JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 82 OF 2003

BEFORE:	**THE HON. MR. JUSTICE PANTON, J.A.** **THE HON. MR. JUSTICE COOKE, J.A.** **THE HON. MR. JUSTICE HARRISON, J.A.**	
BETWEEN	**BERESFORD MILLER**	**APPELLANT**
AND	**CENTURY NATIONAL BANK LIMITED**	**1ST RESPONDENT**
AND	**CENTURY MERCHANT BANK & TRUST COMPANY LIMITED**	**2ND RESPONDENT**
AND	**DONOVAN CRAWFORD**	**3RD RESPONDENT**
AND	**CORPORATE MERCHANT BANK**	**4TH RESPONDENT**
AND	**JOHN REDWOOD**	**5TH RESPONDENT**

Mr. Christopher Dunkley, Miss Jacqueline Cummings and Mr. Barrington Frankson, instructed by Archer, Cummings & Co. for the Appellant.

Mrs. Pamela Benka-Coker, Q.C. and Mrs. Tamar Francis, instructed by Rattray, Patterson, & Rattray for the 1st, 2nd and 3rd Respondents.

Mrs. Sandra Minott-Phillips and Miss Corrine Henry, instructed by Myers, Fletcher & Gordon for the 5th Respondent.

October 2, 3, 4, 5, 2006 and June 27, 2008

PANTON, J.A.:

I have read in draft the reasons for judgment written by my learned brother, Cooke, J.A. I agree with his reasoning and conclusion and have nothing to add.

COOKE, J.A.

1. The appellant's first business transaction with the 1st respondent was on the 24th December, 1987. He sought and received audience with the 3rd respondent who was the managing director of the 1st respondent. The appellant was seeking financing (on the face of it) for his restaurant named "the Upper Room" in Montego Bay, St. James. He succeeded immediately in obtaining his requested financing and was the recipient of a demand loan of $180,000.00. The documentation states that the purpose of the loan was:

> "To purchase restaurant equipment and to provide working capital for restaurant operations."

A current account was made available to the appellant (0001200610) and he was given a cheque book. This loan was secured by mortgage on property owned by the appellant at Unity Hall in St. James. The first bank statement in January 1988 relevant to this loan showed the account to be in overdraft. The Unity Hall property which comprised some 9 acres was the subject of development by the appellant. This started prior to the request and receipt of the demand loan of $180,000.00. It is clear that the appellant utilized this account for the financing of his 30 lots housing project. Thus the financing facility ostensibly provided for

a restaurant operation was used otherwise. In fact "the Upper Room" restaurant is only significant in that this was the activity which initiated the banker/customer relationship.

2. The appellant continued with his housing project. The overdraft continued to soar. Interest rate at that time in Jamaica could probably be regarded as astronomical. The Court below, found that subsequent to the initial demand loan of $180,000.00 there were further demand loans. This finding of fact was inevitable based on the irrefutable documentary evidence which included attendant promissory notes, the appellant's signature on each letter of commitment and the lodgment entries in the respective bank statements of the appellant.

3. (i) On July 7, 1989 there was a demand loan of $5,721,408.52. The purpose was stated to be:

> (a) To purchase restaurant equipment. [sic]
>
> (b) To convert overdraft incurred as a result of housing construction at Unity Hall.

(ii) On October 4, 1990 there was a demand loan of $6,000,000.00. The purpose was stated as:

> "To assist with the infrastructural development of Unity Hall Resort" (the housing project).

Repayment, the document stated:

> "Will be from sale of residential lots within the next twelve (12) months. Interest to be paid monthly".

This loan was secured by mortgage on property owned by the appellant at Greenwood in St. James.

(iii) On October 10, 1990 there was a demand loan of a further $6,000,000.00. The purpose was to:

> "To assist with the infrastructural development of Unity Hall Resorts, to be repaid from sale of residential lots."

This loan was secured by mortgages on Unity Hall and Greenwood properties.

(iv) Finally on September 26, 1991 there was a demand loan of $4,447,671.00.

4. The appellant's expectation as to the progress of the housing project and the anticipated financial reward failed to materialize. His debt to the 2nd respondent was not being serviced. By letter dated March 3, 1992 the 2nd respondent through its attorneys-at-law demanded of the appellant "full and immediate" payment of the sums owing by him. On the 25th of January 1993 the 2nd respondent appointed the 5th respondent as receiver to enforce its rights in respect of the mortgaged properties. In the Instrument of Appointment of Receiver, the sum owing by the appellant to the 1st respondent was approximately $30,000,000.00.

5. The appellant feeling aggrieved by the action of the 1st respondent instituted suit employing every conceivable cause of action. On the 28th of August 2003 after a hearing which consumed 35 days, the appellant failed. Happily in this court the appellant has considerably narrowed the areas of his grievances. Ground 3 (b) was couched thus:

> "The learned judge erred when she held that since the sum of $6,000,000.00 was credited to the Appellant's current account and used for his benefit the 1st, 2nd and 3rd Respondent did not breach their contract with the appellant in relation to the intended purpose of the loan."

I assume that the appellant is here referring to the demand loan of October 10, 1990 (see para. 3 (iii) above). The appellant's contention is that since the purpose of the loan being stated as "to assist with the infrastructural development of Unity Hall Resorts, to be paid from sale of residential lots", the 1st respondent would be forbidden, as it did in applying the proceeds to the reduction of the crippling overdraft debt burden. This ground fails for two reasons. Firstly it would seem to me that it is fallacious to suggest that the words which represented the purpose of the loan meant that the appellant was to receive $6,000,000.00 without any regard to his prior liabilities. In my view this demand loan did "assist with the infrastructural development of Unity Hall Resorts" despite the fact that the proceeds were not used directly in any construction. It assisted because it alleviated the debt burden occasioned by the provision of the infrastructure by reducing the interest rate which would be now payable as contrasted with that payable on the overdraft. All the proceeds of all

the demand loans were lodged to the current account of the appellant. This demand loan was not independent nor in anyway distinct from the other loan transactions.

6. Ground 3(A) is stated as follows:

> "There was no evidence to support the finding of fact [that] the promissory notes were completed documents at the time of the signing by the Appellant in September or October of 1990."

This is in reference to the demand loans of October 4th and 10th, 1990. (see para. 3 (ii) and (iii) above) and to promissory notes pursuant thereto. I am at a loss to appreciate the practical significance of this ground. The 1st respondent appointed a receiver on its perceived power under the mortgage deeds. There can be no doubt that two separate sums of $6,000,000.00 each were lodged to the account of the appellant. Be that as it may, this is how the learned trial judge dealt with this aspect.

> "It was asserted by him that he executed the documents in blank and each should have been for $3,000,000.00. His admission that he attended at the 1st defendant's office with his attorney-at-law and executed the documents clearly belies his assertion. It is manifest that he was not being truthful. It is obvious that at the time of his execution of the promissory notes, these documents were completed. I am persuaded that he had executed one on September 28, 1990 and the other on October 9, 1990, each for $6,000,000.00."

I cannot fault this finding.

7. Ground 2 (d) speaks to the challenge of the learned judge's finding that "he (the appellant) was well aware of all credits, debits and other charges". For this complaint to be of any substance the appellant would have had to have demonstrated that the failure of the 1st respondent to send him statements was an operative factor in his stark delinquency as to the servicing of his debt. This he did not, and could not show. However, as the learned trial judge said:

> "The claimant (appellant) had full knowledge of his indebtedness to the 1st defendant (1st respondent). He was cognizant of the fact that he had not serviced his loans".

This ground is without merit.

8. The appellant also sought in ground 2 (d) to fault the learned trial judge in respect of her finding that there did not exist a fiduciary relationship between the appellant and the 1st, 2nd and 3rd respondents. In dealing with this aspect the learned trial judge said:

> "The doctrine of fiduciary relationship, or, confidential relationship was defined in Tate v Williamson 1866 L P 2 Ch App 55 at page 61 follows:
>
> > "Wherever two persons stand in such a relation, that, while it continues, confidence is necessarily reposed in one, and the influence which grows out of that confidence 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".

> The transactions between the Claimant and the 1st, 2nd and 3rd defendants fall within the ambit of normal banker/customer relations. There is no evidence that their relationship extended beyond ordinary contractual one. There is nothing to show that a fiduciary duty was owing to the Claimant. The 1st, 2nd and 3rd defendant [sic] contractual obligation does not impose on them a duty of care to him. No facts have been pleaded to demonstrate any special relationship between the parties which would impress upon these defendants any fiduciary duty to the Claimant."

In this case the appellant cast himself in the role of the confiding party. I cannot perceive what was the supposed advantage which was obtained and retained. None of the respondents proffered any advice as to the viability of the Unity Hall housing project. The fact that the 3rd respondent may have recommended persons with the requisite expertise to participate in the project does not make the relationship a fiduciary one; nor does the fact that Mr. Chuck was sent by the 3rd respondent to supervise the project. These actions are merely indicative of the 3rd respondent's wish for the project to succeed. Of course the 3rd respondent could not have been oblivious of the duty owed to the depositors with the bank. This ground is entirely misconceived.

9. The appellant made three complaints against the 5th respondent as regards the performance of the latter's duties. The first was that as receiver he did not sell the lots at Unity Hall for the best prices available. This is how the learned trial judge dealt with the issue.

> "Twenty seven (27) lots were sold by the Receiver. Nine of these lots were sold to NESCO Construction Ltd., namely, Lots 4, 6, 12, 17, 18, 21, 25, 29 & 30 which were cumulatively valued at $24,730,738.00. The Receiver disclosed by letter to the 1st defendant that he encountered difficulty in the sale of the lots due to the unattractive designs of the buildings, which were on the development. These buildings were constructed by the Claimant. The Receiver recommended that the lots be withdrawn from sale to allow new homes to be constructed to improve the aesthetics of the area. Although the Receiver had made this suggestion, the indebtedness of the Claimant to the 1st defendant had been increasing at an alarming rate. The 1st defendant's security was jeopardized. NESCO Construction Ltd. offered $16.5 million for the 9 lots. The offer [sic] was accepted by the 1st defendant. In the circumstances these lots were sold for the best prices available. Claimant has not adduced any evidence to show otherwise."

The learned trial judge properly recognised that an assessment of whether the lots were sold for the best prices available must be determined with due regard to the overall exigencies which then obtained.

10. The 2nd complaint was in these terms:

> "There was evidence to show that the 5th Respondent obtained more money for his services than his contract allowed and hence was in breach of his judiciary duty [sic] to the Appellant and was liable to disgorge all funds [sic] received."

In this regard the learned trial judge said:

> "I now turn to the matter of the remuneration of the Receiver. The instrument of appointment of the receiver states, inter alia, that the Receiver "shall be paid a remuneration in accordance with the scale of remuneration agreed between the mortgagee and the Receiver". Section 125(7) of the Registration of Titles

> Act makes provision for the Receiver to retain, from money received by him, a commission not exceeding 5% of the gross amount in addition to all costs, charges and expenses incurred by him.
>
> Miss Cummings urged that the gross income receipts by the Receiver amounted to $16,177,537.70 and 5% of that sum is $808,876.88, while, the sum claimed by the Receiver was $1,542,402.77. The issue of the Receiver's fees had not been raised on the claim, no objections can therefore be taken with respect thereto. Further, the sum of $1,542,402.77 does not only include the Receiver's commission but also his expenses associated with the sale."

These passages adequately dispose of this submission.

11. There is the 3rd complaint that the receiver did not render an account to the appellant

> "in respect of each and every lot individually that was sold at the earliest opportunity"

It cannot be contended that the appellant did not receive a global account. Without deciding the issue, I doubt that the receiver would be obliged to render an account to the appellant of each lot sold. This would only serve to increase the expenses of the receiver. In any event I cannot appreciate how the fact that the receiver did not render individual accounts of each lot sold was injurious to the appellant.

12. Before formally pronouncing my opinion that this appeal should be dismissed, I will venture some comments. It would seem to me that the ambition of the appellant as regards the housing project in Unity Hall was not in

harmony with his financial capacity and his technical competence. He had, had some experience in construction of houses but in this enterprise he clearly "went on over his head". The project appears to have been ill-conceived, bearing in mind that there seems to have been an insufficiency of thought as to the financial sustenance of the operation as well as to the practical circumstances attendant to the completion of the project. Then to compound matter, the appellant was beset with the very high interest rate regime which then prevailed and of which the appellant must have been aware.

13. The appellant sought to say that because the respondents did not call any evidence, the evidence of the then claimant was unchallenged. This is incorrect. The evidence was strongly challenged in cross-examination, particularly through the utilization of the documentary material. The 1st, 2nd and 3rd respondents' position in not adducing oral evidence was that:

> "It was not necessary in law or strategically politic for the respondents to call any evidence."

In **Donovan Crawford and Other v. Financial Institutions Services Limited** (Privy Council Appeal) No. 34 of 2004, (delivered 2nd November, 2005) their Lordships' Board said at para. 7:

> "... It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees. In Herrington v British Railways Board [1972] AC 877, 930, Lord Diplock said of such a decision,

> "This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold." "

This case was substantially determined by the construction of the abundance of documentary evidence. Accordingly, a consideration of the drawing of adverse inference from the fact that the respondents did not give evidence, the burden in this case was for the then claimant to prove its case upon a balance of probabilities. The learned trial judge correctly found he had failed to do.

14. I would dismiss the appeal. The respondents should have their costs agreed or taxed.

HARRISON, J.A.

I have read in draft the judgment of Cooke, J.A. and I agree with his reasons and conclusions. There is nothing further that I wish to add.

PANTON, P.

ORDER

The appeal is dismissed with costs to the Respondents to be agreed or taxed.