THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 147 OF 2012

AVI ENTERPRISES LTD} .... PLAINTIFF

VERSUS

1. **ORIENT BANK LIMITED }**
2. **ATARA MARY LUCY} .... DEFFENDANTS**

BEFORE HON JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The plaintiff's action against the first defendant is for declaration of breach of contract, breach of fiduciary duty, recovery of Uganda shillings 75,000,000/=, interest, special damages, general damages, a permanent injunction and costs of the suit.

It is averred in the plaint that the plaintiff was at all material times a customer of the first defendant having opened current account number 13171802010101 and the second defendant was employed by the first defendant in whose professional job she was directly involved in managing of the plaintiffs account and advising the plaintiff on investment options/decisions. The second defendant while executing her duties on 11th of January 2010 advised the plaintiff through its directors to obtain an overdraft facility and invest it by lending the monies to the second defendant for the repayment of the plaintiff with interest after one month. Consequently in April 2011 the plaintiff applied for the loan and the first defendant approved a loan of 30,000,000/= to the plaintiff would receive the same an advanced all the money to the second defendant. The second defendant was given the money on 11th of February 2010 while in the course of employment of the first defendant. That the investment advice was given carelessly and without regard to the financial risk and loss it would expose the plaintiff to and in breach of the professional duty and contract of banking with the plaintiff. After one month the second defendant failed to deposit the loan money with interest. The plaintiff’s case against the first defendant is that it allowed its employee, the second defendant while in the course of her employment as a staff of the first defendant to steal the plaintiff’s money. Alternatively the first defendant seven was negligent in the discharge of the professional duty of care owed to the plaintiff to give sound investment advice.

Subsequently the plaintiff reported the matter to the police and the second defendant was arrested and tried in Buganda road court and a criminal case number 382 of 2011 wherein she was convicted on her own plea of guilty. She was ordered to pay the plaintiff Uganda shillings

22,400,000/= with accumulated interest from the bank. The plaintiff alleges that despite the order the defendants have refused and neglected to pay the plaintiff and together with interest the amount is now over Uganda shillings 55,000,000/=. Notwithstanding the court orders the defendant's going to demand and recovered the loan the plaintiff obtained by attachment and sale of the plaintiffs property including motor vehicles. Therefore the plaintiff alleges that it was greatly affected the defendant unlawful actions. The plaintiff also claims special damages for loss of business opportunities due to the loss occasioned it by the overdraft facility and the sale of two of the plaintiffs vehicle was valued at over Uganda shillings 100 million. The plaintiff also alleges loss of business in the region of Uganda shillings 300,000,000/=, causing business dress or in close of tools of trade loss of capital valued at over Uganda shillings 120,000,000/=. The plaintiff further alleges misrepresentation about the investment leading to financial causing loss.

The plaintiff seeks a declaration that the defendants breached the banker customer contract with the plaintiff, special damages, a permanent injunction restraining the first defendant or its agents from attachment and sale of the plaintiff's properties, general damages for breach of contract, account of the monies from the sale of the plaintiffs motor vehicles sold by the first defendant, exemplary damages, general damages for negligence, interest at the rate of 28% per annum from the date of the award and costs of the suit.

Summons to file a written statement of defence were issued by the court on 18th of April 2012 and served on the defendants. In miscellaneous application number 248 of 2012 and filed on court record on the 10th of May 2012 the plaintiff applied for default judgment against the defendants in the main suit and for the suit to proceeds ex parte. The first defendant also applied in miscellaneous application number 320 of 2012 for enlargement of time to file and serve a written statement of defence. The plaintiff also applied for a temporary injunction to issue to restrain the first respondent bank from attaching its property. This was miscellaneous application number 196 of 2012. On 22 August 2012 and by consent of counsels for the parties miscellaneous application number 320 of 2012 for enlargement of time within which to file and serve a written statement of defence was granted. The applicant/first defendant was to file and serve the written statement of defence within 14 days. Secondly a temporary injunction was issued against the defendants/respondents from any further attachment and sale of the applicants/plaintiffs property or arrest of the plaintiff’s directors pending disposal of the main suit. Miscellaneous application number 248 of 2012 for default judgement was withdrawn.

Subsequently the first defendants did not file a written statement of defence in terms of the consent order issued on 22nd of August 2012. The plaintiff's counsel in a letter dated 14th of September 2012 applied to the registrar for default judgement and to have the matter proceed ex parte under order 9 rule 10 of the Civil Procedure Rules as if the defendants had filed a defence. On 17 September 2012 a default judgement was entered for the plaintiff against the defendants as prayed for in the plaint and the suit set down for assessment of the quantum of damages. Subsequently on 21 January 2013 this suit proceeded ex parte and the plaintiff called one witness

its director Mr Singh Hardeep who testified as PW1. At the hearing of the applications and the several appearances in court, the plaintiff was represented by Dr James Akampumuza of Messieurs Akampumuza and Company Advocates while the defendant was represented by Sam Gimanga of Messrs Shonubi Musoke and Company Advocates.

Whereas the suit proceeded in default of filing a defence by the defendants pursuant to the order of the registrar dated 17th of September 2012, the first defendants subsequently filed another application namely miscellaneous application number 7 of 2013 seeking to set aside the default judgement entered by the court on 17 September 2012, for the order allowing the respondent/plaintiff to proceed ex parte to be set aside and for setting civil suit number 157 of 2012 for hearing inter partes. The application was filed on 23 January 2013 and argued on 19 March 2013. The first defendant's application was dismissed with costs on 22nd of March 2013. In the meantime the plaintiff had closed its case and written submissions had been filed on 11 February 2013 and the suit fixed for judgement.

The plaintiff's evidence was that the second defendant had advised PW1 Mr Singh Hardeep that the plaintiff had a good record with the bank and was qualified for an overdraft facility from the bank which it could use to advance its business. PW1 testified that the second defendant assured him that the first defendant's head of credit Department was this second defendant's uncle who would ensure that the plaintiff was granted the loan facility. On the prompting of the second defendant the plaintiff's director on behalf of the plaintiff obtained a loan of Uganda shillings 30,000,000/= from the first defendant. The plaintiffs account was credited and the plaintiff went ahead through its director to hand over the money to the second defendant who was never paid it back with interest as agreed. The second defendant was arrested tried and convicted and the first plaintiff requested the first defendant to refund the monies. The first defendant started threatening the plaintiff and sent debt collectors to take the plaintiffs property namely Motor vehicle Toyota Premio registration number UAK 562F valued at Uganda shillings 13,000,000/=, A starlet vehicle UAM 343 valued at Uganda shillings 4,500,000/=, commercial track Isuzu UAH 024 K valued at Uganda shillings 22,000,000/= which were sold and proceeds not accounted for to the plaintiff.

In the written submissions of the plaintiff the first issue was whether there exists of a contract between the plaintiff and the first defendant. Counsel contended that a contract became existent when the plaintiff opened account number 13171802010101 according to exhibit P1. This constituted an implied contract according to the case of **Edward Thomas Foley versus Thomas Hill and others (1848) 2 HLC 28 English Reports** cited as 9 E.R. 1002 a decision of the house of Lords which held that a banker/customer relationship is based on contract law and the terms are implied by banking practice. Counsel contended that the plaintiff hired the services of the first defendant to keep its deposits and advise it on financial matters. The relationship between a banker and customer is based on contract according to the case of **Joachimson versus Swiss Bank Corp [1921] 3 KB 110 CA.**

On the second issue which is whether the defendants breached the contract in the first defendant and plaintiff, the plaintiff's case is for breach of contract, negligence in handling of the banker customer contract which occasioned loss to the plaintiff. The submission of the plaintiff is that the first defendant bank had a duty to execute the plaintiff's instructions to keep its money safe and not expose it to fraud committed by the first defendants' employees including the second defendant. The defendants took advantage of their fiduciary position and were in a stronger position than the plaintiff so as to entice the plaintiff to take an overdraft facility it did not need but based on the fraudulent misrepresentation that the plaintiff was to make a profit within one month. Those actions amounted to breach of the banking contract by failure of the defendant to perform their lawful banking duties to the plaintiff or their actions to take advantage of the plaintiff. Counsel relied on the case of **Byensi Harriet v Kamugisha J.B. HCCR No. 26 of 2011** where Justice Andrew Bashaija quoted from **Royal Bank of Scotland v Etridges No. 2 (2001) UK HL [2002] 2 AC 773** for the doctrine of undue influence as a ground of relief developed by the courts of equity. From the doctrine of undue influence the common law courts developed the principle of duress. Counsel relied on the proposition of law that where unacceptable means is used to procure a transaction, the law will not permit the transaction to stand on the grounds of improper or undue influence.

The second defendant pleaded guilty to the fraudulent transaction and both defendants never took shift measures to pay the plaintiffs money even after a guilty verdict and order to pay. Counsel submitted that the bank must carry out its services to the customer with due care and skill. He relied on the case of **Woods versus Martins Bank [1959] 1 QB 55** where it was held that it was within the scope of the bunkers business to advise on financial matters and in doing so the bank owed a duty of care to the plaintiff to advise him with reasonable care and skill. Counsel also relied on the principle canvassed in the case of **Hedley Byrne and Company Ltd versus Heller (1961) All ER** where the House of Lords held that a duty independent of contract may exist if the person making enquiry is relying on the bank to exercise its special knowledge of the customer to give a true and faithful reply.

The bank has a duty to protect the plaintiff as their customer from fraud. Consequently the plaintiff's case is that the first defendant breached the banking contract and is liable for the manner in which the second defendant handled the plaintiff's money by exploiting confidential information she obtained while handling the plaintiffs account. Therefore the plaintiff's counsel submitted that the first and second defendants are jointly and severally liable for breaching the banking contract.

On the question of whether the first defendant was vicariously liable for the actions of the second defendant, counsel relied on the definition of vicarious liability in the case of **Lister and Others vs. Hesley Hall Limited [2001] UK HL 22.** He submitted that for a claim for vicarious liability to succeed, there must be proof of three ingredients. The first ingredient is that there must be a contractual relationship between an employer and employee. Secondly the employee must have committed a wrong that occasioned injury to another party and this wrong was done in the course

of the employees employment or thirdly in an action of ostensible authority by the employer however incidental.

Counsel further submitted on the principle that a master may be liable for the fraud of the agent. He relied on the case of **Barwick versus English Joint-Stock Bank (1867) 2 Ex 259** where the plaintiff filed an action for false representation and for money had and received. The question was whether if there was fraud on the manager, whether being employed by the bank made the bank answerable. The general proposition of law was that a master is answerable for every wrong of the servant or agent committed in the course of the service and for the Masters benefit whether no express command of a master is proved. Consequently the argument of the plaintiff is that the second defendant as an employee of the first defendant who committed the wrong complained off occasioned injury to the plaintiff. It was the first defendant who placed the second defendant in the position which she used to make misrepresentations and offer wrong advice to the plaintiffs. The advice was a trick to fleece the plaintiff of the money in its account an act for which she pleaded guilty in a criminal court. The plaintiff's counsel further referred to the case of **Lloyd versus Grace Smith and company (1912) AC 716** where a firm of solicitors were held liable for the dishonesty of their managing clerk who persuaded a client to transfer property to him and he then disposed of the property for his own benefit. Counsel concluded that the defendants breached a duty of care through making financial misstatements that subjected the plaintiff to losses. There was fraudulent misrepresentation, recklessness and carelessness coupled with criminality.

Counsel further referred to **Hedley Byrne versus Heller and Partners [1964] AC 465** on the duty to exercise due care when providing banking and investment advice services. The duty of care which the first defendant owed to the plaintiff was foreseeable. The plaintiff trusted the defendant as its bankers with expertise to give him professional advice. The first defendant bank continued employing the second defendant even after pleading guilty to the offence. Secondly it impounded and attached the plaintiff's vehicles. The first defendant never bothered to give an account to the plaintiff, before sale of its vehicles which were its tools of trade.

Judgment

The first issue is: **whether a contract existed between the plaintiff and the first defendant.**

Counsel relied on the case of **Edward Thomas Foley versus Thomas Hill and others (1848) 9 ER 1002** for the proposition that a banker/customer relationship is based on contract law and the terms are implied by banking practice. It was not a contract which was ordinary but with extended liabilities in offering other services such as collecting services. Liabilities for other services are based on other relationships such as the duty of care and principal/agent relationship. The existence of an implied contract between the plaintiff and the first defendant is not in doubt. The first issue is therefore answered in the affirmative. When the plaintiff opened an account

number 13171802010101 in the first defendant’s bank, a contractual relationship accrued between the parties. There is no need to comment about the terms of the contract.

The second issue is: **Whether the defendants breached the contract between the first defendant and the plaintiff?**

The plaintiff’s case is that the first defendant bank had a duty to execute the plaintiff’s instructions and to keep its money safe without exposing it to fraud. The defendants took advantage of their fiduciary position and were able to entice the plaintiff to apply for an overdraft facility it did not need. There was fraudulent misrepresentation to the effect that the plaintiff would make a profit within one month. Counsel further relied on the doctrine of undue influence.

I have carefully studied the exhibits admitted in evidence. Exhibit P1 is a bank statement of the plaintiff. Showing account number 13171802010101 with the first defendant bank. Exhibit P2 are proceedings of Buganda Road Chief Magistrate's Court in criminal case number 382 of 2011. In that case PW2 Mr Hardeep Singh testified that that the second defendant took money from the plaintiff amounting to **Uganda shillings 30,000,000/=** and promised to refund it within one month with interest of the bank. The second defendant failed to refund the money and issued cheques which bounced. The plaintiff reported her to the police in February 2011 and the incident had happened in January 2010. The money was received by the second defendant from PW2 a director of the plaintiff. Some money was deposited into police custody but the plaintiff did not collect it. It is evident from exhibit P2 which are the proceedings of the trial court that on 10 June 2011 the accused pleaded guilty as charged. The accused informed the court that PW1 was correct that she gave cheques that bounced. She was convicted on her own plea of guilty on the charges. The court order is as follows:

> "The accused is to pay back the 22,500,000/= with the lending interest accumulated from that time at the bank rate at that time. Police ordered to pass over the 7.5 million shillings to the complainant with immediate effect. ...
>
> Sgd: Wekesa John
>
> Magistrate Grade One
>
> 10/06/11
>
> Ordered to pay within 30 days
>
> Sgd: Wekesa John
>
> Magistrate Grade One
>
> 10/06/11”

The plea of guilty suggests that the accused was charged with issuing cheques which bounced. The brief facts given by the second defendant after pleading guilty and which is recorded is that "Evidence of PW1 is correct that I gave the cheques that bounced."

This suit proceeded after default judgement was entered for formal proof under order 9 rule 10 of the Civil Procedure Rules. The judgement against the second defendant still stands and she has not participated in the proceedings. The judgement of the registrar dated 17th of September 2012 enters judgement in favour of the plaintiff against the defendants as prayed in the plaint and the suit was set down for assessment by the court of the quantum of damages. The plaintiff prayed for special damages as pleaded in paragraph 7 of the plaint. However because the case was fixed for formal proof of damages it is necessary to examine the cause of action of the plaintiff. The causes of action pleaded in paragraph 3 of the plaint is for declaration of breach of contract, breach of fiduciary duty, recovery of Uganda shillings 75,000,000/=, interest, special damages, general damages, a permanent injunction and costs of the suit.

Paragraph 4 (b) and (c) give the material facts giving rise to the cause of action as the employment of the second defendant by the first defendant whose professional job was managing the plaintiffs account and advising the plaintiff on investment options/decisions. It is averred that on 11 January 2010 the second defendant advised the plaintiff through its directors who had come to transact business to take an overdraft facility on its account and invest it by lending monies from the overdraft facility to the second defendant for the payment of the plaintiff with interest after one month. The investment advice given by the second defendant according to the plaint was to lend money to the second defendant. No facts are given as to what the money was to be used for. Secondly the advice was given by the second defendant. Thirdly the cause of action of the plaintiff relies on certain common law principles. The first principle was that it was within the scope of the bank’s business to give advice on financial matters and in so doing the bank owed a duty of care to the plaintiff.

The first matter to be considered is that the problem arose when the director of the plaintiff handed over the overdraft money to the second defendant for investment. The nature of the investment is unknown. What is clear is that the second defendant undertook to pay the money within one month with interest which would be sufficient to cover the interest of the bank on the overdraft facility. She defaulted and the plaintiff became liable to make good both the principal and interest on the overdraft facility. The offer letter by which the first defendant offered credit facilities to the plaintiff is exhibit P3 and is dated 4th of January 2010. The offer letter is signed by PW1 Mr Hardeep Singh and Brijesh Patel directors of the plaintiff. The offer letter ends with the words "*If the above terms and conditions are acceptable to you please sign the duplicate copy of this letter and return the same to us (along with applicable arrangement fees) and proceed to complete the required documentation formalities*”.

The offer letter clearly indicates the nature of the facility as a temporary overdraft of **Uganda shillings 30,000,000/=.** It was to meet the working capital requirements of the plaintiff and the

period of the overdraft facility was one month. Interest was 6% per annum above the first defendant bank's prime lending rate. The facilities were secured by the personal guarantee of the directors and deposit of motor vehicles UAK 562 K Toyota Premio in the names of Brijesh Patel. In the overdraft facility letter the directors of the plaintiff represented to the bank and warranted that they had the necessary power and authority to get the facility upon the terms and conditions outlined and to observe the obligations. The letter was valid and executed and is a binding obligation which was enforceable against the plaintiff. That the plaintiff warrants in exhibit P3 that it was not in default under any agreement to which it is a party by which they may be bound and no event has occurred as a result of which the plaintiff might commit a default in the near future.

The memorandum and articles of association of the plaintiff was not produced in evidence. The directors however warranted that they had the requisite authority of the plaintiff to get the overdraft facility. The evidence is quite clear that the second defendant was responsible for the loss to the plaintiff. It is apparent that the second defendant took advantage of the one of the directors of the plaintiff and gave an undertaking by which he would lend her money which she would pay back with interest. There is absolutely no evidence as to what she would use the money for. The money was borrowed to be lent out.

The plaintiff relies on the common law and the duties therein imposed by it to give sound financial advice. Before considering the common law, it will be useful to examine the statutory framework for investment advice in Uganda.

Section 1 (t) of the Capital Markets Authority Act cap 84 laws of Uganda defines an investment adviser to mean a person who carries on the business of advising others concerning securities. The business of advising others has to be part of the regular business or the person should issue or publish analysis or reports concerning securities. An investment adviser is a person acting under a contract or arrangement with a client, and that it is on behalf of the client whether on the discretionary authority granted by the client or otherwise to manage a portfolio of securities for the purpose of investment. The definition under section 1 does not include a bank as defined in section 1 of the Financial Institutions Act. Section 32 of the Act provides that no person can be an investment advisor without a licence and it provides as follows:

> "No person shall act as an investment adviser or hold himself or herself out to be an investment advisor unless he or she is the holder of an investment advisers licence issued under this part."

Under section 35 of the Capital Markets Authority Act cap 84 a broker or dealers licence or investment advisors licence can be granted to a body corporate such as the plaintiff but it cannot be granted to a bank. It may be argued that the Capital Markets Authority Act deals with investment in securities. Section 1 (hh) defines securities as:

> “(hh) “securities” means—

(i) debentures, stock, or bonds issued or proposed to be issued by a government;

(ii) debentures, stocks, shares, bonds or notes issued or proposed to be issued by a body corporate;

(iii) any right, warrant, option, or futures in respect of any debenture, stocks, shares, bonds, notes or in respect of commodities; or

(iv) any instruments commonly known as securities, but does not include—

(A) bills of exchange;

(B) promissory notes; or

(C) certificates of deposit issued by a bank or financial institution licensed under the Bank of Uganda Act;"

The Capital Markets Authority Act is very clear about what constitutes security and what do not constitute security. In theory therefore the second defendant or the first defendant bank could not be an investment advisor as defined under the Capital Markets Authority Act. Consequently the first defendant or its employees could not have lawfully given any investment advise (in securities) as defined by the Capital Markets Authority Act. Such an undertaking would be illegal. Secondly there is no evidence about the kind of investment that the plaintiff was required to invest in. It therefore cannot be concluded that it was an investment in securities as defined by the Capital Markets Authority Act. Thirdly there is no evidence on whether the investment was in promissory notes, bills of exchange or certificates of deposit issued by the bank or financial institution licensed by the Bank of Uganda. The evidence is that the plaintiff obtained an overdraft under terms contained in the offer letter exhibit P3 which offer letter was accepted in writing/under the signature of the plaintiffs Directors and also endorsed by the Executive Director and Head of Credit of the first defendant bank. The offer letter indeed contains terms of the contract between the parties. The written contract itself cannot be altered by oral evidence under sections 91 and 92 of the Evidence Act. Section 91 excludes oral evidence by document evidence. Oral evidence cannot be given of the terms of a written contract. The section applies to exclude oral evidence to vary or contradict the terms of a contract, terms of a grant or other disposition of property. It provides that no evidence shall be given in proof of the terms of a contract, grant or other disposition of property or of such matter except the document itself. This is the best evidence rule.

Secondly section 92 of the evidence Act deals with a situation where the terms of the contract or grant, or other disposition of property has been proved in court under section 91. Section 92 provides that "no evidence of any oral agreement or statement shall be admitted as between the parties for purposes of contradicting, varying, adding or subtracting from its terms; but oral testimony may be given of matters described in sections 92 (a) – (f). These include facts which

would invalidate the document. The existence of any separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms may be proved. Thirdly this existence of any separate oral agreement constituting a condition of precedent to the attaching of any obligation under any contract grant or disposition of property may be proved. Fourthly the existence of any distinct subsequent oral agreement to rescind or modify any such contract may be proved except where the contract is required to be in writing or has been registered according to the law for the registration of documents. Any fact which shows in what manner the language of a document is related to existing facts.

The loan agreement is between the plaintiff company and the first defendant bank. The evidence suggests that the request to hand over the money to the second defendant was made by the second defendant after the advice testified about. Evidence also shows that the request for the money is not directly linked to the main contract between the plaintiff company and the first defendant company exhibit P3. Thirdly the advise testified about in the evidence was not to lend money to the second defendant who requested for some money to be paid back within a month with interest. The nature of what she was going to do is unknown. The question is whether she acted as an agent even if she acted for her own benefit. The testimony of PW1 is as reviewed hereunder.

The testimony of PW1 which I listened to in the audio version explains clearly what happened. PW1 is the managing director of the plaintiff. The second defendant called him to the bank and informed him that the plaintiff company had a very good record and could get an overdraft. She further informed him that the head of the credit Department Mr Dick Omara was her uncle and would help approve the credit facility. According to PW1 the second defendant forced him, (persuaded him) to obtain the loan. Exhibit P3 being the loan contract for overdraft facilities is executed by two directors of the plaintiff. She prepared the papers herself and he signed. The overdraft was approved within a week. After one week the second defendant called him and requested for the money. She said she would use the money for one month and pay it back with all the bank charges. The second defendant did not pay the money back after the one month promised. That is when PW1 went to see the head of credit Mr Dick Omara. The head of credit called the second defendant to the office and after discussions assured him that he would get his money back soon but the money was not paid back. He testified that he made a mistake to withdraw the money from the plaintiffs account and give it to Mary the second defendant. Because the question of investment advice was not very clear from the testimony, the court on a question to PW1 to clarify on what he meant in the statement of claim that he had received investment advice clarified the matter. He testified that the business or investment advice received was that he would expand the plaintiffs business through an overdraft facility and the uncle of the second defendant would approve the overdraft facility. In other words the advice was for the plaintiff to capitalise its own business. PW1 was very clear that the advice was for the plaintiff to expand its business by getting an overdraft. The plaintiff never utilised the overdraft because contrary to the purpose of the overdraft spelt out in exhibit P3, the offer letter

and contract of the overdraft, PW1 the managing director of the plaintiff upon being requested by the second defendant for the money to be payable within one month with interest withdrew the **30,000,000/= shillings** and handed it over to her in what was apparently a private arrangement without any documentation. The testimony of PW1 was that after giving the advice, the second defendant prepared the necessary documentation and PW1 signed it. It is after giving the said investment advice that a week later she called PW1 and requested for the money on the ground that she would put it back with all the charges and interest. I have also noted that the overdraft offer letter was executed by two directors of the plaintiff. PW1 admitted that he had made a mistake to withdraw the money and hand it over to the second defendant. His evidence is that the advice was for the plaintiff to expand its business through the overdraft facility. The testimony is also is clear about the chronology of events. It is that soon after the overdraft facility was approved that PW1 got a call from the second defendant when she requested for the money for her own use with the promise that she would pay it back within a month. Consequently the conclusion is that the first defendant or its employees could not have acted as investment advisers in relation to giving money to the second defendant. Secondly, there is no indication as to what kind of investment other than that of expansion of the plaintiffs business formed the basis of the overdraft facility. The terms of the overdraft facility indicates the purpose of the overdraft was to meet the working capital requirements of the plaintiff. The plaintiff testified at length about the business of the plaintiff which was to deal in the renting of trucks and is an authorised distributor of Britannia Allied Industries. The terms of the overdraft facility contract are at variance with what happened when PW1 the managing director of the plaintiff handed over the money which had been approved for a specified purpose to the second defendant. The conclusion is that the first defendant or its employee could not have acted as an investment advisors to the plaintiff company as pleaded in the plaint.

The plaintiff's case will therefore be considered on other premises. We will start with the duty owed to the plaintiff by the defendants. In the case of **Woods v Martins Bank Ltd and Another [1958] 3 All ER 166** the facts were that the bank manager of a branch of the defendant's bank in response to a request by the plaintiff to be his financial adviser, advised the plaintiff who had no real business experience and was only 30 years old to invest £5000 in preference shares of BR Ltd. It was within the knowledge of the bank manager that BR Ltd had a substantial overdraft with the bank. The plaintiff authorised the defendant bank to obtain on his behalf the proceeds of certain investments, to re-invest a sum in BR Ltd out of part of the proceeds and to retain the remainder to the plaintiff's order. The defendant bank opened a current account for the plaintiff and the manager advised the plaintiff to make further investments in shares of BR Ltd and in a capital transaction in relation to unwanted trading stock of that company. The plaintiff invested a total sum of £14,800 in BR Ltd on the basis of the manager's advice, and eventually the whole sum invested was lost. In an action against the defendant bank and the manager it was established that the bank had advertised that expert advice was one of the advantages they offered to customers. Salmon J distinguished the case of **Banbury versus Bank of Montréal [1918] AC 626** which he observed turned on its own facts. It turned on the fact that the plaintiff

further admitted that the bank manager had no general authority to advice and it was not within the scope of the banks business to advice on investments at large. He held that the nature of such a business must in each case be a matter of fact and accordingly cannot be treated as if it was a matter of pure law.

> "In my judgment, the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact and, accordingly, cannot be treated as if it were a matter of pure law."

Salmon J look into account the advertisement of the defendant bank advertising their services as financial advisers in several advertisements. Among the adverts were the words "*you may consult your bank manager freely and seek his advice on all matters affecting your financial welfare*". Also admitted in evidence in that case was a book containing instructions relating to stock exchange transactions. It provided that each branch should transact stock exchange business through the broker or brokers allotted to it by head office or district office unless in any particular case the broker is specifically named by the customer. Salmon J found that the instructions did not alter the true nature of the banks business. On the basis of the nature of the banks business to give financial advice, he held that they had a duty to exercise ordinary care and skill in advising the plaintiff. It is quite clear that the basis of the judgement in the above case is the fact that the bank held itself out to be able to advice on financial matters and it was also found to be one of its businesses. Secondly the plaintiff sought financial advice. Thirdly the plaintiff was an inexperienced businessperson who needed help to invest money.

In the case before the court there is no evidence as to the true nature of the banks business. It is also not indicated whether the plaintiff sought financial advice. Thirdly the second defendant pleaded guilty to an offence. Before proceeding to establish whether the first defendant owed a duty of care in advising the plaintiff to invest its money, it is necessary to establish that it is one of the businesses the bank carries out. Secondly the nature of the investment should be disclosed. It is strange that in this case the overdraft offer letter which was endorsed by the plaintiffs directors does not indicate any where, where the money was going to be applied other than as capital for the plaintiff's business. There was nothing wrong with giving the plaintiff an overdraft to enhance its own business. The problem was that the plaintiff was enticed or allegedly duped to hand over money to the second defendant. It is not indicated where the second defendant was going to invest that money. Money was lent to the plaintiff and the plaintiff lent it back to the staff of the first defendant. Consequently the facts of the plaintiff's case are clearly distinguishable from the case of **Woods versus Martin's bank** (supra).

The second question was whether there was undue influence. Counsel relied on the case of **Royal Bank of Scotland versus Etridge [2001] 2 AC 770.** The facts of the case as stated by Lord Nicholls was that a wife charged her interest in her home in favour of the bank as security for her husband's indebtedness or the indebtedness of the company through which her husband carried on business. Later the wife asserted that she signed the charge under the undue influence

of her husband. The bank sought to enforce the charge signed by the wife and claimed an order for possession of the matrimonial home. The wife claimed that the bank had notice that her concurrence in the transaction had been procured by her husband's undue influence.

Lord Nicholls in examining the history of the law of duress or undue influence noted that in the relationship of banker and customer, the criteria is normally not met except in exceptional cases. He followed the decision of **National Westminster Bank Plc versus Morgan [1985] AC 686 at page 707 – 709.** The principle is not confined to cases of abuse of trust and confidence. It includes cases where a vulnerable person has been exploited. Several expressions used included trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other though the expressions used are not exhaustive. I have had the advantage of reading the case of **National Westminster Bank Plc versus Morgan [1985] 1 All ER 821**. The case was decided by the House of Lords in the lead judgement of Lords Scarman with the concurrence of all their Lordships. In **National Westminster Bank plc v Morgan [1985] 1 All ER 821** Lord Scarman held at page 827:

> *"Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence."*

At 831 his Lordship further stated:

> *"It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case."*

In this case, the plaintiff's managing director accepted to take an overdraft facility for purposes of expanding its capital. The offer letter was signed by two directors of the plaintiff. PW1 testified that the second defendant forced him to take the loan. There was no evidence whatsoever of coercion of any kind. The managing director discussed with the second defendant. However the plaintiff is a limited liability company and the overdraft acceptance was duly signed by its two directors. Were the two directors under duress? The overdraft facility was advanced for the plaintiff to expand its capital base. The plaintiff was not advised to hand over the money to the second defendant. What happened is that after the second defendant had used her knowledge of the plaintiffs affairs to convince the managing director to obtain the loan, she went ahead to persuade the managing director to hand over that money for only one month. The request had nothing to do with expanding the plaintiff's capital for purposes of the plaintiffs business. It was personal folly for the managing director to entrust company money to the second defendant. The

act had nothing to do with financial advice. Possibly the managing director saw an opportunity to quickly make money with the second defendant and pay it back to the company's account within a month with some profit. The overdraft facility was signed by two directors. There is no evidence whatsoever that the directors approved the withdrawal of the money to hand over to the second defendant. I am not satisfied that the first defendant bank is liable for breach of duty or negligence. The second issue of whether the defendant breached the contract between the first defendant and the plaintiff is answered in the negative. There was no breach of contract between the first defendant and the plaintiff. Whatever the managing director did was contrary to the written contract exhibit P3 between the parties.

The third issue is **whether the first defendant was vicariously liable for the actions of the second defendant**.

I have carefully considered the arguments of the plaintiff's counsel on the principle of vicarious liability of the first defendant for the acts of the second defendant. I was referred to several authorities. I will first consider the case of **Lister and others v Hesley Hall Ltd [2001] 2 All ER 769.** In that case the question was whether as a matter of legal principle employers of the warden of the school boarding house, who sexually abused boys in his care, may, depending on the circumstances be vicariously liable for the torts of their employee. The warden systematically abused the boys through mutual masturbation, oral sex and buggery. The warden had complete control of the houses in terms of discipline, giving leave for trips outside the boarding house etc. He was charged convicted and sentenced to 7 years imprisonment. An action was commenced against the boarding school for negligence and vicarious liability. The trial judge dismissed the action for negligence. The defendant admitted owing a duty of care to the boys and the court found that there was failure to report the harm meted on the boys which was a duty owed so as to take preventive action. The court found that the employer was vicariously liable for failure to report the acts of abuse. On appeal to the Court of Appeal per Waller LJ held that if the wrongful conduct is outside the course of employment, a failure to prevent or report the wrong cannot be within the scope of employment so as to make the employer vicariously liable. On appeal by the complainants to the House of Lords, Lord Steyn considered the principles upon which an employer can be held vicariously liable for the torts of employees.

Historically vicarious liability was based on the acts of the employee in the course of employment. The concept that the act complained off should be done in the course of employment was narrower than the modern concept of vicarious liability. The principle was extended to include liability for authorised wrongful acts as well as a wrongful and unauthorised mode of doing an act authorised by the master. A master may also be liable for acts which are not authorised but so closely connected with the acts which the master has authorised that they might be regarded as modes or improper modes of doing them. It is an underlying assumption that an employee acts for the benefit of his employer. However the law developed further in **Lloyd versus Grace, Smith & Company [1912] AC 716** to the effect that a master can be held liable for the dishonesty of the employee who acted for his own benefit. Consequently vicarious

liability is not necessarily defeated if the employee acted for his own benefit. In conclusion his Lordship allowed the appeal when he held at page 781 as follows:

> *" Employing the traditional methodology of English law, I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in Axeholme House to the warden. The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability."*

The second case on the subject is that of **Lloyd versus Grace, Smith and Company [1912] AC 716**. I particularly refer to the judgement of Lord Macnaughten. The facts of the case were that a firm of solicitors allowed the clerk Mr Sandles to conduct the business of the firm. In the course of conduct of that business the clerk dishonestly misappropriated the property of Mrs Lloyd for his own benefit by fraudulently presenting documents for her to sign. His Lordship reviewed the law and noted that the general rule was that the master is answerable for every fraud of the servant or agent as is committed in the course of the service and for the Masters benefit though no express command or privity of the master is proved. It was however a very different proposition to say that the master is not answerable for the fraud of the servant or agent, committed in the course of the service, if it is not committed for the Masters benefit. His Lordship further reviewed the case of **Udell vs. Atherton** where it was held that a man who is himself innocent cannot be sued for a deceit in which he took no part and this is whether the deceit was by his agent or by a stranger. Lord Macnaughten agreed with this proposition as a good and general proposition of law. He went on to say that all deceits and frauds practised by persons who stand in the relation of agent, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal. The question to be asked was whether the situation was such as to bring the representation the agent made within the scope of his authority? The plaintiff's counsel relied on the general rule quoted from Story on Agency that "the principal is liable to third parties in a civil suit for the frauds, deceits, concealment, misrepresentations, tort, negligence, and other malfeasances or misfeasance and or omissions of duty of his agent in the course of his employment although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them". Lord Macnaughten goes on to demonstrate that there were just limitations to the above proposition of law. To quote:

> *"But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine within its just limitations that the tort of negligence occurs in the course of the agency. For the principal is not liable for the tort or negligence of his*

> *agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit."*

He held that the principal Mr Smith was liable for the fraud of his agent in that case because when Mrs Lloyd put herself in the hands of the firm she did not know the exact position Mr Sandles was in. Mr Sandles spoke and acted as if he was one of the firm.

In the facts of the present suit that is no connection between the offer contract for the overdraft and acts of the second defendant. An attempt was made to link the head of credit Mr Dick Omara to authorising the loan transaction. It is apparent that the loan transaction was authorised upon documentation duly executed by the directors of the plaintiff which culminated in signing the overdraft offer letter accepting the terms therein. The second defendant only called upon PW1 the managing director of the plaintiff a week later. It is clear from the evidence that she made the request for PW1 to withdraw the money and give it to her after he had applied for and executed a contract with the first defendant for the overdraft facility. No deceit or fraud has been proved on the part of the first defendant in so far as the loan was approved for the plaintiffs business. The managing director of the plaintiff was deceived by the second defendant. She pleaded guilty to the office of issuing bounced cheques and she was convicted on our own plea of guilty. She accepted personal responsibility and indeed refunded some of the money. PW1 testified that she deposited Uganda shillings 7.5 million with the Central Police Station in Kampala. Secondly she was ordered to pay a sum of Uganda shillings 22,500,000/= within 30 days. In other words, she was held liable to refund the sum of Uganda shillings 30,000,000/= owed to the plaintiff with the interest chargeable on the overdraft. By the time of the order part of the money amounting to Uganda shillings 7,500,000/= had already been deposited with the police. It is further pertinent from the evidence that she secured a sum of Uganda shillings 30,000,000/= from the managing director of the plaintiff and she issued cheques which later bounced. The cheques were personal cheques hence her conviction.

I do not believe the testimony of PW1 on intense examination by his own counsel bordering on cross examination about when he met Mr Dick Omara i.e. whether before the approval of the loan or thereafter. His initial and clear testimony was that he did not meet Mr Dick before the loan was approved and given but after the second defendant had failed to refund the money within the month as she had promised. PW1 went to report the matter to the Head of Credit Mr Dick Omara. Mr Dick Omara called the second defendant to his office. That is when he discussed with the plaintiff about the problem. His initial testimony was that he had gone to report the problem. Upon intense examination by his own counsel as to whether Mr Dick knew about the transaction he mumbled something about being told that she would pay it back. After assessing the overall testimony of PW1 I have come to the conclusion that no credible link has been made to Mr Dick Omara about his knowledge and participation in the plaintiff lending money to the second defendant other that he was an uncle of the second defendant and would approve the loan (presumably on persuasion of his niece). The offer letter for the overdraft was

signed by the Executive Director and Head of Credit of the first defendant and is a regular contract of the first defendant bank.

In the premises the case of the plaintiff does not fall within the principle stated in Lloyd versus Grace, Smith and Company (supra) so as to make the first defendant liable for the deceit of the second defendant. There was no investment advice as pleaded in the plaint to the effect that the plaintiff gets an overdraft and invests it by lending it to the second defendant for repayment within one month. It is strange for money to be borrowed from the bank and lent back to the bank or to an official of the bank for purposes of earning interest to be paid back to the borrower with a profit. The second defendant did not act as an agent of the first defendant bank when she persuaded the managing director of the plaintiff to hand over money to her for a month only.

It was purely a case of folly where an individual believes a story which no prudent person who manages a company such as the plaintiffs company ought to believe. This is more so in view of the testimony of PW1 that he manages a business successfully as seen from the loss of business he asserts in this testimony in the claim for damages. Moreover the evidence does not disclose what the second defendant was going to do in order to be able to add some money and pay it back together with the charges. If the second defendant could earn money and pay back with interest why did she not obtain the loan herself? If anything PW1 the managing director of the plaintiff owed a duty to the plaintiff company not to withdraw the money which had been approved to expand the company's business and which overdraft offer letter was signed by two directors. There is no evidence that the company approved the new venture of the managing director to invest in the second defendant. In those circumstances the first defendant cannot be held vicariously liable for the acts of the second defendant who did not act as an agent when she obtained money from the plaintiff company. It was not within the scope of any express or implied agency for the second defendant to obtain a loan from a customer of the first defendant bank. The suit against the first defendant in so far as it relates to the principle of vicarious liability is accordingly dismissed. What remains to be determined is what happens to the liability of the plaintiff to the defendant as far as the overdraft facility is concerned. The issue would be determined after considering the liability of the second defendant. The first defendant having not participated in the proceedings, the dismissal of the suit on the basis of vicarious liability against the first defendant is with no order as to costs.

On the other hand the second defendant is liable for the acts of deceiving the managing director of the plaintiff and thereby accessing the plaintiff’s money. The Magistrate's Court has already awarded to the plaintiff a sum of Uganda shillings 22,500,000/=. In addition the Magistrate Grade 1 ordered the police to hand over to the plaintiff a sum of Uganda shillings 7,500,000/= deposited by the second defendant at Kampala Central Police Station. In other words the entire sum of Uganda shillings 30,000,000/= has been ordered to be refunded to the plaintiff. The order reads as follows:

> *"The accused to pay back the 22,500,000/= with the lending interest accumulated from that time at the bank rate at that time."*

Section 197 (1) of the Magistrates Courts Act gives jurisdiction to a Magistrates court to order compensation payable by the convict to any person who from the evidence seems to have suffered material loss or personal injury in consequence of the offence committed by the accused and who would in the opinion of the Court be entitled to substantial compensation in civil proceedings. In a subsequent civil suit the sums awarded under the criminal proceedings shall be taken into account. Section 197 (4) of the Magistrates Courts Act provides as follows:

> *"(4) At the time of awarding any compensation in any subsequent civil suit relating to the same matter, the court hearing the civil suit shall take into account any sum paid or recovered as compensation under this section."*

The plaintiff has been awarded compensation by refund of all the money the managing director withdrew and gave to the second defendant together with any interest and charges accruing on the loan. The interest is charged by the first defendant. The second defendant was found liable for this money. The first defendant has sought to recover its money from the plaintiff. The question therefore is what would be the effect of the order of the magistrate awarding compensation to the plaintiff under section 197 of the Magistrate's Court Act?

It is clear from the order of the magistrate grade 1 that it is the second defendant who should refund the money together with any interest accumulated from the time the money was withdrawn which was hardly a week after the loan had been approved. The order was made on 10 June 2011. The interest accruing on the loan together with the principle is the basis of the first defendant proceeding against the plaintiff with recovery measures under the loan offer. It is clearly the order of the Magistrate's Court in the criminal proceedings that the plaintiff should be compensated by the second defendant for any amounts owing to the first defendant. In my opinion it is a roundabout way of saying that the second defendant should pay the first defendant the principal together with any interest accruing on the overdraft facility extended to the plaintiff. In substance therefore the plaintiff is not liable via the order of the Magistrate's Court for Uganda shillings 30,000,000/= together with any charges and interest thereon imposed by the first defendant. In the circumstances of the case, enforcement procedures for recovery of the loan should be taken against the second defendant as an additional order to the Magistrates Court order.

In view of my findings that the managing director of the plaintiff was at fault to lend overdraft money advanced to it by the first defendant to the second defendant, the claim for the substantial damages against the second defendant would be unjust in view of the order of this court to ensue. This is in view of the proceedings already taken against the second defendant and the fact that the plaintiff sought to claim substantial damages against the first defendant bank as well because it had attached its property. The plaintiff is awarded Uganda shillings 2,000,000/= against the

second defendant. Secondly the property of the plaintiff not sold already by the bank shall be released by the first defendant bank to the plaintiff. The property of the plaintiff which has already been sold by the first defendant bank shall be compensated by the second defendant. In case of any outstanding sums due on the overdraft facility, the first defendant may proceed on the basis of the order for compensation of the Magistrate Grade 1 of Buganda Road Court against the second defendant. There shall be no further proceedings against the plaintiff by the first defendant to recovery any outstanding sums under the overdraft facility. Let the first defendant bank deal with its own staff. Costs of the suit are payable by the second defendant to the plaintiff.

Judgment delivered in open court this 19th day of April 2013

Christopher Madrama Izama

Judge

Judgment read in the presence of:

Himanga Sam for the first defendant

Akampurira Jude Baks holding brief for Dr. Akampumuza

Legal officer of First defendant Company Madam Natali Kironde in court

Plaintiffs MD Hardeep Singh in Court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

19th April 2013