Privy Council Appeal No. 65 of 2002

National Commercial Bank (Jamaica) Limited *Appellant*

v.

(1) Raymond Hew and Clifton Hew (as executors of the estate of Stephen Hew (deceased)) and
(2) Raymond Hew *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

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

Delivered the 30th June 2003

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hope of Craighead
Lord Millett
Lord Rodger of Earlsferry

*[Delivered by **Lord Millett**]*

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1. This appeal arises out of two actions which were brought in May 1996 and which were tried together. In the actions the appellant National Commercial Bank (Jamaica) Limited ("the Bank") claimed to recover from the respondents Mr Stephen Hew ("Mr Hew") and his son Mr Raymond Hew a sum of $32,527,952.98 due on an overdraft facility together with interest at 54% per annum from 3rd May 1996 until payment. By 31st March 2000, a few days before the trial began, the sum due had reached $137,522,513.65. (All references to dollars are references to Jamaican dollars.)

2. Mr Raymond Hew denied liability. Mr Hew admitted that he had borrowed money from the Bank, but in one of the actions he claimed and in the other he counterclaimed for damages for negligence and breach of fiduciary

duty. He alleged that, if successful, his claim would extinguish any indebtedness of his to the Bank.

3. The case was opened on behalf of Mr Hew as it had been pleaded, that is to say as a claim for damages. As the trial proceeded, however, it became transmuted into a claim that the transaction of loan ought to be set aside on the ground of undue influence. The trial judge (Reid J) rejected Mr Hew's pleaded claim to damages for negligence but upheld his claim to have the transaction set aside on the ground of undue influence. He dismissed the Bank's claim and gave judgment for Mr Hew for $18,882,005.26, representing repayments which he had made to the Bank over the period of the overdraft. This made it unnecessary for him to deal with Mr Raymond Hew's position, and he contented himself with rehearsing the contending arguments.

4. The Bank appealed. In a unanimous judgment the Court of Appeal dismissed the appeal and affirmed the judge's order. They upheld the judge's finding of undue influence and reversed his finding in favour of the Bank on the issue of negligence. They expressed no view on Mr Raymond Hew's position.

5. The Bank has appealed to the Board, joining both Mr Hew and Mr Raymond Hew as respondents. Mr Hew has since died, and his executors have been substituted in his place.

The Facts.

6. The facts are set out in detail in the judgments below. Their Lordships consider that it is sufficient for them to give a general outline of the facts and condescend to detail only where this is necessary for the purposes of the appeal.

7. When he obtained the overdraft facility in 1989 Mr Hew was 74 years old. He was a businessman of many years' experience and a builder in a small way of business. He owned two parcels of registered land totalling 140 acres at Ironshore, St. James, a prime residential area near Montego Bay, and a further 6 acres of registered land at Glendevon, St. James. He also owned 5 acres of unregistered land at Barrett Town, St. James, for which he had a subdivision plan prepared by a land surveyor dividing it into 29 lots. He had also had the Ironshore lands subdivided and sold off some of the lots. He owned tractors and used them to carry out infrastructure work on his lands and on land of others.

8. Mr Hew was a long standing customer of the Bank's Montego Bay branch. He testified that he developed a close and cordial personal relationship with the branch manager Mr McFarlane and with Mr Cobham who succeeded him as branch manager in 1984. Mr Hew told Mr Cobham that he had long harboured a dream of borrowing £1 million. At the rate of exchange current at the time this represented over $9 million. Mr Cobham told Mr Hew that borrowing had to be for a stated purpose. In September 1989 Mr Cobham approved an overdraft facility of $3 million, of which $2 million was for property development and $1 million was to provide a guarantee to prospective purchasers who wished to withdraw and asked for the return of their deposits.

9. In a facility letter to Mr Hew dated 14th September 1989 Mr Cobham set out a number of conditions which were to be satisfied before funds could be drawn down. One condition was that the facility was to be in the joint names of Mr Hew and one of his sons. Mr Hew designated Mr Raymond Hew for this purpose. Other conditions were consistent only with the purpose of the loan being land development. This was not, however, spelled out explicitly, nor was the land at Barrett Town mentioned in the letter. Mr Cobham denied that it was a condition of the facility that the money should be used only for the Barrett Town development. However, Mr Hew's evidence, which was accepted by both Courts below, was that Mr Cobham insisted that the money be used for Barrett Town; and it seems to have been treated as a condition of the facility that the money should be used for the development of the land at Barrett Town and no other purpose. Interest was chargeable on the overdraft at 20% over prime rate together with additional interest in the event of default.

10. According to Mr Hew's evidence, he did not think that it was a good idea to develop the land at Barrett Town, and would have preferred to develop his land at Ironshore instead. But, he said, he told Mr Cobham that he would build wherever Mr Cobham told him because "he just wanted the money".

11. In the course of conversations leading to the approval of the facility Mr Hew discussed the cost of the necessary infrastructure work with Mr Cobham. They also discussed the structure of the loan, and it was at Mr Cobham's suggestion that it was split into two parts, one for the development itself and one to guarantee repayment of their deposits to purchasers who might withdraw, possibly because the registered title had not become available.

12. Even before 1989 Mr Hew had enjoyed an overdraft facility with the Bank, secured by mortgages over the land at Ironshore and Glendevon. These were now stamped to cover the new arrangements. At the date when the new

facility was formally approved Mr Hew's account was already overdrawn by $1 million. By April 1990 the overdraft had reached $2 million and by the end of 1991 it reached $3 million. No money had been paid into the account, and in July 1992, when the overdraft reached $6 million, Mr Cobham refused to allow any further drawings. By this time only two houses were complete and three others were partly built. No roads had been constructed, only one one-inch pipe was connected to the water supply on the main road half a mile distant, and no electricity was yet available. No houses had been sold and no deposits had been taken. Mr Hew was doing the work himself in order to keep costs down. He later made some repayments, but they were insufficient to keep the interest down and the amount due continued to increase. In 1995 the Bank demanded repayment. This was not forthcoming and the proceedings followed.

Negligence.

13. 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 & Elliot *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."

14. 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

commercial affairs. Nor is there any evidence that Mr Hew ever asked Mr Cobham for advice or received anything which he regarded as advice. Such advice as Mr Cobham did give was limited to the structuring of the overdraft so as to provide a guarantee to prospective purchasers; but it has never been suggested that this was negligent and in any event it was never acted on.

19. The Court of Appeal's conclusion was based on three factors. The first was the judge's finding that Mr Cobham had insisted that the borrowing had to be applied exclusively to Barrett Town. As the Court of Appeal put it:

> "He was thereby, at its lowest, more than subtly, expressing an opinion of his preference as to where the major portion of the loan facility should be expended. He was, in effect, making a choice of the two possible projects for investment. He was expressing a professional opinion to someone in the person of Stephen Hew who, to his knowledge, reposed in him absolute trust and confidence."

The Court of Appeal concluded that:

> "The choice of Barrett Town as the project of development with the loan facility ... was advice given to Stephen Hew by Geoffrey Cobham, clearly devoid of the requisite reasonable care and skill."

20. Their Lordships are unable to accept this. Mr Hew was not entitled to treat Mr Cobham's insistence that the money be used exclusively for the purpose of the Barrett Town development as an expression of his opinion that this was preferable to developing the land at Ironshore, still less as advice that the Barrett Town development was a viable proposition. The Bank's internal records show that Mr Hew had already expressed a desire to develop the land at Barrett Town during McFarlane's time as branch manager and before Mr Cobham came on the scene. In unchallenged evidence Mr Cobham confirmed that the decision to build on that land originated with Mr Hew: it was, he said "the customer's request; this was his proposal".

21. Their Lordships consider that the only possible conclusion on the evidence is that it was Mr Hew's idea to build on the Barrett Town land, that Mr Cobham agreed to lend the money for that purpose, and that insofar as he insisted that the money should be used for that purpose he was merely insisting that it be used for the purpose for which it had been borrowed. This is normal banking practice – it would have been normal banking practice to have made it an express condition of the loan in the facility letter – and such a condition

does not amount even to tacit advice that the customer's proposal is a viable one.

22. It may well have been foolhardy of Mr Hew to embark on the project without obtaining estimates of the likely costs and cash flow forecasts; but the Bank was under no duty to advise him against such a course. It may have been unwise of Mr Cobham to have lent the money without insisting on being provided with such estimates and forecasts and without having conducted a feasibility study of his own. But as Mr Cobham explained, any such study would have been for the Bank's protection, not Mr Hew's. The reason he did not call for such a study is that he did not think that the Bank's interests required it; the Bank had sufficient security to support a much larger loan than anything that was contemplated at the time. This is a useful illustration of the truism that the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound.

23. The second factor on which the Court of Appeal relied was that on the figures the project was clearly flawed from its inception. Mr Cobham knew that it would cost between $2 million and $4 million to put in the necessary infrastructure. By allowing a facility of only $2 million for the development (the other $1 million being by way of security for the purchasers) Mr Cobham ought to have realised that, once the infrastructure had been put in place, Mr Hew would have no money to build any houses. As the Court of Appeal put it:

> "Significantly, when Geoffrey Cobham on 14th September 1989 advised Stephen Hew that the $2,000,000.00 overdraft was approved, the overdraft had then already exceeded $1,000,000.00. The question arises. How therefore did Geoffrey Cobham then expect Stephen Hew thereafter to proceed? He had to complete the provision of infrastructure and thereafter build houses. With no income on sales forthcoming, Hew would be faced from the initial stage with the payment of overdraft interest at 20% above the base rate, in addition to penalty rates. This situation would be aggravated by Geoffrey Cobham's own evidence that the said overdraft facility of $2 million was intended to be spent also on the infrastructure at Ironshore. This transaction was manifestly disadvantageous to Stephen Hew."

24. There are at least two difficulties with this analysis. One is that it ignores Mr Cobham's unchallenged evidence that the $2 million facility was not intended to be the sole source of finance for the project. It was always contemplated that houses would be sold "off the plan" and that deposits paid by purchasers would be available to fund the development - this was the reason for the $1 million "guarantee" facility. Mr Cobham's evidence was that the development had potential to earn revenue in the short term from deposits even before registered titles were obtained and this evidence was not contradicted.

25. It was also contemplated that further funds would be derived from the sale of lots at Ironshore if necessary. Surprisingly the Court of Appeal thought that this would:

> "create an added disadvantage to Stephen Hew, because it would necessitate the release of the title to each lot sold, thereby reducing correspondingly, Hew's security in Ironshore for the loan facility of $2,000,000.00 and the guarantee of '$1,000,000.00'."

It would certainly reduce *the Bank's* security for the loan, but this was something with which the Bank was content. Their Lordships do not understand how it could possibly be thought to be a disadvantage to *Mr Hew*. It would be a positive advantage to him. It would not reduce the amount of his net capital assets, and would alleviate the cash flow problem which was of concern to the Court of Appeal.

26. The other difficulty is that, even if the project was unsound and Mr Cobham ought to have realised it, this means only that he would have been negligent if he had advised Mr Hew to embark upon it. But it does not establish that he did so. Still less does it establish that he assumed a duty to advise Mr Hew against it.

27. The third factor on which the Court of Appeal relied was the absence of registered titles for the land at Barrett Town. Their Lordships see no reason why Mr Cobham should have considered this to be a particular obstacle to the project. Subdivision approval had already been given and an application was in hand to register the title when the overdraft facility was under discussion. In the event there was considerable delay in obtaining registration, but this was due to factors beyond the Bank's control which Mr Cobham could not reasonably have foreseen. Delays were caused by an unexpected difficulty in obtaining supporting declarations as required by the Registration of Titles Act; a fire at the offices of the Parish Council Office; Mr Hew's use of pipes which were not in conformity with the conditions of subdivision approval; and his

undervaluation of the Barrett Town property (which he denied but which appears from the documentary evidence).

28. 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; and their Lordships do not find it necessary to deal with the Bank's contentions that project was not a foolhardy one doomed from the outset; that Mr Hew's losses were caused by factors independent of any advice alleged to have been given by the Bank; or that he was, to a significant extent, the author of his own misfortune.

Undue Influence.

29. Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them. As Lord Nicholls of Birkenhead observed in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at p 794-5:

> "Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. ...
>
> ... [It] arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage."

30. Thus the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence. And secondly the influence generated by the relationship must have been abused.

31. The necessary relationship is variously described as a relationship "of trust and confidence" or "of ascendancy and dependency". Such a relationship may be proved or presumed. Some relationships are presumed to generate the necessary influence; examples are solicitor and client and medical adviser and patient. The banker-customer relationship does not fall within this category. But the existence of the necessary relationship may be proved as a fact in any particular case.

32. Both courts below found that the necessary relationship of trust and confidence existed between Mr Cobham and Mr Hew, and their Lordships are not disposed to interfere with their finding. There was little if any objective evidence to support it, but the assessment of the relationship between two persons is essentially a matter of impression. The trial judge had the advantage of seeing the two men in the witness box and of forming his own impression of their relationship. Their Lordships do not have that advantage, and cannot obtain any clear intimation from the material before them which would enable them to form their own view one way or the other.

33. But the second element is also necessary. However great the influence which one person may be able to wield over another equity does not intervene unless that influence has been abused. Equity does not save people from the consequences of their own folly; it acts to save them from being victimised by other people: see *Allcard v Skinner* (1887) 36 Ch D 145, 182.

34. Thus it must be shown that the ascendant party has unfairly exploited the influence he is shown or presumed to possess over the vulnerable party. It is always highly relevant that the transaction in question was manifestly disadvantageous to the person seeking to set it aside; though this is not always necessary: see *C I B C Mortgages plc v Pitt* [1994] 1 AC 200. But "disadvantageous" in this context means "disadvantageous" as between the parties. Unless the ascendant party has exploited his influence to obtain some unfair advantage from the vulnerable party there is no ground for equity to intervene. However commercially disadvantageous the transaction may be to the vulnerable party, equity will not set it aside if it is a fair transaction as between the parties to it.

35. Their Lordships have looked in vain for any evidence that the transaction of loan was unfair as between the Bank and Mr Hew. The Bank derived no unfair advantage from it, nor any benefit which it would not have sought to obtain from an ordinary arms' length transaction with a commercial borrower. The Court of Appeal identified several features of the transaction which they described as disadvantageous to Mr Hew. These were (i) the fact that the money had to be applied in the development of Barrett Town; (ii) the inadequacy of the funding to finance more than the initial infrastructure; and (iii) the excessive security taken by the Bank (since the Bank, already fully secured on the Ironshore lands, also took a deposit of the titles to the Barrett Town lands when they became available).

40. Their Lordships observe that Mr Hew made no complaint of the rate of interest, which to the eyes of an English judge would appear exorbitant, and neither of the Courts below commented upon it. This is a matter on which their Lordships would defer to the knowledge and experience of the local courts. They understand that the period of the overdraft coincided with a period of very rapid depreciation of the dollar and correspondingly very high interest rates; and in the absence of any complaint by Mr Hew or evidence to the contrary they must assume that the contractual rates were in line with market rates at the time.

41. Their Lordships conclude that it has not been shown that the Bank took unfair advantage of the relationship of trust and confidence which must be taken to have existed between Mr Cobham and Mr Hew. They recognise that in reaching this conclusion they are departing from what may be said to be concurrent findings of fact below; but where they are satisfied that those findings are not supported by the evidence they are not only entitled but bound to reject them: see *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374. It follows that Mr Hew's claim to have the transaction set aside for undue influence must also be dismissed.

Mr. Raymond Hew.

42. This leaves the position of Mr Raymond Hew to be considered. He denied liability; and neither court below found it necessary to determine this question. In the ordinary way their Lordships would remit the question to the local courts to decide; but they do not think that it is necessary to take this course in the present case. Mr Raymond Hew did not give evidence, and no explanation has been given for his failure to do so. There is, therefore, nothing to set against the uncontradicted evidence of the Bank that Mr Raymond Hew was a joint holder on the account. It was a condition of the loan that the account should be in the name of Mr Hew and one of his sons, and Mr Hew agreed that he identified Mr Raymond Hew as the son in question. All the bank statements named him as one of the account holders. The mandate form could not be located, but in the absence of positive sworn testimony from Mr Raymond Hew that he did not sign such a mandate, it must be inferred that he did.

The remedy.

43. In the circumstances it is not strictly necessary to consider what remedy would have been appropriate if Mr Hew's claims had succeeded. But their Lordships think it desirable to state that in their opinion the orders below could not have stood unaltered. Where a transaction is obtained by undue influence, it must be set aside *ab initio;* and this requires a mutual accounting with mutual restitution by both parties. Where the transaction is one of guarantee this presents no difficulty. A surety incurs a liability but obtains no benefit. It is sufficient to set aside his liability; there is nothing for him to disgorge by way of counter-restitution. But where the transaction is one of loan the position is very different. It would not be just simply to set aside the loan; this would leave the borrower unjustly enriched. The proper course is to set aside the contract of loan and require the borrower to account for the moneys received with interest at a rate fixed by the court. Since the effect is merely to vary the rate of interest, it is not surprising that it is rare for the borrower himself to challenge the transaction.

44. The judge dismissed the Bank's claim and ordered it to repay Mr Hew the amount of all repayments which he had made to the Bank. This would leave Mr Hew unjustly enriched to the extent that he retained the benefit of the drawings he had made on the account. He should have been required to repay these with interest at a rate fixed by the Court.

45. The Court of Appeal affirmed the judge's decision and dismissed the appeal. In their case, however, there was another element to consider, viz the extent of any loss which Mr Hew may have sustained by having entered into the transaction. This would have required a very sophisticated accounting, and in theory could have left the Bank a net debtor; but it seems unlikely in the circumstances of the present case. The effect of the order below was to leave Mr Hew in possession of a partly completed development without having incurred any expenditure at all.

Conclusion.

46. Their Lordships will humbly advise Her Majesty that the appeal be allowed; that the suit No CL 1996/H-102 brought by Mr Hew against the Bank and the counterclaim of Mr Hew in the suit No CL 1996 /N-049 be dismissed; that judgment be given for the Bank against both defendants in the suit No CL 1996/N-049 and on the counterclaim therein for such sum as may be agreed between the parties and in default of agreement fixed by the Court; that in default of agreement it be remitted to the Supreme Court of Jamaica to

determine the amount for which judgment should be given; and that the Bank should have the costs of both suits below and before their Lordships' Board.