JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 35/81

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carberry, J.A.

BETWEEN - THE IMPERIAL LIFE ASSURANCE COMPANY OF CANADA
AND
JUDAH, DESNOES & CO. - DEFENDANTS/APPELLANTS

AND - BANK OF COMMERCE JAMAICA LTD. - PLAINTIFF/RESPONDENT

R.N.A. Henriques, Q.C. and Andrew Rattray for 1st Defendant/Appellant.

Ronald Williams, Q.C. and J. Leo-Rhynie for 2nd Defendant/Appellant.

Dr. Lloyd Barnett and Dennis Morrison for Plaintiff/Respondent.

March 7-11, 1983; July 26 and September 23, 1985

ROWE, P.:

In the years which passed between the hearing of the arguments on appeal and the delivery of the judgment on July 26, 1985 there has been a change in the status of Rowe, J.A. who has since been appointed President.

Harold Andrade was on October 22, 1970 registered as the fee simple owner of premises 34-36 Hagley Park Road, St. Andrew. On that same day a first mortgage of the property was registered in favour of the 1st defendant/appellant (Imperial Life) to secure a loan made to Andrade in the sum of $50,000.00.

Richard Roberts an experienced Solicitor and partner in the firm of Judah, Desnoes and Company (Judah) prepared the mortgage documents on behalf of Imperial Life. In unexplained circumstances, the title registered at Vol.352 Folio 90 of the Register Book of Titles was made available either to Andrade or to the Solicitors representing First National City Bank of 21 Constant Spring Road, St. Andrew and on January 14, 1971 mortgage No. 225987 dated 31st December, 1970 was registered and endorsed on the Title whereby Andrade further mortgaged the property to First National City Bank "to secure the monies mentioned in the mortgage." After that endorsement was made the Title was returned to Judah, who on February 1, 1971 forwarded it to Imperial Life, there to rest until 1975.

Andrade approached Imperial Life for an additional loan on the security of 34-36 Hagley Park Road in 1974. Imperial Life was prepared to entertain the request but even if the application was approved its cash flow position prevented it from making an immediate disbursement. Trevor Hylton, a sales representative of Imperial Life explored with the Manager of Bank of Commerce Jamaica Limited (Bank of Commerce) Kingston branch, the possibility of Bank of Commerce facilitating Andrade, a client of Imperial Life, and also the Bank of Commerce with bridging finance. Mr. Shim, then Manager of Bank of Commerce was advised by Hylton that Imperial Life was in the process of granting an additional first mortgage to the amount of $80,000.00 on Andrade's Hagley Park Road property and that it would take some time for the funds to be disbursed by Imperial Life pending the execution of the new mortgage. Hylton said Imperial Life would be prepared to provide Bank of Commerce with an undertaking to disburse the

proceeds of the mortgage directly into Bank of Commerce. Mr. Shim understood Mr. Hylton to be proposing that Bank of Commerce should provide "bridging financing" to the potential borrower, Andrade, which would be repaid in full by Imperial Life when it had available funds and a registered mortgage from Andrade.

Mr. Shim was familiar with that type of financial transaction and he detailed to Mr. Hylton the three conditions on which Bank of Commerce would consider the application. Firstly, Andrade would be required to issue an irrevocable letter of undertaking to Imperial Life, authorising Imperial Life to pay the proceeds of the proposed mortgage directly to Bank of Commerce; secondly, Imperial Life should itself issue an irrevocable undertaking to direct the proceeds of the mortgage directly to Bank of Commerce, and thirdly, that Andrade should provide Bank of Commerce with an up-to-date statement of his assets and liabilities.

In chronological sequence I will set out the important events consisting of letters, oral conversations, dictated statements and telephone conversations between November 7, 1974 and February 5, 1975. As it was Imperial Life's Hylton who fired the first salvo, so it was Imperial Life's Andy Blain, Branch Officer Supervisor who, in his letter of November 7, 1974, fired the second salvo. He wrote to Bank of Commerce confirming that it was prepared to grant an additional first mortgage of $80,000.00 on 34-36 Hagley Park Road, subject to approval of the official Mortgage Application Form which had been sent to its Head Office. The purpose of the letter was identified when Mr. Blain wrote that "these funds would be disbursed by us within one year of receiving approval of the loan from our Head Office." He was

obviously intimating that the accommodation being sought by Andrade would determine within twelve months.

December 17, 1974 was a date of much activity in connection with these proceedings. Imperial Life issued its letter to Andrade commencing in these terms:

> "You will be pleased to know that your application for a first mortgage loan has been approved as follows and placed in the hands of our Solicitors with instructions to proceed immediately.
>
> | | |
> |---|---|
> | Amount of approval loan | J$148,000 |
> | Rate of interest | 11.5% |
> | Term and amortization | 20/20 |
> | Monthly repayment | J$1,551.31 " |

The commitment was made subject to four conditions three of which related to Andrade's production to the prospective lenders' Solicitors of all title documents, five insurance policies etc. where applicable, as may be required by our solicitors the same to be satisfactory to the Solicitors and his eventual execution of the mortgage documents. A letter of similar date was sent to Andrade by Imperial Life which confirmed to him that his recent mortgage for 34-36 Hagley Park Road had been approved for the sum of $80,000.00 at an interest rate of 12.5% and that the new mortgage when blended with the existing mortgage would bring his indebtedness to $148,000.00 and an average rate of interest of 11.5%.

Andrade prepared his own letter to Bank of Commerce making reference to the Bank's stipulations in the conversation with Hylton, to the agreement of Imperial Life to make a loan of $80,000.00 to him, and added his own promise to provide Bank of Commerce with the irrevocable undertaking they demanded in the event of the approval of his loan request. With his letter of approval from Imperial Life and with his letter promising to abide by the Bank's condition, Andrade obtained an interview with

Mr. Shim and gave a statement of his affairs. It was the evidence of Mr. Shim that the statement of assets and liabilities were required for two reasons. In the first place it would be Andrade's liability to pay interest on any loan made by the Bank and in the second place the Bank wanted to know if it would have any protection in the event of recourse to Andrade. The unverifiable and inflated information provided by Andrade placed his net worth well over $700,000.00.

Judah entered the arena with its letter of December 31, 1974. They wrote to Bank of Commerce as under:

> "re Harold Andrade
>
> We have to advise that Mr. Harold Andrade has been granted a loan from the Imperial Life Assurance Company of Canada of $48,000.00 and on completion of the mortgage he should receive approximately J$76,300.00.
>
> The mortgage, however, is not due for completion until October, 1975 and you have our undertaking to forward you the amount of $76,300.00 at that time, subject to satisfactory completion of the mortgage. "

Prima facie, Bank of Commerce's three pre-conditions were then complied with and after discussions at the local level between Shim and Joseph Krukowski, then Asst. Area Manager, King Street Branch of Canadian Bank of Commerce, Mr. Krukowski transmitted Andrade's application to his Head Office in Canada on January 23, 1975, with recommendations. Both Messrs. Shim and Krukowski had reservations as to the terms of Judah's undertaking and these reservations were fully shared by their Head Office which instructed that a firm irrevocable undertaking from Imperial should be sought and obtained before any disbursement.

How to circumvent this roadblock? Here were two Canadian companies doing business in Jamaica, whose main offices in Jamaica were housed in the same building and both wished to do business with each other for the benefit of each other.

Mr. Shim of Bank of Commerce broke the bad news to Mr. Blain of Imperial Life. Mr. Blain needed re-inforcements and so he contacted his area Supervisor Mr. Dutch Holland who took swift action. He went to see Mr. Shim on or about January 30, 1974, introducing himself as the Resident Superintendent for Imperial Life and argued that the letter from Judah of December 31, 1974 was in common form and should be acceptable. Not satisfied with his interview with Mr. Shim, Mr. Dutch Holland next telephoned to Mr. Krukowski, expressing his personal understanding of the reservations held by Bank of Commerce but then he went on to assure Mr. Krukowski of the credibility of Imperial Life and of the genuineness of its commitments. His letter of January 30, 1975 to Bank of Commerce was in these positive terms:

"HAROLD ANDRADE"

"This letter will confirm the fact that the above-named had been granted a loan by the Imperial Life Assurance Company in the amount of J$148,000.00 and on completion of the mortgage in October, 1975, the net proceeds to him will be J$76,300.00.

"This letter will further confirm that these net proceeds (the amount is approximate) will be paid to you direct by our Solicitors Judah, Desnoes & Company, and as you will note a copy of this letter is being sent to Mr. Roberts who will confirm this fact to you that he will follow these instructions."

Mr. Roberts, aware of the urgency of his client's instructions wrote on the same day January 30, 1975 to Bank of Commerce confirming that they had instructions both from "Mr. Harold Andrade and the mortgagees, Imperial Life, to pay over to you the proceeds of the loan obtained by Mr. Andrade on the conditions stated in our letter referred to above" (that of 31st December, 1974).

The posture adopted by Imperial Life's officers was that they had gone far enough in their assurances to Bank of Commerce and if anything more water-tight was required it would have to be provided either by Head Office or its Attorneys-at-Law.

Messrs. Shim and Krukowski said that after the assurances and explanations from one in Mr. Dutch Holland's position and having regard to the practice between banks which extended to dealings between banks and insurance companies, they no longer expected a document from Imperial Life which would satisfy their pre-conditions and therefore they took the decision to disburse funds to Andrade. $55,000.00 were paid to Andrade between February 3, and 5, 1975. Although these payments were made before Bank of Commerce received the letter of February 6, 1975 from the Asst. Administrative Officer at Imperial Life's Head Office in Toronto, Canada, the writer summarised the state of the negotiations most aptly when he wrote:

> "This seems a very simple and straight forward transaction and once our Solicitors legal requirements have been satisfied we would anticipate that the matter will proceed and will be handled to your entire satisfaction."

The prediction as to "entire satisfaction" came to nought. Imperial Life through its branch office transmitted a Requisition to its Solicitors, Judah, to prepare a first mortgage on 34-36 Hagley Park Road. The Requisition recited that the Title was enclosed but this was not so and on May 7, 1975, Mr. Roberts wrote to Imperial Life for the Title. It was forwarded to him under cover of letter May 16 and the rotten news came to light that there was endorsed on the title a second mortgage in favour of First National City Bank. Judah advised in letter of May 21, 1975 that the Security was not considered acceptable. Andrade sought and obtained from Imperial Life extensions of time within which to pay off the second mortgage but he accomplished nothing tangible in that regard. It was not until November 7, 1975 that Imperial Life first informed Bank of Commerce that:

> "Because there was a second mortgage on the property, our company refused to pay out this Loan."

The learned trial judge found that after January 14, 1971 the appellants had actual or constructive notice of the second mortgage endorsed on the title, that the title was in the actual custody of Imperial Life which had ample opportunity to inspect it, that Bank of Commerce had no similar notice and was led to assume or believe that all was clear for the advances to be made to Andrade. He further interpreted the undertaking by Judah which contained the rider "subject to the satisfactory completion of the mortgage" to mean,

> "subject to the preparation, execution and registration of the mortgage documents in the sum of $148,000.00 as principal with Harold Andrade as the mortgagor."

In its Grounds of Appeal, Imperial Life contended, that the learned trial judge's construction of the undertaking as set out above was wrong in law in that he construed the undertaking in accordance with his findings of fact rather than in accordance with the language of the undertaking. Additionally, Imperial Life complained, that even on the Judge's construction of the undertaking there was no breach on the evidence which in fact did not disclose any cause of action against the defendants.

The respondent had in its statement of claim pleaded alternative causes of action against Imperial Life including breach of an agreement partly written and partly oral between itself and Imperial Life, breach of warranty, breach of contract of indemnity, and against both appellants for breach of an undertaking and for negligence. On the findings of fact of the learned trial judge Bank of Commerce can only succeed if the evidence disclose the making of negligent mis-statements by either or both appellants in circumstances which give rise to a cause of action in negligence under the principles adumbrated by the Privy Council in Mutual Life and Citizen's Assurance Co. Ltd. & another v. Evatt (1971) 1 All E.R. 150. On this crucial question counsel on both sides in the course of their arguments

did not find it necessary to go outside the decision in Mutual Life v. Evatt and a commentary in Spencer Bower and Turner (3rd Edition) on Actionable Misrepresentation at pages 414 et seq. I will similarly confine myself.

The respondent contends that a duty of care arises in relation to representations made by one person to another where the representations concern business transactions which by their nature make it clear that the information contained in the representations are matters of importance and will be significant in relation to the contemplated action by the party to whom the representations are made. In a case where a person carries on a business or profession which requires special skill and competence or where by his conduct he makes it appear that he possesses special skill and competence in the subject matter, then if he gives information to a person which is negligently given and that person in reliance on that information suffers damage he will be liable in damages to that other person.

Not every kind of negligent mis-statement will give rise to a cause of action in negligence. Lord Diplock summarised the position as it existed at common law before the decision in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (1963) 2 All E.R. 575, in his speech in the Mutual Life v. Evatt case at page 154 of the report thus:

> "Prior to Hedley Byrne it was accepted law in England that in the absence of contract the maker of a statement of fact or opinion owed to a person whom he could reasonably foresee would rely on it in a matter affecting his economic interest, a duty to be honest in making the statement. But he did not owe any duty to be careful, unless the relationship between him and the person who acted on it to his economic detriment fell within the category of relationships which the law classified as fiduciary. Hedley Byrne decided that the class of

> "relationships between the maker of the statement and the person who acted on it to his economic detriment which attracted the duty to be careful was not so limited, but could extend to relationships which though not fiduciary in character possessed other characteristics."

The relationships possessing characteristics other than fiduciary ones, came to be termed special relationships. Should there be rigid rules or classifications or categorizations of the classes of cases which can give rise to that special relationship? The powerful dissenting speech by Lord Reid and Lord Morris of Borth-y-Gest in Mutual Life v. Evatt was against such rigid classification and in their opinion the true test should be whether the reasonable man would think that in the particular circumstances he had some obligation beyond merely giving an honest answer. But the majority opinion of the Privy Council limited the special relationship to two kinds of cases. Spencer Bower in his Treatise, supra, at page 429 listed them as:

> "First, the case where, by carrying on a business or profession which involves the giving of advice calling for special skill and competence the defendant has let it be known that he claims or possesses and is prepared to exercise the skill and competence used by persons who give such advice in the ordinary course of their business.
>
> Second, the case where, though the defendant does not carry on any such business, he had let it be known in some other way that he claims to possess skill and competence in the subject matter of the particular enquiry comparable with that of persons who do carry on the business of advising on that subject matter, and is prepared to exercise that skill and competence on the occasion in question."

The facts in Mutual Life v. Evatt were entirely different from those in Hedley Byrne v. Heller as are the facts in the instant case different from those two cases above. But as Lord Diplock said in Mutual Life v. Evatt at page 161 the categories of negligence are never closed.

> "As with any other important case in the development of the common law, Hedley Byrne should not be regarded as intended to lay down the metes and bounds of the new field of negligence of which the gate is now opened. Those will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them. The instant appeal is an example: but their Lordships would emphasise that the missing characteristic of the relationship which they consider to be essential to give rise to a duty of care in a situation of the kind in which the respondent and the company found themselves when he sought their advice, is not necessarily essential in other situations, such as, perhaps, where the advisor has a financial interest in the transaction on which he gives his advice (cf W.B. Anderson & Sons. Ltd. v. Rhodes (Liverpool) Ltd. The categories of negligence are never closed....."

In the instant case Imperial Life carried on business of lending money on long term mortgages. The method of operating this business, as the instant case shows, involved a scheme or a series of transactions in which Imperial Life would first consider and approve a mortgage loan, then a willing bank would be asked to provide immediate finance as a bridge between the approval of the mortgage loan and the date of disbursement. When therefore Imperial Life as the long term lender makes a statement of the approval of the mortgage loan and conveys that approval to the short-term lender, Imperial Life must reasonably have contemplated and anticipated that the short-term lender would place reliance upon its statement of approval and be influenced thereby into the grant and disbursement of the bridging finance.

The statements were made by Imperial Life in a context in which it fully appreciated that short-term advances would be made before the completion and registration of the mortgage and the entire series of negotiations were conducted on the basis that immediate advances would be made to Andrade and the Bank would be re-imbursed from the proceeds of the mortgage sometime in the future.

The representations made through the agents of Imperial Life orally and in writing conveyed the information to Bank of Commerce that a binding agreement to grant a first mortgage existed between itself and Andrade and from these representations it could be reasonably inferred that all the essentials relating to the grant of a first mortgage had been agreed and settled satisfactorily between Andrade and Imperial Life and that there was no existing or easily ascertainable factor which would provide an impediment to the grant of the mortgage.

In my opinion, Imperial Life owed a duty of care to Bank of Commerce and failed to use reasonable care in giving the assurances to Bank of Commerce in that it failed to inspect the Certificate of Title which was in its own possession before advising Bank of Commerce that it had approved the mortgage loan to Andrade. The learned trial judge was entirely correct when he concluded that Imperial Life led the Manager of Bank of Commerce to assume or believe that all was clear for the advances to be made to Andrade. Indeed it was the opinion of Imperial Life that Bank of Commerce was being unduly protective of itself when dealing with assurances given by so reputable a company as Imperial Life in such a very simple and straightforward transaction. Indeed Imperial Life was impatient at what

it considered to be undue delay on the part of Bank of Commerce to make the short-term advance to Andrade.

A special relationship was established between the two financial institutions both being money-lenders, the one on long-term mortgages and the other on short-term "bridging financing". The long-term lenders assurances of a mortgage loan in a specified sum, to a named person to be disbursed at a stated future time, was in the instant case intended to be acted upon by the short-term lender, who acting upon the faith of those representations incurred loss. The long-term lender owed a duty of care to the short-term lender and due to its negligence, was in breach of that duty. I would dismiss the appeal of Imperial Life with costs to the respondent to be taxed or agreed.

I am of opinion that Judah is in a different position from Imperial Life. It would be nothing to the point that it was acting on the instructions of Imperial Life if it gave an unequivocal and unconditional undertaking in its own name to pay to Bank of Commerce the sum of $76,300.00 in October 1975 on Andrade's account. The respondent's witnesses Messrs. Shim and Krukowski testified that they understood the undertaking from Judah to be too broad. This is how Mr. Shim put it:

> "When the attorney's letter was received at the Area Office they called us to say that undertaking was too broad and they were of opinion that the Attorneys were only committing to the extent that the funds would only be paid over by them to us provided mortgage proceeds were forthcoming from Imperial Life."

And Mr. Krukowski's evidence was to the same effect. He said:

> "It was too broad because Judah, Desnoes only committed themselves to pay over the funds to the Bank provided that the funds were paid to them by Imperial Life. "

On the evidence Judah was not the Attorneys for Imperial Life in negotiations preceding the approval of Andrade's application for a mortgage loan. Judah's role, as Mr. Williams contended, was, to act on the instructions of Imperial Life, to prepare a first mortgage and cause same to be registered as a first mortgage and thereafter to pay over to Bank of Commerce the proceeds of the mortgage when they were put in funds so to do by Imperial Life. In my view the first paragraph of Judah's letter of December 31, 1974 cannot properly be construed as a representation intended to induce Bank of Commerce to grant "bridging financing" to Andrade. Even if it were a representation, it was true in substance. What is important, however, is that Bank of Commerce did not purport to rely upon that statement of fact. The Bank's concern was with the terms of the undertaking which did not in their view contain a binding obligation on Judah to pay in any event at the stipulated time. Had it not been for the conversations between Mr. Dutch Holland of Imperial Life and the representatives of Bank of Commerce towards the end of January and his letter of January 30, 1975, there is little likelihood that the short-term loan would have been made. Mr. Holland's letter addressed to the Manager of Bank of Commerce in its operative paragraphs said:

"HAROLD ANDRADE

> "This letter will confirm the fact that the above-named has been granted a loan by Imperial Life Assurance Company in the amount of J$148,000.00 and on completion of the mortgage in October, 1975, the net proceeds to him will be J$76,300.00.
>
> "This letter will further confirm that these net proceeds (the amount is approximate) will be paid to you direct by our Solicitors Judah, Desnoes & Company, and so you will note a copy of this letter is being sent to Mr. Roberts who will confirm this fact to you that he will follow these instructions."

I can find no special relationship between Judah and Bank of Commerce. Judah did not in the circumstances owe Bank of Commerce a duty of care and, in any event, there was no breach of any representation made by Judah, giving rise to damage on the part of Bank of Commerce. Accordingly, I would allow the appeal of Judah set aside the judgment of the Court below and enter judgment for Judah with costs against the plaintiff/respondent to be taxed or agreed.

Since preparing this opinion I have had the opportunity to read in draft the opinion of Carberry, J.A. I would agree with his conclusion that Bank of Commerce could not succeed against Imperial Life if this action sounded only in contract.

KERR, J.A.:

I have read the opinion of Rowe, P. (as he now is) and I entirely agree with his reasons and conclusions. I would dismiss the appeal of Imperial Life with costs to the respondent to be agreed or taxed. I would allow the appeal of Judah, Desnoes & Co. and enter judgment in their favour against the respondent with costs to be agreed or taxed.

CARBERRY, J.A.:

This case raises several issues of importance to the business community of Jamaica: amongst them are the relationship between the respective parties in what is called "bridging" or "interim" finance, the meaning and effect in law of what are called locally "letters of commitment", and the significance and effect of an "undertaking" given by an attorney-at-law. The genesis and prime cause of the whole imbroglio however springs from the fact that in this case the first-named defendant, The Imperial Life Assurance Company of Canada, (hereinafter called the Insurance Company), a Company incorporated in Canada, but carrying on business in Jamaica, chose to keep the documents of title, which it held as securities for mortgages or loans made by it in Jamaica, at its Head Office in Canada instead of at its place of business in Kingston. The effect of this was that its local agents and their attorneys-at-law in Jamaica were considerably handicapped in the conduct of their everyday business in Jamaica by lack of access to these documents. Another factor at work was that not only the Insurance Company, but also the original plaintiff, The Canadian Bank of Commerce (now translated into the Bank of Commerce Jamaica Ltd. and hereinafter called The Bank) was also incorporated in Canada, and it appears that both Companies before engaging in any moderately substantial investments or lending of money to local businessmen found it necessary to first seek and obtain approval from their Head Offices in Canada. I express no opinion as to the commercial necessity or policy involved, but it must have slowed down the rate at which their business was conducted, and I think that, coupled with the lack of access to the documents of title, difficulties in communication played their part in the circumstances leading up to the present

litigation. Both the Bank and the Insurance Company were apparently on friendly terms, sharing the same building in down-town Kingston. The second-named defendants, Judah, Desnoes & Co. were a firm of attorneys, well known and respected in the commercial and legal world, and in this instance were the attorneys-at-law for the Insurance Company. They are hereafter referred to as The Attorneys.

Missing, in every sense, from this lineup of the parties in this case, is a local businessman Harold Andrade, who conducted a business Metstrut Limited on premises at 36 Hagley Park Road, Kingston 10.

The story in outline is this: Mr. Andrade apparently wished to borrow money to expand his business on those premises. He was a customer of both the Bank and the Insurance Company. He had already borrowed money from the Insurance Company on a first mortgate of these premises, he now wanted to borrow more. The Insurance Company indicated willingness to increase their loan to him by increasing the size of their first mortgage; they already had his title deeds, a Registered Title, but these were in Canada. He wanted an additional loan of some $80,000.00 but the Insurance Company were not prepared to make the actual advance until the next year, September of 1975. Their rates of interest were attractive, and they had already lent money to him. He was no doubt anxious to secure this advance on those terms, but he needed the money urgently, and with this in mind he approached, through an insurance salesman employed to the Insurance Company, his Bank Manager at the local branch of the Bank, a Mr. Shim. Mr. Andrade sought to persuade the Bank to lend him money now (December, 1974) on the strength of the loan promised to him by the Insurance Company in next year September, 1975. To anticipate, the Bank naturally got in touch with the Insurance Company to verify that they were going to lend Mr. Andrade this

money, with a view to seeing that when it was advanced it would come to them. The Bank naturally sought to make its own position as secure as possible: in this litigation the Bank alleges that it achieved a contract with the Insurance Company by which the Company bound itself to make the loan and to hand the proceeds over to the Bank; the Insurance Company for its part denies that any such contract was made, though admitting that they had fully intended to make a loan to Andrade, and had so told the Bank. In the event two things happened: the Bank went ahead on the strength of (i) its own investigations into Mr. Andrade's affairs, and (ii) the assurances it got from the Insurance Company, (whatever these may turn out to be), and they made actual advances to Mr. Andrade totalling some $76,300.00. In these negotiations the attorneys-at-law employed by the Insurance Company to draw up the documents that were to constitute the expanded first mortgage of Mr. Andrade's premises to the Insurance Company, were asked by their clients to give an "undertaking" to the Bank that there would be a mortgage et cetera. They did so, in guarded terms, but subsequently became involved in the affair nevertheless.

At the time that these negotiations were being conducted, the title to Mr. Andrade's land was in Canada with the Head Office of the Insurance Company. Though it would have been possible to check it at the Registrar of Titles Office in Kingston with some difficulty no one thought to do so. The Attorneys were there to give effect to their clients business transactions, rather than to advise them as to how to run them. They asked in due course for Mr. Andrade's title to be sent to them, so that they could prepare and register the new mortgage and it was sent from Canada. When the Attorneys received it they then discovered for the first time that there was a second mortgage to another Bank the first National City Bank, for the sum of $40,000.00.

The Attorneys advised their clients the Insurance Company of this fact: it appears that the value of the land was not such that it could accommodate all three mortgages, and certainly their existing first mortgage could not be extended to cover the additional money to be lent, unless of course the second mortgagees were paid off or agreed to permit the existing first mortgage to be extended and to take priority over their own.

The second mortgage registered against Mr. Andrade's title could not have been so registered unless that title had been released to Mr. Andrade and the second mortgagee to enable the second mortgage to be registered. This must have been done with the knowledge and consent of someone in the Insurance Company's office, and possibly someone in their Attorney's office may have known of this. This fact had however been lost sight of. Possibly this may have been due to the transfer of the officer in the Insurance Company who had originally dealt with the first mortgage. However, due to the fact that the title was in Canada the existence of the second mortgage had not been appreciated. What was to be done? Attempts to get Mr. Andrade to clear off the second mortgage to enable the transaction to go through failed. The Insurance Company advised the Bank that in the circumstances they would no longer make their promised advance, as they could no longer get a first mortgage. The Bank in effect said: "You promised to do so, and on the faith of that promise we have advanced some $76,300.09 to Andrade. You must make that good to us. You should have known the position all along: you had his title." The Bank in effect replied: "We said we would advance the money on an enlarged first mortgage: we told you that. This is not now possible, and we are not liable to you. You were under a duty to protect yourselves. You investigated Andrade's affairs and relied on that."

Mr. Andrade does not figure in the present litigation. No one has sued him, and he is missing from this litigation. Nor do we know whether the land in question, the business in question, or his assets otherwise are adequate or available to meet the total of his indebtedness.

The Bank has sued (a) the Insurance Company, against whom it is alleged that a contract was made by which they bound themselves to refund advances made to Andrade by the Bank; alternatively it is alleged that the Insurance Company is liable in negligence to the Bank. The Bank has in addition (b) sued the Attorneys of the Insurance Company upon their "undertaking" given at the suggestion of the Insurance Company to the Bank at a time when the Bank was contemplating whether to make "interim" or "bridging" finance available to Mr. Andrade. It seems to be alleged that the Attorneys, though agents of the Insurance Company are also liable in negligence, though this is by no means clear. The statement of claim contains allegations that the defendants made false representations to the plaintiffs, but these representations are implied rather than explicit, and it does not appear that a cause of action in deceit (i.e. for false representations) was ever seriously pursued either before us or below before Parnell, J.

The case calls for a careful analysis of the correspondence passing between the parties, and the alleged oral discussions between employees of the Bank and the Insurance Company.

Giving evidence on behalf of the Bank were Mr. S.A. Shim, the Manager of the local branch that handled the loan to Mr. Andrade, and Mr. J. Krukowski who was Assistant Area Manager of the Bank in Jamaica. The Insurance Company called no witnesses. The Attorneys called Mr. R.D. Roberts, the member of the firm who dealt with the matter on behalf of the Insurance Company.

The trial lasted some eight days, and judgment was reserved for some three months, at the end of which the learned trial judge delivered an oral judgment. All that we have of it is the few notes or headings which he used in giving judgment. He appears to have held that both the Bank and their attorneys had actual or constructive knowledge of the existence of the second mortgage at the time that the Bank was seeking from them binding promises (to use a neutral word) that the loan would be made to Mr. Andrade and that its proceeds would be sent to the Bank. That with this knowledge in their possession they led the Bank to believe "that all was clear for the advances to be made to Andrade". The learned judge seems to have held that both the Insurance Company and the Attorneys gave "undertakings" to the Bank, and declining to apportion blame as between the two defendants, he gave judgment for the Bank against both for the sum of $76,300.00 and with interest thereon at the rate of 14½% from the 1st October, 1975 until the date of judgment (22nd May, 1981).

With respect, the note that we have of the judgment leaves a number of matters unresolved. As I understand it the liability of an Attorney on his undertaking is a cause of action sui generis, and exists quite apart from questions of contract and tort. A little more will be said about it later on. As to liability in either contract or tort the judgment seems to be silent. There is no finding against either party in negligence. There is no finding against the Insurance Company in contract; (as to <u>contract</u>, the Attorneys would not normally be personally liable, they being only agents for a disclosed principal); conversely, the Insurance Company to be liable to the Bank would have to be liable in contract (they would not normally be liable on the undertaking of their attorneys save to indemnify them in case they ordered the undertaking to be given).

The result of this is that in the arguments before us matters have been at large and have been canvassed de novo, neither side being able to say with any certainty what was the finding of the Trial Judge on any particular aspect. For example the Judge records: "I accept the evidence of both Mr. Shim and Mr. Krukowski concerning their understanding of the undertaking."

Does this mean that he accepted that these gentlemen did in fact believe what they said they believed, or is it meant to go further and to be a finding that their belief is in fact and in law the proper construction of the "undertaking", and if so what is to be the result if they say they wanted something firmer to satisfy them, but did not get it?

The first question to be answered should logically be: Was there ever a contract between the Bank and the Insurance Company? If so what was it? The fact that they both had a common borrower, Mr. Andrade, and that each may make a contract with him to lend him money does not mean that there was necessarily any contract between these two lenders. The Bank asserts that there was such a contract, and bases it on (i) some seven letters; (ii) oral discussions between officers of both Companies; and (iii) on the conduct of the parties.

Mr. Andrade first approached the Insurance Company, this was evidently sometime prior to the 7th November, 1974. The application was for an additional first mortgage of $80,000.00 on his property 34-36 Fagley Park Road. He must have known that there was already a second mortgage on it to First National City Bank (hereafter called F.N.C.B.), but it seems clear that the local staff of the Insurance Company (the title being in Canada) did not know that, or if they knew had forgotten it, and that they sent for approval of their Head Office a proposal by him to increase his existing first mortgage to them to $148,000.00 an increase of $80,000.00. It was however clear that this sum would

not actually be advanced until September of the ensuing year.

In this situation Mr. Andrade approached the Bank for "interim" or "bridging" finance. He did not offer nor did the Bank ask for any additional or collateral security for their loan. It is I think important to remember that Mr. Andrade was already, with his Company, a customer of the Bank. It appears from the evidence of Mr. Shim, the local Branch Manager of the Bank, that the Bank indicated as its conditions for granting the interim loan (1) that Mr. Andrade should issue to the Insurance Company an irrevocable "letter of undertaking" (what is meant is irrevocable instructions) requiring them to pay the proceeds of their mortgage loan direct to the Bank; (2) that the Insurance Company should give to the Bank "a firm irrevocable undertaking" that they would pay the proceeds of the mortgage direct to the Bank; (3) that Mr. Andrade should bring in to the Bank a statement of his assets and liabilities. The object of (3) was to verify that he or his business would be able to keep up the interest payments on the interim loan. It did not evidently occur to the Bank to wonder if the Insurance Company had good security for its loan, nor that it would be wise to get some security for their own. Mr. Andrade evidently communicated this to the Insurance Company (actually the initial approach on his behalf was made by by a salesman of the Insurance Company). The result was a letter of 7th November, 1974 from Mr. A. Blain of the Insurance Company to the Bank Manager (Mr. Shim). It is at page 65 of the bundle and reads:

" IMPERIAL LIFE ASSURANCE
COMPANY OF CANADA

7th. November, 1974

The Manager
Canadian Imperial Bank of Commerce
New Kingston
Kingston 5
Jamaica

Dear Sir:

Re: Additional Mortgage - $80,000
34-36 Hagley Park Road Kingston 10

We hereby confirm that subject to approval of the official Mortgage Application form sent by us to our Head Office, we are prepared to grant an additional first mortgage of $80,000.00 on the above property. These funds would be disbursed by us within one year of receiving approval of the loan from our Head Office.

We are requesting a letter of commitment from our Head Office. As soon as this is received, we shall forward it to Mr. Andrade.

Yours very truly,
/sgd./ A. Blain
BRANCH OFFICE SUPERVISOR "

On the 17th December, 1974, the Insurance Company wrote to Mr. Andrade (a) a covering letter from Mr. Blain, and (b) enclosed a letter from its Head Office "approving" his application for a first mortgage loan. The letters appear at pages 67 and 68 of the bundle and read thus:

" December 17, 1974

Mr. Harold Herbert Andrade,
P.O. Box 412,
36, Hagley Park Road,
Kingston.

Dear Sir:

This is to confirm that your recent mortgage for the property 34-36 Hagley Park Road, Kingston, has been approved for the amount of $80,000.00 at an interest rate of 12.5% per annum. This new mortgage when blended with your existing mortgage will make a total loan of $148,000.00.

"Interest for the blended total will be at 11.5% per annum. The monthly payment amount will be $1,551.31.

We trust these arrangements are satisfactory.

Yours very truly,

/sgd./ A. Blain

Branch Office Supervisor

AB/rm Accepted: Harold H. Andrade
17/12/74 "

" THE
IMPERIAL LIFE ASSURANCE
COMPANY OF CANADA

HEAD OFFICE: 95 St. Clair Avenue West, Toronto 7, Canada

Mr. Harold H. Andrade
34-36 Hagley Park Road
Kingston 10, Jamaica

Date 17 December 1974

Security Address 34-36 Hagley Park Road Kingston, Jamaica

Commitment # 0011461

You will be pleased to know that your application for a First Mortgage Loan has been approved as follows and placed in the hands of our Solicitors with instructions to proceed immediately.

Amount of approved loan	-	J$148,000.00
Rate of interest	-	11.50%
Term & Amortization	-	20/20
Monthly repayment	-	J$1,551.31

Monthly payments are to be made by a series of twelve post-dated cheques to be lodged with the Company annually during the continuance of this mortgage.

We require a 1% Commitment Deposit, which will be refunded with the final disbursement of the mortgage funds.

A 2% Placement Fee on J$80,000.00 is to be deducted from the proceeds of this loan.

Existing Mortgage # 33960 to be paid from the proceeds of new loan.

No funds to be advanced on the security until September 1975.

"Fire Insurance must be placed through Life and General Insurance Brokers.

General Assignment of all rents required.

This commitment is contingent upon and will only remain in force subject to:

(a) your signed acceptance of this offer being returned to our office on or before January 7, 1975 failing which it will be immediately withdrawn without further communication;

(b) production by you to our Solicitors of all title documents, fire insurance policies etc., where applicable, as may be required by our Solicitors within TEN days thereafter;

(c) the title being satisfactory to our Solicitors;

Judah, Desnoes & Co.
P.O. Box 8, Kingston, Jamaica W.I.

(d) completion of all legal details deemed by them to be necessary and desirable including your execution of the Deed of Loan/Mortgage Document and other related documents in a form satisfactory to our Solicitors, and commencement of construction (where applicable) within 90 days from the date hereof;

(Should an extension of time be required and granted, interest will immediately begin to accrue at the above rate.)

for INVESTMENT ADMINISTRATION DEPARTMENT

/sgd./ Mrs. T.G. Rau
Mortgage Assistant

TGR/pd

TO:

THE IMPERIAL LIFE ASSURANCE COMPANY OF CANADA
P.O. 212
Kingston, Jamaica

I/We hereby accept this offer of a mortgage loan on the terms and conditions set out above.

Dated 6/1/75 Signed Harold H. Andrade

Original for Head Office
c.c. - Branch Office, Solicitors, Applicant, Applicant's Banker

1017 (Rev. 6/71) South
Please sign and return the top copies retaining the last one for your records."

A few comments may be made about the Form letter from the Head Office of the Insurance Company. It clearly falls far short of a contract or mortgage. In fact it is an offer only and required that the prospective mortgagee should indicate his acceptance of its terms by returning it with his signature endorsed in the part of the form at the bottom. The copy exhibited shows that Mr. Andrade did that, and for good measure endorsed acceptance on the covering letter also. Further the documents clearly anticipate that formal mortgages are to be prepared by the Company's solicitors (attorneys-at-law they are now called) Messrs. Judah, Desnoes and Co. and that the titles and other documents are to be satisfactory to them, and that the mortgage when approved and settled is to be executed by the mortgagor. At that stage and then only will there be a proper mortgage agreement, and at that no funds will be advanced on it until September, 1975. It is clearly a "subject to contract" arrangement. It will bind no one until the mortgage has been executed, and it is clear that it is to be a first mortgage in which the existing first mortgage will be paid off or consolidated into the new first mortgage. This document is the "letter of commitment" to come from Head Office, which is referred to in the letter of 7th November 1974 written to the Bank by the Insurance Company. It is not clear whether the Bank was then given a copy of this "letter of commitment" by either Mr. Andrade or the Insurance Company, but on the same day, the 17th December, 1974, Mr. Andrade wrote to the Bank the letter that appears at page 65 of the bundle, and his letter refers to the Insurance Company's letter to him of that date. It reads:

" METSTRUT LIMITED

36 HACLEY PARK ROAD,

P.O. BOX 412

KINGSTON 10, JAMAICA, W.I.

17th December, 1974

Mr. H. Shim,
Canadian Imperial Bank of Commerce,
Knutsford Boulevard,
KINGSTON 5.

Dear Sir:

I understand from Mr. Hylton of Imperial Life, that you have requested that I give an irrevocable undertaking to them for the payment of the proceeds of $80,000, being the amount agreed to be loaned to me as per their letter dated 17th December, 1974.

This is to confirm that should you grant approval of this loan, that I am prepared to issue the irrevocable instruction to Imperial Life to pay these proceeds directly to you, as and when you approve the loan as being granted.

Yours faithfully,

/sgd./ Harold H. Andrade "

It is at this stage that the second defendants, the attorneys-at-law of the Insurance Company, enter the picture. The "letter of commitment" had spoken of approving the loan and that it had been "placed in the hands of our Solicitors with instructions to proceed immediately". At page 103 of the bundle there is exhibited, (but not here reproduced), a form entitled Requisition to Solicitors, dated 17th December, 1974, and addressed to Judah, Desnoes & Co. from the Head Office of the Insurance Company, setting out some of the details of the proposed mortgage and instructing the preparation of the new first mortgage. The form says Certificates of Title and Surveyor's Certificates enclosed. It was not enclosed. What was enclosed was a form headed "Certificate of Title" in which apparently a Canadian Solicitor certifies that he has examined the Title

documents of the mortgagor and certifies to the Insurance Company Head Office that this is a good marketable title, that the borrower has executed a mortgage which has been duly registered and is a first charge on the said property. It appears that this procedure is the one customarily used in Canada by this Company in respect of its loans on Canadian securities. This apparently is the document kept on file, and one wonders if the Jamaican Registered Title is also kept on file or sent to and kept by the Canadian Solicitor who certifies it. This may or may not account for the Head Office of the Insurance Company not realizing that there was a second mortgage on this property.

Be that as it may, in late December 1974, according to the evidence of Mr. Roberts, the member of the firm Judah, Desnoes & Co. who dealt with the matter, he was asked by Mr. Blain of the Insurance Company to give a letter of undertaking to the Bank as Mr. Andrade was arranging "bridging financing". Mr. Roberts did so, in guarded terms, and this undertaking appears at page 69 of the bundle and reads thus:

"The Manager,
Canadian Imperial Bank of Commerce,
New Kingston,
Kingston 5. 31st December, 1974.

Dear Sir,

Re: Harold Andrade

We have to advise that Mr. Harold Andrade has been granted a loan from the Imperial Life Assurance Company of Canada of J$148,000.00, and on completion of the mortgage, he should receive approximately J$76,300.00.

The mortgage however, is not due for completion until October, 1975, and you have our undertaking to forward you the amount of J$76,300.00 at that time, subject to satisfactory completion of the mortgage.

Yours faithfully,
JUDAH, DESNOES & CO.,

Per: /sgd./ R.D. Roberts "

Mr. Roberts stated in his evidence that when he received the Requisition to Solicitors form this was the first time that he was hearing of this mortgage transaction. He did understand that there was already an existing first mortgage, that he was to discharge the old mortgage and prepare and register the new one in its place. It is important to note that neither the Requisition to Solicitors nor its accompanying document headed: "Certificate of Title" contained any note of the particulars of the Registered Title; it merely referred to the premises as 34-36 Hagley Park Road. It would therefore have presented very real practical problems at that stage for the Attorneys to establish (a) that the title was registered, and (b) to track down the Volume and folio number at the Titles Office and inspect the original Title there.

The guarded nature of the undertaking given by the Attorneys on the 31st December 1974 was recognized. Apparently further discussions took place between the Bank and the Insurance Company. Mr. Shim says that what the Bank wanted was an "irrevocable letter of undertaking." It seems to me that what the Bank wanted, if it ever consciously formulated its requirement, was not an irrevocable letter of undertaking or commitment, whatever that phrase may mean, but that they wanted (i) a firm contract or mortgage that bound the Insurance Company to lend to Mr. Andrade, and (ii) a contract that bound the Insurance Company to hand over the loan proceeds, on instructions from Andrade, to the Bank. No one could at that time have given the Bank what they wanted, for the simple reason that no firm contract had yet been made with Mr. Andrade. The preparation of the mortgage was still far away in the future.

In this situation it appears that the resident supervisor of the Southern Branches of the Insurance Company, Mr. Dutch Holland visited the island. He discussed the matter

and told the Bank that the "irrevocable letter of undertaking" that they wanted would have to come from the Insurance Company's attorneys. He wrote to the Bank on January 30, 1975 as follows - (page 70 of bundle):

"Manager
Canadian Imperial Bank of Commerce
Knutsford Boulevard
Kingston 5.

Dear Sir: January 30, 1975

HAROLD ANDRADE

This letter will confirm the fact that the above-named has been granted a loan by the Imperial Life Assurance Company in the amount of J$148,000.00 and on completion of the mortgage in October, 1975, the net proceeds to him will be J$76,300.00.

This letter will further confirm that these net proceeds (the amount is approximate) will be paid to you direct by our Solicitors Judah, Desnoes & Company, and as you will note a copy of this letter is being sent to Mr. Roberts who will confirm this fact to you that he will follow these instructions.

Yours very truly,

/sgd./ Dutch Holland

Resident Supt.
of Southern Branches

DH:rm
cc. Richard Roberts"

On the same day, 30th January, 1975, the Attorneys as requested wrote again to the Bank, see page 71 of the bundle, as follows:

"The Manager
Canadian Imperial Bank of Commerce
New Kingston
Kingston 5.

DATE: 30th January, 1975.

Dear Sir:

Re: Harold Andrade

Further to our letter of the 31st December last, we write to confirm that we have been instructed both by Mr. Harold Andrade and the mortgagees, Imperial Life, to

"pay over to you the proceeds of the loan obtained by Mr. Andrade on the conditions stated in our letter referred to above.

Yours faithfully,
JUDAH, DESNOES & CO.
/sgd./ R.D. Roberts "

In point of both fact and law this second letter added very little to their letter of 31st December, 1974, save that it said that both the mortgagees and Mr. Andrade had instructed that the mortgage money be paid over when received, and it still referred to the conditions noted before i.e. "subject to the satisfactory completion of the mortgage".

It appears that the Bank contented itself with these two letters. Their Head Office and their local office approved the loan to Mr. Andrade, though it is clear that they continued to regard the letters from the Attorneys as "too broad", meaning that they did not satisfy their wish to get an irrevocable (unconditional) undertaking. Nevertheless they proceeded to commence the disbursements to Mr. Andrade, even before the formal approval of their Head Office was received.

The advances made were as follows:

February	February 3, 1975	$ 15,000.00
	" 5, "	40,000.00
	" 10, "	11,000.00
	" 21, "	5,000.00
	March 3, "	5,000.00
		$ 76,000.00

By letter dated 6th February, 1975, a member of the Head Office staff of the Insurance Company wrote to the Bank (pp. 73/74 of the bundle) as follows:

" 6th February 1975

Canadian Imperial Bank of Commerce
Knutsford Blvd.
Kingston 5, Jamaica

Attention: The Manager

Dear Sirs:

Harold F. Andrade
34-36 Hagley Park Road
Kingston 10, Jamaica
Commitment #0011461

We enclosed herewith a copy of our commitment letter dated the 17th of December 1974 and accepted by the applicant 6th January 1975. We understand that you have requested a number of undertakings from us, and while we are prepared to co-operate to the fullest extent, there are certain limitations over which we have no control that are involved.

1. We cannot at this time fix the date of payout specifically other than to state that we are not prepared to advance the funds prior to September 1st, 1975. At the same time we would anticipate that our Solicitors will be in a position to requisition funds immediately thereafter, and if they do so, we undertake to provide the funds at that time.

2. If Mr. Andrade has requested that the funds in connection with this increase are to be paid to you, and our Solicitors have acknowledged receipt of such a direction to you, then we have absolute confidence in their ability to observe this undertaking. Under circumstances such as these, we do not become involved once the funds have been released by us to our Solicitors.

This seems a very simple and straightforward transaction and once our Solicitors' legal requirements have been satisfied we would anticipate that the matter will proceed and will be handled to your entire satisfaction.

Yours very truly,

/sgd./ K.C. Rivers
Assistant Administrative Officer

K.C. Rivers ,,
D

I think that this letter has been wrongly attributed to Mr. Holland. It should be noted however that it came after the Bank had already approved the loan to Mr. Andrade, and had already advanced him some $55,000. The letter enclosed a copy of the formal letter of commitment sent to Mr. Andrade by the Insurance Company, dated the 17th December, 1974, and already set out above. As was noted earlier, it shows clearly that up to that date there existed no binding contract between the Insurance Company and Mr. Andrade, and it referred to "our solicitors' legal requirements" being satisfied. Nevertheless the author regarded this as a very simple and straightforward transaction. This it was not! Though the Bank kept saying it wanted "an irrevocable undertaking" it did not get what it needed; that is a binding contract between the Insurance Company and Mr. Andrade, for none was ever made. Nor did the Bank get a binding contract of its own with the Insurance Company, it got a conditional undertaking from their Attorneys.

What happened thereafter may shortly be told. The Bank made advances to Mr. Andrade to the extent of $76,000 and he was to pay them 14½%. He appears to have defaulted on these interest payments.

In the meanwhile the Insurance Company's attorneys having recovered the Registered Title certificate from the Company, examined it and noted the existence of the second mortgage to F.N.C.B. which had been hitherto overlooked by all. On the 21st May 1975 Mr. Roberts pointed out to the Insurance Company, his clients, that unless the second mortgagee agreed, it would not be possible to register the new advance as part of the original first mortgage, and that the new advance would rank after the existing second mortgage.

The Insurance Company did not make the promised advance, and in due course it wrote the Bank on 7th November, 1975, some five months after the discovery of the second mortgage, the letter at page 82 of the bundle. It reads:

" November 7, 1975.

Mr. Tom Rhoden,
Manager,
Canadian Imperial Bank of Commerce,
60 Knutsford Boulevard,
Kingston 5.

Dear Mr. Rhoden,

Re: Harold Andrade

When our lawyer, Richard Roberts, was processing the title for the property at 34 - 36 Hagley Park Road he discovered that there was a second mortgage on this property. The loan was supposed to be disbursed on October 1st, 1975. However, because there was a second mortgate on this property, Our Company refused to pay out this loan. Mr. Andrade asked for an extension and it was granted. During this time he was to clear the property of the second mortgage. The disbursement date was extended to April 1st, 1976. I am attaching a copy of the extension agreement showing the terms of the extension.

I apologise that the bank was not informed of this extension. Under these circumstances, please consider extending the period of the loan which Mr. Andrade has with your bank to April 1, 1976.

Yours very truly,
/sgd./ A.O. Blain
BRANCH OFFICE SUPERVISOR

A.O. Blain (Mr.)
/mc
Encl.

c.c. Mr. Harold Andrade "

Efforts to get Mr. Andrade to pay off the second mortgage so that the original first mortgage could be discharged and a new first mortgage registered failed.

On 16th January of 1976 the Branch Manager of the Bank wrote to Judah, Desnoes & Co. as follows:

"January 16, 1976

Judah, Desnoes & Co.
Attorneys-at-Law
4 Duke Street
Kingston

Attention Mr. Richard Roberts

Dear Sirs;

Re: Mortgage - Harold Andrade & Imperial Life

On December 31, 1976 you gave us your undertaking to pay over $76 ,00 in October 1975 subject to satisfactory completion of a mortgage granted to the abovenamed Harold Andrade by the Imperial Life Assurance Company of Canada. That date has now passed.

We are now calling on you to comply with your undertaking within seven days of receipt of this letter.

Yours truly

/sgd./ T.H. RHODEN
Manager "

Mr. Roberts replied for Judah, Desnoes & Co. on the 23rd January, 1976 (page 83 of the bundle) as follows:

"The Canadian Imperial Bank of Commerce,
60 Knutsford Boulevard,
KINGSTON 5.

23rd January, 1976

Dear Sirs:

Re: Harold Andrade - Mortgage to Imperial Life

We have your letter of the 16th instant requesting us to settle the amount of $76,300.00, but we have to advise that up to date the mortgage has not been completed.

When we obtained the Title from Imperial Life, to complete the mortgage, it was discovered that there was a second mortgage endorsed thereon, and before Imperial Life can complete their new mortgage they require either that the second mortgage be settled, or that the First National City Bank who are the second mortgagees consent to Imperial Life's mortgage ranking prior to theirs.

" As far as we are aware, Mr. Andrade requested an extention of the mortgage commitment to March 1st, 1976, by which time he expects to settle the second mortgage. We are still awaiting confirmation from Imperial Life on this matter.

Yours faithfully,
JUDAH, DESNOES & CO.
Per: /sgd/ R.D. Roberts"

The present action by the Bank against the Insurance Company and their Attorneys was brought in November, 1977. The endorsement on the writ shows that the Bank claimed against the Insurance Company (a) for breach of contract, alternatively (b) in negligence; and as against the Attorneys (a) for breach of their undertaking, alternatively (b) in negligence.

The correspondence set out above (apart from the letter of demand to Judah, Desnoes & Co. and their reply) constitutes the base on which the Bank asserts that a contract had been made between them and the Insurance Company. The oral evidence which has also been referred to adds little to it. For completeness it should be noted that Mr. Krukowski said in evidence that at the critical time, towards the end of January, he spoke to Mr. Dutch Holland who "re-assured us of the credibility of Imperial Life and the genuineness of its commitments." He also reported that the Bank's Head Office approved the loan on the 28th January, 1975, and advised Mr. Shim of this on the 4th February. (But the first payment out was made on the 3rd February, 1975).

I think that the following conclusions flow from the evidence and the correspondence set out above:

First, there was never a binding contract between the Insurance Company and Mr. Andrade to make the advance or mortgage loan of $80,000.00. The result is that to the extent that the Bank might have any right to stand in Mr. Andrade's shoes vis-a-vis the Insurance Company, they have nothing to stand on.

Secondly, there was never any binding contract between the Bank and the Insurance Company, by which the latter contracted to make $76,300.00 or any other such sum available to the Bank in September of 1975. I would quote in this connection some observations made as long ago as 1908, by a distinguished Australian Judge, Higgins, J. in a leading case in that jurisdiction: Barrier Wharfs Ltd. v. W. Scott Fell & Co. Ltd. (1908) 5 C.L.R. 647 at 650:

> "The question is, was there such a contract? Now, the burden of proof lies, of course, on the plaintiffs. If there was not a complete contract, the plaintiffs must fail. The law knows no gradations in the contractual relation. It knows nothing of virtual agreements, or honourable understandings. Even if the defendants were shown to have disappointed the legitimate expectations of the plaintiffs for some unworthy reason - to have meanly backed out of almost completed negotiations - the action must fail. There is no contract unless the two parties mutually consented to be bound one to the other by one agreement...."

It may be that as a matter of business parties are often content to rely on and do use "letters of commitment," but in the final analysis a "letter of commitment" usually does not amount to a concluded contract or agreement. It merely indicates that the parties are prepared on the basis indicated to do business with one another: if they wish to go further and bind themselves in law to do so, then they must make a contract. In the instant case the "letter of commitment" written by the Insurance Company to Mr. Andrade amounted merely to an offer to do business on the terms indicated. He was required not only to accept that offer, but to enter into a formal mortgage agreement. The document clearly anticipates that such an agreement, and one to grant a first mortgage, would have to be made before the Company was to make its advance. It clearly contemplated

that the approval of their attorneys to the title was necessary. In the event no such agreement or mortgage contract was ever made.

As to the Bank, leaving apart for the moment the undertaking received from Judah, Desnoes & Co., it is clear that they never got an agreement from the Insurance Company. What they got were reassurances, suggestions that the Insurance Company took their "commitments" (to Andrade) very seriously, but in my judgment no contract was ever made between the Bank and the Insurance Company. An honourable understanding is not a contract

I think that those who propose to grant "bridging finance" ought in their own protection to see and make sure (i) that the borrower has in fact got a final contract (not commitment) with the long term lender; and (ii) that they themselves have a binding contract with the long term lender as to the disposal of the loan. Had the mortgage contract with Mr. Andrade materialized, then condition (i) would have been met, and it would have been comparatively easy to find condition (ii); but in this case all depended on the completion of condition (i). The Bank was at all times aware that the completion of the mortgage was a necessary pre-condition to their obtaining the proceeds of the mortgage loan. Instead, they chose to take their chances on the dependability of Mr. Andrade and the letters of undertaking received from the long term lenders' attorneys. The Insurance Company for its part was well aware that the Bank wished to secure a contract that would bind it, and were equally determined not to give it. "While we are prepared to co-operate to the fullest extent, there are certain limitations over which we have no control that are involved." (Their letter of 6th February 1975 to the Bank). They instead suggested an "undertaking" from their solicitors.

The second question to be answered is what was the effect of the "undertaking" given by Judah, Desnoes & Co. here? In Damodaran v. Choe Kuan Him (1979) 3 W.L.R. 383 (P.C.) Lord Diplock observed at p. 387 E:

> "The main purpose and value of a solicitor's undertaking in transactions for the sale of land is that it is enforceable against the solicitor independently of any claims against one another by the parties to the contract of sale."

In that case the solicitor acting for both vendor and purchaser received the purchase price from the purchaser and gave the vendor an undertaking to pay over the money to him on registration of the transfer of the land to the purchaser. The transfer was registered, but the solicitor declined to pay over the money because he heard that someone else had a claim to be a joint owner with the vendor, and jointly entitled to the price. Held that this was no excuse for not honouring his undertaking.

An undertaking of this sort is enforceable against a solicitor quite independently of normal legal rules: for example in In re Hilliard (1845) 2 Dow. & L. 919; 69 R.R. 880, a solicitor who undertook to pay the debt that his client owed to the plaintiff was held liable on the undertaking though it would have been caught as a guarantee of the debt of another and was void under the Statute of Frauds.

Coleridge, J. Observed:

> "It seems to me that the Court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers."

In In re Grey (1892) 2 Q.B. 440 (C.A.) Lord Esher M.R. observed at page 443:

> "The principle so laid down is that the Court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the Court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the Court's own officers. That power of the Court is quite distinct from any legal rights or remedies of the parties, and cannot, therefore, be affected by anything which affects the strict legal rights of the parties."

We were referred to passages in a recent case, Geoffrey Silver & Duke v. T.A. Baines (1971) 1 All E.R. 473 which conveniently set out salient aspects of the law with regard to enforcing the undertakings of solicitors. Lord Denning, M.R. said at page 475 f:

> "..... This court has from time immemorial exercised a summary jurisdiction over solicitors. They are officers of the court and are answerable to the court for anything that goes wrong in the execution of their office. Even if the solicitor has been guilty of no fault personally, but it is the fault of his clerk, he is accountable for it: see Myers v. Elman [(1939) 4 All E.R. 484; (1940) A.C. 282]. This jurisdiction extends so far that, if a solicitor gives an undertaking in his capacity as a solicitor, the court may order him straightaway to perform his undertaking. It need not be an undertaking to the court. Nor need it be given in connection with legal proceedings. It may be a simple undertaking to pay money, provided always that it is given 'in his capacity as a solicitor': see United Mining and Finance Corpn Ltd v Becher [(1910) 2 K.B. 296] per Hamilton J. If such an undertaking is given, the court may summarily make an order on the solicitor to fulfil his undertaking (see Re a Solicitor [(1966) 3 All E.R. 52]) and, if he then fails to do so, the court may commit him to prison. Alternatively, if it is an order to pay money, execution may be levied against his property. This summary jurisdiction means, however, that the solicitor is deprived of the advantages which ordinarily avail a defendant on a trial. There are no pleadings; no discovery; and no oral evidence save by leave. The jurisdiction should, therefore, only be exercised in a clear case.

> "The first question in the present case is whether the solicitor gave the undertaking 'in his capacity as a solicitor'. This is difficult to define. But I think it will usually be found, in regard to money, that it is an undertaking to pay money which he has in his hands on trust, or on an undertaking that he will apply it in a particular way. Thus, if a solicitor is acting for a client on the sale of land, and gives an undertaking to a bank that he will pay over so much of the money, when received, to the bank, the undertaking is given 'in his capacity as solicitor': see in Re a solicitor (supra). So also, if a solicitor gives an undertaking that he will hold a sum of money in his hands pending the conclusion of negotiations, that too is given in his capacity as a solicitor, as in United Mining and Finance Corpn Ltd v Becher (supra)."

Widgery, L.J.: made observations to like effect at p. 476:

> "This was not the common case of an undertaking given to the court in which any default is akin to a contempt and naturally attracts the remedy of attachment and committal. The undertaking in question here was not given to the court. It was not even given in the course of litigation. There is clear authority, however, from the earliest days that a solicitor, being an officer of the court, is liable to attachment for a breach of an undertaking even though the undertaking is not given to the court itself. But the first requirement of the exercise of that jurisdiction, as Lord Denning MR has pointed out, is that the undertaking in question must have been given by the solicitor in the course of his activities as a solicitor. It must be given by him professionally as a solicitor and not in his personal capacity. The reason for that is clear enough, because a remedy of this kind is intended primarily to discipline the officers of the court, to ensure the honesty of those officers. The court is thus concerned only with their activities as solicitors, and anything done by a solicitor in his private capacity is outside this jurisdiction."

Cordery on Solicitors, 6th Edition (1968) at page 164 puts the matter thus:

> "Whether an undertaking given by a solicitor to the court, his client or a third party may be enforced against him personally depends upon the facts of each case, but the undertaking must be a personal undertaking and given

> "by the solicitor professionally, i.e., as a solicitor; it must be clear in its terms; the whole of the undertaking must be before the court; and the undertaking must be one which is capable of being performed ab initio."

The giving and enforcing of "undertaking" is peculiar therefore to solicitors, and, in Jamaica which has a fused profession, to attorneys-at-law. The liability is free from technical considerations as to whether there is consideration for the promise, or whether a concluded contract has been reached. The promise or "undertaking" once made, must be fulfilled, provided that it is given by an attorney professionally, and provided that its terms are met. It has become a commonplace in contracts dealing with the sale of land, or mortgaging or the like. As Widgery, L.J. said in the Silver case (ante):

> "It is a commonplace that solicitors obtain possession of money or documents to which they have no direct right and give an undertaking that in consideration of being supplied with the money or documents they will deal with them in a particular way."

The fact that solicitors or attorneys-at-law are subject to this discipline with regard to undertakings does not mean that others who are not in the profession are similarly liable. In their case the "undertaking" or promise must be a legally enforceable agreement or it is nothing at all.

The existence of this liability may sometimes be used to give effectiveness to a promise or representation that would not otherwise be binding, and it is clear that the long term lender and the short term lender sought in this case to use a solicitor's or attorney's undertaking to bridge the gap that existed here between a mortgage to be created in futuro and a present advance of money against that liability when it should finally come into existence. This is understandable, but I think that attorneys-at-law should be careful not to be used as cat's paws in this type of situation. An attorney who has the title in his

possession or the money may give assurances or undertakings with a fair measure of impunity: one who has neither may find himself bound by an undertaking that he never had within his power to fulfil. Cases such as Re A Solicitor (1966) 3 All E.R. 52 show a measure of relief, and as Cordery points out in the passage above "the undertaking must be one which is capable of being performed ab initio".

In any event however the "undertaking" must be construed to see whether according to its terms it has been broken. The terms of the undertaking given here have been set out earlier. The undertaking given by Judah, Desnoss & Co. in their letter to the Bank of 31st December, 1974 was "to forward you the amount of J$76,300.00 at that time, subject to satisfactory completion of the mortgage". The undertaking given in the letter of 30th January, 1975 was "to confirm that we have been instructed both by Mr. Harold Andrade and the mortgagees, Imperial Life, to pay over to you the proceeds of the loan obtained by Mr. Andrade on the conditions stated in our letter referred to above", (ie. the letter of 31st December, 1974).

The "undertaking" so given required, as worded, two conditions: first that there should be satisfactory completion of the mortgage by Mr. Andrade, and secondly that the proceeds of the loan so obtained should have been paid by the Insurance Company to their attorneys. Neither condition has been met, and I do not think it can be said that the Attorneys are responsible for the failure of either condition. I would therefore hold that Judah, Desnoes & Co. are not liable on this undertaking. Halsbury, 3rd Edition Volume 36 (1961) dealing with "Liability upon undertakings given as a solicitor" paragraph 266 "Enforcement of undertakings" observes "if the undertaking is conditional, the condition

must be fulfilled before the undertaking will be enforced" and cites in support Hill v. Flotcher (1850) 5 Ex. 470; 155 E.R. 205.

In so far as the learned trial judge purported to find both defendants liable "on the undertaking" I think that he fell into error.

The plaintiff/respondents however attempted to establish liability of the defendants in tort.

I think it is clear that in this case no action lies in the tort of deceit. "The tort of deceit consists in the act of making a wilfully false statement with intent that the plaintiff shall act in reliance on it, and with the result that he does so act, and suffers harm in consequence" per Salmond on Torts, 17th Edition page 386: paragraph 140: Elements of Deceit. Here it is not alleged that any wilfully false statement was made; there is no allegation of fraud. What is being suggested is that a false representation was negligently made.

However a consideration of some of the problems arising in the tort of deceit will bring us to the heart of the present case. Fleming on Torts, 4th Edition page 555 notes:

> "Only misrepresentations of fact are actionable as deceit. This is commonly contrasted with a mere promise, breach of which is not actionable either as a tort or on any other basis than contract. [Jorden v. Money (1845) 5 H.L.C. 185; Coombe v. Coombe (1951) 2 K.B. 215]. Yet every promise contains an implied statement of fact, viz. of a present intent as to the future. What is really meant is that, if I make a promise with every intention of fulfilling it, I cannot be held liable for deceit, should I subsequently become unable or unwilling to do so. The reason for this, however, is not that my promise is not a statement of fact, but rather that I believed the statement of my present intention to be true when I made it. Yet, if I never entertained an intention of fulfilling my promise, I commit a fraud by falsifying my present intention, as when I pass a cheque, knowing that it is not covered and not

> "intending to honour it. [See Re Shackleton, ex parte Whittaker (1875) L.R. 10 Ch.App.446; Re Eastgate (1905) 1 K.B. 465, 467. As Bowen L.J. once said in a celebrated passage, 'the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.' [Edgington v. Fitzmaurice (1885) 29 Ch.D. 459, 483]. Hence, company directors have been held liable for deceit for falsely professing in a prospectus that the money raised by an issue of debentures would be used for expanding activities, when in truth they were set upon using it for paying off pressing debts.
>
> Not only statements of intention, but also statements of opinion, known to be false, may be actionable as deceit, because 'the existence of the opinion in the person stating it is a question of fact'. [Bisset v. Wilkinson (1927) A.C. 177, 182]. It is true that, where the facts are equally well known to both parties, a false opinion expressed thereon by one does not give a cause for complaint to the other. The real explanation for this, however, is not that a statement of opinion is not a statement of fact about the condition of one's mind, but that the parties, bargaining at arm's length, are assumed to be competent to draw their own conclusions. It follows that, if the facts are not known to both alike, a statement of opinion by one who knows the facts best is often treated as a material representation, for he might be held to imply that he knows facts which justify his opinion. [Brown v. Raphael (1958) Ch. 636]."
>
> [References to some of the supporting cases cited omitted as not available locally].

Salmond on Torts, 17th Edition pages 388-389 says much the same thing at pages 388-389:

> "Thirdly, the misrepresentation must be a false statement of fact, and not a mere broken promise. If the words of the defendant amount to a mere promise, they cannot be the basis of an action of tort, and impose no liability on him unless they conform to all the requirements of a valid contract. There is no such thing known to the law as a promise which is not good enough for a contract, but the breach of which is actionable as a tort. [Jorden v. Money (supra)].

> "The term fact, however, is used to include everything except a promise. Thus a statement of opinion, if wilfully false, is actionable as a tort. [Anderson v. Pacific Insurance Co. (1872) L.R. 7 C.P. 65, 69]. So an expression of opinion concerning a present or future event may be a representation of fact if it implies that it is an opinion presently held. [Eisset v. Wilkinson (supra)]. ..... So also an action of tort will lie for a false representation of intention. An unfulfilled promise to do a thing is actionable as a contract or not at all; a false statement of intention to do a thing may be actionable as a tort. Thus in Edgington v. Fitzmaurice (supra), the directors of a company were held liable for fraud in borrowing money on behalf of the company on a false statement of the purpose to which the loan was to be applied. 'The state of a man's mind,' said Bowen L.J., 'is as much a fact as the state of his digestion,' (supra)."

The problem is that the representation made by the Insurance Company in this case was in effect "we intend to lend $80,000.00 to Andrade on a mortgage which is to be consolidated with a first mortgage that we already have on his premises at Hagley Park Road."

This was a representation as to future intent, a promise to Andrade that was to be implemented by being put into formal documents and registered in due course.

The Bank was told of this intent, but no contract was ever made between the Bank and the Insurance Company to the effect that "in consideration of my lending Andrade money against the expectation he has of getting money from you later, you (the Insurance Company) must promise (i) to go through with your loan to him, and (ii) in due course repay my advance to him out of it."

In the absence of such a contract or agreement, you have a situation where in essence the representation on which the Bank acted is that the Insurance Company stated that they intended to lend money to Andrade at some time in the future.

It was not argued that this intention was not honestly held. What is argued is that there is to be extracted from it certain premises which were false, and that there was implicit in the representation certain false statements which were negligently made.

Turning to a consideration of possible liability in negligence the argument before us turned on the effect of Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (1964) A.C. 465 (H.L.) and the cases that have succeeded it.

Commenting on the Hedley Byrne case, Lord Diplock, delivering the majority judgment in the Privy Council case of Mutual Life and Citizens Assurance Co. Ltd. v. Evatt (1971) A.C. 793, said at page 801 F:

> "The several speeches in Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd. [1964] A.C. 465 have lain at the heart of the argument in the courts of Australia and before their Lordships' Board. That case broadened the category of relationships between one man and another which give rise to a duty at common law to use reasonable skill and care in making statements of fact or of opinion. Prior to Hedley Byrne it was accepted law in England that in the absence of contract the maker of a statement of fact or of opinion owed to a person whom he could reasonably foresee would rely upon it in a matter affecting his economic interest, a duty to be honest in making the statement. But he did not owe any duty to be careful, unless the relationship between him and the person who acted upon it to his economic detriment fell within the category of relationships which the law classified as fiduciary. Hedley Byrne decided that the class of relationships between the maker of the statement and the person who acted upon it to his economic detriment which attracted the duty to be careful was not so limited, but could extend to relationships which though not fiduciary in character possessed other characteristics."

Most of the cases that succeeded Hedley Byrne, including that case itself, have turned on the question of whether the circumstances disclosed a relationship between the representor

and representee, apart from contract, and not amounting to a fiduciary relationship, sufficient to impose a duty of care in making a representation.

A variety of tests have been suggested at one time or the other for determining whether a "special relation" existed or not. In Evatt's case where the plaintiff had approached his Insurance Company for information as to the reliability of one of its associated companies, after a sharp division of opinion amongst all the Judges who heard the matter, it was decided by the majority in the Privy Council that the necessary qualifications for deciding that there was a special relation did not exist: the maker had not made it in the ordinary course of his business nor was the subject matter one that called for the exercise of some skill or competence not possessed by the ordinary reasonable man which the maker of the statement was known by the recipient to lay claim to by reason of his engaging in that business or profession: see Lord Diplock at page 802.

The special relationship necessary to support the imposition of a duty of care in making representations has been found in a number of cases:

In Anderson & Sons v. Rhodes (Liverpool) Ltd. (1967) 2 All E.R. 850 it was found to exist between dealers in the fruit market, where one enquiring as to the credit-worthiness of a new comer, was told by the other (negligently) "they are quite all right." In fact the new comer owed thousands of pounds to the representor's firm, but due to the negligence of the accounting department this was unknown to him.

In Esso Petroleum Co. v. Mardon (1976) Q.B. 801 (C.A.) the Company in pre-contract discussions told the intending lessee that their estimated through-put of gasoline likely to be sold at the station was 200,000 gallons per year.

The estimate was negligently made, or rather not re-considered in the light of the local planning authority having refused to allow the pumps to front on the main highway, and the actual through-put proved to be some 78,000 gallons. The Court of Appeal found (1) that the representation was in fact a contractual warranty; (2) that it was also a negligent representation by a party holding itself out as having special expertise, and that there was a duty to take reasonable care to see that the representation was correct. In short that there was a special relationship.

In Arenson v. Arenson (1977) A.C. 405 (H.L.) a case which turned on whether there was a quasi-judicial immunity from liability for making negligent statements attaching to or protecting the auditors of a Company who were asked to value the shares of a shareholder who was selling them to another, it was clearly implicit that the auditors or valuers would or could be liable in negligence in respect of their valuation of the shares. (It was held that they had no such immunity in respect of this negligence - assuming it had been proved).

Accepting the observations of Lord Diplock in Evatt's case at page 809:

> "As with any other important case in the development of the common law Hedley Bryne should not be regarded as intended to lay down the metes and bounds of the new field of negligence of which the gate is now opened. Those will fall to be ascertained step by step as the facts of particular cases which come before the court make it necessary to determine them .....
> The categories of negligence are never closed and their Lordship's opinion in the instant appeal, like all judicial reasoning, must be understood secundum subjectam materiam."

I would hold that on the facts of this case, and possibly in all situations involving the relationships between a borrower, a long term lender, and a short term lender, there is

a "special relationship" which imposes on the long term lender who knows that the short term lender is depending upon the long term loan being ultimately made, a duty to exercise care in the making of representations to the short term lender. There was a relationship of proximity equivalent to contract. See Lord Devlin in Hedley Byrne [1964] A.C. at p. 530.

It is not however enough to establish that the situation gives rise to a duty of care: it is necessary to go further and find that that duty of care has been broken. This involves, as I understand it, that the representor has made a false statement of fact; or possibly advanced an opinion which itself is one that he could not honestly have entertained or which involves directly the existence of facts which are false.

In all of the cases which have been discussed above the representation of fact has been clear. There are none that have involved a representation as to future intent, and in that respect the case before us is not only unique, but involves a very substantial extension of the duty to use care in the making of representations. I think that in the absence of such authority the Courts will have to fall back on the principles established in the cases dealing with deceit, or the knowing making of false statements, and which were referred to earlier in the passage taken from Fleming on Torts.

The statement or representation "we intend to lend $30,000 to Andrade on a mortgage to be consolidated with a first mortgage that we already have on his premises at Hagley Park Road" was true when made, and honestly believed. Can any false statement of fact be inferred from it? I regret that I cannot find it possible to infer from it any representation of fact that is untrue. It may perhaps be implied that we have examined his circumstances and are of the view that we can safely lend him money. But how much further can it be taken. The real complaint is "You promised to lend

money to Andrade, and you have changed your mind, because of something which you had the means of discovering before". For such a complaint to succeed, it seems to me that it must amount to a contract, an enforceable agreement, nothing less will sustain it. I have already pointed out that the promise to Andrade was at best a "subject to contract" one, and that it was conditional on the satisfying of the requirements as to title and the completion and registration of a new mortgage, and there was no direct contract between the Bank and the Insurance Company.

There is one respect in which the Insurance Company has been negligent vis-a-vis the Bank. They had been informed of the situation in respect to the title on the 21st May, 1975, but they did not advise the Bank of this until November 7, 1975. That I think was a breach of their duty of care, but it has not been argued that any damage flows from it, or that if the Bank had been advised sooner they might have been able to take some action with respect to Mr. Andrade's indebtedness to them that has become impossible because of the delay.

For these reasons I am of the view that the Insurance Company is not liable in negligence to the Bank, and I would allow the appeal on this ground also.

I would add that as far as I can see Judah, Desnoes & Co. are not liable in negligence either, apart from the question of whether any "special relation" existed between them and the Bank, it has not been suggested that they made any misrepresentation to the Bank. Their letters merely record the instructions received from their client.

The only ultimate comment that I would make is that the makeshift arrangement of trying to get "undertakings" from attorneys-at-law to use as a basis for making "bridging" or interim advances to customers seems unsatisfactory, and that the short term lenders should make firm contractual arrangements with the long term lender and the borrower that can be enforced in a Court of law, and or should take steps whether by caveats or otherwise to protect themselves against the possibility of the long term lender changing his mind and not proceeding with the making of the long term loan. To repeat the observations of Higgins, J. referred to earlier "The law knows no gradations in the contractual relation. It knows nothing of virtual agreements or honourable understandings."

This is not to say of course that in the business world businessmen are not capable of guiding their future conduct towards those who defeat their legitimate expectations.