JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 9 & 19/05

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A (Ag.)

SUPREME COURT CIVIL APPEAL NO: 9/05

BETWEEN	EAGLE MERCHANT BANK OF JAMAICA LTD	APPELLANT
AND	LETS LTD	RESPONDENT

SUPREME COURT CIVIL APPEAL NO: 19/05

BETWEEN	LETS LTD	APPELLANT
AND	RBTT BANK JAMAICA LTD	1ST RESPONDENT
AND	NATIONAL COMMERCIAL BANK JAMAICA LTD	2ND RESPONDENT

Civil Appeal No. 9/05
Dave Garcia & Miss Ky-Ann Lee, instructed by Myers, Fletcher & Gordon for the appellant - Eagle Merchant Bank

Dr. Lloyd Barnett & André Earle, instructed by Rattray Patterson Rattray for the respondent - Lets Ltd

Civil Appeal No. 19/05
Dr. Lloyd Barnett & André Earle, instructed by Rattray Patterson Rattray for the appellant - Lets Ltd

Mrs. Sandra Minott Phillips & Gavin Goffe, instructed by Myers, Fletcher & Gordon for the 1st respondent - RBTT Bank Jamaica Ltd

Dennis Morrison, Q.C., & Laurence Jones, instructed by Dunn Cox for the 2nd respondent - National Commercial Bank Jamaica Ltd

29th, 30th, 31st, January; 1st, 2nd February 2007
& February 22, 2008

HARRISON, P.

This is a consolidated appeal from the judgment of Marsh, J., on 9th December 2004. In Suit No. C.L. 1998/L.09 (Civil Appeal no. 9/05) he entered judgment for the claimant (Lets Ltd) against the defendant (Eagle Merchant Bank of Jamaica Ltd) in the sum of $33,350,000.00 (JA.) with interest from 14th April 1997 to the date of judgment at the rate of 18.60% per annum with costs to the claimant to be agreed or taxed. In suit no. L.07 and L.04 (Civil Appeal no. 19/05) judgment was entered (a) for the defendant National Commercial Bank Jamaica Ltd ("NCB") with costs to defendant to be agreed or taxed and (b) for the defendant Eagle Commercial Bank/RBTT Bank Jamaica Ltd with costs to defendant to be agreed or taxed.

I have read the draft judgment of my brother Dukharan, J.A. (Ag.) and I agree with his reasoning and conclusion. These are my comments.

Eagle Merchant Bank of Jamaica Ltd ("EMB") is a merchant bank authorized to conduct the business of banking including the acceptance of monies for investment and the conduct of foreign currency transactions.

Lets Ltd ("Lets") is a company incorporated in Jamaica and licensed under the Bank of Jamaica Act to operate as a cambio dealing in the buying and selling of foreign currency instruments and transactions. Lets Investment Company Ltd ("Lets Investment") a company incorporated in Jamaica is owned and controlled

by the shareholders and directors of Lets. Both companies operate from the same office.

In 1996, Lets, through its managing director Mrs. Dorothy Marzouca, entered into an agreement with Mrs. Georgiana Kerr-Jarrett, the then manager of EMB at its Montego Bay branch. The terms of the agreement were that EMB would send to Lets foreign currency cheques or other investments, for sale at an agreed rate of exchange. In return Lets would send to EMB, the equivalent amount in Jamaican dollars. A further condition was that EMB would hold the Jamaican dollar funds, and not make payments therefrom until Lets had informed EMB, that the foreign currency cheques or instruments had been cleared or paid. Mrs. Kerr-Jarrett assured Lets that the persons, on whose behalf they submitted the foreign currency items, had the necessary funds and were reliable.

Donovan Hunter, the successor to Mrs. Kerr-Jarrett in 1997 as manager of EMB, had a similar agreement continuing with Lets and gave to Lets similar assurances.

On 28th April 1997 two (2) U.S. dollar cheques dated 28th April 1997 each for US$475,075.61 payable to Lets Investment Ltd, were sent to Lets Ltd by Hunter, the then manager of EMB, pursuant to the said agreement. These cheques were drawn on Merrill Lynch Bank One, the account of Transact Resources Group/James Ogle/Marina Ogle.

Hunter assured Mrs. Marzouca of Lets Ltd that the drawers were reputable and reliable, had equivalent necessary funds in their account and that EMB would hold the Jamaican dollar equivalent against the uncleared US dollar cheques. These assurances were later confirmed in letter dated 28th April 1997.

Lets in pursuance of the agreement and relying on the assurances, sent to EMB four (4) cheques, in Jamaican currency, totalling $33,350,000.00 payable to James Ogle, as instructed by Hunter. These cheques were the equivalent of the US dollar cheques totalling US$950,151.22, and were drawn on Lets' bankers, NCB.

Hunter also told Lets that the EMB account was in the name of James Ogle.

On 16th May 1997 Lets was advised by its bankers, NCB that the said two US dollar cheques, lodged to its account had been returned unpaid due to "insufficient funds." Lets advised Hunter, who advised Lets that funds were available and were being lodged. On 21st May 1997 the requisite amount of US dollar cheques were lodged to Lets' account at NCB; payment on these cheques were later stopped.

Lets never received the US dollar sums nor a refund of the equivalent sum of Jamaican $33,350,000.00.

Lets' four cheques were stamped with the stamp of EMB and lodged to the latter's account with ECB. The said cheques were not endorsed by the payee

"James Ogle." They were however paid by NCB, and Lets' account debited in the sum of $33,350,000.00.

Lets commenced proceedings against –

(1) EMB for damages for breach of contract, and in the alternative for breach of trust and for loss and expenses.

(2) ECB (RBTT) for negligence and the sum of $33,350,000.00 and

(3) NCB, a declaration that it had wrongly debited Lets' account, a return of the said $33,350,000.00 and damages.

A merchant bank authorized and licensed in Jamaica to carry on banking business, including the acceptance of monies from clients, may also be authorized to engage in foreign currency transactions on behalf of such clients.

The manager of such an institution, to all outward appearances, would be seen as having the authority to conduct such transactions on its behalf. The course of conduct of the principal would be sufficient to portray that an agent has such authority to act, although he had "no such actual authority". The author in ***Bowstead and Reynolds on Agency,*** paragraph 8-013 said,

> "Where a person, by words or conduct, represents or permits it to be representated that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."

Although actual authority may exist, relying on an evidential basis, an apparent or ostensible authority, may be inferred from the course of conduct of

the parties. Diplock, L.J. (as he then was) in ***Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd*** [1964] 2 Q.B. 480, at page 503 said,

> "An 'apparent' or 'ostensible' authority ... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

This is moreso where the course of dealings between the parties covers a period of years and involves numerous substantial transactions of a similar nature as that in question.

Wrongdoing on the part of the employee/agent does not absolve the principal, if such acts are regarded as committed during the course of employment. In ***Lloyd v Grace, Smith & Co.*** [1911-13] All ER Rep. 51, a solicitor was found to be liable to a client, in circumstances where the former's managing clerk committed fraud by misappropriating the client's freehold property, in the course of his employment. Similarly, in ***Thompson v Bell***

[1854] 10 Exch 10; 156 ER 334, the bank was held responsible to the plaintiff, who on the advice of its manager, paid over money to the bank as the purchase price for two houses, which the manager represented that the bank held, as mortgagee. The manager absconded with the money. He was regarded as an agent of the bank conducting the business of the bank, albeit fraudulently.

Consequently, a person holding out another, that the latter has the authority to do certain acts normally done in a business, such person cannot, at the same time, place a secret limitation on the authority and thereby deprive him the agent of that authority. (See ***Edmund v Bushell et al*** [1865] L.R. 1 Q.B. 97). Some notice limiting such authority would have had to be given, in order to notify third parties of the limitation to such authority.

A merchant bank, under the provisions of the Financial Institutions Act may take deposits in its ordinary course of business. A "deposit" is defined in section 2 of the Act as -

> "... a sum of money paid on terms –
>
> (a) under which the sum will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it; and
>
> (b) which are not referable to the provision of property or services or to the giving of security, and for the purposes of this paragraph, money is paid on terms which are referable to the provision of property or services or to the giving of security ..."

This definition of the functions of the bank is wide enough to include, and does not exclude, transactions concerning dealings in foreign currency cheques or other instruments.

In the instant case the appellant EMB accepted the two foreign currency cheques nos. 119 & 110 each for US$475,075.61 dated 28th April 1997 drawn on Merrill Lynch Bank One in favour of Lets Investments Ltd, on deposit, from Transact Resources Corp/James Ogle/Marina Ogle. These cheques were to be sold for the equivalent in Jamaican dollars. EMB contacted Lets not Lets Investment Ltd., and sent to Dorothy Marzouca, the managing director of Lets, the said two foreign currency cheques. She said, in her witness statement dated 30th June 2003, at page 176 of the record:

> "Mr. Hunter assured me that he would hold the Jamaican dollar equivalent to the said US dollar cheques, as EMB had the necessary client funds and that the US dollar cheques were good. Due to the size of the cheques, I asked him to confirm in writing EMB's position as he represented it to me."

Donovan Hunter, sent to Mrs. Marzouca, as a consequence, letter dated 28th April 1997. It reads:

> "Lets Ltd Cambio
> 14 Market Street
> Montego Bay
>
> Attention: **Miss Dorothy Marzouca**
>
> Dear Sirs
>
> We confirm that Eagle Merchant Bank is holding client funds in excess of Thirty Three Million Dollars ($33,000,000.00) to the order of Lets Ltd Cambio. This

> is being held in order to facilitate the sale of two cheques from Tranact Resources Corp to Lets Ltd Cambio. These cheques are Merrill Lynch Bank One and are numbered 109 and 110 for Four Hundred Seventy Five thousand and Seventy Five United States Dollars and Sixty One Cents (US$475,075.61), being a total of Nine Hundred Fifty Thousand One Hundred and Fifty One United States Dollars and Twenty two Cents (US$950,151.22).
>
> It is understood that Eagle Merchant Bank will not release these funds unless Lets Ltd Cambio provides written confirmation to Eagle Merchant Bank Ltd that the United States Dollar cheques detailed above have cleared.
>
> Yours truly
> EAGLE MERCHANT BANK OF JAMAICA LTD
>
> Donovan St. A Hunter
> Manager

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It was argued that the learned trial judge was in error to find that the managers Georgiana Kerr-Jarrett and Donovan Hunter had the authority to enter into the said agreement and to give the said assurances and that Hunter had actual authority to do so. There was no enforceable agreement and Lets suffered no loss.

Both Kerr-Jarrett and Hunter, having been placed as branch managers of EMB had the authority to conduct the business of the bank, including foreign currency transactions. James Ogle, the payee of Lets' four cheques, was a customer of and operated an account with EMB at its Montego Bay Branch.

EMB, as Ogle's banker, would have sent the two foreign currency cheques of US$475,075.61 each, on Ogle's behalf, in exchange for the Jamaican currency equivalent of $33,350,000.00 from Lets. Lets was bound to submit to EMB the latter sum having received the foreign currency cheques. This was a valid and enforceable agreement.

The evidence of Keith Senior, former managing director on behalf of EMB confirms that such transactions, such as the said arrangement and assurances, were authorized by EMB, albeit, not orally, but in writing. Having been shown the assurance letter dated 28th April 1997 at page 409 of the record, he said in cross-examination,

> "I would agree that this letter contains an assurance.
>
> During period I was at EMB Ltd. the institution would not give an assurance such as this orally.
>
> If such an assurance obtained and assurance, given, two individuals would have been required to sign it.
>
> I did not give approval here – it came to my approval subsequently.
>
> I have been employed to BNS Jamaica Ltd. and to JN Fund Managers.
>
> To the best of my knowledge none of those institutions would have given an assurance in writing of such as this orally." (Emphasis added)

Although the evidence of Senior describes the specific format of the assurance usually given third persons dealing with EMB could assume that the

said managers Kerr-Jarrett and Hunter had apparent authority to give such an assurance.

There was no denial that it was within their authority to receive foreign currency cheques for the purpose of sale and conversion in exchange for Jamaican currency.

The evidence, contained in the witness statement of Dorothy Marzouca dated 30th June 2003, exhibits a statement of transactions between Lets and EMB concerned with foreign currency transactions, embracing a period from 26th January 1996 to 28th April 1997. In view of these several transactions between Lets and EMB, involving various payee of foreign currency instruments, EMB must have been aware of the existence of these numerous transactions, including the less than modest payments of sums of $25,166,137.50 and $28,552,500 by Lets in favour of James Ogle on 14th April 1997 and 24th April 1997, respectively. The learned trial judge was accordingly not incorrect to infer that EMB acquiesced in, and conferred "actual" authority on its said managers to effect the transaction in issue.

Furthermore, when EMB received the said four (4) cheques from Lets, on the agreed understanding that EMB would hold them until the foreign currency cheques from Transact Resources Group/Ogle and Ogle were cleared, and being aware that the latter cheques were dishonoured, EMB held Lets' four (4) cheques as constructive trustee in favour of Lets. The ordinary implied agreement between banker and customer is one of lender and borrower (***Joachimson v***

Swiss Bank Corp) [1921] 3 KB 110). This relationship precludes the existence of the concept of trust. However, in the instant case, Lets was not in a relationship as a customer of EMB. The constructive trust is one that is inferred from construing the facts of the case, and which the courts may impose on a person in the interests of conscience and justice. A fiduciary relationship may arise in such circumstances. No formal legal trust is contemplated. In ***Reading v The Attorney General*** [1951] A.C. 507, a soldier who, wearing his army uniform, assisted smugglers of goods to escape police searches in Egypt, was held to hold the money he received in illegal payments, on trust for the Crown.

A cheque which, as a bill of exchange, (section 73 of the Bills of Exchange Act) is an unconditional order to the bank on which it is drawn, to pay. Section 3 of the said Act reads,

> "**3.** 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 in money to or to the order of a specified person, or to bearer."

As between Lets, the payee James Ogle and NCB, the four cheques were governed by the provisions of section 3. However, as between Lets and EMB, the agreed stipulation that EMB was required to hold the said cheques on condition of the clearance of the foreign currency cheques, imposed that duty on EMB. The latter cheques not having been honoured, EMB held the said cheques as constructive trustee for Lets.

Counsel for Lets argued before this Court that the evidence against Hunter, if a servant or agent of EMB, supported the existence of the constructive trust . I find virtue in the point of view. This may be inferred from the facts. Rule 1.16(4) of the Court of Appeal permits such an inference. It reads:

> "The court may draw any inference of fact which it considers is justified on the evidence."

The learned judge was correct to find EMB liable to Lets. EMB is liable both in breach of contract and as constructive trustee for the benefit of Lets.

On the face of it, the confidentiality provisions of section 44(1) of the Financial Institutions Act would have been breached by EMB, by the letter of 28th April 1997 in respect of its customer James Ogle. However, no breach is committed if permission to disclose is given in writing by the customer (paragraph (b) of the Fourth Schedule to the Act,) "... the circumstances are such that it is in the interests of the licensee that the information be disclosed" (paragraph (k) of the said Schedule).

No evidence was given by James Ogle nor of any written permission. However, such an assurance by EMB would make Ogle's foreign currency cheques more readily acceptable in a sale by EMB to a prospective purchaser thereof.

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In respect of the finding that ECB/RBTT was not liable to Lets, I agree with the finding of Marsh, J. James Ogle, as payee of the four cheques, was the ultimate recipient. Section 3 of the Bills of Exchange Act governed the said

cheques. It was the release by EMB, despite the absence of the condition of the agreed prior clearance of the foreign exchange cheques, which was the proximate cause of the loss to Lets. The latter paid out its cheques amounting to $33,350,000.00 and received no foreign currency equivalent in return. In any event the uncontradicted evidence of Keith Senior, in cross-examination, page 412 of the record, was,

> "These cheques were not credited to the account of EMB but to the account of James Ogle who maintained an account on EMB Ltd ... Proceeds of cheques placed in James Ogle's account."

Furthermore, NCB, as the paying bank for the said four cheques drawn by Lets on its account clearly acted within its mandate, without any knowledge of any irregularity to put it on notice. No liability therefore existed on its part in favour of Lets.

The appeals against the judgment of Marsh, J., should be dismissed.

HARRISON, J.A.

I have read in draft the judgment of Harrison, P., and Dukharan, J.A. (Ag.) and agree with their reasoning and conclusions. I have nothing to add.

DUKHARAN, J.A. (Ag)

This is a consolidated appeal arising from the judgment of Marsh J on the 9th December, 2004 giving judgment for the respondents in both matters.

Background

The appellant, Eagle Merchant Bank of Jamaica Ltd. (EMB) was a merchant bank duly incorporated in Jamaica under the Bank of Jamaica Act and was authorized to, and carried on banking business which included the acceptance of money from clients for investment and the conduct of foreign exchange transactions.

The respondent, Lets Limited is also a company duly incorporated in Jamaica and licenced to operate as a Cambio dealing in the buying and selling of foreign currency. Lets Investments Limited is also a company incorporated in Jamaica and is owned and controlled by the shareholders and directors of the respondent Lets Limited and operates from the same office.

In the month of February, 1996, the Respondent Lets Limited entered into an agreement with EMB through its respective managers of the Montego Bay branch, Mrs. Georgina Kerr-Jarrett and then Mr. Donovan Hunter. By this agreement EMB was to submit to the Respondent foreign currency cheques or instruments for conversion into Jamaican dollars at a negotiated rate of

exchange. The Respondent would send to EMB the agreed Jamaican dollar funds. The bank would hold the local funds on deposit making payments therefrom when the cheques sent to the Respondent for conversion had been cleared or paid. Sometimes EMB would send the foreign exchange cheques intended for the respondent in the name of Lets Investments Ltd. which would accept it on the Respondent's behalf. Both Respondent and Lets Investments Ltd. are members of the same group of companies.

EMB through Mrs. Kerr-Jarrett and subsequently Mr. Hunter represented to the Respondent that the clients on whose behalf the foreign exchange cheques were to be submitted to the Respondent for conversion were reputable and reliable.

On the basis of the assurances given by EMB to the respondent, several transactions were effected between February, 1996 and April, 1997. It is one of these such transactions which has resulted in this appeal.

On the 28th April, 1997, pursuant to the agreement, two (2) U.S cheques drawn on Merrill Lynch Bank in the U.S.A. both dated 28th April, 1997 each for U.S$475,075.61 from Transact Resources Corporation/James Ogle/Marina Ogle in favour of Lets Investment Ltd. were delivered by Donovan Hunter on behalf of EMB to the Respondent for conversion.

By letter dated 28th April, 1997, Donovan Hunter advised Lets Limited Cambio assuring Mrs. Dorothy Marzouca (The Managing Director of Lets) that EMB would hold "funds" in excess of $33,000,000. 00. to the order of Lets Limited Cambio so as to "facilitate the sale of two cheques from Transact Resources Corporation to Lets Limited Cambio and to provide written confirmation to EMB that the US Dollar cheques detailed above have been cleared."

Lets Limited Cambio drew and delivered to Mr. Donovan Hunter four (4) National Commercial Bank (NCB) cheques made payable to James Ogle. Those cheques represented the equivalent of the US dollar cheques. The four (4) NCB cheques were deposited by EMB to an EMB account held at the Montego Bay branch of Eagle Commercial Bank (ECB). EMB through its manager Donovan Hunter drew one cheque in the sum of $33,350,308.50 made payable to James Ogle. The said cheque was received by the Montego Bay branch of NCB i.e. the same bank on which Lets Limited drew the cheque for $33,350,308.50. From that cheque $33,176,159.80 was placed in an overnight "call account" in the name of James Ogle. The balance of $174,148.70 was used to purchase £3,100 and deposited in the name of UTS Tours at the said NCB branch.

On the 29th April, 1997, the sum of $33,176,159.80 which was deposited in the name of James Ogle was transferred by way of telegraphic transfer to

Money Traders Ltd. account at the NCB New Kingston Branch. From this account the $33,176,159.80 was dissipated.

Lets Limited filed actions against EMB, ECB, (Union Bank) (RBTT) and NCB on different dates. The actions were consolidated. The claim against EMB was for damages, for breach of trust and/or damages for loss and expenses caused by the negligent mis-statements of EMB, its servant, or agent on or about the 28th April, 1997.

The claim against NCB was for the sum of $33,350,000 and the difference between the US dollar equivalent of the said sum on the 28th April, 1997 and at the time of the repayment by NCB to Lets, being the damages suffered by Lets as a result of the negligence and or breach of contract of NCB in negotiating and or paying for cheques drawn by Lets on its account with NCB.

The claim against RBTT Bank was for negligence and damages in that RBTT Bank accepted the four cheques made payable by Lets to EMB's credit at ECB.

In the claim against EMB Marsh J, found that EMB through its manager, Donovan Hunter, had the authority to enter into the kind of agreement that he was alleged to have entered into and that there was a representation by Mr. Hunter that he had the authority to enter on behalf of his employer into a contract of the kind sought to be enforced by Lets. He further held that this

representation was made by someone who had "actual" authority to manage the business of the bank in respect to those matters to which the contract relates. He gave judgment in favour of the Respondent Lets Ltd. in the amount of J$33,350,000 with interest.

With regard to the claim against (ECB), RBTT Bank, Marsh J, found that (ECB) RBTT was not negligent and gave judgment for RBTT. In the claim against NCB, Marsh J, found that NCB was not liable for the loss suffered by Lets Limited and gave judgment for NCB with costs.

The appellant, EMB having appealed the decision of Marsh J, filed the following grounds of appeal:

Grounds of Appeal

"(a) The Learned Trial Judge erred in finding that Mrs. Georgina Kerr - Jarrett and Mr. Donovan Hunter had the authority to enter into the agreement alleged or give the assurance alleged.

(b) The Learned Trial Judge erred in relying on a letter dated April 28, 1997 from Mr. Hunter as evidence of the alleged agreement between the Appellant and the Respondent.

(c) The Learned Trial Judge erred in finding that Mr. Hunter had actual authority to manage the business of the Appellant in respect of those matters to which the alleged contract related in the absence of any evidence to that effect other than Mr. Hunter's representation.

(d) The Learned Trial Judge erred in finding that there was an enforceable agreement between the Appellant and Respondent whereby the Appellant would submit to the Respondent foreign exchange cheques and in return the Respondent would send the Appellant the Jamaican dollar equivalent, notwithstanding the absence of evidence of consideration for the said agreement.

(e) That the Learned Trial Judge erred in awarding the Respondent the sum of J$33,350,000 plus interest in the absence of proof that the respondent suffered any loss or any loss for which the appellant was liable."

The following orders are being sought:

"(a) That the judgment in favour of the Respondent made on the 9th December, 2004 be set aside.

(b) That the costs of this appeal and of the proceedings below be awarded to the appellant".

The grounds of appeal filed by Let's Ltd. with respect to Eagle Commercial Bank/RBTT (1st Respondent) are as follows:

(1) The Learned Trial Judge erred in holding that ECB/RBTT owed no duty of care to Lets Limited;

(2) The Learned Trial Judge erred in holding that the drawer of the cheques has no legal ground of complaint where the bank permits the negotiation of the cheque without the signature of the payee designated by the drawer;

(3) The Learned Trial Judge erred in holding that the loss suffered by Lets Ltd. would not have occurred if ECB/RBTT had accepted the cheques for lodgment or that Lets Ltd. loss was not due to negligence on the part of ECB/RBTT.

With respect to National Commercial Bank the grounds of appeal are as follows:

(1) The Learned Trial Judge wrongly failed to find that NCB acted in disobedience of the mandate and had no authority to pay on the basis of the bank stamp of ECB/RBTT or "EMB".

(2) The Learned Trial Judge erred in failing to find that NCB by its mandate was obliged to pay James Ogle or on his written instructions and did not comply with this mandate by acting solely on the stamp of ECB /RBTT or EMB.

(3) The Learned Trial Judge erred in failing to hold that the placing of the proceeds of the cheques in an account in respect of which there was no order or written instructions was negligent, particularly as the amounts of the cheques were quite substantial.

(4) The Learned Trial Judge erred in holding that it is unlikely that the sums could have been lodged to Ogle's account without his knowledge, consent or authority in view of the role being played by Donovan Hunter and the absence of any need for authority in the lodging of cheques to an account.

The order sought is as follows:

> That Lets Ltd. appeal be allowed in respect of those parts of the judgment of Marsh J which gave or entered judgment for the defendants, National Commercial Bank Jamaica Ltd. and RBTT Bank Jamaica Ltd. and that those parts of the said judgment be set aside and judgment entered on the Claimant's claim against the said Defendants/Respondents with costs to be agreed or taxed.

Submissions in Appeal No. 9/2005

Mr. Garcia, for the appellant EMB, submitted in ground D, that there was no enforceable agreement between the Appellant and the Respondent for two reasons. Firstly, that there was no evidence of any consideration given by the Respondent to the Appellant as would be necessary for there to be a binding contract between them. Secondly, that the Respondent's branch manager did not have the authority to enter into an agreement of the type alleged on behalf

of the Appellant. Mr. Garcia contended that it was a private arrangement between Mrs. Kerr-Jarrett and Mr. Hunter. He said there was no evidence of any fee charged for this service. Consequently, in the absence of evidence as to valuable consideration there was no valid and enforceable contract between the Appellant and the Respondent.

In ground c, Mr. Garcia submitted that the Learned Trial Judge was wrong in finding that Donovan Hunter had "actual" authority to manage the business of the Appellant in respect of the contract sought to be enforced by the Respondent. He argued that the onus was on the Respondent to establish the authority of the agent. He relied on ***Bowstead and Reynolds on Agency*** 2006 at para. 3-003 which reads:

> "Actual authority is the authority which the principal has given the agent wholly or in part by means of words or writing (called here express authority) or is regarded by the law as having been given to him because of the interpretation put by the law on the relationship and dealings of the two parties (called here implied authority)."

He further submitted that the Respondent has not provided any evidence of any consideration between the Appellant and its branch managers conferring actual authority as would have been necessary for the Respondent to show that its bank managers had the express authority to enter into agreements and make assurances of the nature described. As such, there was no evidence of any express authority for either Mrs. Kerr-Jarrett or Mr. Hunter to have acted as the

respondents suggested they did. He referred to ***Wright v Glyn*** [1902]1K.B. 748.

In ground a, Mr. Garcia submitted that if this court were to find that Mr. Hunter did not have actual authority to act as he did, it will be necessary also to consider whether he had apparent authority to do so. He also submitted that the respondent was seeking to rely on the agents that they had such authority and this cannot create an apparent authority unless the Appellant instigated or permitted it. He relied on ***Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal and Another*** [1964]1 All ER 630, where Diplock L.J. said at page 645:

> "Where the agent on whose apparent authority the contractor relies has no 'actual' authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely on the agent's own representation as to his actual authority. He can only rely on a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates."

Mr. Garcia further submitted that the representation must come from the principal and not from the agent himself. He said there was no such evidence of any such representation by the Appellant or anyone having actual authority to do so that was adduced by the respondent before the Learned Trial Judge.

In sum, he submitted that the Learned Trial Judge erred in finding that Mrs. Kerr-Jarrett and Mr. Hunter had apparent ostensible authority to enter into

the kind of contract alleged. This was not the kind of agreement which a branch manager would give in the normal course of his or her duties.

In ground b, Mr. Garcia made reference to a branch manager's legal obligations and cited Section 44(1) of the Financial Institutions Act which provides for an obligation of confidentiality. Under that provision it is an offence for an official of a licenced financial institution such as the Appellant to "give, divulge or reveal any information regarding the money or other relevant particulars of the account of that customer." The letter of the 28th April, 1997, gives information regarding the money held by the Appellant for its customer James Ogle. The first sentence of that letter states: "we confirm that Eagle Merchant Bank is holding client funds in excess of $33,000,000 to the order of Lets Ltd. Cambio." This Mr. Garcia submits would contravene Section 44(1) of the Act. The essence of the arrangement was based on an assurance that could not have been lawfully given.

In ground e, Mr. Garcia submitted that the respondent suffered no loss for which it could properly recover against the appellant. The respondents drew four cheques totaling $33,350,000 payable to James Ogle and delivered the cheques to the appellant as the banker of Mr. Ogle. Since the cheques were made payable to the order of James Ogle, it was the submission of Mr. Garcia that no right of action by the Respondent would have existed.

Dr. Barnett for the Respondent Let's Limited submitted in Ground D that it was a mutually entered agreement between the parties with the parties undertaking mutual obligations. Based on the assurances given to the Respondent, the Respondent and the Appellant conducted several transactions between 1996 and 1997. This he said has not been controverted. He submitted that from such consistent conduct between the parties, the existence of an agreement can readily be inferred. He referred to the case of ***Shanklin Pier Ltd. v.Detel Products Ltd.*** [1951] 2All ER.127.

In grounds a and c, Dr. Barnett submitted that by appointing Mrs. Kerr-Jarrett and Mr. Hunter as Managers of its branch without any superior officer at the Branch, the appellant gave them the authority to enter into foreign exchange transactions for the Bank and represented that they had the authority to deal with all things incidental to the transactions they were authorized to conduct.

He submitted that the normal business at the appellant's bank at its Montego Bay branch included foreign exchange transactions and that no evidence has been given in contradiction of that basic fact. He further submitted that there was no evidence given to suggest that Mrs. Kerr-Jarrett or Mr. Hunter as managers conducting business at that branch of the bank were not authorized to enter into those transactions. In relation to the Appellants amended defence, Dr. Barnett submitted that there was no allegation that the agreement pleaded by the Respondent in their further amended Statement of Claim was made without authority. The denial of authority on the part of Mrs. Kerr-Jarrett and

Mr. Hunter related to the giving of the assurance regarding the credit worthiness of the Bank's customers and the agreement that the Jamaican dollars would be held on deposit until foreign exchange instruments had been paid or cleared. Dr. Barnett referred to ***Bowstead and Reynolds on Agency*** para 8-013. Dr. Barnett also referred the Court to the cases of ***Freeman and Locker v Buckhurst*** (supra) ***Edmund v Bushell and Jones*** [1865] L.R. 1Q.B. 97, ***Thompson v Bell*** [1854] 10 Exch. 10, ***Ebeed v Soplex Wholesale Supplies Ltd. et al*** 1985 BCLC 404.

In response to ground b, Dr. Barnett submitted that section 44(1) of the Financial Institutions Act has no relevance to this matter. He submitted that the letter of the 28th April, 1997 is saying that these persons are financially reliable and are persons of substance and does not purport to say anything about an account held by the Bank. He further submitted that the letter of the 28th April, 1997 was a part of the course of dealings between the parties and the learned trial judge was correct in relying on the letter as evidence of the agreement between the parties.

In ground e, Dr. Barnett submitted that there was no challenge to the fact that the Respondent suffered a loss of over $33,000,000. He said Mr. Hunter acting as the Appellant's servant and as the person in charge of its branch, received the four cheques drawn on the Respondent's account and misappropriated their proceeds. This he said, was in breach of the Bank's

fiduciary duty to the Respondent and the fact that he misappropriated the funds for his own benefit would not absolve his employer EMB from liability. Dr. Barnett further submitted that it was irrelevant that the cheques were made payable to Lets Investments Ltd. because there was no opportunity for those cheques to have been transferred with any value to Lets Limited. He referred the Court to the cases of **Thompson *v Bell*** [supra] ***Nelson v Larholt*** [1947] 2 All E.R. 751 and the Bills of Exchange Act.

The Issues

The issues to be determined are:

(1) Whether the Learned Trial Judge was correct in finding that there was an enforceable agreement between the Respondent and the Appellant applicable to the transaction of April 28, 1997.

(2) Whether the Learned Trial Judge was right in finding that Georgia Kerr-Jarrett and/or Donovan Hunter had apparent authority to enter into the type of agreement they were alleged to have entered into and in particular the arrangement and representations alleged in relation to the two cheques of the 28th April, 1997 for US$475,075.61 each and the four cheques of the same date for J$8,337,577.13 each.

(3) Whether the Trial Judge erred in finding that Donovan Hunter had actual authority as agent of the Respondent to manage the business of the Appellant to which the alleged agreement related and in particular to make the assurances he is alleged to have made in relation to the transaction of the 28th April, 1997.

(4) Whether there was proof of loss suffered by the Respondent attributable to the actions of the Appellant sufficient to

> justify the trial judge awarding the Respondent the sum of $33,350,000 plus interest against the Appellant.

In relation to grounds b and d the issue is whether or not there was an enforceable agreement between the Respondent and the Appellant as it related to the transaction of the 28th April, 1997.

The evidence of Dorothy Marzouca, acting on behalf of the Respondents is that there was a long course of dealings over the period 1996 – 1997 with the managers of the Appellant's branch in Montego Bay. This has not been challenged. On the basis of assurances given by Mrs. Kerr-Jarrett and Mr. Hunter, several transactions were effected. A letter dated 28th April, 1997 from Mr. Hunter to the Respondent states:

> "We confirm that Eagle Merchant Bank is holding client funds in excess of $33,000,000 to the order of Lets Ltd. Cambio. This is being held in order to facilitate the sale of two cheques from Transact Resources Corporation to Lets Ltd. Cambio. These cheques are Merrill Lynch Bank and are numbered 109 and 110 for US$475,075.61 being a total of US$950,151.22."
>
> It is understood that Eagle Merchant Bank will not release these funds unless Lets Ltd. Cambio provides written confirmation to Eagle Merchant Bank Ltd. that the United States dollar cheques detailed above have cleared."

I am of the view that the existence of an agreement can be inferred from this letter and confirmed the Respondent's contention that an agreement existed. There is no merit in grounds b and d.

In grounds a and c the contention of the Appellant is that Mr. Hunter was acting without authority when he gave the undertaking and the assurances to the Respondent. What are the principles to be applied here? The author in ***Bowstead and Reynolds on Agency*** at para. 8-013 states:

> "Where a person by word or conduct represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent in the faith of any such representation to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."

And in ***Freeman and Lockyer*** (supra). Lord Diplock at p.644 said:

> "An 'apparent' or ostensible authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation made by the principal to the contractor, intended to be and in fact acted upon by the contractor that the agent has authority to enter on behalf of the principal into a contract of the kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation, but he must not purport to make the representation as principal himself. The representation when acted upon by the contractor, by entering into a contract with the agent operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had authority to enter into the contract."

The Appellant EMB was a bank authorized to and carried on banking business which included the conduct of foreign exchange transactions. Should a customer

of a bank who wishes to engage in foreign exchange transactions enquire from a bank manager whether or not he has authority to engage in such transactions? I would think not. In this case undertakings were given by Mrs. Kerr-Jarrett and Mr. Hunter as managers of the Appellant's bank. These are normal undertakings which the manager of a bank would conduct on behalf of his employers' bank. These are normal banking practices. There is evidence that there were representations by Mr. Hunter, by giving the assurances, that he had authority to enter on behalf of the Appellant into a contract sought to be enforced by the respondent.

It is interesting to note that Mr. Keith Senior who gave evidence as an expert for RBTT and who was formerly employed to the appellant's bank said that only the CEO or himself could have given the undertaking that Mr. Hunter gave to the respondent. However, there is no evidence to suggest that any such limitation on their authority was ever conveyed to the branch managers. As this would have been an internal arrangement of the Appellant's bank such arrangement was not conveyed to the Respondent.

In Edmunds v Bushell and Jones [supra] Cockburn, C.J. said at page 99:

> "In this case there ought to be no rule. The defendant carried on business both at Luton and in London. In London the business was carried on in the name of Bushell & Co. Jones at the same time employing Bushell as his manager; Bushell was

> therefore the agent of the defendant Jones, and Jones was the principal, but he held out Bushell as the principal and owner of the business. That being so, the case falls within the well-established principle, that if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority. It is clear, therefore, that Bushell must be taken to have had authority to do whatever was necessary as incidental to carrying on the business; ... and Bushell cannot be divested of the apparent authority as against third persons by a secret reservation."

I am of the view that the representation made by Mr. Hunter was made by someone who had 'actual' authority to manage the Appellants business as it related to the contract between the Appellant and the Respondent. There were a series of such transactions over a period of time and Mr. Hunter's superiors must have known of these transactions which involved millions of dollars. In my view Marsh, J was correct when he found that Mr. Hunter had 'actual' authority to do what he did. Grounds a and c therefore fail.

In ground e the issue was whether there was proof of the loss of $33,350,000.00 suffered by the Respondent. The evidence reveals that four cheques totaling that amount were received by the Appellant drawn on the Respondent's account. As part of the agreement the money was for the purpose of acquiring the foreign exchange that was agreed on. Mr. Hunter as manager and servant of the Appellant's bank received the four cheques and

misappropriated the proceeds. Who then is liable for the misappropriation of the funds?

In ***Thompson v Bell*** [supra] a local bank manager acting as agent for the bank, received money for the purpose of paying off a mortgage. The manager misappropriated the funds. It was held that he was acting within the scope of his apparent authority in receiving the money and must therefore be deemed to have been in custody of the bank. The bank was liable to account for it and to repay it.

The cheques in the instant case were put into the account of the Appellant based on an agreement. The Appellant had agreed to hold these cheques on deposits without making payments until the foreign exchange instruments had been cleared and/or paid. That contractual mandate was broken by the Appellant (through its agent Mr. Hunter) which resulted in loss to the Respondent whose account was debited to the extent of $33,350,000. The Appellant no longer held the funds which were in breach of the agreement.

In ***Nelson v Larholt*** [1947] 2 All ER 751 Denning J (as he then was) stated at page 752:

> "The relevant legal principles have been much developed in the last 35 years. A man's money is property which is protected by law. If it is taken from the rightful owner, or indeed from the beneficial owner, without his authority he can recover the amount from any person into whose hands it can be

> traced, unless and until it reaches, and who receives it in good faith and for value and without notice of the want of authority."

There was no written confirmation for the release of the funds as the US dollar cheques were not cleared.

In my view Marsh, J. was correct when he found for the respondent that they were entitled to judgment for the sum of $33,350,000 with interest.

Submissions in Appeal No. 19/2005

Dr. Barnett for the appellant Lets Limited submitted that whether ECB/RBTT owed a duty of care to Lets Limited can only be determined by the circumstances of this case. The four cheques drawn by Lets Limited had designated the payee without equivocation. EMB was ECB/RBTT's customer with a current account into which the cheques were lodged. EMB was not acting as a Banker but as an account holder. He further submitted that the expert evidence of Mr. Jeffrey Cobham is that where cheques are lodged to the account of a named payee those cheques would be accepted without the endorsement of the payee. He contended that EMB was lodging the cheques as a customer and not as a banker in placing its stamp on the back of the cheques. He submitted that since James Ogle, the payee did not endorse the cheques, ECB/RBTT should have had been put on guard and they needed to at least have made enquiries

particularly where large sums are involved. ECB/RBTT therefore owed a duty of care to Lets Limited.

Dr. Barnett submitted that the normal practice of bankers as reflected in Association of Kingston Clearing House Bankers Rules (Kingston Clearing House Rules) - is that the affixing of a crossing stamp of a collecting bank provides an indemnity to the paying bank against liability to the persons entitled to the cheque. It does not extinguish liability.

He submitted that the normal practice of bankers under the Rules is that endorsement of the payee is normally required for the negotiation of a cheque otherwise than by payment into the payee's own account. The absence of endorsement is a ground for refusing to accept a cheque. Dr. Barnett also referred to the Bills of Exchange Act and to the cases of ***Toronto Domino Bank v Dolphin Plains Credit Union Bank Ltd*** [1992] 98DLR (4th) 736 ***Bank Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*** [1997] 1L.R.C. 581, ***National Westminster Bank Ltd. v Barclay Bank International Ltd.*** [1975] A.C. 654.

In grounds 1 and 2, Mrs. Sandra Minott-Phillips for the 1st Respondent RBTT Bank Ltd. submitted that the 1st Respondent owed no duty of care to the Appellant in respect to the Jamaican dollar cheques as the Appellant having parted with the cheques was no longer the owner of the cheques. There was no contractual relationship of any kind between the Appellant and ECB whom the 1st

Respondent succeeds and therefore no basis in law to bring an action against ECB or the 1st Respondent. She further submitted that the claim against ECB was wholly misconceived as the only person who was entitled to bring an action against ECB was the named payee, James Ogle.

In ground 3, Mrs. Minott-Phillips submitted that the appellant suffered no loss which was caused by the 1st Respondent's actions because by drawing, issuing and delivering the cheques the Appellant relinquished any proprietary right which it may have had in the cheques and must have intended that its account be debited for the sums stated in the cheques.

She submitted also that the 1st Respondent was indemnified by the Appellant in that the custom and practice where the crossing stamp of the collecting bank appears on the cheque is that it indemnifies the paying bank against the incorrectness or lack of endorsement on a cheque. The result is that no reasonable banker would be put on inquiry or refuse to negotiate a cheque that is not endorsed by the payee, once the Crossing Stamp of another bank appears on the cheque.

With reference to Donovan Hunter's certificate of conviction, it was submitted that he was not an employee of the 1st Respondent's bank and was therefore not relevant to the issue as the respondent was not a party to the criminal proceedings against him.

Mrs. Minott-Phillips referred to the court the case of ***Hollington v F. Hewthorn and Company Limited, and Another*** [1943] 1KB 587, as well as the Bills of Exchange Act.

In ground 1, Mr. Morrison Q.C. for the 2nd Respondent NCB submitted that NCB had acted in accordance with its mandate. He referred the Court to **Paget's Law of Banking, 11th Edition.** He said that NCB was authorized to pay on the authorized signatures of John Byles and Dorothy Marzouca, director and chairman or managing director respectively. Nothing in the mandate expressly required the bank to ascertain from the Appellant or payee that it was in order to pay cheques or if the Appellant or payee had given authority for payment of cheques. The cheques in question each bore authorized signatures as per the mandate. There was no question as to the genuineness of the cheques or the bona fides of the named signatories.

In ground 2, it was argued that NCB by its mandate was obliged to pay James Ogle or on his written instructions and did not comply with this mandate by acting solely on the stamp of ECB/RBTT or EMB. Mr. Morrison, Q.C. submitted that the appellant was in the habit of drawing large cheques on their NCB bank account. On previous occasions cheques were honoured when drawn to James Ogle as payee with and without his signature endorsed on them and on those occasions the Appellant did not notify NCB that they were not mandated to pay on them. He supported the view of the Learned Trial Judge that no

reasonable banker would have been put on enquiry in circumstances such as those in which NCB found itself.

In ground 3, it was submitted that ECB/EMB placed the proceeds of the Appellant's NCB cheques in an account held by EMB without the order or written instructions of James Ogle, the payee. The negligence appeared to be attributable to ECB or EMB and not NCB.

In ground 4 it was submitted that although Mr. Senior did concede in cross examination that there was no indication of Mr. Ogle's account on any of the cheques or any indication of any order by Mr. Ogle for the cheques to be placed in EMB's account, it was never suggested to him in cross examination that the proceeds were not placed into the account of James Ogle. There is no clear evidence as to how the proceeds of those cheques came to be lodged into the account of James Ogle or whether this was done on the oral or written instructions of Mr. Ogle. If this arrangement was done on Mr. Ogle's instruments or with his knowledge or authority, his lack of endorsement would be irrelevant. It was submitted in summary that the Appellant has failed to prove that the lack of endorsement was the effective or operative cause of the loss of the sum of $33,350,000.00.

In grounds 1 and 2 the case against the 1st Respondent concerns the four cheques drawn by the Appellant and made payable to James Ogle. EMB had an

account at the Montego Bay Bank of ECB/RBTT. The cheques were lodged to that account and were not endorsed by the payee James Ogle.

Was there a duty of care owed by the 1st respondent to the appellant?

The 1st Respondent has contended that in accepting the cheques and crediting them to EMB's credit it was doing so only as banker to EMB. In ***Toronto Dominion v Dauphin Plains Credit Union Ltd*** 98 D.L.R. (4th) 736., a Credit Union which accepted cheques made payable to a business for deposit to the personal account of the presenter without requiring him to endorse it was held liable to the payee. That case is distinguishable from the instant case in that it is not the payee James Ogle who has sought to fix liability in ECB/RBTT but the Appellant. The unchallenged evidence is that the four cheques were received by Donovan Hunter, the manager of EMB in Montego Bay. He was charged with the offences of obtaining from the Appellant the sum of $33,350,508.00 by false pretence which sum is the subject matter of this action. He pleaded guilty to the charge. However, his conviction in my view is not relevant to the ECB/RBTT's liability.

In ***Hollington v F. Hewthorn and Company Limited, and Another*** [supra] Goddard, LJ said at page 596:

> "A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the '***Duchess of Kingston's*** **Case**' (1776) 2 Sm. L.C., 13th ed., 644) "it would be unjust to bind any person who could not be admitted to make a

> defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore... the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers." This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party."

The Appellant's expert witness, Mr. Jeffrey Cobham stated that based on the Kingston Clearing House Rules that where a cheque bears the crossing stamp of the collecting bank, the drawee's bank is indemnified by the collecting bank whose crossing stamp has been affixed in respect of the correctness or lack of endorsement. The custom and practice of banks is that the crossing stamp of the collecting bank indemnifies the presenting bank against incorrectness or lack of endorsement on a cheque. The practice is that once the crossing stamp appears on a cheque the presenting bank would not refuse to negotiate that cheque.

When the Appellant's cheques were lodged to ECB/RBTT it bore the crossing stamp of EMB and therefore indemnified ECB/RBTT. In my view ECB/RBTT owed no duty of care to the Appellant.

In ground 3, I agree with the submissions made by counsel for the 1st Respondent ECB/RBTT that once the Appellant parted with the Jamaican dollar cheques they no longer belonged to the Appellant and therefore could not suffer any loss by the cheques being honoured. By issuing and delivering the cheques

it must have intended that its account be debited for the sums stated in the cheques.

In relation to the US dollars cheques, these were not payable to the Appellant nor endorsed to the Appellant which had no interest in those cheques. Those cheques were payable to Lets Investments Limited which was a separate legal entity from the Appellant.

I am of the view therefore, that the Appellant's loss was not due to negligence on the part of ECB/RBTT.

In respect of ground 1 against the 2nd Respondent (NCB) the Learned Trial Judge found that NCB acted in accordance with its mandate. **Paget's Law of Banking** states at page 340:

> "A bank which acts in accordance with the mandate is duly authorized. But it does not fallow that a bank which acts contrary to the mandate is bound to be un-authorized."

Paragraph 1(a) defined a customer's mandate as follows:

> "The mandate embodies an agreement which authorizes the bank to pay if given instructions in accordance with its terms. Typically, a mandate will list the individuals who have authority to sign cheques or other payment orders and will specify how may individuals (if more than one) must sign any given order."

In this case the mandate authorizes NCB to pay on the authorized signatures of John G. Byles and Dorothy Marzouca who were chairman and managing director respectively. The cheques in question each had authorized signatures as the mandate required. In ***Lipkin Gorman (a firm) v Karpnale Ltd. and Another*** [1992] 4 All ER 409 May L.J said at page 421:

> "The relationship between the parties is contractual. The principal obligation is upon the bank to honour its customers cheques in accordance with its mandate on instructions ... To a substantial extent the banker's obligation under such a contract is largely automatic or mechanical. Presented with a cheque drawn in accordance with the terms of that contract, the banker must honour it save in what I would expect to be exceptional circumstances."

And in the same case Parker LJ, at page 439 said:

> "Expressions in them, such as that a paying bank must pay under its mandate save in extreme cases, or that a bank is not obliged to act as an amateur detective, or that suspicion is not enough to justify failing to pay according to the mandate, or other like observations which are to be found in the cases, are no more than comments on particular facts or situations and embody in my view no principles of law. Furthermore, what would or might have been held to be a breach of duty at one time may not be a breach of duty of another."

In ***Barclay's Bank PLC v Quincecare Ltd. and Another*** [1992] 4 All ER 363 Steyn J said at page 376 g:

> "... a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the

> sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company."

If one looks at the Kingston Clearing House Rules, Rule 26 relied on by NCB states:

> "The crossing stamp of the collecting bank on cheques shall be understood to guarantee the genuineness of all endorsements regardless of amount. The collecting bank hereby indemnified the paying bank against any claims that may arise with respect thereto."

This would appear to be the standard practice of Bankers. NCB was instructed to pay to the order of James Ogle and paid on the stamp of ECB/RBTT and was therefore indemnified as the paying bank. I am of the view that Marsh J was correct when he found that NCB had a mandate to honour cheques drawn by the appellants. There was no question as to the genuineness of the cheques which had authorized signatures.

In ground 2 the evidence clearly indicates that the Appellant with the arrangement it had with EMB was in the habit of drawing large cheques on the NCB bank account. The evidence also shows that on several previous occasions cheques drawn to James Ogle as payee were honoured, some with, and some without his signature thereon. There was no complaint by the Appellant about those cheques that were honoured that they did not bear Ogle's endorsed signature. There is no evidence that NCB was privy to the arrangement between the Appellant and EMB concerning the withholding of payment on cheques

pending the clearance of other cheques. In fact Mrs. Marzouca admitted that this arrangement was never communicated to NCB. In my view there was nothing to cause NCB to be "put on inquiry" (see ***Barclay's*** case supra) and this ground therefore cannot succeed.

In ground 3, the complaint is that the placing of the proceeds of the cheque in an account in respect of which there was no order or written instructions, NCB was negligent as the amounts of the cheque was quite substantial. I do not see any merit in this ground. The short answer to that complaint is that it was not NCB who placed the proceeds of the Appellant's NCB cheques in an account held by EMB. In my view NCB was not negligent and it would appear that ECB/RBTT and EMB would be the ones to account to the Appellant.

In ground 4, it seems quite strange and as Marsh J, found that it was very unlikely that such large sums could be lodged to James Ogle's account without his knowledge consent or authority. The evidence given by Mr. Keith Senior confirms that the proceeds of the cheques were lodged to James Ogle's account. There is no evidence to suggest that this was not done with Ogle's knowledge or authority. The evidence also reveals that in the same year, April, 1997 cheques were drawn by the Appellant payable to James Ogle while some were paid with and without endorsements of Ogle. There is no evidence that James Ogle has

brought a suit to recover the proceeds of those cheques from NCB or anyone for that matter.

I am of the view therefore that there is no merit in this ground.

Accordingly, the appeal brought by EMB against Lets Limited is dismissed with costs to the Respondent Lets Ltd. to be agreed or taxed.

The appeal brought by the Appellant Lets Limited against RBTT Bank Jamaica Ltd. and National Commercial Bank Ltd. is dismissed with costs to both Respondents to be agreed or taxed.

HARRISON, P.

ORDER:

SCCA 9/2005

The appeal is dismissed with costs to the Respondent LETS Ltd. to be agreed or taxed.

SCCA 19/2005

The appeal brought by the Appellant LETS Limited against RBTT Bank Jamaica Ltd. and National Commercial Bank Limited is dismissed with costs to both Respondents to be agreed or taxed.