IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 1995/M541

BETWEEN	BERESFORD MILLER	CLAIMANT
AND	CENTURY NATIONAL BANK LIMITED	1 ST DEFENDANT
AND	CENTURY MERCHANT BANK & TRUST COMPANY LIMITED	2ND DEFENDANT
AND	DONOVAN CRAWFORD	3RD DEFENDANT
AND	CORPORATE MERCHANT BANK	4TH DEFENDANT
AND	JOHN REDWOOD	5TH DEFENDANT

Miss Jacqueline Cummings and Sylvester Hemmings instructed by Cummings, & Archer for the Claimant.

Mrs. Pamela Benka-Coker and Jeffery Daley instructed by Rattray, Patterson & Rattray for the 1st, 2nd & 3rd Defendants.

Mrs. Michele Champagnie & Miss Helga McIntyre instructed by Myers, Fletcher & Gordon for the 4th Defendant.

Mrs. Sandra Minott Phillips and Christopher Kelman instructed by Myers, Fletcher & Gordon for the 5th Defendant.

Heard: **April 15,16,17,18,19,22,23,24,25,26,**
July 15,16,17,18,19,22,23,24,25
September 17,18,19,23,24,25,26, 2002
January 27,28,29,30; February 3,4,5;
April 7, 8 & August 28, 2003

Coram: Harris J.

The Claimant's Claim against the defendants by way of an amended statement of case raises the following causes of action: -

(1) As against the 1st, 2nd &3rd defendants claim for damages for breach of contract and/or fraud, and/or misrepresentation and/or negligence and/or breach of trust, for conspiracy, and or unjust enrichment.

As against the 4th defendant a claim for damages for conspiracy, fraud, negligence, breach of contract, breach of fiduciary duty and/or unjust enrichment.

As against the 5th defendant, a claim for damages for conspiracy, breach of contract, breach of fiduciary duty, negligence, and/or unjust enrichment.

He also claims:

(2) An account of receipts and payments dealings and transactions between the Claimant and Defendants.

(3) An account of all sums received and disbursed by the defendants on the Claimants behalf.

(4) Payment of sums found to be due to the Claimant.

(5) An account of $6,000,000.00 lodged by the 1st defendant in an account with the 4th defendants, which was opened in the name of the Claimant.

(6) The return of all Claimant's deeds and documents in possession of the defendants, free of encumbrances.

(7) An injunction to restrain the 1st, 3rd and 5th defendants from entering upon premises at Unity Hall in the parish of St. James, registered at Volume 1232 Folios 140-164 and Volume 1232 Folio 82 and lands situate at Barrett Hall in the parish of St. James registered at Volume 961 Folio 297.

(8) An injunction restraining the 1st defendant from selling and or dealing with the Claimant's properties.

(9) Interest on amounts due and owing pursuant to the Law Reform (Miscellaneous Provisions) Act.

The Claimant is a businessman and Real Estate developer. He was the registered proprietor of lands at Unity Hall in the parish of St. James formerly registered at Volume 605 Folio 82 of the Register Book of Titles.

These lands were subsequently sub-divided into 30 lots registered at Volume 1232 Folio 140-160 and Volume 1232 Folio 82. He was also owner of lands at Greenwood in the parish of St. James registered at Volume 961 Folio 297 and jointly registered proprietor with his wife, of lands at Barrett Hall registered at Volume 1196 Folio 396.

First legal mortgages were held by the 1st defendant on the security of lands at Unity Hall and Greenwood and a second legal mortgage was held by them over lands at Barrett Hall, in respect of loans granted to the Claimant.

The 1st and 2nd and 4th defendants were companies duly registered under the laws of Jamaica. The 3rd defendant was a shareholder and managing director of the 1st and 2nd defendants' companies. The 5th defendant was appointed Receiver by the 1st defendant pursuant to powers conferred on them by mortgages of the lands at Unity Hall. These lands at Unity Hall were sold by the receiver.

Several loans were granted to the Claimant between 1987 and 1991 by way of demand loans. The first was made available to him by the 1st defendant in December 1987, the proceeds of which were used to open a current account. The current account went into overdraft in 1988 and continued along that pattern for several years. Sums owing on the current account were converted by the 1st defendant to demand loans. Loans were

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also granted by the 2nd and 4th defendant banks. Proceeds of the loans were lodged to the Claimant's current account. The Claimant disputes the receipt of most of the funds that were lodged to his current account. He also refutes that some of the loans were ever granted to him.

Evidence was given by the Claimant and five witnesses on his behalf. The defendants exercised the option of not proffering evidence and this they are entitled to do.

The Claimant's evidence is that on Christmas Eve 1987 he visited the 3rd defendant who had been previously known to him, at his place of business at the 1st defendant bank and sought his assistance in obtaining funding to purchase equipment, some fixtures and working capital for a restaurant called "the Upper Room" which he operated in Montego Bay. The 3rd defendant responded favourably to the request and issued instructions to a Mr. Michael Reid, the loans officer of the 1st defendant bank to prepare the necessary documents to enable him to obtain the requisite funds.

He stated that he received a cheque book from Mr. Reid with respect to a loan. This loan was for $180,000.00. He drew cheques against the loan account on that day, which cheques he encashed using some of the proceeds to pay bills.

On this occasion of his visit to the 1st defendant's bank he also discussed with 3rd defendant, generally, matters with respect to a development which he had commenced at Unity Hall, St. James in 1985. The lands comprised 9 acres for which he had made application to the St. James Parish Council for sub-division approval into 30 lots. At that time, he said he had 2 houses laid out on the land. These lands were registered at Volume 605 Folio 82. He said he delivered the title to these lands to the 3rd defendant as he "promised to give him a mortgage to purchase the equipment."

The current account, went into overdraft on several occasions. He stated that the overdraft escalated because he used funds from the account to purchase material for the development. He also spoke of the overdraft increasing because of his transferal of funds to aid the development, on the instructions of Mr. Reid with the concurrence of the 3rd defendant. He stated that there was an arrangement by which he would order materials, the 1st defendant would honour the bills on his submission of these bills to them and that he kept the 3rd defendant informed of his progress.

He declared that in 1988 he applied most of the proceeds generated from the sales at his restaurant to assist with the development.

He also spoke of his cheques being often dishonoured by the 1st defendant and related that he had complained to Mr. Reid and the 3rd defendant about this, as well as the state of his overdraft.

It is recounted by him that he sought and obtained the 1st defendant's assistance, through the 3rd defendant, in completing the purchase of land in Barrett Hall in his name. He said he had owed $17,0000.00 on the land and secured a loan from the 1st defendant to obtain title in his name.

His overdraft continued to soar and he admitted that by July 1989 it stood at over $5.7 million. It was also his admission that he executed a promissory note in favour of the 1st defendant for $5,721,408.52. He admitted that $5,721,408.52 represented conversion of his overdraft to a demand loan. He spoke of Mr. Reid and the 3rd defendant advising him to carry out the conversion of his overdraft as it was too high and that it was necessary to do so in order to avoid his account reflecting a high overdraft "for the purposes of the Bank of Jamaica."

A letter of commitment dated August 8, 1989 for the loan of $5,721,408.52 was sent to him by the 1st defendant. Subsequent to the receipt of the letter, he proceeded to the 1st defendant's office as a result of a telephone call. There, he met with Mr. Reid and a Mr. Maurice Keane

Dawes. Mr. Reid handed him a letter which contained a request for him to liquidate the loan in 30 days.

This request, he said, he found surprising as 6 days earlier he had "signed for a one year loan", and if he did not fully meet the conditions of that loan within 12 months he would be charged a penalty of 3%. He said Mr. Reid informed him that the request was as a result of loans committee decision.

He then went to Eagle Commercial and Trafalgar Development Banks to seek funding to pay off the debt to the 1st defendant. The responses from both institutions were favourable but he opted to accept Trafalgar Development Bank's offer as they had inspected the development and responded in 3 days and he wanted to meet the 30 days deadline given to him.

The letter from Trafalgar Development was taken by him to the 1st defendant, where, he spoke with the 3rd defendant who told him that he should ignore Trafalgar Development Bank's offer and that they would continue to fund his development.

In November 1989 the 3rd defendant visited the site and inspected the development and inquired of him whether he had any other loans with any other banks. He disclosed that the owed $400,000.00, on his matrimonial

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home at Morningside Drive, which was jointly owned by his wife and himself.

The 3rd defendant then sent him to a Mr. Dalkeith Hanna, a quantity surveyor to do a feasibility study which would be required to complete 9 houses and the infrastructure on the development at Unity Hall. He attended on Mr. Hanna but did not enter into any agreement with him. He thereafter, attended on Messrs. BGW Cawston & Partners from whom he received reports which took to he took to 3rd defendant who told him he would continue the funding. He was also sent by the 3rd defendant to Lawson Construction Company Limited from whom he obtained a report on the work at the site of the development and to Mr. Arthur Nelson, a consultant engineer who provided a projected appraisal of the development.

He further related that in January 1990 the 1st defendant appointed a Mr. Cecil Chuck to manage the development as a consultant "to see the project through" on behalf of the 1st defendant. He stated that Mr. George Lumsden who had taken over from Mr. Reid, informed him that Mr. Chuck would see the project through, which he understood to mean that he would ensure that the road and the project were completed on time, splinter titles would be obtained and he would pay the 1st defendant the money which he

borrowed. No officer at the bank had sought his permission about Mr. Chuck assuming supervisory responsibilities.

He asserted that the work done by Mr. Chuck was of poor quality. This included, among other things, the removal of the pipeline from the left to the right side of the road, on which side it was more difficult to lay. He said he dug up sidewalks that were already paved and the asphalt he used on the roadway was rejected by the parish council.

It was declared by him that Mr. Chuck assumed full responsibility for all the transactions on the project and he was instructed by Mr. Lumsden, to deliver his cheque book for his account to Mr. Chuck. He stated that Mr. Chuck was made a signatory on his account without his consent and that the 1st defendant refused to honour cheques drawn on the account unless they were countersigned by Mr. Chuck.

He also stated he found Mr. Chuck's mode of operation unsatisfactory. He complained to the 3rd defendant as well as Mr. Lumsden but was met with the response by Mr. Lumsden that he should not be seen on the property. For a period in 1991 he said he signed no cheques and discovered that Mr. Chuck had incurred $10,000.00 for telephone calls which sum had been paid from his account. He spoke of forcibly removing Mr. Chuck from the property.

It was his further evidence that he attended the office of 1st defendant on September 24 or 25 1990 and spoke with the 3rd defendant who told him he would grant him money to complete the development. About 9 houses were under construction at the time. The infrastructure was still incomplete. He was then referred to Mr. Lumsden by the 3rd defendant. The 3rd defendant and Mr. Lumsden told him he would be given $6,000,000.00 for completion of the development. He was given 2 long documents to sign.

He said Mr. Lumsden told him the $6,000,000.00 would be divided in two parts as the Bank of Jamaica would not permit $6,000,000 to be paid out in one sum. He agreed to the proposition. He was given 2 blank slips to sign. He did not sign the slips, as he wanted to consult his attorney-at-law before signing them. He returned to the bank the following day with this attorney-at-law, Mr. Leonard Green and met with Mr. Lumsden, who gave him the slips to sign telling him that the money would be divided into two. Mr. Lumsden's response to an inquiry from Mr. Green as to why this was necessary, was that was the only way he could obtain the loan. He then executed the slips and handed them to Mr. Lumsden who told him the funds would be made available 2 to 3 weeks time.

He again met with the 3rd defendant, Mr. Lumsden and another officer of the 1st defendant bank on the October 4, 1990 and was given a set of

documents to sign setting out the purpose for which the $6 million was to be used and that its purpose was to complete the houses and infrastructure at Unity Hall Resorts. He signed the documents. After October 4 he said he took bills to Mr. Lumsden who would give him a cheque to sign, the amount of which would be sufficient to meet the bills he presented. During the period the development progressed.

Having completed the infrastructure, he obtain certificate of compliance from the Parish Council approving the road and certificate from National Water Commission that pipelines were satisfactory. These he took to 1st defendant bank and handed them to 3rd defendant. He also related that at that time, he gave Mr. Lumsden bills for work done on the infrastructure but had to speak with 3rd defendant who arranged for him to be given a cheque for $60,000.00 which he used to pay the daily workers.

He recounted that he continually requested that 1st defendant make funds available to complete the houses on the development, so they could be put on the market for sale. He had anticipated receiving the $6,000,000.00 to pay the debts incurred in respect of the development and had accordingly written letters and telephoned the 3rd defendant continuously about it, but to no avail. The money was never paid to him. He was not informed that it was lodged to his account on September 26, 1990.

His bank statements were either posted, or delivered to him monthly upon his request for them but he did not receive statements for September and October 1990 until October 1991. He expressed dismay at his account being credited for 2 separate sums of $6 million when he had entered negotiations for a loan of $6 million, which should have been made available to him for his project but which he said he never received.

He further narrated that in September 1991, he was told by the 3rd defendant that he owed 1st defendant interest amounting to more than $4,000,000.00 on the loans. He said he did not know how much money he owned the bank on that occasion but he signed a demand loan.

He spoke of being dissatisfied with the manner in which the 1st, 2nd and 3rd defendants' dealt with his accounts and that he had expressed his disapproval of this to the 3rd defendant and to other officers of the bank on several occasions. He had also written to the 1st defendant bank about this.

On one occasion, while holding a meeting with a Mr. Golding, the then loan director at 1st defendant bank, in relation to his account, as, he had gone there to challenge the contents of a statement sent to him, based on his discovery that the statement reflected that he owed $13.4 million dollars, he observed a receipt, bearing his name, on the 1st defendant's file on Mr. Golding's desk. This, he said, was a statement of account from the 4th

defendant. He took the document and went back to Montego Bay. He telephoned the 4th defendant, spoke to a Miss Tracey Foote advising her that he owed that bank some money, had wanted to repay it, and inquired whether he could obtain a statement.

A statement of loan account and a certificate of deposit showing that $6,000.000.00 had been lodged in his name with the 4th defendant and that a loan of $6 million had been granted to him by the 4th defendant was sent to him. He said he was concerned. He then proceeded with the documents to the Montego Bay Police Station where he reported the matter. He thereafter wrote to the 3rd defendant about it.

He went on to state that, not being able to secure money for his developments, his properties at Unity and Barrett Hall were taken over by the 1st defendant and his property at Morningside Drive was sold by the Bank of Nova Scotia. The work on the project at Unity Hall ceased. Proceedings were commenced by him against the 1st, 2nd, 3rd and 4th defendants and then the 1st defendant placed a receiver in charge of the development. He said that he the Claimant sold one lot in the development and was unaware of what became of the others.

It is also his evidence that he had employed the service of an accountant, a Mr. Anthony Smith, between 1985 to 1994. The accountant

would examine his books and give him advice as to his accounts. Mr. Smith, he said, has since migrated.

The Claimant's 1st witness Mr. Roy Grinnon stated that he was employed on the development site by the Claimant as a mason. He had 5 men who worked with him. The Claimant was the one who was responsible for paying him. He said he had not been paid for work done by him and the sum of $40,000.000 is owed to him by the Claimant.

He also spoke of Mr. Chuck taking over the development in 1990 and that he worked for him between 6 and 8 months. Mr. Chuck, he said, paid him $15,000.00 with the understanding that he shared it among his workers as best as he could.

Mr. Herman Grant, the second witness was a plumber employed on the development from 1988 to 1990. It was the Claimant who was responsible for remuneration, he asserted.

He stated that Mr. Chuck took over the development in February 1990, Mr. Chuck instructed him not to take orders from the Claimant. He stated that Mr. Chuck directed him to remove the pipelines from the right to the left side of the road. He stated he pointed out to Mr. Chuck that this would create difficulty but Mr. Chuck insisted on the removal of the pipelines. He said after Mr. Chuck's departure from the project the pipelines

were returned to their original position and the National Water Authority tested them and issued a certificate of approval to the Claimant and himself.

He said he received cheques from Mr. Chuck to purchase materials and take to the machine shop. These cheques were not signed by the Claimant.

It was also related by, him, that sometime in 1991 two other workers and himself went to Mr. Lumsden in order to secure payment for work done by them. He was owed $320,000.00. Mr. Lumsden inquired of them whether they had a cheque signed by the Claimant. Only a Mr. Samuels, who was also there, had one. Mr. Lumsden informed them that the account was frozen as of that day.

The third witness, Mr. Franklyn Samuels was a general foreman for the development. He said he was introduced to the 3rd defendant in December 1990, on a visit of his to the site. He informed him that there were unpaid bills for material and for the workers. The 3rd defendant told him that he should stick with the Claimant and he, the defendant would provide the necessary funds to finish the project.

He asserted that Mr. Chuck came to the development in 1991. He stated that Mr. Samuels removed the pipelines in keeping with Mr. Chuck's directions, and these were rejected by the Parish Council.

It was also declared by him that Mr. Lumsden visited the development in January 1991 when he instructed with him to prepare a statement which should be addressed to the plaintiff but to be delivered it to him and he did so. An amount of $1,090,000.00 was owing for work done on the development.

Detective Sergeant Alvin Cochrane was the 4th witness called. He stated that he conducted investigations in relation to a report of the Claimant and as a consequence interviewed 17 potential witnesses.

The last witness, Mr. Patrick Allen, a quantity surveyor, testified that the submitted valuation reports on the development to the 1st defendant on behalf of the Claimant. Included in the reports were the projected costs of construction and infrastructure and market values of lots and houses. He was remunerated for work done by him with respect to the reports, by the 1st defendant.

I propose to give consideration to the Claimant's claim against the 1st, 2nd, and 3rd defendants and thereafter to his claims against the 4th and 5th defendants, respectively. I will first address his claim with respect to breach of contract.

The existence of contractual relationship between the Claimant and the 1st defendant is undeniable. Such relationship has its genesis in banker/customer relations.

This proposition is recognized by the learned author Paget's Law on Banking, 1 01h Edition at page 159 as follows:

> "The relationship of banker to customer is one of contract. It consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services. The essential distinction is between obligations which come into existence upon the creation of the banker-customer relationship and obligations which are subsequently assumed by specific agreement; or, from the standpoint of the customer, between services which a bank is obliged to provide if asked, and services which many bankers habitually do, but are not bound to, provide."

In its capacity as agent of the 1st defendant, the 3rd defendant and the Claimant also enjoy a contractual relationship. Transactions between the Claimant, the 2nd and the 4th defendants also give rise to contracts between them. All parties would therefore be entitled to the benefits and subject to the obligations emanating from a banker/customer relationship.

The banker customer relationship is an ordinary contractual one. It does not partake of a fiduciary character except the circumstances are such that a special relationship exists, which places a fiduciary duty on the banker.

In order to determine whether liability is attributable to the 1st, 2nd and 3rd defendants with reference to a breach of any contractual obligation to the Claimant, it is apt to review the transactions between them with respect to their banker/customer relationship.

On December 24, 1987, the Claimant visited the office of the 1st defendant and after communicating with the 3rd defendant about securing financing for his restaurant, it was agreed that he would be granted a demand loan for $180,000.00 to purchase equipment and working capital for his restaurant business.

In exchange for the loan, the Claimant delivered to the 1st defendant a duplicate certificate of title registered at Volume 605 Folio 82 for lands at Unity Hall, St. James. He also executed a promissory note #270101099 for the amount loaned. The proceeds of the loan were used to open a current account $00012006 10 in the name of the Claimant and a cheque book was given to him. The terms and conditions of the loan were reduced to writing and contained in a letter dated January 7, 1987 and this letter was sent by the 1st defendant to the Claimant.

The letter of January 7, 1987 shows that the Claimant was under an obligation to make 30 monthly payments of $6,000.00 in addition interest at the rate of 28% per annum on the loan.

Miss Cummings urged that the cumulative payment of the principal sum with interest thereon at the rate of 28% per annum ought not to have exceeded $230,400.00, yet, the mortgage deed had been stamped for $300,000.00. Here, she is implying that the Claimant had been charged a rate of interest in excess of that which was agreed.

There is no indication from the letter of January 7, whether the rate of 28% was simple or compounded interest. However, paragraph 1 (a) (i) of the mortgage deed in relation to the loan of $180,000.00 specifies, among other things that "interest may be computed as simple interest to compound interest as the bank shall require".

The mortgage deed makes provision for compounding of interest rates. Additionally, compounding of interest rates, by virtue of usage and custom by bankers is permissible at common law. Implicitly, by the process of law, a contractual term in relation to the compounding of interest between the Claimant and the 1st defendant was operative. Although the letter did not specify the type of interest rate the loan would attract, this would not preclude the 1st defendant compounding the rate of interest charged to the Claimant. There is no doubt that the rate of interest had been compounded. It follows that the 1st defendant would have committed no breach of the contractual terms with respect to the amount of interest charged.

No documentary evidence was exhibited illustrating the opening balance of the account, but a statement for January 1988 reflected a balance of $47,099.00 brought forward from December 31, 1987. The Claimant drew cheques on the account on the very day of the loan. By January 29, 1988 the account went into overdraft to the extent of $5 5,984.71. In January 1988 he made a payment of $10,000.00 into the account which he withdrew the same month.

Each month for the year 1988 his statements showed overdrawn balances. By December 1988, the overdraft stood at $1,635,929.33. The account continued into overdraft and by July 1989 the overdrawn balance exceeded $5,000,000.00.

On July 7, 1989 a sum of $5,721,408.52 which was due and owing to the 1st defendant was converted to a demand loan attracting simple interest at the rate of 28% per annum. The rate of interest on the overdraft was compounded. The sum of $5,721,408.52 was lodged to the Claimant's current account, reducing his overdraft balance to $94, 693.20.

Consequent on the conversion of the overdraft to the demand loan a letter was sent by the 1st defendant to the Claimant on August 22, 1989. Paragraph 1 (i) & (ii) reads as follows:-

"Consistent with our standard credit policy, we outline hereunder, the terms and conditions relative to credit facilities extended to you at this office on July 7, 1989:

Amount of Loans - (i) $ 101,010.06 - Representing residual balance of loan granted 21/1/87, by way of a demand promissory note.

(ii) $5,721,408.52 - Representing conversion of overdraft of $5,582,408.50 & $138,999.00 to complete House No. 4, by way of a demand promissory note dated 7/7/89."

The paragraph makes reference to an amount of $101,010.06 representing a residual balance of an original loan. This sum Miss Cummings urged had already been consumed by the loan for $5,721,408.52. On the 7th July 1989, the date of deposit of $5,721,408.52 to the Claimant's account, a sum of $94,963.20 was still due and owing to 1st defendant on the original loan granted in December 1987. The clear inference is that the sum of $101,010.06 relates to the sum of $94,963.20 in addition to the interest which had accrued thereon between July 8 and August 22, 1989.

A copy of the letter was executed by the Claimant and returned to the 1st defendant. By this act, the Claimant acknowledged not only that he was aware that the overdraft was converted to a demand loan but that there was also an outstanding sum of $101,010.06.

He complained that subsequent to the receipt of the letter on August 22, 1989 a further letter dated August 28, 1989 was sent to him by the 1st defendant. The 1st, 2nd , and 3rd paragraphs of this letter read as follows:

> "Further to our consolidation of your liabilities at this office on 7/7/89 and our subsequent discussions, with that ending on 24/8/89, we now advise as follows:
>
> > "Our Credit Committee has reviewed the arrangements, and as indicated, has requested that you be called upon to take steps to obtain alternative financing to liquidate your indebtedness within thirty (30) days.
> >
> > The Loans Committee's decision is based on the assumption that the credit facilitates extended were intended to be of a very short-term nature, with liquidation to come from sale of the houses."

The Claimant expressed surprise that the 1st defendant had sent him this request to liquidate his indebtedness within 30 days. He subsequently, went to Eagle Commercial Bank and Trafalgar Development Bank to seek the necessary financing to pay off the 1st defendant. He recounted that Trafalgar Development Bank agreed to assist him and he informed the 3rd defendant of this. The 3rd defendant then informed him of his willingness to continue funding the development.

Two additional demand loans were granted to the Claimant in 1990. A loan for $6,000,000.00 was given to him on September 28, 1990 by the 1st defendant; another for $6,000,000.00 on October 9, 1990 was granted to him

by the 2nd defendant. Both loans were supported by promissory notes executed by him.

He disclosed that he met with the 3rd defendant at the office of the 1st defendant some time between September 24 and 25, 1990 and was sent by him to a Mr. George Lumsden, an officer of the 1st defendant bank. He stated that both the 3rd defendant and Mr. Lumsden informed him that he would be granted a sum of $6,000,000.00 to complete the development. As a consequence, he said he was given two (2) blank documents to sign which he did not sign until he consulted his attorney-at-law. He returned to the 1st defendant bank the following day and in the company of his attorney-at-law Mr. Leonard Green, signed the two (2) slips, and handed them to Mr. Lumsden.

He also spoke of going to the 1st defendant bank on October 4 and executing documents. A promissory note was executed by him on September 28, 1990 and one (1) on October 9, 1990 each for $6,000,000.00. It is manifest that the documents to which he referred, as having executed in September and October were the promissory notes.

It was asserted by him that he executed the documents in blank and each should have been for $3,000,000.00. His admission that he attended at the 1st defendant's office with his attorney-at-law and executed the

documents clearly belies his assertion. It is manifest that he was not being truthful. It is obvious that at the time of his execution of the promissory notes, these documents were completed. I am persuaded that he had executed one on September 28, 1990 and the other on October 9, 1990, each for $6,000,000.00.

So far as the first loan for $6,000,000.00 of September 28, 1990 is concerned, the Claimant's current account statement from the 1st defendant for September 1990 shows that this sum had been fully credited to his account. A sum of $2,961,213.98 had been applied towards the reduction of his overdraft; $2,919,500.00 was applied to interest on the loan granted on July 7, 1989; $107,336.88 was utilized to liquidate interest on the overdraft. An amount of $110.60 was used in defraying service charge, overdraft fee and stamp duty. After all deductions were made the account showed a credit balance of $11,834.54. The Claimant's receipt of the sum of $6,000,000.00 is irrefutable.

I will now turn to the promissory note for $6,000,000.00 which was executed by the Claimant in October 1990. He declared that he had anticipated receiving that sum but it was never delivered to him, enabling him to complete the infrastructure of his development.

By October 1990 his indebtedness on the demand loans of July 7, 1989 and December 1987 exceeded $5,500,000.00. The sum of $6,000,000.00 was credited to his account and this was so indicated by his statement for October 1990. The sum of $5,518,800.00 was utilized towards the reduction of the principal on the demand loan granted on July 7, 1989. An amount of $227,699.40 was applied towards the liquidation of the interest on that loan. $166,499.87 was used to clear the loan granted in December 1987. A sum of $27,003.00 was used to reduce his overdraft and $60.00 was paid as commitment fee. It is clear that this further sum of $6,000.000.00, which had been credited to his account, was used for his benefit. This loan, as the previous one, covered outstanding costs incurred by him in respect of the financing of his development.

Miss Cummings submitted that the letter of commitment of October 4, 1990 from the 1st defendant to the Claimant clearly shows, among other things, that it was not a rescheduling of the Claimant's debts but a grant to him of additional funds. She further urged that unlike the first loan that is, that of January 7, the terms contained no payment of monthly instalments and that no payments were due for a further 12 months following the contemplated sale of the lots on the development.

The contents of the letter of October 4, 1990 are as follows:-

"With reference to your application for credit, we hereby offer to provide you with financing on the following terms and conditions:

AMOUNT OF LOAN	: $6,000,000.00
INTEREST	: Interest will be at the rate of 42% per annum subject to review/change at the Bank's discretion.
FEES	: You will be responsible for all costs to include Legal Fees; Disbursement or Inspection and Commitment Fee of 1% payable on acceptance of the terms and conditions of this loan.
PURPOSE OF LOAN	: To assist with the infrastructural development of Unity Hall Resort.
REPAYMENT	: Repayment will be from sale of residential lots within the next twelve (12) months. Interest to be paid monthly.
SECURITY	: First Legal Mortgage over parcel of land known as Pimento Hill formerly Unity Hall, St. Andrew registered at Volume 605 Folio 82 in the name of Beresford Miller, P.V. $9,900,000.00; stamped $1,000,000.00. First Legal Mortgage over land part of Barrett Hall now known as Greenwood in the parish of St. James registered at Volume 961 Folio 297 in the name of stamped - $1,000,000.00. Bill of Sale over a 1982 Plymouth Motor Car, Chassis No. 1P3B P26DOCF260071, Registered No. 3005 AQ; stamped for $120,000.00.

Third Legal Mortgage over land part of Rosemount Pen in the parish of St. James registered at Volume 1196 Folio 378 in the names of Beresford Miller and Dorreth May Miller.

P.V.	$1,850,000.00
Less 1st & 2nd Mtgs. BNS	$ 400,000.00
Our Equity	$ 1,450,000.00
Total:	$11,770,000.00

: Unlimited Guarantee of Dorreth Miller.

GENERAL CONDITION : The Bank is to be provided with audited Financial Statements within six (6) months of company year end.

DEFAULT CLAUSE : The Bank reserves the right to demand full settlement of the outstanding balance, if in its discretion, its position is jeopardized as a consequence of deviation from nay of the terms and conditions outlined herein, or for any other reason.."

The loan is a demand loan. It would not have been necessary for the 2nd defendant to have specified monthly payments of principal, they having stated that the principal sum would have been due 12 months following the sale of lots. The agreement stipulated the payment of interest. The Claimant agreed to the terms and conditions laid down in the agreement. He had failed to pay the interest due. Funds were awarded to the Claimant which were used on his project. Although repayment of the principal would not have been due until 12 months after the sale of the lots, in light of the default

clause, the Claimant not having paid the interest, the 1st defendant in its discretion could have taken steps to reschedule the Claimant's indebtedness to them and so they did.

Miss Cummings further urged that although the Claimant agreed that the 1st defendant had utilized the sum of $6,000,000.00 to pay off all the charges which were stated. He did not admit that the paying off of those charges was the agreed purpose for the loan.

It is my view that this is not an issue for further consideration in the circumstances of this case. The Claimant was the 1st defendant's debtor. His indebtedness included funds he expended on his development as well as interest charges accruing thereon and the Claimant was cognizant of the fact that the sum of $6,000,000.00 had been credited to his account.

Although during his testimony, the Claimant spoke of meeting with the 3rd defendant, and Mr. Lumsden and not the 2nd defendant, he recalled being given documents to execute outlining terms and conditions of the loan of $6,000,000.00. However, no mention was made by him of attending on the 2nd defendant to obtain a loan. The description of payment on a cheque dated October 9, 1990 from the 2nd defendant to the 1st defendant for $6,000,000.00 demonstrates that this sum was proceeds of loan advanced to the Claimant.

It is clear that a loan of $6,000,000.00 was granted by the 2nd defendant. The 3rd defendant was Managing Director/Chairman of the 1st and 2nd defendant banks. Mr. Lumsden was a Senior Creditor Manager of both banks. The Claimant was indebted to the 1st defendant. It is obvious that the 1st defendant and 3rd defendants had acted as agents for the Claimant in securing the funds from the 2nd defendant in assisting him with the reduction of his indebtedness. They entered into an agreement with the 2nd defendant to procure the funds and the agreement was ratified by the Claimant in his executing the Promissory Note and the letter of commitment.

Subsequent to October 1990, the Claimant continued work on his development and continued to draw cheques. He asserted that he did not draw cheques after February 1991 and spoke of the 1st defendant assigning a Mr. Chuck to complete the roads and pipeline. He further stated that he counter signed cheques with Mr. Chuck who was appointed to supervise the development without his consent.

On April 10, 1990 Mr. Chuck was appointed agent for the 1st defendant under the terms of their security, they being the mortgagee, in order to supervise the completion of road and infrastructure, so as to secure splinter titles. The Claimant was informed of this in writing. The Claimant had begun construction of houses on the property without obtaining

subdivision approval and in absence of the necessary infrastructure for the development. As a consequence, the requisite approval for the securing of splinter titles, could not be granted by the St. James Parish Council. As a result, the 1st defendant secured the services of Mr. Chuck so that their security could be protected. The 1st defendant had instructed that all cheques drawn by the Claimant should be countersigned by Mr. Chuck.

He related that the first defendant, through its employee a Mr. Lumsden prohibited him to sign cheques in 1991. In December 1990, his current account was in overdraft to the extent of $676,279.21. By September 1991 the overdraft grew to $3,694,925.25. He related that he was not in possession of a cheque book after February 1990 and also in November of that year and drew no cheques. In cross-examination it was disclosed that his assertion that he ceased drawing cheques in February 1990 was untrue. He admitted he drew cheques on the account up to January 1991.

Further, he said he only became aware of the state of his account by examination of his bank statements sometime in late 1991, as he had not been receiving his statements. Statements were issued to him monthly. Statements were sent to him and it was his practice to collect the statements from the bank when convenient. If he did not receive them monthly as he

declared, it would have been as a result of his refusal or his neglect in making necessary inquiry about them with a view to collecting them.

A final loan was granted to the Claimant by the 1st defendant on September 26, 1991. This was for the sum of $4,447,671.00. He declared he did not obtain this loan. His execution of a promissory note for the amount as well as a letter from the 1st defendant counter signed by him, is proof to the contrary. The letter dated September 27, 1991, in part states as follows:-

"As requested on Thursday, 26th instant, while at our offices in Kingston, we supply hereunder the details of your account balances as at Sept. 26, 1991.

Century National Bank Limited

Current Account #0001200610	- $3,694,920.25	Overdraft
	118,439.91	Outstanding Interest
	$3,813,360.16	Total 26/9/91
CLA #27-01-01099-9	$ 202,608.52	Principal
	$ 103,945.15	Outstanding Interest
	$ 306,553.67	Total at 26/9/91
	$ 4,19,913.83	**Total CNB Loans and Interest 26/9/91**
Add Legal Costs to date	$ 321,697.00	Perkins,Grant, Stewart, Phillips & Company – Legal Fees
	$ 6,060.00	Allison Pitter
	$ 327,757.00	

Total Obligation 26/9/91 to Century National Bank Limited

$4,119,914.00	CNB rounded to nearest
327,757.00	Legal Fees to date
$4,447,671.00	**NEW NOTE 26/9/91**

This is represented by the note signed by you 26/9/91."

The Claimant has failed to establish that there had been a breach of contract by the 1st, 2nd and 3rd defendants in relation to the transactions with respect to the loans granted to him in the parties' capacities as customer and bankers. It is patent that the sums allocated to him by way of overdrafts and demand loans were arranged for his benefit. He was accorded the facility of an arrangement by which demands loans which attracted lower rates of interest in lieu of compounded rates of interest on his overdraft were created. The conversion of the overdraft balances to demand loans proved most favourable to him, as, it manifested itself in reduction of interest rate payable by him and consequently inured to his benefit. It decreased his overdraft balances. The object of the loans were not merely to consolidate his debts but to lighten his burden in repayment of debts he incurred, due to his excessive expenditure on his project.

Distinct and independent of the contract between the Claimant and the 1st defendant as banker and customer, a contractual relationship existed between them as mortgagor and mortgagee.

Mortgage deeds were executed by the Claimant in favour of the 1st defendant with respect to lands at Unity Hall, Greenwood, and Barrett Hall. The description of the parties and the terms and conditions of the mortgages were outlined in each document, all similar in form.

The rights and remedies of a mortgagor and a mortgagee are governed by statute, the common law and by equitable principles. No fiduciary relationship arises between a mortgagor and mortgagee as regards a mortgagee's powers of a sale at common law, until the mortgagee has been paid off see Kennedy v DeTrafford (1897) AC 180.

Further, a mortgagee only becomes a trustee of the legal estate upon the redemption of the mortgage if the property is sold under the powers of sale and a surplus remains. Although the mortgagee must exercise his powers of sale bone fides and with reasonable care, he is not a trustee of the power of sale, "for the power of sale is given to the mortgagee to enable him to realize his security."

Once a mortgagor is in default, the mortgagee is at liberty to exercise his rights. He may opt to exercise, concurrently, both his legal and equitable

rights. He may proceed to sell, obtain foreclosure, to take possession of the property, or appoint a receiver, simultaneously.

In addition to the mortgagee's rights at common law, in equity and by virtue of a mortgage deed, his rights and remedies are also enshrined in the Registration of Titles Act. Sections 106, 109, 125 (1) and 125 (3) are relevant for the purpose of this issue.

Section. 106 –states: -

> "If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale ....."

Section. 109 provides:-

> "The mortgagee or annuitant, or his transferees, upon default in payment of the principal sum or interest or annuity, or any part thereof respectively, at the time mentioned in the mortgage or charge, may enter into possession of the mortgaged or charged land by receiving the rents and profits thereof, and may distrain upon the occupier or tenant of the land under the power to distrain hereinafter contained, or may bring an action of ejectment.to recover the land either before or after entering into the receipt of the rents and profits thereof, or making any distress, and either before or after any sale of such land shall be affected under the power of sale aforesaid, in the same manner in which he or they might have brought such action if the

mortgage money or annuity haul been secured to him or them by an assurance of the legal estate in the land mortgaged or charged and any mortgagee or his transferee shall be entitled to foreclose the right of the mortgagor or his transferees redeem the mortgaged land in manner hereinafter provided."

Section. 125 (1) states:-

"A mortgagee of any land under this Act shall have power, whenever he shall be entitled to sell the mortagaged property, or any part thereof, by writing under his hand, to appoint a receiver of the income of the mortgaged property, or any part thereof."

Section. 125 (3) is expressed thus:

"The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides."

The terms and conditions of the mortgage are outlined in several clauses of the deeds.

Those which are germane to the issues raised as to breach of contract are Clauses 1(a), 2(b), 2(f), 2(j), 2(k), 2(l). They are as follows:

Clause 1 "In consideration of the premises the Mortgagor COVENANTS with the Bank:-

(a) To pay to the Bank on demand –

(i) all such sums of money as are now or shall from time to time hereafter become owing to the Bank from the Mortgagor whether in respect of overdraft, moneys advanced or paid to or for the use of the Mortgagor or charges incurred on his account or in respect of promissory notes and other negotiable instruments drawn accepted or endorsed by of 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 under any guarantee indemnity undertaking or agreement or in any manner or on any account (including all sums which have become immediately due and payable under the terms of any **Instalment Loan** whatsoever and whether any such 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 Item 3 of the said Schedule with such rests as are slated in Item 4 of the said Schedule as Rests At Which Interest Payable or at such other times as the Bank shall from time to time specify or at such other rate or rates of interest as the Bank shall from time to time charge which interest may be computed as simple interest to compound interest as the Bank shall require together also with all usual and accustomed Bank charges."

Clause 2

(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."

(f) "The statutory powers of sale and of appointing a Receiver and all ancillary powers conferred on mortgagees by the Registration of Titles Act may be exercised by the Bank upon any default after any demand for payment of the moneys hereby secured or any part thereof or immediately upon any other default in or non-compliance with any of the covenants conditions or obligations on the part of the Mortgagor herein contained or hereunder implied without its being necessary in any one or more of such cases to serve any notice or demand on the Mortgagor anything in the Registration of Titles

Act or any other law to the contrary notwithstanding BUT upon any sale made under the statutory power in that behalf the purchaser shall not be bound or concerned to see of enquire whether such sale is consistent with this proviso and if a sale is made in breach thereof the title of the purchaser shall not be impeached on that account."

(j) "That whenever the whole or any part of any sum payable under paragraph (a) of Clause 1 hereof shall remain unpaid for three days after the date hereinbefore covenanted for payment thereof respectively or whenever there shall be any breach or non-observance of any of the covenants or conditions herein contained or implied, or whenever there shall be any other default mentioned and referred to in section 105 of the Registration of Titles Act all moneys intended to be hereby secured shall become due and payable and so remain until full payment thereof and be recoverable by suit or otherwise as and for moneys then due and payable to the Bank under the covenants hereof. The Powers of Sale and of distress and of appointing a Receiver and all ancillary powers conferred upon the Bank as mortgagee by the Registration of Titles Act shall be conferred upon and be exercisable by the Bank without any notice to or demand on or consent by the Mortgagor NOT ONLY on the happening of the events mentioned in the said Act BUT ALSO whenever the whole or any part of the principal moneys or any payment under Clause 1 (a) above or other sums of money payable hereunder shall remain unpaid for three days after the date on which the same should have been paid under the covenants ....."

(k) "At any time after the security has become enforceable the Bank may appoint a receiver of the property subject thereto upon such terms as to remuneration and otherwise as it shall think fit and may from time to time remove any such receiver and appoint another in his place; any such appointment or removal shall be in writing. A receiver so appointed shall be the agent of the Mortgagor which shall

be responsible for his acts and defaults and for his remuneration costs charges and expenses."

(l) "A receiver so appointed shall be a receiver and manager and entitled to exercise all the powers conferred on a receiver by the Act and by way of addition to and with out limiting those powers such receiver shall have power-

(1) to take possession of and get in the mortgaged lands;

(2) to carry on or concur in carrying on the business of the Mortgagor (where applicable) and do all such things as he may in his absolute discretion deem proper for carrying on such business;

(3) to sell or concur in selling any of the mortgaged lands or otherwise deal therewith at such price or prices and on such terms in the interest of the Batik as he shall think fit;

(4) to make any arrangement or compromise which he shall think expedient in the interest of the Bank;

(5) to make and effect all such repairs improvements and insurances as he shall think fit;

(6) to appoint managers accountants servants workmen and agents for the aforesaid purposes upon such terms as to remuneration or otherwise as he may determine;

(7) to do all such other acts and things as may be considered to be incidental or conducive to any of the matters and powers aforesaid which he may or can lawfully do as agent for the Mortgagor."

Five demand loans were granted by the 1st defendant to the Claimant between December 1987 and September 1991. These loans were granted on the security of the properties of the Claimant. Letters of commitment were issued consequent on the making of each loan. The contents of each letter specified the terms on which the loans were granted and the manner of

repayment. Each letter contained a default clause granting the 1st defendant wide discretionary powers in securing full settlement of sums due to them by the Claimant. The Claimant executed all letters of commitment, demonstrating that he was fully aware of the terms and conditions embodied therein and had consented to them.

Statements were issued to the Claimant over the period January 1988 to December 1991. The status of his account was clearly outlined in the statements. He was aware of the all credits, debits and other charges. The 1st defendant communicated with him from time to time with reference to the state of his account. The Claimant had full knowledge of his indebtedness to the 1st defendant. He was cognizant of the fact that he had not serviced his loans. His failure to honour his obligation to repay the outstanding sums as dictated by the terms of the agreement, was a breach of the covenant in the mortgage to repay sums due and owing.

Clause 2(f) of the mortgage deed empowers the 1st defendant to sell the mortgaged property. Such right was not only accorded to them by the deed but also by statutory and equitable mandates. The exercise by the 1st defendant of their right, of sale of the mortgaged property is unassailable.

So far as the appointment of the receiver is concerned, the 1st defendant as mortgagee, was endowed with statutory powers to appoint a

Receiver and had done so in accordance with the provisions of section 125(1) of the Registration of Titles Act and in keeping with the provisions of Clauses 2(f) and 2(k) of the mortgage deed.

Miss Cummings urged that the 1st defendant committed a breach of contract in appointing a receiver, without proper notice being given to the Claimant and a further breach was evident in the 1st defendant sending a receiver not based on a valid demand or breach of condition as a result of overdue payment.

Clause 2(f) of the mortgage deed as well as section 106 of the Registration of Titles Act enjoined the 1st defendant to serve a demand notice to the Claimant, he being in default with payments of sums due to them. On March 3, 1992 Messrs Rattray, Patterson & Rattray wrote to the Claimant on behalf of the 1st defendant requesting payment of all sums due to them.

The Claimant has not denied receiving this letter. The contents of the letter was a formal notice of demand satisfying the requirements of mortgage deed and the provision of the Registration of Titles Act. The receiver was not appointed until January 25, 1993. Clearly, the sale would have taken place subsequent to the notification of the demand by the 1st defendant. In addition, the Claimant had been in breach of clause a (i) of the mortgage

deed, in that, sums amounting to over $30 million were over due and owing by him to the 1st defendant.

1 now turn to the matter of the remuneration of the Receiver. The instrument of appointment of the receiver states, inter alia, that the Receiver "shall be paid a remuneration in accordance with the scale of remuneration agreed between the mortgagee and the Receiver". Section 125(7) of the Registration of Titles Act makes provision for the Receiver to retain, from money received by him, a commission not exceeding 5% of the gross amount in addition to all costs, charges and expenses incurred by him.

Miss Cummings urged that the gross income receipts by the Receiver amounted to $16,177,537.70 and 5% of that sum is $808,876.88, while, the sum claimed by the Receiver was $1,542,402.77. The issue of the Receiver's fees had not been raised on the claim, no objections can therefore be taken with respect thereto. Further, the sum of $1,542,402.77 does not only include the Receiver's commission but also his expenses associated with the sale.

I will now turn to the Claim for conspiracy. The Claimant asserted that the defendants conspired to cause him deprivation and injury. Conspiracy was defined by Lord Denning in Hadmor Productions Ltd v Hamilton (1981) 2 ALL ER 724 at 733 in following terms: "A conspiracy

consists in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means".

The elements of conspiracy are an agreement, a common intention, an understanding, and a concerted action to do an unlawful act.

A thorough examination of the tort was undertaken by Viscount Simon in the case of Crofter Harris Tweed Co v Veitch 1942 1 ALL E R 143 and at page 149, he said:-

> "On this question of what amounts to an actionable conspiracy" "to injure" (I am assuming that damage results from it), 1 would first observe that some confusion may arise from the use of such words as "motive" and "intention." LORD DUNEDIN in Sorrell v. Smith (4), at p.724, appears to use the two words interchangeably. There is the further difficulty that, in some branches of the law, "intention" may be understood to cover results which may reasonably flow from what is deliberately done, on the principle that a man is to be treated as intending the reasonable consequence of his acts. Nothing of the sort appears to be involved here. It is much safer to use a word like "purpose" or "object." The question to be answered, in determining whether a combination to do an act which damages others is actionable even though it would not be actionable if done by a single person, is not : "Did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action ? " It is : "What is the real reason why the combiners did it?" Or, as LORD CAVE, L.C., puts it : "What is the real purpose of the combination?" The test is not what is the natural result to the plaintiffs of such combined action, or, what is the resulting damage which the defendants realize, or should realize will follow, but what is in truth the object in the minds of the combiners when they acted as they did. It is not consequence that matters, but purpose. The relevant conjunction is not, "so that," but, "in order that." Next, it is to be borne in mind that there may be cases where the combination has more than one "object" or "purpose." The combiners may feel that they are killing two birds with one stone, and, even though their main

> purpose may be to protect their own legitimate interests notwithstanding that this involves, damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiffs right."
>
> Here, he analyses the applicable test in respect of the tort.

It is clear that the test is not what naturally results from the combined action of the defendants, or the damage flowing from that action, which the defendants realize, or, ought to realize would follow but what is the intention of the defendant when they committed the act of which the Claimant complains. It is the purpose, which is important, not the consequence. Even if there is proof that there is a conspiracy, it must be shown that the purpose was to cause injury to the Claimant.

The Claimant declared that the 1st defendant and 3rd defendant conspired to take over his development and that the threat issued by Mr. Lumsden, an officer of the 1st defendants bank to throw him off the property and his inducing him to sign promissory notes in blank, with the knowledge that they were for $6,000,000.00 instead of $3,000,000.00 each were acts of conspiracy. He further averred that sale of lots to a company called NESCO was at a gross undervalue and this also amounted to a conspiracy.

No evidence has been adduced by the Claimant to establish any of the foregoing allegations. There is nothing to show that the 1st and 3rd defendants conspired to take over his development. There is no evidence that

the Claimant executed promissory notes in blank. It is patent that he had loans with the 1st defendant which he failed to service, resulting in escalation of his indebtedness. These loans were given on security of certain properties owned by him. The properties were sold by the 1st defendant, being the mortgagee. Twenty seven (27) lots were sold by the Receiver. Nine of these lots were sold to NESCO Construction Ltd., namely, Lots 4, 6,12, 17, 18, 21, 25, 29 & 30 which were cumulatively valued at $24,730,738.00. The Receiver disclosed by letter to the 1st defendant that he encountered difficulty in the sale of the lots due to the unattractive designs of the buildings, which were on the development. These buildings were constructed by the Claimant. The Receiver recommended that the lots be withdrawn from sale to allow new homes to be constructed to improve the aesthetics of the area. Although the Receiver had made this suggestion, the indebtedness of the Claimant to the 1st defendant had been increasing at an alarming rate. The 1st defendant's security was jeopardized. NESCO Construction Ltd. offered $16.5 million for the 9 lots. The offer was accepted by the 1st defendant. In the circumstances these lots were sold for the best prices available. Claimant has not adduced any evidence to show otherwise.

He further declared that a further act of conspiracy is enveloped in the 1st defendant opening an account in the Claimant's name at the 4th defendant bank and 1st defendant taking a loan from them in the Claimant's name. For these parties to be conspirators, it must be established that the predominant purpose of their action was to injure the Claimant. There is no evidence to show they willfully combined to cause damage to the Claimant and the real purpose of their collaboration was to cause him injury.

A letter of September 27, 1991 from the 1st defendant to the Claimant demonstrates that the 1st defendant was obliged to sell a part of the Claimant's loan in accordance with Statutory requirements. The 1st defendant accordingly sold the promissory note, which the Claimant held with them for $6,000,000.00, to the 4th defendant. They obtained a loan for that sum at the rate of 42% per annum from them. This sum of $6,000,000.00 was credited to the Claimant's account.

A deposit of $6,000,000.00 at the rate of 36% per annum was made with the 4th defendant by the 1st defendant. The difference between the rate of interest due on the loan and that payable on the deposit was paid by the 1st defendant. The loan was guaranteed by the 1st defendant. The Claimant was however, unaware of these transactions until September 19, 1991.

Even if the activities of the 1st, and 3rd defendants in respect of the loan and deposit for $6,000,000.00 were covert, it has not been established that the real purpose of the transactions was to injure the Claimant. The circumstances under which they acted was to protect the interest of the 1st defendant to which the Claimant had been heavily indebted. No actual and substantial pecuniary loss was suffered by the Claimant as a result of the acts of these defendants.

It is of import to note that the letter of September 27, 1991 from the 1st defendant to the Claimant, demonstrates that he was informed that a portion of his debt had been sold to the 4th defendant. The relevant paragraph of the letter reads:

> "So as to fulfil certain statutory requirements, we were obliged to sell a portion of your debt, viz $6,000,000.00 to Corporate Merchant Bank. This facility remains a charge against the collateral we hold, and as such, a part of your overall liability".

The ensuing paragraph of the letter sets out his obligations with respect to 1st and 4th defendants. The letter of September 27, was executed by him. This clearly shows his acknowledgement and that he had consented to the transactions with respect to the 4th defendant.

It is convenient, at this juncture to make reference to the claim for breach of fiduciary duty. Equity places a special duty and liability on a party who stands in a fiduciary relationship to another. It may involve a

confidence to instill a duty to take care in circumstances where a person is under influence of another. A representor has an obligation to take care to a representee. Such duty may arise from a contractual relationship between the parties, or may originate by virtue of a special relationship between them.

The doctrine of fiduciary relationship, or, confidential relationship was defined in Tate v Williamson 1866 L P 2 Ch App 55 at page 61 follows:

> "Wherever two persons stand in such a relation, that, while it continues, confidence is necessarily reposed in one, and the influence which grows out of that confidence abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position, will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed".

The transactions between the Claimant and the 1st, 2nd and 3rd defendants fall within the ambit of normal banker/customer relations. There is no evidence that their relationship extended beyond ordinary contractual one. There is nothing to show that a fiduciary duty was owing to the Claimant. The 1st, 2nd and 3rd defendant contractual obligation does not impose on them a duty of care to him. No facts have been pleaded to demonstrate any special relationship between the parties which would impress upon these defendants any fiduciary duty to the Claimant.

I will now address the claim for misrepresentation. It was a further contention by the Claimant that the 1st defendant promised to provide him

with additional financing to the extent of $6,000,000.00 for the development in order to induce him to sign Promissory Notes and Mortgage Deeds and acting on representations, which were false and reckless, he agreed to execute two promissory notes. He further contended that the 1st defendant's exercise of powers of sale was fraudulent.

Where a statement is made recklessly, intentionally causing a person to act upon it, this gives rise to liability for damages for fraud. Fraudulent misrepresentation is defined by the learned author Clerk & Linsell 15th Edition. At page 17-01 it is propounded by the following statement:

> "a person who causes another to injure himself, is under certain circumstances, liable to the same extent as though he had directly inflicted it. One way on which a person may cause another to injure himself is by making a false representation to such person, whereby he acting on such representation being true, suffers damage".

The tort of fraudulent misrepresentation is grounded in the common law action of deceit. The ingredients of the tort were outlined in the case of Bradford Third Equitable Benefit Building Society v Borders (1941), 2 ALL E R p 205 at page 211 Viscount Maugham declared:

> "My Lords, we are dealing here with a common law action of deceit, which requires four things to be established. First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit : *Peek v. Gurney* (2), at p. 390 *per* LORD CHELMSFORD, and at p. 403, *per* LORD CAIRNS, and *Arkwright*

> v. *Newbold* (3), at p. 318. Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true: *Derry* v. *Peek* (4) and *Nocton* v. *Ashburton (Lord)* (5). Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which include the plaintiff, in the manner which resulted in damage to him : *Peek* v. *Gurney* (2) and *Smith* v. *Chadwick* (6), at p. 201. If, however, fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made : *Derry* v. *Peek* (4), at p. 374, and *Peek* v. *Gumey* (2), at p. 409. Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing: *Clarke* v. *Dickson* (7). 1 am not, of course, attempting to make a complete statement of the law of deceit, but only to state the main facts which a plaintiff must establish."
>
> At page 216 Lord Russell of Killowen had this to say:
>
> "To make a charge of fraud is a serious thing, and, before people make it, they should be clear as to the grounds and facts upon which they rely as the basis of their charge."

Lord Wright at page 220 dated:

> "Fraud involves deliberate intent, which is called *mens rea*. Nothing short of the wicked or guilty mind will serve, as this House held in most striking circumstances in *Derry* v. *Peek* (4), where the statement complained of was, to the knowledge of the directors, not true in fact, but they mistakenly thought that it was as good as true, whereas events completely falsified their expectation, to the damage of the plaintiffs."

Vague averments of the statement of claim touching fraudulent misrepresentation appear in paragraphs 18, 19, 20, 21, & 24. These averments are lacking in particularity. Nothing has been stated as to when or where the alleged representations were made, or by whom they were made.

This claim is also silent as to words used amounting to the alleged representation. The Claimant failed to outline the damage he suffered as a result of the purported misrepresentation. A charge of fraud is serious. A claimant must take care in particularizing allegations of fraud. Loose averments as to allegations of fraudulent misrepresentation are insufficient. There must be material, which clearly indicates misrepresentation and the damage suffered as a result. There is none in this case.

Further, if the Claimant fails to establish that a duty of care is owed to him in contract, he cannot successfully pursue a claim in tort. This principle was clearly enunciated in the case of Tai Hing Cotton Mills Ltd. & Liti Chong Hing Bank Ltd. & Ors (1985) 2 ALL E R 947 at page 957 by Lord Scarman when he said:

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will he to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow

according to whether liability arises from contract or tort, eg in the limitation of action."

He went on to say:

> "Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded, no duty wider than that recognised in *Macmillan* and *Greenwood* can be implied into the banking contract in the absence of express terms to that effect, the respondent banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted."

It is however apparent that there are exceptions to this principle and the rule would be applicable in circumstances where tortuous liability may be imposed on a party for misrepresentation or misstatements made before the execution of a written agreement, or, on entering a general contractual relationship in which a fiduciary relationship exists.

The circumstances of this case is not one which can be classified as falling outside the scope of the general principle. The Claimant cannot rely on the law of tort to obtain a remedy against the 1, 2, and 3rd defendants, having failed to do so in contract.

In paragraph 24(c) of his claim, the Claimant, with reference to the 1st defendant, states that they did the following acts: falsified "the Plaintiff's account by representing that the plaintiff received the sum of $6,000,000.00 when they knew the Plaintiff did not receive same." This, in essence, is a

statement by the Claimant that the 1st defendant had falsified his account to show that he was the recipient of $6,000,000.00 when in fact this sum was not given to him. No civil liability would lie for falsification of accounts, as, falsification of accounts is a criminal offence. But even if this statement were to be considered under an allegation of fraud, there is no evidence to support the Claimant's assertion that any misrepresentation or misstatements in relation to his accounts had been made by the 1st defendant. The evidence adduced is to the contrary. The statements of account and letter of commitment executed by the Claimant clearly demonstrate that the sum of $6,000,000.00 was applied to the credit of his account.

I will now make reference to the claim for negligence. It was a further contention of the Claimant that the 1st defendant was negligent in that they sold the lands at gross undervalue and failed to secure current or accurate valuations thereof before embarking on sale and they failed to take steps to ensure that the rights of the Claimant were protected in exercise their powers of sale under the mortgage.

Negligence denotes failure by a defendant to exercise duty of care resulting in damage to Claimant, which is not too remote. The ingredients of the tort are:

(1) The existence of a duty of care.

(2) Careless conduct by the defendant.

(3) Foreseeability that conduct would have caused the type of damage to the Claimant of which he complains.

(4) A casual link between the defendant's carelessness and the damage.

The question which arises is whether there is evidence to satisfy the foregoing elements of negligence, in particular, that the 1st defendant owed a duty of care to the Claimant. Before proceeding, I must state that the banker/customer relationship, which existed between the Claimant, the 1st and 2nd and 3rd defendants, was exclusively contractual. There is no evidence to prove that these defendants, had by their negligence, caused a breach of any contractual obligation to the Claimant, or failed to exercise a duty of care to the Claimant with respect to the banking transactions.

The 1st defendant would however be saddled with duty to exercise care in relation to the power of sale of the mortgaged property. There is no evidence that the 1st defendant did not exercise care in the sale of the properties. Valuations were secured for the properties. Most of the lots were sold for prices at which they valued, others were sold for the best prices obtainable.

An additional claim was that there was a breach of trust by the 1st, 2nd and 3rd defendants. There is no evidence, which establishes that these defendants were ever trustees for the funds of the Claimant. They were not trustees for the Claimant with respect to their customer/banker relations. Neither was the 1st defendant a trustee for the Claimant by virtue of their mortgagor/ mortgagee relationship.

A claim for breach of trust cannot be sustained. as there is nothing to show that any duties as trustees for the Claimant were imposed on these defendants and that they omitted or neglected to fulfil those duties.

The Claimant also seeks an account of receipts, payments, dealings and transactions between the 1st, 2nd and 3rd defendants and himself, as well as an account of $6,000,000.00 lodged by the 1st defendant in his name at the 4th defendant bank.

Statements of account from the 1st defendant bank were submitted to the Claimant over the period 1987 to 1991 clearly reciting details of all transactions carried out. These outlined all credits and debits relating to his accounts. In addition, by letters from the 1st defendant, he was informed of the state of his accounts on several occasions. It is manifest that he had knowledge of all receipts, disbursements, transactions and dealings

conducted between the 1st defendant and himself and also any transactions or dealings executed by these defendants on his behalf.

So far as the $6,000,000.00 which was lodged with the 4th defendant is concerned, there is a certificate of deposit for that sum. A statement of account bearing date December 6, 1991 in respect of that $6,000,000.00 discloses the state of the Claimant's account with respect to the transaction. A statement of account with respect to the loan account with the 4th defendant also outlines details of that account. The Claimant had sought and obtained copies of these statements, thus illustrating he had not only obtained knowledge of the transaction but had been cognizant of the details of the accounts with the 4th defendant.

In relation to the furnishing of an account touching the sale of lots under the power of mortgage, an account was supplied by the receiver. The receiver is deemed the agent of the Claimant by virtue of S. 125 (3) of the Registration of Titles Act. Section 125(9) of the Act also commands him to pay interest due under the mortgage and among other things, pay the residue of money received by him, to the person who would be entitled to the mortgaged property or to receive the income therefrom. The receiver paid the proceeds of sale of the properties to the 1st defendant. The 1st defendant would have a right to the receipt of the money due and owing to them from

the Receiver, as the principal sums borrowed by the Claimant were not repaid, as well as interest outstanding on the principal loans.

The Receiver issued a Report containing an account of income and expenditure with respect to the sale of the properties. A stamp of acknowledgement dated January 11, 1996 shows that this document was received on that date. The inference is the Claimant was aware of the accounts in relation to the sale of the properties and would not be entitled to any additional account.

The Claimant also prefers a claim against the defendants for negligent enrichment. No such cause of action exists in law. It is presumed however, that the claim was intended to be one with reference to unjust enrichment. There is no evidence to justify a claim for unjust enrichment against any of the defendants.

Consideration will now be given to the claims against the 4th defendant. The Claimant's claims against the 4th defendant raise allegations of conspiracy, negligence, breach of contract, breach of fiduciary duty and unjust enrichment.

However, the main thrust of the Claimant's contention against this defendant is that they conspired with the 1st defendant to defraud him. This allegation is contained in an averment of the claimant, that the 4th defendant

established an account in his name without his consent and paid the proceeds to the 1st defendant without his consent.

It was stated by him that sometime in September 1991 he went to the 1st defendant bank where he met with Mr. Golding, an employee of the bank. He took possession of a receipt, which, he saw in a file on Mr. Golding's desk. His name was on the receipt. He left the bank and spoke to an employee of 4th defendant bank by telephone. He identified himself and told him that he owed them money which he wished to repay. He was sent documents showing that they were holding a Certificate of Deposit in the sum of $6 million in his name as well as a loan for the same amount. He related that he knew nothing of the transaction.

On September 28, 1990 the 1st defendant entered into an agreement with the 4th defendant by way of the sale of a promissory note by the 1st defendant to the 4th defendant, by which a demand loan of $6 million at rate of interest of 42% per annum was obtained from the 4th defendant, and a deposit for $6 million at rate of interest at 36% per annum was also made with the 4th defendant by the 1st defendant..

The transactions from the commencement to conclusion, were conducted by the 1st and 4th defendants only. It has been revealed that the 1st defendant sale of the loan to the 4th defendant was in compliance with

Statutory requirements. At the time of the transaction, the 4th defendant would have been under no obligation to make inquire as to whether the 1st defendant had the Claimant's expressed or implied authority to have entered into the agreement with them.

The transaction between the 1st and 4th defendants in relation to the promissory note was one in which a bank sold a promissory note to another. This promissory note was endorsed by the 1st defendant in favour of the 4th defendant for the sum of $6,000,000.00.

A promissory note is defined in Section 83(1) of the Bill of Exchange Act as follows: -

> "A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer."

Section 83 (2) states:-

> "An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is endorsed by the maker."

A promissory note is a negotiable instrument. The endorsement of the promissory note for $6 million by the 1st defendant validated its enforceability. The 1st defendant was entitled to sell it.

A document dated September 28, 1990 and entitled "Corporate Merchant Bank Credit Application" indicates that the 1st defendant would

place the promissory note of $6,000,000.00 with the defendant. The Claimant admitted it bore the same number as that to which reference was made in a statement of account with respect to the transaction. However, he declared that he was "neutral" as to whether $6,000,000.00 was the same money deposited by the 1st defendant, or the same money to which the Is' defendant had referred in a letter dated October 3, 1990, from the 1st defendant to the 4th defendant paragraphs 1 & 2 which reads:-

> "Re Berrisford Miller
>
> We enclose herewith Promissory Note in the amount of Six Million Dollars ($6,000,000.00) signed by the subject, endorsed in your favour.
>
> We record that a deposit in a like amount has been placed with you at an interest rate of 36 percent. Our agreement with you calls for an interest rate of 42 percent on the note. We ask that interest on the deposit be timed to coincide with interest on the note. The net difference should be advised to us for settlement."

When shown other documentation relating to the loan transaction he continued to give "neutral" responses. He stated however, that he had not been approached by the 4th defendant with respect to loan and the 4th defendant never requested any security for the loan from him. The fact that the 1st defendant sold the promissory note subsequent to the execution of the mortgage granted to the Claimant, does not invalidate the transaction.

It is obvious that, the Claimant, although attempting to be evasive in his answers to matters which were patently clear to him, had not been aware of the transactions between the 1st and 4th defendant until September 199 1. The 1st defendant, in order to fulfill certain statutory requirement was under an obligation to sell a part of the Claimant's debt and sold it to the 4th defendant. The 1st defendant guaranteed the loan at rate of interest of 42%. The credit had been approved on the strength of the deposit of $6,000,00.00 for the term of the loan. The 4th defendant's "disbursement sheet" dated September 28, 1990 shows that a principal sum of $6,000,000.00 was disbursed on the security of a deposit of $6,000,000.00 at an interest of 42% with a monthly payment of $2 10,000.00. Its "documented and disbursement checklists" of the same date illustrated that a demand loan for $6,000,000.00 was granted and that a deposit of $6,000,000.00 was made. Extension of the life of the loan was sought by the 1st defendant and granted by the 4th.

A certificate of deposit bearing the Claimant's name and a statement of account dated December 6, 1991, from the 4th defendant, with reference to the state of the Claimant's account, touching the deposit, show that a deposit of $6,000,000.00 was made by the 1st defendant and certificate of deposit #0070 was issued therefor. In cross-examination, when shown the Statement of Account, the Claimant admitted that reference to his name was made

thereon. He also acknowledged that his name appeared on the Certificate of Deposit 0070 for $6,000,000.00. The sum of $6,000,000.00 was lodged to the Claimant's account.

The loan purchased of the 4th defendant from the 1st defendant, was repurchased by the 1st defendant on August 6, 1993. The transactions were completed in August 6, 1993. On July 27, 1993 the 1st defendant wrote to the 4th defendant requesting the liquidation of the loan with effect from August 6, 1993 and requested the outstanding interest due on settlement of the loan, as well as the return of the Promissory Note. On August 23 the 1st defendant paid the accrued interest and again sought the return of the promissory note. This was remitted by the 4th defendant on August 25, 1993.

In my judgment, the transactions between the 1st and 4th defendants were straightforward. The loan granted by the 4th defendant was by way of the purchase of a promissory note of $6,000,000.00. This sum was credited to the Claimant's account. The 1st defendant guaranteed the loan by a deposit of $6,000,000.00. A 6% difference on the rate of interest between the interest on the loan and that on the deposit was paid by the 1st defendant. The loan was eventually repurchased by the 1st defendant and the promissory note returned by the 4th defendant.

These transactions were devoid of any act on the part of the 4th defendant to injure the Claimant causing him pecuniary loss. No conspiracy has been proved. In addition, there is no evidence that the 4th defendant had been privy to any transactions between the 1st and 2nd defendants to have been involved in any conspiracy with them.

The Claimant also alleges that this defendant failed to account to him for interest on funds belonging to him. The 4th defendant dealt with the 1st defendant, not the Claimant, throughout the transactions. It accounted to the 1st defendant for interest on the deposit. Further, it was arranged that the interest on the deposit would be set off against the interest on the loan.

It is also the Claimant's claim that the 4th defendant had been fraudulent. There is nothing in the pleading particularizing any fraudulent misrepresentation by the 4th defendant. There is no evidence that the 4th defendant had made nay representation to the Claimant. There is nothing which points to fraud on the part of the 4th defendant. Additionally, there was no special relationship between the Claimant and the 4th defendant to have imposed on the 4 h defendant any fiduciary care to the Claimant.

No evidence has been adduced, either by that given by the Claimant, or by the documents exhibited, to establish any fraud, negligence, breach of contract or breach of fiduciary duty by the 4th defendant. The 4th defendant

made no misstatements to the Claimant, nor do they owe him any duty of care, nor was any fiduciary relationship established between them.

No evidence exists to support the claim against this defendant for unjust enrichment.

I will now address the issues as they relate to the 5th defendant.

The claims against the 5th defendant have been expressed in the following terms:

"22 Further and/or in the alternative the Defendants wrongfully and/or maliciously conspired and combined amongst themselves and others to injure the Plaintiff. In furtherance of the said conspiracy the Defendants did the following acts:-

(f) The First, Second, Third and Fifth Defendants caused and/or induced the First Defendant to execute its Powers of Sale over the Defendants premises in respect of debts allegedly owed by the Plaintiff to the First and Second Defendant. The Defendants knew that the First Defendant had not the right to exercise its power of sale and that such exercise of the powers of sale was wrongful as the Plaintiff was not indebted to the First Defendant in the sum alleged.

(g) The Defendants knew that the First and Second Defendants did not disburse to the Plaintiff the sum of $6,000,000.00 or any part thereof.

(m) Fraudulently encashing the Plaintiff's cheque without the knowledge or consent of the Plaintiff.

(n) Failing to account to the Plaintiff of interest on funds belonging to the Plaintiff.

(p) Failing to advise the Plaintiff that the Defendants were in receipt of funds belonging to the Plaintiff.

(q) Encashing the Plaintiff's cheque without the Authority and/or consent of the Plaintiff.

(r) Receiving and accepting monies belonging to the Plaintiff when they knew or ought to have known that they were not so entitled."

"23 Further and/or in the alternative the First Defendant and/or the Fifth Defendant wrongfully and without lawful justification took possession of the Plaintiff's premises and has purported to sell and transfer portions thereof of Third Parties."

"27 By letter dated the 3rd day of March, 1992 the First Defendant has wrongfully and in breach of its fiduciary duty has purported to appoint the Fifth Named Defendant as Receiver of the Plaintiff's premises situate at Unity Hal aforesaid the said Fifth Defendant has entered into possession of the Plaintiff's premises and has dispossessed the Plaintiff thereof and has remained in possession and still continues to remain in possession to the detriment of the Plaintiff."

"32 The Plaintiff contends that the Defendants had knowledge of the misconduct of the First Defendant and in breach of contract and/or in breach of fiduciary duty unlawfully and/or negligently enriched themselves."

"33 At all material times the Defendants well knew or ought to have known that the Plaintiff had embarked upon the aforesaid development for the purpose of making a profit and to liquidate his indebtedness to the First Defendant."

I will first deal with the averments in paragraph 22 of the Claim. So far as the averments contained in sub paragraphs (m) (p) (q) and (r) are concerned, there is nothing to support any of these allegations either from the Claimant himself or from the documentary evidence. There is no evidence that the 5th defendant had knowledge of, or was privy to any

disbursement of $6,000,000.00. The transactions with respect to the loan of $6,000,000.00 were completed prior to his appointment Receiver.

There remains to be considered, paragraph 22 (f) in which the Claimant alleges the existence of a conspiracy between the 1st, 2nd, 3rd and 5th defendants in the exercise of the 1st defendant's power of sale over the mortgaged properties. He declared that the exercise of the power of sale was wrong, as, he was not indebted to the 1st defendant in the sum alleged. The statement from the 1st defendant's bank, his signature appearing on promissory note issued, which, had not been discharged, demonstrate that he received the $6,000,000.00 by way of credit to his account.

His cause of action is conspiracy. He must adduce evidence to show that the essential elements of the tort exist and here it is apt to make reference to the case of Lonrho plc & Fayed (N 05) 1994 1 ALL E R 188 at 198, where Stuart-Smith LJ at page 198 stated:-

> "The plaintiffs' cause of action is conspiracy to injure. The essential ingredients of this tort are an agreement by two or more persons to do acts, lawful in themselves, for the sole or predominant purpose of causing injury to the plaintiff and which causes pecuniary loss to the plaintiff: *see Lonrho Ltd. V Shell Petroleum Co Ltd* [1981] 2 All ER 456, [1982] AC 173 and *Lonrho plc v Fayed* [1991] 3 All ER 303, [1992] 1 AC 448."

At page 200 he continues by saying:-

> "In this type of conspiracy the plaintiff must prove that the sole or predominant purpose of the conspiracy is to injure the plaintiff. If the

> predominant purpose of the defendants is to protect or advance their own self interest, even though damage to the plaintiff is an intended consequence it is not actionable: *see Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456, [1982] AC 173, *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25, [1891-4] All ER Rep 263 and *British Airways Board v Laker Airways Ltd* [1984] 3 All ER, [1985] AC 58."

He further stated:-

> "Damage to the plaintiff is the gist of the action (see per Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456 at 463, [1982] AC 173 at 188). Moreover the plaintiff must prove actual pecuniary or financial loss."

The Claimant had not satisfied his indebtedness to the 1st defendant. A demand for payment made by the 1st defendant, was not met by the Claimant. The 1st defendant as mortgagee, under powers of the mortgage deed and by virtue of their equitable and statutory powers was authorized to appoint a Receiver. The appointment of the 5th defendant as Receiver entitled him, within the dictates of the mortgage deed and the Registration of Titles Act to make arrangement for the sale of the properties.

Proper valuations were secured and there is no evidence lots were not sold for the best available prices. The 5th defendant prepared and submitted a statement of account with respect to the sale. The Claimant has not established that he sustained any pecuniary or financial loss.

There is nothing to demonstrate any malfeasance or misconduct by way of a conspiracy on the part of the 5th defendant in the execution of his duties as Receiver. No culpability can be ascribed to him.

The Claimant's averment that the 1st and 5th defendants wrongfully took possession of his properties, sold and transferred portions to third parties and that the 5th defendant dispossessed him of the land is unjustified. The 5th defendant, acting under the powers conferred on him as Receiver, had the authority to sell the lots. He acted within the scope of his authority in carrying out the sales. No transfer of these lots was done by him nor was he in any way involved in the transfers of any lot.

I will now turn to the Claimant's allegation in respect of breach of contract, breach of fiduciary duty, negligence, and unjust enrichment, as they relate to the 5th defendant. I will first refer to the allegation with respect to breach of contract. Special reference must be made to clause 2 (k) of the mortgage deed, in particular to the last sentence thereof, which reads:-

> "A receiver so appointed shall be the agent of the mortgagor, which shall be responsible for his acts and defaults and for his remuneration, costs, charges, and expenses".

In addition, reference must also be made to section 125 (3) of the Registration of Titles Act states as follows:-

"The Receiver shall be deemed to be the agent of the mortgagor and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides".

Both the mortgage deed and the Act signify the creation of an agency between the Claimant and the 5th defendant. It is a contractual relationship. By virtue of that contract, all acts or omissions of the 5th defendant are those of the Claimant.

The 5th defendant, is required by section 125 (9) of the Registration of Titles Act to pay the residue of the money received by him to the person who, but for the possession of the Receiver, would be entitled to receive the income of the mortgaged property. The Receiver's report which details the sale was addressed to the 1st defendant, which, is the person "entitled to receive the income of the mortgaged property" or otherwise entitled to that property. Clause 2 (m) of the mortgage deed requires the Receiver to apply the net profits of proceeds of sale as follows:-

"(m) The net profits of carrying on any such business and the net proceeds of any sale by the receiver shall subject to any prior ranking claims thereon be applied by him as follows:

(1) In payment of all costs charges and expenses of and incidental to his or any other appointment of a receiver hereunder and the exercise by him or any other such receiver of all or any of the powers aforesaid including his remuneration or that of any other such receiver and all outgoings properly paid by him;

(2) In or towards payment to the Bank of all arrears of interest unpaid in respect hereof;

(3) In or towards payment to the Bank of all other moneys due under this Mortgage;

(4) In payment of any surplus to the Mortgagor;"

The Receiver, in obedience to the section 123 (9) of the Registration of Titles Act and Clause 2 (m) the mortgaged deed applied the process of sale in the manner he was required to do.

Mrs. Minnot Phillips submitted that there is no allegation by the Claimant of breach of the 5th defendant's duty of skill and care which is a term implied in all contracts. The 5th defendant was not, therefore, required to defend such an allegation. The claim against the 5th defendant as framed does not appear to be founded on contract. With this submission, I absolutely agree. I would venture further to state that it could not be founded on any contractual obligation by the 5th defendant to the Claimant.

So far as the averment of breach of fiduciary duty is concerned, there is no evidence to substantiate any breach of such duty by the 5th defendant. Neither has any evidence been adduced to show negligence on his part in the performance of his duties as a Receiver.

The Claimant also seeks an account from this defendant. The defendant rendered accounts of his receivership. It is shown by a date stamp

on these accounts that they were received on January 11, 1996. Accounts were also submitted by this defendant's attorney-at-law with respect to the sale of each lot.

There is no evidence to support a finding of unjust enrichment so far as the 5th defendant is concerned.

The Claimant has not established that each or any of the defendants had been in breach of any of the allegations raised on his claim. Neither the evidence proffered by him, or, his witnesses nor the documentary evidence exhibited, lend support to any of his claims. It is of worth to note that the evidence proffered by his witnesses was of no probative value.

Judgment for the defendants against the Claimant. Costs to the defendants to be agreed or taxed. Certificate for two (2) counsel with respect to 1st, 2nd and 3rd defendants; as well as for the 4th defendant and the 5th defendant.