JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 103/1997

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN:	**FINANCIAL INSTITUTIONS SERVICES LIMITED Substituted for CENTURY NATIONAL BANK LTD.**	**DEFENDANT/ APPELLANT**
AND:	**NEGRIL NEGRIL HOLDINGS NEGRIL INVESTMENT CO. Ltd.**	**PLAINTIFFS/ RESPONDENTS**

Donald Scharschmidt Q.C., Michael Hylton, Q.C. and Dave Garcia instructed by Myers, Fletcher and Gordon for the appellant Bank

Hugh Small Q.C., Pamela Benka-Coker Q.C., Christopher Honeywell Helga McIntyre instructed by McDonald Millingen & Co. for the respondent companies

1999 – March 9,10,11,12,15,16, 17, 18
July 5, 6, 7, 8, 9, 12, 13, 14, 15, 19, 20, 21, 22,23
November 1,2,3,4,8,9,10,15,16,17,18 19,22,23,24,25,26
2000 – May 1,2,3,4,8,9,10,11,12,15,24, 25,26
2002 - March 22

DOWNER, J.A.

(1)

Introduction

John Sinclair met Donovan Crawford in August 1984. Sinclair was a successful sub-contractor who made his money in England. As a sub-contractor he took over Roldogate Ltd., a plastering firm to which he was formerly employed. He also owned two night clubs and a small hotel. Crawford was a banker, and the dominant force in Century National Bank. They struck up a friendship and began to do the business of banking through the companies they controlled. Sinclair's vehicles were Negril Investment Company Ltd., which owned the land on which Negril Gardens Hotel was built and Negril Negril Holdings Ltd. which was incorporated for the expansion of the hotel. Montego Bay Investment Company came later and under its aegis in 1989, the Gloucestershire Hotel in Montego Bay was taken over and reconstructed. The dispute between the parties came for resolution before Ellis J. the senior puisne judge in the Court below and concerned the operation of the current and other accounts by the Bank with respect to the respondent companies.

Crawford gave no oral evidence. He is reputed to be living in Atlanta, Georgia, U.S.A. ever since his Bank failed. The evidence suggests that he was in Jamaica during the course of the trial. So as regards the special relationship claimed by Sinclair and his companies the learned judge below relied on

Sinclair's evidence for the most part. In so doing, he seemed to ignore the independent advice available to the respondent companies firstly from Condel and Strachan who were both Chartered Accountants. There is no mention in his judgment that Sinclair was a director of a company incorporated in England. He also failed to give any weight to Crawford's written statement that Sinclair had done well out of the loans made to him and his companies. There were other issues which arose between the two companies and the bank and Ellis J. decided in favour of the companies by granting most of the declarations sought. These twelve (12) declarations are to be found at pages 45-46 of Vol. 1 of the Record. They were embodied in an order at pages 6,7 and 8 of Vol. 1 of the Record. This order ought not to be recognized. It was not signed by the Registrar of the Court below. There are provisions in it which with respect to titles could not have been made by the learned judge in his minute of order. The appellant Bank was ordered to render an account and was also ordered to repay interest wrongly retained at the rate of 52% per annum. Also it was ordered that two unspecified Registered Titles be returned.

The Bank failed and was eventually merged with a number of other failed financial institutions. Financial Institutions Services Ltd. was the company incorporated by the government to manage the Blaise Financial Institutions and Century National Bank and its Merchant Bank which were the initial failures. These failures were widespread and involved commercial banks, merchant banks and insurance companies. Financial Institutions Services was

substituted for Century National Bank Ltd. as the appellant by Order of this Court on 16th June, 1998. However, I shall refer to the appellant, as the "appellant Bank" and along with the respondent companies they are the parties on appeal. We were told by both sides that the outcome of this case was of great importance to the banking community in Jamaica.

The learned judge below accepted this and said at page 45 of Vol. 1 of the Record:

> "This case is unique in many respects. As far as it lies in my experience, it is the first time in this jurisdiction, that a customer has forensically challenged a banker as to how that banker has operated that customer's accounts. The challenge to the operation of the accounts included questions inter alia as to the banker's competence to compound interest, to vary interest rates, to charge penal rates of interest on overdrafts and to claim under a mortgage, prior to any formal demand on the mortgagor."

The way proceedings were conducted was somewhat unusual. The usual course where bank lending is secured by a mortgage is that the Bank takes the initiative to enforce the mortgage or responds with a counter- claim in which case the respondent companies would have to make a considerable deposit to prevent a sale by the Bank. The respondent companies however went the leisurely route of seeking declarations, instead of being made to answer a demand for payment in 1990. It is against this background that the observations of Ellis J. ought to be considered. The respondents claim to have paid the amount claimed on the 30th day of September and there seems to be

acknowledgement of it by V. Caple Williams an officer of the appellant Bank in the Court below. The initial issue to be decided is whether there was a special relationship between the appellant Bank and the respondent companies.

(II)

Was there a special relationship in law between the appellant Bank and the respondent companies?

The endorsement on the writ in both instances envisages a special relationship and reads as follows at page 52 of Vol. 1 of the Record in respect of the Plaintiff's claim against the Defendant; for:

> "1. An account of what is due and owing by the plaintiff to the defendant in respect of and arising out of the relationship between the plaintiff and the defendant as bank and customer as a consequence of accounts and loan transactions of the plaintiff with the defendant."

Some relevant averments of the first respondent "Negril Negril" claiming a special relationship in law between the parties are to be found at pp. 53 – 54 of Vol. 1 of the Record:

> "5. Negril Investments Limited, the Plaintiff in Suit No. C.L. N 089 of 1991 which was incorporated in 1984, was the registered owner of lands at Negril in the parish of Westmoreland on which it constructed a hotel known as Negril Gardens Hotel. This Plaintiff was incorporated in 1986 to extend the size of the hotel owned by Negril Investments Limited by constructing additional rooms and facilities to be operated with the original hotel.
>
> 6. At the time when the Plaintiff was incorporated, Negril Investments Limited, through its agent Sinclair developed a special relationship with the Defendant

> which acted through its agent Crawford. This relationship involved to the knowledge of both parties that the Plaintiff placed great reliance on and confidence in the ability of the Defendant to conduct the financial affairs of Negril Holdings Limited and the said company had already established current accounts and demand loan accounts with the Defendant."

Be it noted that the special relationship averred, commenced after current accounts and demand loan accounts were in operation with the appellant Bank. As Sinclair put it at page 8 of Vol. 9 of the Record the first phase was completed thus:

> "Mr. B. did all the financing and I built the hotel. I signed on the document which Mr. B. negotiated with Mr. C."

Bingham, being a director of Negril Investment Co. Ltd. was in a fiduciary relationship with the company and was performing his duties. There was no evidence to suggest that there was any special relationship at that period.

The allegations of a special relationship, set out in the Statement of Claim, were developed thus (at pages 60-61 of Vol. 1 of the Record):

> "32. The Plaintiff further states, it developed complete confidence and trust in the Defendant and accepted and relied on its advice and that as a direct consequence of the special relationship a system was instituted by which the Plaintiff would routinely send cash from Negril to be lodged in its account in Kingston and arranged that the Defendant would prepare lodgement advice slips and make lodgements on behalf of the Plaintiff from time to time.

> 33. The Plaintiff through Sinclair, enquired of the Defendant of the state of its indebtedness and on several occasions Crawford represented to the Plaintiff that its financial position was in good stead, that its debts to the Defendant were being serviced and that it was properly performing its obligation under the various contracts.
>
> 34. The Plaintiff accepted and relied on its advice as to the alleged healthy state of the Plaintiff's account until in or about April 1990, when without any prior indication to that effect, the defendant informed the Plaintiff that his accounts were badly in arrears."

However widely the averments are drafted the evidence from Sinclair was that the special relationship commenced after Bingham left Negril Investment Company in April 1987.

An aspect to notice was that bank statements were sent regularly to Strachan the accountant and auditor of the respondent companies and the statements were so sent on Sinclair's instructions. The inference must be that Sinclair was informed by his accountant as to the state of the companies accounts with the appellant Bank. Additionally, in Volume 6 of the Record it was shown that the final accounts of the companies were prepared by Chartered Accountants; firstly, by Leonard Condell and Company and, secondly by Strachan Barrett and Co. right up to the time of the dispute between the appellant Bank and the respondent Companies. These accounts must have been prepared from the primary records of the Companies. The records were eventually produced after discovery during the course of the trial. It should be emphasized that discovery was ordered by this Court. From the very inception

the Companies, under capitalized as they were, they have been financed by bank loans and overdrafts. The financial institutions which provided these facilities were Lival Investments Ltd., the appellant Bank and National Commercial Bank. On all occasions the final accounts showed that interest was compounded monthly and on all occasions the directors were John and Lorna Sinclair. I am unable to trace if a specific claim was made to set aside a transaction which was detrimental to Sinclair and his companies and the nearest declaration sought concerning this issue was as follows at page 64 (L) of Vol. 1 of the Record:

> " A declaration that the Defendant has wrongly debited the Plaintiff's accounts in all instances where the Defendant is unable to supply documentary proof or authorization for such debits."

It is now appropriate to turn to the relevant grounds of appeal which read:

> "11. That the Learned Trial Judge erred in Law and in fact when he concluded that there was in Law a special relationship between **Century National Bank Limited** and the **Plaintiffs/Respondent** and that the latter relied on the former to their detriment.
>
> 12. That the Learned Trial Judge erred in Law and in fact when he concluded that Century National Bank Limited discouraged the Plaintiff/Respondent from obtaining the services of qualified auditors."

There must be an analysis of the cases and some attention to the details revealed in the evidence on this issue, to determine which of the rival contentions is to be accepted.

Here is how Ellis J. after citing Sir Eric Sachs in **Lloyds Bank v Bundy** [1974] 3 All ER 757, 767, treated the issue of special relationship and the consequences he found as set out at pp. 17-18 of Vol. 1 of the Record:

> "On the other hand, whilst disclaiming any intention of seeking to catalogue the elements of such a special relationship, it is perhaps of a little assistance to note some of those which have in the past frequently been found to exist where the court had been led to decide that this relationship existed as between adults of sound mind. Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person on whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element which in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the court on the facts of any particular case."

Later at letter (e) the learned judge continued thus:

> "Confidentiality, a relatively little used word, is being here adopted, albeit with some hesitation, to avoid the possible confusion that can arise through referring to 'confidence.' Reliance on advice can in many circumstances be said to import that type of confidence which only results in a common law duty to take care – a duty which may co-exist with but is not coterminous with that of fiduciary care. 'Confidentiality' is intended to convey that extra quality in the relevant confidence that is implicit in the phrase 'confidential relationship' (cf per Lord Chelmsford LC in **Tate v Williamson** (1866) 2 Ch. App 55 at 62, Linley LJ in **Allcard v Skinner** (1887) 36 Ch D 145 at 181, [1886-1900] All ER Rep 90 at 98 and Wright J in **Morley v Loughnan** [1893] 1 Ch 736 at 751) and may perhaps have something in common with 'confiding' and also 'confidant', when,

> for instance, referring to someone's 'man of affairs'. It imports some quality beyond that inherent in the confidence that can well exist between trustworthy persons who in business affairs deal with each other at arm's length. It is one of the features of this element that once it exits, influence naturally grows out of it (cf Evershed MR in **Tufton v Sperni** [1952] 2 TLR at 523. following Lord Chelmsford LC in **Tate v Williamson** 2 Ch App 55 at 61).
>
> It was inevitably conceded on behalf of the bank that the relevant relationship can arise as between banker and customer. Equally, it was inevitably conceded on behalf of the defendant that in the normal course of transactions by which a customer guarantees a third party's obligations, the relationship does not arise. The onus of proof lies on the customer who alleges that in any individual case the line has been crossed and the relationship has arisen."

Then at letter (f) the learned judge continued, still referring to confidentiality, said:

> "It imports some quality beyond that inherent in the confidence that can well exist between trust worthy persons who in business affairs deal with each other at arms length."

Then Ellis J. said:

> " Guided by the above quotation, and revisiting the evidence of Sinclair and Keane-Dawes, I have no hesitation in holding that Sinclair for the plaintiffs relied on Crawford who represented the defendant. The evidence of Sinclair on this bears some repetition. 'I am not a book person I don't do any reading. That is why I had to have Bingham. We went to Chen Young because we wanted an approved Financial Institution.' Then the reply of Crawford. 'John, the money you are using is yours, you have a lot of asset.. You don't need a partner. What you

> don't know I will help you. I will do everything that Bingham and Chen Young can do'.
>
> Those bits of evidence are clear indications that the plaintiffs through Sinclair relied upon Crawford and Crawford was well aware of that reliance.
>
> The defendant obtained benefit from the transaction in that it obtained the Foreign Exchange which it solicited from the plaintiffs and the introduction of overseas customers by Sinclair as was requested by Crawford.
>
> It is my opinion therefore, that the defendant through Crawford, crossed the line which contains the normal dealing of Banker with Client at arms length. The defendant crossed the line and became a person on whom great reliance was placed. So great was that reliance that when crises arose in the plaintiffs' business they were assured that all was well by the defendant through Crawford. They relied on that assurance and were sucked into a whirlpool of indebtedness, against which they could not swim, to the drowning of their very being."

There are some features to note in the analysis of this judgment in the Court below. The date April 10, 1987 was important as the learned judge found that Bingham parted company with Sinclair at that time.

Be it noted that Crawford was never a shareholder or director of the Sinclair Group of Companies. When Sinclair offered Crawford an equity position Crawford politely declined (see page 146 of Vol 7.) Nor was it explained what National Westminster Bank did for Sinclair and his companies in the markedly different conditions in England. The finding was that the Bank assisted in the paper work. As to what Chen Young's Eagle Financial group would have done for Sinclair is speculative. That financial group like Century

Banking group led by Crawford also failed. This aspect is mentioned because Sinclair intimated that he was minded to do banking with Chen Young. The evidence showed that he did do business with the Eagle Financial group. There is no mention in the learned judge's analysis of the role Keane-Dawes played in handling his accounts at the appellant Bank which showed no signs of a special relationship between the Bank and the respondent companies.

The one financial transaction that the learned judge found was suggested by Crawford was the second loan for $2,500,000 from National Development Bank. An important point to note about Sinclair's English experience was that, the developers played an important part in assisting him. There is no indication that there were skilled developers assisting him in Jamaica and that may have been at the heart of his problems. Here is how that evidence emerged at page 11 Vol. 9 of the Record on this aspect:

> "JS- Namely – I am not a book person. I don't do any reading. I also told him when we just meet that my success in England was performance. The developers I work with in England did a lot of things for me that I should have done myself. I also told him the developers in England would just look after things for me and just hand me a bundle and say 'go to John and read it and if you have any problems bring it to anybody in the office'. Sometimes the contract would sign when the building in the middle. I reminded him that this is the reason why I have to have Mr. B."

Sinclair was asked to read during cross-examination which he did.

Developers are persons skilled in the financial side of construction and are adept in controlling costs. Mr. Sinclair gave evidence that he supervised

the construction of phase two which was the expansion of the hotel but he gave no evidence of his expertise in this area. So the Westminster Bank in England had the benefit of developers' skills aided by their own financial acumen. No such arrangement emerges from Crawford's evidence in the context of his three building ventures in Jamaica.

If there could have been any basis for special relationship, it would have been on the basis of the transaction that resulted from the decision to get a loan of cheap money from National Development Bank. However the fact was, that Sinclair was prepared to deal with Chen Young's Eagle Financial institutions because to secure money from NDB it was obligatory to go through a commercial bank and Crawford persuaded Sinclair to bank with him rather than the Eagle Financial group. Sinclair did go to Paul Chen Young and spoke to Chen Young's assistant. His evidence in chief at page 12 of Vol. 9 reveals that he returned to Crawford and the appellant Bank of his own free will and volition and secured a loan of one million dollars (M$1). Be it noted that before this suggestion by Crawford, Sinclair had a transaction with Lival for cheap money with the National Development Bank.

An examination of the evidence shows that Sinclair was always seeking loans from either Insurance Companies as First National Insurance Co. of which Bingham was an officer, and Island Life which bought out Lival, or banks such as Century National, Eagle or Citizens' Bank. He seems to have needed money both for the development of his hotels and for his personal

affairs. In an important letter (found at page 22 of Vol. 8 of the Record) written by Keane-Dawes his personal debts to the appellant Bank was shown to be in excess of six million dollars ($6m.) Moreover since the cheques for the respondent companies were honoured even when his accounts were in debt, they were granted several temporary loans by the appellant Bank. See **Cuthbert v. Robert** [1909] Ch. 226 at 233 and **Cunliffe Brooks & Co. v. The Blackburn and District Building Society** [1884] A.C. 857 at 864 per Lord Blackburn and 868 per Lord Watson. The relevant citations in these judgments will be cited hereafter. He used short term and temporary loans to finance the development of his properties. The experts have told us, that this was one of the principal reasons for the collapse of the financial system and the attendant bankruptcy of so many businesses.

It is Volume 9 which must be examined with care to ascertain if the finding by Ellis J. that there was a fiduciary relationship between the Sinclair Companies and the appellant Bank can be upheld, or whether it was a close relationship which was advantageous to Sinclair in the rapid expansion of his business and profitable to the Bank in the ordinary course of its dealings with a valued customer.

To illustrate how he remained with the appellant Bank at this stage, here is the gist of Sinclair's evidence at page 11 of Vol. 9:

> "JS - Mr. B went to PCY because we need an approved bank to get the NDB money and we need cheap money this time

HS - What if any was the response to this

JS - He said 'John – the money you using is yours, you own a lot of assets, you do not need a partner and surely not PCY. He going to own you in a little while'.

Judge – At this time when he is saying this to you was Mr. B. still your partner

JS - Mr. B. was now out. He went on to say 'I am already in it. What you don't know I will help you. I will do everything for you John, everything that Bingham used to do for you, everything that PCY can do' and he get down in his charm about his integrity and his trust and many more words what I don't even understand. He was very convincing and sound like just what I need and what I get in England, the help in administration and so on."

Further Sinclair continued his evidence thus:

"JS- He said he had a big machinery here, he is a young bank and has much time to do it for me. He is jut a phone call away. I gather he would do the administering and advise me like the people I had told him about in England. I told him I had already paid a portion for the land and I left to go see PCY. I did not tell him I was taking it (the business) to him. I just said all right Mr. C, I have to talk to PCY and I will get back to you."

To demonstrate that Sinclair had his own professionals, he named Rivi Gardener as his Architect, C.A. Stewart as his Quantity Surveyor and Lloyd Galloway who did the feasibility study. What was missing was the skills of a developer which as a former sub-contractor Sinclair needed. On the financial side we have the evidence, at page 110, of Vol 2 of the Record of Leymon Strachan on 12th October 1989 writing to the appellant Bank concerning bank

statements for the two respondent companies, Montego Bay Investment Co. and John Sinclair. Always there was independent financial advice available to Sinclair and the respondent companies.

The only evidence of Crawford being involved with anything other than banking for the respondent companies was tangential. It ran thus at page 5 of Vol. 9:

> "HS - Did you go inside the house
>
> JS - Yes I did
>
> HS - Did you tell Mr. C that you were interested
>
> JS - I told him I was interested but I would like someone that was involved in real estate to come and look at it."

There is a specific instance where Crawford gave advice on finances. It went thus at page 18 of the Record:

> "JS - In 1988 at the completion of the hotel everything was working perfectly. I was then at Mr. C house on his invitation –why I say his invitation – he phoned me during the week and asked if I was coming up and if I come up to come and see him because he have something to say to me. I go to his house and him say to me he would like to apply to NDB for a further $2 1/2m. I said what reason am I going to give for that and he said well John this money is very cheap. The bigger men in Jamaica use this facility to gain high interest on it more than what they are paying back to NDB and he will see to it that I gain some benefit out of it too."

It should be reiterated that Sinclair had resorted to this method before and it was the government's response to development to have a cheap money policy for foreign exchange earners through specialized institutions.

The snag was that the money was only available after there was a certificate from the Architect or Quantity Surveyors. In the meantime the project needed funds and this is where the intermediaries such as the appellant and other such Banks came into play. These banks had to make their profits from this transaction. It is necessary to grasp this to understand one basis of this dispute. It is also necessary to note that this loan was used to expand the properties of the respondent companies. This aspect will be dealt with later.

The learned judge below made no attempt to evaluate Sinclair's evidence. For instance the above passage must be a fairy tale. Sinclair being the recipient of a previous loan from the N.D.B., must have realized the stringent conditions with which those loans were administered.

An important point to bear in mind was that Sinclair's companies had an accountant and auditor Mr. Leymon Strachan. Before that Mr. Condell was retained even though Bingham was still around. Strachan was with Sinclair when there was a meeting with Crawford to finance a new venture. Sinclair expressed his need for funds. He remained with Crawford albeit with some persuasion. Once again he had the option to go to another bank. Sinclair on his own evidence was not weak but shrewd. He retained the appellant Bank to

finance his project, but he did not reckon the price of money. Leymon Strachan was available and the only inference was that Strachan would count the costs and tender the appropriate advice to Sinclair. The evidence emerges thus at page 19 of Vol. 9:

> "HS - Did you discuss transferring liability from CNB to the Century Trust and Merchant Bank
>
> JS - Yes
>
> HS - What were the circumstances
>
> JS - I told Mr. C that I want to build on this property in Montego Bay but I would need funds to borrow
>
> HS - Where had that discussion taken place
>
> JS - At Mr. C's house
>
> HS - Had you discussed your wish to build with anybody else
>
> JS - I discuss it with a lot of other people. Everybody know that I want was to build
>
> HS - Is there anything arising out of your discussion
>
> JS - Other people say I should use another bank
>
> HS - Did you tell him that
>
> JS - Yes"

Incidentally, Caple Williams a high official at the appellant Bank gave evidence that he never saw Sinclair at Crawford's house. Here is how Ellis J. treated this aspect of the evidence at page 14 of Vol. 1 of the Record:

> "Mr. Crawford gave no evidence in rebuttal of Sinclair's allegations. The only evidence which could possibly be called rebuttal evidence came from Caple Williams. It came not in examination in chief but in answer to a question in cross-examination from Mr. Small as to whether he had ever seen Sinclair at Crawford's house. He replied that he had never seen Sinclair at Crawford's house.
>
> It is my opinion that in the circumstances, that evidence does not do any violence to Sinclair's allegations of a personal and special relationship with Crawford."

Because of the importance of this encounter it is important to detail this bit of evidence to be found at page 536 of Vol. 11 of the Record:

> "I have never seen Sinclair at Crawford's house.
>
> 1988 - 1991/2. Lived there before going to C.N.B.
>
> I had responsibility for Century National Merchant Bank's administration. Matters referred to me. The operational area – not credit area. Crawford had last word on credit.
>
> When I got to C.N.B., Credit Manager was Keane-Dawes. C.N.M.B. operates out of same building as C.N.B. Crawford was CEO of C.N.M.B. and its Chairman. C.N.B. and C.N.M.B. operated as related institutions.
>
> [Witness shown page 132 of Exhibit 1 Negril Investment Limited.]
>
> That type of memo is common in C.N.B. Use of the type is encouraged. On occasions Crawford would make written comments on memos.
>
> On this memo, he initialed memo 3 times. At that time companies were treated separately. It could have corrected the breach.

> Merchant Bank was registered under Protection of Depositors Act. This Act was different from Banking Act.
>
> Merchant Bank could offer more attractive interest rates.
>
> Did not have to have ratio between capital and loans. Can't say where $7 million would come from.
>
> Credit administration would make recommendation to CEO, who would agree or disagree. Operation of account without overdraft limit should have been put in writing for good banking practice.
>
> The transfer of $7 million did not come to my attention as administration of C.N.M.B.
>
> (Paragraph 3 of Document)
>
> The waiver of Commitment fees. I can't say who it is referable to. Commitment Fee usually 2%. Can be assumed that the $140,000.00 would be paid to Century National Merchant Bank.
>
> The transfer was to have corrected breach by commercial bank. I would have charged the commitment fee.
>
> The $60,000.00 would relate to liabilities to commercial bank (and C.N.M.B.)"

The effective refutation of Sinclair's evidence came from Keane-Dawes who gave evidence on behalf of the respondent companies. He handled Sinclair's account at the appellant Bank. He treated Sinclair and his companies as valued customers. He did not treat them as having a special relationship with the Bank.

It was clear that the loans to the respondent companies and Sinclair were to their advantage. On the authority of **National Westminster Bank v. Morgan** [1985] 1 All ER 821 in such a situation the presumption of undue influence is rebutted. What we have in this case is an ordinary banking relationship between Sinclair and the respondent companies and the bank.

The examination in chief continued thus at page 20 of Vol. 9:

"HS - When

JS - At his house

HS - Tell me exactly what you said

JS - I told him that I had discussed it with Magnus Gooden, a manager from NCB

HS - Did he respond

JS - He said 'John why you do that?' I said I didn't think you can manage this one so I go somewhere else. He say people look at you as a big businessman in this country. He said 'I told you I would look after you and your business. You must not make everybody know what you can do. Stick with me and I will look after you.' I started to do the construction from monies I get from the insurance for the hurricane damage. The claim was paid to the bank because I had a loan from them when I was buying the hotel.

HS - There were buildings there when you bought the hotel. What did you do.

JS - I take down half of it and put up new ones and renovate some.

HS - What is the relevance of this March 89 meeting to the Gloucestershire (the G)

> JS - Mr. C said he had a hard time getting money from NDB for the G because of the ratio of his bank but this is something he can easily fix. He said he had a merchant bank and what he going to do is let the merchant bank pay off the commercial bank on the Negril loan so as to let the indebtedness on the commercial bank lesser so he could pick up the loan from NDB." [Emphasis added]

There is an important aspect of the evidence to be noted. Sinclair borrowed money from N.C.B. the largest Bank in Jamaica to buy the Gloucestershire (the "G".) Hotel. He could have dealt solely with that Bank to the exclusion of the appellant Bank if he wished. It is an index of the financial crisis in this jurisdiction that N.C.B. also failed and had to be rescued by the Financial Sector Adjustment Co. (FINSAC) the more powerful sister of the actual appellant in this case.

It is apt to cite the following passage from the judgment of Sir Eric Sachs in **Lloyd's Bank v Bundy** (supra) at page 768:

> "When one has to deal with claims of breach of either common law or fiduciary care, it is not unusual to find that counsel for a big corporation tends to try and focus the attention of the court on the responsibility of the employee who deals with the particular matter rather than on that of the corporation as an entity. What we are concerned with in the present case is whether the element of confidentiality has been established as against the bank; Mr. Head's part in the affair is but one link in a chain of events. Moreover, when it comes to a question of the relevant knowledge which will have to be discussed later in this judgment, it is the knowledge of the bank and not merely the personal knowledge of Mr. Head that has to be examined."

In the instant case it is not only the appellant Bank but the respondent companies and in particular the accounts which must be taken into account. These accounts show the knowledge of the respondent companies. It does not appear that the learned judge below thus focused on this aspect of the matter. Knowledge of the companies is the effective refutation of Sinclair's evidence. The learned judge below failed to take into account that the respondent companies had lives of their own, and they knew what Sinclair pretended not to know.

The role of Strachan who accompanied Sinclair to secure funds for the Montego Bay venture is important and here is how Sinclair put it at one point:

> "Hs - At that time Mr. B had been out for about two years. What was he doing for your two companies
>
> JS - I told Mr. S that Mr. B left and I would like him to look at my account. While Mr. C offered me his full support I did not use Mr. Strachan to do much. One or two times Mr. C said he would like 'your man Mr. Strachan to do something for me' and I would call Mr. Strachan and he would call Mr. C." [Emphasis supplied]

So the point is that even if Crawford tried to dissuade Sinclair from having independent advice he had Strachan and, in his own words, he decided to continue with Crawford. He retained Strachan yet he admitted he preferred to rely on Crawford although the companies of which he was the Managing Director paid Strachan. The respondent companies also had a Secretary and a General Manager. It seems also that there was a Co-ordinator/Consultant, Mrs.

Sandy Chin-Yee retained during Strachan's tenure at the Sinclair Group of Companies. (See page 49 of Vol. 1 of the Record and page 488 of Vol. 11 of the Record). It is not feasible for a company to rely on a special relationship in law when it retains an accountant and auditor which it refuses to utilize to the fullest extent. To my mind Sinclair over borrowed and nearly ruined his companies. Crawford lent beyond the respondent Bank's capacity and so ruined the Bank. There was a lack of prudence on both sides. This is the substance of the case dressed in the guise of a special relationship.

It was evident that a crisis would arise sooner or later as Sinclair did not have the skill of a developer. Also the accountant retained by the company was not consulted or he was rejected. Hence there was no cost control exercised. Crawford called a halt to further advances and computed the total indebtedness as sixty-three million dollars (M$63.) Sinclair had another set of figures which he arrived at as follows. Here it is at page 27 of Vol. 9 of the Record:

> "JS - I told him our first application Mr B done was for $2 1/2m; I told him the second application that I applied for was $6m; I told him the third application was $2 ½; I told him the final application – this is for the Gloucestershire (G) was for $15 1/2m in which he could not obtain $8 1/2m that was later taken up from NDB by Jamaica Citizens Bank (JCB) and handed over to him Mr. C.
>
> I said to him the total borrowing would be $2 1/2m. $2 ½ and $6m which is $11m for the two Negril properties and $15m for the Montego Bay property so if I owed JCB $8 1/2m well then it would be $17 1/2m the total I borrowed from CNB. I told him that there

> is daily lodgment to the bank and even if I delete the daily lodgment it could not be more than the $17 ½ and he promised he would let us have, he would see whether he or I is wrong and let me know in a couple days.
>
> HS - And he was saying you owe how much
>
> JS - Before he give me a paper saying $63m."

A memorandum from Maurice Keane-Dawes, an officer of the appellant Bank, who gave evidence for the respondent companies (at page 133 of Vol 3) provides an effective refutation of the special relationship found by Ellis J. Sinclair together with the accountant and auditor Strachan, at that time, were making representations for concessions with respect to the interest rates. He does not seem to be relying on Crawford then, but on Strachan; and further, the implication is that, he accepted the prevailing interest rate but sought a reduction.

It is important to cite this memorandum in full because of the date March 21, 1989. This was before the dispute in 1990. Secondly, the negotiations were with the Credit Manager not Crawford. Thirdly, Crawford's comments on the Memorandum are instructive. Here is the memorandum and comments:

> "CENTURY NATIONAL BANK LIMITED
> M E M O R A N D U M
> March 21, 1989
>
> TO: Mr. Donovan E. Crawford
> Managing Director

FROM: Mr. Maurice C. Keane-Dawes
Credit Manager

SUBJECT: Negril Investments Company
Negril Negril Holdings Limited

On March 20, 1989, we met with Mr. Sinclair and his Accountant to discuss transfer of the existing overdraft liability to the Merchant Bank with a view to correcting the breach of the Banking Act.

It has been agreed that we will transfer the amount of $7 Million to the Merchant Bank, repayable over a twenty year period. It is the case that in view of the absence of a formal overdraft limit, Mr. Sinclair has incurred substantial overdraft interest and overdraft fees. In fact, the audited account reflects total interest payments for the year 1988 in the region of $4 Million. Against this background, Mr. Sinclair has made representations for a concession on the interest rate.

I am recommending that we waive the commitment fee of approximately $140,000.00 and write off approximately $60,000.00 in interest charges on a one year period in order to minimize the impact of our P & L account. I would appreciate your comments on this matter.

Mr. Sinclair has been requested to call on us prior to the end of this week to sign the Promissory Note and Mortgage forms to facilitate disbursement of the Merchant Bank's loan.

The residual overdraft after application of these funds will be liquidated within a month. This is based on the fact that the Company is enjoying 100% occupancy and deposits to the account since December total in excess of $3.5 Million. We expect that he will have very little difficulty achieving this objective."

Here are the comments by Crawford penned on the memorandum:

> "I would prefer to leave in place commitment fee and reduce the rate being charged. As a policy I would not like to waive commitment fees nor write off anything John has done very well as a result of our help and enjoys a strong capital appreciation R/E owned."

The view expressed by Crawford of the strong capital appreciation and the return on equity to Sinclair is a factor to be taken into account in considering any claim for undue influence. In this note there is no evidence that Crawford knew of Sinclair's reliance on him other than to grant loans in the ordinary course of business. Also Keane-Dawes in 1989 was concerned about correcting breaches of the Banking Act, and with the Profit and Loss account of the appellant Bank. Be it noted that Keane-Dawes was a whistle blower who at the trial gave evidence for the respondent companies. That evidence must be compared with this memorandum.

The evidence reveals two astute minds probable on the road to ruin. Sinclair along with his accountant must have fully realized at that time that his and the respondent companies' debts were growing. Also that there was, no formal overdraft limits and that the interest rates were much higher in Jamaica than that which obtained in England. Crawford gave a signal to Keane-Dawes that interest rates could be reduced. There is no evidence that he, Sinclair, sought to leave the appellant Bank at that time. His assets in the form of two hotels were increasing, but so were his liabilities. Crawford was making

handsome paper profits but his Bank was on the brink of collapse, as were most other financial institutions in the jurisdiction.

Be it noted that when the disputes between the respondent companies and the appellant Bank about the extent of the debt emerged, Sinclair changed accountants and retained Peat Marwick. Another important aspect of this case was that Sinclair always approached Crawford for loans. He certainly was not influenced by Crawford as he told him he was going to approach N.C.B. a much larger Bank, and he did. He returned to Crawford probably for the ease with which overdrafts were obtained . Also he said he was advised to change his banking from the appellant Bank to another. He did'nt.

On this analysis I do not find there was a special relationship as the learned judge below found. In fact when the cross-examination is revisited it reinforces the view that there was no such relationship. Here is how the debts of the Sinclair group was piled up as revealed in cross-examination. The cross-examination also shows the nature of the relationship at page 40 of Vol. 9 of the Record:

> "DS - Let us go back to the years when the relationship was good would those years be from 1984 to 1990
>
> JS - The relationship was good from 1984 until I came back from England in 1990."

That the companies had an auditor from this inception emerges thus at page 41 of Vol. 9:

> "DS - Did the companies have auditors

JS - In the beginning up to 1987 the chairman of the company dealt with that

DS - Dealt with what

JS - The financial side

DS - You mean you don't know if the company had auditors

JS - I know it

DS - I know it

DS - Well did it have auditors

JS - It did have auditors

DS - Who were the auditors in the beginning

JS - A Mr. Condell."

Bingham the Chairman left the companies in April 1987. Here is how the role of Strachan emerged during cross-examination:

"JS - After Mr. B left I appointed auditors."

Then there was the remarkable admission on page 44 of Vol. 9 of the Record. Here he admitted that Strachan was appointed to replace Bingham. The statements therefore that he was relying on Crawford must be taken with a grain of salt. Strachan's evidence is reflected in the final accounts he prepared for the respondent companies.

Then further at page 45 of Vol. 9 of the Record the following evidence emerges:

"DS - After Mr. B left where did the statements go

JS - After Mr. B. left, a few statements did still go to Harbour Street

DS - Did you give the bank any instructions where the statements should go after Mr. B. left

JS - Yes. I gave the bank instructions to send them to Mr. Strachan.

DS - And Mr. S was the person to whom the statements should be sent right up to the dispute.

JS - Mr. S would be the person the statements should send to right up to the dispute."

Here is an extract which shows Sinclair's attitude to repayment of the N.D.B. loan at page 47 of Vol. 9 of the Record:

"DS - Do you understand that the bank was concerned that you should keep your payments up to date in regard to the NDB payments.

JS - I don't see why the bank should concern sir."

To compound the situation here is the further answer at page 48 of Vol. 9 of the Record as to his personal loans:

"DS - Did you agree to the other part –residue to be cleared within 60 days from the proceeds of the sale of the apartments on Grosvenor Terrace.

JS - I don't remember that

DS - Do you understand that the bank was concerned that things should be completed within a certain time.

JS - in all my dealings with the bank I never see concern."

This exchange demonstrates the working of Mr. Sinclair's mind. These answers were in the context of a letter from Maurice Keane-Dawes the Credit Manager of the appellant Bank to Mr. Sinclair. This letter of May 16, 1989 at page 22 of Vol. 8 spoke of the loans to the two respondent companies, a personal loan to Mr. Sinclair and the loans to Montego Bay Investment Company. The letter was written after a meeting between Crawford, Keane-Dawes and Sinclair. The letter brought home with clarity the Bank's concern with the state of the indebtedness of the Sinclair group of companies and the personal indebtedness by Sinclair himself. To reiterate Keane-Dawes was a witness for the respondent companies. Moreover, Sinclair states that Mr. Strachan was at the meeting and further he did not bring the letter to the attention of Mr. Strachan.

In this context it is of importance to set out the function of accountant in contrast to that of auditor to see the knowledge that must be imputed to the company. At 478 of Vol.11of the Record the following passage appears:

"Scharschmidt:	What is the difference in function between an Accountant and Auditor
LR:	An accountant is engaged in keeping the Company records from day to day and is expected to carry out bank reconciliation, post entries from subsidiary books of the account extract a trial balance, and prepare a financial report where possible.

> An auditor embarks on an assignment to independently satisfy himself, that the records and books of account maintained by the company, do reflect accurate information at any given period, he is expected on completing his examination to express an opinion on the state of affairs of the company at a specific date."

This comes from the evidence of Louis Reynolds who gave evidence for the appellant Bank. Mrs. Patricia Daley Smith who gave evidence for the respondent companies gave similar evidence with respect to the functions of an auditor. Here it is at page 353 of Vol. 11 of the Record:

> "AR I would like to read something from principles of auditing by MG May 16th Edition published by Richard D. Erwin Inc. page 24 the heading is Audit procedures not determined by the client..
> ... the status of the audit is determined by the auditor not the client. The auditor determines the procedure to be employed, the management of the firm instructs as to the procedures which follows. The management cannot specify the procedures to be followed by the CPA. This statement says that the auditor assumes full responsibility for the adequacy and scope of their work. Do you agree with this
>
> PODS Yes."

Here is an interesting aspect of the evidence at pages 50-51 of Vol. 9 on the relationship between Mr. Sinclair, his companies and the Bank and the matter of interest:

"JS - I know the bank was quite happy with my companies

DS - Reading the letter you can see the happiness you and your companies were in a business relationship with the Bank.

JS - Yes.

DS - In that relationship you and your companies borrowed money

JS - Yes"

During the good times with the Bank here is how Sinclair described it at page 52 of Vol. 9 of the Record:

"JS - Well it was the first bank manager I could talk to and get immediate response and for your information sir he said I was the best customer and he said it publicly."

The important case of **National Westminster Bank v. Morgan** (supra) sets out with clarity the basis of the presumption of undue influence. The guiding principle is that not every confidential relationship in terms of a banking transaction gives rise to a presumption of undue influence. Lord Scarman considering the ratio decidendi in Sir Eric Sachs' judgment further said at page 830:

"But in the last paragraph of his judgment where Sir Eric turned to consider the nature of the relationship necessary to give rise to the presumption of undue influence in the context of a banking transaction, he got it absolutely right. He said ([1974] 3 All ER 757 at 772, [1975] QB 326 at 347):

'There remains to mention that counsel for the bank, whilst conceding that the relevant special

> relationship could arise as between banker and customer, urged in somewhat doom-laden terms that a decision taken against the bank on the facts of this particular case would seriously affect banking practice. With all respect to that submission, it seems necessary to point out that nothing in this judgment affects the duties of a bank in the normal case where it obtains a guarantee, and in accordance with standard practice explains to the person about to sign its legal effect and the sums involved. When, however, a bank, as in the present case, goes further and advises on more general matters germane to the wisdom of the transaction, that indicates that it may- not necessarily must- be crossing the line into the area of confidentiality so that the court may then have to examine all the facts including, of course, the history leading up to the transaction, to ascertain whether or not that line has, as here, been crossed. It would indeed be rather odd if a bank which vis-à-vis a customer attained a special relationship in some ways akin to that of a "man of affairs"- something which can be a matter of pride and enhance its local reputation – should not, where a conflict of interest has arisen as between itself and the person advised be under the resulting duty now under discussion. Once, as was inevitably conceded, it is possible for a bank to be under that duty, it is, as in the present case, simply a question for "meticulous examination" of the particular facts to see whether that duty has arisen. On the special facts here it did arise and it has been broken'."

In considering this passage in the context of the instant case it seems clear that Sinclair as a director failed to exercise his fiduciary responsibility to his companies and that this issue was ignored in the Court below.

Since we are dealing with two respondent companies and the appellant Bank the issue of the advantage gained by the respondent companies in

commercial transactions must be faced. This is how Lord Scarman put it at page 827:

> "Like Dunn LJ, I know of no reported authority where the transaction set aside was not to the manifest disadvantage of the person influenced. It would not always be a gift: it can be 'hard and inequitable' agreement (see **Ormes v Beadel** (1860) 2 Giff 166 at 174, 66 ER 70 at 74); or a transaction 'immoderate and irrational' (see **Bank of Montreal v Stuart** [1911] Ac 120 at 137) or 'unconscionable' in that it was a sale at an undervalue (see **Poosathurai v Kannappa Chettiar** (1919) LR 47 Ind App 1 at 3-4). Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it."

Then Lord Scarman continues thus on page 809:

> "Similarly, a relationship of banker and customer may become one in which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence."

So there was a need to enquire into the facts of the instant case to ascertain if a special relationship arose which gave rise to undue influence. Also to ascertain whether there was a conflict of interest and,

further if the result was unfair, it must be borne in mind that the banking relationship with Sinclair and the companies lasted over some four years before a dispute arose. Another fact to be taken into account was that Sinclair's companies employed officers. These companies had accountants and auditors, and a secretary, and, statements were regularly forwarded to the accountants of the companies. Further, audited accounts of the companies were prepared which stated the interest payments that accrued and these accounts were signed by John and Lorna Sinclair as directors of the company. Directors of companies cannot shut their eyes to the obvious .

Further, as Crawford gave no evidence, Sinclair's evidence especially under cross-examination, the documentary evidence from the Bank and the respondent companies, as well as the evidence of Keane-Dawes are crucial in determining this issue.

The other important passage in this context runs as follows at 831 of Lord Scarman's judgment:

> "For these reasons, I would allow the appeal. In doing so, I would wish to give a warning. There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by

> another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case." [Emphasis supplied]

Sinclair's folly in not exercising his fiduciary responsibility to his companies cannot be the basis of claiming a special relationship between the appellant Bank and the respondent companies.

When the figure of $63m was put to him as to his debts with the Bank, he said he passed it to his accountant. That accountant was Mr. Strachan. This further evidence is a further demonstration that there was no special relationship between the Bank and the respondent so as to give rise to a fiduciary relationship between them. So the finding of Ellis J, must be set aside. On this analysis grounds 11 and 12 (supra) were successful.

There is a statement of principle by Lord Scarman in the **Tai Hing** case (1985) 2 All ER 947,957 which is applicable to the circumstances of this case. It reads thus:

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships

> believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, eg. in the limitation of action."

This warning is particularly apt where the case was conducted on the basis of contract law and the declarations claimed are all on the basis of contractual documents and the fiduciary relationship claimed in the context of these contracts. Further there was a specific claim for damages for breach of contract which was rejected in the Court below. Accordingly, there was no need to rely on **Headley Byrne and Company Limited v. Heller and Partners Limited** [1963] 2 All E.R. 575, or the more recent developments in the cited cases of **Henderson v. Merritt Syndicates Ltd.** [1994] 3 All ER 506 and **Williams and another v. Natural Life Health Foods Ltd. and another** [1988] 2 All ER 577 as counsel for the respondent companies did in this case.

The other comment which is pertinent is that although the respondent companies aver a special relationship in their Statement of Claim there is no prayer relating to that issue. The substance of the claims for relief is based on restitution. They are saying we have paid what you claimed. It is true we borrowed, but we demand a repayment as you overcharged us.

(111)

Was Article 13 of contract pertaining to the current account conclusive evidence clause?

In considering the authorities cited on this issue it must be emphasized that the principal dispute in this case was the issue of whether there was the special relationship between the Bank and the respondent companies. Also whether compound or simple interest was payable by the respondent companies to the Bank for overdraft facilities and whether the mortgage agreements governed the contracts for operating the current and other accounts. Another principal issue was whether the bank statements sent to the companies could be challenged by the respondent companies because of the conclusive evidence clause, so as to ascertain if the companies would be liable for the balances shown on the statements. The circumstances in this case are markedly different from the circumstances in **Tai Hing Cotton Mill Limited v. Liu Chong Hing Bank Limited** [1985] 2 All E.R. 947 and **Bache and Company (London) Limited v. Banque Vernes et Commerciale de Paris S.A.** [1973] 2 Lloyd's Rep. 437. On the other hand the circumstances of the instant cases in many aspects correspond to those in **Yourell v. Hibernian Bank** [1918] A.C. 372. Here is how Lord Atkinson states the principle at page 391, the situation which governs when no objection is made in the absence of forgery:

> "As to the opening of the current account and taking an account upon a new principle no fraud is alleged, no relief is sought against a person in a

> fiduciary position, no specific errors are alleged to exist, and there is no pretence for saying that the parties acted, as they did in **Danielle v. Sinclair** 6 App. Cas. 181, under a mutual mistake as to the effect of the mortgage deed. The account was kept in writing and approved of in writing. Up to the last it was copied into the mortgagor's pass book and never objected to by him. In **Willis v. Jernegan** (1741) 2 Atk. 251, 252) Lord Hardwicke, in delivering judgment said: 'The plaintiff's counsel have made two objections to the defendant's plea of a settled account. 1.That it was not signed by the parties. 2. That the vouchers were not delivered up at the time. As to the first, there is no absolute necessity that it should be signed by the parties who have mutual dealings, to make it a stated account, for even where there are transactions, suppose between a merchant in England and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account but the person to whom it is sent, keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterwards'."

Similar statements of principle were made by Lord Finlay L.C. at pp 380-381 approving the dissenting judgment of Cherry, .C.J.

In the **Tai Hing** case (supra) Lord Scarman said as follows at page 959 of the conclusive evidence clause in the context of the claim by the Banks that their customers should bear the loss of the forgeries committed by a servant of the companies:

> "Their Lordships agree with the views of the trial judge and Hunter J as to the interpretation of these

> terms of business. They are contractual in effect, but in no case do they constitute what has come to be called 'conclusive evidence clauses'. Their terms are not such as to bring home to the customer either 'the intended importance of the inspection he is being expressly or impliedly invited to make' or that they are intended to have conclusive effect against him if he raises no query, or fails to raise a query in time, on his bank statements. If banks wish to impose on their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the obligation and of the sanction imposed must be brought home to the customer. In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, in their Lordships' view, the true nature of the obligations of the customer to his bank where there is no express agreement is limited to the **Macmillan and Greenwood** duties. Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation on the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts."(Emphasis supplied)

So two features are to be noted. The requirement of inspection must be brought home to the customer and as well as what is intended to be conclusive against him. The contracts to operate the current accounts in the instant case are embodied in fourteen (14) articles and the relevant articles in the context will require detailed treatment later in this judgment. At this stage it is sufficient to say that Article 13 does require the customers to make objections to the statement of account supplied by the Bank to the customer. Further if

there are inaccuracies and they are not notified within ten days to the appellant Bank, the Bank will be released from responsibility.

In this context **Tai Hing** is only partly relevant. Lord Scarman placed his reliance on **Macmillian and Greenwood**. His Lordship was dealing with a situation where, because the companies cheques were forged by their servant, the companies knew nothing of these forgeries, so they gave no mandate to the banks and a conclusive evidence clause gave the banks no protection.

In the instant case the appellant Bank seeks to rely on the following clause so as to make the bank statements unchallengable in all respects. As a matter of construction the clause cannot be so generously interpreted. Here are the contents of the relevant clause as stated in the Further Amended Defence at page 66 of Vol. 1 of the Record:

"ARTICLE 13

> The customer hereby agrees to notify the bank in writing of any change of his address. The customer further agrees to notify the bank in writing of any objection or claim which he may have with regard to the periodic statement of account supplied by the bank to the customer or to any communication sent to him by the bank relative to the bank's internal or external audits or inspection. If the customer does not communicate his objections to the bank as aforesaid within ten days of the date of any monetary or other statement then it shall be understood that the customer shall have accepted the accuracy of the notified balance and the bank shall be released from any responsibility or obligation for any claim arising from any inaccuracy which should have been brought to its attention by the customer. Bank Statements and cancelled cheques will be sent monthly by ordinary mail to the customer's address appearing on

> the bank's records on such dates as the bank shall decide from time to time."

This clause is not appropriate to preclude a challenge on the basis of the status of the mortgage agreements in relation to the contract to operate the current accounts or whether compound or simple interest is payable or many of the other challenges made in this case. What the clause does, is to inform the customer that periodic statements of accounts are a part of the contract to operate a running account and that objection must be made to them or they will be regarded as acceptance of the new notifications. Also inaccuracies of the initial balance may be conclusive against the customer if there is no challenge as to the basis of operating the account.

On the other hand the similarity with **MacMillan's** case is demonstrated by the dictum of Lord Shaw: See **London Joint Stock Bank Ltd. v. MacMillan and another** [1918-1919] All ER Rep. 30 at 53 which reads:

> "A cheque with the signature of a customer forged is not the customer's mandate or order to pay. With regard to that cheque, it does not fall within the relation of banker and customer. If the bank honours such a document not proceeding from its customer, it cannot make the customer answerable for the signature and issue of a document which he did not sign or issue; the banker paying accordingly has paid without authority, and cannot charge the payment against a person who was a stranger to the transaction."

A conclusive evidence clause in general terms cannot detract from the bank's responsibility where there is no mandate from the customer: or in the context

of the instant case where there are challenges to the basis of the agreement with the banker and customer.

The context of the **Bache** case where the Court of Appeal sanctioned a conclusive evidence clause is important. Here is how the context was stated in the headnote. See **Bache and Co. (London) Limited v. Banque Vernes et Commerciale de Paris S.A.** [1973] 2 Lloyd's Rep. 437:

> "The plaintiffs, commodity brokers on the London Commodity Exchange, demanded a bank guarantee before entering into buying and selling transactions on behalf of their customer a French trading company. The defendants, who were the trading company's bankers, gave the guarantee which contained a conclusive evidence clause providing (*inter alia):*
>
> Notice of default shall from time to time, be given by [plaintiffs] to [defendants] and on receipt of any such notice [defendants] will forthwith pay . . . the amount stated therein as due, such notice of default being as between [plaintiffs and defendants] conclusive evidence that [defendants'] liability hereunder has accrued in respect of the amount claimed."

Lord Denning at page 440 stated the ratio decidendi thus:

> "I would only add this: this commercial practice (of inserting conclusive evidence clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later

> by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a conclusive evidence clause, the guarantor must honour it, leaving any cross-claims by the customer to be adjusted in separate proceedings."

Yet Article 13 must have some significance since in a banker's contract there will be variation in interest rates and bank charges. These subsequent variations will bind the customers if no objections are made within ten days. This issue will be revisited when the nature of banking contracts are considered. It is sufficient at this stage to state that it was recognized that the periodic statements from the Bank do have a contractual effect. See page 959 of the **Tai Hing** case on the above analysis. So the ground of appeal which reads:

> "10. That the Learned Trial Judge erred in Law when he concluded that Clause 13 of the contracts to operate Current Accounts did not amount to a Conclusive Evidence Clause"

was not successful.

(IV)

Do the mortages run in tandem with the current accounts so that they must be construed together as the appellant Bank claims?

The prayer in relation to this issue reads as follows at page 63 of Vol. 1:

> "(J) An interpretation of the terms and conditions of the said mortgage dated the 10th August 1987 and their full meaning and effect as they affect the right and liabilities of the parties.
>
> (K) A declaration that the terms and conditions of the said mortgage became operable only when the

> formal demand was made by the Defendant on the Plaintiff on the 26th June 1991."

Then the Defence states at paragraph 44 at page 76 of Vol. 1 of the Record:

> "44. With the exception of paragraph J the Defendant denies that the Plaintiff is entitled to the reliefs claimed or any at all."

So both sides acknowledged the importance of this issue and seek a declaration thereto.

In **Barclays Bank Ltd. v. Beck** [1952] 1 All ER 549, the ratio applicable to the above question was stated by Somervell and Denning LLJ. In that case the charge was entered into by the customer and the bank subsequent to the opening of a current account which was overdrawn. An important statement of principle was cited with approval thus by Somervell LJ.at 551:

> "That opinion was in accordance with what BAYLEY, J., has said in **Twopenny v. Young** (3) B. & C. 211):
>
> > ' . . . where there is that in the instrument which shows that the parties intended the original security to remain in force, the new one has not the effect of extinguishing it . . .'."

In the circumstances of the case, here is how Somervell L.J ruled at pp. 551-552:

> "In my opinion, the clause, so far from doing that, indicates that the position is the opposite. I would rely, in particular, on the expression "all other moneys and liabilities now or hereafter due or to become due." It is covering, that is to say, future advances. Those advances may be on any terms that the customer and bank agree. The customer may get the

bank to agree to grant an advance which shall only be repayable on six months' notice. The form is what I should have expected from the circumstances. The relationship of bank and customer continues, a charge is given, and cl.1 sets out that the farmer remains liable to pay whatever is due and owing to the bank, according to the terms agreed between them apart from this document, as and when it becomes due and owing. The obligation to pay arises not under the charge, but under one or more separate transactions with the bank. It may possibly be that, unless some such clause was there, it could be suggested that the bank, having accepted a charge in respect of the overdraft, had precluded themselves from saying they could sue on demand. If the value of the property charged exceeded the amount of the overdraft, it would seem rather unreasonable if repayment of all moneys owing could be demanded the next day, and, no doubt, that would not be done. But cl. 1 seems to me to make it clear that, notwithstanding the acceptance of the charge, the contractual rights of the bank as against their customer are preserved. For these reasons, it seems to me, the argument that there has been a merger fails." (Emphasis supplied)

As to cl. 1 the learned judge continues thus at page 551:

"The words of the Act, in s. 5 (5), indicate, as one would expect, that it covers not only a charge to secure an advance of a specified sum which might be made *ad hoc* under some special terms, but also a charge given in respect of a fluctuating amount advanced on current account. The material part of cl. 1 of the charge (in which, by definition, "farmer" includes both defendants and relates to their joint account) reads:

'The farmer hereby covenants with Barclays Bank Ltd. (hereinafter called "the bank") that the farmer will on demand or upon the death of the farmer without demand pay to the bank the balance of all moneys now or hereafter owing by the farmer under any account current or other account with the bank and all other moneys and

Lloyds Bank Limited v. Margolis [1954] 1 All ER 734 is the next case relevant to this issue. Upjohn J. in delivering his judgment emphasized that in each case where the issue arose it was a matter of construction. Referring to clause 1 the learned judge said at page 736:

> "I must now turn to the legal charge and read the relevant clauses. I can start with the operative part, cl. 1 of which provides:
>
> > 'The mortgagor [the third defendant] hereby covenants with the bank to pay to them on demand all money and liabilities which now are or at any time hereafter may be due owing or incurred from or by the mortgagor to the bank or for which mortgagor may be or become liable to them on any current or other account or in any manner whatever (whether alone or jointly with any other person and in whatever name style or firm) together with interest to date of repayment commission banking charges law and other costs charges and expenses (such interest being computed both before and after any such demand according to the usual mode of the bank with current accounts and that notwithstanding any account hereby secured may from any cause cease to be carried on as an ordinary banking account and so that interest shall be payable at the rate so provided as well after as before any judgment obtained hereunder)'." (Emphasis supplied)

Then Upjohn J. put it this way at page 738:

> "In my judgment, where there is the relationship of banker and customer and the banker permits his customer to overdraw on the terms of entering into a legal charge which provides that the money which is then due or is thereafter to become due is to be paid "on demand", that means what it says. As between the customer and banker, who are dealing on a running account, it seems to me impossible to

> assume that the bank were to be entitled to sue on the deed on the very day after it was executed without making a demand and giving the customer a reasonable time to pay. It is, indeed, a nearly correlative case to that decided in **Joachimson v. Swiss Bank Corpn.,** where the headnote was this [1921] 3K.B. 110):
>
> > 'Where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent.'
>
> In this case the agreement has provided quite clearly what is to be done before the bank can sue. They must demand the money." [Emphasis supplied]

Be it noted that in the instant case, the usual course was not followed. It is not the appellant Bank who sued on the mortgage deed. It was the customer who has sought declarations as to the force and effect of the mortgage.

There is evidence from Caple Williams a high officer of the appellant Bank which suggests that the liability of the respondent companies was paid off in 1993. See page 339 Vol. 11 of the Record. Mr. Hugh Small Q.C., pointed this out in his written submission before Ellis J. in the Court below. Ellis J. makes no mention of it, and it was not pleaded in the Further Amended Statement of Claim dated 14th February 1994.

In continuing his judgment UpJohn J. approved of the following passage by Denning LJ. in **Barclays Bank, Ltd. v. Beck** [1952] 1 All ER 549:

> "I need only refer to the judgment of DENNING, L.J., in **Barclays Bank, Ltd. v. Beck.** The question there was whether by the execution of a charge under the Agricultural Credits Act, 1928, there was a merger of the simple contract between the bank and its customer. It was held that there was no merger. DENNING, L.J., said ([1952] 1 All E.R. 553):
>
> > 'The distinction is clearly shown by considering the difference between a mortgage debt to a building society and a charge to a bank to secure a running account. The mortgage debt to a building society is created under and by virtue of a deed and is a specialty debt from its commencement, but a future debt on a running account is a debt created by parol and it remains a simple contract debt even though the customer has previously given a charge to secure it which includes a covenant under seal. The future debt on running account is not created under the deed. It may be that it would never have been created but for the deed, but that is a different thing. It only means that the deed is collateral security for its repayment'." [Emphasis supplied]

I have cited the cases above which highlight the issue of demand. **Habib Bank Ltd. v. Tailor** [1982] 3 All ER 561 also deals with this issue. The ratio is expressed in the headnote which reads as follows at page 562:

> "In the case of a normal bank mortgage to secure an overdraft the principal did not become due and could not be sued for by the bank until a written demand had been made, and up until that time there was no due date from which any deferment of payment could be made."

There is a crucial passage in the judgment of Oliver LJ which is valuable in understanding a banker's mortgage. It reads at p 563:

> "In 1978 the bank appears to have arranged with the defendants to allow him an overdraft facility of up to £6,000. I say 'appears' because there is no specific finding of fact about this, but it emerges from the particulars of claim which have been verified by an affidavit. The overdraft was secured by a charge on the dwelling house that I have referred to, and which has a rateable value of only some £207. The charge which is dated 25 October 1978 is what I take to be the bank's ordinary form for an 'all accounts' charge. Clause 1 is a covenant for payment in the usual bankers' form, under which the mortgagor covenants, on demand in writing, to pay to the bank the balance due in respect of all moneys which may become owing to the bank from the mortgagor."

There was an earlier statement of the same principle thus:

> "The effect of this deed was that the lands were charged with the payment of any balance which might be due from William J. Yourell to the bank on his account for overdrafts bills of exchange etc."

This statement is from Lord Finlay L.C. at page 379 from the next case to be considered, **Yourell v. Hibernian Bank** [1918] A.C. 372. It is pertinent to the issue raised by the appellant Bank in the instant case. It illustrates the point emphasized by Upjohn J. in **Lloyds Bank, Ltd. v. Margolis and others** (supra) that on the question of merger in each case it is a matter of construction. The crucial clause in the mortgage is cited in the judgment of Lord Atkinson at page 383. It reads:

> "... but also to pay to them on demand 'the balance which, on any account or accounts present or future between the mortgagor and the bank, either alone or jointly with any other person or persons, shall for the time being be owing by the mortgagor to the bank on foot of overdrafts, bills of exchange, promissory notes, loans, credits, advances, interest, commission,

discount, premiums on policies of assurance, costs, customary charges or otherwise'..."

This is how Lord Atkinson construed the mortgage at pages 384-385:

"... According to the true construction of this clause the bank would be entitled to recover on the mortgage such principal sum as should from time to time be due under the before-mentioned covenant not to exceed 5700ℓ. in amount, with interest on the former sums at the stipulated rate. Whenever on balancing the mortgagor's current account with the bank a debit balance was found against him, that balance, by force of the covenant, became part of the principal moneys secured by the mortgage, subject, however, to the above-mentioned limit. Whatever increased that balance increased the amount of these moneys; whatever diminished it diminished their amount. If sums paid into the bank were, with the consent of the mortgagor, credited to him by the bank in this current account as against that balance, it necessarily followed that they were, by the implied agreement of the parties, appropriated pro tanto to the payment of what had become the principal money then due under the deed. The course of dealing actually followed by the parties, from the date of the mortgage down to the bringing of the action, was this: Interest was calculated from day to day on the mortgagor's overdraft on his current account. On the balancing of this account each half-year the amount of this interest was entered on the debit side of the account, a balance was then struck, and interest was charged during the next half-year upon that balance. The bank, by taking the account with these half-yearly rests, secured for itself the benefit of compound interest. This is a usual and perfectly legitimate mode of dealing between banker and customer. The main contention of the respondents upon this appeal was that although this course of dealing had been, in fact, practically followed up to the bringing of the action, and the accounts kept in this way, yet, owing to what took place in the month of December, 1904, they are entitled to have the accounts reopened and taken from that date

> downwards, not as hitherto, but as between mortgagee and mortgagor." [Emphasis supplied]

Lord Wrenbury commences his opinion thus at pages 398-399:

> "My Lords, the mortgage of November 20, 1899, was expressed to secure the moneys for the time being due and owing to the bank on foot of the covenant for payment by the mortgagor contained in the deed. That covenant was for payment (inter alia) of the balance for time being owing on foot of overdrafts, bills of exchange, credits, advances, interest, commission, discount, and premiums on policies of assurance. The security was to bear interest computed from day to day and not exceeding 6 per cent. The bank were therefore entitled to security for current account and interest on current account and for bills and interest on bills. The whole of this was, however, controlled by a proviso that no greater principal sum than 5700ℓ. should be recoverable on the security. The bank were therefore entitled as against the security to principal not exceeding 5700ℓ., and, in addition, interest to such amount as might be due."

Against the background of these authorities it must be decided what is the effect of the mortgage instrument on the current accounts in this case. As previously stated Negril Investment Co. Ltd., was the first company incorporated and current accounts were opened on the 15th November, 1984 and 4th December 1986. The mortgages with respect to this company were subsequent to the opening of the current account and were dated 4th July 1985 and 18th June 1987. It seems the first mortgage was discharged.

As regard Negril Negril Holdings Ltd., the company was incorporated to expand the hotel, the current account was opened 15th July 1987 and the mortgage was dated 10th August 1987. Overdrafts are a feature of current

accounts. In both instances the mortgage instrument was subsequent to the overdrafts and refers to them. That reference provides the answer; and the answer is that the mortgage deed and the current account contract are to be read together to determine their scope and effect. Promissory Notes and Demand loans are also involved. The point in issue with respect to these Promissory Notes was whether it was permissible to vary the interest rates. This issue will be dealt with hereafter.

The critical clause to interpret in the mortgage of 18th June, 1987, with respect to Negril Investment Co. Ltd. (the mortgagor's covenant at 1) appears at page 12-15 of Vol. 3 of the Record and runs as follows:

> "(a) To pay to the Bank on Demand –
>
> (i) All such sums of money as are now or shall from time to time hereafter become owing to the Bank from the Mortgagor whether in respect of overdraft, monies advanced or paid to or for the use of the Mortgagor or charges incurred on his account or in respect of promissory notes and other negotiable instruments drawn accepted or endorsed by or on behalf of the Mortgagor and discounted or paid or held by the Bank either at the Mortgagor's request or in the course of business or otherwise and all moneys which the Mortgagor shall become liable to pay to the Bank under any guarantee, indemnity undertaking or agreement or in any manner or on any account (including all sums which have become immediately due and payable under the terms of any Installment Loan) whatsoever and whether any such

> monies shall be paid to or incurred by or on behalf of the Mortgagor alone or jointly with any other person firm or company and whether as principal or surety together with interest at the rate per annum stated as the original Rate of Interest in Item 3 of the said Schedule with such rests as are stated in Item 4 of the said Schedule as Rests At Which Interest Payable or at such other times as the Bank shall from time to time specify or at such other rate or rates of interest as the Bank shall from time to time charge which interest may be computed as simple interest to compound interest as the Bank shall require together also with all usual and accustomed Bank charges." (Emphasis supplied)

Other relevant clauses are 3 and 4 which read as follows:

> "3. The giving of time to the Mortgagor or the neglect or forbearance of the Bank in requiring or enforcing payment of the principal moneys and interest hereby secured or any other variation of the provisions of this Instrument or other dealing between the Mortgagor and the Bank shall not in any way prejudice or affect this security or the covenants of the Mortgagor hereinbefore contained or the continuing liability of the Mortgagor by virtue thereof.
>
> 4. The Bank shall be entitled to exercise its remedies under this Instrument concurrently, consecutively or in such order as the Bank in its discretion may from time to time decide and without exercising or exhausting any one remedy before proceeding with another."

The mortgage for Negril Negril Holdings is at pages 8-12 of Volume 2 of the Record. It is in similar terms to that for Negril Investment Co. Ltd.

The original rate was 35% compounded interest with monthly rests. The mortgage with respect to Negril Negril Holdings is dated 10th August, 1987. The original rate of interest was stated to be 28% with compound interest with monthly rests.

It is clear that the crucial words are "To pay the Bank on demand" and once there was a demand by the Bank, monies on overdraft or promissory notes or bank charges with respect to both capital and the interest which is outstanding become payable by the respondent companies. A reasonable time must be given for payment. So the decisive issue was whether there was a demand by the Bank. If the monthly debts are cleared or the principal paid the mortgage security cannot be enforced.

Consequently, the declaration sought by Negril Negril Holdings Limited which reads:

> "(A) A declaration that the rights and liabilities of the Plaintiff and the Defendant under current account numbered 1302529 and operated by the Plaintiff with the Defendant are governed exclusively by contract to operate current account dated the 30th July 1987,"

was granted by the Court below on terms of A above ought not to have been granted. The Mortgage instrument must be read together with the current account contract to determine the scope and effect of the mortgage once a demand was made. The issue of whether a demand was made and when will be treated next. To my mind on this issue the appellant Bank has been successful.

The ground of appeal reads:

> "7. That the Learned Trial Judge was wrong in Law when he concluded that the terms of the mortgages that existed between **Century National Bank Limited** and the Plaintiff's/Respondent were not operable without a proper demand,"

will be given further consideration when the issue of demand is addressed.

There is also an issue as to how the accounts were operated and the evidence of Maurice Keane Dawes, who gave evidence for the respondent companies, will be relevant as well as that of Caple Williams who gave evidence for the appellant Bank. That issue will be dealt with hereafter.

(V)

Was there a demand?

The appellant Bank contended that the letter of June 7' 1990, written by Keane-Dawes and found at Vol. 2 page 119 constituted the demand envisaged by the terms of the mortgage deeds. It detailed the amounts outstanding in respect of the respondent companies, Montego Bay Investment Co., and John Sinclair.

Here are the relevant passages of the letter:

> "It is imperative therefore, that steps be taken immediately to reduce the level of loans to a point where the monthly debt requirement is more manageable. In this regard, we record your undertaking that you will immediately take steps to dispose of sundry personal assets, with a view to effecting lump sum reductions against the outstanding loans.

> It is imperative that the loan accounts reflecting substantial interest arrears are cleared prior to June 30, 1990. Failure on your part to do so, could have adverse implications as far as certain breaches of Bank of Jamaica directives are concerned." (Emphasis supplied)

I have emphasised the above lines to demonstrate that the Bank was guilty of lending beyond its capacity to more than one related group so as to cause a breach of directives from the Bank of Jamaica.

The dictum of Walker J. in **Re The Colonial Finance Mortgage, Investment and Guarantee Corporation Limited** (1905) 6 S.R. (N.S.W.) 6, at p.9 reads:

> "[T] here must be a clear intimation that payment is required to constitute a demand; nothing more is necessary and the word "demand" need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect."

The above case was approved by Nourse J. in **Re a Company** [1983] B.L.C. 37 at 41 and **Bank of Credit and Commerce International S.A.V Blatcher** (unreported) decision of the Court of Appeal (U.K.) delivered 20th December, 1996.

In the light of this analysis I cannot agree with the finding of Ellis J. that the letter of 7th June 1990 did not constitute a demand. It was treated as such by letter dated June 19, 1990 Vol. 2 page 122 by the Chairman of the Sinclair Group of Companies. There is a sting in the closing paragraph of that

letter which is to be noted. It stated that there was a restructured programme and that there was now a competent Board of Directors in place. The importance of the demand was that the Bank could enforce the mortgage if the demand was not met within a reasonable time. This is one of the crucial issues in the instant case. Because of the unusual way this case was presented, the respondent companies to reiterate sought the following declarations in the Court below:

> "(J) An interpretation of the terms and conditions of the said mortgage dated the 10th August 1987 and their full meaning and effect as they affect the right and liabilities of the parties.
>
> (K) A declaration that the terms and conditions of the said mortgage became operable only when the formal demand was made by the Defendant on the plaintiff on the 26th June 1991."

They were granted in terms set out at page 45 of the Record. They read as follows:

> "7. I interpret the terms and conditions of the respective mortgages as follows:
>
> (a) They were not effective immediately upon their execution
>
> (b) each was dependent upon a formal demand for its terms and conditions to be effective
>
> (c) the mortgage did not merge with the contracts to open and operate the current accounts.
>
> (d) The mortgage dated 4thJuly,1985 was discharged in 1986 and ceased to be of any effect from then.

(e) The mortgages dated 18th June, 1987 and 10th August, 1987 had no effect on the terms of the demand loans as shown on the Promissory Notes prior to June 26, 1991.

8. The declaration sought at K is granted."

These declarations must be set aside. The appropriate declaration is that the mortgages of 18th June 1987 and 10th August 1987 can be enforced since a valid demand was made on 7th June, 1990. The respondent companies must be given a reasonable time to pay. The mortgages were in force on the day they were signed, but the enforcement of the security is dependent on the date when the demand is made pursuant to section (1a) of the instrument.

The relevant grounds of appeal with respect to the two preceding sections (p. 4 of Vol. 1) which read:

"7. That the learned Trial Judge was wrong in Law when he concluded that the terms of the mortgages that existed between **Century National Bank Limited** treated the Plaintiff/Respondent were not operable without a proper demand

8. That the Learned Trial Judge was wrong when he concluded that the letter of 7th June, 1990 written by **Century National Bank Limited** did not constitute a demand,"

were successful because a demand was made on June 7, 1990.

(VI)

Was it appropriate for the Bank to charge compound interest on the overdraft incurred by the respondent companies?

The initial method of considering this issue ought to be to examine the authorities on this issue and then proceed to consider the Banking and Mortgage agreements between the respondent companies and the appellant Bank. Additionally, the evidence of bankers ought to be considered to ascertain how other banks in Jamaica conduct this aspect of their business to see whether the conduct of the appellant was unconscionable. All this must be coupled with the judicial notice that must be taken of the exorbitant interest rates in Jamaica. This was based on the government's policy of setting a high interest rate implemented through the issue of Treasury Bills, Certificate of Deposits and latterly by Repurchase Agreements (REPO). These rates are the prime rates which determine the rates at which individual banks extend overdraft facilities to their customers, and determine their lending rates generally.

In this jurisdiction the cost of funds for the smaller and new banks is high. They have few branches, a low customer base and they seek to attract funds by high interest rates and by awarding interest on current accounts in credit. On the other hand they are flexible and are customer friendly. This was a feature of the appellant Bank. These were the reasons why the respondent companies and Sinclair were attracted to the appellant Bank.

Within this context, the cost of funds was the primary determinant. Here is how the evidence emerged from Maurice Keane-Dawes at page 135 of Volume 10 of the Record:

> "HS - During the time you were in the bank how were interest rates on overdraft determined
>
> KD - Interest rates on all loans were determined by the MD in consultation with senior officers of the bank and these would be based on the bank's cost of funds.
>
> HS - And by cost of funds what do you mean
>
> KD - In the course of taking deposits the bank offers certain interest rates on deposits. Cost of funds refers to interest cost paid by the bank on deposits held by customers.
>
> HS - And in determining the rate of interest on an overdraft apart from the interest paid on deposits, was anything else taken into account
>
> KD - The primary determinant was the funds cost
>
> HS - You didn't lend at the same rate you borrowed
> KD - No the bank established a spread above what was being paid
>
> HS - By a spread what do you mean
>
> KD - A percentage range above the costs of deposits."

This extract is from the evidence of Keane-Dawes a former employee of the appellant Bank who gave evidence for the respondent companies.

Caple Williams, an executive vice president of the appellant Bank is more detailed on this aspect. Here is his evidence at page 528 of Vol. 11 of the Record:

> "Paid interest on current accounts since 1988. Liquidity requirement of Bank of Jamaica whereby 25% of deposits had to be cash reserves and bear no interest. Liquidity requirement of 12% in L.R.S.
>
> Bank in 1988 was 4 years old. Bank had to offer higher rates on CDs to attract investors. Portfolio being small could not influence the average rate of borrowing or affect loan rates.
>
> We were about 2 points higher on CDs than others. Higher cost of funds and costs of operation would determine a base rate at which to lend. Liquidity would also influence rate of interest. Shortage of liquidity would attract higher rate to customer on deposits. Also consider the costs of funds borrowed from Bank of Jamaica.
>
> Increase rate of interest.
>
> Bank of Jamaica charges a higher rate than deposit rates."

Further on page 529:

> "... On unauthorized overdraft, bank charged rate up to that charged by Bank of Jamaica. [Temporary overdrafts]
>
> To fund that cheque, bank would borrow from Bank of Jamaica and would charge interest to cover that cost. When CNB grants overdraft facility, it takes into consideration its position with BOJ. It ensures that there is enough funds for the arrangement. In case of unauthorized cheque, bank may or may not have to borrow.

> Bank of Jamaica interest rate July 1988 to September 1990 moved from 48% - 60%. Went to 120% in 1992."

These are the internal and external factors which influenced rates. As to the external factors i.e. the Bank of Jamaica, Caple Williams is helpful. This is how he put it at page 530 of Vol. 11 of the Record:

> "Central Bank policies influence changes in rates of interest – increased costs – higher interest rate. Also changes in liquidity requirement – up or down. Liquidity position could dictate inter bank borrowing."

His evidence continues thus:

> " – Bank's usual rate of interest on approved overdraft is one issue and usual rate of interest on unauthorized temporary overdraft is another thing. In the former, bank's usual rate is determined by factors such as cost of funds, B.O.J. liquidity requirements, overheads and profit margin.
>
> The latter, unauthorized temporary overdraft, is determined by factors e.g.:
>
> 1. Liquidity
> 2. Cost of funds
> 3. B.O.J. rate of interest for loans from that institution
>
> This interest is higher than that charged for approved overdrafts but is not more than that charged by B.O.J. in event Bank's account is overdrawn. These rates are fed into computer for calculating interest on accounts of customer and charging to account monthly – compounding interest. There are movements in the rates up or down depending on the liquidity and cost of funds. Information as to rate is available from the computer."

While this method of determining the usual rate of interest is permissible, it would seem that a policy of stating precisely the number of percentage points above one of the standard Bank of Jamaica rates as the Treasury Bill or REPO rates would be preferable. It would bring a greater measure of exactitude to the exercise. Further, it would be in keeping with the best international practice.

Ellis J. in the Court below found the evidence of Caple Williams 'obfuscatory rather than elucidatory of any area of this aspect of the case' but gives no reasons for such finding. I found his evidence helpful in understanding how the Bank's usual rate of interest was determined.

The provisions of loans through the National Development Bank at lower interest rates was what mitigated the high interest rates in operation for those industries or services which were acknowledged earners of foreign exchange.

An initial example of compounding interest rates is **Yourell v. Hibernian Bank** [1918] A.C. 372. It must be noted that this was a period of low and stable interest rates when the gold standard ruled the world. As was adverted to earlier, this was a case where the mortgage instrument governed the current account agreement. Here is how Lord Atkinson put it at page 384-385:

> "...The course of dealing actually followed by the parties, from the date of the mortgage down to the bringing of the action, was this: Interest was calculated from day to day on the mortgagor's overdraft on his current account. On the balancing of this account each half-year the amount of this interest

> was entered on the debit side of the account, a balance was then struck, and interest was charged during the next half-year upon that balance. The bank, by taking the account with these half-yearly rests, secured for itself the benefit of compound interest. This is a usual and perfectly legitimate mode of dealing between banker and customer."

Then Lord Parker stated the matter thus at page 392:

> "... The mortgage was to secure payment to the respondent bank of the moneys for the time being due or owing to them on foot of the covenant for payment on the part of William J. Yourell therein contained, the proviso for redemption being limited to take effect on payment of those moneys."

Then Lord Parker continued thus:

> "In keeping William J. Yourell's current banking account, which was continued in the books of the bank from the date of the mortgage until after the institution of the present action, the respondents charged him with interest from day to day on his debt balance for the time being, and, the account being kept with half-yearly rests, the interest so charged was capitalized every half-year. The respondent's right to keep the account in this way is not disputed, but the effect of so keeping it was that every payment to the credit of the account went in reduction of the principal secured by the mortgage."

To reiterate Lord Wrenbury deals with the matter thus at pages 398-399:

> "My Lords, the mortgage of November 20, 1899, was expressed to secure the moneys for the time being due and owing to the bank on foot of the covenant for payment by the mortgagor contained in the deed. That covenant was for payment (inter alia) of the balance for the time being owing on foot of overdrafts, bills of exchange, credits, advances, interest, commission, discount, and premiums on

> policies of assurance. The security was to bear interest computed from day to day at not exceeding 6 per cent. The bank were therefore entitled to security for current account and interest on current account and for bills and interest on bills. The whole of this was, however, controlled by a proviso that no greater principal sum than 5700ℓ should be recoverable on the security. The bank were therefore entitled as against the security to principal not exceeding 5700ℓ., and, in addition, interest to such amount as might be due.
>
> The mortgagor had a current account with the bank, and the course of business was that interest was charged upon the overdraft and the interest capitalized half-yearly."

Then to emphasise the issue of compound interest Lord Wrenbury stated at page 400:

> "First: The interest upon the overdraft was capitalized half-yearly. The mortgage was to secure (inter alia) the debit balance of that account. It follows that, as against the bank, the capitalized interest must be regarded as principal for the purpose of the proviso in the mortgage which limits the principal sum to be recovered to 5700ℓ."

The earlier case of **Parr's Banking Company v. Yates** [1898] 2 QB 460 deals with the issue thus at page 467 by Vaughan Williams L.J.:

> "... According to the ordinary practice of bankers the interest due is from time to time added to the principal, and becomes itself part of the principal due."

Rigby L.J. made his introduction thus at pages 466-467:

> "There is one point remaining with which I must deal. The defendant's counsel relied on the old rule that does, no doubt, apply to many cases, namely, that, where both principal and interest are due, the

> sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract, and would be most unreasonable as against him. But I cannot think that this rule can have application as suggested to accounts like the account in this case, which is made out in the manner usual as between banker and customer. Such a mode of making out the account is so far usual that I do not think the customer, or a guarantor of the customer, could object to it. I think one must assume that the understanding of all parties was that the account would be kept as between the person guaranteed and the bank on the usual principle with regard to such accounts – that is to say, by treating moneys paid in from time to time by the customer as a deduction from the general amount due from the customer in respect of the loan and interest thereon, and at the end of each half-year carrying over the debit balance to the next half-year as principal." (Emphasis supplied)

In **National Bank of Greece S.A. v. Pinios Shipping Company No. 1** [1988] 2 Lloyds Rep. 126 (C.A.) Lloyd L.J. said:

> "In my judgment the answer in the present case is simple. Under the terms of the second preferred mortgage, the mode of charging interest was prescribed. It provided that "in case of default in paying any amount due hereunder within four days of the same having been demanded the shipowner will pay interest after the expiration of the aforesaid period of four days at the rate of 2 per cent per annum above the rate hereinbefore provided until the payment of the mortgage in full". The rate previously provided by that instrument was the rate of 2 per cent above the current London Eurodollar market rate in respect of three or six months deposits, whichever be the higher for the time being, with a minimum of 8 percent.

> The effect of this was to entitle the bank to charge compound interest on the outstanding debt. The relationship governed by the mortgage never came to an end; but even if it were not so and the right to charge compound interest is to be founded on implied agreement, the conclusion would be the same. The account on which the bank is suing is indisputably a mercantile account. There is no evidence that the account was closed nor that it had ceased to be current for mutual transactions. The fact that Pinios has not used the account does not mean that it is not current. Both Pinios and the account have continued in being, as has the bank. Nothing has occurred to render the operation of the account impossible. The relationship between the parties is unchanged. Neither the mortgage nor any ancillary agreement relating to the account was ever superseded or supplanted any subsequent agreement between the parties. The bank's right to charge compound interest has therefore remained unimpaired."

Then Nicholls LJ made his contribution at page 147:

> "In 1938, in the case of **Panton v. Inland Revenue Commissioners,**[1938] A.C. 341 at p. 357, Lord Macmillan commented on that principle and its survival despite the repeal of the usury laws:
>
> > On this principle it was held in **Eaton v. Bell** that the bankers who, with the knowledge of and without objection by their customers, debited them with interest with half-yearly rests in accordance with their general practice, did not offend against the usury laws. This method of dealing with loan accounts, which became common form among bankers, survived the abolition of the usury laws and is well established as the ordinary usage prevailing between bankers and customers who borrow from them and do not pay the interest as it accrues."

This **Pinios** case [1990] 1 All ER 78, then went to the House of Lords and Lord Goff in his speech at p. 82 said:

> "It was obvious from an up-to-date statement sent by the bank's solicitors to the respondents' solicitors that the sum outstanding was calculated on the basis of continuing to capitalize interest with quarterly rests; indeed the respondents conceded the bank's entitlement so to capitalize interest. The respondents did not challenge the bank's entitlement to compound interest after the date of demand until after the bank closed its case at the trial. In these circumstances, I cannot think it right to preclude the bank from relying on a custom or practice of bankers, in so far as it could do so without calling evidence which it was precluded by the judge's order from calling."

Then at page 86 Lord Goff said:

> "In **IRC v Lawrence Graham & Co.** [1937] 2 All ER 1 at 8, [1937] 2 KB 179 at 192 Romer LJ (delivering the judgment of the Court of Appeal) said that the practice was –
>
> > 'an old one dating back to long before the repeal of the usury laws, and could not, therefore, have been legal unless it was consistent with those laws. Now before the repeal of those laws a contract to allow the charging of compound interest was illegal. The legality of the practice of bankers was, however, upheld by the courts by treating the bank as making a fresh advance to its customers at the end of each year or half-year as the case might be; see **Lord Clancarty v. Latouche** ((1810) 1 Ball & B 420). There is nothing contrary to the usury laws in such an arrangement: see **Ex p. Bevan** ((1803) 9 Ves 223, 32 ER 588). It is plain that upon the repeal of those laws an agreement to pay compound interest became lawful. In **Holder's** case [**IRC v Holder** [1932] AC 624, [1932] All ER Rep 265], however, there was no agreement to pay it. The bank had merely pursued an old practice of

> bankers upon which an interpretation had been put by the courts. The fact that this had been done at a time when the laws against usury were in force appeared to this court to be immaterial. The practice continued after the repeal of those laws and the repeal could not affect the nature of the practice'."

The law was stated as follows by Lord Goff at p. 88:

> "It is of importance to observe that no case in which this usage has been recognized appears to have been cited to the Court of Appeal in the **Deutsche Bank** case (1931) 4 Legal Decisions Affecting Bankers 293. Furthermore, there is no reference in these cases to the usage being restricted to mercantile accounts current for mutual transactions. On the contrary, one of the earliest cases to which I have referred, **Parr's Banking Co. Ltd. v. Yates** [1898] 2 QB 460, appears to have been concerned with an ordinary customer's overdraft; and in **Panton v IRC** [1938] 1 All ER 787 at 795, [1938] AC 341 at 357, as I have already indicated, Lord Macmillan referred to the usage as prevailing as 'between bankers and customers who borrow from them and do not pay the interest as it accrues'. Having regard, in particular, to the statement of principle by the Lord Justice Clerk (Inglis) in **Reddie v Williamson** (1863) 1 M 228, and the 'equity' on which he based the usage, I can see no good reason for restricting the usage any more narrowly than is set out in Lord Macmillan's simple statement. I have already indicated my doubts concerning the restriction to mercantile accounts current for mutual transactions, tentatively advanced by Lord Cottenham LC in **Ferguson v Fyffe** (1841) 8 Cl & Fin 121, [1835-42] All ER Rep. 48, and, in particular concerning its more positive acceptance in **Croskill v Bower** (1863) 32 Beav 86, 55 ER 34 and in the **Deutsche Bank** case. In my opinion, having regard to the later authorities to which I have referred and, in particular, to Panton **(Fenton's Trustee) v IRC** [1938] 1 All ER 786, [1938] AC 341 and **IRC v Oswald** [1945] 1 All ER 641, [1945] AC

> 360, that restriction (whatever its meaning) has no application to the usage of bankers now well recognized by English law."

This is the law in Jamaica and Bankers are entitled to follow it.

On the issue of whether compound interest ceases when the demand is made for payment Lord Goff said at page 89:

> "I have yet to consider whether the usage to which I have referred ceases to apply where the banker makes a demand on his customer for repayment, as held by the Court of Appeal in the present case. The suggestion that a bank ceases on demand to be entitled to continue to capitalize interest rests entirely on the authority of **Crosskilll v Bower** (1863) 32 Beav 86,, 5 ER 43 and the dicta of Scrutton and Greer LJJ in the **Deutsche Bank** case. The reasoning of Romilly MR in **Crosskill v Bower** was undoubtedly affected by the fact that he understood the bank's entitlement to capitalise interest to be limited to an 'ordinary mercantile current account'; accordingly, in the case before him, he considered that, on the execution by the customer of deeds for the benefit of his creditors, his account ceased to be an ordinary mercantile current account, and the final balance due to his bank was then ascertained. On that basis, he reached the conclusion that, in the absence of any special agreement between the bank and its customer, the effect of the customer closing his account was that the bank ceased to be entitled to charge any interest. In my opinion this conclusion (which has no regard to any custom or usage of bankers) is inconsistent with the 'equity' on which the Lord Justice Clerk (Inglis) stated the banker's privilege to rest. Furthermore, if it be equitable that a banker should be entitled to capitalize interest at, for example, yearly or half-yearly rests because his customer has failed to pay interest on the due date, there appears to be no basis in justice or logic for terminating that right simply because the bank has demanded payment of the sum outstanding in a customer's account. There is no reason to suppose

> that such a demand should of itself bring to an end the relationships of banker and customer: see J Milnes Holden **The Law and Practice of banking** (4th edn, 1986) vol 1, pp 90-94. Indeed, the customer might then gradually pay off his debt by instalments, following on the demand, during which period the relationship would surely continue. The inequity of the supposed rule is amply demonstrated by the facts of the present case, in which the bank has had to wait for over nine years after its demand for payment until Leggatt J gave judgment in its favour. In my opinion, there is so such rule in English law."

As the law on compounding interest rates was stated in **Yourell** and **Pinios** (supra) by the House of Lords these cases are part of the common law of England. In this area we follow the common law of England and so will the Privy Council. See **Tai Hing** [1958] 2 All ER 947 at 958. There is therefore no need to resort to usage and custom of bankers as the law is settled.

In the light of this judgment the following declarations sought in the Court below were considered:

> "(E) A declaration that the Defendant was not entitled to charge the Plaintiff any interest on any overdraft balance over and above the minimum rate of interest payable on overdraft balances up and until the 26th June 1991 when a formal demand was made on the Plaintiff and the terms of the mortgage instrument dated the 18th day of June 1987 came into operation
>
> (F) A declaration that the Defendant was not entitled to compound any such interest if any payable on any overdraft balances by the Plaintiff to the Defendant.

(G) Alternatively, the Defendant was not entitled in law to compound such interest if any, payable by the Plaintiff to the Defendant on any overdraft balances owed by the Plaintiff to the Defendant up until the 26th June 1991, when a formal demand was made by the Defendant on the Plaintiff and the terms and conditions of the mortgage instrument dated the 18th June 1987 came into effect.

(H) A declaration that the said contracts do not permit the Defendant to vary the rates of interest if any chargeable on any overdraft balances on the said current account."

The response of Ellis J. at page 45 of Vol. 1 of the Record was as follows:

"4. The declaration sought at E is granted.
5. The declaration sought at F is granted
6. The declaration sought at H is granted."

In the light of the above analysis the above declarations cannot stand. They must be set aside.

Also the following grounds of appeal at page 3 of Vol. 1 of the Record have been successful:

"1. That the Learned Judge erred in Law when he held that Clause 11 of the contracts to operate Current Accounts did not entitle **Century National bank Limited** to charge the Plaintiff/respondent compound Interest as the said clause was void for uncertainty.

2. That the Learned Trial Judge erred in Law when he concluded that **Century National Bank Limited** had not established a usage, custom or business practice among Bankers in Jamaica to charge Compound Interest on overdrafts.

The declaration sought at H will be addressed hereafter. The declarations which ought to have been granted was that Article 11 of the contract has a term implied by law which permits compound interest. A formal demand pursuant to the mortgage on 7th June 1990. There was no need to establish usage or custom in Jamaica because we follow the common law of England on this issue and that law has been declared by the House of Lords.

The issue of undue influence has dominated this case. If the respondent companies have a good case in law they would have asked that the mortgage instruments and the contract to operate the current accounts be set aside. They have not. The bare essentials of this case is the respondent companies complaint that the interest rates were too high and they should not pay compound interest for overdrafts. It is very much akin to be relying on sale at an undervalue which is unconscionable and so liable to be set aside on the basis that it was presumed or procured by undue influence. Perhaps, an initial issue should be disposed of. There was no need for Sinclair to be advised to get legal advice any more than Mrs. Morgan. See **National Westminster Bank v Morgan** [1985] 1 All ER 821, 826 and 831.

The respondent companies needed money for expansion and the appellant Bank was customer friendly and liberal in lending policies. That was the mix Sinclair wanted and he stated it in his evidence.

In revisiting this issue of undue influence the following passage in **Westminster Bank v Morgan** (supra) must be cited. Lord Scarman said at page 829:

> "In **Poosathurai v Kannappa Chettiar** (1919) LR 47 Ind 1 at 3 Lord Shaw, after indicating that there was no difference on the subject of undue influence between the Indian Contract Act 1872 and English law quoted the Indian statutory provision, s16(3):
>
> > 'Where a person is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other.'
>
> He then proceeded to state the principle in a passage of critical importance, which, since, so far as I am aware, the case is not reported elsewhere, I think it helpful to quote in full (at 4):
>
> > 'It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid. Where the relation of influence, as above set forth, has been established, and the second thing is also made clear, namely, that the bargain is with the "influencer," and in itself unconscionable, then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practiced so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent. These general propositions are mentioned because, if laid alongside of the facts of the present case, then it appears that one vital element – perhaps not

> sufficiently relied on in the Court below, and yet essential to the plaintiff's case – is wanting. It is not proved as a fact in the present case that the bargain of sale come to was unconscionable in itself or constituted an advantage unfair to the plaintiff; it is, in short, not established as a matter of fact that the sale was for undervalue.'
>
> The wrongfulness of the transaction must, therefore, be shown: it must be one in which an unfair advantage has been taken of another. The doctrine is not limited to transactions of gift. A commercial relationship can become a relationship in which one party assumes a role of dominating influence over the other. In **Poosathurai's** case the Board recognized that a sale at an undervalue could be a transaction which a court could set aside as unconscionable if it was shown or could be presumed to have been procured by the exercise of undue influence. Similarly, a relationship of banker and customer may become one in which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence."

It will be demonstrated that to charge compound interest is the law in Jamaica. It will be demonstrated that the evidence and the learned judge accepted it, that interest rates was and to some extent is still high in Jamaica. It has been shown that when Sinclair needed money to acquire a new Hotel in Montego Bay he went to National Commercial Bank and could have stayed there. He went back to the customer friendly appellant Bank. Further in this case it was not a single transaction as in most of the cases cited but two companies which constantly borrowed by way of overdrafts and were informed

by way of monthly statements, the extent of the borrowing and the quantum of interest charged and that the interest was being capitalized monthly.

There is one other aspect to be revisited. The respondent companies aver undue influence and because Sinclair fell under the influence of Crawford there may well be circumstances where a company can aver and prove undue influence. But it cannot be in this case where the dominant director had experience of banking in both the U.K. and Jamaica., where the company had a chartered accountant at its elbow, where it borrowed short term to build up his long term assets was informed periodically of its debts, and where it sought a reduction of interest rates and thereby acknowledging that it was aware of the rates. To my mind it was the knowledge of these features why the company refrained from seeking to set aside the mortgage and current account agreements and seek instead a reduction of the interest rates and the elimination of compound interest.

(VIIA)

The nature of the Banking Contracts as regards the discretionary power to vary interest rates

The grounds of appeal which relate to this issue are grounds 4 and 14 which read as follows:

> "4. That the Learned Trial Judge was wrong in Law when he concluded that **Century National Bank Limited** was not entitled to charge Penal rates of Interest."
>
> "14. That the Learned Trial Judge was wrong in law and in fact when he failed to conclude that the Respondents had acquiesced in compound

> interest being charged at varying rates in respect of balances outstanding on their current accounts over the years the accounts were operated."

To appreciate the appellant Bank's entitlement to charge compound interest it is necessary to examine the contractual document which governs the interest rates which includes compound interest. Further the authorities **Parr's Banking Company Limited v. Yates** [1898] 2 Q.B. 460, **Yourell v. Hibernian Bank** [1918] A.C. 372, and **National Bank of Greece S.A. v. Pinios Shipping Company No. 1** [1990] 2 1 All ER 78 which have been analysed in Section (VI) of the judgment are relevant. These authorities state with clarity the basis of compounding interest and that a banking contract must be construed against the background of the common law principle which recognizes the custom of Bankers. The contractual term which ordains compound interest, is implied by the process of law.

As to the contractual document the initial document to construe is the contract to operate the current account . Articles 11,12, 13 and 14 are relevant. They read as follows:

> "ARTICLE 11. In the event of any account of the customer running into overdraft including those accounts in foreign currency, the Bank is hereby authorized, without any limitation, to transfer the balance of any other account or deposit of the customer, to cover the overdraft. Likewise, in the event of an overdraft in the account, the customer hereby authorizes the Bank to charge him, and hereby agree to pay, in addition to other charges provided in this agreement, interest on the overdraft balance, (<u>at the Bank's usual rate of interest on</u>

overdrafts) until the same is fully satisfied. In the case of an account in foreign currency, the Bank will make the conversion at the official rate of exchange existing on the date of the transaction and such allocation will be made by the Bank without prior notice to the customer. It is clearly understood that the foregoing does not give the customer any right or in any way authorizes him to overdraw any current account even if he has another account in his own name in the same with a credit balance and sufficient funds to cover the overdraft.

ARTICLE 12. The customer hereby authorizes the bank to charge his account on a monthly basis with a specific amount for bank services and in the case of special current accounts, the customer authorizes the Bank to charge his account, from time to time, with the amount that the Bank decides for supplying to the customer with cheque books as well as those amounts that are applicable to current accounts. The monthly charge will be fixed by the Bank from time to time. Notwithstanding the foregoing the Bank is hereby authorized to charge the customer's current account for services, expenses, commissions and disbursements incurred by the Bank for services rendered to the customer, or by obligations conducted by the Bank on behalf of the customer

ARTICLE 13. The customer hereby agrees to notify the bank in writing of any change of his address. The customer further agrees to notify the Bank in writing of any objection or claim which he may have with regard to the periodic statement of account supplied by the Bank to the customer or to any communication sent to him by the Bank relative to the Bank's internal or external audits or inspection. If the customer does not communicate his objections to the Bank as aforesaid within ten days of the date of any monetary or other statement then it shall be understood that the customer shall have accepted the accuracy of the notified balance and the Bank shall be released from any responsibility or obligation/or any claim arising from any inaccuracy which should have been brought to its attention by the customer. Bank

> statements and cancelled cheques will be sent monthly by ordinary mail to the customer's address appearing on the Bank's records on such dates as the Bank shall decide from time to time.
>
> ARTICLE 14. Where the customer is a body corporate the customer agrees to notify the Bank in writing immediately of any change of amendment made in the Articles and/or Memorandum of Association, rules or by-laws as the case may be, as well as any appointment, dismissal, suspension, or substitution of any representatives, officials, managers or officers, who had been authorized or empowered to operate that corporation's current account. The customer shall in like manner notify the Bank of any agreement or resolution taken with regard to the current account, and in the event of failing to do so, the Bank shall be liable for continuing to operate the account according to document, resolutions and other records held by the Bank prior to such notification, notwithstanding that in such documents, resolutions and records in the hands of the Bank, it appears that the appointments or authority of the representatives, officials, managers or officers had been granted for a specific period of time which has since expired." (Emphasis supplied)

The crucial words in Article 11 are "and hereby agrees to pay in addition to other charges provided in this agreement interest on the overdraft balance at the Bank's usual rate of interest on overdrafts until the same is fully satisfied". Then Article 12 empowers the bank to charge the customer's account on a monthly basis. Further Article 13 provides that "bank statements and cancelled cheques will be sent monthly by ordinary mail to the customers' address appearing on the Bank's record on such dates as the Bank shall decide from time to time". So the bank statements are part of the contractual documents and contain the signals for variation in interest rates.

The Bank's audited statements are also part of the contractual documents and Sinclair disclosed that he received them at least three times from Aulous Madden & Co., the auditors of the Bank. See Vol. 9 pp 31-32. Instead of referring these statements to the auditors of the respondent companies, Leymon Strachan, Sinclair told the Court he spoke to Crawford who told him not to trouble himself about it.

It is appropriate to cite a famous passage from **National Westminster v Morgan** [1985] All ER 821 at page 828 where Lord Scarman cited a passage from Lindley L.J. in **Alcard v Skinner** (1887) 36 Ch. D 143which runs thus:

> "It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects."

Similarly, the principles of company law would be undermined if directors were encouraged to live in a fool's paradise. This statement accords with that of Mr. Donald Rainford, appointed by Sinclair to be the Chairman of the Board of his company. Mr. Donald Rainford implied that an incompetent Board of Directors was in charge of the respondent companies before a new board took over.

In this context it is necessary to refer again to the important case of **Tai Hing** [1985] 2 All ER 947 especially as it relates to bank statements which are an integral part of banking contracts. The principal issue decided by that case was that a forged cheque was not a mandate for the bank to debit its

current account. Accordingly, neither the conclusive evidence clause or the debits in the monthly bank statements bound the customer as there was no proof that the customer was negligent as was decided in the **Macmillan and Greenwood** cases.

There are different considerations in this case as there was ample notification in the monthly statements of the variation in interest rates which became part of the contractual documents. Vol. 7 which contains the Bank statements is replete with notices of the variation in interest rates and why the variation was necessary. Banks operate in the context of monetary policy as determined by the Minister of Finance and the Bank of Jamaica. So on page 27, the change is as a result of Bank of Jamaica's decision on liquid asset earnings. On page 31 the variation is due to prevailing market conditions as regards the cost of funds. The appellant Bank has had to compete with other banks for deposits, that is the meaning of prevailing market condition. A significant explanation is given on page 35. It explains the imposition of 60% penalty charge which was imposed because the Central Bank imposed such charges on the appellant Bank.

On page 44 there was an increase in liquid asset ratio as part of the Bank of Jamaica policy. Volumes 5 and 6 contain comparable statements for Negril Investment Co. Ltd. and further statements for Negril, Negril Holdings Ltd.

The initial issue to consider is firstly the implication of law when constructing a Banking contract and secondly where one party is empowered to specify the term for future performance. **Hillas v. Arcos Limited** [1932] All ER Rep. 494 is good illustration as regards the second issue. In stating the principle Lord Wright said at page 504:

> "...Thus in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract, save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted."

This obvious principle has long ago been applied to banking contracts without stating it. If the commercial law had failed to respond to the realities of the financial market place by refusal to accord bankers a discretion to determine interest rates, London and New York would have lost their preeminence as centers of commerce. The international financial system has to pay heed to the action of Governors of Central Banks and the Chairman of the Federal Reserve Board so as to make changes in interest rates in response to the decision of Central Banks. In Kingston too, the judiciary must respond to commercial imperatives.

As regards the initial issue, banking contracts to operate current accounts must be construed against the background of the common law. It was stated in **Yourell's** case at page 380-381 case thus by Cherry C.J. and approved by Lord Finlay L.C. thus:

> "Not only was the account regularly kept by the bank as an ordinary current account, but details of it were regularly entered in the customer's pass book and furnished to him – not, I may observe in passing, to the other mortgagors. At the end of each half-year Mr. Yourell was sent with his pass book a docket which he was asked to sign and return, stating that he had examined the pass book – that the account showing a debit balance against his was correct, and acknowledging that he owed that amount to the bank. This statement he regularly signed down to the year 1914. Yet we are asked to hold that this account, in which no error is shown to exist, does not in any way bind the bank, and that they may repudiate it altogether, and furnish a new account on an entirely different basis, when they find it to be to their financial advantage to do so."

The judiciary had recognized that in banking contracts, there are implied terms which gave Bankers discretionary powers in certain areas as to how current accounts were kept and interest compounded. There is unlikely to be abuse of such powers because of public opinion and competition among bankers. Moreover, in these times banking is international and this includes offshore banking.

Bank statements are covered by the above statement of principle. Lord Scarman in **Tai Hing** recognised the contractual nature of bank statements once they were adverted to in the contract as they were in Article 13 of the

contract in issue in this case. Here is how it was put by Lord Scarman at page 959 :

> "**Liu Chong Hing**. The company opened an account with the bank in November 1962. By this letter of request dated 8 November 1962 Mr Chen stated that the company wished to open the account subject to the bank's rules and regulations. Rule 13 provided:
>
> 'A statement of the customer's accounts will be rendered once a month. Customers are desired: 1) to examine all entries in the statement of account and to report at once to the bank any error found therein. (2) to return the confirmation slip duly signed. In the absence of any objection to the statement within seven days after its receipt by the customer, the account shall be deemed to have been confirmed.'
>
> The bank was authorized to pay cheques if signed by Mr. Chen or by any two authorized signatories. The bank never did send any confirmation slips to the company; nor did it return cleared cheques. The company never sent the bank any confirmation slip.
>
> Their Lordships agree with the views of the trial judge and Hunter J as to the interpretation of these terms of business. They are contractual in effect, but in no case do they constitute what has come to be called 'conclusive evidence clauses'."

Prices and changes in them were permissible in a contract for future performance. Thus at pages 504-505 of **Hillas v. Arcos** (supra) Lord Wright said:

> "As to price, that is specifically fixed in this contract by the clauses which have reference to the respondents' new revised schedule supplemented by a further provision in cl. 8 that the appellants were to have the advantage of any beneficial terms granted

> to any other buyers which directly or in effect reduced the price paid or consideration given for the goods in 1930."

Interest rates are the price of money and a provision giving the appellant Bank a discretion to vary interest rates contained in bank contracts gives precision to the contract in issue. Caple Williams gave the procedure by which interest rates were charged by the appellant Bank and he was not challenged on this aspect of his evidence. It runs thus at page 530 of Vol. 11 of the Record:

> "Bank's usual rate of interest on approved overdraft is one issue and usual rate of interest on unauthorized temporary overdraft is another thing. In the former, bank's usual rate is determined by factors such as cost of funds, B.O.J. liquidity requirements, overheads and profit margin.
>
> The latter unauthorized temporary transfer overdraft, is determined by factors e.g.:
>
> 1. Liquidity
> 2. Cost of funds
> 3. B.O.J. rate of interest for loans from that institution.
>
> This interest is higher than that charged for approved overdrafts but is not more than that charged by B.O.J. in event Bank's account is overdrawn. These rates are fed into computer for calculating interest on accounts of customer and charging to account monthly – compounding interest. There are movements in the rates up or down depending on the liquidity and cost of funds. Information as to rate is available from the computer.

Article 11 contains the provision relevant to overdrafts. This article must be considered against the background of the law relating to overdrafts. This

must be so as the contract does not define overdrafts, it recognizes them. The relevant law is stated thus in **Cunliffe Brooks and Company v. Blackburn and District Benefit Building Society** (1884) 9 App. Cas. 857 where Lord Blackburn said at page 864:

> "The respondents who are bankers, agreed to open an account with the trustees. In all banking accounts the bankers, so long as the balance of the account is in favour of the customer, are bound to pay cheques properly drawn, and are justified, without any inquiry as to the purpose for which those cheques were drawn, in paying them. But they are under no obligation to honour cheques which exceed the amount of the balance, or, in other words, to allow the customer to overdraw. Bankers generally do accommodate their customers by allowing such overdrafts to some extent; when they do the legal effect is that they lend the surplus to the customer, and if the person drawing the cheque is authorized to borrow in this way on account of the customers, the bankers can charge the amount against those customers and their principals, and can make available any securities which, either from the general custom of bankers or from a special bargain, they have to secure their account."

Then Lord Watson put it thus at page 868:

> "I must confess my inability to understand the proposition that an advance made by a banker to a customer, whose account is overdrawn, does not constitute a borrowing and lending, in the strictest sense of the words. It is, no doubt, a particular mode of borrowing, and is frequently resorted to by business men, not for the purpose of obtaining a permanent loan, but temporary accommodation; still, it may be used so as to add to the capital and so to increase the liabilities of the borrower."

Since the complaint is about the rate of interest on overdrawn accounts the following passage by Cozens Hardy M.R. in **Cuthbert v. Roberts, Lubbock & Co..,** [1990] 2 Ch. 226 at 233 is helpful:

> "If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."

The respondent companies had no agreement for overdraft other than Article 11. The appellant Bank honoured cheques when there was no amount standing to the credit of the respondent companies. So the appellant Bank lent the respondent Companies in accordance with the law on the matter. What is in dispute is the rate of interest, and that only in one account a limit on overdraft was imposed by Keane-Dawes in 1988. This was in accordance with discretionary power accorded to the Bank in the contract. Also the discretionary power enables the Bank to discriminate among customers, giving to some the prime rate and to others a higher or penal rate. It all depends on the bankers evaluation of risk. Perhaps William J in **McLeod v National Bank of New Zealand** (1887) S.C. N.2 Vol.6 p.3 should be cited. He said at p. 4:

> "The only question is whether during the period of rather less than two years which elapsed between the date of the bankruptcy and the final liquidation of the amount secured, the bank has a right to continue the amount by half-yearly rests – in other words, to charge compound interest. The question depends upon whether or not the mortgage itself discloses a contract to pay compound interest. If it does, then the mortgagee is entitled to retain compound interest; if not, then, on the authority of **Crosskill v.**

> **Bower** 32 Beav. 86; 32 l.J., Ch. 540; 8 L.T., N.S. 135, simple interest only is chargeable. In the latter case, as stated by Romilly, M.R., in his judgment 32 Beav. 86, at p. 94, the mortgage contained nothing which could affect the question as to whether interest was to be calculated at compound interest or simple interest."

Then the learned judge continued thus:

> "In the present case I think a contract to pay compound interest sufficiently appears on the face of the mortgage. The mortgage is to secure advances, and amongst other things usual bankers charges. Where an account is overdrawn it is notorious that the usual bankers' charge is interest on the account taken with rests. Now, the right to make this charge, being given by the security would continue so long as the security remained a subsisting security, and would, in my opinion, be unaffected so far as the security is concerned by the bankruptcy of the mortgagor. I think, therefore, the bank is entitled to retain interest as charged. I have already decided that the bank is entitled to retain the other item objected to."

In this context it is essential to reiterate that this case concerns two respondent companies who retained Chartered Accountants as accountants and auditors to advise on financial affairs and prepare accounts and audit the books. So it is important to ascertain how firstly Bingham then Condel and then Strachan, the accountants and auditors, accepted the bank statements which were sent to them pursuant to the specific instructions of Sinclair, the Managing Director and dominant shareholder of the respondent companies. Here is how Leonard Condell describes his role as accountant at page 16 of Vol. 6:

> "We have prepared the financial statements set out on Statements 11 and 111 from the records and documents presented to us, and from information and explanations given to us by the Directors.
>
> We have not performed an audit and accordingly do not express an opinion thereon." (Emphasis supplied)

Then in his role as auditor this is how he treats the Bank Interest at page 30 of Volume 6 in the Notes to Financial Statements:

> "5. BANK INTEREST:
>
> Interest charged by Century National bank Limited for interim financing advanced to the company for construction and furnishing the buildings are capitalized, up to September 30, 1986. After this date, such charges will be written off to profit and loss."

Then after that, Strachan Barnett and Co. took over the accounting and auditing functions. That Strachan was both accountant and auditors can be seen from schedules of expenses for 1988 where the fees are stated to be $20,000. See page 66 of Vol. 6.

The first year was 1987 and under the heading Bank Overdraft, the figure at page 40 moved from $59,866 to $2,158,148. It must be borne in mind that there were also bank loans for that year at page 7 of Vol. 6. They are listed as $2,500,000 and $1,620,000 in the Notes to the Financial Statements at page 44 as owing to Lival Investment Ltd. A significant note explains that these loans were secured by property owned by the Company and a property owned by the Managing Director.

One example of Strachan's knowledge at page 70 of Vol. 6 demonstrates showing that he was aware of monthly rests as the caption reads:

> **"BASIS**
>
> compound Interest – Monthly
>
> **METHOD**
>
> Recalculation of interest on the current account balances including the full amount of the cheque allegedly drawn using only the authorized rates on interest used by the bank."

This was therefore knowledge to be attributed to the Company and its directors.

There is an alternative way of justifying compound interest with monthly rests if there is a demand pursuant to the mortgage. This issue was addressed in caption **IV** where it was decided that the mortgage instrument governed the current account. Also that instrument contained an express provision for compounding interest rates and variations thereto. The schedule is at pages 12 of Vol. 2:

"ORIGINAL RATE OF INTEREST (COMPOUND)	TWENTY-EIGHT per cent (28%) PER Annum calculated as Compound Interest with monthly rests.
RESTS AT WHICH INTEREST PAYABLE	Monthly"

This provision came into effect on 10th August 1987 and once the demand was made, the amounts payable comprised interest which was compounded with monthly rests.

In the light of the foregoing I must say that **grounds 4** and **14** were resolved successfully in favour of the appellant Bank.

With respect to ground 14, I find no need to resort to the legal doctrine of acquiescence. It is sufficient to say that the respondent companies were bound by the contract which entrusted to the appellant Bank the discretionary power to vary interest rates. So the declarations granted 3,4,5 and 6 at page 45 of Vol 1(D,E,F,G,H) of the judgment are set aside. These declarations decided that the appellant Bank was not permitted to compound interest and to vary interest rates.

The proper declarations were that by virtue of Article 11 of the contract to operate current accounts, the appellant Bank was entitled to charge compound interest and vary the interest rates monthly. Further, by not terminating the contract the respondent companies accepted the variations in interest rates.

(VIIB)

The nature of Banking Contracts. How do they operate their customer's accounts?

In the instant case, evidence was given of the way bankers treated current accounts in Jamaica, so it is necessary to turn to that aspect of the matter for illustrations of monthly rests. It will be demonstrated that the contract to operate the current accounts as well as the mortgage instruments made the compounding of interest rates with monthly rests permissible. The evidence shows the prevalence of such contractual arrangements in Jamaica.

Paget's Law of Banking 10th edition page 185 states the custom thus "but the custom today is to compound with monthly rests." Mr. Peter Millingen, an attorney-at-law for the respondent companies, in writing to Century National Bank (see letter at page 52 of Vol. 3 of the Record) acknowledged that Mutual Security Bank and National Commercial Bank had contracts which compounded for monthly rests. These two were merged and the combined entities is the largest bank in Jamaica.

In his evidence on banking practice Errol Richards, from the Bank of Nova Scotia, confirmed the practice of agreed overdraft as well as overdrafts where there was no prior agreement. See page 524 of Vol. 11 of the Record. Where no overdraft facility has been granted but is utilized then there is an "overrun rate" which is highest rate. This he said has been the practice at that bank as regards overdrafts for over 100 years.

Geneve Tulloch worked with the Bank of Nova Scotia but was then with Trafalgar Commercial Bank. "Excess rate" the term used by her bank seemed similar to "overrun rate" at Bank of Nova Scotia and "penal rate" at Century National Bank. See 526 Vol. 11 of the Record.

Caple Williams was formerly employed to Bank of Nova Scotia before he became a high ranking officer and director with the appellant Bank. See pages 527-541 of Vol. 11 of the Record. The following aspect of his evidence is important:

> "Paid interest on current accounts since 1988. Liquidity requirement of Bank of Jamaica whereby

> 25% of deposits had to be cash reserves and bear no interest. Liquidity requirement of 12% in L.R.S.
>
> Bank in 1988 was 4 years old. Bank had to offer higher rates on CDs to attract investors. Portfolio being small could not influence the average rate of borrowing. To affect loan rate.
>
> We were about 2 points higher on CDs than others. Higher cost of funds and costs of operation would determine a base rate at which to lend. Liquidity would also influence rate of interest. Shortage of liquidity would attract higher rate to customer on deposits. Also consider the costs of funds borrowed from Bank of Jamaica. Increase rate of interest.
> Bank of Jamaica charges a higher rate than deposit rate."

The Bank statements forwarded to Strachan the accountant and auditor showed the accuracy of his evidence that interest was paid on current accounts in credit. See pages 98-103 of Vol. 2.

He continued his evidence thus:

> "I had no personal dealing with John Sinclair or with any person connected to the Plaintiff company. Records show overdraft facilities of $3.8 million to one of the companies.
>
> This $3.8 million attracted a lower rate of interest than others existing. On unauthorized overdraft, bank charged rate up to that charged by Bank of Jamaica (Temporary overdrafts)
>
> To fund that cheque, bank would borrow from Bank of Jamaica and would charge interest to cover that cost. When CNB grants overdraft facility, it takes into consideration its position with BOJ. It ensures that there is enough funds for the arrangement. In case of unauthorized cheque, Bank may or may not have to borrow.

> Bank of Jamaica interest rate July 1988 to September 1990 moved from 48% - 60%. Went to 120% in about 1992."

In comparing the respondent bank's policy with that of the Bank of Nova Scotia he gave the following evidence:

> "I was with B.N.S. for 23 years. I knew how it charged interest in respect of overdraft. Simple interest on daily balance, then interest is charged to account in following month. Simple interest on the 1st day of the month, and interest charged to account. Not different from that of CNB.
>
> It is standard for all accounts. There is a fee per cheque or temporary overdraft.
>
> Method is standard practice."

To demonstrate the movement of interest rates in Jamaica, the following evidence of Caple Williams is relevant:

> "(Referred to paragraphs 20 to 24 of Statement of Claim and to page 221 of Exhibit 1).
>
> Calculations there at simple interest
> Interest there charged from 17% to 70% in June 16, 1992."

On the vexed issue of penal rates the following extract at page 538 of Vol. 11 is important:

> "Penalty Rate = B.O.J. monitoring commercial banks. In arriving at charges of accounts overdrawn or unable to meet liquidity requirement.
>
> Term used loosely by Crawford."

Then it continues thus:

> "The document would have come to management. It speaks of "penal" interest charges but the term was misused. I would not regard rate of 70% as a penalty rate.
>
> There is no reference to B.O.J. in correspondence shown to me so far.
>
> [Witness shown letter dated June 16, 1992 at page 62 of 1st Supplemental Bundle].
>
> I was director of Bank then. I was not privy to instructions given to find that letter.
>
> The interest stated there would be the usual rates of interest. They were high rates but not penal. Usual in relation to unauthorized overdrafts.
>
> CNB has offered about 2% above the going rates. Don't know Bank had problem in attracting deposits. As a competitor with other banks, we had to seek to attract depositors. Our lending rates were higher than those of other banks. Can't comment on our liquidity problems."

Further the evidence runs thus at page 541 of the Record:

> "The charging of penalty rates on unauthorized overdraft is in keeping with practice in Jamaica."

Here are the rates stated in Caple Williams' evidence at Vol. 11 page 541 of the Record:

> "Authorised rates varies from 26% to 62% - 1987 to 1992. Unauthorised rates varies from 37% to 91%"

Errol Richards (see pages 524-526 of Vol. 11 of the Record) from Bank of Nova Scotia and Valrie Crawford from Mutual Security Bank (see pages 543-546) gave evidence on compounding interest rates at their respective banks.

Josyclyn Richards worked with Barclays Bank and continued when the same bank came under new ownership and became N.C.B. He too speaks of "penalty or excess rates" at page 503 of Vol. 11 of the Record.

Dorothy Parkins see 514-519 of Vol. 11 was the officer from Citi Bank who gave evidence on compound interest rates and monthly rests. She speaks of default rates as the counter-part of penal rates. The substance is the same. Significantly she records that Citi Bank does operate accounts without any defined overdraft limits. Winston DaCosta, pps 519-523 of Vol. 11 of the Record from Eagle Banking Group also gave evidence as to monthly rests at his group.

This exhaustive summary showed that the appellant Bank established that monthly rests on overdraft accounts are a feature in the Jamaican banking system. So I would conclude that the appellant Bank made out its case for charging compound and penal interest rates.

As the issue of undue influence ran throughout the respondent companies' case the appellant Bank adduced this evidence to demonstrate that compounding interest with monthly rests was standard in Jamaica. Also well known was operating overdrafts without any limits imposed. Further penal rates was just a label which described the highest rate of interest charged by banks. Moreover, counsel for the appellant Bank Mr. Scharschmidt QC., contended that the treatment of the accounts of the respondent companies in the light of the practice of other banks in the jurisdiction, would

preclude any suggestion that the practice of the appellant Bank could be termed unconscionable, so as to warrant the intervention of equity.

The precise issue as to how the accounts were handled within this general framework will require special attention.

(VIII)

The costs of Discovery

Ground 13 of the Notice and Grounds of Appeal reads as follows:

> "13. That the Learned Trial Judge erred in conclusion that **Century National Bank Limited** was not entitled to the costs in respect of the order for discovery."

The background to this challenge to the learned judges' ruling is to be found in pages 417-429 of Volume 11 of the Record. Mr. D.M. Muirhead Q.C., for the appellant Bank in the Court below, sought at the close of the respondent companies' case, an order for discovery of the primary books of accounts of the respondent Companies. Those primary books revealed the knowledge of the companies which Sinclair pretended he did not know. This was resisted by Mr. Small QC., and the learned judge ruled in favour of the companies and refused leave to appeal.

It is now necessary to turn to the learned judge's reasons for refusing to exercise his discretion in favour of the appellant Bank. Firstly, he was overruled by the Court of Appeal which he acknowledged thus:

> "When the defendant obtained an order for discovery from the Court of Appeal costs were awarded to the plaintiffs in any event. In the

> circumstances I will not make any award for costs in favour of the defendant. The Court of Appeal must have refused the defendant's costs for good reason."

It would seem that the learned judge followed the Court of Appeal's ruling on costs without taking into account the other circumstances before him. Firstly, that the respondent Bank made good use at the trial of the order for discovery and succeeded on that issue.

Since the major complaint is about rates of interest on overdrawn accounts the following passage by Cozens-Hardy M.R. in **Cuthbert v Roberts Lubbock & Co.,** [1909] 2 Ch 226 at 233 is reiterated because it is helpful:

> "If a customer draws a cheque for a sum in excess of the amount standing to the credit of his account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."

Keane-Dawes was acting in accordance with Article 11 of the contract to operate the current accounts in imposing a limit in one instance and exercised discretion of the appellant Bank not to impose a limit on the second account. As for the rates imposed this was explained by V. Caple Williams and it includes the penal rate which is the highest lending open to the appellant Bank to impose.

Sinclair as a director of the respondent companies and therefore in a fiduciary relation to them, drew cheques when their accounts were not in credit. So did the authorized officers of the company, the secretary and the general manager. The appellant Bank honoured those cheques. To use the words of Lord Scarman, "such contracts are unimpeachable at law".

There is an important point to be made on penal rates. The bank statements reveal that most of the times the current accounts were in overdraft. Neither interest or principal was being repaid. The interest was capitalized. Such accounts were not the best accounts as Keane-Dawes stated in a memorandum which has pleased the respondent companies. They were the accounts which carried the greatest risk. The security which were mortgages would have been difficult to realize if that need arose. So to Crawford they were charged penal rates with justification. See Vol. 10 pp. 224,225, 238, 230.

Caparo Industries plc. V Dickman [1990] 2 A.C. 605 at 660 shows that directors are responsible for preparation of the annual report. It was because of discovery that it was revealed that the respondent companies' primary books of account showed that the compounding of interest was recorded in the books of the companies. See for example page 44 of Vol. 8 of the Record. This showed the amount of interest and how it was capitalized. This is as plain as the proverbial pikestaff.

As for the other revelation disclosed by the primary books of account, here is how the learned judge below put it at p.48 of Vol. 1 of the Record:

> "The plaintiffs at paragraphs 36, 36A, 36B, 36C and 44 of the Statement of Claim contend that the transfer was without specific authority.
>
> On the 21/11/95 subsequent to an order for discovery from the Court of Appeal, Mr. Small abandoned that contention in this manner:

> 'We have looked since documents have come to light. Having regard to facts as disclosed the keeping of records re banking transactions do not allow us to maintain lack of authority to debit. The debit memos are reflected in the books and plaintiffs cannot sustain their previous stance. In Account Book of Negril Investment Co. Ltd. there is an entry.'
>
> That concession and abandonment of pleadings in the light of evidence was expected of Queen's counsel."

So the prayer which reads:

> "(NN) An order that the Defendant be directed to cancel the reversal referred to in paragraphs 36A-36C herein and that the original accounting entry be ordered to stand,"

was answered by the learned judge thus:

> "11. Declaration at NN is refused."

This order must be affirmed.

It should be added that the evidence of Mr. Louis Reynolds an Accountant with the appellant Bank's auditor at pp. 476-492 of Vol. 11 of the Record, explains how the compounding of interest was recorded in the book of the respondent companies and how it was recorded in the final audited accounts and particularly in the notes to the Financial Statements.

A further aspect which received scant attention from the learned judge below was the fiduciary relationship of Sinclair as a director to his companies particularly in the preparation of the annual reports. Sinclair would have the Court believe that he paid no attention to the accounting records of the company, yet he signed the final accounts as Director. Did he not read them

or did he ask Strachan or the Secretary of the companies to explain them? He failed to exercise his fiduciary duties or statutory obligations and then seeks to have this Court entrust them to Crawford. It is an extraordinary claim and must be rejected.

Incidentally although it was alleged that Crawford discouraged Sinclair from retaining Strachan, he was the Accountant and Auditor since Condel, right up to the time when the dispute between the parties arose. Peat Marwick took over from Strachan. Everytime there is an attempt to show Sinclair's dependency on Crawford it failed.

(IX)

How were the accounts of the respondent companies handled by the appellant Bank?

Grounds 5, 6 and 9 of the Notice and Grounds of Appeal remain to be treated. Ground 6 reads:

> "That the Learned Trial Judge was wrong in Law and in fact when he concluded that **Century National Bank Limited** treated the Plaintiff/Respondent's accounts unreasonably."

Ground 5 reads:

> "That the Learned Trial Judge was wrong in Law and in fact when he concluded that funds from the National Development bank were made available to the Plaintiff/respondent at Penal Rates of Interest."

Ground 9 reads:

> "That the Learned Trial Judge was wrong in Law when he concluded that **Century National Bank Limited** was not entitled to vary the rates of interest

> in the Promissory Notes given by the Plaintiff/respondent."

These are the three remaining grounds of appeal which need to be addressed. To take ground 9 first which poses the question whether it was permissible for the appellant Bank to vary the rate of interest on the Promissory Note, here is how the respondent companies averred the issue on the promissory note in the Statement of Claim at 57-58 of the Record:

> "20. In addition to operating the current accounts, with the Defendant, the Plaintiff also secured demand loan financing from the Defendant to assist in the construction of phase II of Negril Gardens Hotel. The particulars of the said loans taken by the Plaintiff from the Defendant are set out hereunder:
>
> **PARTICULARS**
>
> | Loan Number | Amount of Loan | Date of Loan |
> |---|---|---|
> | 2610002021 | $ 280,900.00 | March 15,1988 |
> | 2061002070 | $2,499,100.00 | March 17,1988 |
> | 2661001809 | $1,000,000.00 | October 26,1987 |
> | 2601001737 | $1,500,000.00 | September 23,1987 |
> | 2601001841 | 620,000.00 | November 19,1987 |
> | 2601001702 | $2,600,000.00 | August 20,1987 |
>
> 21. The loans referred to in the above paragraph were consolidated into one loan on the 1st April 1990, namely, loan number 2601001431.
>
> 22. The Plaintiff commenced the further development of the Negril Gardens Hotel in 1987, and prior to negotiating the demand loans with the Defendant, applied to the National Development Bank and obtained commitment for long term financing at concessionary interest rates. The sums obtained on demand loans which are particularised at paragraph 18 of this Statement of Claim represent interim financing by the Defendant to the Plaintiff on the strength of the

commitment of the National Development Bank to extend the loan to the Defendant for on-lending to the Plaintiff.

23. The Plaintiff executed promissory notes in favour of the Defendant on the dates on which the demand loans particularized at paragraph 18 of this Statement of Claim, and the Plaintiff contends that these promissory notes embody all the contractual relationship between the Plaintiff and the Defendant as they relate to the demand loans.

24. The promissory note dated the 15th March 1988, 17th March, 1988, 26th October 1987, 23rd September 1987, 19th November, 1987 and 20th August 1987 respectively provided that on demand, the Plaintiff would repay the sums due with interest at 17% on each loan respectively.

25. The Plaintiff contends that there is no provision in any of the said promissory notes for variation of the interest rates applicable on the demand loans or for the Defendant to compound the interest payable by the Plaintiff. The Plaintiff asserts that the Defendant not only wrongly varied the rates of interest payable on the demand loans, but compounded same at monthly rests when interest payments made by the Plaintiff fell into arrears, contrary to the provisions of the agreement between the Plaintiff and the Defendant."

The appellant Bank averred as follows in its defence:

"26. Regarding paragraph 23. The Defendant admits that the Plaintiff executed promissory notes in favour of the Defendant but denies that the said promissory notes constitute the contract between the Plaintiff and the Defendant in relation to the demand loans. The contract between the parties regarding said loans is contained in the promissory notes, the Instrument of mortgage referred to at paragraph 12 hereof and as subsequently varied by the parties."

The mortgage specifically refers to promissory notes thus:

"(a) To pay to the Bank on Demand –

(i) All such sums of money as are now or shall from time to time hereafter become owing to the Bank from the Mortgagor whether in respect of overdraft, monies advanced or paid to or for the use of the Mortgagor or charges incurred on his account or in respect of promissory notes and other negotiable instruments drawn accepted or endorsed by or on behalf of the Mortgagor and discounted or paid or held by the Bank either at the Mortgagor's request or in the course of business or otherwise and all moneys which the Mortgagor shall become liable to pay to the Bank under any guarantee, indemnity undertaking or agreement or in any manner or on any account (including all sums which have become immediately due and payable under the terms of any Instalment Loan) whatsoever and whether any such monies shall be paid to or incurred by or on behalf of the Mortgagor alone or jointly with any other person firm or company and whether as principal or surety together with interest at the rate per annum stated as the Original rate of Interest in Item 3 of the said Schedule with such rests as are stated in Item 4 of the said Schedule as Rests At Which interest Payable or at such other times as the Bank shall from time to time specify or at such other rate or rates of interest as the Bank shall from time to time charge which interest may be computed as simple interest to compound interest as the Bank shall also with all usual and accustomed Bank charges."(Emphasis supplied)

The principles adumbrated in section IV of this judgment **Do the mortgages run in tandem with the current accounts so that they must be construed together as the appellant Bank claim?** are applicable to promissory notes and demand loans and was anticipated at page 55. The relevant sentence "...Promissory Notes and demand Loans are also involved."

It is instructive to set out one of the promissory notes as an example (that at page 5 of Vol. 2 of the Record):

> "23rd September,1987 No.
>
> On Demand after date We promise to pay to the order of Century National Bank Limited the sum of One Million Five Hundred Thousand Dollars with interest at the rate of 17 per cent per annum as well as after as before maturity Value received.
>
> L. Sinclair
> Negril Negril Holdings Ltd."

The demand loans were consolidated and the following letter speaks for itself:

> "April 9, 1990
>
> Century National Bank Limited
> 14-20 Port Royal Street
> Kingston
>
> Attention:Mr. Maurice C. Kean-Dawes
> Credit Administrator
>
> Dear Sirs:
> Re: Negril Negril Holdings Limited
> Project Id. No. 222-(20-9)-0-3-003

At this time we are consolidating the loans that have been fully disbursed.

To this end we have prepared new repayment schedule and promissory note reflecting the balance outstanding as at April 1, 1990. This balance was derived as follows:

Date Disb.	Amount Disb.	Less Prin. Repaid @ 14%	Balance O/S
17.03.88	$2,499,100.00	78,096.88 x 3	2,264,809.36
15.03.88	280,900.00	8,778.13 x 3	254,565.61
20.11.87	620,000.00	19,375,00 x 3	561,875.00
26.10.87	1,000,000.00	31,250,00 x 3	906,250.00
23.09.87	1,500,000.00	46,875.00 x 3	1,359,375.00
20.08.87	2,600,000.00	81,250,00 x 3	2,356,250.00
	$8,500,000.00		7,703,124.97

Please have the new note signed, sealed and returned soon at which time we will cancel and return those presently being held.

Kindly note that this balance is arrived at on the assumption that all payments are up to date.

Please call if you have any queries.

Yours sincerely

Denise Campbell
Management Accountant."

The respondent companies rely on section 83 of the Bills of Exchange Act which reads:

"PART IV. Promissory Notes

83.-(1) A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain

> in money, to or to the order of a specified person, or to bearer
>
> (2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is endorsed by the maker.
>
> (3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.
>
> (4) A note which is, or on the face of it purports to be, both made and payable within this Island is an inland note. Any other note is a foreign note."

To reiterate the analysis in section IV of the judgment, the mortgage and the promissory note must be read together. Once a demand was made which it was on June 7, 1990, and reasonable time was given for payment, if the Demand Loans were paid with the rates of interest applicable thereto, that would have been the end of the matter. If it was not paid, then the mortgage comes into play on demand and the compounding of interest rates and the variation stated on the mortgage are applicable.

This is the circumstance, in this case where the amount of $70,203,912.00 claimed by the appellant Bank was not paid until 1993. That evidence was elicited by Mr. Hugh Small Q.C., at page 539 of Vol. 11 of the Record during the cross-examination of Caple Williams.

Turning to ground 6 which challenged the learned judge's finding that the accounts were treated unreasonably and oppressively; here are the precise words of the learned judge at page 41 of Vol. 1 of the Record:

> "I find that the defendant treated the plaintiff's accounts unreasonably and oppressively. There was no justification for the penal rates of interest."

For this finding the learned judge relied on the evidence of Maurice Keane-Dawes, the Credit Manager of the appellant Bank who was in charge of the day to day operations of the respondent companies' accounts. However, in this case what is important is the legality of the Bank's conduct. That is what is in issue.

To my mind the learned judge below treated the evidence of Keane-Dawes generally and especially that recorded in his memorandum of March 21, 1989 as law, when the law was contained in the contract to operate the current accounts. That law is contained in the law on overdrafts, as explained by Lord Blackburn and Lord Watson in **Cunliffe Brooks and Co.** (supra);and the law on compound interest as in **Hibernian** and **Pinios** (supra). Also the law on the discretionary power accorded to the Bank to vary interest rates is also applicable. This law is comparable to the setting of future price changes illustrated in **Hillas v Arcos Limited** (supra). All those cases were given scant attention in the Court below.

These cases and the principle which underlie them were dealt with in this judgment at length under the caption **VII The Nature of Banking**

contracts. To reiterate, the settled law entitles the appellant Bank to exercise its discretion to determine interest rates to those who seek loans by way of overdraft without seeking a specific agreement on limits and rates. The appellant Bank also had a discretion to treat the accounts of the respondent companies differently.

To inform himself of such matters, by seeking the advice of the accountant of the respondent companies, Leymon Strachan, was what was to be expected from a company director such as Sinclair. The failure to take such an elementary precaution was an act of folly. These transactions of seeking loans by unauthorized overdraft facilities are unimpeachable in law, and equity will not intervene. Sinclair's conduct at every stage of this case is odd. He has come to this Court to seek equity. Yet the respondent companies had an accountant and auditor. Sinclair on his own account failed to use them at crucial moments. He appointed a Board of Directors, yet borrowed in excess of $1 million from Caribbean Trust Merchant Bank Ltd., without informing them. See Vol. 9 page 21, 95 and 101 of the Record. Counsel for the appellant Bank probed this matter but it was difficult to get Mr. Sinclair to admit that he borrowed $1.4m and that the payment was probably with respect to his personal loans with the appellant Bank.

The National Development Bank

With respect to ground 5, which challenges the learned judge's findings on the rates charged for funds made available through the National

Development Bank, the issue must now be examined. Recognising that the high interest rate policy which was necessary to maintain the stability of the currency, had a deleterious effect on economic development, the N.D.B., a government agency, lent at lower rates, 14% per annum, but not directly to applicants. Applicants were obliged to go through a commercial bank. The commercial bank then lent this money at 17%. So the evidence must be examined to see how this aspect was treated: in particular the charge that, penal interest rates were imposed when 17% was agreed by the appellant Bank and NDB.

In determining whether penal rates of interest were imposed on the respondent companies, the learned judge below seems to have put his trust in the evidence of Keane-Dawes. Vol. 2 of the Record, which contains the documentary evidence, suggests a different story. One interesting fact to observe is that the Chairman of NDB, Mr. Donald Rainford took over the Chairmanship of the Sinclair Group of Companies. His letter to the appellant Bank page 122 of Vol. 2 with "attention Keane-Dawes" had the implication that prior to his taking over the Chairmanship of the Board, the Board of Directors was not up to mark. The NDB had strict provisions as to when disbursement would be made. They required invoices and the Certificates from the Quantity Surveyor. In the meantime cheques of the respondent companies presented to the appellant Bank were honoured when there were no funds to the credit of

their accounts. The price was high interest rates called penal by the appellant Bank.

To demonstrate how the evidence of Keane-Dawes assisted the appellant Bank, in cross-examination it was revealed that Sinclair had an account with the most conservative and profitable bank in Jamaica, the Bank of Nova Scotia. See pages 190-208 of Vol. 10 of the Record. Why didn't he do the bulk of his banking with that bank? It is well-known that the two profitable commercial banks of which Nova Scotia was one did little lending during the period of very high interest rates. They put depositors' funds in high yield government paper and earned handsome profits for their shareholders. The generous overdraft facilities extended to the respondent companies by the appellant Bank was unlikely to be granted by Bank of Nova Scotia.

On the issue of penal rates of interest, the highest charged by the appellant Bank, here is how Keane-Dawes revealed the extent of the knowledge to be attributed to the respondent companies (at page 222 of Vol. 10) of the Record:

> "DM Am I correct sir in saying that the number 2 account was opened to make arrangements for funds for the hotel that had already commenced
>
> KD Yes sir, at penalty interest rates."

Then the evidence continued and Keane-Dawes had to admit the knowledge of the companies with a show of reluctance at page 223 of Vol. 10 of the Record:

> "DM Clearly the client was also aware of the high interest rate that was being charged

KD The client might have been aware that the rates were higher but may not have known what rate was being charged

DM Why do you say that

KD Because the interest rate was not on the statement

DM What was the experience of the client regarding overdraft before the application to the NDB

KD The experience would have been the same as both accounts were being charged at the same high penalty rate

DM And this client would have experienced this. Did you know Mr. B as a man competent in financial matters

KD No

DM The audited accounts should have brought this to the attention of the company

KD I can't say that – I don't know when the audited statements were done

DM But audited accounts would reflect the quantum of interest paid, not the rates

DM But the qualified accountant could work it out

KD I suppose so."

This evidence must be read together with Keane-Dawes' memorandum of March 21, 1989 in which he stated that Sinclair made representations for a reduction in the interest rates: also since at that time the overdraft liability of $7m was being transferred to the Century National Merchant Bank.

Creative accounting by the appellant Bank, operated by Keane-Dawes enabled Sinclair to live in a paradise. The respondent companies knew the way the debits were piling up because the credits were inadequate to cover the debts. Sinclair knew or must be taken to know how the debts of the respondent companies were growing. The accountant and auditor knew of it. Strachan prepared the final accounts and audited the books, but Sinclair pretended not to know. Interest and Principal were not being paid. They were just debited to the account. That is how the respondent companies' accounts were being serviced. The physical assets of the companies were being created by debts not by the injection of equity capital. Here is how the shaky finances were revealed by Keane-Dawes at page 238 in Vol. 10 of the Record:

> "DM You are dealing with substantial liabilities. Had they been outstanding for some time
>
> KD They built up over time
>
> DM The promise to clear account had never been fulfilled had they
>
> KD Well the interest payments were being charged to the account
>
> DM They were not being paid by the customer
>
> KD The customer's accounts were being debited and deposits were being made by the customer in his account
>
> DM And the loans were they being paid
>
> KD They were being paid and debited to the customer's account

DM So that the loans were not being paid, just being transferred to another account

HS Objected

DM Interest payments were being paid by way of debiting the current account

KD Yes

DM In 1989 the bank became dissatisfied with the way the loan was being serviced. That dissatisfaction was related to the position with regards to Banking Act violation

KD Additional credit was being extended at the same time and prior to all this interest payment were being debited to the account."

It was against the background outlined in this evidence that Crawford could fairly say in his note responding to Keane-Dawes' memorandum (supra) that "John has done well with our help."

That there were telephone conversations between Sinclair and Keane-Dawes is evidenced by this aspect of cross-examination at page 248 Vol. 10 of the Record:

"DM The sentence following highlights the urgency of what I call the demand. 'We are available to meet with your accountant ...' This is indicative of urgency is it not

KD What I'm expressing is the fact that in telephone conversations with JS he had questioned the accuracy of the indebtedness. We are therefore expressing our willingness to meet with his accountant."

There is one other revealing aspect of the cross-examination of Keane-Dawes. We are dealing with two respondent companies and the audited accounts were sent to the appellant Bank by its accountant, Mr. Leymon Strachan; see pages 200-201 of Vol. 10 of the Record. The following extract is of importance:

> "DM You relied on the audited statements
>
> KD I relied on the audited statements of the chartered accountant
>
> DM And all the banks do that
>
> KD All the banks that I have worked with
>
> DM All the banks required financial statements as guides to the status of the companies
>
> KD Yes sir."

The importance of the exchange is that it explains the appellant Bank's need for audited accounts for a private company. So although such companies need not file final accounts with the Registrar of Companies, their bankers require them to determine their financial status.

It should be noted that the appellant Bank was responsible to pay the NDB and had to give a Promissory Note as security. See page 44 of Vol. 2 of the Record.

Since the learned judge made a specific finding on penal interest rates adverse to the appellant Bank, it is pertinent to cite the following passage from the evidence of Keane-Dawes at p. 170 of Vol. 10 on rates of interest:

"DM So in the banking community we have the areas of unauthorized overdrafts. So that for purposes of our understanding what applies in banking community, an overdraft in respect of which there is no approved limit is unauthorized.

KD That's according to the banking community

DM Likewise an overdraft which exceeds the approved limit is unauthorized

KD Yes

DM And overdraft that fall into that category are subject to penalty rates of interest

KD Yes."

Despite this evidence from Keane-Dawes, a witness accepted by the learned judge, here is his finding at page 46 of Vol. 1 of the Record:

> "I have found from Keane-Dawes' evidence that persons who had current accounts with the defendant were invariably given credit limits within which specific rates of interest were chargeable and beyond which additional and higher rates of interest were charged as penalty for exceeding the credit limits.
>
> The plaintiffs were given no such credits limit and their accounts were subjected to high penalty rates of interest as soon as they were into overdraft. No wonder the accounts were constantly overdrawn attracting not only penal rates of interest but also compound interest at those penal rates."

In the light of the above reasoning the learned judge was prepared to disregard the evidence of a witness of which he said:

> "... At the end of it I do not find that the credibility of Keane-Dawes was impaired and I find him to be a witness of truth."

The above passage from the evidence of Keane-Dawes must be contrasted to his evidence in chief at page 144 of Vol. 10 of the Record:

> "KD My concern at the substantial penalty interest charges being incurred by the customer on the overdraft borrowings; in particular I had observed from the current account statements that the customer had incurred overdraft interest charges close to $240,000 for the month of February, the month previous to when I did this memo. I expected that the overdraft charge of March would have been higher based on the level of activity in the account. In my view I considered the level of interest charges which were being incurred by the customer to be unjustified, based on the fact that firstly the customer was pursuing economic activity which were in the national interest and as well the financing which was obtained through the NDB was geared towards allowing projects of this nature the benefit of the best or close to the best interest rates that the bank could offer. In addition the bank, that is Century National, derived certain benefits from the operation of these accounts. Firstly in terms of its significant contribution to interest revenues of the bank given the size of the loan, and also the accounts constituted a steady source of foreign exchange inflows for the bank. In addition to these benefits the bank faces minimal risk of loss from the operations of the accounts because the loan exposure was adequately protected by the value of the security. I felt therefore that the waiving of the commitment fee would at least be an indication of the part of the bank to address what I considered to be an anomaly in the sense that the bank's largest borrowing connection was being charged at the bank's worst interest rate." (Emphasis supplied)

Most bankers would contend that the security of real estate at a time when the property market was described as flat was not the ideal security. Assets which were more liquid would have been preferable especially since the Central bank by law insists on a liquidity ratio. Moreover sections 10 and 23 of the Banking Act may restrict the appellant Bank's ownership of land. Keane-Dawes later would admit under cross-examination that the debts of the respondent Bank were being serviced by debiting the accounts.

This action by Keane-Dawes proposed in his evidence illustrates the correctness of a Banker's position in law. The respondent companies were borrowing by way of overdraft large sums of money. Keane-Dawes was using the discretionary power of the Bank to reduce the interest rate and limited the authorized overdraft to $3.8 million. He did this presumably because of Crawford's note on his memorandum which contended for a reduction of the interest rates on the companies' accounts and other concessions.

Here is his evidence at page 151 of Vol. 10 of the Record:

"KD In respect of NNH there was an overdraft limit of $3.8m which, as I indicated earlier, was instituted because the customer had been incurring substantial charges.

Judge The limit is indicated here

KD No my Lord

HS What interest rate was a penalty rate up to June 1988 on the entire overdraft balance, and after June 1988

KD After June 1988 the amounts up to $3.8m would have attracted a lower rate than the penalty rates. Amounts in excess of this figure would attract the penalty rate."

It is difficult to understand the learned judge's findings on penal interest in the light of the above evidence. A feature is that Negril Negril Holdings the first respondent was the account which required large overdrafts to finance the construction of phase two of the hotel.

Paragraphs 20,21,22 and 23 of the Statement of Claim read:

"20. In addition to operating the current accounts, with the Defendant, the Plaintiff also secured demand loan financing from the Defendant to assist in the construction of phase II of Negril gardens Hotel. The particulars of the said loans taken by the Plaintiff from the Defendant are set out hereunder:

PARTICULARS

Loan Number	Amount of Loan	Date of Loan
2610002021	$ 280,900.00	March 15,1988
2061002070	$2,499,100.00	March 17,1988
2661001809	$1,000,000.00	October 26, 1987
2601001737	$1,500,000.00	September 23,1987
2601001841	$ 620,000.00	November 19, 1987
2601001702	$2,600,000.00	August 20, 1987

21. The loans referred to in the above paragraph were consolidated into one loan on the 1st April 1990, namely, loan number 26010011431.

22. The Plaintiff commenced further development of the Negril Gardens Hotel in 1987, and prior to negotiating the demand loans with the Defendant, applied to the National Development Bank and obtained commitment for long term financing at concessionary interest rates. The sums obtained on demand loans which are particularized at paragraph 18 of this Statement of Claim

represents interim financing by the Defendant to the Plaintiff on the strength of the commitment of the National Development Bank to extend the loan to the Defendant for on-lending to the Plaintiff.

23. The Plaintiff executed promissory notes in favour of the Defendant on the dates on which the demand loans were made in respect of all loans particularized at paragraph 18 of this Statement of Claim, and the Plaintiff contends that these promissory notes embody all the contractual relationship between the Plaintiff and the Defendant as they relate to the demand loan."

The Defence was as follows at page 73 Vol. 1 of the Record:

> "23 Save that the Defendant states that the loan numbered 26 100 2021 was given on the 15th March, 1988, paragraph 20 is admitted."

The following cross-examination of Keane-Dawes at pp. 171-172 of Vol. 10 of the Record tells the story of the respondent company's need for cash at every stage of its activity:

> "KD The standard source for construction is generally demand loans and NDB loans fall into that category
>
> DM So what was happening in JS' case is he was using an overdraft facility from CNB for working or operating capital and using demand loan for construction funds through the NDB facility
>
> KD Yes, but Mr. JS had to utilize the overdraft facility pending the fall in of funds from Lival as there was a delay in disbursement that is why the overdraft went to $2m
>
> DM So that when you are projecting the costs you have to meet the OD interest rates; the reality is Mr KD that when costs are being projected for NDB facilities provisions have to be made for the overdraft interest rates

KD That is the reality. However the normal practice in banking is that such facility is provided not at penalty rates but at a reasonable rate over the spread of the prime rate

DM You mean that the use to which money is put determines the rate of interest charged

KD The NDB stresses the importance of below market interest rates

DM Do you mean that the use to which money is put is a primary determinant in the rate of interest which is charged

KD It is not determined by the use to which funds are put but by an agreement on the part of the customer ...

DM There's a difference between funding by loan and by overdraft

KD Yes."

Peat Marwick was appointed by the respondent companies to examine the account between the respondent companies and the appellant Bank. These loans adverted to in paragraph 20 of the Statement of Claim were examined. In their report on page 140 of Vol. 2 of the Record it was found that these loans were disbursed at 17% which took into account the 3% spread stipulated by NDB. If there was any justified complaint on this aspect, we would expect Peat Marwick to point this out in their report.

Here are the critical findings by Peat Marwick at page 140 A of Vol. 2 of the Record:

"3. All loan receipts were credited to the current account number 1302529

4. All interest and principal payments were made from current account number 1302529 except as stated in note 7.

5. Interest calculated on all loans, except the Merchant Bank loan were at the rate of 17% per annum. Interest on the Merchant Bank loan was between 21% to 34%. Interest calculations were correct.

6. Interest paid on all loans except the loan with the Merchant Bank amounted to $4,039,391.82

...

8. Interest on overdraft charged to the current account amounted to $4,906,493.47 with the exception of charges for December 1987 and August 1990. Various interest rates were used during the period July 1987 to September 30, 1990. See appendix attached."

Item 8 is vital to determine whether the penal rates charged amounted to penalties which would warrant the intervention of equity. This appendix was not attached to any of the volumes of the Record supplied to this Court. If there is a further appeal it might be useful to include this appendix.

(X)

Was the claim by the respondent Bank satisfied

The Further Amended Statement of Claim at page 62 of the Record has the following passages:

> "37. On or about the 30th day of September 1992, the Plaintiff, under protest, liquidated its total alleged indebtedness to the Defendant and expressly retained the right to question the accounts proffered by the Defendant as to the Plaintiff's alleged indebtedness to it.

> 38. In the premises the Plaintiff asserts (a) that the Defendant was not entitled to any or all of the sum paid to it in settlement of its purported claims and (b) that the Defendant is under a duty to render a proper account to the Plaintiff and to repay all sums paid in excess of the true liability of the Plaintiff found to be due and owing to the Defendant after the taking of such accounts."

Turning to the Defence, there was no reference to paragraph 37 of the Further Amended Statement of Claim above. So it is admitted. However paragraphs 43 and 44 of the Further Amended Defence are relevant. They read:

> "43 Regarding paragraph 38, the Defendant denies that it is not entitled to the sum paid to it. Further it has rendered a full and proper account to the Plaintiff through regular statements supplied to the Plaintiff. In responding to detailed requests made on behalf of the Plaintiff by its Accountants, Strachan & Strachan and Peat Marwick, as well as the account prepared by Messrs Aulous Madden & Co. filed with the Affidavit of Louis Reynolds sworn to on the 14th day of January, 1993 and filed herein.
>
> 44. With the exception of paragraph J the Defendant denies that the Plaintiff is entitled to the reliefs claimed or any at all."

As regards these pleadings the appellant Bank has been successful on the basis of rendering a full and proper account so as to make the payment of $70,203,912.00 justifiable in law. There remains however the necessity to give full consideration to paragraph 19 of the Further Amended Statement of Claim which avers that to grant the respondent companies unlimited overdrafts was inequitable and oppressive and that the interest rates described as penal were

in fact penalties which warranted the intervention of equity. To evaluate this issue consideration must be given to the terms of the relevant averment in the Further Amended Statement of Claim at paragraph 19 at page 57 of Vol. 1 of the Record. It reads thus:

> "19. The Plaintiff contends that the Defendant operated the Plaintiff's current accounts in an oppressive and inequitable manner in that no overdraft limit having been set on the said accounts, the moment the Plaintiff's account went into overdraft the Plaintiff was charged not only interest, but onerous charges were added against the Plaintiff's account. The said charges were in fact penalties and not sums representing liquidated damages, and the Defendant was not entitled in law to charge the said penalties as the same did not represent an honest evaluation of any losses and damage the Defendant may have suffered as a consequence of any default of the Plaintiff."

To warrant the intervention of equity it would be necessary to set out the penal rate of interest charged over the relevant period and relate those rates to some standard rate, as the Treasury Bill or the penal rates charged by the Bank of Jamaica which are obtainable from its official publication. If that was done it would then be open to the Court below and this Court on review to determine whether the rates were oppressive and inequitable as averred. As for the charge of not imposing a limit on overdraft, it was in the discretion of the Bank to so do. If the respondent companies did not require the overdrafts, it was open to them not to resort to such methods financing the expansion of Negril Gardens Hotel. Sinclair resorted to this method of financing because as the balance sheets of both companies showed, they

were undercapitalized. What the companies lacked in equity capital they made up by extensive borrowing by way of overdrafts.

How did the appellant Bank answer paragraph 19 of the Further Amended Statement of Claim? Here are the responses in the Further Amended Defence at paragraphs 22 and 22a:

> "22. Paragraph 19 is denied. The Defendant states that pursuant to the Banking Act it was liable and obliged to pay penal rates of interest to the Bank of Jamaica in the following circumstances.
>
> (1) If the Defendant's current account held in the Bank of Jamaica went into overdraft;
>
> (2) If its Cash Reserve within the Bank of Jamaica fell below the statutory requirement;
>
> (3) If the Defendant failed to meet the overall liquid assets requirement.
>
> The Defendant further states that although the Plaintiff initially did not have any overdraft facility such facility was granted to the Plaintiff on the 24th of June, 1988 to the extent of $3.8 million. When the Plaintiffs current account went outside the authorized limit the Defendant was put at risk of being in breach of the requirements recited above.
>
> The Defendant further says that prior to the granting of the overdraft facility the Plaintiff was charged Compound Interest on overdraft at rates which were the Defendant's then prevailing rates on unauthorized overdrafts.
>
> After the 24th June, 1988 in respect of sums within the authorized limit, the Plaintiff was charged the Bank's prevailing rate for authorized overdraft and in respect of sums outside the limit, during the years

1988 – 1991 the Defendant charged the Plaintiff Compound Interest varying between 35% and 52% per annum although during the said years the Defendant was liable to pay the Bank of Jamaica a penal rate of 61% per annum. The said rates charged were the Defendants then prevailing rates of interest on unauthorized overdrafts.

As from June 1992 the Defendant charged the Plaintiff its then prevailing rates of interest on unauthorized overdrafts being the penal rate for which it was liable and obliged to pay to the Bank of Jamaica in the event that it was in breach of the requirements of the Banking Act recited above. At all material times the Plaintiff well knew of the consequences of its account going into overdraft as it was notified of all changes in the rates by the Defendant in the monthly statements issued to the Plaintiff.

The Defendant states that pursuant to Clause 11 of the contract to operate current account it was authorized to charge its usual rate of interest on overdrafts and the rates herein were the Bank's usual rate of interest on unauthorized overdrafts.

22 (a) In the alternative, the Defendant states that the contract to operate current account was subject to an implied term that the Bank was entitled to charge interest on unauthorized overdrafts at the rate of interest it was liable to pay the Bank of Jamaica in the event that it was in breach of the requirement of the Banking Act recited above. The Defendant says that the charging of such interest was in accordance with the recognized usage, custom and practice of Bankers in Jamaica."

The appellant Bank relied on the evidence of Caple Williams which was summarized previously and sections 11 and 12 of the Banking Act as well as sections 28-32 of the Bank of Jamaica Act.

To my mind the respondent companies have failed to aver and prove that penal rates charged were inequitable and the onus was on them to do so.

Conclusion

There are three features to grasp in this case in order to understand why errors were made in the Court below.

Firstly, Sinclair as a company director either did not know, or pretended he did not know that when overdrafts were granted to his companies the monies were borrowed. Secondly, the learned judge in the Court below did not realize that the banking contracts in the context of the Banking Act, the Bank of Jamaica Act and the common law conferred a discretion on the bankers as to the interest rates charged. Also the rates charged generally will, of necessity, be higher than prime or penal rates set by the Bank of Jamaica if profits are to be made by the Bank. Thirdly, the term penal rate, of interest, in the context of overdrafts, is just a description of the highest interest rate charged by the bank for unauthorized overdrafts. Provided such rates were not imposed retrospectively and were reasonable in the context of the prevailing interest rates, they would not be penalties which will be struck down by the Court. A rate of not in excess of 5% over the prime or penal rate set by the Bank of Jamaica may be regarded as reasonable.

For written contracts a differential of 4% was approved as a default rate in a period of low and stable interest rates. (See the cases reviewed by Colman

J. in **Lordsvale Finance plc. V Bank of Zambia** (1996) QB 752.[1996] 3 WLR 688, [1996] 3 All ER 156. For the refund a penal rate which amounts to a penalty, it would have to be specifically pleaded and proved. No proper attempt was made by the respondent companies to do this.

Be it noted it was accepted by both sides that the amount claimed and paid was $70,203,912.00

To my mind the appellant Bank has been by and large successful on most of the fourteen grounds of appeal. The hearing lasted many days and was argued with great skill by counsel on both sides. I have found that there was no fiduciary relationship between the respondent companies and the appellant Bank. Instead, I have found an ordinary commercial banking relationship between the respondent companies and the appellant Bank. What was special was the granting of unlimited overdrafts at penal rates by the appellant Bank and this was permissible.

Sinclair, the Managing Director of the respondent companies, acted as if there was no statutory obligation to see that proper books of accounts were kept. These books were kept but had to be ferreted out by an order of Discovery made by this Court. The statutory obligations are set out in the Companies Act sections 142-143; and section 143(3) states the criminal sanctions imposed on a director for failure to obey the provisions in the Statute as regards accounts. Apart from the statutory duties of a director Sinclair failed to consider his fiduciary duties to the respondent companies

which would have obliged him to consult the Secretary of the Company and the Accountant and Auditor Mr. Leymon Strachan. See on this is **Alex Lubb Garages Ltd. v Total Oil GB Ltd.** [1983] 1 All ER 944 at 961-962.

Sinclair pursued a reckless policy of borrowing by way of overdrafts when the bank statements which were recorded in the books of the respondent companies showed that the accounts were constantly overdrawn. He refused to count the costs and when the day of reckoning came he wishes to recover the payment of $70,203,912.00 or part thereof. He wishes to recover all or substantial sums of capital or compound interest on the basis of the equitable doctrine of fiduciary relationship. There is another equitable doctrine of applicable- "He who seeks equity must do equity." In equity Sinclair had special relationship with the respondent companies. He was their managing director. Sinclair showed no prudence in handling the companies' affairs. He banked with Century National Bank because of the ease with which he got overdrafts. He made no effective protest, nor did he seek the advice of his accountant Leymon Strachan concerning the wisdom of funding the expansion of his hotels by way of temporary overdrafts. When he appointed an effective Board of Director chaired by Donald Rainford he paid over one million dollars ($1m) to Century National Bank without informing them. This $1m was borrowed from Caribbean Trust Merchant Bank Ltd. He was a compulsive borrower in a

jurisdiction where high interest rates prevailed. In so borrowing he was able to build his hotels in Negril and Montego Bay.

I would like to make an apology for the delay in delivering this judgment. We in this Court are aware that the prompt delivery of reasoned judgments is essential in the administration of justice. However, the number and complexity of cases have increased considerably during and since the year 2000, partly as a result of the crisis in the financial system which has thrown up numerous difficult cases and partly due to an increase in the crime rate.

There is an urgent need for an increase in the number of judges in this Court. Representations have been made and I understand they are receiving attention.

So to conclude, the appeal is allowed and the orders below in so far as there is an appeal against them, are set aside.

The following orders ought to replace the orders in the Court below:

(1) There was no fiduciary relationship in equity between the appellant Bank and the respondent companies;

(2) The current accounts were governed by the contracts to operate them dated 15th November 1984 and 14th December 1986;

(3) The aforesaid contracts enabled the appellant Bank to charge compound interest at the Bank's usual rate as decided by settled authority;

(4) The appellant Bank was entitled to vary the interest rates and inform the respondent companies by notation on the periodic

statements as was done in the instant case; pursuant to the contracts to operate current accounts and the mortgage instruments;

(5) The mortgages were effective on the dates they were signed. To enforce the security however a demand was necessary, and a reasonable time accorded the companies before enforcement of the security. A proper demand was made on June 7, 1990, and a payment of $70,203,912.00 was accepted by the appellant in 1992 which was justified in law;

(6) It was permissible for the Bank to charge penal rates of interest on unauthorized overdrafts which did not amount to penalties. In the instant case the Sinclair companies did not allege and prove that the penal interest rates charged amounted to penalties;

(7) The taxed or agreed costs of discovery in the Court below must be paid by the respondent companies;

(8) The taxed or agreed costs both here and below must be paid by the respondent companies; and

(9) Liberty to apply.

HARRISON, J.A:

This is an appeal by the appellant (formerly Century National Bank Ltd.) from the judgment of Ellis, J in favour of the respondents in suits Nos. C.L. 1991/N88 and C.L. 1991/N89 (consolidated). Ellis, J ordered that;

> "**1.** The rights and liabilities of the plaintiffs and Century National Bank Limited under current accounts operated by the plaintiffs with Century National Bank Limited are governed exclusively by contracts to operate current account dated the 15th November, 1984, account dated the 4th December 1986, in respect of Negril Investment Company Limited and contract to operate current account dated 13th July, 1987, in respect of Negril Negril Holdings Limited.
>
> **2.** A declaration that upon a proper interpretation of the said contracts to operate current account Century National Bank Limited was not entitled in law to charge interest on any overdraft balance as the provisions as to interest are ambiguous and void for uncertainty.
>
> **3.** Century National Bank Limited is not entitled in law to charge the plaintiffs any interest on any overdraft balance over and above the minimum rate of interest payable during the entire period of the operation of the said current accounts from their opening until formal demand was made on the 26th June, 1991, under the mortgages.
>
> **4.** Century National Bank Limited was not entitled to charge the plaintiffs any interest payable on overdraft balances over and above the minimum rate of interest payable on overdraft balances up and until the 26th June 1991, when a formal demand was made on the plaintiff and the terms of the mortgage instruments.

5. Century National Bank Limited was not entitled to compound any such interest payable on any overdraft balances by the plaintiffs to Century National Bank Limited prior to 26th June 1991.

6. Alternatively Century National Bank Limited was not entitled in law to compound such interest, if any, payable by the plaintiffs to Century National Bank Limited on any overdraft balances owed by the plaintiffs to Century National Bank Limited up until the 26th June when a formal demand was made by Century National Bank Limited on the plaintiff and the terms and conditions of the mortgage instrument dated the 18th June 1987, came into effect.

7. The said contracts do not permit Century National Bank Limited to vary the rates of interest, if any, chargeable on any overdraft balances in the said current account.

8. Upon an interpretation of the terms and conditions of the respective mortgages.

a. they are not effective immediately upon their execution;

b. each was dependent upon a formal demand for its terms and conditions to be effective;

c. the mortgages did not merge with the contracts to open and operate the current accounts;

d. the mortgage dated 4th July 1985, was discharged in 1986 and ceased to be of any effect from then;

e. the mortgages dated 18th June 1987, and 10th August 1987, had no effect on the terms of the demand loans as shown on the Promissory Notes prior to June 26 1991.

9. The terms and conditions of the said mortgages became operable only when the formal demand was made by Century National Bank Limited upon the plaintiffs on the 26th June 1991.

10. Century National Bank Limited do render a proper account in relation to all accounts operated by the plaintiffs with Century National Bank Limited.

11. An order that Century National Bank Limited do pay to the plaintiff all such sums found due and owing to the plaintiffs, at the rate of interest of 52% from the 29th day of September 1992.

12. The plaintiff is entitled to a sum of $70,203,912.00.

13. Century National Bank Limited do pay to the plaintiffs the outstanding amount of $21,723 at the rate of 52% from the 1st day of April 1992, to 18th July 1997.

14 Documents of Title held by Century National Bank Limited are to be returned immediately.

15 There is no award of costs to Century National Bank Limited for costs thrown away on the appeal from the Order for Discovery.

16. Costs to the plaintiffs to be agreed or taxed.

The grounds of appeal are:

"1. That the learned trial judge erred in law when he held that Clause 11 of the contracts to operate current accounts did not entitle Century National Bank Limited to charge the plaintiff/respondent compound interest as the said clause was void for uncertainty.

2. That the learned trial judge erred in law when he concluded that Century National Bank Limited had not established a usage, custom or business practice

among bankers in Jamaica to charge compound interest on overdrafts.

3. That the learned trial judge was wrong in law when he concluded that clause 11 of the contracts to operate current accounts did not entitle Century National Bank Limited to vary interest rates.

4. That the learned trial judge was wrong in law when he concluded that Century National Bank Limited was not entitled to charge Penal Rates of Interest.

5. That the learned trial judge was wrong in law and in fact when he concluded that funds from the National Development Bank were made available to the plaintiff/respondent at Penal Rates of Interest.

6. That the learned trial judge was wrong in law and in fact when he concluded that Century National Bank Limited treated the plaintiff/respondent's accounts unreasonably.

7. That the learned trial judge was wrong in law when he concluded that the terms of the mortgages that existed between Century National Bank Limited and the plaintiff's/respondent were not operable without a proper demand.

8. That the learned trial judge was wrong when he concluded that the letter of 7th June 1990, written by Century National Bank Limited did not constitute a demand.

9. That the learned trial judge was wrong in law when he concluded that Century National Bank Limited was not entitled to vary the rates of Interest in the Promissory Notes given by the plaintiff/respondent.

10. That the learned trial judge erred in law when he concluded that Clause 13 of the contracts to operate current accounts did not amount to a Conclusive Evidence Clause.

> **11.** That the learned trial judge erred in law and in fact when he concluded that there was in Law a special relationship between Century National Bank Limited and the plaintiffs/respondent and that the latter relied on the former to their detriment.
>
> **12.** That the learned trial judge erred in law and in fact when he concluded that Century National Bank Limited discouraged the plaintiff/respondent from obtaining the services of qualified auditors.
>
> **13.** That the learned trial judge erred in concluding that Century National Bank Limited was not entitled to the costs in respect of the order for discoveries."

The facts are that in 1984 Negril Investment Co. Ltd. ("Negril Investment") the 2nd respondent company was incorporated by John Sinclair, who had returned from England to Jamaica in the said year. On his return he had met one Norman Bingham who, having convinced him to do so, he personally purchased 1.5 acres of land in Negril in the parish of Westmoreland, with the intention to enter into the tourism business. The shares in Negril Investment were owned by both Sinclair and Bingham, the former being the majority shareholder. The land was conveyed to the said company. A hotel was to be constructed thereon. In August 1984, Sinclair was introduced by Bingham and one Pat Garel to Donovan Crawford, who was then the managing director and owner of Girod Bank (Ja.) Ltd, which bank's name was later changed to Century National Bank ("CNB"). At this first meeting in Crawford's office, he and Sinclair spoke together for over two hours, acquainting each other of his successes in their respective fields. Crawford, appealing to Sinclair's now

perceived patriotic instinct, commented that the said bank was "... the first true black bank" in Jamaica. Sinclair, impressed, acknowledged that "... in thirty years it was the first he was seeing a black man in such a position ... " as Crawford's. A friendship developed between them. They exchanged visits to each other's homes. The unchallenged evidence of Sinclair was that he developed a close relationship with Crawford and reposed complete trust and confidence in him in respect of the operation of his bank account and other business matters. He trusted and depended on Crawford. On the evidence before him, Ellis, J could and did correctly find that Sinclair placed "great reliance" on Crawford and that the respondents "... relied on that assurance" by Crawford as to the well-being of their financial arrangements. As a consequence of Crawford's influential assurances, Sinclair opened an account with Girod Bank in his name and lodged to the account, U.S.$105,000.00 in 1984. In addition, Negril Investments, later opened an account with the said bank on November 15, 1984. Bingham, the minority shareholder did all the financial aspects, record-keeping and general paperwork for the company. Sinclair acknowledged to Crawford that he Sinclair was "... not a book person."

The first phase of the hotel Negril Gardens, consisting of 16 rooms, was completed in 1985 and went into operation in 1986. Because of its relatively small size as a hotel, it could not attract a professional manager. In addition the absence of a beach, together created a drawback. Consequently, Sinclair, in

1987, negotiated with the owner of land, opposite to Negril Gardens leading to a beach, to purchase it for the purpose of building more rooms.

On April 15, 1987, Bingham left the partnership and sold his shares in Negril Investment to Sinclair. Bingham had been the manager of the financial affairs of the company. Consequently, Crawford, when told of Bingham's departure, assured Sinclair:

> "I am already in it. What you don't know I will help you. I will do everything for you John, everything that Bingham used to do for you ..."

That assurance of involvement given by him to Sinclair manifested itself when, on Bingham's departure in 1987, Sinclair told Crawford that he Sinclair was in negotiation with one Paul Chen Young to buy the land opposite to Negril Gardens for the expansion of the hotel. In reaction, significantly, Crawford "... was in a temper ... raving ..." and said to Sinclair:

> "Why go to Chen Young ... you can do it on your own. Chen Young soon take you over. You don't need these people ...
>
> ... John the money you using is yours, you own a lot of assets, you do not need a partner and surely not Paul Chen Young. He is going to own you in a little while."

Crawford then went on to give the assurance of his intended involvement to help Sinclair. Further, Sinclair described Crawford's conduct then, in this way:

> "... he got down in his charm about his integrity and his trust and many more words what I don't even understand. He was very convincing and sound just what I need and what I got in England, the help in administration and so on."

Sinclair reminded Crawford that at his first meeting with him in 1984, he had told him that he Sinclair was "not a book person ..." that his success in England had been due to his performance, that the developers there had assisted him by doing much of the work that he should have done himself and that is why he needed someone like Bingham to assist him.

Crawford then gave him the said assurance of assistance, adding that he Crawford, had "... a big machinery here ... a young bank and had much time to do it (for him Sinclair) ..."

Having been so dissuaded to negotiate a partnership with Chen Young, Sinclair bought the said beach lands with his own money from an account of his in England. When told by Sinclair of the latter method of financing of the said transaction, Crawford was "... pleased and thankful."

In June 1987, Sinclair commenced the construction of phase II of the building of the hotel, on the beach side. Negril Negril Holdings Ltd. ("Negril Negril") was incorporated for that purpose; the title to the land was transferred to that company. CNB loaned to Negril Negril $1,000,000.00 to carry on the building project, in the interim because, Sinclair on behalf of Negril Negril had applied through CNB for a National Development Bank loan ("NDB"), which was expected.

The latter loan was subsequently approved for $2,600,000.00 and sent to CNB, for on-lending to the respondent. Loans by National Development Bank, a government agency, were available to entities such as the respondent companies

engaged in projects such as the construction of hotels, at a concessionary rate of interest of 17% through a financial institution such as the appellant. The NDB loan to the respondents through CNB to finance the second phase of the building project at the concessionary interest rate of 17%, totalled approximately $6,000,000.00. This building construction phase II project, was completed in November 1987, and officially opened in December 1987.

The friendly social relationship between Sinclair and Crawford continued. They got to know each other's family and exchanged visits between them.

In 1988, after the completion of the construction of the hotel and then in full operation, Crawford invited Sinclair to his home in Kingston and advised him to apply for a further NDB loan of $2,500,000.00. Not having any need for such moneys Sinclair asked what reason should he give for making such a loan request and Crawford replied:

> "... well John, this money is very cheap. The bigger men in Jamaica use this facility to gain high interest on it more than what they are paying back to NDB and (I) will see to it that ... (you) gain some benefit out of it too."

Sinclair consequently made the said application for the loan as directed by Crawford, giving as the reason for the loan "... cost overruns" on the hotel project, although this was not so. This is a demonstration of the implicit trust imposed by Sinclair in CNB through Crawford and the high level of influence of the latter on him Sinclair.

This friendly relationship between the two men was not without some personal benefit to Crawford. In 1987, Crawford got from Sinclair a Datsun Stanza motorcar, which he had for six months free of charge, at the end of which period he Crawford, bought it for $40,000.00 although it was then valued at $170,000.00. In 1988, Crawford borrowed a Mazda bus from Sinclair for three months, also without any payment. Sinclair at Crawford's request permitted CNB to utilize an area of the hotel on land side, the original hotel area, as a branch of the bank, without charge from 1988 until 1990. In addition the manager of the said branch and his wife, occupied a suite, in the hotel, on the beach side from 1988, free of charge, until "... the dispute that has brought this case arose."

In April or May 1990, Sinclair, physically tired from his hotel construction efforts, left Jamaica for a rest period of six weeks in England. He had discussed this with Crawford. After a period of 8-10 days in England, he received calls from his hotel, and others, that his cheques drawn on CNB were being dishonoured. He telephoned Crawford about this and got the reassurance from Crawford that he would see about it, because "... there must be a mistake." Having received further calls of a similar nature of complaint, Sinclair returned to Jamaica "about 15 days" after he had left. On his visit to Crawford, Sinclair was told that:

> "... it was just a misunderstanding and he himself had put everything right."

However, Sinclair found Crawford to be less than his former manner of being "warm and friendly." He was now formal and averted his gaze. Two days after

his return, Sinclair again went to Crawford and enquired from him his total indebtedness to CNB. Crawford wrote on a piece of paper, which he handed to Sinclair, the figure, $63,000,000.00. Sinclair admitted, that he swore on seeing this figure. He had been of the opinion that his indebtedness was then in the region of no more than $17,000,000.00.

On several occasions before the dispute arose in 1990, Mr. Aulous Madden, the auditor for CNB wrote to Sinclair requesting him to acknowledge his indebtedness to CNB, in respect of various stated amounts. On each occasion Sinclair declined and complained to Crawford who described the said letters as mistakes and requesting that they be sent to him. Sinclair complied. Additionally, Crawford consistently discouraged Sinclair to employ a qualified auditor and disagreed with Sinclair's use of Mr. Leymon Strachan, the principal in Messrs Strachan and Strachan, a firm of auditors. However, one Mr Condell was the auditor for the respondent companies in the beginning and thereafter Mr. Leymon Strachan. After the dispute arose, Sinclair engaged the services of Peat Marwick in September, 1990.

The respondents, Negril Negril Holdings and Negril Investment, operated several current accounts and entered into various financial transactions with CNB, as a direct result of the relationship that existed between Crawford, as the agent of the said bank and Sinclair, the majority shareholder in the said companies.

Negril Investments entered into:

(1) current account contract with the bank on November 15, 1984, opening Account No. 001300486. The account ran into overdraft on March 28, 1985, to the extent of $2,182.43 increasing by June 30, 1985 to $148,072.38. No overdraft facility existed. On July 4, 1985, a mortgage agreement was entered into by Negril Investments granting security to the Girod Bank to cover its indebtedness. The latter mortgage was discharged in 1986.

(2) current account contract with the bank on December 4, 1986, opening Account No. 001302051. This account was also operated in overdraft. No overdraft facility was ever in existence. On June 18, 1987, a mortgage agreement was also entered into between the company and the bank to provide security for the former's indebtedness.

Negril Holdings entered into a current account contract with the bank on July 13, 1987, opening Account No. 01382529. This account ran into overdraft on July 21, 1987, to the extent of $87,439.66 increasing to $1,899,868.94 by August 20, 1987. No overdraft facility then existed. The account fell into overdraft on various dates and was operated continuously in overdraft from October 27, 1987, until March 31, 1990. On June 27, 1988, an overdraft limit of $3,800,000.00 was established by CNB. On August 10, 1987, Negril Holdings granted to CNB a mortgage to secure its indebtedness to the said bank

.

Demand loans were made to Negril Investments on July 28, 1985, August 28, 1985 and December 12, 1985. Negril Negril Holdings also received demand loans on August 20, 1987, September 23 1987, November 19, 1987, October 26, 1987, March 15, 1988, and March 17, 1988. All these loans were evidenced by promissory notes of corresponding dates.

The respondents made varied payments to its accounts in reduction of its indebtedness created by overdraft, loans and various interest charges.

After the disclosure in 1990, of the indebtedness of the amount in excess of $63,000,000.00 due to CNB by the respondents, the latter on September 30, 1992, paid off the total amount claimed, albeit under protest. Consequently, the respondents filed writs herein thereafter seeking declarations and repayment of amounts wrongly debited to its accounts by the appellant Bank. As stated earlier, Ellis, J found in favour of the respondents.

The relationship between banker and customer is a contractual one: ***Joachimson v Swiss Bank Corp*** [1921] 3 KB 110. The customer owes a duty to his banker to draw his cheques on his current account in a manner not to facilitate fraud: (***London Joint Stock Bank Ltd v Macmillan et al*** [1918] A.C. 777). The duty of the banker is to honour and pay the cheques of the customer drawn on his current account provided that there is money in the account sufficient to pay such cheques. The bank will "pay by order."

If a cheque is drawn in excess of the amount in a current account, it is viewed as a request for a loan by the customer to his banker. If the cheque is honoured, the customer has borrowed money: (***Cuthbert v Roberts*** [1909] 2 Ch. 226). It becomes a debt. Of course the bank has the option to reject the cheque, thereby refusing the order to pay.

When a bank so honours and pays a cheque of a customer drawn on a current account in which there are insufficient funds to cover the said cheque, the bank is, in effect, extending overdraft facilities to the customer.

Overdraft facilities with a bank are created either expressly or by inference from the course of conduct in business. The learned author in Paget's Law of Banking, 11th Edition, said at page 167:

> "An overdraft is money lent: ' a payment by a bank under an arrangement by which the customer may overdraw is a lending by the bank to the customer of the money'. A banker is obliged to let his customer overdraw only if he has agreed to do so or such agreement can be inferred from a course of business; borrowing and lending are a matter of contract, express or implied." (Emphasis added)

An overdraft facility expressly granted, is usually in writing, stating the limit imposed on the facility and the overdraft interest payable.

Where no overdraft facilities have been authorized and the customer draws a cheque in excess of funds in his current account and the bank honours the cheque it is regarded as an unauthorized overdraft and attracts a rate of interest, to be paid by the customer, higher than the rate payable in the case of an agreed and authorized overdraft facility.

The rate of interest payable on an overdraft must be expressly communicated by the bank to the customer and in particular where that interest is sought to be compounded . This duty arises moreso, in circumstances where the overdraft is unauthorized and penal rates are likely to be charged. This

obligation is even more compelling in circumstances where there may exist between banker and customer, a fiduciary relationship.

This Court said of a fiduciary relationship, recently, in the case of ***National Commercial Bank v Hew et al*** SCCA 101/2000 delivered on December 21, 2001 (unreported), at page 13:

> "There are certain relationships which, because of their very nature, i.e. their fiduciary nature, a presumption of undue influence may arise. For example, where a relationship of parent and child, trustee and beneficiary, priest and penitent, or doctor and patient, to name a few, exists, the benefit of any transaction will be set aside, unless the party presumed to be exercising the influence shows that the other party received the benefit of independent advice."

Apart from these recognized categories where undue influence is presumed, it also arises in circumstances where between two persons, trust and confidence is reposed by one in another, to the latter's knowledge, to the extent that the latter exercises influence over the will of the former. Any transaction entered into between two such persons, will be scrupulously examined by a court, as to its circumstances, and the presumption will arise that such transaction was entered into due to undue influence, if it is shown to have been to the manifest disadvantage of the person whose will has been overborne. The onus would then be on he who is alleged to be exercising the undue influence to prove that he advised the other to obtain independent advice and that this was done before the transaction was entered into.

In **Lloyds Bank** *v* **Bundy** [1974] 3 All E.R. 757, the Court of Appeal set aside a charge and guarantee over a townhouse, signed by the appellant, an elderly farmer, to cover the overdraft indebtedness of a company owned by his son. The appellant trusted and relied on the manager of the bank. The latter was aware of that dependence, and failed to explain to the appellant fully, the difficulties involved in the son's company's accounts. The Court held that because of the relationship of trust and reliance between the appellant customer and the bank, a fiduciary duty existed in the bank, which was gaining a benefit from the transaction, to ensure that the appellant obtained independent advice. Alluding to the consequences of some transactions effected in circumstances of an inequality of bargaining power, Lord Denning, with reference to undue influence said, at page 764:

> "The third category is that of 'undue influence' usually so called. These are divided into two classes as stated by Cotton LJ in ***Allcard*** *v* ***Skinner***. The first are these where the stronger has been guilty of some fraud or wrongful act – expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford LC in ***Tate*** *v* ***Williamson:*** ((1866) 2 Ch. App.55 at p. 61):

> 'Wherever the persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed'."

and at page 765:

> " ... The relationship between the bank and the father was one of trust and confidence. The bank knew that the father relied on them implicitly to advise him about the transaction. The father trusted the bank. This gave the bank much influence on the father. Yet the bank failed in that trust. They allowed the father to charge the house to his ruin."

Commenting on the effect of the presumption of undue influence, Sir Eric Sachs, said, at page 768:

> " ... once the existence of a special relationship has been established, then any possible use of the relevant influence is, irrespective of the intentions of the persons possessing it, regarded in relation to the transaction under consideration as an abuse – unless and until the duty of fiduciary care has been shown to be fulfilled or the transaction is shown to be truly for the benefit of the person influenced."

In the earlier case of ***Allcard v Skinner*** (1887) 36 Ch. D. 145, it was held that a gift to the mother superior of a religious organization by one of its members was returnable due to the presumption of undue influence. The true nature of the presumption of undue influence was recognized as a

disproportionate exercise of power and influence by the stronger over the weaker individual, where a special relationship exists, and an advantage or benefit is derived by the dominant party. Equity will set aside such a benefit.

The necessity for proof of the receipt of an advantage or benefit by the party complained against, when one relies on undue influence was re-emphasized in ***National Westminster Bank v Morgan*** [1985] 1 All ER 821. The House of Lords allowed an appeal by a bank seeking to enforce a charge signed by a wife over the matrimonial home, to secure the mortgage financing of her husband's debt. She had claimed that there was a special relationship between the bank manager, the agent of the bank, and herself, raising the presumption of undue influence exerted on her by the bank and therefore not having received independent advice, the transaction should be set aside. The headnote reads inter alia, on page 821:

> "... a transaction could not be set aside on the grounds of undue influence unless it was shown that the transaction was to the manifest disadvantage of the person subjected to the dominating influence."

Lord Scarman, said at page 827:

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

and at page 829:

> "... a relationship of banker and customer may become one of which the banker acquires a

> dominating influence over the other. In **Poosathurai's** case the Board recognized that a sale at an undervalue could be a transaction which a court could set aside as unconscionable if it was shown or could be presumed to have been procured by the exercise of undue influence.
>
> Similarly, a relationship of banker and customer may become one in which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence."

In ***C.I.B.C. Mortgages v Pitt et al*** [1993] 4 All ER 433, the above principle was also followed.

In ***Royal Bank of Scotland v Etridge (No. 2) and other appeals*** [1998] 4 All E.R. 705, the Court of Appeal considered the principles which apply, in circumstances where a bank seeks to enforce a security by way of a charge over the matrimonial home, given by a wife who claims to have been induced by her husband's undue influence to enter into the transaction, and also seeks to rely on the fact that the said wife received independent legal advice. After detailing the clauses of undue influence, alluding to ***Allcard v Skinner*** (supra), Stewart-Smith, LJ said at page 712:

> "The equitable doctrine of undue influence, however, is not confined to cases of abuse of trust and confidence; it is also concerned to protect the vulnerable from exploitation. It is brought into play whenever one party has acted unconscionably in exploiting the power to direct the conduct of another which is derived from the relationship between them. This need not be a relationship of trust and confidence; it may be a relationship of ascendancy and dependency."

The contractual nature of the relationship between banker and customer, besides giving rise to the presumption of undue influence where a special relationship exists and the banker obtains an advantage in a subsequent transaction, may also create a liability in tort, contrary to the argument of counsel for the appellant in the instant case. Where such a customer obtains advice from his banker who is aware that his advice is being relied on, the banker has a duty to exercise reasonable care and skill in giving such advice, failing which he may be liable in negligence, being in breach of such a duty. In ***Headley Byrne v Heller & Partners*** [1963] 2 All ER 575, the respondent bank who gave inaccurate advice as to the credit worthiness of its customer, was held not to be negligent in respect of such advice, merely because of the disclaimer of responsibility on issuing the advice.

In ***Wood v Martins Bank Ltd et al*** [1958] 1 Q.B. 55, the manager of a bank agreed to, and advised its customer, the plaintiff, to make certain investments. A fiduciary relationship was found to exist between them. The advice was faulty. It was held that the bank was liable in negligence, because the manager had a duty to advise the customer with reasonable care and skill but failed to do so. Because it was to the benefit of the bank that the investments were made in its customer's companies by the plaintiff, the claim could also have been successfully pleaded alleging undue influence.

The rate of interest payable on an overdraft should be communicated to the customer, consequently, the contract to operate a current account should

accordingly stipulate the interest rates chargeable on such account, as well as its mode of computation. This is moreso required in circumstances where overdraft facilities are likely to be granted and utilized. It is desirable that the operative rate of interest be stated precisely and clearly and not be obscure and ambiguous. Alternatively, the rate of interest must be capable of being ascertained, either from the terms of the contract, from the course of dealings between the parties or from the practice among banks. Article 11 of the contract to operate a current account reads:

> **"11.** In the event of any account of the customer running into overdraft, (including those accounts in foreign currency) the bank is hereby authorized without any limitation, to transfer the balance of any other account or deposit of the customer, to cover the overdraft in the account, the customer hereby authorizes the bank to charge herein, and hereby agrees to pay, in addition to other charges provided in this agreement, interest on the overdraft balance (at the bank's usual rate of interest on overdrafts) until the same is fully satisfied. In the case of an account in foreign currency, the bank will make the conversion at the official rate of exchange existing on the date of the transaction, and such allocation will be made by the bank without prior notice to the customer. It is clearly understood that the foregoing does not give the customer any right or in any way authorizes him to overdraw any current account, even if he has another account in his own name in the same with a credit balance and sufficient funds to cover the overdraft."

The phrase "... at the Bank's usual rate of interest on overdrafts" is subject to several interpretations. The precise meaning attributable to that phrase, if ascertainable, would make the clause binding and workable. In order to

determine the meaning and effect of the phrase "... at the bank's usual rate of interest on overdraft ..." the case of ***Scammell v Ouston*** [1941] A.C. 251 is helpful. In that case their Lordships laid down that the phrase "on hire-purchase terms" in an agreement for the payment of the balance of the price of a lorry to be acquired, with an old lorry in part exchange, was too vague, with the result that there was no concluded contract. *Viscount Simon, L.C.,* commenting that the phrase was too vague to give a definite meaning, at page 254, said:

> "That is to say, it requires further agreement to be reached between the parties before there would be a complete consensus ad idem."

Viscount Maugham, after referring to the case of ***Hillas and Co. Ltd. v Arcos Ltd*** (1932) All ER 494 at page 255, said:

> "In order to constitute a valid contract, the parties must express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that, unless this can be done, it would be impossible to hold that the contracting parties had the same intention. In other words, the consensus ad idem would be a matter of mere conjecture."

and at page 256:

> "... a hire-purchase agreement may assume many forms, and some of the variations in those forms are of the most important character – e.g., those which relate to termination of the agreement, warranty of fitness, duties as to repair, interest, and so forth."

Lord Wright, in holding that the language was "... so obscure and so incapable of a definite or precise meaning ...", on page 268, continued:

> "It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to

> enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain. In my opinion that requirement was not satisfied in this case."

In ***Hillas v Arcos*** (supra) their Lordships held that an agreement to buy "...22,000 standards of soffwood goods of fair speculation over the season 1930..." with a further option, read together and considering all the evidence created an enforceable contract. Lord Tomlin, at page 499, said:

> "The governing principles of construction recognised by the law are applicable to every document ... and the problem for a court of construction must always be so to balance matters that, without violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

Lord Wright, at page 504 reiterating the maxim, id certum est quod certum reddi potest, cautioned:

> "... even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted."

In ***Brown v Gould*** [1972] 1 Ch. 53, the Court of Appeal held as valid and enforceable and not void for uncertainty, an option to renew a lease, " ... at a rent to be fixed ... having regard to the market value at the time of exercising the option ... taking into account ... any increased value of such premises ...," because there was a recognized formula stated in the lease, which "... did not

embody such uncertainty of concept as to make it void and unascertainable by anyone genuinely seeking its meaning."

The rationale conveyed by these cases is, that whenever a clause of a contract attracts several interpretations and there is no formula nor machinery therein nor any factor to be construed from the conduct of the parties or from practice, to determine which was intended, the said clause will be held by the Court to have been vague uncertain and unenforceable.

Despite the fact that the term of the contract may be so vague and so uncertain as to make it void and unenforceable, it was argued in the instant case that the usage, custom and practice among bankers in Jamaica would permit the charging of compound interest on overdrafts. Custom, which is referable to conduct from time immemorial is not relevant in the instant case. However, if from the evidence one can recognize a particular course of conduct adopted in a business or trade, which, is so notorious, certain and within the law, a usage or business practice may be taken to have been established. Once such a business practice is established, it would be read along with the other terms of the contract and thereby authorize the charging of compound interest on the overdraft. This would qualify as an exception to the rule that hearsay evidence may not be led to vary the terms of a written document.

Furthermore, the appellant in the instant case relies on article 13 of the contract to operate a current account, as its authority to so charge compound interest on the overdraft, and on the basis of the acquiescence of the

respondents. The appellant argues that article 13, is a conclusive evidence clause, thereby estopping the respondents from denying that the appellant had the right to so charge such interest. Article 13 reads:

> "The customer hereby agrees to notify the bank in writing of any change of his address. The customer further agrees to notify the bank in writing of any objection or claim which he may have with regard to the periodic statement of account supplied by the bank to the customer or to any communication sent to him by the bank relative to the bank's internal or external audits or inspection. If the customer does not communicate his objections to the bank as aforesaid within ten days of the date of any monetary or other statement then it shall be understood that the customer shall have accepted the accuracy of the notified balance and the bank shall be released from any responsibility or obligation for any claim arising from any inaccuracy which should have been brought to its attention by the customer. Bank statements and cancelled cheques will be sent monthly by ordinary mail to the customer's address appearing on the bank's records on such dates as the bank shall decide from time to time."

The nature and effect of the conclusive evidence clause was considered in the case of ***Tai Hing Cotton Mill Ltd v Lui Chang Hing Bank Ltd.*** [1986] A.C. 80. The facts shortly, were that an employee of the customer forged the customer's cheques resulting in the customer's accounts being debited and notification of the debits made on the monthly statements. The customer challenged the right of the bank to debit the accounts. The bank relying on the conclusive evidence clause succeeded at first instance and before the Court of Appeal. Their Lordships of the Judicial Committee of the Privy Council held, allowing the appeal, that whereas the customer had a duty to draw his cheques

in a manner not to facilitate fraud, he had no duty to prevent fraud by checking his monthly statements, and that the clauses did not amount to conclusive evidence clauses being insufficient to be deemed clear and unambiguous or to impress on the customer his obligation and the sanction for his failure to notify the bank. The principles in the ***McMillan and Greenwood*** cases were restated.

The clauses in the ***Tai Hing*** case, each only indicated that if the customer failed to notify the bank of any error in the monthly statements, within a stated period, the statements would be deemed to have been correct. In the instant case, article 13, arguably, could be construed as sufficiently imposing on the customer the obligation to examine his statements and advise the Bank. The consequences attendant on failing to do so, was to his detriment, and was to the Bank's relief from responsibility. However, if the Bank has been guilty of a fundamental breach of the agreement between them, or of any wrongdoing within a fiduciary relationship, the clause will not avail the Bank to create an estoppel against the customer.

Acquiescence, for the above latter reasons, cannot be relied on by the Bank, in the alternative. A person who, has a right, and knowingly stands by and allows his right to be infringed by another, in circumstances where had he complained, the person committing the act would have refrained from doing so, cannot properly complain of such infringement and will be taken to have acquiesced in the act. Consequently, where a customer lacks the knowledge of

the existence of his right and that it is being infringed by a bank, the latter cannot rely on the principle of acquiescence to enforce contractual rights claimed in a contract to operate a current account, namely, to compound interest, vary the rate of interest and to charge penal rates of interest.

If however, a bank is unable, for any reason, to pray in aid the said contract to enforce the abovementioned charges, as the appellant in the instant case may not, in my view, it may in some instances, rely on the terms of a mortgage to do so.

Mortgages over land are at times granted by a customer as security for its indebtedness to a bank. The mortgage deed would contain certain specific terms governing repayment of the said indebtedness. It is not unusual for the mortgage deed signed by the parties to contain the agreed terms governing the repayment of the said indebtedness, including, demand loans, promissory notes, current accounts and overdrafts, existing or to be created in the future, and the mode and rate of interest payable thereon. In ***Youreil v Hibernian Bank Ltd*** [1918] A.C. 373, the customer of a bank mortgaged his lands:

> "... to secure the balance for the time being owing on ... of overdraft, bills of exchange, promissory notes, credits advances, interest commission, discount and premiums on policies of insurance ... to bear interest computed from day to day at the current bank rate up to 6 per cent ..."

In an action to realize its security, the bank claimed that the current account should be regarded as closed as from the date that it appointed a receiver of the

mortgaged lands. It was held in the House of Lords inter alia, at page 373 (the headnote), that:

> "...the current account ... continued as an operative account to which the provisions of the mortgage deed applied." (Emphasis added)

Such a mortgage, being a security, is operational once it is created, and alike any ordinary mortgage is not in abeyance as such until a demand is made. The purpose of a demand is notification that the mortgagee bank seeks to realize its security usually because of default of payment of the principal now due, with interest. The author of Paget's Law of Banking, 11th Edition, stated, at page 180:

> "... the making of a valid demand is normally a pre-condition to the right to realize security."

The authors in Sheldon's Practice and Law of Banking, 10th Edition, stated, at page 320:

> "In all cases, even when the document of charge gives him a power to realize without reference to the borrower or the person who has deposited the security, the banker before selling the security should demand repayment of the loan and give reasonable notice that he is going to sell."

See also ***Lloyds Bank Ltd v Margolis et al*** [1954] 1 All E.R. 734. The mortgage deed may therefore be read along with other contractual documents, namely, the contract to operate a current account and also the loan agreement, in order to determine the precise contractual rights and obligations between the parties.

Ellis, J was therefore in error to hold that the mortgages were not operational until demand was made in June 1991.

In the instant case, the covenant by the mortgagor/customer common to each mortgage document reads at para. 1(a)(i) of the mortgage dated June 18, 1987:

> "**(a)** To pay to the Bank on Demand -
>
> (i) All such sums of money as are now or shall from time to time hereafter become owing to the bank from the mortgagor whether in respect of overdrafts, monies advanced or paid to or for the use of the mortgagor or charges incurred on his account or in respect of promissory notes and other negotiable instruments drawn accepted or endorsed by or on behalf of the mortgagor and discounted or paid or held by the bank either at the mortgagor's request or in the course of business or otherwise and all moneys which the mortgagor shall become liable to pay to the bank under any guarantee, indemnity undertaking or agreement or in any manner or on any account (including all sums which have become immediately due and payable under the terms of any installment loan) whatsoever and whether any such monies shall be paid to or incurred by or on behalf of the mortgagor alone or jointly with any other person firm or company and whether as principal or surety together with interest at the rate per annum stated as the original rate of interest in item 3 of the said schedule with such rests as are stated in item 4 of the said schedule as rests at which interest payable or at such other times as the bank shall from time to time specify or at such other rate or rates of interest as the bank shall from time to time charge which interest may be computed as simple interest to compound interest as the bank shall require together also with all usual and accustomed bank charges."

The clause, by its wording, if effective, could give to the bank the power to;

(a) charge compound interest

(b) vary the rate of interest, or

(c) impose other bank charges;

either in respect of overdrafts, loans, promissory notes or other negotiable instruments.

Consequently, in my view, a consideration of the principle of merger is not appropriate for the determination of the issues arising in this case.

A promissory note is a negotiable instrument promising to pay money, consequent on a contractual obligation resting on the promissor. Section 83(1) of the Bills of Exchange Act defines a promissory note as:

> "83-(1) ... an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer."

Because the promissory note is indicative of an existing consequential contract, it will not contain all the terms of the said contract, for example, a contract to repay a loan. The promissory note may or may not contain a statement of the rate of interest payable. In either event, it must appear on its face, a promise to pay a sum certain. This is especially so for the benefit of third parties, to whom the said note may be negotiated. In the instant case the promissory notes signed on behalf of the respondent Negril Negril Holdings bore an interest rate of 17% per annum, whereas those in respect of Negril Investment bore an interest rate of 33% and in some cases 34% per annum. The respective mortgages

granted by the said respondents anticipated the possibility of the coming into existence of promissory notes, and contained clauses authorizing variation of the rate of interest of such notes. As between the bank and its customer as mortgagee and mortgagor, the power existed to vary the rate of interest in respect of the demand loans, and by extension the corresponding promissory notes which promised repayment of the said loans. However, being a negotiable instrument, in its own right, a third party who obtained the said note for value, would not be affected by a fluctuating interest rate, due to such variation.

Generally, the rate of interest chargeable by a bank on any loan transaction, must be made known to its customer, in clear and specific terms. A borrower from a bank must expect to pay interest on a loan, at a rate agreed upon. Because a cheque drawn on a current account which has insufficient funds to cover the cheque, is a request for a loan, the rate of interest payable in the event such circumstances arise, must specifically be agreed and certain. The author of ***Payment Obligations in Commercial and Financial Transactions*** by R.M. Goode, with reference to loans, said, at page 81:

> "Prima facie only simple interest is payable, the debtor is liable for compound interest only where there is an express or implied term to that effect. Again, such term may be implied from custom or course of dealing."

Further, the authors of ***Modern Banking Law 2nd Edition*** by Ellinger and Lomnicka, discussing the practice of bankers in the U.K. in respect of overdrafts and the interest chargeable thereon said, at page 578:

> "Where a customer who maintains a current account with his bank requires financial accommodation, the branch manager considers the possibility of granting him an overdraft. In such a facility, the bank authorizes the customer to draw cheques on his account up to a ceiling which may not be exceeded at any one time.
>
> As a matter of practice, the letter in which the bank advises the granting of the overdraft to the customer specifies not only the ceiling but also the period for which the overdraft is available. When the accrued interest is debited to the customer's account, it is capitalized. It becomes part of the outstanding balance for future calculations. The rate of interest charged on overdrafts varies from customer to customer, and from transaction to transaction. The lowest rate at which accommodation is granted to particularly sound customers in respect of low risk ventures, is known as the prime rate."

In Jamaica in practice, on current accounts, a particular rate of interest is imposed on the customer who has an agreed overdraft facility. A higher rate of interest is charged where a cheque is drawn by a customer who has no overdraft facility or has, but exceeds his agreed ceiling. These are described as penal rates or penalty charges. A customer who has no overdraft facility and who overdraws and has his cheque honoured is regarded as having a temporary or unauthorized overdraft.

Seeing that the drawing of a cheque on an overdrawn current account is a request for a loan, that act cannot in law be classified as a breach of contract. When a banker, as a consequence, charges a higher rate of interest because the customer has no overdraft facilities, or exceeds the agreed facilities, the higher rate of interest, though described as a penal rate, does not properly qualify as a

penalty consequent on a breach of contract to attract the test as laid down in ***Dunlop Preumatic Tyre Co. v New Garage and Motor Co. Ltd.*** [1915] AC 79. That test is formulated in order to determine whether the charge is truly a penalty or a genuine pre-estimate of damages.

In the instant case, the appellant argued that the learned trial judge was wrong to find that clause 11 was void for uncertainty and therefore the appellant was not entitled to charge the respondents compound interest. The clause "at the bank's usual rate of interest on overdrafts," undoubtedly, attracts several meanings. It is quite unclear which particular meaning could, with certainty be applicable to the parties. Nor can such a particular meaning be ascertainable by reference to any recognized formula or machinery nor from the dealings of the parties. (see ***Brown v Gould,*** supra) On a review of the evidence the practice of charging compound interest varies among banks in Jamaica. The appellant pleaded, in its Further Amended Defence dated October 9, 1995, at page 104 of volume 1 in paragraph 25(a):

> "In the alternative, the defendant states that the contract to operate current account was subject to an implied term that the bank was entitled to charge interest on unauthorized overdrafts at the rates of interest it was liable to pay the Bank of Jamaica in the event that it was in breach of the requirements of the Banking Act recited above at paragraph 25. The defendant says that the charging of such interest was in accordance with the recognized usage, custom and practice of Bankers in Jamaica."

The evidence given before Ellis, J by representatives of the six principal commercial banks operating in Jamaica namely; National Commercial Bank,

Citibank, Eagle Commercial Bank, Bank of Nova Scotia, Trafalgar Commercial Bank, Mutual Security Bank and (Workers' Bank), reveals that all six banks employ the use of documentary agreements with their customers to authorize them to charge compound interest on overdrafts.

That evidence therefore, is support to refute the contention of the appellant that a usage and business practice exists among bankers in Jamaica to charge compound interest on overdrafts. The power to do so is based on a contractual right.

It is my view that Ellis, J was correct to find that clause 11 of the contract to operate current account, because of its ambiguity and vagueness, was void for uncertainty. Furthermore, there was no formula in existence from which a court could ascertain with certainty, what was "the bank's usual rate of interest on overdrafts," to be applied to the respondents' accounts. Accordingly I agree with the finding that clause 11 is void and unenforceable.

In addition to the charging of compound interest on overdrafts, the appellant instituted penal interest rates, described variously as default, penalty or excess rates, in circumstances where the respondents' current accounts;

(i) exceeded the overdraft limit imposed or

(ii) operated in overdraft where no such agreement was agreed, an un-authorised overdraft.

In either case the penal interest rate was debited to the respondents' accounts creating two rates of interest being charged, namely, the overdraft rate and the

penal rate, both compounded. The penal interest rate ranged from 35% to 52%.

The respondent Negril Investments opened its current accounts Nos: 001300486 and 001302051, on November 15, 1984, and December 4 1986, respectively, and operated them in overdraft, without any facility being agreed, up to the 7th day of June 1990, when the appellant demanded payment. The accounts were therefore treated by the appellant as being operated as un-authorised overdrafts by the respondent and attracted penal rates from their inception. The respondents' witness, Maurice Keane-Dawes, a former credit manager employed to the appellant said, at Volume 10, page 152:

> "There was no limit and therefore the entire overdraft would have attracted the penalty rate."

The respondent Negril Negril opened its current account No: 001302051 on December 4, 1986, and operated it in overdraft, without any overdraft facility being agreed. Penal rates were therefore debited to the respondent's account from its inception as an un-authorised overdraft. On June 27, 1986, an overdraft limit of $3,800,000.00 was established.

In the case of all three current accounts, the respondents' cheques were received and honoured by the appellant consistently, without comment or reservation. It defies reason to maintain that, although the respondents' overdrawn cheques were systematically honoured for periods of approximately six years and four years respectively, in respect of its current accounts with the appellant, the said overdrafts were deemed to have been un-authorised. The

attitude and pattern of conduct on the part of the appellant, in honouring the respondents' cheques which were overdrawn, qualify as an acceptance of a valid overdraft facility in operation. I refer to the definition of an overdraft by the author of ***Paget's Law of Banking*** (supra), on page 167:

> " A banker is obliged to let his customer overdraw only if he has agreed to do so or such agreement can be inferred from a course of business."
> (Emphasis added)

Maurice Keane-Dawes said at Volume 10 page 135:

> "If a customer presents a cheque for payment on his account and does not have adequate funds to cover that cheque the bank has the option to return that cheque. Once the bank agrees to pay that cheque it constitutes an authorization for creation of that overdraft." (Emphasis added)

Consequently, on the basis of the general law of banking, as well as the business practice of the appellant, as revealed in the unchallenged evidence of the witness Keane-Dawes, the presentation of the respondents' cheques and their honouring by the appellant was a "creation" of overdraft facility. The imposition of penal rate by the appellant, in such circumstances was contradictory and unjust. In my view, the said current accounts were operated with unlimited overdraft facilities and accepted by the appellant's conduct as such. No penal rates were therefore chargeable, on that basis. The overdraft ceiling of $3,800,000.00 sought to be imposed on the respondent Negril Negril on June 27, 1988, in respect of its account No: 001302051, was ineffective. According to the said witness Maurice Keane-Dawes, it, the said ceiling was never communicated

to the said respondents. The latter account was accordingly, in effect, operable with an unlimited overdraft ceiling.

In much the same spirit that an overdraft ceiling was sought to be imposed unilaterally at a late stage, in 1988, Crawford on behalf of the appellant, should have advised Sinclair on behalf of the respondents, from the inception, because of their relationship, to seek overdraft authorisation formally.

The witness Maurice Keane-Dawes, gave evidence of the inequitable treatment of the respondents' account by the appellant, which led him to write an internal memorandum of his Keane-Dawes' concern at such treatment. He said at Volume 10, page 144:

> "My concern at the substantial penalty interest charges being incurred by the customer on the overdraft borrowings; in particular I had observed from the current account statements that the customer had incurred overdraft interest charges close to $240,000.00 for the month of February the month previous to when I did this memo. I expected that the overdraft charge of March would have been higher based on the level of activity in the account. In my view, I considered the level of interest charges which were being incurred by the customer to be unjustified based on the fact that firstly the customer was pursuing economic activity which were in the national interest and as well the financing which was obtained through the NDB was geared towards allowing projects of this nature the benefit of the best or close to the best interest rates that the bank could offer. In addition the bank, that is Century National, derived certain benefits from the operation of these accounts. (1) Firstly in terms of its significant contribution to interest revenues of the bank given the size of the loan, and also the accounts constituted a steady source of foreign exchange inflows for the bank. In addition to these benefits the bank faces

> minimal risk of loss from the operations of the accounts because the loan exposure was adequately protected by the value of the security. I felt therefore, that the waiving of the commitment fee would at least be an indication of a willingness on the part of the bank to address what I considered to be an anomaly in the sense that the bank's largest borrowing connection was being charged at the bank's worst interest rate.
>
> Penalty interest rate represents the highest rate charged by the bank on advances."

Consequently, because the appellant consistently honoured the respondents' cheques whenever presented, it is my view that no penalty rates were therefore payable on any of the current accounts of the respondents. The "course of business" dictated that the inference should be drawn that the overdrafts were authorized. The charging of such penalty rates for the period 1985 to 1990, was therefore invalid. Such penalty rates charged were clearly beneficial to the appellant to the great disadvantage of the respondents.

It is significant that apart from the frequently recurring notation "overdraft fee," none of the monthly statements of the various amounts sent by the appellant to the respondents indicate that penal fees were being charged.

The contention of the appellant that the justification to charge penalty rates on unauthorized overdrafts, was based on penalty imposed by the Bank of Jamaica (BOJ) on the appellant if the latter depleted its cash reserves or reduced its liquidity ratio below the level imposed by the said central bank, is without merit. The evidence reveals that during the relevant period CNB's account with BOJ never went into overdraft. In any event this was unlikely to have occurred

due to the practice of inter-bank borrowings employed daily, to correct any such shortfall.

The personal friendship between Crawford and Sinclair which commenced in August of 1984, continued through to November 15, 1984, when Negril Investments opened its first account No. 001300486 with the appellant, and beyond. This was due to the trust and confidence reposed in Crawford, the agent of the appellant, by Sinclair. When the mortgage agreement was entered into between the appellant and the respondent on July 4, 1985, the current account 001300486 had already been operated in overdraft since March 28, 1985, incurring overdraft interest compounded, plus penalty interest rates, because the account was then erroneously treated by the appellant as an un-authorised overdraft. In addition, when the said respondent Negril Investments entered into its mortgage agreement on June 18, 1987, the current account No. 001302051, had been operated in overdraft since its inception on December 4, 1986, incurring the high interest rates inclusive of penalty interest rates. This account was also treated erroneously as operating as an un-authorised overdraft.

Equally, in respect of the respondent Negril Negril, when the mortgage agreement was entered into on August 10, 1987, between the parties, current account No. 01302529 had been in overdraft since July 21, 1987, incurring the high interest rates inclusive of penalty interest rates.

In the case of each account therefore, the mortgages were created at the request of the appellant, as authority to validate an existing practice of imposing penalty rates in circumstances where the appellant could not properly do so.

On any view of the evidence, the said penalty rates were invalidly charged by the appellant to its benefit and to the manifest disadvantage of the respondents for the period from March 1985 to June 1990. Consequently, because of the trust and confidence reposed in Crawford as agent for the appellant, by Sinclair on behalf of the respondents and the manifest disadvantage suffered by the respondents to the undoubted financial benefit of the appellant, the presumption of undue influence arose. The onus was then on the appellant to rebut that presumption (***Allcard*** *v* ***Skinner*** (supra)). No evidence was led by the appellant in that regard. The appellant failed to advise the respondents to obtain independent legal advice prior to entering into the said mortgage agreements. The presence of the respondents' employees, however qualified, would not suffice to offset the dominating influence of Crawford on the respondents' agent, Sinclair, nor absolve Crawford of his duty to so advise the respondents. Crawford gave no evidence. The presumption of undue influence which arose remained unchallenged and undisplaced.

A common feature of the mortgage agreement of August 6, 1987, and August 10, 1987, was the clause by which the mortgagor covenanted:

> "To pay to the bank on demand;
>
> (i) All such sums of money as are now or shall from time to time hereafter become owing to

> the bank from the mortgagor whether in respect of overdraft, monies advanced or paid to or for the use of the mortgagor or charges incurred on his account or in respect of promissory notes and other negotiable instruments and whether as principal or surety together with interest at the rate per annum stated as the original rate of interest in Item 3 of the said Schedule with such rests as are stated in Item 4 of the said Schedule as rests at which interest payable or at such other times as the bank shall from time to time specify or at such other rate or rates of interest as the bank shall from time to time charge which interest may be computed as simple interest to compound interest as with all usual and accustomed Bank Charges."

The mortgage agreement dated July 4, 1985, between the parties contained a covenant to the same effect. This mortgage was discharged in 1986 and therefore is not an issue in this case.

The appellant relies on these mortgages, which, read along with the contracts to operate current accounts, could justify the charging of compound interest with monthly rests and the imposition of penalty interest rates.

In my view, because the mortgage transactions of 1987 were tainted with the presumption of the undue influence of the appellant, and which was not rebutted, the said mortgages must be set aside. In ***National Westminster Bank*** v ***Morgan*** (supra) Lord Scarman said at page 827:

> "I know of no reported authority where the transaction set aside was not to the manifest disadvantage of the person influenced."

In ***C.I.B.C. Mortgages*** v ***Pitt*** (supra) the appeal of a wife to the House of Lords to set aside a mortgage charge was dismissed on the ground that no undue influence on the part of the respondent bank was proven, although she was under such influence by her husband who was not an agent of the said bank. Lord Browne-Wilkinson at page 439, said:

> "The effect of the wrongdoer's conduct is to prevent the wronged party from bringing a free will and properly informed mind to bear on the proposed transaction which accordingly must be set aside in equity as a matter of justice."

In ***Commercial Bank of Australia Ltd*** v ***Amadio*** (1983) 151 C.L.R. 447, the High Court of Australia found that a duty existed on the part of the appellant bank to disclose to the respondents material details of the state of affairs of transactions of their son's company, whose overdraft indebtedness which was in a poor state, they provided security for, by executing a mortgage charge to the said bank. The bank benefitted not only from the business that the son's company brought to it, but also through a company which was engaged in building houses jointly with the son's company. The appellate court recognized that a special relationship existed between the respondent's son and the appellant bank to the extent that its manager had a duty to disclose the true circumstance to the respondents before they entered into the transaction. In dismissing the appeal, the court based its decision on the unconscionable dealing of the bank with the respondents. Mason, J maintained that unconscionable

conduct "bears some resemblance to the doctrine of undue influence" but recognizing that there is a difference, he said, at page 461:

> "In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.
>
> There is no reason for thinking that the two remedies are mutually exclusive in the sense that only one of them is available in a particular situation to the exclusion of the other. Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest."

By this observation, he virtually concluded that the two principles were equated to each other. Deane, J said at page 474:

> "The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related."

and at page 480:

> "Relief against unconscionable dealing is a purely equitable remedy. The concept underlying the jurisdiction to grant the relief is that equity intervenes to prevent the stronger party to an unconscionable dealing acting against equity and good conscience by attempting to enforce, or retain the benefit of, that dealing. Equity will not, however, restrain a defendant from asserting a claim save to the extent that it would be unconscionable for him to do so."

The will of the respondents through its principal Sinclair, was overborne by Crawford the agent of the appellant. This was sufficiently manifested on a personal basis by the acts of gentle benevolence on Sinclair's part, by the said sale of the motor vehicle to Crawford at an undervalue, the loan of the motor vehicle without charge and the initial rent free use of the respondents' premises by the appellant in the conduct of its banking business. The duty to disclose the inequity of the overdraft transactions and mortgages and the advice given by Crawford after the departure of Bingham, is conduct of an unconscionable nature and also behaviour amounting to a breach of duty to the respondents which could arguably amount to negligence in the appellant.

The respondents had each alleged in their respective statement of claim a special relationship between representatives of the parties, discussions with and advice given by Crawford the agent of the appellant, the implicit trust and confidence reposed by Sinclair in the latter and the resulting indebtedness of the respondents. In the statement of claim in which the respondent Negril Negril was the plaintiff, it reads:

> "**6** At the time when the plaintiff was incorporated, Negril Investments Limited through its agent Sinclair developed a special relationship with the defendant which acted through its agent Crawford. This relationship involved to the knowledge of both parties that the plaintiff placed great reliance on and confidence in the ability of the defendant to conduct the financial affairs of Negril Holdings Limited and the said company had already established current accounts and demand loan accounts with the defendant.

7. The plaintiff, acting through Sinclair, and prior to the second phase of Negril Gardens Hotel project, had extensive discussions with the defendant through its agent Crawford. The defendant in the course of these discussions represented that in relation to the documentation needed to conduct its operations and to operate its accounts, and advised the plaintiff that it would not need any partners to implement the second phase of the project.

8 The plaintiff, acting through Sinclair, established a similar relationship with the defendant to that which Negril Investments Limited had with the defendant in relation to banking and financial affairs and itself to the knowledge of the defendant had implicit trust and confidence in the ability of the defendant to operate its accounts in a manner that was in the interest of the plaintiff as the customer of the defendant."

"**31** The plaintiff refers to the special relationship which was encouraged and actively developed by Crawford representing the defendant with Sinclair representing the plaintiff.

32. The plaintiff further states, it developed complete confidence and trust in the defendant and accepted and relied on its advice and that as a direct consequence of the special relationship a system was instituted by which the plaintiff would routinely send cash from Negril to be lodged in its account in Kingston and arranged that the defendant would prepare lodgment advice slips and make lodgments on behalf of the plaintiff from time to time.

33. The plaintiff through Sinclair, enquired of the defendant of the state of its indebtedness and on several occasions Crawford represented to the plaintiff that its financial position was in good stead, that its debts to the defendant were being serviced and that it was properly performing its obligation under the various contracts.

> **34.** The plaintiff accepted and relied on its advice as to the alleged healthy state of the plaintiff's account until in or about April 1990, when without any prior indication to that effect, the defendant informed the plaintiff that his accounts were badly in arrears."

The averments in the statement of claim of the respondent Negril Investments were similar. Such allegations of the respondents are in substance sufficiently particularized that if proven, could give rise both to liability in equity based on the presumption of undue influence and in negligence. The assumption of professional services by the appellant supplied to the respondents, on which services the latter placed reliance, imposed a duty on the appellant to exercise reasonable care and skill in such performance, and being in breach of such duty the appellant could be liable in negligence to damages despite the fact that the parties were in contractual relationship ***(Hedley Byrne*** v ***Heller and Partners*** (supra) following ***Nocton v Ashburton*** [1914] A.C. 932).

A court can grant relief based on a cause of action that arises on the pleadings, although the particular cause of action is not specifically named. In ***Drane v Evangelou et al*** [1978] 2 All ER 437, the plaintiff/respondent who was evicted by the appellant, landlord, from his flat where he was a tenant, and his belongings placed outside, sued for breach of quiet enjoyment and recovered damages. The trial judge, in addition, awarded exemplary damages on the ground that although the plaintiff had not pleaded the tort of trespass, the facts were sufficient to base such a claim. The appeal was dismissed by the Court of Appeal. The headnote reads, inter alia, on page 438:

> "The judge was entitled of his own motion to raise the issue of trespass even though it had not been pleaded, because the facts were sufficient to warrant a claim for trespass and as they were set out in the particulars of claim the defendant could not claim that he had been taken by surprise when the judge raised the issue."

Lord Denning MR. at page 440 stated:

> "The tenant in the particulars of claim gave details saying that three men broke the door, removed the tenant's belongings, bolted the door from the inside; and so forth. Those facts were clearly sufficient to warrant a claim for trespass.
>
> > As we said in ***Re Vandervells Trusts***. [1974] 3 All E. R. 205 at 213).
> >
> > 'It is sufficient for the pleader to state material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit'."

In ***Nocton v Lord Ashburton*** [1914] A.C. 932, a mortgagee sued his solicitor claiming to be indemnified against the loss he sustained by being improperly advised and induced by the said solicitor to release a part of his mortgage security thereby making such security insufficient. The statement of claim alleged fraud by the defendant acting as his confidential solicitor, giving the advice mala fide and in the defendant's own interest. In the House of Lords, it was held that fraud was indeed not proved, but that the claim could be upheld on the equitable basis revealed in the pleading. The headnote, reads, inter alia, at page 932:

> "... the plaintiff was not precluded by the form of his pleadings from claiming relief on the footing of breach of duty arising from fiduciary relationship and that he was entitled to relief on that footing."

Viscount Haldane, L. C. said, at page 957:

> "I think that Neville J. was wrong in treating this case as if it were based in substance only on deceit and intention to cheat. No doubt a good deal was said both in argument and in cross-examination which, if established, would have afforded proof of actual fraud. But that was no reason for treating the action as launched wholly on this foundation. It was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damage for negligence."

and at page 958:

> "The proper mode of giving relief might have been to order Mr. Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did."

Lord Shaw said, at page 972:

> "... once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given not fraudulently but in good faith."

Lord Parmoor said, at page 977:

> " ... if all the allegations directly imputing fraud are excluded, sufficient remains on which to found a charge of negligence for breach of duty of the

> appellant in his employment as a solicitor. It does not appear to me that there would be any injustice to the appellant in dealing with the action as one of negligence for breach of duty."

In the instant case, a firm duty arose on the part of Crawford, as agent of the appellant to advise Sinclair on behalf of the respondents in proper detail, of the nature, substance and state of affairs of his accounts, and in particular, his overdraft accounts, and the effect of the mortgages which the respondents were being asked to grant as security. The necessity to obtain independent legal advice was advice which should have been given by Crawford, the dominant figure. The appellant was in breach in this respect.

However, apart from the above, the appellant's conduct attracts the equitable relief of a court because of the undue influence arising from the known special relationship that existed between the appellant and the respondents through their respective agents, consequent on the manifest disadvantage suffered by the respondents.

Ellis, J found that there was a special relationship existing between the respondents and the appellants through their respective agents Sinclair and Crawford. Although the learned trial judge did not expressly advert to the fact of the existence of manifest disadvantage to ground the presumption of undue influence, he did find that the respondents were; "sucked into a whirlpool of their indebtedness.." which would include the penalty interest rates, improperly imposed. There was sufficient evidence before the learned trial judge for him to find that there was manifest disadvantage to the respondents.

Because the mortgages should be set aside due to the undue influence of the appellant, and the fact that clause 11 of the contract to operate the current accounts is ambiguous, void for uncertainty and unenforceable, the overdrafts balances are significantly affected, in respect of the charging of compound interest, and with monthly rests.

In the circumstances, no compound interest is chargeable on the overdrafts.

In respect of the promissory notes, the interest payable is the rate of interest endorsed on the said notes themselves, there being no other document in my view to which such notes are referable.

The evidence of the respondents' witness Mrs Patricia Daley-Smith, a chartered accountant, was accepted by the learned trial judge, as credible. Her calculations reveal options by which the respondents' account with the appellant could have been handled by way of interest calculations and allocation of payment by the appellant, less disadvantageous to the respondents.

The statistical digest of interest rates published by the Bank of Jamaica containing the interest rates charged by commercial banks, and which was introduced as an exhibit in evidence, covered the period from January 1985 to September, 1992.

In addition, Ellis, J held that an acceptable average lending rate was 52%. I see no reason to differ from that finding.

The authors in Halsbury's Laws of England, 4th Edition, Volume 3, paragraph 160, said:

> "By the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts..."

The respondents must expect that in respect of both the demand loans and the overdraft loans advanced, they having gained the use of such funds would therefore be liable to pay some interest for such use. Therefore, simple interest is chargeable, but not compounded in any way. I would so hold.

The appellant should therefore render a proper account in respect of all the accounts operated by the respondents with CNB. The amounts found to be owing to the respondents should be paid by the appellant bank at an interest rate of 52% from September 30, 1992, to the date of judgment.

The circumstances of the instant case, and the events of recent years in relation to the activities of some commercial banks and their managers, demand that consideration now be urgently given by the commercial banks that it is now necessary to give serious thought to the development of a Code of Practice among banks in Jamaica. This is required both for their own benefit and that of their customers, both current and potential in order to maintain certainty and restore the image of confidence. The banks in Jamaica follow their northern neighbours, both near and remote, in adopting numerous practices. They should do so in many other respects, for the mutual benefit of all concerned.

For the above reasons I would dismiss the appeal with costs.

LANGRIN, J.A.:

This is an appeal which has raised fundamental principles of commercial law concerning the relationship between a bank and its customers.

The plaintiffs in the action, now the respondents, were customers of Century National Bank Ltd. The plaintiff/respondents brought an action against the said Century National Bank Ltd. In support of its claim the plaintiffs/respondents in their amended Statement of Claim alleged that Negril Investments Ltd. incorporated in 1984 was the registered owner of lands at Negril in the parish of Westmoreland on which it constructed a hotel known as Negril Gardens Hotel. Negril, Negril Holdings Ltd was incorporated in 1986 to extend the size of the hotel owned by Negril Investments Ltd. by constructing additional rooms and facilities to be operated with the hotel.

John Sinclair, the agent of the respondents, developed a special relationship with the appellant through its agent, Crawford. This relationship involved, to the knowledge of both parties, the placing of great reliance and confidence by the respondents in the ability of the appellant to conduct the financial affairs of the respondents' companies. The respondents had already established current accounts and demand loans with the appellant.

The pleadings at paragraphs 38-43 of the Statement of Claim lay the foundation from which the complaints emanated:

> "38. The plaintiff refers to the special relationship which was encouraged and actively developed by Crawford representing the defendant with Sinclair representing the plaintiff. Up until the year 1987, Mr. Norman Bingham, one of the shareholders in the plaintiff managed the financial affairs of the plaintiff while Mr. John Sinclair supervised and actively participated in the construction of the Negril Gardens Hotel.
>
> 39. In or around the year 1986, Crawford repeatedly represented to Sinclair that the defendant would provide for the plaintiff, all the support infrastructure it would need to manage its finances such as accounting expertise and the necessary managerial assistance. Mr. Norman Bingham sold his shares in the plaintiff to Sinclair.
>
> 40. As a consequence of the representations made by Crawford to Sinclair as to the defendant's willingness and capacity to deal with the accounting and managerial needs of the plaintiff, and after the departure of Mr. Norman Bingham, the plaintiff relied even more on the defendant, and the special relationship developed to such an extent that the plaintiff placed a great deal of confidence and reliance on the defendant.
>
> 41. The plaintiff further states, it developed complete confidence and trust in the defendant and accepted and relied on its advice and that as a direct consequence of the special relationship a system was instituted by which the plaintiff would routinely send, cash from Negril to be lodged in its accounts and permitted the defendant to prepare lodgment advice slips and make lodgments on behalf of the plaintiff from time to time. The plaintiff, through Sinclair, enquired of the defendant of the state of its indebtedness

> and, on several occasions, Crawford represented to the plaintiff that its financial position was in good stead, that its debts to the defendant were being serviced and that it was properly performing its obligations under the various contract.
>
> 42. The plaintiff accepted and relied on its advice as to the alleged healthy state of the plaintiff's accounts until in or about April, 1990, when without any prior indication to that effect, the defendant informed the plaintiff that its accounts were badly in arrears.
>
> 43. The plaintiff took immediate steps to investigate the alleged arrears and the state of its accounts by retaining the services of chartered accountants to examine its accounts with the defendant and plaintiff disputed and continues to dispute the accuracy and the correctness of the accounts which the defendant had been presenting of the plaintiff's dealings with the defendant."

The defendant/appellant in its defence states that the relationship between the appellant and the respondent was the normal relationship of customer and banker. Further, Mr. Crawford was one of the duly entrusted agents of the appellant and had limited direct dealings with the respondents' accounts. The discussions with Mr. Sinclair were limited to a request for a loan and the appellant agreeing to grant the loan.

The factual background was admirably stated by Ellis, J, the learned trial judge in his judgment and I will restate them here:

> "John Sinclair migrated to England in 1958 when he was in his early twenties. He did well financially in England. He did so well that within three years he acquired the plastering firm

Roldogate Limited which had previously employed him.

In addition to Roldogate Limited, Sinclair owned two night clubs and a small hotel. These were called "Couples" and "The Turntable" familiar names in hotel and night club business in Jamaica.

Mr. Sinclair visited his homeland in 1970 and biannually thereafter. Between the years 1971-1981 he bought three houses in Jamaica, the last one at 23 Seymour Avenue . In 1984 Mr. Sinclair decided to return to Jamaica permanently. He left his flourishing plastering company with his workers to run and received income therefrom from time to time. On his return to Jamaica he said 'I do not intend to work again as I did in England, I intend to deal in vintage cars. I was going to relax, just go from coast to coast. He was told by someone that he was too young (he was then 46 years old) for that and he was encouraged to venture into tourism.

He met Mr. Norman Bingham then of First National Insurance Company. Mr. Bingham showed him a piece of land on Norman Manley Boulevard in Negril. He formed a company Negril Investment Company Limited one of the plaintiffs in this case, and the land at Norman Manley Boulevard was conveyed to Negril Investment Company Limited and he Sinclair financed the purchase from his own resources. Norman Bingham and Sinclair owned the shares in Negril Investment Company Limited and so he ventured into the construction of a hotel in Negril. Shortly after Negril Investment Company Limited was formed, a second company Negril Holdings Limited, the other plaintiff was formed.

There is no doubt, on the uncontroverted evidence, that John Sinclair is an unlettered man – he left school in the 4th standard, he is unsophisticated in the intricacies of high finance

but possessing the skill of an excellent plasterer in the building trade.

How therefore did this unlettered man who is to use his words, "not a book person, I don't do much reading' do so well in business in England?

He was given help in the administration of his business by English people and his finances were overseen by the National Westminster Bank in Bristol. It seems therefore he succeeded in England from kind assistance of persons and his Banker.

While Sinclair was away in England, and particularly during the period of Nineteen Seventies to the Nineteen Eighties, Jamaica experienced a growth in the number of commercial banks, merchant banks and other financial institutions. The period also saw the result of that growth in the fact that many qualified Jamaicans became owners and managers of those banks and financial institutions.

Girod Bank was one of the new banks which traded in that name for a while then it became the Century National Bank which is the defendant in this case.

Mr. Donovan Crawford is one of the qualified Jamaicans who assumed ownership and management of one of the new banks. He is the Managing Director of Century National Bank and is the other central figure in this case.

Mr. Crawford, from the evidence, started his banking career in a humble position and worked his way up to the high position which he now occupies. Obviously, he worked hard for his successes and must have gained great expertise in banking and business to have achieved prominence in the defendant Bank.

These two men of divergent backgrounds educationally and socially met in August, 1984. The plaintiff Sinclair said he met Crawford through a Mr. Pat Garrel now deceased and Mr. Norman Bingham. He had just before formed Negril Investment Company Limited and that company had purchased land in Negril. He Sinclair paid for the land from his personal funds.

The circumstances of the meeting is best described in Sinclair's words and I quote 'Garrel and I walked in. I saw Crawford, he pushed out both hands and gave me a huge welcome - very polite', he said 'come in gentlemen, come in.' Sinclair said he was in Crawford's office for two hours Garrel having left after half an hour.

He said Crawford and himself discussed each other's successes. Crawford told him that Jamaica belonged to Jamaicans and that the then Girod Bank was the first true black man bank. Sinclair said he then thought the bank was Crawford's and told him in thirty years it was the first he was seeing a black man sitting in his Crawford's position.

This first meeting led to many other meetings and Sinclair and Crawford became friends and visited each other's house regularly.

Up to this time, Sinclair said he had no account with Girod Bank, he later lodged U.S.$105,000.00 to his name at the Girod Bank.

Subsequent to that deposit in U.S. $ an account was opened at the Bank for Negril Investment Company Limited one of the plaintiffs in this matter. That started a Banker and customer relationship and subsequently another account was opened in the name of Negril, Negril Holdings Limited the other plaintiff.

In April 1987, Mr. Bingham, Sinclair's partner severed connection with the plaintiffs and sold

his shares to Sinclair. It is manifest from the evidence, that Bingham handled the financial aspect of the plaintiffs. On his departure from the business, Crawford informed Sinclair that he Crawford would have to do for him what Bingham did before he left.

Sinclair acting for the plaintiffs, had opened negotiations with another banker Paul Chen Young and Company to finance the expansion of the plaintiff's business. He so advised Crawford and in his words he said ' I thought he was going to smash up the office. I did not think he would behave so'.

Sinclair said he told Crawford that he had made application for financing from the National Development Bank (hereafter referred to as the N.D.B.J). The N.D.B.J. would not deal with the defendant it not then being an approved Financial Institution and so he had to seek assistance from an approved Financial Institution. Furthermore he was not a book person and did not do much reading.

At that explanation Sinclair stated that Crawford calmed down and spoke to him thus and I quote 'John the money you are using is yours. You own a lot of assets, you don't need a partner and surely not Chen Young. He is going to own you in a little while. I am already in it. What you don't know I will help you. I will do everything that Bingham did for you and what Chen Young can do for you.'

Sinclair said Crawford spoke of his charming ways, his integrity and trust. He Sinclair understood that Crawford would help him with paper work as he had been helped in England and by Bingham.

Sinclair completed building the first phase of his hotel at Negril in 1988. That enterprise was in part

financed by a loan of Six Million Dollars from the National Development Bank.

He was invited to Crawford's house where he was told that he Crawford would like him to apply for a further loan of Two Million Five Hundred Thousand Dollars from the National Development Bank.

Sinclair's evidence was that he asked why should he apply for a further loan as everything was working perfectly. Crawford then told him that it was very cheap money and big men in Jamaica were using such loans to gain high interest rate above that which was repaid.

In any event Crawford assured him that he would see that some benefit accrue to him from the loan. The application for the loan was made as directed by Crawford.

Sinclair gave other evidence of his dealing with Crawford personally up to 1990. In 1990 he was told by Crawford that his total indebtedness to the Defendant was Sixty Three Million Dollars. He was surprised by the total indebtedness as by his calculations as to the amounts borrowed and lodgments which were made to the defendant his indebtedness should not have been in excess of Seventeen Million Five Hundred Thousand Dollars. He expressed his non acceptance of his alleged indebtedness to Crawford who assured him that he would ascertain whose figure was wrong. He got no response from Crawford and received a letter from Aulous Madden and company the defendant's auditors requesting his agreement to the figures. He refused to agree the figures and maintained that they far exceeded his indebtedness to the defendant.

He spoke to Crawford about it and was told not to pay the figures any mind as people make mistakes from time to time. In the meanwhile the

> plaintiff said he was discouraged by Crawford from engaging the services of qualified auditors.
>
> Sinclair was cross examined by Scharsmidt Q.C. he said that the relationship between the companies and the defendant was harmonious for several years. Equally, he personally had good relations with the defendant and with Crawford. He denied the suggestion that his borrowings from the defendant commenced in 1984 with a loan of $185,000.00.
>
> It was Crawford he said who assured him that he was meeting his obligations to the defendant and that he was the best customer. He had many meetings with Crawford on matters to do with his business with the defendant almost to the exclusion of meeting with any other person.
>
> The good relationship between Crawford and himself continued until Crawford told him in May 1990 that the plaintiff's indebtedness to the defendant was Sixty Three Million Dollars."

Century National Bank Ltd. operated a Commercial Bank with branches in Kingston and other parishes. The respondents operated current accounts with the Bank. With respect to the first respondent the account was opened from July 1, 1987 and in relation to the second respondent the account was operated from November 15,1984.

Disputes had arisen between the parties as to the indebtedness in relation to the accounts and in particular as to the right to charge interest on loans and the rates of such interest.

I accept the findings of fact by the learned trial judge but on the conclusions of law I am forced to exercise my own judgment.

Judgment was given in favour of the plaintiff against Century National Bank by Ellis, J in the Supreme Court on July 18, 1997. Financial Institutions Services Ltd, the appellant, has been substituted for Century National Bank by an Order of the Supreme Court dated June 16, 1996. The Learned Judge made several orders and it is from these orders that the appellant brought this appeal.

It is now necessary for me to identify and put in context the various issues which fall for consideration in this appeal.

I. **Whether by virtue of Article 11 of the written contract to operate Current Accounts the defendant Bank was entitled to charge Compound Interest and to vary the rate of interest charged on overdrafts**

The contracts to operate current account contain a common clause II which reads as follows:

> "In the event of any account of the customer running into overdraft (including those accounts in foreign currency), the Bank is hereby authorized, without any limitation, to transfer the balance of any other account or deposit of the customer, to cover the overdraft. Likewise, in the event of an overdraft in the account, the customer hereby authorizes the Bank to charge him and hereby agrees to pay, in addition to other charges provided in this agreement, interest on the overdraft balance, (at the Bank's usual rate of interest on overdrafts) until the sum is fully satisfied. In the case of an account in foreign currency, the Bank will make the conversion at the official rate of exchange existing on the date of the transaction and such

> allocation will be made by the Bank without prior notice to the customer. It is clearly understood that the foregoing does not give the customer any right or in any way authorizes him to overdraw any current account, even if he has another account in his name in the same bank with a credit balance and sufficient funds to cover the overdraft."(emphasis mine)

The particular words which in law materially affect the rights of the parties in the contract to operate the current account in clause II are "at the bank's usual rate of interest on overdrafts". The respondents contend that these words are void for uncertainty and are unenforceable. The uncertainty, it is argued, arises from six possible meanings which are ascribed to the phrase and they are:

(a) the rate of interest on overdraft balances existing on the date that the current account was opened;

(b) the rate of interest existing on overdraft balances on the date the contract was signed;

(c) the rate of interest applicable to overdraft balances on the date that the plaintiff's account went into overdraft;

(d) the rate of interest the defendant was accustomed to charge on overdraft balances;

(e) the rate of interest chargeable on overdraft balances on each occasion that the customer present a cheque for payment while the account is in a state of overdraft;

(f) a separate meaning ascribed to the phrase by Caple Williams, a Board member and President of the Bank.

The meaning ascribed by Caple Williams appears at page 530 of Vol 11 of the record and runs thus:

> "Simple Interest is calculated on the daily balances and charged monthly with monthly rests....'The Usual Rate of Interest on approved overdrafts is one thing, the Bank's Usual Rate of Interest on the unauthorized overdrafts (temporary overdrafts) is another thing. The Bank's Usual Rate of Interest is determined by factors such as cost of funds, BOJ equity requirements, overhead expenses and profit margins, while the Bank's Usual Interest Rate on unauthorized temporary overdraft is determined by factors, such as liquidity, cost of funds and BOJ rate of interest for loans or for borrowing from that institution. This rate of interest is higher than that charged for approved overdraft, but is no more than that charged for overdraft by BOJ. These rates are fed into the computer for calculating interest on customers account (respectively) and charged to the account monthly, thereby compounding interest".

It is the appellant's contention that the meaning of the phrase – "banks usual rate of interest" is not a matter for negotiation or agreement by both parties to the contract. Rather, it is one which entitles the bank alone to unilaterally determine what the interest charges would be at the time of the overdraft. In effect in the determination of the "usual rate of interest on overdrafts", the customer would play no part since it was the bank's sole decision. It was further argued that the rate of interest on unauthorized overdrafts was always ascertainable and could easily have been communicated had there been a request.

In ***Hillas v Arcos Limited*** [1932] All E.R. Reprint 494 a stipulation in a contract was left exclusively for the determination by one of the parties. There, an option to buy timber was held to be binding even though it did

not specify the price, since it provided for the calculation of the price with reference to an official price list. Lord Wright had this to say at page 503:

> "It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted."

The case of ***Scammel v Ouston*** [1941] All E.R. 14 involved the interpretation of the phrase on "hire purchase terms". The House of Lords came to the conclusion that the phrase "on hire purchase terms" was too

vague to be given a definite meaning. In the speech of Viscount Maugham at page 18 he indicated that hire-purchase agreement may take many forms and that there was no evidence to suggest that there were any well known "visual terms" in such a contract.

In ***Brown v Gould*** [1972] 1 Ch. 53 an option to renew a lease provided for "such new lease to be for a further term of 21 years at a rent to be fixed by having regard to the market value at the time of exercising the option, taking into account, to the advantage of the tenant, any increased value of such premises attributable to structural improvements made by the tenants". It was held that the option was valid and enforceable since the formula stated in the lease did not embody such uncertainty of concept as to make it void and unascertainable by anyone genuinely seeking its meaning.

These cases illustrate the difficulty in determining the intention of the parties when the clause involved in the agreement has several meanings. These submissions strike at the very foundation of contract law and are a negation of the necessary consensus between parties to a contract.

In my view the agreement to pay a default rate of interest must be an expressed one which is clear and unambiguous. The contract to operate current account makes no reference to the right of the bank to charge compound interest. The particular words which in law materially affect the rights of the parties in the contract to operate the current

account are "at the bank's usual rate of interest on overdrafts." In my judgment these words are void for uncertainty and therefore unenforceable.

II. **Whether by virtue of usage, custom and business practice among bankers in Jamaica the defendant bank, was entitled to charge compound interest on overdrafts**

The appellant's counsel in his submission stated that the contract to operate current account was subject to an implied term that the bank was entitled to charge interest on the overdraft capitalized at monthly rests as is the recognized usage, custom and practice of banking in Jamaica. The compound interest on the overdraft was in accordance with the aforesaid usage, custom and practice and the appellant was entitled to make such charges to the date of payment irrespective of demand being made or otherwise. Usage is defined in Halsbury's Laws of England, 4th Edition at para. 445:

> "A particular course of dealing or a line of conduct generally adopted by persons engaged in a particular department of business life".

The usage must be so generally known as to be considered to form part of the contract. The contract expresses what is peculiar to the bargain between the parties and the usage supplies the rest.

Every usage must be notorious, certain, reasonable and not offend against any legislative enactment or any legal principle at common law.

The question as to the existence of the usage is a question of fact and every usage of which the Courts do not take judicial notice must be clearly shown to exist. Paragraph 474 of Halsbury (supra) states

> "A usage is proved by the oral evidence of persons who become cognizant of its existence by their occupation, trade or position and the evidence must be clear and convincing and it must also be consistent".

Ellis J in applying these principles to the instant case found that the witnesses called by the appellant did not provide any cogent evidence as to the existence of any business practice which entitles them to charge compound rates of interest. The rationale for this finding was that the majority of the practices deponed to concerned contractual arrangements which expressly dealt with compound interest. This is not so with the instant case. In the circumstances the criteria for usage remains unsatisfied.

It is instructive to examine the case of ***Bank of Commerce International S.A.v Blattner*** 20th November 1986 unreported. No1176 of 1986 C.A. The case dealt with a mortgagee's entitlement to charge compound interest. There is a term that the mortgagee is to have interest computed by agreement failing which such agreement shall be by the usual mode of the bank at a rate of 6 ½% above the base rate.

The Court of Appeal in England held that the covenant worded as it was, did not entitle the bank to compound interest although evidence was presented to say that it was the bank's practice to charge it.

In ***National Bank of Greece S.A. v. Pinios Shipping Company No. 1*** [1990] 1 All E.R. 78 (H.L.) it is significant to cite a passage from the judgment of Lord Goff in which he dealt with the question of usage at pg. 87:

> "However, it was not long before the practice became recognized as a usage of bankers and as such implied into the relevant contract. The first case in which this appears to have been done was the Scottish case of ***Reddie v Williamson*** [1863] 1 M 228, decided in the same year as ***Crosskill v Bower.*** The Lord Justice Clerk (Inglis) expressed the matter as follows (at 236):
>
> > 'The parties must of course have had in view that this account-current would be kept in the way, in which bankers always keep such accounts, balancing the account at the end of the year; and, in the event of the interest accruing during the past year not being otherwise paid or provided for, placing the amount of such interest as the last item to the debit of the account, and accumulating such interest along with the principal sum due on the account, and bringing down the balance thus ascertained, consisting partly of principal, and partly of interest, to the new account for the ensuing year, and placing the accumulated balance as the first article of debit in that new account. Where an account is kept in this way consistently throughout its whole course, the interest thus accumulated with principal, at the end of each year not only

> becomes principal, but never thereafter ceases to be dealt with as principal.'

He later said (at 237):

> The privilege of a banker to balance the account at the end of the year, and accumulate the interest with the principal, is founded on this plain ground of equity, that the interest ought then to be paid, and, because, it is not paid, the debtor becomes thenceforth debtor in the amount, as a principal sum itself bearing interest."

In ***Yourell v Hibernian Bank*** [1918] A.C 372 Lord Atkinson said at p.384:

> "The course of dealing actually followed by the parties, from the date of the mortgage down to the bringing of the action, was this: 'Interest was calculated from day to day on the mortgagor's overdraft on his current account. On the balancing of this account each half-year the amount of this interest was entered on the debit side of the account, a balance was then struck, and interest was charged during the next half-year upon that balance. The bank, by taking the account with these half-yearly rests, secured for itself the benefit of compound interest. This is a usual and perfectly legitimate mode of dealing between banker and customer."

Even though these cases establish the usage in banks in England the evidence of usage of banking practices to charge compound interest at monthly rests in the instant case is not certain or clear. No such usage has been established in Jamaica. Nearly all the banks have charged compound interest based on expressed contractual agreement.

In the absence of agreement the bank had no authority to charge compound interest at monthly rests.

III. **Whether the defendant/appellant bank was entitled to charge penal rates of interest**

The respondents allege in their pleadings that the appellant imposed penalty rates of interest on their current accounts the moment they went into overdraft when no limit was set on the overdraft . While no overdraft limit was ever set on the current accounts operated by Negril Investment Co. Ltd, a limit of $3.8M was inserted on the current account of Negril Negril Holdings Ltd. in June , 1988. This was not communicated to Negril Negril Holdings Ltd. The respondents contend that the penalty interest rates charged represented penalties in law which the appellants must repay to them.

It is the contention of the appellant that such rates of interest are not penalties but are permitted by the term "at the banks usual rate of interest on overdraft" as it appeared in the contract to operate current account and that there was a trade usage in Jamaica which permitted the defendant to charge such "penalty rates".

The averments in the appellant's pleadings are to the effect that the appellant was obliged to pay penal rates of interest on its overdraft at the Bank of Jamaica in certain circumstances. Therefore, the argument goes, the interest charged on the respondents' overdraft was a genuine pre-estimate of any damage to the appellants.

Reliance was placed by the learned judge on the evidence of Maurice Keane-Dawes, the appellant's Credit manager and one familiar with the respondents' accounts. He deposed as to his knowledge of the National Development Bank financing at interest rate of 17% to the ultimate borrower. A memorandum dated 21st March 1989 written by Keane-Dawes in relation to the question of penalty rate is apposite:

> "In my view I considered the level of interest charges which were being incurred by the customer to be unjustified, based on the fact that firstly the customer was pursuing economic activity which were in the national interest and as well as the financing which was obtained through the NDB was geared towards allowing projects of this nature the benefit of the best or close to the best interest rates that the bank could offer. In addition the bank, that is Century National, derived certain benefits from the operation of these accounts. Firstly, in terms of its significant contribution to interest revenues of the bank given the size of the loan, and also the accounts constituted a steady source of foreign exchange in flows for the bank. In addition to these benefits the bank faces minimal risk of loss from the operations of the accounts because the loan exposure was adequately protected by the value of the security. I felt therefore that the waiving of the commitment fee would at least be an indication of a willingness on the part of the bank to address what I considered to be an anomaly in the sense that the bank's largest borrowing connection was being charged at the bank's worst rate". (emphasis mine).

The appellant argued that an overdraft is money lent and the obligation in respect of an overdraft is one of debt and the rule against penalties is therefore not applicable. Alternatively, and assuming that

there was a breach of Clause 11 in the contract to operate current account the interest charged was a genuine pre-estimate of the loss suffered.

In order to determine whether a sum is a genuine pre-estimate of the damage, or a sum in terrorem, reference should be made to ***Dunlop Pneumatic Tyre Company Ltd. v New Garage & Motor Co. Ltd.***[1915] A.C. 79. The rules stated by Lord Dunedin are as follows:

(1) The wording used by the parties is of marginal importance. The court must ascertain whether the payment is in truth a penalty or liquidated damages.

(2) Liquidated damages is a genuine pre-estimate of the damage while penalties are sums fixed in terrorem.

(3) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and the inherent circumstances of each particular contract, judged at the time of the making of the contract, not at the time of the breach.

(4a) A stipulated sum is a penalty if it is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have flowed from the breach: otherwise it is liquidated damages.

(4b) It will be held a penalty if the breach consists only in paying a sum of money and the sum stipulated is a greater sum than the sum which ought to have been paid.

(4c) There is a presumption (but no more) that it is a penalty when a single lump sum is payable by way of compensation on the occurrence of one

> or more or all of several events, some of which may occasion serious and others trifling damage.
>
> (4d) It is no obstacle to the sum stipulated being a genuine pre-estimate of the damage, that the consequences of the breach are such as to make precise estimation almost an impossibility. On the contrary that is just the situation when it is probable that the pre-estimated damage was the true bargain between the parties. (Emphasis mine)

In applying the above principles to the instant case there must be a necessary prerequisite of an agreed sum or stipulated figure which is required as a benchmark against which the actual damage will be compared to ascertain whether the stipulated sum was in fact a penalty or liquidated damages. There was in fact no agreed sum in the instant case and therefore the rule against penalty, in my view, is inapplicable.

It cannot be correct for the appellant to assert that the interest rate charged at the time of the breach should be compared with that charged to the Bank by the Bank of Jamaica also at time of the breach. One approach would be to compare the interest rate which was stated in the contract at the time of formation with that existing at the time of breach. In the instant case this could not be done since there was no interest rate stated in the contract apart from the "usual rates of interest" which has already been dealt with and considered to be void for uncertainty and unenforceable. The agreement to pay a penal rate of interest must therefore be an expressed one and any attempt to incorporate such a term by reference to "the usual rate of interest" will

fail. Usual terms and conditions that are not brought to the attention of the customer cannot be useful, since there would be no genuine mutually agreed pre-estimate.

National Development Bank Loans

Paragraph 22 of the Statement of Claim states:

> "The Plaintiff commenced the further development of the Negril Gardens Hotel in 1987, and prior to negotiating the demand loans with the defendant, applied to the National Development Bank and obtained commitment for long term financing at concessionary interest rates. The sums obtained on demand loans which are particularized at paragraph 18 of this Statement of Claim represent interim financing by the Defendant to the plaintiff on the strength of the commitment of the National Development Bank to extend the loan to the Defendant for on-lending to the Plaintiff".

The appellant submitted that Century National Bank was entitled to increase the rate of interest pursuant to its rights under the Mortgage and under its agreement with the National Development Bank permitting it to do so, in relation to the sums borrowed by it and on-lent to the respondents.

Ellis J made reference to the manner in which the accounts were operated and said:

> "When I examined Keane-Dawes' evidence it is clear that funds from the NDB were made available to the plaintiff at penal rates of interest."

The learned judge at page 28 of his judgment continued:

> "There is information on the loans from the NDB and how the defendant dealt with those loans in relation to the plaintiff's accounts. Loans or funding were made available to the plaintiff through the defendant at the soft rate of 17% because the plaintiffs were potential earners of foreign exchange. Because drawings on that funding from the NDB were dependent on evidence of completed works, the plaintiffs of necessity had to find funds until the drawings on NDB fund materialized. The plaintiffs were encouraged to draw cheques on accounts which were already overdrawn and subject to very high penal rates of interest in order to complete building. No overdraft limit was imposed and therefore according to Keane-Dawes the plaintiffs, on those drawings from NDB, paid interest at a rate of three times what was the rate stipulated by the NDB. To my mind the plaintiffs were effectively being loaned their own funds at horrendous rates of interest."

On the 13th February, 1992 Keane-Dawes wrote to Crawford regarding the exhorbitant rate of interest to which Crawford replied:

> "John has done well from our assistance and should continue to pay penalty rates".

Where no overdraft limit is authorized once the customer draws a cheque in excess of funds in the account and the bank honours the cheque, that cheque is regarded as an unauthorized overdraft. In that situation a higher rate of interest would be payable than in a case where the overdraft is authorized. The rate of interest payable on overdrafts must be communicated to the customer and moreso where that interest is sought to be compounded.

An examination of the evidence will reveal that penalty rates were charged on these accounts without any authority expressed or implied to the manifest disadvantage of the respondents.

IV. Whether Clause 13 of the Contract to Operate Current Account was a Conclusive Evidence Clause and the Respondents were bound by it

Article 13 of the Contract to operate Current Account states:

> "The customer hereby agrees to notify the bank in writing of any change of his address. The customer further agrees to notify the Bank in writing of any objection or claim which he may have with regard to the periodic statement of account supplied by the Bank to the customer or any communication sent to him by the Bank relative to the Bank's internal or external audits or inspection. If the customer does not communicate his objections to the Bank as aforesaid within ten days of the date of any monetary or other statement then it shall be understood that the customer shall have accepted the accuracy of the notified balance and the Bank shall be released from any responsibility or obligation for any claim arising from any inaccuracy which should have been brought to its attention by the customer. Bank statements and cancelled cheques will be sent monthly by ordinary mail to customer's address appearing on the Bank's records on such dates as the Bank shall decide from time to time."(emphasis mine).

In paragraphs 8 (iii) (a) and b(ii) of the Further Amended Defence, the defendant pleads as follows:

> "The Defendant further says that monthly bank Statements of the Plaintiff's Current Account together with the cancelled cheques, were supplied by the Defendant to the Plaintiff during

> the entire life of the said account and at no time did the Plaintiff notify the defendant in writing of any objection or claim in respect of the aforementioned statements. In the premise the Defendant says that the failure of the plaintiff referred to herein constituted an acceptance of the accuracy of the notified balances and the defendant is accordingly released from any responsibility or obligation for any claim arising from any inaccuracy which should have been brought to its attention by the Plaintiff/Customer. The Defendant says that the Plaintiff is estopped from asserting otherwise and/or disputing the accuracy of the notified balances".

Reliance was placed on the case of ***Tai Hing Cotton Mill Limited v Lui Chong Hing Bank Ltd. & Others*** [1985] 2 All ER 947. In that case an employee of the bank forged cheques which caused the appellant's account to be debited. The appellant instituted an action claiming a declaration that the bank was not entitled to debit their account. It was held by the Court of Appeal that the appellant owed a duty to the bank to exercise due care in drawing cheques so as not to facilitate fraud and notify the bank of any unauthorized cheque. The Privy Council allowed the appeal and held that a customer had no duty to act in prevention of fraud by checking monthly statements. The Privy Council also authoritatively laid down the following principles:

(1) The burden of the obligation and the sanction had to be brought home to the customer

(2) The provisions of the clause are to be clear and unambiguous.

In that case the court had to construe whether the relevant clauses in the contracts of three banks satisfied the rigorous test indicated above. The relevant clauses were as follows:

> (a) A monthly statement for each account will be sent by the Bank to the depositor by post or messenger and the balance shown therein may be deemed to be correct by the bank if the depositor does not notify the Bank in writing of any error therein within ten days after the sending of each statement...
>
> (b) The Bank's statement of my/our account will be confirmed by me /us without delay . In case of absence of such confirmation within a fortnight, the bank may take the said statement as an approval by me/us.
>
> (c) A statement of the customers' account will be rendered once a month. Customers are deemed:
>
> > (1) to examine all entries in the statement of account and to report at once to the bank any error found therein
> >
> > (2) to return the confirmation slip duly signed. In the absence of any objection to the statement within seven days after its receipt by the customer, the account shall be deemed to have been confirmed.

The Privy Council held that none of the above clauses amounted to a conclusive evidence clause and therefore was not sufficient to set up an estoppel.

It follows that Article 13 must fail the rigorous test as laid down in the ***Tai Hing*** case. Article 13 only relates to the accuracy of the notified balance and does not extend to the rights that the appellant is claiming under it. It is therefore not in law an effective and conclusive

evidence clause. The respondents were therefore not estopped from assuming that the computations of the bank were inaccurate and challenging the alleged right of the Bank to charge interest on overdraft balances to vary the rates of such interest, to compound the said interest and to impose penal rates of interest.

V. Whether there was acquiescence on the part of the respondent to the compound interest being charged at varying rates?

The appellant pleaded at paragraph 21 of its Defence that the compound interest charged on the overdraft balances at monthly rests and that this compounding of the interest was clearly shown on the monthly bank statements sent to the respondents and that the respondents raised no objection to the compounding of the interest and that the debits were regularly paid by the plaintiff.

The law in relation to acquiescence is set out in ***Chitty on Contracts*** 24th Edition paragraph 1758:

> "If a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right stands by in such a manner as really to induce that person committing the act; and who might otherwise abstain from it, to believe that he assents to it being committed he cannot afterwards be heard to complain of the act. In this sense of the term (which has been described as an only proper one) acquiescence by the plaintiff amounts to a waiver of his rights and raises a species of estoppel preventing him from

> subsequently infringing them...the person cannot be held to have acquiesced unless he knew or ought to have known what his rights were. See ***Pauley's Settlement Trusts*** [1964] Ch. 303."

The evidence as indicated by Maurice Keane-Dawes was that the rate and the manner in which the bank charged interest would have to be calculated in order to determine whether or not the interest was compounded.

It follows that the bank statements could not have, on the face of them, provided the respondents with knowledge of their rights. Therefore if the respondents were not aware of their rights they would not have been held to have acquiesced in the appellant computing interest at monthly rests on the overdraft balances on their current accounts.

Such an agreement cannot be implied on the ground of acquiescence on the basis that a customer makes no objection.

In my view the respondents did not acquiesce to the bank compounding interest charged on their overdraft balances at monthly rests and varying rates of interest.

VI. **Whether the parties were bound by the terms of the mortgages when they were created and not only when a demand was made**

The respondents granted mortgages to the appellant in June, 1987 and August 1987 respectively to secure the loans granted to the

companies. The mortgages are similar in terms and give the appellant the right to vary interest rates on all loans and to compound interest charged on these loans.

The appellant contends that the terms of the mortgage can be relied on the moment the deeds are executed. The respondents on the contrary argue that the terms of the mortgage deed did not become operative until a demand in law was made by the appellant for the payment of the sums due and owing in relation to the debts secured by the said deeds.

It is significant to point out that the mortgages were all executed after the current accounts were opened and did refer specifically to the current accounts. The mortgages referred to in the pleadings contain a covenant by the mortgagor at paragraph 1 (a) (i) and (ii) of the mortgage:

> "1. In consideration of the premises the Mortgagor COVENANTS with the Bank;-
>
> (a) To pay to the Bank on demand-
>
> (i) all sums of money as are now or shall from time to time hereafter become owing to the Bank from the Mortgagor whether in respect of overdraft, moneys advanced or paid to or for the use of the Mortgagor or charges incurred on his account or in respect of promissory notes, and other negotiable instruments drawn accepted or endorsed by or on behalf of the Mortgagor and discounted or paid or held by the bank either at the Mortgagor's request or in the course of business or otherwise and all

moneys which the Mortgagor shall become liable to pay to the Bank under any guarantee indemnity undertaking or agreement or in any manner or on any account (including all sums which have become immediately due and payable under the terms of any Instalment Loan) whatsoever and whether any such moneys shall be paid to or incurred by or on behalf of the Mortgagor alone or jointly with any other person , firm or company and whether as principal or surety together with interest at the rate per annum stated as the Original Rate of Interest in Item 3 of the said Schedule with such rests as are stated in Item 4 of the said Schedule as Rests, at which Interest Payable or at such other times as the Bank shall from time to time specify or at such other rate or rates of interest as the Bank shall from time to time charge which interest may be computed as simple interest to compound interest as the Bank shall require together also with all usual and accustomed Bank charges.

(ii) all costs charges and expenses incurred or to be incurred by the Bank in relation to the preparation stamping perfecting and discharge of this instrument or any collateral security or any default hereunder or thereunder and for the protection or enforcement of the Bank's right and interest hereunder on an indemnity basis".

The mortgage deeds and the current account contracts are to be read together. A mortgage creates various rights and obligations. The mortgagor covenants to pay in the manner and at the rate provided for in the mortgage agreement.

The original rates of interests compounded with monthly rests are 35% and 28% respectively.

The case of ***Lloyds Bank v Margolis and Others*** [1954] 1 All E.R 734 is authority for the proposition that where a customer provides security for his overdraft by way of a mortgage and covenants to pay on demand, it is a condition precedent to the issue of the writ that a demand be first made.

In the case of ***Habib Bank Ltd. v Tailor*** [1982] 3 All E.R. 561 a bank agreed to allow the defendant an overdraft on his current account. The overdraft was secured by a charge on the defendant's dwelling house. The charge contained a covenant in the usual banker's form by which the defendant agreed to pay the bank on demand made in writing, the balance due in respect of all moneys owing to the bank. The defendant greatly exceeded his overdraft limit and a demand was made by the bank.

The Court of Appeal approved the decision in the ***Margolis*** case. Reliance was placed on the case of ***Yourell v Hibernian Bank Ltd*** [1918] A. C. 372 where the facts are similar to the present case. A customer had an overdraft at a bank. He executed a mortgage to secure all sums owing by him to the bank, whether by way of overdraft, loans, promissory notes, loans, bills of exchange etc. He subsequently signed some

promissory notes. Lord Parker in the House of Lords observed at page 394:

> "When a customer is allowed by a bank to overdraw his banking account the result at law is that the bank advances to the customer the amount by which the account is overdrawn; and the same result follows when a bank, with the consent of the customer, debits the account with payments made by the bank on the customer's behalf. In the present case the true position seems to be that the 597ℓ. 19s. 7d. was advanced by the respondents to William J, Yourell, and that the payments to preserve the mortgaged property were made by the latter and not by the respondents themselves.
>
> It should be observed that for the sums thus advanced the respondents obtained the security not only of the covenant of William J. Yourell contained in the mortgage, but also the mortgaged property."

The effect of the mortgage in the present case was that the lands were charged with the amount of any balance which might be due from the respondent on his account for loans and promissory notes. For all practical purposes therefore the debts which the respondents covenanted to pay and to secure by that mortgage were :

(1) the balance on all sums of money as are now or shall from time to time become owing together with interest on the current banking account and;

(2) the debt due in respect of the promissory notes signed by the respondent.

Indeed, it is quite common for banks to take mortgages which are expressed to secure all their customers' indebtedness and the authorities have consistently held that the terms of such mortgages relate to all the indebtedness of the customers including overdrafts on current accounts. The learned authors ***G.A. Weaver and C.R. Craigie*** in The Law Relating to Bankers and Customers in Australia observed at p. 568 that:

> "Perhaps the most prominent special characteristic of a bankers' mortgage however is the statement or definition which it contains of the moneys which it secures".

The learned authors after referring to the terms often used in bankers' mortgages, which is similar to the terms of the mortgage in this case, continued:

> "A mortgage in this form is naturally beneficial to the banker as it affords him security for virtually every liability which the mortgagor or the third party debtor may incur towards him, including liabilities which may not have been within the contemplation of the parties at the time when the mortgage was entered into".

In my opinion the view taken by the learned trial judge that the mortgages between the Bank and the respondents were not operable without demand is erroneous. The mortgages take effect when signed. Interest will accrue on the basis set out in the mortgages from that time. In fact if the learned trial judge is correct, in those cases where the mortgage is the only agreement between the parties, no interest at all would accrue before demand. Even the cost of preparing the mortgage

would only be recoverable from the mortgagor if they accrued after demand. A cursory observation would reveal that all the mortgagee's rights under the mortgage can become enforceable without demand.

In my view the contention of the respondents on this point is wholly unsustainable.

As to the question of whether the appellant can rely on the terms of the mortgage to enable it to vary interest rates and compound interest prior to the creation of the mortgages, there is an express clause to that effect. Clause 1 (a) (i) says:

> "pay bank all sums of money as are now or shall from time to time become owing... together with interest (compound)."

At the time the mortgages of the 10th August, 1987 and 18th June, 1987 were given there was no other security given to the appellant to secure existing or future debts or other obligations to the appellant. Therefore since the mortgage deeds do not state that they are given as additional and collateral security the conclusion is compelling that the said mortgages were granted to provide security for any indebtedness of the respondents to the appellant whether then existing or arising thereafter.

The respondents pleaded that the demand under the respective mortgages was not made until the 26th June, 1991. Ellis J relied on the case of ***Re Colonial Finance Mortgage Investment and Guarantee***

Corporation Ltd. [1905] 6 SRNSW 6 at page 9 as to the definition of a demand. There Walker J said:

> "There must be a clear instruction that payment is required to constitute a demand; nothing more is necessary; and the word "demand" need not be used , neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional but the nature of the language is immaterial provided it has this effect".

This definition was approved in the case of ***Re A Company*** [1985] BCLC 37 and in ***Bank of Credit and Commerce International S.A. v Blattner*** [1986] unreported Court of Appeal 20th November, 1986 (no 1176/86).

In the circumstances, it seems to me that the parties were bound by the terms of the mortgages when they were created; and that is, when they were duly signed. It must, however, be emphasized that the Bank could not enforce payment until after demand which in my view was by letter dated June 7, 1990. The following passages of the letter written by Keane Dawes bears this out:

> "Mr. John Sinclair
> c/o Negril, Negril Holdings Limited
> Norman Manley Boulevard
> WESTMORELAND
>
> Dear John
> ...
>
> It is imperative , therefore, that steps be taken immediately to reduce the level of loans to a

> point where the monthly debt requirement is more manageable. In this regard, we record your undertaking that you will immediately take steps to dispose of sundry personal assets, with a view to effecting lump sum reductions against the outstanding loans.
>
> It is imperative that the loan accounts reflecting substantial interest arrears are cleared prior to June 30, 1990. Failure on your part to do so, could have adverse implications as far as certain breaches of Bank of Jamaica directives are concerned.
>
> We are available to meet with your Accountant at the earliest convenient time, to provide a reconciliation of the outstanding accounts".

That letter was clearly a demand. In the circumstances the statutory powers of sale under the mortgage would not become operable until after this date.

In my view the mortgage agreements were created in order to validate the existing practice of charging unauthorized penalty rates and compound interest. In fact they were tainted with the presumption of undue influence which characterized the relationship between the parties.

VII. **Whether the Bank had the right to vary the rates of interest in Promissory Notes given by the Respondents**

Paragraph 28 of the Statement of Claim states that the promissory notes dated the 28th July, 1985, 25th August, 1985 and 12th December,

1985 provided that on demand the plaintiff would repay the sums due with interest at 33%, 34% and 34% per annum respectively.

Section 83 (I) of the Bills of Exchange Act states that a promissory note is:

> "An unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money or to the order of a specific person or to bearer".

The facts are not in dispute. In addition to the overdrafts the respondents were also granted loans. In respect of those loans the respondents executed a number of promissory notes. While the promissory notes do not indicate that the Bank could vary the rates of interest on the loans, the mortgages granted by the respondents specifically provided that they related to money owed in respect of promissory notes and that the bank was entitled to vary the rates of interest.

It was the contention of the respondents that the rate of interest could not be varied because there was no expressed provision in the promissory note to authorize such a variation of the interest rate.

The Learned Trial Judge concluded that since the promissory note was in strict conformity with the definition and requirements set out in the Bills of Exchange Act there could be no reference to any other document. He relied on ***Barclays Bank Ltd. v. Beck*** [1952] 2 Q.B. 47 to say that there could be no merger of the promissory note and the mortgage. The judge

clearly fell into error when he concluded that the appellant had no authority to vary the interest rates on the promissory notes.

A promissory note does not and can never be the contractual document which embodies all the terms of a loan agreement. It is merely a promise to pay. Moreover, there is a mortgage instrument that refers to the promissory notes and which would also apply. Such terms and conditions of the mortgage included the power of the appellant to vary the rates of interest.

I will now deal with the scope and effect of the special relationship on the mortgage instruments.

VIII. **Whether the relationship between the parties was only contractual and no special relationship arose therefrom**

In order to underscore the state of mind of John Sinclair and Donovan Crawford, counsel for the respondents made reference to various parts of the evidence as follows:

- Sinclair's account of the first meeting between himself and Crawford;
- the offer by Crawford to Sinclair to give him a little extra above the bank rate on foreign exchange transaction;
- the allurement of Sinclair by Crawford to encourage the former not to transact business with Paul Chen Young at a time when he was tempted to do so because of the difficulty in obtaining

National Development Bank "(NDB)" financing through Century National Bank;

- the encouragement given by Crawford to Sinclair to deal with the Bank on the basis that the Bank would do everything for him that Bingham used to do and that Chen Young could do;
- the indication to Sinclair by Crawford that the appellant would process the application to the NDB for funds for the development of the Montego Bay Hotel project and that Sinclair should not use the services of National Commercial Bank;
- the representation made by Crawford to Sinclair while the latter was on vacation in England and the Bank was dishonouring the respondent's cheques that "there must be some mistake" and that Sinclair should stay in England and have" a good hard earned rest";
- the statement made by Crawford to Sinclair on his return to Jamaica that "you should not have come back It was just a misunderstanding and I have put everything right", referring to the crisis that had developed following the dishonouring of the plaintiffs' cheques;
- the system whereby foreign cheques and foreign exchange cash were taken by Sinclair to Crawford's home and handed over to him together with a system where the plaintiffs' foreign currency

earnings were transported on Trans Jamaica planes and collected by Crawford or other representatives of the bank;

- and that the bank prepared the deposit slips for lodgment of the foreign exchange; and
- the representation made by Crawford to Sinclair upon the receipt by the respondent of audit documents from Aulous Madden & Co. that Sinclair should pay no attention to those documents because "you know those people make mistakes".

Much reliance was placed on the evidence of the witness Keane-Dawes when he said that Crawford was the ultimate authority on and took all decisions with respect to credit and loan applications relating to the respondents' accounts which represented the largest borrowings at the Bank.

As a general rule the relationship between a bank and its customers will be governed by the express or implied terms of a contract. In the ordinary course of banking no fiduciary duty arises. However, there are certain situations where the court will impose fiduciary obligations because of the active nature of the dealings between the parties in a particular case. A bank should always be cognizant of:

(a) the duty not to place itself in a position where its own interest conflicts with the interest of its customers;

(b) the duty not to profit from its position at the expense of its customers; and

(c) a duty of undivided loyalty; and thus the duty to avoid conflicts between customers and the duty to make available to a customer all the information that is relevant to the customers' affairs.

In ***Lloyds Bank v Bundy,*** [1974] 3 All E.R. 757 the law recognizes that a special relationship can arise between a banker and a customer. In that case the defendant and his son were both customers at the same branch of the plaintiffs' bank. The company ran into difficulties and the defendant guaranteed its overdraft up to £1500 and charged his house to the bank for that sum. Later he executed a further guarantee for £5,000 and a further charge for £6,000. As the farmhouse was worth £10,000 he was advised by his solicitor that that was the most he should commit to his son's business. However, the company's difficulties persisted and in December 1969, a newly appointed assistant manager of the branch told the son that further steps must be taken. The son said that his father would help. The assistant manager went to see the father at his farmhouse taking with him completed forms for a further guarantee and charge up to a figure of £11,000. He told the father that the bank could only continue to support the company if he executed the guarantee and charge and the father did so. In May, 1970 a Receiver was appointed of the company and the bank took steps to enforce the guarantee and charge.

The Court of Appeal set aside the guarantee and charge. The father looked to the bank for financial advice and placed confidence in

it. Since it was in the bank's interest that the father should execute the new guarantee the bank could not discharge the burden of giving independent advice itself. It was incumbent on the bank therefore to see that the father received independent advice on the transaction and in particular on the affairs of the company. This they had failed to do.

At page 764 Lord Denning in dealing with undue influence said:

> "These are divided into two classes as stated by Cotton L.J. in ***Allcard v Skinner*** [1887] 36 Ch. D. 145 at 171. The first are these where the stronger has been guilty of some fraud or wrongful act – expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself.
>
> Sometimes the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist."

The Master of the Rolls went on to say: The general principle obtains which was stated by Lord Chelmsford LC in ***Tate v Williamson*** [1866] 2 Ch App 55 at 61:

> "Wherever the persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position

> will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation existed."

In ***National Westminster Bank plc v Morgan*** [1985] 1 All ER 821 at p. 830 Lord Scarman in delivering the leading judgment in the House of Lords described the views of Sir Eric Sachs in ***Lloyds Bank v Bundy*** (supra) when he said:

> "But in the last paragraph of his judgment where Sir Eric turned to consider the nature of the relationship necessary to give rise to the presumption of undue influence in the context of a banking transaction, he got it absolutely right."

He said:

> "There remains to mention that counsel for the bank, whilst conceding that relevant special relationship could arise as between banker and customer urge somewhat doom-laden terms that a decision taken against the bank on the facts of this particular case would seriously affect banking practice. With all respect to that submission, it seems necessary to point out that nothing in this judgment affects the duties of a bank in the normal case where it obtains guarantee, and in accordance with standard practice explains to the person about to sign its legal effect and the sums involved. When, however, a bank, as in the present case, goes further and advises on more general matters germane to the wisdom of the transaction, that indicates that it may - not necessarily must - be crossing the line into the area of confidentiality so that the court may then have to examine all the facts including, of course, the history leading up to the transaction, to ascertain whether or not that line has, as here, been crossed. It would

> indeed be rather odd if a bank which vis-à-vis a customer attained a special relationship in some ways akin to that of 'a man of affairs'- something which can be a matter of pride and enhance his local reputation – should not where a conflict of interest has arisen as between itself and the person advised be under the resulting duty now under discussion. Once, as was inevitably conceded, it is possible for a bank to be under that duty, it is, as in the present case, simply a question for "meticulous examination" of the particular facts to see whether that duty has arisen. On the special facts here it did arise and it has been broken."

It is important to point out that it was in ***Morgan's*** case that Lord Scarman stated that it was an essential part of the doctrine of undue influence that the transaction entered into must be manifestly disadvantageous to the party influenced and that it must be shown that the party influenced came under the domination of the influencer. In the present case the trial judge held that the plaintiff companies:

> "Relied on that assurance and were sucked into a whirlpool of indebtedness against which they could not swim , to the drowning of their very being".

It appears that reference is here being made to high interest rates, penal rates of interest and compound interest as a manifest disadvantage to the plaintiff companies. Where the plaintiff is able to prove that there was a fiduciary relationship and there was also manifest disadvantage, the presumption of undue influence arises. When the presumption arises, the burden of proof shifts to the defendant to rebut it

by proving that the plaintiff was independently advised. In fact, obtaining independent advice was discouraged when Crawford told Sinclair that there was no need for an auditor and Chen Young should not be consulted.

A case which is necessary to take notice of is ***Woods v Martins Bank Ltd.*** [1958] 3 All ER 166. Here the plaintiff asked the branch manager to be his financial adviser. The branch manager went on to advise the plaintiff to make certain investments which he described as wise ones. When the contrary became true an action was brought. It is clear from the case that liability for negligent advice may be founded in contract or in tort. Where the plaintiff is a customer the claim will generally be made in contract.

Counsel for the appellant argued that the question of a special relationship would not arise since such an action is confined to tort. The fallacy of this argument is underscored in the ***Bundy*** case (supra) by Sir Eric Sachs where he was careful to mention (at p. 766 of the judgment) that the special relationship imposes on the defendant a fiduciary duty of care.

The law is settled that a person who has been induced to enter into a transaction by the undue influence of another (the wrongdoer) is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed. In ***Bank of Credit and***

Commerce International SA v Aboody [1992] 4 All E.R. 955 at 964 the Court of Appeal adopted the following classification which the House of Lords subsequently approved in the leading case of ***Barclays Bank plc v O'Brien and Another*** [1993] 4 All E.R. 417 at 423:

> "**Class 1:** *actual undue influence*. In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.
>
> **Class 2:** *Presumed undue influence*. In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:
>
> **Class 2 A:** Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.
>
> **Class 2 B:** Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue

> influence. In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned"

Ellis J, in his judgment made a finding that a special relationship had indeed existed between Crawford and Sinclair. The learned judge said of his finding that it was based not on the fact that Crawford gave no evidence in rebuttal but on the fact that he accepted the tested evidence of Sinclair and Keane-Dawes, an employee of Century National Bank. In the particular circumstances of this case the manifest disadvantage would relate to the penalty interest rates improperly charged and the compound interests at monthly rests which must be set aside.

CONCLUSION

I have come to the conclusion that in the present case it is inescapable that the learned judge was correct in his finding that there was a special relationship and indeed a fiduciary relationship between the parties.

There was a fiduciary relationship between the parties giving rise to a presumption of undue influence. In the present case the evidence is overwhelming that Crawford was both an adviser and a representative of

Sinclair. He advised Sinclair to use the Bank to help him with the development, not to engage Paul Chen Young and to use Crawford instead; and to seek the loans from the National Development Bank. He represented Sinclair by signing lodgment slips on his behalf and managed his account. It is because Crawford had acted as both adviser and representative why there was an inevitable conclusion that a fiduciary relationship arose which gave rise to presumed undue influence. There was therefore a proper basis for Ellis J, to find that the line had been crossed, resulting in the special relationship existing between the respondent and the Bank.

It was demonstrably clear that the respondents through their alter ego John Sinclair reposed trust and confidence in Crawford, the alter ego of the appellant. The respondents have clearly shown that the transactions were manifestly disadvantageous to them. The learned judge said in relation to this aspect of the case at page 10 of the judgment:

> "It is my opinion therefore, that the defendant through Crawford, crossed the line which contains the normal dealing of Banker with client at arms length. The defendant crossed the line and became a person on whom great reliance was placed. So great was that reliance that when crises arose in the plaintiffs' business they were assured that all was well by the defendant through Crawford. They relied on that assurance and were sucked into a whirlpool of indebtedness, against which they could not

> swim, to the drowning of their very being."(emphasis supplied)

It is unquestionably, the penal rates of interest, compound interest and charges to which the trial judge was referring as being manifestly disadvantageous to the respondents.

I should point out that it is only in the instance where the plaintiff/respondents are able to prove both that there was a fiduciary relationship and a reliance thereon culminating in a manifest disadvantage that the presumption of undue influence arises. When the presumption arises, the burden of proof shifts to the defendant/appellant to rebut it. The alleged wrongdoer can rebut the presumption only by showing that the complainant was either free from any undue influence on his part or had been placed by, the receipt of independent advice, in an equivalent position. That involves showing that he was advised as to the propriety of the transaction concerning the penalty rates of interest and compound interests at monthly rests by an adviser fully informed of all the material facts.

There was no evidence of rebuttal in this case. Indeed, by the time the mortgages were executed, Norman Bingham had resigned as Director of the Company. The obtaining of independent advice was discouraged when Crawford told Sinclair that there was no need for an

Auditor and Paul Chen Young should not be consulted. The evidence of John Sinclair and Maurice Keane-Dawes remain unchallenged.

A successful plea of undue influence entitles the plaintiff/respondents to have the entire transaction set aside. The transaction would mainly relate to the unauthorized charges, penal rates of interests and compound interests. The evidence is clear that John Sinclair expected to pay some interest though not the penal rates and compound interest rates imposed by the bank.

The appellant should therefore not be allowed to retain the benefit of the transaction and the charges, penal rates of interest and compound interests arising therefrom should be set aside. Further, in view of the apparent admission made in the pleadings that some interest should be paid on these accounts, it is my view that only simple interest should be charged on the accounts. I am fortified in this view having regard to the following concession made before us in written submission by the respondents:

> "The plaintiffs accept that interest would be payable to the bank on the overdraft balances on simple interest at the Defendants' prevailing rate of interest when the plaintiffs opened their current accounts until the time the Defendant made a demand under the mortgages on June 26, 1991. The Court may imply such a term into the contract to operate the current account".

In my judgment an account of all the transactions between the parties should be rendered by the bank to determine the sum payable by

the respondents at simple interest rates chargeable on the accounts up to the date of payment on September 30, 1992.

For the foregoing reasons, I would dismiss the appeal with costs.

ORDER

DOWNER, J.A.:

By a majority (Harrison, Langrin, JJA); Downer JA dissenting: appeal dismissed. The order of Ellis J, is varied.

IT IS ORDERED that -

(1) The rights and liabilities of the respondents to the appellant under the current accounts numbered 1300486, 1302051 and 1302529 are governed exclusively by contracts to operate current accounts dated 15th November, 1984, 4th December, 1986 and 13th July, 1987, respectively.

(2) The appellant was not entitled to charge the respondents interest on any overdraft balance other than the minimum rate of interest payable from the date of the opening of the said accounts until a formal demand for payment was made on 7th June, 1990.

(3) The appellant was not entitled to compound any such interest payable on any overdraft balances by the respondents.

(4) The said contracts did not entitle the appellant to vary the rates of interest chargeable on any overdraft balance in the current accounts.

(5) The mortgages which would have come into operation on the date of execution are set aside.

(6) The appellant render a proper account in respect of all the accounts operated by the respondents with the appellant.

(7) The appellant pay to the respondents all sums found to be due and owing to the respondents at the rate of interest of 52% from 30th September, 1992, until the date of judgment, that is, the 18th July, 1997.

(8) The respondents pay to the appellant one day's costs thrown away on the appeal from the order for discovery.

(9) The costs of this appeal and the costs below are the respondents' to be agreed or taxed.