IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1996 - M 105

BETWEEN	GIFFORD MORRELL	1ST PLAINTIFF
AND	FIONA MORRELL	2ND PLAINTIFF
AND	WORKERS SAVINGS AND LOAN BANK	DEFENDANT

Mr. Hugh Small Q. C., Miss Hillary Phillips Q. C.
Miss Karla Small, and Mr. Carey Mills
Attorneys-at-law for the Plaintiff.

Mr. Dennis Goffe Q. C., Mrs. Sandra Minott-Phillips
Attorneys-at-law for the Defendant.

Heard: 1, 2, 3, 4, 8, 9, 10, 11, 12, 15, 16, 17 December, 1997;
23, 24, 25, 26, 30, 31 March, 1998;
1, 2, 3 April, 1998 and 2 October, 1998.

COOKE, J.

JUDGMENT

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

In the latter part of the 1970's Mr. Morrell, an erstwhile supervisor of the dairy herd at Alcan, embarked on a new course – dealing in foreign

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

Now, Negril is some 22 miles from Sav-la-mar. He was to be allowed into the bank before opening hours and after closing hours to transact business. All his Jamaican dollar requirements to purchase foreign exchange would be provided to him. He would be given same day clearance on instruments. According to Mr. Morrell, a critical aspect of the proposed relationship was that purchasers of foreign exchange must first deposit to his account the equivalent Jamaican currency before there could be any deduction from his foreign currency accounts to be paid to them. Further, there should be no deduction from any of his accounts unless he had so authorised in writing. It is Mr. Morrell's contention that the bank was in breach of contract, and negligent as regards these two terms of the agreement. He also says that the bank did not ensure that the payments in Jamaican dollars in respect of the purchases of foreign

exchange were credited to his current account. This current account was to be used exclusively for transactions involving trading in foreign exchange. In due course, Mr. Morrell opened accounts with the bank. Suffice it to say at this juncture, that he opened a current account and three foreign savings accounts, in U. S. and Canadian dollars, and English pounds.

The only evidence of the agreement outlined by Mr. Morrell is his own. The court did not hear from Mr. Heron. There was no contractual document embodying the terms on which Mr. Morrell relies. Accordingly, the court will review the evidence as to the operation of the accounts and come to a resolution as to the correctness of his assertions. In this exercise, the court's assessment of the credibility of the witnesses will be of significance. The witnesses were Mr. Morrell, Mr. Reynolds, who was at most of the relevant time credit officer for the bank, and Miss Grindley who was the operations manager of the bank.

On a normal day, Mr. Morrell says he would get to the bank, say, about 8:30 a. m. This was the morning visit. He then proceeded to:

(a) Check his foreign savings accounts.

(b) Find out through the bank the requirement of the International Department (located in Kingston) for foreign exchange.

(c) Secure cash by tendering a cheque drawn on his current account – at times for 1 million dollars or more.

(d) Leave a signed blank cheque to be filled out according to his instructions. (One of his couriers would collect the proceeds thereof if requested.)

(e) Discuss transactions to be undertaken by the bank with his customers for that day.

(f) Verify lodgments that had been made the previous evening.

On the evening visit he would:

(g) Produce lodgment for that day.

(h) Reconcile transactions – including telephone transfer, drafts, and withdrawal slips. Presumably he would, by signing the relevant documents, give his written authorisations – for it is his evidence that although he gave oral instructions, these instructions would be authorised in writing on that same day when he visited the bank. At the reconciliation stage Mr. Morrell would issue a cheque for the sums disbursed on his oral instructions for that day.

Mr. Reynolds was a witness who I have no hesitation in regarding as honest and credible. As regards the term insisted on by Mr. Morrell that the Jamaican equivalent had to be first lodged before foreign exchange was sent to the purchaser, he said there was never ever such an arrangement, for it never happened in that manner on even one occasion. In answer to a question as to why Mr. Morrell's account was not credited on the same day as the telephone or draft instructions, Mr. Reynolds said:

> "Funds sent to named specific person or entity for example at New Kingston Branch. The named recipient would get foreign exchange – go away and return with Jamaican equivalent in large majority of cases. If money not come back on same day and I knew of it – contact Morrell who would contact party. In a few instances (after contact with Morrell) money arrived following day. In a few instances Mr. Morrell would say he got cash himself. With most exchange simultaneous – cheque and foreign exchange."

I accept the evidence of Mr. Reynolds that at no time did the account operate according to the agreement as stated by Mr. Morrell, whereby the purchaser would first lodge the Jamaican dollar equivalent. I also accept that in the operation of the account as outlined above by Mr. Reynolds, Mr. Morrell was an active and more than enthusiastic participant. I find it quite strange that there could have been a term of such fundamental importance and (a) the bank at no time adhered to its obligation and (b) Mr. Morrell so willingly acquiesced to its breach. In his evidence as regards his complaints to the bank Mr. Morrell never raised the issue that there was a breach of contract in the manner now alleged. The crux of his concern is that there were unauthorised debits from his current account, and to this attention is now given.

It was submitted on behalf of Mr. Morrell that a bank may only debit its customer's account where it has its mandate to do so. For this unchallengeable proposition of law the case of ***Catlin v Cyprus Finance Corporation (London) Ltd.*** **[1983] 1 All E. R. 809** was cited. It was further submitted that the bank could only debit the account of a customer on the written order of the customer. In this regard, reliance was placed on ***Joachimson v Swiss Bank Corporation*** **(1921) Rep. All E. R. 92** especially the following passage from the judgment of **Atkin LJ at p. 100:**

> **"The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written**

> **orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept."**

I doubt that this oft quoted passage is helpful to Mr. Morrell. Firstly, the passage as I understand it is dealing with circumstances of the respective contractual duties of banker and customer as regards the utilisation of cheques vis-à-vis the customer's account. These common law contractual duties do not preclude other contractual obligations from being agreed and enforced. I am not persuaded that a bank can only act on written orders. If there is an agreement or if such an agreement may be inferred that a customer instructs a bank orally to pay **X** a certain sum of money and **X** is paid that money, can that customer now say the payment was unauthorised because there was no written order? I think not. It is my view that a mandate from a customer, if clear, precise and free from ambiguity need not necessarily be in writing. Now, in respect of Mr. Morrell's accounts, there were, he says, many, many debits which were unauthorised because there were no written orders by him to document those debits. These debits amounted to millions of dollars. How did they come about?

I do not think it is in dispute that during the day Mr. Morrell would make numerous phone calls requesting of the bank to carry out transactions in relation to his account. His position is that at reconciliation time he would give his cheque for any debits that transpired that day. This was indeed so in the beginning. This is the evidence of Mr. Reynolds.

> "In first few weeks of operation he used to give us cheques drawn on his current account to cover debit memos which had come about during the day. But after a while transactions became so

> numerous and we had become so comfortable with him, we did not insist on replacement cheques every evening. Thereafter, these debit memos go out with statements. Mr. Morrell would have reconciled these memos daily. Daily reconciliation of all transactions."

This was the genesis of unwarranted laxity on the part of the bank. It was to get worse. Mr. Reynolds said:

> "As we became quite comfortable with operation, he (Morrell) was no longer being asked to sign Telephone Transfer forms."

This witness further said:

> "When we became more comfortable we not insist on daily basis that (Morrell) sign withdrawal slips."

Mr. Reynolds admitted that there was:

> "No paper trail bearing Mr. Morrell's signature for many transactions."

Miss Grindley recognised that the operation of the Morrell account was "unusual". In a letter dated February 2, 1995 Valerie Alexander an attorney-at-law writing on behalf of the bank to the then attorneys-at-law for Morrell said:

> "I believe we are all agreed that there has been less than perfect record-keeping on both sides and in these circumstances we are mandated to do our utmost to realize some mutually fair solution."

The description of "less than perfect record-keeping" is quite euphemistic. I can appreciate how this undesirable state of affairs arose. Mr. Morrell was the biggest customer of the branch. Everything was to be done to facilitate his transactions. He was not to be kept waiting. He was the customer who was recommended to attend a "choice" luncheon with

the principals of the holding company which had the majority shareholding of the bank in mid 1993. As for Mr. Morrell, he was in an activity which demanded instant action. His negotiations did not lend themselves to considered reflection. Decisions had to be immediate. Hence the many telephone instructions which were daily features of the conduct of his business. He had to strike while the iron was hot. These are considerations which cannot be excluded in the consideration of the issue of whether the debits not documented by Mr. Morrell were unlawful.

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

Mr. Morrell maintains that his current account was used only for his foreign currency transactions. This assertion was crucial to his case, for if this was in fact so, there ought to be no overdraft. This assertion crumbles under scrutiny. Before mid 1992 Mr. Reynolds had discussions with Mr. Morrell about an increase in his overdraft facilities. Mr. Reynolds

was concerned about the want of security. When Mr. Reynolds inquired of Mr. Morrell as to "why overdraft climbing so high?", the latter gave two reasons:

(a) He needed to have a certain quantity of Jamaican cash to purchase foreign exchange in his area – Negril.

(b) He was engaged in doing construction – building two bedroom units as part of an Eco-tourism project on his property. He drew funds from his current account for that project.

Now there is an issue in this case pertaining to a mortgage of Mr. Morrell's property. It is the same property on which there was the Eco-tourism project. I will be dealing with the question of the enforceability of that mortgage in due course. For now it is sufficient to say that the bank had instituted proceedings to enforce what it perceived was its rights under the mortgage. Court proceedings ensued. In an affidavit of Mr. Morrell filed in those proceedings he swore:-

> "I proceeded with completion of Eco-tourism project in anticipation of a grant of a loan for which I had applied and based upon the nature of the relationship that I had developed with the defendant (bank) and volume of funds that regularly passed through account I used funds from current account to make payments for completion of project."

I find that when Mr. Morrell asserts that his current account was used exclusively for currency transactions he is not being truthful. When he said that he used other financial resources in the development of the Eco-tourism project, that is a most significant deviation from the path of truth. Further, Mr. Morrell would wish to convey the impression that he

always had a sufficiency of foreign currency in his foreign currency savings accounts. He swore that he never ever borrowed foreign currency from the bank. This is not so. Mr. Reynolds, whose evidence I have already indicated I accept, had this to say:

> "If Mr. Morrell did not have enough foreign currency in his account he would request us by telephone to approve debits in excess of his balance with a promise to make enough foreign exchange lodgments during the day to cover those amounts. When we had some idea of amount of daily purchases during a particular period and where shortfall was within daily flows it would be approved. I had honestly had no problem with that. Where it was above the daily flows, I always objected but he [Morrell] would still on occasions get it approved by manager Mr. Duhaney."

It does appear that Mr. Morrell, as he himself had said, had an excellent relationship with the members of staff of the bank, and especially with the managers during the relevant period – Heron, Duhaney and Corrie. I doubt that any is still employed to the bank. It should be noted that none of these gentlemen gave evidence. Two of the members of staff left the bank to work with his organizations, one of whom is still in his employment. This excellent relationship apparently led to the genesis of Mr. Corrie's reprehensible manoeuvres. I speak of what in this case has become known as "the Tuesday lodgments".

As regards these "Tuesday lodgments", Mr. Morrell said:

> "I did draw a cheque on occasions on Workers Bank and place it in my N. C. B. current account. Circumstances were because current account at Workers Bank – Corrie instructed me that on a

> Tuesday afternoon when they had to make a report to head office they did not want to report the high overdraft. Corrie asked me to put an N. C. B. cheque to reduce overdraft and Workers Bank cheque to be paid the following day to N. C. B. This was done on several occasions on a Tuesday."

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

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

In taking part in this fiction Mr. Morrell said that he only participated because of instructions from Mr. Corrie and that the fictional exchange of cheques was for the bank's sake – "not mine". Mr. Morrell seeks to be portrayed as a helpless and forlorn figure at the mercy of the bank. I do not agree. He was well aware of why his overdraft was in a perilous position. He was amenable to any manoeuvre which at any particular point in time could camouflage his predicament. When Mrs. King arrived at the bank in 1994 there arrived a manager who *did* dishonour his cheque.

By his evidence Mr. Morrell's first complaint to the bank about his overdraft was in February 1993. By then the overdraft figure was being expressed in millions of dollars. Mr. Morrell said that Mr. Duhaney, the

then manager, instructed Mr. Reynolds to investigate his current account. Mr. Reynolds' evidence, which I prefer, is different. He said that in the presence of Mr. Duhaney and himself, Mr. Morrell spoke about a discrepancy of U. S. $5,000 in his savings accounts. On his [Reynolds] investigation he discovered that there had been a breakdown in the process, in that the evening lodgments were not being verified on the evening but were carried over to the next morning. He admitted that the overnight storage was unsuitable. He continued:

> "I immediately spoke to the officers involved and corrected the system. On the matter of U. S. $5,000 – it could not be substantiated by Mr. Morrell – eventually Morrell dropped the issue."

I do not accept Mr. Morrell's evidence that he complained to Mr. Duhaney about his experiencing problems in reconciling his overdraft. Mr. Morrell further said that Mr. Corrie who succeeded Mr. Duhaney told him that he [Corrie] had uncovered U. S. $100,000 debited without authorisation. I cannot say if Corrie *did* say so. However, Mr. Morrell does not seem to have pursued this non-authorised debiting. Certainly U. S. $100,000 is not a paltry sum.

Then there was this "choice" luncheon at the Pegasus Hotel. When he was asked for complaints, it is his evidence that:

> "My input concerned late circulation of statements – sometimes three weeks late."

It is indeed strange that Mr. Morrell did not indicate his discomfiture about the management of his account. He was in the company of the most senior personnel concerned with the bank.

After Mrs. King dishonoured his cheque, Mr. Morrell immediately contacted head office. He dealt with a Mr. Basil Naar. At some point, it was agreed that a Mr. Bell, who was Mr. Morrell's accountant, would

utilise Mr. Morrell's records as well as the bank's to try to resolve the dispute. By letter dated 8th July, 1994 [Ex. 4] Mr. Bell indicated that his examination revealed that there were unauthorised debits of Mr. Morrell's account amounting to J$5,933,786. These debits were identified. This letter was sent to the branch in Sav-la-mar. Mr. Reynolds was asked to investigate. This is his evidence:

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

I accept Mr. Reynolds' evidence that Mr. Morrell accepted that the questioned debits in the Bell letter were genuine debits.

The mortgage document shows that it was signed by Mr. Morrell on the 9th December, 1993. He said he signed a blank document in October 1993. At the time he signed, he said that the essential particulars were not written on that document. He signed that document pursuant to a proposed loan of J$6,000,000 which he sought to finance an Eco-tourism project on his 60 acre holding in Lacovia in St. Elizabeth. He said he never

received this loan and since there was a total failure of consideration from the bank, the mortgage is unenforceable. It is the bank's contention that this mortgage was security for Mr. Morrell's overdraft and therefore enforceable. It is thus a question of fact. The legality of the creation of the mortgage does not arise.

In the determination of this issue it is essential to place this mortgage within the context of the operation of the account. Mr. Morrell has tried to distance himself as far as possible from anything which would involve him with an overdraft. In his examination-in-chief a letter dated 13th May, 1992 was tendered by him. It was a letter addressed to Mr. Morrell which indicated that the bank had approved:

(a) J$300,000 Overdraft

(b) J$250,000 Demand Loan

That letter requested him to indicate his acceptance by signing "and returning the attached copy". This letter (Ex. 8) did not bear Mr. Morrell's signature. He said:

"I did not accept proposal in that letter."

In cross-examination a letter in identical terms was shown to him. It bore his signature of acceptance. At first he still maintained that he did not sign. Subsequently he admitted that he *did* sign (Ex. 15). He said that he agreed to an overdraft because it was offered to him. He did not mind paying the commitment fee of $6,250. He said:

"If overdraft there - not hurt. Whether there or not - had no intention of using it."

I now advert to the evidence of Mr. Reynolds. He was involved in discussions with Mr. Morrell prior to the opening of the accounts. He said:

"I personally took part in these discussions with Mr. Morrell. These discussions took place over a period of days before account opened. The account

> was opened to allow him to access overdraft facilities. Mr. Morrell outlined the fact that he had an amount of foreign exchange which he did not wish to convert into Jamaican dollars and asked if this amount could be used for overdraft facility."

The history card reveals that Mr. Morrell's current account was opened with a deposit of J$40,000. I find that from the inception Mr. Morrell *intended to* and *did* utilise the overdraft facilities afforded to him. It does seem impossible for him to conduct the huge volume of business with a financial base of J$40,000. There are no records before the court in respect of statements prior to October 1992. In that statement the opening balance showed a debit balance of J$310,927. This overdraft kept increasing and for the most part the account was always substantially overdrawn.

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

Mr. Reynolds paints a different picture. He said:

> It (valuation report) was given to me by Morrell when in discussions about increasing his overdraft facility. At this time the Jamaican dollar account in overdraft. Morrell was under pressure from us to reduce the extent of overdraft. I told him there was risk – greater problem if anything went wrong – obvious implications of head office monitoring account unauthorised by them. Flows on account

depended heavily on him – if he was not around for whatever reason – spell disaster. If bank had security to cover overdraft – regularise. He submitted valuation on property to me and promised to make property available as security for overdraft."

I unhesitatingly prefer the account of Mr. Reynolds. At the time when this valuation report was submitted it bore no relationship to any proposed Eco-tourism loan. Perhaps at this stage, although it should be obvious by now, I found Mr. Morrell an unimpressive witness. In his examination-in-chief he exuded unbridled confidence. However, as Mr. Goffe warmed to his task of cross-examination, the erstwhile confidence evaporated. I now reproduce some of my comments made in my notebook of the impression I formed of Mr. Morrell as he was cross-examined.

- His ebullience has turned sombre.
- Witness wilting under cross-examination.
- Witness seeks protection of court when none is needed.

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

To support the plaintiff's stance that the mortgage was in respect of a loan of J$6,000,000 for an Eco-tourism project, reliance was placed on a loan application made by Mr. Corrie on behalf of Mr. Morrell [Ex. 10]. This application is dated the 6th April, 1994. It was a request for:

[a] Demand loan - J$50,000

[b] ADL - J$2,800,000

The loans were to be utilised as follows:

[a] To replace funds used in the building of the entertainment centre – J$700,000

(b) To replace funds used to build cottages C, D and E as noted in the valuation report.

I do not know of which valuation report Mr. Corrie speaks. Certainly it is not the one tendered by the plaintiff (Ex. 9). In that report there is no mention of any cottages C, D and E. Mr. Corrie in his request envisioned unlimited success for the Eco-tourism project. As for Mr. Morrell, his credit-worthiness was beyond reproach. Nowhere in that request is there any reference to the overdraft facilities which Mr. Morrell had with the bank. In this request, Mr. Corrie wrote:

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

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

As part of the formal arrangements, Mr. Morrell signed a document headed:

AGREEMENT RE
OPERATION OF ACCOUNT

To: **WORKERS SAVINGS & LOAN BANK**

It begins:

The Undersigned (herein called "the Customer") for valuable consideration hereby agrees with WORKERS SAVINGS & LOAN BANK (herein called "the Bank") that the operation of the account of the Customer and the carrying on of other banking business with the Customer shall be subject to the following terms and conditions.

1. .....
2. .....
3. .....

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

During the conduct of this trial the only question pertaining to clause 4 was put by Mr. Goffe. It was an enquiry of Mr. Morrell as to whether he [Morrell] had read that clause, and to this there was an affirmative reply. That was all. In his closing address Mr. Goffe submitted that on a proper construction of this clause, Mr. Morrell's suit must fail. In reply Mr. Small postulated three positions.

1. The defendant did not plead estoppel by claiming reliance on the clause. The rules of pleading "require that facts relied on to establish an estoppel of any kind must be pleaded". The reason was that "the parties must know the case they have to meet in order that they may lead the evidence and address the issues raised in the case on the pleadings".
2. The defendant waived any reliance of the clause because:
   [a] Their conduct in participating in the KPMG Peat Marwick audit.
   [b] Mr. Duhaney's promise of reconciliation and Mr. Morrell being allowed to continue use of the account although depicting an overdraft; and
   [c] Mr. Corrie's attempted reconciliation of the accounts.
3. The plaintiff [Mr. Morrell] acted to his detriment in reliance on the defendant's conduct by continuing the use of the account

and agreeing to submit to the audit and to be bound thereby and by paying substantial sums of money which represented one-half of the professional fees for production. Reliance for position three (3) was placed on ***Central London Property Trust Ltd. v High Tree House Ltd.*** **[1956] 1 All E. R. 256.**

Mr. Small further submitted that the clause as worded should not be given the effect sought by the defendant.

In respect of position one (1) it is my view that at all times Mr. Morrell knew of the existence of the clause. It was a term of the agreement between himself and the bank. It had been reduced to writing. He said he had read it. It cannot be said that he was taken by surprise. It cannot be that a party is precluded from relying on a clause in a contract because such a clause is not specifically pleaded. The issue here is essentially one of law. The evidential component is simply whether or not, if the clause is held to be legally binding, Mr. Morrell complied with it. In respect of the clause, Mr. Morrell knew or is deemed to know the case he had to meet - since he was aware of this clause.

In respect of position two (2), for the purpose of comment, I will assume that the assertion of the factual situation stated is true. I cannot agree that if parties make attempts to settle disputes that any such attempt at settlement or mediation amounts to a waiver of either of the parties' legal rights. Surely, such efforts of resolving disputes outside of a court trial are worthy of commendation. Too little of this takes place in our jurisdiction. To accede to position (2) would be to completely erase this welcome alternative to litigation.

I fail to appreciate the detriment of which the plaintiff speaks. His continued use of his account in the state that it was should be regarded as a favour to him. It allowed him to carry on his transactions. His payment of one-half of the professional fees was his contribution towards

mediation. For this position three (3) to succeed it must be demonstrated that there was a representation by the defendant, express or implied, that it would at no time rely on clause 4 and that the plaintiff thereafter pursued a course of conduct which resulted in detriment or loss. This is clearly not so in this case. There was no express representation. There was nothing which the bank did which could amount to an implied representation. As already said, there was neither detriment nor loss to the plaintiff.

I now turn to the validity of clause 4. Both parties relied heavily on the Privy Council case of ***Tai Hing Cotton Mill v Liu Chong Hing Bank Ltd. and others*** **[1985] 2 AER 142** in which **Lord Scarman** delivered the opinion of the Board. In dealing with the three clauses there under consideration, he opined at p. 959 d – f:

> **"Their Lordships agree with the views of the trial judge and Hunter J. as to the interpretation of these terms of business. They are contractual in effect, but in no case do they constitute what has come to be called 'conclusive evidence clauses'. Their terms are not such as to bring home to the customer either 'the intended importance of the inspection he is being expressly or impliedly invited to make' or that they are intended to have conclusive effect against him if he raises no query, or fails to raise a query in time, on his bank statements. If banks wish to impose on their customers an express obligation to examine their monthly statements and to make those statements, in the absence of a query, unchallengeable by the customer after expiry of a time limit, the burden of the obligation and of the sanction imposed must be brought home to the customer. In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, in their Lordships' view, the true nature of the obligations of the customer to his bank where there is no express agreement is limited to the Macmillan[1] and Greenwood[2] duties. Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation on the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts."**

Both parties relied on this passage. For a verification clause to pass the rigorous test to which it must be subjected, such a clause must set out in clear language the nature and extent of contractual obligations

[1] *London Joint Stock Bank Ltd. v Macmillan* [1918] AC 777, [1918-19] All ER Rep 30, HL
[2] *Greenwood v Martins Bank Ltd.* [1933] AC 51, [1932] All ER Rep 318, HL

imposed by such a clause on a customer, and the consequences of failure to comply with those obligations. The obligations imposed by clause 4 are in respect of statements received. They are:

i) To examine the said cheques and vouchers.

(In my view vouchers include debit memos.)

ii) Check credit and debit entries.

iii) Within thirty days of delivery (of statement) notify the bank in writing of any errors or omissions.

The consequence of failure to comply with those obligations is that:

> "It shall be conclusively settled as between the bank and customer that the said cheques and vouchers are genuine and properly charged against the customer."

In ***Saunders v Bank of Nova Scotia*** **[1983] 35 WIR** (a case from the Court of Appeal of the Bahamas), a corresponding clause was stated thus at p. 34 f – j:

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

This clause is essentially similar to clause 4. Its binding effect on the customer was not challenged. DaCosta J. A. regarded it at p. 34 j.

> **"... as obviously in standard form signed by every customer of the respondent bank who desires to operate an account of that nature and who has obtained permission to do so. It is designed for normal and ordinary operations of the account."**

In that case, as regards a particular debit memo, the issue was whether or not the questioned memo issued out of the ordinary operation of the account. No such issue arises in this case.

In ***Arrow Transfer Co. Ltd. v Royal Bank of Canada et al*** **[1972] 27 DLR (3d) 81**, the Supreme Court of Canada decided that a clause similar to clause 4 is legally binding on the customer. At p. 84 Martland J. said:

> **"I agree with the opinions expressed in the Court of Appeal that the verification agreement provided Royal with a complete defence to the action. That agreement is a contract, defining the terms upon which the bank continued the account of the appellant. The appellant agreed to verify each statement of account which it received from the bank, and, within the period specified, to notify the bank of debits wrongly made in the account. At the end of the stipulated period the account as kept by the bank became conclusive evidence that it contained no debits that should not be contained in it, subject to only two exceptions:**
>
> **(1) Errors of which timely notice had been given to the bank;**
>
> **(2) Payments made on forged or unauthorised endorsements."**

Further, at page 86 he continued:

> **"The verification agreement in question in the present case is not ambiguous. It is a contract under which the customer undertakes a duty to the bank to disclose within a limited period, among other things, debits wrongly made. In the present case, the appellant received the statements and the relevant vouchers. Having failed to perform his contractual duty, the agreement made the statements conclusive evidence against him."**

Le Cercle Universitaire d'Ottawa v National Bank of Canada **1988 43 DLR (4th) 147** is a case of the Ontario High Court of Justice. The head note which I consider accurate is:

> **"An agreement between a bank and its customers, provided that the customer would examine bank statements relating to its accounts and would notify the bank within 30 days of any errors, irregularities or omissions. The agreement further provided that after 30 days the statement should be conclusively settled as correct. The bank negligently permitted an employee of the customer to defraud the customer by depositing cheques to her own account, though clearly marked for deposit to the customer's account only. The customer, however, failed to notify the bank of the omissions within 30 days of the sending of the statements.**
>
> **On the application for a declaration, HELD the account agreement**

was clear, and provided a complete defence to the bank."

In this case the ***Tai Hing*** case was considered by the Court (Steele J.).

It is therefore clear that by agreement a contractual duty can be undertaken by a customer to examine his bank statements with care and to challenge the correctness of such statements within a stipulated time. I would think that any such stipulated time must be of reasonable duration. I hold that clause 4 is unambiguous. It sets out the obligations undertaken by the customer (Morrell) with clarity and precision. It "brought home" to Mr. Morrell the importance of his obligation and the dire consequence of not notifying the bank in writing of any errors or omissions within thirty days of the receipt of his statement(s). Mr. Morrell failed to carry out his contractual duty of notification in writing within 30 days of the receipt of his statements. He is therefore barred from challenging the correctness of debits or credits to his account unless such challenge or query had been made in the stipulated time, in writing. However I reject the submission by Mr. Goffe that clause 4 precludes Mr. Morrell from challenging the rate of interest charged by the bank on his overdraft. Clause 4 is relevant and limited to transactions in which the operation of the account would not be affected unless the customer initiated action – or action is initiated as in the case of forgeries or other form of deception purportedly on behalf of the customer. Therefore when the bank indicates sums owed for interest on a statement, that is an action initiated by the bank. Accordingly, Mr. Morrell can challenge the validity of interest charges. I shall deal with this issue in due course.

There are two documents which speak to the rate of interest.

(a) The first I will call the overdraft document (Exs. 8 and 15). This concerned the facility of $300,000. Here the rate was – "65% subject to change based on money market conditions".

(b) The second was the mortgage document (Ex. 6) where it is stated that the original rate of interest was – "62% subject to change from time to time".

Neither of these documents specifies the method of computing interest nor whether or not interest is to be compounded. In this case it appears that interest was computed on a daily basis. It seems sufficiently certain that interest was compounded at the end of each month. The interest rate charged reached a high of 120% per annum.

There was no evidence of the usage and practice of bankers. Mr. Reynolds' evidence was as to instructions which were received from head office, for example as to the rate of interest to be charged. These instructions were bare edicts which did not reveal the basis on which any particular rate of interest was determined. The court has not been enlightened as to the changes which took place "based on money market conditions". Accordingly, the increase in the rate of interest cannot be justified by either of the two terms as to the interest rates set out above. An attempt was made through Mr. Reynolds to justify the increases showing that the rate of interest charged to Mr. Morrell was the same as that being charged by the Bank of Jamaica on the defendant's overdraft with the said Bank of Jamaica. This I find quite unattractive.

Mr. Morrell is a stranger to the relationship between the bank and the Bank of Jamaica. Why should Mr. Morrell be asked to bear any burden of the bank because the bank did not properly run its affairs? Perhaps the role of the Bank of Jamaica could have had an impact on "money market conditions". If so, let the court be told.

Mr. Reynolds said:

> "Interest on monies beyond limit would be (subject) to stipulated penalty rate – stipulated by head office ... I advised Mr. Morrell at some point. I did not make a

note at time. I am sure it was in the first couple of months of his opening of the account. I did not pass this information to head office. I told him penalty rate at time 90%. This rate charged went as high as 120%. May have fluctuated as low as 75%."

In my view, that bit of evidence, contrary to the stance of the defendant, does not in any way bind Mr. Morrell to pay the increased interest rate. It is a unilateral declaration of the bank. It cannot come "within change based on money market conditions" because that has not been demonstrated.

I now turn to the issue of compound interest. In this regard I place great reliance on ***National Bank of Greece S. A. v Pinios Shipping Co. No. 1 and another The Maira*** **[1990] 1 A. E. R. 78**. This was a decision of the House of Lords. **Lord Goff** in his speech (with which all the other Law Lords agreed) said at p. 80 a:

> **"The issue on the appeal before your Lordships' House is whether the bank ceased to be entitled to capitalise interest from the date when it demanded repayment, with the effect that it was entitled only to simple interest from the date of the demand until the date of judgment."**

The Court of Appeal had held that the bank was entitled to capitalise interest only until the date of demand for repayment. This decision, the House of Lords found to be wrong. Lord Goff embarked on a legal historical discussion and reviewed the relevant cases, some of which were not cited in the Court of Appeal. The way the "issue on appeal" is framed, Lord Goff accepted that a banker was entitled to capitalise interest before the date when he demanded payment. This capitalisation of interest received approval on the basis that because of the custom, usage and practice of bankers, a term to that effect could be implied. One of the cases reviewed by Lord Goff was ***Parr's Banking Co. Ltd. v Yates*** **[1898]**

2 Q. B. 460. In the concluding sentence of his judgment **Vaughn Williams LJ** said:

> **"According to the ordinary practice of bankers the interest due is from time to time added to the principal and becomes itself part of the principal due."**

In the case before their Lordships, the capitalisation took place at quarterly rests. Lord Goff in considering this fact spoke thus at p. 89 - 90 j – a:

> **"The cases which I have cited show the usage to be applicable to cases of both annual and half-yearly rests. There is however so far as I am aware, no case which shows it to be applicable to cases of quarterly rests into which the present case falls; though equally there is nothing to indicate that it does not apply and it may well do so. Again, the respondent's account with the appellant bank was not concerned with a simple borrowing, but with an amount outstanding in an account with the bank following a payment by the bank under its guarantee to the shipbuilders. However, in view of the concession made by the respondents in the courts below neither of these points need trouble your Lordships. That concession was that the bank was entitled to charge compound interest with quarterly rests during the banker/customer relationship."**

I accept that the bank, according to the custom and usage of bankers, is entitled to capitalise interest. As I have already indicated there was no evidence pertinent to the practice and usage of bankers in Jamaica or indeed elsewhere. I have to rely on a term implied by the custom, usage and practice of bankers as shown in the cases. The plaintiff has made no concession that there should be capitalisation on a monthly basis. Accordingly, I hold that capitalisation (except agreed otherwise, and it is not so in this case) can only be implied on half-yearly or yearly rests. There is no material before the court which indicates whether or not there should be half-yearly or yearly rests. In the circumstances it is my view that fairness suggests half-yearly rests. I so hold. It follows that interest is to be calculated at simple interest on a per annum basis and capitalised at half-yearly rests. Before leaving this aspect it may be thought that overdrafts may fall in a different category

from other loans. In my view this is not so - see ***Parr's Banking Company Limited v Yates*** [*supra*].

The Court has been provided with a document [Ex. 22] headed "Commercial Banks Loan Rates". This is a publication of the "Economic Information and Publications Department – Bank of Jamaica". It covers the years 1992 – 1997 and shows the range and monthly average of these loan rates. I struck an average rate on a yearly basis. In round figures the average rate would be:

1992	1993	1994	1995	1996	1997
54	50	61	50	58	47

I am aware that the initial overdraft agreement specified a rate of 65%. However this rate would be applicable only to the amount of $300,000. There was no contractual agreement for sums which exceeded that amount. I am also aware that the mortgage document specified 62%. Likewise there was no contractual provision for sums which exceeded $6,000,000. The bank is entitled to charge a reasonable interest rate. Therefore it is my view that the bank should be permitted to charge the average yearly rate for each year as set out above and I so hold. In respect of 1998 the rate claimed by the defendant is 45%. This is reasonable. Having come to this decision it is unnecessary for me to determine if the interest charges above the average annual rate are in the nature of a penalty. In any event the material presented to the court was insufficient to make any such determination. All I need say is that such interest rate charges above the annual yearly rate is not allowed.

When Mrs. King on the 13th May, 1994 dishonoured Mr. Morrell's cheque, it will be recalled he immediately contacted a Mr. Basil Naar at the head office. There was the investigation by Mr. Bell to which I have already adverted. Discussions ensued but instead of accommodation the parties appear to have been adamant. Lawyers became involved.

Eventually it was agreed by both parties to engage KPMG Peat Marwick – (KPMG) Chartered Accountants. This firm set out:

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

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

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

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

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

is not well founded.

The summary of the KPMG report is as of 31st May, 1994, (Ex. 20). This report posits two alternative positions. The first is based on the assumption that debits against Mr. Morrell's account for which his approval was not seen were nevertheless authorised by him. In which case the position would be:

A.	i]	US$ a/c	$38,100.01 CR
	ii]	CDN $ a/c	795.85 CR
	iii]	UK£ a/c	1,973.98 CR
	iv]	J$ a/c	41,578.621.18 DR

The second position represents the situation wherein it is assumed that where Mr. Morrell's approval was not seen such debits were unauthorised, in which case it would mean:

B.	i]	US$ a/c	$49,145.01 CR
	ii]	CDN $ a/c	58,572.52 CR
	iii]	UK£ a/c	11,161.75 CR
	iv]	J$ a/c	6,784,229.24 DR

Now Mr. Morrell in his evidence-in-chief said he accepted the report but Workers Bank did not accept it. I do not know which of the above alternative conclusions it is that he accepted. I am mindful that his acceptance may have been only by way of effecting a settlement. This court, subject to qualifications expressed in this judgment, accepts the accounting in A above.

It was submitted that the plaintiff could not bring an action in tort as well as in contract. This proposition it was argued is founded on the passage in the opinion of the Board in the ***Tai Hing*** case at p. 957, d – j:

> **"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 a 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 be 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, e.g. in the limitation of action. Their Lordships respectfully agree with**

> **some wise words of Lord Radcliffe in his dissenting speech in *Lister v Romford Ice and Cold Storage Co. Ltd.* [1957] 1 AER 125 at p. 139 AC 555 at 587. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said:**
>
> > **'Since in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is not real distinction between the two possible sources of obligation. But it is certainly I think, as much contractual as tortious. Since, in modern times, the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.'**
>
> **Their Lordships do not, therefore, embark on an investigation whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. 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."**

In this passage, although Lord Scarman has stated that "their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in law to adhere to the contractual analysis", it is my view that the guidance offered here is not such as to prohibit a tortious claim. Further, when Lord Scarman said:

> **"The respondent banks cannot rely on the Law of Tort to provide them with greater protection than that which they have contracted."**

I do not understand him to be saying that an action such as this could not be brought in tort. In this case the plaintiff's cause of action was in both Tort and Contract. Clearly there is no advantage in pursuing an action in tort. But suppose for whatever reason the plaintiff had decided only to pursue a tortious remedy, does that mean that his action could be struck out on that basis? Certainly not. As I understand it, what Lord Scarman was saying is that the duty of care of a banker must be determined according to the contractual nexus which determines the relationship

between banker and customer. This is a contractual duty of care to exercise such care and skill as would be exercised by a reasonable banker – see ***Karak Rubber Co. Ltd. v Burder and others No. 2*** **[1972] 1 AER 1210**. Accordingly although the plaintiff has embarked on an unnecessary exercise, it cannot be said that it was an exercise which was legally impermissible.

The Plaintiff sought in 18 (a) of its Statement of Claim

> "An Account of all receipts, payments, dealings and transactions between the First Plaintiff and the Defendant in all of the Plaintiffs' accounts with the Defendant."

In the KPMG report (Ex. 18) under "Findings" in para. (1) it is stated:

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

I have determined that clause 4 (the verification clause) is binding on Mr. Morrell. However, this binding effect would be relevant only to those statements which Mr. Morrell received. He has not denied that he received all the statements as from 1992. The court is now faced with the difficult problem of decision making as regards that period from "inception to December 31, 1992 when the transactions could not be verified". There is evidence which I accept that statements were sent to Mr. Morrell on a monthly basis. The plaintiff has not challenged the accuracy of the bank's accounting which computed overdraft balance at December 31, 1992 to be the sum of J$2,348,147.25. This sum includes interest charges. I have decided that the rate of interest for 1992 is 54%. Those statements which were seen by KPMG either from

the bank or Mr. Morrell are to be regarded as a true reflection of the state of Mr. Morrell's account except of course for interest charges. The bank has relied on the binding effect of the statements. Therefore to substantiate the sum of J$2,348,147.25 or that part subject to variations in interest rate charges which must now be calculated at 54% per annum, the bank (not Mr. Morrell) must produce the missing statements. Any reasonable and prudent banker is obliged to keep and when requested produce a record of the customer's account. The time limited for production is 31 days from date hereof. Mr. Morrell's obligation to the bank will be limited to that revealed in the monthly statements that are produced either by the bank or has been produced by Mr. Morrell. Interest charges will be applicable only to transactions contained in those statements which can be examined.

In paragraph 18(B) of the Particulars of Claim the plaintiff sought:

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

This is denied.

In paragraph 18 (C) of the Particulars of Claim the relief is for:

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

This is denied, subject to the ruling on interest charges (*supra*).

Paragraph 18 (D) of the Particulars of Claim pertains to the issue of penalty interest concerning which I have indicated it is unnecessary for me to deal with.

Paragraph 18 (E) of the Particulars of Claim seeks:

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

I accept that as of May 31, 1994 the balances in Mr. Morrell's foreign savings account were:

US$ a/c	$38,100.11
CDN $ a/c	795.85
UK£ a/c	1,973.98

There is no evidence as to whether or not these sums are still at the bank. If so, the bank will pay interest on those sums at 4% per annum for any period for which these sums remained at the bank subsequent to May 31, 1994.

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

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

In respect of the counter claim, the sum owed to the defendant will be computed according to the guidelines I have set out:

1. The year 1992 will be dealt with separately from the ensuing years.
2. The overdraft figure, if any, following calculations for year 1992 will be the starting figure for year 1993.
3. The court accepts the statements for years 1993 and 1994 up to when the account became inactive except for the interest charges.

4. The interest charges will be computed in accordance with the percentage rates and method of capitalisation of interest as set out above.

It is declared that the mortgage no. 795693 is valid and enforceable.

I will now hear counsel on the following:-

(i) The accounting necessitated by the conclusions to which I have come, and

(ii) Question of costs.