NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUITS NO. C.L. N.88/91]
NO. C.L. N.89/91] Consolidated

BETWEEN NEGRIL NEGRIL HOLDINGS LIMITED
NEGRIL INVESTMENTS LIMITED PLAINTIFFS

A N D ~~CENTRUY~~ CENTURY NATIONAL BANK DEFENDANT

Hugh Small Q.C., Mrs. P. Benka Coker Q.C., and C. Honeywell instructed by Messrs. Clinton Hart and Company for the Plaintiffs.

D.M. Muirhead Q.C., D. Scharschmidt Q.C., Alfred A. Rattray, Ms. D. McDonald and C. Sewell instructed by Rattray, Patterson and Rattray for the Defendant.

HEARD: 1995 - January 23, 24, 25, 26, 27, 30 and 31 February 1, 2, 6, 7, 8, 9, 10, 13, 14, 15 and 17 May 24, 26, 29, 30 and 31 June 1, 2, 5, 6, 7, 8, 12, 13, 14, 15, 19, 20, 21, 22 and 23 July 2 and 4 November 13, 14, 15, 16 20, 21, 22, 23, 27, 28, 29 and 30 December 1, 12, 18, 19 and July 18, 1997.

ELLIS, J.

The decade between 1950 to 1960, saw an unprecedented wave of emigration of Jamaicans to England. Those who so emigrated were the young, the old, the skilled and the unskilled, the ambitious and the unambitious.

Many of those emigrants worked very hard in England and as a consequence achieved strong financial positions. having so achieved, some returned to Jamaica; some on retirement and others to engage in business.

One of the aforesaid emigrants is Mr. John Sinclair one of the central figures in this case. John Sinclair migrated to England in 1958 when he was in his early twenties. He did well financially in England. He did so well that within three years he acquired the plastering firm Roldogate Limited which had previously employed him.

In addition to Roldogate Limited, Sinclair owned two night clubs and a small hotel. These were called "Couples" and "The Turntable" familiar names in hotel and night club business in Jamaica.

Mr. Sinclair visited his homeland in 1970 and biannually thereafter. Between the years 1971-1981 he bought three houses in Jamaica the last one at 23 Seymour Avenue. In 1984 Mr. Sinclair decided to return to Jamaica permanently. He left his flourishing plastering company with his workers to run and received income therefrom from time to time.

On his return to Jamaica he said "I do not intend to work again as I did in England, I intended to deal in vintage cars. I was going to relax and just go from coast to coast. He was told by someone that he was too young (he was then 46 years old) for that and he was encouraged to venture into tourism.

He met Mr. Norman Bingham then of First National Insurance Company. Mr. Bingham showed him a piece of land on Norman Manley Boulevard in Negril. He formed a company Negril Investment Company Limited one of the plaintiffs in this case, and the land at Norman Manley Boulevard was conveyed to Negril Investment Company Limited and he Sinclair financed the purchase from his own resources. Norman Bingham and Sinclair owned the shares in Negril Investment Company Limited and so he ventured into the construction of a hotel in Negril. Shortly after Negril Investment Company Limited was formed a second company Negril Negril Holdings Limited, the other plaintiff was formed.

There is no doubt, on the uncontroverted evidence, that John Sinclair is an unlettered man - he left school in the 4th standard, he is unsophisticated in the intricacies of high finance but possessing the skill of an excellent plasterer in the building trade.

How therefore did this unlettered man who is to use his words, "not a book person, I don't do much reading' do so well in business in England?

Before I venture to answer that, I think Ulrici's description of Shylock the Jew in The Merchant of Venice is worthy of quotation and I quote "forbearance, gentleness, kindliness and all the lovely names which greet the happy on the threshold of life and accompany them on their paths, he has never known; injustice, harshness, and comtempt stood around his cradle, hate and persecution obstructed every step of his career."

Unlike Shylock the quoted description does not apply to Sinclair since he was given help in the administration of his business by English people and his finances were overseen by the National Westminister Bank in Bristol. It seems therefore he succeeded in England from the kind assistance of persons and his Banker.

While Sinclair was away in England, and particularly during the period of Nineteen Seventies to the Nineteen Eighties, Jamaica experienced a growth in the number of commercial banks, merchant banks and other financial institutions. The period also saw the result of that growth in the fact that many qualified Jamaicans became owners and managers of those banks and financial institutions.

Girod Bank was one of the new banks which traded in that name for awhile then it became The Century National Bank which is the defendant in this case.

Mr. Donovan Crawford is one of the qualified Jamaicans who assumed ownership and management of one of the new banks. He is the Managing Director of Century National Bank and is the other central figure in this case.

Mr. Crawford, from the evidence, started his banking career in a humble position and worked his way up to the high position which he now occupies. Obviously, he worked hard for his successes and must have gained great expertise in banking and business to have achieved prominence in the defendant Bank.

These two men of divergent backgrounds educationally and socially met in August, 1984. The plaintiff Sinclair said he met Crawford through a Mr. Pat Garrel now deceased and Mr. Norman Bingham. He had just before formed Negril Investment Company Limited and that company had purchased land in Negril. He Sinclair paid for the land from his personal funds.

The circumstances of the meeting is best described in Sinclair's words and I quote "Garrel and I walked in. I saw Crawford. He pushed out both hands and gave me a huge welcome - very polite. He said "come in gentlemen, come in." Sinclair said he was in Crawford's office for two hours Garrel having left after half an hour.

He said Crawford and himself discussed each other's successes. Crawford told him that Jamaica belonged to Jamaicans and that the then Girod Bank was the first true black man bank. Sinclair said he then thought the bank was Crawford's and told him in thirty years it was the first he was seeing a black man sitting in his Crawford's position.

This first meeting led to many other meetings and Sinclair and Crawford became friends and visited each other's house regularly.

Up to this time, Sinclair said he had no account with Girod Bank, but he later lodged U.S.$105,000.00 to his name at the Girod Bank.

Subsequent to that deposit in U.S.$ an account was opened at the Bank for Negril Investment Company Limited one of the plaintiffs in this matter. That started a Banker and Customer relationship and subsequently another account was opened in the name of Negril, Negril Holdings Limited the other plaintiff.

In April 1987, Mr. Bingham, Sinclair's partner severed connection with the plaintiffs and sold his shares to Sinclair. It is manifest from the evidence, that Bingham handled the financial aspect of the plaintiffs. On his departure from the business, Sinclair informed Crawford that he Crawford would have to do for him what Bingham did before he left.

Sinclair acting for the plaintiffs, had opened negotiations with another banker Paul Chen Young and Company to finance the expansion of the plaintiffs' business. He so advised Crawford and in his words he said "I thought he was going to smash up the office. I did not think he would behave so."

Sinclair said he told Crawford that he had made application for financing from The National Development Bank (hereafter referred to as the N.D.B.). The N.D.B. would not deal with the defendant it not then being an approved Financial Institution and so he had to seek assistance from an approved Financial Institution. Furthermore he was not a book person and did not do much reading.

At that explanation Sinclair stated that Crawford calmed down and spoke to him thus and I quote "John the money you are using is yours. You own a lot of assets, you dont need a partner and surely not Chen Young. He is going to own you in a little while. I am already in it. What you dont know I will help you. I will do everything that Bingham did for you and what Chen Young can do for you."

Sinclair said Crawford spoke of his charming ways, his integrity and trust. He Sinclair understood that Crawford would help him with paper work as he had been helped in England and by Bingham.

Sinclair completed building the first phase of his hotel at Negril in 1988. That enterprise was in part financed by a loan of Six Million Dollars from the National Development Bank.

He was invited to Crawford's house where he was told that he Crawford would like him to apply for a further loan of Two Million Five Hundred Thousand Dollars from the National Development Bank.

Sinclair's evidence was that he asked why should he apply for a further loan as everything was working perfectly. Crawford then told him that it was very cheap money and big men in Jamaica was using such loans to gain high interest rate above that which was repaid.

In any event Crawford assured him that he would see that same benefit accrue to him from the loan. The application for the loan was made as directed by Crawford.

Sinclair gave other evidence of his dealing with Crawford personally up to 1990. In 1990 he was told by Crawford that his total indebtedness to the Defendant was Sixty Three Million Dollars. He was surprised by the total indebtedness as by his calculations as to the amounts borrowed and lodgements which were made to the defendant his indebtedness should not have been in excess of Seventeen Million Five Hundred Thousand Dollars. He expressed his non acceptance of his alleged indebtedness to Crawford who assured him that he would ascertain whose figure was wrong. He got no response from Crawford and received a letter from Aulous Madden and Company the defendant's auditors requesting his agreement to the figures. He refused to agree the figures and maintained that they far exceeded his indebtedness to the defendant.

He spoke to Crawford about it and was told not to pay the figures any mind as people make mistakes from time to time. In the meanwhile the plaintiff said he was discouraged by Crawford from engaging the services of qualified auditors.

Sinclair was cross examined by Scharsmidt Q.C. He said that the relationship between his companies and the defendant was harmonious for several years. Equally, he personally had good relations with the defendant and with Crawford. He denied the suggestion that his borrowings from the defendant commenced in 1984 with a loan of $185.000.00.

It was Crawford he said who assured him that he was meeting his obligations to the defendant and that he was the best customer. He had many meetings with Crawford on matters to do with his business with the defendant almost to the exclusion of meeting with any other person.

The good relationship between Crawford and himself continued until Crawford told him in May 1990 that the plaintiffs' indebtedness to the defendant was Sixty Three Million Dollars.

There was further cross examination of Sinclair with respect to documents which demonstrated his companies' indebtedness to the defendant. He emphatically denied that indebtedness to the extent claimed by the defendant.

Finally, he answered Mr. Scharschmidt to say that his evidence which he gave as to his relationship with Crawford was the truth and that he trusted and depended on Crawford.

I have set out in some detail the plaintiff's evidence which obviously was led to show circumstances of special relationship between Sinclair and the Defendant.

Mr. Crawford gave no evidence in rebuttal of Sinclair's allegations. The only evidence which could possibly be called rebuttal evidence came from Caple Williams. It came not in examination in chief but in answer to a question in cross examination from Mr. Small as to whether he had ever seen Sinclair at Crawford's house. He replied that he had never seen Sinclair at Crawford's house.

It is my opinion that in the circumstances, that evidence does not do any violence to Sinclair's allegations of a personal and special relationship with Crawford.

The Statements of Claim in this case, and the defences reflect

allegations and denials of special relationship between Sinclair, who acted for the plaintiffs, and Crawford. There is also evidence from Mr. Keane-Dawes to the effect that Crawford assumed ultimate authority and took all decisions with respect to credit and loan applications by plaintiffs.

I would have expected cogent evidence from Crawford in rebuttal. He chose not to give any evidence. The evidence of a special relationship comes from Sinclair and Keane-Dawes whose evidence was fully tested in cross-examination by Mr. Scharschmidt Q.C. and Muirhead Q.C.

On that evidence, Mr. Small Q.C., for the plaintiffs in closing submissions asked the court to find that a special relationship existed between Sinclair, who acted for the plaintiffs, and Crawford who acted for the defendant.

The defendant by Mr. Scharschmidt Q.C. argued in resistance of any such finding. He did so by making reference to the endorsements on the Writs of Summons. The endorsement is common to each Writ and reads thus:-

"1. An account of what is due and owing by the plaintiff to the defendant in respect of and arising out of the relationship between the plaintiff and the defendant as bank and customer as a consequence of accounts and loan transactions of the plaintiff with the defendant.

2. A declaration that the provision in the agreement between the plaintiff and the defendant which provides for payment of interest on the said loans is void for uncertainty and unenforceable. Consequently, the defendant is not entitled to any interest on the said loans OR IN THE ALTERNATIVE.

3. If a declaration in terms of paragraph 2 is not made a declaration that interest charged by the defendant on the said loans to the plaintiff which exceeds the minimum rate of interest charged by the defendant on overdraft accounts constitutes a penalty and is void;

4. And further proper accounts, enquiries and directions;

5. Costs."

He reminded the court of the opening remarks of Mrs. Benka-Coker Q.C., that the "plaintiffs' case is exclusively in contract."

On those premises Counsel argued that the Statements of Claim cannot be used to enlarge the cause of action endorsed on the Writs. He said there is no cause of action in Tort in the endorsement and a special relation cannot arise out of contract it arises only in tort.

The plaintiffs in the Statements of Claim allege customers and banker relationships and the defendant in its defence admits that relationship in relation to each plaintiff.

A banker and customer relation is contractual. In **A. Joachimson (a firm) v. Swiss Bank Corp. (1921) All E.R. Rep. P.92** both Bankes L.J. and Atkin L.J. so held at pages 95B and 100 B-E. The contract between a banker and customer can give rise to special relationship and the cases of **Lloyds Bank v. Bundy [1975] Q.B. 347** and **National Westminster Bank v. Morgan [1985] All E.R. 821** are of ample authority.

I am therefore constrained to say that Mr. Scharschmidt's argument on the point does not bear the weight of authority.

On the evidence I find that a special relationship existed between Sinclair and the defendant Crawford. I do so, not because Crawford gave no evidence, but because I accept as credible the sworn evidence of Sinclair and Keane-Dawes on the circumstances of a special relationship.

I have spent some time on arriving at a finding of the existence of a special relationship since on the pleadings and on the submissions, such a finding is of importance. The mere finding of a special relationship which has no effect on the plaintiff is of no avail. I must now examine the nature of the special relationship which I have found and its effect, if any, on the plaintiffs through Sinclair.

In my examination I find great assistance from the judgment of Sir Eric Sachs in **Lloyds Bank v. Bundy [1974]** 3 All E.R. 757 and which judgment was accepted by Lord Scarman in **Nat. West Bank v. Morgan** (1985) 1 All E.R. p. 830. At page 767 letters c-d the learned judge said:

> "On the other hand, whilst disclaiming any intention of seeking to catalogue the elements of such special relationship, it is of a little assistance to note some of those which have in the past frequently been found to exist where the court had been led to decide that this relationship existed as between adults of sound mind. Such cases tend to arise where someone relies on the guidance or advice of another where the other is aware of that reliance and where the person on whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element which will for convenience be referred to as confidentiality. It is this element which so impossible to define and which is a matter for the judgment of the court on the facts of any particular case."

Later at letter (e) he continued:-

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

Then at letter (f) he continued, still referring to confidentiality,

> "It imports some quality beyond that inherent in the confidence that can well exist between trust worthy persons who in business affairs deal with each other at arms length."

Guided by the above quotation, and revisiting the evidence of Sinclair and Keane-Dawes, I have no hesitation in holding that Sinclair for the plaintiffs relied on Crawford who represented the defendant. The evidence of Sinclair on this bears some repetition. "I am not a book person I dont do any reading. That is why I had to have Bingham. We went to Chen Young because we wanted an approved Financial Institution." Then the reply of Crawford. "John, the money you are using is yours, you have a lot of asset. You dont need a partner. What you dont know I will help you. I will do everything that Bingham and Chen Young can do."

Those bits of evidence are clear indications that the plaintiffs through Sinclair relied upon Crawford and crawford was well aware of that reliance.

The defendnt obtained benefit from the transaction in that it

obtained the Foreign Exchange which it solicited from the plaintiffs and the introduction of overseas customers by Sinclair as was requested by Crawford.

It is my opinion therefore, that the defendant through Crawford, crossed the line which contains the normal dealing of Banker with Client at arms length. The defendant crossed the line and became a person on whom great reliance was placed. So great was that reliance that when crises arose in the plaintiffs' business they were assured that all was well by the defendant through Crawford. They relied on that assurance and were sucked into a whirlpool of indebtedness, against which they could not swim, to the drowning of their very being.

The plaintiffs commenced their dealings with the defendant on different dates. The first plaintiff did so on the 15th of July, 1987 and the second plaintiff on the 15th November, 1984 and again on the 4th of December, 1986. They commenced their dealings with the defendant by contracts to open current accounts.

The Contracts their Interpretation and Consequential Effect

The contracts to operate current accounts contain a Common Clause 11 which reads as follows:

> "In the event of any account of the customer running into overdraft, (including those accounts in foreign currency) the Bank is hereby authotised, without any limitation, to transfer the balance of any other account or deposit of the customer, to cover the overdraft. Likewise, in the event of an overdraft in the account, the customer hereby authorises the Bank to charge him and hereby agrees to pay, in addition to other charges provided in this agreement, interest on the overdraft balance (at the Bank's usual rate of interest on overdrafts) until the same is fully satisfied. In the case of an account in foreign currency, the Bank will make the conversion at the official rate of exchange existing on the date of the transaction and such allocation will be made by the Bank without prior notice to the customer. It is clearly understood that the foregoing does not give the customer any right or in any way authorises him to overdraw any current

account even if he has another account on his name in the same with a credit balance and sufficient funds to cover the overdraft."

The plaintiffs' contend at paragraphs 12 and 13 of the respective Statements of Claim that the contracts to operate current accounts are the only documents which define and govern the rights and liabilities of the parties relative to current account transactions. Furthermore, the contracts are the only documents which allow the defendant to charge interest. The plaintiffs therefore submit that the phrase "at the Banks usual rate of interest on overdrafts" which is common to each contract at Clause 11 is ambiguous or uncertain and is unenforceable.

The defendant at paragraph 11 of its defences contend that in addition to the contracts to operate the current accounts there were mortgages which set out the rights and liabilities of the parties. Those mortgages obliged the plaintiffs to pay interest on the terms set out therein. It is my understanding that the defendant is saying that the mortgage terms are to be construed with the contracts to open and operate the current accounts and the contracts to open the current accounts are subject to the terms of the mortgages. I will deal with these two conflicting positions.

The mortgages are:

(i) mortgage dated 4/7/1985

(ii) mortgage dated 18/6/1987

(iii) mortgage dated 10/8/1987

The mortgages at (i) and (ii) are referable to Suit No. C.L.N.89 of 1991 and that at (iii) is referable to Suit nO. C.L. N.88 of 1991.

The submissions on the plaintiff's position are contained in the following:-

The first mortgage was granted by the first plaintiff to Girod Bank (which became the defendant) in 1985. That mortgage allowed for compound interest monthly and a variation of interest rates. This mortgage, the plaintiff submits was secondary to the contract to open and operate the current account dated 15th November, 1984. It was secondary to the contract for current account because it was granted eight months after the 15th

November, 1984 and contains nothing to expressly connect it to the contract of current account. Also the terms and conditions of the current account contract were not made subject to the mortgage terms.

The mortgage was granted to secure loans from the defendant to the plaintiff and it was not intended that the terms of the mortgage should be co-extensive with those of the contract to open and operate the current account. The mortgage should not be read with the contract hence the defendant can place no reliance on its terms to vary interest rates on overdrafts or to compound such interest.

The defendant at paragraph 12 of the defence in Suit C.L.89/91 recites clauses 2(a) and (b) and 1(a) of the mortgages dated 4th July, 1985 and 18th June, 1987 respectively.

Clause 2(a) is in these terms:

> "To pay the Bank on the date set out at item 4 of the Schedule hereto such monies as shall for the time being be actually due to the Bank in respect of all monies and liabilities now or hereafter due or incurred by the mortgagor to the Bank on any account in any manner whatsoever whether in respect of demand loans, monies advanced on current accounts or over-draft monies advanced or paid to or for the use of the mortgagor alone or jointly with any other person firm or company and whether as principal or surety together with all usual and accustomed bank charges provided always that the certificate of a duly authorised official of the bank shall be conclusive evidence as to what is due."

2(b) - "To pay to the bank as long as any monies are owing to the bank under paragraph (a) of this clause interest thereon at the rate stipulated in item 5 of the Schedule hereto with monthly rests or at such other times as the bank shall from time to time specify or at such other rate or rates of interest as the bank shall from time to time charge."

Clause 1(a) of the mortgage dated 18th June, 1987 reads:

> "To pay to the Bank on Demand
>
> (i) All such sums of money as are now or shall from time to time hereafter become owing to the Bank from the mortgagor whether in respect of overdraft, monies advanced or paid to or for the use of the mortgagor or charges incurred on his account

> or in respect of promissory notes and other negotiable instruments drawn accepted or endorsed by or on behalf of the mortgagor and discounted or paid or held by the Bank either at the mortgagor's request or in the course of business or otherwise and all monies which the mortgagor shall become liable to pay to the bank under any guarantee, indemnity undertaking or agreement or in any manner or on any account (including all sums which have become immediately due and payable under the terms of any Instalment Loan) whatsoever and whether any such monies shall be paid to or incurred by or on behalf of the mortgagor alone or jointly with any other person, firm or company and whether as principal or surety together with interest at the rate per annum stated as the Original Rate of interest in Item 3 of the said Schedule with such rests as are stated in Item 4 of the said Schedule as rests at which Interest payable or at such other times as the Bank shall from time to time specify or at such other rate or rates of interest as the Bank shall from time to time charge which interest may be computed as simple interest to compound interest as the Bank shall require together also with all usual and accustomed Bank Charges.'

The mortgage deed dated 10th August, 1987 in Suit C.L. N.88 of 1991 at Clause 1(a) (1) is in similar terms to those in 1(a) (i) of Suit C.L. N-89.

The defendant's contention that the contracts to open and operate current accounts are to be read with the mortgages is valid only if there is a merger of the two.

A question of merger arose and was dealt with in the case of **Barclays Bank Limited v. Beck and Another [1952] 1 All E.R. 549.** The defendants in that case operated a farm and held a current account at the plaintiff's bank. The account became overdrawn and mortgage was created to secure all moneys then or thereafter owing to the bank and to pay on demand all such moneys. Subsequently the farm was sold and the amount charged thereon was discharged by paying an amount less the amount on the overdrawn account. The Bank sued for the amount of the overdraft. The defence was that

the discharge of the mortgage had discharged the indebtedness in full. The court held that the defence failed. On appeal to the Court of Appeal the decision was upheld.

Lord Denning at page 552 Letter G-H explained the concept of merger thus:-

> "The merger of a simple contract debt into a specialtity debt depends undoubtedly on the intention of the parties and their intention is to be gathered from the documents they have signed.
>
> In an ordinary case where a defendant who owes an existing simple contract debt gives security for the payment of it by means of a Covenant under seal and a charge on his property the simple contract debt is merged in the specialty unless there is an express intention to the contrary.
>
> But a running account with a bank stands on a different footing. When security is given for payment of amounts due or to become due on a running account, the doctrine of merger, it if applies at all, would at the most only apply to the indebtedness which existed at the date when the covenant was taken and the charge given. The reason is because merger can only apply to existing debts. Future debts do not merge; they take their colour from the circumstances in which they arise------
> ---
> If they are created under and by virtue of a deed, they are speciality debts from their commencement, but if they are created by a simple contract outside a deed they remain simple contract debts even though there is a deed in existence which gives collateral security for them.
>
> In my opinion, therefore, the agricultural charge was only a collateral security for the running account. When this collateral security was dischraged the indebtedness on the simple contract remained....."

It is my understanding from the dictum of Lord Denning, that there can be no merger when a current account overdraft is secured by a mortgage.

The defendant as I have said earlier, contended for a situation where the contracts to open and operate the current accounts were to be read with and governed by the mortgages. In closing submissions it was further said by the defendant and I quote:-

> "Accordingly, given these facts and since the mortgage instruments do not state that the mortgages are given as additional and collateral

> security, it is submitted that it is wrong to say as plaintiffs have pleaded that the morrgages were granted by the plaintiffs to provide additional and collateral security for any indebtedness to the defendant. The defendant submits that the said mortgages were granted to provide security for any indebtedness of the plaintiffs to the defendant whether then existing or arising thereafter."

The cases of **Lloyds Banks Limited v. Margolis and Others [1954] 1 All E.R. 734** and **Habib Bank Limited v. Taylor [1982] 3 All E.R. 561** were cited ahead of the quoted submission. Those cases are authorities for the proposition that the making of a demand was a condition precedent to the recovery of money secured by a legal charge or mortgage.

The cases certainly do not support the contention that the mortgages in these cases merge with the contracts to operate current accounts. Neither do they support in the least, the proposition contained in the quotation above. As a matter of fact the case of **Barclays Bank v. Beck (1952) 1 All E.R.**, which held that a subsequent legal charge did not merge with a contract to operate a current account was cited with approval in the Margolis case.

It is therefore my conclusion and finding that, on the evidence and on the application of the case law -

(a) there has been no merger of the mortgages with the contracts to open and operate the current accounts;

(b) the documents are to be construed separately and;

(c) the contracts to open the current accounts are the only documents relative to the relationship between the parties in operating the current accounts.

In light of the above conclusion and finding I must return to a consideration of the Contracts to open and operate the current accounts.

It is the plaintiffs' contention, in paragraphs 8-19 and 9-18 of the respective Statements of Claims, and in their written submissions that:-

(i) under the contracts to open and operate the current accounts

(hereinafter called the contracts) the defendant Bank owes a number of obligations to the customers (plaintiffs).

(ii) the only obligation which the customer/plaintiff owes to the Bank is a "duty to exercise reasonable care in the execution of written orders."

(iii) the common law limits the customers obligations to the Bank. The Bank cannot extend those obligations unless with agreement between the parties.

(iv) the contracts contain the obligations between the plaintiffs and the defendant. In that light those obligations contained in the contract take precedence over any implied obligation of the parties.

(v) the plaintiffs bore no implied duty to check monthly Bank Statements and to notify the defendant of unauthorised transactions. Therefore the Article 13 of the Contracts is not in law a conclusive evidence clause.

(vi) the clause "at the banks usual rate of interest on overdrafts" contained in article 11 of the contracts are void for uncertainty and are unenforceable.

(vii) the defence pleas at paragraphs 20(a) of the defences that the contracts were subject to implied terms of the defendants entitlement to charge compound interest at monthly rests are of no avail. The pleas by the defence at paragraphs 25(a) of the defences which say that the defendant by implied terms in the contract was entitled to charge interest on unauthorised overdrafts at rates of interest it was liable to pay to the Bank of Jamaica in the event that the defendant was in breach of the Banking Act are also of no avail.

(viii) that the defendant's pleas at paragraphs 20(a), b & 25(a) of Defences that it was entitled to charge interest on overdraft capitalised sums monthly according to the recognised usage and practice of Bankers in Jamaica are not valid pleas.

The above eight points are not exhaustive of the plaintiff's contentions. However in the light of the pleadings by the defendnat relative to the contentions and the cases cited it is my view that a consideration of them now will go a far way to establish the validity or otherwise of the competing positions as to the contracts.

In relation to the plaintiff's contentions (i) - (v) above the

following cases were cited in support thereof:

(i) N. Joachimison (A firm) v. Swiss Bank Corporation [1921] All E. Rep. 92-101.

(ii) Foley v. Hill (1843) - (1860) All E. Rep. Reprints p.16.

(iii) London Joint Stock Bank Limited v. McMillian et al (1918-19) All E.R. H.L. pp.30-59.

(iv) Greenwood v. Martins Bank Limited (1932) All E.R. Reprints p.318.

(v) Tai Hing Cotton Mill Limited v. Lin Chong Hing Bank Limited [1985] 2 All E.R. 947-959.

The defendant has not in its final submissions raised any challenge to the plaintiffs' submissions as to the nature and content of the parties' relationship: that is, it is contractual between banker and customer and may contain implied terms and which implied terms, if any, will be superceded by those in the contract.

I am concluded, having considered the cases listed (i)-(iv) above that plaintiffs' contention as advocated by Mrs. Benka-Coker Q.C. are sound and are fully supported by the cases cited. My conclusion as to the correctness of the plaintiffs' contention does not end the matter because in the light of defendant's pleadings the following points also fall to be considered and determined.

(i) is the article 11 of the contract ambiguous or uncertain and consequentially void and unenforceable?

(ii) does article 13 of the contract provide a conclusive clause?

Was the defendant under the contract competent to:

(iii) vary interest rates on the current accounts?

(iv) to compound the interest on the current accounts?

(v) to charge "penalty interest on unauthorised overdrafts?"

Article 11 of the contract is as follows:

"In the event of any account of the customer running into overdraft (including those accounts in foreign currency), the Bank is hereby authorised, without any limitation, to transfer the balance of any other

> account or deposit of the customer, to cover the overdraft. Likewise, in the event of an overdraft in the account, the customer hereby authorises the Bank to charge him and hereby agrees to pay, in addition to other charges provided in this agreement, interest on the overdraft balance, (at the Bank's usual rate of interest on overdrafts) until the same is fully satisfied. In the case of an account in foreign currency, the Bank will make the conversion at the official rate of exchange existing on the date of the transaction and such allocation will be made by the Bank without prior notice to the customer. It is clearly understood that the foregoing does not give the customer any right or in any way authorises him to overdraw any current account, even if he has another account on his name in the same with a credit balance and sufficient funds to cover the overdraft."

The Clause in article 11 which reads at the "bank's usual rate of interest on overdrafts," according to the plaintiffs, is void for uncertainty. The uncertainty, on the plaintiff's case, arises from the fact that six possible meanings are attachable to the phrase.

I am of the opinion these possible meanings are of enough weight to demand listing and they are:

(a) the rate of interest on overdrafts balances existing on the date that current account was opened;

(b) the rate of interest existing on overdraft balances on the date the contract was signed;

(c) the rate of interest applicable to overdraft balances on the date that the plaintiff's account went into overdraft;

(d) the rate of interest the defendant was accustomed to charge on overdraft balances;

(e) the rate of interest chargeable on overdraft balances on each occasion that the customer presents a cheque for payment while the account is in a state of overdraft;

(f) the meaning ascribed to the phrase by Caple Williams.

Prominent among the cases which the plaintiffs rely on for

support of their contention are **Scammell v. Ouston (1941) A.C. 251** and **Brown v. Gould (1972) 1 Ch. p.55**.

The Scammell case held that a phrase "on/hire purchase terms" the usual was too vague to provide any precise meaning attachable to it with the upshot that there was no enforceable contract between the parties.

In resisting the plaintiffs' contention the defendant submits that on a construction of Article 11 the parties have agreed that one of the parties, the bank, is the party to determine and charge its usual rate of interest on overdrafts. The only evidence of relevance is for the defendant to state its usual rate of interest on overdrafts. The plaintiffs as customers of the bank would play no part in determining the rate of interest on overdrafts. The defendant relied on the cases of **Hillas v. Arcos Limited (1932) All E.R. 494 and 502 et seq** and **McLeod v. The National Bank of New Zealand (1887) S.C.N.Z. Vol. 6, 3** as supportive of its contention.

Having set out the parties positions on Clause 11 I must now consider the authorities in support of those positions.

In Scammell v. Ouston the plaintiff made an order for a motor vehicle which stated inter alia that "this order is given on the understanding that the balance of the purchase price can be had on hire-purchase terms over a period of two years."

The order was accepted by the defendnt but no hire purchase terms were worked out or determined specifically. Evidence showed later that a wide variety of hire purchse agreements existed and nothing indicated which of them was favoured by the parties.

When the defendant refused to deliver the ordered vehicle, the plaintiff sued and was met with the plea that no contract had been made. The House of Lords agreed.

Lord Wright said there were two grounds on which he must hold that no contract had been made.

> "The first is that the language used was so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular intention. The object of the court is to do justice between the parties, and the court will do its best, if satisfied

> that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words considered, however broadly and untechnically and with due regard to all the just implications fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found, but I think that it is found in this case. My reason for so thinking is not only based on the actual vagueness and unintelligibility of the words used, but is confirmed by the startling diversity of explanations tendered by those who think there was a bargain, of what the bargain was. I do not think it would be right to hold the appellants to any particular version. It was all left too vague. But I think the other reason which is that the parties never in intention nor even in appearance reached an agreement, is a still sounder reason against enforcing the claim. In truth, in my opinion, their agreement was inchoate and never got beyond negotiations. They did indeed accept the position that there should be some form of hire-purchase agreement, but they never went on to complete their agreement by settling between them what the terms of the hire-purchase agreement were to be."

I apprehend from the above quotation that Lord Wright found that no contract existed because inter alia, diverse meanings could be given to the term "on hire-purchase terms."

In **Brown v. Gould (1971) 2 All E.R. 1505** the learned trial judge Megarry J. as he then was, refused to void a clause in an agreement for uncertainty of phraseology or diversity of meaning. But the learned judge did accept that a clause can be struck down if it is devoid of meaning or if it attracts a variety of meanings which makes it impossible to say which of them was intended.

He did so at page 1512 of the report at letters c-e in this way:

> "Furthermore it does not seem to me that Counsel for the defendant has been able to demonstrate that this

> is a case of uncertainty in either of the two main ways in which that can be done. A provision may be void for uncertainty because it is devoid of meaning---------- The other main head is where there is a variety of meanings which can fairly be put on the provision and it is impossible to say which of them, was intended."

In **Hillas and Company v. Arcos Limited (1932) All E.R. 494**

Lord Tomlin and Lord Wright made the following speeches respectively:

> "The problem of a court of construction must always to balance matters that, without violation of essential principle, the dealings of men may, as far as possible, be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

> "It is the duty of the court to construe agreements made by business men - which often appear to those unfamiliar with the business far from complete or precise - fairly and broadly without being astute or subtle in finding defects; on the contrary the court should seek to apply the maxim verba ita sunt intelligenda ut res magis valeat quam pereat. That maxim, however does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of of law, as, far instance, the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail."

Are any of the features of the cited cases referable to the point in this case, which falls to be determined?

I see features from the Scammell case which are so referrable. Firstly, I have no doubt that the clause "at the banks usual rate of interest on overdrafts," attracts the description of vagueness as did "the usual hire-purchase terms" in Scammell. Secondly, that vagueness and consequential lack of precision in the meaning of the clause is not curable by a recourse to any prior dealing between plaintiffs and defendant. Prior dealing between the parties, as existed in **Hillas v. Arcos Limited**, is not present in the instant case.

The defendant's Attorney Mr. Scharschmidt as I understood him, submitted that "the usual rate of interest on overdraft" is that

which is unilaterally determined by the defendant. I cannot accept that submission for the simple reason that it is in negation of the necessary consensus between parties to a contract.

Thirdly, in Scammell v. Ouston there was an absence of accepted business practice which could go to aid in the interpretation of the "usual hire-purchase terms."

The defendant says the evidence given by witnesses from the several banks as well as that given by Caple Williams adequately supply the accepted business practice which could assist the interpretation of "the usual rate of interest or overdraft."

The evidence is said to indicate that compound interest was chargeable on overdrafts where there was no agreement for overdraft facilities. That interest rate according to the witness Caple Williams, was ascertainable from computer at any given time and was well known to the defendant.

The defendant submits that the practice of compounding interest, as evidenced by the several witnesses which it called, in the absence of express agreement entitles the defendant to charge compound interest. That entitlement is present either on the contract or by custom and the interest charged would be lawful. A fortiori, the plaintiffs would have acquiesced in such charges.

The plaintiffs in this area have defined 'usage', which to my mind is equivalent to business practice or custom, as "a particular course of dealing or line of conduct which has acquired such notoriety, that once persons enter into contractual relationships in matters respecting the particular branch of business life, where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct unless they have expressly or impliedly stipulated to the contrary."

In the light of the pleadings and the tenor of the submissions the parties have agreed that the usage or custom in this case attracts proof by the defendant.

I think that the plaintiffs have correctly stated five characteristics which the defendant must prove so as to have the court's acceptance of what is called "usage" or custom.

The "usage" must be:

(i) notorious

(ii) certain

(iii) reasonable

(iv) not offensive to any legislative enactment or common law.

These characteristics, of necessity, must be cumulatively proven.

On my considering the dispositions of the witnesses from the various banks I do not find that they provided any cogent evidence as to the existence of business practice which would assist me in interpreting "the usual rate of interest on overdraft" to confer any entitlement on the defendant to compound interest. I hold that finding because in a majority of the practices deponed to, there was express terms in the contracts to compound interest on overdraft balances unlike the circumstances of this case.

In the other practices, at some time there had been express terms to charge compound interest on overdrafts.

Those are circumstances which negate notoriety and certainy in the practices.

As far as the evidence of Caple Williams go, I find it obfuscatory rather than elucidatory of any area of this aspect of the case.

The clause "the usual rate of interest on overdraft" is therefore void for uncertainty and is unenforceable to authorise the charging of compound interest by the defendant.

If my conclusion as to the absence of usage, custom or business practice is wrong the case of **Bank of Commerce International S.A. v. Blattner (20 November, 1986 unreported) Court of Appeal (Civil Division) No. 1176 of 1986** allows me to say that the defendant had no competence to charge compound interest.

Blattner dealt with a mortgagee's entitlement to charge compound interest. There was contained in a mortgage, a covenant which obliged the mortgagor to have interest computed by agreement or failing such agreement by the usual mode of the bank and shall be at the rate of 6½% above the base rate----------

The Court of Appeal in England held that the covenant worded as it was, did not entitle the bank to compound interest although evidence was present to say it was the bank's practice to charge it.

The case of **Trustee Savings Bank v. Maughan [1992] 1 Irish Report 488** also offers me support in my conclusion.

This case, albeit a decision of first instance, concerned the issues of:

(a) whether the bank was entitled to compound interest on outstanding debt, and

(b) to charge default rates of interest.

In relation to the issue of compound interest Costello J. said that the principle laid down in Blattner although it was a case on a mortgage, is of general application to loans by a bank. He then concluded that when a contract is made and is subject to the bank's "usual terms and conditions" an entitlement to compound interest does not arise even if a practice exists to charge such interest.

The learned judge further held that a default rate of interest was invalid. That is so because a term in a contract which entitled a bank to interest at a higer rate in case of a default, may be void for being a penalty. There must be an express agreement to pay a default rate of interest and any attempt to imply such a term by reference to "usual terms and conditions" will not succeed.

I would respectfully adopt and apply Mr. Justice Costello's reasoning to the instant case.

The case of **National Bank of Greece S.A. v. Pinios Shipping Company No. 1 [1989] 3 W.L.R. 1330** was cited in support of the defendants argument of entitlement to charge compound interest.

That decision to my mind does not assist the defence here since in the case the customer conceded and admitted the bank's right to compound interest.

CONCLUSIVE EVIDENCE CLAUSE

Article 13 of the contract to open the current accounts reads thus:

> "The customer hereby agrees to notify the bank in writing of any change of his address. The customer further agrees to notify the bank in writing of any objection or claim which he may have with regard to the periodic statement of account supplied by the bank to the customer or to any communication sent to him by the bank relative to the bank's internal or external audits or inspection. If the customer does not communicate his objections to the bank as aforesaid within ten days of the date of any monetary or other statement then it shall be understood that the

> customer shall have accepted the accuracy of the notified balance and the bank shall be released from any responsibility or obligation for any claim arising from any inaccuracy which should have been brought to its attention by the customer. Bank Statements and cancelled cheques will be sent monthly by ordinary mail to the customer's address appearing on the bank's record on such dates as the bank shall decide from time to time."

The above clause is called a conclusive evidence clause. The defendant contends that the clause in the circumstances of this case and on the evidence relieves it from any responsibility for any inaccuracy in the statements of account. Defendant relies on the evidence given by Sinclair on the 6th of February, 1995 which is:

> "Statements for Negril Investment Company Limited went to Harbour Street to Mr. Bingham, that continued until Mr. Bingham left, they were sent to Bingham on my authority. After Bingham left I instructed that the statements should go to Mr. Strachan."

Reliance is also placed on the evidence given by Louis Reynolds on the 20th November, 1995 to the effect that Cash Books and Bank Reconciliation Statements show that the statements, cancelled cheques and debit memos had been received by the plaintiffs.

The defendant therefore pleaded at paragraphs 8 (iii)(a) and 6 (ii) of Negril Negril Holdings Limited and Negril Investment Limited respectively:-

> "The defendant further says that monthly Bank Statements of the Plaintiff's Current Account together with the cancelled cheques, were supplied by the defendant to the plaintiff during the entire life of the said account and at no time did the plaintiff notify the defendant in writing of any objection or claim in respect of the aforementioned statements. In the premises the defendant says that the failure of the plaintiff referred to herein constituted an acceptance of the accuracy of the notified balances and the defendant is accordingly released from any responsibility or obligation for any inaccuracy which should have been brought to its attention by the plaintiff/customer. The defendant says that the plaintiff is estopped from asserting otherwise and/or disputing the accuracy of the notified balances."

In **Paget's Law of Banking 10th Edition at page 174**, the subject

of "conclusive evidence clause" is treated by the learned authors thus:

> "Although reliance upon a conclusive evidence clause can be forensically unattractive, there is clear authority that, as a matter of principle, such a provision is binding according to its terms. This authority is **Bache and Company (London) Limited v. Banque Vernes et Commerciale de Paris S.A. [1973] 2 Lloyd's Rep. 437, C.A.,** applying a decision of the **High Court of Australia Dobbs v. National Bank of Australasia Limited (1935) 53 C.L.R. 643.**"

In both cases a conclusive evidence clause was claimed to be contrary to public policy as tending to oust the jurisdiction of the court and in both the submission was rejected.

In Bache's case, commodity brokers demanded a bank guarantee prior to its buying and selling stocks on behalf of their customers. The defendant who were bankers to the trading company gave the guarantee which contained a conclusive evidence clause. That clause inter alia provided:

> "Notice of default shall from time to time be given by (plaintiffs) to (defendants) and on receipt of any such notice (defendants) will forthwith pay the amount stated therein as due, such notice of default being as between (plaintiff) and (defendants). Conclusive evidence that (defendants) liability hereunder as accrued in respect of the amount claimed."

Bache transacted business for the trading company who defaulted in payments to the extent of ₦60,000.00. Bache issued and served a notice under the conclusive evidence clause. Subsequently a writ was issued claiming ₦60,000.00 under the guarantee.

Summary judgment was awarded and on appeal the judgment was upheld by the Court of Appeal. In upholding the judgment the Court of Appeal emphasised the acceptability, on principle, of a conclusive evidence Clause.

Lord Denning, who gave the main judgment, gave the reason why conclusive evidence Clauses are acceptable thus:

> "this commercial practice (of inserting conclusive evidence clauses) is only acceptable because bankers or brokers who insert them

> are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted."

The underlining is mine as I am of opinion that although a conclusive evidence clause is acceptable on principle, it is nevertheless liable to careful scrutiny by a court to see if it should be regarded as such.

In that light, the plaintiffs say the clause cited does not qualify to be a conclusive evidence clause. They rely on **Tai Hing Cotton Mill Limited v. Liu Chong Hing Bank Limited [1986] A.C. 80; (1985) 2 All E.R. 947 P.C.**

The appellant in this case, held current accounts at the defendant's bank. The appellant's clerk forged several cheques to an amount of H.K.$5.5 million. The bank honoured the cheques on presentation and debited the appellant's accounts.

The appellants system of internal financial control was inadequate to prevent or detect fraud and the frauds were not discovered until 1978. The appellants sued the defendants claiming declarations that they were not entitled to debit their accounts with the amount of the forged cheques and payment of the sums. Both at first instance and in the Court of Appeal in Hong Kong the appellants claims were dismissed. The courts held that the appellants owed a duty to the banks to prevent fraud in their business and to challenge/which they neglected. In the circumstances the appellants were estopped from asserting that the accounts were wrongly debited.

The Judicial Committee of The Privy Council allowed the appeal. In so doing the Judicial Committee followed the decisions in **London Joint Stock Bank Limited v. McMillan [1918] A.C. 777 H.L. and Greenwood v. Martins Bank Limited [1933] A.C. 51 H.L.** Those cases were dealt with "ante" in this judgment and stated authoritatively that the only duty which a customer owes to a bank, in the absence of express agreement, is a duty to exercise due care in drawing cheques so as not to facilitate fraud and to notify the bank immediately of unauthorised cheques of which he becomes aware. The Judicial Committee held that no wider duty than that so established in the

cases to require a custom to act to the prevention of fraud in his business or to require him to check his monthly statements, can be implied into the contract as necessary incidents of the relationship of banker and customer.

The Judicial Committee also held that in order that a contractual obligation to examine its bank statements maybe imposed on a customer with the consequential acceptance of the accuracy of the statement if unchallenged, clear and unambiguous terms are necessary.

I am of the opinion that the circumstances of the instant case are very close to those of the Tai Hing case.

The conclusive evidence clauses raised by the Bank there, are of like nature to that in the present case. Those conclusive evidence clauses were rejected by the Judicial Committee and in so doing Lord Scarman said:

> "If Banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the objection and of the sanction imposed must be brought home to the customer. In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that in their Lordships' view the true nature of the obligations of the customer to his bank where there is no express agreement is limited to the MacMillan and Greenwood duties. Clear and unambiguous provisions is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts."

I unhesitatingly adopt the above citation and apply it to the instant case. The consequence of that application constrains me to find that the Clause 13 does not amount to a conclusive evidence Clause so as to estop the plaintiffs from enquiring into every aspect of the accounts.

In accepting the reasoning in Tai Hing I am aware that **Bache and**

Company Limited v. Banque Vernes Et Commerciale De Paris S.A. was not referred to in the Tai Hing's case. In that case, Tai Hing may be said to be per incuriam Bache. But be that as it may, Bache is a decision of The Court of Appeal whereas Tai Hing is a decision of the Judicial Committee which binds this court.

Variation of Interest Rates on Current Accounts

The article 11 contains no provision for a variation of interest rates. It speaks of interest at the "bank's usual rate of interest." That clause I have already found to be void for uncertainty and obviously could afford no competence on defendant's part to vary interest rates.

Compound Interest on Current Account

The law traditionally leaned against compound interest. In this case, the article 11 speaks to interest "at the banks usual rate of interest." In the light of my finding relative to that clause there can be no question of compound interest based on the contract.

Penal Interest Rates on
Unauthorised Over Drafts

The plaintiff at paragraphs 19 and 22 of Suits C.L.88/91 and 89/91 respectively, plead that the defendant charged them penalty rates of interest on their current accounts the moment they went into overdrafts as no limit was set on overdraft.

They say no overdraft limit was ever set on the accounts for Negril Investment Company Limited (C.L.89/91); and it was only in June of 1988 that a limit of $3.8 million was imposed on the account of Negril Negril Holdings Limited (C.L.88/91).

The defendant at paragraphs 22 and 25 of the defences denies that the rates of interest were penal but were perfectly permissable within the contract to open and operate current accounts.

Moreover, the defendant argues that it was obliged statutorily, to pay penal rates of interest to the Bank of Jamaica in the following situations:

(i) If its current account held in the Bank of Jamaica went into overdraft;

(ii) If its cash reserve at the Bank of Jamaica fell below the statutory requirement;

(iii) If the Defendant failed to meet the overall liquid assets requirement.

The defendant says between the years 1988-1991 its penal rate of interest payable to the Bank of Jamaica was 61% per annum whereas the rate of interest charged the plaintiff was between 35% and 52% per annum. In the circumstances since the rate of his penalty to Bank of Jamaica exceeded the interest rate which he charged the plaintiff the latter is not a penalty. In any case he says the penal rate it to pay Bank of Jamaica was duly notified to the plaintiff in the monthly Statements which were issued to the plaintiff.

At the outset let me say that the plea of notification in the monthly statements does not avail the defendant. The relationship of banker and customer does not give rise either in contract (impliedly) or in tort to any duty owed by the customer to the bank to check his monthly (or other periodic) bank statements so as to be able to notify the bank of any items which were not or may not have been authorised or agreed to by him.

The case of **Tai Hing Cotton Mill Limited v. Liu Chong Hing Bank Limited (1986) A.C. 80** is the binding authority on the point.

Parties to a contract may agree to a sum which should become payable as damages on a breach. A sum so specified and agreed can either be a proper pre-estimate of the loss caused to one party by a breach of the other, or it may be a threat over one part so that he is "terrorised" to perform the contract. In the former case the sum is liquidated damages and in the latter, it is a penalty.

The point was determined in **Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company Limited (1915) A.C. 79**. The speech of Lord Dunedin at page 86 summarized certain rules which a judge should follow in finding a penalty or liquidated damages. They are:

(i) the conventional sum is a penalty if it is extravagant (excessive) and unconscionable in comparison to the greatest loss which could flow from the breach

(ii) if the promisor is to pay a certain sum of money and if it is agreed that if he does not pay that sum he is to pay a larger sum, this larger sum is a penalty.

(iii) if the sum is payable only upon one event the sum is liquidated damages. (See **Law v. Redditch Local Board (1892) 1 Q.B. 127).**

(iv) if an amount is to be paid upon the happening of one or more or all of several events, some of which may result in serious and others in minor damage, there is a presumption that it is a penalty.

The rules will assist a judge to decide, upon the terms and circumstances of a contract judged as at the time of making the contract, not as at the time of its breach; if the amount is liquidated damages or penalty. It is also useful to note that "the distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages."

The only clause of the contract which speaks to the defendant being able to charge interest (penal or otherwise) on overdrafts is clause 11. That clause says that the bank is authorised to charge interest on the overdraft balance (at the bank's usual rate of interest on overdrafts) until the same is fully satisfied.

I have already found that the clause is void and cannot give support to a claim for competence to charge interest at penal rates.

In addition to that finding, it is necessary to examine the validity of the clause within the circumstances of this case.

The important circumstances relative to penalty rates of interest came in the evidence of Maurice Keane-Dawes who was the defendant's credit manager and who was familiar with the plaintiff's accounts.

Mr. Keane-Dawes gave evidence as to his knowledge of the National Development Bank providing capital financing for projects which

contribute to national development by creating employment and earning foreign exchange. The National Development Bank provided financing at interest rate far below the normal commercial bank rate. In his experience applicable interest rate was not in excess of 17% to the ultimate borrower.

The witness deposed to a letter dated 29/6/87 which was an application for a loan from the National Development Bank in favour of the plaintiff Negril Negril Holding Limited C.L.88/91/. He prepared the application and it was for an amount of J$6000000. No letter of commitment was sent to the plaintiff Negril Negril Holdings Limited.

A memorandum dated 21/3/89 was shown to the witness Keane-Dawes. He admitted authorship of the document and his reason for so doing is so cogent, relative to the question of penalty rate, as to demand quotation -

> "I wrote the memo as it was my concern at the substantial penalty interest charges being incurred by the customer on the overdraft borrowings; in particular I had observed from the current account statements that the customer had incurred overdraft interest charges close to $240,000 for the month of February, the month previous to when I did this memo. I expected that the overdraft charge of March would have been higher based on the level of activity in the account. In my view I considered the level of interest charges which were being incurred by the customer to be unjustified, based on the fact that firstly the customer was pursuing economic activity which were in the national iterest and as well the financing which was obtained through the NDB was geared towards allowing projects of this nature the benefit of the best or close to the best interest rates that the bank could offer. In addition the bank, that is Centuty National, derived certain benefits from the operation of these accounts. Firstly in terms of its significant contribution to interest revenues of the bank given the size of the loan, and also the accounts constituted a steady source of foreign exchange inflows for the bank. In addition to these benefits the bank faces minimal risk of loss from the operations of the accounts because the loan exposure was adequately protected by the value of the security. I felt therefore that the waiving of the commitment fee would at least be an indication of a willingness on the part of the bank to address what I considered to be an anomaly in the sense that the bank's largest borrowing connection was being charged at the bank's worst interest rate."

Keane-Dawes said in his evidence that the plaintiffs' accounts were identified by the Bank of Jamaica as being in breach of S.10(1)(e) of the Banking Act which set ceilings on loan to any one customer. He said prior to the accounts being identified there was no limit on the overdraft and the statemnts reflect that cheques were routinely honoured irrespective of the balances shown. This was done on the authority of Crawford the Managing Director of the defendant.

The plaintiff Negril Negril Holding Limited had on its account an overdraft limit of $3.8M and paid interest thereon at a penal rate up to June, 1988. The interest would be at a lower rate after June, 1988.

The other plaintiff Negril Investment Limited had no overdraft limit on its accounts. As a consequence all its overdrafts attracted interest at the penal rate.

The evidence given by Keane-Dawes was vehemently challenged on cross- examination by Muirhead Q.C. At the end of it I do not find that the credibility of Keane-Dawes was impaired and I find him to be a witness of truth.

Keane-Dawes' evidence showed clearly how the accounts of the plaintiffs were operated by the defendant. That evidence which I fully accept completely negates the defendant's pleas at paragraphs 22 and 25 of the respective defences. Those pleas are to the effect that the defendant was obliged to pay penal rates of interest on its overdrafts at the Bank of Jamaica in certain circumstances. In the circumstances the interest charged on the plaintiffs overdrafts were genuine pre-estimate of damage.

But Keane-Dawes' evidence is that the defendant's current account at Bank of Jamaica was never in an overdraft position so as to necessitate charging the plaintiffs penal rates of interest.

When I examine Keane-Dawes' evidence it is clear that funds from the National Development Bank were made available to the plaintiffs at penal rates of interest. The defendant incurred no loss to the extent of the amount charged as penalty.

I find that the defendant treated the plaintiffs' accounts unreasonably and oppressively. There was no justification for the penal rates of interest.

This concludes my findings on the contracts to open and operate the current accounts. It is now necessary to consider the submissions of the parties relative to:

(a) the mortgages and

(b) the promissory notes

The Mortgages

These are dated 4/7/85 and 18/6/87 referable to plaintiff in Suit C.L. N.89/91 and that dated 10/8/87 from plaintiff in Suit C.L.88/81.

The relevant clauses of the mortgages have already been set out at pages 12-14 of this judgment and I do not deem it necessary to repeat them here.

The plaintiffs at paragraphs 29 and 36 of the Statements of Claim contend that the terms and conditions of the mortgages as they relate to the payment of interest were not operative and effective without formal demand by the defendant for repayment of sums due and owing by the plaintiffs. In that light sums recovered from the plaintiffs, by the defendants, in relation to the mortgages, prior to a formal demand were not permitted under law.

The defendant at paragraphs 33 and 39 of the respective defences says the mortgages, being one of the documents which governed the parties relationship, allowed for the charging of interest without any demand. In any event, demands were made by letter of 7/6/90 and during meetings with plaintiffs in the said month of June, 1990.

Where a mortgage is given to secure a current account between the parties as is the case here, rights under the mortgage accrue only on a formal demand. The formal demand is a condition precedent to the recovery of money secured by the mortgage. See the cases of **Lloyds Bank Limited v. Margolis and Others [1954] 1 All Eng. Rep. 734** and **Habib Bank Limited v. Tailor [1982] All E.R. 561**.

The fact that a demand is essential in the recovery of money secured demanded that a demand be properly defined.

Such a definition was made by Walker J. in **Re: Colonial Finance Mortgage Investment and Guarantee Corporation Limited (1905) 6 S.R.N. S.W. 6 at 9** :

> "there must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word "demand" need not be used; neither is the validity of a demand lessened by its being clothed in the languge of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect."

The quoted definition has been given approval in **Re A Company [1985] B.C.L.C. 37 and in Blattner 20/11/86 C.A. No.1176 of 1986**.

The defendant says that valid demands were made upon the plaintiffs orally at meetings and by letters dated 7/6/90 - "Dear John letters."

John Sinclair denied being present at any meeting at which any oral demand for payment was made upon the plaintiff(s). In that case, only the letter of the 7/6/90 demands consideration to see if it is within the accepted definition of a valid demand.

I am in no dount that the letter of 7/6/90 constitutes no formal demand as claimed by the defence. The letter of 7/6/90 is similar in tenor to the letter of September 20, 1892 and which was considered and refused validity as a demand in **Re Colonial Finance, ante**.

On the 26th of June, 1991 letters were sent to the plaintiffs relative to theit indebtedness to the defendant. Those letters are, I find, clearly valid letters of demand and on the pleadings have been so accepted by the plaintiffs.

Since there was no valid demand prior to 26th June, 1991, which would enable the defendant to exercise rights to realise its security under the mortgage the plaintiffs are quite correct to plead that "any sum recovered by the defendant from them representing interest on loans and charged at rates under the mortgages prior to 26/6/91 are in law not recoverable by the defendant."

In the written submissions the plaintiffs did urge the court to make 10 findings of law relative to the mortgages. I am taken by the obvious urgency of the submissions. However, to be conservative of time and words, I will say this. I have earlier found that the mortgages are to be treated as collateral to the contracts to open current accounts, the relationship of customer and banker between the parties has not been impaired. In the circumstances none of

the terms and conditions of the mortgages were operable without a proper demand.

The Promissory Notes

The plaintiffs gave promissory notes to the defendant for sums borrowed from the defendant.

The notes given with respect to loans to plaintiff in Suit C.L.88/91 all bore interest at a rate of 17% at simple interest. The other notes given in relation to loans to plaintiff in Suit C.L. 89/91 had interest rates of 33%; 34% and 34% respectively.

The plaintiffs argue that the rates of interest stated on the notes cannot be varied by the defendant in the absence of express provision contained in the note.

The defendant with much sophistry and by rather circuitous argument says that it was entitled to vary the rates of interest. The defendant says that the promissory notes were granted on the basis of some other agreement which is the mortgage. That agreement would contain the terms. Without such an agreement the promissory note would be a "mere naked promise" which could not be enforced by the defendant.

With all deference to the defendant's eminent attorney, that argument is untenable.

I say so firstly because each of the Promissory Note is in strict conformity with the definition and requirements set out in the Bills of Exchange Act. Each note state what sum is to be paid, to whom it is to be paid, by whom it is to be paid and at what rate of interest. There is nothing contained in the note which makes for the variation of interest rates. Moreover, "a certain sum in money" in the definition of a promissory note includes the interest payable.

Secondly the defendant's argument would rest on a merger of the promissory note with the mortgage. The case of **Barclays Bank Limited v. Beck (1952) 2 Q.B. 47** negates that contention.

The defendant had no authority to vary the interest rates on the promissory notes.

This case is unique in many respects. As far as it lies in my experience, it is the first time in this jurisdiction, that a customer has forensically challenged a banker as to how that banker has operated that customer's accounts. The challenge to the operation of the accounts included questions inter alia as to the banker's competence to compound interest, to vary interest rates, to charge penal rates of interest on overdrafts and to claim under a mortgage, prior to any formal demand on the mortgagor.

The plaintiffs claim on each suit, several declarations. The suits have been consolidated thus enabling me to deal with the claims together. I do so and treat them as follows:

1. The Declaration sought at A in the respective pleadings and relative to the stated current accounts is granted.

2. The alternative declaration sought at B is denied.

3. The alternative declaration at D is granted.

4. The declaration sought at E is granted.

5. The declaration sought at F is granted.

6. The declaration sought at H is granted.

7. I interpret the terms and conditions of the respective mortgages as follows:-

   (a) they were not effective immediately upon their execution.

   (b) each was dependent upon a formal demand for its terms and conditions to be effective.

   (c) the mortgages did not merge with the contracts to open and operate the current accounts.

   (d) the mortgage dated 4th July, 1985 was discharged in 1986 and ceased to be of any effect from then.

   (e) the mortgages dated 18th June, 1987 and 10th August, 1987 had no effect on the terms of the demand loans as shown on the Promissory Notes prior to June 26, 1991.

8. The declaration sought at K is granted.

9. The declaration sought at L is not granted.

10. The order that the defendant render proper accounts in relation to all the accounts operated by the defendant with the plaintiffs is granted.

11. Declaration at NN is refused.

12. The plaintiffs also seek orders that the defendant do pay to them all such sums of money found due and owing to them at a rate of interest to be determined by the court.

I must now make a few observations and comments.

In every area where complaint has been made the plaintiffs have succeeded. There has been no evidence that the plaintiff's business were conducted so as to make for failure. Their hotels regularly made substantial depostis with the defendant's bank in local and foreign currencies. Notwithstanding such deposits their current accounts were constantly in serious states of overdraft which, according to the defendant, attracted penal rates of interest. The question must be asked why?

To answer that, the "Special Relationship" between Sinclair and Crawford, which I have found, has to be revisited and the evidence of Keane-Dawes re-examined.

The special relationship was the medium within which the plaintiffs' accounts were operated and Keane-Dawes evidenced the method used in operating those accounts.

I have found from Keane Dawes' evidence that persons who had current accounts with the defendant were invariably given credit limits within which specific rates of interest were chargeable and beyond which additional and higher rates of interest were charged as penalty for exceeding the credit limits.

The plaintiffs were given no such credits limit and their accounts were subjected to high penalty rates of interest as soon as they went into overdraft. No wonder the accounts were constantly overdrawn attracting not only penal rates of interest but also compound interest at those penal rates.

In the evidence given by Keane-Dawes on the 13th February, 1995 there is information on loans from the National Development Bank and how the defendant dealt with those loans in relation to the plaintiffs' accounts. Loans or funding were made available to plaintiff through the defendant at the soft rate of 17% because plaintiffs were potentioal earners of foreign exchange.

Because drawings on that funding from the National Development Bank were dependent on evidence of completed works, the plaintiffs

of necessity had to find funds until the drawings on the National Development Bank's funding materialised.

The plaintiffs were encouraged to draw cheques on accounts which were already overdrawn and subject to very high penal rates of interest in order to complete building.

No overdraft limit was imposed and therefore according to Keane-Dawes the plaintiffs, on those drawings from the National Development Bank, paid interest at a rate of three times what was the rate stipulated by the National Development Bank. To my mind the plaintiffs were effectively being loaned their own funds at horrendous rates of interest.

Crawford for the defendant was well aware of the oppressive and unfair manner in which the plaintiffs' accounts were being operated. That conclusion is inescapable from the evidence given on 13th February, 1995 that when Keane-Dawes wrote to Crawford suggesting that the greater part of the substantial penalty rate of interest resulted from the manner in which the accounts were operated, his suggestion was brushed aside thus "John has done well from our assistance and should continue to pay penalty rates "(See memo. dated 21/3/89 at p.132 of Neg. Investment File). Interestingly Keane-Dawes was accused of not acting in the best interests of the defendant because he made the suggestion.

There is no doubt in my mind that the "special relationship" between Sinclair on behalf of the plaintiffs and Crawford for the defendant and the unfair manner in which the plaintiffs' accounts were operated, inter alia, adversely affected the plaintiffs' business by forcing on them massive overdrafts at penal rates of interest.

The plaintiffs on the declarations which I have already granted, were not obliged to pay the penal rates of interest charged. It follows that the interest so paid is refundable the plaintiffs. What is the amount of that interest?

The plaintiffs called a Chartered Accountant Mrs. Patricia Daley-Smith to prove the interest. Her proof of that interest involved in no small measure a transfer of $1.520.000 from Negril Negril Holdings Limited account to that of Negril Investments Limited account. That transfer was shown in Bank Statements issued to

Negril Negril Holdings. Interest for a period 16/3/89 - 29/4/92 in an amount of $5,104,842.00 was shown in the statement. That situation clearly indicated an adverse effect on the current account of Negril Negril Holdings Limited. It is also of some significance that on her evidence and for a five month period 29/4/92 - 28/9/92 plaintiff Negril Negril Holdings Limited was charged interest to an amount of $8.025.631.

Mrs. Daley-Smith gave evidence of ways in which the plaintiffs' accounts could have been operated with far less interest charges. These ways or methods were set out in Schedules at Exhibit 14, 14A, 15 and 15A. Mrs. Daley-Smith was lengthily cross-examined by Mr. Alfred Rattray. Mr. Rattray taught her in classes at the then College of Arts Science and Technology. A great deal of the cross-examination challenged the competence of Mrs. Daley-Smith as an accountant and the credibility of her method of calculating the interest paid. I must say that at the end of the witness Daley-Smith's competence was not shaken and her evidence and calculating method remained credible.

As was expected, the defendant called Mr. L. Reynolds as a witness. Mr. Reynolds is also an accountant and was obviously called to discredit Daley-Smith's evidence as to the method and correctness of her calculations. His evidence did not achieve that objective.

When I started to consider the evidence of Daley-Smith I mentioned that her calculation of interest took into consideration a transfer of $1.520M from one of plaintiffs' current account - Negril Investment Company Limited 1300486 to that of 1302529 of Negril Negril Holdings Limtied.

The plaintiffs at paragraphs 36, 36A, 36B, 36C and 44 of the Statements of Claim contend that the transfer was without specific authority.

On the 21/11/95 subsequent to an order for discovery from the Court of Appeal, Mr. Small abandoned that contention in this manner:

> "We have looked since documents have come to light. Having regards to facts as disclosed the keeping of records re banking transactions do not allow us to maintain lack of authority to debit. The debit memos are reflected in the books and plain-

> tiffs cannot sustain their previous stance. In Account Book of Negril Investment Co. Ltd. there is an entry."

That concession and abandonment of pleadings in the light of evidence was expected of Queen's Counsel.

I am however constrained to make a few observation on the Books which were discovered. In the books, which are designed to be permanent records of transactions, several important entries were made in pencil. These entries in pencil included indicia of the authorization to transfer $1.520M which plaintiffs said was lacking.

I was surprised to see entries in an important book as a cash book written up in pencil. When I asked Mr. Reynolds if he could offer the court any explanation as to entries being made in ink and pencil he said he did not know why. He did say however, that if he were asked to audit such a book he would strongly protest the entries being done in pencil.

One thing is certain John Sinclair did not make the entries in the books. He not being a "book person" as he said in his evidence. He did swear to an affidavit of documents on 31/8/95. At paragraph 5 of that affidavit he referred to a letter from his accountants Strachan and Strachan. I quote from that letter:

> "The main cash book with reconciliations, petty cash books, Journals, General Ledgers, Subsidiary Records and all supporting documents were at sometime either removed by or delivered to us for examination, up dating where appropriate, and they were promptly returned to the client either directly by the writer or the companies' then Co-ordinator/Consultant Mrs. Sandy Chin-Yee. It should be noted that the requested information were all fully documented in the books that now cannot be found and it is considered that Mrs. Chin-Yee should be able to give invaluable information as to the whereabouts of those books in light of the role she played in the Companies."

I have commented at some length on this aspect of the evidence since:

(a) the transfer of money to an amount of $1.520M from one plaintiffs accounts to the other resulted in plaintiff paying interest of $8.025.631.

(b) if as the plaintiffs contend the transfer was unauthorised the payment of interest would be unjust and was repayable;

(c) the entry in the book which damaged plaintiffs claim was done in pencil;

(d) Crawford did assure Sinclair on the departure of Bingham that he would do for him what Bingham did;

(e) Mrs. Sandra Chin-Yee was not called to explain the state of the books.

In the light of Mr. Small's abandonment of claim of unauthorised transfer of the $1.520M there is no need to consider any question of repayment of interest on that amount. I hold although with some reluctance, that the transfer and reversals must stand.

The defendant in the circumstances claims that all costs thrown away in this aspect of the case should be paid by the plaintiffs on a Solicitor/Client basis or otherwise.

When the defendant obtained an order for discovery from the Court of Appeal costs were awarded to the plaintiffs in any event. In the circumstances I will not make any award for costs in favour of the defendant. The Court of Appeal must have refused the defendant's costs for good reason.

The plaintiffs in their pleadings have claimed damages for breaches of contract. They submit that in quantifying damages the court should consider the evidence of Mrs. Daley-Smith

The evidence as given by Mrs. Daley-Smith for the plaintiffs are really evidence of special damages and since they have not been specifically pleaded I cannot countenance it in any claim for general damages.

On the claim for general damages I am not convinced as to the propriety of that claim. I have not seen the breach which would result in damage.

From the findings I have made and the declarations granted, it is clear that the plaintiffs paid interest on their accounts over and above what should have been paid. In some cases, example where the clause 11 was held to be void for uncertainty no interest was payable.

Interest which was so deducted by the defendant has to be repaid to the plaintiffs. The total amount of interest so repayable is to be ascertained from the accounts which the defendant has been ordered to render to the plaintiffs at 10 above.

Any amount so ascertained to be repayable to the plaintiffs is to bear interest from the 29/9/92 to date. That interest is to be at a rate of interest of 52%.

I have fixed the rate of interest at 52% because this is a commercial case and I accept the dictum of Forbes J in **Tate and Lyle v. Greater London Council [1981] 3 ALL E.R. 716; 722** that:

> "In commercial cases it seems to me that the rate at which a commercial borrower can borrow money would be the safest guide. I should add, perhaps that the proper question is: at what rate could the plaintiff borrow the required sum and not what return could the plaintiff have expected if he had invested it."

During the relevant period 29/9/92 to date, lending rates ranged between 57%-52% in 1997. It is in that light that I have struck a balance and fix a rate of 52%.

There is also as the plaintiffs have claimed, an outstanding amount of $21,723 which is payable to the plaintiffs. The evidence of Mrs. Daley-Smith confirms that amount and there has been no challenge to it from the defendant. It is therefore ordered that the amount of $21,723 is to be repaid to the plaintiffs at rate of interest of 52% as of April 1, 1992 to date.

Before I end, during this case there was some evidence which suggested that certain documents of title to property of John Sinclair are being held by the defendant - Exhibits 6 and 7.

It is ordered that such documents of title are to be returned to John Sinclair immediately.

In the light of the findings there will be judgment for the plaintiffs with costs to be agreed or taxed.