

*Privy Council Appeal No. 34 of 2004*

**Donovan Crawford and Others**

*Appellants*

v.

**Financial Institutions Services Limited**

*Respondent*

FROM

**THE COURT OF APPEAL OF JAMAICA**

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REASONS FOR REPORT OF THE LORDS OF THE  
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE  
10th October 2005, Delivered the 2nd November 2005  
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*Present at the hearing:-*

Lord Nicholls of Birkenhead  
Lord Hoffmann  
Lord Rodger of Earlsferry  
Lord Walker of Gestingthorpe  
Lord Mance

*[Delivered by Lord Walker of Gestingthorpe]*  
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1. At the close of the hearing on 10 October 2005 the Board announced that they would humbly advise Her Majesty that the appeal would be dismissed for reasons to be given later. The Board now gives its reasons.

2. On 10 July 1996 the Minister of Finance exercised statutory powers to assume management control of Century National Bank Limited (“the Bank”) and two bodies corporate associated with the Bank, Century National Building Society (“the Building Society”) and Century National Merchant Bank Limited (“the Merchant Bank”). The first appellant, Mr Donovan Crawford, was the chairman and chief

executive of each of these bodies. The validity of this intervention was challenged, but was upheld in litigation which reached the Board: *Century National Merchant Bank and Trust Co Ltd and others v Davies and others* [1998] AC 628.

3. Before the intervention the Bank, the Building Society and the Merchant Bank had been part of a group of companies under the ultimate control of Mr Crawford and members of his family. They owned, either directly or through the second appellant, a company called Regardless Limited ("Regardless"), the whole issued share capital of Century National Bank Holdings Ltd ("Holdings"). Holdings owned 80% of the issued share capital of the Bank and the whole of the issued share capital of the Building Society, the Merchant Bank, Century National Development Ltd ("Development") and some other companies which need not be identified. Mr Crawford was at all material times a director of Regardless, Holdings and Development. At all material times the other directors of Regardless were his mother, Mrs Alma Crawford and his wife, Mrs Claudine Crawford.

4. Soon after the intervention by the Minister of Finance, and following investigations made by accountants, two sets of proceedings (suit CL 1996/C330 and suit CL 1997/C050) were commenced by the Bank and the Building Society respectively. The first action was against nine defendants and the second action was against six defendants: in each case the defendants included Holdings, Mr Crawford and Regardless. Mr Crawford's mother was a defendant in the first action. On 21 January 1998 (following a scheme of arrangement approved by the Court) the respondent Financial Institutions Services Ltd ("FIS") was substituted as plaintiff in both actions, and on 28 April 1998 the actions were consolidated.

5. The consolidated proceedings were heard by Wolfe CJ over seven days in the autumn of 1998. The Chief Justice's reserved judgment (which runs to almost 100 pages) gave judgment in favour of FIS on a variety of claims against different defendants. All the claims were based or consequential on mismanagement and misappropriation in the financial affairs of the corporate group. Many of the claims are not directly relevant to this appeal. The issues in dispute were narrowed at the hearing by the Court of Appeal of appeals brought by Mr Crawford, Regardless, Mr Crawford's mother and a co-director of Mr Crawford named Balmain Brown. The Court of Appeal dismissed these appeals on 31 July 2001. Before the Board the issues have narrowed again.

The progress of the appeal to the Board has been delayed by the Court of Appeal's mistaken attempt to require the costs below to be paid as a condition of a further appeal. The Board granted special leave to appeal on 17 July 1993.

6. There are four live issues before their Lordships. The first three have been referred to (as they were below) as the Paddington Terrace transaction, the First Trade transactions, and the Crawford payments. The fourth live issue relates to lending transactions (other than the First Trade transactions) entered into by the Bank and the Building Society and alleged to have been made in breach of duty by their directors. Other issues (in particular, those relating to a guarantee signed in blank by Mr Crawford and his mother, and a deposit of title deeds claimed to evidence equitable mortgages) have been settled. Before considering the four live issues their Lordships wish to note two points in regard to the proceedings as a whole.

7. The first relates to the oral evidence, or rather the lack of oral evidence, at trial. Despite the variety of serious allegations made in the pleadings against Mr Crawford, and the matters deposed to by the investigating accountants as calling for explanation, neither Mr Crawford nor any member of his family gave evidence before the Chief Justice. 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.”

8. The second point relates to the pleadings. FIS's amended pleadings did not in terms allege fraud against Mr Crawford (although they did allege numerous breaches of fiduciary duty as well as negligence, and paragraph 59 of the amended statement of claim in the first action alleged that the Paddington Terrace transaction was “a sham and unenforceable” as well as being in breach of Mr Crawford's fiduciary duty to the Bank). But conversely the pleadings on behalf of Regardless did not raise any defence based on section 70 of the

Registration of Titles Act, which contains an exception for fraud. Their Lordships will return to these two points below.

9. The Bank owned a property at 1 Paddington Terrace, Kingston. On 27 March 1990 the Bank's board passed a resolution approving Mr Crawford's purchase of this property "at book value plus 10 % with the option to pay for same within 12 months" (this period was later extended by a further six months). The minutes of the board meeting indicated that the purchase had previously been agreed at a private meeting between Mr Crawford and two other directors and "the Chairman was now asking the Board to formally approve this resolution." There was unchallenged evidence that the book value of the property, plus 10%, amounted to about \$2.824m (all sums are in Jamaican dollars except where otherwise stated). In October 1990 Mr Crawford obtained a valuation of the property which put its market value as \$4m. There is no evidence that he disclosed this valuation to his co-directors. On 22 August 1991 Mr Crawford paid just over \$1.813m for the property and had the legal title transferred to Regardless.

10. The Chief Justice described the circumstances of this acquisition as curious, which is by no means an exaggeration. The transaction could not, he said, be allowed to stand. In his order he made a declaration against Regardless to the effect that FIS was the beneficial owner of the property, with appropriate consequential relief. The Court of Appeal upheld this order, relying on section 191 of the Companies Act (which invalidates any attempt to exempt or indemnify a company director in respect of a breach of duty or breach of trust). In relation to section 70 of the Registration of Titles Act (a defence which Regardless sought to raise for the first time in the Court of Appeal) the Court was unmoved by the absence from the pleadings of the word "fraud".

11. Before the Board Mr Oswald James, for the appellants, attacked the conclusions of the lower courts and urged that there was no adequate evidence to support them, especially as fraud had not been pleaded. A sufficient ground for rejecting those submissions (in relation to both the Paddington Terrace property and the other live issues) is the well-settled practice of the Board not to depart from concurrent findings of fact in the lower courts. But in view of the spirited submissions put forward by Mr James their Lordships will add some further observations. These enlarge on the two salient points

already noted, Mr Crawford's failure to give evidence and the absence of a pleading of fraud.

12. The weight to be attached to a defendant's failure to testify varies with the circumstances of the case. It is plain that in this case the Chief Justice and the Court of Appeal attached a good deal of weight to Mr Crawford's silence, and their Lordships are satisfied that they were right to do so. Mr Crawford was the chairman and chief executive of the Bank, the Building Society and the Merchant Bank. It is an irresistible inference that he was the directing mind behind Regardless, Holdings and the rest of the group. The consolidated proceedings raised many grave issues as to his stewardship of the whole group of companies. His failure to testify was a strong indication that he had no satisfactory answer to what was alleged against him.

13. Mr James referred in passing to some well-known cases on common law deceit in arguing that deliberate, dishonest deception is required for what is sometimes called "actual fraud." It is well settled that actual fraud must be precisely alleged and strictly proved. But a serious breach of fiduciary duty, in which the fiduciary deliberately prefers his own interests to those whose interests it is his duty to protect, amounts to equitable fraud. It occupies an intermediate position between actual fraud and mere negligence. The classic exposition is in the speech of Lord Haldane LC in *Nocton v Ashburton* [1914] AC 932, 945-958. Its effect has been summarised by Millett LJ in *Armitage v Nurse* [1998] Ch 241, 250-251.

14. The reference to fraud in section 70 of the Registration of Titles Act may well extend to fraud in the wider sense, but it is unnecessary to decide that point since there was no evidence to support the view, and a considerable volume of material against the view, that Regardless was a purchaser in good faith. During his oral submissions Mr James referred to Regardless as Mr Crawford's nominee. Even if that should be taken as meaning no more than that Mr Crawford directed the transfer to Regardless, the courts below had ample material on which to conclude that Regardless was (in the words of Russell J in *Jones v Lipman* [1962] 1 WLR 832, 836)

"A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity."

For these reasons their Lordships reject the appellants' case on the Paddington Terrace transaction. The other issues can be dealt with more briefly because they follow the same pattern, but without any complication arising out of registration of title to land.

15. There were two groups of First Trade transactions. In the first group of transactions the Bank deposited no less than US\$25.5m with a Bahamian company called First Trade International Bank & Trust Ltd ("First Trade"). First Trade lent on the same aggregate sum to Development, Holdings, and a Bahamian company called Shelltox Ltd (another subsidiary of Holdings). There was an arrangement under which First Trade could set off against its indebtedness to the Bank any part of First Trade's advances to Development, Holdings and Shelltox Ltd which proved irrecoverable. In the event the whole of the onward lending proved irrecoverable and the Bank lost US\$25.5m and a large amount of interest. The second First Trade transaction was comparable, though on a smaller scale. The Chief Justice described the first group of First Trade transactions as "steeped in fraud" and it is understandable that he should have made that comment. It might have been helpful (since fraud was not pleaded) if he had gone on to say that the relief granted in respect of the First Trade transactions (a series of money judgments carrying simple interest) was relief to which FIS was entitled on the basis of negligence and breach of fiduciary duty, in no way depending on any finding of actual fraud. The Court of Appeal was right to reject this ground of appeal.

16. The "Crawford payments" was a compendious expression used to cover a number of payments totalling over \$1.48m which the Bank made to or for the benefit of Mr Crawford, as payments or reimbursement of expenses such as household expenditure and the education of his daughter. Mr Glen Harloff, the investigating accountant who gave evidence, could find no vouchers for any of this expenditure. Mr Crawford, as already noted, gave no evidence on this or any other subject. Mr James suggested in his oral submissions that perquisites and benefits in kind of this sort were common in Jamaica, and were often dealt with informally. He submitted that they would have been provided for in Mr Crawford's service contract. But Mr Crawford never produced any written service contract, and Mr Harloff's evidence was that his enquiries into the existence of any written contract had proved fruitless. The Chief Justice was entitled to find, as he did, that Mr Crawford (and his co-director Mr Williams, who did give evidence but said nothing about similar payments to him)

had been “helping themselves to the Bank’s funds,” and the Court of Appeal was right not to disturb that conclusion.

17. The last live issue was Mr Crawford’s liability for bad debts incurred on direct lending by the Bank and the Building Society to other group companies, in particular Holdings, Development and Regardless. Mr Downer, the temporary manager appointed by the Minister of Finance, testified that these loans were not made in accordance with good banking practice. Mr Crawford had a personal interest in the debtor companies. There was no proper security (it is unnecessary to go into the guarantee signed in blank by Mr Crawford and his mother, since that issue has been settled). Eventually the bad debts proved to be enormous (Holdings owed over \$330m to the Bank and over \$220m to the Building Society, and Development owed over \$370m to the Bank). There are concurrent findings that all these loans were made negligently and in breach of fiduciary duty and Mr Crawford as chairman and chief executive officer of the Bank and the Building Society was the individual primarily responsible.

18. For these reasons their Lordships will humbly advise Her Majesty that (except as to the issues on which the parties have already come to terms) these appeals should be dismissed. Paragraphs 5 and 6 of the order of the Chief Justice (covering the matters which have been compromised) will cease to have effect. The appellants must pay the respondent’s costs before the Board.