JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 101/2000

BEFORE:	**THE HON. MR. JUSTICE FORTE, P** **THE HON. MR. JUSTICE HARRISON, J A** **THE HON. MR. JUSTICE LANGRIN, J A**	
BETWEEN:	**NATIONAL COMMERCIAL BANK (JAMAICA) LTD.**	**APPELLANT**
AND	**STEPHEN HEW** **RAYMOND HEW**	**RESPONDENTS**
BETWEEN:	**STEPHEN HEW**	**RESPONDENT**
AND	**NATIONAL COMMERCIAL BANK**	**APPELLANT**

Stephen Shelton and Dave Garcia for appellants instructed by Myers, Fletcher and Gordon.

Lord Anthony Gifford, Q.C., Mrs Sandra Bright and Miss Kerry-Gaye Brown for respondents instructed by Gifford, Thompson and Bright.

January 15, 16,17, 18, 19, 22, and November 9 , 2001

FORTE, P

Having read in draft the judgment of Harrison, J A, I entirely agree and have nothing further to add.

HARRISON, J A:

This is an appeal from the judgment of Reid, J. on July 31 2000, dismissing the appellant's claim in Suit No. C.L. 1996/N49, with costs, and making no order on the counterclaim therein, and giving judgment for the

respondent in Suit No C.L. 1996/H102 in the sum of $18,882,005.26 with costs to be agreed or taxed.

The grounds of appeal are as follows:

> "**1.** The learned trial judge's findings that 'Mr. Cobham had insisted that the borrowing had to be applied exclusively to Barrett Town' is against the weight of the evidence.
>
> **2.** The learned trial judge erred in finding that the appellant was in breach of any fiduciary duty to the 1st Respondent.
>
> **3.** The learned trial judge erred in holding that the appellant and/or its managers were guilty of undue influence.
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> **4.** The learned trial judge erred in holding that the transaction between the appellant and the 1st respondent was to the "manifest disadvantage" of the 1st respondent.
>
> **5.** The learned trial judge's finding that the respondents should not repay any of the balance now owed, and that the appellant should pay to the 1st respondent the sum of $18,882,005.26, is not supported by the evidence and does not follow from his other rulings."

The respondents filed a respondents' notice, contending that the appeal should be dismissed for the reasons contained in the judgment of Reid J. and also on the further ground that,

> " the learned judge erred in law in failing to hold, on the facts which he had found, that the appellant acting though (sic) the second defendant Geoffrey Cobham had breached a duty of care owed to the first respondent, in that the said Geoffrey Cobham negligently advised him to apply the moneys borrowed from the appellant to the development of

> the first respondent's property in Barrett Town, in the parish of Saint James and the first respondent having relied on that advice had suffered loss and damage."

The facts relevant to the instant case are that the respondent Stephen Hew, a businessman, 85 years old at the trial, was engaged at various times in the furniture, bakery and a tractor-rental business. He acquired 5 acres of land at Barrett Town, St. James, unregistered and "in bush" in the 1960's. He subsequently acquired lands at Ironshore, St. James – 45 acres by transfer registered in 1983 and 95 acres by transfer registered in 1989. He also owned 6 acres of land at Glendevon, St. James.

Stephen Hew entertained a firm lifelong resolve from the 1920's which he described as a dream to buy a Cadillac motor car and to borrow a million pounds before he died. He bought the car "before the war."

Stephen Hew was a customer of the Montego Bay branch of the appellant, National Commercial Bank, (formerly Barclays Bank) prior to 1977. He informed Geoffrey Cobham, manager of the said Bank, in 1984, of his life's dream to borrow one million pounds. Cobham said that Stephen Hew told him about this dream "in a jesting mode ... the mode was light-hearted ..." Cobham had also been told of Hew's dream by his predecessor Dunbar McFarlane.

In November 1985, a joint account was opened in the names of Stephen Hew, Annie Hew, his wife, and Clifton Hew, his son, with the appellant Bank.

After Stephen Hew acquired the Ironshore lands in 1983, he had it

subdivided and sold lots therefrom. He also used his tractors to do infrastructure work on his lands and on land of others.

The land at Barrett Town had a mere common-law title and Stephen Hew had a sub-division plan prepared by a land surveyor sub-dividing it into 29 lots. Having acquired the 95 acres of land at Ironshore, in January 1989, Stephen Hew then had, in Geoffrey Cobham's view:

> " ... 140 acres of Ironshore land (representing) very valuable security."

Asked in cross-examination, how many million dollars the bank would lend on the basis of such security, Geoffrey Cobham replied,

> "Banks should not, and do not lend on the basis simply of security. Security is the final refuge of the bank on all loans. The bank looks at the likelihood of success of the project and that is the basis on which it lends," (Emphasis added).

and agreed that the appellant could then lend "several million dollars" on the basis of 140 acres of Ironshore lands. It was then suggested to Geoffrey Cobbam in cross-examination:

> "Because it was, certainly in 1989, I suggest that for the first time it became feasible for Mr. Hew to realize his childhood dream to borrow a million dollars – a million pounds."

He replied: "I suppose so, yes."

Stephen Hew asked for the loan of "one million pounds'" saying that he was going to keep it and then give it back. Geoffrey Cobham stated that the loan had to be for a purpose and suggested in a "... light discussion, interplay ..."

> "Why not borrow it, put it in a deposit for a week and then repay it."

Stephen Hew stated that Geoffrey Cobham told him, having got the approval for the loan, that he should build the houses in Barrett Town "because it had a plan and everything ready." Geoffrey Cobham denied telling him so. Clifton Hew, the son of Stephen Hew, confirmed that Geoffrey Cobham took him to visit the property at Barrett Town and told him that the loan:

> "would have to be for the property at Barrett Town ... if it was not Barrett Town property he would not approve the loan,"

after he Clifton Hew had said that the Bank should approve the loan for Ironshore, instead of Barrett Town. Geoffrey Cobham agreed, in cross-examination, that Clifton Hew did express misgivings about the Barrett Town project, in that the said lands did not yet have a registered title.

Geoffrey Cobbam agreed with Clifton Hew's suggestion that:

> " ... Ironshore would be a more suitable location for the project"

but disagreed that he told him "that the facility for development was for Barrett Town and for Barrett Town alone." Geoffrey Cobham maintained that he said:

> "... this is in respect mainly for Barrett Town."

Denying that Stephen Hew had no considered plan to spend the two million dollars loan Geoffrey Cobham said:

> "Well, I need to explain the entire nature of the $3 million facility. The plan was to sell lots primarily in Ironshore, while at the same time - also at the same time earning from the heavy duty equipment rental -

> taking into account earnings from equipment rentals and simultaneously expenditure for the Barrett Town development."

Stephen Hew had a good personal relationship with Geoffrey Cobham. He trusted him as a friend and his bank manager. Stephen Hew said that whatever Geoffrey Cobham asked him to sign he signed it. He depended on Goeffrey Cobham "or whoever the manager is." As to their relationship Geoffrey Cobbam said of Hew:

> "He certainly sought my advice on banking matters and financial matters ... he relied on that advice."

The banking and financial matters, Geoffrey Cobham explained to be:

> "Such as the arrangement whereby the facilities advanced to him by the bank, structured to the $2 million overdraft limit and $1 million guarantee. It was certainly my suggestion to Mr. Hew, as an example, that while title, or the process of getting approvals and titles for the Barrett Town property was in process, interested purchasers would be prepared to pay deposits or amounts down against an undertaking from the bank that in the event, for whatever reason, titles did not become available, such deposits would be refunded. So that a prospective purchaser would have the certainty either of getting title or a refund of his money."

The appellant had the titles to the 140 acres of Ironshore lands of Stephen Hew, as security for the loan. Despite this Geoffrey Cobham requested that as soon as the titles to the 29 lots at Barrett Town were obtained they should be sent to the appellant. Although Geoffrey Cobham had then been of the view that a number of things had to occur before Barrett Town could earn

any revenue, he maintained that revenue could be earned before infrastructure was put in, or before title was obtained, from deposits from purchasers. He said:

> "Certainly deposits and perhaps in some instances even completion of payment from prospective purchasers, but certainly deposits."

Geoffrey Cobham admitted that he knew how much it would cost to provide infrastructure for the development at Barrett Town, because he and Stephen Hew sat and discussed the figures which ranged from $2,000,000.00 to $4,000,000.00. The work included remedial work to the approach way to the development. He said that estimates were provided "by Mr. Hew" but " ... it was not a sort of binding and formal presentation ...", nor were any written estimates of costs provided by a surveyor or contractor, while he had these discussions with Stephen Hew.

Geoffrey Cobham was involved in writing letters to:

(a) the St. James Parish Council submitting a copy of the approval plan of the Barrett Town development, the original of which was lost;

(b) an organization called Investors, on 30th November 1989, "assisting Mr. Hew ... to solicit potential purchasers for Barrett Town;"

(c) the Town Planning Department;

(d) Mr. Hew's attorney, Miss Wilson; and

(e) the land surveyor, in respect of the obtaining of titles to the 29 lots.

Geoffrey Cobham explained his involvement in dispatching these bits of correspondence, in relation to the Barrett Town project, as necessary, because Stephen Hew "did not have a secretary."

On 14th September 1989, the appellant wrote allowing Stephen Hew a facility of $2,000,000.00 by way of an overdraft and $1,000.000.00 as a guarantee. The overdraft of $2,000,000.00 was to be used for " ... expenditure for the Barrett Town development ..." Geoffrey Cobham also stated that the said overdraft was:

> "for $3M ... primarily for the development of Barrett Town property and also for maintenance expenses on equipment, heavy duty equipment, and as well, some work on the lots of Ironshore."

Geoffrey Cobham explained in cross-examination, that the guarantee of $1,000,000.00 was to ensure the refund of deposits of prospective purchasers, if titles were not available. Some of the lots in Barrett Town had been sold.

Prior to 14th September 1989, the account "Stephen Hew and/or Raymond Hew the Sea Castle View," with the appellant was allowed to be overdrawn to the extent of $701,633.13 on 30th August 1989, although the approval was only for $100,000.00

On 14th September 1989, the overdraft exceeded $1M. The letter dated 14th September 1989, from the appellant, signed by Geoffrey Cobham reads:

> "Dear Stephen:
>
> I am happy to advise that the Bank has agreed facilities for you as follows:

		Limit
Overdraft	-	$2,000,000
Guarantee	-	$1,000,000
		$3,000,000

However, the following must be in place before you are able to draw any further funds:

1. Evidence of pre-sale of lots of approximately $2M is presented.
2. Expenditure figures/cash flow projections to substantiate the $2M requirement.
3. Facilities to be joint in the name of your son and yourself.
4. You are to obtain a professional valuation of the properties charged to the Bank showing a value of not less than $4M.
5. Deposits/sales proceeds of $1M must be held in an escrow account before the guarantee is issued.
6. No excess over the limit of $2M will be allowed on the overdraft.

Incidentally, Mr. Craig Martin, the attorney-at-law from California, telephoned me to enquire about your lots for sale and to tell us that a Ms. Theresa Sleugh will be coming to Jamaica on Friday, September 15, 1989, and will have a look at the properties during her visit.

Please remember that you need to give Mrs Audry Wilson a Survey Diagram showing the 29 lots, and a Surveyor's Declaration. Please ask Mr. Alexander to supply these as soon as possible."

Despite these restrictions specifically stated, no evidence of pre-sale of lots (at Barrett Town) "of approximately $2M" was ever insisted on by the appellant nor presented. No cash flow projection of $2M was presented nor were any deposits of $1M representing sales held in an escrow account. In addition, the overdraft limit was allowed to escalate to, $1,349,005.00 on 31st October 1989,

$1,604,071.90 on 27th December 1989, $2,008,844.84 on 30th April 1990, $2,325,527.04 on 30th July 1990, and $3,398,671.72 on 22nd May 1991. The charges on the overdraft attracted payments of 20% above prime rate, plus penalty rates, in some circumstances. No credit was received by the appellant on this account between July 1989, and July 1992, on which latter date the overdraft exceeded $6M. Stephen Hew had been drawing cheques up to then.

Stephen Hew's Ironshore land of 45 acres was mortgaged to the appellant on 13th September 1989, to the extent of $1,750,000.00 and the land of 95 acres also at Ironshore was mortgaged on 27th December 1989, in the sum of $5,000,000.00. Geoffrey Cobham agreed that the security was good and so the risk to the Bank "was lessened."

In 1991, when the overdraft had exceeded $3,000,000.00, Geoffrey Cobbam told Stephen Hew that the Bank "wanted back its $3M" and that he could not draw any more cheques.

At that time only two houses had been built at Barrett Town; 3 others were only partially built. No proper roads were constructed, one only one-inch pipe was connected to the main source on the main road, half mile away, and no electricity was yet available.

Stephen Hew then sold some of the lots in Ironshore. In May 1996, Stephen Hew received a letter of demand from the appellant's attorneys-at-law for the payment of the sum of $32,945,108.20 within seven days. Stephen Hew filed suit against the Appellant and Cobham on 22nd May 1996, claiming damages

for negligence and breach of fiduciary duty. Consequently, on 28th May 1996 the appellant filed suit against Stephen Hew, Clifton, Annie and Raymond Hew to recover the said sum. Both suits resulted in the judgment of Reid, J. on 31st July 2000.

Mr. Shelton for the appellant argued that the appellant was under no duty in law to advise Stephen Hew of the feasibility of the development at Barrett Town nor to determine what facility should be utilized by Hew. The appellant did not hold itself out as providing advice in commercial matters and so owed to Stephen Hew no fiduciary duty, the breach of which would give rise to a claim for such breach or in negligence. Stephen Hew, to the appellant's knowledge had, at all times, independent professional advice available namely, attorneys-at-law, a land surveyor and land valuator. The appellant did not take advantage of, nor advise Stephen Hew of the wisdom of developing Barrett Town, because he himself, had chosen to do so from 1983, as indicated on the G 18 card, exhibit 5. The appellant gave no financial nor commercial advice on the wisdom of the said development, relied on by Stephen Hew to give rise to the presumption of undue influence. Mr. Garcia submitted that no manifest disadvantage was suffered by Stephen Hew to give rise to the said presumption, seeing that the transactions disclose that there was benefit, both to the appellant by way of the usual consideration of interest and loan, and to Stephen Hew by way of the facility of the overdraft for the development of Barrett Town. If advice was given it was not the proximate cause of loss to the respondent Stephen Hew. No breach of

fiduciary duty, undue influence nor negligence arose. Only the usual duty of banker to customer existed and no loss occurred in such circumstances.

Lord Gifford for the respondent argued that the appellant abused the trust placed in its manager Geoffrey Cobham by the respondent Stephen Hew and accordingly the learned trial judge was correct in finding that the appellant procured the transaction by undue influence and breach of fiduciary duty. Consequently, the interest and fees received by the appellant ought to be re-paid and the further interest claimed is not payable by the respondent. In reliance on the respondent's notice, he argued, in the alternative, that having regard to the fact that Geoffrey Cobham had advised Stephen Hew on financial and other matters concerning the wisdom of the development at Barrett Town and insisted that the proceeds of the loan be spent on the said development, it was bad advice. Geoffrey Cobham was aware that neither Stephen Hew nor his sons were experienced developers and that Stephen Hew relied on him for advice in financial matters. Geoffrey Cobham was aware that there were no estimates nor cash flow projections for the development and that no registered titles were yet available. Geoffrey Cobham was aware that Ironshore was a more suitable location for development and in all the circumstances he owed a duty of care to advise Stephen Hew properly. He concluded that he failed to do so and the appellant was therefore guilty of negligence and liable in damages to the respondents.

The Court, as a general rule, will seek to uphold the contractual arrangements of men. It will not however fail to examine, and if necessary, strike down some bargains where inequitable conduct exists.

Undue influence is a doctrine recognizable where one person exercises such a dominating power over another that the latter cannot be seen as exercising his free will in the execution of any resulting transaction. The law frowns on such a transaction.

There are certain relationships which, because of their very nature, i.e. their fiduciary nature, a presumption of undue influence may arise. For example, where a relationship of parent and child, trustee and beneficiary, priest and penitent, or doctor and patient, to name a few, exists, the benefit of any transaction will be set aside, unless the party presumed to be exercising the influence shows that the other party received the benefit of independent advice.

In ***Allcard v Skinner*** (1887) 36 Ch. D. 145, where a gift by a sister to the mother superior in a religious organization was held to be returnable, as to the unexpended portion, due to the undue influence imposed on the donor, Kekewich, J. at page 147, said:

> "The law allows absolute freedom of disposition, and only insists that when challenged under such circumstances as exist here the disposition shall be proved to have been absolutely free. What is required by law for the fulfillment of this condition? The law does not exclude influence. Nay, it recognizes influence as natural and right. Few, if any, men are gifted with characters enabling them to act, or even think, with complete independence of others, which could not largely exist without destroying the

> foundations of society. But the law requires that influence, however natural and however right, shall not be unduly exercised – that is, shall be exercised only in due proportion to the surrounding circumstances and the strength of the person submitted to it. The more powerful influence or the weaker patient alike evokes a stronger application of the safeguard."

The author of An Introduction to Equity by Keeton, 6th Edition at page 228, said:

> "Undue influence is the unconscientious use of power or authority, by one person over another, in such a way that the stronger party acquires a benefit, either for himself or for some person or object indicated by him. Where it exists, the transaction cannot stand. Equity will set it aside on the application of the weaker party."

Undue influence may however be actually imposed as a matter of fact, or may arise by presumption of law. Cotton, L.J. in ***Allcard v Skinner*** (supra) identified these two classes of cases, the first being, where the stronger has committed fraud or wrong to gain an advantage over the weaker and the second being, where the special relationship exists, e.g. trustee and cestui que trust, and an advantage or benefit is obtained from the latter. In either case the benefit of the transaction is liable to be set aside.

In ***Zamet v Hyman*** [1961] 1 WLR 1442, the Court of Appeal set aside a deed entered into 3 days before marriage by a widower, 79 years old and a widow 76 years old, whereby the latter was induced to renounce her rights, after marriage under the Inheritance Act and the Intestates' Estate Act, in exchange for £600.00 payable on his death. He died leaving an estate of £10,000.00. Lord Evershed, M.R. was of the view that although the presumption of undue

influence did not necessarily arise between an engaged couple, the nature of the deed favouring one party placed the onus on such a benefitting party to prove the transaction free from undue influence "after full free and informed thought about it ..." Donovan and Dankwertz, L.J.J. held that no presumption of undue influence arose from the relationship but actual undue influence was proven as a fact.

There are therefore relationships other than the traditionally recognized fiduciary relationships from which the presumption of undue influence may be seen to exist, arising from an evident confidence which is abused and which a court will set aside in the absence of acceptable explanatory factors. ***Lord Denning, M.R.*** in ***Lloyds Bank v Bundy*** [1974] 3 All E.R. 757, after referring to the classification by Cotton, LJ in ***Allcard v Skinner*** (supra), identified a further situation. He said, at page 764:

> "At other times a relationship of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford LC in ***Tate v Williamson*** [(1866) 2 Ch App 55, 61]. Wherever the persons stand in such a relation that, while it continues confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed ..."

The authors in Snell's Principles of Equity, 26th Edition, at page 610 observed:

> " ... it is not only among the well recognized types of fiduciary relationship (e.g., trustee and cestui que trust, or principal and agent) that instances are to be found of the presumption of undue influence being held to exist. The presumption arises wherever two persons stand in such a relation that confidence is necessarily reposed by the one and the influence which naturally grows out of that confidence is held by the other. All the circumstances have to be considered to determine whether this confidential relationship exists, but there are certain relationships where it will be readily inferred that one party reposes confidence in the other."

In ***Lloyd's Bank v Bundy***, (supra), the appellant an elderly farmer signed a charge over his farmhouse in excess of its value and a guarantee to cover an increase in a bank overdraft of a company, then in difficulties, owned by his son. Both were customers of the bank. The farmhouse was the appellant's sole asset. The documents signed were presented by the assistant manager of the bank, at a meeting with the appellant; present also were the son and his wife. The assistant manager was aware that the appellant trusted and relied on him implicitly to advise him, as bank manager of the transaction. The assistant manager told the appellant about the company's situation, but did not explain fully the company's accounts. The trial judge found that the bank was entitled to enforce the charge and the guarantee, and ordered that the appellant give up possession of the farmhouse which had been sold by the bank. The Court of Appeal held that a confidential relationship existed between the

appellant and the bank thereby imposing on the bank "a duty of fiduciary care ..." to ensure that the appellant received independent advice, seeing that the bank was gaining a benefit from the transaction. The guarantee and charge were set aside and the order for possession dismissed. Lord Denning M.R., at p. 765, said:

> "The consideration moving from the bank was grossly inadequate. The son's company was in serious difficulty. The overdraft was at its limit of £10,000. The bank considered that their existing security was insufficient. In order to get further security, they asked the father to charge the house – his sole asset – to the uttermost. It was worth £10,000. The charge was for £11,000. That was for the benefit of the bank. But not at all for the benefit of the father, or indeed for the company. The bank did not promise to continue the overdraft or to increase it. On the contrary, they required the overdraft to be reduced. All that the company gained was a short respite from impending doom.
>
> ... The relationship between the bank and the father was one of trust and confidence. The bank knew that the father relied on them implicitly to advise him about the transaction. The father trusted the bank. This gave the bank such influence on the father. Yet the bank failed in that trust. They allowed the father to charge the house to his ruin."

Sir Eric Sachs, explaining the concept and nature of undue influence, of the second class, at page 768, said:

> " ... once the special relationship has been shown to exist, no benefit can be retained from the transaction unless it has been positively established that the duty of fiduciary care has been entirely fulfilled . . .
>
> . . . once the existence of a special relationship has been established, then any possible use of the

> relevant influence, is, irrespective of the intentions of the persons possessing it, regarded in relation to the transaction under consideration as an abuse – unless and until the duty of fiduciary care has been shown to be fulfilled or the transactions shown to be truly for the benefit of the person influenced." (Emphasis added)

He then adverted to the duties of the manager of a bank to its customer and demarked the accepted boundaries. At page 772, he said:

> " ... it seems necessary to point out that nothing in this judgment affects the duties of a bank in the normal case where it is obtaining a guarantee, and in accordance with standard practice explains to the person about to sign its legal effect and the sums involved. When, however a bank, as in this case, goes further and advises on more general matters germane to the wisdom of the transaction, that indicates that it may not necessarily must - be crossing the line into the area of confidentiality so that the court may then have to examine all the facts, including, of course, the history leading up to the transaction, to ascertain whether or not that line has, as here, been crossed." (Emphasis added)

Although the doctrine of undue influence in this context, is concerned with the abuse of trust and confidence resulting in an unfair advantage to the person in whom the trust is imposed, the impugned interaction between the strong and the weaker party may be so subtle that a court of equity will be diligent to detect the imbalance. In ***Royal Bank of Scotland v Etridge*** [1998] 4 All E.R. 705 Stuart-Smith LJ., with reference to ***Zamet v Hyman*** (supra), and ***Allcard v Skinner,*** (supra), recited the categories of undue influence, i.e. actual or express and presumed undue influence, and further subdivided the latter into its two classes. He then said of the doctrine, at page 712:

> "The equitable doctrine of undue influence, however, is not confined to cases of abuse of trust and confidence; it is also concerned to protect the vulnerable from exploitation. It is brought into play whenever one party has acted unconscionably in exploiting the power to direct the conduct of another which is derived from the relationship between them. This need not be a relationship of trust and confidence; it may be a relationship of ascendancy and dependency." (Emphasis added)

The nature of the benefit received by the party complained against, to the disadvantage of the complainant, was considered in ***Allcard v Skinner***, (supra), as an evidential factor to indicate that it was more probable than not, that the benefit was obtained by undue influence. This factor was emphasized and extended in ***National Westminster Bank plc v Morgan*** [1985] 1 All ER 821 where it was held that in order to succeed in a claim based on undue influence it had to be proven that the transaction was manifestly disadvantageous to the complainant. The facts of the latter case are that a wife respondent executed a document giving to the appellant bank a legal charge over their jointly owned matrimonial home, to secure mortgage financing advanced by the bank to avert a prior mortgagee action to take possession of their home. The bank manager had visited the home and on her enquiry he innocently assured the wife that the charge covered the re-financing of the mortgage only and did not extend to cover the husband's business debts. On the contrary, on a proper interpretation of the document the charge did. Before she signed the charge the wife did not obtain independent advice. They fell into arrears in payment and the bank obtained an order for possession of the house. The husband died shortly after.

Nothing was then owed to the bank in respect of advances for his business. The wife appealed from the order contending that when she signed the charge she was subject to undue influence by the bank. The bank countered that undue influence did not avail her because she did not suffer from any manifest disadvantage, but on the contrary, benefitted from the bank's refinancing which saved her home from possession by the prior mortgage. The Court of Appeal allowed the wife's appeal on the ground that there was a special relationship which raised the presumption of undue influence and the wife did not receive independent advice. The appeal by the bank was allowed by the House of Lords. The headnote reads inter alia, on page 821:

> **"Held** – A transaction could not be set aside on the grounds of undue influence unless it was shown that the transaction was to the manifest disadvantage of the person subjected to the dominating influence. The basis of the principle was not public policy but the prevention of the victimisation of one party by another, and therefore a presumption of undue influence would not necessarily arise merely from the fact that a confidential relationship existed between the parties, and although undue influence was not restricted to gifts but could extend to commercial transaction, e.g. between a banker and a customer, it was not based simply on inequality of bargaining power."

Lord Scarman in delivering the opinion that the bank "had not crossed the line" outside of normal banking relationship between banker and customer, at page 827, said:

> "Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence

> to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it." (Emphasis added)

In ***C. I. B. C. Mortgages v Pitt et al*** [1993] 4 All ER 433, the principles were emphasized that where presumed undue influence was complained of manifest disadvantage must be proved by the complainant. However such proof was not necessary where actual undue influence was found to have been exerted. In that case the mortgage loan by the bank to Mr. and Mrs Pitt to pay off a prior mortgage on the security of their matrimonial home and to purchase a holiday home was partially used by Mr. Pitt to speculate on the stock market, which crashed. Actual pressure was exerted on her by Mr. Pitt. She complained of undue pressure by the bank due to the action of her husband. The Court rejected her contention and held that the loan had been made to them both and that the husband was not the agent of the bank which was unaware of the husband's actual pressure on her.

Advice can conceivably be interpreted as a rebuttable presumption of undue influence, in circumstances where the customer to the knowledge of the bank manager, reposes a degree of trust and confidence in, and depends on the latter, and an advantage is taken of the customer. The author in An Introduction

to Equity by Keeton (supra), referring to advice in the context of undue influence at p. 227 said:

> "Undue influence, however, is not easy to define. It must be distinguished from duress, i.e. the exercise or threat of physical force. It is obviously something more than mere advice, although advice, strongly pressed and often repeated, may be construed as undue influence if the relationship of the parties warrants it. Much turns upon this last point, for every case of undue influence is founded upon the assumption that one party is in a stronger position, or has greater intellectual power or knowledge of affairs than the other and that the other, in consequence, places reliance upon the guidance of the stronger party." (Emphasis added)

Negligence, rejected in the findings of Reid, J., was relied on in the respondent's notice.

The manager of a bank has no duty to advice a customer of the manner in which he may utilize his funds or of the feasibility of his investments. He may advise the customer on banking matters or financial matters within the context of banking. However he had a duty, in that regard, to advise the customer within reasonable care and skill, failing which, he may be found liable in breach of that duty, ***Headley Byrne v Keller and Partners*** [1963] 2 All ER 575. In that case respondent bankers advised an enquiring bank as to the credit worthiness of the former's customer, as a result of which advice, which proved to have been a misjudgment, the appellants, advertising agents lost money on advertising contracts placed with the said customer. The respondents had initially, disclaimed responsibility for the advice. It was held, in the House of Lords that, but for the disclaimer of responsibility for their replies

the circumstances might have given rise to a duty of care on the part of the respondents. Accordingly, on those facts, they were not negligent. The headnote to the case at page 575 reads:

> "If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results."

The latter case outlined the principles that may give rise to liability in negligence when advice is given in a business context and such advice is relied on.

In ***Woods v Martins Bank Ltd. et al*** [1958] 1 Q.B. 55, the plaintiff with limited business experience, requested the manager of a bank to be his financial adviser. The manager agreed. He advised the plaintiff to make several investments in a company, and to guarantee an overdraft in a second company, describing both companies to the plaintiff as " ... financially sound." Both companies were customers of the bank and there was no reasonable basis on which the manager should have described their financial status as he advised, nor should he have advised the said investment. The plaintiff lost the sums invested and was liable on the overdraft. He sued in fraud and negligence. It was held that the manager owed a duty of care to the plaintiff to advise him with

reasonable care and skill and having failed to do so both the manager and the bank were guilty of negligence. Salmon, J found, inter alia, as summarized in the headnote, at page 56:

> **"Held (1)** The limits of a banker's business could not be laid down as a matter of law; the nature of such a business must in each case be a matter of fact, and on the facts it was within the scope of the bank's business to advise on all financial matters, and they owed a duty to the plaintiff to advise him with reasonable care and skill in the transactions referred to.
>
> ***Banbury v Bank of Montreal*** [1918] A.C. 626; 34 T.L.R. 518 distinguished.
>
> **(2)** That from May 9, 1950, when the bank accepted the plaintiff's instructions the relationship of banker and customer existed between them.
>
> **(3)** That even if the plaintiff did not become a customer until later, the defendants would still have been under a duty to exercise ordinary skill and care in advising him in relation to the £5,000 transaction on May 9; a fiduciary relationship existed between the plaintiff and the defendants.
>
> **(4)** ...
>
> **(5)** That as none of the advice was reasonably careful or skilful, and but for it the plaintiff would never have made any of the investments or given the guarantee, he had made out his case in negligence against both defendants."

In the instant case, six principal issues arise:

(1) Did the respondent Stephen Hew entertain a certain level of trust and confidence in the bank manager Geoffrey Cobham, who was aware of it?

(2) Did the respondent rely on Geoffrey Cobham for advice in banking matters and also in matters of investment?

(3) Did Geoffrey Cobham give such advice to Hew, with the knowledge that the latter relied on him and with the knowledge of the trust and confidence that the latter reposed in him?

(4) If so, in the circumstances, did the parties enter into a transaction which was manifestly disadvantageous to the respondent raising the presumption of undue influence, resulting in an obligation on Cobham to inform Hew to seek independent advice?

(5) In addition or in the alternative, did Geoffrey Cobham advise Hew on the latter's financial affairs, thereby giving rise to a duty on Geoffrey Cobham to advise him with due care and skill and did Cobham fail in this duty, making him negligent and liable to Hew in damages?

Reid, J. found that Stephen Hew did repose a level of trust and confidence in Geoffrey Cobham, the bank manager. The learned trial judge at page 128, said:

> " ... what has been established, at very least, is the de facto existence of a relationship under which a customer reposed trust and confidence in a banker, and this had led to an unconscionable arrangement thus raising a presumption of undue influence."

There is ample evidence to show that Stephen Hew trusted Geoffrey Cobham "... as a friend and bank manager," and willingly acquiesced in his Cobham's instructions, "whatever Cobham asked him to sign he signed." His dependence on Geoffrey Cobham was known to the latter who admitted that "he sought my advice," albeit on "... banking and financial matters." In those circumstances, this finding of the learned trial judge cannot be faulted.

In explaining what his Geoffrey Cobham's advice to Stephen Hew on "banking and financial matters," he admitted that he suggested to Stephen Hew that,while the process of approvals and the obtaining of titles for the Barrett Town development was being addressed,

> " ... interested purchasers would be prepared to pay deposits or amounts down against an undertaking from the bank that in the event, for whatever reason, titles did not become available, such deposits would be refunded."

It is less than ingenious, to say the least, to maintain that this suggestion was that of a bank manager advising on a "banking matter." This was capable of being construed as, advice in the nature of the procedure to be adopted in dealing with prospective purchasers, in the management of a real estate development project. The "undertaking" by the bank was the necessary assurance of stability to the potential purchaser. In response to the suggestion that he advised Stephen Hew of:

> "... the potential of the project and the ability to earn revenue while it was being developed and before title was obtained,"

Geoffrey Cobham replied, "Yes, I certainly discussed that with him." (Emphasis added)

Reid, J was correct to find on the evidence that "Mr. Cobham insisted that the borrowing had to be applied exclusively to Barrett Town." Geoffrey Cobham agreed that "Ironshore would be a more suitable location for the project" but maintained that the facility was " ... in respect mainly for Barrett Town." 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. Furthermore, to Geoffrey Cobham's knowledge, Stephen Hew was driven by a juvenile compulsion to satisfy his childhood fantasy to " ... borrow a million dollars before he died," and was then in sound financial health to be allowed to do so. Stephen Hew was not then the hard-headed businessman, but a customer of the appellant's bank, at his vulnerable best. Despite the fact that Stephen Hew had expressed a desire, several years before to build houses at Barrett Town, as evidenced on the G18 form, I do not agree with counsel for the appellant, that the evidence before the learned trial judge did not support the finding that the appellant gave advice to Stephen Hew to invest in Barrett Town. I agree with the finding of the learned trial judge who, from the evidence, saw Stephen Hew, as " ... the picture of a submissive posture of an acquiescing borrower." This was advice to Stephen Hew "... strongly pressed ..." to which he could in no respect fail to accede.

Counsel for the appellants, Mr. Garcia, argued that the finding of the learned trial judge that there was manifest disadvantage to Stephen Hew is not supported on the evidence. Reid, J. found, at Volume 1 of the record page 128:

> "However, what has been established, at very least, is the de facto existence of a relationship under which a customer reposed trust and confidence in a banker, and this had led to an unconscionable arrangement

> thus raising a presumption of undue influence. The manifest disadvantage that has accrued to the customer requires no further elucidation."

The learned trial judge did not however, detail from the evidence what he regarded as the disadvantage to Stephen Hew, although in his oblique way he referred to the fact of its existence. The failure of the learned trial judge to detail such a specific finding does not preclude this court from doing so, where the evidence led points to such a fact. Rule 18 (3) of the Court of Appeal Rules, 1962 reads:

> "**(3)** The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."

National Westminster Bank v Morgan (supra) supports the view that it must be shown that there was manifest disadvantage to the person under the dominating influence for the presumption of undue influence to arise, along with the other pre-existing factors.

In the instant case, Geoffrey Cobham, was well aware from his discussions with Stephen Hew, that it would cost $2,000,000.00 to $4,000,000.00 to put in the necessary infrastructure in the Barrett Town development. Therefore, by allowing an overdraft facility of $2, 000,000.00 to Stephen Hew, "to build houses at Barrett Town," (the further $1,000,000.00 was a guarantee for the 29 titles to be issued), he must have been aware that after Stephen Hew had put in the infrastructure at Barrett Town, the entire

overdraft facility would have been exhausted, leaving nothing to spend to "build houses at Barrett Town." The development was therefore clearly flawed from its inception.

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 of 20% above the base rate, in addition to penalty rates. This situation would be further aggravated by Geoffrey Cobham's own evidence that the said overdraft facility of $2,000,000.00 was intended to be spent also on the infrastructure at Ironshore. This transaction was manifestly disadvantageous to Stephen Hew.

In addition, Geoffrey Cobham's request issued by letter dated February 21, 1989, and the guarantee received from Stephen Hew's attorney-at-law, with Hew's authority, that the registered titles to the 29 lots at Barrett Town be sent to the bank, is less than understandable in the ordinary course of events. There was no right in the bank to the said titles. In Geoffrey Cobham's own words the bank's loan was adequately secured by the mortgage on the 140 acres of prime lands at Ironshore. The effect of the guarantee of the deposit with the bank of the registered titles to the 29 lots was the creation of additional security to the

already "good security" in the Ironshore lands, for the loan to Stephen Hew. The bank was over-protected. Stephen Hew was thereby providing excessively increased security to the bank, to the former's obvious manifest disadvantage. The said letter at Vol. 2 of the record p. 52 reads:

> "21st February, 1989
>
> Miss Audrey Wilson
> Attorney-at-Law
> Church Street
> Montego Bay
>
> Dear Madam:
>
> Re: Part of Barrett Town, St James – Lots No. 1 to 29 on the Plant of Barrett Town – Mr Stephen Hew
>
> You are in the process of obtaining twenty nine separate lots for our customer Mr Stephen Hew.
>
> We should be grateful for your confirmation that you will send the duplicate certificates of title for these twenty nine lots directly to this office as soon as they are ready, and that this arrangement will not be varied without the express consent of the Bank.
>
> Yours faithfully,
>
> Jeffrey Cobham
> Manager
>
> I agree with the above and hereby grant permission for you to send the duplicate certificates of title direct to National Commercial Bank Jamaica Ltd., Montego Bay for the attention of Mr Cobham.
>
> Stephen Hew."

The deposit of the 29 registered titles would create a lien in favour of the appellant bank over the said titles of Stephen Hew, provided that a debt was owed by Stephen Hew. The tone and purport of the said letter conferred on the said bank the power to determine the duration of the arrangement. It reads inter alia,

> "...this arrangement will not be varied without the express consent of the Bank."

The author in Snell's Principles of Equity (supra), defines a legal lien at common-law, at page 482, as,

> "A ... right of one person to retain possession of the goods of another until his claims are satisfied."

In addition, the said deposit, could in law be construed as creating 29 equitable charges on the said lots. Snell's is also helpful. The author stated at page 472:

> "A mere agreement to deposit a document, unaccompanied by an actual deposit, is ineffectual; but if the agreement is clearly evidenced in writing, it will be effectual to establish a charge."

This agreement to deposit the 29 titles with the appellant, with the latter's unilateral power of variation, was an extraordinary advantage to the appellant bank, which was providing no additional consideration to Stephen Hew for this benefit. Stephen Hew had already provided satisfactory security for the overdraft and guarantee facility of $3,000,000.00, by the mortgage on the Ironshore lands, which security Geoffrey Cobham himself classified as "good".

This further deposit was an exorbitant request and was clearly to the manifest disadvantage of Stephen Hew.

The effect of the said agreement, also, was that Stephen Hew was deprived of the right to deal with his 29 titles to his lots, in whatever manner he chose. Furthermore, the absence of registered titles to the said lots of Barrett Town, made it unlikely that there would be any sales of the said lots to create income inflows to service the said loan with the bank. There were no sales prior to September 1985. Geoffrey Cobham's evidence that income to further service the loan was anticipated from the sale of some of the lots in Ironshore is significant. That would create an added disadvantage to Stephen Hew, because it would necessitate the release of the title to each such 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.

In ***National Westminster Bank v Morgan*** (supra) Lord Scarman at p. 827 said:

> "I know of no reported authority where the transaction set aside was not to the manifest disadvantage of the person influenced. It would not always be a gift: it can be a 'hard and inequitable' agreement (see ***Ormes v Beadel*** (1860) 2 Giff 166 at 174. 66 ER 70 at 74): or a transaction 'immoderate and irrational' (see ***Bank of Montreal v Stuart*** [1911] AC 120 at 137)."

Reid, J. was therefore correct to find that there was manifest disadvantage to Stephen Hew, on the evidence.

In the circumstances, because there was manifest disadvantage suffered by Stephen Hew in the said transaction with the appellant bank, the presumption arises that the appellant bank exercised undue influence over the said

respondent: (***National Westminister Bank vs Morgan***, (supra)). As a consequence, Geoffrey Cobham as manager had a legal obligation to see to it that Stephen Hew obtained independent legal advice. It is quite incorrect for Geoffrey Cobham to state that he had an obligation only to housewives to advise them; his obligation also arose in these circumstances. Nor can Geoffrey Cobham rely on the fact, as he sought to do by the submission of Mr. Shelton for the appellant, that Stephen Hew had available to him six attorneys-at-law, a realtor and a surveyor. Geoffrey Cobham had a duty to advise Stephen Hew to seek independent legal advice, in the circumstances, from someone who had all the knowledge of the transaction and could give him competent and balanced advice in his protection. He did not advise Stephen Hew to speak to his attorney-at-law, Miss Wilson about the transaction, choosing instead to ask Stephen Hew to speak to his son Clifton Hew, who, as admitted by Geoffrey Cobham, had no experience as a developer or businessman, nor was he known to have any legal or banking expertise. Geoffrey Cobham was therefore in breach of that duty to advise Stephen Hew to seek independent advice. In ***Allcard v. Skinner***, (supra) Cotton, L. J., referring to the case of a gift by a donor who is subject to a dominating influence at page 171 said:

> "In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. ... the Court interferes, ... to prevent the relations which existed between the

> parties and the influence arising therefrom being abused."

In Halsbury's Laws of England, 4th Edition, Vol. 18, at paragraph 342, the learned authors, referring to the onus of proof where undue influence is complained of by an individual, and relying on ***Allcard v Skinner*** (supra), said:

> " ... he has merely to prove the existence of the relationship, and then the onus falls on the person benefited by the transaction of proving that the power conferred by the relationship was not abused."

It is my view that Reid, J. was correct to find that the presumption of undue influence was not rebutted by the appellant bank.

In so far as he intimated in his finding that actual undue influence was proven, Reid J's finding cannot be supported on the state of the pleadings and the conduct of the case. He said, at Volume 1 p. 128:

> "Where affirmative proof falls short in establishing that by wrong-doing undue influence was exerted on the complainant to enter into the impugned transaction then the case could not be embodied under the rubric of actual undue influence."

Actual undue influence is regarded as a species of fraud (Lord Browne-Wilkinson in **C.I.B.C. Mortgages v Pitt** (1993) All E.R. 433). The respondent did not rely on an allegation of fraud nor seek to prove conduct amounting to fraud. The evidence may have bordered on actual undue influence, but it was not a finding open to the learned trial judge.

On the other hand, the view of Reid, J. that a finding of negligence was not appropriate, in the circumstances of the case, is more than generous to the

appellant. A person who gives advice to one who seeks it, in circumstances where the person asked knows that his advice is being relied on and trusted and who gives that advice freely without reservation or disclaim of responsibility, accepts a legal duty and must act with reasonable care and skill, and,

> "... for failure to exercise that care, an action will lie in negligence if damage results." ***(Headley Byrne v Heller and Partners)*** (supra).

The learned trial judge found inter alia that:

> "... Mr. Cobham had insisted that the borrowing had to be applied exclusively to Barrett Town. Advice was offered on matters germane to the wisdom of the transaction and, inferentially, must have been relied upon."

That finding was one which could properly have been made on the evidence.

Mr. Geoffrey Cobham, at the lowest, expressed to Stephen Hew a preference for the expenditure by him on the development of the Barrett Town project, despite the fact that, on Geoffrey Cobham's own admission to Clifton Hew, the Ironshore development was a more viable project. He instructed Stephen Hew that he could proceed "to build houses at Barrett Town", giving him an overdraft facility with a Two Million Dollar ($2,000.000) ceiling in September, 1989, well knowing that at that time the overdraft had already exceeded One Million Dollars ($1,000.00), and that approval for sub-division development, required a prior expenditure of Two Million Dollars ($2,000.000) to Four Million Dollars ($4,000.000) for the cost of necessary infrastructure before any houses could be built for sale. Geoffrey Cobham so encouraged

Stephen Hew, in spite of the fact that, unlike the viable Ironshore project, no registered titles had yet been obtained for the 29 lots at Barrett Town. With that knowledge, Geoffrey Cobham was of the view that sales of lots at Barrett Town could be expected and deposits thereon accepted, prior to the acquisition of titles. This advice seem less than prudent and casts him in the role of a real estate developer recommending an accepted method of sales and as an adviser on a commercial project, rather than as the mere bank manager that he was, advising on banking matters, as he should have been. In keeping with that conduct and image Geoffrey Cobham involved himself in various aspects of the development project. He wrote the said letters to the St. James Parish Council, the Town and Country Department and a potential purchaser, among others.

The effect of the advice was that Stephen Hew, in his known vulnerable state, was ushered by Geoffrey Cobham into a transaction to expend money on a project with several foreseeable weakening features of obstacles, delays, and escalating costs. The loan transaction, contained ostensible pre-conditions to ensure prudence in disbursement, e.g., that the lender provide evidence of advance projected sales of Two Million Dollars ($2,000.000). These conditions were ignored by the appellant bank without any pretence to see that they were enforced. Stephen Hew, therefore, had to cope with a transaction in the pursuit of the Barrett Town project, attracting the payment of overdraft interest from its inception, and with no foreseeable prospect of income from deposits from sales. He was committed to, and propelled towards the payment of high interest rates,

including penalty payments from which he could have had no forseeable solution. Reid J. in his particular style correctly described the Barrett Town development as one:

> "... with prospects of returns in the foreseeable future doubtful."

The choice of Barrett Town as the project of development with the loan facility granted even "mainly for Barrett Town", was advice given to Stephen Hew by Geoffrey Cobham, clearly devoid of the requisite reasonable care and skill. The appellant bank and Geoffrey Cobham were, on the evidence, accordingly in breach of their duty to Stephen Hew. They could have been found by Reid, J. to have been guilty of negligence and therefore liable in damages. Alike the bank manager in ***Woods v. Martins Bank Ltd.*** (supra), the advice was without the requisite reasonable care and skill. The appellant bank, in the instant case was guilty of negligence.

The manager of a bank must remain a banker simpliciter advising on banking and related financial matters. He must exhibit a professional detachment from investment transactions with his customers and not be tempted into the realms of investment advice and thereby be seen to have "crossed the line."

In the instant case the presumption of undue influence exerted on Stephen Hew by the appellant bank, was correctly found by Reid, J. not to have been rebutted by the appellant bank. The transaction, resulting in the great

disadvantage to Stephen Hew, and to the bank's advantage, was properly set aside: (***Lloyd's Bank Ltd. v. Bundy*** (supra)).

I am of the view that Reid, J. was correct to dismiss the appellant's claim for $32,945,108.20 and to enter judgment for the respondent Stephen Hew, in the sum of $18,882,005.26. The latter sum was unchallenged as being the sum overpaid by Stephen Hew for interest and penalty charges apart from the repayment of the principal overdraft loan.

For the above reasons, it is my view that this appeal ought to be dismissed, with costs to the respondent.

LANGRIN, J.A.

Having read in draft the judgment of Harrison, J.A., I agree with the reasoning and conclusion therein and there is nothing I could usefully add.

ORDER

FORTE, P.

Appeal dismissed. Order of the court below affirmed. Costs to the respondent to be taxed if not agreed