IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

The Hong Kong and Shanghai Banking Corporation Limited,
No. 24, Sir Baron Jayathilake Mawatha,
Colombo 01.

Plaintiff

S.C. (C.H.C.) Appeal No. 62/2012

H.C. (Civil) Case No. 194/2009/MR

Vs.

Pratap Shyam Sunder Singh,
No. 1, Rockwood Apartment,
Rockwood Place,
Colombo 07.

Defendant

AND NOW BETWEEN

Pratap Shyam Sunder Singh,
No. 1, Rockwood Apartment,
Rockwood Place,
Colombo 07.

Defendant – Appellant

Vs.

The Hong Kong and Shanghai Banking Corporation Limited,
No. 24, Sir Baron Jayathilake Mawatha,
Colombo 01.

Plaintiff – Respondent

Before: **Hon. Jayantha Jayasuriya, P.C., C.J.**

Hon. A. H. M. D. Nawaz, J.

Hon. Janak De Silva, J.

Counsels: Harsha Soza, P.C. with Srihan Samaranayake for the Defendant – Appellant

Manoj Bandara with Gamini Balasooriya for the Plaintiff – Respondent

Written Submissions:

21.12.2018 and 05.06.2024 by the Defendant – Appellant

01.04.2019 and 10.06.2024 by Plaintiff – Respondent

Argued on: 22.05.2024

Decided on: 27.11.2024

Janak De Silva, J.

The Defendant-Appellant (Appellant) applied to the Plaintiff-Respondent (Respondent) for a housing loan. The housing loan application identified the property to be purchased as 18/9, Chitra Lane, Colombo 05 (demised premises).

The Respondent by letter dated 23.05.2006 intimated its decision to offer the Appellant a loan of Rs. 18,200,000/= or 80% of the market value, whichever is lower, repayable over a period of 180 months at the interest rate of 13.90% which was to be reviewed annually. This letter contained several terms and conditions of the loan.

The Appellant signed the letter of acceptance on 23.05.2006 itself and accepted the loan subject to the terms and conditions of the letter dated 23.05.2006.

The Respondent by letter of offer dated 05.06.2006 sent a more detailed letter setting out the terms and conditions of the loan which was signed and accepted by the Appellant on the same day.

Accordingly, a sum of Rs. 18,200,000/= was lent and advanced to the Appellant. The Appellant used the loan proceeds and bought the demised premises from Jayawardena Vidana Arachchige Lakshman Nalaka, who claimed to be seized and possessed and/or otherwise well and sufficiently entitled to the demised property. It was signed on his behalf by Vijith Sarath Kumara, who claimed to be the Attorney of Jayawardena Vidana Arachchige Lakshman Nalaka. The Transfer Deed bearing No. 3135 dated 05.06.2006 was attested by Mallikaratchige Dilrukshi Lalani Perera of the firm Julius & Creasy.

On the same day, the Appellant mortgaged the demised property to the Respondent as security for the loan repayment by Primary Mortgage Bond No. 3136 dated 05.06.2006 (Mortgage Bond), attested by the said Mallikaratchige Dilrukshi Lalani Perera of the firm Julius & Creasy.

The Appellant paid five loan instalments and defaulted afterwards. In this action, the Respondent seeks to recover the amount due on the housing loan transaction. The Appellant contends that good and valid title to the demised premises did not pass to him resulting in the total failure of the consideration. Hence he asserts that nothing is due. Furthermore, the Appellant has made a claim-in-reconvention in a sum of Rs. 50 million for damages suffered due to breach of duty of care on the part of the Respondent.

The learned Commercial High Court judge entered judgment as prayed for in the plaint and dismissed the claim-in-reconvention. The Appellant appeals.

There are two primary questions that arise for determination in this appeal. Firstly, whether there has been a total failure of consideration of the housing loan. Secondly,

whether the Respondent has any duty of care towards the Appellant and if so, whether it was breached.

The Appellant has based his submissions on English law principles. Moreover, there is a clear difference between the concepts of *justa causa* and consideration. Hence, the need to first determine the applicable law.

Introduction of English Law

Although our common law is the Roman-Dutch law, English law has been introduced into our legal system through legislation enacted by the British, express enactment that it will apply in certain areas, enactment of local laws taken from an English Act and application through judicial interpretation.

I shall examine only the introduction of English law in certain areas through express enactment as it is sufficient to dispose of the questions which arise for determination in this appeal.

English judges who were serving in Ceylon (as it was then known) were called upon to apply Roman-Dutch law principles to the commercial disputes before them. This no doubt was problematic as it was thought that some of the English judges had contempt for the principles of Roman-Dutch law [Lee, article in the Journal of Comparative Legislation, N.S. vol. vii, p. 237]. It brought about a mosaic of judicial precedent. Although at times, Roman-Dutch law principles were applied without any reservation, there were instances when it was refused due to the absence of a corresponding English law principle or was applied with modifications thought fit by the judge.

Thus, in ***Boyd v. Staples*** **[(1820-33) Ramanathan's Reports 19 at 21]** it was held that the English statutory limitation is not the law of this Island, the Roman-Dutch law and the regulations of the Government are guided in the administration of justice. On the contrary, in ***Sedembranader v. Sangerapulle*** **[(1843-1855) Ramanathan's Reports 19)]***,* decided in

1845, Oliphant C.J. commented that the rule that interest might not be recovered in any action in excess of the principle is unknown to the English law and refused to apply the rule as there was no equity in it. Somewhat of a middle path was taken, in ***In Re the application of Siva Pooniam for a writ of habeas corpus*** **[(1820-33) Ramanathan's Reports 78 at 80]** when it was held:

> *"It has been always understood and this Court has always acted on the understanding that the basis of law in this Island is the Dutch Roman law as administered at the period of conquest in 1769, "with such deviations, expedients and useful alterations as, in the words of the character, shall be either absolutely necessary and unavoidable, or evidentially beneficial and desirable."*

The starting point for agitation for clarity and application of English law to commercial disputes is the decision in ***Gerard and Brown v. Fulton*** **[(1847-63) Ramanathan's Reports 124]** where Carl, J. was uncertain whether English law or Roman-Dutch law applied in considering the days of grace permitted for the acceptance or payment of a bill of exchange. Finally, he applied the principles of Roman-Dutch law but only after delaying the judgment and consulting the Chief Justice.

The state of uncertainty of the law and the reasons for the introduction of English law to commercial matters are succinctly explained by Tambiah [*Principles of Ceylon Law*, H.W. Cave and Company, 1972, page 529] as follows:

> *"Attempts to equate the principles of English law and Roman-Dutch law on commercial matters by the judges brought about chaos and obscurity in commercial law, resulting in great dissatisfaction among the powerful English commercial circles in Ceylon. As a result of persistent agitation by the powerful community, the English law on commercial matters was introduced by legislation."*

There are two such enactments which needs consideration. They are Ordinance No. 5 of 1852 and Ordinance No. 22 of 1866.

Ordinance No. 5 of 1852 sought to introduce into Ceylon the law of England in certain cases. It appears that this legislation was enacted due to the representations made by the Chamber of Commerce. Governor Sir John Anderson in his address to the Legislative Council on 2nd September 1851 [See *Addresses delivered in the Legislative Council of Ceylon by Governors of the Colony*, Vol. I, page 239], stated that in January 1850 the Chamber of Commerce had, in an address presented to him, made certain complaints as to the ill-working of the present laws in some respect and called for certain amendments to be made.

He had referred certain passages of their address to the judges of the Supreme Court requesting the judges to state if any amendments in the law as desired by the Chamber was called for; and if so, what course they would recommend should be followed. The judges had suggested several alterations in the laws and among others they considered that all matters connected with shipping and all other maritime matters, and all questions regarding bills of exchange should be decided by the Law of England. Thereafter Ordinance No. 5 of 1852 was enacted.

Section 2 of Ordinance No. 5 of 1852 read as follows:

> *"The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England in the like case, at the corresponding period, if the contract had been entered into, or if the act in respect of which any such question shall have arisen, had been done in England; unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted."*

The Statement of Objects and Reasons of the Bills of Exchange Ordinance published in the Ceylon Government Gazette No. 7,539 dated July 30, 1926 states that it reproduces practically without alteration the Bills of Exchange Act, 1882 of England which was in force in Ceylon by virtue of Section 2 of Ordinance No. 5 of 1852. This was done as it was considered desirable in view of the fact that many of the District Judges are not provided with the English acts. Since this obviated the need to retain Section 2 of Ordinance No. 5 of 1852, it was repealed by Section 97(3) of Bills of Exchange Ordinance No. 25 of 1927 (Bills of Exchange Ordinance).

However, in order to address any argument based on any omission, Section 98 (2) of the Bills of Exchange Ordinance provided that the rules of the common law of England, including the law merchant, except in so far as they are inconsistent with the express provisions of that Ordinance, or any other enactment for the time being in force, shall apply to bills of exchange, promissory notes and cheques.

Within fourteen years of the enactment of Ordinance No. 5 of 1852, a further step was taken by Ordinance No. 22 of 1866 towards introducing English law principles to govern other areas of commercial law matters in Ceylon.

Governor Sir Hercules Robinson, addressing the Legislative Council on 3rd October 1866 [See *Addresses delivered in the Legislative Council of Ceylon by Governors of the Colony*, Vol. 2, page 97] observed that Ordinance No. 5 of 1852 had been enacted to introduce the law of England to the colony in maritime matters and in contracts and questions arising out of bills of exchange, promissory notes and cheques. Nevertheless, he declared that the legislature was of the view that there were other commercial questions in which it is desirable to assimilate our law with that of England such as questions relating to the laws of partnership, joint stock companies, corporations, banks and banking, principals and agents and life and fire insurance. In fact, he claimed that though it has not been formally declared to be in force, the English law has been for years virtually administered

in these matters and that for this purpose Ordinance No. 22 of 1866 would be laid before the Council.

The judges of the Supreme Court were again consulted on this matter. They were of the view that an Ordinance on these lines was desirable. They only opposed to it being one in connection with immovable property [See Sessional Paper No. 12 of 1866].

Section 3 of Ordinance No. 22 of 1866 read as follows:

> *"In all questions or issues which may hereafter arise or which may have to be decided in this Colony, with respect to the law of Partnerships, Joint Stock Companies, Corporations, Banks and Banking, Principals and Agents, Carriers by land, Life and Fire Insurance, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted.*
>
> *Provided that nothing herein contained shall be taken to introduce into this Colony any part of the Law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or other immovable property, or any estate, right, or interest therein."*

In view of the repeal of Section 2 of the Ordinance No. 5 of 1852 as adumbrated above, Sections 2 and 3 of the Civil Law Ordinance as set out in Legislative Enactments 1956 (Revised Edition) reads as follows:

> *"2. The law to be hereafter administered in Ceylon in respect of all contracts or questions arising within the same relating to ships and to the property therein, and to the owners thereof, the behaviour of the master and mariners, and their respective rights, duties, and liabilities, relating to the carriage of passengers and*

goods by ships, to stoppage in transit, to freight, demurrage, insurance, salvage, average, collision between ships, to bills of lading, and generally to all maritime matters, shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period, if the contract had been entered into or if the act in respect of which any such question shall have arisen had been done in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereafter to be enacted.

3. In ***all questions or issues*** *which may hereafter arise or which may have to be decided in Sri Lanka* ***with respect to the law of*** *partnerships, corporations,* ***banks and banking****, principals and agents, carriers by land, life and fire insurance,* ***the law to be administered shall be the same as would be administered in England in the like case****,* ***at the corresponding period****, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereafter to be enacted :*

Provided that nothing herein contained shall be taken to introduce into Ceylon any part of the Law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or other immovable property, or any estate, right, or interest therein." (emphasis added)

For the reasons elucidated, I am of the view that this legislative history must play a pivotal role in the interpretation of the scope and ambit of Section 3 of Civil Law Ordinance. I shall revert to this later in interpreting the words *Banks and Banking* and *All Questions or Issues* therein.

The proviso makes it clear that Section 3 of the Civil Law Ordinance did not intend to introduce any part of the Law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or other immovable property, or any estate, right,

or interest therein. These matters will continue to be governed by Roman-Dutch law or any law that has been enacted subsequently.

Where English law is the applicable law by virtue of Section 3 of the Civil Law Ordinance, both English statutory law and common law will apply [See ***People's Bank v. Yashoda Holdings (Pvt) Ltd.*** **(2009 BLR 167)**, ***Wright and Three Others v. People's Bank*** **(1985) 2 Sri.L.R. 292 at 295**; Tambiah, *Principles of Ceylon Law*, H.W. Cave and Company, 1972, page 533, Weeramantry, *Law of Contracts*, First Indian Reprint 1999, Vol. I, page 46].

Moreover, even where legislative provisions have been subsequently enacted in Sri Lanka on a particular subject identified in Section 3 of the Civil Law Ordinance, English law will apply where no specific provision has been made therein [See ***The Mahakande Housing Company Ltd. v. Duhilamomal and Others*** **(1981) 2 Sri.L.R. 232,** ***People's Bank v. Yashoda Holdings (Pvt) Ltd.*** **(2009 BLR 167)**].

Section 3 of the Civil Law Ordinance requires Court to apply, not only the English law in force at the time of its enactment, but also any subsequent statute [***Wright and Three Others v. People's Bank*** **(supra),** ***cf. Usman v. Rahim*** **(32 N.L.R. 259)**, Weeramantry (supra.)].

Finally, it must be noted that the Civil Law Ordinance did not introduce English procedural law, but only the substantive law in England [See ***Mudalihamy v. Punchi Banda*** **(15 N.L.R. 350)**, ***The Government of The United States of America v. The Ship "Valiant Enterprise"*** **(63 N.L.R. 337 at 343)**].

Corresponding Period

In ***People's Bank v. Yashoda Holdings (Pvt) Ltd.*** **(supra)**, it was held that the relevant period in Section 3 of the Civil Law Ordinance is a date *after* the date of the institution and/or a date after the answer has been filed. The Court was guided by the approach adopted in ***The Shantha Rohan*** **[(1994) 3 Sri.L.R. 54]** where the Court of Appeal was

interpreting the words "for the time being in force" used in Section 13(2) of the Judicature Act.

It does not appear that the court gave its mind to the long-established common-law rule that the rights of the parties must be determined as at the date of the institution of the action [See ***Ponnammah v Arumugam*** **(8 N.L.R. 223 at 226),** ***Silva v. Nona Hamine*** **(10 N.L.R. 44),** ***Ponnamma v. Weerasuriya*** **(11 N.L.R. 217),** ***Silva v. Fernando et al*** **(15 N.L.R. 499),** ***Jamal Mohideen & Co. v. Meera Saibo et al*** **(22 N.L.R. 268 at 272),** ***Sharieff et al v. Marikkar et al*** **(27 N.L.R. 349),** ***Eminona v. Mohideen*** **(32 N.L.R. 145),** ***De Silva et al v. Goonetileke et al*** **(32 N.L.R. 217),** ***De Silva v. Edirisuriya*** **(41 N.L.R. 457),** ***Lenorahamy v. Abraham*** **(43 N.L.R. 68),** ***Kader Mohideen & Co. Ltd., v. Gany*** **(60 N.L.R. 16),** ***Abayadeera and 162 others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and Another*** **(1983) 2 Sri. L. R. 267,** ***Talagune v. De Livera*** **(1997) 1 Sri.L.R. 253,** ***Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and Others*** **(1998) 1 Sri.L.R. 235,** ***Lalwani v. Indian Overseas Bank*** **(1998) 3 Sri.L.R. 197,** ***Jayaratna v. Jayarathna and another*** **(2002) 3 Sri.L.R. 331,** ***Sithy Makeena and others v. Kuraisha and others*** **(2006) 2 Sri.L.R. 341,** ***cf. Sabapathipillai et al v. Vaithialingam*** **(40 N.L.R. 107)**, ***Thangavadivel v. Inthiravathy*** **(53 N.L.R. 369),** ***Mariam Nurban Hussain Teyabally v. Hon. R. Premadasa and two others*** **[S.C. No. 69/92, S.C.M. 05.11.1993],** ***Master Divers (Pvt) Ltd. v. Karunaratne and others*** **[CA (PHC) APN 140/2012, C.A.M. 09.08.2018**].

In my view, the words “at the corresponding period” appearing in Section 3 of the Civil Law Ordinance is insufficient to displace the common law rule that the rights of the parties must be determined as at the date of the institution of the action.

Accordingly, where English law is applicable by virtue of Section 3 of the Civil Law Ordinance, it is the English law prevailing at the date of the institution of the action that must be applied to determine all questions or issues that may have to be decided with respect to the law of banks and banking. However, I hasten to add that the position in

English law relevant to the questions or issues that arise for determination does not differ depending on the date of the institution of the action and/or a date after the answer has been filed.

Banks and Banking

In ***Indian Bank v. Acuity Stock Brokers (Pvt) Limited*** **[(2011) 2 Sri.L.R. 149 at pages 155-6)** Suresh Chandra J. appears to have adopted a narrower interpretation to *banking* in holding that:

> *"There is no clearcut demarcation of the transactions that one has with a Bank being classified as Banking Transactions. It is usual to consider lodging money into a bank account, withdrawing money, adding interest to an account, direct debits, deducting bank charges, basically any sort of activity involving a change of money in an account is a banking transaction which are usually listed in a bank account statement."*

I find it difficult to accede to such a narrow interpretation of *banking*. In ***Tennant v. Union Bank of Canada*** **(1894 AC 31 at 46)]** it was held that *banking* is an expression wide enough to embrace every transaction coming within the legitimate business of a banker. In ***Nimalaratne Perera v. People's Bank*** **[(2005) 2 Sri.L.R. 67 at 70]** Amaratunga, J. adopted this wider exposition and held that:

> *"By Ordinance No. 22 of 1866, English Law relating to Banks and banking was introduced into Ceylon and in all questions which arise in Ceylon with respect of the law of banks and banking, the law to be administered is the same as would be administered in England in the like case. The expression 'banking' embraces every transaction coming within the legitimate business of a banker [Tennant v. Union Bank of Canada (1894 AC 31)].* ***Maintaining a current account between a bank and a customer and granting a loan or other banking facilities are legitimate***

businesses relating to banking and accordingly the law applicable is the English Law.”(emphasis added)

I am in respectful agreement with this wider formulation of *banking* given the legislative history of Section 3 of the Civil Law Ordinance adumbrated earlier.

Moreover, the two words *banks and banking* in Section 3 of the Civil Law Ordinance must be read conjunctively. This view is supported by the dicta of Weeramantry, J. ***De Costa v. Bank of Ceylon*** **(72 N.L.R. 457 at 509)** and Wijayatilake, J. in ***De Costa v. Bank of Ceylon*** **(supra. at 547)**. Not every question or issue where a Bank is a party will necessarily require the application of English law. Similarly, not every question or issue which involves *banking* necessarily makes English law the applicable law. It must be a question or issue with respect to the law of *banks and banking*.

To that extent, I am in respectful agreement with the decision in ***Indian Bank v. Acuity Stock Brokers (Pvt) Limited*** **[(2011) 2 Sri.L.R. 149]** where it was held that there are many transactions, where the Banks are parties, which do not come within the realm of Banking transactions and regarding which the Roman-Dutch law applies.

The Respondent is admittedly a Bank licensed under the Banking Act No. 30 of 1988 as amended. Section 86 therein defines “banking business” to mean the business of receiving funds from the public through the acceptance of money deposits payable upon demand by cheque, draft, order or otherwise, and the use of such funds either in whole or in part for advances, investments or any other operation either authorized by law or by customary banking practices.

This action is based on a housing loan granted by the Respondent, a bank, to the Appellant. The two primary questions or issues that arise for determination are with respect to the law of banks and banking. They fall within *banking* in Section 3 of the Civil Law Ordinance.

Therefore, the question or issue on the alleged failure of consideration and its legal effect must be determined by applying English law.

All Questions or Issues

Upon an examination of the answer of the Appellant, it is clear that the claim-in-reconvention is based on the liability imputed to the Respondent for alleged breach of contract which is co-extensive with liability in tort independently of the existence of the contract.

Therefore, a consideration must be made of judicial precedent to ascertain the intention of the legislature in using the words *All questions or issues* in Section 3 of the Civil Law Ordinance.

My search for any judicial precedent instructive of the true interpretation of Section 3 of the Civil Law Ordinance has been somewhat fruitless due to the lack of any intricate attempt to fully expound the scope and ambit thereof.

In ***Hong Kong and Shanghai Bank v. Krishnapillai*** **(33 N.L.R. 249 at 253)** it was held that the right of a pledgee to sell his security without recourse to a court of law is peculiar to the English law of mortgage and pledge, and the common law of the land in the matter of mortgage and pledge does not give place to the English law of mortgage and pledge, and the common law of the land in the matter of mortgage and pledge does not give place to the English law when the mortgage or pledge is a Bank. Nevertheless, this does not form the *ratio decidendi* as none of the banks involved in that action sought to sell the security they held without recourse to a court of law.

Similarly, in ***Mitchell v. Fernando*** **(46 N.L.R. 265 at 269**) Keuneman, J. was of the view that the matter before court relates to the mortgage of movables and is not a matter with respect to Joint Stock Companies. Court simply applied the dicta in ***Hong Kong and Shanghai Bank v. Krishnapillai*** **(supra).**

The Court did not, in either of these cases, enter into an elaborate examination of Section 3 of the Civil Law Ordinance in order to determine its scope and ambit.

In ***Bank of Ceylon v. Kulatilleke*** **(59 N.L.R. 188)** the question arose whether the drawer of a crossed "Not Negotiable" cheque the amount of which is subsequently altered fraudulently by a third party is entitled to recover from the collecting banker the amount by which the cheque is so fraudulently raised. It was held (at page 189) that as our law on the subject of a banker's liability is the same as in England (Section 3 of the Civil Law Ordinance), except where special provision has been made in our law, the defendant would be liable to pay to the plaintiff the amount that has been paid to the defendant by his bank without his authority.

However, the decision in ***Bank of Ceylon v. Kulatilleke*** **(supra)** was disapproved in ***Daniel Silva v. Johanis Appuhamy*** **(67 N.L.R. 457)** on the basis that the question whether the action was really one where the banker was sought to be made liable on the basis of conversion did not receive due attention by Court.

In ***Daniel Silva v. Johanis Appuhamy*** **(supra)** the action was filed based on the English tort of conversion. The question arose whether the English doctrine of conversion is part of our law. The trial judge was of the view that it was in view of Section 98(2) of the Bills of Exchange Ordinance and Section 3 of the Civil Law Ordinance. In appeal, all three judges agreed that the English doctrine of conversion was not part of the law of Ceylon.

Fernando, J. (at page 461) took the view that since the action was founded on a delict, the Roman-Dutch law had to be applied. He held further that Section 98 (2) of the Bills of Exchange Ordinance was only intended to apply to any omissions or deficiencies in the Ordinance in respect of the law relating, inter alia, to cheques, and cannot form the basis of a proposition that, where the delict of conversion was in relation to a cheque, therefore the English common law of conversion is introduced into our law.

Nevertheless, Fernando, J., did not engage in any detailed exposition of the scope and ambit of Section 3 of the Civil Law Ordinance. Instead, the decisions in ***Hong Kong and Shanghai Bank v. Krishnapillai*** **(supra)** and ***Mitchell v. Fernando*** **(supra)** were cited with approval.

Tambiah, J. having agreed with the findings of Fernando, J. went on to examine at length the question whether the English doctrine of conversion is part of our law. He concluded that the English doctrine of conversion was never tacitly adopted in Ceylon and is not part of our common law.

Thereafter, Tambiah, J. went on to examine whether the English doctrine of conversion has been applied to Bills of Exchange by statutory provision. In this examination he considered Section 3 of the Civil Law Ordinance. After considering the decisions in ***Hong Kong and Shanghai Bank v. Krishnapillai*** **(supra),** ***Mitchell v. Fernando*** **(supra)** and ***Bank of Ceylon v. Kulatilleke*** **(supra),** Tambiah, J., disagreed with the reasons given by Basnayake, CJ., in ***Bank of Ceylon v. Kulatilleke*** **(supra)** and concluded that despite section 3 of the Civil Law Ordinance, the common law of Ceylon on delict remained unaltered.

Alles, J. agreed with the judgment of Fernando, J.

However, none of the three justices made any detailed exposition of the scope and ambit of Section 3 of the Civil Law Ordinance. The examination of the scope and ambit of Section 3 of the Civil Law Ordinance was perfunctory. To be fair by Court, the question of examining the applicability of English law due to any connections with Banking matters did not arise as the liability to be considered was not of a banker but of a person to whom the cheque had been transferred by the forger or his agent.

Hence, the decisions in ***Hong Kong and Shanghai Bank v. Krishnapillai*** **(supra),** ***Mitchell v. Fernando*** **(supra)** and ***Bank of Ceylon v. Kulatilleke*** **(supra)** is of little assistance in

expounding the scope and ambit of Section 3 of the Civil Law Ordinance, and in particular in relation to *Banks and Banking*.

Within about four years of the decision in ***Daniel Silva v. Johanis Appuhamy*** **(supra)**, a bench of five judges of the Supreme Court was constituted in ***De Costa v. Bank of Ceylon*** **(72 N.L.R. 457)** to settle the conflict of opinion as to whether the English law doctrine of conversion is part of the law of Ceylon. Two out of the five judges, Fernando, C.J., and Alles J. had been members of the bench in ***Daniel Silva v. Johanis Appuhamy*** **(supra)**.

Fernando, C.J. held (at page 465) that our Courts have not introduced and adopted the basis of liability for conversion which obtains under the English common law. Hence his conclusion was that this doctrine is not part of the common law of Ceylon.

Nevertheless, he went on to consider whether it has been introduced through statute law. He first considered Section 2 of the Ordinance No. 5 of 1852 which read as follows:

> *"The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England in the like case, at the corresponding period, if the contract had been entered into, or if the act in respect of which any such question shall have arisen had been done in England; unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted."*

He held (at page 466) that at the time of the enactment of this section, the law of England concerning contracts upon bills of exchange, promissory notes and cheques, was the common law, including the law merchant as developed at that stage, and thus Section 2 had accordingly the effect that the rights, duties and liabilities of parties to the contract upon any such negotiable instrument would be regulated by the English common law.

However, he held that there was more to it since Section 2 provided that the English law would apply also in respect of all questions relating to such instruments and of all matters connected with such instruments. If then a question arose as to the liability of a collecting Banker to the true owner of a cheque, it could fairly be said that there was involved a question relating to a cheque: one of the special incidents affecting a cheque, and perhaps the most important such incident, is the collection of a cheque by one Bank from another, and indeed the commercial practice of the making of payments in discharge of monetary liabilities by means of cheques is rendered effective through the system of the collection by Banks of the proceeds of cheques, and if in English law a Banker incurred a liability to the true owner of a cheque because he had collected the proceeds and credited them to the account of a customer, the law by reason of which that liability arose could fairly be regarded as the law in respect of a question relating to a cheque.

Accordingly, he held that so long as Section 2 of the Ordinance of 1852 was in force, the liability of a collecting Bank in Ceylon in circumstances such as exist in that case had to be determined by the application of the English law. Thereafter he went on to examine the English Act of 1882 and held (at page 469) that all of its provisions applied in Ceylon by virtue of Ordinance No. 5 of 1852 and that from 1882, the liability of a collecting Bank in Ceylon was the same as that which arose in England in similar circumstances. Nevertheless, he held (at page 472) that after the Bills of Exchange Ordinance was enacted in 1927, it is that law and not Ordinance No. 5 of 1852 which is applicable, and that although the English doctrine of conversion is not part of the common law of Ceylon, the Bills of Exchange Ordinance (Cap. 82) has the effect that the liability of a collecting Bank in Ceylon to the true owner of a cheque is the same as would arise in England in a like case.

Sirimane, J. held that in consequence of the two enactments, Section 2 of Civil Law Ordinance, and Section 98 (2) of Bills of Exchange Ordinance), he was of the view that in all matters connected with bills of exchange a person who would be liable in English Law would also be liable in Ceylon, and to that extent the English Law of conversion is part of our law.

He sought to fortify this conclusion by reference to Section 3 of the Civil Law Ordinance. He held (at page 484) that different branches of the law often overlap, and cannot be looked at in separate water-tight compartments. Conversion has been adapted, modified, and applied to bankers and the business carried on by them, so much so that no book on the law of banking can be complete without a discussion on this subject. It has grown with the law of banks and banking, and become part of that law. He went on to state that if the Plaintiff in that case had consulted a lawyer in regard to the liability of the banker, he would not expect the latter to refer to a treatise on the doctrine of conversion, or the Roman Dutch Law relating to delicts, or the Principles of Negligence but rather to a text book on the law of banks and banking.

Alles, J. took the view that Section 2 of the Ordinance No. 5 of 1852 did not contemplate the introduction of the English doctrine of conversion into our law dealing with cheques. Having examined Section 2, he held (at page 494) that although there must have been an inherent desire of the Englishmen of the time, for the purposes of promoting trade and commerce in their colonies to introduce bodily the law of England of the relevant period relating to bills of exchange, it does not appear to him, that the language of Section 2 gave effect to that intention.

Alles, J. also considered the application of Section 3 of Civil Law Ordinance. After a perfunctory examination, he agreed with the views of Tambiah, J. in ***Daniel Silva v. Johanis Appuhamy*** **(supra)** and the decisions in ***Hongkong & Shanghai Bank Corporation v. Krishnapillai*** **(supra)** and ***Mitchell v. Fernando*** **(supra)** that the rights and liabilities of

the banker under our law are not affected by the introduction of the English law of Banks and Banking.

Weeramantry, J. agreed with the conclusion in ***Daniel Silva v. Johanis Appuhamy*** **(supra)** that the doctrine of conversion forms no part of the general law of Ceylon. However, he observed that the case of ***Daniel Silva v. Johanis Appuhamy*** **(supra)** does not offer any guidance on whether the transaction under examination attracts the English or the Roman-Dutch law by reason of its connection with matters of banking as it did not have to deal with the liability of a banker.

Weeramantry, J. differed from that decision and held (at page 509) that rights of a bona fide holder for value of a negotiable instrument is governed by English law. It was held that such a transaction attracts the English law relating to conversion although the doctrine of conversion forms no part of our general law.

Weeramantry, J. however observed that the conclusion that the English law of conversion does not as a general doctrine form part of the law of this country does not dispose of the matter before court, in view of the further questions whether, in so far as concerns cheques and matters of banks and banking, the English principles of conversion are drawn into our legal system.

He held that it would be unrealistic to take the view that the law relating to conversion forms no part of the law of banks and banking and that the Civil Law Ordinance as amended by Ordinance No. 22 of 1866 brought into this country the English rules relating to conversion in so far as they had become the subject of special application to the law of banks and banking. Much emphasize was laid on the fact that one party to the impugned transaction was a bank.

Wijayatilake, J. held (at page 545) that English law was applicable in view of Section 2 of Ordinance No. 5 of 1852 and laid much emphasis on the words "and in respect of all matters connected with such instruments or if the act in respect of which any question shall have arisen, had been done in England."

Hence it is clear that neither Fernando, C.J., nor Alles, J. engaged in a detailed exposition of the scope and ambit of Section 3 of Civil Law Ordinance in ***Daniel Silva v. Johanis Appuhamy*** **(supra)** or in ***De Costa v. Bank of Ceylon*** **(supra)**. Wijayatilake, J. did not consider it in ***De Costa v. Bank of Ceylon*** **(supra)**. However, Weeramantry, J. and Sirimane, J. did so in that case. Their approach exemplifies the need to bear in the mind the legislative history to identify the intention of the legislature.

In my view, the correct approach to interpreting Section 3 of the Civil Law Ordinance is to examine the import of each and every word in that section. We must act on the assumption that the legislature did not use any surpluses. The legislative history must be our guiding light in this exercise. In fact, we now know that the legislature was clearly aware of the circumstances which led to its enactment. As Tambiah aptly explains, the English law on commercial matters was introduced to Ceylon by legislation in view of the chaos and obscurity brought about by attempts by English judges to equate the principles of English law and Roman-Dutch law on commercial matters.

Therefore, the correct interpretation of Section 3 of the Civil Law Ordinance requires, in addition to interpreting *Corresponding Period* and *Banks and Banking* which I have sought to do above, an interpretation of the words *All Questions or Issues* as well. Such an approach gives due deference to the legislative history adumbrated earlier.

In granting of loans or carrying on any other banking facilities, there may be situations where a question on the liability of a bank may arise under contract as well as tort [See ***Trans Orbit Global Logistics (Pvt) Limited v. Peoples Bank*** **[S.C. Appeal 92/2020, S.C.M. 13.12.2021)].**

This is the settled position in English law after years of judicial and academic debate [See ***Henderson v. Merrett Syndicates Ltd.*** **(1995) 2 AC 145,** Burrows (*Remedies for Torts and Breach of Contract*, (2nd Ed., page 4, Butterworths, 1994)].

Chitty on Contracts [28th ed., (Vol. 1)(1999), pages 38 and 39] in discussing the development of the law with regard to the relationship between contract and tort states as follows:

> *"Where the constituent elements of a claimant's case are capable of being put either in terms of a claim in tort or for breach of contract, the general rule is that the claimant may choose on which basis to proceed, though this rule is subject to a number of qualifications, notably where to do so would be inconsistent with the terms of the contract. This traditional position was clearly affirmed by the House of Lords in the important decision Henderson v. Merrett Syndicates Ltd. which drew to close the uncertainty on this point caused by a dictum of Lord Scarman in the Privy Council in 1985 in Tai Hing Cotton Mill Ltd, v. Liu Chong Hing Bank Ltd ..... This dictum (of Lord Scarman) appeared to favour the exclusion of claims in tort where the parties were in a contractual relationship, though the context of its acceptance by later Courts was typically the denial of liability of recovery of pure economic loss in the tort of negligence. However, paradoxically, the House of Lords' decision on the nature and ambit of the tortious liability to be found on the facts before it in Henderson v. Marrett Syndicates Ltd. created new and very considerable uncertainty as regards the relationship of contractual and tortious claims between parties to a contract. For, it accepted that its own earlier decision in Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd should be interpreted as establishing a "broad principle" of liability in tortious negligence based on the defendant's assumption of responsibility, an assumption which would appear to be satisfied whenever a party*

to a contract either possessing or holding himself out as possessing a special skill agrees to perform a service for the other party."

In ***Jayamohan v. Hatton National Bank Ltd.*** **[(2001) 3 Sri.L.R. 392 at 404]**, Wigneswaran, J. having cited this extract with approval went on to state that Lord Goff of Chieveley had in *Henderson's* case held that a very broad principle of liability based on an "assumption of responsibility" had been established after the decision in *Hedley Byrne's* case and that this principle suggested a very considerable overlap between the tort of negligence and liability in contract between parties to contracts.

Moreover, Banks have been held liable for breach of contract as well as in tort [See ***Barclays Bank plc v. Quincecare Ltd. and another*** **[(1992) 4 All ER 363 at 375-6].**

Where such questions or issues arise both under contract as well as tort in relation to an action brought against a bank by its customer on a banking transaction, **they are all questions or issues which arise with respect to the law of banks and banking**, and the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period. I am fortified to adopt this approach upon a consideration of the reasons for introducing English law to specified areas by the Civil Law Ordinance as adumbrated above.

Moreover, a similar approach was approved of by Fernando, CJ in ***De Costa v. Bank of Ceylon*** **(supra. at 466)** in interpreting Section 2 of Ordinance No. 5 of 1852. It was held:

"At the time of the enactment of this section, the law of England concerning contracts upon bills of exchange, promissory notes and cheques, was the common law, including the law merchant as developed at that stage, and s. 2. had accordingly the effect that the rights, duties and liabilities of parties to the contract upon any such negotiable instrument would be regulated by the English common law. But this was not the only effect of the section; for it provided that the ***English***

law would apply also in respect of <u>all questions</u> relating to such instruments and of <u>all matters</u> connected with such instruments. If then a question arose as to the liability of a collecting Banker to the true owner of a cheque, it could fairly be said that there was involved a question relating to a cheque*: one of the special incidents affecting a cheque, and perhaps the most important such incident, is the collection of a cheque by one Bank from another, and indeed the commercial practice of the making of payments in discharge of monetary liabilities by means of cheques is rendered effective through the system of the collection by Banks of the proceeds of cheques,* ***and if in English law a Banker incurred a liability to the true owner of a cheque because he had collected the proceeds and credited them to the account of a customer, the law by reason of which that liability arose could fairly be regarded as the law in respect of a question relating to a cheque****.*

[…]

The particular provision of s. 2 of the Ordinance of 1852 which I am now examining is the declaration that "in all questions relating to cheques, the law to be administered shall be the same as would be administered in England in like case". ***The construction of this provision requires primarily a determination whether there is for decision some question relating to a cheque; and if the determination is that there is such a question, then the English law must be administered to decide the question.*** *I can concede that not every matter concerning a cheque, such as the mere theft of a cheque or the placing of a cheque in the custody of some person, is a "question" contemplated in the provision. But* ***where the alleged or proved circumstances indicate some dealing with a cheque which is peculiar to its character as a cheque, and which is for a purpose connected with that character, and some question then arises as to the effect or consequences of such dealing, does not that question relate to a cheque****? If this be not so, the reference*

in the provision under consideration to "questions relating to cheque" apparently adds nothing to the matters denoted in the earlier reference in s. 2 to "contracts" upon cheques. Moreover, the subsequent reference in s. 2 to "all matters connected with cheques" would appear to be quite without purpose if a dealing of the nature I am contemplating is not to be regarded as such a matter. I rely in this connection on the reasons stated by Lord Denning for the opinion that the collection of cheques by a Banker is characteristic of a Banker's business. (United Dominions Trust v. Kirkwood [(1966) 1 A. E. R. 968.]).” (emphasis added)

The claim-in-reconvention is based upon the alleged breach of a duty of care arising from the alleged undertaking of the Respondent to advise the Appellant on the title to the demised property. The alleged undertaking was given *qua* banker with respect to a loan transaction. It is a question or issue with respect to the law of banks and banking.

For the foregoing reasons, I hold that the action instituted by the Respondent to recover the amount due on the housing loan agreement as well as the claim-in-reconvention made by the Appellant based on an alleged breach of duty of care must be determined by applying English law.

Failure of Consideration in English Law

The defense of the Appellant to the pleaded cause of action is that valid title to the demised premises did not pass to the Appellant on Deed No. 3135 and consequently there was a total failure of the consideration of Rs. 18,200,000/=. Accordingly, it is contended that no money is due to the Respondent from the Appellant.

Before I proceed to examine the housing loan agreement to identify its consideration, an examination of the position in English law on the meaning attributed to consideration in general and in the context of failure of consideration must be done.

There are at least three possible meanings that can be attributed to the expression "consideration" in English law. The primary meaning is based on reciprocity and is the "advantage conferred or detriment suffered" which is necessary to turn a promise not under seal into a binding contract. Lord Wilberforce in ***Midland Bank Trust Co. Ltd. and Another v. Green*** **[(1981) AC 513 at 531]** held that "valuable consideration" is an expression denoting an advantage conferred or detriment suffered.

The *locus classicus* of the meaning of consideration in English law is found in ***Currie and Others v. Misa*** **[(1875) LR 10 Ex 153 at 162]** and reads as follows:

> *"a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other".*

Academic opinion differs on the reciprocity approach to consideration. McKendrick [*Contract Law*, 11th ed., 2015, pages 67-68] provides a succinct summary of the debate between Treitel and Atiyah on the traditional interpretation. I need not venture to take a definitive position in view of the meaning attributed to consideration in English law in the context of failure of consideration which is discussed below.

Secondly, the expression "consideration" is equated to "causa" or *justa causa* as known to Roman law and reflected in the traditional conveyancing expression "in consideration of natural love and affection" [See Birks, *An Introduction to the Law of Restitution* (1985), page 223].

The third meaning of the expression "consideration" is found in the context of failure of consideration and its *locus classicus* is found in the speech of Viscount Simon LC in ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd.*** **[(1943) AC 32 at 48]** where he stated:

> *"In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act…and thus, in the law relating to the formation of a contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and the quasi-contractual right to recover money on that ground, it is, generally speaking,* ***not the promise which is referred to as the consideration, but the performance of the promise****. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled."* (emphasis added)

This approach was approved nearly half a century later in ***Rover International Ltd v. Cannon Film Sales Ltd*** **[(1989) 1 WLR 912 at 923]** by Kerr LJ who held that the test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract.

According to this approach, what is crucial is that the recipient of the payment should have given or done at least part of what was understood to be due in return for the payment. There is strong academic support for this approach [Andrew Burrows, *The Law of Restitution* (2nd ed, 2002) 324-325; Andrew Burrows, Ewan McKendrick and James Edelman *Cases and Materials on the Law of Restitution* (2nd ed, 2006) 251; Graham Virgo *The Principles of the Law of Restitution* (2nd ed, 2006) 306].

However, recently a different approach has been taken in holding that failure of consideration is not exclusively concerned with performance. The view has been expressed that failure of consideration focuses not on performance, but on the underlying

legal validity of the transaction [See ***Guinness Mahon & Co Ltd v. Kensington and Chelsea Royal London Borough Council*** **[(1999) QB 215],** ***Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*** **[(1996) AC 669]**

Either way, I am of the view that there is no failure of consideration in the present case.

The Appellant seeks to make out that there was an obligation on the part of the Respondent to pass good and valid title to the demised premises to the Appellant which did not happen due to the negligence of the Respondent and the Notary appointed by the Respondent. It is on this basis that the Appellant claims that there has been a failure of consideration.

This is factually misconceived. The Appellant applied for a housing loan. The Respondent agreed to lend a sum of Rs. 18,200,000/= to the Appellant on the undertaking that he will repay the loan in agreed instalments. Admittedly the loan was received by the Appellant.

For failure of consideration to occur, the Appellant should have been deprived of the benefit of the performance of the promise made to him. On the contrary, the Appellant received the benefit of the performance of the promise made by the Respondent, namely the lending of money.

In these circumstances, I hold that there is no failure of consideration for the housing loan agreement. The learned Judge of the Commercial High Court correctly entered judgment as prayed for in the plaint.

Claim-in-Reconvention

According to the Appellant, he is a "Premier Customer" of the Respondent and as such enjoys several concessions and privileges over and above normal customers. Around 2004, he was looking out to purchase a housing property. A broker named Mohan informed him that the demised property was for sale. The Appellant intimated his interest to purchase the demised premises to the Respondent.

The Appellant claims that the Respondent had not only agreed to grant the housing loan but had also agreed to advise on the title to the property, and to arrange notarial services for the execution of the transfer deed notwithstanding the usual practice of the buyer nominating his own notary to write the transfer deed.

The Respondent had, as part of the services offered to a "Premier Customer", met with the intermediaries, retained the services of their own lawyers Julius & Creasy to carry out a title search, recommended the title, sent their officers to the demised premises and checked out all relevant matters.

According to the Appellant, the Respondent represented and warranted that the title was perfect by causing a deed of transfer to be drawn up and providing facilities to the Appellant for the purchase of the demised property. It is further alleged that the Respondent did not recommend a title insurance to be taken and thereby represented that there was no defect or any other deficiency in the title.

The Appellant alleges that the intention of the Respondent was purely to engage in business without realizing that it owed a duty of care towards the Appellant. It is alleged that this fact is evident by the actions of the Respondent to retain a lawyer from lawyers retained by it to attest the deed of transfer pertaining to the demised premises.

It is alleged that the documentation used to transfer the demised premises, in particular the alleged defects in the attestation clause, establish the negligence of the Respondent and its notary in the matter of ascertaining the identity of the vendor of the demised premises.

Duty of Care in English Law

There is no general legal obligation for a bank to advice its clients or to warn them of potential risks in most ordinary banking transactions including lending. Moreover, even

where a banking transaction is an inherently hazardous transaction, that by itself is generally insufficient to give rise to a duty of care.

For a bank to owe such a duty, the customer must request advice and the bank must accept or the customer and the bank must agree to an arrangement under which the bank is to provide advice.

The duty will be contractual where the claimant can prove a contract under which the bank has agreed to advise. However, banks often take the precaution of excluding such characterization of the relationship in the contractual documentation. Therefore, more often than not, a claimant is left with establishing a tortious duty to advise on the part of the bank. Such a duty arises in exceptional circumstances [See ***Lloyds Bank Plc v. Cobb*** **(1991) 12 Legal Decisions Affecting Bankers 210 (CA),** ***Williams & Glyn's Bank Ltd. v. Barnes*** **[1981] Com LR 205)**].

The general proposition that banks owe no duty to advise their customers or to warn them of probable risks applies to most ordinary banking transactions, not only to lending. Even intrinsically risky transactions are not generally sufficient to give rise to a duty.

Thus, in ***Redmond v. Allied Irish Bank Plc*** **[(1987) 2 FTLR 264]**, the customer paid into his account endorsed, non-transferable cheques marked as payable only to the account of a third party. It was held that the bank had no duty to warn the customer of the dangers involved in this risky practice. In ***Finch and another v. Lloyds TSB Bank Plc and others*** **[(2016) EWHC 1236 (QB)]** it was held that a bank owed no duty to advise its customer as to the existence and effect of a particularly onerous term in the loan agreement that the bank was offering.

The claim-in-reconvention specifically claims that there was a breach of a duty of care. The contractual arrangements between the parties do not contain any express provision

to take care. The case of the Appellant is that the Respondent agreed to advise the Appellant.

I shall begin by examining the decision in ***Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*** **[(1964) AC 465]** upon which the Appellant has based his claim-in-reconvention.

In ***Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*** **(supra)** the question arose whether bankers could be held liable in tort in respect of the gratuitous provision of a negligently favourable reference for one of their customers, when they knew or ought to have known that the customer would rely on their skill and judgment in furnishing the reference, and the customer in fact relied upon it and consequently suffered financial loss.

The *locus classicus* on this issue is found in the speech of Lord Morris of Borth-y-Gest (at paragraphs 502-503) who laid down as a general principle that:

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

Their Lordships confirmed that this principle applies to banks providing advice in the course of business to their customers, and approved Lord Finlay LC's statement in ***Banbury v. Bank of Montreal*** **[(1918) A.C. 626]** that a banker "is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently".

All the law Lords in ***Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*** **(supra)** approached the issue in terms of one party having assumed or undertaken responsibility towards the other. Nevertheless, it is now established that the principle enunciated therein extends beyond the provision of information and advice to include performance of other services.

In ***Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*** **(supra)** the House of Lords distinguished between "deliberate advice" and "casual or perfunctory conversations". In the former case, the bank will be considered to have assumed responsibility while in the latter case, it will not.

Two examples are found in ***Michael Wilson and another v. MF Global UK Ltd. and another*** **[(2011) EWHC 138 (QB)]** and ***The Libyan Investment Authority v. Goldman Sachs International*** **[(2016) EWHC 2530 (Ch)]**. In ***Wilson*** **(supra. para. 96)** it was held that the conversations in which the advice was allegedly given were best characterised as "exchanging information and 'bouncing ideas' off each other or swapping hunches about the market", much of it being "spontaneous and off the cuff". The court declined to hold that the defendant had assumed any responsibility for what was said.

On the contrary, in ***The Libyan Investment Authority v. Goldman Sachs International*** **[(2016) EWHC 2530 (Ch), para. 258]** a claim concerning the sale of complex investment products, Rose, J. drew what was described as a "critical" distinction between "a situation where the bank gives advice on stock market opportunities going beyond the normal remit of a counterparty bank" and "situations where senior executives of the bank and the client have general discussions in an informal setting about how the individuals see the markets developing and about the prospects for particular stocks or sectors." Liability may be attached to the former, while no liability is attached to the latter.

The most difficult question in determining whether a bank has breached any duty of care in tort is to determine whether it has assumed responsibility. The "ultimate question" is whether, viewed objectively, the facts of the transaction show that the bank assumed a

responsibility to advise on its suitability [***Fine Care Homes Ltd v. National Westminster Bank Plc and another*** **[2020] EWHC 3233 (Ch) at paragraph 107**].

Evaluation of Evidence

There is nothing in the loan agreement to indicate that the Respondent took upon itself the obligation to pass valid title to the demised premises to the Appellant. In this context, I must refer to the distinction between warranty of title and an undertaking to warrant and defend title. In ***Chellappah v. McHeyzer et al.*** **(38 NLR 393 at 396)** Soertsz, J. held:

> *"An express warranty of title occurs when a vendor in so many words warrants that he has a good and lawful title. Whereas in every contract of sale, other than one in which the vendor definitely states that he will not warrant and defend title, there is implied, if it is not expressed, an undertaking to warrant and defend title if and when it is challenged. In the present case, clearly there is no express warranty of title but only an explicit undertaking to warrant and defend it."*

In ***Prenn v. Simmonds*** **[(1971) 1 WLR 1381 at 1385]** Lord Wilberforce held that for the purpose of construing written agreement evidence should be restricted to evidence of the factual background known to the parties *at or before the date of the contract* including evidence of the "genesis" and objectively the "aim" of the transaction.

The evidence establishes that it is the Appellant who identified the demised premises for purchase and sought a housing loan and approached the Respondent for the loan.

The Deed of Transfer No. 3135 by which the Appellant sought to obtain title to the demised premises and the Mortgage Bond No. 3136 were executed on the same day, namely 5th June 2006.

In clause 3 of the Mortgage Bond No.3136 dated 5thJune 2006, the Appellant has given a warranty of title in stating that he has good right and full power to mortgage and hypothecate the demised premises.

By clause 2 therein, the Appellant agreed with the Respondent to warrant and defend the title to the demised premises.

Clearly, the Appellant gave the Respondent a warranty of title as well as agreeing to warrant and defend the title to the demised premises.

These warranties given on the date of execution of both the deed of transfer and mortgage bond run counter to the assertion of the Appellant that the Respondent was under a duty to pass valid and legal title to the demised premises. The Appellant could not have warranted title to the Respondent and also undertaken to warrant and defend title had the Respondent undertaken to pass good and valid title to the demised premises to the Appellant. This is fatal to the claim of the Appellant that the Respondent agreed to advise on the title to the demised property.

An important element of the advisory claim of the Appellant is that the Respondent arranged notarial services for the Appellant through its lawyer Mallikaratchige Dilrukshi Lalani Perera of M/s Julius & Creasy. Nevertheless, according to letter dated 05.06.2006 (P5), the Appellant had written to M/s Julius & Creasy requesting them to act on his behalf in respect of the purchase of the demised premises in his name. Therein he has specifically acknowledged that he is aware that M/s Julius & Creasy are acting as lawyers for the Respondent in respect of the mortgage of the demised premises to be executed by the Appellant and that he has no objection to M/s Julius & Creasy acting on his behalf as well.

The Appellant contends that this letter was prepared by the Respondent and he had no choice other than to sign it as otherwise the loan would not have been granted. However, he did of course have choices such as seeking independent advice from another notary which he did not.

Moreover, the attempt to assimilate the role of the said notary as that of the Respondent is factually misconceived. The said notary was a member of the M/s Julius & Creasy

retained by the Respondent to provide professional advice to its in relation to the transaction. She was also retained by the Appellant to advise him with the full knowledge of the professional relationship between the said notary and the Respondent.

In this context, the decision in ***Bristol & West Building Society v. Mothew*** **[(1998) Ch 1]** is instructive.

The plaintiff advanced money to a husband and wife secured by way of a first mortgage on the house they were buying. The defendant solicitor, was acting on behalf of both the plaintiff and the husband and wife throughout the purchasing process.

The loan did not cover the entire purchase price – the lenders therefore required an express assurance that the balance would be supplied by the purchaser's personal finance, rather than a second mortgage loan.

The defendant solicitor mistakenly provided this assurance, and so when the purchasers defaulted on their repayments and the lenders enforced their security by selling the property at a loss. The plaintiff sought to recover their whole net loss from the defendant for breach of contract, negligence, and breach of trust or fiduciary duty.

Lord Millett (at page 18) considered the position of a fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both and held that there is a breach of the obligation of undivided loyalty. In that situation the fiduciary puts himself in a position where his duty to one principal may conflict with his duty to the other and described it as "the double employment rule".

It was held (at page 19) that the breach of the rule automatically constitutes a breach of a fiduciary duty. However, Lord Millett went on to hold that the plaintiff could not complain of this given that it was aware that the defendant was acting for the purchasers when it instructed him and that was the very reason why it chose the defendant to act for it. This is exactly on point with the facts of this appeal.

Lord Millett went on to state that even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the furthering the interests of one principal to the prejudice of those of the other. He must serve each as faithfully and loyally as if he were his only principal.

Taking the case of the Appellant at the highest, even if it is assumed that the notary was negligent in executing the deed of transfer by failing to properly investigate the title, the liability lies with the said notary and not the Respondent as rightly pointed out by the learned Judge of the Commercial High Court.

The Appellant also seeks to rely on the Respondent obtaining all documentation relating to the title to the demised property to be consistent with its obligation to ensure that the Appellant gets good title, and would be able to afford good security for the loan to the bank.

Nevertheless, the purpose of taking a collateral as security for the grant of a housing loan and the grant of the housing loan itself must be viewed from different perspectives, that of the Appellant and the Respondent.

As Lord Millett observed in the Privy Council in ***National Commercial Bank (Jamaica) Ltd v. Hew and Others*** **[(2003)UKPC 51, para. 21]** even where a lender insists that the money lent be used in a particular way, it does not even amount to tacit advice that the proposed project is a viable one. He went on to explain that (at para. 22):

> *"It may well have been foolhardy of Mr. Hew [the customer] to embark on the project without obtaining estimates of the likely costs and cash flow forecasts; but the bank was under no duty to advise him against such a course. It may have been unwise of Mr. Cobham [the bank manager] to have lent the money without insisting on being provided with such estimates and forecasts and without having conducted a feasibility study of his own. But as Mr. Cobham explained, any such study would*

have been for the Bank's protection, not Mr. Hew's. The reason he did not call for such a study is that he did not think that the Bank's interests required it; the Bank had sufficient security to support a much larger loan than anything that was contemplated at the time. ***This is a useful illustration of the truism that the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound.*** *"* (emphasis added)

For all the foregoing reasons, I hold that the Respondent did not undertake to advise the Appellant on the housing transaction or give any warranty of title to the demised premises. The claim-in-reconvention must necessarily fail.

The judgment of the Commercial High Court of the Western Province holden in Colombo dated 08.08. 2012 is affirmed.

The appeal is dismissed with costs fixed at Rs. 1,00,000/=.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Jayantha Jayasuriya P.C., C.J.

CHIEF JUSTICE

A. H. M. D. Nawaz, J.

JUDGE OF THE SUPREME COURT