JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 64 & 88/99

Suit Nos. CL 1996/C-330 & 1997/C-050

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**DONOVAN CRAWFORD**	**3RD DEFENDANT/ APPELLANT**
	REGARDLESS LTD	**6TH DEFENDANT/ APPELLANT**
	ALMA CRAWFORD	**9TH DEFENDANT/ APPELLANT**
	BALMAIN BROWN	**5TH DEFENDANT/ APPELLANT**
AND	**FINANCIAL INSTITUTIONS SERVICES LTD**	**PLAINTIFF/ RESPONDENT**

Pamela Benka-Coker, Q.C. for Donovan Crawford, Regardless Ltd and Alma Crawford instructed by **Harold Brady of Brady & Co**

Dr. Lloyd Barnett with Anthony Pearson instructed by Pearson & Company for Balmain Brown

Michael Hylton, Q.C. with **Sandra Minott-Phillips, Michelle Henry-Champagnie** and **Hilary Reid** instructed by **Myers, Fletcher & Gordon** for Respondent

July 10, 11, 12, 13, 14, 17, 18, 19 20, 21, 24, 25, 26, 2000 and July 31, 2001

FORTE, P:

On July 10, 1996 the Minister of Finance exercising his powers under the Banking Act, assumed the temporary management of Century National Bank Ltd. Subsequently, in accordance with an Order made in the Supreme Court (on the 21st October, 1997), the assets of Century National Bank Ltd and all claims and rights to recover debt, damages or other compensation from persons liable to the Bank became vested in the respondent. At the time immediately preceding the assumption of temporary management by the Minister, the appellant Donovan Crawford, (and indeed at the material times at which the issues in the case arose), was the Chief Executive Officer and Chairman of Century National Bank (the "Bank"). The appellant Alma Crawford, the mother of Donovan Crawford, became involved in the suit because of an alleged guarantee and a mortgage document which she together with Donovan Crawford signed. The latter, the respondent alleged related to certain properties owned by them and the titles to which were deposited with the Bank. These titles came to the respondent's hand through the take over by the Minister.

The guarantee and mortgage were alleged in the Statement of Claim to have been given to the Bank by the appellant Donovan Crawford as well as the appellant Alma Crawford. In order to understand the claims of the respondent some further facts must be recorded. Also sued on the Writ were several companies which it was alleged were indebted to the Bank, and whose debts were secured by a Company-Century National Development Ltd ("CND"). Century National Bank Holdings Ltd ("Holdings") was the holding company for the Bank and for these other companies which are Fordix Ltd and Spring Park Farms, as well as "CND". Although "CND" was also indebted to the Bank, there was no document, apart from the guarantee and the mortgage, which evidenced any security given to the Bank, for its (CND's) indebtedness or the

indebtedness of the other companies whose debts it had secured. Regardless Ltd was also a debtor of the Bank, but at the time of this action had paid off its debts. The connection of Donovan and Alma Crawford to these companies is relevant also to a proper understanding of the issues in the case. The connections are as follows:

> 'Regardless' owned totally by Donovan Crawford, his wife and children
>
> 'Holdings' – Majority shares owned by Donovan and Alma Crawford and 'Regardless'
>
> CND, Fordix and Spring Park Farms – owned totally by Holdings
>
> From these, two things emerge:
>
> (i) Donovan and Alma Crawford and Regardless as majority shareholders of Holdings, would therefore have had a controlling interest in CND, Fordix and Spring Farm together with Regardless which is owned by Donovan Crawford and his immediate family.
>
> (ii) Alma Crawford had no beneficial interest in Regardless Ltd although she was a director of that company.

The respondents claimed on the guarantee and the mortgage – in respect of the debts of CND. Both documents which were printed standard forms were signed by Donovan and Alma Crawford, but the principal debtor in the guarantee was not stated, that part of the form remaining blank.

On the mortgage document, there was no insertion of the name of the mortgagor, nor of the properties mortgaged. In respect of both documents, both Donovan and Alma admitted to signing them in blank, and to having signed a letter addressed to the Manager of Century National Bank "confirming executing mortgage documents with the date, limit of mortgagor's liability and original amount for stamp duty purposes left in blank" and authorizing the Bank "to fill in such blanks and complete the security."

The Guarantee

In respect of this aspect of the case the appellants challenged the finding of the Learned Chief Justice who came to the conclusion that the guarantee is enforceable and that "the plaintiff is authorized to complete the document by filling in the name of CND as the debtor" and consequently made such order.

In coming to his conclusion, the Learned Chief Justice, in the absence of direct evidence as to whom the principal debtor was, drew inferences from facts that he found proven by the respondent. Before examining this finding, it ought to be recorded, that although Donovan and Alma Crawford filed defences in the action, neither testified in their defence. In effect the establishment of the plaintiff's case depended on whether the inferences that could be drawn from the plaintiff's evidence was sufficient to prove that the intention of the party at the time of the giving of the guarantee was that CND would be the principal debtor.

In its Statement of Claim, the respondent alleged that CND was indebted to the Bank in the sum of $251,608,398.43 being debit balance outstanding at September 15, 1996 in respect of its current account with interest accruing at 65% per annum.

In respect of the guarantee the respondent pleaded as follows in paragraph 21:

> "By an instrument in writing made in or about the year 1992,the 3rd Defendant (Donovan Crawford) and the 9th Defendant (Alma Crawford) guaranteed to CNB payment of all sums due to CNB from the 2nd Defendant. Despite demand, the 3rd and 9th Defendants have not paid the sums due to the Plaintiff from the 2nd Defendant or any part thereof. This instrument of guarantee is a printed document which was executed in blank by the said 3rd and 9th Defendants on the understanding that the 2nd Defendant was the principal debtor whose total indebtedness was being guaranteed. By executing the document in blank the 3rd and 9th Defendants impliedly authorized CNB to complete it by inserting the 2nd Defendant's name, the approximate date on which it was executed, and the word 'unlimited'.

In paragraph 20 of the 3rd defendant/appellant's Defence he responded to paragraph 21 of the Statement of Claim (supra) thus:

> "**20.** Paragraph 21 of the Statement of Claim is denied. The Third Defendant and the Ninth Defendant executed a guarantee as security for advances made by the Plaintiff to the Third Defendant and the Sixth Defendant (Regardless Ltd) and for no other purpose. There was no authority given to the Plaintiff to insert the name of the Second Defendant, and if any such insertion has been done, it has been done wrongfully and without authority."

The 9th defendant in keeping with the pleadings of the 3rd defendant pleaded the following in respect to the guarantee: (paragraph 3 of her Defence).

> "**3.** As to paragraph 21 of the Ninth Defendant denies that she guaranteed any sums due to the Plaintiff from the Second Defendant. She denies that there was any 'understanding' whether expressed to any party or implied, that the Second Defendant's obligations were guaranteed by her. She admits that she signed a document of guarantee for the express purpose of guaranteeing a loan by the Plaintiff to the Sixth Defendant. (Regardless) She denies that she authorized the Plaintiff to complete the said document by inserting the Second Defendant's name and contends that any such insertion would be unlawful."

The appellants through their Defences, denied that the guarantee which they admittedly signed was in respect of the indebtedness of Development, as alleged by the respondent. Instead they sought to contend that the guarantee was in respect of loans granted to Regardless Ltd, which had already been paid.

The respondent, both at trial, and before us maintained that there was evidence upon which a reasonable inference could be drawn, that the principal debtor to which the guarantee related was "Development" (CND).

There was no challenge to the fact that the appellants entered into and signed a contract of guarantee with the respondent. The issue raised was whether the guarantee applied to the loans issued to Regardless Ltd, or to CND Ltd. The appellants gave no evidence and consequently there is no evidence that the parties

intended the guarantee to relate to Regardless. This issue arose only in the pleading which is not evidence.

Nevertheless, the respondent had the burden of proving that the guarantee related to the debts of CND. The learned Chief Justice therefore had to examine the evidence on the respondent's case in particular reference to all the background history and relationship of the Bank with the appellants to determine the intention of the parties at the signing of the guarantee. In doing so, he came to the following conclusion at page 59 of his judgment:

> "Now what is the factual situation from which the intention of the parties may be gleaned?
>
> 1. The debts of all the other entities in which the parties had an interest and who were indebted to the plaintiff were guaranteed, namely Fordix Ltd., Spring Park Farms and Holdings Ltd.
>
> 2. Development Ltd. guaranteed the debts of the above entities
>
> 3. The huge debt owed by Development Ltd. was not guaranteed. This debt stood at J$235,887,984.90 with interest at the rate of 65% from September 16, 1996 and US$16,000,000 and interest thereon pursuant to its guarantee of the first defendant. Also the sum of J$251,608,398.43 being the debit balance outstanding as at September 16, 1996 in respect of the second defendant's current account with C.N.B. with interest at the rate of 65% per annum from September 16, 1996.
>
> 4. Both Donovan and Alma Crawford have a beneficial interest in Development Ltd.
>
> 5. Alma Crawford had no beneficial interest in Regardless Ltd.
>
> 6. Regardless Ltd indebtedness to C.N.B. Ltd stood at J$7,000,000.00 and has now been liquidated.
>
> I am satisfied that the haste with which the indebtedness of Regardless was liquidated was all part of a plan to facilitate the defence that the guarantee was in respect of Regardless. The position of Donovan and Alma Crawford is,

> Regardless having liquidated its indebtedness, we are entitled to have our title deeds returned as the guarantee is no longer valid.
>
> The enormity of the debt of Development Ltd., the fact that Development Ltd. had guaranteed the debt of other entities lead me to conclude on a balance of probabilities that the defendants intended to guarantee the indebtedness of Development Ltd. when they signed the blank guarantee.
>
> More significantly, the defendants refused to adduce any evidence to controvert the allegation by the plaintiff, which in my view is supported by the factual situation.
>
> It certainly does not make sense to argue that Development Ltd., having guaranteed the debt of all these other entities, would not be required to provide some guarantee for its own indebtedness."

In her challenge to these findings, Mrs. Benka-Coker for the appellants contended firstly that a contract of guarantee is strictly construed in favour of the guarantor, and no liability is to be imposed on him, which is not distinctly covered by the contract. In addition to this, she submitted, in this particular instance, the contract of guarantee was itself in writing. It is not permissible in law, she argued, for anyone to add to or vary the written document. It was not open to the learned judge to complete the contract for the bank and to insert his hypothesis of the name of the principal debtor and to seek to make certain that which was uncertain.

This submission is clearly wrong. The equitable remedy of rectification has always been available to correct or complete a document which does not express the intention of the parties. The decision in the case of ***Whiting v. Diver Plumbing and Heating Ltd*** [1992] 1 NZLR 560 a case from New Zealand, cited by Mr. Hylton, Q.C. for the respondent and with which I agree confirms this proposition. It is sufficient to say only that the case concerned, a guarantee executed by the appellant in favour of the respondent and which it was alleged guaranteed the indebtedness of a company owned by the appellant. The name of the principal debtor was not filled in. In delivering the

judgment of the Court, on application for interrogatories addressed to the defendant to state the name of the principal debtor, Tipping J said:

> "There can be no doubt in the present case that Mr. Whiting has already signed an instrument which clearly is the subject of a bona fide application for rectification by ***Diver Plumbing.*** There is a blank in the prepared form. It must have been the intention of both parties if acting bona fide that the name of the debtor should be inserted in the blank. The interrogatory is designed to elicit evidence from Mr. Whiting as to who the person was whose name has been omitted. The Court may supply an omission in a document by rectification; so the intention of the parties as to the omission is obviously a relevant issue."

If the documents recording the contract can be rectified, then in order to do so, the intentions of the parties as to how the blanks should be filled in must be inferred from the surrounding circumstances, unless of course there is an admission by the guarantor as to the identity of the principal debtor. In the instant case, though only in pleadings the appellants alleged that the principal debtor was Regardless Ltd. They have given no evidence in support. The background to the document must be looked at for a determination of the issue whether the principal debtor was intended to be CND or Regardless. At the time when the guarantee was signed by the appellants, Donovan Crawford was Chairman, and Chief Executive Officer of the Bank, and in control of the day to day administration. The knowledge of the intentions of the party should rest in him. He however, would have been in one sense representing the Bank on the one hand, and the appellant Alma Crawford and himself on the other.

In addition, he and Alma, had controlling interest in CND the company alleged by the respondent to be the omitted principal debtor. The consequence of that, is that there was no available person who would be cognizant of the transaction who could testify to the intentions of the parties; Donovan and Alma having chosen to refrain from testifying. The learned Chief Justice therefore was entitled to look at the facts surrounding the contract of guarantee and determine what was the intention of the parties. Ironically,

Mrs. Benka-Coker in her submission on behalf of the appellant impliedly advanced that proposition. Here is what she contended:

> "It is further submitted that the learned judge relied on evidence which was inadmissible in proof of the allegation that the principal debtor was the 2nd defendant/appellant. In construing a contract according to the legal principles applicable, the court was only entitled to look at all the surrounding circumstances at the time the document was signed in order to see what was the subject matter which the parties had in contemplation at the time the guarantee was signed and to determine the scope and object of the guarantee." [Emphasis added]

This submission admits to the entitlement of the learned Chief Justice to look at the "factual situation" to determine what "was in the contemplation of the parties" that is to say what was the intention of the parties.

However, in the case of ***Reardon Smith Line Ltd v. Hansen-Tangen Hansen-Tangen v. Sanko Steam Ship Co*** [1976] 3 All E.R. 570, Lord Wilberforce in his speech, questioned whether the use of "surrounding circumstances" to determine "the setting in which a contract is made" was not imprecise, and opined that the Court, in a commercial contract should know the commercial purpose of the contract. This he felt presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. He then speaks to the extrinsic facts which could be an aid of construction and for which in particular the intentions of the parties can be ascertained.

He said at page 574:

> "It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one

> is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. It is in this sense and not in the sense of constructive notice or of estopping fact that judges are found using words like 'knew or must be taken to have known'."

Given the factual situation that existed at the time of the signing of the guarantee, what is to be inferred to have been the intention of reasonable persons placed in the same position as the appellants and the respondent? The appellants through their pleadings alleged that the guarantee was security for the debts of Regardless Ltd. No evidence has been offered by the appellants to support their pleadings. The debt of Regardless stood at about $6 – 7,000,000.00 whereas that of Development stood at an amount in the region of $400,000.000.00 One of the sureties – Alma Crawford – had no beneficial interest in Regardless Ltd which ought to be a consideration in the determination of whom was the intended principal debtor. On the other hand, Alma & Donovan Crawford both had controlling interest in Development, and consequently would be the architects in the acquisition of the loans to Development. Donovan Crawford, was the officer in control of the day-to-day administration of the Bank, and would have great influence in the determination of the overdraft facilities allowed to Developments. In a sense he would have been representing both sides – the Bank, as also Development. In fact, it is conceded that Development secured the debts of the other companies. It is reasonable therefore, to infer that the Bank would require the debts of Development also to be secured. Indeed Donovan Crawford in his sworn response to interrogatories admitted that the overdraft facilities to Development were not granted "without proper and sufficient security." If he is correct, then what was the security offered by Development for its debts, and how did that company secure the debts of the other companies? As the evidence stood, the blank guarantee form signed by the appellants was in the hands of the respondent. All the companies in which both Alma & Donovan had beneficial

interest were indebted to the Bank. In respect of those loans, one of those companies, Century National Development Ltd had secured the debts of the other companies. Regardless, a company in which Donovan, but not Alma, had beneficial interest also owed money to the Bank, but an amount far less than that for which Development had liability. The signatures of the appellants on the guarantee signify an agreement between the Bank and the appellants for the guarantee of monies owed to the Bank. In my view, the conclusion to which the learned Chief Justice came, was inescapable given the factual situation. The only reasonable conclusion to be drawn from the facts stated heretofor, must be that it was the debt of Development that the parties intended should be secured by the guarantee. On a balance of probabilities, a conclusion that the guarantee could not relate to Regardless Ltd, was inevitable, given two additional factors:

(i) Alma had no beneficial interest in Regardless; and

(ii) on the evidence available, there was no ground for coming to the conclusion that Regardless was the principal debtor whereas the enormity of the indebtedness of Development made it more reasonable to conclude that the guarantee related to that debt.

For the above reasons, I would hold that the learned Chief Justice was correct in his conclusions and, consequently the contention of the appellant in this regard cannot be sustained.

Equitable Mortgage

The following claim was made by the respondent in paragraph 22 of its Statement of Claim:

> "**22.** In order to induce CNB to grant the overdraft facilities referred to in paragraphs 11 and 14 hereof, and as security for their indebtedness to CNB:

(a) The 3rd Defendant created equitable mortgages by deposit of title deeds in favour of CNB over the lands comprised in the following Certificates of Title:

i. Volume 1129 Folio 802 - 2A Sterling Castle, Red Hills

ii. Volume 1127 Folio 720 - Lot 5 Sterling Castle

(b) The 3rd Defendant and the 9th Defendant created equitable mortgages by deposit of title deeds in favour of CNB over the lands comprised in the following Certificates of Title:

i. Volume 1185 Folio 828 - Lot 1 Strata 298 Sterling Castle

ii. Volume 1185 Folio 829 - Lot 2 Strata 298 Sterling Castle, Red Hills

iii. Volume 1185 Folio 832 - Lot 5 Strata 298, Sterling Castle

iv. Volume 1185 Folio 833 - Lot 6 Strata 298, Sterling Castle

v. Volume 1185 Folio 834 - Lot 7 Strata 298, Sterling Castle

The overdraft facilities and consequent indebtedness referred to in paragraph 22 (supra) related to indebtedness of Holdings ($235,887,984.90 debt balance at 15th September 1996 with interest accruing at 65% per annum) and Development ($251,608,398.43 debt balance at 15th September 1996 with interest accruing at the rate of 65% per annum).

In his defence, the 3rd Defendant/Appellant, Donovan Crawford, whilst admitting that Holdings and Development were indebted to CNB, made no admission as to the amount owing or the rate of interest claimed. In respect of the claim that he had created equitable mortgages in respect of the properties claimed in paragraph 22 of the Statement of Claim, he made a denial without more.

In respect of this claim Alma Crawford the 9th Defendant/Appellant pleaded as follows:

> "As to paragraph 22b of the Amended Statement of Claim the Ninth Defendant denies that she created any equitable mortgage on any of the properties there specified. The said deeds were deposited with the Plaintiff for safe keeping."

As earlier stated both appellants did not give evidence. Consequently, as in the case of the guarantee, the learned trial judge had to look at the evidence of the plaintiff to determine whether the allegations in the Statement of Claim were proven to the required standard.

There was no dispute that both appellants executed an instrument of mortgage in blank and provided the Bank with a letter authorizing it to complete the said instrument. It was also undisputed that the title deeds referred to in paragraph 22 of the Statement of Claim were in the custody of the Bank.

On this background, Mrs. Benka-Coker, Q.C. contended that the mere presence of title deeds in the custody or control of the alleged mortgagee is insufficient to permit the inference to be drawn that the parties intended the creation of a mortgage. She submitted that there must be evidence existing at the time that the deeds came into the possession or custody of the purported mortgagee from which the intention of the parties to the contract may be inferred. She maintained that there was in fact no evidence in this regard.

The learned Chief Justice in coming to his decision relied on the following passage taken from Halsbury's Laws of England 4th Edition, Vol. 32 at paragraph 429:

> "A deposit of title deeds does not in itself create a charge, and the mere possession of deeds without evidence of the contract under which possession was obtained, or of the manner in which the possession originated so that a contract may be inferred, will not create an equitable security. The deposit is a fact which admits evidence of an intention to create a charge which would otherwise be

> inadmissible, and raises a presumption of a charge which throws upon the debtor the burden of rebutting it.
> A mere deposit of title deeds upon an advance, with intent to create a security on them, but without a word passing, gives an equitable lien so that, as between debtor and creditor, the fact of possession of the title deeds raises the presumption that they were deposited by way of security."

The latter words were obviously taken from the judgment of Lord Selborne in ***Dixon v. Muckleston*** [27 L.T. Rep. N.S. 804; L.Rep. 8Ch. App. 155, 162] and was in fact affirmed by Chitty J, in ***R v. McMahon; McMahon; v. McMahon*** [1886] 55 L.T. 763. In the latter case Chitty, J. accepted that the doctrine was laid down by Lord Eldon in **Ex parte Langston** (17 Ves 227) in the following words:

> "If money is advanced in such a way that a contract can be inferred, and the deeds are handed over without a word being said, then there is a charge upon the deeds."

What was the evidence before the learned Chief Justice? Firstly it ought to be remembered that the appellants offered no evidence in this regard. Though Mr. Crawford, denied the specific allegation in his Defence, Mrs. Crawford admitted that the title deeds were deposited with the Bank, albeit maintaining that they were deposited for safe-keeping, a contention not supported by any evidence.

Both appellants were majority shareholders of Companies to which excessive financial advances were made. Both executed an instrument of mortgage, and authorised the Bank to complete the document.

In my view the learned Chief Justice was correct in coming to the conclusion that there was sufficient evidence proven to create the presumption of an equitable mortgage having been created, as alleged. There was no evidence from either appellant to rebut this presumption, and consequently the learned Chief Justice was correct when he held:

> "In the absence of any evidence from Donovan Crawford and his mother Alma Crawford in whose names all the above titles stand, the presumption raised, that the deeds were deposited by way of security has not been rebutted.

> Accordingly, I hold the titles referred to above are subject to an equitable mortgage in favour of the plaintiff."

This ground fails.

Paddington Terrace

Property at 1 Paddington Terrace, owned by CNB was transferred to Regardless Ltd on the 14th August, 1991 at a cost of $1,813,612.00.

As has been seen earlier, Regardless Ltd was a company owned by Donovan Crawford, his wife and children. The sale to Regardless, arose out of a decision of the Board of CNB to sell the property to Donovan Crawford, who nominated Regardless Ltd to be registered as owner. The approval of the Board was sought, because Crawford was Chairman of the Board of Directors. The resolution to this effect was passed by the Board on the 27th March 1990, when an option was given to Crawford to purchase the property, the option extending over a period of 12 months. The resolution reads as follows:

> "The Chairman/Managing Director is hereby given formal approval by the Board to purchase No. 1 Paddington Terrace at book value plus 10% with the option to pay for same within 12 months and as suggested by Mr. Hadeed, a deposit of Ten Thousand Dollars ($10,000.00) be paid and a legal agreement drafted to reflect this arrangement."

At the expiration of the 12 months, Crawford, had not yet exercised the option, but had on the 19th February, 1991, applied to the Board successfully for an extension of the option for a period of six months. In the course of the 12 months, however, i.e. in October 1990 Crawford himself requested Orville Grey & Associates to assess the market value of the property and on the 31st October, 1990 Orville Grey tendered a report to him showing that the market value of the property was $4million.

In its Statement of Claim the Bank, sought to set the sale aside, and to have the Bank restored as the registered owner of the property. It did so on the following grounds:

> "**59.** The said transfer was a sham and unenforceable in that, inter alia:
>
> (a) It was not at arm's length;
> (b) It was not for market value;
> (c) It was in breach of the 3rd Defendant's fiduciary duties to CNB.

In its defence Regardless Ltd pleaded as follows:

> "**4.** In reply to paragraph 58 and 59 of the Statement of Claim, the Sixth Defendant denies that the transfer referred to was a sham or unenforceable. The Sixth Defendant is the registered and lawful owner of the said premises."

The appellant Donovan Crawford, in his Defence denied the allegation in the Statement of Claim. In resolving this issue the learned Chief Justice outlined the circumstances surrounding the transaction, and relying on two passages from ***Palmer's Company Law Vol. 2*** paragraphs 8-517 and 8-518 came to the following conclusion:

> "Applying the above principles to the instant transaction it is clear to me that this transaction must not be allowed to stand, Crawford having failed to disclose to the Board the true market value of the property. The Board approved the contract not knowing the true facts. It matters not that the contract might have been a fair one. The Court discourages situations in which possible conflict of interest and duty may arise. The Court in such circumstances will not address its mind to the merits of the transaction.
> In the circumstances, I order that the transfer of 1 Paddington Terrace to Regardless Ltd be set aside and the plaintiff is hereby declared the true owner of the property."

The passages in Palmer's (supra) read as follows:

> "It has been seen earlier that the position of a director, vis-a-vis the company, is that of an agent who may not himself contract with the principal, and that it further is similar to that of a trustee who, however fair a proposal may be, is not allowed to let the position arise where his interest and that of the trust may conflict.

> It follows from these propositions that a director's power of contracting with his company are extremely limited. ... the company is entitled to the collective wisdom of its directors, and if any director is interested in a contract, his interest may conflict with his duty, and the law always strives to prevent such a conflict from arising. The director may enter into a contract only if he makes full disclosure of all material facts to the members of the company, who then approve the contract. Not even if it can be shown that the contract in question is a fair one is the director allowed to enter into it, for the courts will not, in such cases, look into the merits, but adhere strictly to the rule that the possible conflict of interest and duty must not be allowed to arise. 'No man' said Lord Cairns L.C. 'can in this Court, acting as an agent, be allowed to put himself in a position in which his interest and duty will be in conflict.'
> If for example, the directors agree to sell to one of themselves part of the property of the company, the company is entitled to have the sale set aside, or at its option, to sue the directors for breach of duty."

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The appellant however complained that the learned Chief Justice in relying solely on the cited passage from ***Palmer's*** failed to give consideration to the provisions of Article 94 of the Articles of Association of the Company – which he alleges significantly protects him in contracting for the purchase of 1 Paddington Terrace. The relevant portion of Article 94(5) reads as follows:

> "... no Director or intending Director shall be disqualified by his office from contracting with the Company either with regard to his tenure of any other such office or place of profit or as a vendor, purchaser, or otherwise, nor shall any such contract, or any contract or arrangement entered into by or on behalf of the Company in which any Director is in any way interested, be liable to be avoided, nor shall any Director so contracting or being so interested be liable to account to the Company for any profit realized by any such contract or arrangement by reason of such Director holding that office or of, the fiduciary relation thereby established."

Mrs. Benka-Coker puts forward the above provisions of Article 94(5) as a complete answer to the respondent's claim in relation to the contract of sale of the property at Paddington Terrace. This in my judgment could only be, if the contract between Crawford a Director of the Company and the company was in fact at arm's

length and not the subject of a breach of duty or trust by him to the Company. These Articles must be read in conjunction with Section 191 of the Companies Act, which in my view confirms that the Articles cannot apply in those stated circumstances.

Section 191 reads as follows:

> "**191.** Subject as hereinafter provided, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, or other officer of the company, or any person (whether an officer of the company or not) employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void: ...".

The provisos are irrelevant to the issues under consideration.

By virtue of Section 191 of the Companies Act therefore, Article 94(5) cannot avail the appellant, if his conduct in relation to the contract, discloses that he was guilty of a breach of duty or a breach of trust.

To resolve the issue joined in relation to this transaction a good starting point is the following dicta of Lord Cranworth, L.C. in the case of ***Aberdeen Railway Company v. Blaikie Brothers*** [1843-1860] All E. R. [Reprint] 249 at page 252:

> "This, therefore, brings us to the general question, whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself or with a firm in which he is a partner. The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is

> allowed to be raised as to the fairness or unfairness of a contract so entered into."

As long ago as 1854, when this case was decided, the common law recognized that a director of a company was duty bound to act only in circumstances which would promote the interest of the company, and should never enter into contracts in which his personal interest would conflict with the interest of the company. He could do so, however if his Board of Directors approved the transaction after full disclosure to the Board. Failure to make full disclosure, as we shall see, would have adverse effects on any consequent transaction. **In re: *Lady Forest (Murchison) Gold Mine Limited*** [1901] 1 Ch. 582 at 589 Wright, J. uttered the following words with which I agree and which in my judgment has general application:

> "Although I shall have to say that Mr. Simpson and the other directors, members of the syndicate, were guilty of a breach of duty in the matter, it appears to me that they were not guilty of anything which in any ordinary sense of the word can be described as fraud at all. They disclosed the fact that they were directors of the vendor syndicate, and thereby they necessarily disclosed that they were making some profit. It is quite true they did not disclose what profit they were making, and in that, as it seems to me, they were wrong and guilty of a breach of duty."

Before this, in 1899 in the case of ***Langunas Nitrate Co. v. Lagunas Syndicate*** [1899] 2 Ch. 392, Rigby, L.J. quoted with approval (pages 444-5) the words of James, L.J. in ***Erlange v. New Sombereo Phosphate Co***. 5 Ch. D. 73 at 118, which are as follows:

> "A promoter is, according to my view of the case, in a fiduciary relationship to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so, but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. " (Emphasis added)

Having referred to the dicta of James, L.J. Rigby, L.J. then continued (pages 445, supra)

> "Now, it is clear that the full and fair disclosure which a trustee would have to make to his cestue que trust to whom he was selling would have to include not only the fact of his being the owner, but all the natural facts concerning his interest and position, including what it had cost him, or in other words, the amount of profit that he was to get out of the transaction and many other things which an independent vendor would be under no sort of obligation to disclose."

A director of a company is not precluded from purchasing property from the company, but in seeking the consent of the company to enter into such a contract his fiduciary relation with the company requires that he makes full and fair disclosure of all the circumstances relating to the transaction. The authors of ***Goff and Jones, Law of Restitution*** share this view. At page 649 of that text they state:

> "But it is not true to say that a trustee may never buy trust property, for the purchase is not void but voidable by the beneficiaries within a reasonable time. Lord Cairns L.C. accepted that there is no rule of law that a trustee shall not buy property from his *cestui que trust;* but, 'if challenged in proper time, Equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value and that all information was laid before the *cestui que trust* when it was sold.' The trustee must disclose all that he knows about the property, its actual and potential value and every fact which may weigh with a vendor in determining whether to sell and the price at which to sell. He must give the beneficiary all that reasonable advice against himself, that he would have given against a third person. Even if a trustee acts honestly, he may find that a court, in later proceedings, will conclude that he suppressed a material fact."

In the instant case, the respondent had to show that the 3rd defendant/appellant, Donovan Crawford failed to make full and fair disclosure to his Board of Directors when he sought and obtained the latter's consent for his purchase of 1 Paddington Terrace. There is no evidence that the market value of the property was known at the time the Board approved the option to purchase. At the time,

however, that the 'option' was extended the evidence clearly shows that Donovan Crawford had knowledge that the market value of the property was $4 million in October of the previous year. This knowledge he did not disclose to the Board at that time, nor at the time of applying for the extension. In addition, the uncontradicted evidence of Mr. Glen Harloff, Vice President of Dispute Analysis Forensic Investigations Section at Price Waterhouse, Toronto and an expert in this field discloses that the price at which the property was sold, was not in keeping with the resolution of the Board which gave the approval for the sale to Crawford. The property, the resolution states, should be sold 'at book value plus 10%'. Mr. Harloff's examination of the books revealed that the book value at the time of the sale was in fact $2,824,417.00 and not $1,813,612.00 for which it was actually sold. There was also evidence that the Bank continued to pay for repairs to the property up to October of 1991, after the property had been transferred to Regardless Ltd.

In view of the above, it is clear that there was ample evidence upon which the learned Chief Justice could come to the conclusion that this transaction was in breach of Crawford's fiduciary duties.

Mrs. Benka-Coker, however contended the following:

> "(i) third parties had already acquired rights under the transfer and therefore 'restitutio in integrum' was no longer possible, and
>
> (ii) the provisions of the Registration of Titles Act became operable and in particular Section 70, and the registered title could not now be defeated save on the proof by the plaintiff of fraud in the 6th defendant/appellant."

The submission in (i) must be considered on the background that Crawford had the controlling interest in ***Regardless Ltd*** (the 6th Defendant) to which the property was transferred and that it was Crawford to whom the property was sold, he nominating Regardless as the entity to which the property was to be transferred. Mr. Michael

Hylton, Q.C. in response to these submissions, relied on the following passage from Halsbury's Laws of England (4th Edition) Volume 16 at paragraph 911:

> "The principle of following assets applies wherever a fiduciary relation between parties subsists, and extends to enable property to be recovered not merely from those who acquire a legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, but from volunteers into whose hands the legal title to property has come provided that, as a result of what has gone before, some equitable proprietary interest had attached to the property in the hands of the volunteer."

The legal title to the property having passed to Regardless Ltd, the question arises as to whether Regardless could be said to be a bona fide purchaser for value without notice. If of course it was not, then some equitable proprietary interest in favour of CNB would have attached to the property. Consequently, though the legal title would be in Regardless, a beneficial interest would reside in CNB. Regardless, cannot be said to be a 'stranger' to the transaction, as it was Crawford who had the controlling interest in Regardless, who negotiated with the Board of Directors of CNB in a manner which amounted to a breach of his fiduciary dealing and a fortiori would be seized of the knowledge of that breach. His knowledge must necessarily be also attributed to him in his position of major shareholder of Regardless and consequently it cannot be said that Regardless was a bona fide purchaser for value without notice.

In my judgment, the evidence demonstrates that Regardless Ltd was a mere nominee of Crawford and was, as has been submitted by Mr. Hylton, Q.C., a "vehicle for the transfer of the property." It cannot be successfully contended therefore, that Regardless should be viewed as a separate entity in the context of this transaction, and be allowed to hide behind a shield of "stranger" to the transaction. As Miller J said in ***Agip (Africa) Limited v. Jackson*** [1992] 4 All E.R. 385 at 401 where directors had transferred the company's funds to an incorporated company called Baker Oil Ltd:

> "There is some artificiality in treating Baker Oil as a distinct entity. It was a mere nominee used purely as a vehicle for the transfer of money. It was the creature of Mr. Jackson and Mr. Griffin. In reality it was nothing more than a name on a bank account."

In the same way, Crawford in breach of fiduciary duty, bought the property from CNB and nominated Regardless Ltd, a company owned by his wife, children and himself to be the transferee. Regardless Ltd in this context was indeed, nothing more than a vehicle for the transfer of the property. The contention by Mrs. Benka-Coker, Q.C. in (i) above (the rights of third parties) must therefore fail.

In respect of (ii) (the contention regarding Section 70 of the Registration of Titles Act) – I agree with the submissions of Mr. Hylton, Q.C. that that Act affords no defence to the appellant Crawford.

As I have earlier said the legal interest now held by Regardless Ltd is held on Trust for CNB who is entitled to the beneficial interest in the property. In these circumstances, the property by an order of the Court can be transferred to the Respondent.

As on the face of the record, the evidence reveals that Crawford's conduct in the whole transaction in relation to the purchase of this property by him, amounted to a fraud committed on the Bank, Section 70 of the Registration of Titles Act would offers no protection. In so far as Regardless is concerned, for reasons already given, that company is fixed with the knowledge of Crawford, and cannot be described as a bona fide purchaser for value without notice. Section 70 of the Registration of Titles Act is designed to protect an innocent purchaser. Regardless cannot claim innocence in the whole transaction and consequently the circumstances of this case fall within the exception prescribed in Section 70. The title to the property can therefore be transferred back to the Bank. It has been argued that the respondent did not plead "fraud" in its Statement of Claim and so no order can be made on that basis. As already stated

however, fraud is disclosed on the face of the record, and no evidence having been offered to contradict it, the court must take cognizance of it, particularly in these circumstances where the fraud was committed by a person in a fiduciary position vis-à-vis the company that was defrauded. Such a person ought not to be allowed to shelter behind an Act of Parliament, to defeat the proprietary right of another who is the beneficial owner of the property.

In those circumstances, it is my judgment that the learned Chief Justice was correct in his conclusions in respect of the transaction concerning 1 Paddington Terrace, and I would consequently affirm the order he made in this regard.

Negligence and Breach of Fiduciary Duty

The Statement of Claim alleged that the Bank suffered great loss as a result of the negligence and breach of fiduciary duties by the 3rd defendant/appellant (Crawford) and the 5th defendant/appellant Balmain Brown. Similar allegations were also made in respect of the 4th defendant Williams, but no appeal having been pursued by him, no reference will again be made in that regard. Though the allegations claimed joint and several liability in Crawford and Brown, the President, and a Director of the CNB, in keeping with the order in which the submissions were made I will deal firstly with the allegations made against Crawford in this regard and thereafter examine the merits of the appellant Brown's appeal. As the submissions in respect of both touch on the duties and responsibilities of directors/employees of a company, references to the legal principles will necessarily affect both appeals.

Both Crawford and Brown were charged in the Statement of Claim with negligence and breach of fiduciary duty which led to the following losses of the Bank.

> Paragraph 30 – "As a result of the 3rd, 4th and 5th Defendants' aforesaid negligence CNB has incurred expenses and suffered loss and damage including the expenses, loss and damage particularized below.

PARTICULARS

a. The sum owing by the 1st Defendant (Holdings) on its overdraft, being $235,887,984.90 and interest;

b. The sum owing by the 2nd Defendant (Development) on its overdraft being $251,608,398.43 and interest;

c. The sums owing by the 6th (Regardless Ltd) 7th (Fordix Ltd) and 8th (Spring Park Farm) being

   i. $5,180,590.63
   ii. $2,469.80 and US$484,584.33
   iii. $35,615,443.31

   respectively and interest;

d. The sum of US$22,000,000.00 and interest;

e. The sum of US$3,500,000.00 and interest;

f. The sum of US$81,802.66 and interest."

Paragraphs d – f outlined as particulars of claim above, related to special transactions, which as was done in the arguments before us will be treated separately, later in this judgment.

In addition, the claim in negligence and/or breach of fiduciary duty also related to the Paddington Terrace transaction as well as to certain payments made in respect of Crawford's personal financing and are hereunder stated as is in the Statement of Claim.

(i) "U.S.$4,770.90 which was the cost of a generator

(ii) $152,888.58 paid to Flagger College in respect to Crawford's daughter

(iii) $238,000.00 paid to Crawford's household help

(iv) $66,400 for 'other help'

(v) $860,227.00 paid for refurbishing Crawford's residence

(vi) $159,982.00 tuition fees for Crawford's daughter – Sian

(vii) $US71,047.00 Cost of another generator."

These latter payments related to Donovan Crawford and will also be treated separately.

The particulars of negligence as pleaded and which remain relevant to this appeal were as follows:

> "**Particulars of negligence of the 3rd, 4th and 5th Defendants**
>
> Causing and/or allowing CNB to:
>
> a. grant overdraft facilities to the 1st Defendant (Holding) without proper and sufficient security;
>
> b. grant overdraft facilities to the 2nd Defendant (CN Development without proper and sufficient security;
>
> c. grant a loan and/or overdraft facilities to the 6th (Regarless Ltd) 7th (Fordix Ltd) and 8th S(pring Park Farm) Defendants without any or any proper security;"

d – f relates to specific transactions i.e. First Trade/Tower Bank transaction, Shelltox transaction, and second First Trade transaction which were alleged to be unsafe transaction and which will be treated separately:

> g – related to the Paddington Terrace transaction,
> 'h' – "Make various payments to or for the benefit of the 3rd Defendant (Crawford) which the 3rd Defendant was not entitled to, and which were not in the best interests of CNB.

These payments were described as the "Crawford Payments" and will also be dealt with separately.

The Statement of Claim then detailed losses, which occurred as a result of the 3rd, 4th and 5th defendants negligence which are already set out above.

In the alternative (paragraph 31 – Statement of Claim), the respondent claimed breach of fiduciary duty as follows:

> "**31.** Further and in the alternative, the 3rd, 4th and 5th Defendants, and each of them had a fiduciary duty to CNB including but not limited to a duty to:
>
> a. act in its best interests;
> b. act in good faith;
> c. enter into contracts and/or agreements which were in it best interests;
> d. exercise their powers as directors for proper purposes only
> e. not misuse CNB's assets;
> f. not place themselves in a position where there would or alternatively, could be a conflict of interest between their duty to CNB and their personal interests;
> g. ensure that CNB was provided with adequate and proper security in respect of any overdrafts, loans or other credit advanced by CNB to its customers;
> h. ensure that CNB carried on its business in accordance with its articles of association, the Companies Act, the Banking Act, the Bank of Jamaica Act, and other relevant legislation and regulations."

Paragraph 32 then alleges that in breach of their fiduciary duties, the 3rd, 4th and 5th Defendants and "each of them" caused and/or allowed CNB to enter into the transactions, which the respondent had earlier alleged were the transactions entered into as a result of their negligence and which have already been detailed heretofore. It then alleges that as a result of breaches of their fiduciary duty, CNB has incurred the expenses and suffered the loss and damage as already detailed in its claim in negligence.

Liability of Crawford

In coming to his conclusion on this issue the learned Chief Justice stated as follows:

> "These other losses, it is contended, have arisen out of instances where there were conflicts between the personal interests and the corporate duties of the directors.
>
> What are these other losses to which the plaintiff refers?

(i) Losses suffered by the Bank and Building Society as a result of the loans made to Corporate Defendants.

In respect of these loans there were no loan agreements and no fixed terms of repayment. The corporate entities were experiencing financial hardships. They were unable to service the debt. The debts were unsecured. These loans consisted of large sums of money.

These loans were personally approved by Crawford, Williams and Brown, who were not only directors of the Bank and Building Society, but holders of senior management posts in both institutions.

Richard Downer, the temporary manager, testified that the loans to the corporate bodies were not made in keeping with good banking practice.

Brown himself admitted that the loans were not made in accordance with the requirements of prudent banking practice.

The involvement of Crawford and Williams is significant in that they had interests in the Companies to which the loans were made. This was clearly a conflict of interest and a breach of fiduciary duties. There was a shortfall of some $750,000,000,between the balance owing by the Defendant companies and their assets."

In coming to his conclusion that Crawford and Williams were liable the learned Chief Justice relied on the following passages from ***Palmer's Company*** Law Volume 2 paragraph 8 – 156:

"Like other fiduciaries directors are required not to put themselves in a position where there is a conflict (actual or potential) between their personal interests and their duties to the company or between their duty to the company and a duty owed to another person."

And at paragraphs 8.536 – 8.537:

"A director of a company may not make a secret profit for himself from the use of corporate assets, information or opportunities. This principle, which has its origins in the no-conflict rule, has probably now attained the status of a separate rule. The use by the director of corporate assets to make a secret profit for himself is clearly a breach of his fiduciary duty."

The reliance on these passages suggests that the learned Chief Justice based his findings on the alternative claim for a breach of fiduciary duties on the part of Crawford, and not on the allegation of negligence. In spite of this the 3rd defendant/appellant challenges the finding of the learned Chief Justice not only on the basis of a breach of fiduciary duty, but also on the basis of negligence. In respect of Crawford, the finding that it was his breach of fiduciary duty that led to the losses in respect to the overdrafts of Holdings, Development, Regardless Ltd, Fordix and Spring Park Farms, in my judgment is unchallengeable. Crawford was the Chief Executive Officer, and Chairman of the Board of Directors. As a director, he occupied a fiduciary position and all the powers entrusted to him were exercisable in his fiduciary capacity. This fiduciary relationship with the Bank, imposed upon him duties of loyalty and good faith. He was also under duties of care, diligence and skill, which are very different from the duties to be cautious and not to take risks which are imposed on many trustees: (See Palmer's Company Law 28th Edition Volume 2 at paragraphs 8.405). In determining his liability, it must be recognized that he was an experienced banker, who should know the guidelines by which loans are granted to customers, so as to leave the bank secured against any failure to make good those loans. As a director, his personal interest cannot conflict with the interest of the Bank. It may be useful to reiterate at this time, that Crawford had a personal interest in all these (related) companies that were given unsecured loans by the Bank.

These loans were the largest debts owed to the Bank. In his evidence, which the learned Chief Justice no doubt accepted, Mr. Richard Downer, the temporary manager appointed by the Minister after the takeover of the Bank, spoke to the large sums of overdraft afforded Holdings, Development and the other related companies in which Crawford had personal interest. The only semblance of any security granted for these

large overdrafts (e.g. Holdings $331,155,010.76 at time of his evidence including interest accruing at 6% p.a.) was a guarantee given by Development, which itself owed in overdraft at time of trial $372,238,928.18 being the subject of a judgment against it, and including interest. The guarantee given by Development was of course of no value, as apart from the overdraft, it had "no substance, it had no assets to make good the guarantee". In fact the total overdraft portfolio of the Bank was $1.304billion, 86% of which was unsecured. In relation to the debts owed by Holdings and Development, neither the records of the Bank or the Building Society revealed any formal loan agreement with these companies, nor were there any documents setting out a formal arrangement for the repayment of these debts. In addition Holdings and Development had consistently made losses. The evidence also revealed that Crawford personally approved the indebtedness to the Bank – and this in circumstances where the companies whose indebtedness he approved were companies in which he had personal beneficial interest. As Chief Executive Officer and Chairman of the Board of Directors of the Bank, Crawford indulged in what was a conflict of interest in approving these loans, and consequently a breach of his fiduciary duties. In my judgment, the learned Chief Justice was correct in coming to such a decision, and therefore there was no necessity to determine the validity of the claim in negligence as it applied to Crawford.

In any event, in my judgment, the conclusion of the learned Chief Justice could have been equally founded in negligence. Mrs. Benka-Coker relied on, inter-alia, the following passage from the judgment of Neville, J in the case of **In re: *Brazillian Rubber Plantations and Estates, Limited*** [1911] 1 Ch. 425 at page 436:

> "I have to consider what is the extent of the duty and obligation of directors towards their company. It has been laid down that so long as they act honestly they cannot be made responsible in damages unless guilty of gross negligence. There is admittedly a want of precision in this statement of a director's liability. In truth, one cannot say whether a man has been guilty of negligence, gross or

> otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. A director's duty has been laid down as requiring him to act with such care as is reasonably to be expected from him, having regard to his knowledge and experience. He is, I think, not bound to bring any special qualifications to his office. ... He is not, I think, bound to take any definite part in the conduct of the company's business, but so far as he does undertake it he must use reasonable care in its despatch.
> Such reasonable care must, I think, be measured by the care an ordinary man might be expected to take in the same circumstances on his own behalf. He is clearly, I think, not responsible for damages occasioned by errors of judgment."

This dicta of Neville, J was referred with approval by Romer, J in the English Court of Appeal in the case of ***In re City Equitable Fire Insurance Co.,*** [1925] 1 Ch. 407 and 428 when he said:

> "The care that he is bound to take has been described by Neville J. in the case referred to above as 'reasonable care' to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. In saying this Neville J. was only following what was laid down in ***Overend & Gurney Co v. Gibb*** as being the proper test to apply, namely:
>
> 'Whether or not the directors exceeded the powers entrusted to them, or whether if they did not so exceed their powers they were cognizant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into?' "

Romer J, thereafter set out three propositions 'that seemed to be warranted from the reported cases:

> "1. A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.
>
> 2. A director is not bound to give continuous attention to the affairs of his company; and

> 3. In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly."

These cases show that a director is expected to act with such care as is reasonable to be expected from a man of his skill and experience. If the circumstances are so plain, so manifest, and simple of appreciation that no man with any ordinary degree of prudence, acting on his own behalf would enter into such a transaction, then it could be said that he was acting without reasonable care.

In the instant case, these transactions i.e. the approval of the overdrafts in the circumstances in which they were approved i.e. without any security, or formal agreement for payment etc were so plainly and manifestly unsafe and unwise that the only conclusion must be that Crawford acted without reasonable care, and acted outside of the best interest of the Bank and the Building Society. Crawford could not successfully plead lack of skill or experience as he had been the Chief Executive Officer of the Bank, from its inception and consequently must have had the skill and experience of a Banker. In his case, as the CEO he was expected to give continuous attention to the business of the Bank. He approved the overdrafts personally. The Companies to whom the loans were granted were all companies in which he had personal interest and he must therefore be presumed to have knowledge of their financial status. In those circumstances it could not be said that in approving the loans, he was acting in reliance on "well trusted officials." In this regard, I accept as the law the following passage in Pennington's Company Law 6th Edition at page 602:

> "Many of the foregoing cases involved part-time directors, and often the loss complained of had been caused by the acts of a managing director to whom full powers of management had been properly committed. The court therefore acted fairly in not imposing too heavy a duty on the other directors, particularly when they were part-time, non-

> executive directors. But these decisions cannot form a reliable guide to the standard of care expected of full-time executive directors employed under service contracts, especially when they are each employed to manage some department of the company's business as well as to supervise its whole undertaking at board meetings. Such directors will usually be specialists in their own field, be it accountancy, engineering, marketing, finance or anything else, and they will be expected to exhibit the skill and care of a competent practitioner in that field when handling the company's affairs."

Crawford was indeed, a specialist in banking, dealing with transactions which called for expertise in that discipline. In the circumstances, it would be difficult to escape the conclusion that in these circumstances, he did not exercise the standard of care required of him in performing the duties attached to his position of Chief Executor Officer and Chairman of the Board of Directors. In my judgment for these reasons, a claim in negligence must succeed, and the conclusion of the learned Chief Justice albeit based on breach of fiduciary duties must be sustained.

Crawford Payments

These claims concerned, certain items claimed in the Statement of Claim and stated heretofore, in respect of which payment was proved to have been made by the Bank, such items having nothing to do with his entitlement under his contract of employment or with his position as Chairman of the Board of Directors. The evidence revealed that although these items were paid for, there were no vouchers in respect of any of them supporting the legitimacy of the funds expended for them. In respect of Crawford, I agree with the learned Chief Justice's reliance on the following passage from ***Walker v. Wimbourne and Others*** [1975-1976] 137 CLR 1 at page 12 which speaks to the misapplication of a Company's funds by directors:

> "Once again the inference is irresistible that there was a misapplication of the company's funds, a misapplication which occurred because the directors disregarded, and were blind to their duty to act in the best interests of Asiatic. Accordingly, there was a misfeasance and in this

> instance it may be safely concluded that the whole of the moneys paid away have been lost.
> There is the question whether all the directors were parties to the misfeasance.
> Although D.J. Wimbourne made the decision to make payments I see no reason for excluding R.S. Wimbourne from responsibility for what occurred. It is scarcely conceivable that as governing director he was unaware that Asiatic was making these payments. And if he was unaware this in itself reflects a gross disregard for the company and its affairs."

Accepting this passage as a correct application of the law, I need only emphasize, that as these payments directly affected the personal affairs of Crawford, it could never be said that he was unaware that they were being made. Indeed it is an inescapable inference that the payments were made specifically at his behest. There being no legitimate authority for the payments, they must constitute a misapplication of the Bank's funds and consequently Crawford is liable for making good those losses. I conclude that the learned Chief Justice was correct in so finding.

First Trade Transaction

I turn now to deal with the specific claim in respect of the First Trade Transaction. In order to understand the issues that arise in relation to this transaction, it is necessary to set out the history and the circumstances surrounding it.

First Trade International Bank and Trust Ltd ("First Trade") was incorporated in the Bahamas and was a subsidiary of Transnational Group Ltd, another Bahamian company. First Trade was licenced and commenced business in October 1993. Crawford was at the material time, a Director both of First Trade and of Transnational Group Ltd. First Trade received approval to commence business with a share capital of US$6 million. CNB Ltd over a period of time deposited US$25.5 million with First Trade in reciprocity for First Trade making the following loans –

(i) US$6 million to Development

(ii) US $16 million to Holdings

(iii) US$3.5 million to Shelltox

The total amount loaned by First Trade is exactly the same amount as the deposit made by CNB. As the learned Chief Justice surmised the $25.5 million deposit could be said to be a guarantee of the loans made to these three entities in all of which Crawford had personal beneficial interest. Significantly, the evidence revealed that the interest earned on the deposit of US$25.5 million was applied against the interest payable to First Trade by Holdings and Development and Shelltox in respect of their loans. Holdings, Development and Shelltox failed to pay the debts totalling US$25.5 million. As a result First Trade set off CNB's deposits against the debts due from Holdings, Development and Shelltox, the latter being a company incorporated in the Bahamas and owned and/or controlled by Holdings Ltd, Development Ltd, Donovan Crawford and Valton Williams. In 1995, First Trade went into liquidation.

It should be noted that the deposits of US $25.5million by CNB into First Trade were in separate accounts and covered a period of time during which, each time a deposit was made, a loan equivalent to that deposited sum would be made either to Holding, Development or Shelltox. In the end, the sum total of the deposit of US$25.5m was set off, depriving CNB of the said sum. In determining Crawford's liability in relation to this transaction, his connection with the various companies is of importance. I reiterate therefore, that he, his mother Alma Crawford and Regardless Ltd (which is owned by Crawford and his family) were the major shareholders of Holdings Ltd one of the companies that benefitted from a loan from First Trade, which in effect was guaranteed by CNB through its deposit in First Trade. In addition, Crawford was also the majority shareholder in Development Ltd. Shelltox Investments Ltd was owned and/or controlled by Holdings Ltd, Development Ltd, Donovan Crawford, and Valton Williams. This was therefore another instance, where Crawford indulged in unwise banking practice, and apparently deliberately put the Bank's funds at risk in order to

assist these companies, in all of which he had direct personal interest. In doing so, he caused the Bank to lose the sum of US$25.5m, his other companies making no effort to repay the sums borrowed from First Trade, with the resultant setting off of that amount by First Trade. The breach of his fiduciary duty to the bank was in my judgment proven by an abundance of evidence. In the event, I agree with the conclusions of the learned Chief Justice and endorse the following words in his judgment:

> "How could any person with the experience of Crawford and Williams cause the bank to deposit the sum of US$25.5 million with such an institution having a share capital of under US$6,000,000? This type of conduct in my view borders upon recklessness. This was more than the taking of a risk in the ordinary course of business. Even a person with little or no experience in financial matters would have appreciated that this transaction was fraught with danger. Crawford and Williams as Directors and Officers of the Bank failed to act in a manner which was consistent with the best interest of the Bank. The interest of the Bank was relegated to the back burner to serve the interests of Holdings Ltd., Development Ltd and Shelltox Ltd. To say that they were negligent is to put it mildly. They were undoubtedly in breach of their common law duty of care as well as their contractual and fiduciary duties."

This complaint that the learned Chief Justice fell into error in finding that Holdings, Shelltox and Development (CND) as well as Crawford liable to the Bank for the loss of this US$25 million is in my judgment without merit. As already stated, the liability of the appellant Balmain Brown in respect of this transaction will be dealt with later in this judgment.

Jamaica Grande

I turn now to consider the issue concerning the Jamaica Grande.

The claim is to recover US$16m which it is alleged that the Bank lost as a result of the purchase of 1,100,040 Jamaica Grande shares at a purchase price of US$11m which was paid by the Merchant Bank on behalf of the Bank. An amended return was prepared to give the impression that the Merchant Bank was always the registered

shareholder of those shares. Thereafter the Merchant Bank signed a Trust Deed declaring that it holds the shares on behalf of Holdings, and Holdings repays the Merchant Bank – the money used to acquire the shares – but instead of US$11m it pays US$16m. Subsequently, Holdings sells 700,000 of the 1,100,040 shares to the Century National Building Society for over J$1 billion. In addition, as part of the transaction, the Building Society agrees to write off an approximately J$484m debt owed by Holdings to the Building Society.

Subsequent to all of this the Supreme Court per the learned Chief Justice in a suit brought by the Bank, declares that the Bank owned and always remained the owner of the shares in Jamaica Grande. In doing so, he declared invalid, the previous dealings outlined heretofore, and reversed these transactions. The Bank consequently paid the Merchant Bank its US$11m which it had paid for the shares, the Building Society reversed the write off of the $484m thereby re-instating the debt, and the Merchant Bank confirmed that it owed Holdings US$16m. The Building Society, however, having at the time, a judgment against Holdings for a sum in excess of US$16m thereafter obtained an Order directing the Merchant Bank to pay the US$16m it owed Holdings to the Building Society.

The amount of US$16m which was the subject of the loan from First Trade to Holdings would appear to have been the sum used by Holdings to purchase the Jamaica Grande shares from the Merchant Bank. On the reversal of the transactions connected to those shares as outlined above, it was ordered that the US$16m that should have been returned to Holdings should be paid by the Merchant Bank to the Building Society. However, the Bank had to pay the Merchant Bank US$11m which the Merchant Bank had originally paid for the shares. The US$16m owed by Holdings to First Trade, and against which First Trade had set off the Bank's deposit, was never recovered by the Bank. In the end, the Bank had therefore lost its US$16m which it had deposited in

First Trade. Holdings would still therefore have been liable for this amount, and Crawford for the reasons stated above would also be liable.

The learned Chief Justice was therefore correct in finding Crawford liable in respect of the total sum (US$25.5m) lost to First Trade.

The appeal of Balmain Brown

The respondent claimed against Brown, as it did against Crawford and Williams in negligence and/or breach of fiduciary duty for the debts of the several connected companies, as well as in relation to the Crawford and Williams' payments, and the First Trade transaction, the details of which have been set out heretofore, when dealing with the appeal of Crawford. The law in relation to the duty of care owed by Directors to their companies has already been looked into, and in my judgment, applies equally to the appellant Brown as I have found it to apply to the appellant Crawford. There is however one distinction; that is, that the appellant Brown had no personal or beneficial interest in any of the companies to which these large sums of money were loaned. Nevertheless, as a director of the company he also had a duty requiring him to act with such care as is reasonably to be expected of him, having regard to his knowledge and experience. It is expected that such a person would exercise reasonable care measurable by the care an ordinary man might be expected to exercise in the circumstances in his own behalf. The words of Neville, J stating the test in ***Overend & Gurney Co v. Gibb*** (supra) are equally applicable to the case of Brown as they are to Crawford i.e. whether he was cognizant of circumstances of such a character, so plain, so manifest and so simple of appreciation that no man with any ordinary degree of prudence, acting on his own behalf would have entered into such a transaction.

Before examining the evidence as it relates to Brown, it should be recorded that he is a banker of experience having spent thirty-eight years in that field. Although he joined the Bank as Managing Director on the 6th April 1993, he was thereafter made

aware of certain undertakings given by the Bank to the Bank of Jamaica in March 1993. The following are some of the undertakings which have some relevance to the issues in this appeal:

> "6. Extension of further credit facilities to any current borrower who presently holds credit classified as "non-performing" "doubtful" or "loss" is prohibited.
>
> ...
>
> 8. The bank shall ensure the adoption of any strict adherence to acceptable written loan policies and procedures.
>
> 9. The bank shall not engage in hazardous lending and collection policies and practices such as would be evidenced by:
>
> (a) an excessive volume of loans without proper documentation including but not limited to credit information and collateral security documentation;
>
> (b) the extension of credit without adequate pre-credit analysis to ascertain the repayment ability of the borrower or the relevant project;
>
> (c) insufficient collateral security coverage to adequately protect the bank in the event of non-payment by the borrower;
>
> (d) credit facilities which are adversely classified to controlling shareholders, directors officers, their associates and connected persons;
>
> (e) excessive current rates of credit which are also adversely classified;
>
> (f) excessive loan losses;
>
> (g) failure to adopt and put in place appropriate loan policies;
>
> (h) failure to heed the administration and follow the recommendations of the Supervisory Authorities to put in place prudent credit administration.
>
> 10. The bank will put in place, to the satisfaction of the Supervising Authorities, a programme over an appropriate period to:
>
> (a) ...

(b) reduce existing credit facilities including letters of credit, to connected persons to within the requirements of the Banking Act, and to such further levels as are deemed to be necessary to ensure soundness of the bank.

11. The bank will put in place a programme to determine the adequacy of all existing security for credit facilities granted, and where security is found to be inadequate, to take such steps as are reasonable to obtain appropriate security."

These undertakings clearly emphasized a focus on the increasing of loans and concern with the security or inadequacy of security in respect of these loans. Brown therefore in his capacity as President and Director of the Bank must necessarily, if he was performing his duties as such in the interest of the Bank, have been guided by these undertakings before considering and approving the loan portfolios of any outstanding debtor let alone a non-performing debtor. In spite of this, we find the evidence revealing his approval of an increase in the overdraft facilities of Development in 1995 from an authorized amount of $35,000,000.00 [which in fact had already mounted to a debit of $78,630,769.57] to a total of $90 million. The document showing such approval states as security the following:

> "Held as evidence of good faith Certificates of Title over several properties owned by the Company along with legal mortgage document – Estimated Value of some $250m."

The document states the terms of Payment as follows –

> "To show wide fluctuation with cover from time to time from making investments."

The legal mortgage referred to was never evidenced by the registration of any mortgage against the properties nor was any caveat registered against any Title. On Mr. Brown's own evidence the overdraft facility to Development was being used to finance a private housing development by Development at Devon House East and to pay interest incurred by Development on money it had borrowed outside of the Century Financial

Entities' operation. It appeared that the sale agreement for each house was sent to Williams who had beneficial interest in Development and without any objection from the appellant Brown. In the end Development's debt rose to $231m an amount which formed the basis for the judgment against Development.

Spring Park Farms

Before this, from July 28, 1993, Brown had been informed of the concerns of Mr. Gifton G. Simms, General Manager – Credit Administration in relation to the overdraft of Development for Spring Park Farms. This concern was transmitted to Brown by the sending by Mr. Simms of a memorandum he had addressed to Mr. V.C. Williams, Senior Vice President. The memorandum is as follows:

> "Mr. V.C. Williams
> Snr. Vice President
>
> Gifton G. Simms
> General Manager – Credit Administration
> **CENTURY NATIONAL DEVELOPMENT LIMITED**
> **SPRING PARK FARMS**
>
> Further to our recent verbal discussion, this is to advise that we are somewhat perturbed about the quantum of debt that rest in the subject's Current Account.
>
> Specifically, I should bring to your attention that sometime in the past a $2,000,000.00 limit was placed against the account. Today, I observe that the limit was moved to $3.5 million. I am not sure who is approving these limits or are they duly approved?
>
> As I mentioned before, given the connected account and the drive to prepare for our next inspection, it is incumbent to regularize this situation.
>
> In spite that the new limit is $3.5 million, please be advised that the account now rests at $3,517,561.28.
>
> Your urgent attention on this matter would be greatly appreciated."

Holdings

In respect of this company, the appellant writing a memorandum for "the file" on the 26th May, 1994 noted that the "residual balance of $30 million remained outstanding but stated that the bank was "at no undue risk." He noted that the Account was secured by the unlimited guarantee of Century National Development Ltd. As we have earlier seen, this guarantee was valueless, Development being heavily indebted to the Bank and unable to pay its own debts, which were never adequately secured, or the subject of prudent banking practice.

This evidence reveals an active participation by the appellant Brown, in the approval of these loans to the connected companies, at a time when he was aware of the special care to be taken in respect of the Bank's portfolio in keeping with the undertaking given to the Bank of Jamaica by the Bank. He approved these loans when it must have been plain and manifestly evident that the companies to which they were being given were companies in which his fellow directors and employees of the Bank had connection, and in the knowledge that there were no formal agreements with and no adequate securities from these entities which at the time were all showing losses. In my judgment there was ample evidence to conclude that he failed to exercise the standard of care required of him as a director in the handling of the Bank's funds. He was indeed negligent and in breach of the fiduciary duty he owes to the Bank as a director who ought to act in the interest of the Bank. I would find that the conclusions of the Learned Chief Justice are correct and affirm his Order in this regard also.

First Trade – Brown

This transaction has already been outlined previously in this judgment. The question for decision here is whether the appellant Brown has any liability in respect of that transaction. The matter concerns the transfer of foreign exchange from the Bank to First Trade over a period of time amounting to a total of US$25.5 million. The

appellant's defence in this regard was that he knew nothing of the transaction until June 1, 1995 when he was so informed at a meeting at the Bank of Jamaica. In rejecting this defence the learned Chief Justice found, (giving detailed reasons) as follows:

> "A careful examination of the uncontroverted evidence raises serious questions about the credibility of Mr. Brown's testimony.
>
> The evidence discloses that the deposits with First Trade began in December 1993, some eight months after Mr. Brown assumed the Presidency of the Bank. By March 1995 the deposits stood at US$25.5 million. Is it likely that such large sums of foreign exchange could have been invested or deposited with an overseas institution without the President of the Bank being aware of the transaction? Even more striking is the fact that these large sums of foreign exchange were being deposited overseas at a time when the bank was experiencing cash flow problems and grave financial difficulties. I am unable to accept that the transaction could have taken place without the President's knowledge. Assuming, to be generous, that the transaction took place without his authority in his position as President he ought to have known. That is what diligence is all about.
>
> It is difficult to find that Mr. Brown knew nothing of the transaction, when it is he would signed the financial statement of the Bank for the period ending June 30, 1994. The financial statements disclosed that there was a substantial increase in the sum due to the Bank from foreign banks. Did he not question this state of affairs? Or did he turn a blind eye to the situation?
>
> Further, the evidence discloses that the department of the Bank which dealt with deposits, viz, Finance and Investments Department fell within the area of Brown's responsibility. The Vice President of that department reported directly to Mr. Brown, as is evidenced by the organizational chart. It is to be noted, however, that Mr. Brown denied that Mr. Williams reported directly to him.
>
> The most cogent piece of evidence which leads me to find that Mr. Brown knew of the First Trade deposits is a memorandum which he addressed to the Chief Executive of the Bank, Don Crawford. [on November 21, 1994] In that memorandum he described First Trade as "winner" and encouraged closer ties with Mrs. Amber Elliot who handled the Bank's affairs at First Trade. When confronted with this damning evidence, Mr. Brown offers the strangest of explanations, to wit, that he was not commending the

transaction with First Trade but was only commenting upon what he had been told about the investment in First Trade.

On June 13, 1995, Mr. Brown wrote two letters to the Bank of Jamaica explaining the First Trade transaction in detail. Notwithstanding the detailed nature of the letters vital information was omitted.

Mr. Brown attended two meetings of the Board at which, to his knowledge, the Board was supplied with misleading information as to the transaction. The full facts surrounding the transaction were not revealed to the Board and Mr. Brown sat in awesome silence.

The cumulative effect of all this evidence compels one to conclude that Mr. Brown was not a witness of truth when he averred that he knew nothing about the First Trade transaction until he was so advised by the Bank of Jamaica.

There is also evidence that Mr. Brown signed on behalf of the Building Society the agreement by which the Building Society acquired some of the Jamaica Grande shares from Holdings Ltd. Mr. Brown concedes that he knew that the shares had previously belonged to the Merchant Bank, of which he was also the President and that Holdings Ltd had paid US$16 million for the shares. It will be recalled that the loan by First Trade to Holdings was US$16 million on which Holdings defaulted and the Bank's deposit with First Trade was used to liquidate Holdings Ltd's indebtedness. It ought to have occurred to Mr. Brown, considering Holdings Ltd's financial position which was one of consistent loss that "something is rotten in the State of Denmark" or more appropriately something is rotten in the Century Financial Entities. He closed his eyes. He literally blindfolded himself and without displaying the diligence and prudence required of him, approved the transaction.

To compound the matter he signed letters authorizing Towerbank to use interest, due from it to the bank, in settlement of interest due from Holdings Ltd and Development Ltd.

All these actions on the part of Mr. Brown lead me to conclude that he, along with Crawford and Williams, was involved in a scheme in which the Bank's money was being used to satisfy the indebtedness of companies in which Crawford and Williams had financial interests.

I, therefore, hold that all three Defendants, Crawford, Williams and Brown acted negligently and in breach of their fiduciary duties and are therefore liable for the losses

> suffered by the Bank in respect of the First Trade transaction."

This reasoning and conclusion are based on the evidence as is revealed in the notes of evidence and in my judgment clearly and adequately summarizes the relevant evidence and issues arising therefrom.

It is therefore sufficient to say that I agree with the detailed reasoning and the conclusion arrived at which cannot be faulted.

It is only left to say that there was indeed ample evidence upon which the learned Chief Justice found that the appellant Brown in all the circumstances knew of the First Trade transaction at a time before he stated that the knowledge came to him, and, that given all the other circumstances, the appellant Brown as a director did not exercise the standard of care and skill required of him - a banker of vast experience. There is no reason to disturb this finding.

Crawford Payments – Brown

As we have seen these payments were made by the Bank in respect of expenses incurred by Crawford on request for personal matters. The issue here is whether Brown who was in control of the Bank during the period these payments were made, was so negligent that he ought to be responsible to the Bank for these losses. The learned Chief Justice, relying on the dicta in ***Walter Wimborne & Others*** [1975-76] 137 CLR 1 (supra) found that he was so responsible. This was a misapplication of the Bank's funds and whether the appellant knew of it or not is not important because his position in the Bank as President and Director suggests that he ought to have known. The learned Chief Justice concluded that the position of Crawford as Chairman and Chief Executive Officer of the Bank caused the appellant Brown to "close his eyes" to many things which did not meet his approval. In my judgment, as President of the Bank, the appellant ought to have known of the misapplication of the funds of the Bank but

instead allowed these payments to be made, out of an unwarranted loyalty to Crawford. I agree that in so doing he was again unfaithful to his duties owed to the Bank and is responsible for making good the losses.

Brown's Counterclaim

The appellant Brown claimed in a counterclaim against the respondent, damages for wrongful dismissal. The letter of dismissal reads as follows:

> "23rd August 1996
>
> Mr. Balmain Brown
> c/o Century National Bank Limited
> 14 Port Royal Street
> KINGSTON
>
> Dear Mr. Brown
>
> Your employment with all or any of the following companies:
>
> - Century National Bank Limited
> - Century National Merchant and Trust Company Limited
> - Century National Building Society Limited
>
> Is terminated with immediate effect as a result of my discovery that you have issued misleading financial statements and engaged in unsafe banking practices and because you have issued unauthorised communications subsequent to the commencement of the Temporary Management contrary to specific instructions.
>
> Kindly call Mr. Wilfred Baghaloo to make arrangements for the return of all items that are the property of the Bank including automobiles.
>
> Yours very truly,
>
> (Sgd.) R. Downer
> Richard Downer
> Representative of the Temporary Manager"

Without considering the question of "unauthorized communication" it is sufficient to say that:

i. The accusation of engaging in unsafe banking practices is supported by the evidence as has been evidenced earlier in this judgment, and consequently no valid complaint can be made in this regard; and

ii. the allegation of issuing misleading financial statements has also been evidenced in dealing with the appellant's liability in respect of the First Trade transaction.

In the circumstances, the learned Chief Justice's finding in favour of the respondent on the counterclaim cannot be disturbed.

I would dismiss the appeals affirm the Orders of the Court below and award costs to the respondent to be taxed, if not agreed.

BINGHAM, J.A.

I have taken the opportunity of reading in draft the judgments prepared in this appeal by Forte, P and Langrin, J.A. They have both correctly identified and dealt with the issues arising for consideration in the appeal. I wish to state that I am in agreement with their reasoning and conclusions reached by them that the appeals be dismissed and that the judgment of the learned Chief Justice below be affirmed, with the order for costs as proposed by the learned President.

I am to state that there is nothing further that I could usefully add.

LANGRIN, J.A:

This is an appeal by these appellants against the judgment by Wolfe, C.J. in respect of two actions brought first by Financial Institutions Services Ltd. (FIS) against CNB Holdings Ltd., Century National Development Bank, Donovan Crawford, Valton Caple Williams, Balmain Brown, Regardless Limited, Fordix Limited, Spring Park Farms, Alma Crawford and secondly FIS against CNB Holdings Ltd., Donovan Crawford, Balmain Brown, Valton Caple Williams, Regardless Ltd., and Debroc Limited. Both actions were consolidated.

The respondent Financial Institutions Services Ltd. is a government owned company which now owns all the assets and rights of Century National Bank Ltd, Century National Building Society and Century National Merchant Bank Ltd. The rights of the respondent, include the right to pursue the claim in these actions.

Both actions were commenced in the names of Century National Bank Ltd. and Century National Building Society. On January 21, 1998 by an order of the Supreme Court, Financial Institutions Services Ltd., was substituted as plaintiff in both actions. Century National Bank Ltd. hereinafter referred to as "the Bank" was at all material times a bank licensed under the Banking Act of 1992 and carried on business as bankers through various branch offices in Jamaica.

It should be observed that by the time the appeal was heard there were only four appellants.

The 3rd appellant, Donovan Crawford was a Chief Executive Officer, and, the Chairman of Century National Bank Ltd., CNB Holdings Ltd., Century Development Ltd, and Regardless Ltd. The 6th appellant, Regardless Ltd., is a company incorporated under the Companies Act. All its shares were owned by Donovan Crawford, his wife Claudine and his children Donovan and Sian. It is significant to observe that Donovan

Crawford, Regardless and Alma Crawford owned a majority of the shares in CNB Holdings Ltd.

The 9th Appellant, Mrs. Alma Crawford is Donovan Crawford's mother. She is also a Director of Regardless and a shareholder of CNB Holdings Ltd.

The 5th appellant, Balmain Brown was between April, 1993 and August 1996 the President and an employee of the Bank. In August 1996, Mr. Richard Downer terminated his services. Mr. Brown has counterclaimed for wrongful dismissal and claims damages.

At the conclusion of the hearing in the court below which lasted seven (7) days the Learned Chief Justice made the following orders:

"(1). Judgment for plaintiff against C.N.B Holdings Limited, Century Development Limited, Donovan Crawford, Balmain Brown and Valton Caple Williams for:

(a) the sum of US$16,000,000.00 being the amount deposited with First Trade to secure a loan of that amount made to CNB Holdings Limited by First Trade Ltd., with interest on the said sum at the rate of 8% per annum from June 29, 1994 until the date of judgment.

(b) The sum of US$3,500,000.00 deposited with First Trade Ltd. to secure a loan of that amount made to Shelltox Investments Limited, with interest at the rate of 8% per annum from April 4, 1995 until the date of judgment.

(2) Against Century National Development Limited, Donovan Crawford, Balmain Brown and Valton Caple Williams for -

(a) the sum of US$6,000,000.00 deposited with First Trade Ltd. to secure a loan of that amount made to Century National Development Limited by first Trade Ltd., with interest on the said sum at the rate of 8% per annum from January 21,1994, until the date of judgment.

(3) Against Donovan Crawford, Balmain Brown and Valton Caple Williams for -

(a) the sum of US$ 81,802.00 the credit balance in the Bank's account with First Trade Ltd. as at October 30,1995 with

interest at the rate of 8% per annum from October 30,1995 until the date of Judgment;

b) the sum of $331,155,010.76 (the balance due from CNB Holdings Ltd. to the Bank) with interest at the rate of $49,680.43 per day from September 21, 1998 to the date of Judgment;

(c) the sum of $22,029,946.10 (the balance from CNB Holdings Ltd. to the Building Society) with interest at the rate of $72,428.29 per day from September 21, 1998 to the date of Judgment;

(d) the sum of $372,238,921.18 (the balance due from Century National Development Ltd. to the Bank with interest at the rate of $55,763.35 per day from September 21, 1998 to the date of judgment;

(e) The sum of $17,170,285.61 (the balance due from Regardless Limited to the Building Society) with interest at the rate of $2,626.90 per day from September 21, 1998 to the date of Judgment;

(f) The sum of $20,444,275.05 (the balance due from Fordix Limited to the Bank) interest at the rate of $3,062.66 per day from June 21, 1998 to date of Judgment;

(g) The sum of $50,960,453.77 (the balance due from Spring Park Farms to the Bank) with interest at the rate of $7,634.14 per day from September 21, 1998 to the date of Judgment;

(h) The sum of $30,077,452.64 (the balance due from Debroc to the Building Society) with interest at the rate of $4,601.58 per day from September 21,1998 to the date of judgment;

(i) The sum of US$307,221.90 (being payment to Donovan Crawford) with interest at the rate of 8% per annum from May 27, 1996 to the date of judgment.

(j) The sum of $1,173,097.58 (being payment to Donovan Crawford) with interest at the rate of 49% per annum from August 9, 1995 to date of judgment;

(k) The sum of US$126,576.00 (being payments to Valton Caple Williams) with interest at the rate of 8% per annum from June 22, 1994 to the date of Judgment;

4. Against Regardless Ltd.

(a) whereby it is declared that the plaintiff is the beneficial owner of premises known as 1 Paddington Terrace and comprised in Certificate of Title registered at Volume 492 Folios 932 and 933;

(b) that the said Regardless Ltd. shall within fourteen (14) days of being requested to do so, execute a transfer of the said property to the plaintiff's order;

(c) that in the event Regardless Ltd. shall fail to execute the said transfer the Registrar of the Supreme Court is hereby empowered so to do;

(d) that all costs relating to the transfer be paid by Regardless Ltd.

5. Against Donovan Crawford and Alma Crawford for -

(a) the sum of $703,393,931.94 with interest at $105,443.78 per day from September 21, 1998 being the total indebtedness of Century National Development Limited to the Bank pursuant to the instrument of guarantee signed by them.

(b) It is hereby declared that the undermentioned Certificates of Title are subject to an equitable mortgage in favour of the plaintiff as security for the indebtedness of Donovan Crawford and Alma Crawford to the plaintiff.

(i) Volume 1185 Folio 8282 – Lot 1 Strata 298 Sterling Castle

(ii) Volume 1185 Folio 829 – Lot 2, Strata, 298 Sterling Castle

(iii) Volume 1185 Folio 832 – Lot 5, Strata 298 Sterling Castle

(iv) Volume 1185 Folio 834 – Lot 7, Strata 298 Sterling Castle.

(c) It is hereby ordered that the said Donovan Crawford and Alma Crawford shall within fourteen (14) days, of being requested to do so, execute legal mortgages in respect of the titles mentioned above in favour of the plaintiff, to secure their total indebtedness or part thereof to the plaintiff;

(d) That in the event the said Donovan Crawford and Alma Crawford shall fail or refuse to execute the said mortgages

the Registrar of the Supreme Court is hereby empowered to execute the said mortgages;

(e) Donovan Crawford and Alma Crawford are being ordered to pay the costs of preparing and registering the said mortgages.

6. Against Balmain Brown -

whereby it is ordered that the Counter Claim filed herein be dismissed with costs to the Plaintiff to be taxed if not agreed.

7. Against CNB Holdings Limited, Century National Development Limited, Donovan Crawford, Valton Caple Williams and Regardless Limited whereby it is ordered that the mareva injunction granted on October 2, 1996, be extended until further order of the Court with liberty to apply. This injunction is in respect of the defendants' named therein and does not affect the rights of third parties or seek to control the activities of third parties.

8. The costs of these proceedings, which are to be paid by all defendants, are to be taxed if not agreed."

These orders are now challenged on appeal by Donovan Crawford, Regardless Ltd., Alma Crawford and Balmain Brown. The other defendants have not filed any appeal.It is convenient at this point to give a brief chronological account of the central events underlying this case.

Century National Bank (The Bank) was formerly Girod Bank Limited. There was a change of name in 1986. Century National Building Society and Century National Merchant Bank Ltd. and Trust Company were the other financial entities in the Century group. The following companies formed a part of the Century group. CNB Holdings Ltd. was incorporated on June 25, 1992 for the purpose of reorganizing the structure of the Bank and its related companies. The company was to become the holding company for the Bank, Building Society, Merchant Bank and other subsidiaries. The other subsidiaries were Century National Development, Fordix Limited, Shape Corporation and Spring Farms Limited.

The Associated companies include Jamaica Grande Ltd., General Consultants and Insurance Brokers Ltd. and Regardless Ltd.

The Banking Act placed restrictions in relation to the trading activities in which banks could involve themselves, and this restriction gave rise to the holding company. The Development Company has as its mandate the development of real estate. The Building Society facilitated long term lending at lower interest rate. Lease financing and medium term financing were provided by the Merchant Bank, and which was prohibited by the Commercial Bank.

Several reviews of the performance of the Bank were conducted by the Central Bank of Jamaica, Price Waterhouse Jamaica and Price Waterhouse International.

On the 10th July 1996, the Minister of Finance, assumed Temporary Management of the Bank , Building Society and Merchant Bank. Donovan Crawford was dismissed as Chairman and Chief Executive Officer sometime in 1996.

In 1997 Financial Institutions Services Limited was vested by order of the Court with all the assets and liabilities of the Bank and the right to institute proceedings on behalf of the Bank to recover debts owed to it.

Summary Judgment had been entered in favour of the Plaintiff against CNB Holdings Ltd. Century Development Ltd. Regardless Ltd, Fordix Ltd. and Spring Park Farms, all defendants. All these entities had overdraft facilities with the Bank and admitted owing monies to the Bank.

Having given an overview of the case leading up to the appeal it is now time to address the grounds of appeal beginning with the issue of the guarantee.

However, before doing so I am constrained to mention that Mrs Benka Coker, Q.C. began her arguments by underscoring the effect of the new Banking Act in the present case. She argued that the Banking Act of 1992 which came into effect in January, 1993 placed new and onerous duties on commercial banks. For example it prohibited fixed assets of a bank from exceeding its capital base. Section 13 she argued prohibits the Bank from conducting certain business or engaging in certain trades including owning land. Section 15 provides that liquid assets must not be less than 15% of its prescribed liabilities. She invited the Court to take judicial notice of the fact that governments since 1980 in order to control inflation and stabilize the exchange rate have introduced a high interest rate policy which caused the interest rate on deposit loans in the Bank to be extremely high and hence consequential increase on loans owed to the Bank by its customers.

While her opening may have correctly described the economic environment within which the Commercial Banks operated, this court will have to examine whether the court below applied the correct legal principles to the issues which emerged in the case.

THE GUARANTEE

The Respondent claims against Donovan Crawford and Alma Crawford as guarantors of Development's indebtedness. They both admit having executed the relevant Instruments of Guarantee in blank, but stated that they were guaranteeing another debtor.

The essence of the appellants' arguments on the guarantee is that the court below had no legal authority to properly conclude that Century National Development Ltd., ("Development") was the principal debtor in the incomplete instrument of

guarantee signed by Donovan and Alma Crawford. By introducing the doctrine of "**non est factum**" the learned Chief Justice wrongly introduced an irrelevant consideration and so misdirected himself from properly considering the real issue that he had to determine. The Crawfords contended that the principal debtor to be inserted into the guarantee was Regardless and not Development.

In seeking to ascertain the real intention of the parties regard must be had to the commercial purpose of the contract and the factual basis against which it had been made.

In ***Reardon Smith Line Ltd. v Hansen – Tangen v Sanko Steamship Co.***[1976] 3 All ER 570 Lord Wilberforce at p.574 had this to say:

> "In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> ...What must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. It is in this sense and not in the sense of constructive notice or of estopping fact that judges are found using words like 'knew' or 'must be taken to have known' ."

There was sufficient evidence before the judge to justify his findings that the true intention of the parties was that the principal debtor was Development. He relied in particular on the following facts:

(1) Development guaranteed the debts of all the other entities in which the parties had an interest and who were indebted to the respondent. There was no other guarantee by the Crawfords of any of those debts. Indeed it was Mr. Crawford's defence that prudent banking practices were followed. In fact when he

responded to interrogatories he said that the overdraft facilities to Development were given with proper and sufficient security.

(2) Development's total debt was over $400M while Regardless' debt was only $6M.

(3) The Crawfords both had a beneficial interest in Development. Mrs. Crawford had no beneficial interest in Regardless.

It is significant that the Crawfords did not give evidence at the trial so there was nothing from them to weigh against the evidence before the learned trial judge.

Against that background the learned Chief Justice was entitled to find that the parties had intended that the guarantee should have been in relation to Development.

In ***Riggs Asset Finance Ltd. v Blue Circle Ltd.*** [1994] an unreported English Court of Appeal decision the defendant acknowledged that he had signed a guarantee in blank but contended that the guarantee had been filled in to guarantee debts of an unintended party and also guaranteed a quite different transaction. The trial judge had rejected the defendant's evidence that he did not know the true identity of the "principal debtor".

Millet L.J. at page 3 said:

> "In the absence of any evidence of implication in the fraud on the part of the plaintiff or notice of the misrepresentations alleged to have been made to Mr. Drury, Mr. Druy's only defence was one of **non est factum** and that defence in the case of any ordinary person of normal understanding is not open to a person who knowingly signs a document in blank".

He went on further to say at page 4:

> "If a man signs a document in blank he has only himself to blame if some unscrupulous person afterwards completes it in a manner he did not intend".

Since the Statute of Frauds was not pleaded in the Court below, the appellants cannot now rely on it. See Section 179 of the Civil Procedure Code Law which provides that there shall be no departure in pleading.

I accept Mr. Hylton's, Q.C. submission that nothwithstanding that there was no express authorization to fill in the name of the principal debtor the Bank was impliedly authorized to do so. Consequently, unless the defence of **non est factum** arose, the appellants were bound by the terms of Guarantee as completed by the Respondent.

In my view the learned Chief Justice was correct in concluding that the fact that the information had been missing at the time when the Guarantee was executed did not render the guarantee uncertain. Mrs. Alma Crawford acknowledged that the Guarantee existed and was clearly aware of its legal character. She did not plead or prove undue influence and accordingly was bound by the guarantee.

For these reasons I would conclude that the contention of the appellants in this regard cannot be sustained.

EQUITABLE MORTGAGES:

I turn next to the issue of whether the deposit of title deeds in the circumstances of this case create equitable mortgages.

Counsel for the appellants argued that there was no evidence as to how the title deeds came to the Bank or that there was any intention on the part of Donovan and Alma Crawford to create equitable mortgages over the said lands. The burden of proof which was placed on the plaintiff/respondent was never discharged.

For the plaintiff/respondent counsel contends that there was an equitable mortgage in favour of Century National Bank by deposit of title deeds of certain

properties, namely, five lots owned by Donovan Crawford and Alma Crawford. In Halsbury's Laws of England (4th Edition) Volume 32, para. 429 it is provided:

> "...The deposit is a fact which admits evidence of an intention to create a charge which would otherwise be inadmissible, and raises a presumption of charge which throws upon the debtor the burden of rebutting it."

In ***Maugham v Ridley*** [1863] 8L.T. 309 the Vice Chancellor said:

> "There was clear evidence before the mere oath of the plaintiff as shown by the letters, that there had been pecuniary transactions between the parties long after the deposit. It would not be too much for the court to infer from the circumstances that the deposit was in the nature of a security for the debt due".

In ***Re McMahon; McMahon v McMahon*** [1886] 55 LT 763 Chitty J stated the general principle that mere possession of deeds without more will not be sufficient to create an equitable security. The Court examined the surrounding facts in order to determine whether an equitable charge had been created in that case. At page 764 he said:

> " If money is advanced in such a way that a contract can be inferred and the deeds are handed over without a word being said, then there is a charge upon the deeds".

The evidence in the Court below was that, Mrs. Crawford admitted that the Titles were deposited with the Bank for safekeeping while Mr. Crawford made a denial. However, the Crawfords executed an instrument of mortgage in blank and provided the Bank with a letter authorizing the Bank to complete the security.

In my judgment the facts clearly raise a presumption that there was an intention to create a charge. As neither of the Crawfords gave evidence there was nothing to rebut the presumption cast on them that the deposit of the Titles was intended to create a security in favour of the Bank. This ground fails.

PADDINGTON TERRACE:

The respondent's claim is that the Bank is the true owner of property known as No. 1 Paddington Terrace and an order was sought to set aside the Bank's transfer to Regardless. Regardless contended that the transfer to it was valid and enforceable.

The question to be answered is whether the transfer of the property at Paddington Terrace to Regardless should be set aside. The appellants contended that the learned Chief Justice failed to properly assess in law the extent of the fiduciary duty owed by a director to the company of which he is an agent. Further he failed to appreciate the legal consequences of the Articles of Association of the plaintiff bank as they related to contracts between the plaintiff and its directors. It was submitted that even if the learned judge was correct, the provisions of section 70 of the Registration of Titles Act were now operable and the registered title could not be defeated save on proof of fraud in Regardless Ltd. "**Restitutio in integrum**" was no longer possible since third parties had now acquired rights under the sale.

The Bank's Board of Directors passed the following resolution on March 27, 1991:

> "The Chairman/Managing Director is hereby given formal approval by the Board to purchase No. 1 Paddington Terrace at Book value plus 10% with the option to pay for same within 12 months and as suggested by Mr. Hadeed, a deposit of Ten Thousand Dollars ($10,000.00) be paid and a legal agreement drafted to reflect this arrangement."

The Learned Chief Justice found the following facts:

(1) The book value as testified by Glen Harloff, of the property as at August 1991, was $2,824,417.00.

(2) A valuation done for Crawford, the Chief Executive Officer of the Bank by Orville Grey and Associates on October 31, 1990 states that the property had a market value of $4M.

(3) Notwithstanding the knowledge which he had, Crawford paid the sum of $1,813,612.00 for the property.

The Companies Act section 188 subsections (1) to (3) are similar to Article 94 of the Articles of Association of the Bank. Subsection (5) of section 188 states:

> "Nothing in this section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company".

It therefore follows that the fact of the inclusion of Article 94 does not in any way relieve Mr. Crawford of the duty imposed on him to make full disclosure.

The learned Chief Justice placed great reliance on the passage in Palmer's Company Law Volume 2 at paras. 8-517 to 8-518 dealing with the validity of a contract entered into by directors with the company:

> "It has been seen earlier that the position of a director, vis-a-vis the company, is that of an agent who may not himself contract with his principal, and that it further is similar to that of the trustee who, however fair a proposal may be, is not allowed to let the position arise where his interest and that of the trust may conflict.
>
> It follows from these propositions that at common law a director's powers of contracting with his company are extremely limited, unless the articles of the company expressly permit the director so to contract, as discussed in para. 8.518 post. He may take up shares or debentures, including convertible debentures, of the company (though he cannot vote in respect of allotments to himself), and he may buy the right to subscribe for shares or debentures, although he is prohibited from buying options in quoted shares or debentures. In other respects he is, like a trustee, disqualified from contracting with the company and for a good reason: the company is entitled to the collective wisdom of its directors, and if any director is interested in a contract, his interest may conflict with his duty, and the law always strives to prevent such a conflict from arising. The director may enter into a contract only if he makes full disclosure of all material facts to the members of the company, who then approve the contract. Not even if it can be shown that the contract in question is

> a fair one is the director allowed to enter into it, for the courts will not, in such cases, look into the merits, but adhere strictly to the rule that the possible conflict of interest and duty must not be allowed to arise. 'No man' said Lord Cairns LC, 'can in this court, acting as an agent, be allowed to put himself in a position in which his interest and duty will be in conflict.'
>
> If for example, the directors agree to sell to one of themselves part of the property of the company, the company is entitled to have the sale set aside, or, at its option, to sue the directors for breach of duty. So, too, if a director, concealing his interest sells, through a third party, his property to the company, the company is entitled to reject the property and claim repayment of the purchase money, or to retain the property and claim damages for any loss sustained by the non-disclosure. The same rule applies to contracts in which the director is in any way interested, for example, with any company in which a director holds shares. This rule applies whether the shares are held in trust or beneficially. The shareholders can, by resolution of a general meeting, confirm a contract in which the directors or some of them are interested, and upon such a resolution the director is entitled to vote his shares in whatever way he chooses, even if the result will be to assure the passing of the resolution. Such a resolution would not, however, be effective if it amounted to a fraud or oppression of the minority of shareholders." (Emphasis added).

In ***Aberdeen Railway Company v Blaikie*** [1843 – 1860] All ER Rep. 249 it was held that:

> "It is the duty of a director of a company so to act as best to promote the interest of the company. That duty is of a fiduciary character, and no one who has such duties to discharge can be allowed to enter into engagements in which he has, or can have a personal interest which conflicts, or possibly may conflict, with the interests of the company. A director, therefore, is precluded from entering on behalf of the company into a contract with himself or with a firm or company of which he is a member, and so strictly is this principle adhered to that no question can be raised as to the fairness or unfairness of a contract so entered into".

The general rule appears to be that a director cannot enter into a contract with a company unless ratified by the company in general meeting after a full disclosure.

In the final analysis the evidence clearly demonstrates that this transaction was not in the best interest of the company. There was ample evidence on which the trial judge could find and so found that there was no full disclosure of the material facts.

It is settled law that a fiduciary relationship exists between a director and his company. In Halsbury's Laws of England, (4th Edition) Volume 7 at para. 518 it is provided:

> " A director who has misapplied, or retained, or become liable or accountable for any money or property of the company or who has been guilty of any breach of trust in relation to the company must make restitution or compensate the company for the loss. Where the money of the company has been applied for purposes which the company cannot sanction, the directors must replace it, however honestly they may have acted".

Further in Halsbury's Laws of England (4th Edition) Volume 16 at paragraph 911 it is stated:

> "The principle of following assets applies whenever a fiduciary relation between parties subsists, and extends to enable property to be recovered not merely from those who acquire a legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, but from volunteers into whose hands the legal title to property has come provided that, as a result of what has gone before, some equitable proprietary interest had attached to the property in the hands of the volunteer".

It is established that if a director enters into a contract with the company it is prima facie voidable at the instance of the company regardless of the fairness or otherwise of its terms.

Against this background Regardless counterclaimed that it had no knowledge of the breach of trust on the part of Mr. Crawford. The knowledge of Crawford must be imputed to Regardless, because the shares in Regardless are owned by Crawford, his

wife and children. In these circumstances the transfer to Regardless was a mere cloak which enabled Mr. Crawford to commit a breach of his fiduciary duty. Regardless was not a bona fide purchaser for value without notice and should be regarded as a constructive trustee. That being so the property is trust property. The legal interest held by Regardless is therefore held on trust for the respondent. The property can be followed into the hands of Regardless and can be claimed by the respondent as their property in equity and properly to be transferred to the respondent. In my view the title of Regardless is not indefeasible. Section 70 of the Registration of Titles Act contains the relevant statutory provisions. It provides that all prior rights are defeated in favour of the registered proprietor except in the case of fraud and thus introduces the principle of indefeasibility. In ***Christian Alele v Robert Honnibal and George Brown*** SCCA No. 111/89 (unreported) delivered March 14, 1991, Downer J.A. in dealing with the question of what constitutes fraud adopted the dictum of Lord Cairns in ***Peek v Guerney*** [1873] L.R. 6 H.L. 377 at p. 403 that:

> "there must be some active misstatement of fact, or at all events, such a partial and fragmentary statement of fact such that the withholding of that which is not stated makes that which is stated absolutely false".

The conduct of Crawford although not pleaded as fraud by the respondent was so patent on the record that the learned Chief Justice was bound to take notice of it: See ***Domsalla v Barr*** [1969] 3 All E.R. 487. Indeed he acted on it as fraud. I accept the submission of Mr. Hylton, Q.C. that the Registration of Titles Act affords no defence to the appellant. There is no basis on which the order of the learned Chief Justice should be disturbed.

NEGLIGENCE AND BREACH OF FIDUCIARY DUTY:

The plaintiff/respondent's claim is against Crawford, Williams and Brown who it is contended are liable to make good the debts and losses sustained as a consequence. The losses result from their negligence; alternatively, from a breach of their contractual duties as managers of the Bank and Building Society; alternatively from a breach of their fiduciary duties as directors of the Bank and Building Society.

The gravamen of the complaint by the appellants in respect of negligence and breach of fiduciary duties is that the facts do not support the conclusion of the trial judge. Even if according to counsel there was evidence on which the trial judge relied, such evidence was insufficient to cause any reasonable conclusion to be drawn that the appellants were negligent or in breach of their fiduciary duty.

The respondent makes reference to losses arising out of instances where there were conflicts between the personal interests and corporate duties of the directors. In respect of various loans made by the Bank there were no loan agreements and no fixed terms of repayment. The loans consisted of large sums of money and the borrowers were unable to service the debts which were unsecured. There was no registration of any mortgage , no caveats and no legal charges.

Richard Downer, the temporary manager, testified that the loans to the connected corporate bodies were not made in keeping with good banking practice.

Palmer's Company Law (28th Edition) Volume 2 para 8.405 states clearly the nature of legal duties owed by directors to their companies:

> "For most purposes it is sufficient to say that directors occupy a fiduciary position and all the powers entrusted to them are only exercisable in this fiduciary relationship in the company as principal. The fiduciary relationship

> imposes upon directors duties of loyalty and good faith which are akin to those imposed upon trustees properly so called. As agents directors are also under duties of care, diligence and skill, but these duties are very different from the duties to be cautious and not to take risks which are imposed upon many trustees proper".

It is clear from the evidence that the Bank suffered significant losses in situations where there were conflicts between Mr. Crawford's personal interests, whether in his own right or through companies in which he had an interest and his corporate duties. There were enormous loans to Holdings and Development from the Bank in which there were no loan agreements and no fixed terms of repayment. Neither were there feasibility studies or business plans. The documentary evidence disclosed that these loans were not secured or insufficiently secured.

Glen Harloff testified that he examined the books in respect of the listed payments which were paid to Crawford and Williams and that he found no supporting vouchers in respect of these payments. Crawford did not give evidence; and neither did Williams, who gave evidence, deal with the unauthorized payments. I accept the finding of the trial judge that in the absence of supporting vouchers he concluded that the payments were unauthorized.

In my view the evidence is sufficient to support the conclusion of the learned Chief Justice that Mr. Crawford acted in breach of his fiduciary duties. There is no necessity to deal with the issue of negligence.

THE FIRST TRADE TRANSACTION:

The plaintiff/respondent claims that Holdings and Development are liable to it for the sum of US$25.5M and interest in relation to losses suffered by the Bank as a result of the First Trade/Towerbank transaction.

The essence of the appellants' complaint under this head are two-fold:

(a) That the Learned Chief Justice failed to address the issue of whether the First Trade Transaction demonstrated negligence and/or breach of the fiduciary duties of Mr. Crawford; and

(b) That the Learned Chief Justice erred in failing to take into consideration the effect of the acquisition of the Jamaica Grande shares.

It is of paramount importance to briefly outline the history of this transaction. In June 1993 First Trade received approval to start business with a share capital of less than US$6 million. Six months after, the Bank deposit US$25.5 million with First Trade "in reciprocity" for First Trade lending US$6Million to Development, US$16million to Holdings and US$3.5million to Shelltox. It should be noted that Crawford was a director of First Trade. The interest earned by the Bank on the deposits was applied against the interest payable by Holdings, Development and Shelltox on the loans. Holdings, Development and Shelltox did not repay the above debts totaling US$25.5 million to First Trade. In 1994-5 First Trade sets off the Bank's deposit against the debts due from Holdings, Development and Shelltox, i.e. the said sum of US$25.5million. In June 1995 the Board of the Bank was advised about the transaction. In order to conceal the fact that First Trade had set off the US$25.5million deposited by the Bank a paper transaction is created with Towerbank, a Panamanian Company to give the false impression that the deposits had been moved to Towerbank. First Trade goes into liquidation and Towerbank sets off the deposits. The incestuous nature of these relationships are self-evident.

In 1991 the Bank acquires shares in Jamaica Grande at a purchase price of US$11million paid by Merchant Bank on behalf of the Bank. In 1994 Merchant Bank signs a trust deed declaring that it holds the shares on behalf of Holdings. Although

Merchant Bank had paid US$11million for the shares in 1991, Holding repays Merchant Bank US$16 million.

The Chief Justice in 1997 ruled that the Bank was and still is the owner of the shares in Jamaica Grande thereby declaring invalid the previous dealings of the Merchant Bank, Holdings and the Building Society relating to the shares. Following the ruling by the Chief Justice the various transactions were reversed. The net result is that the Bank has lost US$16Million because some of the loans could not be repaid.

Upon examination of the evidence the Learned Chief Justice said at p.66 of his judgment:

> "The likelihood of these companies being able to repay the loans made by First Trade was remote. It was therefore, a reckless act on the part of those who caused the Bank to enter into the transaction."

Further at page 69-70 he states:

> "How could any person with the experience of Crawford and Williams cause the Bank to deposit the sum of US$25.5million with such an institution having a share capital of under US$6,000,000? This type of conduct in my view borders upon recklessness. This was more than the taking of a risk in the ordinary course of business. Even a person with little or no experience in financial matters would have appreciated that this transaction was fraught with danger. Crawford and Williams as Directors and officers of the Bank failed to act in a manner which was consistent with the best interest of the Bank."

In my view the learned Chief Justice correctly applied the law in determining whether Mr. Crawford was negligent and/or in breach of his common law duty of care and fiduciary duties in causing the Bank to enter into the First Trade Transaction. He correctly found that Mr. Crawford was grossly negligent and was in breach of the duties of skill and care which he owed to the Bank.

This complaint is therefore groundless.

Balmain Brown's Appeal

Let me now turn to an examination of the complaint by the appellant Balmain Brown which was compendiously and clearly set out in the skeleton argument filed by Dr. Barnett.

(1) The Learned Chief Justice erred in law and on the facts in holding that the 5th appellant Balmain Brown is liable to the Respondent for the several sums set out in the judgment as there was no evidence or finding to the effect that any act of negligence or breach of fiduciary duty on the part of Balmain Brown caused the said losses or any of the said losses.

(2) The Learned Chief Justice erred in law when he dismissed the 5th appellant's counterclaim for wrongful dismissal as an employee of the said bank.

The main issues to be examined are the legal nature of the appellant's general or contractual duty of care as a director or executive officer of the Bank as well as the true legal nature of the appellant's fiduciary duties in the same capacity.

It is significant to note the degree of negligence required to ground liability in a director which was stated by Romer J ***In re City Equitable Fire Insurance Company Ltd.*** [1925] 1ChD. 407 at 427:

> "I confess to feeling some difficulty in understanding the difference between negligence and gross negligence, except in so far as the expressions are used for the purpose of drawing a distinction between the duty that is owed in one case and the duty that is owed in another. If two men owe the same duty to a third person, and neglect to perform that duty, they are both guilty of negligence, and it is not altogether easy to understand how one can be guilty of gross negligence and the other of negligence only.
>
> But if it be said that of two men one is only liable to a third person for gross negligence, and the other is liable for mere negligence, this, I think, means no more than that the duties of the two men are different. The one owes a duty to take a greater degree of care than does the other... If, therefore, a director is only liable for gross or culpable negligence, this

> means that he does not owe a duty to his company, to take all possible care. It is some degree of care less than that. The care that he is bound to take has been described... as 'reasonable care' to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. In saying this Neville, J. was only following what was laid down in ***Overend and Guerney Co. v Gibb*** as being a proper test to apply, namely: Whether or not the directors exceeded the powers entrusted to them, or whether if they did not so exceed their powers they were cognizant of circumstances of such character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into?"

Mr. Brown was not a director simpliciter but was a director and an employee of the Bank in a managerial position. In his capacity as President of the Bank he should have ensured that he was privy to all things relevant to the orderly running and functioning of the Bank. As he contends, if he were unaware of things which he ought to have been aware of then he was grossly negligent. He should have made it his duty to know from which foreign banks monies were due to the Bank in the amount set out in the Financial Statements and verify that the funds were unemcumbered in any way. It is quite plain that if he had done so he would have realized immediately that the Bank's funds were in serious jeopardy. Further, he should have ensured that the interest earned by the Bank on its deposits with First Trade was received by the Bank. Instead the funds of the Bank were used to secure loans to companies related to the Bank. The learned Chief Justice was correct when he concluded that such conduct amounted to gross negligence.

In ***Selangor v United Rubber Estates Limited v Craddock & Others*** (No. 3) [1968] 2 All E.R. 1073 Ungoed Thomas J. at p.1094 said:

> "So in my view, in general as in this case a credit in a company's bank account which the directors are authorized to operate are monies of the company under

> the control of those directors and are held by them on trust for the company in accordance with its purposes".

The fact that Mr. Brown had no personal interest to serve cannot exonerate him of his fiduciary duty as a director . These were unsecured or improperly secured loans to corporate defendants in the control of Crawford and Williams in which disbursements were made after Brown's appointment. His failure to ensure that these loans were either called or proper security was put in place cannot be overlooked.

It is instructive to point out the case of ***Joint Stock Discount Company v Brown*** [1869] 8 L.R. Equity .Cases . p381. In this case a director who denied liability for an impugned arrangement on the basis that it was complete before he joined the Board, was nevertheless found liable. Sir W.M. James V.C at p.403 said:

> "... Therefore, there was never a moment at which Mr. Brown, if he had done his duty, might not have rectified the fault he had committed by assenting to that arrangement . Instead of that he went on, and was afterwards a party to the arrangement by which the shares were ultimately taken;..."

In my view, there is no reason to disturb the findings of the learned trial judge in his assessment of the credibility of the witness concerning his denials of the knowledge of the transactions which resulted in the pecuniary loss to the respondent. This ground therefore fails.

I must now deal with the complaint of wrongful dismissal. The ground is stated as follows:

> The learned trail judge erred in law and on the facts in holding that the dismissal of the appellant was justified and that the counterclaim fails because the evidence addressed at the trial did not disclose;

(1) that the appellant had issued any misleading financial statement;

(2) engaged in unsafe banking practices; and

(3) issued unauthorized communication.

In the case of ***David Lashley & Partners Inc. v Bayley*** [1992] 44 W.I.R 44 at p.50, Husbands J.A. in delivering the judgment on behalf of the Court stated:

> "As a general principle, there is good ground for the dismissal of a servant if he is habitually neglectful in respect of the duties for which he is engaged, but not if there is only an isolated instance of neglect, unless attended by serious consequences. In ***Jupiter General Insurance Co. v. Shroff*** [1937] 3 All E.R. 67 Lord Maugham in his judgment stated:
>
> > 'It must be remembered that the test to be applied must vary with the nature of the business and the position held by the employee and that decisions on other cases are of little value...'."

With regard to misleading Financial Statements the Balance Sheet of the Bank as at June 30, 1994 recorded that it had cash resources of $2.6 billion. The deposits of First Trade were included in that figure. There was nothing in the Financial Statements which indicated that the Bank's deposits were subject to restricted use. Mr. Brown was one of the directors who signed the Bank's financial statements. No money actually passed between the Bank and Towerbank and therefore it was a paper transaction. In fact there were numerous paper transactions which were reflected in financial statements signed by Crawford, Williams and Brown. Mr. Brown in his defence stated that he was not aware of the First Trade Transaction referred to (supra) but the learned judge rejected this allegation of lack of knowledge.

In relation to unsafe banking practices it is appropriate to point out that Mr. Brown being in charge of credit had failed to ensure that the Bank had proper security for the enormous loan extended to Holdings and Development. Mr. Downer, Temporary

Manager, testified that in relation to the loans made to connected companies based on the security and other documents which he found it was his opinion the loans were not in accordance with good banking practice.

The unauthorized communication issue was not relied on in the pleadings but since the evidence on the issue was before the court, the court was obliged to consider it. In ***Domsalla v Barr*** [1969] 3 All ER 487 Edmund Davis L.J. at p. 493 said:

> "By adverting to the plaintiff's intention to set up in business on his own account, there was being introduced into the case an entirely new element which had received no adumbration at all in the statement of claim. For that reason, in my judgment, the plaintiff was going outside his pleadings, and objection might properly have been taken to the leading of such evidence.
>
> The objection, however, was not made, and accordingly it is not right, in my judgment, for this court to say now it will not have regard to such evidence as was called in support of this new, unpleaded matter; but that in no way relieves the court from the duty of carefully assessing such evidence as was adduced in support of this entirely novel allegation."

Mr. Downer testified that Mr. Brown had issued unauthorised publication from the Bank subsequent to temporary management. The instructions stated thus:

> " All incoming mail must be delivered unopened to the Price Waterhouse representative and no external correspondence can be signed by the staff of the bank until further notice".

In breach of those instructions Mr. Brown wrote on the Bank's letterhead to the Minister of Finance and he signed it as "President".

Dr. Barnett argued on behalf of Mr. Brown that the communication in question was not external. I cannot agree. I accept the respondent's submission that to write a letter on the bank's letterhead explaining the Bank's position in relation to the Central

Bank's inspection and to sign it in his capacity as President of the Bank and further to copy it to a third party was clearly a breach of the directions.

In my view the learned Chief Justice was entitled to find that the dismissal of Mr. Brown on all the above matters was justified.

I have since read the judgment of the Learned President and I am in full agreement with his reasoning and conclusion in relation to the matters not dealt with in my judgment.

For all the foregoing reasons I would dismiss the appeal in respect of all the appellants and affirm the relevant orders of the Learned Chief Justice in the Court below with costs to the respondent to be taxed, if not agreed.

ORDER:

FORTE, P.

The appeals are dismissed and the orders of the Learned Chief Justice which relate to the appellants are affirmed. The appellants must pay the costs of the respondent, to be taxed, if not agreed.