IN THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

CA S NO. 318 OF 2014

CHARLES B. LAWRENCE & ASSOCIATES

THE APPELLANT

AND

INTERCOMMERCIAL BANK LIMITED

THE RESPONDENT

Panel: I. Archie C.J.
G. Smith J.A
P.A. Rajkumar J.A

Appearances:
Mrs. L. Maharaj S.C Leads Mr. K. Walesby,
Instructed by Mr. R. Katwaroo
on behalf of the Appellant

Mr. M. Hylton QC Leads Mr. P. Deonarine,
Instructed by Ms O. Clarke
on behalf of the Respondent

I have read the judgment of Rajkumar JA. I agree with it and have nothing to add.

……

I. Archie

Chief Justice

I have read the judgment of Rajkumar JA .I also agree with it and have nothing to add.

……..

G. Smith

Justice of Appeal

Judgment

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Delivered by Justice of Appeal Peter A. Rajkumar:

Background

1. This appeal was heard and a unanimous oral judgment was delivered on the date of hearing, with an indication that the reasons therefor would be expanded upon and delivered at a later date. The opportunity is taken to now do so.

2. The appellant is a valuator. The respondent is a commercial bank, which was approached to advance money by way of loan to Singapore Automotive Trading Limited (Singapore). Rafferty Development Limited (Rafferty) was to be the guarantor of that loan and it retained the appellant to provide a valuation of lands situated between lightpole 60 and 69 San Fernando By-pass Road, San Fernando (the subject lands). These were to be used as security for the loan by the respondent. Although the appellant's client was the guarantor, it is undisputed that, as expressly indicated in his valuation report, the valuation prepared by the appellant was provided to ascertain the current open market value of the subject lands for the purpose of a proposed mortgage.

3. The appellant provided a valuation report on the subject lands. He expressed the opinion that "the current open market value of subject lands free from all encumbrances with vacant possession was in the order of fifteen million dollars ($15,000,000)". He indicated that his opinion assumed, inter alia, that *2. a good marketable title can be shown, 3. Town and Country Planning and all other statutory approvals would be granted for the construction of the commercial development of subject lands* and *4. Vacant possession and (sic) free from all encumbrances is available*. *7. The property not falling under the provisions of the Rent Restriction Act (sic) of 1981.* Based on the valuation the respondent advanced to Singapore the sum of three million dollars ($3,000,000.00).

4. In fact:-

i. there were occupiers on the land, and

ii. the subject lands did not have planning approval for the "construction of commercial development".
Also, unknown to the parties at the time, Singapore had no title to the subject lands.

5. The respondent advanced three million dollars ($3,000,000) to Singapore but no payments were made under the loan. Further, the respondent was not able to realise any sums under its mortgage of the subject lands. Because the title to the subject lands was allegedly defective the respondent recovered two million and four hundred thousand dollars ($2,400,000) from its own attorneys at law, being a portion of the amount advanced plus interest. It sought to recover the remainder of its loss from the appellant.

6. The trial judge found that the appellant was negligent and breached his duty in tort to the respondent by a. failing to identify the presence of occupiers on the subject lands and b. in wrongly valuing the subject lands on a commercial basis. She found that the second defect in the valuation dealt solely with the question of how much money ought to have been advanced on the security. However the first defect in the valuation went to the question of whether money should have been advanced at all on the basis of the security provided[1].

Issues

7.

i. Whether the trial judge's findings as to negligence by the appellant should be reversed.
ii. Whether the trial judge wrongly excluded relevant evidence.
iii. Whether recovery from the respondent's attorneys released the appellant from any obligation to satisfy any unrecovered amounts advanced.
iv. Whether the trial judge's finding that the contractual rate of interest was applicable was correct in law.
v. Whether, if the answers to i, ii, and iii. are in the negative whether any deduction should

[1] Paragraph 94 of the Judgment

be made with respect to the damages awardable to the respondent on the basis of contributory negligence.

8. The conclusion of the trial judge was that the presence of occupiers on the land was not sufficiently or adequately communicated in the valuation report, (which was being prepared for the purpose of a mortgage), so as to draw to the attention of the respondent bank as mortgagee, that there was the potential for the presence of occupiers (whatever the legal status of their occupation). This could have impacted upon i. the decision whether even to accept the land as security under a mortgage ii. the decision whether to even grant the loan facility as a consequence and iii. the value of the subject lands, their realisability as security, and the amount if any of any loan.

9. Because the existence of occupiers was directly relevant to the decision as to whether to even grant the loan facility on the security of the mortgage of the subject lands, the trial judge found that the respondent's entire loss could equally be attributable to the negligent valuation[2].

10. However, that was not the only basis upon which the valuation was found to be negligent. The subject lands were also valued on the assumption that approvals would be granted for the construction of commercial development - (the commercial basis). The trial judge found that on the evidence there was no proper basis for valuing the subject land on the commercial basis[3]. There was therefore no adequate basis for a valuation being proffered of fifteen million dollars ($15,000,000.00) on the basis that *"planning and other approvals would be granted for commercial development"*.

11. In fact, the trial court found that the defendant's statement that "*these lands had been developed changing its (sic) use from agriculture to commercial purposes"* was not based on any evidence, and in the absence of such evidence the inclusion of that statement in the valuation

[2] Paragraph 97 of trial judge's judgment.
[3] Paragraph 88 of the judgment

was wholly misleading[4]. She concluded that a valuer is required to consider the highest and best **approved** use of the property. However, there was no approval for the use of the subject land for commercial purposes.

Conclusion

12. i. No justification has been demonstrated for reversing the findings and conclusion of the trial judge that the valuation report was negligently prepared and that the appellant was in breach of a duty of care to the respondent in that (a) he failed to identify and/or indicate that there were occupiers on the land in accordance with the practice accepted by competent respected professionals and (b) he valued the Land on the commercial basis when there was no basis for doing so and in doing so he failed to represent the true market value of the property[5].

ii. The trial judge did not err in excluding relevant evidence at trial and in any event the excluded evidence would have made no difference to that conclusion.

iii. Notwithstanding the recovery of two million four hundred thousand dollars ($2,400,000) from the respondent's attorneys at law the appellant was not thereby released from his obligation, under the separate cause of action against him occasioned by his negligent over-valuation, to satisfy the respondent's claim to any unrecovered amounts outstanding on the mortgage loan.

iv. In the calculation of damages awardable to the respondent for the appellant's tortious breach of duty, the contractual rate of interest between the respondent and Singapore was inapplicable in this case and a proper rate of interest needed to be applied to those damages awardable. In the circumstances a proper rate of interest based upon the then applicable statutory rate of interest would be 12% per annum.

v. A deduction of 20% must be made with respect to damages awardable on the basis of contributory negligence by the respondent.

[4] Paragraph 87 of the judgment
[5] Paragraph 89 of the judgment

Order

13. The orders of the trial judge are varied as follows:

It is ordered that the appellant pay to the respondent damages in the sum of three million dollars ($3,000,000.00) plus interest at the rate of 12% per annum from the date of the advance to the date of judgment, less the sum of two million and four hundred thousand dollars ($2,400,000.00). From that sum is to be deducted 20%. Interest on that sum would accrue thereafter at the applicable statutory rate from the date of the judgment before the trial court to the date of payment.

Analysis

Issue 1 – Negligence – Law - Duty of valuer

14. It is well established that a valuer has a duty in tort to a lender who, it was reasonably foreseeable, would rely on his valuation. In **South Australia Asset Management Corp v Nykredit Mortgage Bank plc & Ors** [1997] A.C. 191 **(**Nykredit No.1) although valuers were retained by the lender nevertheless it was held that their duty of care existed in both contract and tort, although the extent of the duty in each was the same.

15. In Nykredit No. 1 the measure of damages payable to lenders by valuers who negligently overvalue property to be provided as security was considered. It was held at page 192 c-e ibid (headnote - all emphasis added):-

> *"….that the duty of the defendants in each case, which was **the same in tort as in contract**, had been to provide the plaintiffs with a **correct valuation** of the property, namely the figure that a **reasonable** valuer would have considered it **most likely** to fetch if **sold on the open market**; that where a person was under a duty to take reasonable care to provide information on which someone else would decide on a course of action he was, if negligent, responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong; that the **measure of damages was the loss attributable to the inaccuracy of the information suffered by the plaintiff***

through embarking on the course of action on the assumption that the information was correct; …

16. The duty of the valuer in this case therefore was the same in tort as in contract, and it was to provide the respondent as a proposed lender with a **correct valuation** of the subject property, namely the estimated price which the property might reasonably be expected to fetch if sold on the open market at the date of the valuation (per Lord Hoffman at 211C ibid).

17. At 211D-E (ibid) Lord Hoffman considered the purpose of a valuation in those circumstances in order to determine the type of loss for which compensation would be required, and consequently the measure of damages if that duty were breached, as follows:

The valuation tells the lender how much, at current values, he is likely to recover if he has to resort to his security. This enables him to decide what margin, if any, an advance of a given amount will allow for a fall in the market, reasonably foreseeable variance from the figure put forward by the valuer (a valuation is an estimate of the most probable figure which the property will fetch, not a prediction that it will fetch precisely that figure), accidental damage to the property and any other of the contingencies which may happen. The valuer will know that if he overestimates the value of the property, the lender's margin for all these purposes will be correspondingly less.

18. The trial judge was required to consider whether the valuation of the property at fifteen million dollars ($15,000,000.00) being based on a. an assumption of vacant possession, and b. an assumption of approval for commercial development, was in either or both instances negligent . The trial judge found that both assumptions were unjustified because i. there were occupiers on the land whose presence was not drawn to the attention of potential mortgagees by mentioning this in the valuation report. ii. there was no basis for the assumption that the land could be valued as if it had approvals for *"the construction of the commercial development of subject lands"***.** Without such approvals the value of the property for residential use was found as a question of

fact to be two million three hundred and seventy five thousand dollars ($2,375,000.00)[6]. There was sufficient to put the appellant on notice of occupiers whose presence needed to be disclosed in his report. Without vacant possession and the ability of the respondents to realise a sale of the property, any loan secured thereon could be compromised in the event of default.

19. In fact the respondent bank may even have chosen not to advance any money on a loan secured by such a property if potentially encumbered by the presence of occupiers. This was similar to the position in **South Australia Asset Management Corporation Respondents and York Montague Ltd. v United Bank Of Kuwait Plc and Prudential Property Services Ltd. Nykredit Mortgage Bank Plc. [1997] A.C. 191 (**Nykredit No. 1) where no advance would have been made if correct valuations had been supplied. At issue therefore is:

a. Whether the trial judge's assessment and evaluation of the evidence on those issues of
   i. the assumption of vacant possession and
   ii. the assumption of approvals for commercial development, on which she grounded her finding of negligent overvaluation,

were plainly wrong. (See **Beacon Insurance v Maharaj Book Stores Limited** [2014] UKPC 21).

b. Whether the court fell into error in its application of the law to the facts.

Revisiting findings of fact

20. In **Beacon Insurance Company Limited v Maharaj Bookstore Limited Privy Council Appeal No. 102 of 2012** the Judicial Committee of the Privy Council reiterated that an appellate court should only exceptionally contemplate reversing a trial judge's findings of fact. The circumstances in which an appeal Court can interfere with findings of fact were discussed as follows.

21. At paragraph 12 of the judgment Lord Hodge referred to the judgment in *Thomas v Thomas* [1947] AC 484, per Lord Thankerton, at pp 487-488[7]

[6] Paragraphs 40, 60, and 84 of the judgment of the trial judge.

[7] *"Where a question of fact has been tried by a judge without a jury, and* ***there is no question of misdirection of himself by the judge****, an* ***appellate court which is disposed to come to a different conclusion on the printed evidence should not do so*** *unless*

22. At paragraph 13 Lord Hodge referred to the case of ***In re B (A Child) (Care Proceedings: Threshold Criteria)*** [2013] 1 WLR 1911 in which Lord Neuberger (at para 53) indicated that a Court of Appeal will only rarely even contemplate reversing a trial judge's findings of primary fact[8].

23. At paragraph 14 of the judgment Lord Hodge pointed out that the Judicial Committee had adopted a similar approach in a case from this jurisdiction, **Harracksingh v Attorney General of Trinidad and Tobago [2004] UKPC 3** in which it referred (at para 10) to the dictum of Lord Sumner in SS Hontestroom (Owners) v SS Sagaporack (Owners) [1927] AC 37, 47[9]:

Valuation as a cleared site

24. In the valuation report an express statement was made at page 3 thereof that "*on site stands (sic) some small building structures"*. The further statement was made and emphasised **"HOWEVER ONLY THE LAND ELEMENT IS BEING CONSIDERED IN THIS VALUATION REPORT AS**

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it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Lord Hodge stated that "*it has often been said the appeal court must be satisfied that the Judge at first instance had gone "**plainly wrong***" and "*directs the appellate court to consider whether it was permissible for the judge at first instance to make findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed records of the evidence. The Court is **required to identify a mistake in the Judge's evaluation of the evidence that is sufficiently material to undermine his conclusions**. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence. Choo Kok Beng Kok Hoe (1984) 2 MLJ 165 at 168-169 (Lord Roskill)*"

[8] Lord Neuberger had stated:
*"This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached **a conclusion on the primary facts**, it is only in a **rare case**, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it….*

[9] *"… not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, **merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case**. … If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should … be let alone."*

A CLEARED SITE". It was submitted that that statement was in all the circumstances sufficient to discharge the appellant's duty and notify the respondent of the possible presence of occupiers. The trial judge did not agree. She found that (at paragraph 53) "upon recognizing there were occupiers on the land the defendant/appellant was required to:

i. in the valuation clearly identify the problem of occupiers so as not to mislead,

ii. make further onsite investigations as to the nature of the occupation, and,

iii. treat the assumption of the land being a cleared site as a special assumption and identify it as such in the valuation".

25. It is not essential to consider whether or not the second requirement was necessary or the third requirement was a finding available on the evidence. That is because, whatever the terminology employed, it was clear that the duty on the appellant, as explained in Nykredit No. 1, was to provide a correct valuation of the property to the respondent. He therefore had to draw to the attention of third parties who might rely on his report, any matters which could have affected the value of the property or the ease of realization of the property as security on the open market. Whether or not the appellant was required to make further investigations as to the nature of their occupation, the very presence of occupiers on the land, whatever their status was a matter that needed to be disclosed within the report in order to comply with his duty in tort to potential mortgagees such as the respondent.

26. The trial judge found that in his evidence in cross examination the appellant indicated that he recorded the presence of occupiers on the land by the words "on site stands (sic) some small building structures". However this is not a reference to occupiers. The trial judge found that there were six structures of varying sizes on both parcels of land and concluded (at paragraph 54) that the description of the land as merely having some building structures on it does not properly represent the extent of the problem as must have been seen by Lawrence on his site visit.

27. The trial judge concluded that this was not sufficient to convey to the unsuspecting reader that these words were intended to refer to the presence of occupiers on the land. The unsuspecting reader in this case would include the respondent as a potential mortgagee of the land who could reasonably be expected to rely upon it for the valuation contained therein. On the basis of that valuation it was reasonably foreseeable that a decision would be made as to a. whether to accept the subject property at all as security for sums advanced secured by a mortgage and b. whether there were matters observed by the valuator which affected whether the security was readily realizable on the open market.

28. It was in that context the trial judge found that the appellant had breached his duty of care to the respondent. The appellant had not expressly identified the presence of occupiers on the land and, even if he had arguably put the respondent on notice of potential occupiers by the presence of "**small building structures"**, he had not identified the extent of any potential problem with **occupiers** given that he had merely stated that he observed six small structures on both parcels of the subject land.

29. The trial judge found the presence of occupiers was a matter that impacted upon the decision whether to make a loan at all on the security of the land. The appellant contends that there was no evidence to support this conclusion. In fact however there was evidence of Mr. Mohan that supported her conclusion[10]. Mr. Mohan further testified that if the land had not been accepted as security the remaining security would not have been sufficient and the loan facility would not have been granted.

30. There was a distinction between valuation as a cleared site and valuation free from all encumbrances with vacant possession. While he drew attention to the presence of some **small building structures** which, if removed, would have permitted valuation as a cleared site, he did not expressly draw attention to the specific matter of the presence of **occupiers** which impacted upon valuation free from all encumbrances with **vacant possession**. The certificate of market

[10] Paragraph 95.

value was “I am of the opinion that the current open market value of subject lands free from all encumbrances with vacant possession, is in the order of fifteen million dollars ($15,000,000). He noted that open market value would allow for the proper exposure to the market of at least 6 months from date of formal advertisement.

31. His duty to provide a correct valuation based upon likely open market sale price could not have been satisfied therefore when he failed to disclose in his report issues of occupation which had the potential to affect that price. This is a duty that was breached regardless of whether the appellant was required to make further onsite investigations as to the nature of the occupation, or whether he was required to expressly identify as a special assumption his assumption of the land being a cleared site. He was required at the very least to indicate in his report that there were occupiers even if he did not make enquiries as to their status. If that were in the report this would have put third parties such as the respondent on notice of a material matter that could have impacted: a. the decision to even accept the subject lands as security for a loan b. the **realisability** of the subject lands if taken as security and c. the value of the land and therefore its **adequacy** as security for any advance made. The trial judge’s evaluation of the evidence and conclusion in this regard cannot be faulted.

Valuation on a commercial basis

32. The trial judge’s conclusion on this was as follows (all emphasis added):

> *87. At the end of the day the question is whether there was a proper basis for the Defendant to value the land as commercial. In this regard not only are the opinions of the experts relevant but so is the basis upon which the Defendant determined that the Land ought to be valued as commercial. The Defendant bases his opinion in the main on the fact that the Land has been **developed** changing its **use** from agriculture to **commercial** purposes. There is however **no** evidence of this. In that regard I am satisfied that insofar as the Defendant based his conclusion that the optimum use for the Land was commercial this was based on the fact that the Land had been developed changing its use from agriculture to commercial*

purposes. In the absence of such evidence this was not a valid basis for arriving at the conclusion and in fact its inclusion in the Valuation was wholly misleading.

88. I am satisfied that on the evidence before me there was no proper basis for valuing the Land as commercial. Indeed if we return to the three criteria that Gumansingh calls the basis of his opinion in his statement of the 27th January 2014 he seems to confirm that in arriving at the optimum use a valuer is required to consider the highest and best ***approved*** *use of the property. At the end of the day there is no* ***approval*** *for the use of the Land for commercial purposes.*

33. The trial judge found the evidence disclosed no basis upon which the appellant could have chosen to value the land on a commercial basis. Even if he were attempting to value the land at its highest and best use he had to have a basis for concluding that the highest and best use of the land would be as a commercial site. He claimed i) that he used comparators and he gave examples of several such comparators upon which he founded his values of one hundred to two hundred dollars per square foot. Those comparators however, on his own evidence, were in relation to properties that were not adjoining or even adjacent or in proximity to the subject lands and were different in character. The reference in the report *"these lands have been developed changing its (sic) use from agriculture to commercial purposes"* to the change of the use of "these lands", gave the impression that "these lands" in that report actually referred to the subject lands. In fact he claimed that he meant that "these lands" referred to lands in the vicinity[11]. Yet the impression conveyed by the report was that "these lands" were the subject lands which had in fact changed in their use from agriculture to commercial purposes and the trial judge so found.

34. The trial judge further found that reference in the valuation to the changing of the use of the land from agricultural to commercial was actually misleading. This was a finding of fact with

[11] Paragraph 65 of the judgment

which an appeal court would only interfere if the trial judge was found to be plainly wrong. In this case with respect to this matter the trial judge could not be said to be plainly wrong.

35. Further there was no basis for him to conclude that the lands could have realised the $100 to $150 dollars per square foot at which he had valued them at on the assumption that they were available for commercial development. He contends that in his report he made it clear that his valuation was based upon the **assumption** that planning and statutory approvals would be granted for their commercial development.

36. However that was not the case. The impression created of availability for commercial use was not sufficiently dispelled by the statement that the valuation was being given on the assumption that planning approvals would have been obtained. The statement was in the context that, as stated in the report, that "these lands" had evolved in their use from agricultural to commercial purposes implying that planning permission and approvals for commercial development would be obtainable. The erroneous impression conveyed by the report that the lands in fact were realizable as security at a value of fifteen million dollars ($15,000,000.00) was based upon availability for such commercial development. It would have been far less misleading to any one relying on that valuation, and a matter of no great difficulty, to have dispelled that impression by **expressly** indicating that the lands **could** be valued at as much as fifteen million dollars ($15,000,000.00) if commercial approvals had been obtained, but that in fact no such commercial approvals had been observed by the valuator, and that in default an alternative basis for valuation could have been on the basis of residential use, at a much lower value.

37. A third party looking at the valuation and relying upon it for the purpose of advancing money on its security would have been given the clear impression i. that such valuation as a realisable security could actually be in the vicinity of fifteen million dollars ($15,000,000.00), ii. that there was no impediment to its saleability on the open market despite the undisclosed presence of occupiers thereon and iii. the lands were so valued or could have been valued based upon a realistic prospect that planning permission for commercial development would be

available *because "these lands have been developed changing its (sic) use from agriculture to commercial purposes"*.

38. The appellant contended that there were many reasons why it would have been proper to value the land for commercial use and the trial judge's conclusion otherwise failed to take these into account. These included that the appellant was instructed by Mr. Alexander of Rafferty to value it on the basis that the site was approved for commercial use. However any such instructions could not absolve him of his duty to third parties relying thereon for a professional objective valuation.

39. The appellant claimed that there was evidence which justified commercial valuation which the trial judge failed to consider. This included the following:

i. Mr. Lawrence and Mr. Goomansingh gave evidence that the area around the property was an area of mixed commercial and residential **use**,
ii. that there was a heavy flow of **traffic** in the area,
iii. that there was a high **demand** for land in the area,
iv. that the appellant's **client** had **told** him that he **intended** to put it to use as a retail car mart,
v. that a potential purchaser, who had made an opening bid of two million dollars ($2,000,000.00), had indicated that he **intended** to put the land to commercial use, and,
vi. that there was commercial use **potential** in advertising frontage along the main highway.
vii. Further that the value of the property was six times higher as commercial use than as residential.
viii. It was therefore reasonable to assume that purchasers would wish to treat the land as commercial and **make an effort to secure** its approval as commercial.
ix. Finally the appellant contended that he did not say that his reason for valuing the land on a commercial basis was that its use had already changed to commercial. Rather he

expressly identified this in his report as an assumption to be checked.

x. The appellant also contended that Mr. Augustus one of the expert valuators, at paragraph 20 of his witness statement accepted that the lands could have been valued assuming the grant of commercial use (sic).

40. The difficulty with all of these reasons is that they do not confront the fact that a valuation is required to provide the proposed lender with a correct valuation of property, namely the figure that the reasonable valuer would have considered it most likely to fetch if sold on the open market. Even the opening bid received by the potential purchaser who intended to make commercial use of it was two million dollars ($2,000,000.00), a far cry from the alleged value of fifteen million dollars ($15,000,000.00) if it had in fact secured commercial development approval.

41. Without a basis for valuing the land on the express assumption that "town and country planning and all other statutory approvals would be granted for the construction of (sic) the commercial development of subject lands", his certificate of market value in the order of fifteen million dollars ($15,000,000.00) was questionable. Without such approvals for commercial development the value of $15,000,000.00 could not be justified. The trial judge found on the evidence that there was no basis for assuming such planning and statutory approvals. In fact, as the appellant accepts in his evidence in cross examination at page 1683 (R.O.A), to his knowledge there had been no planning applications for commercial use of the property.

42. The trial judge accepted the evidence of Mr. Goomansingh that in arriving at the optimum use a valuer is required to consider the highest and best **approved** use of the property. If even the valuation report were being prepared on optimistic assumptions of the ease at which planning approval for commercial use and development would be obtained, it would be necessary for this to have been made clear in the report itself so as to be communicated to third parties to whom a duty of care was owed. The report was not qualified by expressing the commercial use valuation as a potential best case scenario, with the actual value of the subject

land based on current reality (without such planning approval) also being included. It clearly gave the impression to a potential mortgagee that the value was in the order of fifteen million dollars ($15,000,000.00) without making sufficiently clear that that certified open market value was not based on actual current planning approval but rather based on the most optimistic of assumptions of future approval, which had not even been applied for at the time of valuation.

Special Assumption

43. The trial judge found that even if the valuer had been making an assumption only as to a) the availability for commercial development or b) its realization as a cleared site with no occupiers thereon, that these would be special assumptions that he would have needed to have made and identify as such, and that these should have followed a particular regime as set out in the Royal Institute of Chartered Surveyors (RICS) valuation standard (the red book). The trial judge found that although the relevant portion of the RICS[12] was not before her that she was entitled to conclude that the special assumption had to be identified as such.

44. It is not necessary to determine whether this was so given that the crux of her decision was that the presence of occupiers, whatever their status, was not disclosed and that there was no approval for the use of the Land for commercial development.
Whether or not those matters were identified as special assumptions the report did not frontally communicate that while this was what the value of the land could be in future with planning approval for commercial development, that its current open market value without such approvals may have been otherwise. Instead it conveyed the impression that fifteen million dollars ($15,000,000.00) was the current open market value of the property, and led the respondent to make an advance on the security of property which, without such planning permission, was in fact worth considerably less.

45. It was therefore held to be a breach of duty of the valuer to value the subject property on a commercial basis in the sum of fifteen million dollars ($15,000,000.00) when there was no

[12] 2.1 and 2.2 see paragraph 48 of the judgement

basis for doing so. In fact there was evidence that valuation of that property on the alternative basis of residential use would have been far less in the vicinity of two million three hundred and seventy five thousand dollars ($2, 375,000.00). The failure to make it clear that there was no reason to prefer the commercial use basis and the failure to refer to the alternative use and value of the subject property if on that basis, rather than the alternative residential use basis amounted to a breach of duty. That duty extended in tort to third parties who, it could reasonably be foreseen, might rely on it to determine the extent of any advance. This was accepted by the appellant at paragraph 15 of his witness statement.

46. On the issues of whether or not, therefore, the valuation was an overvaluation or a negligent valuation there is no reason to interfere with, or to disagree with, the trial judge's findings with respect to the interpretation, and construction of the evidence nor with her conclusions on the effect of the valuation report on the respondent bank, to whom a tortious duty of care was owed.

Issue 2 - Exclusion of material from witness statement

47. The appellant contended that exclusion of certain aspects of the witness statement of the appellant occasioned prejudice to him because at the conclusion of the trial the absence of that evidence was utilised by the trial court as the basis for adverse findings of negligence against him. That material is set as follows: - *"I did however request information on the occupants of the site and was informed by Mr. Alexander that the occupants were relatives responsible for tending to the said property. My instructions were that approvals were being sought for commercial purposes namely the erection of a Retail Car Mart on the said property and the valuation was to be conducted on the basis that the site was approved for commercial use."*

48. This material would have made no difference to the appellant's defence since the inquiry that he wished to refer to and the response that he received:

a. were not contained in his report, which was the only means of communication to third parties relying thereon and to whom he owed a duty of care.

b. in any event even if evidence of those enquiries had been admitted into evidence they could not have satisfied the duty upon him to ascertain and mention material matters that could

potentially affect the value of the subject lands. Those alleged inquiries could not have absolved him of his duty to ascertain and disclose matters material to his valuation in his valuation report which was being expressly prepared and being relied upon for the purpose of a mortgage.

49. Further, those alleged inquiries and response as to intended use could not have provided the necessary basis for him, as an independent professional valuator, to have valued the subject land on a commercial basis.

Issue No. 3 - Multiple Tortfeasors – the release rule

50. A compromise was entered into with the respondent's former attorneys at law based upon the respondent's claims against them in respect of the alleged defective title to the subject lands. The appellant contended that this had the effect of releasing him from the respondent's claim against him or from the obligation to satisfy any further liability or any unrecovered portion of the damages.

51. The tort alleged against the respondent's attorneys at law was negligence in failing to detect a fraudulent deed, an impediment on the title to the subject property. The trial judge found in effect that in relation to the claim against the valuer that the bank had been induced to advance monies in respect of the subject property which, had the presence of occupiers thereon been disclosed to it, it may not have done at all. It was open to her on the evidence to find that the bank had been induced by the allegedly negligent valuation to advance sums in excess of the amount which it would have advanced had the property been valued as residential ($2,375,000,00) and not commercial ($15,000,000.00).

52. At paragraph 41 of **Gulf View Medical Centre Limited and Anor v Dr. Lester Goetz, Tesheira Khan CA Civ P187/2013** delivered 31st July 2014 the Court of Appeal in this jurisdiction, after careful consideration of the English authorities in relation to the release rule in the context of the UK Civil Liability Contribution Act section 3 and section 26(1) of the Supreme Court of Judicature Act Chapter 4:01, concluded, albeit obiter, "*if we were to express an opinion it would*

be that the logical consequence of section 26 (1) must be that the release rule no longer exists in this jurisdiction".

53. Based upon the decision in ***Gulf View*** the release rule would not apply. This is because i. the respondent's former attorneys at law and the appellant were not joint tortfeasors. The component of damage resulting from a negligent overvaluation is distinct from the component of damage caused by both the respondent's former attorneys and the appellant in leading the respondent to accept the subject lands as security for the advance. The negligent overvaluation in this case further led to an amount being advanced ($3,000,000.00) in excess of the correct value of the property ($2,375,000.00) and therefore in excess of the amount that would have been advanced based upon a non-negligent valuation. ii. The respondent's former attorneys at law and the appellant were therefore several tortfeasors causing different damage for which they are independently liable to the respondent. iii. Even if they could have been considered joint tortfeasors the partial release rule does not apply in this jurisdiction so that a release of the respondent's attorneys from liability to the respondent would not automatically operate as a release of the appellant. See ***Gulf View*** per judgment of Narine JA[13]. (all emphasis added). The

[13] **THE LAW**

18. At common law, where damage was caused as a result of torts committed by two or more persons, the tortfeasors were classified as joint tortfeasors or several tortfeasors. A distinction was also made between several tortfeasors causing the same damage, and several tortfeasors causing different damage. See: **Clerk and Lindsell on Torts (18th ed)** at **para 4-101.**

19. Joint liability generally arises in cases of agency, where a principal is liable for tortious acts of his agent, in master and servant cases, where the employer is liable for torts committed by his employee in the course of his employment, and generally in cases where the tortfeasors commit a tort in furtherance of a common design, or there is concerted action towards a common purpose. See: **Clerk and Lindsell on Torts (18th ed)** at **para 4-107** and **4-108**.

20. At common law, there was only one single and indivisible cause of action available for a joint tort. It followed from that principle that judgment against one joint tortfeasor operated as a bar against any subsequent action (or the continuance of the same action) against another joint tortfeasor, even if the judgment remained unsatisfied. Another consequence of the principle was that the release of one joint tortfeasor operated as a release of the others, even if the claimant had not recovered his full loss.

21. In the case of several tortfeasors, a separate cause of action was available against each tortfeasor. It followed that judgment against one several tortfeasor was not a bar to an action against the others, and a release of one several tortfeasor did not operate as a release of the others.

23. These provisions are mirrored in **section 26(1)** of the **Supreme Court of Judicature Act Chap 4:01** which provides:

appellant's liability for a negligent overvaluation was separate and distinct from liability of attorneys at law in respect of defective title to the subject lands. They were therefore concurrent tortfeasors. Therefore to the extent that there was loss and damage that was not fully satisfied by settlement with the respondent's attorneys at law the appellant's liability would not be released by that settlement and he can be called upon to satisfy it. However to avoid double recovery any amount recovered from one tortfeasor would have to be deducted from the damages payable by the other tortfeasor.

Measure of Damages

54. Given that the trial judge's finding is accepted that the valuation was negligent the measure of damages must be considered. Nykredit No. 1 page 216D-E addressed the measure of damages in a case of negligent valuation as follows:

"Where damage is suffered by any person as a result of a tort, whether a crime or not –
(a) Judgment recovered against any tortfeasor liable in respect of that damage ***shall not be a bar*** *to any action against any other person who would if sued, have been liable as a* ***joint tortfeasor*** *in respect of the same damage…"*

36. The decision in **Jameson** (supra) was subsequently explained and distinguished in the later decision of the House of Lords in **Heaton & Others v Axa Equity and Law Life Assurance Society plc & Others** [2002] 2 All ER 961. At page 966, paragraph 9 of the opinion of Lord Bingham, the following propositions are to be found:

(i) In considering whether a sum accepted under a compromise agreement should be taken to fix the full measure of A's loss, so as to preclude action against C in tort in respect of the same damage, the terms of the settlement agreement between A and B must be the primary focus of attention, and the agreement must be construed in its appropriate factual context.

(ii) In construing the agreement various significant points must be borne in mind, inter alia:

(1) The release of one **concurrent** tortfeasor does not have the effect in law of releasing another **concurrent** tortfeasor.
(2) …
(3) …
(4) …

37. As can be gleaned from the learning referred to above, the reliance by the appellants on the release rule, on the basis that they are **concurrent** tortfeasors, is misplaced. While the English authorities (notably **Watts** (supra)) appear to suggest that the release rule still applies in the case of joint tortfeasors, **it does not apply to concurrent tortfeasors** whose liability is joint and several.

In the case of breach of a duty of care, the measure of damages is the loss attributable to the inaccuracy of the information which the plaintiff has suffered by reason of having entered into the transaction on the assumption that the information was correct. One therefore compares the loss he has actually suffered with what his position would have been if he had not entered into the transaction and asks what element of this loss is attributable to the inaccuracy of the information. In the case of a warranty, one compares the plaintiff's position as a result of entering into the transaction with what it would have been if the information had been accurate. Both measures are concerned with the consequences of the inaccuracy of the information but the tort measure is the extent to which the plaintiff is worse off because the information was wrong whereas the warranty measure is the extent to which he would have been better off if the information had been right.

55. The adequacy of that settlement though challenged by the appellant on this appeal is not a matter that is relevant. The loss caused to the respondent by both the negligent advice on title by its former attorneys at law and the negligent valuation of the appellant was the same, (being an advance of three million dollars ($3,000,000.00), made by the respondent which it would not have otherwise made, plus reasonable interest thereon.) It makes no difference in the circumstances of this case given that the total loss claimed against both parties is the same and that both the respondent's attorneys at law and the appellant are responsible for it. Therefore a deduction in the sum of two million four hundred thousand dollars ($2,400,000.00) already received in respect of the same loss was required from any sums recoverable against the appellant.

The Alternative Basis – Overvaluation

Value of the subject lands – the correct valuation

But once the valuer has been found to have been negligent, the loss for which he is responsible is that which has been caused by the valuation being wrong. For this purpose ***the court must form a view*** *as to what* ***a correct valuation*** *would have been. This means*

the figure which it considers most likely that a reasonable valuer, using the information available at the relevant date, would have put forward as the amount which the property was ***most likely to fetch if sold upon the open market****. While it is true that there would have been a range of figures which the reasonable valuer might have put forward, the figure most likely to have been put forward would have been the mean figure of that range. There is no basis for calculating damages upon the basis that it would have been a figure at one or other extreme of the range. Either of these would have been less likely than the mean: see Lion Nathan Ltd. v. C. C. Bottlers Ltd., The Times, 16 May 1996* ***pages*** **221G-222A**

56. The true value of the subject lands given that title in Rafferty was based on an alleged fraudulent deed, was effectively nil. At the time of the valuation however this was unknown. What could have been known is that the residential value of the subject lands **assuming good title** was two million three hundred and seventy five thousand dollars ($2,375,000.00). It was only on a valuation of fifteen million dollars (15,000,000.00) based upon negligent valuation on a commercial basis that any sum would have been advanced in excess of two million three hundred and seventy five thousand dollars ($2,375,000.00). That portion of the bank's loss would be entirely attributable to a negligent overvaluation[14].

The possibility of using an amount in excess of 70% of that sum based upon the respondent's lending guidelines was expressly rejected in Nykredit No. 1 at page 219E-G as follows:-

[14] *I turn now to the various theories suggested by the appellant defendants for defining the extent of the valuer's liability. One was described as the "cushion theory" and involved calculating* ***what the plaintiff would have lost*** *if he had* ***made a loan of the same proportion of the true value of the property as his loan bore to the amount of the valuation****. The advantage claimed for this theory was that it allowed the lender to claim loss caused by a fall in the market but only to the extent of the proportionate margin or "cushion" which he had intended to allow himself. But this theory allows the damages to vary according to a decision which the lender made for a different purpose, namely, in deciding how much he should lend on the value reported to him. There seems no justification for deeming him, in the teeth of the evidence, to have been willing to lend the same proportion on a lower valuation.*

An alternative theory was that the lender should be entitled to recover the whole of his loss, subject to a "cap" limiting his recovery to the amount of the overvaluation. This theory will ordinarily produce the same result as the requirement that loss should be a consequence of the valuation being wrong, because the usual such consequence is that the lender makes an advance which he thinks is secured to a correspondingly greater extent. But I would not wish to exclude the possibility that other kinds of loss may flow from the valuation being wrong and in any case, as Mr. Sumption said on behalf of the defendants York Montague Ltd., it seems odd to start by choosing the wrong measure of damages (the whole loss) and then correct the error by imposing a cap. The appearance of a cap is

The basic comparison

57. The basic comparison was explained in Nykredit No. 2 309 c- e as follows:

> *It is axiomatic that in assessing loss caused by the defendant's negligence the basic measure is the comparison between (a) what the plaintiff's position would have been if the defendant had fulfilled his duty of care and (b) the plaintiff's actual position. Frequently, but not always, the plaintiff would not have entered into the relevant transaction had the defendant fulfilled his duty of care and advised the plaintiff, for instance, of the true value of the property. When this is so, a professional negligence claim calls for a comparison between the plaintiff's position had he not entered into the transaction in question and his position under the transaction. That is the basic comparison. Thus, typically in the case of a negligent valuation of an intended loan security, the basic comparison called for is between (a) the amount of money lent by the plaintiff, which he would still have had in the absence of the loan transaction, plus interest at a proper rate, and (b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property*.

58. Applying this the calculation should be:-

i. the amount of money lent, **plus**

ii. interest at a proper rate, **minus**

iii. the value of rights acquired, (namely the borrower's covenant – in this case worthless), and

iv. the true value of the overvalued property – two million three hundred and seventy five thousand dollars ($2,375,000.00) assuming proper title.

59. This would work out as follows:

a. In principle the respondent's loss would be limited to the extent of any over valuation. The evidence is that the valuation of the property as commercial would have been in the vicinity fifteen million dollars ($15,000,000.00) ($14 million dollars per Mr. Augustus, $15 million dollars

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actually the result of the plaintiff having to satisfy two separate requirements: first, to prove that he has suffered loss, and, secondly, to establish that the loss fell within the scope of the duty he was owed.

per the appellant and Mr. Goomansingh). The evidence is that the value of the property as residential was in the vicinity of two million three hundred and seventy five thousand dollars ($2,375,000.00). In this case that limit has no practical significance as the property would have been overvalued by twelve million six hundred and twenty five thousand dollars ($12,625,000.00). The bank actually advanced three million dollars ($3,000,000.00). Its loss would be this amount in addition to interest at a proper rate.

b. There is also an additional complication in this case, namely that it was alleged by the bank that the title to the property was defective based upon a 1968 fraudulent deed. In this regard it sought recovery against its own attorneys at law and obtained a settlement in the sum of two million four hundred thousand dollars ($2,400,000.00) from them in respect of all of its claims in that action. Its claims in that action were damages for negligence based upon allegedly defective title. However, as in the instant action, the bank in fact had sought recovery of all sums that had been advanced upon the security of the subject lands.

c. If there had been proper title to the subject property the respondent would have been able to reduce its loss by the sale of the subject lands under the mortgage. However in the absence of a proper title it could not do so. The respondent was compensated for the fact that there was no title to the subject property via the compromise of its claim against its former attorneys at law and the receipt from them of two million four hundred thousand dollars ($2,400,000.00).

d. The appellant is not responsible for the value of the security in this case being zero. If the title had not been defective the appellant could have had the benefit of its value - two million three hundred and seventy five thousand dollars ($2,375,000.00), deducted from the respondent's loss. In fact because of the settlement with the respondent's attorneys the respondent was compensated for the fact that the property's title was defective and its value effectively zero. That settlement figure in the sum of two million four hundred thousand dollars ($2,400,000.00) must be deducted instead from the respondent's loss. The settlement figure of two million four hundred thousand dollars ($2,400,000.00) is marginally higher than the value of the land found

by the trial judge two million three hundred and seventy five thousand dollars ($2,375,000.00). The appellant's liability in this case is not therefore overly complicated by the fact that the value of the subject property turned out to be zero, because this aspect of the claim was effectively compensated via recovery against former attorneys at law for the equivalent of its value.

Issue No. 4 - Interest

Date of accrual of cause of action

60. **Nykredit No. 1** was subsequently considered in Nykredit Mortgage Bank plc v Edward Eldman Group Limited No. 2 [1998] 1 All E.R. 305 **- at 309d – e (Nykredit No. 2)**

> *When, then, does the lender first sustain measurable, relevant loss? The first step in answering this question is to identify the relevant measure of loss. It is axiomatic that in assessing loss caused by the defendant's negligence the basic measure is the comparison between (a) what the plaintiff's position would have been if the defendant had fulfilled his duty of care and (b) the plaintiff's actual position. Frequently, but not always, the plaintiff would not have entered into the relevant transaction had the defendant fulfilled his duty of care and advised the plaintiff, for instance, of the true value of the property. When this is so, a professional negligence claim calls for a comparison between the plaintiff's position had he not entered into the transaction in question and his position under the transaction. That is the basic comparison. Thus, typically in the case of a negligent valuation of an intended loan security, the basic comparison called for is between (a) the amount of money lent by the plaintiff, which he would still have had in the absence of the loan transaction, plus interest at a proper rate, and (b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property.*

61. The relevant date would be the date on which the lender actually suffered the loss attributable to the valuer's breach of duty. As in Nycredit No. 2 [1998] 1 All E.R. 305 the amount lent of $3 million dollars had at all times exceeded the true value of the property. The borrower here defaulted immediately giving rise to the loss. The borrower's covenant was worthless. The loss and the cause of action therefore arose at the date of the loan.

62. As pointed out by Lord Hoffman in Nykredit No. 1 at page 216H-217A[15] it would be wrong in principle to conflate the contractual rate of interest 15.75 per cent rate per annum, which would be based upon the contractual duty by the bank's client, with the amount recoverable against the tortfeasors for breach of a duty of care.

63. In the absence of evidence that the bank would actually have been able to lend the sum advanced to another client at the rate of 15.75 per cent per annum it could not be assumed that that rate would be equivalent to the loss that was suffered by the bank. It was conceded that there was no evidence as to what the respondent would have been able to earn on the sum loaned to Singapore had it not advanced the sum of three million dollars ($3,000,000.00) to it. In those circumstances the court doing the best that it could, had to arrive at a proper rate of interest.

64. An indicative rate of interest which would have been applicable at the time both of the advance and of the judgment would have been the statutory rate. That rate, being 12% per annum, provides a rational basis for a rate that can be considered a proper rate. The rate of

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[15] The measure of damages in an action for breach of a duty to take care to provide accurate information must also be distinguished from the measure of damages for breach of a warranty that the information is accurate. In the case of breach of a duty of care, the measure of damages is the loss attributable to the inaccuracy of the information which the plaintiff has suffered by reason of having entered into the transaction on the assumption that the information was correct. One therefore compares the loss he has actually suffered with what his position would have been if he had not entered into the transaction and asks what element of this loss is attributable to the inaccuracy of the information. In the case of a warranty, one compares the plaintiff's position as a result of entering into the transaction with what it would have been if the information had been accurate. Both measures are concerned with the consequences of the inaccuracy of the information but the tort measure is the extent to which the plaintiff is worse off because the information was wrong whereas the warranty measure is the extent to which he would have been better off if the information had been right.

This distinction was the basis of the decision of this House in *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223. Simplifying the facts slightly, the plaintiffs were moneylenders who had advanced £10,000 repayable with interest at the rate of 36·51 per cent., rising in the event of default to 45·619 per cent., on the security of a house which had been valued at £18,000. The valuation was admittedly negligent and the property fetched only £12,000. By that time arrears of interest had increased the debt to nearly £20,000 and the lenders claimed £8,000 damages. This House held that the lenders were **not entitled to damages which represented the contractual rate of interest**. That would be to put them in the position in which they would have been if the valuation had been correct; a measure of damages which could be justified only if they had given a warranty. In an action for breach of a duty of care, **they could not recover more than what they would have earned with the money if they had not entered into the transaction**. As there was no evidence that they would have been able to obtain the same exorbitant rate of interest elsewhere, the claim in respect of arrears of interest failed.

12% per annum would be from the date of the loan until judgment and, thereafter, the current statutory rate would apply.

Calculation of Damages

65. In this case under the basic comparison a. the amount of money lent was three million dollars ($3,000,000.00) b. interest at a proper rate was 12% per annum c. the date of the loss in this case was the date of the advance and d. the value of the rights acquired by the bank were a. rights under the borrower's covenant – (of no value) and b. the true value of the overvalued property. While the appellant contends that that was two million three hundred and seventy five thousand dollars ($2,375,000.00) this was on the assumption that the borrower had proper title. It did not but the equivalent of the value of the property was provided by the compensation obtained from the respondent's attorneys at law who were responsible for certifying title and compensating for any defect therein.

66. Therefore the damages awardable to the respondent would have been a) the amount of principal advanced, being three million dollars ($3,000,000.00), plus interest at a proper rate (12% per annum) accrued on that advance, from the date of the advance until the date of judgment. From this would need to be subtracted the amount of two million four hundred thousand dollars ($2,400,000.00) recovered from the respondent's attorneys at law.

Issue No. 5 - Contributory Negligence

67. Having found both i. that there was negligence in the valuation and ii. that the appellant could not avail himself of the benefit of the release rule in the circumstances of this case,- the issue arose as to whether the damages which would flow from those two findings would be reduced by any contributory negligence by the respondent itself. The evidence before the Court was that the bank had its own internal procedures. They were documented in a manual which was in evidence before the court. It was quite clear that the bank's own internal guidelines and lending procedures required it, even in the case where valuation had been provided to it by a valuator, to itself, via its officers, inspect the property it was proposed to use as security. The

evidence of Mr. Mohan was that the respondent bank considered that because the appellant was on its panel of valuators that it was justified in relying even more heavily upon him and not itself checking in accordance with its internal procedures whether there were occupants on the site. That does not justify absolving the respondent from the consequences of that decision, especially as the valuation had not been commissioned by the respondent.

68. It failed to send officers to inspect the subject property .Such an inspection would have revealed to it the presence of the occupiers and put it on alert to the possibility that such occupiers might affect the availability of vacant possession in the event of a loan default. This must have contributed to a) the possibility that it may not have considered the property to be adequate security and it may have made no loan advance, or (b) that it may have made an advance but in a lesser sum had a **proper valuation** been provided to it, or (c) that it may have made the same advance but required additional security. The fact is that it was material factor that went towards the bank's eventual loss.

69. Given that the presence of persons on the land which might have affected the ease of its realization as security was a matter that was equally discernible and discoverable by bank personnel on a visit, the failure by the bank to follow its own internal guidelines was a factor which must have contributed toward the damage that it ultimately suffered. Therefore an appropriate contribution should have been deducted for the contributory negligence of the bank in not itself inspecting the property in accordance with its own guidelines.

70. The foreseeable loss to the bank arose from two factors a) the failure by the appellant to disclose that the subject land may not have been free and available with vacant possession and b) an over valuation having been made, the bank advanced in excess of what it would have advanced had an over valuation not been made. Its own contribution is assessed at 20% taking into account i. the possibility that an advance may not have been made, as well as ii. the possibility that an advance may have been made but for a lesser sum with additional security being required if the presence of occupiers had been revealed.

71. If each cause of loss is estimated to account for 50%, and the respondent's contribution to one cause, (detection of occupiers), is itself estimated to account for 50% of that cause, that would produce an estimated contribution of 25%.

72. With a cushion of over $12.5 million dollars based on the appellant's overvaluation it may reasonably be inferred on the primary facts found by the trial judge, that the chance of the land being accepted as security, even with the presence of occupiers, may well have been increased. The effect of that significant overvaluation on the decision to accept the subject lands as security cannot be ignored. A discounted figure for the respondent's contribution is therefore utilised to take this into account.

Damages taking into account contribution

73. On the issue of damages the proper basis for damages in this case would be i. the advance by the bank of three million dollars, plus ii. a proper rate of interest, (not being the **contractual** rate of interest), minus iii. the extent to which recovery has already taken place as against the respondent's former attorneys at law, which would be two million four hundred thousand dollars (2,400.000.00). That figure would be further subject to (iv). deduction of the 20 per cent contribution referred to above.

Order

74. In those circumstances the order was made that the appellant pay to the respondent damages in the sum of three million dollars ($3,000,000.00), plus interest at the rate of 12% per annum from the date of the advance to the date of judgment before the trial court, less the sum of two million four hundred thousand dollars ($2,400,000.00) already received. From that sum is to be deducted 20% for the respondent's contributory negligence. Interest on the sum so calculated would accrue thereafter at the applicable statutory rate from the date of the judgment before the trial court to the date of payment.

ii. The Appellant will pay to the Respondent two thirds of the costs agreed in the court

below.

iii. By agreement it is ordered that there would be a stay on the Order for 21 days.

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Peter A. Rajkumar

Justice of Appeal

15th April 2019