IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1996/N-049

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	PLAINTIFF
A N D	STEPHEN HEW	1ST DEFENDANT
A N D	CLIFTON HEW	2ND DEFENDANT
A N D	ANNIE HEW	3RD DEFENDANT

CONSOLIDATED WITH SUIT NO. C.L. 1996/H-102

BETWEEN	STEPHEN HEW	PLAINTIFF
A N D	NATIONAL COMMERCIAL BANK (A Company registered with the Companies Act)	1ST DEFENDANT
A N D	JEFFREY COBHAM	2ND DEFENDANT

Mr. Michael Hylton Q.C. and Miss Haydee Gordon instructed by Myers, Fletcher & Gordon representing the Plaintiffs in N-049 and the Defendants in H-102.

Lord Anthony Gifford Q.C., Mrs. Sandra Bright and Ms. Garrie Gaye Brown instructed by Messrs. Gifford, Thompson & Bright representing the Defendants in N-049 and the Plaintiff in H-102.

Heard: 10th, 11th, 12th & 13th April; 5th & 6th June and 31st July, 2000.

REID, J. :

On 28th May 1996, the National Commercial Bank of Jamaica (hereinafter called

the Bank) filed a writ of summons with statement of claim endorsed against the defendants – named for the recovery of two sums of money owing together with interest accruing at the rate of 54 per cent per annum from 3rd May, 1996 until the date of payment.

The first defendant counter-claimed for damages for negligence and breach of fiduciary duty by the Bank, claiming damages which by virtue of the counter-claim would extinguish or offset any indebtedness arising from the loans.

In the action sub-nomine C.L. 1996/H-102 Mr. Stephen Hew who will hereafter be referred to simply as Mr. Hew, issued a writ of summons against the bank as also against Mr. Jeffrey Cobham the manager for damages for negligence and breach of fiduciary duties.

Since the main issues are those raised by the plaintiff Hew upon whom lies the burden of proving negligence and or breach of fiduciary duty, it was agreed that the hearing should begin with his testimony.

BACKGROUND TO THE LITIGATION

Mr. Hew. is the registered proprietor of two parcels of land, one of 95 acres and the other of 45 acres at Ironshore in St. James a prime residential area near to Montego Bay. He also had a registered title to a parcel of six acres in Glendevon St. James, an area not nearly as desirable as the Ironshore property for residential

purposes. At a district in St. James called Barrett Town, he also owed approximately five acres in elevation overlooking a prime location called Sea Castle which is close to Rose Hall another well known and prime area situated along the main road from Montego Bay as one proceeds to Falmouth. For the Barrett Town land Mr. Hew did not have a registered title.

Mr. Hew had been in the business of furniture as well as having other business interests but according to him, had no experience in the development of lands for sale, for subdivision and sale for residential purposes. He held accounts with the Bank, N.C.B. and had developed cordial relations with its managers in particular, Mr. Dunbar McFarlane and Mr. Jeffrey Cobham, in that order, the latter being manager of the Sam Sharpe Square Branch in Montego Bay from 1984 to 1991. Mr. Hew had various loan transactions with the Bank and the Bank retained the certificates of titles to the Ironshore and Glendevon lands respectively by way of security for moneys advanced. He had cherished for many years a dream to borrow a million Pounds. Judicial notice can be taken that a few years following the attainment of Independence status in Jamaica, the national currency was converted from Pounds Sterling to dollars at a conversion rate of Two Dollars as the equivalent of One Pound Sterling. Mr. Hew had expressed that dream wish to each of the managers aforesaid.

In early 1989 an overdraft facility of $2 Million Dollars was granted to him and he availed himself of it through his account up until about June 1989. The letter confirming that facility was sent in September 1989 and the mortgages upstamped

to the value of $1,750,000.00 on the 45 acre Ironshore property in April 1960 and on the 95 acre parcel at Ironshore on 27th December, 1989 to secure $5 Million. Central to the principal issues raised is the nature of the relationship that obtained between Mr. Hew as customer and the Bank through its manager Mr. Cobham; as well as the conversations between them at a time before the facility was granted, also the implication of such dialogue. The case presented on behalf of Mr. Hew is that he was totally dependent on Mr. Cobham as to how the facility should be granted and for what purposes to be applied. Mr. Cobham, it is averred, had insisted that the facility was to be applied towards financing the building of houses on the Barrett Town property. On behalf of the Bank, it is pleaded that that facility was not so limited but rather, for the purpose of financing infrastructure both at Barrett Town and Ironshore.

It is the case for the plaintiff Hew that the facility had been utilized to the extent that the level of the overdraft had exceeded the $2 Million mark by the end of April 1990. A further facility of $1 Million under the heading of guarantees was also utilised, thus bringing the overdraft by the end of 1991 to a level in excess of $3 Million. In about the month of May 1991, although two houses had been completed and others were in stages of being erected, no sale had been consummated as there was still no registered title. Following the aggregation of a considerable debt, the Bank informed Mr. Hew that no further credit facility would be forthcoming.

Mr. Lord Gifford Q.C., in his opening address points out it will be the case in essence for Mr. Hew that the Bank had undertaken a particular duty of care to give advice to him, and upon which it was known that he would rely. The advice was to build on Barretrt Town lands and that the loan would not otherwise be approved. Such advice, it would be shown, was demonstrably negligent having regard to all the circumstances.

The further negligent act or omission is the manner in which the funds had been advanced to him. Had the advances been by a demand loan, the rate of interest payable would have been less.

At this stage it might be useful to examine the pleadings which are set out at length as the issues particularly of breach of fiduciary care so require.

THE PLEADINGS SUIT C.L. 1996/H-102

It is common ground that the Bank is a registered Company under the Companies Act and conducts the business of banking with branches in many Towns of the Island. Mr. Cobham, the second defendant was at the material time, manager at the Montego Bay branch.

Paragraph 3 of the statement of claim, reads:-

> ***"The plaintiff has for many years as a customer relied on the first defendant branch in particular through its manager whilst acting in the course of his duty, for advice on all his commercial transaction, and it is known to whomsoever is the manager at any given time that he so relies and this dependence has become more total as the plaintiff has advanced in age."***

Paragraph 4. .....

Paragraph 5.

> ***"The defendant Bank has held itself out at all material times to the plaintiff as having the capacity and expertise to give him financial advice on loans."***

Paragraph 6.

> ***"That a clear fiduciary relationship has developed and has existed at all material times and the defendants or the plaintiff a fiduciary duty to observe reasonable skill and care in giving advice to the plaintiff."***

Paragraph 7. .....

Paragraph 8.

> ***"That in or about the year 1989 the said Mr. Dunbar McFarlane introduced the Plaintiff to the second Defendant, another manager attached to the said Montego Bay Branch and shortly thereafter in or about the year 1990 the plaintiff approached the latter manager (the second defendant) to borrow the sum of One Million Dollars for the purpose of building houses for all and made it clear to the second defendant that in particular at his age he was solely dependent on the second defendant acting on behalf of the bank for advice as to the site amongst other things which the second defendant in his well considered judgment thought to be most suitable."***

Paragraph 9.

"That the plaintiff had made clear to the second defendant that he was also in possession of property at Barrett Town in the parish of St. James but that there was no registered title to that property. However, whatever documents the plaintiff had evidencing ownership were given to the second defendant."

Paragraph 10.

"That the second defendant decided to lend money (One Million Dollars) to build houses on the said Barrett Town property which property as stated aforesaid had no registered title. That the said manager remained steadfast in his decision.

Further, that the defendant has never done a project proposal of the building project nor made enquiry nor done a feasibility study."

Paragraph 11.

"That acting upon the advice of the second defendant manager, the plaintiff proceeded to start the building project and later in the year the second defendant approved further loans up to Three Million Dollars for building on the said land at Barrett Town and the second defendant instructed the plaintiff that he could draw cheques on that sum."

Paragraph 12.

"That in or about the early part of the year 1991, the second defendant instructed the plaintiff that no more withdrawals could be make. At that stage the plaintiff had completed two houses; another was approximately three-quarters on the way to completion and the foundation had barely been completed on yet another two and the infrastructure was partially in place."

Paragraph 13.

> ***"That the second defendant further demanded all moneys owed to the first defendant bank by the plaintiff with immediate effect."***

Paragraph 14.

> ***"That the plaintiff pointed out to the second defendant that it was impossible to pay the moneys owed as inter alia he had not completed all the houses and would find it difficult if not impossible to sell even those that had been completed as there was no registered title for the Barrett Town lands and also that the infrastructure had not been completed on same."***

Paragraph 15.

> ***"The second defendant informed the plaintiff that these difficulties were his the plaintiff's sole concern and further threatened that the first defendant bank would sell some of the land at Ironshore to recover some of the first defendant bank's money on the debt."***

Paragraph 17.

> ***"The defendants solely or jointly further extended the overdraft facilities incurring for the plaintiff payments at compound interest and rapidly increased the plaintiff's debt to the first defendant bank and made it impossible for the plaintiff now an eighty year old man without a great variety of resources to repay."***

Paragraph 18.

> ***"The plaintiff has to date paid to the first defendant a sum over Fourteen Million Dollars gained from properties which the plaintiff was forced to sell and the proceeds of which he was obliged to turn over to the first defendant in full."***

Paragraph 19.

"Because of the negligence of the defendant in that they failed to exercise the necessary duty of care and the breach of their fiduciary duties the plaintiff has suffered loss, incurred a debt now claimed by the first defendant to be of Thirty-two Million Nine Hundred and Forty-five Thousand One Hundred and Eighty Dollars and Twenty Cents and has been put to expense and suffered damages.

Particulars are then given as to the breach of fiduciary duties:

i) Giving to the plaintiff an overdraft of $1,750,000 on a loan for property development instead of an ordinary mortgage as is the general accepted banking practice.

ii) Providing further funds and advising to borrow and to take funds totally Three Million dollars to facilitate a building project on Barrett Town lands for which the plaintiff had no registered title and for which the defendant did not have a project proposal and had made no enquiry into its feasibility with full knowledge that the plaintiff depended completely on the defendant for advice.

iii) Extending the aforesaid overdraft facility and incurring to the plaintiff extensive compound interest on his repayment instead of converting same to a demand loan contrary to bank regulations and the general practice.

iv) Advising the plaintiff to embark on a building programmed on Barrett Lands for which there was no title instead of the Ironshore property for which the plaintiff had registered titles knowing fully well that it would be easier to sell houses on the Ironshore property and to release funds to repay the loan.

v) Making additional advances on the plaintiff's loans for payment of compound interest and penalties without first restructuring the said loans; and registering the additional indebtedness thus created to the tune of Eighteen Thousand Dollars in contravention of the general banking practice and regulations.

vi) Charging excessive interest to the plaintiff's account in all the circumstances in particular up-stamping and registering Thirteen Million Dollars as additional indebtedness to the plaintiff's title.

DEFENCE ON BEHALF OF THE BANK AND MR. COBHAM

1. Paragraph 1 and 2 of the Statement of Claim are Admitted.

2. Paragraph 3 of the Statement of Claim is denied. In particular, the defendants deny that the first defendant through its servants or agents or otherwise gave the plaintiff advice on any of his commercial transactions and say further that the provision of such advice did not form part of the services to which the plaintiff was contractually entitled.

3. Paragraph 4 of the Statement of Claim is not admitted.

4. Paragraph 5 is denied (that is the averment that the bank had held itself out as giving expert advice.

5. In answer to paragraph 6, it is admitted that a fiduciary relationship existed but such a relationship was limited to duties and obligations common to the banker-customer of debtor-creditor relationship and did not extend to the giving of financial advice. Save as aforesaid, paragraph 6 of the Statement of Claim is denied.

6. In answer to paragraph 7 of the Statement of Claim, the defendants:

   a. Admit that in 1983 the plaintiff requested overdraft facilities in the sum of $5,000.00 from the first defendant through the then manager of the Montego Bay branch, Mr. Dunbar McFarlane, and that the facilities were granted.

   b. Make no admission as to the purpose alleged.

   c. Say that the plaintiff executed a mortgage over approximately 45 acres of land in Ironshore in the parish of St. James as security for the said loan.

   d. Deny the other allegations in paragraph 7 of the Statement of Claim.

7. In answer to paragraph 8 of the Statement of Claim the Defendants say that in or about 1989, the Plaintiff requested a Two Million Dollar ($2,000,000.00) overdraft to subdivide and put in roads at his Barrett Town and Ironshore properties. He also applied for a further One Million dollar ($1,000,000.00) as a standby facility to purchase lands whenever he found a good bargain, and for a One Million Dollar ($1,000,000.00) guarantee which was to cover any claims for refunds from purchasers in the proposed subdivision.

8. In further answer to paragraph 8 of the Statement of Claim, the defendants deny that the plaintiff was dependent on the 2nd defendant for advice as alleged or at all, and also deny that any such dependence was 'made clear' to the 2nd defendant.

9. Save that the defendants say that the plaintiff advised them that he had already applied for registered title to the said land, paragraph 9 of the Statement of Claim is admitted.

10. In answer to paragraph 10 of the Statement of Claim the defendants say that the plaintiff was given an overdraft of Three Million Dollars ($3,000,000.00) for the purposes set out in paragraph 7 hereof, the said overdraft was secured by the plaintiff's properties at Glendevon and Ironshore. Save as aforesaid, paragraph 10 of the Statement of Claim is denied.

11. Save that the Defendants admit that a further overdraft of Three Million Dollars ($3,000,000.00) was made available to the Plaintiff, paragraph 11 of the Statement of Claim is denied.

12. In answer to paragraph 12 of the Statement of Claim the defendants admit that the 1st defendant decided not to grant any further overdraft facilities to the plaintiff, but say that this decision was made after the plaintiff had exceeded the approved limits of his overdraft which occurred in or about June 1990. Save as aforesaid paragraph 12 of the Statement of Claim is not admitted.

13. Paragraph 13 of the Statement of Claim is admitted.

14. In answer to paragraphs 14 and 15 of the Statement of Claim, the defendants say that they were advised by the plaintiff that his liabilities would be cleared from the proceeds of sale of lots in his Ironshore property. Save as aforesaid paragraphs 14 and 15 are denied.

15. Paragraphs 16 of the Statement of Claim is denied.

16. In answer to paragraph 17 of the Statement of Claim the defendants admit that overdraft facilities were extended to the plaintiff were in accordance with the agreement between the parties and interest was charged and calculated pursuant to the terms of that agreement. Save aforesaid, that paragraphs of the Statement of Claim is denied.

17. Paragraph 18 of the Statement of Claim is denied.

18. Save that the 1st defendant admits that the plaintiff is indebted to it as alleged, paragraph 19 of the Statement of Claim and the particulars thereof are denied.

19. In further answer to paragraph 19, the defendants repeat paragraphs 8, 9 and 16 hereof and say further that the plaintiff specifically requested that the funds be accessed through an overdraft facility.

By an amended defence, the following was included with the appropriate re-numbering:-

20. **the bank statements which were sent to the plaintiff provided: "Failing receipt by the Manager within 15 days from the date of despatch of this statement of notice of disagreement with any of the entries confirmation of the correctness of the statement as rendered will be assumed".**

21. **in the circumstances, the plaintiff is bound by the terms fo the clause set out in paragraph 21 hereof, or alternatively, is estopped from disputing the correctness of the relevant statements.**

In his reply, Mr. Hew joins issue and added simply in paragraph 2 the following:

> **"In respect of paragraphs 7 and 10 of the Defence, the Plaintiff specifically denies that the defendant granted to him any loan facility for the purpose of developing his Ironshore property, as pleaded in the Statement of Claim."**

Three bundles of documents by agreement were tendered, not as proof of the truth of the contents, but only as proof that the documents were created on or about the dates sent and in the ordinary course received by the relevant parties. There is one qualification which is no longer relevant.

In his opening address Lord Gifford Q.C. referred to certain documents exhibited, in order to depict the background adumbrated by the pleadings. The documents will be identified according to the volume in which each is exhibited, references to

the Mr. Hew will be understood as a reference to Mr. Stephen Hew, all others by that surname will be appropriately described.

After the acquisition of the 45 acre parcel at Ironshore, there is an entry (after others) of a mortgage in April 1990 to secure $1,750,000.00.

On the 95 acre title is another mortgage to secure $5 million. A number of letters are worth reproducing to better understand the events. At **Exhibit (Vol. 1 pg.52)**, Mr. Cobham, on 21st February, 1989, on behalf of the Bank wrote to Miss Audrey Wilson, Attorney-at-Law of Montego Bay.

"Dear Madam:

Re: PART OF BARRETT TOWN, ST. JAMES – LOTS NO. 1 TO 29 ON THE PLAN 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,

(Sgd.) JEFFREY COBHAM
MANAGER"

Appended thereto is a footnote:

"I agree with the above and hereby grant permission for you to send the duplicate certificates of title direct to National Commercial Bank Jamaica Limited, Montego Bay for the attention of Mr. Cobham.

(Sgd.) Stephen Hew"

Two weeks later, the Bank opened an account for Mr. Hew and his son Raymond jointly, called the 'Sea Castle View' for access to lending by overdraft.

On 13th July, 1989, Mr. Cobham wrote to Mr. Hew as follows:-

"Dear Stephen:

Re: LOTS 1 TO 29 - PLAN OF BARRETT TOWN

I have spoken to Attorney-at-Law, Audrey Wilson, to find out when the titles for the individual lots are likely to be available, and I learned that she Is unable to proceed with the preparation of individual titles for the property at caption until she receives the following:

1. *Supporting declarations from person who can certify the circumstances under which you purchased the land, and that the title is not In dispute. I believe the persons whose names you originally submitted as declarants have since died.*

2. *A certified copy of the sub-division plan from the Parish Council. The photocopy which you provided is not acceptable. I believe that we were told by the Parish Council staff that the relevant documents had been destroyed in the fire which gutted their building a few years ago. You will now have to ask the surveyor, Mr. Brian Alexander to prepare another plan which can then be certified by the Parish Council.*

3. *The Survey Diagram is still to come from Mr. Brian Alexander. I have copied this letter to Miss Wilson so that if my suggestions for solving the problems are not the best, she can correct me. If you are not clear on any aspect of what needs to be done, please let me know.*

Yours sincerely,

(Sgd.) J.C. COBHAM
MANAGER

cc: Miss Audrey Wilson
cc: Mr. Brian Alexander"

By the end of July, the 'Sea Castle View' account was in overdraft $364,890.00.

At page 56, Mr. Cobham on 24th July 1989 again wrote to Miss Wilson:

> *"Re: Part of Barrett Town, St. James*
> *Lots No. 1 to 29 on the Plan of*
> *Barrett Town – Mr. Stephen Hew*
>
> *Further to my letter of 13th July, 1989 to Mr. Hew and copied to yourself, I now include herewith:-*
>
> *(a) Declaration by Egbert Spence (vendor in 1970) in duplicate;*
> *(b) Declaration by Stephen Hew (purchaser in 1970);*
> *(c) Declaration by Hubert Ferguson, in duplicate;*
> *(d) Declaration by Izia Edwards in duplicate;*
> *(e) Application by Stephen Hew.*
>
> *Please acknowledge receipt on the enclosed copy of this letter.*
>
> *We should be grateful for your undertaking to send us the duplicate certificates of title when they become available as requested in our letter of 21st February, 1989 (copy enclosed).*
>
> *(Sgd.) JEFFREY COBHAM*
> *MANAGER*
>
> *Encls.*
>
> *cc: Mr. Stephen Hew*
> *cc: Mr. Brian Alexander*
>
> *P.S. Copies of Tax Receipt for 1984 to 1990 attached."*

At page 57, Mr. Cobham wrote to the Secretary of the St. James Parish Council on 7th September, 1989:

"Re: <u>SUB-DIVISION APPROVAL – LANDS PART OF BARRETT TOWN, ST. JAMES MR. STEPHEN HEW</u>

It appears that the original approved plans for the lands at caption were destroyed or lost. We now submit on Mr. Hew's behalf a new set of plans (three copies) for approval, along with a photocopy of the original plans showing where you had approved them on 17th August, 1982. We should be grateful if you would deal with this as urgently as possible.

(Sgd.) JEFFREY COBHAM
MANAGER
Encls.

cc: Mr. Stephen Hew
cc: Miss Audrey Wilson"

A mortgage deed is executed on 13th September, 1989 **(See pages 58 to 62)** by Mr. Hew at an original rate of 20 per cent per annum above prime rate as security for the original amount of $1,750,000.00) the land mortgaged being the 45 acre parcel at Ironshore.

On 14th September, 1989, Mr. Cobham wrote to Mr. Hew as follows:-

"Dear Stephen:

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

	<u>Limit</u>
Overdraft	*$2,000,000*
Guarantee	*<u>$1,000,000</u>*
	$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. Audrey Wilson a Survey Diagram showing the 29 lots, and a Surveyor's Declaration. Please ask Mr. Alexander to supply these as soon as possible.

(Sgd.) JEFFREY COBHAM
MANAGER"

The overdraft now stood at $1,039,050.00 **(Volume 3 page 1)**.

On 27th December, 1989 the further mortgage earlier alluded to, was executed at an original rate of interest at 20 percent above the prime rate to secure $5 Million over the 95 acres of Ironshore lands.

At page 76, **(Voulme 1),** Mr. Cobham writes on 29th March, 1990 to Mr. Brian Alexander as follows:

> *"....We believe that your office is preparing the Survey Diagram showing the 29 lots together with a Surveyor's Declaration. How soon can you send this to us? Any assistance you can give in having this concluded speedily would be appreciated.*
>
> *(Sgd.) JEFFREY COBHAM*
> *MANAGER*
> *Encl.*
> *cc: Mr. Stephen Hew*
> *cc: Miss A. Wilson"*

The overdraft had now reached $1,925,529.97 **(See Volume 2 page 83).**

At page 77 **(Volume 1)** is a letter dated 5th April, 1990 from the Secretary/Manager of the St. James Parish Council to the Government Town Planning Department:

> ***"Re: Subdivision of lands – Part of Barrett Town, St. James – Stephen Hew***
>
> ***....The application was approved at a meeting of the Development and Town Planning Committee on 1st August, 1992.***
>
> ***I attach hereto copy letter from Mr. Jeffrey Cobham, Manager, National Commercial Bank, Limited, dated 7th September, 1989, acting on behalf of Mr. Hew requesting copies of the approved plans.***
>
> ***In absence of the file which was destroyed in the fire, I send you herewith three (3) copies of the subdivision plan No. S/50a/75 for lands part of Barrett Town on behalf of Stephen Hew, and ask that you be good enough to examine them and advise whether these plans are the same plans recommended by your Department for approval by the Council in June 1981. I am also to ask that a copy of your Department's recommendation be returned with the plans.***
>
> ***Your early attention will be appreciated.***
>
> ***(Sgd.) Secretary/Manager***
> ***ST. JAMES PARISH COUNCIL***
>
> ***Attch...3***
>
> ***cc: Mr. Jeffrey Cobham"***

At page 77, ibid, Mr. Cobham on 5th April, 1990, also writes to the Senior Officer, Government Town Planning Department.

"Re: SUBDIVISION OF LANDS – PART OF BARRETT TOWN, ST. JAMES, ST. JAMES – STEPHEN HEW

We enclose an envelope containing correspondence from the Secretary/manager of the St. James Parish Council with regard to the above.

We should be grateful if you would assist us by giving this matter your urgent attention since the destruction of the records during the unfortunate fire at the Parish Council building here has resulted in delays which have been very costly to Mr. Hew.

For speed, you may send any correspondence to the undersigned via our branch in the Mutual Life Building on Oxford Road, or any other branch convenient to you.

(Sgd.) JEFFREY COBHAM
MANAGER

cc: ....
cc: Mr. Stephen Hew
cc: .... Encl"

Mr. Brian Alexander on 6th June, 1990 wrote to Mr. Cobham, that the pre-checked diagram was ready for delivery; page 81, on 12th June, 1990, Mr. Cobham replied:

"Re: LAND PART OF BARRET TOWN, ST. JAMES – STEPHEN HEW

We refer to your letter of 6th June, 1990.

We have been requested by Mr. Hew to take delivery of the pre-checked diagram and we enclose herewith our manager's cheque for $14,550 in final payment of his balance. Kindly deliver the diagram to our bearer.

(Sgd.) JEFFREY COBHAM
MANAGER
Encl.

cc: Mr. Stephen Hew"

At page 83, Mr. Cobham on 2nd July, 1990 sends an update to Mr. Hew:

> ***"Dear Stephen"***
>
> ***Re: BARRETT TOWN – LOTS 1 TO 29***
>
> ***We have sent the pre-checked diagram in respect of the above property to your attorney Miss Wilson. However, the attorney has now stated that she needs:***
>
> ***(a) a certified copy of the sub-division plan passed by the St. James Parish Council;***
>
> ***(b) a property tax receipt – presumably for the year 1990 to 1991 as we sent her the 1989-90 receipt in July, 1989.***
>
> ***We have written again to the Government Town Planning Department about (a) and we ask you to let us have the receipt for the 1990-91 taxes.***
>
> ***Enclosed for your records is a photocopy of the pre-checked diagram.***
>
> ***(Sgd.) JEFFREY COBHAM***
> ***MANAGER"***

At the core of the resolution of the issues involved, is whether or not the bank manager 'had crossed the line between on the one hand explaining an ordinary banking transaction in the ordinary course of a normal business relationship between banker and customer and on the other hand entering into a relationship in which he had a dominating influence' and therefore under a duty to see that Mr. Hew was afforded the benefit of independent advice.

The testimony of each witness in some detail will follow.

Mr. Hew testified that Mr. Cobham had told him that he was to build the houses in Barrett Town because it ***"had a plan and everything ready".*** Thereafter, on his return from Florida, USA, Mr. Cobham had told him (he can) 'go ahead and build the house them in Barrett Town and later had made it clear that (he) could get the money (provided) that he put (the houses in Barrett Town).

His reply: ***"I said wherever you tell me to put it I have to put it because I just want to get the million dollars, and he said 'go ahead ... and draw a cheque ... and just build'."***

Thereafter, he 'just start the work and just spending the money'; adding, 'start using up the million dollars'.

His understanding was that Mr. Cobham (had said) ***"that (he) could get up to three million dollars."***

Apart from having the surveyor's plan he did not have any other documents, proposals or builder's estimates.

Events later took an almost dramatic down-turn, Mr. Hew expressing himself thus:

> ***"(I) just want to borrow a million, then I got caught up, when it reached three million dollars, he said no more."***

The location did not have electricity, the approach to the property narrow and rough 'country-track like'. As to other amenities, he testified:

> ***"The water is nearby, by the main road; Barrett Town road passes through there. They just fixed it about a year now."***

Glossing over any considered evaluation of the location for building, he testified:

> ***"What we talked about is just money business ... when we started arguing is when it is finished, and he said ... when the three million dollars finish he said to me, 'Mr. Hew the bank want back the three million dollars now'."***

And testily he had said:

> ***"How the hell am I going to pay it back and you know damn well, that the place don't have a title." I said, 'you have to lend me some more money to put in the infrastructure and get the title and sell the houses and then I will pay it back' and he said, 'that' my business'."***

Up to the time of this conversation, he would describe his relationship with Mr. Cobham as 'very well, he was very nice to me'.

Mr. Cobham would call him 'Stephen' and in turn, witness would address the former as 'Mr. Cobham' or 'Jeff'.

He admitted than an entity called KIW had offered US$600,000.00 for the entire property but his application to the manager after Mr. Cobham had been turned down. To Mr. Cobham, he had never given any cash flow projection; estimates for development and building the latter had never sought. Raymond Hew, his son was not present at any negotiation for the million dollar loan, and had signed no cheque on the account. Mr. Hew had no secretary (on whom to rely), saying, 'I don't have any body else but myself and the bank manager'.

The mention of Ironshore for the purpose of building arose this way: It was Hew's suggestion but Mr. Cobham rejoined that he was lending the money to put

everything in Barrett Town. At that time i.e. 1989, Miss Audrey Wilson was his Attorney-at-Law, but was never present at any of the conversations, nor was her name mentioned. Mr. Cobham had never suggested that Mr. Hew should seek her advice.

When the overdraft had exceeded $3 Million, two of the three bedroom units were now completed, one three-quarters finished and two were 'out of the foundation – the walls gone up'. The water supply, no nearer than the main road a half mile off, was connected to the houses by a one-inch conduit. Apart from his foreman who would collect cheques from him to pay to workers, Mr. Hew himself was doing everything in order to keep expenditure manageable.

As to why the money was lent on overdraft, he said:

> ***"I don't know when the was giving to me, I trusted Mr. Cobham, and he said to me ...Because whatsoever he asked me to sign or whatever it is, I signed them, and I don't know what they were charging for overdraft or whatever, it is all I know."***

In cross-examination by Mr. Hylton Q.C. asked, if he had ever sold lots in any other area other than in Glendevon or Barrett Town prior to the discussions with Mr. Cobham. He could not, he said, recall, because he 'might have (had pieces of land here and there'. Admitting to having owned and operated heavy duty equipment he said that it was to build roads and other infrastructural work in his property in Ironshore. The D-6 and D-7 tractors he had loaned to a Mr. Dixon when they were not in use for his own work; nor did he recall a suit against him by

Ready Homes Limited' in mid 1998 (over) work performed with his tractor. To each suggestion that prior to his meeting with Mr. Cobham he had been sub-dividing and selling lands in Ironshore he replied, cautiously, 'I think so'. Various Attorneys-at-Law from time to time had acted for him before his meeting with Mr. Cobham; also one Max Sotheby, a Realtor whom he had engaged to value lands and seek purchasers. He did not remember which of the two accounts that bore his name was opened first, nor the year of first discussing the loan with Mr. Cobham. He denied that Mr. Cobham at any time had told him that the bank could not lend so large a sum of over a million dollars other than on a joint account with a much younger person. Never had he said 'in that case it would be Raymond, my son', but testifying, said:

> ***"...he never asked me anything at all, what him tell me to do is to sign and him put the wife's name in it, and then him call and say he is going to open an account for Raymond and one other account for Clifton, so I have to sign them, whatever."***

Only one account with the bank did he have; and so far as he was concerned, no overdraft. For him the position simply was,

> ***"... I only have one loan for a million dollars, and they tell me, 'sign' and I signed."***

He regarded Cobham apart from his being a bank manager, as a very good friend (who) is 'going to take care of me and lend me the million dollars'.

Clifton Hew now 48 years of age, testifying, had on the occasion of his trip with Mr. Cobham to the Barrett Town land, remarked on the absence of a title and had suggested to him that the loan should be approved for the Ironshore property instead. Mr. Cobham's rejoinder was that there would be no approval except for Barrett Town. Witness knew that his father's tractor had been used for clearing the Ironshore property. For his part, witness was against the Barrett Town (project) and had no wish to discuss it with his father. He repudiated the suggestion that Mr. Cobham had told him that it was his father who had wished to build at Barrett Town.

Mr. Cobham, presently the Managing Director of National Commercial Bank Limited has had over thirty years of service with the Bank and its predecessor, Barclays Bank, D.C & O and was introduced to Mr. Hew by Mr. Dunbar McFarlane whom he succeeded as manager in 1984. The meetings with Mr. Hew were at some periods quite frequent and at times less so. He described his dealings with Mr. Hew and found him ***"certain(ly), a very strong character, always prepared to argue, very strong opinions"***. From the course of discussions, the indications to Mr. Cobham, was that the nature of Mr. Hew's business consisted mainly in development – the sale of lots and rental of heavy equipment – ***"tractors specifically"***.

Explaining the letter ***(at Volume I page 170)*** dated May 15, 1996 from the Bank's Attorneys-at-Law making a formal demand for immediate payment of the sums named, he had this to say:

> ***"These two accounts represent interest on the accounts (referred to earlier). The practice in banking is that if ... recovery of a debt is considered to be at risk, then the bank ceases to take any profit interest which accrues to that debt and instead such interest is placed on what is called an interest on classified account.***
>
> ***... an account is classified when it becomes non-performing"***

The account showing a balance of $11,622,089.19 reflects the interest account that relates to account number 431857427. He explained the procedure of the addition of names to become a joint account by use of a 'Mandate 3' (Man 3) form. The mandate 3 form joining Raymond to the 'Sea Castle View' account was not located – but Mr. Cobham vouches for its execution at which he was present; Raymond Hew, himself had not testified. The letter to Mr. Hew dated 14th September, 1989, says Mr. Cobham, was the culmination of discussions, over a duration of months, 'rather weeks'. Mr. Hew's request originally was for an overdraft facility of $3 Million to be used primarily for the development of Barrett Town property and also for maintenance expenses on heavy-duty equipment, ***'and as well, some work on the lots of Ironshore".*** The stipulation at paragraph 3 -

> ***"Facilities to be joint in the name of your son and yourself"***

was so placed as Mr. Hew was then about 69 or 70 years old and in their discussion, witness had mentioned that :

> ***"the bank would prefer to have one of his sons as joint account holder with him".***

Asked how did Mr. Hew respond, witness said:

> ***"At first extremely negative. Well, I insisted and he then with some ... there was some deliberation as to which of the sons, and the decision was Raymond."***

It appears that the witness stopped just short of saying ***'reluctance'***. Exhibited were bank statements, some marked 'hold', Mr. Hew so requesting as he was uncomfortable that when the statements were mailed or sent to his address they were available to others.

His examination of the accounts gave a balance owing calculated up to 31st March, 2000 as $137,572,512.65 with interest continuing to accrue at the rate of $120,567.68 per day, calculated at a current rate of 32 percent per annum. Where a reduction of interest rate is indicated, it reflects a lending rate by the bank based on market forces - falling interest rates in the market, generally.

In the bank a "G-18" card **(Exhibit 5)**, records comments on the account of a customer considered a major borrower:

> ***"... generally, the larger the borrowing"*** says Mr. Cobham ***"the more likely it is that a history of events would be kept on file rather than a G-18".***

If there is the need to send a reminder to a customer that his limit has been overdrawn, a daily position sheet would be mailed to the customer and a notation accordingly placed on the G-18.

Entries on the G-18 would be made and initialled by persons at management level and the document passed around for the information of others who would in turn initial same.

Adverted to paragraphs 11 and 13 of Mr. Hew's statement of claim, he denied ever having given advice to Mr. Hew on commercial transactions nor was he aware of such advice given by any other manager to Mr. Hew. Disclaiming any expertise in land development, he insisted that the decision to build at Barrett Town ***"...was the customer's request; this was his proposal."***

Untrue was the comment in paragraph 10 of the statement of claim that Hew approached him to borrow $1 Million.

"The discussion always centered around a figure of $3 Million" says Mr. Cobham; not to borrow $1 Million; and he had not imposed as a condition of the loan that the development should be at Barrett Town. Asked if Hew had indicated a preference to build on the Ironshore lots? He answered:

> ***"No, he did not, although it was contemplated that in later years he felt that this might happen"***

The answer repeated less tentatively, reads:

> ***No, he did not, but he indicated that in later years there was a possibility of building at Ironshore.***

The visit to Barrett Town along with Clifton Hew was made on the initiative of Mr. Cobham for this reason:

> ***'Because I wanted, despite Mr. Hew Senior's strong objection, other members of his family particularly his sons to be aware of the project and what was planned.*** **(underlinings mine)**

Financing by overdraft, he said, was -

> ***"Mainly of Mr. Hew's – particularly at Mr. Hew's request – Stephen Hew's request. He felt that he was businessman and that he was also in the business of renting tractors and so on, and wanted – in his words – flexibility, not to be put in a straight jacket".***
> .....
>
> ***"There was some discussion as well of the benefits of going the loan route. It was always contemplated that there would be - - from the sale of other properties, other lots, Ironshore and other properties as well beside Ironshore, and from incomings from the rental of equipment, that the overdrawn balance would be kept in check, in reasonable check, whereas, with a loan which would tend to be fully drawn, or drawn in large blocks, he would have interest on the total drawings from the very first day".***

Q: Did you ever advise Mr. Hew to have an overdraft instead of a fixed loan?

A: No I didn't advise him but certainly in our discussions he strongly requested this.

No banking regulation was there to forbid lending by overdraft for building development. The practice he said:

> ***"... varies according to a number of criteria. In a case where an account is specifically and only limited to a particular project, then it is not likely that a fluctuating overdraft facility would be agreed."***

The explanation for no 'feasibility study or formal projection proposal' required by the Bank was:

> "There are a number of reasons. Firstly, the amount involved – which was $2 Million overdraft and $1 Million guarantees – the cost of having such a proposal formally done would be high in relationship to the borrowing requested.
>
> Two - it would depend on the amount of equity that the customer was bringing to the project. In this case, apart from the law itself, Mr. Stephen Hew was bringing to the project his equipment – tractors and his ability to build infrastructures."

Q: Any other reason?

A: Overall, the security was, apart from the project itself considered good security... So the risk to the bank was somewhat lessened, and the feasibility studies and so on are for the protection of the bank and the judgment as to whether they are absolutely necessary at any given point is the bank's.

Mr. Cobham, under cross-examination admitted that from the time of their first meeting, Mr. Hew had continued to refer to his dream of borrowing One Million Pounds, not regarded as childish but amusing: ***'in a jesting mode'***, ***'lighthearted'***.

There had been no reference by Mr. Hew to any particular use to which so large a borrowing should be put. Mr. Hew was strong willed, and not naïve; nor was the form of address "Dear Stephen" in letters, ante, meant to be patronising.

Up to the end of 1984, agreed Mr. Cobham, Mr. Hew had had sufficient security to cover borrowing of $1 Million, if required, from the Bank.

The security limit set at $310,000 did not reflect a valuation of property, for none was done.

The acquisition of the 45 acre parcel in Ironshore represented very valuable security. On the basis of a combined 140 acres at Ironshore, the Bank would confidently lend $7 Million to a project considered viable.

Up to 1989, Mr. Hew's references to his life's dream to borrow one million - was never in earnest (as) far as Mr. Cobham was concerned, although later it was agreed that the Bank would lend "...facilities of $3 Million - $2 million overdraft; $1 Million guarantee".

Later in cross-examination, the following appears:-

Q: When he spoke – I am talking particularly about this later time than the earlier time when he spoke ...about borrowing the million pounds, did you say to him, 'you have to tell me what for'?

A: I certainly did say that borrowing has to be for a purpose.

Q: And you recall him saying "any purpose? I am going to keep it and give it back" – anything like that?

A: Well, in a jesting mode. There was a suggestion: Why not borrow it, put it in a deposit for a week and then you repay it? And that was obviously in a ...It was a light-hearted discussion, inter-play, not a serious banking matter by any means.

Mr. Hew, in Mr. Cobham's view, did have a considered plan of how to spend the money, explained thus:

> ***"...to explain the entire nature of the $3 Million facility. The plan was to sell lots primarily at Ironshore, while 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".***

The purpose for his-securing Mr. Hew's consent for Miss Wilson to send him the duplicate certificates of title – and for so requesting Miss Wilson, was to retain them relating as they did to the project on which Mr. Hew had embarked; and (ultimately) the possession was for security "if necessary" he admitted.

The reason for the Bank to have possession of the twenty-nine certificates of title was:

> ***"Because obviously if the bank is funding a particular project it prefers to have control of the security relating to that project. It might at a later time make a decision, but certainly that is my position".***

It was approximately two weeks later that the joint Sea Castle View account was opened. Further on:

> Q: Did you ever advise Mr. Hew to take independent advice before he committed himself to such a large loan?
>
> A: I certainly encouraged him to discuss the matter fully with his sons, and I think , as I said before, I felt that it would be to his advantage to have them also involved.

As to any knowledge he had of Mr. Hew's involvement in real estate development, specifically in laying out infrastructure for building houses for sale, he had this to say:

> ***"I certainly was of the opinion, whether on his account or on account of other parties that he was involved in precisely this -- ...that he did have knowledge and experience of infrastructure work".***

In relation to the time of the conversation about the $3 Million, was he aware of any development for which Hew had been responsible?; and to this he replied:

> ***"I knew he was involved with and responsible for work done. Now the details I was not aware of. I was underthe impression that he was responsible for work being done at that time but the details I don't know but I was under the impression that these were maybe gutters, road work, paving – that sort of thing – the preparation of site using tractors".***

At this stage he conceded that he would not call (Mr. Hew) an experienced developer. At that time he would be mindful that before Barrett Town (project) could earn any revenue, a number of things would have had to happen. His was a categorical 'no' to the suggestion that one such would be the obtaining of titles. As to how feasible this was, he suggested:

> ***"Certainly deposits and perhaps in some instances even completion of payment from prospective purchasers"!!***

Infrastructure he said, would not necessarily have to be (laid) for development to take place. He would not accept that, deposits (on purchase) apart, no one would pay down the complete price of a house, infrastructure not being in place. As to his knowledge of how much it would cost to provide infrastructure at Barrett Town he replied: ***"Yes, we certainly did discuss this and we had some figures".***

Q: What figures were discussed?

A: Well these varied. There was some discussion as to the need, for instance, to do remedial work on the approach way to the site itself. And certainly I said to Mr. Hew that this was not his responsibility, but from memory the estimates depending on that, ranged from about $2 Million to about – well, in total it could have been close to $4 Million, if you took the approach way.

Q: Were estimates provided?

A: Estimates were provided.

Q: Written? Were estimates in writing provided to you?

A: By Mr. Hew or anyone?

Q: In relation to Barrett Town, by Mr. Hew or on his behalf?

A: By Mr. Hew. We sat – it was not a sort of binding and formal presentation but certainly we sat and went through the figures.

Q: But no written estimates from a surveyor or contractor, no written estimates of costs?

A: No.

.....

Q: Did you give Mr. Hew advice upon any transactions?

A: Banking transactions, yes.

Q: Would it be fair to say that by 1989 Mr. Hew had looked to you as his mentor on financial matters?

A: 'Mentor' is too strong a word to use. He certainly sought my advice in financial matters, banking matters.

Q: Such as what?

A: Such as an 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 reasons, titles did not become available, such deposits would refunded. So that a prospective purchaser would have the certainty either of getting title or a refund of his money. That was the reason for the arrangement.

To say that he had encouraged Mr. Hew to believe that the Barrett Town development would be a prudent and viable project would not be a fair comment, he avers. Without denying that he advised Mr. Hew that the project was capable of earning revenue while it was being developed, before it had had title, he said:

"I certainly discussed with him ways of ensuring that."

As to whether he believed that Mr. Hew relied on advice he gave on banking and financial affairs he said ***"yes, I think he did"***. Even while advising Mr. Hew to seek advice from his sons Clifton and Raymond, he had no knowledge of any experience had by either in real estate development.

In answer to the question ***"Did they have experience"?***

A: To my knowledge, no.

More to the point, he said: ***"I am not aware of them having specific building experience".***

He had identified an occasion of his meeting Raymond at the Bank when the 'Man 3' form was signed by Raymond. When asked if after the loan was approved if he had ever visited Raymond, here is another example of a tentative answer:

> A: Well, I have – Mr. Raymond Hew is a customer in his own right at the bank and from time to time we did meet, 99.9 per cent on his own matter but apart from general comments – he was a substantial customer, so we did meet and there was some general comment on the Barrett Town, Ironshore schemes.

Raymond's involvement in the discussions between the witness and Mr. Hew was, he said, ***"not to a great extent"*** the reason – he proferred, ***"Mr. Hew Snr. discouraged discussions unless he was present"***.

Of the extent of discussions between father and son, he did not know what consultation took place, or if at all. Positively affirming that Raymond Hew had given consent for $3 Million advance on the account to which the former was a signatory, he was next asked if Raymond had ever said that he agreed with the loan.

His answer: "***Not in those words, no".*** He was not able to recall if Raymond had signed any written authority, or approved of the loan. Then follows:

> Q: In words, if any – did Mr. Raymond Hew ever agree verbally that he approved of the loan?
>
> A: I am unable to recall the words precisely.

As to the gist of the context signifying that approval, the answer was:

> ***"The context, Your Honour, was the discussions of the project, the means of funding the project".***

To the suggestion that Raymond was simply not involved in the Barrett Town (project) or the related account once opened Mr. Cobham could only exclaim ***"How does one answer that. How does one answer that".!!***

When Mr. Cobham on 13th July, 1989 wrote to Mr. Hew **(Vol. 1 page 55),** he had learnt from Miss Wilson that she was unable to proceed with the preparation of individual titles until she should have:

1) Supporting declarations from persons as to the circumstances of purchase and that there is no dispute as to title;

2) A certified copy of the subdivision plan from the Parish Council as a photocopy is not acceptable.

The survey diagram from Mr. Alexander, it was noted, was ***',still to come'.***

By 7th September, 1989 it became a matter of urgency... **(Vol. 1 page 57)** Notwithstanding what his earlier letter **(Vol. 1 page 55)** – had disclosed, the submission of a photocopy would, he thought, have made the process ***'a fairly routine matter'***. Although on 13th September, 1989, Mr. Hew had been asked to sign an instrument of mortgage relating to an original amount of $1,750,000 when on 14th September, 1989 the account was overdrawn by $1 Million, there was no document before the latter date which records any approval for that facility or any purpose for which it was granted.

As to evidence of pre-sale of lots of approximately $2 Million, none such was received even up to when the $3 Million facility was exhausted. Averring that 'expenditure figure/cash flow projections to substantiate the $2 Million requirement' **(Vol. 1 page 66)** had been received, Mr. Cobham admitted that they were not on file. What figures then did he receive?; his answer:

> ***"Based on the continuing discussions between Stephen Hew and myself, we were kept abreast of the expenditure on the project and what is needed, and the income from sale of lots.***
>
> ***"...in respect of written figures the answer is 'no'".***

What such figures he received, he would not be able to recall "in dollars and cents" because:

> ***'...this was an ongoing process during which Stephen Hew would say, 'I am doing this next week – a, b, c; I would be doing this stage next week and I would need funds for that purpose'.***

Throughout the history of Mr. Hew's borrowing, certainly up to the extent of $3 Million, the Bank, Mr. Cobham admitted, had received ample security. When in January, 1990 another mortgage was registered, the Bank, he agreed, ***'was adequately covered to the extent that loss was unlikely'***. By charging interest at 20% per annum above prime rate, the bank, he conceded, ***'did stand to make a profit from its business both ways'***, that is, either from the *'customer'* or from the sale of securities. The only guidance he offered Mr. Hew to seek external advice

was for the latter ***'to involve his sons'***. He had not considered that he owed a duty to Mr. Hew, not to facilitate so heavy a borrowing on which (the Bank) stood to gain, without first ensuring that the customer first take skilled and independent advice on the viability of the project. He volunteered that he would regard such a duty to a housewife, ***"...not in the case of a seasoned businessman"***, such as Mr. Hew who was certainly not 'an elderly man whose rather foolish childhood dream was being realized by this project'.

When he had written on 30th November, 1989, **(Exhibit 6),** it was in response to an advertisement. The letter reads:

> *"The Investors*
> *P.O. Box 585*
> *Kingston*
>
> *Dears Sirs,*
>
> *We refer to your advertisement which appeared in the Sunday Gleaner of 26th November, 1989.*
>
> *Our customer, Mr. Stephen Hew is interested in your proposition and has asked us to contact you on his behalf.*
>
> *There are 29 lots in Barrett Town, St. James, overlooking the site of the Urban Development Corporation Sea Castle Development. Three house are completed and four others are in the course of construction. Enclosed are photographs which will give you some idea of the site as it was two months ago; one of them shows the Sea Castle site below. As you are no doubt aware, the area is adjacent to that slated for development by Mr. John Rollins, the U.S. investor.*
>
> *Also enclosed is a basic plan of the houses being constructed. Mr. Stephen Hew may be contacted at 952-5329 or through ourselves.*
>
> *Yours faithfully,*

JEFFREY COBHAM
MANAGER

Encls.

cc: Mr. Stephen Hew"

It was not intended to convey that only lots in Barrett Town were being marketed. The reasons for the absence of reference to Ironshore would now be difficult to say without recalling or having (to hand) the advertisement. Had there been sale of any of the lands, the Bank would have been so advised, as they had all the titles; but up to 1992 the accounts reflect no revenue earned from any sale.

Mr. Dunbar McFarlane, presently Managing Director, NCB Group and Chairman of the National Commercial Bank Limited, testifying, would recall Mr. Hew as having been engaged in land development; and inter alia, had made regular applications to the Bank to that end .....to assist in various endeavours; in relation to his real estate transactions particularly, 'was a prudent man...not easily led or persuaded'.

On the G-18 **(Exhibit 5)** he acknowledges his handwriting and vouches for the accuracy of entries thereon. This, it should be observed, only records Mr. Hew's hope to use KIW's Expand-a-Home concept ***"on his Barrett Town sub-division, which comprises 29 lots".***

But equally significant, that entry addresses an obstacle:

> ***"Title is at common law, meaning that there could be problems especially since lawyer Lord who handled the matter years ago has migrated".***

The assurance offered by Mr. McFarlane that Mr. Hew had had experience in the development of real estate was:-

> ***"that in the discussions surrounding the latter's application for financing', he represented his plans to put roads in the property as a way of facilitating the subdivision; his plan to deal with infrastructure such as roads to facilitate the subdivision".***

His assertion that there was such a development is perhaps no more than mere conjecture, to wit: ***"to the extent that we got proceeds of sale from time to time".***

CLOSING SUBMISSIONS ON BEHALF OF THE BANK AND MR. COBHAM

Mr. Hylton Q.C in his opening submissions had identified eight issues raised on the pleadings and would urge the Court to resolve them all in favour of the Bank and Mr. Cobham. The first three issues were straightforward and required only formal proof thereof from the Bank. Uncontradicted, those issues should be resolved in the Bank's favour.

Of signal importance is the G-18 Card **(Exhibit 5)** a document prepared at a time when there was no dispute between the parties and therefore no reason for logging false entries. In the unreported decision of the **Court of Appeal in**

Zachariah Sharief v. National Commercial Bank Jamaica Limited

(SCCA 65/94) it was held that a copy of a G-18 Card was admissible in evidence as a ***"banker's book"***, pursuant to **Section 33 of the Evidence Act**. The submission is unassailable.

Raymond Hew's liability was a straightforward issue. He had not given evidence; neither his father nor his brother had offered explanation for his absence.

The case of **Midland Bank Limited v Shephard reported at [1988] 3 ALL ER. 17** underscores the principle that all joint account holders are liable to the bank for all sums outstanding. There the English Court of Appeal rejected a wife's contention that her signature to a joint account had been obtained by the undue influence of her husband acting as agent for the bank.

Uncontradicted, he submitted, was the evidence that Raymond Hew had been a joint holder on account numbered 431-857-464. See the Signature Card at **(Exhibit 1 page 53)**. Moreover the Affidavit of documents made by Stephen Hew and (on behalf of Raymond Hew) contained all the bank statements clearly naming Raymond Hew as one of the account holders **(See Exhibit 2 and 3)**.

Reliance was placed on the Bank's letter of September 14, 1989 **(Exhibit 1 page 66)** indicating clearly a condition of lending, namely, that the facility should be in the name of Mr. Hew and one of his sons. Stephen Hew had confirmed that Raymond was the designated one. This was not challenged by cross-examination.

The contents of the secondary evidence of the Bank's **"Man 3"** form adduced, was consistent with all the other written evidence. By its terms, both

Raymond Hew and Stephen Hew were liable for the amounts outstanding to the Bank on that account.

As to the issue of how much remains owing there was little contest.

Whether Mr. McFarlane and/or Mr. Cobham acted as Mr. Hew's 'commercial adviser'.

Although the pleadings allege that each Manager had acted as Mr. Hew's commercial adviser, no such evidence was adduced in respect of Mr. McFarlane. There was no correspondence from either Mr. Cobham or Mr. Hew to support this nor did any independent witness corroborate Mr. Hew's claim; documentary evidence including his own documents, contradicted him. Asked in cross-examination **(See page 27 of the transcript)**. 'When did you have the factory?' he replied "what factory?"- (in examination-in-chief he had mentioned that he had taken over a factory). Other examples to show him untruthful were:

(1) his claiming not to remember whether he was involved in the sub-division or development of other lands;
(2) his answers as regard his heavy duty equipment; and
(3) he knew not of the names Clifton Hewand Annie Hew on his account; Simply, he had signed whatever Mr. Cobham had given him to sign. That account had in fact, been opened before Mr. Cobham became manager .

A very important issue urged Mr. Hylton Q.C. was the decision to build on Barrett Town lands. Mr. Hew had said that he never considered so doing prior to the

discussion in 1989 with Mr. Cobham. The entry by Mr. McFarlane on page 2 of the G-18 log **(Exhibit 5)** shows that Mr. Hew had had such a discussion with him. His self-betrayal was his denial when confronted with the letter dated September 14, 1989 – **(Exhibit 1 page 66),** of ever having seen it before. This letter had been produced in his affidavit of documents **(See item 10 at page 23 of the Judge's Bundle).** In that Affidavit, he had acknowledge a copy in his possession and had produced it during discovery.

Also cited were the reasons he offered as conducing to the delay in the fulfillment of a title for the Barrett Town land; he denied that the delay was attributable to failure to comply with terms for the Parish Council's approval. With an array of no less than six Attorneys (successively), it was inconceivable, that Mr. Hew would have turned to Mr. Cobham for advice, commercial, or in real estate development.

The Sixth Issue: Why Barrett Town was chosen as the site for Mr. Hew's development and who chose it?

Mr. Hew's claim that the decision was Mr. Cobham's and that on it he had relied to his detriment rests, solely on his own oral evidence. No contemporary document produced confirms this. From the Bank or from Mr. Cobham is no letter deciding on, confirming, or so recommending Barrett Town; not even the letter **(Exhibit 1 page 66)** setting out the terms of the loan; it does not mention Barrett Town and imposes no condition for development on a particular site.

No Attorney acting for Mr. Hew had ever written making such an assertion; the first such arose in the pleadings, after the action had been filed. There would be no advantage either to Mr. Cobham or to the Bank giving such 'plainly bad advice'; Mr. Cobham's career and the Bank's chances of recovery of the debt would most assuredly be at risk.

Mr. Cobham's reason for arranging a meeting with Clifton Hew was for another member of Mr. Stephen Hew's family to know what the latter was doing. If on Clifton's version, it was to inform him of the stipulation as to site as he avers, why should it be necessary, when Stephen Hew, on his evidence, had previously been made to accept this.

The G-18 card **(Exhibit 5)** would give the lie to this; the entry on 24th March, 1983, was more than five years before, Mr. Cobham would for the first time, have raised this matter.

The Seventh Issue – Why overdraft facilities were granted and whether the Bank acted improperly in granting them?

This turns only on Mr. Hew's oral evidence unsupported by documentary evidence. Mr. Hew was fully aware of the implications of an overdraft account, its benefits and disadvantages, having had hitherto, extensive experience of such for many years up to 1989.

The Court should find that such facilities were at Mr. Hew's request; the Bank had not acted improperly in granting same.

Mr. Hew's demeanour in the witness box supported Mr. Cobham's description of a ***"very strong character, always prepared to argue, [with] very strong opinions"***.

The Eight Issue: What were the nature and extent of the fiduciary duties of care owed to Mr. Hew by the Bank; and whether the Bank and Mr. Cobham had breached those duties?

Citing the decision of the **English Court of Appeal** in **Lloyd's Bank Limited v Bundy [1974] 3 ALL ER 757,** Mr. Hylton Q.C. alluded to the ***"very unusual circumstances"*** (per Cairns LJ. concurring with the judgment of Sir Eric Sachs) of that case and sought to distinguish the present one. The representation in **Bundy's** case which led to reliance on advice given by the assistant bank manager could not be equated with Mr. Hew's situation. Mr. Hew's testimony did not disclose that the Bank gave financial or other advice on this venture, nor was any supposed knowledge of the viability of the development to be imputed to the Bank (rather than to Mr. Hew).

Unlike **'Bundy'** this case reflects no unconscionable arrangement. The absence of a benefit accruing to the person seeking relief, was an essential factor conducing to a manifest disadvantage in **'Bundy'**.

The transaction here contemplated a benefit to the Bank, (interest on loans) and a corresponding one to Mr. Hew, namely, the facility for the development. Hence, no manifest disadvantage is disclosed. Mr. Hew does not claim to have been

misled into thinking that the advice he received was good advice!! His decision to build at Barrett Town was his way to achieve his ***"childhood dream"***.

No duties other than the usual ones of a banker and customer arose, and of these there was no breach. There was no special relationship to support a finding of undue influence exercised.

In Suit N/049, the Plaintiff should have a judgment in the sum of $137,522,513.65 with interest at a rate of $120,567.68 (per day) from 1st April, 2000 to the date of judgment with costs to be taxed or agreed.

In Suit H/102 there should be judgment for the Defendant with costs (likewise).

SUBMISSIONS ON BEHALF OF MR. HEW

Two sources of authority, submitted Lord Gifford Q.C, apply to this case, the law of negligence and the law relating to the fiduciary case which may arise between a bank and its customer.

The essence of the case of negligence pleaded is:

1) Mr. Cobham on behalf of the Bank gave advice to how, namely that he should apply the loan facility which he was anxious to have, to the development of his land at Barret Town;

2) The Bank owed a duty to Mr. Hew to advice him with reasonable skill and care;

3) Mr. Hew relied on that advice, and expended over $3 Million in the development aforesaid;

4) That advice was negligent: it was foreseeable that the funds would be fully utilised before any revenue could be earned. Moreover, the

Bank gave the advice without obtaining any estimates, development plans or other evidence of viability (of the project);

5) Mr. Hew suffered loss and damage by reason of his reliance on the advice.

The essence of Mr. Hew's case of fiduciary duty of care is:

1) He demonstrated to the Bank that he was totally reliant upon its manager for guidance as to the means of realising his childhood dream of honouring *'a million pounds'*. (and a dominating influence arose);

2) Great benefit would accrue to the Bank from substantial interest to be earned which it could be sure to recoup, as it held ample security;

3) Because of these facts the Bank was under a fiduciary duty of care, in particular not to enter into a *'million pound'* loan transaction with

Mr. Hew without insuring, at least, that the latter had skilled independent advice;

4) Where the fiduciary duty of care exists, the burden of proof is on the person who owes that duty to show that he has discharged it;

5) The Bank acted unconscionable in that without estimates development plans, et cetera, and without ensuring that that Mr. Hew had had the assistance of any skilled independent advice, overdraft facilities from which the Bank would derive great benefit were granted;

6) That since the Bank cannot show that it discharged such duty of care, it could not retain any benefit from the transaction.

Acknowledged were the important differences in spite of overlap in the application of those two sources of authority.

The situation was comparable to that in **Woods v. Martins Bank [1959] 1 Q.B. 55** where **Salmon J.** mindful that ***'the limits of a banker's business could not be laid***

down as a matter of law' concluded that on the facts of that case ***"they owed a duty to the plaintiff to advise him with reasonable care and skill"***..

Great store was laid by the judgment of **Sir Eric Sachs** in the **Bundy Case**, supra, particularly at page 767e:

> ***"Reliance on advice can in many circumstances be said to impart that type of confidence which only results in a common-law duty to take care – a duty which may con-exist with but is not coterminous with that of fiduciary care".***

Also at 767g, the judgment reads:

> ***"...the relevant relationship can arise between banker and customer... The onus of proof lies on the customer who alleges that in any individual case the line has been crossed and the relationship has arisen***

Concomitants of that duty are:

> ***"...to ensure that the person liable to be influenced has formed 'an independent and informed judgment' ...or...after full, free and informed thought*** **768d to e" ibid.**

and the consequences, at 771e :

> ***"Once the relevant duty has been established, it is contrary to public policy that the benefit of the transaction be retained by the person under the duty unless he positively shows that the duty of fiduciary care has been fulfilled."***

It would be shown that the Bank had crossed the line into the area of confidentiality and the facts had to be meticulously examined.

The onus was to establish the wrongfulness of the transaction as explained by Lord Scarman in the House of Lords in **National Westminster Bank plc. v. Morgan [1985] 1 AC 686 [1985] 1 ALL ER. 821.** The views of Lord Denning MR. which although not part of the ratio decidendi of **Bundy's** case addresses an important perspective: - Lloyd's Bank v Bundy 1074 3 ALL ER 757 at 765e:

> ***"English law gives relief of one who without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or his ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."***

On the facts:

(1) Mr. Hew had spoken repeatedly Mr. McFarlane and to Mr. Cobham of his 'childhood dream' to borrow ***'a million pounds'*** but

(2) had not formed any concept of a purpose for which he wanted same;

(3) The Bank, and Mr. Cobham especially, must have regarded Mr. Hew as a naïve and childish man who was looking for guidance as to how to utilize so immense a borrowing facility.

They had known that Mr. Hew had had some experience in buying and selling property, but knew that he was not an experienced developer.

(4) Mr. Hew was told that if he wanted to borrow money for developing land, to be applied to the Barrett Town land;

(5) The advice given, the overdraft of $2 Million was approved at some time before 5th June, 1989, but no document relating to it was made until September, 1989;

(6) Mr. Hew did not have a 'considered plan' for the utilization of the loan;

(7) The loan was made in three stages. At no stage was any attempt made by the Bank to assess whether the project for which the funds were used was a viable one. Mr. Hew was encouraged to borrow moneys exceeding $3 Million on a project which had no prospect of earning revenue in the foreseeable future. No attempt was made to enforce any of the conditions governing the terms and conditions laid down in Mr. Cobham's letter dated 14th September, 1989 to Mr. Hew. Borrowing remained unchecked during the second half of September and the month of October, 1989, even though there were known difficulties in obtaining title to Barrett Town. The enforcement of those conditions laid down would have been a sensible way of verifying that Mr. Hew had a viable project. The inference to be drawn from the failure to enforce is that the Bank did not care if

Mr. Hew squandered the loan facility on Barrett Town, since they had a prime security in the Ironshore land;

(8) At no stage did the Bank suggest to Mr. Hew that he should take independent advice from a qualified person;

(9) The Bank played a prominent role in actively seeking to obtain title to Barrett Town, by carrying out tasks which should normally have been performed by the customer and by his attorney. It even tried to canvas for purchasers.

APPLICATION OF THE FACTS TO THE LAW

1) On the issue of negligence, the Bank gave advice, thus assuming the common duty of care to exercise reasonable skill and care.

2) That advice was negligent, and that the duty was breached. (inasmuch as)

(a) The project recommended by the Bank was obviously foolhardy and became even moreso as time progressed and further drawings were Permitted; and

(b) The Bank had taken no steps to inquire into or verify the soundness of the project and had not even sought to verify information required in terms of the letter of 14th September, 1989.

3) Mr. Hew suffered loss and damage, in interest charges which would not have been incurred if the advice had not been given.

On the issue of breach of fiduciary duty:

1. The circumstances relied on to show that this was a case of a fiduciary relationship in the sense defined in **Bundy's Case** are:

(a) Mr. Hew's childish and off-repeated dream of borrowing a million pounds;
(b) His ignorance as to how to apply a borrowing of this size;
(c) His age and lack of experience in developing land;
(d) His vulnerability; even his sons were not supporting this project;
(e) His dependency on Mr. Cobham, whom he viewed with great respect;
(f) His ownership of lands which offered massive security for the loan; the Bank 'could not lose', and stood to make a large profit from the loan.

2. The Bank acted unconscionably in that:

(a) it took advantage of its relationship (in the circumstances of the loan);
(b) failed to obtain any proof of the viability of the project;
(c) it guided and advised Mr. Hew, and/or allowed him to proceed without ensuring that he (was afforded the benefit of independent advice)

Mr. Cobham's acknowledgement of such a duty to a housewife but not to a 'seasoned businessman' ignores the consideration that Mr. Hew might have been more vulnerable and dependent than many a housewife might be.

CONSEQUENCES AND DAMAGES

Should Mr. Hew succeed either in negligence or breach of fiduciary duty, or on both, the consequence will be:

1) The Bank's claim against Stephen Hew and Raymond Hew must fail. The accumulated interest is a benefit not to be derived from a transaction in breach of a fiduciary duty (or, *a fortiori,* if negligence is proved). Alternatively the interest paid and payable by Mr. Hew is the damage flowing from the breach of duty; either way the result is the same.

2) Mr. Hew is entitled to claim what he has paid for interest to date for the same reasons. The total sum paid less the amount for cheques drawn represent interest and bank charges - a benefit which the Bank should not retain.

3) He would also be entitled to interest on the amounts paid to the Bank by way of interest.

If Mr. Cobham had in fact given negligent advice he would be personally liable and the Bank vicariously, for Mr. Cobham's acts in the course of employment.

In relation to the breach of fiduciary duty, it was conceded, on the authorities, that the breach would be the Bank's and so Mr. Cobham would not be personally liable.

The Bank's claim, if successful, should be against Stephen Hew only. There was no evidence that Raymond Hew gave any authority for the overdrafts, which were granted. No mandate form has been disclosed; on the balance of probabilities none

was signed. Moreover, the letter of 14th September, 1989 was addressed to Stephen Hew alone.

The 'conclusive evidence clause' pleaded in paragraph 21 of the amended defence to action H-102, would only apply to bank statements that were despatched to Mr. Stephen Hew. On the evidence none had been sent after June, 1991.

The orders sought to action N-049 was for the claim to be dismissed with costs; no order on the counter-claim.

In Suit H-102 the Plaintiff seeks judgment against the Defendants jointly and severally in the sum of $18,882,005.26 with costs.

Commenting on the authorities cited by Lord Gifford Q.C., Mr. Hylton Q.C., observed that the common thread running through them, and what the Court looks at, is whether or not the customer received a benefit from the transaction in each case. Where a benefit to the customer was not disclosed and the transaction enured to his manifest disadvantage the Court would rule in each instance against the Bank. Where a benefit accrued to the customer a ruling adverse to him would follow. The oft-repeated reference by Lord Gifford Q.C. to the Bank as 'throwing money at (Mr. Hew)" was not, by any authority cited, supportive of a disadvantage suffered; in fine in the absence of some recognised disability to be imputed to him, Mr. Hew must abide responsibility for his own (improvident) acts.

On the issue of negligence Mr. Garcia, in tandem, commenting on the case of **Woods v Martin's Bank Limited**, supra, would pray in aid a significant finding of fact there, namely, that the Bank in that case had held itself out as an institution which offered financial advice. In the instant case, there was no such 'holding out' and consequently no reliance on advice as such. Compared with the situation in 'Morgan' supra, the benefit to the customer Hew was considerably higher, namely, an overdraft facility for the implementation of the planned development.

FINDINGS

First I must state that I am of the view that Mr. Hew's cause of action in negligence is inappropriate as the evidence unfolding, shows. I am unable to discover any mandate express or implied to the Bank to conduct a feasibility study to enable Mr. Hew to make an informed decision consequent on receiving such report.

As the submissions on each side indicate, the crucial issue is whether or not from the course of events there arose a duty of fiduciary care toward Mr. Hew on the part of the Bank and arising therefrom, a breach of that duty, conducing to manifest disadvantage as a result of undue influence exercised, serious enough to require equitable relief.

There are cases in which the determination of issues rest to a great extent on the impressions gleaned from the nuances of the demeanour of witnesses. In the present case the inferences to be drawn from the *ipssima verba* of the witnesses, together with the events and circumstances which are revealed in the documents exhibited, when carefully analysed, present a composite picture and the conclusions thereon which are warrantable.

To that end, the testimony of Mr. Hew and Mr. Cobham each, has been extracted at length, the latter moreso, as determination will ultimately be made as to whether or not the Bank may have crossed the line which divides a normal business relationship from one in which undue influence is disclosed, in breach of the accepted duty of care where a conflict of interests has arisen.

In many of the cases where the doctrine of undue influence is considered, the examination of evidence revolves around the execution of a single deed, a mortgage, a guarantee, as examples, and the consequences arising. The present case is not about the execution of a particular deed but about a protracted course of transactions in which access to a borrowing facility was permitted - a benefit accruing in the first stages but becoming less of a blessing when the entrenched terms of the facility documented, became unexpected pot-holes along a smoothly surfaced roadway.

In the House of Lords decision in **National Westminster Bank plc. v Morgan (1985 ALL ER 821 Lord Scarman** described the nature of the relationship under consideration and sounding a caution against the "use ... as is all too frequent in

this branch of Law, of words and phrases such as 'confidence', 'confidentiality' and 'fiduciary duty'" at page 827 pointed out:-

> ***"There are plenty of confidential relationships which do not give rise to the presumption of undue influence (a notable example is that of husband and wife: See Bank of Montreal v Stuart (1911) A.C. 120; and there are plenty of non-confidential relationships in which one person relies on the advice of another, e.g. many contract for the sale of goods."***

Referring to the case of **Allcard v. Skinner (887 36 Ch. D. 145)** where the transactions in question where gifts, Lord Scarman explains that the observations by Lindley LJ. At 182 – 183, ibid, were not to be understood as excluding the applicability to other transactions in which disadvantage or sacrifice is accepted by the party influenced, and at page 827 to 828 continued:-

> ***"The principle justifying the Court in setting aside a transaction for undue influence can now be seen to have been established by Lindley LJ. In Allcard v Skinner. It is not a 'vague public policy' but specifically the victimisation of one party by the other."***

Alluding to the circumstances which give rise to the presumption as well as the critical importance of the nature of the transaction, he said at page 828:-

> ***"Subsequent authority supports the view of the Law as expressed by Lindley LJ. In Allcard v Skinner. The need to show that the transaction is wrongful in the sense explained by Lindley LJ. Before the Court will set aside a transaction whether relying on evidence or the presumption of the exercise of undue influence has been asserted in two Privy Council cases."***

In the second of the cited cases, **Poosathurai v Kannappa Chettiar** (1919) L.R. 47 Ind. App.1, Lord Shaw had said at page 3:-

> ***"It must be established that the person in a position of domination has used that position to obtain an unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid. Where the relation of influence, as above set forth, has been established, and the second thing is also made clear, namely, that the bargain is with the influencer, and in itself unconscionable, then the person in a position to use his dominating power, has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent."***

Having illustrated that the range of transactions which could qualify for equitable relief was wide, Lord Scarman characterised the 'disadvantage', thus:

('Morgan' at page 827: ibid)

> ***"Whatever the character of the transaction, the authorities shows 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."*** *(underlining mine)*

At page 829 he also said:-

> ***" ... the doctrine is not limited to a transaction of gift. A commercial relationship in which one party assumes a role of dominating influence over the other. In (Poosathurai) ... the Board recognised that a sale at an undervalue could be a transaction which a Court could set aside as unconscionable if it was shown or could be presumed to have been procured by the exercise of undue influence. Similarly a relationship of banker and customer***

may become one in which the banker acquires dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the Court to presume that it resulted from the exercise of undue influence."

Turning to the decision of the Court of Appeal in **Lloyd's Bank Limited v Bundy (1974) 3 ALL ER 757** which was cited before the House, he continued,

at page 829 in **Morgan**:

"It was, as one would expect, conceded by counsel for the wife that the relationship between banker and customer is not one which ordinarily gives rise to the presumption of undue influence; and that in the ordinary course of banking business a banker can explain the nature of the proposed transaction without laying himself open to a charge of undue influence."

Referring to the ratio decidendi of the judgment of Sir Eric Sachs in **'Bundy's'** Case, supra, said Lord Scarman at p. 830:

"... In the last paragraph of his judgment where Sir Eric turned to consider the nature of the relationship necessary to give rise to the presumption of undue influence in the context of a banking transaction, he got it absolutely right."

What Sir Eric Sachs had said, in 'Bundy' at p. 772 was:

'Nothing in this judgment affects the duties of a bank in the normal case where it obtains 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 the present 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. It would indeed be rather odd if a bank which vis-à-vis the customer attained a special relationship in some ways akin to that of a "man of affairs" – something which can be a matter of pride and enhance its local reputation – should not, where a conflict of interest has arisen as between itself and the person advised, be under the resulting duty now under discussion. Once, as was inevitably conceded, it is possible for a bank to be under that duty, it is, as in the present case simply a question for "meticulous examination" of the particular facts to see whether that duty has arisen.'***

Only passing mention need be made of another House of Lords decision nearly a decade following the decision in **'Morgan'**. It is the case of **C.I.B.C. Mortgages plc v. Pitt [1993] 4 ALL ER 433 1 AC 200**. One of the authorities cited by Mr. Hylton Q.C. was a decision of the English Court of Appeal in **Dunbar Bank plc v. Nadeem and another – [1998] 3 ALL ER 876**. The judgment of Millett LJ at page 882 makes a reference to the ***'C.I.B.C. mortgages'*** case thus:

> ***"On the law as it stands at present, a person who can prove the exercise of actual undue influence by another in respect to a transaction is entitled to have the transaction set aside without proof of manifest disadvantage"***

The speech of Lord Browne-Wilkinson in the ***C.I.B.C. Mortgages*** case, supra, in which each of the other four Law Lords concurred, had this to say, **[1993] 1 AC 200 at 208:**

> ***"I have no doubt that the decision in Morgan***

> ***does not extend to cases of actual undue influence. Despite two references in Lord Scarman's speech to cases of actual undue influence, as I read his speech he was primarily concerned to establish that disadvantage had to be shown, not as a constituent element as the cause of action for undue influence, — but in order to raise a presumption of undue influence with class 2. (presumed undue influence)"***

At page 209, ibid, he said this:

> ***"I, therefore, hold that a claimant who proves actual undue influence is not under the further burden of proving that the transaction induced by undue influence was manifestly disadvantageous: he is entitled as of right to have it set aside."***

It is common ground that Mr. Hew had spoken first to Mr. McFarlane and thereafter to Mr. Cobham, repeatedly, about his long standing 'dream' (aspiration) to borrow one million pounds. He had spoken o f this to Mr. Cobham from their early meetings; this dream had not been linked to any particular use to which that borrowing should be put. Only in 1989, concedes Mr. Cobham, did it for the first time become feasible for the dream to be realised.

Mr. Hew, he said, had had a 'considered plan' for the implementation of the $3 million dollar facility around which their discussion had always 'centered'. That plan primarily was to sell lots in the Ironshore property which Mr. Hew owned and at the same time to take into account earnings to be derived from rental of his heavy-duty equipment simultaneously to be applied to offset expenditure on the development of the Barrett Town lands. However, there is no document that

attests to this three-fold 'considered plan'. In anticipation of the project at Barrett Town, the account captioned the 'Sea Castle View' was opened in the names of Stephen Hew and Raymond Hew jointly. Two weeks earlier, Mr. Cobham had lost no time in securing the consent of Mr. Hew to mandate Miss Wilson, Attorney-at-Law, to send to the Bank the twenty-nine titles to the lots at Barrett Town as soon as they should be ready.

Mr. Cobham vehemently asserted that from the very outset of the discussions of borrowing to build houses for sale, the figure of $1 million was not mooted, for 'the discussion always centered around a figure of $3 million.

Certain notations on the G-18 **(Exhibit 5)** are worth noting. The entry on 24th September, 1987 records a request for:

> ***"an occasional and temporary increase to $150,000.00 in overdraft to cover additional expenses associated with the Ironshore development. An imminent sale of 18 acres of the land will realise approximately $2 ½ million. We have agreed to extend limit for three months be renewed. Commission fee of $1500 etc."***

A notation indicates the granting of facilities by overdraft up to $150,000.00 limit to expire on 31st December, 1987.

On 15th January, 1988, the next entry on the G-18 reads:-

> ***"Mr. Hew has approached us for additional $150,000.00 for development of the Ironshore lots. This we have declined (sic), as the source of payment is yet to be arranged i.e. there are no firm sales to hand.***

We have, however, exceptionally agreed to increase the (overdraft) limit to $165,000.00 primarily on the basis of the security held to cover personal expenses.

Mr. Hew has been implored to finalise sale for the lots at the earliest as we cannot and will not continue to fund him on the basis of security. L/M (legal mortgage) sent for stamping $150,000.00."

BLANK LINES (sic)

In June, 1988, the very next entry reads:

"The manager has agreed on increased overdraft limit of $250,000.00 (see memorandum dated 3rd June, 1988 on file). However, we need to have L/M on Ironshore property increased – (securities?) P 1. Prepare L/M forms for additional $90,000.00 for Ironshore property.

Please update statistics and RTM. We now hold mortgage total $310,00.00 Ironshore property $250,000.00."

Up to this point, the entries deal exclusively with the Ironshore property.

It was after the joint account captioned *'The Sea Castle View'* – was opened on March 1989 with Raymond Hew that the notations on the G-18 addresses another subject, that is the Barrett Town lands.

On 21st April, 1989 the status of accounts reads:-

"Overdraft $276,499.00 joint with Raymond, Sea Castle Cr (credit) $973.41"

and continues:

"Mr. Hew wishes to start preparatory work for developing his land which over-looks Sea Castles:

he has asked that we allow him a $100,000 overdraft limit on the joint account with Clifton and $200,000 on the account (Stephen and/or Annie and/or Clifton Hew account). Agreed. Do we need to upstamp our mortgage?

The terse response is:

"No. Total security held $310,000.00. Advances please apportion limits as indicated in one manager's epitome."

The obedient compliance:

"Limits and expiry dates marked 8th June, 1989".

At some sta ge associated with the occasion of Mr. Cobham's visit to the Barrett Town land, accompanied by Clifton Hew, the latter had raised some concern about the Barrett Town project. The fact that it did not have a registered title was ***"... one aspect of his concern"*** said Mr. Cobham. While agreeing with Clifton's observation that Ironshore would be more suitable for the project, Mr. Cobham had rejoined, he said: ***"this is in respect mainly of Barrett Town."***

Mr. Cobham's prolonged gratuitous gloss in testimony only confirms, as the G-18 entry shows, that the lending contemplated was for Barrett Town development. Confirmation of this is revealed in Mr. Cobham's responses when asked if Mr. Hew had ever indicated a preference to build on the Ironshore lots. He had replied:

"No, he did not, although it was contemplated that in later years, he felt that this might happen."

This is no unguarded response for consistently when the questions was repeated:- he said:

> ***"No, he did not, but he indicated that in later years there was a possibility of building at Ironshore."*** ***(underlinings mine)***

If it might be argued, that the reference to building might aptly be construed as building of houses as opposed to any ongoing laying of infrastructure at Ironshore as there may be, the mention of 'later years' consistent with what is on the 'G-18' form, shows that borrowing for the development of Barrett Town exclusively was what was then contemplated.

From the foregoing, I make a finding that Mr. Cobham had insisted that the borrowing had to be applied exclusively to Barrett Town.

The Ironshore property with its provenance for ample security and potential yield from the sale of lots, could not readily offer accommodation for the request early in 1988 for an additional overdraft facility; it was declined, but only 'exceptionally' permitted an increase by a comparatively small amount (later to be increased to $250,000.00).

Ironshore was still relevant as it provided a prime security even up to $7 Million if required. If, as Mr. Cobham conceded, he had felt and then had expressed to Clifton Hew that for a development project, Ironshore would have been a more suitable location, why then had he not expressed this to Mr. Stephen Hew? There is not scintilla of evidence that he had even attempted a cautious suggestion in this

regard to Mr. Hew – the very customer, wont to seek advice in banking and financial matters from his bank manager – and willing to be guided accordingly. Mr. Cobham would not have been unmindful of the notation on the G-18 made by his predecessor that the obstacle to development at Barrett Town was the absence of a registered title, a clearly inhibiting factor.

The submission that the Bank had nothing to gain in giving that 'clearly bad advice' is to acknowledge tacitly that the development, as proposed, was hardly one which 'had a good chance of success for the Bank to support it'.

The issue of advice given cannot be narrowed in the context, literally, of the Bank through their managers acting as 'commercial advisers' to Mr. Hew. The issue is whether the Bank had proceeded further than what was required in everyday banking and had advised, *de facto*, on 'more general matters germane to the wisdom of the transaction.'

Mr.Cobham had accepted that he had discussed with Mr. Hew the cost of providing infrastructural work at Barrett Town "and we had some figures". He had also discussed the 'ways of ensuring' that the project at Barrett Town might yield revenue while in the process of development.

The consideration of the high interest rate must have been at the heart of this exercise.

Although Mr. Cobham could provide no supporting documentation of the written figures of expenditure supplied, he had said:

> ***"Based on the continuing discussions between Stephen Hew and myself, we were kept abreast of the expenditure on the project and what is needed and the income from the sale of lots."***

Alluding elsewhere to the figures that were discussed, he had answered:

> ***"Well these varied. There was some discussion as to the need for instance, to do remedial work on the approach way to the site itself; and certainly I said to Mr. Hew that this was not his responsibility..."***

Elsewhere he also alluded to it as "an ongoing process during which Hew would say 'I am doing this next week,' a, b, c; ..." Mr. Cobham accepted that Mr. Hew would rely on advice which he gave 'in banking and financial affairs.' Implicit in the foregoing is that advice was offered on 'matters germane to the wisdom of the transaction' and, inferentially, must have been relied upon. More importantly all this can be presumed to have intruded into the area of confidentiality.

Mr. Cobham's testimony supplies this. In discussions he had told Mr. Hew that the Bank would prefer one of his sons to be a joint account holder.

Response-wise Mr. Hew was initially 'extremely negative', but that was changed by Mr. Cobham's 'insistence' followed by a deliberation as to which son it should be.

All this was without any consideration given to the business acumen and or known expertise of either son in infrastructural development.

The initiative in taking Clifton Hew on the trip to Barrett Town avowedly was, as Mr. Cobham himself admitted, because he:

> ***"wanted, despite Mr. Hew senior's strong objections,***
> ***other members of his family particularly his sons,***
> ***to be aware of the project and what was planned."*** ***(underlinings mine)***

It did not appear to have occurred to Mr. Cobham that effectively, he may have been forging an unsuitable alliance that might, however noble the sentiments that prompted him so to do, effectively derogate from the Bank's customer being kept 'scrupulously (and) separately advised in the independence of a free agent''

The facile character-sketch of Mr. Hew, according to Mr. McFarlane "...a prudent man ... not easily led or persuaded", or on Mr. Cobham's version, a 'very strong character, always prepared to argue" each gives way to the picture of a submissive posture of an acquiescing borrower. In the first blush of that submissiveness, Mr. Hew, before anything else, had been prevailed upon to consent to the titles being sent directly to the Bank – a stipulation not to be varied except by the Bank's express consent. The only ***quid pro quo*** for this surrender was the promise of access to the facility of a borrowing on terms not shown to have been yet disclosed to him.

If in all this, the exercise of a dominant influence is not postulated, then it is difficult to say how else the scenario can be characterised.

Despite the tergiversations in the testimony of Mr. Hew, what remains unanswered in the Bank's case is how an experienced bank manager deigned to confer a blessing on a project with prospect of returns in the foreseeably near future doubtful, and unlikely to offset debt accumulating at an interest rate of 20% above

prime lending rate. And this is just one aspect of the entire episode. The precipitate action in securing for the Bank unborn titles becomes the start of another weave in the tapestry of an unconscionable bargain having the effect, even if not so intended, of ensuring a customer's acquiescence in what he may have conceived was the skillful competence of a bank manager – the interpreter of aspirations born of a childish fantasy.

The reasons offered by Mr. Cobham for not requesting a feasibility study for the project bear a moment's examination.

The first is that the cost such a proposal formally done would be high in relation to the borrowing requested. Inevitably, such a cost would be borne by the customer but it would enable proper evaluation to be made in terms of the risk involved. Plausible is the consideration that equipment for infrastructure was the customer's equity, but this could be a useful factor in a very formal evaluation.

The third reason, namely that the project itself was considered good security, articulates the Bank's perspective; only to further state that *'feasibility studies are for the protection of the Bank, hence, the judgment as to whether they are absolutely necessary at any given point is the Bank's'* does not accord with 'something which can be a matter of pride and enhance (the Bank's) local reputation'.

Without reiterating at length the submissions presented by Lord Gifford Q.C, and which I find eminently acceptable, save that as to negligence I will add one thing. If I am wrong in my finding that on the facts as analysed, Mr. Cobham had

ordained that the borrowing be applied to Barrett Town exclusively, the end result would remain unaffected, given the circumstances in their entirety. 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. 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.

As a final comment, it is to be observed that the examples in many cases cited deal with transactions 'procured' by the use of undue influence. There is no magic in a selected formulation of words. The doctrine is clearly apt to encompass a transaction sustained by the exercise of undue influence. Nor would it make a difference if somewhat less elegantly it were expressed in a sentence: 'he procured the sustenance of a transaction by undue influence'.

In the result, Suit N/049 is dismissed with costs and no order on the counter-claim. In Suit H/102 there will be judgment for the Plaintiff against the first defendant in the sum of $18,882,005.26 with costs to be agreed or taxed.

I record my gratitude to learned Counsel on both sides for every enabling facility including a preview of the written submissions as well as the reproduction of the transcript for greater ease in my preparation of what turned out more protracted than I had hoped.