can be a "holder in due course" within the meaning of the Act. Sect. 21, sub-s. 2, which distinguishes immediate from remote parties and includes a holder in due course among the latter, points to the same conclusion."*

[47] In the case of ***Capital Solutions v Rosh Marketing*** (unreported), Court of Appeal, Jamaica, SCCA No. 63/2008, judgment delivered 30th July 2009 at paragraph 51 of the Judgment, the Jamaican Court of Appeal following ***Jones v Waring*** (supra) accepted it as "*well established that the original payee of a bill cannot be regarded as a holder in due course*". I therefore consider that this issue is beyond debate.

[48] As it relates to the issue of the status of the original payee of a bill, Section 27 of the Act provides that:

> *"Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time."*

In these circumstances the Court finds that the correct designation of the Claimant is a holder for value of the Cheques since the Court accepts that it paid the proceeds of the Cheque to the Defendant. Although learned Queen's Counsel has submitted to the contrary, it is the Court's finding that the Defendant did receive consideration in exchange for the Cheques and there is no difficulty resolving this issue on the facts as might have been the case in ***Capital Solutions v Rosh*** *(supra).*

[49] The Claimant's position is that the Cheques have been dishonoured and notice of the dishonour has been duly given. The cheques have not been honoured and the Defendant is in breach of its statutory duty as provided in section 55 of the Act which provides as follows:

> *The drawer of a bill by drawing it –*

> *a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder, or any indorser who is compelled to pay it:*
>
> *Provided that the requisite proceedings on dishonour be duly taken;*
>
> *b) is precluded from denying to a holder in due course the existence of the payee, and his then capacity to indorse.*

[50] It was submitted on behalf of the Claimant that based on the clear provisions of the Act the Defendant's duty to compensate it for the amount of the Cheque (or the Replacement Cheque) is absolute. In support of its position the Claimant has relied on a number of cases, including ***Charles Wilson v National Commercial bank of Jamaica and K.G. Yapp*** (1993) 30 J.L.R. 169 and ***North Eastern Distributor Limited v Desnoes and Geddes Limited*** (1997) 34 J.L.R. 564; which considered different factual situations but reaffirmed the general principle of the obligation of the drawer to compensate the holder of a dishonoured cheque.

[51] Although learned Queen's Counsel did not take issue with the statements relating to the general principles, it was submitted that the obligation of a drawer of a cheque to pay is not absolute. Counsel argued that a bank owes a duty of care to its customers and that negligence ousts the obligations imposed by the Act. In an effort to avoid undue repetition, the Court will subsequently address the Defendant's submission in relation to its assertion of negligence/breach of duty of care by the Claimant

The Defendant's submissions on the Defence and Ancillary Claim

[52] In his written submissions learned Queen's Counsel framed the main legal issue as follows:

> *"Was the claimant negligent or in breach of banking policy in paying out money before lodging the cheque or awaiting the cheque's clearance especially in the context of their(sic) having been a number of dishonoured cheques in the past."*

Having so framed the main legal issue, the issue of negligence or breach of banking policy was a common defence to the restitutionary claim, the claim for breach of statutory obligation and to the Ancillary Claim. Accordingly Queen's Counsel's submissions and the key authorities relied on can conveniently be addressed at this stage as a result of the considerable degree of overlapping.

[53] One of the cases on which Queen's Counsel relied was ***J & F Transport Ltd. Et Al v Markwart Et Al*****,** May 26 1982 Saskatchewan Court of Queen's Bench. In that case the parties made admissions for the purposes of the trial that the Bank of Montreal which was a defendant, at the request of Lloyd Markwart, opened an account at one of its branches and 36 cheques totalling Thirty-five Thousand Three Hundred and Six Dollars and Fifty-seven Cents ($35,306.57) payable to the plaintiff were deposited by Mr Markwart into that account and the proceeds were subsequently withdrawn by him. It should be noted that the account was opened in the name of J & F Transport Ltd. The Plaintiff's claim included an assertion that the defendant caused or permitted the plaintiff to be defrauded. The bank in turn contended that the plaintiff, by the manner in which it conducted its affairs, permitted its employee Mr Markwart to steal its funds when reasonable precautions would have revealed the fraud and consequently the plaintiff is the author of its own misfortune. The Court found in favour of the plaintiff against the bank. The Court also found that Mr Markwart was hired as a bookkeeper and in the circumstances of the case the Court found no negligence on the part of the plaintiff in not supervising in a closer manner the work of its bookkeeper.

[54] It is evident that there are a number of important factual differences between this case and the case before this Court. The first, is that I have found that there is insufficient evidence before the Court to support a finding that Ms Brown improperly appropriated the proceeds of the Cheque. Another factor which is of importance is the difference between the limited responsibilities of a bookkeeper and those of Ms Brown who, in the absence of any day to day input by Mr Lake, was the *de facto* Manager of the Defendant. The Court has found that as an

authorised signatory, she was duly authorised to draw cheques on the Defendant's account at NCB and to encash same.

[55] Queen's Counsel highlighted the findings of the Court in paragraph 13 as follows:

> *"There is no evidence whatsoever that Lloyd Markwart had at any time "the ostensible authority to handle moneys of the plaintiff" Markwart's authority was limited to physically delivering the plaintiff's cheque to a specified branch of the Toronto-Dominion Bank, Markwart had at no time authority to endorse the cheques he deposited in to the account he opened with the defendant, and under the provisions of s. 49 of the Bills of Exchange Act, R.S.C. 1970, c. B-5, his endorsements thereof were wholly inoperative. The evidence before me is that the plaintiff at no time dealt with the defendant; there is no evidence of any holding out of Markwart as having authority to endorse the cheques."*

However, these observations serve to strengthen my finding that the differences between this case and the cases under consideration significantly lessens any assistance which may be obtained from the learned Judge's conclusions

[56] Learned Queen's Counsel also relied on the case of ***Marfani & Company Limited v Midland Bank Limited*** 1966 M No 2172 a decision of the English Court of Appeal delivered 21st March 1968. In this case the Plaintiff's employee Mr Kureshy opened an account with the defendant bank in the name of Eliaszade. He subsequently lodged to this account a cheque for £3,000.00 which was drawn by the Plaintiff on the Bank of India in favour of a firm called Eliaszade. The defendant bank presented the cheque for payment to the Bank of India and credited the payment it received to the account of Eliaszade which Mr Kureshy had opened and he duly withdrew almost all of this sum. The case was decided primarily on the basis of section 4 of the Cheques Act 1957 which protects a bank which receives payment of specified instruments for a customer who has no title or a defective title. Section 4(1) provides as follows:

> *'(1) Where a banker, in good faith and without negligence–*
>
> *(a) receives payment for a customer of an instrument to which this section applies; or*

(b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself;

and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.

Section 4(2) confirms the applicability of section (1) to cheques.

[57] The Court's analysis of the duty of care as owed by the Defendant in the **Marfani Case** (supra) to prevent and or investigate the opening of fraudulent account, was based in part on the special factual matrix of that case and for that reason the case did not prove to be of much assistance to me.

[58] Learned Queen's Counsel referred the Court to page 11 of the case of ***Tai Hing Cotton Mill Limited v Liu Hing Bank Limited and others*** Privy Council Appeal No. 41 of 1984, where the Privy Council confirmed that the relationship between banker and customer is a matter of contract. The Court also reviewed what it described as the classic, though not necessarily exhaustive, analysis of the incidents of the contract as found in the judgment of Atkins L.J. in ***Joachimson v Swiss Bank Corporation*** [1921] 3 K.B. 110 at page 127. I do not find it necessary to reproduce those obligations here because the point must be reinforced that the Agreement was for the provision of very limited services. Accordingly the rights and obligations of the parties are consequently different from what they would be in the general banker-customer case involving, for example, the bank encashing a forged cheque drawn on its customer's account at that bank.

Conclusions and disposal

[59] For purposes of the restitutionary claim the Court finds that the Defendant did receive the benefit of the proceeds of the Cheque and was enriched by the receipt of the said proceeds at the expense of the Claimant. The Court also finds that in all the circumstances it would be unjust to allow the Defendant to retain that benefit.

[60] The Court also finds that the Claimant would be entitled to succeed on the alternative claim of breach of statutory duty arising from the failure of the Defendant to compensate the Claimant for the dishonoured Cheque or the Replacement Cheque, since the Claimant was a holder for value.

[61] As it relates to the Ancillary Claim, the Agreement between the Claimant and the Defendant was that the Claimant would make a cheque payable to the Claimant drawn on the Defendant's account at NCB's Spanish Town Branch and the Claimant would expedite the encashment of such a cheque and pay the proceeds in cash to the Defendant.

[62] The Court's conclusions in respect of the Ancillary Claim are founded on a number of findings of fact including but not limited to the finding that Ms Brown was an agent of the Defendant entitled to enter into the Agreement and that there is insufficient evidence of Ms Brown having misappropriated the proceeds of the Cheque.

[63] Because of the scope of the obligations of the Ancillary Defendant arising from the Agreement as the Court has found it to be, the Court also finds that the Claimant did not have a duty to first check with any of the directors or officers of the Defendant to ensure that the NCB Account had adequate funds to cover the Cheque. The Court finds that in all the circumstances the Ancillary Defendant did not breach any duty of care it owed to the Ancillary Claimant which resulted in it suffering damages. Accordingly the Court finds that on a balance of probabilities the Ancillary claim for Negligence fails.

[64] The Court also finds that having regard to the scope of the Agreement as the Court has found it, the Ancillary Defendant is not in breach of the Agreement and accordingly the Court finds on a balance of probabilities that the Ancillary claim for breach of contract also fails.

The Interest issue

[65] The Claimant has claimed interest from 3rd May, 2007 to 6th November, 2012 in the sum of Six Million Seven Hundred and Forty-six Dollars Three Hundred and Eighty-one Dollars ($6,746,381.00) plus interest at a rate of nineteen point five (19.75 %) per annum on the sum of Six Million One Hundred and Ninety-three Thousand Two Hundred and Seventy-six Dollars ($6,193,276.00) from 3rd May 2007. The Claimant's witness Mr Johns confirms that the base lending rate offered by the Bank of Jamaica "*at the material time*" in 2007 was 19.75%. In cross examination Mr Johns conceded that he does not know what it was afterwards in 2009, 2010, 2011, 2012 *etc*.

[66] In the Court of Appeal decision of ***British Caribbean Insurance Company Limited v Delbert Perrier*** SCCA No. 114/94 it was held that it is open to the Court to award interest to a successful claimant in matters of commerce. In the **Perrier** case, Carey JA expressed the view that the issue was not subject to debate and said at page 16 of the Judgment:

> *"I do not think it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld".*

Carey JA referred to the statement of Forbes J in ***Tate & Lyle Food Distribution Ltd. V Greater London Council & Anor*** [1981] 3 All ER 716 as to the basis for awarding interest at page 722 as follows:

> *"Despite the way in which Lord Herschell LC in* ***London, Chatham and Dover Railway Co v. South Eastern Railway Co.*** *[1893] AC 429 at 437 stated the principle governing the award of interest on damages, I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognised is that it is all part of the attempt to achieve restitution in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one*

> *should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates, the correct thing to do is to take the rate at which plaintiffs in general could borrow money."*

[67] For the avoidance of doubt, I wish to expressly state that the Court is not having any regard to the special position of the Claimant and the fact that it may have access to its depositors' funds upon which it pays low interest. However considering the length of time under consideration and the changes which would have occurred over time to the Bank of Jamaica's Base lending rate, it would be, in the Court's view, inaccurate and unjust, to rely on the single rate as prayed for by the Claimant without additional evidence. The Claimant has submitted that in the alternative the Court awards the judgment rate. The **Law reform (Miscellaneous Provisions) Act** section 3 empowers the Court to make an award of interest at the rate it thinks fit between the date the cause of action arose and the date of Judgment. In the circumstances of this case the Court finds that simple interest at the rate of 3% per annum from 3rd May 2007 to the date of judgment would adequately compensate the Claimant and accordingly the Court makes that award.

[68] In the premises and for the reasons given herein the Court makes the following orders:

1. Judgment in favour of the Claimant in the sum of $6,193,276.00 plus interest at the rate of 3% per annum from 3rd May 2007

2. Judgment for the Ancillary Defendant on the Ancillary Claim.

3. Costs of the Claim and Ancillary Claim to the Claimant/Ancillary Defendant to be taxed if not agreed