[2021] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 69/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD BISHOP JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPELLANT**
AND	**SYLVIA STEENS**	**RESPONDENT**

Mrs Sandra Minott-Phillips QC and Litrow Hickson instructed by Myers Fletcher & Gordon for the appellant

Lord Anthony Gifford QC and Ms Maria Brady instructed by Gifford Thompson & Shields for the respondent

19, 20 February 2020 and 19 February 2021

PHILLIPS JA

[1] I have read in draft the judgment of Edwards JA and I agree with her reasoning and conclusion. There is nothing I need to add.

MCDONALD-BISHOP JA

[2] I too have read in draft the comprehensive judgment of Edwards JA. She has exhaustively and carefully analysed the critical issues necessary for the resolution of this appeal and I endorse her reasoning and conclusion in relation to them. There is nothing that I could usefully add.

EDWARDS JA

Introduction

[3] In this appeal, the National Commercial Bank Jamaica Limited (NCB) ("the appellant"), challenged the decision of Thompson-James J ("the trial judge") made on 5 August 2013, whereby she gave judgment in favour of Ms Sylvia Steens ("the respondent"). The respondent's claim alleged that the appellant was vicariously liable for negligent investment advice she received from its employee, Miss Sandra Cunningham ("Ms Cunningham"), to invest in the Higgins Warner investment scheme, which subsequently failed causing financial loss to her.

[4] The appellant is, and was at the material time, licensed under the Banking Act of Jamaica as a commercial bank. The respondent had been a long-standing customer of the appellant. She was also a customer of NCB Capital Market Limited, which is an investment bank and an affiliate of the appellant, both being a part of the same group of companies.

[5] Having been designated a first class customer of the appellant, the respondent was assigned a personal banker who was Ms Cunningham. Ms Cunningham also

happened to be a close personal childhood friend of the respondent. It is unclear whether this was previously disclosed to the appellant. Monies were invested by the respondent in May and June 2007 in an unregulated investment scheme run by Higgins Warner. Between June and November 2007, the respondent received interest on her principal investments in Higgins Warner. The Higgins Warner scheme collapsed in or about November 2007 and all payments to the respondent ceased.

The claim

[6] Subsequent to the collapse of Higgins Warner, the respondent wrote to the appellant, through her attorneys-at-law, in an attempt to recoup her losses. This was to no avail. As a result, on 17 December 2008 she filed suit against the appellant. The respondent alleged that in or about May and June 2007, she met with Ms Cunningham at the Morant Bay branch of the appellant, in the parish of Saint Thomas. On this occasion, Ms Cunningham gave her unsolicited advice about a secure investment scheme, from which she could make more money than that which she was making from the Euro dollar account she held in NCB Capital Markets Limited. She claimed that Ms Cunningham told her she would not lose her money, and advised her to borrow $6,000,000.00 from the appellant to invest in the programme. She was also advised to use her Euro fund as collateral for the loan.

[7] The respondent further alleged that in reliance on this advice she signed several documents which facilitated: (a) the loan from the appellant, (b) the use of €100,000.00 of her Euro fund as collateral; and (c) the investment in the Higgins Warner investment scheme. Of the $6,000,000.00 proceeds from the loan, a portion

was converted to US$40,000,00 and invested in Higgins Warner. She also alleged that Ms Cunningham had converted a portion of the loan proceeds received from the appellant to her own use.

[8] The respondent averred that in giving negligent advice, Ms Cunningham, acting in the course of her employment with the appellant, had "failed to act with proper skill and care and/or failed to act in the interests of the [the respondent] but rather acted in furtherance of her own interests, and/or was negligent". The particulars of negligence were set out as follows:

> "(1) Advising an investment which was manifestly speculative and unreliable.
>
> (2) Failing to give any advice as to the risks associated with such an investment.
>
> (3) Furthering her own interests, namely that she was an agent of Higgins Warner and earned commissions from investments which she had introduced.
>
> (4) Failing to provide the [respondent] with copies of the documents referred to above so that the [respondent] could study them and understand the nature of the said investment."

[9] The respondent also pleaded that the appellant was vicariously liable for all loss and damage she suffered as a result of the relevant actions of Ms Cunningham for the following reasons:

> "(1) The advice was given by Sandra Cunningham at the [appellant] Bank in her capacity as the [respondent's] personal banker.

(2) Her torts and/or criminal acts were so closely connected with her employment that it would be fair and just to hold the [appellant] vicariously liable."

[10] Further, and in the alternative, the respondent sought to rely on the contractual relationship between herself and the appellant as customer and banker, and in accordance with the duty owed by Ms Cunningham as a servant of the appellant to act with proper skill and care and to act with due regard to the respondent's interests and not in furtherance of its own.

[11] The respondent claimed against the appellant a total loss of $2,004,475.28, being the amount she averred would restore her to the position she would have been in had there been no negligent advice, no loan and no investment. She averred that she paid a total of $7,239,349.38 to repay the loan, and in arriving at the sum claimed, she deducted from that sum the moneys that were returned to her by Higgins Warner and Ms Cunningham (with interest) in the amount of $2,520,000.00 and $2,714,874.10, respectively.

The defence

[12] The appellant admitted that the respondent was its customer and that Ms Cunningham had been assigned to her as her personal banker. However, it defended the claim on the basis, in summary, that it was licensed under the Banking Act of Jamaica as a commercial bank, and that licence did not include the giving of investment advice. It averred that it was a separate legal entity from both NCB Capital Markets Limited and Higgins Warner, although NCB Capital Markets Limited is an affiliate. Ms Cunningham, it averred, was only authorized to convey information about its services

and to act on its behalf in relation to commercial banking transactions with the respondent. Ms Cunningham was not authorized to give any investment advice, and this, it asserted, was a fact well known to the respondent. The appellant denied that Ms Cunningham gave investment advice to the respondent in her capacity as its servant as alleged. It averred that if Ms Cunningham had given the respondent any advice, she would have done so in her personal capacity, as at the material time, she lived in the respondent's house and they had a relationship that was independent of the respondent's relationship with it.

[13] The appellant also admitted that, on or about 27 June 2007, the respondent borrowed $6,000,000.00 for the purpose of acquiring property and for personal expenses. This was the purpose stated in the application for the loan and the commitment letter dated 25 June 2007, accepted and signed by the respondent. The respondent received the entire loan proceeds from the bank and they were disbursed in accordance with her instructions. The appellant contended, therefore, that if the respondent suffered any loss or damage, such loss was not attributable to it.

The evidence in the court below

(1) The documentary evidence

[14] Approximately 44 exhibits were tendered into evidence at the trial. Of relevance to this appeal are the following:

i. a document headed "World Football Idol" dated 22 May 2007 whereby the respondent, by her signature, agreed to an investment of US$4,000.00 in Higgins Warner;

ii. a letter of authority dated 20 June 2007 signed by the respondent authorizing NCB Capital Markets to hypothecate the sum of €100,000.00 in her Euro account;

iii. a letter dated 25 June 2007 from the appellant advising of the approval of the respondent's application for a loan of $6,000,000.00, which was signed by the respondent in acceptance of the loan;

iv. a Deed of indemnity dated 26 June 2007 addressed to NCB Capital Markets Limited and signed by the respondent;

v. a cheque dated 27 June 2007 in the amount of $6,000,000.00 representing the loan proceeds made payable to the respondent which she endorsed;

vi. a document headed "World Football Idol" dated 27 June 2007 whereby the respondent, by her signature, agreed to an investment of US$40,000.00 in Higgins Warner;

vii. several bank statements for the respondent's NCB United States (US) dollar account, a Jamaican dollar account and her loan account;

viii. an undated letter from Sandra Cunningham addressed to the respondent and signed by both parties, stating that Ms Cunningham would return US$40,000.00 from the bank loan, which was invested in Higgins Warner, to the respondent;

ix. a letter dated 29 April 2008, from Sandra Cunningham to the respondent, stating that she had made full and final payment to the respondent of $2,650,000.00, by way of a Bank of Nova Scotia cheque dated 28 April 2008, and that, in all, she had paid to the respondent $3,194,800.00 in satisfaction of the loan by the respondent to her.

[15] The statements for the respondent's US dollar account indicated that several deposits were made to the respondent's account by Higgins Warner on various occasions, totalling US$36,000.00. The first such deposit of US$800.00 was made on 22 June 2007, one month prior to the disbursement of the loan. This represented interest of 20% per month on the initial investment sum of US$4000.00 made in May 2007.

(2) <u>The respondent's evidence</u>

[16] The respondent's evidence was that she met Ms Cunningham in the parish of Saint Thomas when she was 14 years old. They became close friends and their

friendship continued over the years. Ms Cunningham later became an employee of the appellant at the Morant Bay branch. Ms Cunningham at some point also lived in her house in Yallahs after Hurricane Ivan in 2004. Although, in her witness statement, the respondent said Ms Cunningham lived at her house rent free but later became a tenant, in cross examination she said Ms Cunningham was never a tenant but always lived there rent free. Whilst Ms Cunningham lived in her house in Morant Bay, she lived in Portland, so would only see Ms Cunningham when she, the respondent, came to the appellant to do business. She evicted Ms Cunningham in about 2008.

[17] The respondent noted that she had banked with the appellant, with whom she held several accounts, since she was in school, and continued to do so whilst living in Germany between 1994 and 2004. During that time, Ms Cunningham was assigned as her personal banker, and she would see Ms Cunningham from time to time when she visited Jamaica. She would bring funds and make lodgements to her accounts on those occasions. Her accounts with the appellant included a Euro account, a US dollar account and several Jamaican dollar accounts. She also had a NCB Capital Markets Account. Although she went to live in Portland when she returned to Jamaica in 2004, she maintained her accounts with the appellant in Morant Bay, and Ms Cunningham continued to be her personal banker and friend.

[18] In May 2007, she went to Morant Bay to pay some bills, at which time she saw Ms Cunningham in her office. Ms Cunningham told her about an investment programme from which she could earn higher returns. Ms Cunningham also assured her that the

investment was safe. Even though she had not asked for advice, she agreed to do as Ms Cunningham advised because she trusted her and she was her personal banker. Ms Cunningham told her she would arrange for her to take a loan from the appellant of $6,000,000.00 to invest in the programme, using the funds in her Euro account as collateral.

[19] To her best recollection, it was on a second visit to Ms Cunningham's office, that she was given some documents to sign by Ms Cunningham, which she signed without reading. Ms Cunningham did not give her copies of those documents. These documents were the letter of authority to hypothecate funds from the Euro account, the letter of approval of the loan application, the deed of indemnity, the two Higgins Warner contracts, and the cheque representing the loan proceeds of $6,000,000.00. Although the commitment letter for the loan said the purpose of the loan was to cover personal expenses and to purchase property, she did not see it at the time, and she did not need any funds to cover personal expenses, nor was she intending to purchase any land.

[20] Sometime after she did these transactions, Ms Cunningham called her and told her she was not working with the appellant anymore as she was under investigation. In November 2007, on a visit to the appellant in Morant Bay, she spoke to the manager who asked her to call Mr Parchment, an investigator with the appellant. She spoke with him on the phone, and subsequently met with him. He advised her that fraud had been committed on her accounts and that she owed the bank $5,000,000.00. He told her about Higgins Warner, which she was hearing about for the first time, and he took a

statement from her. Mr Parchment accompanied her to the office of Higgins Warner and she confirmed that there was US$40,000.00 in an investment account in her name. Sometime later, she heard on the news that Higgins Warner had closed down and moved out of Jamaica. The police also informed her of same. She admitted she had seen statements which showed she received funds from Higgins Warner totalling US$36,000.00, but had received no further funds since November 2007.

[21] The respondent said she tried to call Ms Cunningham to no avail. She then consulted an attorney who wrote to the appellant on her behalf. The response from the appellant was that Ms Cunningham had acted outside the scope of her employment and that she, the respondent, was liable to repay the $6,000,000.00.

[22] On 4 February 2008, she visited Ms Cunningham at her house in Yallahs, at which time Ms Cunningham handed her the two "World Football Idol" documents. She asked Ms Cunningham to account for the balance of the loan that was not invested, and Ms Cunningham stated that she had borrowed it. She had not given Ms Cunningham permission to borrow any money. Ms Cunningham, however, wrote out a letter in her presence which she signed.

[23] On 29 April 2008, she received a text message from Ms Cunningham informing her that she could pick up a cheque at the Bank of Nova Scotia. Having gone there, she was given a letter in Ms Cunningham's handwriting, referencing various payments made into her account by Ms Cunningham. Thereafter, she was informed by a representative of the appellant that there was a cheque at the bank for her in the amount of

$2,650,000.00. This money was placed in a new account, in her name, upon her request.

[24] Between July 2007 and 2008, she made various payments on the loan account, and on 1 October 2008, she liquidated the loan by making a payment of $4,727,387.34. She spent a total of $7,239,329.38 repaying the loan.

[25] The respondent asserted that she was never given any information that Ms Cunningham was only authorised to convey information about the appellant's services and to act in relation to banking transactions. Rather, she trusted Ms Cunningham as her personal banker to give her advice about everything.

[26] The respondent, however, admitted under cross-examination that when she was dealing with her banking business, she did it with the appellant and when dealing with investments, she dealt with NCB Capital Markets. She knew Ms Cunningham to be an employee of the appellant. Although she knew that the appellant's business was the business of banking only, she said she did not know that Ms Cunningham was not permitted to give her advice in relation to investment. She also admitted that in order to pledge her Euro investment with NCB Capital Market as security for the loan, she had to instruct NCB Capital Markets to give the appellant the relevant information. She had two investment accounts with NCB Capital Market, one in US dollars and the other one in Euro dollars. However, she maintained that she thought it was the same bank.

[27] She also maintained that she did not know about Higgins Warner and she did not bank with it. She did not know Higgins Warner was an illegal business. She had not

seen the many notices regarding unregistered investment schemes and, although she had heard public comments on radio about investing in unregistered schemes, it was after her issue with the appellant.

[28] She admitted that she signed contracts with Higgins Warner; one on 22 May 2007 and the other on 27 June 2007, but did not read them. She had not concerned herself with whether or not Higgins Warner was registered to conduct investment business, but she knew the appellant was registered to carry on investment business. She denied she had been unhappy with the appellant at the time she invested with Higgins Warner. She knew the appellant was engaged in the business of banking and admitted that Higgins Warner was not in the business of banking. She, however, invested with it because of what Ms Cunningham had told her.

[29] She admitted that her relationship with Ms Cunningham was close and had begun long before Ms Cunningham had started working with the appellant. She also admitted that they had remained close over the years and interacted in the way it was normal for close friends to interact. She accepted that it was normal for close friends to give each other advice but that it depended on the advice. The respondent agreed that her relationship with Ms Cunningham had nothing to do with Ms Cunningham's job with the appellant and that it was independent of her relationship with the appellant.

[30] The respondent also agreed that she received payments into her account, from Higgins Warner, identified as salary. She also agreed that the signature on the letter, acknowledging the loan to Ms Cunningham, was hers, and that she loaned Ms

Cunningham US$40,000.00. She admitted that a loan does not constitute misappropriation of funds, and agreed that Ms Cunningham had paid her back.

[31] The respondent acknowledged that she had given Ms Cunningham a power of attorney to debit her account, as well as yellow slips so that Ms Cunningham could make deposits to her account. This was done so that she did not have to travel all the way to Saint Thomas (to do it herself) and that, she said, proved how much she trusted Ms Cunningham. She admitted that all disbursements from the loan were done on her instructions, and in relation to the appellant, she admitted that the bank had accounted to her for all her monies held in her accounts.

[32] She was unable to account for the fact that she invested US$4000.00 with Higgins Warner in May 2007 and received interest on her funds in June, before she received the loan funds from the appellant. She also admitted to signing the second contract on 27 June 2007. Although she kept her passbooks for both her Jamaican dollar savings account as well as her US dollar savings account, she had to go in the bank to get them updated. She did not get any statements from the bank as all her statements went to Ms Cunningham. She admitted that all the references to Higgins in her US dollar bank statement occurred before November 2007, but maintained that the first time she had heard about Higgins Warner was in November 2007.

[33] She accepted that the two contracts in evidence shown to her were with Higgins Warner and 'not a contract between NCB and herself', but that she had sued the appellant for the loss rather than Higgins Warner.

[34] Although it was her signature written under 'acceptance' on the commitment letter, she had signed it without reading. She agreed that the stated purpose in the letter was the purpose for which the appellant had disbursed the loan, but that she did it, based on what Ms Cunningham had told her. She invested based on what Ms Cunningham told her. On re-examination, she said that the passbook had not been updated between May and November 2007 and denied knowing about the deposits of interests as salary made in her account by Higgins Warner. She also again denied that she ever lent Ms Cunningham any money.

(3) The evidence of Ms Paulette Forsythe on behalf of the appellant

[35] Ms Paulette Forsythe, operations manager at the appellant's Morant Bay branch, gave evidence on behalf of the appellant. As operations manager of that branch, she had access to the records of the respondent's accounts held there. It was her evidence that, pursuant to the appellant's licence under the Banking Act, its only activities are that of a commercial bank, and its employees can only give advice relating to the services it is licensed to offer. The appellant bank is not licensed to give investment advice and is not in the business of doing so.

[36] The respondent was the holder of several accounts at the Morant Bay branch and was listed as one of the bank's 'first class' customers. As a first-class customer, she was assigned a personal banker, who at the material time, was Ms Cunningham. Ms Cunningham resigned from the appellant on 23 November 2007, and the respondent's accounts at the branch were subsequently closed at her request on 15 January 2009.

[37] The respondent was also a customer of NCB Capital Markets Limited, a member of the NCB group of companies. NCB Capital Markets was in the business of giving investment advice. That account was opened on 24 January 2005.

[38] In or about June 2007, the respondent made an application to the appellant for a loan for the purposes of acquiring real estate and for personal expenses. On 25 June 2007, a commitment letter was issued by the appellant setting out the terms of the loan, including the purpose for which the funds were being loaned. This commitment letter was signed by the respondent. The agreed collateral for the loan was the hypothecation of €100,000.00 that the respondent had in her account at NCB Capital Markets Limited. On 27 June 2007, a cheque was issued representing the loan proceeds made payable to the respondent in the amount of $6,000,000.00. Between July 2007 and 2008, the respondent repaid $2,508,797.66 of the loan, and then on 1 October 2008, liquidated the loan account by making a final payment of $4,727,387.34.

[39] The appellant first became aware that the respondent had lost funds invested in the Higgins Warner scheme when she made a complaint to the appellant, through her attorneys, claiming that Ms Cunningham had given her negligent advice to invest in the scheme.

[40] The appellant had no affiliation with Higgins Warner, and from notices she has seen in the press by the Financial Services Commission, she knew it to be an unregistered alternative investment scheme. It is not and has never been the practice of the appellant to advise its customers in relation to products and services not offered

by it. Ms Cunningham was never authorized to give investment advice to the respondent or any other customer, and any advice given by the appellant to the respondent was in relation to the services offered by it. Further, if Ms Cunningham offered any advice to the respondent in relation to Higgins Warner or any products and services not offered by the appellant, such advice was given in Ms Cunningham's personal capacity, as she was a personal friend of the respondent.

[41] Ms Forsythe explained that the duty of a personal banker was to give the customer advice on the appellant's products and services, giving that personal touch so the customer could enjoy exceptional personal service. The personal banker could open accounts on behalf of the customers and prepare managers cheques or drafts and whatever else the appellant offers. Regular customers could access the same products offered by the appellant but they would have to stand in line and do it themselves, whereas the personal banker would do the leg work for first class customers. The intention was for the first class customer and personal banker to develop a personal relationship and that the customer would trust the personal banker in relation to the business of the appellant. The personal banker was to give advice about the appellant's products and not about its affiliates. If a customer wanted to invest with NCB Capital Markets, the personal banker would refer the customer to NCB Capital Markets. Employees of the appellant were not authorized to give advice on unregistered financial institutions.

[42] She admitted there was a branch of NCB Capital Markets at the same premises as the appellant, but stated there were clear signs differentiating NCB Capital Markets from the appellant.

[43] She also admitted that Ms Cunningham was investigated in about November of 2007 in relation to allegations of fraud, and that her resignation on 23 November 2007 was connected to that investigation.

The decision in the court below

[44] Having seen and heard the evidence, and having examined the documents, the trial judge, in her judgment **Sylvia Steens v National Commercial Bank Jamaica Limited** [2013] JMSC Civ 104, found that Ms Cunningham did in fact give investment advice to the respondent assuring her that it was safe, and that the respondent had accepted the advice based on the trust she had in Ms Cunningham as her personal banker. She found that Ms Cunningham did not qualify her advice as to show that she was not accepting responsibility. The trial judge also accepted that it was Ms Cunningham who had advised the respondent to take out a loan to fund the investment, and concluded that Ms Cunningham had a legal duty to exercise reasonable care in giving advice to the respondent, and had in the circumstances, failed to do so. She found that Ms Cunningham had been placed in a fiduciary position in relation to the respondent and ought to have acted for her benefit, and that not only did Ms Cunningham use her position at the appellant bank in an "unreasonable manner" but also in a "manipulative" and "perhaps dishonest manner".

[45] The trial judge placed the burden of proof on the appellant to show that the respondent had known that Ms Cunningham was only authorized to convey information about the appellant's services and was not authorized to give investment advice, and found that the appellant had adduced no evidence of that. She noted several inconsistencies in the respondent's evidence, but accepted her evidence that she signed the documents without reading them and without receiving copies of them, and that she did so because of the personal banker relationship she had had with Ms Cunningham. She accepted that funds were invested in Higgins Warner prior to the receipt of the loan funds, but found that the documents were all signed together on the occasion the respondent attended the bank in relation to the investment.

[46] The trial judge also found that on a totality of the evidence, Ms Cunningham had advised the respondent to invest in Higgins Warner, that it was a secure investment, and that she should take a loan of $6,000,000.00 from the bank for that purpose. She also accepted the respondent's evidence that she did not understand that the appellant and NCB Capital Markets were separate legal entities or that they were different. She also accepted as true, the respondent's evidence that she did not know that Ms Cunningham was not authorized to give advice in relation to investments and that she did not know about Higgins Warner until the investigator advised her of same. The judge concluded that the whole series of transactions spoke to manipulation by someone with banking knowledge and that Ms Cunningham's dealings were wholly inconsistent with her position as a personal banker. She also found that Ms Cunningham used her position to her own ends.

[47] The trial judge also concluded that the appellant was vicariously liable as it had introduced the risk of the wrong, and Ms Cunningham's act "may fairly and properly be regarded as done by her while acting in the course of the bank's ordinary business". In coming to her conclusions the trial judge relied on the cases of **Hedley Byrne & Co. Ltd v Heller & Partners Ltd** [1963] 2 All ER 575; **Banbury v Bank of Montreal** [1918] A.C. 626; **National Commercial Bank (Jamaica) Ltd v Hew and Another** (2003) 63 WIR 183; [2003] UKPC 51; **Woods v Martins Bank Ltd and Another** [1958] 3 All ER 166; **Bazley v Curry** (1999) 2 SCR 534; **Bernard (Clinton) v Attorney General** (2004) 65 WIR 245; [2004] UKPC 47 and **Dubai Aluminium Co. Ltd v Salaama & Others** [2003] 2 AC 366; [2002] UKHL 48, as well as the well-known statement on vicarious liability in Salmond and Heuston on the Law of Torts, 19th edition, page 233.

[48] The trial judge applied the approaches of the Canadian judges in the case of **Bazley v Curry**, the Privy Council in the case of **Bernard**, and the House of Lords in **Dubai Aluminium**. In the final analysis, the trial judge found that the proximity between the respondent and Ms Cunningham was sufficiently close for her to owe a duty of care to the respondent, and that in giving the respondent the advice to invest in Higgins Warner, Ms Cunningham had been negligent. As a result, the trial judge found that Ms Cunningham had acted within the scope of her duty and, therefore, the appellant was vicariously liable.

[49] For these reasons, and on the authority of **Hadley and Anor v Baxendale and Others** [1843-60] All ER 460, the trial judge awarded damages to the respondent in the amount pleaded with interest, as well as costs to be agreed or taxed.

[50] Subsequently, on 9 September 2013, Evan Brown J, in relation to the question as to the applicable interest rate in the same matter, set the interest on the judgment sum at the rate of 7½% per annum, from 18 December 2008 to 5 August 2013. He also awarded costs as agreed in the sum of $750,000.00. He further ordered, by consent, that the judgment sum and interest were to be paid into an escrow account, opened at the appellant, in the name of Gifford, Thompson & Bright, pending the determination of the appeal and the "consequential determination by the Court of Appeal of entitlement to the funds in the escrow account as between [the respondent] and the [appellant]".

The appeal

[51] The appellant filed notice and grounds of appeal on 21 August 2013. The grounds of appeal filed are as follows:

> "(1) The learned Judge [sic] erred in finding that the delivery of a personal banking service by itself converted the ordinary contractual relationship between a bank and its customer into a fiduciary relationship/relationship of trust and confidence such as gave rise to the duty of care required for a claim for pure economic loss arising from negligent acts or statements to be actionable.
>
> (2) The learned judge erred in failing to appreciate that the facts pleaded in the Particulars of Claim spoke only to the ordinary contractual relationship between the parties and did not allege the existence of a special relationship between the [appellant] and [the respondent].

(3) The learned Judge [sic] erred in failing to appreciate the impossibility of determining the extent to which the [respondent's] alleged reliance on the advice of Ms Cunningham was a consequence of her pre-existing and close friendship with Ms Cunningham or of the latter being her personal banker; and that, given that:

i. She gave Miss Cunningham a power of attorney to deal with her account.

ii. She knew the [appellant] was in the business of banking only, [sic]

iii. The [respondent's] investment prior to her excursion with Higgins Warner were with the separate legal entity NCB Capital Markets Limited [sic]

iv. Higgins Warner was not licensed or registered to take funds from members of the public to invest with a promise to pay returns, the balance of probabilities was in favour of a determination that it was neither just nor reasonable to impose a duty on Miss Cunningham in these circumstances in relation to her statements to [the respondent] about Higgins Warner.

(4) The learned Judge [sic] erred in failing to appreciate that it was not open to her in the face of written contracts to the contrary to find on the basis of parol evidence that:

i. no moneys were loaned by [the respondent] to Sandra Cunningham; and

ii. [The respondent] did not place the funds with Higgins Warner.

(5) The learned Judge [sic] erred in using an authority concerned with intentional torts (**Bernard (Clinton) v Attorney General**) to find the Appellant vicariously liable on these facts for the tort of negligent misstatement attributed to its employee, Sandra Cunningham and that it introduced to [the respondent] the risk of the wrong.

(6) The learned Judge [sic] erred in relying on the case of **Hadley v Baxendale** for guidance in relation to damages for the tort of negligent misstatement.

(7) The learned judge erred in finding that, in advising the respondent in relation to investing in Higgins Warner, Sandra Cunningham acted within the scope of her duty [as an employee of [the appellant].

(8) The learned Judge [sic] erred in failing to at all address the issue of whether the action brought by the Respondent against the Appellant was a way of circumventing her inability to resort to the court for enforcement of her contracts with Higgins Warner, as same were illegal for being in contravention of the Securities Act."

The issues

[52] The two main issues this court has to grapple with are whether the trial judge was correct to hold that Ms Cunningham owed a duty of care to the respondent and was, therefore, liable to her in negligence for the alleged advice, and, whether Ms Cunningham, was acting within the scope of her employment so that it would be just to hold the appellant vicariously liable. To find the answer to those questions, it is necessary, in my view, to determine the following sub-issues, as they arise from the grounds of appeal filed:

(1) whether the trial judge erred in finding that the relationship of personal banker and customer gave rise to a fiduciary relationship or relationship of trust and confidence so as to entitle the respondent to a cause of action for negligent misstatement (grounds 1 and 2);

(2) whether the trial judge erred in failing to appreciate that, on the evidence, it was impossible to determine the extent to which the respondent's reliance on Ms Cunningham's advice was a result of their personal friendship rather than as a result of the personal banker relationship, and that it was neither just or reasonable to impose a duty on Ms Cunningham in those circumstances (ground 3);

(3) whether it was open to the trial judge to rely on parol evidence to find that the respondent did not loan money to Ms Cunningham nor knowingly invest with Higgins Warner in the face of the documentary evidence to the contrary (ground 4);

(4) Whether the trial judge erred in finding that in advising the respondent, in relation to investing in Higgins Warner, Ms Cunningham acted within the scope of her duty as an employee of the appellant (ground 7);

(5) Whether the trial judge erred in applying principles relating to intentional torts to find the appellant vicariously liable for the tort of negligent misstatement (ground 5);

(6) Whether the trial judge erred in relying on the authority of **Hadley v Baxendale** to calculate damages for the tort of negligent misstatement (ground 6);

(7) Whether it was necessary for the trial judge to address the issue of whether the respondent's claim was a way of circumventing her inability to sue on her Higgins Warner contracts owing to their illegality (ground 8).

The role of this court

[53] I am mindful that this court may only interfere with the findings of fact and conclusions of the trial judge if it is satisfied that she misdirected herself as to the evidence or the law, she was plainly wrong, her conclusions cannot be supported by any advantage she may have had of having seen and heard the witnesses, or where the conclusions drawn by her are inconsistent with the evidence before the court (see **Watt (or Thomas) v Thomas** [1947] 1 All ER 582; **Central Mining and Excavating Limited v Peter Croswell and others** (1993) 30 JLR 503; and **Industrial Chemical Co (JA) Limited v Owen Ellis** (1986) 23 JLR 35).

Discussion and analysis

Whether the trial judge erred in finding that the relationship of personal banker and customer gave rise to a fiduciary relationship or relationship of trust and confidence so as to entitle the respondent to a cause of action for negligent misstatement (grounds 1 and 2);

[54] Before an employer can be held vicariously liable, the court must be satisfied that the tort alleged was committed by its employee. The tort Ms Cunningham was alleged to have committed was the tort of negligent misstatement. I will, therefore, embark on a discussion of the principles relating to that tort.

(i) The principles in relation to negligent misstatements

[55] The principles in relation to the tort of negligent misstatement were pronounced in the classic case of **Hedley Byrne & Co Ltd v Heller & Partners Ltd**. In that case, the House of Lords, whilst accepting that it was still the law that an innocent, but negligent misrepresentation, gives no cause of action, without more, established that, in addition to instances where there exists a contractual obligation or fiduciary duty, a person may be liable for pure economic loss, if in the course of business, he, having a special skill or knowledge, gives advice to a person whom he knows will likely act upon that advice. This is so, regardless of the fact that such advice is innocently given, if it is given without qualification. Circumstances must exist that create a special relationship between the parties that would create in the 'advisor' a duty to take care that he would not ordinarily have.

[56] There is no liability for financial loss caused by a careless statement made in a wholly social situation, unless it can be shown that the person making the statement was under a duty to take care when making it or had assumed a responsibility in making such a statement. Where there is a relationship equivalent to a contract, a duty of care will exist. Typically, outside of contract and fiduciary duty, a special relationship will be found where it was reasonable for the claimant to have relied on the care and skill of the defendant who made the statement and who held himself out as having a degree of skill in the particular matter and the defendant knew or ought to have known that the claimant was relying on his statement.

[57] In that regard, Lord Reid, at page 583 of **Hedley Byrne v Heller** said this:

> "This passage makes it clear that Lord Haldane [*Robinson v National Bank of Scotland* 1916 SC (HL) 154 at p 157] did not think that a duty to take care must be limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognised by the Court of Chancery as being of a fiduciary character. He speaks of other special relationships, and I can see no logical stopping place short of all those relationships where it is plain that **the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that**, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him." (Emphasis added)

[58] At page 589 of that judgment, Lord Morris of Borth-y-Gest said this:

> "If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberate advice **as to certain financial matters of a nature with which the bank ordinarily dealt the bank would be under no obligation to accede to the request: if however they undertook, though gratuitously, to give deliberate advice (I exclude what I might call casual and perfunctory conversations) they would be under a duty to exercise reasonable care in giving it.** They would be liable if they were negligent although, there being no consideration, no enforceable contractual relationship was created." (Emphasis added)

[59] At page 590, he said this:

> "It seems to me, therefore, that if A claims that he has suffered injury or loss as a result of acting upon some misstatement made by B who is not in any contractual or fiduciary relationship with him the inquiry that is first raised is whether B owed any duty to A: if he did the further inquiry is raised as to the nature of the duty. There may be circumstances under which the only duty owed by B to A is the duty of being honest: there may be circumstances under which B owes to A the duty not only of being honest but also a duty of taking reasonable care. The issue in the present case is

> whether the bank owed any duty to Hedleys and if so what the duty was."

[60] Having gone on to determine that there may be circumstances, independent of contract and fiduciary duty, where information or advice is given under circumstances of a special relationship and which created a duty not only to be honest but to be careful, Lord Morris of Borth-y-Gest went on to state, at page 594, that:

> "My lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. **Furthermore, if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise**." (Emphasis added)

[61] **Banbury v Bank of Montreal** was an action for negligence and breach of duty, in which the House of Lords held that a banker was under no duty to advise a customer on investments generally, in the ordinary course of its business, but if he undertook to do so and did so negligently, he will incur liability. It also reiterated the principle that in general relationships equivalent to a contract, there is a duty of care. In that case, the appellant had claimed that, as a customer of the defendant bank, he was given negligent investment advice by a bank manager of the bank who warranted that the investment was safe. The appellant alleged that he invested in reliance on that advice, but the advice was negligent and as a result he suffered financial loss. The respondent bank denied that any advice had been given at all, and alternatively, asserted that if

any advice had been given, the manager had been acting outside of his authority. The Court of Appeal reversed the decision of the jury which had found that the bank was liable, holding, inter-alia, that the respondents owed no duty to the appellant to advise him carefully, and that there was no evidence that the manager had any authority to bind the bank.

[62] On appeal to the House of Lords, by a majority, the Law Lords affirmed the decision of the Court of Appeal, finding that there was no evidence before the jury on which they could reasonably find that the manager had authority to advise the appellant as to the investment or that the bank had owed any duty to advise the appellant carefully or at all. In coming to its decision, the court considered that the bank could only be liable if the giving of the advice was within the scope of the manager's actual or implied authority in the course of his employment.

[63] In that case, although it was acknowledged by the parties that it was not part of the bank's business to advise its customers with regard to investments, it was claimed by the claimant that there were special circumstances which made it a part of the bank's business to give advice on the particular investment in question. The House of Lords held that no such special circumstances existed.

[64] The general principle stated in **Banbury v Bank of Montreal** was considered in **Hedley Byrne v Heller** with approval.

[65] **Woods v Martins Bank** was also a case dealing with the responsibility of a bank for financial advice alleged to have been negligently given. In that case, the

claimant, a young wealthy businessman, asked the manager of the defendant bank to be his financial adviser. The manager agreed. Subsequently, the manager gave him investment advice, which turned out to be negligent and the investment was lost. The court found that it was within the scope of the defendant bank's business to advise on the investments and that the bank was liable for the failure of its employee to exercise the ordinary care and skill in giving the advice.

[66] Salman J, in giving judgment for the claimant, held that the scope of a defendant bank's business was a question of fact and not pure law and, in that case, advising on financial matters was within its scope. He based his finding on the fact that the bank had advertising literature and other publications in which it held itself out as being able to give the very best advice and to obtain, on behalf of its customers, help and advice on investments from the best available sources. He found, as a fact, that the best available source on this particular investment was the defendant bank itself. The literature also indicated that the bank offered consultation and free advice on all matters affecting its customers' financial welfare. The bank manager, having given financial advice without using the ordinary skill and care that a bank manager ought to possess, both the manager and the bank were liable for the plaintiff's loss. His Lordship distinguished **Banbury v Bank of Montreal** on the facts of that case.

[67] **Woods v Martins Bank** was approved in **Hedley Byrne v Heller** as an example involving a special relationship.

[68] **National Commercial Bank v Hew** was a case in which a defendant to a claim by the bank for monies due and owing on a loan counter sued. In his countersuit he alleged that he had been induced, by the negligent advice of the bank's agent, to use the proceeds of his overdraft from the bank to develop a property. This turned out to be an unwise investment. The trial judge's dismissal of this claim was reversed by the Court of Appeal which found the bank liable in negligence. The bank appealed to the Privy Council and the Board allowed the appeal and gave judgment for the bank on the basis that, inter-alia, the manager had not advised Mr Hew as to the viability of the project and that the bank was not under any duty to advise him against it. The Board considered, at paragraph 18 of the judgment, delivered by Lord Millett, that there was no evidence that:

> "the bank held itself out to members of the public that it would advise them in relation to their commercial affairs. Nor [was] there any evidence that Mr Hew ever asked Mr Cobham for advice or received anything which he regarded as advice."

[69] Further, the Board held that, whilst it was not prepared to overturn the trial judge's finding that there had been a relationship of trust and confidence between the parties in the particular circumstances, there was no evidence that the bank abused its position, or received any unfair advantage from the transaction.

[70] I will refer to two other cases decided by the Privy Council. **Royal Bank Trust Co (Trinidad) Ltd v Pampellonne** (1986) 35 WIR 392, was a case in which the Board held that a bank was not liable where its manager, at the request of its customer, had given to the customer information in the form of literature and

application forms but had not given any advice to invest. The Board held that, in the circumstances, there was no special relationship between the bank and the customer which gave rise to any duty of care on the part of the bank.

[71] **Mutual Life and Citizens' Assurance Co Ltd and another v Evatt** [1971] 1 All ER 150 involved investment advice given to a policy holder by an insurance company. The Privy Council held, by majority, that circumstances in which a special relationship would exist to create a duty beyond the duty to be honest were; (i) where the defendant is in the business of giving advice calling for special skills and competence and holds himself out as having such skill and competence, which he is prepared to exercise in the ordinary course of his business; and (ii) where, although the defendant does not carry on any such business, he holds himself out as possessing the skill and competence in the subject matter, which he is prepared to exercise on the particular occasion. Where the defendant does not hold itself out as competent to give the advice sought, the only duty owed is a duty of honesty.

[72] The majority decision in **Mutual life v Evatt** was applied by this court in **The Imperial Life Assurance Company of Canada and Judah, Desnoes & Co v Bank of Commerce Jamaica Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 35/1981, judgment delivered 23 September 1985, at pages 49 to 50.

[73] In summary then, it is the law that, generally, a person is not liable for innocent but negligent misrepresentation. There must be something more. The giver of the advice or the maker of the statement must expressly or by implication undertake some

responsibility for its accuracy either by way of contract or warranty or some fiduciary duty (see generally the case of **Hedley Byrne v Heller**). Apart from liability in such circumstances, there may be occasions where a duty to take care will arise if advice is voluntarily given. Although no liability would arise for statements or advice given in social situations, if a person undertakes to give deliberate advice, without disclaimer, knowing that the receiver of the advice intends to rely on it, liability may lie if the advice is negligently given.

[74] The duty imposed as a result of a relationship between the parties outside of a contract or a fiduciary relationship, therefore, must be one recognised by law as being a special relationship, either by virtue of proximity or as a result of the advisor holding himself out as possessing a special skill which creates in him a duty to exercise that skill with reasonable care. The special relationship, where it is alleged, must be shown to exist.

(ii) Application of the principles to the facts of this case

[75] In the instant case, there was no allegation of fraud or dishonesty, neither was any evidence adduced of fraud or dishonesty having been perpetrated by Ms Cunningham or the appellant, against the respondent. There was no pleading as to fraudulent misrepresentation or dishonesty on the part of Ms Cunningham or the appellant, and the claim in tort was for negligent misstatement.

[76] Before any liability can be laid at the feet of Ms Cunningham, or, for that matter, the appellant, there must exist, and the court must find, that there was a duty of care

which was owed to the respondent and that this duty of care was breached, resulting in damage to the respondent. The simple question in this case is whether there was a relationship between Ms Cunningham and the respondent which gave rise to a duty of care. The trial judge, therefore, had to determine whether the advice allegedly given was given by Ms Cunningham, and if so, whether it was given in the course of the appellant's business. In that enquiry, the trial judge would have to ascertain whether Ms Cunningham owed a duty of care to the respondent by virtue of the banker and customer relationship or by virtue of some other special relationship.

[77] The appellant's primary duty to the respondent was grounded in contract. It is trite law that there is no general fiduciary duty arising in the relationship of banker and customer (see **National Commercial Bank v Hew**, at paragraph [31]). That relationship is one of debtor and creditor in a common law contractual arrangement. However, the factual circumstances of an individual case may give rise to an inference that the relationship was elevated to one of trust and confidence in a strict fiduciary sense. Whether a banker-customer relationship has been so elevated is a mixed question of fact and law, in all the circumstances of the case.

[78] In this case, the respondent was a customer with the appellant, which is a commercial bank. The alleged advisor, Ms Cunningham, was an employee of the appellant and a close personal friend of the respondent. The evidence is that the appellant was not an investment bank and did not hold itself out, or any of its employees, including Ms Cunningham, as being authorised or skilled in the business of

investments. Neither was any evidence led that it had assumed a responsibility to give investment advice to its customers, including the respondent. Ms Cunningham was not employed to the appellant as an investment adviser and it was not part of her duties with the bank to give investment advice to customers. The trial judge, therefore, had to determine whether Ms Cunningham gave gratuitous advice to the respondent, and if she did, did the circumstances in which she gave that advice give rise to a duty of care. It must be borne in mind that it was not alleged, pleaded or averred that the appellant held out Ms Cunningham as an employee trained, skilled and or authorised to advise its customers on investment matters.

[79] The trial judge found that Ms Cunningham did in fact give the respondent investment advice. However, faced with the uncontroverted fact that the appellant was a commercial bank not in the business of investments, and that Ms Cunningham was not an investment advisor and was not authorized to give such advice, the trial judge, nevertheless, found that the advice was given by Ms Cunningham in her capacity as a personal banker. The trial judge found that, as a personal banker, Ms Cunningham was in a fiduciary position to the respondent and, as a result, owed a duty of care in giving her investment advice. The trial judge appears to have accepted that the appellant was not in the business of giving investment advice but found that Ms Cunningham's designation as a personal banker to the respondent created a fiduciary relationship. It was in the context of this 'proximate' relationship that the trial judge found the duty to exercise care in giving the investment advice existed. She also found that Ms Cunningham had not qualified her advice to show she was not accepting responsibility.

[80] This court must, therefore, determine whether the trial judge was correct in finding that Ms Cunningham gave investment advice to the respondent, and if she did so, whether she owed a duty of care arising from a fiduciary relationship.

[81] Mrs Minott-Phillips QC, on behalf of the appellant, argued that the trial judge was wrong to find Ms Cunningham liable on the basis that she was in a fiduciary relationship with the respondent, as no such relationship was pleaded and none existed. Queen's Counsel further argued that even if it was established that Ms Cunningham gave the respondent investment advice, based on the evidence that advice was given by Ms Cunningham in her capacity as a life-long friend and not in her capacity as a personal banker. Queen's Counsel pointed to the respondent's admission, under cross-examination, that she made the investment based on what Ms Cunningham had told her and that their relationship was independent of a relationship with the appellant.

[82] Queen's Counsel submitted that the trial judge absolved the respondent of any responsibility for the predicament in which she placed herself with her eyes wide open, and disregarded the various documents that the respondent acknowledged she signed. Queen's Counsel submitted that the trial judge erred in accepting, instead, the respondent's evidence that she signed the documents without reading them, even though *non est factum* was not pleaded.

[83] There was no dispute that Ms Cunningham was an employee of the appellant bank and was the personal banker for the respondent. The bank also did not deny that, in the relationship of personal banker, 'the intention was for the customer and personal

banker to develop a personal relationship and that the customer would trust the personal banker in relation to the business of the bank'. In my view, however, any special skill held by Ms Cunningham, in relation to her employment, would necessarily (in the absence of any evidence to the contrary) be with regard to the commercial banking business of the appellant.

[84] It is to be noted that the Privy Council in the case of **National Commercial Bank v Hew** definitively stated that the banker-customer relationship does not ordinarily fall within the category of a relationship of 'trust and confidence' (see paragraph 31; see also **Governor and Company of the Bank of Scotland v A Ltd and others** [2001] 3 All ER 58, at paragraph 25, where the court opined that such a relationship, on the face of it, is not a fiduciary relationship but a commercial one founded in contract). The Privy Council in the former case did, however, state, at paragraph 31, that such a relationship may be proved on the particular facts of a case (page 192).

[85] In **Bristol and West Building Society v Mothew (t/a Stapley &Co)** [1996] 4 All ER 698, at pages 711 and 712, a fiduciary and the nature of a fiduciary relationship was described as follows:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his

> own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

[86] The trial judge, in the instant case, did not expressly identify any other facts to substantiate her finding of a fiduciary relationship other than Ms Forsythe's admission that it was expected that the customer would trust the personal banker in relation to the bank's business. Of note is the fact that, the trial judge acknowledged that whatever trust there would have been would have pertained to the 'bank's business', which I am forced to point out did not include the giving of investment advice. The presumption raised by the evidence of the personal banker relationship creating a legal relationship of trust and confidence, in my view, would be rebutted by the fact that the trust and confidence would necessarily have to do with the bank's business. The evidence is that the appellant did not deal with investments, it was not within the scope of employment of Ms Cunningham to give investment advice, and even more telling, although not conclusive of the issue, is the fact that the advice given by Ms Cunningham was in direct conflict with the interest of the appellant and was for the direct benefit of the respondent and Ms Cunningham only.

[87] Counsel for the respondent, Lord Anthony Gifford QC, submitted that the trial judge was entitled to make the findings of fact that she did, particularly because (a) they accurately reflected the evidence of the respondent; (b) she had the opportunity to observe the demeanour of the respondent and to accept that she was speaking the truth in spite of some inconsistencies; and (c) the only other witness to the relevant

events was Ms Cunningham, who was not called as a witness for the appellant. He contended that the respondent was also entitled to rely on Ms Forsythe's evidence as to the intention to create a relationship of trust between Ms Cunningham and the respondent, the former having been designated as her "personal banker".

[88] Queen's Counsel also argued that the finding that it was Ms Cunningham who first raised the issue of investing in the scheme and who gave the assurance that it was secure was crucial, and distinguishes the instant case from that of **RBTT Jamaica Securities Limited v Yvonne Powell** [2015] JMCA Civ 10. In that case, this court reversed the finding of the trial judge that the customer had acted in reliance on the banker's advice, as the customer had already known about and invested in the alternative investment scheme prior to the bank officer giving the relevant advice. Queen's Counsel also sought to distinguish that case, as well as **National Commercial Bank v Hew**, from the instant case, on the basis that, in those cases, the court held that there had been no advice from the bank which had influenced the customer. In this case, Queen's Counsel argued, there was a finding that the advice was given and relied on to the detriment of the customer.

[89] Queen's Counsel also sought to draw a parallel between this case and the case of **Woods v Martins Bank**. It was submitted that, like in the instant case, the bank officer was not authorised to give investment advice but had agreed to be the customer's financial adviser upon the customer's request. Queen's Counsel argued that the similarity lay in the fact that, in this case, the appellant held out Ms Cunningham as

the respondent's "personal banker". He submitted also, that it was entirely reasonable for the trial judge to find that the respondent did not understand NCB Capital Markets to be a separate legal entity, as both entities were in the same building, and to the customer, it could well appear that there was one NCB with different departments.

[90] Queen's Counsel submitted that the respondent relied on Ms Cunningham as her personal banker and that their personal relationship did not undermine any of the financial transactions. He highlighted the fact that: (1) Ms Cunningham was assigned by the appellant to be the personal banker to the respondent; (2) the relationship of personal banker to customer is intended to create a high degree of trust on the part of the customer; (3) the respondent was a customer of both the appellant and its affiliate, NCB Capital Market, so that her dealings with the appellant concerned both banking and investment; and (4) the relationship of banker and customer involves the sensitive issue of money.

[91] I cannot agree with this submission. I am of the view that the circumstances of the relationship between Ms Cunningham as a personal banker and the respondent did not give rise to any such fiduciary obligation. In assigning a personal banker to the respondent, the facts do not support a contention that the bank undertook to act for the respondent in relation to the giving of investment advice, or to create any relationship of trust, confidence or unqualified loyalty of a degree to qualify as giving rise to a fiduciary relationship. Therefore, there could be no fiduciary relationship and consequent duty of care resulting therefrom. The evidence is that the extent of the

'trust' created in the relationship of personal banker and client was limited to the giving of information in relation to the products and services of the bank, and doing leg work in relation to drafts and the opening of accounts, which did not in any way include making investments or advising on investments. The evidence given by Ms Forsythe from the bank made it clear that Ms Cunningham had no authority to give investment advice to customers and it was not part of her duties as a personal banker.

[92] In my view, the trial judge erred in finding that there was a fiduciary relationship between Ms Cunningham and the respondent arising from the relationship of personal banker and customer.

[93] That, of course, is not the end of the matter. Accepting that Ms Cunningham advised the respondent to invest in Higgins Warner, when Ms Cunningham was under no contractual or fiduciary duty to do so, the trial judge was, therefore, required to find, that when Ms Cunningham advised the respondent, it was in circumstances of some other "special relationship". The trial judge would have had to be satisfied that there was a special relationship between Ms Cunningham and the respondent of such a nature that created a duty in Ms Cunningham to exercise proper care. The trial judge would also have had to find that Ms Cunningham knew the respondent was trusting her skill and judgment in the advice she was giving, at the material time, and was relying on it, and that she gave that advice without qualifying it to show that she was not accepting responsibility. She would also have had to determine whether, in finding that

the respondent relied on the advice, it was reasonable for her to have done so, in all the circumstances of the case.

[94] Further, even if a special relationship existed between the respondent and Ms Cunningham, the question whether the element of reliance was established on the evidence would arise. Notwithstanding that the respondent was the only witness to the relevant events, the documentary evidence made it quite clear that the respondent had invested in Higgins Warner before receipt of the loan she alleged Ms Cunningham persuaded her to take for the sole purpose of funding the investment. To that evidence, the respondent's only rebuttal was that she did not know why, and that she did not read the documents. She also did not explain the incontrovertible fact that her bank records showed that she had received monies from Higgins Warner before the loan was disbursed. Her sole response to this was that her bank books were in Saint Thomas whilst she was in Portland, and she had not gone into the bank to update them during the period. There was no explanation where that money came from and under what circumstances that investment was made.

[95] Lord Gifford, in his submissions, sought to invoke the plea of *non est factum*, notwithstanding that it was admittedly not pleaded in the particulars of claim. He argued that a specific plea was not necessary as the respondent's statement that she did not read the documents was sufficient. I disagree. A plea that one did not read documents before signing them does not necessarily indicate that one intends to argue that they are not bound by the contents thereof because they were mistaken as to the

contents of what they signed. This is particularly so, when that person has admitted the validity of the contract and performed it in full. In any event, I do not think such a plea can avail the respondent who admitted that she intended to and did sign the documents to give effect to the loan and to the investment.

[96] As to the issue of the loan document, which she claimed to have signed without reading, the page on which she signed had all the pertinent information, in capital and bold writing, just above her signature; that is, the loan amount and the purpose of the loan. It could only be missed if the respondent had closed her eyes in signing, or if Ms Cunningham had covered the page and left open only the spot where the respondent's signature should go. There was no evidence of that, and, at the very least, the respondent was guilty of wilful blindness. At its highest, she knew exactly what she was doing.

[97] Suffice it to say the respondent could hardly show that she acted with care in the circumstances. The respondent admitted that her intention was to obtain the loan from the bank, and to invest in a more profitable investment scheme, and as her counsel argued, she signed all the documents she thought necessary to bring this to fruition. If she did, in fact, neglect to read the contents of the documents that would have been due to her own fault. It is no defence to say she trusted Ms Cunningham so she did not read the documents. There is no allegation that she had asked Ms Cunningham for information but that Ms Cunningham had lied or refused to give it to her, or that she even asked for copies of the documents and they were not given to her. From all

appearances, she was content to enter into the investment scheme until the interest payments had stopped coming. When the respondent was asked if she intended to invest US$40,000.00 and to collect 20% interest of US$8,000.00 for a period of six months, her response was that she signed the document, she did not read it and that she "can't answer if she intended to". However, she said she knew NCB investments was registered to carry on investment business, but that she was not enticed to invest with it now because of the interest rate she saw there – 20% (referring to the Higgins Warner scheme and contract). All things considered, it is apparent that the validity of the loan agreement was accepted by the respondent when she accepted that she was bound by the loan and paid it back in full.

[98] In **RBTT Securities Jamaica Limited v Yvonne Powell**, the fact that the respondent (in that case) had invested in the Cash Plus investment scheme prior to the alleged giving of advice, was one of the factors this court took into account in dispelling the assertion that there had been any element of reliance. This court set aside the decision of the trial judge made in favour of the respondent Powell on the basis that, on the facts before the trial judge, his conclusion was 'inexplicable'. This court considered several critical facts, including the fact that: (1) the respondent was a fairly experienced person who held responsible positions in several organizations; (2) she had been a customer of Cash Plus and was receiving benefits prior to her conversations with the bank representative; and (3) she knew the difference between the appellant and the RBTT bank.

[99] In this case, the respondent had an investment account with NCB Capital Markets, an entity she knew was in the business of investment banking. Under cross-examination, it became quite clear, although she alleged otherwise, that the respondent knew that the appellant and NCB Capital Markets conducted different businesses and offered different services, regardless of the fact that they may have operated on the same premises. She knew that the appellant was not in the business of investments. There was no evidence of the respondent, on any prior occasion going to Ms Cunningham for investment advice, even though Ms Cunningham was her personal banker and she claimed to rely on her advice for "everything".

[100] This case draws parallel to **RBTT Securities Jamaica Limited v Yvonne Powell**. When one examines the earlier contract signed by the respondent with Higgins Warner, though she stated she did not read it, it is in fact a single page typed document and the only insertions in handwritten script on the open face of the document were the respondent's signature, the sum of money invested, the proposed interest payment and the date. The respondent did not assert she was blind, and there was, therefore, no way, in my view, that upon signing, she could have missed seeing those important elements of the contract. They fairly jump off the page. Furthermore, there was no escaping that this earlier investment and first interest payment of US$800.00 was before the loan was accepted and invested in Higgins Warner.

[101] Further, even if the respondent had relied on Ms Cunningham, the trial judge ought to have considered whether it would have been unreasonable for her to have

done so, since she knew Ms Cunningham was not an investment banker, and never held herself out to be so. The Higgins Warner scheme was not part of the appellant's or NCB Capital Markets' offerings. The respondent gave no evidence that Ms Cunningham had claimed to be a part of Higgins Warner, had any special connection to Higgins Warner, or came by any special knowledge of the operations of Higgins Warner, by way of her position in the bank.

[102] In the final analysis, it is clear and undisputed that Ms Cunningham had no authority to give investment advice. She had no authority to do so in her capacity as personal banker, and there was no evidence as to any special circumstance which could have led her to give investment advice, in her capacity as such. In my view, on the facts and as a matter of law, Ms Cunningham was not in a fiduciary relationship with the respondent simply by virtue of being her personal banker. It is, therefore, not possible to say the basis upon which it would have been proper for the trial judge to find that, by virtue of her designation as a personal banker, without more, Ms Cunningham was held out as possessing the skill and competence to give the advice it was alleged she gave.

[103] Bearing in mind that the first investment was made in May 2007, prior to the loan the respondent said she was advised to take, and the failure of the trial judge to reconcile the inconsistency between the documentary evidence and the respondent's oral evidence, it could not be said that it has been shown, on a balance of probabilities, that the investment the respondent made was as a result of her reliance on Ms

Cunningham's advice in her capacity as personal banker. Neither has it been shown that it was reasonable for her to rely on such advice.

[104] This takes me to the issue of the friendship between the respondent and Ms Cunningham and its effect on what the trial judge was tasked to do.

Whether the trial judge erred in failing to appreciate that, on the evidence, it was impossible to determine the extent to which the respondent's reliance on Ms Cunningham's advice was a result of their personal friendship rather than as a result of the personal banker relationship, and that it was neither just or reasonable to impose a duty on Ms Cunningham in those circumstances (ground 3);

[105] Mrs Minott-Phillips argued that it would not be just or reasonable to impose vicarious liability on the appellant, given that (i) the respondent gave Ms Cunningham a power of attorney to deal with her account; (ii) the respondent knew the appellant was in the business of banking only; (iii) the respondent's investment prior to her excursion with Higgins Warner were with the separate legal entity NCB Capital Markets Limited, and (iv) Higgins Warner was not licensed or registered to take funds from members of the public for investment purposes.

[106] Queen's Counsel also argued that based on the close personal friendship between Ms Cunningham and the respondent, it was not possible to determine the extent to which the advice given by Ms Cunningham and the respondent's alleged reliance on it, resulted from their friendship rather than from any other relationship, such as banker and customer. I agree. The trial judge appears to have given no consideration to the question whether it was more probable than not that the respondent would have relied on Ms Cunningham as a close friend, the respondent

being possessed of the knowledge that Ms Cunningham was not an investment banker and that the appellant was not in the business of investment and had never held itself or Ms Cunningham out to be so. Further, that the advice the respondent was being given was unrelated to the appellant or NCB Capital Markets, to which she was accustomed.

[107] It is unclear how the trial judge dealt with the significance of the circumstances surrounding this close relationship in her assessment of the case. The respondent had accepted in her evidence that it was normal for close friends to give each other advice. The evidence demonstrated just how close their personal friendship was, and the concomitant level of trust the respondent had placed in Ms Cunningham as a friend, in that the respondent had allowed Ms Cunningham to live in her house rent free and had even given her, as a friend, power of attorney over one of her accounts. There is no allegation Ms Cunningham was given power of attorney over the said account into which the loan proceeds were deposited, and from which disbursements were made to Higgins Warner, as personal banker. These things had nothing to do with their banking relationship. In fact, under cross-examination, the respondent agreed that it would be fair to say that her relationship with Ms Cunningham had nothing to do with her working at the appellant.

[108] Notwithstanding this evidence, the trial judge concluded that this lifelong close friendship did not affect the respondent's reliance on Ms Cunningham as her personal banker, but gave no reasons for that conclusion. Lord Gifford contended that the

suggestion that Ms Cunningham gave the advice as her friend was rightly rejected by the trial judge, as when a banker gives advice in their office to a childhood friend, as frequently happens, they do so in the course of their employment. I am of the view that this submission is unsustainable. The respondent gave no positive evidence, in this regard, other than her evidence that she relied on Ms Cunningham to advise her on "everything". However, Ms Cunningham was not employed or authorised as personal banker to advise customers on "everything". In those circumstances, it is difficult to see the basis upon which the trial judge felt herself in a position to conclude that the friendship between the two did not affect the respondent's reliance on the advice from Ms Cunningham. I, therefore, agree that, in the absence of any positive evidence, one way or the other, it would have been incredibly difficult to separate the reliance placed on Ms Cunningham as a friend from her position as a personal banker. This is especially so as the loan which was taken from the appellant was shared with Ms Cunningham, in that, the respondent loaned part of the loan proceeds from the bank to Ms Cunningham, a fact which was evidenced by her signature on the letter written by Ms Cunningham, despite her oral denials.

[109] In my view, and with due regard given to the very experienced trial judge, the only conclusion open to her on the evidence, was that Ms Cunningham gratuitously advised the respondent with regard to the investment in Higgins Warner. In doing that, Ms Cunningham may well have assumed a duty of care, which she personally failed to discharge. However, Ms Cunningham was not sued and this was not an avenue pursued

by the trial judge. In the light of my ultimate conclusions with regard to the remaining grounds, I do not consider it necessary to embark on that road either.

[110] The respondent, having sought to hold the appellant vicariously liable for the actions of Ms Cunningham, the larger issue, which I will later address, is whether the trial judge was correct to find that the appellant was vicariously liable for the actions of Ms Cunningham.

Whether it was open to the trial judge to rely on parol evidence to find that the respondent did not loan money to Sandra Cunningham nor place the funds with Higgins Warner in the face of the documentary evidence to the contrary (ground 4)

[111] The trial judge's findings with respect to the loan to Ms Cunningham and the respondent's earlier investment with Higgins Warner were inconsistent with her other findings and with the evidence before her.

[112] In respect of the inconsistencies in the respondent's evidence, Lord Gifford argued that the trial judge recognized these inconsistencies existed and took them into account. He accepted that the trial judge's finding that the respondent signed all the documents at once was not supported by the evidence, but submitted that that error did not invalidate the trial judge's decision, nor, he said, did it undermine the fact that that Ms Cunningham had deceived the respondent into believing that the investment was secure.

[113] At paragraph [72] of her decision, under the heading "inconsistencies in Miss Steens' evidence", the trial judge acknowledged the existence of the letter signed by

both Ms Cunningham and the respondent in relation to the return of US$40,000.00 allegedly borrowed by Ms Cunningham from the respondent. With regard to that, the trial judge said, "it seems to me that Miss Steens is admitting a loan from her to Miss Cunningham". Then, at paragraph [84], she said that the letter written by Ms Cunningham (exhibit 1-20) was instructive, as it showed that Ms Cunningham admitted that she invested US$40,000.00 in Higgins Warner. At paragraph [85] she also found that the letter dated 29 April 2008 written by Ms Cunningham and signed by both of them was instructive, as she found that Ms Cunningham admitted in that letter, that a sum of over $2,000,000.00 was 'loaned to her' by the respondent and that this was a part of the loan obtained from the appellant.

[114] Further, although the respondent said, in her witness statement, that she did not give Ms Cunningham permission to borrow any part of her money, she admitted signing the letter admitting to the loan, and under cross examination she admitted that, by her signature on the document, she was agreeing that she had loaned Ms Cunningham the US$40,000.00. She also agreed that a loan did not constitute misappropriation of funds. Notwithstanding this evidence, the trial judge concluded that Ms Cunningham received the respondent's money and used it in various ways, and she accepted the respondent's oral testimony to find as a fact that the respondent did not loan money to Ms Cunningham (paragraphs [85] and [81] respectively). The trial judge made this finding, even though she did not reject the authenticity of the letters and the respondent's admissions.

[115] These were findings which were clearly inconsistent, not only with the documentary evidence but also the respondent's own oral evidence, and were, therefore, not properly made.

[116] In relation to the placing of funds with Higgins Warner, the trial judge said she could not agree that the respondent placed the loan funds with Higgins Warner, notwithstanding that she said she 'fully appreciated' that some of the funds were invested with Higgins Warner, prior to the receipt of the loan from the appellant (see paragraph [88] of the trial judge's decision). The trial judge reasoned that this was so because she accepted that all the documents were signed on the same occasion that the respondent attended the bank in relation to the loan. Respectfully, this explanation, which did not come from the respondent but was provided by the trial judge herself, did not reconcile the inconsistencies in this aspect of the evidence. It was also not consistent with the evidence, as the documentary evidence proved that the second contract with Higgins Warner and the loan with the appellant were both signed on a different date from the first contract with Higgins Warner.

[117] There was no explanation as to why the dates on the documents signed by the respondent to effect the investment in Higgins Warner were different, spanning up to a month apart. In her witness statement, the respondent said that in May she received the advice from Ms Cunningham, and that she went back on a second occasion and signed all the documents. However, the first Higgins Warner contract was signed and dated 22 May 2007 by both her and the company's president. The respondent's letter of

authorization to NCB Capital Markets for hypothecation of her Euro funds as collateral for the loan is dated 20 June 2007. The first interest payment on the investment under the Higgins Warner investment made in May was deposited on 22 June. The commitment letter from the appellant is dated 25 June 2007. The deed of indemnity signed by her and purported to be signed in the presence of a Justice of the Peace, as well as the letter confirming the hypothecation of funds from NCB Capital Markets, are both dated 26 June 2007. The loan from the appellant to the respondent, in the amount of $6,000,000.00, was disbursed on 27 June 2007, and the second contract with Higgins Warner is signed by both the respondent and the president of that company on the said date.

[118] The respondent's US dollar bank account records show that she received a deposit of interest from Higgins Warner of US$800.00 on 22 June 2007, the very same amount agreed to and in the time frame agreed in the first Higgins Warner contract, exactly one month after the date therein (22 May 2007). There is no evidence on that document that it was Ms Cunningham who 'placed funds' in Higgins Warner. In fact, none of those documents make reference to Ms Cunningham in any way. Both Higgins Warner contracts were signed by the respondent personally. The respondent gave no evidence as to where the funds came from for the earlier investment in Higgins Warner in May, for which she received interest payments in June, before the loan disbursement. The trial judge failed to take into account this evidence and to reconcile the inconsistencies, but said she believed that 'in the main' the respondent was speaking

the truth. She was not entitled to do so in the face of the documentary evidence before her without reconciling that evidence with the respondent's oral evidence.

[119] I will now consider whether, nevertheless, the trial judge was correct in law and on the facts when she found that the appellant was vicariously liable for the conduct of Ms Cunningham.

Whether the trial judge erred in relying on the authority of Bernard (Clinton) v Attorney General to find the appellant vicariously liable for the tort of negligent misstatement (ground 5)

Whether the trial judge erred in finding that in advising the respondent in relation to investing in Higgins Warner, Ms Cunningham acted within the scope of her duty as an employee of the appellant (ground 7)

Discussion and analysis

[120] As I said earlier, this case required a determination by the trial judge as to whether Ms Cunningham, as an employee of the appellant, did a tortious act for which the appellant, as her employer, is capable in law of being held vicariously liable. Breach of contract was alleged at trial, however, this seemingly, was not pursued by the respondent. It is useful, therefore, to start with the law applicable in cases of vicarious liability.

(a) Vicarious liability generally

[121] The law of vicarious liability, generally speaking, imposes a strict liability on an employer for any tort done by its servants in the course of their employment, regardless of the absence of blameworthiness on the part of the employer. The classic statement of the principles surrounding vicarious liability is that made by the eminent

jurist and academic, John Salmond, that "a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment". The employee's acts are deemed to be done in the course of employment if those acts are:

> (1) "expressly or impliedly authorised by the employer;
>
> (2) an unauthorised manner of doing something authorised by the employer; and
>
> (3) unauthorised acts of the employee so connected with authorised acts that they may be considered as improper modes of doing an authorised act" (Salmond on Torts, 1st edition (1907), pg 83; Salmond on Torts 9th edition (1936), pg 95); Salmond and Heuston on Torts, 21st edition (1996), pg 443.

[122] With regard to the third category, Salmond said in his first edition, at page 84, that, "if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible". Over the years, although Salmond's formulation remained the foundation of this area of law, judicial pronouncements in a plethora of cases have developed various nuances to this general principle. I will come to these later in this discussion. Suffice it to say, the theory of vicarious liability is largely a matter of policy. Categories (1) and (2) above generally give little difficulty in application. Category (3), however, has resulted in different judicial criticisms and, ultimately, in a reformulation and expansion of what has come to be known as the 'close connection' test'.

[123] Vicarious liability is, therefore, not confined to acts done in the course of employment with the employer's authority, but may also extend to unauthorised acts which are so closely connected with acts the employee was authorised to do, that it can fairly be said it was done in the course of employment. The various formulations of these tests that have been developed upon and expanded in the cases, and their appropriate application to a particular case, will have to be considered within the context of the peculiar facts of each case. Regardless of the test applied, however, for vicarious liability to be imposed, the commission of a tort by the employee must be proved. If the tort is so proved the question arises whether the employer should be held liable for it. The employer will not be liable if, when the appropriate test is applied, the tort was not committed in the course of employment, or to put it another way, within the scope of the employee's duty. The employer is not liable merely because he provided the opportunity or the access to the place which the employment afforded (see the judgment of Lord Clyde in **Lister and others v Hesley Hall Ltd** [2001] 2 All ER 769, and generally, in all cases on vicarious liability).

(b) Vicarious liability for reliance based torts

[124] Where the case involves a reliance based tort such as misrepresentation, whether fraudulent or negligent, there is high authority that the appropriate test to be applied is whether there was a holding out or representation by the employer to the claimant, with the intention that the claimant would act upon it, and which was, in fact, acted upon by the claimant, that the employee had the authority to do what he or she did, including acts falling within the usual scope of the employee's ostensible authority.

See the decision of the House of Lords in **Armagas Ltd v Mundogas SA; The Ocean Frost** [1986] 2 ALL ER 385. This appears to be obvious by virtue of the very nature and legal definition of these torts and the manner in which they can be held to have been committed.

[125] The most recent pronouncement on vicarious liability in the context of reliance based torts is to be found in the case of **Hockley Mint Ltd v Ramsden and others** [2018] EWCA Civ 2480, a decision of the English Court of Appeal. That court found that the case of **Armagas** was binding authority from the House of Lords for the principle that, "where a claimant has suffered loss in reliance on the deceit of an agent, the principal is vicariously liable if, but only if, the deceitful conduct of the agent was within his or her actual or ostensible authority" (see paragraph [48]).

[126] The case of **Hockley Mint** involved the tort of deceit, where fraudulent misrepresentations had been made by an agent of the defendants which caused the claimant to suffer financial losses. The claimant sued several defendants for damages for deceit and conspiracy to injure by unlawful means. The trial judge found that the agent had committed fraud, and although he found that the principal was not a willing participant in the fraud, on the authority of **Lister** and **Dubai Aluminium**, he found the principal vicariously liable for the actions of his agent.

[127] The Court of Appeal, however, found that the trial judge had applied the wrong test. It said, at paragraph [63]:

> "The analysis of the Judge did not identify or address the essential ingredients of vicarious liability of a principal for the deceit of his agent as required by *Armagas*: a holding out or representation by the principal to the claimant, intended to be and in fact acted upon by the claimant, that the agent had authority to do what he or she did, including acts falling within the usual scope of the agent's ostensible authority. **Instead, he applied a broad principle of fairness and a test of 'sufficiently close connection' derived from *Lister* and *Dubai Aluminium*. Those cases, however, did not concern a reliance based tort, and were not about the ostensible authority of an agent or employee as a result of a holding out by the principal or employer.** They concerned the ordinary course of employment (in *Lister*) and the ordinary course of a firm's business (in *Dubai Aluminium*). That is why *Armagas* was not mentioned in any of the speeches in either case, and why Lord Nicholls in *Dubai Aluminium* said (at [30]) that in that case and in the other cases he cited there was no question of reliance or holding out, and why he also said (at [28]) that he left aside cases where the wronged party was defrauded by an employee acting within the scope of his apparent authority. In short, the first ground of appeal is correct in stating that the Judge applied the wrong test." (Emphasis added)

[128] The correct question, it said, was whether the principal had held out the agent as having had authority to enter into the relevant transactions, and whether the claimant had relied on that holding out, which would further depend on whether the transactions appeared genuine (see paragraph [73]). The court in coming to its decision relied extensively on the dicta of Lord Keith in **Armagas.**

[129] The case of **Armagas** involved a bribe by one party's agent to induce the other party's agent to enter into a fraudulent three-year charter party agreement. The principals of the companies involved were not aware of the deceit. Armagas sued for wrongful repudiation of contract, and vicarious liability for the deceit of the defendant's agent. The trial judge found the defendant vicariously liable for the deceit of its agent,

but the Court of Appeal reversed that decision. The House of Lords agreed with the Court of Appeal. The Law Lords held that the defendant was not vicariously liable for the deceit of its agent, on the basis that the agent had no authority, whether actual or ostensible, to enter into a three-year charter party, a fact that was known to the claimant. The fact that the agent had misrepresented that he had received special authority was insufficient.

[130] It had been argued before the House that although the agent had no actual or ostensible general authority to enter into contracts of such a nature, he had specific ostensible authority to enter into this particular one. The House rejected that argument.

[131] Holding that it was well settled that a master was not liable for the dishonest torts of his servant, simply because the latter's employment gave him the opportunity to commit it (**Morris v C W Martin & Sons Ltd** [1965] 2 ALL ER 725, at page 738), the House of Lords also rejected the argument that the principal was liable because, although the agent was not acting within the scope of his actual or ostensible authority, he was acting within the course of his employment. Holding that there was no distinction in those two expressions, the House held, at page 393 of the judgment of Lord Keith of Kinkel, that:

> "The essential feature for creating liability in the employer is that the party contracting with the fraudulent servant should have altered his position to his detriment in reliance on the belief that the servant's activities were within his authority, or, to put it another way, were part of his job, this belief having been induced by the master's representations by way of words or conduct."

[132] The court also rejected the applicability of the dictum of Lord Denning in **Navarro v Moregrand Ltd** [1951] 2 TLR 674 at 680, which is to the effect that although a principal is liable in contract for only things done within its actual or ostensible authority, it remains liable in tort for all wrongs done in the course of the servant's or agent's employment, whether or not it is within his actual or ostensible authority. It held that the principle was not applicable to reliance based torts (page 393). Lord Keith, in his judgment, concluded, at page 394, that:

> "**In the end of the day the question is whether the circumstances under which a servant has made the fraudulent misrepresentation which has caused loss to an innocent party contracting with him are such as to make it just for the employer to bear the loss. Such circumstances exist where the employer by words or conduct has induced the injured party to believe that the servant was acting in the lawful course of the employer's business. They do not exist where such belief, although it is present, has been brought about through misguided reliance on the servant himself, when the servant is not authorised to do what he is purporting to do, when what he is purporting to do is not within the class of acts that an employee in his position is usually authorised to do and when the employer has done nothing to represent that he is authorised to do it."** (Emphasis added)

[133] Although the statements in **Armagas** were made in the context of fraudulent misrepresentation, they are no less applicable, in my view, to negligent misrepresentation, it too being a reliance based tort.

(c) Vicarious liability for intentional wrongs

[134] The judges in the cases of **Hockley Mint** and **Armagas** were at pains to point out that the appropriate test for vicarious liability, involving reliance based torts, as developed, is settled and is not the same test as in cases involving other intentional wrongs and negligent physical acts. Therefore, the courts declined to follow the case of **Lister** and the line of cases which relied on it, such as **Dubai Aluminium.**

[135] **Lister** involved the sexual abuse by the defendant's employee of the claimants who were young boys under the care of the defendant. The House of Lords had to consider the proper approach to take in determining whether the employee's wrongful act had been committed in the course of his employment, and whether, in applying that proper approach, the defendants were vicariously liable for the sexual abuse of the claimants. The case involved an intense examination of how the law of vicarious liability developed to embrace intentional wrongdoing of this kind by the employee.

[136] The House of Lords determined that Salmond's formulation did not adequately cover cases involving intentional wrongdoing. The usefulness of Salmond's formulation, it said, was critically dependent on focussing on the right act of the employee. The court relied on the dicta of Diplock JA in **Rose v Plenty** [1976] 1 All ER 97, and the broad approach to the nature of employment taken in that case, to consider the question whether there was a close connection between the torts of the employee in sexually abusing the claimants, and his employment as warden to take care of the claimants. The approach suggested by the court was to concentrate on the relative closeness of the connection between the nature of the employment and the particular

tort. The court then considered the question whether the employee's torts were so closely connected with his employment that it would be fair and just to hold them liable. What essentially has to be considered is the connection between the act and the employment. If there is a connection, the closeness of that connection must be examined. The time and place of the act may not be conclusive of the matter.

[137] The court, in **Lister**, largely approved the approach in **Bazley v Curry** (although it decried its more philosophical and policy based pronouncements), and found that the required approach was that of an examination of how closely the tort was connected with the employment so as to determine whether it would be just to saddle the employer with liability. Having outlined Salmond's formulation, Lord Steyn, at paragraph 20 said this:

> "It remains, however, to consider how vicarious liability for intentional wrongdoing fits in with Salmond's formulation. The answer is that it does not cope ideally with such cases. It must, however, be remembered that the great tort writer did not attempt to enunciate precise propositions of law on vicarious liability. At most he propounded a broad test which deems as within the course of employment 'a wrongful and unauthorised mode of doing some *act* authorised by the master'. And he emphasised the connection between the authorised *acts* and the 'improper modes' of doing them. In reality it is simply a practical test serving as a dividing line between cases where it is or is not just to impose vicarious liability. The usefulness of the *Salmond* formulation is, however, crucially dependent on focussing on the right act of the employee. This point was explored in *Rose v Plenty* [1976] 1 All ER 97, [1976] 1 WLR 141…
>
> If this approach to the nature of employment is adopted, it is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorised acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care

> for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of employers while the warden was also busy caring for the children."

[138] **Bazley v Curry** was also a case involving the sexual abuse of a child at a care facility run by a non-profit organization. The Supreme Court of Canada performed an in-depth analysis of the development of the law of vicarious liability along with the policy considerations upon which it is primarily based. Whilst the court accepted that the issue before it was governed by the traditional Salmond test, it determined that, for intentional torts, where it would be difficult to find that the act was authorized by the employer, even ostensibly, the court had to look at previous cases as well as the rationale behind vicarious liability – which was for a just and practical remedy for the harm, and deterrence of future harm. The court noted, at paragraph 20, that "[t]he language of authority, whether actual or ostensible, is inappropriate for intentional, fraudulent conduct like theft of a client's property". The court was of the view that, in cases of intentional torts, "where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong" (paragraph 22). Where the act is only coincidentally linked with the employment, such as being committed on work premises during work hours, this will not justify the imposition of vicarious liability. It was said, at paragraph 36, that:

> **"A wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer. To impose**

> **vicarious liability on the employer for such a wrong does not respond to common sense notions of fairness. Nor does it serve to deter future harms. Because the wrong is essentially independent of the employment situation, there is little the employer could have done to prevent it. Where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer."** (My emphasis)

[139] The court, at paragraph 41 of the judgment, outlined the following criteria for determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, which, it noted, may vary from case to case and include such subsidiary factors as:

> "(a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power."

[140] Those considerations were applied to the specific intentional tort of sexual abuse, focussing on the enhancement of the risk, the employee's specific duties and whether they gave rise to special opportunities for wrongdoing.

[141] The common thread in all these cases is the fact that they involved intentional wrongdoing or a negligent physical act, and absent any notion of reliance. The court in **Bazley v Curry**, specifically, made it plain that the principles should be applied to cases where the employer is to be held liable for vicarious liability of an unauthorized intentional wrong where there is no precedent or where the precedent is inconclusive. Inherent in all the decisions is the fundamental acceptance that the principles applied in those cases are not necessarily applicable to traditional negligence cases for which precedents already exist. In **Bazley v Curry**, the difference in the applicable tests was explained as the difference between the foreseeability of a risk from specific conduct in negligence cases, as against a broad risks incidental to the whole enterprise, in cases of intentional torts (at paragraph 39).

[142] **Dubai Aluminium** was a case involving the question of liability of the innocent members of a firm of partners for the fraudulent criminal conspiracy of one of its partners. The guilty partner was the one who drafted the consultancy agreement to give effect to the fraud. He had authority to draft commercial agreements in the ordinary course of the firm's business. The House of Lords decided that the wrongful act of one partner could bind the innocent partners if it could properly be regarded as done by that partner in the ordinary course of the firm's business. It said the court was to determine this as a matter of law by assessing primary facts. In that case, the actions of the partner in drafting the necessary agreements to effect the fraud was so closely connected with the acts he was authorised to do, that he could fairly and properly be regarded as having acted in the ordinary course of the firm's business. The

House of Lords approved **Bazley v Curry** and **Lister** which had relied on **Morris v C W Martin & Sons Ltd**.

[143] Lord Nichols of Birkenhead, in giving his judgment, was at pains to state at paragraphs 27 to 29 that his consideration of the authorities took into account that the appeal before him concerned dishonest conduct. He expressly left aside cases where an employer undertook responsibility to a third party and delegated that duty to an agent or partner as well as cases where an employee was acting within the scope of his employment. He noted that, in those cases, the critical feature was that the wronged person was acting in reliance on the ostensible authority of the employee. Lord Nichols, therefore, recognised that the principles he was expounding in this case, did not affect reliance based torts. At paragraph 29 to 30, he explained that his discussion of the authorities would not include such cases because the case before him was not a reliance based tort. The authorities he considered, therefore, as he said, were authorities applicable to cases other than reliance based torts. These were the said paragraphs relied on by the court in **Armagas** to show that the decision in **Dubai Aluminium** did not affect the settled tests applied in respect of reliance based torts.

[144] In its decision in **Bernard**, the Privy Council established that, in cases involving intentional wrongs, the applicable test for vicarious liability is that set out in the case of **Lister**, which focuses on the closeness of the connection between the employment and the tort of the tortfeasor.

[145] In **Bernard**, the claimant was shot in the head by a police constable whilst using a payphone at the Central Sorting Office in Kingston. The evidence was that the claimant had waited in a long line, and upon reaching his turn, the police constable demanded the phone, stating that he was going to make a long-distance call, and shouting "boy leggo this, police". The claimant refused to release the phone and the constable slapped him, shoved him in the chest, pulled out his service revolver, and shot him point blank in the head. The claimant was taken to the hospital, and whilst there was charged by the constable for assaulting a police officer. The charges were subsequently withdrawn, and the claimant filed suit against the constable and the Attorney General (AG) for assault, false imprisonment, and malicious prosecution. The trial judge found the AG vicariously liable, however, on appeal, the Court of Appeal found that the AG could not be held vicariously liable, as the actions of the constable did not fall within the Salmond formulation for vicarious liability, in that, the constable's unlawful actions could not have been deemed as actions falling within the lawful execution of his duty.

[146] On further appeal to the Privy Council, the Board found that the Court of Appeal was wrong and reinstated the decision of the trial judge. The Board found that the Court of Appeal had applied the wrong test, and that, as was found in **Lister**, the Salmond test was not appropriate in cases of intentional torts, the applicability of which could often lead to skewed results. At page 253, Lord Steyn stated:

> "Lister is, however, important for a number of reasons. It emphasised clearly the intense focus required on the closeness of

> the connection between the tort and the individual tortfeasor's employment. It stressed the need to avoid terminological issues and to adopt a broad approach to the context of the tortious conduct and the employment. It was held that the traditional test of posing, in accordance with Salmond's well-known formula, the question whether the act is 'a wrongful and unauthorised mode of doing some act authorised by the master' is not entirely apt in cases of intentional wrongs: Salmond, The Law of Torts, 1907, 83, now contained in the current edition of Salmond and Heuston, The Law of Torts, 21st ed., 1996, 443. **This test may invite a negative answer, with a terminological quibble, even where there is a very close connection between the tort and the functions of the employee making it fair and just to impose vicarious liability.**
>
> **The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable.** In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee. This strand in the reasoning in Lister was perhaps best expressed by Lord Millett who observed (para 83, at 250D):
>
> > '... Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust.'" (Emphasis added)

[147] **Lister** was also applied in **Dubai Aluminium** which, in turn, was cited with approval by the Board in **Bernard**. Interestingly, at no point in **Bernard** did the Board say that Lord Nichols was wrong to exclude reliance based torts from his analysis. The Board also cited McLachlin J's statement, at page 62, in **Bazley v Curry**.

[148] This court in **Princess Wright v Alan Morrison** [2011] JMCA Civ 14, which was a matter involving an accident caused by an employee whilst driving the employer's motor vehicle outside of work hours, was asked to consider the applicability of the close connection test. The respondent, in that case, had contended that the close connection test, as applied in **Bernard,** only applied to cases involving intentional torts, as the Board in **Bernard** made no reference to cases that represented settled law in non-intentional tort cases. This court, however, held that the 'close connection' test was not a new test, but rather a widening of the scope of the Salmond test, and was, therefore, of general application.

[149] At paragraph [20], Harris JA said:

> "[20] It cannot be denied that over the years, non intentional [sic] and intentional wrongs have been applied in determining vicarious liability. However, the 'close connection test' does not introduce a new approach. Lord Steyn sought to put into perspective the application of Salmond's formula in relation to this approach. He indicated that in dealing with intentional torts, the issue as to 'whether an act is wrongful and an unauthorized mode of doing some act authorized by the master' may produce an unjust and unfair result, as this formula may not invite an affirmative answer…He emphasized that the "close connection test" is not one which was plucked from the air, in the development of the law, but had its foundation in a 'high line of authority'…"

[150] She then concluded, at paragraphs [21] and [22], as follows:

> "[21] The focus is the relative closeness of the connection between the nature of the employment and the wrongful act. In our judgment, the 'close connection test' does not create a dual approach in determining vicarious liability…To fully appreciate the intent and impact of the approach, **the focal point must be the steps which are to be taken in making a decision as to an**

> **employer's liability for the acts of his employee's wrongful act.**
>
> [22] In applying the requisite principles, consideration must first be given to the relative closeness of the connection between the nature of the employment and the particular wrong. Thereafter, an inquiry should be made as to whether the circumstances dictate that it is just and reasonable to assign liability to the employer. **In so doing, consideration should be given to the danger to others created by the employer, who assigned duties, as well as the tasks given to the employee. All these factors, when taken cumulatively, would certainly apply to all actions falling within the ambit of the vicarious liability doctrine.** It follows therefore, that the necessity would not have arisen for Lord Steyn to have expressly, mentioned **Rambarran** and **Morgan**. In our judgment, the test propounded by him has not brought about a change in the approach in the law on vicarious liability. **The 'close connection test' does not displace the traditional test but rather, in widening its scope, it permits the court to adopt a broader perspective of the law**." (Emphasis added)

[151] This approach was considered in **Debbie Powell v Bulk Liquid Carriers Ltd, Osmond Pugh and Caribic Vacations Ltd** [2013] JMCA Civ 38, where Brooks JA agreed with Harris JA that the test in **Lister** did not depend on a distinction between intentional and non-intentional wrongs (paragraph [62]). Neither **Debbie Powell** nor **Princess Wright** involved an intentional wrong, but rather negligent physical acts. Brooks JA in **Debbie Powell** agreed with Harris JA in **Princess Wright** that the "close connection test" did not "displace" the traditional test but widened its scope, thus permitting the court to adopt a "broader perspective" of the law". I agree, but to that I would only expressly add, what is necessarily implied in that statement, that the court will only do so where it is necessary and appropriate.

[152] In both **Princess Wright** and **Debbie Powell**, the drivers were employed by the defendants to drive but were not authorised to make the trip which they did. It was appropriate on the facts of those cases to ask the question what was the "relative closeness of the connection between the nature of the employment and the particular wrong". In **Debbie Powell**, the trip taken by the employee had no connection with his employer's business he having been assigned specific duties on that night (and it could therefore have been said, using the traditional language of the test; that he was on a frolic of his own).

[153] Although the close connection test for vicarious liability may be of general application, what is applicable to each particular tort will be determined by the facts of the individual case, the elements of the tort itself, and by virtue of precedent. The extension of the first two categories of the Salmond test was as a result of the inappropriateness of those existing tests to cases involving intentional wrongs, particularly sexual offences and assault, as well as the absence of any precedent enunciating the proper test to be applied in such cases in order to yield a just result. Importantly, the cases in which the close connection test has been developed and applied to intentional wrongs, have not overruled or disapproved the application of the existing time honoured tests to those situations for which precedent already exists. All they have said is that the language of authority, actual or ostensible, is inappropriate for intentional wilful wrongs such as sexual or other assaults and theft.

Did the judge apply the wrong test?

[154] Mrs Minott-Phillips submitted that having regard to the fact that the claim, as pleaded, concerned a reliance based tort, the trial judge, in relying on **Bernard,** applied the wrong legal test. Instead, Queen's Counsel argued, the relevant principles are those set out by the House of Lords in **Armagas**. She contended that the trial judge ought to have applied those principles to determine whether there had been a holding out by the appellant that Ms Cunningham was authorised to give investment advice. It was argued that, in analysing the case, the trial judge fell into error, as did the trial judge in **Hockley Mint**, by applying the tests of a "broad principle of fairness" and "sufficiently close connection" as set out in the **Bernard** and **Dubai Aluminium**. It was submitted that such an approach is unsuitable to this type of case, where a holding out and actual or ostensible authorisation by the employer, needed to be alleged and established by the claimant, before the question of the employer being vicariously liable for the tort could even arise.

[155] Further, it was submitted, the trial judge compounded her error by relying on the dissenting opinion of Lord Finlay in **Banbury v Bank of Montreal** in preference to the decision of the majority of the court.

[156] Lord Gifford submitted that the claim was brought on the basis of vicarious liability for the tortious acts of an employee, and in the alternative, contractual liability. He said that based on the trial judge's findings at paragraphs [73] and [87] of her judgment, Ms Cunningham 'used her position at the appellant in an unreasonable,

manipulative and perhaps dishonest way', 'resigned under the shadows of allegations of fraud' and was 'accused of dishonesty'. He submitted, therefore, that her tortious actions went beyond negligence, and the judge was correct to rely on cases involving vicarious liability in respect of intentional torts.

[157] He disagreed with Mrs Minott-Phillips that different principles apply in cases involving intentional torts. In the instant case, he submitted, the tort was either negligence or fraud, but there was insufficient evidence before the trial judge for her to decide. Nonetheless, all cases, he argued, must now be looked at on the basis of the close connection test formulated in **Bazley v Curry**. In applying this test, he said, the court must have regard to all the facts, including whether the tortious conduct was authorised by the employer or was within the scope of the authority, and recovery of damages by a customer who suffers loss as a result of the employee's tortious conduct is not obstructed by the fact that the employee was not authorised to do the act. In that regard, Lord Gifford submitted that the applicable law is that contained in the authorities of **Bazley v Curry**, **Dubai Aluminium**, **Bernard** and **Lister**.

[158] These submissions reveal that Queen's Counsel on both sides are at opposite ends of the scale with regard to the applicable law in respect of vicarious liability in cases of the type before this court. This case as pleaded is one of negligent misstatement by an employee of the appellant, on which the respondent relied to her detriment. However, it is apparent that the tone of the case at trial changed to one having to do with the dishonesty of Ms Cunningham. The trial judge found Ms

Cunningham liable for giving negligent advice to the respondent, whilst acting within the course of her employment, for which the bank should be held liable. Although she relied on a line of cases dealing with intentional torts, the trial judge made no definitive finding of fraud or any other intentional wrongdoing against Ms Cunningham.

[159] Negligent misstatement is a reliance based tort. It seems to me, on settled high authority, that the more appropriate and applicable test to cases of this nature, involving reliance based torts, is that set out in **Hockley Mint** and **Armagas.** These two cases establish that the close connection test, applied in cases of intentional wrongs and other negligent physical acts committed in the course of employment is not entirely appropriate as a test for vicarious liability in cases of reliance based torts. The court in **Hockley Mint** specifically dismissed the close connection test in **Lister** as being applicable to reliance based torts for reasons this court finds highly persuasive. This is so notwithstanding the decisions of **Bernard, Princess Wright, Debbie Ann Powell and Dubai Aluminium**. None of these cases mentioned **Armagas.** As I have already stated, those cases did not involve reliance based torts, and, with the exception of **Dubai Aluminium**, there is nothing said in them which indicates that the courts would have had such a tort in their contemplation. **Dubai Aluminium** specifically excluded reliance based torts from its contemplation. Although the close connection test is of general application, it must be understood to carry the rider that it should only be applied where necessary and appropriate to the tort and the facts of each particular case. In the same way that the test of actual or ostensible authority is not appropriate

to cases involving intentional wrongdoing, the close connection test is not appropriate to reliance based torts.

[160] Lord Gifford argued that **Armagas** is inapplicable as it is inconsistent with the growing body of authority on the close connection test. In my view, this is not a correct assessment of the development of the law, as, based on the authorities discussed above, the close connection test did not replace the time honoured settled existing tests, but rather, was an extension of the Salmond formulation in order to fill a gap in cases not appropriately covered by the tests in criteria one and two of Salmond's formulation. The court in **Armagas** found that in reliance based torts, the employer would be liable if the wrong done by the employee was not only actually authorised, but also ostensibly authorised. If the employee was actually authorised to do the act complained of, that would be the end of the matter. If the wrong committed was within the class of acts an employee in that position was usually authorised to do, and the employer had induced the injured party, by words or conduct to believe that the employee was acting in the course of his employment, the employer could be held liable, notwithstanding that what the employee had done amounted to a criminal or negligent act. In considering whether the advice was given in the course of employment, the court would have to determine whether the employee had actual or ostensible authority to give the specific advice he or she gave. If the employer held out the employee as having the authority, then that would be decisive as against the employer. If the employer assumed the responsibility and only delegated to the employee to carry out the actions on its behalf, then it would also be vicariously liable.

In that regard, there would be an obvious connection with the tort committed by the employee and his employment.

[161] Queen's Counsel further argued on behalf of the respondent that **Hockley Mint** applies to cases of vicarious liability of an agent as distinct from that of an employee. I do not agree. Whilst it is true that in **Hockley Mint** the tortfeasor was referred to as an agent of the defendant, in my view, this is inconsequential. Firstly, throughout the various cases, the terminology of agent/principal and employee/employer is used interchangeably. Whilst all agents are not employees of the principal, all employees are agents of the principal. Secondly, the case of **Armagas**, relied on as binding authority in **Hockley Mint**, used the terms agent and employee interchangeably, and the tortfeasor was actually an employee of the defendant company. The court spoke to the enforceability of the contract entered into by the deceit of the agent/employee. It made no distinction as regards the test to be applied for vicarious liability of an agent or an employee.

[162] **Hedley Bryne v Heller**, which established the tort of negligent misstatement, established that it was a reliance based tort. In that case, bankers gave careless advice, which was relied on, resulting in loss. There was no contractual agreement to do so. The action failed because the defendant bank had disclaimed responsibility for the advice.

[163] Nothing in the cases relied on by the respondent and the trial judge, expressly or by implication, states that all previous tests settled by precedent have been overruled

and replaced with the single test of close connection (see the opinion of Lord Carloway in **Leanne Wilson v Exel UK Limited, Trading as "Exel"** [2010] CSIH 35 at paragraph 25 and cited by Brooks JA (as he then was) in **Debbie Powell**, at paragraph [59]). Lord Carloway made it clear that the close connection test, which was being applied to new situations of intentional torts, was not intended to alter established "well-trodden" precedents.

Application of the correct test to the case

[164] The respondent was burdened with the task of showing that the appellant was vicariously liable for the alleged advice given to her by Ms Cunningham, if it was found to be negligently given. The appellant put in issue, in its defence, the fact that it was not in the business of giving investment advice generally, nor had it assumed a responsibility to advise on Higgins Warner investments, specifically. There was no averment by the respondent that the appellant was in the business of giving investment advice or that, the appellant, as principal, had made any representations or held out to her by word or conduct, that Ms Cunningham was authorised to give investment advice and which induced her to believe that Ms Cunningham was acting within the scope of her authority in advising her to invest money in Higgins Warner. Neither was it averred that by making Ms Cunningham the personal banker for the respondent, it gave her the ostensible authority to give investment advice.

[165] It was asserted by the appellant that the respondent's bare assertion that she did not know the difference between it and NCB Capital Markets was belied, not only by her averments in the particulars of claim in relation to her investment in GOJ global

bonds at NCB Capital Markets, but also by the documentary evidence that she was required to hypothecate those funds as security for the loan, and by her reference in her witness statement to her NCB Capital Markets account separately from her accounts with the appellant. I agree and say further that, her knowledge of the distinction between the two entities was incontrovertibly established at the outset of her cross-examination.

[166] On that basis, the trial judge ought to have considered the lack of evidence before her. Instead, the trial judge wrongly compensated for this lack of evidence by reversing the burden of proof and placing it on the appellant to show that the respondent knew that Ms Cunningham was only authorised to convey information about the bank's services and not to give investment advice. Lord Gifford contended that whether the trial judge made a mistake in respect of the burden of proof is not important. What was important, he said, was that the respondent relied on Ms Cunningham as her personal banker, and that their personal relationship did not undermine any of the transactions. That contention is unsustainable.

[167] By reversing the burden of proof, the trial judge, fundamentally, fell further into error as, in order to find the appellant vicariously liable, the burden remained on the respondent throughout to plead and prove that she was induced by the appellant's representations to her, by words or conduct, that Ms Cunningham's activities were within the scope of her duties. Both, she failed to do.

[168] It was contended by Mrs Minott-Phillips that the trial judge's finding that Ms Cunningham's "dealings were wholly inconsistent with proper dealings on the part of a personal banker" precludes the notion that the trial judge could have been of the view that the appellant induced the respondent to believe that Ms Cunningham was acting within the scope of her authority, that Ms Cunningham acted within the scope of her employment, or, that the respondent could have believed that this was so. I fully agree with this view.

[169] The trial judge, relying on **Bernard**, **Bazley v Curry** and **Dubai Aluminium**, found that the appellant should be held liable, as Ms Cunningham in giving the advice, committed a wrong in the course of her employment and the appellant's ordinary business. In so doing, she found that the bank introduced the risk of the wrong, and that it would be just and reasonable to hold the appellant liable. All this was on the sole basis that Ms Cunningham was the respondent's personal banker and was in a fiduciary relationship with her.

[170] Not unlike the situation in **Banbury v Bank of Montreal**, in this case, there was no allegation of fraud or dishonesty, and none was proved, despite the trial judge's observations of Ms Cunningham's bona fides. Also, as in the case of **Banbury v Bank of Montreal,** the operations of the appellant bank in this case were confined to the business of banking by way of statute, and had the employees of the appellant advised anyone as to investments, they would have been acting outside the scope of their authority.

[171] The trial judge relied on the passage from Lord Finlay LC's dissenting opinion in **Banbury v Bank of Montreal** that was cited by the Privy Council in **National Commercial Bank v Hew**. At paragraph 13 of the latter case, the Privy Council cited the following words of Lord Finlay (from page 654 of **Banbury v Bank of Montreal**):

> "While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions **when advice may be given by a banker as such and in the course of his business**…If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently." (Emphasis added)

[172] While this is a correct statement of the law, the trial judge, in applying this case to the instant one, failed to properly apply the principles to the facts of the case, which were similar to those in **Banbury v Bank of Montreal**, in that she failed to assess whether the appellant had undertaken to advise the respondent on investment opportunities in the course of its business of banking. The advice given must be the advice of a banker in the course of his employer's business of banking, 'as such'. There was no pleading or evidence that Ms Cunningham had any authority, whether actual or ostensible, to give the kind of advice it is alleged she gave, in the course of her employment as banker in the appellant's banking business. Neither was there any evidence that the bank undertook by words or conduct to give investment advice to the respondent by holding out that Ms Cunningham was authorised to do so, notwithstanding that it was not in the business of giving such advice.

[173] The trial judge also placed reliance on the following words of Salmon J in **Woods v Martins Bank Ltd**, at pages 173 and 174:

> "I find that it was and is within the scope of the defendant bank's business to advise on all financial matters and that they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions…
>
> …as he chose to advise him, the law in those circumstances imposes an obligation on him to advise with reasonable care and skill."

[174] However, the context within which these findings were made, distinguished that case from the instant case. In finding that the actions of the bank's employee in advising the claimant fell within the business of the bank, despite its protests that it did not, Salmon J considered certain publications of the bank in evidence, whereby the bank described all-encompassing services to include the giving of expert advice on all matters affecting the financial welfare of the customer as well as help or advice about investments to be obtained by managers from 'the best available sources'. Although, the publications were not made until after the transactions, the court accepted the evidence of the impugned manager that the bank had always operated in this fashion. The court also rejected evidence from a secret book of instructions relied on by the bank, circulated to their branch managers, which included a direction that they ought not to directly advise the purchase or sale of any investment. In that case, the bank held itself out as being in the business of giving investment advice. There is no such evidence in this case.

[175] Salmon J distinguished the case from that of **Banbury v Bank of Montreal**, on the basis that, in that case, the claimant had admitted that the bank manager had no general authority to advise on investments, in that, it was not within the bank's business, and the bank had assumed no responsibility to the claimant.

[176] In **National Commercial Bank v Hew**, the Privy Council did not address the concept of vicarious liability, but considered, at paragraph 14, that it was:

> "…not sufficient to render the bank liable to Mr Hew in negligence that Mr Cobham knew or ought to have known that the development of Barrett Town with the borrowed funds was not a viable proposition. It must be shown either that Mr Cobham advised that the project was viable, or that he assumed an obligation to advise as to its viability and failed to advise that it was not."

[177] From the foregoing, I am of the view that the trial judge erred in relying on the principles in **Bernard** and **Bazley v Curry** to assess the vicarious liability of the appellant in the circumstances of a case which was a reliance based tort. The more appropriate test for cases of this nature involving reliance based torts is that set out in **Armagas**, as approved and applied in **Hockley Mint**. Therefore, the trial judge ought to have assessed whether the appellant had assumed the responsibility to advise the respondent and had held out Ms Cunningham as having actual or ostensible authority to advise on investments generally, or on the specific investment as alleged, it being common ground between the parties that the appellant was not in the business of giving investment advice.

[178] How does the court determine when the banker has assumed or undertaken a duty to give advice where none existed? The answer cannot fairly come from an enquiry whether there is a close connection between the position of the banker and the advice given. In the instant case, the appellant had no obligation in its ordinary relationship with the respondent to advise her on investments, and there was no evidence before the court that it undertook to advise or assumed an obligation to advise the respondent on investing in Higgins Warner by holding out that Ms Cunningham had any authority as personal banker to do so. Neither was any evidence led, from which a reasonable inference could be drawn, that it was reasonable for the respondent to rely on any advice from Ms Cunningham to take out a loan with the appellant in order to invest in a company she claimed she had never heard of, and of which she herself made no enquiry. The evidential fact that Ms Cunningham was her personal banker was hardly sufficient, without more.

[179] The evidence of the respondent was that she had investments with NCB Capital Markets, and that is where she went to deal with her investments. For her commercial banking needs, she dealt with the appellant. Although she said Ms Cunningham gave her advice on 'everything', and that she did not know that Ms Cunningham was not permitted to advise her in relation to investments, under cross-examination she stated at page four of the notes of evidence, that:

> "I was an ordinary customer of NCB. I did my banking business at NCB… I was also a customer of NCB Capital Market Ltd. Some of my investment business was done at NCB Capital Market, Morant Bay. I had more than one investment with NCB Capital Market. I

> had two. When I was doing dealing [sic] with my banking business, I did it with NCB, and when dealing with investment, I dealt with NCB Capital Market. Sandra Cunningham was known to me to be an employee of NCB. I did not know that she was not permitted to give me advice in relation to investment. I did not do banking with Higgins Warner…I agree at all times I know that NCB was the business of banking only."

[180] There was no evidence before the trial judge, nor was it pleaded for that matter, that the appellant had ever advertised or in any way represented to the public, including the respondent, that it offered investment advice as a service through its personal bankers or any other staff member. Undeniably, therefore, Ms Cunningham had no 'actual' authority to advise any customer as to investments as a part of her duty as a personal banker. But also, there is no evidence that the appellant had induced the respondent to believe that Ms Cunningham was ostensibly authorised to give such advice by holding out that she was authorised to do so. The fact that the appellant created the position of personal banker, which encouraged a relationship of 'trust' between personal banker and customer, does not avail the respondent, as this was obviously, in relation only to the lawful business of the appellant and what the personal banker was authorised to do. This much was said by the witness for the appellant.

[181] Although the trial judge said that the 'advice' was given in Ms Cunningham's capacity as personal banker, she found, at paragraph [90] of her decision, that Ms Cunningham's dealings were "wholly inconsistent with proper dealings on the part of a personal banker". I take that to mean the trial judge accepted that Ms Cunningham was not authorised to give the advice she found had been given the respondent.

[182] Further, borrowing from the statement in **Armagas**, at page 394, it is not just for the employer to bear the loss in circumstances in which the injured party has so relied "through misguided reliance on the servant himself, when the servant is not authorised to do what he is purporting to do, when what he is purporting to do is not within the class of acts that an employee in his position is usually authorised to do and when the employer has done nothing to represent that he is authorised to do it".

[183] In cases where the application of Salmond's first two formulations brings about a negative result, and it is clear that there is such a close connection that it would be unjust not to hold the employer vicariously liable, then the close connection test would be the most appropriate. This was the position in **Lister**, **Bernard** and in **Bazley v Curry**. In my view, there was no necessity for that test to be applied in this case. Applying the appropriate test and arriving at a negative result, in my view, does not leave in its wake any such close connection which would have made it just to hold the employer vicariously liable. The conclusion of the trial judge that there was such a close connection and that the appellant introduced the risk is simply not supported by the evidence.

[184] In the instant case, the trial judge ought to have applied the test in **Armagas**. However, even in her consideration of the question whether it was just for the appellant to be held vicariously liable because of the close connection of the wrong to the employee's duties, the judge still took the wrong approach. In order to properly answer the questions whether the actions of Ms Cunningham were so closely connected to

what she was employed to do and whether the appellant created or enhanced the risk, the trial judge was required to look at Ms Cunningham's actions in terms of her broad duties. That would take us back to the fact that it was no part of her or the bank's duties to give investment advice. This means that the limitation was in the scope or sphere of Ms Cunningham's employment, rather than in her conduct.

[185] In **Lister**, the court held that if the employee broke the connection of his employment, his employer was not liable. The evidence showed that Ms Cunningham, in giving the advice she gave, for which the appellant assumed no responsibility by holding out that she was authorised to do so, broke all connections with her employment. The only evidence given by the respondent, who bore the burden to prove her case, of a connection between the advice and the appellant, was that it was given in Ms Cunningham's office. All the authorities based on the close connection test indicate that incidental connections in time and place, by themselves, will not suffice. I dare say incidental connections in the employee's position, as shown in **Banbury v Bank of Montreal** and **National Commercial Bank** v **Hew** (involving bank managers), by themselves, will equally not suffice.

[186] In **Lloyd v Grace Smith & Co** [1912] AC 716, where a solicitor's clerk fraudulently transferred a client's property to himself and sold it for his own benefit, it was pointed out that if the employee had stolen the documents from the claimant's bag, instead of by conversion, his employer would not be liable. The employer was liable because the firm of solicitors dealing with the client had delegated their duties to

the claimant, to the employee. What the employee did in that case was closely connected to his duties and was within the scope of the authority to be implied from his employment. In **Bazley v Curry**, it was considered that where the intentional act was random and wholly unconnected to the nature of the employer's business and the employee's duties, the employer was not liable.

[187] In determining whether there was a close connection between the alleged tort and Ms Cunningham's employment and whether the appellant introduced the risk of wrongdoing, the trial judge ought to have considered the following factors:

i) the advice was to invest in an unregulated scheme, which it would have been unlawful for the appellant, a licensed commercial bank, to do;

ii) the appellant provided no opportunity for Ms Cunningham to exceed her authority (in the cases on intentional torts it is referred to as an opportunity to abuse power). She was not given limited authority to advise on investments which she exceeded. She had no such authority;

iii) the appellant knew nothing of the advice, or the investment itself, as even the purpose for the loan, which was stated in the application to the appellant, was disguised as being for the purchase of real estate and personal use;

iv) the alleged tort was committed by a deceit on the appellant itself, in the application for the loan by the respondent, the proceeds of which was then used to invest in Higgins Warner;

v) the investment was not for the benefit of the appellant, or any entity connected to the appellant, and was invested outside of the appellant in an unregulated entity unconnected to the appellant;

vi) that although the position of personal banker may have provided the opportunity, in terms of place, it was not enough to clothe Ms Cunningham with authority to do that which she was not authorised to do in that position, as the advice was in no way connected with that position;

vii) that the risk had been substantially minimised by the offer of investment services in a separate affiliate company of which the respondent was already a longstanding customer, and to, therefore, impose liability for a wrong unrelated to any foreseeable risk, was effectively making the appellant an involuntary insurer;

viii) Ms Cunningham and the respondent were close personal friends and, based on the evidence before the court, at no time did Ms Cunningham assert to the respondent that she was acting with the knowledge or authority of the bank or in the course of her

employment when she allegedly advised the respondent that it was safe to borrow money from the appellant to invest in Higgins Warner;

ix) the difficulty posed by the fact of the close friendship between the respondent and the employee and in attempting to determine whether there was reliance on the employee as a bank employee as against reliance on the employee as a close personal friend;

x) that money was invested in Higgins Warner before the respondent acted on the advice she claimed she was given and took out a loan which she then invested in Higgins Warner. At the end of the case, there was no explanation offered to the court about the earlier investment; and,

xi) that no risk was created or enhanced by the appellant in creating a position of personal banker which, in this particular case, gave no greater power, influence and trust to Ms Cunningham over the respondent, independent of the lifelong close friendship, and attorney relationship (under power of attorney) between the respondent and Ms Cunningham on whom she relied "for everything". Ms Cunningham was not employed to advise on "everything" and the appellant did not hold the employee out as being authorised to advise on "everything".

[188] Whilst none of these factors, by themselves, are conclusive of the issue, if the trial judge had given adequate consideration to them in applying the close connection test, she could, properly, have come to no other conclusion than that Ms Cunningham acted independently of her employment, and it was not just for the appellant to be held vicariously liable for her actions, in those circumstances. Instead, the trial judge appears to have been distracted by her erroneous view that Ms Cunningham had committed an intentional wrong and was "dishonest" and "manipulative" of the respondent, where no such allegation was made by the respondent and no evidence was led to support that finding. Further, the trial judge seemed to have, erroneously in my view, taken the view that the risk was created simply from the fact that Ms Cunningham was the respondent's personal banker at the appellant's bank, without indicating how that specific duty gave rise to a special opportunity for wrongdoing. It was also not sufficient or correct for the trial judge to have said Ms Cunningham was a fiduciary, as, in principle, she was not.

[189] Therefore, not only did the trial judge apply the wrong test, but in applying the close connection test, she failed to take account of relevant factors which caused her to come to the wrong conclusion, in any event. In the result, I find that the trial judge fell into error when she applied the close connection test and found that the actions of Ms Cunningham were so closely connected to her employment that she was acting in the course of her employment and it was just for the appellant to be held vicariously liable.

Whether the trial judge erred in relying on the authority of Hadley v Baxendale to calculate damages for the tort of negligent misstatement (ground 6)

[190] It is not strictly necessary to consider this ground in the light of my opinion on the merits of the appeal against liability. However, in the light of the appellant's complaint regarding the trial judge's apparent error in the application of the normal measure of damages in this case, it may be important to say a few words on the issue. In calculating damages, the trial judge relied on the dictum of Alderson B in **Hadley v Baxendale**, at page 465, which dealt with the applicable measure of damages where there is a breach of contract. It is to be noted that, the rule has since been refined and restated with clarity by Lord Asquith in **Victoria Laundry v Newman** [1949] 2 KB 528. Having cited the case, the judge found that the sum claimed by the respondent was such that "may fairly and reasonably be considered as arising".

[191] I am in agreement with Queen's Counsel for the appellant that the trial judge was wrong to apply the rule in **Hadley v Baxendale** in deciding on the remedy available to the appellant. In this regard, it is plain that the trial judge erred. That case involved the question of the appropriate measure of damages for the breach of a contract, where damages for such breach had not been specified. It had nothing to do with the measure of damages in cases of a tort, let alone one involving negligent misstatement. The measure of damages in contract is to place the claimant in the position he would have been had the contract been performed. See also McGregor on Damages, paragraphs 1-021 to 023 and Halsbury's Laws of England/Damages (Volume 29 (2019))/8). The trial judge relied on **Hadley v Baxendale**, notwithstanding that

she acknowledged that the respondent's testimony was that the appellant "had accounted to [her] for every cent she put in".

[192] Although the normal function of damages for both contract and tort is compensatory, the normal measure of damages in tort, generally, is to put the claimant in the position he would have been had the tort not been committed (see Halsbury's Laws of England/Damages (Volume 29 (2019))/7). Specifically, in cases involving negligent misstatement, or negligent misrepresentation, the measure of damages is an award which serves to put the claimant in the position she would have been had the negligent misstatement not been made (see McGregor on Damages, seventeenth edition, at paragraph 41-002, page 1486, with reference to the application of the normal measure of damages to the tort of deceit); See also **Esso Petroleum Co Ltd v Mardon** [1976] 2 All ER 5, per Lord Denning at pages 16 to 17).

[193] Therefore, where a negligent misstatement or fraudulent misrepresentation has been made, and which caused the claimant to enter into a contract with the tortfeasor or with a third party, the normal measure of damages is the value transferred, usually represented by the price paid, plus any consequential losses, less the value received (see McGregor on Damages paragraph 41-048). It has also been described as all the loss suffered by the claimant as a result of the contract he was induced to enter (see **Esso Petroleum** at pages 7, 16, and 17).

[194] For a full discussion of the development of the law in this area see McGregor on Damages and the cases set out in paragraphs 41-002 to 011 and at 41-041 to 056. On consequential losses, see paragraph 41-025.

[195] In calculating damages in the instant case, the trial judge relied on calculations set out in the particulars of claim. That loss was outlined as all the money the respondent had paid towards the loan (which was the loan amount with interest) minus the money she received from Higgins Warner and Sandra Cunningham, with interest. This amounted to $2,004,475.28. This was not the proper measure of damages.

[196] The evidence is that the respondent paid a total of $7,236,185.00 to clear the loan, so that the correct amount that she would have lost, given that she received $6,000,000.00 from the bank, is the interest on the loan that she paid, in the amount of A$1,239,349.38, and any other costs associated with the acquisition of the loan (consequential losses). This would place her in the position she would have been in, if the negligent misstatement had not been made. Anything else would result in unjust enrichment (see **National Commercial Bank v Hew**, at paragraph [43]).

[197] The trial judge, therefore, erred in this regard.

Whether the judge erred in failing to address whether the instant claim was a way of circumventing the respondent's inability to sue on her Higgins Warner contracts owing to their illegality (ground 8)

[198] Whilst it is equally not necessary to determine this ground of appeal in light of the conclusions I have arrived at, I will only say that the tactical motive of a claimant in choosing a defendant against whom to bring a claim, does not invalidate a legitimate

claim, nor does it preclude the recovery of damages, if the claimant is legally so entitled.

Conclusion and disposition

[199] The appeal brought by the appellant has merit and ought to succeed. The trial judge was wrong to find, on the evidence before her, that Ms Cunningham, as personal banker to the respondent, was in a fiduciary relationship with the respondent. The trial judge also failed to properly assess the evidence in concluding that the advice given by Ms Cunningham to invest in the unregulated investment scheme was given in her capacity as personal banker to the respondent.

[200] The trial judge further failed to apply the correct test in assessing whether the appellant should be held vicariously liable, in the circumstances, and in so doing, she failed to consider relevant factors. This caused her to erroneously conclude that the conduct of Ms Cunningham was so closely connected to her employment that it was just to hold the appellant vicariously liable.

[201] In my view, the appeal ought to succeed and the judgment and orders of the trial judge made on 5 August 2013, be set aside. I would also enter judgment for the appellant with costs here and in the court below, such costs to be taxed, if not agreed. Consequentially, the funds paid into the account at the National Commercial Bank in the name of Gifford, Thompson and Bright pursuant to the orders of Evan Brown J, made on 9 September 2013, are to be returned to the appellant, with any interest accrued thereon, and the account closed.

PHILLIPS JA

ORDER

(1) The appeal is allowed.

(2) The judgment and orders of Thompson-James J made on 5 August 2013 are set aside.

(3) Judgment is entered for the appellant, National Commercial Bank Jamaica Ltd.

(4) Costs of the appeal and in the court below to the appellant, to be agreed or taxed.

(5) The monies paid into the account at the National Commercial Bank in the name of Gifford, Thompson and Bright, pursuant to the orders of Evan Brown J, made on 9 September 2013, are to be returned to the appellant with any interest accrued thereon and the account closed, thereafter.