COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2018/CLE/gen/01420

BETWEEN

O'LAYINKA LOCKHART

First Plaintiff

AND

OSBOURNE LOCKHART

Second Plaintiff

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Defendant

Before:	The Honourable Madam Justice Camille Darville Gomez
Appearances:	Mrs. Krystal D. Rolle, KC and Ms. Kendrea Demeritte for the Plaintiffs Mr Ferron Bethel, KC with Mrs. Lakeisha Hanna for the Defendants
Hearing Dates:	20th and 21st October, 2022
Submissions Received:	9th December, 2022

Frustration — Self-induced frustration — Lawful termination of employment — Implied terms — No obligation to preserve loan eligibility or employment continuity

RULING

Darville Gomez, J

This action concerns the withdrawal of a previously approved mortgage facility by FirstCaribbean International Bank (Bahamas) Limited (the "Bank") to Mr. and Mrs. Lockhart for the intended purchase of a residential property described by them as their "dream home."

The mortgage facility had been granted pursuant to a joint application submitted by the Plaintiffs, with Mrs. Lockhart employed by the Bank at the time of approval. Subsequent to the approval, Mrs. Lockhart's employment with the Bank was terminated. Following her termination, the Bank withdrew the mortgage facility in its entirety, thereby bringing the contemplated purchase of the property to a premature and definitive conclusion.

The couple have alleged that Mrs Lockhart's subsequent termination by the Bank was deliberate and done solely for the purpose of terminating or withdrawing the Mortgage loan agreement. They have asked the Court to imply into the loan agreement a term *"that in circumstances where the Defendant after entering into the Mortgage Loan Agreement then unilaterally decided that it would cancel the Mortgage Loan Agreement, could not terminate the First Plaintiff's employment for the sole and exclusive purpose of rendering the Plaintiffs incapable of performing the Mortgage Loan Agreement and then turnaround and rely on such changed financial circumstances as the basis for cancelling the Mortgage Loan Agreement."* They have dubbed this *"The termination of Employment just to cancel the Loan Clause"*.

On the other hand, the Bank has asserted that *"in a nutshell what the Plaintiffs have asked this Court to do, is to imply a term into the banker/customer relationship whereby once the bank had provisionally approved the loan for the Lake Cunningham property, the bank was obliged to maintain the employer/employee relationship with the First Plaintiff to ensure that the Plaintiffs would be in a financial position to complete the purchase of the home."* The Bank has countered and dubbed this the *"Guaranteed Employment Clause."*

Mr and Mrs Lockhart have claimed damages for breach of the implied terms and or breach of the Mortgage Loan Agreement or alternatively damages for induced frustration of the Mortgage Loan Agreement including general damages. The Bank has denied the claim.

For the reasons hereinafter set out, I have dismissed the claims of the Plaintiffs and have awarded costs to be paid by them to be assessed by the Court, if not otherwise agreed between the parties.

Introduction and Background

[1.] Mr. and Mrs. Lockhart commenced this action by a generally endorsed Writ of Summons filed on the 5th December, 2018. By their Amended Statement of Claim filed on the 9th October, 2019 the Lockharts claimed inter alia:

(i) Damages for negligence and/or breach of statutory duty as aforesaid.
(ii) Damages for wrongful dismissal as aforesaid
(iii) Damages for breach of the implied terms, breach of contract and/or induced frustration of contract as aforesaid in respect of the Mortgage Loan Agreement.
(iv) General Damages.
(v) Interest on all damages pursuant to the Civil Procedure (Award of Interest) Act, 1992
(vi) Such further or other relief as the Court deems just.

(vii) Costs.

[2.] Prior to the trial, the parties resolved the portion of the claim for personal injury and wrongful dismissal in relation to Mrs. Lockhart, therefore, I need not consider this and make no further reference to it.

[3.] Therefore, the remaining reliefs sought by the Lockharts' was *inter alia*, damages for breach of implied Terms, Breach of Contract and/or Induced Frustration of Contract in respect of the Mortgage Loan Agreement.

[4.] The implied terms that the Lockharts assert were incorporated into the Mortgage Loan Agreement were:

i. That the Defendant, its servants and/or agents would not itself, of its own motion, bring about a change of the state of circumstances existing at the date of the Mortgage Loan Agreement ("The State of Circumstances").

ii. That the Defendant, its servants and/or agents would not itself, of its own motion, bring about a change of the Plaintiffs' financial position as it existed at the date of the Mortgage Loan Agreement ("The Plaintiffs' Financial Position").

iii. That the Defendant, its servants and/or agents would not itself, of its own motion, terminate the First Plaintiffs' employment, without cause, so as to cause a material change in the Plaintiffs' circumstances ("Material Change of Circumstances") depriving them of the benefit of the Mortgage Loan Agreement.

[5.] By its Defence filed on the 10th October, 2019 the Bank denied the claim and in particular, denied the incorporation of the implied terms referred to in paragraph 4 above and averred that its relationship with Mrs Lockhart as an Employee did not incorporate implied terms and obligations into its relationship with the Lockharts as a Banker and Customer.

[6.] Mrs Lockhart gave evidence and called Ms. Cleopatra Deal, former employee of the Bank as a witness.

[7.] The Defendant relied on the evidence of a sole witness, Ms. Sheila Brown, an employee of the Defendant.

Issues

[8.] The parties have agreed the issues to be considered by the Court and they are as follows:

(i) Whether there were Implied Terms in the Facility Letter between the parties whereby:

(a) the Defendant would not cause a change of circumstances which existed at the time the Agreement was made;

(b) that Defendant would not cause a change in the Plaintiff's financial circumstances which existed at the time of the Agreement;

(c) the Defendant would not terminate the First Plaintiff's employment without cause, so as to cause a material change in circumstances.

(ii) Whether the Defendant induced the frustration of the agreement.

(iii) If so, whether the First and Second Plaintiffs suffered loss and damage by reason of such breach of the Implied term and/or by reason of such induced frustration of the Agreement and if so what amount of loss.

(iv) Costs.

The Evidence

O'layinka Lockhart

[9.] The witness statement of O'layinka Lockhart filed on 20 September, 2022 stood as her evidence in chief.

[10.] She testified that she was gainfully employed with First Caribbean International Bank for approximately sixteen (16) years until her termination and for about eight (8) of those years she served as a Mortgage Officer, during which period she became familiar with the Bank's loan application processes. It was her evidence that she was a stellar employee who always "met or exceeded expectations" and as a result she was described as "the perfect employee" by her branch manager, in May 2015, she was recognized as the "Top Producer-Mortgages over the entire Caribbean", and at her final performance evaluation in 2015 she received the highest rating achievable of "Exceptional Performance".

[11.] She confirmed that her and her husband had two mortgages with the bank: (i) one for their primary residence in Garden Hills Subdivision; and (ii) one for their property situate at Three Peas Corner.

[12.] She explained that her household consisted of seven (7) people, including her four (4) children and her mother, and that they resided in a three (3) bedroom home which they had outgrown. The Lake Cunningham subdivision home, which contained inter alia, five (5) bedrooms, was therefore in her view perfectly sized for her family.

[13.] Mrs Lockhart described what she termed "the protracted process" of securing her and her husband's loan approval, which included numerous instances of meetings with officers at every level of the Bank. Based on her experience, a loan application ordinarily took about seven (7) to fourteen (14) days, however, she stated that her and her husband's application took approximately fifty (50) days before an approval was granted.

[14.] She acknowledged that her debt service ratio exceeded the normal threshold of 45%, but stated that from her experience it was not unusual for applicants with a higher than normal ratio to still obtain approval.

[15.] It was her evidence that the loan represented a consolidation of her and her husband's existing debt together with a new mortgage for the purchase of the Lake Cunningham property, which had an appraised value of $920,855.20. She averred that her and her husband invested a down payment of $25,000.00, a payout of a prior loan and overdraft totaling $34,000.00, and paid insurance in the amount of $7,000.00, appraisal costs for three (3) properties of $1,100.00, legal fees of $4,031.25 and other miscellaneous expenses.

[16.] She testified that the law firm of Mackay & Moxey acted for her, her husband and the Bank, the vendor, Scotiabank, was represented by the law firm of Harry B. Sands Lobosky & Co. and that Harry B. Sands Lobosky & Co. also represents the Bank in this action.

[17.] She recounted the steps following the execution of the Agreement for Sale by her and her husband and the payment of the $25,000.00 deposit. She avers that title searches were conducted and approved, a conveyance was prepared by the attorney's for Scotiabank, and then the Bank sent instructions to Mackay & Moxey to prepare the mortgage. She explained that on 15th September, 2016, Scotiabank's attorneys forwarded the executed conveyance and back title documents to Mackay & Moxey, together with a completion statement showing a balance due of $419,804.73 and then on 20th September, 2016, Mackay & Moxey issued a favourable Report on Title to the Bank following which both the Conveyance and the Mortgage were signed by the Lockharts.

[18.] She testified that the mortgage facility was opened on the 17th October, 2016, assigned an account number in the Bank's system, and a Loan Disbursement Summary was prepared with the first payment scheduled for 23rd October, 2016.

[19.] However, despite Mackay and Moxey's two requests for the disbursement of the loan funds to complete the purchase, she testified that, on the 25th October, 2016, Mackay and Moxey received a letter from the Bank advising that the loan offer was being withdrawn due to an adverse change in Mrs. Lockhart's circumstances.

[20.] Mrs. Lockhart averred that such a withdrawal was an abnormal occurrence and one which she had never witnessed in her sixteen (16) years in banking. This was a view also expressed by Ms Cleopatra Deal who gave evidence on her behalf.

[21.] It was Mrs. Lockhart's position that she was terminated without cause so as to frustrate her mortgage contract with the Bank, particularly because employment was a key criterion for the loan's approval.

[22.] She stated that the Defendant was aware that her salary alone would be insufficient for her and her husband to qualify for the loan, with the result that she and her husband lost the opportunity to purchase the Lake Cunningham Property.

[23.] Nevertheless, Mrs Lockhart testified that she attempted to have her mortgage facility reinstated, by way of contacting Mr. Mark St. Hill and forwarding him an email on 14 November 2016.

[24.] However, she averred that on 23 November, 2016 she received a further letter from Harry B. Sands Lobosky & Co. stating that the bank had "withdrew its financing of the loan subsequent to a material change in circumstances", i.e. her loss of employment.

[25.] She described the effects the loss of the opportunity to purchase the home had on her children as devastating as they fell in love with the home after viewing it. Further, she testified that the family had in fact already packed their belongings with the expectation and anticipation of moving into the home.

[26.] On cross examination, Mrs Lockhart accepted that her job title was that of Sales Specialist and not Mortgage Officer. She explained, however, that titles were changed annually, but whether styled Sales Specialist, Consumer Finance Specialist or Mortgage Officer, the duties performed in those roles were all the same. This explanation was later reiterated by Mrs Lockhart in re-examination.

[27.] She further accepted that she had both a banker-customer and an employer-employee relationship with the Bank, and that these relationships were separate and distinct. She acknowledged that the Bank could determine with whom it was willing to lend money based on their credit application, and described the approval process.

[28.] She confirmed that she was already a customer of the Bank when the loan was processed for the Lake Cunningham property, and that she had previously undergone the usual banking procedures, for two mortgages she had previously obtained.

[29.] The Defendant's Counsel took Mrs Lockhart through the various loan facilities she had for both the Garden Hills property and the Three Peas property which were between her and her husband and her and her husband and her mother respectively. In each instance, she agreed that the loans were provisionally approved, the terms embodied in a facility letter were reviewed and endorsed, title investigations were carried out, and the funds were ultimately disbursed.

[30.] Mrs Lockhart accepted that the process followed for those facilities were substantially similar to that for the Lake Cunningham property purchase.

[31.] She was referred to the application form of the Bank, which included the condition: *"I understand and agree that valuation charges, legal expenses and the costs of surveys will be borne by me whether or not the loan is granted."* She admitted understanding this condition but maintained that the loan had in fact been approved.

[32.] She confirmed that her and her husband had executed an Employee Borrowing Agreement as a part of the loan process, and accepted that it provided for an adjustment to prevailing customer rates if her employment was terminated.

[33.] She further accepted that her employment was governed by an Industrial Agreement under which the Bank could dismiss her without cause, that there was no written assurance of continued employment during or after any loan application process, and that the relevant Facility Letter permitted the Bank to withdraw the loan facility in the event of an adverse change in her circumstances.

[34.] She explained that by the time of the withdrawal, so much time had elapsed that it was not possible to secure alternative financing. She also noted that Scotiabank was awaiting the completion funds and had another purchaser waiting.

[35.] On re-examination, she reiterated the loan process and the stage at which the offer of financing was withdrawn. Her evidence was that the Bank only withdrew its offer after all approvals had been granted, title was confirmed, documents were executed, the facility was opened in the Bank's system, and that at this juncture the only thing left to be done was issuance of funds.

[36.] Finally, she confirmed that the two other mortgage facilities she held with the Bank remained on the books after her termination and that she has continued to service them without issue.

Cleopatra Deal

[37.] Ms Deal testified that prior to her dismissal in December 2019, she had been employed with the Bank for over twenty-four (24) years, and the last position she held was as a Wealth Manager. She gave evidence of the general loan application procedure which she said involved documentation such as proof of income, appraisal reports, a valid sales agreement when property is involved, and anything else that would assist an adjudicator in determining whether a customer qualified for a loan.

[38.] She stated that she received a call from an adjudicator concerning the Lockharts' loan application and that in her opinion it was being looked at with bias. She testified that she was later approached by Mrs Lockhart to have a review of the same, and subsequently, she became the Lockharts' loan officer.

[39.] Her evidence was similar to that of Mrs. Lockhart regarding what they found to be protracted delays in obtaining approval of the loan from the Bank. She described the delays as irregular for an application of this nature which in her view was an easy one to approve.

[40.] It is unnecessary to highlight what she found odd, or irregular, however, because the facility was eventually granted to Mr and Mrs Lockhart and that is undisputed.

[41.] She confirmed on cross examination that, because Mrs Lockhart was an employee of the Bank, she was required to submit an Employee Borrowing Agreement in addition to the Facility Letter, and that Mrs. Lockhart received preferential rates from the Bank when she obtained a loan as a Bank employee. However, she denied that once an employee of the Bank ceased to be employed that would mean that the preferential rates would automatically be adjusted to the Bank's prevailing interest rates. She said that this was a matter within the Bank's discretion.

[42.] She accepted that neither the Employee Borrowing Agreement nor the Facility Letter obliged the Bank to maintain Mrs Lockhart's employment during the life of the mortgage loan or during the loan application process.

[43.] She explained that, following approval, the Lockharts signed the Facility Letter and communications began with the Plaintiffs and the Vendor's attorneys for the purposes of fulfilling the necessary conditions.

[44.] Ms Deal testified that, after receiving all relevant documents, she forwarded them to the Processing Centre in Jamaica. She stated that she was eventually informed by the Assistant Manager of the Bank that the Lockhart's loan had been withdrawn. She expressed surprise, having previously believed that only she had the authority to withdraw an application, but upon inquiry as to the reason for the decision she was advised to communicate with the head office in The Bahamas.

[45.] Her evidence is that when she received the information via telephone that the application was withdrawn, Mrs Lockhart was still employed with the Bank and she was subsequently terminated on the following day.

[46.] On cross-examination, she agreed with the Bank's lawyer that the end of the loan application process would be the disbursement of the funds, viz., the issuance of the cheque to the vendor. She accepted that prior to the loan being drawn down and the funds disbursed that the Bank reserved the right to withdraw that loan.

[47.] She was asked about the withdrawal letter to the Lockharts in October, 2016 which she said was dictated to her and she signed, in the following terms:

> *"I refer to the facility letter dated the 25th of August, 2016, at page four of the facility letter. The Bank reserves the right to withdraw the offer of the loan if the bank becomes aware of any adverse changes in the borrower's circumstances.*
>
> *We wish to advise that we are unable to proceed with the facility at this time because we are aware that your financial position has changed."*

[48.] She agreed with the Bank's lawyer that she found the process before the loan was provisionally approved unusual and disturbing but that the loan was eventually approved. She also agreed that the Bank in its sole discretion decides to whom it would lend monies to. She was asked by the Bank's lawyer whether she agreed that the senior executive team had the authority to withdraw the loan application. Her evidence was that she was unaware of who had the authority, however, she was of the view that she had the authority to do so until this incident occurred.

[49.] Ms Deal confirmed that appraisal fees, legal fees, and any other disbursements were the responsibility of the Lockharts. She also confirmed that the Facility Letter sent to the attorneys, Mackay and Moxey stated: "*We have provisionally approved a mortgage facility for the subject customers as set out within the attached facility letter dated the 5th of August 2016 and duly executed by the customers*", and referenced the requirement for an Employee Borrowing

Agreement, which Mrs Lockhart signed. The first line of the Agreement stating: "*I agree that should my employment terminate for any reason other than retirement*", which she testified that the Lockharts did not raise any questions about.

[50.] She explained that, as the manager responsible for the Plaintiffs' loan facility, she was *" never even made aware that the head office team was calling the loan [officers] advising them to withdraw the loan. They never once advise me of that."*

[51.] Upon re-examination, Ms. Deal clarified that she was uncertain whether senior executives possessed the authority to withdraw loans. However, she presumed that she herself held such authority, though she had never exercised it in her twenty-six (26) years of service. Moreover, she testified that she had never observed senior executives withdraw a loan at any stage whatsoever.

The Respondent

Sheila Brown

[52.] Sheila Brown was the only witness the Defendant's relied on in this matter. A witness statement was filed containing her evidence in chief. However, prior to the commencement of her testimony and having been foreshadowed by counsel for the Plaintiffs Mrs Rolle, KC highlighted her objections in respect of certain paragraphs contained in Ms Brown's witness statement.

[53.] Certain paragraphs were struck by consent between Counsel, viz., paragraphs 45, 46, 55 and 56 and the remaining paragraphs, viz., 44, 52, 53 and 54 were struck out by the Court on the basis that they primarily contained legal argument and submissions.

[54.] Therefore, evidence contained in paragraphs are 44, 45, 46, 51, 52, 53, 54, 55 and 56 will be disregarded.

[55.] Ms Brown testified that in 2016, she was the supervisor of Mrs Lockhart when Mrs Lockhart was transferred to the Shirley Street Branch.

[56.] She confirmed that the Lockharts were already customers of the bank *"having gone through the normal procedures that are required for all customers seeking services from the Bank. The First and Second Plaintiffs completed the various application forms and were approved for facilities such as bank accounts, personal loans and credit cards. Additionally, prior to 2016 the First and Second Plaintiffs were mortgage customers as they applied for and obtained two (2) mortgages for Two (2) different properties from the Bank."*

[57.] In her evidence in chief, Ms Brown explained the mortgage loan process that the Lockharts' underwent to obtain the two mortgages that they held with the Bank. She stated that the Plaintiffs were required to fill out a client application form and provide supporting documents such as proof of income, and thereafter the application was forwarded to the Credit Risk Management Department for approval. She went further testifying that following the provisional approval, a facility letter containing terms and conditions was presented to the Plaintiffs which they accepted.

After acceptance, she said the Bank communicated with the relevant attorneys to investigate title and to prepare the relevant legal documents. She then indicated that the final step was the drawdown of the loan funds to complete the process.

[58.] Ms Brown highlighted that the relationship between the First Plaintiff and the Bank was contractual and that of debtor and creditor but admitted that the First Plaintiff did receive a preferential mortgage rate and a waiver of commitment fees for the Garden Hills property because of her employment with the Bank.

[59.] Ms Brown's evidence in chief contained a great deal of information regarding the existing loan facilities that the Lockharts held with the Bank as well as the loan approval process. She noted that the First Plaintiff had a high debt service ratio of 61.08% in contrast to the normal threshold of 45%.

[60.] She emphasized that the facility letter was a provisional approval for the reason that (i) the Plaintiffs were required to comply with certain terms and conditions; (ii) it was necessary for title to be investigated; and (iii) the Bank had the authority to withdraw the provisional approval if there was an adverse change in circumstances.

[61.] Further, Ms Brown testified that on the 25th October, 2016 the Bank withdrew its offer for the Lake Cunningham property because the Bank became aware of an adverse change in the First Plaintiff's employment status.

[62.] She confirmed that the First Plaintiff was terminated without cause but noted that the Bank had the authority to do so under the Industrial Agreement inasmuch as the First Plaintiff was fairly compensated.

[63.] It was her evidence that the Industrial Agreement contained no provision which guaranteed the First Plaintiff's employment until her retirement or for the duration of her mortgage loans with the Bank.

[64.] Further, she confirmed that the First Plaintiff's relationship with the Bank as a customer is separate and apart from her employment relationship with the bank. She termed the respective relationship of the contracts as Banker and Customer, and Employer and Employee and emphasized that they were distinct.

[65.] She stated that the withdrawal of the Lake Cunningham facility was prudent to protect the interest of the Bank and that there was no breach in the loan application process.

[66.] During cross examination, she admitted that she had no involvement with the submission, approval, or withdrawal of the Plaintiffs' loan application, but confirmed the loan was in fact approved.

[67.] She acknowledged that the Plaintiffs complied with all stipulations of the Facility Letter, including title approval and execution of conveyance and mortgage documents.

[68.] Ms Brown confirmed that, under the Employee Borrowing Agreement, employees who were terminated would continue to hold mortgages, but the interest rates would be adjusted to the standard customer rate.

[69.] She admitted that the only reason the Lockharts no longer had a mortgage facility for the Lake Cunningham property was the Bank's decision to withdraw the loan, which if not withdrawn, would have continued.

[70.] She agreed that the Plaintiffs *" were not precluded from reapplying to the Bank when their financial situation improved or their debt service ratio decreased"*, but acknowledged that as long as Mrs Lockhart remained unemployed, a new application for financing would likely fail.

The parties' case

The Plaintiffs' Case

[71.] I set out the submissions of the Plaintiffs' Counsel.

1. The Plaintiffs' repeated references in their pleadings to the First Plaintiff having been terminated **WITHOUT CAUSE** is for the purpose not only of asserting that there was no reason given for her termination premised on some wrongdoing on her part **BUT ALSO** to implicitly assert that circumstances would be entirely different had she committed some wrongdoing and/or was terminated for cause.
2. The First Plaintiff accepts the Defendant's right both by Statute and at Common Law to terminate her for cause.
3. Indeed, the First Plaintiff also accepts the Defendant's right both by Statute and at Common Law to terminate her without cause.
4. What the Plaintiffs do **NOT** accept is that the Defendant can terminate the First Plaintiff without cause **SOLELY** for the purpose of terminating the Plaintiffs' Mortgage Loan Agreement.
5. Resultantly, and respectfully, the Defendant's assessment as to what the Plaintiffs are asking the Court to imply is wholly misconceived and wrong.
6. The Defendant's Counsel in her opening statement at Trial said, ***"...in a nutshell what the Plaintiffs' have asked this Court to do, is to imply a term into the banker/customer relationship whereby once the bank had provisionally approved the loan for the Lake Cunningham property, the bank was obliged to maintain the employer/employee relationship with the First Plaintiff to ensure that the Plaintiffs would be in a financial position to complete the purchase of the home."***[xi] The Defendant calls this the ***"Guaranteed Employment Clause".***
7. The Plaintiffs assert no such ***"Guaranteed Employment Clause"*** and are not inviting the Court to imply any such ***"Guaranteed Employment Clause".***
8. In a nutshell, 'what the Plaintiffs' have asked this Court to do is to imply into the Mortgage Loan Agreement a term ***"that in circumstances where the Defendant after entering into the Mortgage Loan Agreement then unilaterally decided that it would cancel the Mortgage Loan Agreement, could not terminate the First Plaintiff's employment for the sole and exclusive purpose of rendering the Plaintiffs incapable of performing the Mortgage Loan Agreement and then turnaround and rely on such changed financial circumstances as the basis for cancelling the Mortgage Loan Agreement."***

9. The Plaintiffs call this the "***The Termination of Employment Just to Cancel the Loan Clause***".

10. It is the "***Termination of Employment Just to Cancel the Loan Clause"*** that the Plaintiffs' are inviting the Court to imply.

11. The Plaintiffs have started their Closing Submissions with the clarification of this position so that the Court is not misguided, mislead, distracted or otherwise deluded into thinking that the Plaintiffs contend that the First Plaintiff's employment with the Defendant was guaranteed and/or that the Defendant could never terminate her so long as the Loan Agreement was in existence. **THIS IS NOT THE PLAINTIFFS' CONTENTION.!!**

12. The Plaintiffs contend that the Defendant could not terminate the Plaintiff just as the means of terminating the Mortgage Loan Agreement because in so doing the Defendant thereby breached the Mortgage Loan Agreement.

13. The Plaintiffs' submit that the evidence adduced at Trial overwhelmingly demonstrated **as a fact** that the Defendant decided to terminate the Mortgage Loan Agreement prior to the First Plaintiffs' termination, that the Defendant attempted to terminate the Mortgage Loan Agreement even prior to the First Plaintiffs' termination **AND** that the First Plaintiff was ultimately thereafter terminated **SOLELY** to effectuate the predetermined and previously attempted termination of the Mortgage Loan Agreement.

14. The Court is therefore respectfully invited to disregard the Defendant's notion of an asserted ***"Guaranteed Employment Clause"*** as the red hearing that it regrettably is because the Plaintiffs have never made and do not make any such assertion.

15. The Court will be invited to imply the "***Termination of Employment Just to Cancel the Loan Clause"*** which as will be demonstrated below was convincingly proven on the evidence.

The Defendant Adduced no Evidence of Fact Relative to the Specific Facts In Issue

16. Undoubtedly, the facts which are germane to the Court's determination of the Plaintiffs' claim are (i) the facts surrounding the Plaintiffs' loan application process, (ii) the facts surrounding the ultimate approval of the Plaintiffs' loan and (iii) the facts surrounding the termination of the Plaintiff Mortgage Loan Agreement (hereinafter together referred to as "The Material Facts").

17. The Defendant called one (1) witness at Trial who was there witness of fact. This was Ms. Sheila Brown. Ms. Sheila Brown signed a Witness Statement on 20th September, 2022 filed on the same day.

18. After having Paragraphs 44-46 and 51-56 of Ms. Brown's witness statement excluded by consent and/or by the Court's order on the Plaintiffs' preliminary objection, Ms. Brown was cross examined on 21st October, 2022.

19. Significantly, Ms. Brown demonstrated on cross examination that she had no knowledge of any of the Material Facts. Ms. Brown's evidence in this regard was as follows:-

Mrs. Rolle KC: ... It is correct to say that you weren't involved in the submission of that loan application were you?

Mrs. Brown: I was not involved. That is correct. I was not involved.

Mrs. Rolle KC: And it is also correct to say that you were not involved in the approval of that facility?

Mrs. Brown: No. I was not. That is correct. I was not.

Mrs. Rolle KC: Thanks. And it is similarly correct to say that you were not involved in the process of withdrawing that facility?

Mrs. Brown: That's correct. I was not involved.

20. The Defendant's sole witness of fact confirmed a lack of involvement in the loan application and approval process and in the withdrawal of the loan. As such, her evidence did not speak to these issues.

21. Resultantly the Defendant adduced no evidence whatsoever on the Material Facts.

22. The remainder of Ms. Brown's evidence, that is what remains after the aforesaid paragraphs were struck out, has minimal probative value because it does not address the Material Facts and cannot assist the Court at all in determining the Material facts.

23. The Plaintiffs on the other hand called a witness who was directly involved in the submission of the loan application, in the approval process relative to the loan application and directly made aware of the Defendant's purported withdrawal of the loan after the purported withdrawal had occurred. This witness was Mrs. Cleopatra Deal.

24. As will be demonstrated below Mrs. Deals evidence on the Material Facts, including her extensive evidence on the gross irregularities attendant to the loan approval process and the purported withdrawal was wholly unchallenged. These facts therefore remain as stated.

25. It was quite evident at Trial that the Defendant made a conscious decision not to engage Mrs. Deal on the evidence relative to the irregularities. The result of such decision has significant evidentiary implications as will be addressed in the next section of this Closing Submission.

The Plaintiffs' Asserted *"Termination of Employment Just to Cancel the Loan"* Case Was Proven Because the Evidence at Trial Confirmed that the Defendant Decided and In Fcat Tried to Terminate the Loan Even Before the First Plaintiff's Termination

26. It must be remembered and stressed that the Defendant's position, both pleaded and evidentially, is that the Plaintiffs' Mortgage Loan Agreement and her loan financing was **only** withdrawn after and as a result of the First Plaintiff having loss her employment.

27. It is therefore critical at this juncture to repeat the Defendant's stated position on the cancellation of the Mortgage Loan Agreement as unequivocally communicated to the Plaintiffs in the letter from the Defendant's Attorneys dated 23rd November, 2016.

28. In this letter the Defendant's Attorneys stated, ***"We are instructed that the Bank withdrew its financing of the loan SUBSEQUENT TO a material change in your circumstances, I.E. YOUR LOSS OF EMPLOYMENT."***[ii] [Emphasis Added]

29. If there is any credibility at all in the Defendant's said contention the evidence at Trial ought to have demonstrated the First Plaintiff's loss of employment coming **BEFORE** the Defendant's decision to terminate the loan.

30. Significantly, however, what the evidence at Trial demonstrated was the fact that the Defendant's decision to terminate the Plaintiffs' Mortgage Loan Agreement was made **BEFORE** the First Plaintiff's termination of employment.

31. It cannot credibly be said that the Defendant withdrew the Plaintiffs' financing ***"subsequent to"*** the First Plaintiff losing her employment if the evidence shows that the Defendant withdrew the financing before the First Plaintiff loss her employment.

The Evidence That the Defendant Decided AND In Fact Attempted to Terminate the Loan Agreement Even Prior to the First Plaintiff's Termination.

32. Firstly, the evidence of the Plaintiffs' Witness Mrs. Cleopatra Deal was unequivocally that the Defendant had decided and had attempted to cancel the Plaintiffs' Loan Agreement without her knowledge even prior to the First Plaintiffs' termination.

33. Ms. Deal evidence in this regard was at Paragraphs 51 to 55 of her Witness Statement[iii] and was as follows:-

> *51. After hearing nothing from the Processing Centre I decided to make contact with the Processing Centre. When I called, I spoke to the Assistant Manager who advised me that Mrs. Lockhart's application was being withdrawn.*
>
> *52. This came as a huge surprise to me because I was the person with primary carriage of the loan application and only I had the authority to withdraw the application. I had submitted the application and only I could withdraw it. Nevertheless, I was told that the application, unbeknownst to me, had been withdrawn.*
>
> *53. Naturally given this grave abnormality I pushed the issue seeking to get more information from the Assistant Manager on the alleged 'withdrawal" of Mrs. Lockhart's loan application. I was then informed by the Assistant Manager that they could not speak to me about the matter any further. I was told that I would have to speak to the head office in the Bahamas.*
>
> *54. It should be noted that when I was told by the Assistant Manager of the Processing Centre that Mrs. Lockhart loan was being withdrawn, at that point Mrs. Lockhart was still employed by the Bank.*
>
> *55. The following day, Mrs. Lockhart's employment was terminated by the Bank.*
>
> *56. So, I was told by the Assistant Manager of the Processing Centre in Jamaica that Mrs. Lockhart's loan application was being withdrawn a day before Mrs. Lockhart's employment was terminated by the Bank.*
>
> [Emphasis Added]

34. Mrs. Deal consistently stated this position including the following statement made on cross examination namely:-

> **Ms. Deal: ...One of those things being as the manager responsible for this loan facility I was never even made aware that the head office team was calling the loan, advising them to withdraw the loan. They never once advised me of that.**

35. Secondly, the Defendant offered no contradictory evidence of fact on this issue because its sole witness of fact, Ms. Brown, could not and therefore did not speak to the issue because she admittedly was not involved in it.

36. Thirdly, and significantly, at no point during Mrs. Deal's cross examination did Counsel for the Defendant suggest to Mrs. Deal the contrary contention that the Defendant did not decide to withdraw the loan prior to the First Defendant's termination and/or that her evidence in this regard was not true or accurate.

37. This evidence was not therefore challenged by a contrary contention nor by an assertion or suggestion as to its factual inaccuracy.

38. In fact, the nature and tenure of the Defendant's cross examination of Mrs Deal on this issue was wholly supportive of the Plaintiffs' assertion that the Defendant had in fact decided and attempted to withdraw the loan prior to the First Plaintiff's termination.

39. On the issue of the Defendant's decision and attempts to withdraw the Plaintiffs loan even prior to the First Plaintiff's termination, the case which the Defendant put on cross examination to Ms. Deal

included the following questions namely:-

> **Mrs. Hanna: But Mrs. Deal as you rightly admitted earlier you didn't know who has the authority to withdraw loans. You thought it was you but you were wrong and you can't say who has the authority to withdraw loans.**
>
> **Mrs. Hanna: So, now my question as a result of her comment is that she is now saying that the loan was withdrawn and she didn't know. And I said as she rightly she did not know that head office had the authority to withdraw the loan as she earlier admitted. I am only referencing what she said before to what she had said now.**
>
> **Mrs. Hanna: Mrs. Deal, I put it to you that the reason <u>why the loan was withdrawn before Mrs. Lockhart was terminated was because</u> the bank in being prudent was required -- the bank was required in accordance to look out the plaintiff's relationship as a customer and thereafter make certain decisions with regard to their continued relationship. <u>And as a result the loan was withdrawn prior to her being terminated</u>.** [Emphasis Added]

40. Clearly, the case put to Ms. Deal on cross examination was that Head Office had the authority to cancel/withdraw the Plaintiffs' loan and that this decision was indeed made even prior to the First Plaintiff's termination.
41. There was some reason of ***"prudence"*** for having done so although the ***"prudence"*** point and/or the asserted rational for having made the decision was not pursued by Counsel.
42. What is clear however is that the contrary proposition of fact that being that the Defendant had **<u>NOT</u>** decided and attempted to cancel the Loan prior to the First Plaintiff's termination was never put to Ms. Deal.
43. Instead what was suggested was that the Defendant's Head Office had the authority to do so without informing Ms. Deal and that the Defendant had in fact done so.
44. The result is that Mrs. Deal's statement of fact on the Defendant's decision to withdraw the loan even before the First Plaintiff's termination is wholly unchallenged.
45. Further, it is now not open to the Defendant to assert a contrary factual contention, the same having never been put to Ms. Deal on cross examination.
46. Further, it is not open to the Court to accept any such contrary factual position even if it were stated, the same having never been put to Ms. Deal on cross examination.
47. This is the rule in **Browne v. Dunn**. The rule emanates from the case which bears that name namely, **<u>Browne v Dunn.</u>**
48. It is a rule of practice and procedure. In the case the Court stated as follows:-
"If, on a crucial part of the case, a party intended to ask the jury to disbelieve the evidence of a witness, that party should cross-examine that witness or at any rate make it plain, while the witness was in the box, that the evidence was not accepted. This case is the basis for the term "rule in Browne v Dunn" adopted in many common law jurisdictions."

49. This rule has been consistently followed in numerous authorities.
50. In **<u>Markem Corp and another v Zipher Ltd; Markem Technologies Ltd and others v Buckby and other</u>** the Court stated as follows:-
'<u>Where the court is to be asked to disbelieve a witness</u>, <u>the witness should be cross-</u>

examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.'" [Emphasis Added]

51. The Court in **Markem Corp and another v Zipher Ltd; Markem Technologies Ltd and others v Buckby and other** also quoted from the Judgment of Lord Herschell in **Allied Pastoral Holdings Pty Ltd v *Federal Commr of Taxation* [1983] 1 NSWLR 1** which also followed the **Rule in Browne v. Dunn** where he stated:-

"Now my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses." [Emphasis Added]

52. Similarly, in the case of **Scope Machinery Pty Ltd -v- Ross** the rule was again applied, specifically in relation to a proposition of fact.

"At no point in the cross-examination of Mr Ross was it put to him that on the day of the accident he had deliberately engaged the manual override switch with his left hand, while reaching between the platens with his right hand. During argument on the appeal, counsel for the manufacturer conceded that this scenario was never put to Mr Ross (appeal ts67). However, in the closing submissions at trial, this hypothesis was suggested to the trial judge.

In those circumstances, it was not open to the trial judge to accept a proposition of fact that had not been put to Mr Ross... This rule, sometimes described by reference to its historical origins in the decision in Browne v Dunn (1893) 6 R 67, is now recognised as a component of the basic obligations of procedural fairness which underpin all court proceedings... where a party wishes to contend that the injury was caused by reason of the conduct of the injured party, fundamental principles of procedural fairness required that proposition to be put squarely and explicitly to the injured party in cross-examination." [Emphasis Added]

53. The **Rule in Browne v Dunn** has also been endorsed and followed by the Bahamian Courts.

54. In the case of **Colco Electric Co. v. Gold Circle Co** Senior Justice Lyons J (as he then was) confirmed the application of the **Rule in Browne v Dunn** in Bahamian jurisprudence when he stated as follows:-

"There is one very important rule of evidence relevant in particular in civil trials where the normal circumstance is that both parties' cases go into evidence. It is called the Rule in Browne v Dunn (1894) 6 R 67 (HL). The rule is as much an ethical requirement as it

is practical. <u>It is observed by counsel because in its observance it assists the court to do justice on the merits".</u> [Emphasis Added]

55. The **Rule in Browne v Dunn** was wholly accepted and followed by Justice Keith Thompson (as he then was) in the case of **<u>Lillian Antoinette Russell v Rubis Bahamas Limited.</u>**

56. The result is that the Defendant cannot assert that it did not decide to and attempt to withdraw the Plaintiffs' Loan even prior to her termination because no such contention was put to Mrs. Deal on cross examination.

57. Indeed, and in any event, the Defendant's position on cross examination wholly supports the Plaintiffs' contention that the Defendant decided and attempted to withdraw the Plaintiffs' loan even prior to the First Plaintiff's termination.

58. The Court is therefore respectfully invited to make the factual finding that the Defendant did in fact decide to and attempt to withdraw the Plaintiff's Loan before the First Plaintiff was terminated (i) because no contrary proposition of fact was put to Mrs. Deal on cross examination leaving Mrs. Deals evidence on this point wholly unchallenged and (ii) because the Defendant's cross examination in any event supports this finding, the Defendant having asserted that it had the authority to do so.

59. This evidence and the resultant finding that the Defendant decided and attempted to cancel/withdraw the loan even prior to the First Plaintiff's termination quite obviously destroys any conceivable notion or credibility in the Defendant's position that the Plaintiffs' Loan Agreement was only cancelled because of the First Plaintiff's loss of employment.

60. The evidence of the Defendant's decision and attempts to terminate the Plaintiffs' Mortgage Loan Agreement even prior to her termination instead supports the Plaintiffs' case that the First Plaintiff was terminated so that the Loan Agreement could be cancelled on this basis.

61. The surrounding evidence wholly supports the contention that the First Plaintiff was terminated so that the Loan Agreement could be cancelled on this basis.

62. The surrounding evidence includes Mrs. Deal's evidence of the obstruction to the approval of the Plaintiffs' loan and the exceptional abnormality of the withdrawal of the same. Mrs. Deal confirmed on re-examination that she had never in her career seen such an attempt to withdraw a loan after approval.

> **Mrs. Rolle KC: Now, Mrs. Deal, in the course of answering the questions about the withdrawal of the plaintiff's loan prior to her termination. It was suggested to you, first of all, that only the executive had the authority to withdraw the loan. You were unclear as to whether senior executives had the authority to withdraw the loan. But you said that you presumed that you had such authority to withdraw that loan?**
>
> **Mrs. Deal: Correct**
>
> **Mrs. Rolle KC: Had you ever withdrawn a loan at that stage?**
>
> **Mrs. Deal: Never in 26 years.**
>
> **Mrs. Rolle KC: Have you ever seen senior executives withdraw a loan at that stage?**
>
> **Mrs. Deal: I have never seen senior executives withdraw a loan ever at no stage.**

63. Consequently, what we have in this case is a situation where historically senior executives had

never withdrawn a loan at any stage but attempted to withdraw the Plaintiffs' loan at the most advanced stage and when presented with inquiries from Mrs. Deal the First Plaintiff was terminated and then the loan was cancelled.

64. The Defendant quite clearly used the termination of the First Plaintiff to effectuate a withdrawal of a loan in circumstances which were clearly wholly unprecedented.

65. In any event, the Court quite clearly cannot accept the Defendant's contention that the Plaintiffs' Loan was cancelled only because the First Plaintiff's employment was terminated because the evidence clearly demonstrates the Defendant's decision and attempts to terminate the loan even prior to the First Plaintiff's termination.

66. The Plaintiffs therefore respectfully invite the Court to reject the Defendant's contention as lacking in credibility and being wholly inconsistent with the evidence.

67. The Court in the circumstances is also invited to find that Defendant terminated the First Plaintiff's employment so that the Loan Agreement could be cancelled.

The *"Termination of Employment Just to Cancel the Loan"* Is a Breach of the Implied Term of the Mortgage Loan Agreement and/or Self Induced Frustration.

68. First and foremost, for the purpose again of avoiding any misguidance or confusion, the implied terms relied upon by the Plaintiffs are terms to be implied into the Mortgage Contract and not into the First Plaintiff's employment contract.

69. Secondly, while the Plaintiffs in their Opening Submissions did indeed refer to the 1864 case of **Stirling v Maitland**, the Plaintiffs in Paragraphs 21 through 24 of their Opening Arguments also cited and relied upon the cases of **Barque Quilpué, Limited v. Brown, William Cory & Son Ltd v London Corpn, Ogdens Ltd v Nelson and Plantation Holdings (FZ) LLC v Dubai Islamic Bank PJSC** all making the same point namely that every contract has an implied term (i) that one party to a contract will not do anything to prevent the other party from performing the contract, (ii) that one party to a contract would do nothing of his own motion to put an end to the state of circumstances under which the contract operates and (iii) that one party to a contract cannot by his own motion cause the impossibility of performance of a contract.

70. These terms are necessarily implied into every contract because if they weren't, that is if a party could make a contract and then of its own motion derail the contract with impunity the contract would then have no efficacy at all.

71. The Defendant relies on the cases of **Marks and Spencer plc v BNP Parabas Securities Trust Co (Jersey) Ltd and another** and **Duval v 11-13 Randolph Crescent Ltd** and the test enunciated in these cases which the Court would apply when determining whether a particular term should be implied. These cases in no way defeat the position posited by the Plaintiffs.

72. Firstly, as confirmed during the Plaintiffs' Opening Arguments, there are instances where the plaintiffs assert varying implied terms and the Court must apply the test enunciated in these cases because the Court actually has to determine whether the specific implied term asserted in that particular case should be implied.

73. However, the aforementioned authorities of **Stirling v Maitland, Barque Quilpué, Limited v. Brown, William Cory & Son Ltd v London Corpn, Ogdens Ltd v Nelson** and **Plantation Holdings (FZ) LLC v Dubai Islamic Bank PJSC** have already determined that the terms asserted by the Plaintiffs' in the instant case are implied in every contract. There is no question as to whether these specific terms are implied because this has already been definitively determined by the Courts. Consequently, the test need not be applied.

74. Secondly, the cases of **Stirling v Maitland, Barque Quilpué, Limited v. Brown, William Cory & Son Ltd v London Corpn, Ogdens Ltd v Nelson** and **Plantation Holdings (FZ) LLC v Dubai Islamic Bank PJSC** would never have laid down the proposition that these terms would be implied in every contract unless it was understood and accepted that such terms must be implied to give business efficacy to contracts.

75. In any event and for the avoidance of doubt, how could the Mortgage Loan Agreement achieve its desired result and have efficacy if after having entered into the contract one party could prevent the other party from performing the contract, put an end to the state of circumstances under which the contract operates and/or of his own motion cause the impossibility of performance of the contract with impunity. Clearly, the implied terms that a party cannot do these things is necessary to give efficacy to the contract which has been made.

76. Thirdly, the implied terms are **NOT** inconsistent with any express term in the Mortgage Loan Agreement.

77. First and foremost, "***The Termination of Employment Just to Cancel the Loan Clause***" is just that, it is implied that the Defendant cannot terminate the First Plaintiff just so it can terminate the Mortgage Loan Agreement. There is no express clause in the Mortgage Loan Agreement which allows the Defendant to terminate the First Plaintiff just so it can terminate the Mortgage Loan Agreement.

78. Resultantly, there is no inconsistency between the implied terms and the express terms of the Mortgage Loan Agreement.

79. Secondly, the Defendant suggests that the implied terms asserted by the Plaintiffs are inconsistent with the Employee Borrowing Agreement which allows the Defendant to terminate an employee who has a loan.

80. There is with respect no inconsistency here either because any such termination of employment does not automatically end the loan. Consequently, while the Defendant is free to terminate the employee who has a loan, the loan continues and so there is no termination of the loan agreement.

81. This fact was confirmed not only by the First Plaintiff herself during her evidence but also by the Defendant's witness, Mrs. Brown.

82. Mrs. Brown's evidence relative to the Employee Borrowing Agreement, after having been shown the provision was as follows:-

> **Mrs. Rolle KC: ...it is correct for me to say then, that the effect of this provision and your evidence in these paragraphs is, that once the First Plaintiff's employment was terminated, what would happen as a result of this provision is that she would no longer be entitled to benefit from the employee preferential rates of interest, and the rates of interest of her mortgage loans would then be adjusted to whatever is the prevailing rates in existence at that time; is that correct?**
>
> **Mrs. Brown: Yes, that is correct.**
>
> **Mrs. Rolle KC: And it is also correct for me to then say that the effect of that is, that once the First Plaintiff was gone, was no longer an employee with the First Caribbean Bank, she would still have a mortgage. She would just have to pay the rate of interest that everybody else is paying; right?**

Mrs. Brown: Yes, the higher rate. Customer rate.
Mrs. Rolle KC: But the mortgage itself would continue.
Mrs. Brown: Yes

83. Resultantly, on the admission of the Defendant's own witness, the result that the parties envisaged from the Employee Borrowing Agreement is that even if the First Plaintiff's employment was terminated, the Mortgage Loan Agreement would have continued with the rate of interest increasing to the usual rate.

84. However, the Mortgage Loan Agreement would continue.

85. Clearly, there is no inconsistency as between this anticipated result and the terms to be implied.

86. Further and in any event, this has no bearing whatsoever on the "***Termination of Employment Just to Cancel the Loan Clause***"

Self-Induced Frustration

87. The Plaintiffs' in their Opening Submissions cited the authority of **Maritime National Fish Ltd v Ocean Trawlers Ltd** on the principle of Self Induced Frustration.

88. The Plaintiffs also rely on the authority of **Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd**. where Viscount Simon L.C. defined self-induced frustration as:

"Self-induced frustration...involves deliberate choice, and those cases amount to saying that a man cannot ask to be excused by reason of frustration if he has purposely so acted as to bring it about.

QUANTUM OF DAMAGES

Mitigation

89. The Defendant is asserting that the Plaintiffs' failed to mitigate their losses by failing to secure financing from another bank after the cancellation of Mortgage Loan Agreement.

90. Firstly, the Defendant's plea of failure to mitigate must fail because the First Plaintiff confirmed that they didn't make application for alternative financing because she had no employment and knew that employment would be a necessary criteria for such application.

91. The First Plaintiff also confirmed the fact that at the time that the Mortgage Loan Agreement was cancelled the closing date for the purchase had already passed and that time did not permit the making of such an application.

92. Secondly, the Defendant's plea of failure to mitigate must also fail because the Defendant's evidence did not make out a case of failing to mitigate. The Defendant has the burden to prove this assertion.

93. Specifically, there was no evidence adduced by the Defendant to support a contention that the Plaintiffs were able to secure an alternative loan within the time prescribed or at all AND that the Plaintiffs were otherwise capable of completing the purchase despite the Defendant's eleventh-hour cancellation of the Mortgage Loan Agreement and the First Plaintiff's lack of employment.

94. In fact, the Defendant's witness Mrs. Brown agreed and accepted on cross examination that so long as the First Plaintiff remained unemployed a loan application would likely fail.

95. Mrs. Brown's evidence in this regard was as follows:

Mrs. Rolle KC: Now, if we can now go to Paragraph 58 of your witness statement, paragraph 58 provides, 'The First and Second

> **Plaintiffs, however, were not precluded from reapplying to the bank when their financial situation improved, or their debt service ratio decreased." ... Now, I want to ask the question relative to their financial situation. Are you then accepting, by that statement, that so long as the First Plaintiffs remained unemployed, an application for financing would likely fail?**
>
> **Mrs. Brown: Based on ratios, yes.**

96. There is therefore no evidentiary basis at all for the Court to make a finding that the Plaintiffs failed to mitigate their losses.

97. The Court is respectfully invited to reject the Defendant's plea of failure to mitigate.

The Mortgage Loan Expenses

98. The Defendant in the presentation of its case placed significant emphasis on the assertion that the expenses incurred by the Plaintiffs relative to the Mortgage Loan Agreement are irrecoverable.

99. The Plaintiffs in their opening arguments cited the authority of **Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd** which confirmed that in the assessment of damages such expenses must be deducted.

100. The Plaintiffs thereafter in Paragraph 49 of their Opening Submissions stated as follows, ***"Following the authorities all costs associated with the Plaintiffs' obtaining the benefit of the contract must be deducted. This would include all legal fees and expenses the Plaintiffs' incurred which total $8,099.71. This includes legal fees, insurance and related expenses".***

101. Cleary the Plaintiffs have not persisted in seeking to recover these expenses noting that the assessment of damages necessitates the deduction of the same.

102. In any event, the point which the Defendant asserts relative to these expenses is now moot.

Conclusion

103. For all of the reasons advanced by the Plaintiffs in their Opening Submissions and in these Closing Submissions the Plaintiffs respectfully invite the Court to enter Judgment in their favour in the amount of $912,800.29 for breach of contract.

104. The Plaintiffs also invite the Court to award them interest on their damages of $912,800.29 from the date of the issuance of their Writ of Summons until Judgment at such rate as the Court deems just.

105. The Plaintiffs also respectfully invite the Court to Order that the Defendant pay to the Plaintiffs the costs of and occasioned by this action.

The Defendant's Case

The Pleadings

[72.] Mrs. Hanna, Counsel for the Defendant invited the Court to disregard the evidence of Mrs Lockhart and her witness Cleopatra Deal regarding the conduct of the Bank during the application process and the difficulties experienced in obtaining the approval for the loan. She insisted that the

Plaintiffs were bound by their pleadings and referred to Order 18, rule 7 and Order rule 12(1) of the Rules of the Supreme Court which has now been replaced by the Civil Procedure Rules, 2022. She also relied on the Cotton L.J. in the case of **Philipps v. Philips** (1878) 4 Q.B.D. 127 at 139 and 133 where he stated:

> ***"What particulars are to be stated must depend on the facts of the case. In my opinion it is absolutely essential that the pleading, not to be embarrassing to the Defendants, should state the facts upon which will put the Defendants on their guard and tell them what they have to meet when the case comes on for trial."***
>
> ***"If parties were held strictly to their pleadings under the present system they ought not be allowed to prove at the trial, as a fact on which they would have rely in order to support their case, any fact which is not stated in the pleadings. Therefore, again, in their pleadings they ought to state every fact upon which they must rely to make out their right or claim."***

18. The pleaded case of the First and Second Plaintiffs is for breach of the alleged implied terms of the contract, breach of contract and self-induced frustration **only**. The said particulars for the alleged breach of the implied terms of the contract, breach of contract and self-induced frustration can be found at paragraphs 45, 54 and 55 of the Amended Statement of Claim.

19. A close review of the Particulars of breach of the alleged implied terms and/or breach of the Mortgage Loan Agreement relate specifically to the termination of the First Plaintiff's employment without cause, self-induced change of the First and Second Plaintiff's financial position, self-induced adverse change of circumstances and the failure to allow the First and Second Plaintiffs a reasonable opportunity to rectify or re-instate their financial position.

20. The First and Second Plaintiffs, however, in their opening Statement allege that they experienced difficulty in having the loan application approved as a result of the deliberate interference from the Bank, with a view to inhibiting the approval of the loan. Further, they allege that the conduct of the Bank during the application process was prohibitory.

21. The Bank submits that the First and Second Defendants did not plead unfair bargain or unfair practices against the Bank, in their Amended Statement of Claim. Therefore, the Banks submits that any evidence led by the First Plaintiff with regard to the alleged "unusual" loan process or the alleged "unusual" withdrawal thereof should be given no weight and disregarded by this Honourable Court. Moreover, the loan was eventually approved which was admitted by the First Plaintiff in her evidence.

22. In that regard, the Bank submits that all of the preliminaries which were given in evidence and which speaks to the process which occurred prior to the loan being provisionally approved are irrelevant and were not pleaded by First and Second Plaintiffs.

23. Consequently, the Bank submits that paragraphs 21-72,131-134 of the First Plaintiff's Witness Statement should be disregarded by this Honourable Court and given no weight. And paragraphs 20-47,52-56, 59, 64 and 68 of Ms. Cleopatra Deal's Witness Statement should be disregarded by

the Court and not given any weight, as the allegations made therein are not before the Court for its consideration.

The Evidence

[73.] Mrs. Hanna went through the evidence and suggested that the Court ought to give significant weight to the evidence of Mrs Brown because she was a veteran in the Bank with extensive experience in the Mortgage and Lending division of the Bank. Mrs. Hanna referred in particular to the fact that parts of her evidence had been corroborated by Mrs Lockhart and Ms Deal inter alia, the loan process, the fact that the Lockharts' loan had been provisionally approved and that the Bank reserved the right to withdraw the loan at any time before the loan is drawn down if the Bank becomes aware of any adverse change in the borrower's circumstances.

[74.] Additionally, Mrs Brown's evidence with regard to the terms and conditions of employment with the Bank, the Industrial Agreement and the Bank's ability to terminate Mrs Lockhart without cause was also accepted by Mrs Lockhart. She admitted that her employment could be terminated with or without cause or that she could resign or be made redundant.

[75.] Similarly, Mrs Deal in cross-examination admitted that as the Bank's representative, she never agreed on the Bank's behalf that the Bank would keep Mrs Lockhart employed during the life of the mortgage loan or during the loan application process and none of the loan documents guaranteed Mrs Lockhart's employment during that time.

[76.] Both Mrs Brown and Mrs Lockhart agreed that there were two relationships that she had with the Bank, one of Banker and customer and the other of, Employer and Employee and that they were separate and distinct.

[77.] Ms Deal on the other hand disagreed with Mrs Brown that there was no overlap in the Banker/Customer relationship compared to that of the Employer/Employee relationship because the setup and commitment fees for the loan were waived and Mrs Lockhart received a preferential interest rate. Mrs Brown sought to explain that there was in fact no overlap and that Mrs Lockhart had an express benefit incorporated into her Employment contract which provided a benefit in the Banking relationship. Thus, Mrs Hanna invited the Court to accept the evidence of Mrs Brown and find that there was no overlap in the relationships.

The Nature of the Contractual relationships of the parties

[78.] The Bank asserted that two separate and distinct relationships existed between the parties; (i) Banker and Customer or that of debtor and creditor and the second one between the Bank and Mrs

Lockhart as Employer and Employee. She relied upon the case of **Foley v Hill** [1843-60] All ER Rep 16 at 20 for the classic definition of a banker client relationship.

[79.] Mrs Hanna referred to the contract with the Bank and Mrs Lockhart being governed by the Industrial Agreement and the contract between the Bank and the Lockharts as a Banker and Customer being governed by the various loan documents, namely, the Facility letter, the CIBC FirstCaribbean Credit Application and the Employee Borrowing Agreement.

[80.] Mrs Lockhart in cross-examination agreed that she and her husband had a Banker and Customer relationship with the Bank and she had an Employer and Employee relationship with the Bank and agreed that they were two separate and distinct relationships. Ms Deal similarly, accepted on cross-examination that she processed the loan application for the Lockharts as a result of the Banker Customer relationship they had with the Bank.

[81.] Therefore, Counsel for the Bank submitted that the Court in determining the matter must consider the Lockharts claim against the backdrop of two (2) separate and distinct relationships. She submitted as follows:

> **The Bank and First Plaintiff's Employer Employee Relationship**
>
> 24. The First Plaintiff was employed with the Bank from the 19th May, 2003 and was terminated on the 17th October, 2016. The First Plaintiff's terms and conditions of employment were governed by the Industrial Agreement made between the Union and the Bank. This evidence was stated by Ms. Sheila Brown in paragraphs 6, 34-37 of her Witness Statement and corroborated by the First Plaintiff at page 33 lines 15-32, page 34 and page 35 lines 1-17 of the Transcript dated the 20th October, 2022.
>
> 25. Article 1 of the Industrial Agreement listed the following as the purpose of the Industrial Agreement:
>
> *1.1 The purpose of this Industrial Agreement is to record agreement between the Bank and the Union on the regulation of salaries, hours of work and general conditions of employment applicable to the employees of the Bank covered by this Agreement, in order to consolidate employee/employer relations, to ensure the productivity of the employees, to help achieve the highest level of performance, consistent with safety and good health, to provide quality service to the Bank's internal and external customers, to establish a procedure to secure a prompt and fair resolution of employee grievances, for the consideration of proposals and for the resolution of differences between the Bank and the Union.*
> *1.2 While this Agreement should be read in tandem with the Bank's Code of Conduct and Code of Discipline (see Appendices 1 and 2) and other related policies, the Agreement takes precedence to any matters covered by both.*
> *1.3 The spirit and intent of this Agreement is to secure, in the interest of the wellbeing of the employees, the efficient and economic operation of the Bank through an orderly and constructive relationship between the Management of CIBC FirstCaribbean International*

Bank (Bahamas) Limited and The Bahamas Financial Services Management Workers' Union.

1.4 ***The Articles set forth in this Agreement relating to rate of pay, hours of work, conditions of employment, rights and obligations of the parties, recognition and the avoidance and settlement of disputes have been negotiated for this purpose.***

26. The Bank submits that it is trite law that the general principles of the law of contract apply to Contracts of Employment. Therefore, the First Plaintiff and the Bank were bound by the express conditions of employment, outlined in the Industrial Agreement.

27. One such condition of employment was outlined in Article 19.8.4, which states,

"If the Bank terminates the employment of any employee other than by summary dismissal, the member of staff will be compensated in accordance with the Employment Act."

28. The aforementioned Article conferred the right upon the Bank to dismiss the First Plaintiff with pay, in accordance with the Employment Act. This right to terminate the First Plaintiff's employment is independent of the First Plaintiff's relationship with the Bank as a customer.

29. Moreover, Article 1.4 of the Industrial Agreement speaks to the provision of quality service to the **Bank's internal** (and external) **customers**. The internal customers in this instance are the Bank's employees – the First Plaintiff admitted this fact at page 34 lines 11-18. Therefore, it is clear that the Bank and the Union intended for there to be a separate and distinct relationship between the Bank and its employees and the employees of the Bank who may also be its customers.

30. It is also worthy to note that the provisions of the Industrial Agreement do not incorporate any benefit which an employee may have been entitled to receive as a Customer. The Bank submits that this state of affairs existed because the Bank and the Union intended for there to be a separate and distinct relationship.

31. The First Plaintiff, as a result of being an employee of the Bank, had an express benefit of preferential rates and a waiver of her commitment fees incorporated into her contract with the Bank as a customer. The incorporation of this benefit into the Banker Customer relationship did not result in a merger of the Banker Customer relationship and the Employee Employer relationship. They remained separate and distinct.

32. The Bank therefore submits that as there were two contracts and two separate and distinct relationships between the Bank and the First and Second Plaintiffs, this Honourable Court should find that there was no fault or default by the Bank, under the Employment Contract with the First Plaintiff, which would render the Bank liable in the Banker and Customer relationship.

The Law of Implying Terms into the Contract

33. The First and Second Plaintiffs seek to imply the following terms into the Facility letter, namely,

i. ***That the Defendant, its servants and/or agents would not itself, of its own motion, bring about a change of the state of circumstances existing at the date of the Mortgage Loan Agreement ('The State of Circumstances");***

ii. ***That the Defendant, its servants and/or agents would not itself, of its own motion, bring about a change of the Plaintiffs' financial position as it existed at the date of the Mortgage Loan Agreement ("The Plaintiffs' Financial Position"; and***

iii. ***That the Defendant, its servants and/or agents would not itself, of its own motion, terminate the First Plaintiffs' employment, without cause, so as to cause a material change in the Plaintiffs' circumstances ("Material Change of Circumstances") depriving them of the benefit of the Mortgage Loan Agreement."***

34. In a nutshell, what the First and Second Plaintiffs have asked this Court to do is to imply a term into the banker/customer relationship whereby once the bank had provisionally approved the loan for the Lake Cunningham property, the Bank was obliged to maintain the employer/employee relationship with the First Plaintiff to ensure that the Plaintiffs would be in a financial position to complete the purchase of the home. The Bank has nicknamed the combined effect of these implied terms the "the Guaranteed Employment Clause".

35. The Bank submits that as the present case concerns a commercial loan and the terms of the contract were contained in written documents, namely, the Facility Letter, CIBC FirstCaribbean Credit Application and the Employee Borrowing Agreement, this Court should not go outside the "four corners" of the contract (or loan documentation) and admit extrinsic evidence.

36. The Bank commends the ratio of Lord Neuberger PSC, in the case of **Marley v Rawlings** , to the Court for its consideration of the issue. In the case, Lord Neuberger PSC affirmed the aforementioned view,

"18 During the past 40 years, the House of Lords and Supreme Court have laid down the correct approach to the interpretation, or construction, of commercial contracts in a number of cases starting with Prenn v Simmonds [1971] 1 WLR 1381 and culminating in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900.

19 When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words (a) in the light of: (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

37. The Bank further commends the case of **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another** where Lord Neuberger PSC held the following view, which supports the position that English Courts have been reluctant to imply terms into a contract which are inconsistent with the contractual documents and/or express terms,

"28 In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. **Further, given that** *it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath JSC's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication."*

38. Moreover, in the **Marks and Spencer plc** case, Lord Neuberger PSC held (see paragraphs 15-31), *" that a term would be implied into a detailed commercial contract only if that were necessary to give the contract business efficacy or so obvious that it went without saying; that the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract but was concerned with what notional reasonable people, in the position of the parties at the time at which they had been contracting, would have agreed; and that it was a necessary but not sufficient condition for implying a term that it appeared fair or that the court considered that the parties would have agreed it if it had been suggested to them."*

39. The Bank submits that the evidence demonstrated that there was an express term in one of the contractual documents, namely, the Employee Borrowing Agreement, that upon the termination of the First Plaintiff's employment, for any reason other than retirement, the rates on all of the First Plaintiff's loans would be adjusted.

40. The Employee Borrowing Agreement stated as follows:-
"I agree that should my employment terminate for any reason other than retirement, the interest rate on all my loans with FirstCaribbean International Bank (Bahamas) Limited or FirstCaribbean International Finance Corporation (Bahamas) Limited and such other subsidiaries or affiliates of FirstCaribbean International Bank Limited as may from time to time hereafter come into existence and any successors or assignees of these Companies (each known as the "Bank") will on the date of such termination be adjusted to the Bank's then prevailing rate applicable to customer loans with similar security and similar terms and conditions, or if a mortgage loan, will be adjusted to the rate stipulated in the mortgage."

41. The Bank submits that it is clear that the Employee Borrowing Agreement envisioned a scenario whereby the First Plaintiff could be dismissed by the Bank, with pay, pursuant to the terms of the Industrial Agreement, with the result being the preferential interest rates would cease. The First Plaintiff, in cross examination, admitted that the Bank could terminate her employment with or without cause or she could resign or be made redundant and if either of those circumstances occurred any interest she had with any banking facilities would be adjusted to the prevailing rates applicable to customers with similar security and similar terms and conditions.

42. Sheila Brown at paragraph 44 of her Witness Statement stated that the Employee Borrowing Agreement formed a part of the contractual documents because it is the document utilized by the Bank to preserve and protect its interest by having all interest rates revert to the prevailing or stipulated interest rate upon the Employee's termination for any reason other than retirement. The First Plaintiff, in cross examination, admitted that as a part of the loan process she was required to endorse the Employee Borrowing Agreement and she did sign the same.

43. Ms. Deal, in her cross-examination, admitted that the First Plaintiff was required to endorse the Employee Borrowing Agreement and submit the same as a part of the application process. She (Ms. Deal) read the information to the Plaintiffs and they did not raise any questions regarding the document, therefore, they agreed to the terms by their signatures.

44. The Bank submits that as a result of the clear words in the Employee Borrowing Agreement, the proposed implied terms/Guaranteed Employment Clause are unjust. Such terms are also in direct conflict with the First Plaintiff's terms and conditions of employment (the Industrial Agreement) which allows the Bank to dismiss the First Plaintiff with pay or on the ground of Redundancy.

45. Moreover, Ms. Deal stated in cross-examination that as the Bank's representative, she never agreed on the Bank's behalf that the Bank would keep the First Plaintiff employed during the life of the mortgage loan or during the loan application process and none of the loan documents guaranteed the First Plaintiff's employment.

46. The Bank therefore submits that the term "***the Defendant, its servants and/or agents would not itself, of its own motion, terminate the First Plaintiffs' employment, without cause, so as to cause a material change in the Plaintiffs' circumstances ("Material Change of Circumstances") depriving them of the benefit of the Mortgage Loan Agreement***" cannot be implied into the contract because it contradicts the express term in the Employee Borrowing Agreement.

47. The Bank further submits that the evidence demonstrated that the terms which the First and Second Plaintiffs seek to imply into the Banker Customer relationship are not necessary for business efficacy and would be detrimental to the Bank because that would mean that as long as an employee had a mortgage or personal loan with the Bank, the Bank will be prohibited from dismissing the employee, except for cause, for the duration of the loan period, some of which could be as high as Thirty (30) years. The Bank would therefore be unable to separate its relationship with its employees from that as Employer versus Banker.

48. Further, implying those terms into the Facility Letter does not make business sense because the Bank is sometimes required to dismiss an employee on the grounds of redundancy or for no reason at all to protect its interests, financial or otherwise.

49. The Bank submits that it did not prefer the interest of the First and Second Plaintiffs to its own with regard to the Lake Cunningham property. Ms. Deal in cross-examination stated that the Bank wanted to secure its risks and ensure that any exposure that it has will be covered by the client.

Even though Ms. Deal stated she would not say that the Bank preferred its interest to that of its clients, the Bank submits that by wanting to secure its risks and any exposure, the Bank is in fact preferring its interest to that of its clients.

50. The Bank further submits that without those implied terms being incorporated into the Facility letter, the contract makes commercial and practical sense. It is worthy to note that the First and Second Plaintiffs obtained Two (2) earlier Mortgages from the Bank without having those terms incorporated by implication into the contract.

51. Moreover, it is the Bank's position that as a result of the proposed implied terms not being reasonable and fair, or being necessary to make business or commercial sense, contradicting the Employee Borrowing Agreement and Industrial Agreement and the terms not being so obvious that it goes without saying, the Bank has not breached any terms of the Facility letter or the contract in general.

52. At all material times, it was the intention of the parties for those relationships to remain independent and separate. This is clearly evident by the fact that the First and Second Plaintiffs were required to go through the normal loan application process as a customer normally would and Ms. Deal confirmed that she processed the loan for the First and Second Plaintiffs like any ordinary clients of the Bank.

53. Consequently, the Bank submits that this Honourable Court should find that the proposed terms cannot be implied into the contract and the Bank has not breached any terms of the Facility letter or the contract.

The Implied Terms/Material Change of Circumstances

54. Under the claim of Material Change of Circumstances, the First and Second Plaintiffs are relying on the "implied term principle" characterized by Lord Diplock in the case of **Cheall v Apex** as,

"... except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated the contract by frustration, is often expressed in broad language as: 'a man cannot be permitted to take advantage of his own wrong'. But this may be misleading if it is adopted without defining the breach of duty to which the pejorative word 'wrong' is intended to refer the person to whom the duties owed."

55. In the case of **Duval v 11-13 Randolph Crescent Ltd.** Lord Kitchin JSC described the "implied term principle" as follows,

"44 It is well established that a party who undertakes a contingent or conditional obligation may, depending upon the circumstances, be under a further obligation not to prevent the contingency from occurring; or from putting it out of his power to discharge the obligation if and when the contingency arises. The principle was explained in these terms by Lord Alverstone CJ in Ogdens Ltd v Nelson [1903] 2 KB 287, 296:

> *"It is, I think, clearly established as a general proposition that where two persons have entered into a contract, the performance of which on one or both sides is to extend over a period of time, each contracting party is bound to abstain from doing anything which will prevent him from fulfilling the obligations which he has undertaken to discharge; further, that, where a person has undertaken to carry on a business, out of the profits of which he has undertaken to pay certain moneys as a consideration for the contract to the other party to the contract, he must not by his own act or default disable and incapacitate himself from further carrying on such business."*

56. Subsequent to discussing the history of the cases involving the implied term principle, Lord Kitchin JSC, then held at paragraph 51 of the Ruling that:

"51 The correct approach to the implication of terms was recently stated by Lord Neuberger PSC, with whom Lord Sumption, Lord Hodge and Lord Clarke of Stone-cum-Ebony JJSC agreed, in Marks and Spencer plc v BNP Paribas [2016] AC 742, paras 14—32 that, it is sufficient for present purposes to note first, that the express terms of the contract must be construed before one can consider any question of implication; secondly, that the term to be implied must be necessary to give business efficacy to the contract or so obvious that "it goes without saying"; and thirdly, that the term to be implied must be capable of clear expression. A way of assessing whether a term is necessary to give business efficacy to a contract is to consider whether, without the term, the contract would lack commercial or practical coherence."

57. The Bank therefore submits that with regard to the terms which the First and Second Plaintiffs seek to imply into the commercial contract, this Honourable Court must first construe the express terms of the contract (the Facility Letter, CIBC FirstCaribbean application form and the Employee Borrowing Agreement) to see if there is any conflict. Secondly, this Honourable Court must decide whether the implied terms are necessary to give business efficacy to the contract or so obvious that "it goes without saying". Thirdly, the term to be implied must be capable of clear expression. And lastly, in determining whether a term is necessary to give business efficacy to a contract, this Honourable Court must consider whether, without the term, the contract would lack commercial or practical coherence.

58. The Bank submits that with regard to the first question, the evidence demonstrated that the proposed implied terms contradicts the express terms of the Employee Borrowing Agreement which contemplates the Bank dismissing the First Plaintiff with pay. The First Plaintiff admitted that the Bank was able to dismiss her employment without pay and there was no written documentation between her and the Bank which guaranteed her employment.

59. With regard to the second question, the Bank submits that the evidence demonstrated that the implied terms are not necessary to give business efficacy to the contract and are not so obvious that "it goes without saying" because the First and Second Plaintiffs were already in a Banker Customer relationship with the Bank and the Bank was not required to keep the First Plaintiff employed in order for the parties to maintain that relationship. Moreover, the Bank did not intend to impose terms into the Banker Customer contract which restricted its ability to manage its employees and business.

60. The Bank submits that the implied terms are capable of clear expression, so the third question is satisfied. However, with regard to the Court determining whether the terms were necessary to give business efficacy to a contract, the Bank submits that without the term, the contract has commercial or practical coherence and the First and Second Plaintiffs obtained two (2) previous Mortgages from the Bank without such terms being implied into the relationship.

61. Lastly, the Bank submits that the implied term principle does not apply in this instance because the Bank did not, in the Banker Customer relationship, bring the contract to an end by its conduct. The contract ended by mutual agreement due to an extraneous circumstance outside of the Banker Customer relationship.

Frustration of Contract

62. The First and Second Plaintiffs allege in paragraph 55 of the Amended Statement of Claim that the Bank has induced the frustration of the contract.

63. The Bank submits that it has never advanced the position that the contract was frustrated. On the contrary, the Bank submits that the evidence demonstrated that under the express terms of the Facility letter, the First and Second Plaintiffs agreed that the Bank could withdraw the offer for the loan, at any time, if the Bank became aware of any adverse change in the First and Second Plaintiffs' circumstances. Therefore, there was no supervening event which "frustrated" the contract. The Bank and First and Second Plaintiffs foresaw the possibility of a change in the Plaintiffs' financial position and made an express provision in the contract for the same.

64. The Bank submits that the contract was discharged, by mutual agreement, as per the express terms of the Facility letter. The Bank, in advising the First and Second Plaintiffs that the loan had been withdrawn specifically referenced the Facility letter and the express provision which allowed for the withdrawal of the loan. Ms. Deal, in cross-examination confirmed that this was basis for withdrawing the loan from the First and Second Plaintiffs.

65. Moreover, the evidence from Ms. Deal, in cross-examination is that the loan process was completed when the loan was drawn down and the funds disbursed and the Facility Letter allowed the Bank to withdraw the loan at any time before the loan was drawn down and the funds disbursed.

66. It is worthy to note that the First and Second Plaintiffs pleaded at paragraph 54 (ix) of the Amended Statement of Claim that the Bank refused to draw down on the Loan proceeds on the basis of a Self-Induced "adverse change of circumstances". However, the First Plaintiff in cross-examination,

contradicted her pleaded case and advanced that the loan was in fact drawn down because a loan is considered drawn down when the loan account opened.

67. The Bank invites the Court to find the First Plaintiff's evidence in this regard as being contradictory and to accept the evidence of Ms. Deal that the loan process was not completed as the loan was not drawn down and the funds were not disbursed.

68. Consequently, the Bank submits that this Honourable Court should dismiss the First and Second Plaintiff's claim that the Bank has frustrated the contract.

Damages

69. The First and Second Plaintiffs claim damages for the cost of the Appraisal Report in the amount of Three Hundred Dollars ($300.00), the costs of the Insurance Premium for the Lake Cunningham House in the amount of Three Thousand Seven Hundred and Sixty-eight Dollars and Forty-six Cents ($3,768.46) and legal fees paid to Messrs. Mackey & Moxey for completed legal services in the amount of Four Thousand Thirty-one Dollars and Twenty-five Cents ($4,031.25).

70. The Bank submits that the First Plaintiff, in her evidence during cross-examination, admitted that she and the Second Plaintiff were not entitled to recover these expenses as Section 7 of the Credit Application form expressly stated that **"I (the First and Second Plaintiffs) understand and agree that valuation charges, legal expenses and the costs of surveys will be borne by Me, whether or not the loan is granted."**

71. Both the First and Second Plaintiffs endorsed the said Credit Application form as their agreement to the aforementioned term in the application form. Ms. Deal also agreed in cross-examination that based on the terms of the Credit Application Form, the First and Second Plaintiffs agreed to bear the costs for the miscellaneous fees for processing the loan.

72. Moreover, this obligation was confirmed under the "**Covenants**" section in the Facility Letter, which expressly stipulated in Paragraph 6, that "**All costs in connection with processing the loan, including appraisal fees, legal fees, inspection fees, stamp duties and other disbursements will be borne by the mortgagors.**"

73. During cross examination, the First Plaintiff attempted to qualify this statement by adding that this provision only applied if the loan was approved. However, when pressed to show where such a qualification existed in the Facility Letter or any other document before the Court, the First Plaintiff was unable to. The Bank therefore invites the Court to reject the suggestion by the First Plaintiff and to construe the clear and unambiguous of the Facility Letter and hold that the First and Second Plaintiffs are responsible for all costs of processing the loan.

74. Further, in cross-examination, Ms. Deal admitted the First and Second Plaintiffs would be responsible for bearing the costs of the appraisal and legal fees and other disbursements.

75. With regard to the alleged Loss of Bargain, the Bank avers that as it is not in breach of the Facility letter or contract, the First and Second Plaintiffs are not entitled to damages for Loss of bargain.

Moreover, the First and Second Plaintiffs have provided no evidence of how they attempted to mitigate their loss or what attempts were made to secure a similar home in a similar area.

76. In view of the foregoing, the Bank submits that this Honourable Court should dismiss the First and Second Plaintiffs' claims with costs to the Defendant Bank to be taxed, if not agreed.

Analysis and disposition

[82.] The Court has been asked to imply the following terms into the Agreement, viz., the Mortgage Loan Agreement:

(i) that the Defendant would not cause a change of circumstances which existed at the time the Agreement was made;

(ii) that the Defendant would not cause a change of the Plaintiff's financial circumstances which existed at the time of the Agreement;

(iii) that the Defendant would not terminate the First Plaintiff's employment without cause, so as to cause a material change in circumstances.

(iv) Assuming that question (iii) is answered in the affirmative, whether the Defendant breached the implied terms or any of them?

(v) Whether the Defendant induced the frustration of the Agreement?

(vi) Assuming that question numbers 3, 4 and/or 5 are answered in the affirmative, whether the Plaintiff suffered loss and damage by reason of such breach of the implied term and/or by reason of such induced frustration of the Agreement and if so what amount of loss?

Preliminary Issues

[83.] The Plaintiffs' Counsel has submitted that (i) the facts surrounding the loan application process, (ii) the facts surrounding the ultimate approval of the loan; and (iii) the facts surrounding the termination of the Mortgage Loan Agreement (hereinafter together referred to as "the Material Facts") are germane to the Court's determination of the Lockharts' claim.

[84.] However, Counsel for the Bank argued that the Lockharts did not allege unfair bargaining or practices in their pleadings. As such, any evidence presented by Mrs. Lockhart regarding an "unusual" loan process or its withdrawal should be disregarded. She further submitted that the loan was ultimately approved, as acknowledged by Mrs. Lockhart.

[85.] Consequently, she contends that all preliminary evidence relating to the loan process prior to its provisional approval is irrelevant and outside the scope of the pleadings. She relied upon Order 18, rule 7 of the Rules of the Supreme Court and Order 18, rule 12(1). Additionally, she cited as authority the case of **Philipps v Philips (1878) 4 Q.B.D 127.**

[86.] She referred to the dicta of Cotton L. J and Brett, L.J who each had this to say in the **Philipps** case at pages 133 and 139:

> ***"If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at trial, as a fact which is not stated in the pleadings. Therefore, again in their pleadings they ought to state every fact upon which they must rely to make out their right or claim."***
>
> ***"What particulars are to be stated must depend on the facts of the case. In my opinion it is absolutely essential that the pleading, not to be embarrassing to the Defendants, should state the facts upon which will put the Defendants on their guard and tell them what they have to meet when the case comes on for trial."***

[87.] Since the **Philips** case, there has been a series of cases decided which have consistently reaffirmed the principle that parties are bound by their pleadings including **Loveridge and Another v Healey [2004] EWCA Civ 173, Al-Medenni v Mars UK Ltd [2005] EWCA Civ 1041, Johnston v Caddies Wainwright Ltd [1983] EWCA Civ J0121-1**, and **Jacobs v Chalcot Crescent (Management) Company Limited (2024) EWHC 259 Ch** among others.

[88.] I have reviewed the pleadings and in particular, the Amended Statement of Claim and the Lockharts' pleaded claims are for breach of the alleged implied terms of the contract, breach of contract and or induced frustration.

[89.] Further, the Amended Statement of Claim commenced at paragraph 26 under the heading *"The First and Second Plaintiff's Claim for Breach of Contract"* with the particulars of the Mortgage Loan Agreement dated 19th August, 2016, a chronology of the events with reference to the process of the investigation and subsequent approval of the title of the subject property by the attorneys, the express terms of the Mortgage Loan Agreement, reference to the proposed implied terms of the said Agreement and concluded with the said breach of the Mortgage Loan Agreement.

[90.] The Plaintiffs plead at paragraphs 16 and 17 that Mrs. Lockhart was terminated by a letter dated 17th October, 2016 without cause which was confirmed by a subsequent letter from the Bank's attorneys dated 23rd November, 2016.

[91.] There were no pleaded allegations of the length of time it took for the loan to be processed, the difficulties experienced by the Plaintiffs in obtaining its eventual approval and the withdrawal of the loan prior to the termination of Mrs. Lockhart. These "Material Facts" were referred to by the Lockharts' attorney as germane to the Court's determination of their claim.

[92.] However, these issues were only raised during the course of the trial by Mrs. Lockhart and her witness, Ms. Deal.

[93.] The Lockharts' attorney invited the Court to accept that the evidence relative to Mrs. Lockhart's termination having occurred after the withdrawal of the loan was uncontroverted. Counsel submitted that, given the rule in **Browne v Dunn (1893) 6 R 67**, the party disputing the evidence

of a witness on a material point must *"make it plain, while the witness was in the box, that the evidence was not accepted"*. In other words, as provided in **Markem Corp and another v Zipher Ltd; Markem Technologies Ltd and others v Buckby and other s [2005] EWCA Civ 267**:

> ***'Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.' [Emphasis Added]***

Accordingly, the Plaintiffs argued that the Court is bound to accept Mrs. Lockhart's evidence as to the sequence of events.

[94.] The Lockharts' pleaded case relative to the termination of Mrs Lockhart and the withdrawal of the loan commenced (i) at paragraph 16 with the termination letter by the Bank to Mrs Lockhart dated 17 October, 2016; (ii) at paragraph 47 the Bank's letter dated 25 October, 2016 advising the Lockharts that it had withdrawn the Mortgage Loan Agreement because of the change in their financial position; and (iii) at paragraph 48 with another letter from the Bank's attorneys dated 23 November, 2016 advising that the Bank withdrew financing by reason of the material change of circumstance. Each of these paragraphs were admitted by the Bank.

[95.] In summary, the pleaded case advanced by the Plaintiffs was that Mrs. Lockhart was terminated on 17 October, 2016 and the Bank withdrew the financing on 25 October, 2016 because of the change in their financial position or a material change of circumstances. The Bank's attorney reiterated the withdrawal and the reason for the withdrawal by a further letter dated 23 November 2016.

[96.] These facts were undisputed between the parties.

[97.] Lord Justice Dyson in the **Al-Medenni v Mars UK Ltd** case had this to say:

> ***'The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ 173, Lord Phillips MR said this at paragraph 23:***
>
> ***"In McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 Lord Woolf MR observed:***
>
> ***'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties.'***
>
> ***It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no***

prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."

[98.] The Lockharts' Counsel in her submissions and through her evidence advanced their case on the Material Facts, viz., the inordinate length of time it took to process the loan, the challenges faced in processing it and the subsequent withdrawal of the loan prior to her termination. However, these facts are inconsistent with the pleadings.

[99.] It is on the basis of this departure from the pleadings that the Bank has invited the Court to disregard the evidence contained in the witness statements of Mrs. Lockhart and Ms. Deal at paragraphs 21–72, 131–134 and 20–47, 52–56, 59, 64 and 68 respectively. Each of these paragraphs refer to facts not pleaded by the Lockharts. In fact, the Material Facts advance a different case than the one pleaded.

[100.] The Court is mindful of what the cases refer to as the *"paramountcy of pleadings in proceedings"* which affirms the necessity for litigation to be confined within the boundaries set by the parties' pleadings and the importance of ensuring that parties are held to the case they have pleaded. Where material facts are introduced through witness evidence that depart materially from the pleaded case, the opposing party is placed at a distinct disadvantage, unable to properly prepare or respond. Put another way in the words from Lord Justice Coton in the **Phillips** case, "*In my opinion it is absolutely essential that the pleading, not to be embarrassing to the Defendants should state the facts upon which will put the Defendants on their guard and tell them what they have to meet when the case comes on for trial."*

[101.] Such departures the cases say *"are not merely technical—they strike at the heart of fair adjudication"*.

[102.] Unfortunately, at this juncture, it is impossible to permit the Plaintiffs to amend their pleading. However, the inconsistency between the case advanced at trial and that which was pleaded is both irreconcilable and materially prejudicial to the Bank's ability to meet the case against it.

[103.] Therefore, the "Material Facts" upon which the Lockharts have relied upon cannot be considered.

[104.] In these circumstances, I am left with no alternative but to disregard the evidence contained in the witness statement of Mrs. Lockhart at paragraphs 21–72 and 131–134 and that of Ms. Deal at paragraphs 20–47, 52–56, 59, 64, and 68.

[105.] I will now consider the two other grounds advanced for the Lockharts.

Implied Terms

[106.] The parties have each agreed the express term as contained in the Mortgage Loan Agreement and the Bank's reliance on the said term. It reads as follows:

> *The Bank reserves the right to:- withdraw the offer of the loan if at any time before the loan is drawn down any of the information submitted in connection with the mortgage application is found in the Bank's opinion to be incorrect or misleading or if the bank becomes aware of any adverse change in the borrower's circumstances.*

[107.] The Mortgage Loan Agreement referenced the Employee Borrowing Agreement at page 3 of 5. This Agreement stated as follows:-

> *"I agree that should my employment terminate for any reason other than retirement, the interest rate on all my loans with FirstCaribbean International Bank (Bahamas) Limited or FirstCaribbean International Finance Corporation (Bahamas) Limited and such other subsidiaries or affiliates of FirstCaribbean International Bank Limited as may from time to time hereafter come into existence and any successors or assignees of these Companies (each known as the "Bank") will on the date of such termination be adjusted to the Bank's then prevailing rate applicable to customer loans with similar security and similar terms and conditions, or if a mortgage loan, will be adjusted to the rate stipulated in the mortgage."*

[108.] The Lockharts invited the Court to imply the following terms into the Mortgage Loan Agreement:

(i) that the Defendant would not cause a change of circumstances which existed at the time the Agreement was made;

(ii) that the Defendant would not cause a change of the Plaintiff's financial circumstances which existed at the time of the Agreement;

(iii) that the Defendant would not terminate the First Plaintiff's employment without cause, so as to cause a material change in circumstances.

(iv) Assuming that question (iii) is answered in the affirmative, whether the Defendant breached the implied terms or any of them?

(v) Whether the Defendant induced the frustration of the Agreement?

[109.] At the outset the parties have also agreed that the Bank and Mrs Lockhart were in two separate and distinct relationships viz., as an Employer/Employee and a Banker/Customer.

[110.] The case advanced on the pleadings by the Lockharts was that Mrs Lockhart was terminated on 17 October, 2016 and the Bank withdrew the loan by letter on 25 October, 2016. A subsequent letter would also be sent by the Bank's attorney on 23 November, 2016 reiterating the withdrawal.

[111.] It is an established principle that courts are reluctant to imply terms into a contract where the parties have expressly agreed their intentions. In **BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266**, Lord Simon said:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

[112.] Both Counsel have referred to the dicta of Lord Neuberger in the case of **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2015] UKSC 72** where his Lordship approved the case above and also set out the test for implied terms. This court accepts that is the test to be applied in the instant case.

[113.] The Lockharts have submitted that the implied terms that they have relied upon are terms to be implied into the Mortgage Contract and not into the First Plaintiff's employment contract. Secondly, they also cited and relied upon the cases of **Barque Quilpué, Limited v. Brown, William Cory & Son Ltd v London Corpn, Ogdens Ltd v Nelson** and **Plantation Holdings (FZ) LLC v Dubai Islamic Bank PJSC** which they say make the same point namely that every contract has an implied term (i) that one party to a contract will not do anything to prevent the other party from performing the contract, (ii) that one party to a contract would do nothing of his own motion to put an end to the state of circumstances under which the contract operates and (iii) that one party to a contract cannot by his own motion cause the impossibility of performance of a contract.

[114.] They say that these terms are necessarily implied into every contract because if they were not, that is if a party could make a contract and then of its own motion derail the contract with impunity the contract would then have no efficacy at all. Counsel for the Lockharts submitted that the implied terms are necessary for the business efficacy of the contract. In short, that the contract is incapable of performance without the implied terms.

[115.] Counsel for the Lockharts have advanced the argument that the Mortgage Loan Agreement cannot achieve its intended purpose or retain legal efficacy if, after execution, one party is permitted—without consequence—to obstruct the other party's performance, terminate the operative circumstances of the agreement, or unilaterally render performance impossible.
Mrs. Rolle, KC, submitted that the implication of terms prohibiting such conduct is necessary to give business efficacy to the contract. She further contended that these implied terms are not inconsistent with any express provision of the Mortgage Loan Agreement.

[116.] On the other hand Counsel for the Bank has submitted that the implied terms contradicted the express terms of the contract.

[117.] The Bank submitted that this Honourable Court must first construe the express terms of the relevant contractual documents—namely, the Facility Letter, the CIBC FirstCaribbean application form, and the Employee Borrowing Agreement—to determine whether any conflict arises.

[118.] Secondly, the Court must assess whether the proposed implied terms are necessary to give business efficacy to the contract or are so obvious that "they go without saying."

[119.] Thirdly, any implied term must be capable of clear expression.

[120.] Lastly, in evaluating whether a term is necessary to give business efficacy, the Court must consider whether, absent the term, the contract would lack commercial or practical coherence.

[121.] On the first question, the Bank argued that the evidence demonstrates a contradiction between the proposed implied terms and the express provisions of the Employee Borrowing Agreement, which contemplates the Bank's ability to dismiss the First Plaintiff with pay. The First Plaintiff conceded that the Bank could terminate her employment without pay and that no written documentation guaranteed her continued employment.

[122.] On the second question, the Bank submitted that the implied terms are neither necessary for business efficacy nor so obvious as to be presumed. The Plaintiffs were already in a Banker-Customer relationship with the Bank, and the continuation of the First Plaintiff's employment was not essential to maintaining that relationship. Moreover, the Bank did not intend to incorporate terms into the Banker-Customer contract that would restrict its discretion in managing its employees or business operations.

[123.] Regarding the third question, the Bank acknowledged that the proposed implied terms are capable of clear expression. However, it maintained that the contract retains commercial and practical coherence without them, noting that the Plaintiffs had previously obtained two mortgage facilities from the Bank without such terms being implied.

[124.] Finally, the Bank contended that the principle of implied terms does not apply in this instance, as the Banker-Customer relationship was not terminated by any conduct of the Bank. Rather, the contract concluded by mutual agreement due to an extraneous circumstance unrelated to the Banker-Customer relationship.

[125.] I accept the position of Counsel for the Lockharts supported by the authorities regarding the terms implied in every contract and the necessity for the same. I also accept the test laid down by Lord Simon in the case of **BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266** for a term to be implied and the necessary conditions that must be satisfied.

[126.] The Employee Borrowing Agreement was expressly incorporated by reference into the Mortgage Loan Agreement. By executing both the Employee Borrowing Agreement and the Mortgage Loan

Agreement, the Lockharts affirmed their acceptance of the terms therein, including the incorporation.

[127.] In light of these submissions, this Honourable Court is tasked with determining whether the proposed implied terms are both legally justified and commercially necessary. The Plaintiffs assert that without such terms, the Mortgage Loan Agreement is vulnerable to unilateral frustration, rendering it ineffective and incoherent. They rely on the doctrine of business efficacy and the presumption of good faith in contractual performance. Conversely, the Bank maintains that the express terms of the governing documents are sufficient and internally consistent, and that the proposed implied terms would impermissibly constrain its managerial discretion. The Bank further argues that the contract retains commercial coherence without the implied terms, as evidenced by prior mortgage arrangements with the Plaintiffs. The resolution of this issue turns on whether the implied terms meet the established criteria—namely, necessity, obviousness, consistency with express terms, and clarity of expression—and whether their inclusion is essential to uphold the integrity and functionality of the contractual framework.

[128.] I have considered the established authorities on implied terms including: **BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) CLR 266, Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10, and Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72.**

[129.] I will consider the implied terms.

(i) *that the Defendant would not cause a change of circumstances which existed at the time the Agreement was made;*

(ii) *that the Defendant would not cause a change of the Plaintiff's financial circumstances which existed at the time of the Agreement;*

(iii) *that the Defendant would not terminate the First Plaintiff's employment without cause, so as to cause a material change in circumstances.*

[130.] I found that each of the proposed implied terms by the Lockharts were capable of clear expression and had thereby satisfied one of the requirements laid down by Lord Simon in the **BP Refinery** case.

[131.] However, I did not find that that they satisfied the other conditions laid down.

[132.] Mrs. Lockhart was an employee with the Bank and the Employee Borrowing Agreement had already been incorporated into the Mortgage Loan Agreement.

[133.] Therefore, when this is considered then, the other conditions are not met because: (i) the terms are not reasonable and equitable, as they would unduly constrain the Bank's managerial discretion

over its employees; (ii) they are not necessary to give business efficacy to the contract, which remains commercially coherent without them; (iii) they are not so obvious that "they go without saying"; (iv) they contradict the express terms of the Employee Borrowing Agreement, which expressly contemplates termination of employment for reasons unrelated to the borrowing arrangement.

[134.] Accordingly, I find that the proposed implied terms cannot be judicially incorporated into the Mortgage Loan Agreement.

Self-Induced Frustration

[135.] The Plaintiffs further allege that the Bank engaged in conduct amounting to self-induced frustration, relying on **Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] All ER Rep 86** where the Privy Council held that frustration cannot be invoked where the frustrating event was brought about by the party seeking to rely on it and **Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd [1942] AC 154** particularly the dicta of Viscount Simon LC at p.166, which affirms that a party cannot plead frustration where it has itself caused the impossibility of performance.

[136.] The position of the Plaintiffs on this issue is worth repeating here verbatim:

> "1. The Plaintiffs have started their Closing Submissions with the clarification of this position so that the Court is not misguided, mislead, distracted or otherwise deluded into thinking that the Plaintiffs contend that the First Plaintiff's employment with the Defendant was guaranteed and/or that the Defendant could never terminate her so long as the Loan Agreement was in existence. **THE PLAINTIFFS' CONTENTION.!!**
>
> [Emphasis added by the Plaintiffs' Counsel]
>
> 2. The Plaintiffs contend that the Defendant could not terminate the Plaintiff just as the means of terminating the Mortgage Loan Agreement because in so doing the Defendant thereby breached the Mortgage Loan Agreement."

[137.] Therefore, Counsel for the Plaintiffs did not dispute the Bank's legal authority to terminate Mrs. Lockhart's employment. Both Mrs. Lockhart and her witness, Ms Deal conceded this position. As such, the Bank was entitled, in law and under contract, to bring the employment relationship to an end at any time.

[138.] However, the Plaintiffs' case rests not on the absence of legal entitlement, but on the alleged motive behind the Bank's decision. Counsel submitted that the Bank terminated Mrs. Lockhart's employment for the sole purpose of withdrawing the previously approved Mortgage Loan Agreement. In other words, the Plaintiffs contend that the termination was engineered to frustrate the loan and deny the Plaintiffs access to financing.

[139.] The Bank submitted that it has never advanced frustration as the basis for its withdrawal of the loan offer. Rather, the Bank maintained that its decision was made in accordance with the express terms of the Mortgage Loan Agreement. In its view, there was no supervening event that rendered performance impossible or radically different. The Bank further contends that both parties foresaw the possibility of a change in financial circumstances, and that the Agreement expressly provided for such contingencies. Accordingly, the Bank asserts that its conduct was contractually justified and does not engage the doctrine of frustration.

[140.] While the Court does not dismiss the seriousness of the allegation by the Lockharts, motive alone does not transform a lawful act into a frustrating event.

[141.] I agree with the Bank. The lawful exercise of a contractual right—however unfortunate in timing or effect—does not engage the doctrine of frustration. As affirmed in **Davis Contractors Ltd v Fareham UDC [1956] AC 696**, frustration arises only where a supervening event renders performance impossible or radically different from what was agreed; it does not extend to situations of hardship, inconvenience, or financial disadvantage. Similarly, in **The Super Servant Two [1990] 1 Lloyd's Rep 1**, the Court of Appeal held that frustration must not be self-induced, and cannot arise from a party's own election or contractual discretion. The decision of the Bank to terminate employment and withdraw the loan offer—while distressing to the Plaintiffs—was lawfully made and does not constitute a frustrating event in law.

Conclusion

[142.] The Court expresses its appreciation to Counsel for both parties for their comprehensive and helpful submissions, which materially assisted in the resolution of the issues before the Court.

[143.] In conclusion, the Court acknowledges the hardship experienced by the Lockharts and is not without sympathy for the circumstances in which they found themselves. Nevertheless, the legal threshold for frustration has not been met. The events in question do not amount to a supervening occurrence beyond the parties' control, nor do they justify the implication of a term requiring, in essence, that Mrs. Lockhart remain employed following loan approval. Such a term would exceed the scope of the Mortgage Loan Agreement and impose obligations not contemplated by the parties. The Bank acted within its contractual rights, and the Lockharts' claim must be dismissed.

[144.] I award costs to the Bank to be agreed between the parties within thirty (30) days or longer by agreement. In the event that the parties are unable to agree, they will be assessed by the Court, on the papers. The Lockharts shall be given an opportunity to respond within fourteen (14) days after service of the same on them.

Dated the 26th day of September, 2025

Camille Darville Gomez
Justice