WMG 5

IN THE SUPREME COURT OF JUDICATURE

IN COMMON LAW

SUIT NO: L. 001 OF 2002

BETWEEN	**HENRY LUE**	**1st CLAIMANT**
AND	**LUE'S PROPERTY LIMITED**	**2nd CLAIMANT**
AND	**LUE'S STONE QUARRYING LIMITED**	**3rd CLAIMANT**
AND	**A & H BUILDINGS (JA) LIMITED**	**4th CLAIMANT**
AND	**ISLAND VICTORIA BANK**	**1st DEFENDANT**
AND	**RONALD SASSO**	**2nd DEFENDANT**
AND	**REFIN TRUST LIMITED**	**3rd DEFENDANT**
AND	**FINSAC LIMITED**	**4th DEFENDANT**

Ms. Jacqueline Cummings, Mr. Sylvester Hemmings and Mrs. Debra Reid-Archer instructed by Archer, Cummings & Co. for the Claimants; Mrs. Sandra Minott-Phillips instructed by Myers, Fletcher & Gordon for the 1st, 3rd and 4th Defendants; Mr. Emil George and Ms. Stacy-Ann Powell instructed by Dunn Cox for the 2nd Defendant.

Heard June15, 16, 17, and 18, 2004; July 8, 2004 and September 22, 2006.

CORAM: ANDERSON J.

The First Claimant, Henry Lue, to whom I shall hereinafter refer briefly as "Lue" is the chairman, chief executive officer and majority shareholder of the 2nd, 3rd and 4th Claimants. I shall where necessary, refer to these Claimants as "Property", "Quarrying" and "Buildings" respectively. The 1st Defendant (hereinafter "the Bank") was at the material time, a bank registered and licensed under the Banking Act and is the bank with whom the Claimants allegedly did the various transactions which have given rise to these claims and the 2nd Defendant was its chief executive officer. The 3rd and 4th Defendants are allegedly the successors in title or assignees of the business of the Bank and are sued in the capacity of assignees.

When this matter came on for hearing, Mr. Emil George, Q.C. on behalf of the 2nd Defendant, applied to the court to strike out the suit as against that defendant, on the ground that the Claimants' statement of case disclosed no cause of action against him. The application was based upon the fact that the allegations against that Defendant were all directed to him in his capacity as the President and Chief Executive Officer

and therefore the servant or agent of the 1st Defendant. The loan contracts to which the Claimants' pleadings refer were all between the Bank and the respective Claimants and not the 2nd Defendant personally. Similarly, the alleged "relationship of trust and confidence", related to the relationship between the Claimants and the Bank according to paragraph 10 of the statement of claim. The 2nd Defendant as Chief Executive Officer of the 1st Defendant had an over-riding fiduciary to that institution and this required him to act in protection of the interests of the Bank of which he was always acting as servant or agent. There was no allegation that at any time the 2nd Defendant purport acted as other than the 1st Defendant's representative, servant or agent. His acts were therefore clearly the acts of the 1st Defendant bank and liability if any would be vicariously that of the Bank. Nor was there any averment that in the course of so acing he had overstepped his authority or was guilty of any fraudulent or other misconduct.

Mr. George cited Bowstead and Reynolds on Agency, 17th Edition, page 532 to the following effect:

> Where the agent acts for a company and is in a senior position within it, a further feature is introduced, for to hold him personally liable may, especially in the case of one-man companies, be in effect to pierce, or at any rate to ignore, the corporate veil. In such cases clear evidence of a separate wrong will normally be looked for.

The application was opposed by Ms. Cummings for the Claimants but, after consideration, the Court ruled that Mr. Sasso, the 2nd Defendant should be dismissed from the suit as a party.

According to the Statement of Claim, Lue has provided personal guarantees in favour of Property, Quarrying and Buildings. Property has provided collateral for the loan, the issue giving rise to this action; Quarrying and Buildings have both provided guarantees for the 1st and 2nd Claimants. The Statement of Claim further alleges that the 1st and 2nd Claimants became customers of the Bank in May 1992 when the Bank opened its doors at a New Kingston location by opening a current account with the said Bank; that the relationship between the Claimants and the 1st Defendant "was based on trust and confidence over and above the banker-customer relationship and the Bank through its officers and servants were aware of this".

According to paragraph 16 of the Statement of Claim, the 1st and 2nd Claimants in or about 1994 borrowed ten million dollars ($10,000,000.00) in order to develop forty five (45) housing units at Midland Glades Housing Scheme in the Parish of Clarendon. (The statement of claim was amended to accord with the evidence in the witness statement of Mr. Lue. See below) Lue's witness statement however said that there were to be forty-six (46) units. The statement of claim avers that it was agreed that the loan would be at the rate of 65% per annum which was the current loan rate at the Bank. I take it that the "rate" referred to was the rate of interest.

The Claimants' Statement of claim also alleges that the Bank did not compute the interest on a reducing balance basis as it had said it would but instead compounded the interest due. It was also claimed that there was an over-run on the Midland Glades Housing Scheme and it is acknowledged that the 1st and 2nd Claimants had to apply for a further $5,000,000.00 loan to complete the project. The statement of claim says that this now made the principal indebtedness "$15,000,000.00", but in light of the amendment referred to above, this figure should also have been amended to $25 million. The Claimants complain that again the sums borrowed were not credited to the relevant (Property) account, but as cheques were drawn the account went into overdraft and the higher rate of interest appropriate to overdraft was charged.

The Claimants also claim that as a result of this treatment, "the Plaintiffs were told that the loan was exceeding the limit set for an individual customer by the Bank of Jamaica" and the 2nd Defendant started pressuring the 1st Plaintiff to make payments to reduce the debt". The statement of claim further alleged that Lue was "forced and coerced by the 1st and 2nd Defendants to use the 3rd and 4th Plaintiffs (Quarrying and Buildings) to cross guarantee the Midland Glades loan so as to allow the 1st and 2nd Defendants to satisfy the alleged Bank of Jamaica rule which was the illegal and self-serving advise (sic) given to him by the 1st and 2nd Defendants, and that the Plaintiff under duress and unreasonable pressure put on him by the Bank allowed the Bank to redistribute the debt to appease them".

It was further claimed in the statement of claim that the rate of interest applied to these loans was the overdraft rate of 120% per annum and that the claimants were also

wrongly and illegally charged a commitment fee of .5% on the debt that was "redistributed". It is not clear to me what .5% was being referred to as the actual sums charged on the so-called redistribution of a $34,000,000.00 debt into separate debts of $18,000,000.00 and $16,000,000.00 are not of that percentage. According to Lue's witness statement, the commitment fees were respectively, $202,000.00 and $180,000.00 which do not represent .5% even when GCT of 15% is to the fee.

The Claimants essentially claim that they have suffered loss and damage because of the negligence and/or breach of trust on the part of the 1st and 2nd defendants. The Claimants allege the following particulars of negligence.

i. Negligently advising and encouraging the Plaintiffs to use an overdraft facility rather than a loan to finance the Midland Glades Housing Scheme Development.
ii. Negligently charging the excessive overdraft penal rate of interest to the Plaintiffs without adequate notice in breach of prior agreements to charge the loan rate of interest.
iii. Negligently causing the Plaintiffs to agree to a redistribution of the loan so that the 1st and 2nd Defendants could allegedly satisfy their alleged banking requirement imposed by the Bank of Jamaica.
iv. Negligently causing the Plaintiffs to pay commitment fees on the redistributed debt.
v. Negligently failing to complete the transfer of the Cross Pen property to the Plaintiffs thus adversely affecting the Plaintiffs' ability to dispose of the property and to settle outstanding debt (or use the property as collateral).
vi. Negligently failing to advise the Plaintiffs to seek independent legal and financial advice.
vii. Negligently allowing the Plaintiffs to finance the project on an overdraft facility with interest rate of 120% per annum.
viii. Negligently advising the Plaintiffs to continue drawing cheques on their current account without providing proper supervision of the said account allowing the account to exceed its limit and or not setting any limits on the said accounts in violation of Bank of Jamaica rules.

The Claimants also allege in their statement of claim that the defendants were "in breach of confidentiality (sic) reposed in the 1st and 2nd Defendants". They then set out what are claimed to be "Particulars of Reliance". These are stated to be as follows:

a) In anticipation of the disbursement of the loan from the Bank and on the Bank's instructions, the Plaintiff's continued to draw cheques against the Plaintiffs' current account to construct the Midland Glades Housing Scheme, on the belief that the agreed loan rate would be applied. As a result of the 1st and 2nd Defendants' negligence and breaches of duty the Plaintiffs have not seen any benefits or financial returns on the sums invested.

b) In anticipation of the disbursement of the loan on favourable terms the Plaintiffs proceeded to borrow an additional $5 million from the Bank to complete the construction of the Midland Glades Housing Scheme thereby increasing the Plaintiffs' liabilities. As a result of the 1st and 2nd Defendants' negligence and breaches of duty the Plaintiffs have not seen any benefits or financial returns on the sums invested and have incurred additional cost and expenses.

It would seem that the pith and core of the Claimants' claim may be summed up in paragraphs 40, 41 and 42 of the statement of claim. These paragraphs allege:

1. The loan(s) for Midland Glade Housing Scheme was never disbursed on the terms agreed between the parties and as such the consideration for the giving of security failed.
2. In the premises the Plaintiffs are entitled to the return of the security pledged and the voiding of such portion of the contract between the parties to provide security for the loan.
3. The Bank negligently and in breach of a term implied in the contract between the parties failed to return the security granted by the Plaintiffs causing the Plaintiffs further injury and loss as the Plaintiff Company had no unencumbered collateral that they could use to access a loan from any other source.

Among the remedies sought by the Claimants are declarations in the following terms:

1) That the lien on the collateral pledged by the Plaintiffs should be discharged given the breach of fiduciary and/or statutory duty and/or negligence;
2) That the Plaintiffs should be discharged from the guarantees given by them in contemplation of this loan;
3) That the Cross Pen Property should be returned to the Plaintiff

Evidence for the Claimants

Lue's Witness Statement, on the other hand, said that the demand loan in question was made to Property in the sum of twenty million dollars ($20,000,000.00) at a rate of 68%. He says, however, that the loan was not credited to the Claimants' bank account. Rather, the Claimant was advised to write cheques and the Bank would honour the cheques. It is claimed that this created an overdraft for Property which was then subjected to the overdraft interest rate of 120% rather than the regular loan interest rate as applied on previous loans secured by the Claimants.

In addition to the loan of April 1994, the Lue Witness Statement acknowledges further loans of $2,800,000.00 in or about October 10, 1994 in exchange for "signed and sealed promissory note and debenture document"; a demand loan to Buildings in

the sum of $25,000,000.00 on February 1, 1995 again in exchange for promissory note and debenture documentation, at an interest rate of 52% per annum, and in respect of which non-refundable commitment fee of $140,625 was paid; demand loans on March 23, 1995 to Property in the amount of $13,000,000.00 and to Quarrying for $11,000,000.00 with interest rate of 49% per annum. Lue also says that on April 19, 1995, he provided a promissory note to the bank in the sum of $10,000,000.00 at an interest rate of 30% per annum for which he paid a non-refundable commitment fee of $112,500.00. In addition to these loans from the Bank, Lue also acknowledged that on May 1995, he took a personal loan from Horizon Building Society in order to partially satisfy demands for repayment made by the Bank. In order to secure this loan, he pledged real property at 11 Omara Road in the parish of St. Andrew and Lot 311 Prospect, in the parish of St. Thomas.

Mr. Lue finally admits in his witness statement that his attorneys, Fraser and Aitcheson, on May 17, 1996 *made a proposal* to the Bank for "full and final settlement of all debts owed by me and my companies in the amount of $95,000,000.00" and the proposal was accepted on July 4, 1996, by the bank. However, the proposal was never acted upon as the Claimants were unable to get the appropriate funding.

The Lue Witness Statement contains several other allegations including a projection of lost profits for developments not undertaken, in the sum of almost one billion dollars. For example, he says that because the Defendant Bank did not finance his Savannah Villas development which was to provide funding to pay the debt of $95 million which agreed to liquidate in July 1996, he lost $133 million. He says he lost $800 million on not developing Garel' Pen, though there is nothing in the evidence to connect this with any of the Defendants. In any event, even if there were any relationship, it is trite law that pure economic loss is irrecoverable as being too remote. He also claims for loss of, and the cost of required repairs to, construction equipment in Spanish Town; loss of his high credit rating; laying off of his workforce; hospitalization for diabetes in 1997, 1998 and 1999; burdensome medical bills to which his family now has to contribute. Regrettably, none of these allegations are substantiated nor is there any credible evidence creating any nexus with the rest of the Claim.

One of the features which the Court noted was the amount of hearsay evidence which is contained in the First Claimant's witness statement and the difficulty at times of deciphering some of the comments. It is recognized that counsel, of course, does not write a client's witness statement, but needs to ensure that it complies with the normal rules of evidence. One interesting omission from the witness statement is that although the Statement of Claim asks for the "return of the Cross Pen Property" this property is not mentioned in the Lue witness statement to show what had happened to the property and why it should be returned. Based upon the signed mortgages and other security documents exhibited, however, it seems clear to the court that there were valid grants of these securities.

The other witnesses for the Claimants were Louis Bell, chief accountant of the Lue's Group of Companies, a witness of fact, and Kaye Soares, a financial consultant who gave evidence about what transpired after he was retained to deal with the Group's alleged indebtedness. Bell gave evidence about the setting up of the bank account with the bank, the subsequent borrowings for the various projects and in particular, the evidence concerning the loan of $20,000,000.00 for Midland Glades Housing Development. He gave evidence that commitment letter and promissory note for the demand loan were duly signed and returned to the Bank on November 29, 1993. As additional security for the loan there was given a first mortgage on land at lot 3, Denbigh registered at Volume 475 Folio 27; an assignment of proceeds from sale of housing units to the extent of the company's indebtedness to the Bank; Lue's full and unconditional guarantee and peril insurance with the Bank's interest noted thereon. He confirms that rate of interest was 68% but avers that the loan was never credited to the Property account. The effect was that when cheques were drawn thereon, it created an overdraft which was made subject to overdraft interest of 120%. He states in his evidence that this led to Property paying $10,365,207.16 more in interest than it ought to have paid. There is no explanation in the statement as to the period to which this excess is said to have applied, though the statement sets out interest charges for months up to and including March 1996.

All the available evidence, however, indicates that there was a reallocation of the Group's indebtedness in or around April 1994. There is no evidence as to the status of

the overdraft, if any, at that time, and so it is not clear why the periods after that, and up to March 1996 would be relevant. This is not explained. There are also questions as to the witness' credibility in relation to his testimony on a previous facility of $6,000,000.00 which all agree had been fully repaid and is not an issue in this case. With respect to that facility, the witness had said that only $2,563,000.00 "was credited to L.P.L's account". However, under cross examination he had to acknowledge that page 13 of Exhibit 1, the letter from Mr. Stewart to the Bank dated September 30, 1992, did indicate that there were at least two draw-downs of $1.5 Million each approved by the Bank.

In any event, his evidence in re-examination before the Court, seemed to indicate that in April 1994 after the loan of $20,000,000.00 had been negotiated and the then indebtedness of the Group of $34,000,000.00 was re-allocated between Property and Quarrying, all Property received was about $704,000.00 while two loans for $10,000,000.00 and $5,000,000.00 were repaid as well as interest of "two point some odd million" out of the $18,000,000.00 allocated to it as its share of indebtedness. What struck me in relation this witness who is an accountant, is that he seemed to hold the view that the only way a facility extended by a bank to a customer could be given effect, would be by placing the funds in the customer's account.

Now it must be clear that if the bank says that it will honour cheques up to a certain amount notwithstanding the lack of funds in the account that will also be the grant of a "facility or accommodation". (The question then would become whether by allowing the customer to run an overdraft subject to the higher interest rates, rather than the 68% agreed on for a demand loan, the Bank breached its contract with the customer). I make this point here in light of the fact of a letter from Lue's property Ltd. dated July 13, 1993, Exhibit PC2 of Paul Chin's witness statement and signed by Cleve Stewart in which he requested that "the present overdraft facility be transferred to a demand loan with a repayment date of November 4, 1993". The letter also asked for an "additional facility of five million dollars by way of a demand note mature on November 4, 1993". It is instructive to note that the letter states: "The facility at '2' above will only be used if the proposed sale of the twenty units to National Housing Trust is not approved by their board". It is axiomatic that this did not contemplate the placing of the five million in an account since it would attract interest charges from

the date it was so placed, whereas if it was only used in the circumstances contemplated, the interest would only run from the date of, and on the amount of, such user.

Before looking at the defences filed in relation to the statement of claim, I need to confess some difficulty with the pleadings set out in the said statement of claim which are often, quite imprecise. It is often neither clear what is the theory of liability being advanced nor the precise facts upon which any liability may be said to rest. Is it a breach of a duty of confidence or a duty of confidentiality? Has there been a breach of a duty of care based upon the "confidence reposed in the Bank" to give proper advice, or a breach of a duty of "confidentiality" for which, as far as I am aware, there is no common law duty? Further, it is not at all certain to which claimant, the 2nd, 3rd or 4th, the term "Plaintiff Company" in paragraph 42, cited at paragraph 3 in the immediately preceding section of this judgment, refers.

As far as the 4th Defendant is concerned, it does not admit the averments made in the statement of claim and on the available evidence was not an assignee of the loans, the subject matter of the claim by the Claimants. The 4th Defendant also denied any contractual arrangements between itself and the Claimants or any of them. Nor does the 4th Defendant have any interest in any of the loans the subject of the claims by the Claimants or any security therefor. Indeed, there was no evidence led that the 4th Defendant was in any way implicated in the dealings between the Claimants and the Defendants. There was, indeed, some correspondence in the agreed bundle of documents at page 145-149, a letter on FINSAC letterhead which counsel for the 1st, 3rd and 4th Defendants submits and the court accepts, was merely the 4th Defendant acting "as agent" for the 3rd Defendant and not in its own capacity. Once this is accepted, it becomes clear that the 1st and 3rd Defendants are the "real defendants" in this action and it is to the defence filed on their behalf that we must now turn our attention.

The 1st and 3rd Defendants join issue on all the significant averments of the Claimants. Counsel for these defendants denies that there has been any breach of trust, negligence or breaches of statutory or fiduciary duty by them In fact she says, the "particulars of trust and confidence" pleaded in Claimants' statement of claim are not

supported by any evidence adduced by Claimants. She further avers that any relationship between the 1st Defendant and the 1st Claimant, Lue, was a normal banker/customer relationship and that there is no evidence of any further reliance upon the bank or any officer thereof, over and above that normal relationship. There is a denial as well that there has been any breach of a duty of care giving rise to a sustainable claim in negligence against the 1st and 3rd Defendants. Further, it was submitted that based upon the Claimants' own pleadings and the admissions contained in the letter from their then counsel dated July 1995, the Defendants are entitled to judgment in their favour.

Defendants' counsel in the course of her opening submissions also submitted that the Claimants had actually acknowledged their indebtedness to the 1st Defendant. Further, in answer to the Claimants' averment that the debts had been assigned to the 3rd and 4th defendants without the consent or approval of the claimants, counsel also denied that there was any assignment to the 4th defendant or any legal obligation on the part of the 1st Defendant to so advise the Claimants of any such decision to assign. In any event, it appears that Claimants have conceded that this claim is not sustainable as there was evidence before this court of a court order which formed the basis of the assignment.

Evidence for the Defendants

The witness of fact for the Defendants was Paul Chin, a senior manager of Dennis Joslin Jamaica Inc, the agent of Jamaica Redevelopment Foundation Inc. In his witness statement, Chin stated that based upon the records of the Bank, the principal indebtedness of was in the sum of $15,000,000.00 by the end of July, 1993. He points out that by letter dated November 29, 1993, Property had written to the Bank requesting a "standby facility to the extent of $20 million, to be approved with initial drawdown to commence the first week of December". Lue in his witness statement refers to a demand loan which he claimed the Bank had approved and, in respect of which, on November 29, 1993, "LPL signed, sealed and delivered all documentation for the demand loan of $20 million to IVB". Paul Chin in his witness statement also says that the loan "was approved". When one looks at the letter of November 29, 1994, however, from Property, there is no reference to "demand loan" at all. Rather, it clearly refers to a "standby facility" in respect of which there had already been a

disbursement of $1,826,746.00 "to complete the acquisition of the land" for the Midland Glades housing development.

According to Chin, by April 1994, the indebtedness of property was in excess of $34 million, and there were applications by Property and Quarrying for loans of $18 million and $16 million respectively. This appears to be consistent with the application dated April 13, 1994 signed by Michael Scott and Norman Nelson, in which the Group acknowledged the then indebtedness of Property to be about $34,198,218.00. Pursuant to these applications, it was contemplated that the debt would be split between Property and Quarrying. (See Exhibit PC 6 of Paul Chin's witness statement). In its application for a demand loan of $16,000,000.00, Quarrying stated:

> "We are requesting that an amount of sixteen million dollars be transferred from Lue's Property Limited to Lue's Stone and Quarrying Limited. The purpose is to reduce the total indebtedness of Lue's Property Limited and place the obligation in its true perspective".

Given the acknowledgment of a total indebtedness of $34 million, the fact that $16 million was allocated to Quarrying meant that the application for the $18 million demand loan was in respect of debts then owed by Property. Louis Bell's evidence for the Claimants, in this regard, is that of the loan amount of $18 million to Property, the amount credited to its account was in fact only $747,452.80 which was the sum left after paying out the following items:

a)	Demand Loan Bay View Gardens	10,000,000.00
b)	Demand Loan Bay View Gardens	5,000,000.00
c)	Interest on Loan Bay View Gardens	2,252,547.20
	Total	17,252,547.20

In his evidence, Louis Bell had stated that the payments of $17,252,547.20, were "deducted" from the $18,000,000.00 which was being allocated to Property. But this makes no sense, as those sums could not be taken from what was already, an indebtedness. The effect, therefore, must have been to liquidate the old liability and to create a new liability in the sum of the new loans for both companies.

There is a certain level of confusion and even conflict in the evidence, in the witness statements and the documents allegedly supporting averments therein, as between the Claimants and the Defendants, and even within the witness statement of the defendants' witness. According to Mr. Paul Chin's evidence, the sum of $34,198,218

was "currently outstanding" on April 12, 1994 at a time when the bank was considering the additional "loan" to Quarrying. The relevant bank account statement for Property as of April 12, 1994 does show an overdraft of $16,187,027. But Mr. Chin's witness statement refers to "Exhibit PC 7" to his witness statement which he claims is a "copy of the letter to that company (Property) and signed by Lue's Property Ltd. indicating its agreement to the terms of the loan to it of $18M". The purport of the reference to "the letter" in the witness statement is that the whole letter is there but, in fact, all that is attached is the signature page with two signatures. Moreover, the page attached is a copy of the letter addressed, not to Property but to Quarrying. What is more curious, however, is that in respect of the purported signed acceptance in respect of an alleged $16 million loan, the commitment fee was said to be $180,000.00. Now, it is clearly the evidence that the commitment fee in relation to these loans is 1%, so a fee of $180,000.00 must refer to a loan of $18 million. It is, of course, Mr. Chin's own evidence that the $18 million loan was for Property, not for Quarrying. This is supported by the application of April 13, 1994 to which reference is made below. In the next paragraph of his witness statement, Mr. Chin states:

> "A letter from IVB to Lue's Stone & Quarrying dated April 25, 1994 (responding to Lue's Stone & Quarrying Ltd.'s letter of April 5, 1994) approved its request for financing by way of a demand loan in the sum of $16 million and its terms were accepted by Lue's Stone & Quarrying Ltd. I exhibit herewith marked PC8 a copy of both letters".

In fact, the letters exhibited were, one addressed to the Bank from Quarrying dated April 5, 1994 requesting a loan of $16 million *and one from the Bank to Property approving a loan of $18 million* with a commitment fee of 1% plus GCT. Notwithstanding the untidiness and even apparent confusion here, there are two promissory notes evidencing promises to pay $18 million and $16 million respectively, on the part of Property and Quarrying. The loans were also cross-guaranteed and subject to the personal guarantee of Henry Lue as well as a mortgage over property at Volume 475 Folio 27 of the Register Book of Titles. It is perhaps instructive that Chin's statement in paragraph 26 stated that both Property and Quarrying "were granted overdraft facilities by the Bank separate (and apart from the demand loans) to fund their working capital needs". The evidence for this assertion is not given. In respect to these two (2) demand loans, however, Mr. Chin states: "*The Bank's records do not indicate the demand loans having been charged to their*

accounts at any time". (emphasis mine) It is not at all clear to me what this means. The statement also concedes that an interest rate of 120% per annum was charged to Lue's Property between February 24 1994 and September 15, 1994 "on such part of the company's overdraft as exceeded the *arranged line of credit*". Of course, unless the witness was referring to the purported standby credit of $20 million which had been applied for and approved, there was no evidence that a "line of credit" had been "arranged". I understand the witness to be referring to that sum. Thus, at paragraph 28 of his witness statement Chin says: "The Bank's records indicate that the loan proceeds were credited to the current accounts of Lue's Property Ltd. and Lue's Stone and Quarrying Ltd". Then in paragraph 37, while not talking about a loan at all, he says: "The Bank credited the loan proceeds to the current accounts of Lue's Property Limited and Lue's Stone & Quarrying Limited". The witness statement does not indicate where in the records this is shown, nor is it clear which "loans" are being referred to. With respect to the interest rate of 120% referred to above, the statement cites "an internal memorandum of the Bank dated March 28, 1996 which acknowledged that there had been an overpayment to the extent of $7.42 million on interest charged to the Claimants. The Claimants can, in my view, rely upon this admission as indicating an error, at least to that extent, on the part of the Bank.

There were subsequent loans to the Group. Thus, in March 1995, Buildings negotiated and received a loan of $25 million. This was collateralized by the guarantee of Property supported by an instrument of mortgage over property at Rules Pen in the Parish of Clarendon and registered at Volume 1278 Folio 185 of the Register Book of Titles, as well as a promissory note of Henry Lue.

With respect to other security held by the Bank, the return of which the Claimants are claiming, Chin's witness statement acknowledges that the Bank was holding three titles, Volume 1036 Folios 650-652 in respect of a debt of $2.8 million owed to the Bank by Chrijohlis Limited.

Mr. Chin's witness statement also acknowledges that the Bank received two payments of $10 million and $12 million from the Claimants. Further, that by a letter dated May 15, 1996, the Bank was advised of the difficulties which the Property was

experiencing in servicing its debts, and seeking the bank's forbearance during its period of difficulty.

Finally, by letter dated July 4, 1996 the Bank made a proposal for settlement of the debt owed by the Claimants and this was accepted by the Claimants' then attorneys by a letter dated July 4, 1996. That agreement has not been honoured as the Claimants failed to pay in full or on time, the first instalment due.

Through Mr. Chin, the Defendants also deny ever having received any complaints in writing from the Claimants of any errors or omissions in relation to their bank statements. It is also denied that the Bank ever told Lue or anyone on his behalf to go ahead and write cheques on accounts which might have been overdrawn. The alleged indebtedness of all the Claimants is given in Chin's witness statement giving a total liability of over $144 million as at March 2002, and averring that no part of that indebtedness has been paid since that time.

Counsel for the defendants contends that the fundamental issues which the court has to consider are as follows:

- Were the Claimants indebted to the defendants or any of them?
- Did the 1st defendant properly assign the indebtedness to the 3rd Defendant?
- Are the guarantees, debentures and mortgages granted by the Claimants valid and enforceable and if so, by whom?
- Was there any relationship giving rise to any rights or obligation whether in contract, tort or under statute between the Claimants and the 4th Defendant, FINSAC Limited?

I also believe that an issue which is to be canvassed is whether, if the answer to the first of the questions above is in the affirmative, the Claimants (or any of them) have acknowledged that said indebtedness. It is my view that based upon the evidence, indeed even the evidence of the 1st Claimant himself, the answer to the first of the foregoing questions is in the affirmative. I have also formed the view that there has been an acknowledgment of indebtedness by the First Claimant both on his own behalf, and on behalf of the other companies in the Group as will become apparent when I deal with Defendants' counsel's submissions on the issue of a real account stated. I have also previously indicated that based upon the evidence of Mr. Paul Chin

and the exhibits attached thereto as well as the evidence of Lue, that the guarantees, debentures and mortgages granted by the Claimants are valid and enforceable by the 3rd Defendant, Refin Trust Limited. It still remains to consider whether any of the Claimants' claims have been made out. It will be recalled that the claimants' statement of claim alleged that the defendants were negligent; were in breach of their fiduciary duty; were in breach of contract and breached their statutory duty.

Negligence

As I understand the Claimants' statement of claim, the allegation of negligence is contained in paragraph 36 and 37 and is in the following terms:

> That the indebtedness of the (Claimants) has been caused by the bad advice and conduct of the 1st and 2nd Defendants to finance the Midland Glades Housing Scheme development on an overdraft facility, not by a loan which the (Claimants) applied for, and had been approved by the 1st and 2nd defendants at the rate of 68% but instead applied the overdraft rate of 120% per annum and by illegally compounding interest, and further redistributing his debt under duress.
>
> That as a result of the negligence of the 1st and 2nd Defendants in that they failed to exercise the necessary duty of care and the breach of fiduciary duties, the Midland Glades Housing Scheme was completed and all the proceeds paid over to the Bank and the (Claimants) are still heavily indebted, have suffered loss, injury and were put to great expense

The Claimants then list eight (8) specific particulars of negligence on the part of the Defendants, which particulars have already been set out above. It should be noted that several of these particulars overlap. Thus, for example, the drawing of cheques and the creation of an overdraft and the non-supervision of an account by a bank on behalf of its customer, are different perspectives of the same issue. I must mention that the suggestion that the Bank was negligent in not advising a businessman who had been in business for over twenty years to seek independent legal advice, when there is evidence that he did have access to attorneys, is at the very least, absurd.

In relation to these pleadings of negligence, what is the evidence? Lue in his witness statement stated:

> "On November 29, 1993, LPL signed, sealed and delivered all relevant documentation for the demand loan of $20,000,000.00 to IVB. The interest rate was 68% per annum. A non-refundable commitment fee of $200,000.00 was charged. Although LPL accepted I.V.B.'s offer of a demand loan of $20,000,000.00 on November 29, 1993, this amount was never credited to L.P.L.'s

current account as IVB opted to carry an overdraft at interest rate of 120% per annum".

He stated that the loan was used to cover overdraft "created by Mr. Sasso". It is not clear from Lue's evidence how Sasso "created the overdraft". What is clear from Lue's evidence is that, at a point in or around April 1994, he was advised by the Bank through its then president and chief executive officer of new requirements of the Regulator, the Bank of Jamaica. Pursuant to these requirements, there was a need to reallocate the $34,000,000.00 indebtedness discussed above, among at least two (2) companies within the group. As a result of the new regulations, Mr. Lue said there was a need to place limitations on the indebtedness of any single customer. Mr. Paul Chin in his witness statement on behalf of the 3rd Defendant stated that the decision to redistribute the loan was done at the request of Quarrying, but I believe that this was merely a characterization of what was said in the documentation. I do find some support from the witness statement of Ronald Sasso, (the former 2nd Defendant and former President of the Bank, and who has been discharged from the suit, but whose witness statement was admitted into evidence by agreement between the parties), that the reallocation was effected because of a need to comply with new Bank of Jamaica regulations.

It is trite law that he who alleges must prove. The Claimants appear to have fallen woefully short of providing the court with evidence on a balance of probabilities, that any problem experienced with the Midland Glades development was due to any increase in the interest rate from that allegedly contracted for under the "standby facility" and any other rate charged on such sums as may have represented overdraft. Indeed, Mr. Lue's own witness statement lists a number of other factors which could have impacted upon the viability of the development. No evidence has been led as to what was the dollar differential between the projections for the scheme, as conceived, and the eventual out-turn. This is important because, even on the Claimants' evidence, at the time on November 29, 1993 when Property sought to formalize the standby facility, it had already drawn down on disbursements of almost $2 million. Claimants have not said that the 120% rate was applied on any defined sum for a defined period so as to give rise to a specific amount of damages. Sasso's evidence is that the rate was applied in relation to those outstanding loan sums which were not being serviced

and as a result of which, because the Bank would be running an overdraft with the Bank of Jamaica, it would pass this rate of interest to the loans which were not being paid up. Indeed, in the Sinclair case (see below), the Privy Council acknowledged that, in that case, "high rates of interest were partly explicable by the high rate of inflation in Jamaica during this period, and the high rates of interest which the Bank of Jamaica charged to commercial banks, especially if they went outside the central bank's guidelines". The facts giving rise to this case were, of course, taking place during the same historical period as the Sinclair case.

In any event, it is not clear to me how the need to comply with a directive of the Regulator can be brought within the concept of duty of care, breach and damages. In relation to the November 1993 loan, there was evidence from the Claimants' own documents that they had requested a "standby facility". Based on Sasso's witness statement, I accept that there is evidence that the Claimants were encouraged to use an overdraft "as a means of obtaining loans for his companies in the formative stages of the loan accounts". However, there is nothing to lead the court to conclude that the use of an overdraft for an entire project was advised by the Bank or that the Claimants should continue drawing cheques on their current account in funding the Midland Glades development. I also understand Sasso's evidence to be that these loans were periodically converted to demand loans and that by judicious use of an overdraft facility, the Claimants could avoid having to pay interest on the full amount of a demand loan which they would have to pay once the loan was credited to their account, although they might not need all of the loan sum immediately. I regard this as straightforward commercial common sense practice. I do not accept that the Bank had encouraged him to just keep writing cheques irrespective of the state of the Claimants' accounts. Nor do I accept that a bank has any duty to "supervise" a client's account to ensure that said account does not "exceed its limits". I also hold that there was no negligent charging of "penal" interest rates, "without adequate notice".

With respect to the claim that commitment fees were "negligently charged" because when demand loans might have been used to pay off or replace overdrafts, the Claimants received no "benefit", this is a misunderstanding of how banks operate. Counsel for the claimants sought valiantly, in cross examining Paul Chin, to get him to agree to the proposition that where there was a pre-existing obligation created, for

example by the bank having allowed an over draft, if this was subsequently converted into a demand loan, there would be no basis for the payment of a commitment fee, since the converted overdraft provided no "additional benefit". This betrays a singular lack of appreciation of the normal banking practice. It is standard practice for as commitment fee to be required because it is the granting of a separate facility which is time bound and interest rate bound, whereas with an overdraft, the bank may, at least in the absence of any agreement to the contrary, require the immediate liquidation of that overdraft.

There are allegations in the Statement of Claim concerning the Bank holding titles at Cross Pen in the Parish of St. Catherine; Rules Pen in Clarendon and Midland Glades in Clarendon. There is no averment that the Defendants had a duty to complete a transfer of the Cross Pen properties which are in the name of a company, Chrijohlis Limited. In cross examination, Lue was asked whether he was aware that Chrijohlis was itself indebted to the Bank, and he said he was not aware. There is no evidence that the Defendants "negligently failed to complete the transfer" of the said property. The statement of claim merely avers that "the Cross Pen property registered at Volume 1036 Folios 650,651 and 652 was not transferred to the 2nd Plaintiff and the Bank has refused to release these titles to effect the transfer to the 2nd Claimant. In light of the foregoing, any claim in relation to that property must fail. There is no allegation that there was a duty to return the said security to the Claimants or indeed to anyone of them, and how that duty was breached. In fact, Mr. Lue's own evidence in relation to his inability to fund his other projects was to the effect that: "because of the Lue's Group's situation with I.V.B. we were unable to obtain funding from any other financial institution to finance the Savannah Villas Development, despite several applications locally and overseas". Moreover, he acknowledges: "I was forced to close all of my businesses in January 1997 with the exception of Lue's Transport and Equipment Limited due to inability to obtain funding and illness". This seems to provide compelling explanations for the difficulties eventually experienced by the Claimants. Any losses or expenses arising from the closure of the 1st Claimant's businesses, whether because of theft of equipment or the need to repair because of non-activity, are wholly irrecoverable, and I so hold. In sum, I find that the Claimants have failed to show that the Defendants or any of them is guilty of negligence as alleged or at all. The issue of negligence is also relevant in

consideration of the alleged breach of fiduciary duty asserted by the Claimants against the defendants.

Breach of Fiduciary Duty

The statement of claim alleges that there was a relationship of trust and confidence between the (First?) Claimant and the Bank. Paragraph 10 of the pleadings sets out what are alleged to be eight (8) particulars of that relationship. These are said to be:

i. The Plaintiffs had grown over the years with the support of the Bank manifested in readily available loans and other forms of cooperation.
ii. The Plaintiffs joined the Bank from the inception and at the personal encouragement of Burt Bryan the Credit Officer, to whom the 1st Plaintiff was personally introduced.
iii. The close personal relationship between the 1st Plaintiff and members of staff at all levels in its branch where the Plaintiffs banked, its corporate headquarters and other centralized departments of the Bank.
iv. The close personal relationship with Burt Bryan who at the material time was Credit Officer at the Bank's New Kingston Branch, where the Plaintiffs account was located.
v. The special treatment granted to the Plaintiffs in the management of their accounts and liabilities prior to the time of the transfer of the Plaintiffs' liabilities from the Bank to the 3rd and 4th Defendants
vi. The reliant attitude of the 1st Plaintiff on his bankers.
vii. The reliant attitude towards bankers by older businessmen, such as the 1st Plaintiff, which is now largely of the past but still existent today.
viii. The Bank's awareness, through its officers and servants of the abovementioned Particulars of Trust and Confidence.

These averments are purportedly supported by a list of the alleged borrowings by the Claimants from the defendant Bank starting from 1992. There seems to have been no issue until the alleged borrowings for the Midland Glades housing development in November 1993. Counsel for the Defendants submitted further, that even if all the allegations in the particulars of a relationship of trust and confidence were established, this did not amount to any special relationship over and above the normal relationship of banker and customer. I agree with both submissions. There is nothing in the particulars which raises it above this level. Further, there are some averments in the pleadings of which no evidence has been adduced. For example, no evidence had been led in relation to paragraphs (iii) (iv) (v) (vi) (vii) or (viii).Thus, for example, the

pleadings speak to the "reliant attitude towards bankers by older businessmen such as the 1st Plaintiff, which is now largely of the past, but still existent today". No evidence of this general alleged "reliant attitude" nor how this Claimant, Lue, exhibited that reliance. Indeed, Mr. Lue did not start out in 1992, as "an older businessman". He was an experienced businessman who had been in business from the 1970s and had dealt with Alpart Alumina Company, a multinational corporation. The Bank, on the other hand, was new having only started in the early 1990s.

I accept the submission of counsel for the 1st, 3rd and 4th Defendants that the criteria which would allow a court to find that there had been the alleged negligence, were articulated in the recent Jamaican case which went to the Judicial Committee of the Privy Council, **National Commercial Bank (Jamaica) Ltd. v Raymond Hew and Clinton Hew (as executors of the estate of Stephen Hew (deceased) and Raymond Hew. (Privy Council Appeal 65 of 2002)**. In that case, delivering the advice of the Board, Lord Millett, in dealing with the issue of negligence pleaded against a bank, said.

> The legal context in which this question falls to be decided is well established. In *Banbury v Bank of Montreal* [1918] AC 626 Lord Finlay LC said at p 654:
>
> > "While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business ... If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently."
>
> In relation to a failure to advise a customer, Warne & Elliott *Banking Litigation* (1999) states at p 28:
>
> > "A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the

> bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given."
>
> It is, therefore, not sufficient to render the Bank liable to Mr Hew in negligence that Mr Cobham knew or ought to have known that the development of Barrett Town with the borrowed funds was not a viable proposition. It must be shown either that Mr Cobham advised that the project was viable, or that he assumed an obligation to advise as to its viability and failed to advise that it was not. Their Lordships have examined the transcripts of the trial with care, and have failed to find any evidence to support any such finding.

As in that case so in this one, there is no evidence of the Bank having been requested by the Claimants or any of them, nor the Bank acceding to such request, to give advice in relation to the viability of the Midland Glades housing development. There is no such evidence. As his lordship succinctly summed up the matter in paragraph 27 of the opinion:

> In the circumstances their Lordships can find no support in the evidence for a finding that Mr Cobham advised Mr Hew as to the wisdom of developing Barrett Town or that the Bank assumed a duty to do so. This is sufficient to dispose of the claim for negligence;

In other words, in the absence of evidence of the Bank giving advice on the project or assuming a duty so to do, a claim in negligence is unsustainable. Nor is there any implication to be drawn from the fact that the Bank allowed Mr. Lue to draw cheques on his account, as to either the viability of the project nor the giving of advice on its financing. It should be noted here that one of the assertions in the instant case is that pursuant to the "demand loan", described in the documents as a "standby facility", funds were not placed in the account. Rather, an overdraft was extended to the Claimants. There is evidence from the Bank's witness on this point, that using the overdraft route on which interest would only be paid when used, was more advantageous than taking a fixed loan upon which interest would have to be paid from day one.

In relation to the allegation of breach of fiduciary duty, I note the averments in the statement of claim that the Claimant, Lue, was "forced and coerced by the 1st and 2nd

defendants to use the 3rd and 4th Plaintiffs to cross guarantee the Midland Glades loan so as to allow the 1st and 2nd defendants allegedly to satisfy the alleged Bank of Jamaica rule, which was the illegal and self-serving advice given to him by the 1st and 2nd Defendants, and that the Plaintiff under duress and unreasonable pressure put on him by the Bank allowed the Bank to redistribute the debt to appease them". It is trite law that a Bank Manager has a duty, both fiduciary and contractual, to do what is necessary to protect the interests of the bank. In such circumstances, it is impossible to contemplate that a manager, doing what was necessary to protect his institution from breaching regulatory strictures and enhancing the bank's likelihood of recovery, can be said to be breaching any duty of care or fiduciary duty to the bank's customer. Further, there is no evidence that redistributing the debt as alleged by the 1st Claimant is in any way, illegal.

I wish to make one final comment in relation to the question of breach of fiduciary duty which the Claimants have put forward it seems, without much conviction. Their counsel has articulated certain allegations which they claim provide evidence of a special relationship. But as pointed out in the Privy Council case **FINANCIAL INSTITUTIONS SERVICES LIMITED v NEGRIL NEGRIL HOLDINGS LTD. And NEGRIL INVESTMENT COMPANY LTD.** (Privy Council Appeal No 37 of 2003) (the so-called "Sinclair Case") per Lord Walker of Gestingthorpe at paragraph 14 of the Board's judgment:

> The authorities show that the relationship between a banker and his customer, although not normally a fiduciary relationship, may exceptionally (*although equitable relief is available only if the relationship is shown to have been abused*. See the judgment of the Board in National Commercial Bank (Jamaica) Ltd. V Hew (2003) UKPC 51. (Emphasis mine)

I find that no fiduciary relationship has been established on the evidence in this case and *ergo*, no abuse of any such relationship.

Compounding of Interest

The Claimants also aver that the bank has wrongfully charged compound interest on the loans and/or overdrafts, which they were servicing. Does a bank have a right to charge compound interest? In **NATIONAL BANK OF GREECE SA v PINIOS SHIPPING CO. No 1 AND ANOTHER [1990] 1 All E.R.78**, the House of Lords considered this question. The Court of Appeal had reversed a holding by the Court below to the effect that a creditor bank was entitled to charge compound interest on a

mortgage debt up to the date of judgment. In the Court of Appeal, the debtor had contended that the mortgage deed had no provision for the charging of compound interest, and that if there was any such entitlement, it ceased to be applicable once the bank had made a demand for the repayment of the mortgage thereby terminating the relationship of banker and customer. The Appellants in the House of Lords argued that the bank's entitlement to compound interest arose from usage of bankers entitling bankers to capitalize interest on a debt until payment. Their Lordships unanimously upheld the bank's contention. What was instructive about this decision is that in that case, there was

a) No evidence before the court of the practice of bankers;
b) The court found that there was no express term in the mortgage which entitled the bank to charge compound interest; and
c) The Bank never pleaded or proved a custom entitling it to continue to charge compound interest after the account had been closed.

The Claimants' attorneys argue that the charging of compound interest in the instant case is unlawful. Thus at paragraphs 18 and 19 of the statement of claim the Claimants allege:

> The 1st and 2nd Plaintiffs were advised by the Bank to write cheques against the current account and the Bank would apply the loan rate of 65% as in previous loans, and the 1st and 2nd Plaintiffs paid the commitment fee for this loan.
>
> That the bank did not apply the rate of 65% to this current account as in the past instead illegally without notice to the Plaintiffs compounded the overdraft rate of 120% to the account.

Counsel for the Claimants acknowledges that there are authorities from both the House of Lords (**YOURELL V HIBERNIAN BANK LTD [1918] AC 372**) and the Privy Council (**Ex.P BEVAN (1803) 9 Ves 223**) which support the right of bankers to charge compound interest. Counsel cited the case of **DEUTSCHEBANK & DISCONTO GESSELLSCHAFT v BANQUE des MERCHANDS de MOSCOU [1931] 4 LDAB 293** where, while the principle of compounding interest was upheld, it was not allowed due to the special circumstances of a war being in progress at the time. Counsel elicits from this case the proposition that "compound interest cannot be charged if the factual circumstances do not allow it". She then proceeds to cite certain

circumstances which, she says, make this case special, including the fact of "an overdraft being forced on the customer in breach of contract for a demand loan" and "the nature of the transaction in which specific costs were quoted to intended purchasers of housing". It is sufficient to say that none of these circumstances even remotely approach the seriousness of a war in which the nation is involved, and so, even if there were any validity in the proposition, the circumstances are easily distinguishable. Claimants' counsel acknowledged that **PANTON v IRC (1938) AC 341**, was a further authority that supported the proposition that bankers are entitled to compound interest where customers fail to pay interest as it accrues. In this case, there is abundant evidence, including from the 1st Claimant himself as well as the witness statement of Ronald Sasso which it was agreed should be available for use by either party, that the Claimants were not servicing their loan accounts in a timely manner. Counsel suggested that compounding ought not to apply where as here interest was charged from day to day and credited at monthly rests. I regret that I cannot accept that proposition and no authority was cited.

The issue of compound interest was one of the central features of the **Sinclair** case referred to above. At first instance, Ellis J held that he "did not find that they (the dispositions of the witnesses) provided any cogent evidence as to the existence of business practice which would assist me in interpreting 'the usual rate of interest on overdraft' to confer any entitlement on the defendant to compound interest. I hold that finding because in a majority of the practices deponed to, there was (sic) express terms in the contracts to compound interest on overdraft balances, unlike the circumstances of this case". Lord Walker in the Privy Council stated: "In the Court of Appeal, the majority adopted and strengthened this conclusion. Harrison J.A. (at pages 282-283) referred to a contractual right enjoyed under their written agreements by all the six leading commercial banks operating in Jamaica and Langrin J.A (at pages 316-8). concluded that 'nearly all banks' charged compound interest under express contractual terms. Downer J.A. dissenting, reached a different conclusion".(page 214) Having reviewed the evidence which was available to the first instance judge, the Privy Council concluded: "After a detailed review of this part of the evidence, their lordships have concluded that it did not justify the conclusion reached by the judge and upheld by the majority of the Court of Appeal". Certainly,

the Privy Council's view is an implicit acceptance of the position of Downer J.A in the Court of Appeal who said:

> As the law on compounding interest was stated in **Yourell v Hibernian Bank (1918) AC 372** and **Pinios** by the House of Lords, these cases are part of the common law of England. In this area, we follow the common law of England and so will the Privy Council. There is therefore no need to resort to the usage and custom of bankers as the law is settled.

In light of the Privy Council ruling in the **Sinclair** case, counsel for the Claimants can hardly expect to rely upon the holding of Ellis J. at first instance, as they seek to do.

Counsel for the Defendants submitted that in any event, the issue of whether the bank could charge compound interest was academic as the mortgage signed by the Claimants specifically provided for interest to be compounded "with monthly rests". Indeed, she made the point that in any event, there was evidence that the loans were not being serviced in a timely manner. As is apparent above, this would form a proper basis for the charging of compound interest. There can be no argument of a breach of contract in relation to the charging of compound interest.

Another aspect of the Claimants' case requires comment. There are numerous references in the submissions of the Claimants to rates of interest being "penal rates" and there is a suggestion that charging a rate of interest of 120% was a "penal" rate. As I understand the witness statement of Ronald Sasso, however, the rate of 120% was the amount charged by the Bank of Jamaica where an individual bank ran an overdraft with the central bank, and this rate was recovered from the respective customers who were, themselves, in overdraft at the individual institution. The Claimants do not aver what was the "normal" or "non-penal rate" in relation to any overdraft which the Bank allowed. In any event, I find dicta in **Sinclair**, on penal interest rates, instructive. In that case there was also a pleading of the customer being charged penal rates of interest. The Privy Council seemed to have taken that phrase to be applicable to, the rate of interest applicable to "unauthorized overdrafts", that is, overdrafts incurred by the customer over and above that allowed by the bank. The Privy Council held that, having created a special relationship with its customer, it could not conscientiously allow the customers' overdrafts to get bigger and bigger while treating them as unauthorized overdrafts in order to charge penal rates of

interest. It was in those circumstances that the Privy Council considered that the courts below were correct to disallow the rates charged by the bank. In this case, the Claimants have not led any evidence of the rates of interest which they might have paid on any overdraft as opposed to the 120% they alleged they suffered. In addition, as found here, there is no special relationship. In relation to this averment of the Defendant Bank changing the rate of interest purportedly agreed on a demand loan, I have formed the view that the evidence is too tenuous to find in favour of the Claimants and so here as well, I find in favour of the Defendant Bank on the question of a breach of contract.

I wish to comment again upon the evidence in relation to the demand loan/standby facility of $20,000,000.00 which was sought in relation to the Midland Glades development. I start by observing that according to Lue's witness statement, the demand loans which Property had taken prior to July 1993, were repaid in full. The difficulties now complained of must therefore have started with the November 1993 request for the $20,000,000.00. This is corroborated by Mr. Bell's evidence, when he says that if the sum of $20,000,000.00 had been credited to the LPL account, there would not have been an overdraft. Mr. Lue says: "On November 29, 1993 LPL signed sealed and delivered all relevant documentation for the demand loan of $20,000,000.00 to IVB. The interest rate was 68% per annum. A non-refundable commitment fee of $200,000.00 was charged". He says that this "demand loan" was never credited to LPL's account as the bank "opted to carry an overdraft at interest rate of 120% per annum". Mr. Bell, the chief accountant of Lue's Group of Companies, deponed in his witness statement as follows:

> In mid-November 1993, LPL requested a demand loan of $20,000,000.00 from IVB to finance a development called "Midland Glades".
>
> IVB submitted a Letter of Commitment and Promissory Note to LPL for a demand loan of $20,000,000.00 signed by Mr. Sasso and Mr. Norman Nelson which was duly signed sealed and delivered to IVB on November 29, 1993.
>
> The interest rate was 68% per annum and a non-refundable commitment fee of two hundred thousand dollars ($200,000.00) was charged.

> Consequently we wrote cheques on the current account on the understanding that this sum would be credited to the account. This situation meant that the current account went into overdraft and we were charged overdraft interest.
>
> Although LPL accepted this demand loan of $20,000,000.00 from IVB on November 29, 1993, IVB never credited LPL's account with the proceeds of this demand loan but opted again to carry an overdraft in LPL's current account, thus creating a situation of compounding interest. The overdraft interest rate charged on the current account of LPL was 120% per annum. This action resulted in LPL paying $10,365,207.16 additional in interest charges.

It should be pointed out again, in light of the discussion on compounding of interest above, that the carrying of an overdraft in the current was not, per se, responsible for the compounding of interest, contrary to what Mr. Bell might have thought. What is interesting in Mr. Bell's witness statement is that he purports to set out the overdraft interest charged "re Midland Glades". I make a number of elementary observations. Firstly, there was *no evidence that there was a separate account for "Midland Glades"*. There is abundant evidence that LPL previously had a current account with the Bank and there is nothing in the evidence which would support the view that the current account was only established for that particular project. Secondly, he sets out a list of the monthly amounts charged. The list of charged interest for consecutive months from December 12, 1993 to March 31, 1996 amounts to a total of $19,848,206.23. There is no indication as to what was the principal sum on which he computed the interest charges, nor does he indicate what should have been the amount of interest and how he had arrived at it. What is clear is that the amount set out in his witness statement does not appear to represent a rate of interest of 120% compounded at monthly rests. That evidence is totally absent. What is the court to make of it in these circumstances? Mr. Bell also suggests that LPL was charged a commitment fee of $200,000.00 for a loan it did not receive. I repeat that if a facility is provided, even a standby facility, a commitment fee is payable.

Mr. Chin, the Defendant's witness, in his witness statement says that "the loan was granted by the Bank" However, as I have also pointed out above, there are two apparently conflicting statements of Mr. Chin in his statement. I have rehearsed the above in relation to this part of the evidence because there is no documentary evidence provided by either of the parties confirming the averments in the witness

statements either as it affects the issue of what was being applied for and given, or the terms upon which the parties agreed. We cannot lose sight of the basic principle that he who alleges must prove. However, it would not be unreasonable to believe that the records which were the subject of much of Mr. Chin's analysis and statement, would include such documentation. Notwithstanding that observation, I can find no basis for holding in the Claimants' favour in relation to any of the issues canvassed above, as the Claimants have not proven any of their averments on a balance of probabilities. Indeed, while I make no finding of fact in light of the evidence, I would venture to say that in commercial experience, the expression of a "standby facility" is normally more consistent with the granting of an overdraft than a demand loan.

Even if I am wrong in relation those issues above, I accept the submission of counsel for the Defendants when she says that the complaint of the Claimants based on the compounding of interest must fail. Moreover, such a complaint is void of materiality in light of the fact that an account stated has been arrived at between the parties on the basis of the correspondence dated July 4 and 22, 1996. The letter of July 4, 1996 from the Bank to Fraser & Aitcheson, the then attorneys at law for the Companies, refers to a letter dated May 17, 1996 from the said attorneys at law. That letter, according to the text of the July 4 letter, detailed a "proposed full settlement of the Lue Group's debt by a total payment of Ninety-five million dollars ($95,000,000.00) in accordance with certain terms and conditions". The letter continued:

> In this regard, we now confirm that we are prepared to accept the offer of ninety five million dollars in settlement of the said debt over a period of twelve (12) months as detailed below":
>
> | | | |
> |---|---|---|
> | 1st Payment | $40 million | Payable in 2 months |
> | 2nd Payment | $20 million | Payable in 4 months |
> | 3rd Payment | $30 million | Payable in 9 months |
> | 4th Payment | $5 million | Payable in 12 months |

The letter then recited two "conditions of settlement" which in my view are conditions subsequent and were exclusively for the benefit and protection of the Bank and therefore could be waived by them. The letter of July 26, 1996 is from the attorneys in response to the July 4, letter and is in the following terms:

> We write further to your letter of July 4, 1996 and to the meeting earlier this afternoon at your offices at which were present your president, Miss Marguerite Davidson, her assistant, Mr. Colin

> Newman, Messrs John Chuck and George palmer representing Lue's Property Limited and the signer hereof.
>
> *We confirm the acceptance by the Lue's Group of Companies of the settlement proposal outlined in your said letter of July 4, 1996, in its totality.* We further confirm that for the purposes of the settlement, time will begin to run from today, and that the Lue's Group of Companies are already mobilized to implement their responsibilities in this matter. (Emphasis mine)

These letters are to be read against the background of the letter of March 19, 1996 from the Bank to Mr. Lue setting out the balances on the accounts as requested by Mr. Lue. Counsel for the Bank submitted that at the very least this exchange constituted an admission of the indebtedness out of court and necessitates the Claimants proving that the debt is not due, a burden it is submitted, has not been met by the Claimants. Further, and in any event, counsel submitted that the account stated constituted by virtue the letters exchanged (refer above) is a "real account stated" and cannot be avoided except for fraud or some other vitiating factor which would make it liable to be set aside. Clearly, there is no allegation or even any evidence of fraud on the part of the Defendants in this case.

In **CHINESE MARITIME TRANSPORT LTD v A/S VESTMAR [1998] EWCA CIV 290 (19 FEBRUARY 1998)**, the issue of whether certain actions amounted to a stated account came before the English Court of Appeal. Hobhouse L.J. briefly set out the issues in the following terms:

> This is an appeal from a decision of Judge Hallgarten sitting at the Central London County Court. The claim made in the action was for the payment of hire which it was alleged had been underpaid owing to a deduction of alleged off-hire. The dispute between the parties raised two points. One was what might be described as the merits, namely whether the vessel had been off-hire at the times in question; the second was whether there had been a settled account between the parties which had precluded the plaintiffs from reopening that account and claiming the sum claimed in the action.

In that case, a dispute between charterers (plaintiff) and a disponent owner (defendant) of a vessel over the amount of money due from the charterers had been resolved after an exchange of correspondence including a statement of account, and an agreement thereon. Hobhouse L.J. stated:

> The situation, therefore, is one which requires a consideration of what is the effect of what passed between the parties when the

> charterers rendered an account, invited the disponent owners to agree it, the disponent owners did agree it, and charterers paid the sum shown in the account.
>
> It appears to fall within the classic description of an account stated properly so-called as referred at page 1493 of Chitty on Contracts, Volume 1, General Principles. It there says:
>
> > "'A 'real account stated' is one in which the account includes items on both sides and the parties have agreed that there shall be a set-off and only the balance shall be payable. The '...several items of claim are brought into account on either side, and, being set against one another, a balance is struck and the consideration for the payment of the balance is the discharge of the items on each side.' Though such an arrangement is frequently regarded as quasi-contractual, it is more properly described as 'a promise for good consideration to pay the balance'; and the consideration is valid and the settlement is binding even though some of the debts may be statute-barred, or otherwise unenforceable. Fraud, however, will permit the questioning of an account stated."
>
> I find myself in a similar situation to the judge. In my judgment, the purpose of accounts such as this is to achieve finality. These accounts were not drawn in equivocal terms, nor were the communications in equivocal terms.

I respectfully adopt the logic and the dicta of the learned Lord Justice and hold that the Defendant is entitled to succeed on this basis as well. The only question that I would raise would be whether, the Bank having acknowledged charging interest at the 120% rate for the period between February 24, 1994 and September 15 1994 and conceding that if there had been an arranged line of credit, the interest would have been $7.42 million less, the bank might wish to take that into account when it seeks to enforce its rights consequent upon this judgment. As I have sought to point out above, I am far from satisfied as to evidence for the so called demand loan and any terms thereof, and therefore I make no ruling in this regard.

As a further matter of fact, there is no credible evidence of any payment having been made in relation to that real account stated and I accordingly hold that the Claimants have failed in relation to their suit. Finally, I am also satisfied that the assignment was a proper assignment, having been effected pursuant to an order of the court and the successors in title are entitled to rely upon the assignment in seeking to enforce the

debt. By the same token, there can be no breach of a statutory duty of confidentiality under the Banking Act where the assignment has been made pursuant to such a Court Order. The declarations sought by the Claimants in their statement of claim are also denied.

I also find that on the evidence before me, FINSAC Ltd. is not a proper party, ought not to have been sued and therefore I award judgment in its favour on the Claimants' claims. Judgment is awarded to the 1st, 3rd and 4th Defendants with costs to be taxed if not agreed.