NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. N-185/2000

BETWEEN	**THE NATIONAL COMMERCIAL BANK**	**PLAINTIFF**
AND	**ALVIN MURRAY**	**1ST DEFENDANT**
AND	**HEATHER MURRAY**	**2ND DEFENDANT**

Miss Camaleta Brown and Miss Tennisha Watkins instructed by Vacianna & Whittingham for Plaintiff

Andrew Irving and Miss Stacy Kong-Quee instructed by Gifford, Thompson and Bright for the Defendants

HEARD: JULY 21, 22 AND 30, 2003 & FEBRUARY 19, 2004

Daye, J. (Ag.)

Mr. Alvin Murray was a national prize farmer at the Annual Denbeigh Agricultural Show in 1996. In February 1996 he submitted an application to the Agricultural Credit Bank for a loan of $12.5 million at 13 percent per annum interest through the National Commercial Bank an approved lending institution. He applied for the loan to commence

planting non-blue Mountain Coffee on his Cold Spring property in Westmoreland and to maintain coffee on his Maidstone property in Manchester.

At the time Mr. Alvin Murray applied for this loan he and his wife Heather Murray were joint holders of a current account at the Montego Bay branch of the National Commercial Bank. The couple had an overdraft facility on this current account which they had used. They increased their use of and the amount drawn on the overdraft facility while waiting approval of the loan. The increase use of the overdraft facility was not the subject of any written agreement or any other new express agreement with the bank. Mr. Murray alleges this was as a result of an oral agreement with the bank.

On the 24th February, 1998 the bank sent a letter of demand to the couple for an overdraft payment of $1,673,388.66 as well as for $2,400,000.00 on a commercial paper. In fact the commercial paper is a promissory note which is a type of loan offered by the bank to its customer. The Murray's obtained such a loan of $2,400,000.00 in June and July of 1997 from the bank. The purpose of this loan was to convert the arrears on their overdraft to commercial paper to enable the Murray's to secure a lower interest rate than the interest rate on the overdraft facility. The bank practice is that a commercial paper or promissory note must be supported by adequate guarantee. Mr. Murray's father-in-law was the guarantor of the commercial paper or promissory note they had with the bank in June and July 1997. On the 31st July, 2000 the bank sued the couple for $9,398,694.00 of which $5,360,012 was for interest. By the 30th June, 2003 the bank revised their claim to $1,608,682.00 due and owing by the couple plus interest to be calculated. The reason for this revised claim was that the $2,400,000.00

on the commercial paper was paid by the guarantor of that loan. This sum plus cost of insurance was deducted from principal sum of $4,038,652.00.

Mr. and Mrs. Murray admit they used the overdraft facility and owe the bank a principal sum. However, they contend the amount the bank sued them for is not correct. The couple charge that the sum of $9,398.694.00 consists mainly of compound and penalty interest which the bank wrongfully charged them on the overdraft which they advised them to use.

The issues which emerged of the trial are:

a. Was there a special fiduciary relationship between the couple and the bank?

b. Did the bank in March 1996 give the couple advice to use their current account overdraft facility until and as their Agricultural Credit Bank loan would be approved?

c. Did the bank in June 1997 negligently and unfairly advise the couple to convert their overdraft account to commercial paper?

d. Did the couple rely on the bank's advice on each of the occasion claimed?

e. Did the bank fail to take reasonable care in giving the couple advice about their loan facilities?

f. Did the couple delay the approval of their loan by failing to provide adequate security for it?

g. Did the couple suffer $39,749,776.80 loss or any financial loss attributable to the bank?

Mr. Alvin Murray's claim is similar in one aspect to Mr. John Sinclair's claim in

Financial Institutions Services Ltd., sub. for Century National Bank v Negril, Negril Holdings and Negril Investment Co. Ltd S.C.C.A 103/1997, judgment delivered March 22, 2002. Mr. Sinclair on behalf of his companies claimed that Mr. Don Crawford, the Managing Director of Century National Bank advised him to use his overdraft facility with his bank pending the approval of his loan application to the National Development Bank. He applied for the loan to assist him to construct and expand the construction of Negril Gardens Hotel, Negril Westmoreland. He further claimed that the bank wrongly and unfairly charged him compound and penalty interest on his overdraft while he was waiting on his low interest loan which they assured him would be approved. The Court of Appeal by a majority found on the facts that a special relationship existed between the bank and the customer. They held there was a fiduciary relationship between the bank and Mr. Sinclair's companies and the bank owed a duty to take reasonable care in giving advice which they breached. Mr. Justice Downer, dissenting, held there was no special relationship between bank and customer because the customer had an independent accountant and auditor who could advise them if they needed it.

In **Box v Midland Bank [1981] 1 Lloyds L.R.434** the Court held a bank manager was not obliged to predict the outcome of an application to head office for a loan but having done so was under a duty to take reasonable care since he knows his prediction would be relied on. In **National Commercial Bank v Raymond Hew et al** delivered on 30th June, 2003 Lord Millet affirmed the statement of principle of Lord Findlay L.C. on which a banker should use reasonable care and skill when giving advice to a customer. Lord Findlay L.C. said as follows:

> "While it is not part of the ordinary business of a banker to give advice to customer as to investment generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business.... If he undertakes to advise he must exercise reasonable care and skill in giving the advice...."

Apart from the banker being liable to a customer for negligent mis-statement or mis-representation a bank may have a transaction between itself and customer set aside in equity if the bank used undue influence to secure the transaction. In **NCB v Hew et al (supra.)** Lord Millet said that undue influence can "arise out of a relationship between two persons where one has acquired over another a measure of influence or ascendancy of which the ascendant person takes unfair advantage" He pointed out that a relationship giving rise to undue influence may fall in the category of one which is either proved or presumed. He also pointed out that generally the banker – customer relationship does not fall within the presumed category but it is a relationship that has to be proved. I now turn to issue of overdraft and interest rates.

In **Century National Bank** (supra.) Harrison, J.A. stated the rules that govern overdraft and interest rates. They are:

a. an overdrawn current account is a request for a loan;

b. an overdraft facility is created either expressly or by inference from the course of conduct;

c. an overdraft facility expressly created is usually in writing stating the limit imposed on the facility and the overdraft interest payable;

d. where no overdraft facility has been authorised and the customer draws a cheque in excess of funds in his current account and the bank honours the

cheque it is regarded as an unauthorised overdraft and attract a higher rate of interest than the rate of an agreed and authorised overdraft facility;

e. a bank must expressly communicate the interest rate to the customer especially when it charges compound interest and penal interest on an unauthorised overdraft;

f. the rate of interest in a loan agreement will be void for uncertainty if it is not stated precisely and clearly. (eg. interest will be charged on an overdraft "...at the bank's usual rate of interest on overdraft).

I have considered the evidence from the witness statements and the cross examination of the bank's two witnesses and Mr. Alvin Murray's testimony. I paid particular attention to the testimony of Mrs. Arscott-Allen and Mr. Alvin Murray concerning the issue whether there was a special relationship between the bank and Mr. Murray. I found Mrs. Arscott-Allen, credit officer with the bank:

1. became acquainted with Mr. Alvin Murray as a customer when his overdrawn current account was assigned to her;
2. was introduced to Mrs. Heather Murray by a former employee of the bank;
3. advised Mrs. Heather Murray about honouring cheques drawn on their current account for expenses for the Murray's farm prior to 1996;
4. told Mr. Alvin Murray on several occasions during his telephone enquiries that his loan was being processed at head office;
5. assessed Mr. Alvin Murray's application for his loan and found it in order after she had visited his coffee farm at Cold Spring;

6. was aware that Mr. Alvin Murray increased his use of an overdraft facility he had with the bank after his application for the loan in February 1996;
7. was aware that Mr. Alvin Murray placed confidence and trust in her.

None of these findings amount to evidence that Mrs. Arscott-Allen, as agent of the bank, had crossed the line into the area of "confidentiality' in her dealings with the Murray's.

She did not give any advice about the wisdom of the couple's farming venture. She supplied information which assisted the couple in operating their overdraft. No special relationship was created at this stage whereby the bank exercised any undue influence over the will of the couple.

I do not find that Mrs. Ascott-Allen advised the couple to take an overdraft facility in February 1996 because their Agricultural Credit Bank loan would be approved. There is a material discrepancy on this issue in the couple's case. In paragraph 4 of the defence and Counter-claim the couple claim Mrs. Arscott-Allen advised them the loan was being processed and in the interim an overdraft facility should be in place to fund the venture until the loan was approved. At trial Mr. Alvin Murray testified he was told to use the overdraft facility as interim finance because the loan would be approved. He further testified that Mrs. Arscott-Allen assured him that the National Commercial Bank Agricultural Department would do a favourable report on his proposal to take the Agricultural Credit Bank.

On this evidence no representation was made by Mrs. Arscott-Allen that the bank had the power to approve the couple's loan application. Mr. Alvin Murray admits under cross examination that Mrs. Arscott-Allen told him that she hoped the loan would be

approved shortly. In his evidence he said after making several enquiries about his loan to Mrs. Arscott-Allen she told him "she did not know what else to tell him as head office had the loan processing".

I do not find Mr. Alvin Murray and his wife relied solely on the bank's advice and took out an overdraft on their account pending the approval of their loan application. Mr. Alvin Murray had applied for a loan to the Agricultural Credit Bank before in 1996 through Jamaica Citizen's Bank. Therefore he would have knowledge of the process for approving such loans. I do not accept his testimony that he would not have used his overdraft facility in 1996 if he had not been told that the loan would be approved. Mr. Alvin Murray agreed in his testimony that he had used his overdraft facility with the bank on two previous occasions between 1989 and 1993. Further, on the 18th February 1995 Mr. Murray had signed a contract with a Japanese Company to supply them with green coffee beans during the crop year 1995/1996. He had to do so to liquidate an advance payment of US$102,000.00 the company gave him. In order to meet his obligation he had to establish additional acres of coffee and he needed funds for this. The source for interim financing would be the bank and his overdraft with the bank. So I do not accept Mr. Murray's testimony that it was the bank's advice that caused him to use his overdraft in 1996.

In my view the position is some what different in 1997. It is agreed by all parties that bank advise a Mr. Alvin Murray to convert his overdraft loan to commercial paper or promissory note in June and July 1997. The purpose of this was to enable Mr. Murray to obtain a lower interest rate than that which was charged on the overdraft and which was fuelling Mr. Alvin Murray's indebtedness. At this stage of the bank's dealing with

Mr. Murray and his wife they were aware that he was complaining about the high interest rate on his overdraft. They must have been aware too that this high interest rate was becoming onerous to the Murray's. Mr. Murray was visiting Mrs. Arscott-Allen weekly about his loan application at this time and complaining about the delay and cost to him. The bank ought to know Mr. Murray would rely on their advice to secure a lower interest rate on the commercial paper in order to reduce his debt. The Murray's accepted the bank's advice and converted their overdraft loan to a commercial paper with an interest rate of 23 percent per annum. The Murray's defaulted in their payment on this loan . There was no term in this loan agreement about penalty interest.

When this latter loan fell into arrears the bank consolidated and combined the overdraft principal and interest with the commercial paper interest. They based their action on the joint current account agreement of 1985 they had with the couple. (Judges bundle no. 3 page 45). This agreement gave them power to charge any rate of interest in their sole discretion. In my view they would not be able to rely on their antecedent agreement to support interest charges on the commercial paper agreement.

In relation to the overdraft account Mrs. Arscott-Allen testified that the Murray's enjoyed an open overdraft facility. There was no other document of the terms of the overdraft apart from the initial loan agreement. This agreement had no stated rate of interest or method of computing interest on the overdraft. Compound or penalty interest charged under this agreement would be void and unenforceable (per Langrin , J.A. **Century National Bank** (supra. at p. 179-199). Further,it is my view the Murray's overdraft was authorised, as the bank honoured their cheques and hence this overdraft account ought not to attract compound interest.

It was not the bank that was responsible for the delay in the approval of the loan . There was an unresolved issue between the bank and the Murray's about the adequacy of the security he supplied for the loan. This was the source of the delay. It was the Murray's responsibility to supply all the necessary security which they did not do on time.

The commercial paper also did not have any stated penal rate of interest. Mr. Reid, the bank's expert, agreed on this. In addition he testified there is no letter of commitment charging the couple penal interest on their current account. He produced in evidence an interest rate sheet for the Murray's current account (Judge's bundle no. 2 page15). The interest rate charged on this account from 1998 showed a spread of 34 percent to 84 percent. Mr. Reid testified that the interest rate column included compound interest and penalty interest. He did no investigation if normal interest was charged to the account prior to 1997. No written account was supplied to Murray about normal interest on Mrs. Arscott-Allen's evidence. Therefore the bank cannot charge penal interest on the commercial paper.

The couple would be liable for the present principal and interest on it. In my view the interest rate ought to be a rate between 13 percent charged on the Agricultural Credit Bank loan and the 23 percent charged in the National Commercial Bank commercial paper. I assess the interest rate at 18 percent per annum.

I do not find the couple suffered any damage of $39 million. The bank did not breach any duty of care towards them. There was no special relationship between the couple and the bank when they first started to increase their use of their overdraft facility in 1996.

In any event the damages claimed by the couple would be too remote. Damages are not recoverable for loss of profit which is unconnected to the physical damage (i.e pure economic loss). **Spartan Steel Alloy v Martin Co. Ltd**. [1992] 3. All ER 557. Mr. Murray's proposal was overly optimistic. He claimed damages for the profit he would have made in an 8 year projection to supply a Japanese company non Blue Mountain Coffee. In reality all he had was a 4 year contract with the company. He actually started the first year of the contract with a negative balance. His proposal was shown to be deficient in cross examination. He is unable to prove the damages he claimed.

In all the circumstances I order that the defendant pay the plaintiff back the principal sum of $1,608,682.00 outstanding plus interest at 18 percent per annum until date of Judgment.

Costs to the plaintiff to be agreed or taxed.