Privy Council Appeal No 20 of 2006

(1) Gifford Morrell
(2) Fiona Morrell *Appellants*

v.

Workers Savings & Loan Bank *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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

Delivered the 18th January 2007

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Lord Millett
Lord Walker of Gestingthorpe
Lord Mance

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*[Delivered by **Lord Mance**]*

1. The appellants, Mr Gifford Morrell and Miss Fiona Morrell (father and daughter) were active customers of the respondent bank, Workers Savings & Loan Bank, during a two-year period beginning in February 1992 and ending in May 1994. After that time the bank refused to honour further cheques and the appellants' four accounts (a Jamaican dollar current account No. 8001100 and US

dollar, Canadian dollar and pound sterling accounts) became inoperative. In proceedings brought in March 1996 the appellants claimed inter alia an account and declarations to the effect that the bank "has wrongly debited [their] accounts in all instances where the [bank] is unable to supply documentary proof or authorisation for such debits", that an overdraft and overdraft and penalty interest debited by the bank to the Jamaican dollar account were not owed, and that a mortgage dated 9th December 1993 over property in Lacovia, St Elizabeth did not cover any overdraft (as the bank was contending) but was only given to the bank as security for a loan which was never granted and was thus unenforceable. The bank counter-claims for an overdraft (put, with interest, at 56.86 million Jamaican dollars [or J$56,856,850.54] in September 1994).

2. The claim and counter-claim were the subject of a trial extending over some 28 days from December 1997 to May 1998. On 2nd October 1998 the trial judge, Cooke J, gave a detailed judgment, concluding in summary that (a) in respect of the period ending 31st December 1992 any liability of the appellants on the Jamaican dollar account was limited to that revealed by monthly bank statements which the bank was able to produce - in the event the bank could not produce any complete set of such statements, and the balance on the Jamaican dollar account was taken as nil, rather than at the overdraft level of J$2,348,147.25 suggested by such statements as the bank could produce, (b) the bank had established as accurate and binding the movements shown on all subsequent bank statements and (c) interest was only recoverable on the Jamaican dollar overdraft from time to time at a reasonable rate, which the judge fixed at 45% p.a. with half-yearly rests. In the result, the appellants' claim was dismissed and the counterclaim succeeded in an amount which in October 1998 totalled with interest (and after crediting some small balances on the foreign currency accounts which carried interest at only 4% p.a.) $243,201.568.87.

3. The Court of Appeal consisting of Downer, Bingham and Walker JJA, heard an appeal by the appellants over 44 days, The hearing started in October 1999, continued in March and April 2000 and then in March and December 2002 and concluded in January 2003. During the second period in March 2000, the appellants sought to raise, for the first time, the entirely new point that the purpose of the accounts which they had opened and operated was, to the bank's knowledge and with its consent, illegal foreign exchange trading on their part. As a result, they argued that the bank's counterclaim and any attempt to enforce the mortgage, if given as security for the overdraft on the accounts, must fail and (presumably therefore) accepted that their own claim must likewise be dismissed. The Court decided that it would hear the substantive submissions on this new point *de bene esse*, reserving until judgment the decision whether to allow the point to be raised

at all. By judgment given on 4th November 2004 and by a majority (Downer JA dissenting) the Court of Appeal upheld Cooke J's determination of the substantive issues. Downer and Walker JJA held that the defence of illegality should not be allowed to be raised because it involved issues of fact which it would have required trial to determine, while Bingham JA held that any such defence failed on the facts found by Cooke J. Against this judgment, appeal is now brought by leave of the Court of Appeal.

4. The appellants' accounts were with the bank at its Savanna-la-mar branch in the parish of Westmoreland. The appellants signed account opening forms for the accounts which provided inter alia that

> "Each of the undersigned further agrees with you and with each other that .... such moneys and interest or any part thereof may be withdrawn by any one of the undersigned or his or her attorney or agent, and each of the undersigned hereby irrevocably authorises you to accept, from time to time, as a sufficient acquittance for any amount so withdrawn, any receipt, cheque or other document signed by any one of the undersigned, or his or her attorney or agent, without any further signature or consent".

Mr Morrell was described in the documentation as a fish farmer, although, since the description was not in his writing, it is not clear whether it appeared on the documentation when he signed it. The appellants also signed in respect of the Jamaican dollar current account an "agreement re operation of account" dated 16th April 1992 providing inter alia:

> "3. CHARGES TO ACCOUNT:
> The Bank may charge against any account of the Customer at any branch of the Bank the amount of any bill of exchange, promissory note, cheque or other instrument, drawn, made, accepted or endorsed by the Customer which is payable at any branch of the Bank, and the amount of any bill of exchange, promissory note, cheque or other instrument cashed or negotiated by the Bank for the Customer or credited to his account for which payment is not received by the Bank, together with any charges and expenses incurred by the Bank in connection therewith and the Customer shall be and remain liable to the bank in respect of each amount so charged.
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> 4. VERIFICATION OF ACCOUNT:
> Upon the receipt from the Bank from time to time of a statement of account of the Customer together with cheques and other debit vouchers for amounts charged to the said account appearing therein, the Customer will examine

> the said cheques and vouchers and check the credit and debit entries in the said statement and, within thirty days of the delivery thereof to the Customer or, if the Customer has instructed the Bank to mail the said statement and cheques and vouchers, within thirty days of the mailing thereof to the Customer, will notify the Bank in writing of any errors or omission therein or therefrom; and at the expiration of the said thirty days, except as to any errors or omissions of which the Bank has been so notified, it shall be conclusively settled as between the Bank and the Customer that the said cheques and vouchers are genuine and properly charged against the Customers and that the Customer was not entitled to be credited with any amount not shown on the said statement."

Although Miss Morrell was or became a joint customer of the bank in respect of all four accounts, the accounts and their operation have been treated, no doubt realistically in the light of Mr Morrell's evidence, as under his complete control and as belonging to him alone.

5. Whatever the extent of Mr Morrell's involvement in fish farming, it is clear that by early 1992 he was engaged on a very substantial basis in the quite different business of dealing in foreign exchange from his base in Negril some 22 miles from Savanna-la-mar. The judge found that, after a spell as supervisor of Alcan's Jamaican dairy herd, Mr Morrell embarked on this new business in the late 1970s, and that

> "By 1992 he was well-established and had cultivated a most desirable clientele. The volume of his transactions staggered the comprehension of the court".

However, the judge also found, as will appear, that Mr Morrell had other business interests, including an Eco-tourism project at the 60 acre property in Lacovia which was the subject of the mortgage and where Mr Morrell lived. Mr Morrell became a customer of the bank after a lunch meeting with the bank's Savanna-la-mar manager, Mr Heron, in early 1992, where "a business relationship .... was fashioned" which gave rise at the trial to issues as described by the judge in the following passage:

> "Essentially, Mr. Morrell would transact his [foreign exchange] business through the bank. For the bank, this would result in its customers being better serviced. It would have acquired a most preferred customer and access to considerable foreign currency. There would be consequential benefits to its income. For Mr. Morrell, some

> of his logistical hurdles would be removed. No longer would his couriers or himself have to be traversing Jamaica carrying cash. His customers would receive foreign exchange through the network of the bank. Mr. Morrell's evidence is that he was to receive special treatment.
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> Now, Negril is some 22 miles from Sav-la-mar. He was to be allowed into the bank before opening hours and after closing hours to transact business. All his Jamaican dollar requirements to purchase foreign exchange would be provided to him. He would be given same day clearance on instruments. According to Mr. Morrell, a critical aspect of the proposed relationship was that purchasers of foreign exchange must first deposit to his account the equivalent Jamaican currency before there could be any deduction from his foreign currency accounts to be paid to them. Further, there should be no deduction from any of his accounts unless he had so authorised in writing. It is Mr. Morrell's contention that the bank was in breach of contract, and negligent as regards these two terms of the agreement. He also says that the bank did not ensure that the payments in Jamaican dollars in respect of the purchases of foreign exchange were credited to his current account. This current account was to be used exclusively for transactions involving trading in foreign exchange. In due course, Mr. Morrell opened accounts with the bank. Suffice it to say at this juncture, that he opened a current account and three foreign savings accounts, in U.S. and Canadian dollars, and English pounds.
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> The only evidence of the agreement outlined by Mr. Morrell is his own. The court did not hear from Mr. Heron. There was no contractual document embodying the terms on which Mr. Morrell relies."

6. The bank statements for the years 1993 and 1994 show that, even after stripping out the opening overdraft of J$2,348,147.25, the Jamaican dollar current account was frequently in overdraft to the extent of a few million dollars. During a few very brief periods from May 1993 onwards it went somewhat deeper into overdraft, and a practice of Tuesday window-dressing also developed (as will appear) in order temporarily to obscure the overdraft from head office. But, making full allowance for these, the general pattern of the account up to 12th May 1994 is still in contrast with its development in the short period of its operation thereafter. On 12th May 1994 the nominal overdraft (i.e. the bank statement figure before stripping out the opening overdraft of J$2,348,147.25) climbed as a result of

the debiting of numerous fairly small cheques from around J$5 million to nearly J$9 million. Three large cheques withdrawal totalling J$16.05 million then carried it to over J$25 million on 13th May 1994, whereupon Mrs King, who appears to taken over from Mr Corrie as branch manager on that very day, informed Mr Morrell that the branch would not honour further cheques. But the bank statements show that the account was debited with J$13.5 million (pursuant to a debit memorandum) on 17th May, with a cheque for J$1.5 million on 19th May and with some J$3.1 million overdraft interest on 31st May 1994. These, together with other minor debits, took the nominal overdraft to J$41,578,621.18. There appears to have been an unexplained change of pattern from 12th May 1994 onwards. The reason(s) for such a series of large withdrawals were not explored at trial. But their Lordships note that the appellants have not challenged any of such debits, including the J$13.5 million made pursuant to a debit memorandum.

7. A report jointly commissioned by the parties and made by KPMG Peat Marwick ("KPMG") dated 3 January 1996 examined debits made to the appellants' account. The appellants' challenge at trial was confined to debits to the account made in the period between 6th January 1993 and 5th April 1994, together with four minor debit items totalling J$238,068 appearing on 7th and 19th April 1994 and 16th May 1994. The debits challenged and made pursuant to debit memoranda which were available for KPMG's examination consist in 35 debits totalling J$4,814,748 in respect of which debit advices were not located for KPMG's examination (appendix 7) and some 111 totalling J$35,093,277,80 in respect of which the bank could not produce written approval from Mr Morrell (appendix 5). Eliminating all these (146) debits the Jamaican dollar account would have been in debit in the sum of J$6,784,229 as at 31st May 1994, *before* the further elimination of overdraft interest which would in that event also be necessary. The KPMG report referred to but did not verify total overdraft interest of J$9,548,461 in the period 1st January 1993 to 31st May 1994. The report also identifies a further debit dated 16th September 1993 for J$8,640,000, in respect of which there was no written approval by Mr Morrell, but which KPMG traced as relating to a sum remitted by the bank in partial reimbursement of a US$300,000 withdrawal by Mr Morrell from another bank.

8. The appellant's case was and is that no debit could properly be made to the account without their (in practice, Mr Morrell's) documented approval. They maintain that, but for the debits wrongly debited, the Jamaican dollar account would never have been overdrawn, and, in the light of what appears above, that appears correct. Indeed, had the debits challenged not been made, the Jamaican dollar account would have been in steadily increasing credit from January 1993 until 12th May 1994, and, if interest was stripped out, there would have been a

credit balance probably approaching J$40,000,000 by the latter date. It was only the series of large withdrawals from 12th to 31st May 1994 that would then have reduced the appellants from a status of multi-millionaires to a much lesser status at the latter date. It is however clear that the bank sent and Mr Morrell received on a monthly basis statements of account showing the now challenged debits and their drastic effect on the balances on the Jamaican dollar account, together with copies of debit notes, and there is no suggestion that the debit notes sent were incomplete, even though some could not be traced by the time of the KPMG report (and others appear to have gone missing since then).

9. The appellant's case has different strands, as indicated by the passage cited above from Cooke J's judgment. First and foremost, the appellants suggest that, as a matter of contract, the bank disentitled itself from debiting any sums in respect of which it did not obtain one of the appellants' signatures. Second, it is said that, as a matter of contract, the bank undertook only to remit foreign currency to clients of Mr Morrell after it had received from such clients a corresponding Jamaican dollar sum into the account. Third, it is submitted that the bank was and is unable to prove as a matter of fact that it made or received any oral authorisation from either appellant to make the disbursements to clients or others to which the debits under challenge purportedly relate.

10. In support of the first submission reliance is placed on the language of the documentation by which the accounts were opened, irrevocably authorising the bank "to accept, from time to time, as a sufficient acquittance for any amount so withdrawn, any receipt, cheque or other document signed by any one of the undersigned, or his or her attorney or agent, without any further signature or consent", (see para 4 above), as well as upon certain dicta, particularly in *Joachimson v. Swiss Bank Corporation* [1921] 3 KB 110, 127 where Atkin LJ said that a bank's obligation "includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch". But a customer's irrevocable authority to a bank to accept a document signed by a particular undersigned, attorney or agent without any further signature or consent does not preclude the actual customer from giving or the bank from accepting and acting upon oral instructions from that customer. Similarly, the fact that a bank impliedly promises to repay any amount due against the written order from the customer addressed to the bank at the branch does not exclude either the possibility of an oral order or a bank's right to be indemnified in respect of an oral order, if it can show that such was given by the customer or with his authority. A bank may not be bound, or prudent, to accept purely oral instructions. But there is no basis in the contractual documentation used in this case or at common law for saying that a bank which can show that it received and chose to act on oral instructions is

disentitled from obtaining an indemnity from its customer. That would be both strange and unfair. Even if contractual documentation purported to preclude a bank from acting upon, or being indemnified for acting upon, a customer's oral instructions, there would be little conceptual difficulty about treating subsequent oral instructions given by the customer on which the bank acted as involving a consensual variation. Cooke J was on any view right to conclude that the bank was entitled to indemnity in respect of any orally authorised disbursements which it could establish, and the majority in the Court of Appeal was correct to uphold him on this point.

11. The second strand of the appellants' case is that the bank was anyway only entitled to disburse foreign exchange after receiving equivalent Jamaican dollars into the current account. In conjunction with this argument, the appellants submitted at trial that the accounts were used purely for the purposes of Mr Morrell's foreign currency business - although in the appellants' case before their Lordship the submission made is that it was unreasonable to conclude that the Jamaican current account was not used "primarily" for the conduct of Mr Morrell's foreign currency transactions, a different proposition. The combined effect of the two points advanced at trial would, if they were accepted, be that (unless Mr Morrell failed to match his foreign exchange dealings with his clients with his dealings with the bank) his accounts should never have fallen into overdraft. The credibility of the appellants' case on these two points has therefore a direct bearing on the third and central issue whether the Jamaican dollar account did in fact fall into overdraft.

12. The judge accepted neither of the two points. He found that at no time was the account operated (or to be operated) according to the suggested agreement whereby a purchaser from Mr Morrell of foreign currency would lodge the Jamaican dollar equivalent before any foreign exchange was remitted. He described Mr Morrell as "an unimpressive witness", and found that he was not being truthful when he asserted in evidence that the current account was used exclusively for currency transactions, and he concluded that the account was also used to finance other business, particularly Mr Morrell's Eco-tourism project on his Lacovia property. Miss Hilary Phillips QC who presented this part of the appellants' case before the Board submitted that the judge's finding ran contrary to the evidence of Mr Reynolds, the bank's credit officer and later assistant manager at Savanna-la-mar until September 1993. Mr Reynolds explained that (when Mr Morrell was buying foreign currency) he would draw on the Jamaican dollar account to obtain cash with which he bought the foreign currency, which he would then lodge in one of his foreign currency accounts and that (when he was selling foreign currency) he would obtain a draft from the bank or give telephone authority

to the bank to make a transfer to his client who would then remit the agreed Jamaican dollar equivalent to Mr Morrell's current account, normally by transfer from another bank, but sometimes in cash. In a large majority of cases, the matching transfer would arrive on the same day, but in a few instances on the following day. If it did not arrive on the same day, Mr Reynolds would contact Mr Morrell who would contact his client. The typescript of the judge's notes, which is all that is available, then states: "With most of [the] companies dealt with exchange simultaneously. Cheque and foreign exchange", but that cannot affect the clear meaning of the preceding text (just summarised) and probably refers to the transaction between Mr Morrell and his client, not between Mr Morrell and the bank. There is therefore no inconsistency between the judge's rejection of Mr Morrell's suggestion that no sum ever left his account until *after* it had been covered by an inward remittance and the evidence given by Mr Reynolds that the transactions proceeded the other way round.

13. The more significant point is whether the accounts were used purely (or primarily) for the purposes of Mr Morrell's foreign currency business, or whether the judge was justified in concluding the contrary, with the inference that this might well explain why they could frequently be in overdraft. The judge like the parties concentrated on the period up to April 1994. Their Lordships have already drawn attention to the series of large withdrawals from the account between 12th and 31st May 1994. One might think that these were difficult to relate to foreign exchange dealings, but, in view of the way the trial proceeded, their Lordships put that thought on one side and focus on the judge's findings. In support of the bank's case on this point, the bank was able to refer to a number of documents, some signed by Mr Morrell others internal, purporting to refer to an overdraft, or to security for an overdraft, for Mr Morrell's farming or Eco-tourism activities.

14. First, Mr Morrell signed in agreement a facility letter dated 16th April 1992 wherein the bank offered him a J$300,000 overdraft to "provide working capital for farming operations". He thereby committed himself to a 2½% commitment fee. This itself suggests that he was using or intended to use the current account to fund business activity other than the foreign exchange dealings. On 28th April 1992 the branch sought head office approval to continue the overdraft, with an accompanying memorandum explaining that Mr Morrell was a fish farmer, but that he spent most of his time in his foreign currency operations as "an approved dealer", reporting an average weekly income of J$100,000. The memorandum went on that "To this end, we extended a cash secured overdraft recently" (though to what "cash secured" might refer is not apparent). The memorandum also mentions a personal financial statement said to report "cash resources of $2.5 million". Whether or not Mr Morrell actually had cash resources of J$2.5 million

(which is not shown), the judge may have gone too far in treating the fact that he opened the current account with a deposit of only J$40,000 and thereafter conducted a huge volume of foreign exchange business as suggesting that he must have relied on an overdraft. But this is far from being the only evidence that Mr Morrell did, for whatever reason, overdraw on the current account. On 30th April 1992 the branch wrote again to head office in relation to the credit application, recording that Mr Morrell had diversified in recent years into citrus (with 80 acres of established citrus), sheep (with a 40 acre farm) and fish farming (in the form of a partnership interest in 66 ponds covering 100 acres in which the partnership was said to have invested J$12 million). All these ventures were said to yield "a modest income of J$300,000 per annum which should improve tremendously when the fruition of the citrus commences in twelve months time". A very brief reference was made to the effect that contact had been made with Mr Morrell "since the liberalisation of the foreign exchange market" since when "he now maintains several accounts with us, including three Foreign Currency accounts" in respect of which modest credit balance figures were given. No reference was made to the Jamaican dollar account and Mr Reynolds gave evidence that head office asked that even the brief reference made to the foreign exchange accounts be deleted because it did "not want records to show dealing with illegal Foreign Exchange Trader".

15. Mr Morrell signed a further letter dated 13th May 1992 continuing this overdraft facility and also making available a new demand loan of J$250,000 to assist in the purchase of a 1990 Honda Civic car. In June 1992 he procured and made available to Mr Reynolds a valuation (at J$10,127,600) of Mr Morrell's 60 acre "residential agricultural holding with freehold land with development" at Lacovia. Mr Morrell said in evidence that this was to obtain a separate loan for his Eco-tourism project, but Mr Reynolds whose account the judge "unhesitatingly" preferred said that it was with a view to providing security for an increased bank overdraft (although such security was not in the event provided at that time). He said that he had raised with Mr Morrell the branch's concern the level of the then overdraft, which was without any head office authorisation, and asked him why it was "climbing so high", to which Mr Morrell responded openly in mid-1992 that it was partly because he needed to have cash in hand to buy Jamaican dollars and partly because he was engaged in construction work, building two-bedroom units as part of his Eco-tourism project at Lacovia, and drawing funds from the Jamaican dollar account for that purpose. Contrary to Miss Phillips' submission, their Lordships further consider that the judge was fully entitled to draw an adverse inference (to the effect that Mr Morrell was trying to distance himself from any overdraft) by his initially incorrect and his inconsistent and unconvincing answers

in chief and cross-examination in relation to the signature and purpose of the letter dated 13th May 1992.

16. In March and May 1993 head office reminded the Savanna-la-mar branch to send documentation to facilitate a review of the J$300,000 overdraft facility, if it was still required. On 1st June 1993 Mr Duhaney as branch manager reported that Mr Morrell was seeking an increase to J$2 million against additional security, and that the branch would submit a formal application. On 9th December 1993 Mr Morrell executed the mortgage over his 60 acre property at Lacovia. His evidence was that he did so to secure a loan for Eco-tourism purposes. The bank's case was that this was the promised security for the overdraft on the Jamaican dollar account, even though the reasons for such overdraft may have included the use of that account to fund Mr Morrell's Eco-tourism project.

17. In support of their case on this point, the appellants sought to draw assistance from a later letter of 6th April 1994 which Mr Corrie, by then the manager of the bank's Savanna-la-mar branch, wrote to head office. The letter applied for approval for a loan of J$2,800,000 "to invest in Eco-tourism project" at the Lacovia property, in which Mr Corrie advised that Mr Morrell had already invested J$6 million over the last 18 months, such loan to be secured by the mortgage over that property which he advised that the branch already held. Although the proposal describes extensively Mr Morrell's plans for the property and his "related business" as a silent partner in the fish farm, it is notably silent about his activity as a foreign exchange dealer and about any overdraft on his current account. From Mr Morrell's viewpoint, although the absence of any reference to his main line of business would be curious, the absence of any reference to an overdraft might be said to be consistent with his case that there was no such overdraft. From the Savanna-la-mar branch's viewpoint, assuming that the bank is able to show that the appellants' account was in regular overdraft, two possible reasons for the silence of the letter are apparent.

18. One such possible reason is that the branch (particularly although perhaps not exclusively through Mr Corrie) had, with Mr Morrell's assistance, been misleading the bank's head office about the overdrawn state of the account as this should (on the bank's case) truly have appeared. Mr Morrell himself gave evidence in this connection that Mr Corrie had invited a process of teaming and lading whereby on certain Tuesdays (the day on which the branch reported balances to its head office) Mr Morrell would give to the branch and the branch would credit to his account a cheque drawn on National Commercial Bank ("NCB") in an amount sufficient to reduce the apparent balance to an acceptable level; Mr Morrell accepted that on a number of such occasions the NCB cheque would (no doubt due

to lack of funds) be "worthless" and Workers Bank would lodge a corresponding cheque with NCB on the next day (or might, it seems, simply write off the original NCB cheque) "thus completing the fiction of that transaction". Mr Morrell sought to explain his conduct by asserting that he had been complaining to the branch and asking for a reconciliation of the account since January 1993, but that nothing had happened. The judge, as will appear (cf paragraphs 28-31 below), rejected that evidence, and described Mr Morrell as "amenable to any manoeuvre which at any particular point in time could camouflage his predicament", rejecting any suggestion that Mr Morrell was "a helpless and forlorn figure at the mercy of the bank". Their Lordships see no basis for criticism of the judge's assessment in this respect.

19. The other possible reason for the silence of the letter is that the branch and head office may well have been coy about referring openly to Mr Morrell's foreign exchange activity because of the potential legal problem that they presented (cf paragraph 14 above), to which their Lordships will revert. However this may be, the judge had no doubt that the reality was that the branch was concerned about the overdraft on the appellants' account which appeared on the bank statements and that it sought and, by way of the mortgage in December 1993, obtained security covering it.

20. The judge found "perplexing" the suggestion in the letter of 6th April 1994 of a loan for J$2,800,000 in the context of an unexplained pre-existing mortgage of J$6,000,000, and concluded that the letter was a ploy and a sham, by the pretence of which "Mr Morrell hoped to preserve his property from the consequences of his defaulting in satisfaction of payments on his overdraft". Their Lordships doubt whether the evidence justified this last conclusion regarding Mr Morrell's motivation. It seems to them likely that, for one or both of the reasons already indicated, the branch was not prepared to be open about the true nature of Mr Morrell's business and reason for the mortgage. As to whether the letter was a ploy or sham, it is even possible that Mr Corrie was seeking head office permission for a separate loan. The branch had on the preceding day, a Tuesday, received and credited to the account a cheque for J$17,250,000, which temporarily converted the balance appearing on the relevant bank statement from an overdraft of over J$4.3 million to a credit. It is possible that Mr Corrie believed that he could continue to cover up from head office any overdraft on the Jamaican dollar account, and transfer at least part of Mr Morrell's hitherto unauthorised borrowing (itself likely to have been attributable to other business commitments such as Eco-tourism) into a separate loan. But, even if one assumes that this was so, their Lordships see no reason whatever to question the judge's basic finding that the bank insisted on the mortgage of 9th December 1993 to cover the substantial

overdraft which in the bank's eyes by then regularly existed and appeared on the bank statements which the bank prepared and sent monthly to Mr Morrell.

21. Finally, in concluding that the reasons for the overdraft included the use by Mr Morrell of the Jamaican dollar account to fund other business activity such as his Eco-tourism project, the judge was able to rely on Mr Morrell's own statement, that he made payments out of the account to complete his Eco-tourism project, in an affidavit in proceedings instituted by the bank to enforce the mortgage. Miss Phillips submits that the reliability of this admission is thrown in doubt by the consideration that the total value of debits challenged equates with or exceeds the total overdraft claimed as at 31st May 1994. But the total value of all debit entries on the account from late January 1993 to 31st May 1994 was (after deducting service charges, overdraft interest, stamp duty and the Tuesday lodgements) nearly J$1,200,000,000. Miss Phillips submission appears to assume what it has to prove, namely that the debits challenged can be disregarded and that none of the debits totalling J$1,200,000,000 related to business other than foreign exchange dealings. It also leaves unexplained the final series of withdrawals in May 1994.

22. The third strand of the case raises an issue central to the resolution of this appeal: whether the bank proved that it had made and received oral authorisation to make the disbursements to which the debits under challenge purport to relate. The judge held that it had done this. This issue can be viewed both at a detailed and at a more general level. At the detailed level, the judge heard evidence from Mr Morrell and on the bank's side from Mr Reynolds and a Miss Grindley, who was assistant operations manager at the Savanna-la-mar branch from 1992 until it seems March 1994. Mr Morrell's account was that he continued throughout to attend twice-daily at the branch to check the accounts, leaving a signed blank cheque in the mornings to be completed in the evening to cover disbursements authorised by telephone during the day and attending in the evening to check and reconcile accounts and sign documentation and so enable the cheque to be completed. Mr Reynolds, who the judge regarded as honest and credible, said that, while this represented the position at the outset, after a while transactions became so numerous and the bank became so comfortable in the relationship that it no longer insisted on signed documentation or signed cheques in the evening covering all the day's transactions, but would rely on debit memoranda which Mr Morrell would reconcile daily and of which he would later receive copies with the monthly bank statements. As to Miss Grindley, the judge summarised her evidence as follows:

> "A great number of questioned debit memos were tendered in evidence. Miss Grindley had to deal with a majority of them. She either "checked" or

> "approved" these debit memos. She gave evidence that whether "checking" or "approving" she first spoke to Mr. Morrell by telephone. Her evidence in this aspect was unchallenged. I accept that at all times she, in respect of those debit memos which concerned her, conferred with Mr. Morrell. I have no reason to doubt her veracity. It is revealing that Miss Grindley's association with debit memos covered an extensive period of time. It was from January 1993 to April 1994. Telephone instructions by Mr. Morrell to the bank whereby debit memos were generated was the established pattern of Mr. Morrell in the conduct of his transactions. I further hold that these instructions were unequivocal and amounted to a mandate. I am not unmindful of the "less than perfect record-keeping" of the bank. However, I cannot say that on a balance of probabilities Mr. Morrell has established that the debit memos were not authorised."

23. The judge quoted the phrase "less than perfect record-keeping" from a letter written on 2nd February 1995, not long after the relevant period, by the bank's attorney. The judge himself categorised the bank's failure to insist on signed cheques each evening as "unwarranted laxity [which] was to get worse" when Mr Morrell was not required to sign any documentation (in the form of transfer or withdrawal forms) at all.

24. The appellants challenge the judge's approach to the bank's evidence and to credibility. While a large number of debit memoranda were admitted into evidence, this was on the understanding that the bank had to prove that the debits which they recorded related to debits made and authorised by Mr Morrell. Miss Phillips submits that the judge erred in treating Miss Grindley as able "to deal with a majority of them", that her evidence showed that "she knew little about them and that she was fabricating her evidence as she went along". The Court of Appeal did not accept such criticisms and endorsed the judge's findings. The area is one where there are concurrent findings of fact, with which their Lordships will only rarely interfere and with which they see no reason to interfere in this case. Having read the notes of evidence, it is clear that Miss Grindley was involved in one way or another with a large number of the disputed debit memoranda. At the date of trial in 1997-98 it is not surprising that she could not recall or assist on certain aspects. Miss Phillips submits that her evidence did not justify the judge's finding that she obtained Mr Morrell's instructions not only where her signature appears as the approving officer on the relevant debit memorandum, but also in every case where she appears as the officer responsible for checking the debit. It is said that her evidence that she obtained such instructions was confined to one debit memorandum (No. 33C). The judge's note is equivocal, but the judge understood her to mean that it was in every case, and their Lordships do not find it possible to

interfere with that finding. However, they add that it is not a finding which could in their view possibly be critical to the outcome of this case.

25. There were also debit memoranda in relation to which Miss Grindley acknowledged that she could not claim any involvement at all, whether as the officer receiving the original instructions or as the officer checking or approving the resulting debit memorandum. But she could speak authoritatively about procedures, and all the debit memoranda available at the time of trial were in evidence before the court, for the judge to make whatever he could of them. Many of them carry explanations of the purported transactions, including names of persons to whom monies were purportedly disbursed on Mr Morrell's instructions which correspond with names of persons with whom, on both the bank's and Mr Morrell's own evidence, he undertook foreign exchange dealings. Miss Phillips pointed to the appearance of names such as Wallace and Spence, who were (she suggested) not among Mr Morrell's couriers. But both the Wallace family and Greg Spence were, on his own evidence, persons with whom he had foreign exchange dealings. According to Mr Reynolds and Miss Grindley, the Wallace family were well-known to the bank as hoteliers in Negril with a connection to Mr Morrell (and indeed known personally to Mr Reynolds), while Mr Spence used to work at NCB and was known to both as someone who they understood to be a bearer whose services Mr Morrell used to collect cash and cheques. As a matter of probability the judge was also entitled and bound to consider the likelihood or otherwise of the branch debiting Mr Morrell in error for transactions with persons in fact connected with Mr Morrell which Mr Morrell never authorised and with which he was never involved. Even in relation to the debit memoranda which could not be located at the time of the KPMG report and the further debit memoranda which went missing between the time of that report and trial, the judge was entitled to take into account the same consideration. As regards the former, the KPMG report in many cases gives details connecting the debit to a purported transaction with a person (e.g. J. Wallace, P. Smith, C. Heslop) identified in the evidence as a customer or connection of Mr Morrell, as well in some cases as details of the telephone instructions purportedly given by Mr Morrell.

26. Miss Phillips also submits that Miss Grindley gave evidence explaining the reason for the debit memoranda in a way which had not been put to Mr Morrell and was inconsistent with Mr Reynolds's evidence. The explanation was that they covered transactions which Mr Morrell instructed after the bank had itself completed the blank cheques which were left and in principle intended to cover any transactions. She said that the bank's practice was to complete such cheques at 2.00 p.m. when the bank closed. She said that there were no records distinguishing between transactions before and after the signed blank cheques were completed

with figures. But Mr Morrell himself confirmed in evidence that he checked that the figures entered on such cheques tallied with the total of the authorised debits to which such cheques related. Hence, indeed, the fact that the issues in this case have been confined to other debits, which the appellants have never suggested can have been or were covered by the signed cheques as completed. Miss Grindley also said that Mr Morrell came to the bank "most days", which points to another situation in which disbursements could have been made after any signed cheque left on his last attendance had been completed. Mr Reynolds, though less specific, gave an account of the bank's internal procedure which does not appear inconsistent with Miss Grindley's evidence. The judge's note records Mr Reynolds as saying that "There were times used up blank cheque left. Still needed more money. We would then write up internal debit to his account for purpose of purchasing cash from Bank or purchasing managers [sic]. Cheques to purchase cash from other banks."

27. Miss Phillips further contended that the judge should have accepted as more reliable than the bank's evidence Mr Morrell's diary entries. But these are very informal hand-written entries, the weight to be attached to which in the light of the evidence was very much a matter for the judge to assess in the light of all the evidence. His refusal to accept that they gave a complete picture cannot be open to challenge before their Lordships.

28. The position must also be viewed at a more general level. It is common ground that Mr Morrell came regularly to the bank to check and verify transactions. The evidence of both Mr Reynolds and Miss Grindley appears to have been that (as one would expect) he would then have seen the debit memoranda (cf also paragraph 22 above), although the judge made no such express finding. But, whether he did or not, it is clear beyond doubt that he saw some, and probably all, of the disputed debit memoranda with the monthly bank statements which he was sent. His evidence, as noted, was that he would check that the figures entered on the signed blank cheques which he had left tallied with the debits to which they purportedly related. All other debits (except for bank charges) were, he said, in error. The judge's note of his evidence continues:

> "From very start object to debit memos. Objection oral not in writing. D Memos kept coming month after month despite objections. From early 1993 there was a promise of reconciliation of account. True I objected. True I raised objections."

Mr Morrell said that he first complained to Mr Duhaney, the then branch manager, in early 1993. Mr Reynolds gave contrary evidence; there was, he said, a complaint about a supposed discrepancy of US$5,000 on a savings account and the bank also

discovered that evening lodgements to Mr Morrell's account were not being verified the same evening, but carried over until the next morning in unsuitable storage. This problem was rectified and Mr Morrell failed to substantiate and eventually dropped his complaint about the US$5,000. The judge preferred Mr Reynolds' evidence, and did not accept Mr Morrell's evidence that he complained about experiencing problems reconciling his overdraft. The judge's finding on this point appears to their Lordships unassailable. It is simply inconceivable that an experienced businessman, whose bank balance should on his account have shown him to be a multi-millionaire (cf paragraph 8 above), would, however informal and good his relationship with the bank, have failed to record in writing his protests at the bank's continual monthly debiting of his account in the face of his repeated objections with unauthorised amounts which were nothing to do with him - and the effect of which was not only to deprive him of a positive bank balance in the tens of millions but also to involve him in the alleged incurring of overdraft interest which he must have appreciated was being or would be levied on the alleged overdraft at the very high rates current on Jamaican dollar accounts.

29. The matter goes still further. At some point in 1993 Mr Morrell was, as one of the bank's two top customers, invited to lunch in the Pegasus Hotel, with principal officers of the bank, and asked whether he had any complaints about the bank's service. His only response was, he acknowledged, to complain that statements sometimes took three weeks to arrive. In about July 1993, three months or so after Mr Duhaney was superseded by Mr Corrie, Mr Morrell said that Mr Corrie accepted that there had been a US$100,000 debit without authorisation. The judge commented that this was not a paltry sum (c.J$2,800,000 at the then current exchange rate) but that there was no indication that Mr Morrell pursued it.

30. Also very significant is a letter dated 8th July 1994 written by Bell's Management and Accounting Services, a firm engaged by Mr Morrell to assist him. The letter recorded that Bell's had examined the bank's records and listed 16 debits totalling J$5,955,786 made between 15th March 1993 and 14th July 1993 which it said "were not authorised by Mr Morrell" and "should be credited to his account". One or two of the 16 debits appear no longer even to be among those in issue, but that is a minor point which can be put aside. The judge found that, after the letter of 8th July 1994, Mr Morrell said in a conversation with Mr Reynolds that he had not seen the list, and acknowledged that *all* the debits questioned in the letter were genuine debits involving transactions done with his regular bearers. In the Court of Appeal Walker JA added in relation to the letter that "It must be presumed that the contents of this letter reflected the full extent of Mr Morrell's discontent up to the time". If Mr Morrell had not seen the list and in the light of the judge's finding that Mr Morrell when asked accepted the debits questioned in the

letter, this may even put the matter too favourably to Mr Morrell. But what seems inconceivable in the face of the letter is that Mr Morrell at that stage believed that the account should show a multi-million overdraft in his favour. Had he believed this, he would surely have impressed his belief on Bell's and Bell's could hardly have written the letter they did.

31. A further letter dated 12th October 1993 written by Brady & Co. as attorneys for Mr Morrell to the bank is equally, if not more, difficult to reconcile with any belief on Mr Morrell's part that he was not very substantially indebted to the bank. Brady & Co. wrote that "We am instructed to take steps to settle our clients indebtedness to you", and asked for a full breakdown on a month to month basis of the balances and the interest rate applicable from January to September 1994. This conclusion is not avoided by a later letter dated 3rd November 1993 in which Brady & Co. sought to confine what they had previously written to Mr Morrell's "lawful" indebtedness, and added that, since 12th October they had been instructed to advise that Mr Morrell appeared not to be indebted to the Bank on any principal sums and should have a credit balance in the region of J$12 million, based on the allegedly unauthorised debits listed in the letter of 8th July 1994, an amount of J$2,000,000 allegedly deposited but not credited in June 1994 and the fact that Mr Morrell's accounts were still to be reconciled.

32. Miss Phillips submits that, in arriving at his judgment in favour of the bank, the judge reversed the burden of proof. She refers to the last sentence quoted in paragraph 22 above. That is a fair point in relation to the counter-claim and their Lordships will also accept in relation to the claim, if that sentence is taken in isolation. But the judgment must be read as a whole. Even if one looks at the whole passage quoted in paragraph 22 above, their Lordships do not think that the judge was reaching conclusions about the course of dealing which depended on the burden of proof. And, looking at the judge's later findings at the more general level which their Lordships have discussed in paragraphs 28-31 of this judgment, their Lordships have no doubt at all that the judge was deciding unequivocally that the bank's account was correct and that the appellants' account became during 1993 and 1994 substantially overdrawn in the way shown by the bank statements and the debit memoranda under challenge, subject only to correction to strip out the initial overdraft of J$2,348,147.25 at 1st January 1993 with consequential interest. Their Lordships, having considered all the points made in the appellants' case and by Miss Phillips orally, conclude that there is no basis on which they can or should upset the concurrent findings of the courts below to that effect.

33. In these circumstances, it is unnecessary to consider the bank's further submission that the appellants' claim and defence to counterclaim are precluded by

the terms of the Verification of Account clause (clause 4) set out in paragraph 4 above. The judge allowed this point to be raised at trial, although no specific reliance had been placed on it in any pleading, and both he and Walker JA, with whose reasoning on this point Bingham JA also agreed, considered that clause 4 (unlike the clauses in issue in *Tai Hing Cotton Mill Ltd. v. Lui Chang Hing Bank Ltd.* [1986] AC 80 and *Financial Institutions Services Ltd. v. Negril Negril Holdings Ltd.* [2004] UKPC 40) met the rigorous standard of clarity and unambiguity necessary for a valid conclusive evidence clause and precluded the claim and defence. Miss Phillips challenged both the decision to allow the point to be raised and the judge's substantive conclusion upon it. As to the former, the point should, their Lordships consider, have been pleaded, but, in the absence of any suggestion of trial prejudice and in circumstances where the judge understandably rejected the appellants' suggestions of other relevant prejudice, they see no reason to disagree with the judge's exercise of his discretion to permit the point to be relied upon.

34. As to the substance, their Lordships prefer, in the light of the time and trouble taken before the judge and on appeal to resolve Mr Morrell's and the bank's position on the facts, to decide the case on the same basis. They would only add that they would not accept Miss Phillips' submission that clause 4 only applies to circumstances also falling within clause 3; clause 4 is on the contrary independent and general. Miss Phillips further argued that the clause was not sufficiently brought home to Mr Morrell and that its wording could not on any view apply where the bank had been as lax as it had and there had been a complete disregard of good banking practice. On the other hand the bank was able to argue forcefully that it was open to it and Mr Morrell to develop and agree any modus operandi they wished, however informal it might be; that the situation was not one where the bank could owe or be in breach of any duty of care to Mr Morrell by acting as it did - the debits were either authorised or unauthorised by him; that the clause was there precisely to cover and regulate circumstances where its customer might be able to assert some error or omission on the part of the bank in the debits it made to the customer's account; that, despite the relatively draconian nature of clause 4, its particular wording was sufficient to reverse the customary position and to impose on the customer a burden of checking statements and debit memoranda for, and of notifying, any errors or omissions; and that its terms were clearly and unambiguously to the effect that, if this burden went unperformed, that the customer could not after the event undertake the sort of exhaustive challenge to individual debits which has taken so much court time in this case. However, their Lordships do not need or wish to express a concluded view on this point.

35. Their Lordships turn lastly to the issue of illegality. The first issue arising is whether the majority of the Court of Appeal was right to hold that the question, not having been raised at trial, was not open for consideration on its merits on appeal. The second issue, if their Lordships differ from the majority below on the first issue, is whether the relevant transactions involved such illegality in fact and law as to affect all or any aspect of the appellants' claim and the bank's counter-claim. The two issues are inter-related because consideration of the first necessarily involves some consideration of the nature and extent of the suggested illegality. The relevant principles in relation to the first issue are not in question. They are indicated by *North Western Salt Company Ltd. v. Electrolytic Alkali Company* [1914] AC 461 and *Snell v. Unity Finance Co. Ltd.* [1964] 2 QB 203, approving a statement of principle by Devlin J in *Edler v. Auerbach* [1950] 1 KB 359, 371 to the following effect: first, where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, where the contract is not *ex facie* illegal, evidence of surrounding circumstances tending to show that it has an illegal object should not be admitted unless the circumstances are pleaded; thirdly, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the surrounding circumstances are before it; but, fourthly, where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.

36. In the present case, neither the banking contract nor the mortgage between the appellants and the bank was *ex facie* illegal. What is now said is that Mr Morrell was carrying on business as an unlicensed foreign exchange dealer, contrary to the exchange control legislation then in force, that his business as such was knowingly aided and abetted by the bank again contrary to such legislation and that the mortgage was given to secure. Even without the latter allegation, it might be said that the banking facilities afforded to the appellants were for the purpose of enabling Mr Morrell to conduct an illegal activity prohibited by the exchange control legislation, so as to render them unenforceable at common law.

37. The relevant legislation consisted of the Exchange Control Act 1954, as amended by The Exchange Control (Removal of Restrictions) Order 1991 as from 24th September 1991, and by the Exchange Control (Removal of Restrictions) Order 1992 as from 24th April 1992 and as replaced by the Exchange Control (Repeal) Act 1992 as from 17th August 1992. The regime applicable under these Acts and orders between 24th September 1991 and 17th August 1992 was in the following terms (part of section 3 of the 1954 Act):

> "(1) Save as provided in subsections (2) and (3), any person may buy, sell, borrow or lend foreign currency.
> (2) No person shall carry on the business of buying, selling, borrowing or lending foreign currency in Jamaica unless he is an authorised dealer.
> (3) It shall be unlawful for any person who is not an authorised dealer to engage in any transaction referred to in subsection (1) if the transaction involves the payment or receipt of Jamaican currency on behalf of a person who is not an authorised dealer."

38. As from 17th August 1992 a similar regime operated as part of section 25A of The Bank of Jamaica Bank Act, reading:

> "(1) Except as provided in subsections (2) and (3), any person may buy, sell, borrow or lend foreign currency or foreign currency instruments.
> (2) No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorised dealer.
> (3) It shall be unlawful for any person to buy, sell, borrow or lend foreign currency or foreign currency instruments in a transaction involving the payment of Jamaican currency, unless the payment is made to or, as the case may be, by an authorised dealer."

39. Until 17th August 1992 the regime was reinforced under paragraph 1 of Part II the Fifth Schedule to the 1954 Act by a provision making guilty of an offence "any .... person who conspires or attempts, or aids, abets, counsels or procures any other person, to contravene" any restriction imposed by or under the 1954 Act.

40. The bank was itself an authorised dealer under the legislation, this being expressly confirmed by The Bank of Jamaica (Authorised Dealers) Order 1992. The judge introduced Mr Morrell in the first paragraph of his judgment in these terms:

> "Mr Morrell was an unlicensed dealer in foreign exchange. It was a time before the repeal of the Exchange Control Act. It was a time when there was a great scarcity of foreign exchange. It was a time when the proverbial fortune could and no doubt was made in dealing in foreign exchange on the black market."

He went on to describe the genesis of Mr Morrell's relationship with the bank in terms which their Lordships have indicated in paragraph 5 of this judgment.

Although the judge does not appear to have accepted Mr Morrell's case that the Jamaican dollar account was to be used exclusively for the purposes of his foreign currency business, and certainly found that it was in the event used, to the bank's knowledge and without protest, for other disbursements, particularly for his Eco-tourism business, the factual findings which their Lordships have recited show on their face a strong case for saying that the main purpose for which the account was originally opened and to be used was to the bank's knowledge unlicensed foreign exchange dealing. The question is whether the counterclaim relates so clearly and incontrovertibly to a contract or contracts involving such dealing to the bank's knowledge as to require the Court of Appeal and now their Lordships to decline to entertain it.

41. Their Lordships have come to the conclusion that this is not so. Neither party considered or had the opportunity of considering any suggestion of illegality before the judge, not surprisingly when the appellants were claimants and any such suggestion at that stage would have disentitled them from pursuing their claim. It was only after losing at first instance that Mr Morrell's primary concern has become to defeat the counterclaim. The judge's introduction to Mr Morrell and his business relationship with the bank was made and phrased without either party having had any interest in considering the implications of such statements, or seeking in any way to qualify them at trial. Of course, it might be suggested that the statements are more rather than less likely to be accurate because neither party had an interest at that stage in trying to conceal or shape the truth to its interests. Mr Reynolds' statement regarding head office's attitude to the internal memorandum of 30th April 1992 (paragraph 14 above) may be said to fall into this category. But that overlooks both the dangers of simply accepting or extrapolating from general statements in relation to matters not in issue and the value of tested evidence and argument. The Board is not satisfied that it has all the relevant surrounding circumstances before it which would have been investigated if illegality had been an issue at trial.

42. Their Lordships have no doubt that, if only the bank's (counter-) claim had been before the judge and Mr Morrell had defended it by a plea of illegality, the closest attention would have been given by the bank to possible responses. One obvious question would have been whether any illegal purpose which the bank may have shared attached to the whole, and the whole period, of its relationship with Mr Morrell, whether a distinction might not be drawn between foreign exchange dealings and other dealings, or even between different foreign exchange dealings, and whether all or part of the overdraft claimed by the bank could be attributed to debits relating to disbursements unrelated to the unlawful foreign exchange dealings. It was after all Mr Morrell's own contention that his foreign

exchange dealings could lead to no continuing or increasing overdraft, although he might need short-term overdrafts to draw, in effect, working capital in order to fund purchases of foreign currency for sale to other clients. The judge's finding that the Jamaican dollar account was used for other disbursements (as Mr Morrell accepted on affidavit) and that Mr Morrell in mid-1992 told Mr Reynolds that its use for his Eco-tourism project was why the overdraft was "climbing so high" would have achieved even greater potential significance in the context of any plea of illegality. Likewise, the bank could well have developed further the argument that, although the mortgage was to secure the overdraft, both sides well understood that the overdraft was substantially if not entirely attributable at that stage to drawings from the Jamaican dollar account to fund the Eco-tourism project. Further, on this aspect, their Lordships draw attention once more to the major withdrawals in the latter part of May 1994, which led to the ultimate overdraft figure on the basis of which the bank counterclaims. These could well have been explored to see whether and how far they were all related to foreign exchange dealings. It was pointed out in the course of submissions that on 16th May 1994 Mr Morrell finally achieved authorised dealer status under the Bank of Jamaica Act and that this itself might have involved him in substantial legitimate expense. But no evidence was adduced or elicited on any such possibility or on any aspect of May 1994 withdrawals.

43. The bank would in relation to the occasions when it bought foreign exchange from or sold foreign exchange to Mr Morrell doubtless have sought to invoke the protection of subsections (3), set out in paragraphs 36 and 37 above. After the question of illegality was raised in the Court of Appeal, the bank was also able to produce documentary evidence from the Bank of Jamaica and a Mr Richard Jones showing that Mr Jones was authorised by the Bank of Jamaica on 29th November 1991 to act as its agent in the purchase of foreign currency and that Mr Jones on 2nd December 1991 had established an office in Negril and appointed Mr Morrell to assist him in the performance of his duties. On that basis, and probably by seeking disclosure from Mr Morrell of further documentation relating to this and any other similar arrangements to which he was party, the bank could have sought to show that Mr Morrell made purchases of foreign currency, whether from the bank or persons other than the bank, on behalf of the Bank of Jamaica and was to this extent properly authorised under the exchange control legislation. If and so far as he financed such purchases on a short-term basis out of his Jamaican dollar account, debits to and reimbursements of that account might in that respect have been argued to be made in the pursuit of lawful business activity.

44. Submissions of law were also raised before the Court of Appeal and their Lordships about the effect of the combination of subsections (1) and (2) set out in

paragraphs 36 and 37 above. The bank submitted that this was a situation where, as in *Yango Pastoral Company Ltd. v. First Chicago Australia Ltd.* (1978) 139 CLR 410, a distinction might be drawn between the illegality of foreign exchange business conducted by Mr Morrell and the illegality of the particular contracts involved. Whether such a distinction could assist the bank, if it lent money on overdraft for the purpose of such a business would have had to be considered, as might English authority (notably *Phoenix General Insurance Company of Greece SA v. Halvanon Insurance Co Ltd* [1988] QB 216 to which their Lordships were not referred. In the event however it is not necessary to consider this aspect further.

45. Their Lordships are satisfied for the reasons outlined that the majority in the Court of Appeal was right to refuse to allow the question of illegality to be raised for the first time on appeal.

46. In the result, their Lordships will humbly advise Her Majesty that the appellant's appeal should be dismissed with costs and that the judgments of Cooke J and the Court of Appeal in favour of the bank on the claim and counterclaim should be affirmed.