

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV2017-02452

BETWEEN

INDRA JAIKARAN

First Claimant

SHANTAL JAIKARAN

Second Claimant

AND

JMMB (T&T) LIMITED

Sued as

JMMB (T&T) LIMITED

(formerly called INTERCOMMERCIAL BANK LIMITED)

(by original action)

Defendant

AND

JMMB (T&T) LIMITED

(formerly called INTERCOMMERCIAL BANK LIMITED)

Defendant/Ancillary Claimant

AND

CYNTHIA JAIKARAN

(Administratrix ad litem of the Estate of Mohan Jaikaran deceased)

Ancillary Defendant

(by ancillary action)

Before the Honourable Mme. Justice Jacqueline Wilson

Date of Delivery: July 26, 2019

APPEARANCES:

Mr. Ernest Koylass SC, Ms. Debbie Roopchand and Mr. D. Arjoon Attorneys at law
for the Claimants

Ms. Lynette Maharaj SC, Ms. Keisha Patryce Khan and Mr. Vijay Deonarine
Attorneys at law for the Defendants

JUDGMENT

BACKGROUND

1. The First and Second Claimants are the wife and daughter of Mohan Jaikaran (the Deceased) who died on 12 April 2015. On 17 July 2001, together with the Deceased, the claimants became joint owners of property known as Apartment 4K, La Riviera, Columbus Circle, Westmoorings (the property).
2. The property is subject to a mortgage in favour of the defendant (the Bank), the validity of which is disputed by the claimants. The claimants allege that their signatures on the mortgage deed (the Deed) were not appended by them and that the mortgage is thereby invalid and unenforceable against them. They allege that, after the Deceased's death, they made payments towards the mortgage before becoming aware of its invalidity and that the Bank was unjustly enriched by virtue of such payments. They seek the recovery of the sums paid to the Bank.
3. The Bank accepts that the claimants' signatures on the Deed were not appended by them. The Bank asserts that the claimants are nevertheless bound by the mortgage on a number of grounds. First, that the claimants duly authorised the Deceased to act as their agent in respect of the mortgage; second, that the claimants, after becoming aware that their signatures on the Deed were not authentic, made payments towards the mortgage and thereby ratified the transaction; third, that the claimants are estopped from asserting the invalidity of the mortgage; fourth, that sums advanced by the Bank under the mortgage were used to discharge an existing mortgage with Republic

Bank Limited and that the Bank is thereby entitled to the interest formerly held by Republic Bank Limited; and fifth, that by entering into the mortgage the Deceased severed his interest as joint tenant in the property and the Bank is thereby entitled to recover the value of his interest.

4. The Bank counterclaims for an order of possession of the property so as to exercise its power of sale for the recovery of the outstanding mortgage debt.

THE CLAIMANTS' EVIDENCE

5. The claimants'¹ evidence is that the Deceased was the owner and director of several companies in Trinidad and Tobago, namely WIN TV Limited, WIN Radio 101.1 Limited, Typhoon Productions Limited, WIN Communications Limited and JVC Entertainment Company Limited, and that his daughters were also named as directors and/ or shareholders without any direct involvement by them in the Deceased's business affairs. The Deceased's daughters all live in the United States of America and the property serves as their residence while visiting Trinidad.
6. The claimants state that, as far as they were aware, the property was last mortgaged to Republic Bank Limited. After the Deceased's death they met with the Bank's representatives in June 2015 when they first became aware of the Deceased's indebtedness to the Bank and that the debt was secured by a mortgage over the property. On that occasion, the first claimant signed a handwritten document in which she agreed

¹ References to the claimants include either or both of them

to service the Deceased's loans but had no knowledge of their full extent. Thereafter, in order to forestall a sale of the property, the claimants made payments to the Bank leaving it to the Bank to apply the payments towards the various loans. At the time the payments were made the claimants had not seen the Deed notwithstanding the efforts made by them to procure it from Bank. They ultimately saw the Deed on 16 November 2016 when the Attorney with conduct of the administration of the Deceased's estate obtained a copy of it from the Bank.

7. The claimants state that they then became aware that their signatures on the Deed were purported to have been affixed on 5 May 2012 in the presence of Mr. Namcaran Singh before a Notary Public in New York. They deny the authenticity of their signatures on the Deed and its related documents, that is, statutory declarations, waivers of independent legal advice, indemnities and a share transfer form, and also deny authorising anyone to sign the documents on their behalf.
8. The claimants state that upon seeing the Deed in November 2016 and noting the obvious forgery of their signatures they stopped payments to the Bank and sought legal advice. They retained the services of an Expert in Forensic Document Examination, Mr. John Osborn, to examine the Deed and related documents to determine whether their signatures were genuine. Mr. Osborn provided a report dated 16 December 2016 in which he concluded that the claimants' signatures were not genuine.

THE DEFENDANT'S EVIDENCE

9. Four witnesses gave evidence on behalf of the Bank:

- i. Mr. Namcaram Singh, former director of WIN TV and WIN Radio;
- ii. Mr. Devati Mooledhar, the Bank's General Manager, Corporate & Investment Banking;
- iii. Ms. Anna Deonarine Rampersad, Attorney-at-law formerly employed with the Bank's Attorneys, Messrs. Girwar and Deonarine; and
- iv. Mr. Timothy Gyan, Assistant Manager of the Bank's Remedial Management Unit.

Together they gave the history of dealings with the property as derived either from the Bank's records or their own direct involvement.

HISTORY OF DEALINGS WITH THE PROPERTY

10. In or around January 2012, the Deceased approached the Bank to obtain credit facilities for himself and a number of his companies.
11. The Bank's records show that the property was purchased in July 2001 for the sum of \$1,721,638.00 at which time a deed of mortgage of \$1,750,000.00 was executed in favour of Royal Merchant Bank and Finance Company Limited, with the Deceased and the first claimant named as Borrowers (the first mortgage). The first mortgage was repayable over a period of fifteen years and the mortgage deed was duly executed by the first claimant and the Deceased, with the Deceased also signing on behalf of the second claimant by virtue of a registered Power of Attorney. A deed of release of the first mortgage was registered on 10 July 2006.

12. On 15 June 2006 the claimants and the Deceased executed a deed of mortgage over the property in the sum of \$5,000,000.00 in favour of Republic Bank Limited (the second mortgage) under which the Deceased was named as the Borrower. The second mortgage was for the duration of the unexpired residue of the sub-lease under which the property was purchased and was executed by the claimants in New York before a Notary Public.
13. On 5 January 2012, Republic Bank Limited wrote to the Deceased regarding his indebtedness. Republic Bank Limited agreed to accept the payment of \$15.5m in full settlement of the Deceased's debt, provided that payment was made by an extended deadline of 31 January 2012.
14. In or around February 2012, the Bank began to extend credit facilities to the Deceased. The first line of credit was a short-term loan in the sum of \$2,500,000.00 secured by guarantees given by the Deceased and two of his companies and the proposed assignment of proceeds of the sale of a parcel of land owned by one of the Deceased's companies. In the event that the sale of land did not materialise, a mortgage was to be executed over the property.
15. The sale of the land did not materialise and the Bank's Attorneys proceeded with the preparation of the Deed and its related documents (the loan documents). Arrangements were made for the Deceased to collect the loan documents from the Bank's Attorneys on 2 May 2012 and to take the documents abroad for execution by the claimants before a Notary Public and for the Deceased to attend the Attorneys' offices on 7 May 2012 where he would sign the documents.

16. On 2 May 2012 Mr. Namcaran Singh collected the loan documents on behalf of the Deceased. On 7 May 2012 the Deceased duly attended the Attorneys' offices and executed the loan documents before Ms. Deonarine Rampersad. The loan documents were shown as executed by the claimants in New York on 5 May 2012. The Deed was registered on 25 May 2012.
17. Prior to the execution of the Deed, Republic Bank Limited had written to the Deceased indicating that it would accept the sum of \$2,844,512.11 in settlement of his indebtedness on the strict condition that payment was made no later than 18 May 2012.
18. Between May 2012 and March 2013 the Bank extended a number of credit facilities to the Deceased and his companies, WIN Communication Limited and WIN Radio Limited.
19. On 21 May 2012 the Bank granted a loan of \$7,160,267.00 to the Deceased to discharge the mortgage with Republic Bank Limited and to assist with the cost of expanding WIN Communication Limited. The loan was repayable in monthly instalments of \$85,471.20 over a ten-year period and was secured by a First Demand Mortgage over the property and other collateral securities including floating charges over the assets of WIN TV Limited and WIN Communication Limited in the sum of \$2,863,000.00 each and a promissory note in the sum of \$7,200,000.00 by the Deceased. The deeds of debenture were executed on 18 May 2012 by the first claimant and the Deceased at the offices of the Bank's Attorneys.
20. On 22 May 2012 the Bank paid the sum of \$2,844,512.11 to Republic Bank Limited, in settlement of the sums due and owing under the

second mortgage. A deed of release of the second mortgage was registered on 6 June 2012.

21. On 31 May 2012 the Bank granted an overdraft facility in the sum of \$800,000.00 to WIN Radio Limited to finance its working capital. This too was secured by the mortgage on the property and by floating charges over the assets of WIN Radio Limited and WIN Communication Ltd., together with a promissory note by the Deceased.
22. On 5 July 2012 the Bank granted a loan of \$370,000.00 to the Deceased for the purchase of a Mercedes Benz. The loan was repayable in monthly instalments of \$7153.14 over a period of five years and was secured by a promissory note in the sum of \$370,000.00 issued by the Deceased.
23. On 28 February 2013 the Bank granted a temporary increase of \$200,000.00 to an overdraft facility of \$800,000.00 held by WIN Radio 101.1 Limited. The sum was secured by a promissory note in the sum of \$200,000.00 issued by WIN Radio 101.1 Limited to the Bank.
24. On 19 March 2013 the Bank granted a credit card facility to the Deceased in the sum of \$100,000.00 under what was known as a Powerpay Account. The sum was secured by a promissory note issued by the Deceased in the sum of \$100,000.00.
25. In or around May 2014 the loans granted to the Deceased fell into arrears.

26. In July 2014 the Bank made a demand for the full payment of \$6,636,272.68, failing which it indicated its intention to institute proceedings for recovery of the outstanding debt. The Deceased made partial payments towards the loan arrears and on 7 November 2014 the Bank issued a further demand for payment of \$221,624.70 by 14 November 2014.
27. On 14 November 2014, the Deceased met with the Bank's representatives and promised to discharge his indebtedness in full within the next six months.
28. On 12 April 2015 the Deceased died leaving the loan facilities still in arrears.

EVENTS SUBSEQUENT TO THE DECEASED'S DEATH

29. Subsequent to the Deceased's death the claimants met with the Bank to discuss the Deceased's indebtedness.
30. The Bank's records show that the first meeting was held on 24 April 2015. At a further meeting on 6 May 2015 the parties discussed proposals for the discharge of the Deceased's debts. One such proposal was that either of the claimants would take over the mortgage of the property in her own name with financing to be provided either by a foreign institution or the Bank. At that meeting the claimants provided two cheques in the sum of \$92,624.00 and a third cheque in the sum of \$15,482.21, the proceeds of which were applied to the mortgage and the overdraft facility. The claimants also requested a number of documents from the Bank, including an updated statement of the

Deceased's loans, a list of the debts that required urgent attention and copies of all loan documents.

31. By letters dated 7 May 2015 to the first claimant the Bank provided details of the loans granted to the Deceased and his companies and the status of each loan. Enclosed with the letters were copies of the loan documents, including the Deed. The second claimant signed as receiving the Bank's letters.
32. At a further meeting with the Bank on 9 June 2015 the first claimant confirmed her agreement to discharge the Deceased's indebtedness. The first claimant signed a manuscript note to that effect written by one of the Bank's representatives.
33. By letter dated 1 July 2015 the Bank again provided the claimants with a list of the loans and credit facilities that were granted to the Deceased. The status of each loan and line of credit was again provided on 9 July 2015 and 2 September 2015.
34. By email correspondence of 10 August 2015 the Bank sought further payment of the arrears of the loan facilities and on 2 September 2015, the arrears not having been discharged, the Bank sought full payment of all loan facilities by 30 September 2015.
35. On 4 September 2015 the claimants and their then Attorney, Mr. Ronnie Bissessar, met with the Bank to discuss the demand letter of 2 September 2015. The claimants agreed to take steps to regularize all payments due to the Bank on or before 30 September 2015.

36. Between July 2015 and August 2016 there was ongoing communication between the Bank and the claimants regarding the Deceased's indebtedness and the claimants' proposals to discharge it. During that period, up to and including October 2016, the claimants made payments towards the mortgage and other outstanding loans. However, the loans remained generally in arrears leading the Bank to issue a number of reminders and, thereafter, demand letters for full payment of the loan balance. The Bank's demand letters were often met with a response by the claimants seeking further information.
37. On 26 April 2016 the Bank issued a demand letter to the claimants and to WIN Radio Ltd seeking payment of the arrears then outstanding in the sum \$888,011.66 on or before 17 May 2016, failing which enforcement action was threatened. By letter in response dated 11 May 2016 the claimants sought more time to make restitution to the Bank.
38. On 9 August 2016, the claimants met with the Bank and agreed to submit a proposal for the full discharge of the Deceased's debts on or before 31 August 2016. By email dated 30 August 2016 the claimants indicated to the Bank that the proposal was not yet complete. The Bank issued further demand letters on 19 September 2016 and 29 September 2016 the latter of which sought the payment of \$956,294.62 on or before 20 October 2016.
39. On 26 October 2016 the Bank issued a demand letter to the Estate of the Deceased seeking the payment of \$4,973,287.89 on or before 16 November 2016. Further demand letters were issued on 9 and 10 November 2016 for the payment of \$987,657.17 on or before 24 November 2016 in respect of guarantees given by the Deceased for

credit facilities to WIN Radio. The Bank's letters of demand were again met with a request by the claimants for information regarding the Deceased's accounts.

40. On 11 November 2016, the claimants' Attorneys wrote to the Bank seeking clarification on the assets and liabilities of the Deceased's estate "as it relates to the Bank." By letter in response dated 16 November 2016 the Bank provided details of all loans and credit facilities granted to the Deceased, the date on which the loans were granted, the security held in respect of each loan and the outstanding balance owed to the Bank. A number of documents were enclosed with the Bank's letter, including a copy of the Deed.
41. By pre-action protocol letter dated 5 May 2017 the claimants' Attorneys wrote to the Bank indicating that the claimants were first provided with the Deed in or around September 2016, when they became aware that their signatures were purportedly witnessed by Mr. Namcaram Singh in New York on 5 May 2012. The claimants' Attorneys advised that the claimants had denied signing the Deed and caused a handwriting expert to examine their signatures. The report of the handwriting expert dated 16 December 2016 found it to be highly probable that the claimants' signatures on the Deed were not genuine. The Attorneys alleged that the Deed, having been procured by fraud, was "void ab initio and unenforceable against the claimants" and called upon the Bank to remit all sums paid by the claimants.
42. The claimants filed the present proceedings on 5 July 2017. On 20 July 2017 they brought an application for an interlocutory injunction to

restrain the Bank from taking possession of the property and from selling or otherwise disposing of it.

43. On 30 January 2018, the claimants' application for an interim injunction was dismissed. The claimants appealed the decision and at the hearing of the appeal on 11 June 2018 the parties entered into a consent order under which the Bank agreed to refrain from taking possession of the property or entering into an agreement for its sale on condition that the claimants pay the sum of \$250,000.00 on or before 11 July 2018 and, thereafter, the monthly sum of \$40,000.00 beginning 31 June 2018. It was further ordered that, should the claimants fail to meet the stipulated conditions the Bank was immediately released from its undertaking and was at liberty to sell the property. The claimants did not comply with any of the conditions of the consent order.
44. Under the consent order the claimants further agreed to grant permission to the Bank to enter the property for the purpose of conducting a valuation. However, the Bank's valuator was not given full access to the property as some rooms were locked and the claimants asserted that they did not have the keys. As a result, the valuator was unable to complete the valuation and the Bank's efforts to sell the property were frustrated.

THE DEED

45. Central to the dispute in these proceedings is the date on which the claimants first became aware that their signatures on the Deed were not authentic. To this extent, the claimants' case against the Bank leans heavily on the credibility of their evidence.

46. The claimants' evidence is that they first saw the Deed in November 2016 when a copy was sent to their Attorneys by email from the Bank.
47. The Bank's evidence is that a copy of the Deed was delivered to the claimants under cover of a letter dated 7 May 2015, the receipt of which was acknowledged by the second claimant's signature. In cross examination the second claimant accepted the signature on the Bank's letter as hers but could not recall receiving the letter. Curiously, however, she could recall that the Deed was not enclosed with the letter.
48. The Bank asserts that the claimants were aware of the Deed long in advance of November 2016 as evidenced by a letter of 21 August 2015 from their former Attorney which fixed them with knowledge of the Deed as early as June 2015.
49. An examination of the various sources from which the date of the claimant's knowledge of the Deed may be discerned yields inconsistent results. In their statement of case filed on 5 July 2017 the claimants pleaded that they first became aware of the Deed in September 2016. The pleading was subsequently amended to reflect a later date of November 2016. The pre-action protocol letter of 5 May 2017 by the claimants' Attorneys asserted the claimants' knowledge of the Deed as of September 2016 while an earlier letter of 21 August 2015 by their former Attorney suggested a date of around June 2015. Affidavits sworn by the claimants in support of the injunction application gave the relevant date as September 2016.

50. The following extract from the letter of 21 August 2015 by the claimants' former Attorney, which recites the instructions given by them, provides helpful insight:

"The Property Issue

By deed of sub lease dated 17th July 2001 and registered as DE200101731984D000 the deceased and Indra as lessees became entitled to possession of Apartment 4K, La Riviera, Westmoorings ("*the said property*") for a term of ninety- nine (99) years from 10th April 1979.

By a deed of mortgage dated 7th May 2012 registered as DE201201175099D001 the lessees *purportedly* mortgaged the said property to IBL for the sum of \$8.0M.

You advised that you only became aware of the terms of the mortgage about two (2) months ago and that neither of you had executed the deed of mortgage in favour of IBL.

You also advised that you are making monthly mortgage payments of \$106,000.00 to IBL. Further that IBL has refused to provide you with documents evidencing the disbursement of the mortgage loan and has now demanded the repayment of the entire mortgage sum by 30th September 2015 notwithstanding that the mortgage is being paid and is not in arrears."

51. In their witness statements the claimants did not challenge the provenance of the above letter. Neither did they distance themselves from the instructions reportedly given by them. However, in cross-examination the second defendant denied providing a copy of the Deed to the Attorney and surmised that he may have obtained a copy of it on his own, while the first claimant disclaimed knowledge of her involvement in the matter, asserting that she only knew what the second claimant told her.

52. In my view, the letter of 21 August 2015 provides compelling evidence that the claimants had seen the Deed prior to the date of the letter and, as the letter suggests, as early as June 2015. I am also of the opinion that they did in fact provide a copy of the Deed to the Attorney, having previously received delivery of it from the Bank.

53. It is clear from the letter of 21 August 2015 that, in instructing their Attorney, the claimants disavowed the authenticity of their signatures on the Deed and advised him of their continued payments toward the mortgage, notwithstanding the disclaimer. There is no complaint in the letter of any refusal by the Bank to provide a copy of the Deed to the claimants. Had such a complaint been made, there is no sensible reason for it to have been excluded from the letter as it would not have escaped the attention of the Attorney and would, in fact, have fortified the claimant's concerns.

54. In addition, there is nothing in the substantial correspondence passing between the claimants and the Bank from May 2015 to September 2016 to alert the Bank of any concerns by the claimants regarding its failure to provide the Deed to them. When considered in their proper context, the

claimants' various requests for "closing documents" are understood to mean the disbursements by the Bank from the sums secured by the mortgage and not to the Deed itself.

55. It is also relevant that, both as to the place and manner of its execution, the Deed cannot be considered as exceptional when compared with the first and second mortgage. That is to say, the first mortgage was executed by the Deceased on behalf of the second claimant, pursuant to a power of Attorney granted by her, while the second mortgage was executed by the claimants before a Notary Public in New York. To this extent, the execution of the Deed was consistent with the claimants' manner of doing business and provides an explanation for their failure to raise objection with the Bank for a prolonged period after becoming aware that their signatures on the Deed were not authentic.
56. I pause here to make some general observations about the claimants' credibility. At the outset of the proceedings, the first claimant denied the signature on her witness statement as hers. It was only by virtue of her Attorney's painstaking efforts in leading her that the witness statement was ultimately admitted as her evidence-in-chief. In cross-examination the first claimant also denied giving a power of Attorney to the Deceased in 2011 and was ambivalent as to whether the signature on such a document was hers, notwithstanding that it was among the documents given to the handwriting expert as a sample of her genuine signature.
57. In cross-examination the credibility of the second defendant was similarly attacked when, in relation to the letter of 21 August 2015, she contended that she went to her former Attorney for advice on how to treat with the Bank's demand letter of 2 September 2015 and that the

allegations of fraud asserted in the letter were not a reflection of her instructions but of her Attorney acting on a frolic of his own.

58. In all the circumstances, I am of the opinion that the claimants' assertion that they first saw the Deed in November 2016 was no more than a dishonest effort by them to reconcile the date of their knowledge with the date on which they ceased to make mortgage payments to the Bank, so as to mount an argument that no payments were made after they became aware of the inauthenticity of their signatures.
59. By virtue of the claimants' own admission, as recorded in the letter of 21 August 2015, I fix them with knowledge of the Deed at a date no later than the end of June 2015.
60. The claimants' claim for restitution and the grounds of defence advanced by the Bank must now be examined against the backdrop of the above findings.

RESTITUTION

61. Having regard to the findings of the expert report, there is no dispute that the claimants' signatures on the Deed are not genuine.
62. Counsel for the claimants submits that in light of the inauthenticity of the signatures the mortgage is a nullity in relation to the claimants and does not create a charge over their interest in the property.
63. Counsel submits that the Bank was unjustly enriched by the claimants' payments, the payments having been made under a mistake of fact

and/or law and induced by the Bank's representations that the Deceased's indebtedness was secured by the mortgage.

64. Counsel for the defendant submits that the claimants' payments were not made under a mistake or pursuant to representations by the Bank as the claimants were aware of the Deed as early as June 2015 and of the fact that their signatures were not authentic. Counsel submits that for there to be misrepresentation "*one party has to be induced to enter into a contract in reliance on an unambiguous and material representation of an existing fact of which he had no previous actual knowledge*": Atkins Encyclopaedia of Court Forms 2nd Ed (2001) Vol 12(2) at p.20.
65. Counsel for the defendant submits that the mortgage is valid and enforceable against the claimants on the grounds discussed below.

AGENCY

66. Counsel for the defendant submits that the Deceased had a general authority by the claimants to deal with their financial affairs in Trinidad and a specific authority granted pursuant to a power of attorney by the second claimant in 2001 and by the first claimant in 2011.
67. Counsel submits that the 2001 power of attorney was not limited to transactions involving the first mortgage, as asserted by the second claimant. Counsel submits further that the 2011 power of attorney granted by the first claimant was not disclosed in the claimants' list of documents or at any time thereafter but was identified among the documents given by the claimants to the handwriting expert for his review.

68. The defendant submits that, notwithstanding that the identity of the person who affixed the claimants' signatures on the Deed has not been established, all fingers point to the Deceased as he would have been familiar with the claimants' signatures and was a common signatory to the loan documents, with no suggestion having been made that his signature on any of the documents was forged.
69. The defendant submits that the findings of the expert report that the claimants' signatures were "written by the same writer" and that any "attempt to imitate was rudimentary at best" suggest that the Deceased was the likely author of the claimants' signatures and that he took no special care to match them having perhaps done so many times before, without question.
70. Counsel submits that by virtue of the claimants' admitted delegation to the Deceased of responsibility for their financial affairs in Trinidad, if the Deceased did sign the mortgage documents on their behalf, he did so as their agent and with their knowledge and approval.
71. Counsel submits further that the claimants, having constituted the Deceased as their agent, were jointly responsible for the acts falling within the scope of his apparent or ostensible authority and that it was immaterial whether the Deceased's acts were wrongful or were expressly prohibited by the claimants: Halsbury's Laws of England, 5th Ed, 2012, Vol 1, Agency, para 151. Counsel relied on the dicta of Wilfred Green MR in Uxbridge Permanent Benefit Building Society v Pickard [1932] 2 KB 248 at 256 as authority for the proposition that "the effect of a forged instrument as affecting the principal falls within the question of ostensible authority."

72. In response, Counsel for the claimants submits that no question arises as to an agency between the claimants and the Deceased by virtue of the fact that the Deceased attended to the claimants' financial affairs in Trinidad and was their provider. Counsel submits that the Deceased's role was explained purely on the basis of his family relationship with the claimants.
73. Counsel submits further that the mortgage bore no connection to the claimants and that the Deceased entered into the transaction on his own and for the purpose of obtaining loans for his several companies.
74. In my judgment, the evidence establishes that the Deceased assumed full responsibility for his business affairs in Trinidad and that the claimants were content for him so to act, notwithstanding that they may have been named as shareholders or directors of the several companies managed by him.
75. In my view, however, the question whether the Deceased signed the Deed on behalf of the claimants and whether, in doing so, he was expressly or impliedly authorised by them, is not germane to a determination of the claimants' liability under the mortgage. The relevant consideration is the claimants' course of conduct after becoming aware of the Deed and the legal inferences to be drawn in that regard.

RATIFICATION

76. Counsel for the defendant submits that the claimants ratified the mortgage transaction by paying the instalments for more than a year

with full knowledge that their signatures on the Deed were not authentic. Counsel submits that the mortgage is therefore binding on them and that they are not entitled to reimbursement of their payments.

77. Counsel relies on the case of Jean Sarah English v Swift Advances Plv and Ors [2010] EWHC 2058 where it was held that a mortgagor who had ratified transactions with her bank was bound by the transactions even though her signatures on the mortgage were forged by her son. Counsel submits that the court in *English* treated the claimant's payments to the bank after she became aware of the forgery as a "*positive acceptance of the binding effect of the charge and loan agreements on (her),*" a conclusion which was fortified by the fact that she also "*caused (her) solicitors to pay the amount necessary to redeem the charge on sale, without any protest, or even asking them for any advice, as to whether she was liable to pay.*"
78. Counsel submits that in this case, the claimants' acts of positive acceptance go much further than in *English* as the claimants paid the mortgage for more than a year after raising the inauthenticity of their signatures with their Attorneys.
79. In response, Counsel for the claimants submits that there was no ratification by the claimants of the mortgage transaction as no payments were made by them after becoming aware that their signatures on the Deed were not genuine.
80. Counsel submits that the claimants' payments to the Bank did not constitute acceptance of the validity of the mortgage but were made in order to avoid the threat of sale of the property.

81. This argument by Counsel was expressly rejected in *English* where it was held that the claimant's payments towards the loans were all in the context of avoiding an order for possession and were an indication that the claimant regarded the loans as binding on her.²
82. As indicated above, the claimants made payments towards the mortgage for more than a year after becoming aware that their signatures on the Deed were not genuine. They did not put the Bank on notice of their allegations of fraud until 5 May 2017, when the invalidity of the Deed was asserted in the context of a pre-action protocol letter by their Attorneys.
83. The property was at serious risk of foreclosure when the pre-action protocol letter was issued. The default in payment of the sums secured by the mortgage began in July 2014, prior to the Deceased death, with the loan accounts remaining substantially in arrears almost continuously thereafter notwithstanding the efforts at payment made by the Deceased and, upon his death, by the claimants. The Bank's ongoing demands yielded little success although commitments were made both by the Deceased and the claimants to discharge the debt in full. Having failed to discharge the arrears for more than two years after the Deceased's death, the claimants then invoked the invalidity of the Deed, as a measure of last resort, to absolve themselves from further liability.
84. In the prevailing circumstances, it is clear that the threat of enforcement action by the Bank was the motivating factor giving rise to the claimants' assertion of invalidity, more so than a real concern by them that their signatures on the Deed were not authentic.

² See paragraph 53

85. For the above reasons, I uphold the submission by the defendant that the claimants' payments toward the mortgage from June 2015 to October 2016 confirmed their acceptance of the validity of the Deed and its binding effect on them.

ESTOPPEL

86. Counsel for the defendant submits that by virtue of the same facts that support a finding of ratification, the claimants are estopped by their conduct from denying the Deed as theirs. As authority for the proposition, Counsel relies on the following statements in Zorida Gerold v Kazim Mohammed and Anor CV No. 2015-02907, at para 38, per Donaldson-Honeywell J quoting Halsbury's Laws of England, 5th Ed, Vol 32, para 262:

“...if a man in whose name a deed is forged admits or represents the deed to be his; or keeps silent after discovery of the forgery he may be estopped as against any person who altered his position on the faith of the admission, representation or silence from denying the deed to be his.”

87. Counsel submits that in the case of *English* it was acknowledged that silence may be construed as representation in circumstances where the claimant was under a duty to raise allegations of fraud with the bank and that an estoppel was created by the bank's detrimental reliance on the representation by choosing to release the mortgage early and thereby losing a statutory entitlement to recover funds from an alternative source.

88. Counsel relies on the following dicta of Lord Sumption in Kelly and Ors v Fraser [2013] 1 AC 450 (PC) at p. 460G-H; 461C:

“A common form of detriment, perhaps the commonest of all, is that as a result of his reliance on the representation, the representee has lost an opportunity to protect his interest by taking some alternative course of action. It is well established that the loss of such an opportunity may be a sufficient detriment if there were alternative courses available which offered a real prospect of benefit, notwithstanding that the prospect was contingent and uncertain.

...Where a person has been led to assume that no issue arises as to the regularity of his transaction, he is unlikely at the time to apply his mind to alternative possibilities. The question what he would have done, and with what results, is in practice bound to be a matter for retrospective and hypothetical reconstruction.”

89. Counsel submits that had the Bank been made aware at an earlier stage of the allegations of invalidity it would have acted sooner, and with greater success, in enforcing the debentures given as security for the mortgage. Counsel submits that when such action was ultimately taken by the Bank in October and November 2016, the assets charged by the debentures had already been moved, requiring the Bank to revoke its receivership.
90. Counsel submits further that the Bank did not pursue legal action against the claimants in 2015 to enforce its rights under the mortgage as the claimants had agreed to pay the mortgage and continued to make

payments with knowledge that their signatures on the Deed were not genuine and without making such disclosure to the Bank.

91. Counsel contends that the claimants are thereby estopped from relying on the alleged invalidity of the Deed to set aside the mortgage and to recover the monies paid to the Bank. Counsel relies on the dicta of Lord Reid in Fung Kai Sun v Chan Fui Hing [1951] AC 489, at 503 where it was said that:

“In their Lordships’ judgment it must be held that the respondents were not entitled to withhold from the appellant information that the appellant’s mortgages were forgeries, and that when they chose to do so they took the risk that they would later be estopped from asserting that these deeds were forged if by reason of their keeping silent the appellant suffered detriment.”

92. In response, Counsel for the claimants submits that the Bank suffered no detriment by the claimants’ delay in giving notice of the alleged fraud and that the Bank benefitted from the payments made by the claimants before notice was given.
93. Counsel submits that there was no evidence of the course of action the Bank would have taken had notice been given before and that the stated difficulties with the receivership did not provide proof of detriment as such difficulties may also have arisen in an earlier receivership.
94. Counsel submits that the principles to be derived from *Kelly* are that detriment is not presumed and must be proved, that it may be proved

by establishing facts on which it could be inferred, but only where there is a proper evidential basis for such inference.³

95. Counsel submits that the inference of detriment suffered by the Bank was not inescapable on the evidence and that the alleged detrimental reliance was not proven.
96. It must be stated that in so far as detrimental reliance is concerned, there is no requirement on the defendant to prove that steps which may have been taken to enforce the mortgage debt would have been successful, had the claimants given earlier notice of the alleged fraud. All that is required is for the Bank to demonstrate that it was deprived of a viable opportunity to enforce recovery of the debt at an earlier stage. In my view, the Bank's forbearance in taking enforcement action against the claimants for an extended period on the basis of their stated commitment to discharge the mortgage debt is sufficient to establish the required detriment. The necessary elements to establish an estoppel by representation are therefore made out.⁴

UNJUST ENRICHMENT

97. Counsel for the Defendant contends that, in the event the mortgage is considered to be invalid, the Bank is entitled to possession of the property on principles of unjust enrichment, having paid for the release of the second mortgage to Republic Bank Limited. Counsel contends that the Bank is thereby entitled to the proprietary interest formerly held by Republic Bank Ltd., which it can enforce by sale: Menelaou v Bank of Cyprus UK Ltd [2016] AC 176.

³ At p. 461, paras 18-19

⁴ See *English* at para 60

98. Counsel for the claimants accepts the Defendant's submissions under this head. Counsel goes on to state that the sums paid by the claimants should be attributed to the second mortgage with the claimants remaining liable for the difference. No authority was provided by Counsel to support this proposition and I have no difficulty in rejecting it.
99. In view of my conclusion on the validity of the mortgage, no determination is required either under this ground or on the ground that relates to the purported severance of the joint tenancy by the Deceased.

FINDINGS AND CONCLUSION

100. In summary, the key findings discussed above are as follows:
- a. The claimants became aware of the Deed no later than the end of June 2015;
 - b. The claimants' payments towards the mortgage from June 2015 to October 2016, with knowledge that their signatures on the Deed were not genuine, confirmed their acceptance of its validity;
 - c. Therefore, the mortgage is valid and binding on the claimants;
 - d. For the same reasons, the claimants are estopped from asserting the invalidity of the mortgage.
101. In the result, the claimants' claim for restitution is not made out. The claim is therefore dismissed. The claimants shall pay the defendant's costs of the claim on a prescribed basis.

102. The defendant is granted the relief sought on the counterclaim. The claimants shall pay the defendant's costs on the counterclaim on a prescribed basis.

DISPOSITION OF ANCILLARY CLAIM

103. In the ancillary claim brought by the Bank against Cynthia Jaikaran (Administratrix of the Estate of Mohan Jaikaran deceased) as ancillary defendant, the Bank seeks the payment of sums due under a number of promissory notes and personal guarantees issued by the Deceased, including the payment of interest.

104. No defence was filed by the ancillary defendant and the ancillary claim is thereby deemed to be admitted. Having regard to the findings made on the substantive claim, the defendant/ ancillary claimant is granted the full relief sought in the ancillary claim.

105. The ancillary defendant shall pay the costs of the ancillary claim on a prescribed basis.

Jacqueline Wilson QC
Judge