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Privy Council Appeal No. 37 of 2003

Financial Institutions Services Limited *Appellant*

v.

(1) Negril Negril Holdings Ltd. and
(2) Negril Investment Company Ltd. *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 22nd July 2004

Present at the hearing:-

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Sir Andrew Leggatt
Dame Sian Elias

*[Delivered by **Lord Walker of Gestingthorpe**]*

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1. The appellant Financial Institutions Services Limited is a company formed to take over the assets and liabilities of a number of banks which got into difficulties in Jamaica during the closing years of the last century. One of the banks was Century National Bank Limited, originally named Girod Bank (Jamaica) Ltd. Their Lordships will refer to this company as "the Bank" and will use that expression to include, where appropriate, Financial Institutions Services Limited as its successor (under a court order dated 21 October 1997). The respondents are two companies, Negril Negril Holdings Limited ("NNH") and Negril Investment Company Limited ("NIC"), which were the plaintiffs at first instance. Their Lordships will refer to these two companies together as "the Companies".

2. NNH and NIC commenced separated sets of proceedings against the Bank by writs issued on 18 June 1991 (1991 N088 and 1991 N089 respectively). The proceedings were in due course consolidated. The consolidated action was tried by Ellis J during 1992, with several adjournments, and on 18 July 1997 the judge gave judgment in favour of the Companies. The Bank appealed to the Court of Appeal which on 22 March 2002 (Harrison and Langrin JJA, Downer JA dissenting) varied the order of Ellis J but for the most part dismissed the appeal. The Bank now appeals to the Board against the order of the Court of Appeal. The litigation has had several remarkable features, not the least of which is that according to the record the hearing of the appeal by the Court of Appeal took almost as long (53 days) as the hearing at first instance (55 days, 33 of which were occupied by oral evidence).

3. The trial judge made various findings of fact, only one of which (relating not to the parties' conduct, but to the usage of bankers in Jamaica) is seriously challenged before the Board. It is therefore possible to summarise the facts fairly shortly, and without revisiting in detail many matters of fact which were in issue before the judge and in the Court of Appeal.

4. The managing director and principal shareholder of the Companies is (and was at all material times) Mr John Sinclair. He was born in Jamaica in 1936. His schooldays were abbreviated by his father's death and he began work as a builder. In 1958 he emigrated to England, where he became a skilled plasterer. He became self-employed, and his business prospered. At one stage he employed about 20 persons. He became the owner of two nightclubs in Bristol. Over the years he made occasional visits to Jamaica and he acquired some property there. Then in January 1984 he returned to permanent residence in Jamaica.

5. Mr Sinclair's original intention was to take life easily on his return to Jamaica. But he was only 46 and he was disinclined to be idle. He met Mr Norman Bingham, who worked in an insurance business. Mr Bingham told Mr Sinclair about some land in Negril (on the west coast of Jamaica) which had development potential, and they decided to develop it through NIC, which was incorporated in 1984. Mr Sinclair and Mr Bingham both became directors and shareholders of NIC, but Mr Sinclair seems to have provided all or most of the money for the initial purchase of the land.

Sinclair bought Mr Bingham's shares and Mr Bingham resigned his directorship, leaving Mr Sinclair and his wife as the only directors. Mr Bingham's departure was a significant event because of Mr Sinclair's reliance on him for financial guidance. Moreover he was losing Mr Bingham's guidance at a time when he wanted the Companies to embark on an ambitious development project which would need substantial funding. After Mr Bingham's departure Mr Leymon Strachan of Strachan Barrett & Co. was appointed as auditor of the Companies, and it appears that bank statements were sent to him (at any rate from September 1988). There was little evidence that Mr Strachan did more than perform the minimum statutory duties of an auditor, although he was during 1989 involved in discussing a regulatory breach. Mr Strachan ceased to be auditor in 1989 or 1990.

13. Mr Sinclair's plan was to acquire the beachside site and to construct a larger hotel. He hoped to be able to obtain a NDB loan at an attractive rate of interest. Mr Sinclair saw Mr Crawford and told him that he was thinking of approaching another possible source of finance, Paul Chen Young. Mr Crawford was very upset that Mr Sinclair was thinking of taking his business elsewhere. He persuaded Mr Sinclair not to do so. According to Mr Sinclair's evidence as set out in the transcript:

> "[Mr Crawford] said 'John – the money you using is yours, you owns a lot of assets, you does 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 Bingham still your partner?
>
> Witness: Mr Bingham 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."

14. It is appropriate to pause here in the narrative and look forward to the litigation which ensued. In the consolidated action the Companies pleaded a "special relationship" based on Mr Sinclair's having (to Mr Crawford's knowledge) reposed trust and confidence

in Mr Crawford. The judge found that this was established, and the authorities show that the relationship between a banker and his customer, although not normally a fiduciary relationship, may exceptionally become one (although equitable relief is available only if the relationship is shown to have been abused: see the judgment of the Board in *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC 51. But the most important element in the judge's finding of a special relationship was Mr Crawford's assurance to Mr Sinclair, given in or around April 1987, that he (Mr Crawford) would do all that Mr Bingham had done in the past. The first mortgage dated 4 July 1985, which set the pattern for later mortgages, was entered into when NIC and Mr Sinclair had the benefit of Mr Bingham's financial guidance.

15. Mr Sinclair was persuaded to use the Bank for the second phase of the Negril Gardens Hotel development. NNH became a customer of the Bank. As the second-phase development got under way the Companies incurred substantial overdrafts but no formal overdraft limits were set at that time. Both Companies entered into mortgages in the Bank's standard form, NIC on 18 June 1987 and NNH on 10 August 1987. The form of mortgage was a familiar "all monies" charge payable on demand. It expressly provided for compound interest to be charged, and for the rate of interest to be varied.

16. There were also promissory notes in favour of the Bank entered into by both NIC and NNH. The documentary and other evidence about these notes is not easy to follow, but the general pattern is that during the first-phase development (that is between July and December 1985) NIC issued notes at an annual interest rate of 34% or thereabouts for a total principal sum of $1.95m (all references are to the Jamaican dollar, which suffered very serious inflation during the 1990s, leading to high interest rates). During the second-phase development (between August 1987 and March 1988) NNH issued notes to a total principal amount of $8.5m (consolidated into a single note on 1 April 1990). These were at an annual rate of 17% (reflecting the benefit of on-lending originating from the NDB). There were also, later on, notes issued by a third company formed by Mr Sinclair, Montego Investments Ltd ("MI").

17. The second-phase development was completed in November 1987. There was an opening ceremony on 8 December 1987 at which Mr Crawford was the guest speaker. At some time during 1988 (the precise timing is unclear) Mr Sinclair conceived a third

project, the rebuilding (under the name of the Gloucestershire Hotel) of a derelict hotel at Montego Bay, which is on the north coast of the island not far from Negril. MI was formed for this purpose. Again Mr Sinclair thought of using a new source of funding but after talking to Mr Crawford he decided to stay with the Bank. Mr Sinclair and his Companies were by then an important part of the Bank's business connection. The redevelopment of the Gloucestershire Hotel (a large hotel with 88 rooms and 12 shops) was finished in November 1989 and there was a formal opening on 17 February 1990. Mr Sinclair felt exhausted by the efforts which he had put into this venture. His evidence was that he ran the new hotel for two months without a manager and then decided to go to England for a good rest.

18. On 21 March 1989 Mr Keane-Dawes wrote an internal memorandum to Mr Crawford. It referred to a breach by the Bank of the regulatory code imposed by the Banking Act, and of proposed action (in which Mr Sinclair cooperated) to rectify this. It then referred to the Companies' overdrafts:

> "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 amount of $4m. 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 and write off approximately $60,000 in interest charges over a one-year period in order to minimise the impact on our P & I account. I would appreciate your comments on this matter."

Mr Crawford did not agree to this proposal. His reaction was that Mr Sinclair had done well out of his connection with the Bank. But Mr Keane-Dawes had on 24 June 1988 fixed a formal limit (of $3.8m) on NNH's overdrawn account, then in debit to the extent of about $3.765m, with an interest rate of 26%. He said in evidence that he thought it anomalous that "the Bank's largest borrowing connection was being charged at the Bank's worst interest rate".

19. Mr Sinclair travelled to England in April or May 1990. He had planned to stay for at least six weeks but he had been in England for only about a week when he had a disturbing telephone message

from Jamaica saying that the Companies' cheques were bouncing. Mr Sinclair managed to get Mr Crawford on the telephone. Mr Crawford said that he would put matters right. But Mr Sinclair decided that he must return at once. As soon as he got back to Jamaica he went to see Mr Crawford. Mr Crawford did not greet him in his usual friendly manner. He told Mr Sinclair to talk to Mr Keane-Dawes, but Mr Keane-Dawes referred him back to Mr Crawford. A few days after his return Mr Sinclair, accompanied by his friend, Mr Orville Gray (since deceased), saw Mr Crawford. Mr Sinclair asked Mr Crawford what the total indebtedness of the Companies was. According to Mr Sinclair, Mr Crawford noted figures down on a piece of paper, making a grand total of about $63m. This piece of paper is not extant and the alleged total seems larger than any sum that the Bank ever claimed. Whatever it was it profoundly shocked Mr Sinclair.

20. That was the beginning of the end of their personal and commercial relationship. Mr Sinclair took immediate steps to strengthen the Companies' boards of directors. Mr Donald Rainsford was appointed as chairman. Mr Sinclair also caused the Companies to instruct KPMG Peat Marwick, Kingston ("KPMG") to investigate and report on the Companies' finances.

21. On 7 June 1990 Mr Keane-Dawes wrote to Mr Sinclair pressing for a reduction in the Companies' indebtedness. There is an issue as to whether this letter constituted a demand for the purposes of the outstanding mortgages. If it did not, it is common ground that demands were made by formal demand letters dated 26 June 1991.

22. On 18 June 1991, after KPMG had made progress with their investigations, the Companies commenced proceedings against the Bank. The two amended statements of claim were on parallel lines, which facilitated the consolidation of the proceedings. Each pleaded a special relationship based on reliance, trust and confidence. Each alleged that the current accounts had been operated in an oppressive manner. Each was followed by a long and complex prayer for relief, seeking a number of detailed declarations, partly on questions of construction and partly on the interaction of the provisions of the mortgage securities and the other contractual arrangements between the Bank and its customers. The prayers did not in terms ask for the mortgages to be set aside (on the ground of undue influence or abuse of confidence) nor did they seek any other relief expressly linked to the allegation of a special

relationship. They did however seek an account, and an order for payment with interest of any sum found due on the taking of the account.

23. The amended statements of claim were not delivered until early in 1994. By then the Companies had succeeded (their Lordships do not know by what means) in paying off the whole of the indebtedness claimed by the Bank. That sum was not $63m but it was a very large sum. Their Lordships were shown a letter dated 30 September 1992 from the Companies' attorneys showing that a total of $35, 641,201, together with a further sum of $2m for costs and charges, was paid to the Bank, under protest, on or before that date.

24. The judge's reserved judgment, and the order which he made, are both quite lengthy. At the risk of some over-simplification they can be summarised as follows.

(1) The judge found that a special relationship had been made out on the evidence. This did not however have any obvious effect on the relief which he granted, which seems to have been based wholly or mainly on his conclusions on issues of construction of the documents and on banking usage.

(2) There was no demand under the mortgages until 26 June 1991, and until that date they were "not effective".

(3) Until 26 June 1991 the Bank was not entitled to charge compound interest or to vary the rate of interest.

(4) The reference in Article 11 of the account-opening agreement to "the Bank's usual rate of interest on overdrafts" was so uncertain as to be unenforceable. Until 26 June 1991 the Bank could charge only what was referred to as "the minimum rate of interest", which has been treated as an annual rate of 26%.

(5) Article 13 of the Agreement (the conclusive evidence clause) did not prevent the Companies from challenging the state of the account.

(6) The sum repayable to the Companies was to carry interest at an annual rate of 52% from 29 September 1992. That, together with the time occupied by the litigation, explains the very large sums (totalling just over $70m) payable under the judge's order.

25. The Court of Appeal, by a majority, rejected most of the Bank's grounds of appeal and ordered it to pay the costs (except for one day spent on a particular issue). The Court of Appeal did however vary the judge's order in two main respects. First, it held that the Bank had made an effective demand by the letter of 7 June 1990. Second, it ordered that the mortgages ("which would have come into operation on the date of execution") should be set aside. Since the demand in question was one made under the mortgages, there is some inconsistency between these two points. But their Lordships need not dwell on that inconsistency since it is clear that the order setting aside the mortgages cannot stand. The point had not been pleaded or argued either at first instance or in the Court of Appeal. Nor did the mortgages as such demonstrate any abuse of confidence. It was entirely natural that the Bank, when advancing large sums for the second-phase development at Negril, should want security. So far as the special relationship found by the judge is relevant at all (and little time was spent on it in argument at the hearing before the Board) it is relevant to the way in which the Bank managed the overdrawn accounts, especially in charging high interest rates on overdrawn balances on the ground that they were "unauthorised".

26. The issues argued before the Board were more limited, and (to some degree) more clearly defined than in the courts below. The judge's finding of a special relationship played little part in the argument. For the appellant Bank the Solicitor-General (Mr Hylton QC) did not formally concede the point but he recognised that he was faced with concurrent findings of fact (albeit by a majority in the Court of Appeal). Mr Ali Malek QC (for the respondent Companies) placed little practical reliance on the finding and did not attempt to uphold the setting-aside of the mortgages. Nor did he argue that the interest charged constituted a penalty. Instead the argument centred on the following issues:

(1) Were the courts below right in holding that the reference in Article 11 of the account-opening agreements to "the Bank's usual rate of interest on overdrafts" was so uncertain as to be unenforceable?

(2) Regardless of the answer to the first question (and apart from the mortgages) was the Bank entitled to charge the interest rates which it did charge at different times between 1984 and 1992?

(3) In the light of the answers to the first and second questions, and bearing in mind that (as the Companies accept) they did not expect to get financial accommodation for nothing, how should interest be charged and at what rate?

(4) What was the effect of the mortgages, and was the letter of 7 June 1990 an effective demand under the mortgages?

(5) What was the effect of Article 13 of the account-opening agreements?

Their Lordships will discuss the issues in this order.

27. On the first issue, concerning Article 11, their Lordships consider that the courts below were correct. They wish to emphasise, however, that they reached this conclusion on the particular (and unusual) facts of the case, and their decision certainly does not establish any general proposition that references to a bank's "usual rate of interest" or "usual terms" are insufficiently certain to amount to a contractual term (compare the observations of Lord Wright in *G Scammell & Nephew Ltd v Ouston* [1941] AC 251, 273). Whether such a provision fails for uncertainty must depend on the evidence placed before the court.

28. In this case the Bank was at the material times (between 1984 and 1987) a mere fledgling in the world of banking (indeed it was still not much more than a fledgling when it succumbed in the harsh financial conditions of the mid-1990s). It did not publish or display at its premises a rate of interest as its usual lending rate. It did not in terms inform the Companies (or, so far as the evidence went, any others of its customers) of the interest rates which it was charging (although a financially competent customer would have been able to obtain, from his bank statements, information enabling him to make a rough calculation). Mr Garcia (who followed the Solicitor-General on this point, and did so with considerable ability) explained that in practice the rate of interest charged to a customer depended on a number of factors (including the cost of funds, the personality of the customer, the security offered, and the size of the transaction). That was a realistic submission but it completely undermined the notion that the Bank had a single usual rate. The Bank was finally driven to the position that its "usual rate" was whatever rate it chose to charge from time to time, which cannot be the right answer.

29. It is convenient to take the second and third issues together. The Companies readily accepted, through their counsel, that they did not expect to be able to borrow funds interest-free, and were liable to pay a proper rate of interest. But they resisted the suggestion that if the Bank had failed to establish an express term of sufficient certainty to enable it to capitalise unpaid interest on a monthly basis, it should be entitled to do so under any sort of implied term. That would, Mr Malek submitted, be a bizarre result.

30. Mr Malek also submitted that the Bank could not succeed in establishing a custom (among bankers in Jamaica at the material time) of capitalising unpaid interest at monthly intervals. Any such custom would have to be well known to the banks' customers as well as to the banks themselves; it would have to be certain, reasonable, and not inconsistent with any express contractual terms. In the courts below the Companies' counsel argued successfully that the evidence of general banking practice showed that interest had been capitalised monthly under express contractual terms. It was therefore useless as evidence of custom.

31. On this point Mr Malek sought to rely on concurrent findings below. Ellis J stated (at page 86 of the record),

> "On my considering the dispositions of the witnesses from the various banks I do not find that they provided any cogent evidence as to the existence of business practice which would assist me in interpreting 'the usual rate of interest on overdraft' to confer any entitlement on the defendant to compound interest. I hold that finding because in a majority of the practices deponed to, there was express terms in the contracts to compound interest on overdraft balances unlike the circumstances of this case."

In the Court of Appeal the majority adopted and indeed strengthened this conclusion. Harrison JA (at pages 282-3) referred to a contractual right enjoyed under their written agreements by all six leading commercial banks operating in Jamaica and Langrin JA (at pages 316-8) concluded that "nearly all banks" charged compound interest under express contractual terms. Downer JA, dissenting, reached a different conclusion (at page 214).

32. The Board is always very reluctant to interfere with any concurrent finding of fact. But on this point the relevant finding depends on the assessment of a relatively small volume of evidence

given by bank officials. That evidence is recorded, partly in a full transcript and partly in the judge's notes, and little (at any rate on the point which is now relevant) can have depended on the demeanour of the witnesses. The Board has therefore thought it right to review this evidence.

33. Its effect can be summarised as follows:

(1) Mr Josyelyn Richards had worked for the National Commercial Bank ("the NCB") for nearly 30 years. His evidence in chief was that when a customer had an overdraft facility, "calculations were done daily, balances applied to account on a monthly basis". The process continued as long as the overdraft continued. In cross-examination he agreed that under its express contractual terms the Bank had the right to charge compound interest. The relevant forms were put to him. Most of the rest of his evidence was concerned with interest rates.

(2) Mrs Dorothy Parkins had worked for Citibank for about 24 years. Her evidence in chief was that "interest is calculated on a daily balances [? basis] and is charged at the end of each month". In cross-examination she was not asked about her bank's documentation, except a general question as to whether it was "meticulous" (the witness said it was).

(3) Mr Winston DaCosta was employed at NCB from 1961 to 1988. He then worked for Eagle Merchant Bank. He spoke of interest being added to the account on the last working day (apparently of the month) but it is not always clear whether his evidence of practice related to NCB or to Eagle. An Eagle form was read to him in cross-examination but the witness did not remember it and did not confirm it.

(4) Mr Errol Richards had worked for the Bank of Nova Scotia ("BNS") for 35 years. His evidence in chief was:

> "Interest is on daily closing balance on simple interest basis at agreed rate. Interest is automatically charged to current account on last business day of each month so increasing sum outstanding by that interest charged. On first business day of following month interest would be on an amount representing closing balance as at end of previous month if no deposit for the charge was made – compounding

interest. This has been the Bank's practice for past 106 years."

In cross-examination he said that his bank had always used a written contract and that "the present contract" (he was giving evidence in 1995) embodied its practice, referring to the payment of "interest and overdue interest". Recalled later, Mr Richards stated that the form used until 1993 did not in terms refer to compound interest.

(5) Ms Geneve Tulloch worked for BNS and then, from 1983, for Trafalgar Commercial Bank. Her evidence in chief was:

"Interest is accrued on daily basis and posted at end of each month. If no payment, interest calculated on new balance and so on."

She was not cross-examined about the form of either bank's documentation.

(6) Mr V Caple Williams was the only witness who was an officer of the Bank. He had been an executive vice-president from 1988. Before that he had worked for BNS for about 23 years. He said of practice at BNS:

"Simple interest on daily balance, then interest is charged to account in following month. Simple interest on the first day of the month, and interest charged to account. Not different from that of CNB."

He described this as standard practice. He was cross-examined at some length, but largely about regulatory matters. He was asked in cross-examination about the Bank's documentation and said that it "adopted forms used in Canada".

(7) Ms Valerie Crawford had worked for the Mutual Security Bank since 1989. Her evidence in chief as to the monthly charging of overdraft interest was to the same effect as that of the other witnesses. She was asked in chief to produce a Royal Bank form (Royal Bank was said to have been a predecessor of Mutual Security Bank) but counsel for the Companies objected and the point was not pursued (either in chief or in cross-examination).

34. This evidence established, with striking unanimity, that interest on overdrafts with commercial banks was calculated on a daily basis and charged to the account on the last working day of the month. This produced the effect of compound interest, although not all the witnesses used that particular form of words to describe it. In only one case (the NCB) was it clearly established that this practice was, at the material time, covered by an express contractual term. On the evidence, it is a matter of conjecture whether there was an express term in the other commercial banks' standard documentation. There may have been, but it was not established by the evidence. After a detailed review of this part of the evidence, their Lordships have concluded that it did not justify the conclusion reached by the judge and upheld by the majority of the Court of Appeal.

35. What actually happened in this case was that the Bank charged the Companies interest on their overdrawn accounts, adding unpaid interest to the account on a monthly basis, and charging that interest at high rates. The high rates of interest were partly explicable by the high rate of inflation prevailing in Jamaica during this period, and the high rates of interest which the Bank of Jamaica charged to commercial banks, especially if they went outside the central bank's guidelines. But another, much more questionable reason for the rates being so high was that until Mr Keane-Dawes fixed an overdraft limit for NNH in June 1988, the Companies were charged the higher rates (sometimes referred to as "penal" rates) appropriate to unauthorised overdrafts. That conduct was incompatible with the Bank's obligations arising out of the special relationship which (as the judge and the majority of the Court of Appeal found) existed between the Bank and the Companies, at any rate from the time of Mr Bingham's departure.

36. It was in charging penal rates of interest, and not in charging the interest to the overdrawn accounts at monthly intervals, that the Bank took unfair advantage of the Companies. The Bank's practice in charging interest at monthly intervals had begun while Mr Bingham was looking after the Companies' financial affairs, and before Mr Crawford's promise to do everything which Mr Bingham had done for the Companies. It was standard practice, and not in itself objectionable. But had Mr Bingham remained as an adviser on the financial side, it is very probable that he would (as the second phase of the Negril development got under way, and the overdrafts increased) have taken steps to ensure that authorised overdraft limits were set, so as to attract the lower rate of interest on authorised overdrafts. The Bank, having entered into a special relationship,

could not conscientiously allow the Companies' overdrafts to get bigger and bigger while treating them as unauthorised overdrafts in order to charge very high rates of interest.

37. For these reasons their Lordships consider that it was right for the courts below to disallow the rates charged by the Bank, but that they went too far in disallowing any compounding effect (until demand under the mortgages, which is part of the fourth issue). In their Lordships' opinion the Bank was entitled to interest at a reasonable commercial rate (which the judge fixed at 26%, a figure which has not been challenged as a separate issue before the Board) on the overdrawn balances from time to time due, but with unpaid interest added to the overdrawn accounts at monthly intervals. This solution could be justified either by the implication of a contractual term, or as a requirement imposed by the Court in granting relief of a restitutionary nature. This is not a case in which the implication of a term would be unrealistic. It would be more unrealistic to conclude that the uncertainty of the expression "the Bank's usual rate of interest" led to the absence of any contractual relationship between the Bank and each of the Companies. Plainly there was a contractual relationship of banker and customer (buttressed by further obligations arising out of the special relationship) but a gap as to the interest rate (compare the slightly different approaches to a comparable problem taken by Lord Atkin and Lord Wright in *Way v Latilla* [1937] 3 All ER 759). This is not an appropriate case for the Board to embark on any prolonged discussion of this rather ambiguous watershed between contractual and restitutionary obligations. Either approach leads to the same result. Quite apart from the effect of the mortgages (considered below) the order of the Court of Appeal must be varied so as to provide for monthly capitalisation of the overdraft interest ordered by the judge.

38. On the fourth issue, the Court of Appeal held that interest could not be charged under the mortgages (which expressly provide for compound interest, and for variation of the rate of interest) until 7 June 1990; but that the mortgages should be wholly set aside. The setting aside of the mortgages was not an issue raised on the pleadings. Nor was it argued, either at first instance or in the Court of Appeal. It was a point raised for the first time in the judgments of the majority in the Court of Appeal, and Mr Malek rightly did not seek to defend it. The mortgages were granted to give the Bank security for the Companies' rapidly-increasing overdrafts, and there was nothing oppressive in the Bank seeking security. That part of the Court of Appeal's order must be set aside.

39. However, the primary function of the "all monies" mortgages was, as just mentioned, to provide the Bank with security against the possibility of default. Until a demand was made under either mortgage, the Bank's rights (especially as regards the charging of interest) depended on the contractual terms (evidenced by the account-opening agreements and the promissory notes) on which the Bank had provided the Companies with loan facilities of various sorts. The judge's order (if literally construed) went too far in saying that the mortgages "were not effective immediately upon their execution". They were immediately effective in the creation of security. But their terms as to interest did not come into effect until the making of a demand.

40. The demand did not have to be (as the judge's order put it) "a formal demand" but it did have to be clear and unconditional. As was said in *Re Colonial Finance Mortgage Investment & Guarantee Corporation Ltd* (1905) 6 SR NSW 6, 9,

> "... there 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."

41. Mr Keane-Dawes' letter of 7 June 1990 (addressed to Mr Sinclair, who was greeted as "Dear John") was expressed in polite terms. It was not expressed in clear or unconditional terms. Its main thrust was to ask that the Companies' overdraft levels should be reduced (by an unspecified amount) and that no further large cheques should be issued. There was a suggestion as to negotiations with the Companies' trade creditors. There was nothing amounting to a demand within the meaning of clause 1(1)(a) of the mortgages. The judge was right to hold that an effective demand was first made on 26 June 1991.

42. The fifth issue concerns Article 13 of the account-opening agreements. Article 13 provided that a customer agreed to notifying the Bank in writing of any "objection or claim" with regard to periodic bank statements and that:

> "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."

43. The courts below relied heavily on the decision of the Board in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80. The facts of that case were very different in that it involved, not an objection to the rate of interest charged, but the honouring by three different banks of several hundred cheques on which a managing director's signature had been forged by an accounts clerk. Moreover, the contractual terms (set out in the report at page 109) were different in that two of the three banks' documentation referred to "errors" (and the third simply referred to confirmation of the account). However their Lordships do derive assistance from the general proposition in *Tai Hing* (at page 110) that,

> "Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts."

44. In applying this general principle their Lordships attach some significance to the references in Article 13 to "accuracy" and "inaccuracy" (suggesting errors of computation rather than errors of principle) and also to the Article's stated effect in releasing the Bank "from any responsibility or obligation for any ... claim arising from any inaccuracy". This suggests a release of the Bank from claims for consequential loss as a result of a customer being misinformed about his financial position. The account-opening agreements are standard-form documents which must be construed against the Bank which prepared them, and their Lordships see no reason to give the clause any wider effect. It is not therefore an obstacle in the Companies' way. The same conclusion could readily be based on the special relationship found in the courts below, but it is not necessary to put it on that narrower ground.

45. Their Lordships will therefore humbly advise Her Majesty that the order of the Court of Appeal (which itself varied the order of Ellis J) should be varied as follows.

(1) The Bank's right to charge overdraft interest was until 26 June 1991 limited to interest at the rate ordered by Ellis J, but with monthly capitalisation of unpaid interest.

(2) The mortgages are not to be set aside. Interest may be charged under the mortgages as from the date of demand, 26 June 1991. The mortgages were immediately effective as securities.

In other respects the order of the Court of Appeal will stand. The Court of Appeal's order for interest at the rate of 52% per annum (from 30 September 1992 until judgment on 18 July 1997) was not challenged before the Board and will stand, without prejudice to any argument (raised on the taking of the account) as to interest after 18 July 1997.

46. In the event the appellant Bank has had a limited measure of success on some grounds of appeal, but has failed on others. Their Lordships will therefore invite the parties to make written submissions as to costs in accordance with directions to be given by the Registrar.