JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO.123/98

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN: **GIFFORD MORRELL** **1ST. PLAINTIFF/APPELLANT**

AND: **FIONA MORRELL** **2ND PLAINTIFF/APPELLANT**

AND: **WORKERS SAVINGS AND LOAN BANK** **DEFENDANT/RESPONDENT**

Hilary Phillips, Q.C. Dr. Lloyd Barnett, and Harold Brady instructed by Grant Stewart and Phillips for Appellants.

Dennis Goffe, Q.C. Sandra Minott-Phillips and Odia Reid instructed by Myers, Fletcher and Gordon.

October 4,5,6,7,12,13,14, 15,19,20,21,1999; March 21, 22, 23, 27, 28, 29, 30, 31, 2000; April 3,4,5,6,7, 2000; March 12,13, 14,18,19, 20,21, December 10,11,12,13, 16, 2002; January 13, 14,15,16, 20,21,22,23, 2003; and November 4, 2004

DOWNER, J.A. (dissenting)

INTRODUCTION

(i)

The problem to be resolved in this unusual appeal is whether Cooke J. ruled correctly concerning the operation of four current accounts which the appellants Gifford Morrell and his daughter Fiona Morrell operated with the respondent bank, Workers Savings and Loan Bank constituted under the Workers

Savings and Loan Bank Act. The dominant account was in Jamaican currency while the other three accounts were in U.K. sterling, American dollars and Canadian dollars. The cardinal principle of law advanced by the appellants was that the four contracts to operate the accounts provided for written mandates by way of cheques on the Jamaican dollar account and withdrawal slips for the foreign currency accounts were the only methods to debit these accounts. There were two minor exceptions to this invariable rule. The accounts could be debited for bank as well as interest charges. Closely connected with these accounts, on the Bank's case, was that a mortgage was held over Mr. Morrell's property. The learned judge ruled that the Bank was entitled to enforce the mortgage as the current account in Jamaican dollars was in overdraft. He also imposed a rate of interest on the amount he found the appellants owed the Bank. On the issue of the mortgage the appellants claimed that it was for a specific loan which was never disbursed. They therefore contended that the Bank could not exercise a power of sale for this reason and also from the fact that all the accounts were in credit.

This was a complicated case. Some of the records could not be traced. Some of the principal Bank employees gave no evidence, and in any event they were no longer employed by the Bank. In these circumstances both parties jointly retained accountants to carry out an audit of the accounts with such records as they both submitted. The evidence of the accountants which was relied on by the appellants will be crucial in this appeal. Equally important, will

be the conclusive evidence clause in the contract for the Jamaican current account on which the Bank relies.

The other principal issue between the parties was raised by the appellants for the first time on appeal. The learned judge acknowledged at the very outset of his reasons for judgment, that Morrell was trading in foreign exchange, in contravention of the Exchange Control Act. Counsel for the Bank cross-examined Mr. Morrell on this issue. The issue of law which was raised for the first time on appeal was whether the Bank can rely on these illegal transactions to enforce its debt and retain its powers of sale pursuant to the mortgage. On this issue the Bank's principal defence was that the matter ought to have been pleaded in the Court below. The other line of defence was that even if it was obligatory to plead the illegality, the breaches were for the criminal Courts. It would not affect the validity of the mortgage. It is against this background that all the issues must be examined.

(ii)

How the issues were pleaded in the Court below

The appellant's Amended Statement of Claim is to be found at pages 192-202 of Volume 1 of the Record.

The accounts in issue were the Jamaican Dollar Account opened on 16th April, 1992, the U.S Dollar Account 8200038, Canadian Dollar Account 0820041 and the U.K. sterling account 08239941. The foreign currency accounts were deposit accounts, but there were no passbooks and in substance they were

operated as current accounts although there were no cheque books. These accounts were also called savings accounts. It is noteworthy, that no bank statements concerning these foreign currency accounts were ever sent to the appellants.

The appellants' averments concerning the operation of his accounts - his daughter's name was added later- are set out in the following paragraphs of the Amended Statement of Claim:

> "3. During 1992 the Plaintiff opened a Jamaican Dollar account #8001100 referred to in this Statement of Claim as 'the current account'.
>
> 4. The Plaintiff also opened a United States of America Dollar Savings Account #8200381; a Canadian Dollar Savings Account #8200046 and a Pound Sterling Savings Account #08200041.
>
> ....
>
> 6. Pursuant to the said agreement the Defendant undertook to receive lodgments into the Plaintiffs' current account in Jamaican Dollars from the Plaintiff's customers and clients and to make payments from Plaintiff's foreign exchange savings accounts in various foreign currencies to the said customers and clients. The said transactions were conducted on the basis of the rates of exchange that the First Plaintiff negotiated with his customers and clients and which he communicated to the Defendant and the written authorizations given by the First Plaintiff to the Defendant to deduct sums from the Savings Accounts."

A point to note is that there is a specific reference to the four accounts in these paragraphs. With respect to the Jamaican dollar account clause 4 of the agreement was captioned "Verification of Account. " Paragraph 6 and any

other averment in the Amended Statement of Claim which adverts to this account brings the Verification clause in issue. With respect to all four accounts there are provisions in the agreement to open the accounts which stipulate that the withdrawals from the accounts were to be by written mandates by the appellants.

The Amended Statement of Claim continues:

> "7. The Defendant undertook that in those instances where the First Plaintiff agreed to sell foreign exchange to purchasers who were not in Savanna-la-Mar that payments in Jamaican Dollars would be made to another of the Defendant's branches and that the Defendant would arrange for the transfer of the Jamaican Dollar funds by telephone after the Defendant received the Jamaican Dollar funds from the purchasers and lodge those sums in the Plaintiffs' current account before it made payments in foreign exchange to the purchasers from the Plaintiffs' Foreign Exchange Savings accounts.
>
> 8. In addition to transactions that involved the Plaintiffs' customers and clients, the Defendant, acting on behalf of its own customers periodically made requests to the First Plaintiff for him to sell foreign exchange to the Defendant's customers. These requests were the basis of contracts between the First Plaintiff and the Defendant for the First plaintiff to sell foreign exchange to the Defendant's customers in which the Defendant undertook to collect the Jamaican currency from its customers and lodge the same into the Plaintiffs' current account. In those instances where the First Plaintiff agreed to sell foreign exchange to the Defendant's customers who were not at the Savanna-la-mar branch the Defendant's customers would make payment of the Jamaican Dollar funds to the account of the Plaintiffs at another of the Defendant's branches and the Defendant would arrange, after the Defendant received the Jamaican Dollar funds from the

purchasers, for the transfer of the Jamaican Dollar funds by telephone to the Plaintiffs' current account before payments were made from the Plaintiffs' Foreign Exchange Savings Accounts to the Defendant's customer.

9. In any event whether the First Plaintiff was selling foreign exchange to his customers or facilitating the Defendant to sell foreign exchange to the Defendant's customers it was agreed between the First Plaintiff and the Defendant that no deductions would be made from the Plaintiffs' foreign exchange savings account without his written authority."

On the basis of paragraphs 6,7,8 and 9 the appellants alleged Breach of Contract and Negligence. The particulars of the Breach of Contract are as follows at page 199 of Volume I of the Record:

"PARTICULARS OF BREACH OF CONTRACT

11. The Defendant in breach of contract and or negligently operated the said accounts so that the Plaintiffs' current account went into overdraft in early 1993, at a time when the sole business being transacted through that account related to trading in foreign exchange.

(a) Failing to ensure that the purchasers of foreign exchange made lodgments to the Plaintiffs' current account before deductions were made from the Plaintiffs' Foreign Exchange Savings Accounts.

(b) Failing to ensure that the payments in Jamaican Dollars made by the purchasers of Foreign Exchange were credited to the Plaintiffs' current account

(c) Making deductions from the Plaintiffs' current account and Foreign Exchange

> Savings Accounts without any written authority to do so."

As 11(c) is at the heart of the appellants' claim, it is appropriate to state that cheques or withdrawal slips were the instructions the appellants were relying on to substantiate their claims. Then paragraph 12 reads:

> "12. As a consequence of the breach of contract by the Defendant the Defendant charged the Plaintiffs interest on the said overdraft, in consequence whereof the Plaintiffs have suffered loss and damage."

If the unauthorized debits resulted in an overdraft, then the appellants can rightly claim that the corresponding interest charges were unwarranted.

The appellants made further allegations on the issue of interest thus at page 200 at Volume 1 of the Record:

> "14. The Defendant has wrongfully charged the Plaintiffs' overdraft rates and penal rates of interest. The Defendant also wrongfully stated that the Plaintiffs' said current account as at September 1994 was overdrawn in the amount of Fifty Six Million Eight Hundred and Fifty Six Thousand Eight Hundred and Fifty Six Dollars and Fifty Four Cents ($56,856,850.54)."

The Bank's response was as follows at page 182 of the Record in their Amended Defence and Counterclaim.

> "9. Save that the Defendant admits charging the Plaintiff overdraft rates of interest and advising the Plaintiff that as at September 1994 his current account was overdrawn in the sum of $56,856,850.54, paragraph 14 of the Amended Statement of Claim is denied."

Turning to the issue of operation of the accounts the following paragraphs at page 181of Volume I of the Record read as follows:

> "3. Save that from time to time and in the ordinary course of the operation of the relevant accounts, the Defendant received lodgments in the said current account and made payments to various persons on the Plaintiff's instructions both oral and written, paragraph 6 of the Amended Statement of Claim is denied.
>
> 4. Paragraph 7 of the Amended Statement of Claim is denied. From time to time the Plaintiff or persons acting on his instructions would lodge funds to other branches of the Defendant bank for the credit of the Plaintiff's accounts at its Savanna-la-Mar branch.
>
> 5. Paragraph 8 of the Amended Statement of Claim is denied. In particular, the Defendant denies ever requesting that the Plaintiff sell foreign exchange to the Defendant's customers or entering into contracts with the Plaintiff for him to sell foreign exchange to the Defendant's customers. From time to time the Plaintiff would sell foreign exchange to the Defendant in the usual course of the Defendant's banking business.
>
> 6. Paragraph 9 of the Amended Statement of Claim is denied. On numerous occasions, the Defendant made deductions from the Plaintiff's account on his oral instructions."

With respect to the above issue of oral instructions it will be very important to the appellants' case to establish that there are authorities which establish that written instructions by way of a cheque or a signed withdrawal slip was part of the contract between banker and client and that in this case

the contract between the appellants and the Bank makes written instructions mandatory.

Quite apart from the appellants' reliance on written instructions as the only permitted way to make deductions from their accounts, the appellants have advanced a powerful submission on the construction of the Verification Clause to the circumstances of the instant case. This Court's response will be of general importance to the banking community. The response at pp 47-49 of this judgment was written before the delivery of **Financial Institutions Services Limited v Negril Holdings Ltd. et al** P.C. Appeal No. 37 of 2003. The analysis at paragraphs 42-44 supports the stance taken in this judgment.

The issue pertaining to the mortgage was addressed thus at paragraph 15 of the Amended Statement of Claim at Volume I of the Record:

> "15. In September 1994 the Defendant wrongfully attempted to sell the First Plaintiff's property at Lacovia in the parish of St. Elizabeth registered at Volume 1034 Folio 102 of the Register Book of Titles under powers of sale contained in an Instrument of Mortgage dated 9th December, 1993. The Instrument of Mortgage was executed by the First Plaintiff in blank in anticipation of a loan which the First Plaintiff had applied for from the Defendant but which loan was never granted. The First Plaintiff says therefore that this Instrument of Mortgage is unenforceable."

Paragraph 10 of the Amended Defence and Counter-Claim in Volume I of the Record is the response:

> "10. In answer to paragraph 15 of the Statement of Claim, the Defendant:

a. admits that it attempted to sell the property referred to, but says that this was a proper exercise of its powers of sale under mortgage No. 795693. It further says that it was entitled to exercise the said power of sale pursuant to the terms of the said mortgage and the provisions of the Registration of Titles Act.

b. Denies that the mortgage was executed in anticipation of a loan which was never granted. The said mortgage was executed to secure the overdraft on the Plaintiff's Jamaican current account and was granted by the Plaintiff in consideration of the Defendant agreeing to allow further overdraft facilities and to delay proceeding against the Plaintiff in respect of the Plaintiff's then indebtedness.

c. Denies that the mortgage is unenforceable."

With respect to this issue, it is substantially an issue of construction of the mortgage instrument. The mortgage instrument, as exhibited, is a second mortgage with prior mortgages in favour of National Commercial Bank.

Both parties retained K.P.M.G Peat Marwick to audit all the documents relating to the appellants' current and deposit accounts. Here is how the averments were structured on this issue on pages 200- 201 of Volume I of the Record:

"16. The First Plaintiff disputed the Defendant's claim by filing Suit No. C.L.M. 471 of 1994 and the parties in an effort to settle the dispute between them engaged the services of the accounting firm KPMG Peat Marwick in 1995 to audit all of the Plaintiffs' and the Defendant's documents relating to the operation of the said Current and Savings Accounts. This audit demonstrated that the Defendant made deductions from the Plaintiffs' current and foreign exchange

savings accounts without any written or other authority and the Plaintiffs dispute the Defendant's right to do so.

17. The Plaintiffs further say that the balance in the said account was wrongly put in overdraft by the Defendant based on:-

(i) the unauthorized deductions from the said current account in the operation of the foreign exchange trading referred to in paragraphs 6, 8 and 9 herein; and

(ii) the unauthorised deduction of overdraft fees and/or interest and the unlawful charging of compound interest."

In the Amended Defence and Counterclaim the reference to K.P.M.G. Peat Marwick is treated thus at paragraph 11 on page 183 of Volume I of the Record:

"11. In answer to paragraph 16 of the Amended Statement of Claim, the Defendant admits that the Plaintiff filed the suit alleged and that on a without prejudice basis the parties engaged the services of KPMG Peat Marwick for the purposes alleged, but denies the other allegations in the said paragraph."

A point to note is that the Accountants who carried out the Audit were called as witnesses for the appellants and their report was put in evidence at the trial.

Before referring to the remedies claimed by the Appellant it is pertinent to examine the counterclaim by the respondent Bank. It reads thus in the following paragraph of page 183 of Volume I of the Record:

"COUNTERCLAIM

14. By way of counter claim the Defendant states that in April, 1992 the plaintiff requested and was granted an overdraft facility for one year in the amount of $300,000,00 at an agreed rate of interest of 65% per annum. During the said year the Plaintiff exceeded that limit considerably, and at the expiry of the one year period, the Plaintiff had an overdraft in the amount of $4,910,365.22. Subsequently he applied for increased overdraft facilities, which were granted on his agreeing to provide security in the form of the mortgage referred to in paragraph 10 hereof.

15. The Defendant is indebted to the Plaintiff in the sum of $137,752,282,86 inclusive of interest as at February 28, 1998. Amended particulars of the said debt are supplied to Plaintiff herewith. Interest continues to accrue at the rate charged from time to time by the Defendant on overdrafts which as at the date hereof is 45% per annum.

16. Despite demand, the Plaintiff has failed to pay the said sum to the Defendant, and the Defendant counterclaims:

a. For the said sum of $137,752,281.86 with interest at the rate charged from time to time by the Defendant on overdrafts (which at the date hereof is 45% per annum), from March 1, 1998 to the date of judgment or sooner payment

b. A declaration that the mortgage no. 795693 is valid and enforceable.

c. Costs and attorneys-at-law costs."

It is now appropriate to state the reliefs claimed by the Appellants at pages 201-202 of the Record.

Firstly the appellants claimed:

"(A) An account of all receipts, payments dealings and transactions between the First Plaintiff and the Defendant in all of the Plaintiffs' accounts with the Defendant.

(B) A declaration that the Defendant has wrongly debited the Plaintiffs' accounts in all instances where the Defendant is unable to supply documentary proof or authorization for such debits.

(C) A declaration as to the extent to which the overdraft debited to the Plaintiffs' account was the fault of the Defendant and therefore that the overdraft interest charged on the account is not owed by the Plaintiffs."

Then the Claims regarding interest are stated thus:

"(D) In the alternative, a declaration that in law the Defendant cannot charge the Plaintiffs penalty interest rates.

(E) An order that the Defendant do pay to the Plaintiffs all such funds found due and owing to the Plaintiffs, at such rate of interest that this Honourable Court may deem fit."

As regards the mortgage paragraphs 18(F) (G) and (H) read:

"(F) A declaration that the Defendant held the Certificate of Title registered at Volume 1034 Folio 102 of the Register Book of Titles in respect of the property at Lacovia in the Parish of St. Elizabeth on condition that it was a security for a loan which was never granted and for no other purpose, and that the mortgage dated 9th December 1993 is unenforceable.

(G) An order for delivery of the aforesaid Certificate of Title registered at Volume 1034 Folio 102 of the Register Book of Titles.

(H) An injunction restraining the Defendant from selling the First Plaintiff's said property being all that parcel of land part of Haughton situate at Lacovia in the Parish of St. Elizabeth and being the land comprised in Certificate of Title registered at Volume 1034 Folio 102 of the Register Book of Titles."

Damages were also claimed for beach of contract and negligence.

It was in the light of these averments that the relevant law and the evidence, must be considered with respect to judgment in the Court below.

(iii)

Analysis of judgment in the Court below

From the pleadings it is clear that the following issues were to be determined: (1) the proper operation of the four accounts, (2) the investigation by K.P.M.G. Peat Marwick, (3) the matter of interest charges, and (4) the issue of the mortgage. How did Cooke J. deal with and resolve these issues? The issue of the illegality of the foreign currency transaction was raised in this Court for the first time. However the learned judge below wrote at pages 223-224 of Volume I of the Record:

> "As Mr. Gifford Morrell, the first plaintiff herein tells it, there was early in 1992, a chance luncheon encounter between himself and Mr. Heron at a restaurant called Fair Flakes in Negril. Mr. Heron was the manager of the branch of the Workers Savings and Loan Bank [the bank] in Sav-la-mar. Mr. Morrell was an unlicensed dealer in foreign exchange. It was a time before the repeal of the Exchange Control Act. It was a time when there was great scarcity of foreign exchange. It was a time when the proverbial fortune could and no doubt was made in dealing in foreign exchange on the black market.

> In the latter part of the 1970's Mr. Morrell, an erstwhile supervisor of the dairy herd at Alcan, embarked on a new course – dealing in foreign exchange on the black market. His source would be in Negril and its environs, one of the leading tourist destinations in Jamaica. He would sell to anyone who wished, irrespective of the geographical location of the buyer. By 1992 he was well established and had cultivated a most desirable clientele. The volume of his transactions staggered the comprehension of the court. As they lunched, on the initiative of Mr. Heron, according to Mr. Morrell, a business relationship between the bank and Mr. Morrell was fashioned. Essentially, Mr. Morrell would transact his business through the bank. For the bank, this would result in its customers being better serviced. It would have acquired a most preferred customer and access to considerable foreign currency. There would be consequential benefits to its income. For Mr. Morrell, some of his logistical hurdles would be removed. No longer would his couriers or himself have to be travelling Jamaica carrying cash. His customers would receive foreign exchange through the network of the bank. Mr. Morrell's evidence is that he was to receive special treatment."

It should be noted that the Exchange Control Act was repealed on 17th August 1992, and the mortgage was dated 9th December, 1993. The current account was opened 16th April, 1992. These dates will be of importance when the issue of illegality is being addressed.

Quite apart from the averments in the Amended Statement of Claim there was extensive reference to Mr. Morrell's dealings in foreign currency in the answers given to the request for Further and Better Particulars by the Bank.

Here is a classic example at page 172 of Volume I of the Record:

"As to paragraph 5 of the Statement of Claim

1. By what means did the Defendant receive "knowledge" about the business in which the Plaintiff was engaged?

2. Who is the manager referred to?

3. Was the alleged agreement in writing or oral?

4. If oral, when and where was it made?

5. If in writing, please give full particulars of the writing?

Answer

1. The Defendant approached the plaintiff to purchase foreign exchange and so was aware or had knowledge of the business of the Plaintiff. The Defendant engaged in foreign exchange transactions with the Plaintiff before the Plaintiff became a customer of the Defendant.

2. Mr. Watsworth Heron.

3. The agreement was oral.

4. The agreement was made orally at the offices of the Defendant.

5. Not applicable."

That the Bank at the outset was concerned about the foreign currency transaction is evident in the following particulars sought and answers given at pages 174-175 of Volume 1 of the Record:

As to paragraph 11 of the Statement of Claim

1. Please give full particulars of the deductions alleged in subparagraph (e) including the date and amount of each such deduction?

2. Please give full particulars of the payments referred to in subparagraph (e) including the date and amount of each such payment?

3. Please give full particulars of the deductions which the Defendant allegedly made from the Plaintiff's Foreign Exchange Savings Account, including the date and amount of each such deduction?

Answers

1-3 It was customary for the Plaintiff to sell foreign exchange directly to the Defendant or indirectly to the Defendant's customers. Requests for foreign exchange were usually received from Mr. Errol Taylor or Miss Collette Young of the International Department of the Defendant. Upon receipt of verbal requests from the Defendant, the Plaintiff would attend the Sav-la-mar branch of the Defendant and execute withdrawals from his United States Savings Account. There was a verbal agreement for the Defendant to credit the Jamaica Dollar equivalent of the proceeds from sale of foreign exchange to the Plaintiff's account.

Foreign currency accounts which are savings accounts were not supported by a savings passbook but by monthly statements. However, the Plaintiff has never received a statement of the account from the Defendant.

At the time of the dispute there was a binding agreement between the Plaintiff and the Defendant to secure the services of KPMG Peat Marwick to analyse the accounting and banking records of the Plaintiff. It was further agreed that both parties would honour the findings of KPMG Peat Marwick.

> Attached is schedule number 1 outlining the unauthorized withdrawals from the Foreign Currency Accounts of the Plaintiff without corresponding credits to the Jamaican Dollar Account."

The Schedule is at page 177-180 of Volume I of the Record. The audited figures tell the story of the amounts debited from those accounts without withdrawal slips, signed by Mr. Morrell. It was US$1,493,464; Canadian $1,386,144; and U.K £496.098. J$37,352,273.00 ought therefore to have been credited to his current account in Jamaican currency. There is an additional figure of J$40,727,979.00 recorded as the total amount of loss. The difference between Jamaican dollar figures presumably were the unwarranted debits in interest and bank charges. The connection between the foreign currency accounts and the Jamaican current account must be grasped to understand the structure of this case. The bank's answer to the appellant's requests for Further and Better Particulars was revealing. Here is the question and the significant response at page 35 of Volume I of the Record:

> "4. Give full particulars of 'the usual course of the Defendant's banking business whereby' the Plaintiff would sell foreign exchange to the Defendant.
>
> Answer
>
> In the course of usual banking business the Defendant purchases foreign exchange from customers who desire to sell same. In the course of that usual banking business the Defendant bought foreign exchange from the Plaintiff."

The audited details of the instructions to debit Mr. Morrell's foreign currency accounts are exhibited at pages 161-170 of Volume I of the Record. The numbers are staggering. Equally important in the tables are the instances where Mr. Morrell signed withdrawal slips, and, where the withdrawals are covered by Debit memos only which are the Bank's internal documents. These transactions cover the period March 1992 to 26th June 1994. It must be reiterated that these foreign currency accounts were operated in an unusual manner. There was no cheque book. There were no bank pass books and no statements sent to the appellant relative to these accounts.

That the Bank was aware of Mr. Morrell's dealing with foreign exchange is also evident from the cross-examination of Mr. Goffe Q.C. for the respondent Bank.

Here is the evidence elicited at page 275 of Volume 1 of the Record:

> "Started operating as currency dealer in the late 1970's. At that time not licensed by Bank of Jamaica, nor approved. When started in late 70's not used Bank account-cash. Aware that up to 1992 Exchange Control Act in operation. I applied for cambio license early 1994. Earned income from Foreign exchange before had bank account."

Later on in response to Mr. Goffe, Mr. Morrell said at page 277 of Volume 1 of the Record:

> "I told the Bank that I had been trading in foreign currency for a few years.
>
> Account opened purely for Foreign Exchange dealings. I told the Bank that. On back of document my signature and that of my daughter."

Further in the cross examination at page 287 Mr. Morrell said:

> "Not so payments for Foreign exchange sold by me were not always lodged by me to Current account – thus causing overdraft."

Then at page 293 of Volume I of the Record Mr. Morrell told the Court.

> "All funds deposited to Current account was from my Foreign exchange deals."

Then later, on the same page, is the following:

> "Court - Why do you say never utilized overdraft facility.
>
> Answer - I knew what purchases were and sales. Kept within financial confines of those transactions."

As to Mr. Morrell's evidence in chief on this issue bearing in mind the current account in Jamaican currency was opened on 16th April, 1992, the evidence as regards dealing in foreign exchange is relevant at page 261 of Volume I of the record:

> "... hold licence to operate cambio – 16th May 1994. Prior to that operate Cambio 16th May, 1994. Prior to that operate as unlicensed Foreign Exchange dealer."

So there was ample evidence from both sides to support the learned judge's findings as to Mr. Morrell's dealings in foreign currency. It was important to rehearse this evidence as it will be vital when dealing with the preliminary point of law which was raised by Dr. Barnett during the course of the appeal. Neither side made an issue of Mr. Morrell's trading in foreign currency. The learned judge below confined his attention to the operations of the four

accounts and it may be that this is the correct approach even at this level, as the issue is being raised here for the first time.

The gist of Mr. Morrell's evidence was that withdrawals from his accounts were always by written mandate, which was a cheque for the current account or a withdrawal slip for the foreign currency account. He further stated that he made daily reconciliations which he recorded in his diary. On the other hand Mr. Reynolds the credit manager at the Bank, at one stage said that on no occasion was the account operated as Mr. Morrell stated and the learned judge accepted the evidence of Mr. Reynolds on this aspect of the matter. An earlier statement by Mr. Reynolds admitted that the accounts were operated by the Bank in the manner described by Mr. Morrell. Yet even if there were withdrawals during the course of the day which were not later in the day covered by a cheque or withdrawal slips, one would have expected cheques or withdrawals slips within a reasonable time. It is common ground that Mr. Morrell went to the Bank twice daily concerning his accounts. In the morning he received cash and left an open cheque which he would complete in the evening or the following morning.

Catlin v Cyprus Finance Corp (London) Ltd [1983] 1 All ER 809 and **Joachimson v. Swiss Bank Corporation**[1921] All ER Rep 92 were cited to support the appellants' contention that written authorization was necessary for withdrawals from his accounts. It is sufficient at this stage to cite the dictum

of A.T. Lawrence J. in **Bale v Parr's Bank Limited** at Vol. xxv. (1908-1909) Times Law Reports p. 549 at 551 which states:

> "One of the essential terms of the contract between banker and customer was that the banker would not part with the customer's money without his authority."

The learned judge below ruled against the appellant thus at page 228 of Volume I of the Record:

> "...I am not persuaded that a bank can only act on written orders. If there is an agreement or if such an agreement may be inferred that a customer instructs a bank orally to pay **X** a certain sum of money and **X** is paid that money, can that customer now say the payment was unauthorized because there was no written order? I think not. It is my view that a mandate from a customer, if clear, precise and free from ambiguity need not necessarily be in writing. Now, in respect of Mr. Morrell's accounts, there were, he says, many, many debits which were unauthorized because there were no written orders by him to document those debits. These debits amounted to millions of dollars. How did they come about?"

This passage ignores the written contracts between the Appellants and the Bank and the common law which provide for written authorization for withdrawals from the accounts.

To reiterate Mr. Reynolds admitted that originally the situation was as Mr. Morrell describes it, that there would be reconciliation every day which would be settled by Mr. Morrell drawing a cheque with respect to the current account. He would also sign the telephone transfer forms which were part of the Bank's procedure in relation to the savings account. To complete the

exercise withdrawal slips would be signed so that the accounts would be properly debited. It is now necessary to cite the learned judge's narrative of events so as to pinpoint Mr. Reynolds' explanation as to the lack of written mandates from the appellant. Here are the judge's own words at page 229 of Volume I of the Record:

> "This was the genesis of unwarranted laxity on the part of the bank. It was to get worse. Mr. Reynolds said:
>
> > As we became quite comfortable with operation he [Morrell] was no longer being asked to sign Telephone Transfer forms.
>
> This witness further said:
>
> > When we became more comfortable we not insist on daily basis that [Morrell] sign withdrawal slips.
>
> Mr. Reynolds admitted that there was:
>
> > No paper trail bearing Mr. Morrell's signature for many transactions."

Did it ever occur to Mr. Reynolds that he might have had to answer internal or external auditors of the Bank? Or as happened in this case, that he would be called to give evidence in Court?

The fact that originally cheques for the current account and withdrawal slips for the three foreign exchange accounts were the standard procedure as recounted by Mr. Reynolds, gives credence to Mr. Morrell's contention that this was the proper way to debit his account. If the Bank departed from that procedure the question as to the liability of the Bank becomes live. Once the

learned judge found that there was unwarranted laxity on the part of the Bank, he ought to have rejected the evidence of Mr. Reynolds and found the Bank liable for the unwarranted debits.

A finding was necessary in view of the averment by the appellants that the Bank was in breach of contract for:

> "11(c) making deductions from the Plaintiffs' current account and Foreign Exchange Savings Account without any written authority to do so.

The learned judge below in his assessment of the evidence had this to say about Miss Grindley the operations manager, the other witness from the Bank at page 229 of Volume I of the Record:

> "Miss Grindley recognized that the operation of the Morrell account was "unusual" In a letter dated February 2, 1995 Valerie Alexander an attorney-at-law writing on behalf of the bank to the then attorneys-at-law for Morrell said:
>
> > 'I believe we are all agreed that there has been less than perfect record-keeping on both sides and in these circumstances we are mandated to do our utmost to realize some mutually fair solution'."

A relevant comment on this passage is that it was the responsibility of the Bank to keep proper records.

The Bank's witness describes the operation as unusual. Their lawyer admits the less than perfect record keeping. This seems to indicate that written mandates were the usual method of operating the accounts. It was also the proper way to operate pursuant to the written contract between the

parties. Cheques and withdrawal slips were the ultimate steps, telephone memos would be an intermediate step. There was no evidence from these two witnesses that the Bank made any attempt to secure written mandates from Mr. Morrell. Why was this so? Ms. Grindley made an attempt to provide written instructions by Mr. Morrell and provided "a set-off agreement" signed by him when he lodged two Certificates of Deposit in Canadian dollars and U.K. sterling at the time of opening his account. He also signed a "Hypothecation Agreement". Ms. Grindley's evidence on this issue is to be found at page 386 of Volume I of the Record. The set-off agreement is to be found at page 745 of Volume 2 of the Record:

Here is how the learned judge dealt with the large number of debit memos for which there was no written mandate from Mr. Morrell. At page 230 the learned judge said:

> "A great number of questioned debit memos were tendered in evidence. Miss Grindley had to deal with a majority of them. She either "checked" or "approved" these debit memos. She gave evidence that whether "checking" or "approving" she first spoke to Mr. Morrell by telephone. Her evidence in this aspect was unchallenged. I accept that at all times she, in respect of those debit memos which concerned her, she conferred with Mr. Morrell. I have no reason to doubt her veracity. It is revealing that Miss Grindley's association with debit memos covered an extensive period of time. It was from January 1993 to April 1994. Telephone instructions by Mr. Morrell to the bank whereby debit memos were generated was the established pattern of Mr. Morrell in the conduct of his transactions. I further hold that these instructions were unequivocal and amounted to a mandate. I am not unmindful of the

> "less than perfect record-keeping" of the bank. However, I cannot say that on a balance of probabilities Mr. Morrell has established that the debit memos were not authorized."

It is sufficient to say at this stage that the Bank admitted that there was no written authorization for a large number of transactions. If written authorizations were an expressed or an implied term of the Bank's contract with Mr. Morrell then the question concerning the Bank's liability must be answered convincingly if the Bank is to be found not liable. It is largely a matter of law. The learned judge treated it as a matter of fact. Once the Bank breached the contract and debited the appellants' account without written mandates, the Bank was liable.

The learned judge relied on Mr. Reynolds, but he was not the only officer of the Bank. There was Mr. Duhaney, the manager who did not give evidence. Here is an example of the unusual method of operating Mr. Morrell's account. The learned judge writes at page 232 of Volume I of the Record:

> "... He swore that he never ever borrowed foreign currency from the Bank. This is not so. Mr. Reynolds, whose evidence I have already indicated I accept, had this to say:
>
> > 'If Mr. Morrell did not have enough foreign currency in his account he would request us by telephone to approve debits in excess of his balance with a promise to make enough foreign exchange lodgments during the day to cover those amounts. When we had some idea of amount of daily purchases during a particular period and where shortfall was within daily flows it would be approved. I had honestly had no problem with that. Where it

> was above the daily flows, I always objected but he [Morrell] would still on occasions get it approved by manager Mr. Duhaney."

Was Mr. Reynolds the officer who should then make the reconciliation by securing the appropriate cheque or withdrawal slip at the end of the day? Since the foreign exchange accounts were savings accounts, how was the deficit recorded? Were there any relative records to this aspect of the case? It is of some significance that the learned judge accepted Peat Marwick's findings that the three foreign currency accounts were in credit when they completed their audit of those accounts. The Peat Marwick findings accepted by the learned judge are at page 251 of Volume I of the Record. The fact that those accounts were in credit at the time of the audit demonstrates that the appellant's evidence ought to have been preferred to that of Mr. Reynolds. The learned judge tended to ignore the documentary evidence the common law and the contract between the appellants and the Bank, which told in favour of the appellant.

There is another aspect of the Bank's handling of the appellant's account which must be mentioned. In adverting to the relationship between Mr. Corrie the Manager of the Bank, and the appellant the learned judge said at page 232 of Volume I of the Record:

> "This excellent relationship apparently led to the genesis of Mr. Corrie's reprehensible manoeuvres. I speak of what in this case has become as "the Tuesday lodgments". As regards these "Tuesday lodgments," Mr. Morrell said:

> 'I did draw a cheque on occasions on Workers Bank and place it in my N.C.B. current account. Circumstances were because current account at Workers Bank – Corrie instructed me that on a Tuesday afternoon when they had to make a report to head office they did not want to report the high overdraft. Corrie asked me to put an N.C.B. cheque to reduce overdraft and Workers Bank cheque to be paid the following day to N.C.B. This was done on several occasions on a Tuesday.'

On or about 27th April, 1994, the amount of the cheque involved was J$17,800,000. To continue with Mr. Morrell's evidence.

> 'The overdraft situation at Workers Bank, despite my complaints became of increasing size- attracted the attention of head office. Accordingly both myself and the bank indulged in a fiction. I would lodge N.C.B. cheque which I knew was worthless, to my Workers Bank account. This would be reflected in the communication to head office. The next day a corresponding Workers Bank cheque would be lodged to N.C.B. thus completing the fiction of that transaction'."

From the above extract it is clear that the learned judge accepted Mr. Morrell's narrative of events which constituted the "Tuesday lodgments." The inference must be that there was a connection between the unauthorized debits and the recorded overdraft. The question must be raised as to why the Bank instituted the fiction instead of seeking the relevant mandates from Mr. Morrell. The other issue which emerges from the judge's findings is that Mr. Morrell did complain about the overdraft and that as a result of those complaints the "Tuesday lodgments" were devised by Mr. Corrie.

There was an example of "Tuesday lodgments" in **British and North European Bank Ltd. v Zalzstein** [1927] 1 KB 92. In that case, the manager admitted the fiction but the customer claimed the credit. The customer failed. In this instance Mr. Morrell has made no claim. He said he did not benefit from the transaction. So we find laxity on the part of Mr. Reynolds and Ms. Grindley in respect of the fiction. We find complicity between Mr. Morrell and the manager. Who is liable? The evidence suggests the Bank is liable. What Mr. Morrell is claiming is the credit balances in the four accounts which he was convinced would be the results after the accounts were audited. He was so convinced because on his account each day he reconciled his accounts and recorded his transactions in his diary.

When a new manager, Mrs. King, arrived at the Bank in 1994 she did dishonour Mr. Morrell's cheque on May 13th. This was one of the factors which has triggered these legal proceedings. The audited "Tuesday lodgments" are exhibited at page 1010 of Volume 3 of the Record. Here is how Peat Marwick described them at page 979 of Volume 3 of the Record:

> **"Findings cont'd**
>
> (7) Lodgments and credit advices totaling J$201,345.057 (appendix 9) transacted on Tuesdays could not be related to US$ bank drafts issued. These credit advices cleared large overdraft balances which would be incurred on the account up to Monday of each week but cleared by the Tuesday (presumably the date of the bank's internal reporting)."

Both parties retained the services of K.P.M.G. Peat Marwick Chartered Accountants, to determine the state of Mr. Morrell's accounts. Both parties submitted their documents to the accountants and the report was based on two assumptions which will be detailed later. The report is to be found at pages 970-1020 of Volume 3 of the Record.

Although the learned judge examined the Accountant's report with care and expressed a preference for one of the assumptions, he relied on the Verification clause in the contract to come to the following conclusion, at page 245 of Volume I of the Record:

> "It is therefore clear that by agreement a contractual duty can be undertaken by a customer to examine his bank statements with care and to challenge the correctness of such statements within a stipulated time. I would think that any such stipulated time must be of reasonable duration. I hold that clause 4 is unambiguous . It sets out the obligations undertaken by the customer [Morrell] with clarity and precision. It "brought home" to Mr. Morrell the importance of his obligation and the dire consequence of not notifying the bank in writing of any errors or omissions within thirty days of the receipt of his statement(s). Mr. Morell failed to carry out his contractual duty of notification in writing within 30 days of the receipt of his statements. He is therefore barred from challenging the correctness of debits or credits to his account unless such challenge or query had been made in the stipulated time, in writing."

It was on this legal basis that the learned judge accepted the Accountant's finding which was that Mr. Morrell's accounts would read as follows at page 251 of Volume I of the Record:

"A.	i)	US$ a/c	$38,100.01 CR
	ii)	CDN $ a/c	795.85 CR
	iii)	UK£ a/c	1,973.98 CR
	iv)	J$ a/c	41,578,621 DR"

It is of some significance that the foreign currency accounts were found to be in credit.

There were two challenges to this finding by the appellants. Firstly, that the Verification Clause was not specifically pleaded by the Bank and, secondly, that even if it was not necessary to plead it specifically, it did not have the conclusive effect the learned judge attributed to it. On the pleading point **Turquand and Capital and Counties Bank v Fearon** [1870] Vol. 48 Law Journal Reports 703 and **Farrel v Secretary of State for Defence** [1980]1 All ER 166 were cited as examples of specific pleadings. On the effect of the Verification Clause **Tai Hing Cotton Mill v Liu Chong Hing Bank and others** [1985] 2 All ER 142 was relied on by both parties. So far as the pleading point is concerned the Appellants referred to the specific numbers of the accounts in issue at page 191 Volume I of the Record. The agreement to open the account was in writing. The agreement contained the Verification Clause. The Bank admitted that these were the relevant accounts in paragraph 1A of the Amended Defence and Counterclaim at page 181 of Volume I of the Record.

The learned judge at page 253 of Volume I of the Record concluded thus on this issue:

> "I have determined that clause 4 [the verification clause] is binding on Mr. Morrell. However, this binding effect would be relevant only to those statements which Mr. Morrell received. He has not denied that he received all the statements as from 1992."

The important finding here is that the Bank's statements are part of the contract between the appellants and the Bank. As for the learned judge's construction of the Verification Clause, this issue will be addressed later.

With respect to the issue of interest, this is how the learned judge treated with it at page 253 of Volume I of the Record:

> "The court is now faced with the difficult problem of decision making as regards that period from "inception to December 31, 1992 when the transactions could not be verified". There is evidence which I accept that statements were sent to Mr. Morrell on a monthly basis. The plaintiff has not challenged the accuracy of the bank's accounting which computed overdraft balance at December 31, 1992 to be the sum of J$2,348,147.25. This sum includes interest charges. I have decided that the rate of interest for 1992 is 54%. Those statements which were seen by KPMG either from the bank or Mr. Morrell are to be regarded as a true reflection of the state of Mr. Morrell's account except of course for interest charges. The bank has relied on the binding effect of the statements. Therefore to substantiate the sum of J$2,348,147.25 or that part subject to variations in interest rate charges which must now be calculated at 54% per annum, the bank [not Mr. Morrell] must produce the missing statements. Any reasonable and prudent banker is obliged to keep and when requested produce a record of the customer's account. The time limited for production is 31 days

> from date hereof. Mr. Morrell's obligation to the bank will be limited to that revealed in the monthly statements that are produced either by the bank or has been produced by Mr. Morrell. Interest charges will be applicable only to transactions contained in those statements which can be examined."

The appellants have challenged the overdraft figure of $2,348,147.25. They pointed out that this figure was the result of debiting their accounts without written authorizations. This specific figure will be dealt with later.

The learned judge was certainly correct concerning the obligations of a prudent banker. He therefore should have found that Mr. Reynolds and Ms. Grindley were not prudent bankers. It is also somewhat surprising that the Bankers at the Head Office did not detect the pattern in the "Tuesday lodgments". Sections 33-34 of the Evidence Act assumes that a Banker will keep books and make provisions for entries in a bankers book to be adduced as evidence in Court.

The learned judge also determined at page 255 of Volume I of the Record that the rate of 4% for interest was applicable to the balances in the foreign currency accounts.

The remaining issue resolved by the learned judge was the issue of the mortgage. The learned judge said at 255 of Volume I of the Record:

> "With regard to paragraph 18 [F] I hold that mortgage dated 9th December is enforceable and accordingly the order sought for the delivery of the certificate of title registered at Volume 1034, Folio 102 of the Register Book of Titles is refused.

> The injunction sought to restrain the defendant from selling property comprised in the above-mentioned certificate of title is not granted."

It was on the basis of the foregoing findings that the order in the Court below at page 1212 of Volume 3 of the Record was as follows:

> "1. There be judgment for the Defendant on the Claim;
>
> 2. There be judgment for the Defendant on the Counterclaim in the sum of $243,202,568.87;
>
> 3. Costs to the Defendant on the Claim and Counterclaim to be agreed or taxed;
>
> 4. Certificate for two counsel."

(iv)

The Resolution of the issues in this Court

There are fourteen grounds of appeal and an attempt will be made to group them as they relate to the issues as stated in the judgment of the Court below. Firstly, the grounds of appeal relating to the operation of the accounts at the bank will be dealt with. They are at pages 2-9 of Volume I of the Record and are numbered 2,7,8, and parts of ground 14.

The grounds are as follows:

> "(2) The Learned Trial Judge erred in law in holding that in this case, in all the circumstances and the evidence there was a mandate from the Plaintiffs to the Defendant which was clear, precise, and free from ambiguity to debit the Plaintiffs' accounts, though not in writing.
>
> . . .

(7) The Learned Trial Judge erred in law and in fact in holding that in all the circumstances and the evidence of this case the Defendant was entitled to debit the Plaintiffs' accounts without any written authorization to do so.

(8) The Learned Trial Judge erred in law and in fact in finding that there was an established pattern in the generation of the debit memos which permitted funds to be deducted from the Plaintiffs' Jamaican dollar current account without any written authorization of the Plaintiffs, which nevertheless was authorised by the Plaintiffs.

...

(14) The Learned Trial Judge erred in fact:

(a) in accepting the evidence of Mr. Reynolds and Miss Grindley as against the evidence of Mr. Morrell in **relation** to the operation of the Plaintiffs' accounts with the Defendant, bearing in mind the documentary and ***viva voce*** evidence given at the trial.

(b) in holding that in the operation of the Plaintiffs' account with the Defendant, purchasers of foreign exchange currency were not obliged to lodge the Jamaican dollar equivalent before obtaining foreign exchange from the plaintiffs' foreign currency accounts.

(c) in finding that the operation of the account as stated by Mr. Morrell, that the Jamaican equivalent must be first paid into the account before all foreign currency was released, though a term of fundamental importance, was at no time adhered to by the bank and that Mr. Morrell willingly acquiesced in the breach of that term by the bank, as this is against the weight of all the evidence."

Section (d) is divided into several sub-sections thus. The Learned trial judge erred in fact:

"(d) in accepting the evidence of Mr. Keith Reynolds when he said that

(i) "In the first few weeks of operation he used to give us cheques drawn on his current account to cover debit memos which had come about during the day. But after a while transactions became so numerous and we had become so comfortable with him, we did not insist on replacement cheques every evening. Thereafter, these debit memos go out with statements. Mr. Morrell would have reconciled these memos daily. Daily reconciliation of all transactions.

(ii) As we became quite comfortable with operation, he (Morrell) was no longer being asked to sign Telephone Forms

(iii) When we became more comfortable we did not insist on daily basis that (Morrell) sign withdrawals slips

(iv) "No paper trail bearing Mr. Morrell's signature for many transactions" as this evidence was never put to Mr. Morrell and hithertofore was never a part of the Defendant's case.

(e) in failing to accept and hold that the debit memos were reconciled and replaced by the First

Plaintiff's cheques at the end of the banking day for to hold otherwise is against the weight of all the evidence.

(f) in holding that the debit memos about which Miss Grindley gave evidence were not challenged by the Plaintiffs in cross-examination.

(g) In accepting Mr. Reynolds evidence that the bank had the authority to deduct sums from the Plaintiffs' foreign exchange savings accounts without written authority as this finding is against the weight of all the evidence, including but not limited to pages 38-40 and 43-48 of Exhibit 11.

(h) in failing to accept that the "Tuesday lodgments" were a fictional exchange, operated at the request of the officers of the Defendant, in an effort to mislead representatives of the Defendant at their Head Office, by the interference with information represented in the statements of the Defendant.

(i) In finding that Mr. Morrell did not complain to Mr. Duhaney about his experiencing problems in reconciling his overdraft as this is against the weight of the evidence.

(j) In holding that the Plaintiffs though granted the overdraft facility by the Defendant operated the overdraft facility, as the operations of the Plaintiffs' trading

in foreign exchange at a time of extreme scarcity of those funds did not require the use of the overdraft facility as enunciated in the evidence.

(k) In holding that Exhibit 10, an inter-office letter of the Defendant produced by Mr. Corrie and submitted to the Head Office, for the attention of Ms. Catherine Barber, Assistant General Manager, Business risks, was a ploy, or a sham, and that Mr. Morrell was engaged in artifice as there is no evidence to support such a finding.

(l) In accepting the amounts stated in the KPMG report in respect of the foreign currency accounts, as these amounts assumed that the debits for which written authorization were not seen were authorized, as this finding is against the weight of the evidence."

Analysis of how the accounts were operated

The first issue to be examined is the agreement between the appellants and the Respondent Bank as to how the accounts were to be operated. The four grounds listed above challenging the learned judge's findings on this aspect of the case will be examined.

Perhaps the most important account, was the current account in Jamaican Dollars. It is therefore appropriate to cite the agreement between the appellant and the respondent Bank bearing in mind that there are

authorities binding on the Bank as to the contents of Banking contracts. Another point to note is that they are standard form contracts drafted by the Bank's lawyers and most likely copied from precedents.

The important clause is captioned "Charges to Accounts". The agreement to operate the current account supports the appellants' contention that their mandates to the Bank as regards debits to the accounts must be in writing. Bank charges imposed by the Bank for operating the account are the sole exception. The clause at page 959 of Volume 3 of the Record reads:

> "3. CHARGES TO ACCOUNT
>
> The Bank may charge against any account of the Customer at any branch of the Bank the amount of any bill of exchange, promissory note, cheque or other instrument, drawn, made, accepted or endorsed by the Customer which is payable at any branch of the Bank, and the amount of any bill of exchange, promissory note, cheque or other instrument cashed or negotiated by the Bank for the Customer or credited to his account for which payment is not received by the bank, together with any charges and expenses incurred by the Bank in connection therewith and the Customer shall be and remain liable to the Bank in respect of each amount so charged."

Be it noted that all the instruments listed must be drawn, made, accepted or endorsed by the customer. It is clear that the instruments listed must be in writing. The Bank is also entitled to debit the account for cheques and expenses.

Clause 6 is also of importance. It reads at page 959 of Volume 3 of the Record:

> "6. You are hereby authorized to forward to the Undersigned from time to time by mail, statements of account of the Undersigned, together with cheques and other debit vouchers charged to the said account, and unpaid collection bills of the Undersigned."

The importance of Clause 6 is that it incorporates the statements of accounts sent by the Bank to the appellants as part of the contract. It is significant that it speaks of cheques and other debit vouchers. To forward debit vouchers prepared by the Bank without the corresponding cheques or written instructions would be a breach of contract by the Bank. This is the basis for rejecting the evidence of Mr. Reynolds and Ms. Grindley. The procedure stated by Mr. Morrell initially was in accordance with the contract. Mr. Reynolds and Ms. Grindley later debited the appellants' accounts without Mr. Morrell's cheques or withdrawal slips and this was unwarranted. The Bank must bear that loss. The issue of whether Clause 4, the Verification of Account Clause can exonerate the Bank of its primary obligation, to debit the appellants' account by written mandate as stipulated in Clause 3 which deals with Charges to Account will be addressed later.

Catlin v Cyprus Finance Corporation (London) Ltd. [1983] 1 All ER 809 reiterates the proposition that a bank could only properly debit the account of a customer on their written mandate especially where the mandate contains such an express term.

The other important case in this area of the law is **Joachimson v Swiss Bank Corporation** [1921] All ER Rep. 92. Atkin L.J. sets out the

relevant implications in the contract between bank and customer. At page 100 the learned Lord Justice said:

> "I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's accounts. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine."

Be it noted, in the instant case, having regard to the contract of both the current account and the foreign currency accounts the mandate must be in writing. Additionally even without the expressed condition for a written mandate for withdrawals from the accounts, it would be a necessary implication in any banking contract for a written order by customers to any debits to be made from their accounts pursuant to **Joachimson's** case.

Having regard to the plain meaning of clause 3 and clause 6 of the agreement to open the current account in Jamaican dollars and clause 2 in the agreement to open the foreign currency deposit accounts, the learned judge's finding that oral instructions were capable of debiting the current account of the appellant cannot be supported. There were oral instructions by Mr. Morrell to the Bank. But the system required that they should be recorded on Telephone Transfer Forms and covered by Mr. Morrell's cheque or withdrawal slip at the end of the day or within a reasonable time thereafter. Since it was not done the excuses of Mr. Reynolds and Ms. Grindley cannot exonerate the Bank. The Bank was in breach of contract. The unauthorised debits as found by Peat Marwick must be accepted by this court as correct.

As for the three foreign currency accounts the same principle applies. So the clause pertaining to written instructions must be examined. We need only refer to one, as it is a standard form contract drafted by the Bank. Clause 2 at page 963 is sufficient to establish the appellant's case that written instructions are essential to debit these accounts.

> "2. Each of the undersigned further agrees with you and with each other that except only in the case of some lawful claim before repayment, all such moneys and interest or any part thereof may be withdrawn by any one or the undersigned or his or her attorney or agent, and each of the undersigned hereby irrevocably authorizes you to accept, from time to time as a sufficient acquittance for any amount so withdrawn, any receipt, cheque or other document signed by any one of the undersigned, or his or her attorney or agent, without any further signature or consent."

This concludes the four grounds dealing with the operation of the accounts. In summary the contract between the appellants and the Bank stipulated that cheques and withdrawal slips were the proper method of debiting the accounts. The Bank was authorized to debit for bank charges and lawful claims before repayment. However, the Bank went beyond its remit and debited the accounts without written mandates from the appellants. The bank is responsible for those debit entries.

The conclusive evidence clause

The important finding by Cooke J. regarding the conclusive evidence clause with respect to the current account must now be reiterated. It runs thus at page 245 of Volume I of the Record:

> "It is therefore clear that by agreement a contractual duty can be undertaken by a customer to examine his bank statements with care and to challenge the correctness of such statements within a stipulated time. I would think that any such stipulated time must be of reasonable duration. I hold that clause 4 is unambiguous. It sets out the obligations undertaken by the customer [Morrell] with clarity and precision. It "brought home" to Mr. Morrell the importance of his obligation and the dire consequence of not notifying the bank in writing of any errors or omissions within thirty days of the receipt of his statement[s]. Mr. Morrell failed to carry out his contractual duty of notification in writing within 30 days of the receipt of his statements. He is therefore barred from challenging the correctness of debits or credits to his account unless such challenge or query had been made in the stipulated time in writing."

It is now necessary to turn again to the pleadings to ascertain if the conclusive evidence clause was referred to by both parties either expressly or by implication. The appellant averred in paragraph 3 of the Amended Statement of Claim at page 191 of Volume I of the Record:

> "3. During 1992 the Plaintiff opened a Jamaican Dollar account #8001100 referred to in this Statement of Claim as 'the current account'."

Paragraph 1A of the Amended Defence and Counterclaim at page 181 of Volume I of the Record reads:

> "1A. Save that the Defendant says that the accounts referred to are joint accounts, the other owner of the account being the Plaintiff's daughter Fiona Morrell, paragraphs 3 and 4 of the Amended Statement of Claim are admitted."

So once both parties refer to the current account they can rely on Verification of Account (Clause 4).

It would have been better if the Bank had referred to the clause specifically but the omission does not preclude the respondent from putting forward its effect as a defence.

The learned judge's findings regarding the conclusive evidence clause gave rise to grounds of appeal which were as follows:

> "...
>
> (3) The Learned Trial Judge erred in law in holding that clause 4 – the verification of account clause (page 4 Exhibit II) is unambiguous and complies with the principles enunciated in ***Tai Hing Cotton Mill v Liu***

Chong Hing Bank Ltd and Others [1985] 2 All ER, 142.

(4) The Learned trial Judge erred in law and in fact in ruling that clause 4 – the verification account clause was binding on the second Plaintiff when there was no evidence that the statements of the Defendant were ever submitted to the Second Plaintiff.

(5) The Learned Trial Judge erred in law in failing to hold that:

(i) The Defendant in failing to plead estoppel could not rely on the said verification clause;

(ii) The Defendant had waived reliance on the said clause;

(iii) The First Plaintiff had acted to his detriment in his reliance on the Defendant's conduct by continuing to use the account."

Then the grounds pertaining to the conclusive clause continues thus:

"(9) The Learned Trial Judge erred in law and in fact in holding that clause 4 was binding on the Plaintiffs in light of the circumstances of this case and the very special and unusual relationship which existed between the first Plaintiff and the Defendant. Further the finding of the Learned Trial Judge in relation to the unwarranted laxity of the Defendant with regard to the operations of the Plaintiffs' accounts and the record keeping by the Defendant of the Plaintiffs' accounts is inconsistent in holding that clause 4 was binding on the Plaintiffs.

(10). The Learned Trial Judge erred in law and in fact in holding that clause 4 was binding, although the charges of interest were not, as

both the deductions by way of debit memos and the charge of interest were actions initiated by the officials of the Defendant. This ruling is therefore against the weight of the evidence, including but not limited to the fact that the debit memos had already been settled by the First Plaintiff's cheque at the end of the banking day.

(11) The learned Trial Judge erred in law and in fact in holding that the verification account clause – Clause 4 was binding on the Plaintiffs in light of the fact that the Learned Trial Judge accepted that any reasonable and prudent banker is obliged to keep and when requested produce a record of the customers account, yet the KPMG report, Exhibits 17 and 18 indicated that the Defendant had not produced the source documents relevant to the several entries and transactions of the Plaintiffs, allegedly recorded on the statements of the Defendant and further those documents were not produced by the Defendant at the trial.

...

"(14) The Learned Trial Judge erred in fact:

...

(m) In holding that Mr. Morrell had accepted that Exhibit 4 had been settled to his satisfaction as this finding is against the weight of the evidence.

(n) In holding that clause 4 of the verification clause was known to Mr.Morrell for all intents and purposes of this case as there is no or no credible evidence that Mr. Morrell read the clause on the opening of the account, that is in respect of the Jamaican dollar current account.

(o) In failing to find that the First Plaintiff continuously complained about the inaccuracies on his bank statements, the unauthorized debiting of his accounts, and the failure of the Defendant to reconcile the errors reflected in the Plaintiffs' accounts."

The next step is to refer to Clause 4 of the contract exhibited at page 939 of Volume 3 of the Record. It reads thus:

"4. VERIFICATION OF ACCOUNT

Upon the receipt from the Bank from time to time of a statement of account of the Customer together with cheques and other debit vouchers for amounts charged to the said account appearing therein, the Customer will examine the said cheques and vouchers and check the credit and debit entries in the said statement and, within thirty days of the delivery thereof to the Customer or, if the Customer has instructed the Bank to mail the said statement and cheques and vouchers, within thirty days of the mailing thereof to the Customer, will notify the Bank in writing of any errors or omissions herein or therefrom; and at the expiration of the said thirty days, except as to any errors or omissions of which the Bank has been so notified, it shall be conclusively settled as between the Bank and the Customer that the said cheques and vouchers are genuine and properly charged against the Customer and that the Customer was not entitled to be credited with any amount not shown on the said statement."

It must be recognized that banking contracts are to be considered in the context of the implied terms stated by Atkins L.J. in the **Joachimson** case. Further, the conclusive evidence clause is an exemption clause to be found in a standard form contract. It must be construed contra proferentem

This is how Lord Scarman put it in **Tai Hing Cotton Mill Limited v Liu Chong Hing Bank Limited** 1985 2 All ER 947 at 959 in the context where an employee of the customer of the Bank had presented forged cheques which the Bank honoured and sought to impose thereon debits to the customer's account. On the basis of the contra proferentem rule it is necessary to point out the ambiguities in the clause. It imposes an obligation to report errors and omissions. The complaint here is that the Bank made unauthorized debits to the appellants' account. These are no mere errors or omissions. The unauthorized debits go to the root of the contract and cannot be covered by the Verification clause.

Also to be noted is that the **Macmillan and Greenwood** tests are two- fold. Firstly, the duty of the customer not to draw a cheque in a manner which may facilitate fraud or forgery, and secondly, the duty to inform the bank of any forgery as soon as it is detected. It is doubtful how far an exemption clause can add further obligations for the customer.

As for estoppel Lord Scarman said at page 959 of **Tai Hing:**

> "Mere silence or inaction cannot amount to a representation unless there be a duty to disclose or act: see **Greenwood's** case [1933] AC 51 at 57, [1932] All ER Rep 318 at 321. And their Lordships would reiterate that unless conduct can be interpreted as amounting to an implied representation, it cannot constitute estoppel: for the essence of estoppel is a representation (express or implied) intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss: see **Greenwood's** case."

Mr. Morrell did complain. Here is how the judge accepted his evidence on this aspect of the case at page 227 of Volume I of the Record:

> "In his evidence as regards his complaints to the bank Mr. Morrell never raised the issue that there was a breach of contract in the manner now alleged. The crux of his concern is that there were unauthorized debits from his current account, and to this attention is now given."

The appellant, Mr. Morrell gave a full statement of his oral complaints to the Bank from as early as 1993 and stated that his accounts were debited without his mandate. On one occasion Mr. Reynolds was present and was deputed to make a reconciliation of the accounts. Mr. Corrie, a manager, devised the "Tuesday lodgments" against the background of the appellant's complaints. See page 226 of Volume I of the Record.

I reiterate a point I made on the issue of conclusive evidence clauses in **Financial Institutions Services Ltd. v. Negril Negril Holdings and Negril Investment Co. Ltd.** SCCA 103/1997 delivered March 22, 2002. At page 43 it reads:

> "A conclusive evidence clause in general terms cannot detract from the bank's responsibility where there is no mandate from the customer."

In the instant case debit notes from the Bank without corresponding cheques for the current account or signed withdrawal forms for the foreign currency accounts are incapable of properly debiting the appellants' accounts. As a result of this I differ from the learned judge below on this aspect of the case.

Another point to note is that the monthly bank statements which form part of the contract between the appellants and the Bank state at page 945 of Volume 3 of the Record:

"Please examine any differences within 15 days".

It is an open ended statement. This is the clause which the customer would read as it was stated in every monthly statement. It was, therefore, open to the appellant to challenge the debit entries in the Bank statements for which there was no written mandate.

It should be reiterated that the primary obligation of the Bank in debiting the accounts pursuant to Clause 3 of the contract is that the Bank was permitted to debit the accounts on written mandates of the customer.

It is appropriate to note that a Bank statement is not an account stated which would preclude the customer from challenging the statement. Paget's Law of Banking, Eleventh edition states the position thus at page 162:

> "In the strict sense of the term, an account stated describes the position where an account contains items both of credit and debit, and the figures are adjusted between the parties and a balance struck . See **Camillo Tank SS Co Ltd v Alexandria Engineering Works** (1921) 38 TLR 134 per Viscount Cave at 143: **Siqueira v Noronha** [1934] AC 332 per Lord Atkin at 337. In **Laycock v Pickles,** (1863) 4 B & S 497, cited with approval by Lord Atkin in **Siqueira v Noronha** [1934] AC 332 at 338, Blackburn J explained that the consideration for the payment of the balance is the discharge of the items on each side, and continued:

> 'It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due'."

The monthly bank statements are not stated accounts (admitted accounts) or settled accounts (agreed accounts). So these are further grounds to find that those statements are not conclusive against the customer.

The Report of K.P.M.G. Peat Marwick

The ground of appeal pertaining to this issue is as follows at pages 5- and 8 of Volume I of the Record:

> "(14) The Learned Trial Judge erred in fact:
>
> (n) in accepting the amounts stated in KPMG report in respect of the foreign currency accounts, as these amounts assumed that the debits for which written authorization were not seen were authorized, as this finding is against the weight of the evidence."

The following extracts from the judgment of the Court below will demonstrate how the learned judge treated the Peat Marwick report. At page 249-250 of Volume I of the Record the learned judge found:

> "When Mrs. King on the 13th May, 1994 dishonoured Mr. Morrell's cheque, it will be recalled he immediately contacted a Mr. Basil Naar at the head office. There was the investigation by Mr. Bell to which I have already adverted. Discussions ensued but instead of accommodation the parties appear to have been adamant. Lawyers became involved. Eventually it was agreed by both parties to engage KPMG Peat Marwick (KPMG) Chartered Accountants. This firm set out:

> 'to investigate and examine the relevant records and supporting documentation in order to determine the balance due to/from the bank on four (4) accounts operated by Mr. Morrell.'

So both parties were to make available to this firm their respective records. A report by KPMG was produced. In its covering letter to the report KPMG stated:

> 'Generally we found that many of the source documents were unavailable for our examination. We performed such alternative procedures as we considerd necessary in the circumstances in an attempt to verify the transactions. However we are unable to verify satisfactorily all transactions on the relevant bank accounts and therefore, the result of our investigations are not conclusive.'

In the face of this comment, it would seem that the pleading on behalf of the plaintiff in para. 16 that

> 'This audit [KPMG report] demonstrated that the Defendant made deductions from the Plaintiff's current account and foreign exchange savings accounts without any written or other authority'

is well founded."

It has been previously demonstrated that the Bank admitted that there was a large number of debits recorded in the Bank statements for which there were no cheques or withdrawal slips signed by Mr. Morrell. It is true that Mr. Reynolds and Ms. Grindley, for the Bank, said that there were oral instructions from Mr. Morrell for all the debits reflected in the statements. But the assertions of these officers cannot override the Bank's duty to perform the contract in the only way that was permitted which was by written mandates of

Mr. Morrell. To accept the evidence of Mr. Reynolds and Ms. Grindley would be to treat their evidence as the law on the issue. The law on the issue is the contract to operate the account and the common law decisions which have been cited previously.

The learned judge continued on pages 250-251 of Volume I of the Record:

> "The summary of the KPMG report is as of 31st May, 1994, [Ex.20]. This report posits two alternative positions. The first is based on the assumption that debits against Mr. Morrell's account for which his approval was not seen were nevertheless authorized by him. In which case the position would be:
>
> | | | |
> |---|---|---|
> | A. i) | US$ a/c | $38,100.01 CR |
> | ii) | CDN $ a/c | 795.85 CR |
> | iii) | UK£ a/c | 1,973.98 CR |
> | iv) | J$ a/c | 41,578.621 DR |
>
> The second position represents the situation wherein it is assumed that where Mr. Morrell's approval was not seen such debits were unauthorized, in which case it would mean:
>
> | | | |
> |---|---|---|
> | B. i) | US$ a/c | $49,145.01 CR |
> | ii) | CDN $ a/c | 58,572.52 CR |
> | iii) | UK£ a/c | 11,161.75 CR |
> | iv) | J$ a/c | 6,784,229.24 DR |
>
> Now Mr. Morrell in his evidence-in-chief said he accepted the report but Workers Bank did not accept it. I do not know which of the above alternative conclusions it is that he accepted. I am mindful that his acceptance may have been only by way of effecting a settlement. This court, subject to qualifications expressed in this judgment, accepts the accounting in A above."

To my mind the learned judge erred. He should have accepted the position at B as a starting point and then applied the law to those findings to ascertain if any adjustments were to be made. One adjustment that springs to mind is the interest and bank charges that were debited to the accounts. In both instances these charges would have to be reduced to determine the true state of indebtedness, if any, of the appellants to the Bank. They would have to be reduced because interest was charged on the debits which were not authorized by Mr. Morrell's written mandates and the Bank would have imposed charges on these debits which were improper.

If these three foreign currency accounts were in credit, then the damages the appellants would have suffered is the interest they would have obtained during the period of the surplus down to the point of judgment in the Court below.

The basic error in the learned judge's findings regarding the KPMG report is that he accepted the Reynolds/Grindley approach which ignored the contract between the appellant and the Bank so as to justify the unauthorized debits reflected in position A in the judgment. Position B, with the suggested adjustments, was in accordance with the law and will reflect the true position.

It is now essential to cite extracts from Peat Marwick which indicate the scope of reference and the method which was used to examine the accounts. Its letter in part at page 970 of Volume III of the Record stated:

"August 3, 1995

Ms. Valerie Alexander
Company Legal Counsel
Workers Savings and Loan Bank
153 East Street
Kingston

Dear Ms. Alexander

Workers Savings and Loan Bank (Workers Bank) and Mr. Gifford Morrell

With reference to our letter of July 25, 1995 and subsequent discussions to amend it, we are now writing to confirm our understanding of the terms of our engagement by yourselves and Mr. Harold Brady in the abovementioned matter.

We understand that we are being engaged to examine the records of Workers Bank for the period circa April 1992 (date Mr. Morrell's accounts were opened) to May 1994 to provide independent verification of the disputed balances outstanding on four accounts held by Mr. Morrell at the bank's Savanna-la-mar branch.

We take this opportunity to summarise our understanding of the terms of our engagement and responsibilities to be undertaken in respect of the disputed balances.

(a) **Report requirements**

We understand that we are required to establish the amount owing by/or to Mr. Morrell as at May 31, 1994 with reference to the underlying documentation, and to give the prevailing interest rates applied during the period.

(a) **Scope of work**

> We shall examine all available records of Workers Bank which affect Mr. Morrell's accounts. Workers Bank has advised that there are problems with the availability of records for the period January 1993 to June 1993. For this period, the Manager of the branch will be relied on to provide all possible assistance. Mr. Morrell or his accountant Mr. Kenneth Bell, will provide us, through interviews or otherwise, with any information we may deem necessary.
> ..."

Then the letter continues thus at page 971 of Volume III of the Record:

> "...
>
> (f) **Extent of reliance and limitation on circulation of the report**
>
> As both parties may rely on our report to settle the dispute in or out of court, **our report is to be used solely for this purpose and should not be distributed, quoted or referred to, in whole or in part, without our prior written consent."**

It is important to grasp the limitations in relation to the amount stated on the report concerning the interest rates. In short the amounts stated in "B" of the Report at page 251 of Volume I of the Record must be reduced in the current account since it contains unwarranted interest and bank charges and the amounts reflected in the savings accounts must be increased to reflect the interest which should accrue to those accounts.

It is against this background that the report must be considered together with the evidence the two accountants gave in Court. It is necessary

to cite the covering letter to the report. It is at pages 973-974 of Volume III of the Record and it reads:

"January 3, 1996

Dear Mrs. Alexander

Workers Savings and Loan Bank (Workers Bank) and Mr. Gifford Morrell

With reference to our engagement letter dated August 3, 1995, we have examined documents held by Mr. Morrell and the records of the Savanna-La-Mar Branch, Workers Savings and Loan Bank for the period circa April 1992 to May 1994 to independently verify the balances on four accounts held by Mr. Morrell at that branch.

Our report dated January 3, 1996 is presented on pages 1 to 6, together with the following appendices:-

Appendix 1 Summary of account balances showing impact of debits for which Mr. Morrell's approval was not seen.

Appendix 2 Posting and other errors identified.

Appendix 3 Reconciliation of US$ bank drafts issued with J$ equivalents lodged.

Appendix 4 Debit advices for which the bank did not have Mr. Morrell's documented approval – Cdn$ account and UK£ account

Appendix 5 Debit advices for which the bank did not have Mr. Morrell's documented approval –J$ account.

Appendix 6 Withdrawals from the US$ account for which Mr. Morrell's approvals were not seen.

Appendix 7 Debit advices which were not located for our examination – J$ account.

Appendix 8 Lodgment to the J$ account returned prior to the termination of the account.

Appendix 9 Tuesday lodgments as per findings 7, page 4 of report.

Appendix 10 Credits to Mr. Morrell's J$ account excluded from the reconciliation of US$ bank drafts issued with J$ equivalent lodged to the J$ account.

Appendix II Overdraft interest rates – J$ account.

Generally, we found that many of the source documents were unavailable for our examination. We performed such alternative procedures as we considered necessary in the circumstances in an attempt to verify the transactions. However, we were unable to verify satisfactorily all transactions on the relevant bank accounts and therefore, the results of our investigations are not conclusive.

Appendix I summarizes the bank account balances resulting from our findings.

This report should only be used for the purpose of settling the dispute between the bank and Mr. Morrell, in or out of court and should not be reproduced nor used for any other purpose without our prior written consent.

Yours faithfully

KPMG Peat Marwick.

c.c. Miss Hillary Phillips, Attorney-At-Law."

The other relevant document is the Report from the accountants dated January 3, 1996. It is pertinent to the understanding of the method used by

the accountants and it will also demonstrate the inadequate record keeping at the Bank. One wonders whether the internal and external auditors were asleep during the two year period when the bank accounts were active. As for the staff, Mr. Morrell states, that Mr. Reynolds complained of shortage of staff and other deficiencies, but the conclusion must be that something was radically wrong at the Bank.

The report reads at pps. 976-977 of Volume III of the Record:

"January 3, 1996

Dear Mrs. Alexander,

Workers Savings and Loan Bank (Workers Bank) and Mr. Gifford Morrell

1. Context and objectives

In view of a dispute between the captioned parties over transactions on bank accounts operated by Mr. Morrell, we were engaged by both parties to investigate and examine the relevant records and supporting documentation in order to determine the balance due to/from the bank on four (4) accounts operated by Mr. Morrell.

The following were the disputed accounts operated by Mr. Morrell.

	Description of account		Date opened
US	$ account	$82000381	February 2, 1992
Ja.	$ account	#80011000	April 16, 1992
Cdn.	$ account	$8200046	March 3, 1992
UK	£ account	$08200041	March 2, 1992

...."

Then follows the important statement concerning the Foreign currency account:

> "It was evident that the J$ account was a current account with the usual current account statements printed. The foreign currency accounts bore the description "regular account" and it appears that monthly customer statements were not issued for these accounts."

The upshot of this was that as far as the foreign currency accounts were concerned Mr. Morrell had to rely on his diary as the Bank did not send him regular monthly statements. I reiterate that there was no pass-book either.

The report continues thus:

> "2. **Work done and findings**
>
> (a) Work done on US$ Account #82000381 –cut off date May 31, 1994
>
> We performed the following:-
>
> (1) Checked available debit advices to verify debits.
>
> (2) Matched debit advices with available bank draft application forms bearing customer approval.
>
> (3) Matched debits to bank draft stubs and telephone transfer forms where debit advices could not be located.
>
> (4) In an effort to verify customer approval, we compared debits to Mr. Morrell's diary,
>
> (5) Matched debits to corresponding credits in the J$ account using the exchange rates as per Mr. Morrell's diary.

(6) Credits on the account were verified to lodgment slips and credit advices."

Then for the Findings:

"(1) Debit advices were not available for all debits

(2) Bank draft application forms with customer approval were not found in respect of the majority of the debit advices.

(3) Debits for which debit advices were not found, were all traced to draft stubs and counterfoils.

(4) Telephone transfer forms were seen for debits which related to inter-bank transfers.

(5) Debits amounting to US$3,700,450.22 (appendix 3.1) of which US$2,587,405.22 (appendix 3.5) were taken as approved by Mr. Morrell as they appeared in his diary, were not matched directly to corresponding credits in the J$ account. However, an overall reconciliation was done (appendix 3).

(6) There was no evidence of Mr. Morrell's approval of debits totaling US$11,045 (appendix 6).

(7) We were able to match all credits to the account with lodgment slips.

(8) Lodgment slips were signed by various parties and a number of them bore the description "by order of self" and there were instances of the "paid in" section of lodgment slip not being signed.

(9) Posting and other errors totaling US$28,341 (appendix 2.1) were identified.

Conclusion

> Based on the foregoing, the balance due to Mr. Morrell on the US$ account as at May 31, 1994 amounted to US$38,100.01 (appendix I). If the debits which appear to be unauthorized due to the lack of documented approval by Mr. Morrell are reversed, the balance due to Mr. Morrell would be US$49,145.01 (Appendix I)."

Similar exercises were carried out on the UK. Sterling, the Canadian dollar and the Jamaican dollar current account. The details on the Jamaican dollar accounts are to be found at pages 978-979 of Volume III of the Record and the details of the UK sterling and Canadian accounts are to be found at page 979 of Volume III of the Record.

It is necessary to cite two of the findings at page 978 of Volume III of the Record. They read:

> "(5) The branch did not have any documented authorization from Mr. Morrell for debit advices amounting to J$35,093,277.80 (see appendix 5.6). Mr. Morrell informed us that there should be no debits on his account in respect of payments made on his behalf as he would issue cash cheques to the bank to cover such payments.
>
> . . .
>
> 8. Overdraft interest amounting to J$9,548.461.37 for the period January 1993 to May 1994 has not been verified due to the uncertainty relating to authorization of the debits on the account (appendices 5.6 and 7)."

Then the conclusion with respect to the Jamaican dollar account reads at page 979:

"*Conclusion*

Based on the foregoing and subject to the overdraft balance of J$2,348,147.25 brought forward from December 31, 1992 being verified, the overdraft balance on the J$ account at May 31, 1994 amount to $41,578,621.18 (appendix I). If the debits which appear to be unauthorized due to lack of documented approvals by Mr. Morrell and amounts for which debit advices could not be located are reversed, the overdraft balance would be $1,670,595.38 (appendix I)."

As for the Canadian and UK accounts it is appropriate to turn to the conclusion which reads at page 980:

"*Conclusion*

Based on the foregoing, the amounts due to Mr. Morrell on these accounts were CDN$58,795.83 and UK£1,973.98 respectively (appendix I). If the debits for which documented customer approval were not seen are reversed, the balance due to Mr. Morrell would be Cdn $58,572.52 and UK£11,161.75 respectively (appendix I)."

On the matter of interest here is what the Report says at page 980 of Volume III of the Record:

"(d) *Other matters*

(i) Interest income:

Although the foreign currency accounts consistently reflected credit balances, no interest was credited to these accounts except for the months stated below:

Account	Months interest credited
US$ account	June 1994 to October 1994
Cdn$ account	May 1993 to October 1994
UK£ account	March 1993 to May 1994

> We are not certain of the proper designation of these accounts, whether savings or current, and are, therefore, unable to determine the propriety of the non-payment of interest."

As for interest rates the agreement settles the matter. It is a clause which appears at the overleaf of each of the following pages . That is pages 962-964 of Volume III. It reads at clause 1 on the overleaf at 963:

> "1. The undersigned having opened a deposit account with you in their joint names, in consideration thereof hereby agree with you and with each other that all moneys now or from time to time deposited to the said account, and interest thereon, shall be and continue the joint property of the undersigned, and for the purpose of effectually constituting such joint account each of the undersigned hereby assigns and transfers to the undersigned jointly all such moneys together with all interest that may accrue thereon."

It is common knowledge that the interest rates on ordinary savings accounts are compounded with yearly rests so the learned judge fixed the rate of 4% for the foreign currency accounts. A fair way of computing this is to compute the amount found at the end of audit from January 3 to the delivery of the judgment in the Court below which was October 2, 1998. The amounts which are stated on Appendix I at page 983 of Volume III of the Record are as follows:

"US$49,145.01 Cdn$38,572.52 and UK£11,161.15."

With respect to the Jamaican current account the debit balance shows $1,670,599.38 at page 1020 of Volume III of the Record. This figure is arrived at by deducting $5,113,633.86 from $6,784,229.24. This global figure

includes interest on the unwarranted debits and bank charges thereto. The bank and interest charges must be deducted to reflect the true balance and interest rate over the relevant period.

Even before this computation is made the figure of $5,113,633.86 at pages 983 and 1020 of Volume III of the Record must be deducted from the debit balance of $6,784,229.24. The basis for this is to be found at page 983 of Appendix 1 and it reads:

> "Less net unsupported lodgments in excess of unmatched debits on US account appendix 3."

So the figure is One Million Six Hundred and Seventy Thousand Five Hundred and Ninety Five Dollars and Thirty eight Cents ($1,670,595.38). This figure should take into account $2,348,147.25. The basis for this approach is to be found at page 978 of Volume III of the Record where the KPMG Report states:

> "*Findings*
>
> (1) The branch, as well as Mr. Morrell, was unable to locate all the bank statements, paid cheques, lodgment slips and advices from inception to December 31, 1992. We are, therefore unable to verify the transactions for this period. The overdraft balance as at December 31, 1992 was J$2,348,147.25."

It is the Bank's responsibility to supply the appropriate records. The result of their calculation $2,348,147.25 - $1,670,595.38 is $677,551.87 which would result in a credit balance in this account of $677,851.87. Using the figures from the Statistical Digest from the Bank of Jamaica for interest rates which is the practice in these Courts Ms. Phillips Q.C. for the appellant

submitted that the figure of $9,548,461.37 when this is added to the figure of $677,581.87 puts the current account in credit of $10,226.013.24.

The status of the mortgage

Ground 12 of the grounds of appeal reads at page 5 of Volume I of the Record:

> "(12) The Learned Trial Judge erred in law and in fact in failing to hold that the loan funds in respect of the $6,000,000.00 had not been disbursed to the First Plaintiff and the mortgage registered in relation thereto was therefore void and unenforceable."

As for the ruling of the learned judge it was as follows at page 255 of Volume 1 of the Record:

> "With regard to paragraph 18[F] I hold that the mortgage dated 9th December is enforceable and accordingly the order sought for the delivery of the certificate of title registered at Volume 1034, Folio 102 of the register Book of Titles is refused.
>
> The injunction sought to restrain the defendant from selling property comprised in the above-mentioned certificate of title is not granted."

During the course of his judgment the learned judge said at pages 237-239 of Volume I of the Record:

> "A valuation report [Ex. 9] has been tendered in evidence. It is a report in respect of Mr. Morrell's 60 acres in Lacovia. Why was this valuation report obtained? According to Mr. Morrell he was asked to get a valuation for his property which was to be collateral for a proposed loan to develop an Eco-tourism project. This report which he said he handed in to Mr. Reynolds is dated the 29th June, 1992.

Mr. Reynolds paint a different picture. He said:

> It [valuation report] was given to me by Morrell when in discussions about increasing his overdraft facility. At this time the Jamaican dollar account in overdraft. Morrell was under pressure from us to reduce the extent of overdraft. I told him there was risk – greater problem if anything went wrong – obvious implications of head office monitoring account unauthorized by them. Flows on account depended heavily on him – if he was not around whatever reason – spell disaster. If bank had security to cover overdraft – regularize. He submitted valuation on property to me and promised to make property available as security for overdraft."

Then the learned judge continued thus at the same page:

> "To support the plaintiff's stance that the mortgage was in respect of a loan of J$6,000,000 for an Eco-tourism project, reliance was placed on a loan application made by Mr. Corrie on behalf of Mr. Morrell [Ex.10]. This application is dated the 6th April, 1994. It was a request for:
>
> [a] Demand loan - J$50,000
>
> [b] ADL - J$2,800,000
>
> The loans were to be utilized as follows:
>
> [a] To replace funds used in the building of the entertainment center – J$700,000
>
> [b] To replace funds used to build cottages C.D. and E as noted in the valuation report.
>
> I do not know of which valuation report Mr. Corrie speaks. Certainly it is not the one tendered by the Plaintiff [Ex.9]. In that report there is no mention of any cottages C.D and E. Mr. Corrie in his request

envisioned unlimited success for the Eco-tourism project. As for Mr. Morrell, his credit-worthiness was beyond reproach. Nowhere in that request is there any reference to the overdraft facilities which Mr. Morrell had with the bank. In this request, Mr. Corrie wrote:

> 'We already have title in our possession and have registered our interest to cover $6 million'."

Then the learned judge continued thus:

> "I find it perplexing to appreciate why there should be a mortgage of $6,000,000 when the loan sought is a sum of $2,850,000. This is the same Mr. Corrie who with Mr. Morrell participated in the fiction of "Tuesday lodgments". Here, again, he is engaged in artifice. It is my view that the mortgage was in respect of security for the overdraft. The letter of request [Ex.10] was a ploy. By the pretence that the mortgage was in respect of a proposed loan, Mr. Morrell hoped to preserve his property from the consequences of his defaulting in satisfaction of payments on his overdraft. The letter was all a sham. The mortgage is enforceable."

Earlier the learned judge said at page 235 of Volume I of the Record:

> "The mortgage document shows that it was signed by Mr. Morrell on the 9th December, 1993. he said he signed a blank document in October 1993. At the time he signed, he said that the essential particulars were not written on that document. He signed that document pursuant to a proposed loan of J$6,000,000 which he sought to finance an Eco-tourism project on his 60 acre holding in Lacovia in St. Elizabeth. He said he never received this loan and since there was a total failure of consideration from the bank, the mortgage is unenforceable It is the bank's contention that this mortgage was security for Mr. Morrell's overdraft and therefore enforceable. It is thus a question of fact. The legality of the creation of the mortgage does not arise.

> In the determination of this issue it is essential to place mortgage within the context of the operation of the account. Mr. Morrell has tried to distance himself as far as possible from anything which involve him with an overdraft. In his examination-in-chief a letter dated 13th May, 1992 was tendered by him. It was a letter addressed to Mr. Morrell which indicated that the bank had approved:
>
> [1] J$300,000 Overdraft
>
> [b] J$250,000 Demand Loan
>
> That letter requested him to indicate his acceptance by signing "and returning the attached copy". This letter [Ex.8] did not bear Mr. Morrell's signature. He said:
>
> "I did not accept proposal in that letter."
>
> In cross-examination a letter in identical terms was shown to him. It bore his signature of acceptance. At first he still maintained that he did not sign. Subsequently he admitted that he *did* sign [Ex. 15]. He said that he agreed to an overdraft because it was offered to him. He did not mind paying the commitment fee of $6,250. He said:
>
> "if overdraft there- not hurt. Whether there or not – had no intention of using it'."

I think this issue ought to be resolved by examining the mortgage instrument at page 694 of Volume II of the Record. It is a second mortgage and the material part reads:

> "1. In consideration of the premises and of an original loan of $ to the Mortgagor by the Bank (the receipt whereof is hereby acknowledged) the Mortgagor COVENANTS with the Bank:
>
> (a) To pay to the Bank ON DEMAND 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, moneys advanced or paid to or for the use of the Mortgagor or charges incurred on his account or in respect of 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 moneys which the Mortgagor shall become liable to pay to the Bank in any manner or on any account whatsoever and whether any such moneys 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 the said Schedule with such rests as are stated in 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 together also with all usual and accustomed Bank charges."

Then clause (b) at page 696 reads:

(b) This security shall be a continuing security and shall avail the Bank in respect of all present and future indebtedness of the Mortgagor on any accounts whatever and is in addition to any security which would be implied or arise in the ordinary course from the business relations between the Mortgagor and the Bank and shall be deemed to continue notwithstanding any payments from time to time made by the Mortgagor or any settlement of account or other thing whatsoever."

Then the Schedule at page 699 reads:

"THE SCHEDULE

1. DATE OF MORTGAGE	:	The 9th day December, 1993
2. THE MORTGAGOR	:	GIFFORD EDRIC MORRELL
3. MORTGAGOR'S ADDRESS	:	HAUGHTON DISTRICT, LACOVIA, ST. ELIZABETH
4. ORIGINAL RATE OF INTEREST	:	62% SUBJECT TO CHANGE FROM TIME TO TIME
5. RESTS AT WHICH INTEREST PAYABLE	:	MONTHLY
6. ORIGINAL AMOUNT FOR STAMP DUTY PURPOSES	: :	SIX MILLION DOLLARS ($6,000,000.00)
7. THE MORTGAGED LANDS:		ALL THAT PRCEL OF LAND PART OF HAUGHTON SITUATE AT LACOVIA IN THE PARISH OF ST. ELIZABETH AND THE LAND COMPRISED IN CERTIFICATE OF TITLE REGISTERED AT VOLUME 1034 FOLIO 102"

It is to be noted that there are two prior mortgages for $200,000 and $5,000 and National Commercial Bank is the mortgagee. The second mortgage to the respondent Bank is for One Hundred Thousand US dollars ($100,000) with interest. The notice demanding payment at page 693 of Volume II of the Record speaks of the Notice of default with interest of $56,856,850.54. So it is safe to conclude that the $6,000.000 proposed for the Eco-tourism project was never advanced. If the Court finds that Mr. Morrell's current account is in credit there will be no basis for the second mortgage. The declaration that the mortgage is unenforceable would have to be granted. The mortgage should be cancelled. Since it is registered on the Title, the Registrar of the Supreme Court

would be obliged pursuant to section 158(1)(a) of the Registration of Titles Act to instruct the Registrar of Titles to cancel the second mortgage endorsed on the Title. There is another challenge by the appellants regarding the validity of the mortgage in a ground of appeal raised during the course of this appeal. It is another of the unusual features in this case. In summary the submission is that in obtaining the mortgage the appellant was aided and abetted by the Bank as an illegal currency trader and on that basis the mortgage was tainted with illegality and so void and unenforceable. This issue will be discussed later.

The rate of interest

In **Tai Hing** (supra) at page 960 Lord Scarman said:

> *"Interest*
>
> Their Lordships respectfully agree with the trial judge in his rejection of the submission that because the sums wrongly debited were in non-interest bearing accounts interest is not recoverable. The company has lost the opportunity of placing the money at interest as a result of the unauthorized debits made by the banks to the respective current accounts. Interest is, therefore payable. In the circumstances of this case interest should run from 15 May 1978, for by issuing its writ on that day the company required the banks to eliminate the unauthorized debits from the relevant current accounts and to repay what is due."

Further for the foreign currency accounts I would accord 4% interest compounded with yearly rests. This covers the ground of appeal which reads thus at page 3 of Volume I of the Record:

> "(6) The Learned Trial Judge erred in law in holding that although no evidence was tendered that

> compound interest was agreed to be charged by the Defendant in respect of the Plaintiff's loans with the Defendant, and no evidence was tendered by the Defendant of the custom and usage of banks to charge compound interest in Jamaica, that interest should be computed by way of simple interest on a per annum basis and capitalized at half-yearly rests."

The ground complained about the interest the learned judge awarded the Bank. Having regard to my decision that it is the Bank who owes the appellants, this ground was irrelevant.

Grounds 1 and 4 pertain to the counter-claim. Ground 1 reads at page 2 of Volume I of the Record:

> "(1) The Learned Trial Judge erred in law and in fact in giving judgment for the Defendant on the claim and the counterclaim as those findings are not sustainable in law and are against the weight of all the evidence."

To reiterate Ground 4 at page 34 at page 3 of Volume 1 of the Record reads:

> "(4) The learned trial judge erred in law and in fact that Clause 4 – the verification clause was binding on the second plaintiff when there was no evidence that the statements of the Defendant were ever submitted to the Second Plaintiff."

Ground 13 reads at page 5 of Volume I of the Record:

> "(13) The Learned Trial Judge erred in law and in fact in ruling that the Defendant had succeeded on its Counterclaim in the amount of $243,201,568.89."

In the light of the submissions and analysis in this Court it follows simply that the appeal has been successful and the Counterclaim is dismissed.

On this aspect of the appeal, Ms. Hillary Phillips Q.C. argued for the appellants while Mrs. Sandra Minott-Phillips submitted for the respondent Bank. I am indebted to both counsel for their learned submissions.

(v)

The preliminary point of law

Ground 15 reads as follows:

> "15. The admissions made and the evidence adduced at the trial clearly demonstrated that the arrangements between the First Appellant and the Respondent amounted to an illegal activity prohibited by the Exchange Control Act (see section 3(1), (2), (4), Fifth Schedule, Part II, paragraphs 1,2,3) in which the Respondent aided and abetted the First Appellant and accordingly the amount claimed by the Respondent is irrecoverable and the mortgage adjudged to have been granted as security with respect to moneys advanced to facilitate the said illegal transactions is void and unenforceable.
>
> Dated the 6th day of October, 1999"

It is important to recount how this ground of appeal came to be filed and argued. It was filed during the course of Ms. Phillips' submissions for the appellants. Further, it was contended that it was a preliminary point of law and was capable of determining the whole appeal. Also it was sought to have a ruling on this issue before resumption of the hearing on the other grounds of appeal. To my mind a ruling would have been premature. The Court ruled that the decision on this ground would be reserved and given when the Court delivered its judgment. It is necessary at the outset to say that I shared the Respondent's fears that in order to embark on this ground, the matter should have been pleaded in the Court below so that the Bank would have known beforehand

what it had to meet and prepare a defence. See section 178 of the Judicature (Civil Procedure Code) Law (now repealed) which reads:

> "178. The defendant or plaintiffs (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

The case of **North Western Salt Company v Electrolytic Alkali Company Ltd** [1914] A.C. 461 is relevant to this issue. Lord Haldane states the principle thus at page 469:

> "My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."

and continued thus at page 470:

> "The Court of Appeal ought, in my opinion, in the absence of amended pleadings and full evidence, to have refused to enter into what was a mere speculation on an intricate and wide question of fact. If this be so, then the only question which can legitimately be considered is whether the contract sued upon is one which on the face of it ought not to be enforced. As I read the judgments of the majority of the Lords Justices, they seem to have thought that the contract, although possibly valid if taken by itself, was not so in view of inferences of fact to be drawn from the character of the outside agreements to which it referred. But if there is not sufficient evidence to enable a Court to review the situation in its entirety, then the Court is confined to what appears on the face of the contract sued upon, including any documents incorporated with it. As the outside agreements and documents to which I have referred were not so incorporated, I think that they could not be looked at in an action with the restricted issues which the pleadings before us raise."

Lord Moulton was of the same mind. He said at page 476:

> "This reasoning would be sound in the case of a properly constituted action, where the defence of illegality is duly raised on the pleadings. The Court would then be entitled to assume that it had before it, in evidence, all the relevant surrounding circumstances. If any be missing it is the plaintiff's own fault, and he must take the consequences. In such a case the legal motto, *de non apparentibus et de non existentibus eadem est ration*, is rightly applied. But it is not so where the issue is not raised on the pleadings. The plaintiffs have received no notice that the point will be raised, and are presumably not prepared with the necessary evidence. Even if they are in a position to call the evidence they are not at liberty to do so, because they are only entitled to call evidence on the issues raised by the pleadings. The facts before the Court at the end of the case are therefore only a casual selection from the surrounding circumstances, and the Court has no longer the right to treat them as

> properly and fully representing those surrounding circumstances so as to justify its pronouncing on their true effect upon the contract. It may be shortly put as follows: if the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not ex facie illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting."

It is questionable whether the learned judge below should have referred to Mr. Morrell as an unlicensed trader or permitted any cross-examination on that part of the evidence. Here is how Lord Moulton dealt with this issue at page 474:

> "At the trial before Scrutton J. the plaintiffs put their manager into the witness box to give evidence on some issue of fact raised in the pleadings. In commencing his cross-examination of this witness counsel for the defendants put a question to him admittedly not relevant to any matter pleaded, but directed solely to shew that the contract was, in fact, a contract in restraint of trade, and thus void or unenforceable. Objection was taken to the question on the ground that if the defendants intended to raise such a defence they ought to have pleaded it. The objection was sustained by the judge. He could scarcely have done otherwise in face of the specific provision in the Rules that the defendant must raise by his pleading all matters which shew the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, as, for instance, fraud facts shewing illegality either by common or statute law. The defendants thereupon asked for leave to amend their pleading so as to arise the defence of illegality, but the judge refused such leave, on the ground that it would be unfair to the

> plaintiff to allow such an amendment to be made when the trial had already commenced."

Lord Parker expressed similar views at page 478. On the main issue he said at page 479:

> "For my part, I entirely agree with the dissenting judgment of Kennedy L.J. Even assuming that the facts and documents in question, if unexplained, would establish the existence of an attempt on the part of the plaintiffs to establish such a monopoly, your Lordships cannot disregard the fact that the plaintiffs have had no opportunity of explaining them. The full facts, if known, might profoundly modify any inferences your Lordships might be induced to draw from the imperfect information now before the House."

Lord Sumner expressed his views thus at page 481:

> "Much of the oral evidence was strictly immaterial since though obtained in cross-examination, it went to no issue. It may, therefore, be disregarded. Nor does the residue suffice, for this simple reason. Whatever else can be made of it, if anything, this is certain, that we do not know half of the facts material to the case. For myself I should require to know much more of the conditions of the trade and of the effect of such arrangements as these before I could profitably express any opinion on the practical rights and wrongs of the sale of salt. In such a matter partial information is as bad as none."

I should also add that it would have been impossible for the learned judge below to resolve any issues on the basis of illegal transactions as the illegality could affect both parties and it would require pleadings to identify the issues which the illegality would affect. There are two other preliminary remarks which seem appropriate. This ground of appeal concentrates on the

mortgage as the sole issue. It was never clear to me whether the appellants would abandon the other grounds of appeal whatever the results were on this ground. Also to be taken into account is that the mortgage on its face is a legal instrument.

Mercantile Credit Co. Ltd. v Hamblin [1964] 1 WLR 423 was rightly cited to justify raising this issue where,

> "John Stephenson J. refused leave to amend and, finding for the defendant on other grounds, said that, in his view, counsel was not acting improperly in inviting the court to consider the possible illegality of the transaction. On the contrary, it was counsel's duty, however embarrassing, to prevent the court from enforcing illegal transactions."

I will attempt later to demonstrate that the Bank's ambivalent stance in the Court below contributed to the state of affairs which made this ground arguable.

It is essential to recount my decision on the mortgage in this context. The appellants on my assessment of the evidence and the law applicable, have some $10 million standing to their credit in their current account, which they now claim. The claim by the Bank that this account was in overdraft has failed, and as such the appellants are entitled to a declaration that the second mortgage held by the Bank is unenforceable. The appellants' contention that no moneys were disbursed by the Bank for the Eco-tourism project has not been resisted by the Bank, as it contended that the mortgage was to secure an overdraft. The Bank supports this contention on the basis of the Instrument

of Mortgage. So in a way this ground is superfluous, but it was argued over many days.

The first issue to be addressed is the period during which the Exchange Control Act was in force in relation to the appellants' current account at the Bank. The Exchange Control Law 1954 was repealed on 14th August 1992, by the Exchange Control (Repeal) Act 1992. The second mortgage in issue is at page 699 of Volume 2 of the Record and was dated 9th day of December, 1993. The notice, at page 693 of Volume II, of the Record to demand payment was dated 28th September 1994. Therefore, this new ground of appeal which specifically refers to section 3(1)(2)(4) of the Fifth Schedule of the Exchange Control Act has cited an Act which has been repealed. It is important therefore to ascertain the provisions of the repealed Act.

It is essential to state the climate in which the amendment took place. In 1980 the new government immediately abolished the Financial Intelligence Unit (the "FIU") a group of specialist investigators whose duty it was to secure compliance with the draconian provisions of the Exchange Control Act. An Assistant Director of Public Prosecutions and a Crown Counsel were assigned to conduct trials in the several courts of the Island while the F.I.U. was in existence. The F.I.U. was abolished and the new Government announced that no questions would be asked concerning the origin of foreign currency provided it was deposited with commercial banks who were the authorized dealers. It was in such a climate that traders like Mr. Morrell flourished. When the

Exchange Control Act was repealed the factual situation was that during the period 1980-1992 few if any prosecutions took place and exchange control was virtually at an end although the law, as amended, remained on the statute books.

Before the formal repeal of the Exchange Control Act, there were amendments and suspensions of some of its provisions and removal of some of its restrictions. These are to be found in three Ministerial Orders made in pursuance of section 45 of the Exchange Control Act. They are the Exchange Control Act (Amendment) No. 41 Order 1991 of August 16, 1991; and August 30, 1991 Jamaica Gazette Supplement of the above date; and the Exchange Control (Removal of Restrictions) Order 1991 dated September 24 in the Jamaica Gazette Supplement of that date.

The amendment to the Bank of Jamaica Act, (Act 11/1992) which replaced the Exchange Control Act reads so far as is relevant:

"

PART IVA – Dealings in Foreign Currency

Foreign Currency trans-actions.

22A.-(1) Except as provided in subsections (2) and (3), any person may buy, sell borrow or lend foreign currency or foreign currency Instruments.

(2) No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorized dealer.

Amendments

(3) It shall be unlawful for any person to buy, sell, borrow or lend foreign currency

> or foreign currency instruments in a transaction involving the payment of Jamaican currency, unless the payment is made to or, as the case may be, by an authorized dealer."

That the respondent Bank was an "authorized dealer" is not in dispute. See the Bank of Jamaica (Authorised Dealers) Order, 1992 **Jamaica Gazette Supplement** dated Friday November 27, 1992. The first point to note is that dealings in foreign currency is now in the context of the Bank of Jamaica Act in a liberalized climate. The rigours of the old Defence Regulations and its successor, the Exchange Control Act as manifested in such a case as **Boissevan v Weil** [1950] AC 327 are now history. There is a residue of control in the new law, by way of criminal offences, but control of prosecutions lie with the Director of Public Prosecutions. The object of the new provisions is to ensure that foreign currency flows into the coffers of authorized dealers. The Bank of Jamaica will therefore have effective control over the monetary policy of the country. The F.I.U., which was always on the look out for breaches under the Exchange Control Act is no longer in existence. It is against this background that the new provisions must be interpreted. It was because of bold traders like Mr. Morrell that section 22B of the Bank of Jamaica Act was enacted. That section provided for a wide range of authorized dealers. The commercial banks were no longer the only authorised dealers. This class has been widened and the most aggressive authorized dealers are the owners of cambios. In his evidence Mr. Morrell told the Court that he became a cambio operator in 1994. In the light of all this it is somewhat strange that

the counsel for the Bank cross-examined on his status as a foreign exchange dealer when his status was not in issue.

There is some evidence from the Bank that it sought to conceal the fact that Morrell was a foreign exchange trader: See page 322 of Volume I of the Record and page 739 of Volume II of the Record. One feature that was mentioned in counsel's submission was that Morrell was assisting an authorized dealer and if the matter had been raised and an amendment granted in the Court below, the submission would be that the Bank would have sought an amendment to its Defence and Counterclaim to aver that Morrell was an assistant for an undisclosed principal, Mr. Richard Jones. As part of Mrs. Minott-Phillips' submission the following important correspondence was adverted to:

"November 29, 1991

Mr. Richard Jones
15 Covington Close
KINGSTON

Dear Mr. Jones.

The Bank of Jamaica hereby authorizes you to act as its agent in the purchase of foreign currency with effect from December 1, 1991. All such transactions are to be carried out in keeping with terms and conditions agreed between yourself and the Bank, which terms and conditions are incorporated in a separate agency agreement.

Yours sincerely

F. A. DePeralto
Deputy Governor"

The attachment to this letter reads:

> "December 2, 1991
>
> TO WHOM IT MAY CONCERN
>
> The Bank of Jamaica (B.O.J.), by letter dated November 29, 1991, has authorized me, RICHARD JONES, to act as its Agent in the purchase of foreign currency, with effect from December 1, 1991, in keeping with terms and conditions incorporated in an agency agreement.
>
> To effectively discharge my functions I established an office at De Buss, Norman Manley Boulevard, Negril and Mr. Gifford Morrell will assist me in the performance of my duties.
>
> Signed
>
> RICHARD C. JONES
> Bank of Jamaica Purchasing Agent."

The other point to note is that criminal sanctions may be the clue to this aspect of the case. It is necessary to set out the criminal sanctions as follows:

> "Amendments
>
> Offences. 25D.-(1) Any person who contravenes any provisions of this Part or fails to comply with any requirement imposed by or under this Part shall be guilty of an offence and shall be liable –
>
> (a) on summary conviction in a Resident Magistrate's Court to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding one year or to both such fine and imprisonment;

(b) on conviction before a Circuit Court to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

(2) Where an offence is committed under this Part the Court may, if it thinks fit -

(a) in relation to an offence involving any foreign currency or foreign currency instrument, order the foreign currency or foreign currency instrument as the case may be, to be forfeited; and

(b) impose a larger fine not exceeding three times the amount or value of the currency or instrument as the case may be.

(3) No proceedings for an offence punishable under this part shall be instituted, except by or with the consent of the Director of Public Prosecutions."

It seems that Mr. Morrell might have been in breach of 22A(2) in that he, not being an authorized dealer, bought foreign currency. On the other hand, even if he was in breach of 22A(2) he complied with 22A(3) by selling foreign currency to the Bank which was an authorized dealer. By according the Director of Public Prosecutions specific powers, Parliament ensured that in the institution of criminal proceedings the public interest was paramount. After the repeal of the Exchange Control Act it was essential that foreign currency should flow into the coffers of authorized dealers who were controlled

by the Bank of Jamaica so as to empower that institution to exercise control over scarce foreign currency. The level of foreign currency reserves held by the Central Bank is a significant determinant of the rate of exchange of the Jamaican dollar.

These statutory provisions suggest that criminal sanctions leave no room for the Civil Courts to find the relevant contracts void. Further it would be inimical to the public interest to impose a criminal sanction on an authorized dealer for purchasing foreign currency. Even more, it would be odd for the Court to declare the mortgage invalid when the Bank held the mortgage on the basis of granting overdraft facilities to the appellants.

Are there any authorities which support this stance? I think the test appropriate to this case, in the context of the Bank of Jamaica Act, was set out with clarity by Mason J. in **Yango Pastoral Company PTY Limited and Others v First Chicago Australia Limited and Others** (1977-1978) 139 C.L.R. 410 at 426:

> "Where, as here, a statute imposes a penalty for contravention of an express prohibition against carrying on a business without a licence or an authority and the business is carried on by entry into contracts the question is whether the statute intends merely to penalize the person who contravenes the prohibition or whether it intends to go further and prohibit contracts the making of which constitute the carrying on of the business. In deciding this question the court will take into account the scope and purpose of the statute and the consequences of the suggested implication with a view to ascertaining whether it would conduce to, or frustrate, the object of the statute.

Then Mason J. continues thus at page 427:

> "It is not rational to suppose that the Parliament intended to inflict such dire consequences on innocent depositors. Nor is it rational to suppose that the Parliament intended to advantage innocent borrowers whilst penalizing innocent depositors. Even less is it to be supposed that the Parliament intended to invalidate the wide range of commercial and other securities which are brought into existence in the course of carrying on a banking business and thereby to inflict loss on the many persons acquiring such securities. I therefore conclude that the purpose of the Act is adequately served by the imposition of the very heavy penalty which is prescribed for a contravention of s.8 and that it does not prohibit and thereby invalidate contracts and transactions entered into in the course of carrying on banking business in breach of the section."

Mason J. recognized the competing principles in this area of law which he stated at page 428. It reads:

> "The suggested application on the principle often involves a conflict between competing common law policies. In **Beresford's** Case [1938] A.C. at p. 603 Lord Macmillian identified the conflict between the principle that no court ought to assist a criminal to derive benefit from his crime and the principle that contracts deliberately undertaken by persons of full age ought to be enforced. In **Cleaver's** Case [1892] 1 Q.B., at p. 181 Lord Esher M.R. prefaced his remarks on the unenforceability of a life insurance contact where the beneficiary murdered the assured with the warning that "when people vouch that rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires."

Then at page 429 Mason J said:

> "There is much to be said for the view that once a statutory penalty has been provided for an offence the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished – see my judgment in **Jackson v Harrison** [1978] 138 C.L.R. 438, at p. 452."

To my mind the mortgage held by the Bank over Mr. Morrell's property is valid and the fact that the Bank is an authorized dealer empowered to buy and sell foreign currency, reinforces the stance that the criminal sanction is adequate to cope with breaches of the Bank of Jamaica Act. The statute was not meant to prohibit lending on the security of a mortgage. If it were otherwise, in this case Mr. Morrell would escape his contractual obligations, if any, and the shareholders of the Bank would be injured if Mr. Morrell owed the Bank.

Jacobs J. at page 433 cites Devlin L.J. in **Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.** [1961] 1 Q.B. 390 thus:

> "I think that the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this case, greatly outweigh the punishment that could be imposed upon him, and thus undo the penal effect of the statute."

Gibbs A.C.J. posed the problem thus at page 413:

> "Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed."

It must be recalled that in this case it is Mr. Morrell who seeks to avoid the obligations, if any, of the mortgage by alleging that the Bank, by granting him overdraft facilities on his current account, aided and abetted him in contravention of the Bank of Jamaica Act.

Part of the confusion in the instant case is that Mr. Morrell described himself as an unlicensed dealer in foreign exchange. So did the learned judge below. He was so described because by 1994 he had a licence to operate a Cambio. Prior to that he may have been trading on behalf of an authorized dealer. That however was never a pleaded issue in the Court below or in this Court.

On the facts of the case the appellants' account was not in overdraft. However, if it had been in overdraft, the mortgage would have been enforceable. So, as a matter of law, the appellants have not succeeded on this ground. Dr. Barnett for the appellants and Mrs. Sandra Minott-Phillips for the respondent argued on this aspect of the appeal and I am indebted to them for their cogent submissions.

vi

Conclusion

This has been an exceptional case. Two responsible officers of the respondent Bank have sought to justify debiting the Morrells' accounts without their written authority. That a written mandate from the Morrells was essential to debit their accounts is evidenced by the four written contracts between the Bank and the appellants. Then the Bank sought to rely on the verification clause which gives exemption for errors or omissions if there is a failure to report such errors or omissions after thirty days. But the unauthorized debits were no mere errors or omissions. They were deliberate debit entries made in breach of contract. The verification clause was of no assistance to the Bank in such circumstances. Once the appellants succeed on those two issues it follows that they must also succeed on the other issues. All four accounts were in credit. Therefore, the mortgage over Mr. Morrell's property must be cancelled. It was the Bank's attempt to sell Mr. Morrell's property that triggered this litigation. Correspondingly, the Bank has failed on its Counterclaim to recover upwards of $54M from the Morrells. The Bank cannot enforce the mortgage and the appeal must be allowed. The order of this Court ought to be:

ORDER

(1) Appeal allowed

(2) Order below set aside

(3) Appellants' bank accounts declared to be in credit as follows:

(a) US$49,145.01

(b) Can. $58,572.52

(c) U.K. $11,161.15

(d) J$10,226,013.24. This figure includes Interest.

Interest on the foreign currency accounts payable from January 3, 1996 to date of judgment in Court below. The rate is 4% compounded with yearly rests.

(4) The second mortgage held by the Bank to be cancelled by the Registrar of Titles on being instructed to do so by the Registrar of the Supreme Court.

(5) Liberty to apply

(6) Costs both here and below are to go to the appellants except on ground of appeal 15 in this Court where there should be no order as to Costs.

BINGHAM, J.A:

Having read in draft the judgments prepared in this matter by Downer and Walker, JJA I wish to state that I am in agreement with the reasoning and conclusions reached by Walker, J.A. that the appeal be dismissed and the judgment of Cooke, J below be affirmed with order for costs as proposed by him.

The nature of the hearing of the appeal was long and protracted, having commenced on 4th October 1999 continuing for twelve days. This period was fully taken up in arguments by learned Queen's Counsel for the appellants when the matter was adjourned for a date to be fixed.

When the hearing resumed several days were then taken up in March and April 2000, hearing a motion brought by the appellants raising an issue that the contract entered into between the appellants and the respondent bank, was void as it breached the provisions of the Exchange Control Act. The Court took the view that it would entertain the arguments but that it would incorporate its decision on this issue in its judgment in the appeal. The substantive hearing was to continue for another fourteen days before the submissions were concluded on 23rd January 2003. The Court then reserved judgment. Given this background it was necessary if justice was to be done to the parties for the Court to proceed with the utmost care in examining the issues raised by Counsel in the appeal in coming to its own decision. Regrettably, this has proven to be a difficult hurdle to surmount. There has now been a division in the decision arrived at. This is

what has led me to set out the reasons that prompted me to the course that I have taken in this matter.

The History of the Claim

This is best set out in the judgment of the learned trial judge. To quote from his judgment - "in early 1992 there was a chance luncheon encounter between himself (Morrell,) and Mr. Heron at a restaurant called the Fair Flakes in Negril. Mr. Heron was the Manager of the branch of Workers Savings and Loan Bank in Savanna-la-mar. Arising out of this meeting Mr. Morrell and Mr. Heron came to an arrangement satisfactory to their mutual advantage."

Mr. Morrell was encouraged to become a valued customer of the bank at the Savanna-la-mar branch where Mr. Heron was the Manager. The relationship with the bank was not the usual one of banker and customer. Morrell was to become and be treated by all and sundry at the bank as a preferred customer. His dealings with the bank were not limited to the regular banking hours. He was given the facility of carrying on business at the bank outside the normal working hours. This meant that he had access to the bank before the hours that the bank was opened for business to the public and after it was closed for business.

During the course of a working day, Morrell was allowed to give oral instructions to the bank staff to effect telephonic transfers to third parties. At the outset these were recorded by the bank preparing debit memos against the respective accounts operated by Morrell. At the close of the

day this arrangement would be regularized by the signature of Morrell to the debit memos being obtained after reconciliation of the respective accounts were effected. Another method of accounting adopted was by Mr. Morrell leaving a signed blank cheque leaf with the credit manager of the bank. This cheque leaf would then be filled in with the appropriate sum at the close of business following a reconciliation of the particular account(s).

At the start of the relationship between Mr. Morrell and the bank this arrangement of a daily reconciliation seemed to have worked reasonably well. After the foreign exchange transactions became too numerous, however, the standard practice which was resorted to in the case of the ordinary customer was overlooked in the case of Mr. Morrell. According to Mr. Reynolds, who was the credit manager and who acted for a while as bank manager between the departure of Mr. Duhaney and a Mr. Corrie taking up duties at the bank, he became "more comfortable with Mr. Morrell even to the extent that the necessity for daily reconciliations was not insisted upon". Needless to say as the learned trial judge found the officers of the bank ignoring what was well accepted banking practices was to lead to an escalation in the permitted overdraft limits of the plaintiffs. This led to Mr. Reynolds calling on Morrell to regularize this situation by providing security to protect the bank's position.

Following this, Morrell lodged the title to his farm at Lacovia, St. Elizabeth, as security for an overdraft of $6,000,000.00. A valuation of the property was

obtained and an application for a mortgage charging the property was executed by him. Mr. Morrell later claimed that the mortgage was effected to obtain a loan of $6,000,000.00 to carry out a development on the property as part of an eco-tourism project which was not pursued. It was contended on behalf of the appellants, therefore that there being no consideration obtained for the lodging of title by way of security for this loan, the bank was obliged to cancel the mortgage and to return the title to the appellants.

Given the bank's stance, after the title was lodged as security, the overdraft continued to escalate further, a situation which led Mr. Corrie the then manager to resort to the fiction of "Tuesday lodgments." This situation called for Mr. Morrell to issue a cheque to cover his total indebtedness to the bank drawn on his account at National Commercial Bank, Santa Cruz, which was done to satisfy the bank's head office in Kingston that Morrell's account was being operated within the permissible limits. On the following day a Workers Bank cheque for the corresponding amount would be drawn on Morrell's current account in favour of National Commercial Bank, Santa Cruz, thus cancelling the debit entry of the previous day.

This state of affairs was to continue in what seemed to be a harmonious relationship until May 1994, when with the advent of one Mrs. King as credit manager replacing Mr. Reynolds, the lid was placed on Mr. Morrell's credit limits and cheques drawn by him on his current account were dishonoured due to lack of funds in the account. This led to a complaint made by him to Mr. Basil Naar,

a senior vice president at the head office. Following enquiries, Mr Naar took a firm stand that the state of Morrell's indebtedness was as indicated by the monthly statements issued by the bank.

Subsequent discussions between the bank and Mr. Morrell led to K.P.M.G. Peat Marwick and Mitchell, a firm of auditors, being engaged to conduct an audit of the bank's records to determine what the true state of Morrell's accounts was.

This exercise although it may be seen as commendable, proved, however, to be inconclusive as the auditors were unable to resort to several records of the bank and had to rely on entries made by Mr. Morrell in note books and diaries which he said were used by him to record daily transactions made with customers in relation to his accounts at the bank.

In this regard these entries unless supported by other contemporary documents such as signed debit memos, or authorized instructions to the responsible officer at the bank would be of little or no weight in determining the value or the accuracy of the particular sum.

In dealing with the K.P.M.G report which called for the firm:

> "to investigate and examine the relevant records and supporting documents in order to determine the balance due to/from the bank on four [4] accounts operated by Mr. Morrell."

this report stated that:

> "Generally we found that many of the source documents were unavailable for our examination. We performed such alternative procedures as we

> considered necessary in the circumstances in an attempt to verify the transactions. However we are unable to verify satisfactorily all transactions on the relevant bank accounts and therefore, the result of our investigations are not conclusive." (Emphasis supplied)

In the light of the above it is clear that the conclusion of the learned trial judge that the pleading in the Statement of Claim at paragraph 16 to the effect that:

> "This audit (KPMG report) demonstrated that the Defendant made deductions from the Plaintiff's current account and foreign exchange savings account without any written or other authority."

is well founded.

This finding of the learned trial judge given the substance of the report is sound being fully supported by the comments in the report. The report sets out two alternative situations based on assumptions as to which of the rival contentions is the correct one.

Having regard to this untenable state of affairs it became clear that for a proper determination of the matter the learned trial judge had now to resort to the oral evidence of the witnesses, supported where this was possible by such documentary evidence not in dispute. The focus then, to a large extent was on the credibility of the principal officers of the bank who testified and the testimony of the first plaintiff/appellant Clifford Morrell, for the assessment of the learned trial judge. For the bank the two witnesses were Mr. Reynolds and Miss Elaine Grindley.

Miss Grindley was the officer at the bank who had the longest relationship with the appellant (1st plaintiff). She had to obtain his personal authorization in the form of his acceptance of debit memos evidencing his oral requests for advances during the course of the working day. This relationship covered a period lasting from January 1993 to April 1994. The learned trial judge's finding was that her evidence in relation to the bank's approval, and, Mr. Morrell's subsequent acknowledgement of having requested these numerous advances, went unchallenged. Mr. Reynolds could only recall one occasion in which Mr. Morrell raised a query concerning an amount of Five Thousand ($5000) Canadian Dollars. This was brought to his attention following information allegedly brought to Morrell's notice by his auditor Mr. Bell. The evidence in the case does not indicate how this matter was resolved and if so to whose benefit.

Morrell on the other hand also raised the matter of a sum of $100,000 which he claimed to have been an unauthorized debit arising from an unsuccessful attempt by him to reconcile his overdraft on the occasion of one of his many visits to the bank at the end of the day after closing hours. He said he complained to Mr. Duhaney the then manager at the bank about the matter. Again there is no evidence as to how this matter was dealt with. It is however, significant that Mr. Morrell enjoyed an excellent relationship with all three managers viz. Heron, Duhaney and Corrie, over the relevant period that he had his accounts there (1992-1994). None of them gave evidence at the trial. Mr.

Corrie, the gentleman who was responsible for inventing the fiction of the "Tuesday lodgments" was dismissed from the bank in May 1994.

Given the fact that they as the managers who were in charge of the bank's affairs during the period Mr. Morrell was allowed to operate an overdraft which in late 1992 stood at just over $300,000 but, when finally held in check in May 1994, by the dishonouring of some of his cheques by Mrs. King the new credit manager, this overdraft had then escalated to a sum with interest which stood at over Fifty-Six Million Dollars ($56,000,000.00) naturally, Mr. Morrell's immediate response was to lodge a complaint to the officers at the bank's head office in Kingston. When his complaints led nowhere and with the inconclusive report arising from the K.P.M.G. report and the threat of foreclosure looming in respect of his Lacovia project, a writ issued by him against the bank was his method of retaliation.

The learned trial judge having seen and heard Mr Reynolds and Miss Grindley for the bank, and Mr. Morrell, rejected the account given by Morrell and accepted the evidence of the bank officers. His finding was, that he was very impressed with the account given by Mr. Reynolds whose evidence he found to be credible, and, which he "unhesitatingly accepted." As previously mentioned the account of Miss Grindley having gone virtually unchallenged, this meant that in so far as it was in conflict with Morrell's account, the learned trial judge was right in accepting it and acting on it in coming to his conclusion in the case.

Morrell's entire conduct based on his account clearly did not impress the learned trial judge as the tribunal of fact. It is not difficult to envisage why this was so. A few examples have been already resorted to. There is however, the need to resort to at least one other. This had to do with the mention by Morrell of the complaint he made to Mr. Duhaney about the difficulty he had in reconciling a figure of $100,000.00. This complaint, it would seem, apparently fell on "deaf ears". Not long after, he (Morrell) was invited to an upscale function hosted by the top officers of the bank held at the Pegasus Hotel at which, apart from the principal officers of the bank in attendance, he was invited as the only customer from the Westmoreland area. When asked whether he raised the matter of the problem he was experiencing in reconciling his accounts, he stated that he only mentioned the problem he was having with his bank statements which he said he had been receiving late, sometimes three weeks late. This prompted the learned trial judge to form this view of his testimony:

> "My view is that Mr. Morrell will do or say anything if at that particular point in time he perceives it to be to his advantage."

The Preliminary Point of Law
(the illegality issue)

This relates to ground 15 which has been fully set out in the judgment of Downer, J.A., and so does not bear repetition. It has its genesis in a statement appearing at the beginning of the judgment of the learned trial judge. He referred to the appellant Mr Morrell as "an unlicensed foreign exchange dealer".

The appellant's contention was that as the respondent was saying that the mortgage was obtained by Mr Morrell as security for further advances on his overdraft in order to facilitate his illegal foreign exchange transactions, this agreement was tainted and therefore void.

As the appellant's case was that the title to the Lacovia property had been lodged with the bank to obtain a loan of $6,000,000.00 to develop his project on the farm at Lacovia, which on the face of it was a legitimate venture having nothing to do with any illegal foreign exchange transactions in which the appellant may have been engaged, it is of some interest to know on what basis the learned trial judge ground this conclusion in labeling the appellant as an "unlicensed foreign exchange dealer." In my view the evidence touching on this issue has to be fully examined before one could determine whether this finding can be supported.

As the respondent argued with some force the illegality issue was not pleaded nor made an issue at trial. It was being raised for the first time in the appeal. The respondent was not placed in a position to answer this matter in their defence below. Had it been raised below, a resort to interrogatories could have ensured that any information bearing on the matter could have been produced. During the arguments before us it was brought to our attention that one Richard Jones a foreign exchange dealer licensed to purchase foreign exchange on behalf of the Bank of Jamaica at the material time, had appointed the appellant as a sub-agent to purchase foreign exchange on his behalf. In

such an event such dealings by the appellant would not necessarily have earned the classification accorded to him by the learned trial judge.

The bank for its part was fully authorized by the Exchange Control Act and Regulations to purchase, and with the approval of the Central Bank to sell foreign exchange. In the circumstances, it is not clear to me at any rate just in what manner it could be said that the bank facilitated the appellant in his foreign exchange dealings.

In his judgment, Downer, J.A., has seen the dilemma that this issue now being raised posed for the respondent. He recognized that it ought to have been pleaded in the Court below to enable the respondent bank to know before hand the case they had to meet and so prepare a defence. In this regard he referred to section 178 of The Judicature (Civil Procedure) Code Law and the decision of the House of Lords in ***North Western Salt Company*** v ***Electrolytic Alkali Company Ltd.*** (1914) A.C. 461 per dictum of Lord Haldane at page 469, with which judgment the other Law Lords were in agreement. I too share the view expressed by Downer, J.A., at page 78 where he said:

> "It would have been impossible for the learned trial judge below to resolve any issues on the basis of illegal transactions as the illegality could cut both ways and it would require pleadings to identify the issues which the illegality would affect."

Given the manner in which this issue came to be argued therefore, not having been raised by the appellants below there exists no clear evidential basis supporting the findings by the learned trial judge of the appellant Mr Morrell as

an "unlicensed dealer" or that the bank for that matter facilitated him in his illegal foreign exchange transactions. This ground therefore, cannot be sustained.

Conclusion

From the evidence and findings of the learned trial judge, it is without a shadow of a doubt that Mr. Morrell, was treated by the three managers Heron, Duhaney and Corrie, as a preferred customer of the bank at the Savanna-la-Mar branch. In a situation of the obvious scarcity of foreign exchange he was a prime factor and the bank benefitted from his presence. He used this facility to escalate his indebtedness to the bank to unforeseen heights. This situation was taking place either with the full knowledge and consent of those in charge of the bank's affairs, or, if not, then they seemed to have turned a blind eye to what was taking place at the bank.

At the end of it all, when one examines with care the reasoning and the conclusions to which the learned trial judge came, I am firmly of the view that they revealed a sordid state of affairs prevailing at this financial institution. His decision was the only just result that was called for in the circumstances.

It is for the above reasons I have been led to the course adverted to at the commencement of this judgment.

WALKER, J.A.:

Between the years,1992 and 1994 the appellant Gifford Morrell was, from all the evidence, conceivably the most preferred customer of the Savanna-la-mar branch of the respondent bank ("the bank"). For as long as that special relationship lasted – and that relationship is crucial to the legal positions of the parties and on that basis to the outcome of this appeal – Mr. Morrell, quite literally, had the run of the bank. He could personally access the bank and its functionaries before opening hours and after closing hours, and would regularly do so. Mr. Morrell maintained four (4) separate accounts at the bank, namely:

(a) Jamaican dollar current account;

(b) United States dollar account;

(c) Canadian dollar account; and

(d) English Pound Sterling account.

In or about the month of May, 1994 the relationship between Mr. Morrell and the bank soured. The change came about when Mr. Morrell complained that his Jamaican dollar current account was showing an ever increasing overdraft in error. Eventually Mr. Morrell's cheques were dishonoured by the bank. What was more, the bank threatened to exercise its powers of sale over certain real estate which it held under the terms of a mortgage deed executed by Mr. Morrell and of which the bank was the mortgagee. The bank claimed that Mr. Morrell's property

had been mortgaged to the bank in order to secure the burgeoning overdraft, whereas Mr. Morrell claimed that the mortgage was effected in anticipation of funds which ought to have been disbursed to him by the bank but which he never received. In time the parties agreed to submit their differences to mediation and in pursuance of that agreement they engaged the services of KPMG Peat Marwick ("KPMG"), a reputable firm of chartered accountants, with a hope of determining their respective rights. In due course KPMG rendered a Report which reflected findings in terms that:

> "(a) If Mr. Morrell did receive the benefit of debits which he disputed and for which his approval was not seen, he was indebted to the bank in the amount of J$41,578,621.81 on his current account;
>
> (b) If Mr. Morrell did not receive the benefit of the debits disputed by him and for which his approval was not seen, he owed the bank the sum of J$6,784,229.24 on his current account."

This Report was accepted by Mr. Morrell. Nevertheless, Mr. Morrell filed an action against the bank claiming:

> "(A) An account of all receipts, payments dealings and transactions between the Plaintiff and the Defendant in all of the Plaintiff's accounts with the Defendant.
>
> (B) A declaration that the Defendant has wrongly debited the Plaintiff's accounts in all instances where the Defendant is unable to supply documentary proof or authorization for such debits.

(C) A declaration as to the extent to which the overdraft debited to the Plaintiff's account was the fault of the Defendant and therefore that the overdraft interest charged on the account is not owed by the Plaintiff.

(D) In the alternative, a declaration that in law the Defendant cannot charge the Plaintiff penalty interest rates.

(E) An order that the Defendant do pay to the Plaintiff all such funds found due and owing to the Plaintiff, at such rage (sic) of interest that this Honourable Court may deem fit.

(F) A declaration that the Defendant held the Certificate of Title registered at Volume 1034 Folio 102 of the Register Book of Titles in respect of the property at Lacovia in the parish of St. Elizabeth on condition that it was a security for a loan which was never granted and for no other purpose, and that, the mortgage dated 9th December, 1993 is unenforceable.

(G) An order for delivery of the aforesaid Certificate of Title registered at Volume 1034 Folio 102 of the Register Book of Titles.

(H) An injunction restraining the Defendant from selling the Plaintiff's said property being all that parcel of land part of Haughton situate at Lacovia in the parish of St. Elizabeth and being the land comprised in Certificate of Title registered at Volume 1034 Folio 102 of the Register Book of Titles.

(I) Damages for breach of contract.

(J) Damages for negligence.

(K) Such further or other relief that the Court may deem just.

(L) Costs."

Mr. Morrell's action was defended by the bank which counter-claimed as follows:

> "By way of counter claim the Defendant states that in April, 1992 the Plaintiff requested and was granted an overdraft facility for one year in the amount of $300,000, at an agreed rate of interest of 65% per annum. During the said year the Plaintiff exceeded that limit considerably, and at the expiry of the one year period, the Plaintiff had an overdraft in the amount of $4,910,365.22. Subsequently he applied for increased overdraft facilities, which were granted on his agreeing to provide security in the form of the mortgage referred to in paragraph 10 hereof.
>
> The Plaintiff is indebted to the Defendant in the sum of $137,752,281.86 inclusive of interest as at February 28, 1998. Amended particulars of the said debt are supplied to Plaintiff herewith. Interest continues to accrue at the rate charged from time to time by the Defendant on overdrafts which as at the date hereof is 45% per annum.
>
> Despite demand, the Plaintiff has failed to pay the said sum to the Defendant, and the Defendant counterclaims:
>
> a. For the said sum of $137,752,281.86 with interest at the rate charged from time to time by the Defendant on overdrafts (which at the date hereof is 45% per annum), from March 1, 1998 to the date of judgment or sooner payment.
>
> b. A declaration that the mortgage no. 795693 is valid and enforceable.
>
> c. Costs and attorneys-at-law costs."

The action was tried over several days by Cooke J who in the final analysis gave a judgment for the bank in the following terms:

> "1. That there be judgment for the Defendant on the Claim;
>
> 2. There be judgment for the Defendant on the Counterclaim in the sum of $243,201,568.87;
>
> 3. Costs to the Defendant on the Claim and Counterclaim to be agreed or taxed;
>
> 4. Certificate for two counsel."

The learned trial judge also declared "that the mortgage no. 795693 is valid and enforceable". It is against this judgment and declaration that the Morrells (Fiona Morrell was joined as a co-plaintiff at the trial) now appeal to this court.

On this appeal two broad questions arise for determination. They are:

(1) Is the trial judge's finding that the disputed mortgage contract between the parties is valid and enforceable justified by the evidence?

(2) Is the trial judge's finding that Mr. Morrell is indebted to the bank in the amount of $243,201,568.87 justified by the evidence?

I shall consider first question (1). By a motion filed two days after the commencement of hearing of this appeal, the appellants sought and were granted permission to add and argue a further ground of appeal.

That ground raised for the very first time an issue of illegality. It was formulated in the following terms:

> "The admissions made and the evidence adduced at the trial clearly demonstrated that the arrangements between the First Appellant and the Respondent amounted to an illegal activity prohibited by the Exchange Control Act (see section 3(1),(2),(4), Fifth Schedule, Part II, paragraphs 1,2,3) in which the Respondent aided and abetted the First Appellant and accordingly the amount claimed by the Respondent is irrecoverable and the mortgage adjudged to have been granted as security with respect to moneys advanced to facilitate the said illegal transactions is void and unenforceable."

A plea of illegality is based on the legal principle **"ex turpi causa non oritur actio".** The plea provides an absolute defence to an action in contract. Illegality often reaches out a far way, though it is not by any means all-embracing. The case of **Collins v Blantern** (1767) 2 Wils. K.B. 341 is one of respectable antiquity. There the facts disclosed that a bond for £700 was given as part of an arrangement to stifle a prosecution for perjury, and when an action was brought for the money, the question was whether illegality was a good defence, and whether the defendant could plead it. No trace of it appeared on the face of the bond. The Court of King's Bench had no doubt about the answer. In his judgment Wilmot C.J. said that:

> "the manner of the transaction was to gild over and conceal the truth; and whenever Courts of Law see such attempts made to conceal such wicked deeds, they will brush away the cobweb

> varnish, and shew the transactions in their true light. ... This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again, you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back. **Procul O! procul este profani."**

There is no legal bar to this court taking cognizance of a plea of illegality even though it was not pleaded or argued at the trial. Indeed, the authorities show that in a case where the spectre of illegality surfaces at the appellate stage of proceedings, not having been raised previously by any of the parties, an appellate court would be duty bound to take the point **suo motu** in keeping with the requirements of public policy: see ***Snell v Unity Finance Company Ltd.*** [1963] 3 W.L.R. 559. In the instant case at the very outset of his written judgment the trial judge made a significant finding of fact. It was that Mr. Morrell was "an unlicensed dealer in foreign exchange". That was a finding of illegality on the part of Mr. Morrell. So the question arises: was the bank involved in that illegal activity in such a way as would defeat its counter-claim against Mr. Morrell? The bank admitted in its Defence that it had knowledge of the fact that Mr. Morrell was engaged in the business of

trading in foreign exchange, and the bank also admitted in its pleadings that it had bought foreign exchange from Mr. Morrell. However, there was no evidence that the bank, which was itself an authorized dealer in foreign exchange under the Exchange Control Act ("the Act"), at any time sold foreign exchange to Mr. Morrell. At all events the Act permitted the buying and selling of foreign currency by authorized dealers, and also permitted the purchase of foreign exchange by authorized dealers (see s.4 of the Act as amended by s.3 of the Exchange Control (Removal of Restrictions) Order 1991). Dr. Barnett for the appellants argued that while, ostensibly, an overdraft facility was extended to Mr. Morrell by the bank for the purpose of facilitating Mr. Morrell's farming project and the disputed mortgage taken by the bank in order to secure that facility, in reality, by so doing, the bank was aiding and abetting Mr. Morrell in his illegal activity of dealing in foreign exchange, an illegal activity of which the bank was at the time fully aware. In support of his argument Dr. Barnett pointed the court to certain portions of the bank's pleadings and also to various bits of evidence adduced at the trial whereby the bank admitted knowledge that Mr. Morrell's accounts were opened and operated in the course of dealing in foreign exchange. Counsel also drew attention to the fact that the bank also admitted that it bought foreign exchange from Mr. Morrell in the usual course of banking business. Based on these pleadings and evidence it was Dr. Barnett's submission

that the bank and Mr. Morrell facilitated each other in carrying out Mr. Morrell's illegal activity. However, the trial judge found as a fact that Mr. Morrell's overdraft facility was extended by the bank solely for the purpose of providing working capital for Mr. Morrell's farming activities of which documentary proof was tendered in evidence before the court. It was also the trial judge's finding that the disputed mortgage was taken by the bank to secure that facility. It must also be noted that Mr. Morrell said that he understood the entitlement of the bank to sell the mortgaged property in the event of his default in servicing the overdraft facility.

In my opinion the finding of the trial judge on this aspect of the matter is perfectly justified by the evidence. It is clear that mere knowledge in the bank of Mr. Morrell's illegal activity at the time of extending the overdraft facility to him, and then taking a mortgage on Mr. Morrell's property to secure that facility, cannot suffice to taint that mortgage with illegality. The trial judge specifically found that the overdraft and mortgage were referable to Mr. Morrelll's farming project and not to his illegal activity of trading in foreign exchange. In my opinion the mortgage agreement between the parties is able to stand on its own untainted by Mr. Morrell's illegal activity of trading in foreign exchange. The mortgage is, therefore, valid and enforceable as the trial judge found.

I turn now to consider question (2). The issues with which the trial judge was here concerned were essentially ones of fact and the

judgment of the trial judge depended largely on his assessment of the evidence that he had before him. The appeal, so far as this aspect of it is concerned, similarly turns largely on these factual issues. There is no doubt as to the approach which an appellate court must apply when dealing with an appeal on fact from a trial judge who has seen and heard the witnesses when giving evidence. In this regard I would refer to the decisions of the House of Lords in ***Watt or Thomas v Thomas*** [1947] A.C. 484 and of the Judicial Committee of the Privy Council in ***Industrial Chemical Co. (Jamaica) Ltd. v Ellis*** [1986] 35 W.I.R. 303. In ***Watt v Thomas*** Lord Thankerton said at pp. 487 – 488:

> "1. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion;
>
> 11. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> 111. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard

> the witnesses, and the matter will then become at large for the appellate court."

In the earlier case of ***Clarke v Edinburgh and District Tramways Company*** [1919] SC (HL)35,37 Lord Shaw of Dunfermline observed that the appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was "plainly wrong". In the recent case of ***Roy Green v Vivia Green,*** Privy Council Appeal No. 4 of 2002 in which the judgment of the Board was delivered on the 20th May, 2003, Lord Hope of Craighead having quoted that part of Lord Macmillan's judgment in ***Watt v Thomas*** (supra) which reads at page 491:

> "So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

went on to say:

> "the appellate court must bear in mind too the observations of Lord Fraser of Tullybelton in ***Chow Yee Wah v Choo Ah Pat*** [1978] 2MJL 41,42. He said that when Lord Thankerton referred in ***Watt v Thomas*** to 'the printed evidence' (and this applies also to the passage which their Lordships

> have quoted from Lord Macmillan's speech in that case) he was referring to a transcript of the verbatim shorthand record of the evidence, and that it was obvious that the disadvantage under which an appellate court labours in weighing evidence is even greater where all it has before it is the judge's notes of the evidence and has to rely on such an incomplete record.
>
> In this case there is no verbatim transcript. The only record of the evidence is contained in the notes of the proceedings which were taken during the trial by the trial judge."

In the present case we are faced with a similar situation where the only record of the evidence adduced at the trial is contained in the notes of the proceedings which were taken by the trial judge. This was a case of some complexity in which the evidence at the trial was adduced in voluminous content. For one thing it is clear that during the material period of time the bank was operated in a loose fashion and with scant regard for proper banking practices. So run it created open season for unscrupulous intermediaries who would tamper with the Morrell accounts, particularly Mr. Morrell's current account. This was appreciated by the trial judge who in the course of his judgment described the situation as one of "unwarranted laxity on the part of the bank which "was to get worse". In making his findings of fact the trial judge placed reliance on documentary evidence and on an assessment of oral evidence given by the several witnesses in the case. Essentially, the Morrells' case hinged on the absence of documentary evidence to substantiate debits to Mr.

Morrell's accounts which he contended he did not authorize or receive the benefit of. Essentially, the bank's case was that the contractual arrangements between Mr. Morrell and the bank were partly written and partly oral, and that pursuant to those arrangements Mr. Morrell, himself, and oftentimes third parties named by him, received the benefit of undocumented transactions with which his accounts were debited. In these circumstances the real question was not whether there was written authorization given by Mr. Morrell for each one of the several questioned debits to his accounts, but whether the bank could prove on a balance of the probabilities that those debits were in actual fact authorized by Mr. Morrell. In the final analysis the trial judge found in favour of the bank. In so doing he accepted the evidence for the bank and rejected the evidence for the Morrells, in the process describing Mr. Morrell (somewhat infelicitously from Mr. Morrell's point of view) as "an unimpressive witness who will do or say anything if at that particular point in time he perceives it to be to his advantage."

The evidence at the trial revealed that the debits from Mr. Morrell's current account had been evidenced by documents referred to as "debit memos" and in relation to these documents the trial judge had this to say:

> "A great number of questioned debit memos were tendered in evidence. Miss Grindley had to deal with a majority of them. She either "checked" or "approved" these debit memos.

> She gave evidence that whether "checking" or "approving" she first spoke to Mr. Morrell by telephone. Her evidence in this aspect was unchallenged. I accept that at all times she, in respect of those debit memos which concerned her, conferred with Mr. Morrell. I have no reason to doubt her veracity. It is revealing that Miss Grindley's association with debit memos covered an extensive period of time. It was from January 1993 to April 1994. Telephone instructions by Mr. Morrell to the bank whereby debit memos were generated was the established pattern of Mr. Morrell in the conduct of his transactions. I further hold that these instructions were unequivocal and amounted to a mandate. I am not unmindful of the "less than perfect record-keeping" of the bank. However, I cannot say that on a balance of probabilities Mr. Morrell has established that the debit memos were not authorized."

As to the arrangement between Mr. Morrell and the bank, Mr. Reynolds, the bank's credit officer, and Miss Elaine Grindley, the bank's operations manager, testified for the bank . Both witnesses described in great detail the arrangement which accounted for Mr. Morrell's **modus operandi** as a preferred customer of the bank. In giving evidence Miss Grindley identified numerous debit memos as evidencing withdrawals from Mr. Morrell's current account being withdrawals which to her knowledge were authorized by Mr. Morrell. That there was, indeed, an arrangement between the bank and Mr. Morrell allowing for the latter's current account to be debited by way of "debit memos" issued by the bank was, it may be said, confirmed by a letter dated 8th July, 1994 addressed to Mr. Basil Naar, a representative of the bank, by Bell's Management and

Accounting Services acting on behalf of Mr. Morrell. That letter is instructive as it shows that of a total amount of $117,200 reflected in a debit memo issued on May 7, 1993, against Mr. Morrell's current account, an amount of $97,200 was acknowledged as a genuine debit whereas the balance of $20,000 was disputed. That letter which is reproduced hereunder reads:

8th July, 1994

"Mr. Basil Naar,
General Manager,
Credit & Retail Banking,
Manchester Square,
Kingston.

Dear Mr. Naar,

Re: Gifford Murrell

Following our discussions it was agreed that I should examine your records of Mr. Murrell's Account. I now report the following:-

Listed below are Debit Memo's which were not authorized by Mr. Murrell.

15.3.93	DM		$1,000,000	Cash	Paid	out
15.3.93	"		63,500	"	"	"
11.8.93	"		500,000	"	"	"
20.10.93	"		500,000	"	"	"
27.10.93	"		600,000	"	"	"
2.12.93	"		286,200	"	"	"
31. 1. 94	"		250,000	"	"	"
4.2.94	"		174,000	"	"	"
3.3.94	"		50,000	"	"	"
11.2.94	"		63,900	"	"	"
4.3.94	"		1,500,000	"	"	"
6.4.94	"		250,000	"	"	"
7.5.93	"	117,200				

Managers Cheque 97,200

to D. Robert $20,000 Net Account for	20,000 $5,057,600	
21.5.93	379,500	No Voucher
27.5.93	184,786	" "
14.7.93	333,900	" "
	$5,955.786	

The total amount of $5,955,786 represents the amount which should be credited to Mr. Murrell's Account.

We look to your confirmation.

Yours faithfully

Kenneth Bell
BELL'S MANAGEMENT & ACCOUNTING SERVICES"

It must be presumed that the contents of this letter reflected the full extent of Mr. Morrell's discontent up to the time. The letter was referred to Mr. Reynolds for investigation and relative thereto Mr. Reynolds testified before the trial judge in the following terms:

> "To carry out instructions I did research into documentation at Sav-la-mar and Black River branches. I investigated each item to ascertain if Morrell had signed to authorize formally any of the transactions that were contained in letter. I was able easily to identify three of transactions, two of which I was personally involved and third I traced to an official cheque which was issued by Black River Branch...
>
> The relationship between Mr. Morrell and myself was still fairly good. I telephoned him at his office in Negril and asked him what letter about i.e. letter from accountant to bank. [His] reply to me was that he did not know of any list of disputed items as he had not seen list. I mentioned to him

> that, transactions were all done by regular bearers which he acknowledged."

Of Mr. Reynolds' credit-worthiness as a witness the trial judge said:

> "I accept Mr. Reynolds' evidence that Mr. Morrell accepted that the questioned debits in the Bell letter were genuine debits...Mr. Reynolds was a witness who I have no hesitation in regarding as honest and credible."

and of Miss Grindley's credit-worthiness he said:

> "I have no reason to doubt her veracity."

Now as stated earlier in this judgment the bank's case was that the contractual arrangements between itself and Mr. Morrell governing the latter's accounts were partly written and partly oral. That the trial judge so found is apparent from his judgment where he says:

> "I am not persuaded that a bank can only act on written orders. If there is an agreement or if such an agreement may be inferred that a customer instructs a bank orally to pay X a certain sum of money and X is paid that money, can that customer now say the payment was unauthorized because there was no written order? I think not. It is my view that a mandate from a customer, if clear, precise and free from ambiguity need not necessarily be in writing."

Part of those written arrangements was the Verification of Account Clause 4 of the Agreement for operation of Mr. Morrell's current account. Clause 4 read as follows:

"4. VERIFICATION OF ACCOUNT:

> Upon the receipt from the Bank from time to time of a statement of account of the Customer together with cheques and other debit vouchers for amounts charged to the said account appearing therein, the Customer will examine the said cheques and vouchers and check the credit and debit entries in the said statement and, within thirty days of the delivery thereof to the Customer or, if the Customer has instructed the Bank to mail the said statement and cheques and vouchers, within thirty days of the mailing thereof to the Customer, will notify the Bank in writing of any errors or omissions therein or therefrom; and at the expiration of the said thirty days, except as to any errors or omissions of which the Bank has been so notified, it shall be conclusively settled as between the Bank and the Customer that the said cheques and vouchers are genuine and properly charged against the Customer and that the Customer was not entitled to be credited with any amount not shown on the said statement."

On this appeal Counsel for the Morrells argued against the trial judge's interpretation and application of Clause 4. The argument was, firstly, that the Clause was not specifically pleaded as it should have been and, secondly, that even if pleaded Clause 4 would have availed the bank nothing in light of the fact that the bank did not observe good and proper banking practices in its contractual relationship with Mr. Morrell. Specifically, it was contended for that the bank had acted outside of Mr. Morrell's mandate requiring written approval of withdrawals from his account. In so doing the bank had committed a fundamental breach of contract as a consequence of which it could not take advantage of

Clause 4. With regard to this aspect of the matter the finding of the trial judge was expressed in these terms:

> "It is therefore clear that by agreement a contractual duty can be undertaken by a customer to examine his bank statements with care and to challenge the correctness of such statements within a stipulated time. I would think that any such stipulated time must be of reasonable duration. I hold that clause 4 is unambiguous. It sets out the obligations undertaken by the customer (Morrell) with clarity and precision. It 'brought home' to Mr. Morrell the importance of his obligation and the dire consequence of not notifying the bank in writing of any errors or omissions within thirty days of the receipt of his statement(s). Mr. Morrell failed to carry out his contractual duty of notification in writing within 30 days of the receipt of his statements. He is therefore barred from challenging the correctness of debits or credits to his account unless such challenge or query had been made in the stipulated time, in writing."

I think, myself, that the trial judge was correct in the conclusion to which he came. The entire Agreement for operation of his current account was at the very outset of the case put in issue by Mr. Morrell through his amended Statement of Claim. Clause 4 was an integral part of that Agreement. There was no legal requirement for a separate, specific pleading of Clause 4 by the bank, and it is clear that Mr. Morrell could not have been taken by surprise when the bank placed reliance on that Clause. Counsel for the Morrells relied on cases such as ***Smith v. South Wales Switchgear*** (H.L. (Sc.)) (1978) 1 W.L.R. 165; ***Port Jackson Stevedoring Pty Ltd v. Salmond and Spraggon (Australia) Pty Ltd*** (1980) 3

All ER 257; ***Saunders v. Bank of Nova Scotia*** (1983) 35 WIR 1; ***Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd and others*** (1985) 2 All ER 947 which speak to the contractual relationship between banker and customer, and generally to the effect of exemption clauses (of which Clause 4 is an example) in a contract. However, the fact of the matter is that in the instant case the bank was not obliged to rely solely on Clause 4 in order to prove its case. It could do so, and did do so, as well on the basis of other evidence consisting of the contents of the KPMG Report, debit memos with which the Morrells' current account was debited on Mr. Morrell's instructions, documentary exhibits otherwise and the oral evidence of witnesses, including evidence elicited through the cross-examination of Mr. Morrell, himself. In this way the bank proved its counter-claim independently of Clause 4. It was a fact that the questioned debit memos were issued by the bank to Mr. Morrell who retained them in his possession and later produced them to KPMG in order to facilitate the audit agreed on by the parties. It was a fact that Mr. Morrell accepted the Report which was furnished by KPMG and which showed that on either of the two hypotheses posited by KPMG, Mr. Morrell was indebted to the bank. Indeed, If Mr. Morrell were now to be allowed to retain money he has in fact already received from the bank, and in addition be adjudged entitled to receive further payment from the bank on the basis of debit memos for debits for which the bank cannot

produce his written authorization but which in truth were authorized by him., Mr. Morrell would be unjustly enriched at the expense of the bank, its depositors and shareholders. Mr. Morrell must repay his indebtedness to the bank as ordered by the trial judge.

I would dismiss this appeal with costs to the respondent to be taxed if not agreed.