Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. E-051 OF 1980

BETWEEN	EDEN COUNTRY CLUB LTD.	PLAINTIFF
A N D	ROYAL BANK JAMAICA LTD.	DEFENDANT

A N D

SUIT NO. C.L. R-980 OF 1982

BETWEEN	HEIDI REIDELL	PLAINTIFF
A N D	ROYAL BANK JAMAICA LTD.	DEFENDANT

Dr. Manderson-Jones for Plaintiffs.

Mrs. Angell Hudson-Phillips Q.C., and Mr. Richard Ashenheim instructed by Milholland, Ashenheim and Stone for the Defendant

HEARD: 21st, 22nd, 23rd, 24th, 25th June 26th, 27th, 28th, 29th, 30th July, 1993; 28th February, 1994; 28th September, 1998; 1st October, 1998; 1st, 3rd, 4th March, 1999 and January 21, 2000

F.A. SMITH, J.

These actions were consolidated on the 10th May, 1990 pursuant to Order on Summons for Further Directions.

By the 28th February, 1994 the Court had heard all the evidence and the matter was adjourned for written submissions.

Unfortunately a dispute arose between the plaintiffs and their attorney-at-law, Dr. Manderson-Jones. Many efforts were made to resolve this dispute but to no avail.

The plaintiffs eventually terminated Dr. Manderson-Jones instruction to represent them.

The plaintiff filed a Summons for Further Directions which was heard on the 1st October, 1998. Thereafter Mrs. Heidi Reidell the plaintiff in the second suit and a director and shareholder of the plaintiff in the first suit, represented herself in Suit No. R-080 of 1982 and it was agreed that the submissions made on her behalf would in so far as they are relevant to Suit No. E-051 of 1980, be taken into account when dealing with the latter

Suit No. E- 051 of 1980
Eden Country Club Ltd. vs. Royal Bank Jamaica Ltd. (the Eden Suit)

The Defendant was licensed to carry on the business of banking

in Jamaica and operated a branch office in Montego Bay. The plaintiff was at all material times a customer of the Defendant and had an account (No.114-157-1) at the aforesaid branch.

The directors and shareholders of the plaintiff company were at all material times Alton Jenoure, Heidi Reidell, Jenoure Gooden and Vivienne Gooden.

The Plaintiff is claiming that the defendant made a number of unauthorised debits and withdrawals from the plaintiff's account between April, 1979 and April, 1980 totalling $190,391.76.

Accordingly the plaintiff claims:

(i) A declaration that the Defendant wrongfully debited the plaintiff's account with the amount of $190,391.76.

(ii) An account of the transactions between the plaintiff and the defendant and payment to the plaintiff of any additional sums which may be found due to it.

(iii) Damages of $185,433.26 for breach of contract in respect of the operation of the plaintiff company's account.

(iv) Alternatively payment of the said amount of $185,433.26 as money had and received by the defendant to the plaintiff company's use.

(v) Alternatively damages for negligence.

The defence is that under the ostensible authority of the plaintiff company and/or the parties acting within the terms of the ostensible or actual authority thereby given, internal debit memos were used to withdraw funds from the plaintiff's account for the payment of wages and operating expenses which the plaintiff's company was liable to pay.

The defendant made no admission as to the contractual duty raised by the plaintiff Eden in its statement of claim but stated that it acted inter alia, pursuant to the provisions of clause 9 of the "Agreement for Operation of Account" (paragraph 12 of Defence).

The defendant further stated that it had acted in accordance with the mandate given by the plaintiff to the defendant and that the account was operated by persons ostensibly acting within the terms of the authority thereby given. The Defendant further claimed that it also acted in accordance with the terms of a new signing resolution of the 2nd October, 1979 of which it was given due notice

on 4th October, 1979.

The Evidence in Outline

Three witnesses gave evidence.

Mrs. Heidi Reidell and Mr. Alton Jenoure for the plaintiff and Mr. Thomas William Robinson for the Defence.

Mrs. Heidi Reidell operated account No.117-691-61 with the Defendant's Bank at the defendant's branch office in Montego Bay, St. James. This account was opened on the 27th November, 1978 in the names of Alton Jenoure, Jenoure Gooden and Mrs. Heidi Reidell. Mrs. Reidell was a signatory to the account and drew cheques frequently on and made lodgements to the said account.
The account she said, was opened in order to refurbish and restore a dormant golf course and restaurant at Iron Shore, in the parish of St. James.

On the 7th November, 1978 Mr. Alton Jenoure on behalf of the plaintiff signed a letter of intent to lease from Trans Caribbean Jamaica Limited the Iron Shore Golf Club and Golf Course. This property was renamed Eden Country Club Limited. This limited liability company was formed with the initial shareholders being Mr. Alton Jenoure and Mrs. Reidell. They were also directors of the plaintiff. This Golf company was formed on December 18, 1978; its registered office was at Ironshore in Montego Bay.

At a meeting of the Board of Directors held on the 13th February, 1979 the Defendant was appointed the banker of the plaintiff company. The Manager of the Defendant Bank was Mr. Thomas William Jack Robinson.

The plaintiff company on February 16, 1979 opened a current account No.114-1571 with the Defendant. An Agreement for Operation of Account was signed by Mr. Jenoure Gooden and his wife Mrs. Vivienne Gooden, the Managing Director and Secretary, respectively of the plaintiff company.

This document provides that the authorised persons for the signing of all cheques, bills, instruments or other documents drawn on or made payable to the Bank shall be:

1. The Managing Director who must sign jointly with Alton E. Jenoure or Heidi Reidell or;

2. The Secretary/Director to sign jointly with Alton E. Jenoure or Heidi Reidell.

The same applied to all requests for advances, loans, overdrafts or otherwise with or without security. According to the plaintiff the reason for this signing arrangement was to ensure mutual security and control of the plaintiff company's business in favour of the Directors.

Mrs. Reidell testified that the plaintiff presented to the Defendant a copy of the Memorandum and Articles of Association of the plaintiff company as well as a copy of the Certificate of Incorporation, copies of the signing arrangements and signature cards.

It is her evidence that the directors were not required to and did not give any guarantee or security in relation to account number 114-1571. The Guarantees at pages 129 to 134 of Volume 1 of the agreed documents were in respect of account number 117. She swore that at the time when these documents were signed the name of "Eden Country Club Limited" was not stated thereon. She also referred to copies of hypothecation forms among the agreed documents and asserted that they were not the facsimile of the original documents.

When the two guarantees were signed on the 16th February, 1979 account 114 was not overdrawn, she contended. Statement of account in respect of account 114 dated March 12, 1979 (pp. 59-74 of agreed documents) was referred to. The date of the first entry is February 19, 1979; the date of the last entry is April 11, 1980.

Mrs. Reidell said she signed cheques during the period February 19 to March, 1979. She did not sign any other instrument and no other instruments other than cheques were drawn by any other officer of the plaintiff company.

Cheques and debit memos signed by unauthorised persons were used to effect withdrawals from account 114 during this period.

The following is a list of debit memos which the plaintiff claims represent unauthorised withdrawals from its account number 114. These debit memos bear the initials of Mr. Robinson the Manager of the defendant Bank.

(1) Debit memo dated May 11, 1979 in respect of pay roll signed by L.V. Gooden for $3,000.00

(2)	Debit memo dated May 18, 1979 in respect of payroll signed by L.V. Gooden for	$2,400.00
(3)	Debit memo dated 1.6.79 for payroll signed by Jenoure Gooden for	$1,976.00
(4)	Debit memo dated 19.6.79 for wages signed by Jenoure Gooden for	$6,000.00
(5)	Debit memo dated 16.6.79 for wages signed by Jenoure Gooden for	$ 500.00
(6)	Debit memo dated 25.6.79 for pay roll signed by Jenoure Gooden for	$3,000.00
(7)	Debit memo dated June 79 for wages signed by Jenoure Gooden for	$6,000.00
(8)	Debit memo dated 18.9.79 for wages signed by for	$1,800.00
(9)	Debit memo dated 13.7.79 for pay bill signed by L.V. Gooden for	$2,666.00
(10)	Debit memo dated 28.9. for wages signed by L.V. Gooden for	$ 780.00
(11)	Debit memo dated 6.7.79 for pay bill signed Jenoure Gooden for	$1,300.00
(12)	Debit memo dated 27.7.79 for pay roll signed by Jenoure Gooden for	$1,000.00
(13)	Debit memo dated 10.8.79 for pay bill signed by L.V. Gooden for	$1,800.00
(14)	Debit memo dated 17.8.79 for wages signed by L.V. Gooden for	$ 800.00
(15)	Debit memo for wages stamped August 27, 79 signed L.V. Gooden for	$ 550.00
(16)	Debit memo for pay bill dated August 31, 79 signed L.V. Gooden for	$ 700.00
(17)	Debit memo for cash advanced dated September 12, 79 signed Lv. Gooden for	$ 600.00
(18)	Debit memo for payroll dated April 17, 79 signed Jenoure Gooden and L.V. Gooden for	$2,630.00
(19)	Debit memo for wages dated April 27, 79 signed Jenoure Gooden for	$2,410.90
(20)	Debit memo for payroll dated May 4, 79 signed L.V. Gooden for	$2,399.00
(21)	Debit memo (transferred to 117-691-6) dated February 21, 79 (Ex. 3) not signed by any officer of the plaintiff company for	$76,000.00
(22)	Debit memo (transfer to 117-691-6) dated May 17, 79 not signed	$6,158.00
(23)	Debit memo dated 24.5.79 not signed	$ 78.58
	Total	$118,558.29

It is the plaintiff's contention that none of these debit memos complied with the signing authority which the bank knew of. Mrs. Reidell stated that she was not aware of them at the time they were being put through. She identified two other debit memos not among the agreed documents. The first dated 26.6.79, not signed, for $1886.00 in respect of stamp duty and legal fees for Bill of Sale. The second also dated 26.6.79 signed Jenoure Gooden for $72.50 in respect of stamp duty and registration fees for a Bill of Sale. These debit memos were drawn against the plaintiff's account No.114-1571. The Bill of Sale, she said was over property in which the plaintiff had no interest. The subject property was owned by herself, Alton Jenoure and Jenoure Gooden. These two debit memos were received in evidence as exhibit 5.

Mrs. Reidell identified 71 cheques signed by Jenoure Gooden and L.V. Gooden drawn on the plaintiff's account number 114 with the Defendant Bank. These cheques were for period 2.10.79 to 11.4.80. She asserted that the Banking resolution of February, 1979 was not replaced by a new resolution and that the Board of Directors of the plaintiff company did not authorise the signing of cheques by Jenoure Gooden and L.V. Gooden. It is not in dispute that the total amount debited the plaintiff's account in respect of these cheques is $38,288.00.

She identified a crossed cheque for $3500.00 payable to the plaintiff (Exhibit 4) $500.00 of this amount was deposited to the plaintiff's account and $3,000.00 was paid out as cash. This should not have been done. The plaintiff she claims is entitled to this amount.

The pledge of $25,000.00 made by Mr. Gooden and Mr. Jenoure when account No. 117 was opened in November of 1978 was not returned. She claims that this cash collateral is nowhere shown to have been credited to either account 114 or 117.

She contended that the amount of $7,754.00 which Mr. Robinson admitted in his affidavit was charged as interest, was not due to the Defendant Bank. The Bank she said was not entitled to this amount.

In cross examination she agreed she had said that she became a signatory to account 117 at its opening on 24/11/78. She agreed

that her name did not appear on that account. Her explanation was that permission from Bank of Jamaica was necessary since she was a foreigner and could not borrow money from the Bank.

In answer to Mrs. Hudson-Phillips Q.C., she said the resolution assigning the defendant to be the plaintiff's bank was written up in the Bank's office. This was on the 16/2/79. At that same time two instruments of guarantee were executed by Mr. Jenoure, Mr. and Mrs. Gooden and herself. All four of them had gone to the Defendant Bank's office for the purpose of carrying out the procedures for the opening of account 114. However she did not agree that these instruments of guarantee formed part of the documentation required by the Bank in order to enable the plaintiff to open and operate account 114.

She insisted that she guaranteed the indebtedness previously incurred by herself, Mr. Gooden and Mr. Jenoure in respect of account 117. According to her she was guaranteeing her own debt, Mr. Jenoure was guaranteeing his and so was Mr. Gooden.

The relationship between herself and the Goodens began to deteriorate around January/February 1979. They were mere functionaries of the Company; they were not shareholders, she claimed. It was not in her power to get rid of them. She does not now know their whereabouts. Mr. Gooden put up cash collateral of $25,000.00. He had left a good job at Shell Company and his wife had left secure employment at Geddes Grant Limited to become Managing Director and Secretary of the plaintiff company respectively.

She agreed that the Price Waterhouse draft accounts show loans from both Goodens to the Plaintiff Eden.

Mr. Alton Jenoure, a shareholder and director of Eden Country Club Limited gave support to the evidence of Miss Reidell. He had around 14 years experience as a banker, was Manager of the Westgate Branch of the Bank of Nova Scotia from 1970 to 1972. He did not consider it unusual for the Bank not to demand security for the Palintiff Eden's account number 114-15-71.

He said the guarantee that the four (4) directors signed had nothing to do with Eden account number 114. The guarantee was to cover the overrun on account 117. The four persons were not

signing as directors, they signed personally. They were all asked to sign blank forms, he said. He was a signatory for the company on company's bank account. He did not sign any cheques or debt instruments on account 114 for the period April, 1979 to October, 1980.

In answer to Counsel for the Defendant he said that Account 117 was opened in November, 1978 to operate the Golf and Country Club. It was his intention to operate the venture as a partnership. He did not advise the Bank Manager, Mr. Robinson, that it was their intention to incorporate a company to operate the business.

The Defence

Mr. Thomas William Robinson who now lives in Barbados was the only witness for the defence. He lived in Jamaica from November 14, 1977 to June 30, 1983. He was employed as Manager for the Royal Bank Jamaica Limtied, Montego Bay Branch. He had about 30 years banking experience up to 1983.

He recalled having banker/customer dealing with Mrs. Reidell, Mr. Alton Jenoure and Mr. Jenoure Gooden. This began in November, 1978. At a meeting they stated their intention to take over Ironshore Golf Club. They showed him a letter of intent and wanted overdraft facility of $50,000.00. They were planning to form a company. He told them he would assist as long as they put up in full cash collateral and it was understood that the overdraft would be in the name of the company. It was agreed that the advances would be taken over by the company. He told them he would also wish personal guarantees from the shareholders.

As only $25,000.00 could be put up at the time he agreed to allow facilities to go up to $25,000.00 in the names of Jenoure Gooden and Alton Jenoure.

Mrs. Reidell was to put up cash collateral in the form of U.S. $12,500.00 at her bank in the U.S.A.

He recalled when the corporate account was opened in February 1979. He obtained the personal guarantees from all the shareholders. He processed the demand loan in the name of the company for $31,000. This demand loan was necessary because additional funds were required to get the operation started.

He identified the personal guarantee of the four 'shareholders', a document signed by Jenoure Gooden, L.V. Gooden, Alton Jenoure and Heidi Reidell on 16/2/79 for $46,000.00. This was, he said, to secure debts and liabilities, present and future advances in the name of Eden Country Club Limited. This document he said was signed in the presence of Miss Brownlow and himself.

The guarantee for $46,000 was meant to be $45,000 to secure the original overdraft but when the guarnatee was signed the overdraft had moved up above $45,000.00.

By the 16th of February, 1979 all the securities except for the Bill of Sale were in place.

On February 21, 1979 the account 117-69-16 was in overdraft to the tune of $80,143.68 (page 140 of Volume 1 of Agreed Bundle)

Mr. Robinson's evidence is that he gave instructions for $76,000.00 to be transferred from account 114-157-1 to account 117-69-16 that is the personal account of Mr. Gooden and Mr. Jenoure. He did this, he said, because at that time he had obtained all the securities except the Bill of Sale and the securities included two personal guarantees of the shareholders for $46,000.00 and $31,000.00.

The difference of $1,000.00 between the sum of the guarantees and the amount transferred is due to the fact that the overdraft arranged in the name of the company was $45,000.00 and the demand loan was $31,000.00.

He was in the process of clearing off the overdraft in the personal account 117-691-6 but because a few cheques were outstanding a balance was left back in the account.

The debit memo in respect of the $76,000.00 (Exhibit 3) was not countersigned by any officer of the plaintiff company. Debit memos, he said, were not signed by customers except where cash was received.

On 16th May, 1979 the balance on account 117 was $6234.29 in overdraft. An attempt was made to pay off this sum by way of credit memo for $6,158.42 but because of interest on the overdraft a further sum of $78.58 was necessary to close it.

By a debit memo dated May 21, 1979 the sum $6,158.42 was transferred from account 114 to account 117. A further debit memo

for $79.62, was issued debiting the plaintiff company's account 114 to meet overdraft interest on account 117 ($78.58 interest and $1.04 for service charge).

In the normal course of events statements would be dispatched to the customers within a week to ten (10) days of the closing date. After this no further statement would be prepared automatically.

Turning to debit memos for period 17th April, 1979 to 28th September, 1980 drawn on account 114-157-1 except for three (3) they all, he said, represent weekly payrolls as prepared by the Managing Director and/or Secretary/Director of the Plaintiff company. Those excepted are the two already referred to for $6,158.42 and $79.62 and one for $76,000 (Exhibit 3) which represents sum transferred from account 114-157-1 to account 117-691-6.

He admits that payment for wages and payroll made during the period 17th April, 1979 and 28th September, 1979 were not made in accordance with the provisions of Part B of the plaintiff's authorised signatures resolutions of the 11th February, 1979. However, he said the bank had "little alternative" as otherwise the plaintiff's business would have collapsed and the bank would have been left unprotected.

The symbol "M", he said, indicates that credits were made by way of debit memos and not by cheque deposits. He admits that the symbol "M" was omitted from account 114-157-1. It was the duty of the key punch operator at the Data Centre in Kingston where the processing of accounts was done, to apply the symbol "M".

With respect to debit memos other than those for wages/payroll bills, Mr. Robinson said, he knew of no reason why such debit memos should be countersigned by an officer of the plaintiff company.

I will deal with other aspects of his evidence when considering the specific claims of the plaintiff.

The Plaintiff's Claims

(1) Damages for Negligence

The Plaintiff Eden at paragraphs 19 to 21 of the Statement of Claim avers that the Defendant in breach of its alleged duty to exercise a reasonable degree of skill and care as bankers to the plaintiff negligently and wrongfully allowed or permitted the plaintiff company's account to be operated in a manner contrary to the terms and conditions of the agreement entered into between the Defendant and the Plaintiff.

In the particulars of Breach of Duty the plaintiff relies on the particulars of the Defendant's alleged breach of contract with the plaintiff and alleges a failure of the Defendant to discolse certain information to Alton Jenoure and Heidi Reidell and failure

to observe the provisions of the Articles of Association of the Plaintiff company and the resolution of plaintiff's Board of Directors.

Counsel for the Defendant made the following submissions:

(1) That the claimby the Plaintiff Eden for damages for negligence - a claim in tort - cannot be sustained for the reason that the Plaintiff Eden and the Defendant being in a contractual relationship with each other, the Plaintiff cannot rely on the law of tort to provide it with greater protection than that for which it has contracted.

(2) That the claim for damages for negligence cannot be sustained because the alleged loss and damage as particularised in the plaintiff's Statement of Claim (paragraph 21) reflect "pure economic loss" and such loss is not recoverable.

Counsel relied on **Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd., and Others (1985) 2 All E.R. 947 P.C.** and **Laufer and Others v. International Marbella Club S.C.C.A. No. 2 of 1988.**

In the Laufer case the Court of Appeal reviewed the authorities including the decision of the Privy Council in the Tai Hing case and held:

> "The position therefore is that since a party to a contract cannot rely on the law of tort to provide greater protection than that for which he had contracted much less can a stranger to the contract rely on a breach of that contract to sustain a claim in tort."

The court concluded that where the parties had delimited their rights and obligations in contract it was impermissible for one such party to extend the obligations of the other party by suing in tort.

As regards a claim for pure economic loss as damages occasioned by negligence the Court of Appeal in the Laufer case held:

> "It is our considered opinion, consonant with the weight of the authorities, that where there is no allegation of physical damage to property or person, an allegation which sounds only in economic loss cannot support a cause of action in tort."

This principle was emphasised by the House of Lords in **Murphy v. Brentwood D.C. (1990) 2 All E.R. 908.** This court regrets that it did not have the benefit of submissions on behalf of the plaintiff in this regard.

I accept the Defendant's submission that the present state of the law is that no duty of care in tort is owed by a banker to its client in the absence of a contractual duty of care or of a "special relationship of proximity between the parties as would introduce the principle of reliance enunciated in **Hedly Byrne v. Heller & Partners (1964) A.C. 462.**

Accordingly it is my view that in this case the plaintiff cannot rely onthe law of tort to provide it with greater protection than that for which it had contracted.

I hold that the Defendant owed no duty of care in tort to the plaintiff Eden in respect of the operation of its account 114-157-1 as is alleged in its pleadings since there is no special relationship of proximity between them as would be wide enough to embrace pure economic loss.

Declaration and Damages for Breach of Contract

The plaintiff seeks a declaration that the defendant wrongfully debited the plaintiff's account No.114-157-1 with the amount of $190,391.76. This declaration can only be made if the court finds that the Defendant has broken its contract with the plaintiff Eden.

The documents required for the opening of this account were, The Board of Directors Resolution, Agreement for Operation of Account, Signing Authority, Signature Card, Memorandum and Articles of Association. These documents govern the operation of the account by both the Defendant Bank and its customer the plaintiff company.

The Shareholders and the Directors of the plaintiff company were at all material times Alton Jenoure, Heidi Reidell, Jenoure Gooden and Vivienne Gooden.

The Defendant admits that the Resolutin of Directors regarding banking account was passed in accordance with the Defendant's standard form of resolution. The Resolution which appointed the Defendant as the plaintiff's banker placed the defendant on notice of the Articles of Association of the plaintiff company by being headed up in the following manner:

> " Resolution of Directors Regarding Banking Account. The authority given by this resolution must be in accordance with the provisions of the Memorandum and Articles of Association."

Clause 2 of the resolution provides:

> "The Bank be and is hereby instructed and authorised to honour the signature(s) of such person or persons as are designated as authorised signatories from time to time on form J. 218 duly executed by the company under seal and delivered to the Bank to all cheques, bills, dividend or interest, warrants and other documents drawn on or made payable with the Bank whether the account is overdrawn by the payment thereof or in credit, and to any order to withdraw any or all securities or other property in the hands of the bank including any box or boxes, sealed envelopes or packets and their contents, and the Bank be and is hereby authorised and instructed to act on the same signature(s) in arranging or granting credits or guarantees in Jamaica or abroad to or for the company and under its responsibility."

Clause 5 reads:

> "The authorised persons designated on Form 218 be and are hereby authorised to arrange with the Bank for advances by way of loan, overdraft or otherwise to be made or continued from time to time."

Clause 6:

> "The Bank be furnished with Form J.218 setting out the full names of all persons authorised to sign for the company from time to time together with specimen of their signatures (Form 1791) and that in the event of any change in such authorised persons amended Form be forwarded to the Bank. Each such form when filed with the Bank shall be binding in the company until notice to the contrary shall have been given to the manager of the branch of the Bank at which the account of the company is kept, and receipt of such notice has been duly acknowledged in writing."

Clause 7:

> "A copy of this resolution be forwarded to the Bank and that it shall remain in force until rescinded by the Board, resolution notice of which shall have been given to the Manager of the branch of the Bank at which the account of the company is kept, and receipt of such notice has been duly acknowledged in writing."

The Defendant's Form J.218 was duly executed under seal by the Plaintiff setting out the names of all persons authorised together with their specimen signature on Form 1791. The persons authorised to sign were:

> "The Managing Director to sign jointly with Alton Jenoure or Heidi Reidell
>
> or
>
> The Secretary/Director to sign jointly with Alton Jenoure or Heide Reidell."

"The Agreement for Operation of Account" set out the mandate and the conditionfor repayment of amounts debited to the plaintiff company's account, Clauses 9 and 10 thereof provide:

Clause 9 "The Bank is hereby authorised to honour the signature(s) and act upon the instruction of such person or persons as may be designated by the undersigned from time to time as authorised signatories (or in the case of a company duly executed under its common seal) until such time as the Bank shall have received written directions to the contrary and the undersigned accept(s) full liability for anything done by such person or persons ostensibly acting within the terms of the authority thereby given."

Clause 10 "The undersigned will repay to the Bank all amounts debited to the account of the undersigned in accordance with the provisions of this agreement."

Regulation 92 of the Articles of Association contained the following provision:

> "All cheques, promissory notes, drafts, bills of exchange and other negotiable instruments, and all receipts for moneys paid to the Company shall be signed, drawn, accepted, endorsed or otherwise executed, as the case may be, in such manner as the Directors shall from time to time by resolution determine."

The Defendant knew of the above quoted provisions but states that it acted pursuant to a resolution passed at an extra ordinary general meeting held on October 2, 1979. The Defendant claims that the account was operated by persons ostensibly acting within the terms of the authority given by this resolution. This resolution, the Defendant claims was duly signed and sealed and was in the following term:

> "Be it resolved that the signatures necessary for Banking - transactions, be that of the Managing Director, together with that of any other Director."

This "Resolution" bore the signatures of the Managing Director and Secretary. This resolution purports to change the authorised persons as stated in the original banking resolution of the 15th February, 1979.

At paragraph 14 of its Defence the Defendant states that it relied thereon and acted in accordance therewith.

I agree with Dr. Manderson-Jones that the rule in **Royal British Bank v. Turquand [1843-60] All E.R. 435** cannot avail the Defendant

in these circumstances. In **Rolled Steel Products Ltd. BSC (1985) 3 All E.R. 52 at 53 (g) (i)** it was held that:

> "The defence that a company could be assumed to have properly performed acts which were within its constitution was not an absolute and unqualified rule of law applicable in all circumstances but only applied in favour of persons dealing with the company in good faith, that being a matter of fact which was capable of being disproved by evidence that the defendant knew of the irregularity in the company's procedures or if the circumstances were such as to put the defendant on inquiry which he failed duly to make."

In this case the Defendant knew that any change inrespect of the authorised persons must be done by a resolution of the Board of Directors.

The evidence before me is that Mr. Robinson, the Defendant's Manager advised Mr. Jenoure Gooden and his wife Mrs. L. Vivienne Gooden to proceed by way of an extra ordinary general meeting. Moreover the undisputed evidence is that the Defendant required the Goodens to sign the Form J218 long before an extra ordinary general meeting was in fact convened.

In the circumstances of this case the Defendant "must be taken not only to have read both Memorandum and the Articles of the plaintiff company, but to have understood them", Slade L.J. at p. 77 (c) ibidem.

I find that the Defendant knew that Mr. Jenoure and Miss Reidell, two directors, did not want the Goodens alone to sign and accordingly would not support the change in signing authority. This change effectively removed the safeguard on which the defendant was put on notice.

In my view there can be no doubt that in light of the pleadings and the evidence the Turquand rule is not applicable.

Indeed Mrs. Hudson-Phillips Q.C., for the Defendant did not in her written submission seek to rely on this rule. She conceded that payments made by debit memos during the period 17th April, 1979 and 28th September, 1979 (pp. 76 to 81 of Volume 1 of Agreed Bundle) were not made in accordance with the provisions of Part B of the plaintiff's company authorised signatures resolution of the 11th

February, 1979 (p.58A Vol. 1). However she contends that the Defendant is entitled to recover from the plaintiff company the sums advanced to its managing director and/or its secretary as these were for the payment of wages and/or payroll. This she submitted, is in accordance with the principle of equity that where a third party's money (the Defendant's) is obtained by an agent's (the managing director's/secretary's) unauthorised act and applied for the benefit of the agent's principal (the plaintff Eden) the principal is liable to restore the money even though the third party knew the agent was not authorised to obtain or receive the money.

In support of this submission counsel for the Defendant relies on the cases of **Reversion Fund and Insurance Co. Ltd. v. Maison Cosway Ltd. (1913) 1 KB 364** and **Rolled Steel Products Ltd. v. BSC 1985 3 All E.R. 52.**

The head note in the Reversion Fund case is as follows:

> "The managing director of the defendant company was by the (term of his appointment) prohibited from borrowing money on behalf of the company, unless specially authorised so to do by the company. Without authority from the defendant company he borrowed money on its behalf from the plaintiff company which money he applied in discharging existing legal debts of the defendant company. The plaintiff company knew through its officers, when the advance was made, that the managing director of the defendant company had no authority to borrow on its behalf."

By a majority it was held that the plaintiff company was entitled to recover from the defendant company the money advanced notwithstanding its knowledge as before mentioned. Counsel for the Defendant refers to a passage from the judgment of Buckley, L.J. at p.376:

> "The principle is that, where A has found money for payment of a debt due from B to a third person and the money has been applied to the payment of the debt, A is entitled to say that B has had from him that money, becuase it has been applied in discharge of B's debt, and therefore in equity B owes him the amount of money so applied. That is recognised as being the principle applicable in such cases by Collins M.R. in **Bannatyne v. McIver**."

Having reviewed some of the earlier cases Buckley, L.J. at p.378 expressed himself thus:

> "If then, as appears from these decisions the prohibition of borrowing does not apply in such cases, what difference can it make whether the person advancing the money does know or does not know of the absence of authority to borrow?"

At p.382 he continued:

> "I have gone through the authorities at some length because the question seems to me to be one of considerable importance. I cannot find any reason for saying that, in this second class of cases, namely, where the money is borrowed by an agent without authority from the principal but is applied in paying debts of the principal, the question of knowledge by the lender of the agent's want of authority to borrow is material for the purposes of the equitable doctrine on this subject, the basis of that doctrine being that the transaction is not, in substance, one of borrowing at all. The whole question for the purposes of that doctrine is whether the money found by the lender has been applied so as to relieve the so-called borrower of liability. If and to the extent that it has been so applied, he cannot retain the money. The lender is not entitled to stand in the shoes of the original creditor by subrogatio, but the debtor whose debt has been paid with his money is bound to repay that money to him. On the question of law I am of opinion that the plaintiff company is entitled to recover. As regards the fact of knowledge I have no doubt that the officers of the plaintiff company must be taken to have known that the managing director of the defendant company had no authority to pledge the credit of the company for the loan, but I do not think that it is material whether they knew or not."

In concurring with Buckley L.J., Kennedy L.J. had this to say:

> "The present case appears to me to be a strong case for the application of the doctrine so stated, because in some of the cases in which it has been applied the company had no borrowing powers at all, whereas here the company itself had power to borrow, and the most that can be said is that the person acting as agent required special authority to borrow on behalf of the company. That appears to me to be an a fortiori case as contrasted with one in which the company itself had no power to borrow. If the equitable doctrine in question is applicable where a company had no power to borrow, there seems to me to be a stronger case for its application where the only irregularity was that the agent had not been specially authorised to borrow, and he had done so, not for his own benefit, but for the benefit of his principals, who had a right to affirm his action."

The Reversion Fund case was applied in the Rolled Steel Products case. Slade L.J. at p.89 (c) to (e) said:

> "As at present advised, I do not think that an order in the form suggested by counsel would do equity. The effect of my conclusion in the due authorisation point is that the directors of R.S.P. purporting to act on behalf of R.S.P. but without its authority have borrowed a sum of £401,448 from Colvilles..... This particular sum, however, was immediately applied by the directors of R.S.P. for the benefit of R.S.P. in discharging the liability of R.S.P. to S.S.S. The result was that the aggregate liabilities of R.S.P. remained the same, save for the obligation to pay the interest to Colvilles at a rate higher than that (if any) which had been agreed with S.S.S."

All three Lord Justices were at one that since RSP was at all material times under an obligaiton to repay the £401,448 to Colvilles or BSC, RSP could not then seek redress against the defendants on the basis that the sum of £401,448 was improperly paid to BSC.

The Debit Memos

In the instant case the plaintiff company was authorised by its memorandum to borrow money and had passed the relevant resolution. However as said before the managing director and the secretary were not authorised to sign the debit memos in question. In light of the equitable principle enunciated in the **Reversion Fund** and **Rolled Steel Products** cases I must therefore turn my mind to the issue as to whether or not the plaintiff company had the benefit of the sums advanced by way of the debit memos.

The defendant in its defence (paragraph 19) states that internal debit forms or memos were on the signature of the Managing Director and the Secretary/Director employed to withdraw funds for payment of wages and operating expenses for and on behalf of the plaintiff - charges which the plaintiff company was compelled to pay. The plaintiff in its Reply (paragraph 16) did not traverse this but merely claims that the defendant acted "wrongfully and unlawfully" in breach of its contract with the plaintiff for the operation of the account and in contravention of the plaintiff's authority for the operation of the account.

Mr. Robinson's evidence is that the debit memos represented amounts on the weekly payrolls as prepared by the Managing Director of the plaintiff company who was required to sign receipt of the

wages. The Managing Director he said, also had to provide the cashier with a breakdown of the wages. These memos, span the period 17th April, 1979 to 28th September,1979. It was not the custom of the Defendant to verify the names of employees of any company before paying out the wages/payroll bills.

There was no disruption of the running of the plaintiff company because of the non-payment by the plaintiff of its employees. Mr. Robinson said he visited the Club and played golf there during the relevant period, he found the course properly maintained and saw persons working in the Club.

Under cross-examination by Dr. Manderson-Jones he agreed that the plaintiff company was lodging as much cash to the account as was being withdrawn by way of debit memos for wages. The reason for this was that it was better accounting practice to lodge credits to the account and then use debit memos to pay wages.

He admitted that the symbols for debit memos were invariably omitted fromthe bank statements of the company making them appear to be cheques. The debit memos, he agreed, did not dislcose the names of the employees to whom the wages were to be paid. He disagreed with the suggestion of counsel for the plaintiff company that the use of the debit memos was to circumvent the letter and purpose of the signing authority and not to provide a loan for wages.

I agree with Mrs. Hudson-Phillips Q.C., that in light of the pleadings, the documentary evidence (see particulars of debit memos which indicate that the payments represent wages/payroll bills), in light of the evidence of the Defendant's Manager - Mr. Robinson and in the absence of any evidence to the contrary the reasonable conclusion is that such payments were in fact made for wages/payroll bills.

On the basis of the equitable principle enunciated in the Reversion Fund case the Defendant is entitled to recover the money used to pay the wages of the employees of the plaintiff company.

Let me at this point move on to consider debit memos other than those for wages viz:

(i) $6,158.42 - transfer from account No.114-157-1 to account 117-691-6.

(ii) For $79.62 overdraft interest and

(iii) For $76,000 transfer from account 114-157-1 to 117-691-6.

With respect to (i) and (ii) the contention of the defendant is that they were made pursuant to an arrangement made in November 1978 with Mrs. Reidell, Mr. Alton Jenoure and the Goodens, all of whom subsequently became shareholders and directors of the plaintiff Eden.

The arrangement with these four persons was that the plaintiff would take over the liabilities represented by account 117-691-6 once the plaintiff company had been incorporated to take over the operations of the Ironshore Golf and Country Club which they were operating through account 117-691-6 which was the personal account of Mrs. Reidell, Alton Jenoure and Jenoure Gooden. Mr. Robinson admitted in cross-examination that he had referred to these debit memos in a document, which he signed on the 11th July, 1980, as cheques. He said he so described them because at the time he had not seen the symbol "M" on the Statement of Account. He also in answer to Dr. Manderson-Jones said that it was only while he was in the witness box i.e. some 13 years later that he realised that these amounts were not in fact cheques but debit memos. However when further pressed by then counsel for the plaintiff company he conceded that he himself had given instructions and authorised the issue of both debit memos and had in fact initialled the one for $6,158.42. Thus it is clear that the plaintiff company at the time did not authorise the transfer of these amounts ($76,000 and $6,158.42) from its account 114 to the personal account 117 of Mrs. Reidell, Mr. Jenoure and Mr. Gooden.

The question for the court therefore is whether the defendant bank was entitled to make such transfers. As I have already mentioned the defendant is saying that these transfers were done pursuant to an arrnagement with Mrs. Reidell, Mr. Alton Jenoure and Mr. and Mrs. Jenoure Gooden. According to him in November, 1978 they told him they were taking over Ironshore Golf Club. They intended to form a company to do so. They wanted overdraft facility of $50,000. They showed him letter of intent. He told them the Bank would have no problem granting them such facility as long as they put up full cash collateral and as long as it was understood that the overdraft

would be in the name of the company. He told them he would also wish personal guarantees from them, all of whom would become shareholders and directors. It was agreed. He emphasised that it was understood that as soon as the company was formed that the advances would be transferred into the name of the company hence the reason for requesting personal guarantees.

On the 21st February, 1979 the shareholders of plaintiff Eden attended at his office to finalise the prior arrangement. By this arrnagement $45,000 was advanced by way of overdraft and $31,000 by way of demand loan.

The overdraft limit in the personal account was accordingly extended to $76,000.

On the 21st February, 1979 the personal account 117 was in overdraft to the tune of $80,143.68 - this he said, constituted a loan. The limit was exceeded.

It was necessary, he said, for the $76,000 to be debited the plaintiff's account 114 and credited to the personal account 117 pursuant to the arrangement he had with the shareholders of the plaintiff company.

In answer to Dr. Manderson-Jones the witness said that the $31,000 was subsumed in the overdraft in the personal account 117. It appeared as a credit in the company's account 114 because the demand loan was extended in the name of the company and had to be credited to the company's account. At that point in time the facilities in the personal account would have been transferred to the company's account as the bank then held the personal guarantees of the shareholders.

The sum of $6158.42 was transferred by way of debit memo from the company's account 114 to the personal account 117 to close the latter account. This he said, was also done pursuant to the said arrangement.

Mr. Alton Jenoure, agreed that Mr. Jenoure Gooden and himself signed a demand note for $31,000. This he said was to cover overrun on account 117-6-916 and had nothing to do with Eden's Account 114. He also agreed that all four directors signed a guarantee for $46,000 on 16.2.79. This too, he said, was in respect of account 117 and had nothing to do with account 114. When shown another

guarantee (see page 132 Vol. 1 of Agreed Bundle) he agreed that it was a guarantee for $31,000 signed by the four directors on the 16.2.79. This was to cover the overrun on 117, he claimed. The four persons were not signing as directors they were signing personally because Eden Country Club was not in existence at the time. He said they (the directors) were all asked to sign a blank form the name "Eden Country Club Ltd" was not written on the form at the time they signed.

Mrs. Reidell's evidence is in the same vein. It is important to note that this was not pleaded by the plaintiff.

In answer to Mrs. Hudson-Phillips Q.C. he denied that the bank agreed to provide them with temporary facilities in their names pending the incorporation of the company to operate the business.

He agreed that the company stamp "Eden Country Club Ltd" was on the demand note. This he said was put on afterwards perhaps by Mr. Gooden (the Managing Director). He did not agree that the promissory note had nothing to do with account 117. Both Mrs. REidell and Mr. Jenoure claimed that the guarantees they signed were guarantees of their own debts. Mrs. Reidell said Mr. Jenoure was also guaranteeing his own debt. But what of Mrs. Gooden? All four shareholders signed guarantees. Mrs. Gooden has no interest in personal account 117. Quite apart from the terms of the guarantee what is Mrs. Gooden doing executing guarantee in respect of the personal account?

I agree with Mrs. Hudson-Phillips Q.C., that the evidence of Mrs. Reidell and Mr. Jenoure in this regard is not logical and therefore improbable. One does not guarantee one's own debts - that is indeed outside the concept of a guarantee.

It is difficult to believe that both these witnesses who are very intelligent persons would have executed a guarantee which did not contain the name of the customer having read the document before signing it.

In a letter dated November 6, 1980 addressed to Mr. Robinson and signed by Mr. Alton Jenoure and Mrs. Heidi Reidell they seem to be saying otherwise. This letter is captioned:

"Re: Account Eden Country Club Ltd.

The first paragraph reads:

> "We are in receipt of individual registered letter dated August 1, 1980 demanding payment of $77,000 immediately by virtue of Forms 812 which we signed on February 16, 1978 (sic) to graranteed advances to the subject account. (emphasis supplied)

This clearly is in conflict with their oral evidence. I find on the balance of probabilities that although the plaintiff company was not yet incorporated when the guarantees were signed the name "Eden Country Club Ltd" was on the Forms. I find that there was an understanding, as claimed by the Defendant, that as soon as the plaintiff company was formed the advances would be transferred into the name of the company. The letter of intent which they took to the Bank was signed by Mr. Alton Jenoure on the 7th November, 1978 on behalf of Eden Ltd., although it was not yet incorporated. This to my mind confirms the evidence of Mr. Robinson.

Accordingly I hold that the plaintiff company cannot now contend that the debits of $76,000 and $6,158.42 by way of internal debit memos were improperly made - see **Amalgamated Investment and Propery Co. Ltd. (in liquidation) v. Texas Commerce International Bank Ltd. (1981) 3 All E.R. 577 C.A.** in which it was held that where the conduct of parties took place on the basis of a state of affairs which was agreed and believed by both parties to be true, that gave rise to estoppel by convention.

Both Mrs. Reidell and Mr. Jenoure are shareholders and directors of the plaintiff company. Although the company is a separate and distinct entity from its shareholders, they were parties to the arrangement with the defendant. They and Mr. Gooden sought banking facilities for a limited liability company to operate the Club and Golf Course. Since the the plaintiff company was not yet incorporated the defendant could only provide initial facilities through the medium of an account in the names of Gooden and Jenoure pending the incorporation of the limited liability company. I agree with counsel for the defendant that in such circumstances any collateral security taken in respect of the venture could only have been

taken in support of the liabilities of the company which would have carried out the venture. I accept the evidence of Mr. Robinson in this regard.

Mrs. Reidell and Mr. Alton Jenoure are estoppel by convention from contending that the debits of $76,000 and $6,158.42 were improperly made.

Cheques

All the cheques at pages 82 - 99 of Volume 1 of the agreed bundle were drawn on the Plaintiff Eden's account 114-157-1 during the period 10th October, 1979 to 11th January, 1980. They were signed by the Managing Director (Mr. Jenoure Gooden) and his wife, the Secretary, after the replacement authorised signature resolution passed by the company in extraordinary general meeting on the 2nd October, 1979.

This resolution was not passed by the Board of Directors of the Plaintiff as was required by Article 92 of the Articles of Association. It was accordingly null and void. It follows therefore that all those cheques were drawn contrary to the Plaintiff's banking arrangements that were in force. In other words they were unauthorised.

Mrs. Hudson-Phillips Q.C on behalf of the Defendant referred to the Reversion Fund case supra and made silimar submissions to those made in respect of the debit memos. The Plaintiff in its Statement of Claim avers that the Defendant in breach of its duty, from the 2nd October, 1979 to the 11th April, 1980, allowed sums of money to be withdrawn from the Plaintiff Company's account by the said Managing Director and/or Director/Secretary of the Plaintiff's Company (Paragraph 18 (c)). The Defendant in paragraph 21 of its defence denies paragraph 18 (c) and stated that it acted in accordance with the resolutions and/or instructions of the Plaintiff.

Mrs. Reidell testified that she got on well with the Goodens until February 1979 when she refused to sign blank cheques sent to her by them. She said she also refused to sign cheques which did not have bills attached to them. The Goodens became angry and stopped sending cheques to her and Mr. Jenoure.

She stated that she received assurances from them that they were operating the business from the daily cash sales.

She examined the cheques and counted seven (7) cash cheques, four cheques made out to L.V. Gooden (the Director/Secretary) and one to J.A. Gooden the Managing Director. She said she did not know some of the payees and as far as she knew the Plaintiff had no business with them. She knew some, but did not know whether or not the Plaintiff Company had any dealing with them. She identified one cheque payable to the Jamaica Public Service.

Counsel for the Defendant submitted that an analysis of the cheques will reveal that most of them were drawn in favour of the suppliers of food and drink, equipment, electricity, hotel supplies, petrol, all items which could properly be used in the operation of the restaurant, club and golf course in which the Plaintiff Company was engaged.

Since the Company's account was in overdraft during the relevant period the Defendant contends that the Plaintiff having had the benefit of the payment of its debts by money advanced by the Defendant for the honouring of these cheques, is liable to repay those sums to the Defendant.

I am afraid I cannot accept this contention. In the first place Defendant did not aver in its defence that the cheques were used for the purposes of the Plaintiff. Mr. Robinson in his evidence made no mention of the purposes for which the cheques were drawn. Unlike Ms. Reidell he took no steps to ensure that they were for the purpose of the Plaintiff's Company. He could have insisted that bills be attached to the cheques before he approved them. His evidence is that he approved all the cheques by initialling them. Secondly apart from the cheque made out to Jamaica Public Service Company the inference cannot be drawn that the cheques were employed in <u>discharging the Plaintiff's debts</u>. Indeed they could have been used for example, to effect purchases thereby increasing the indebtedness of the Plaintiff. The Defendant is only entitled to recover the sum which had in fact been applied in paying the legal debts and obligations of the Plaintiff.

In my view the Defendant has failed to establish that the money advanced by the Defendant for the honouring of the cheques in question was applied in discharging the debts of the Plaintiff's Company. The Plaintiff is therefore entitled to recover from the Defendant the amount debited by way of cheques signed by the Goodens in breach of the signing authority. The Total amount so debited is $38,288.00.

Amount debited from crossed cheque

Mr. Robinson admitted that crossed cheque should not have been cashed. This cheque was for $3,500 payable to the Plaintiff and should have been lodged.

Instead $3,000 was paid out as cash and only $500 deposited to the Plaintiff's account.

The Defendant concedes that the Plaintiff is entitled to recover $3,000.

Cash Collateral of $25,000

Dr. Manderson-Jones, counsel for the Plaintiff indicated during the trial that the cash collateral of $25,000 was relevant to the Plaintiff's claim for an account.

The Defendant contends that it is not accountable to the Plaintiff in respect of this sum.

According to Ms. Reidell after account 117 was opened $25,000 was pledged by Mr. Jenoure and Mr. Gooden. The hypothecation form signed by both is headed: "Collateral assigned as security for the present and future obligations however, arising of EDEN COUNTRY CLUB LTD - (herein after called the "Customer" to the ROYAL BANK JAMAICA LIMITED (herein after called the "Bank". This form is dated 24th November, 1978.

Mr. Alton Jenoure's evidence is that he pledged $25,000 jointly with Mr. Jenoure as security to cover overdraft in respect of account 117-691-6. This account was closed by the bank in May 1979. He claims that the $25,000 was not returned to him, neither was any portion of it. He did not know if it was taken into calculation when the account was closed.

Mr. Robinson's evidence is that the hypothecation form was signed in his presence and the full details on the form were there

when it was signed. The $25,000 and accumulated interest were applied to the non-productive ledger. He agreed with Plaintiff's counsel that this sum is not shown on the statement of account to have been credited to the Plaintiff company.

The Plaintiff's contention is that this sum should not have been transferred to a non-productive ledger but should have been taken into reckoning against the balance of Plaintiff's account number 114 or any counterclaim which may be established. But Mr. Robinson's evidence is that account 114 was declared a non-productive account. The statement of account shows that on 22nd April, 1980 the account 114 was credited with $101,233.35. Immediately before there was an overdraft of the same amount. Mr. Robinson explained that the effect to this credit was to make the account non-productive by transferring it to the non-productive ledger. The cash collateral in the name of Gooden and Jenoure with accumulated interest was credited to this non-productive account thereby reducing it. The non-productive ledger card on which the credit was noted, was among documents sent to Ms. Reidell a director and shareholder of the Plaintiff Eden.

Clearly the contention of the Plaintiff is misconceived. There can be no doubt that the Defendant was entitled to apply the cash collateral, as it did, against the sum due from the Plaintiff Eden.

Mrs. Hudson-Phillips Q.C. also submitted, correctly in my view that this sum is not a sum in respect of which the Defendant is accountable to the Plaintiff. It was specifically pledged by Messrs. Gooden and Jenoure as collateral security for the debts of the Plaintiff Eden and has been applied for that purpose. If the Defendant were accountable to anyone in respect of this sum, it would be accountable to Messrs. Jenoure and Gooden, neither of whom is a Plaintiff in the suit.

Accordingly this Court cannot properly make an order in respect of the Gooden and Jenoure cash Collateral.

Cost of Bill of Sale

Two debit memos for a total of $1,958.50 were drawn against the Plaintiff's account 114. These were in respect of costs for preparing a Bill of Sale. This Bill of Sale was over property in which the Plaintiff had no interest.

Mr. Robinson under cross-examination admitted that this sum was debited contrary to signing authority.

It seems to me that the Defendant is not disputing the fact that this sum was improperly debited in that it was not used to satisfy the legal obligation of the Plaintiff.

However, it must be noted that the Plaintiff's account 114 was at all material times in overdraft. Also, Mr. Robinson's evidence is that the Plaintiff's account was re-credited with $1,886 which was the lagal cost in having the Bill of Sale prepared and with interest that was charged on this amount.

Interest charged - $7,754.16

The Plaintiff seems to be relying entirely on a statement made by Mr. Robinson in an affidavit to found this claim (see Vol. 2 p. 50). In that affidavit Mr. Robinson said that it would also be noted that during the period April to October, 1979 $7,754.16 was charged automatically by the computer representing interest, service charges and stamp duty.

Ms. Reidell in evidence states - "I am not of the view that the amount $7,754.16 was due to the bank; the bank was not entitled to this amount as stated by Mr. Robinosn in his affidavit." But Mr. Robinson in cross-examination testified that the amount was not improperly charged. The evidence before me is certainly not sufficient to establish this claim. The Plaintiff has not shown that it is entitled to this amount.

Summary

1. Court finds that the Defendant wrongly debited the Plaintiff Eden's account 114 with the following sums:

   (i) $3,000 - the sum paid out in cash from crossed cheque for $3,500

(ii) $38,288.00 - amount debited by way of unauthorised cheques during period 2.10.79 to 11.4.80

(iii) $1,958.50 - amount debited to cover costs for preparing Bill of Sale

(2) Court finds that the Defendant properly debited the Eden's account with the following sums:

(i) $42,258 - total amount debited by way of debit memos - period April 1979 to October 1979.

(ii) $76,000 - Amount transferred from company's account 114 to personal account 117 by way of debit memo dated 21.2.79 (Ex. 3)

(iii) $6,158 - amount transferred from account 114 to account 117.

Suit No. C.L. R080 of 1982 - Heidi Reidel v. Royal Bank Ja. Ltd.

In this suit the Plaintiff Reidell seeks the release of her U.S. $12,500.00 Certificate of Deposit, interest thereon, damages and costs.

Plaintiff Reidell claims that she was a signatory to account number 117-691-61 which was opened on the 27th November, 1978. On the 11th December, 1978 the Plaintiff Reidell assigned U.S.A Term Deposit (Time Savings Certificate) No. 1972 as a collateral for Account No. 117-691-61.

On the 28th May 1979 account 117 had a zero balance and thereafter was never drawn against, thereby, the Plaintiff claims, entitling her to her certificate of deposit.

The Defendant in its defence claims that the certificate of deposit was assigned as security for the "present and future obligations however, arising" of Eden Country Club Limited a company of which the Plaintiff Reidell was at all material times a director and shareholder. Eden Country Club Limited operated account 114 with the Defendant's bank.

The Defendant further claims that the said Term Deposit No. 1972 was renewed and remained assigned to the Defendant on the said terms and conditions by certificates Nos. 2129 and 2254 the

latter maturing on the 23rd June, 1980. The Defendant states that the account of Eden Country Club Limited was overdrawn in the sum of $96,838.46 as at 31st July, 1982 and was throughout the relevant period overdrawn in sums in excess of the face value of the Time Saving Certificate. Accordingly the Defendant claims it is entitled to apply the sum as per the said Time Savings Certificate or its successor in reduction of the said debt.

In its counterclaim the Defendant claims:

(1) A declaration that it is legally and beneficially entitled to Time Savings Certificate No. 2254 and/or funds represented thereby.

(2) An order that Riverside Community State Bank of Minneapolis deliver up to the Defendant or its agent the said Time Savings Certificate.

(3) That Judgment be entered for the Defendant in the sum of $98,560.00.

(4) That the amount realised from the Time Savings Certificate be applied towards satisfaction of the said judgment

(5) Costs and interest at commercial rates

Plaintiff Reidell's Hypothecation of U.S. $12,500

The real issue here is whether the Plaintiff's Time Saving Certificale NO. 1972 was provided as security for account 117 or for Eden Country Club Limited's account 114.

Mrs. Reidell's evidence is that she was a signatory to account 117 which was opened on the 27th November, 1978. She referred to some thirty cheques drawn on that account and signed by her and many deposit slips, in support of her contention. She recognised her signature on copy of hypothecation form (see page 117 Vol. 1 of agreed bundle) in respect of U.S. $12,500.

However, she is contending that the copy is not the facsimile of the original document in that the words "Eden Country Club Ltd." were not on the original document. "There was no customer assignation on the document when I signed it in 1978", she insisted. She identified another hypothecation form (p. 118 of agreed bundle) for

renewals of initial Term Deposit. She denied signing this. She only signed one and when she signed it nothing in manuscript was thereon and it did not bear a date. It is her contention that "Eden Country Club Ltd." could not have been on the hypothecation form when she signed it because the Company was incorporated on the 18th December, 1978 and the form bears the date 11th December, 1979 before the name was even assigned to the Company.

She stated that she indicated to the Defendant that she was assigning her Time Saving Certificate to account 117-691-6 and to no other. She did not subsequently alter this instruction.

In cross-examination she agreed that her name did not appear on account 117. The reason for this, she said, was that as a foreigner she needed permission from the Bank of Jamaica to borrow money. However, she was quick to say that the purpose for opening the account was not to borrow money for the venture they were about to undertake. When pressed by counsel she admitted telling the Court that the purpose for opening account 117 was to enable them to refurbish the dormant golf club. She nonetheless insisted that they intended to use their own money and not to borrow. When shown paragraphs 4 and 5 of an affidavit she swore on January 11, 1982 she admiited that one of the reasons for opening account 117 was to obtain a line of credit. She agreed they had to go the route of opening account 117 because Eden Country Club Ltd. had not yet been formed

As said before Mr. Jenoure's evidence supports Ms. Reidell's claim.

Mr. Robinson, the Defendant's Branch Manager, said that Mrs. Reidell's name does not appear on signature card in respect of account number 117-691-6 which is in the names of Jenoure Gooden/ Alton Jenoure. The signature card was received in evidence as Exhibit 8. He said the Hypothecation forms at pages 117 and 118 of Vol. 1 of agreed bundle were signed in his presence by the Plaintiff Reidell to secure advances in the name of Eden Country Club Limited for U.S. $12,500.00.

The document was prepared in duplicate, he stated, because there was another bank involved and that bank might require an original of the document. The p. 118 document was taken for his

bank and p.117 for the other bank which was the Riverside Community State Bank of Minneapolis, Minn.

The P. 117 document contained at the time of signing the name "Eden Country Club Ltd." The p. 118 document at the time of signing also had similar information. Whenever the Term Deposit matured the renewal Term Deposit plus interest was recorded on p. 118 form. Hence the manuscript thereon.

His evidence is that Mrs. Reidell came to him at the bank in December 1979 to endorse the Term Deposit for a further extension. He advised her that the bank was going to realise the security because the account was not operating properly. She asked that that action be postponed as she expected the tourist season to generate improved income. He agreed and she endorsed the Term Deposit for renewal for six (6) months.

The witness Robinson said he had occasion to call in the deposit a couple of weeks before its maturity in June 1980. He wrote the overseas bank and sent the security via the Royal Bank of Canada, N.Y. for collection. It was not honoured by the bank as Mrs. Reidell had taken legal action in the U.S.A. to restrain the release of the funds.

The submissions of Mrs. Hudson-Phillips Q.C. were to a great extent the same as those she made in respect of the Gooden/Jenoure hypothecation already considered in the Eden case.

As I have said before it is clear as can be that the intention of the Plaintiff Reidell and her associates when they approached the Defendant in November 1978 must have been to seek banking facilities for a limited liability company which would operate the club and golf course

I find it difficult to accept Mrs. Reidell's evidence that she made it clear to Mr. Robinson that she was assigning the Certificate of Deposit only to cover account 117.

As said before the letter of intent was signed by Mr. Jenoure on behalf of "Eden Ltd." although the company was not yet incorporated. This is not in dispute. It seems to me to be beyond dispute, that any collateral security taken in respect of the venture could only have been taken in support of the liabilities of the company which would carry out the venture.

It is the contention of Mrs. Reidell that as of the 28th May, 1979 account 117 had a zero balance and that her certificate of deposit should have been released to her then. Yet in her evidence in chief she testified that the Term Deposit was renewed in June 1979 and again December 1979 because she was still indebited on account 117. This is in conflict with her pleadings (paragraph 4 of Statement of Claim).

The documentary evidence (term deposit 2129 and 2254 at pages 120 and 121 of Vol. 1 of Agreed Bundle) shows that the term deposit was indeed renewed twice after the 28th May, 1979. The statement of account (page 143 of Vol. 1 of Agreed Bundle) shows account 117-691-6 to have a zero balance on 28th May, 1979 and no other liabilities since. This is consistent with Mr. Robinson's evidence.

On the state of the evidence before me there cannot be the slightest doubt that account 117-691-6 contained no liabilities after the 28th May, 1979.

Thus the reason given by Mrs. Reidell for renewing the certificates of deposit namely to cover liabilities of account 117 is not the true reason.

I agree with Mrs. Hudson-Phillips that the true reason for the renewals is that given by Mr. Robinson namely that the certificates were always intended to cover the liabilities of Eden Country Club Ltd. account 114-157-1, that at the time of the first renewal 5th June, 1979, the liabilities of the temporary account 117-691-6 had already been transferred to 114-157-1 and that at the time of the second renewal, the 24th December, 1979, the Plaintiff Reidell had specifically requested the Defendant to allow her to renew and not be realise it, in the hope that by the end of the 1979/80 winter tourist season, the liabilities of Eden Country Club Limited on its account 114-157-1 would have been reduced.

The fact that the instrument of hypothecation was executed on the 11th December, 1978 before the actual incorporation of the Company Eden Country Club Limited on the 18th December, 1978, does not necessarily support Mrs. Reidell's contention that the

name of the Company was inserted after the instrument was signed. Such conduct is consistent with the conduct of Mr. Jenoure, her associate , in signing the letter of intent on behalf of "Eden Ltd." before it was incorporated and does not necessarily mean that the instrument was altered after it was signed.

I agree with Defendant's submission that the legal defect of the pre-incorporation execution has been remedied by the renewal of the certificates and therefore of the hypothercation, after the incorporation of the company. It is the contention of the Defendant that having been induced by the Plaintiff to permit her to renew her certificate of deposit in December 1979 and having on the basis of that inducement acted to its detriment by advancing additional sums by way of overdraft to Eden Country Club Limited, the Plaintiff Reidell is estopped from denying that her certificate of deposit was hypothecated to cover the liabilities of the Company.

It is also my view that the principle of estoppel by convention as enunciated in the Amalgamated case already referred to in respect of the Jenoure/Gooden hypothecation, is applicable to the Plaintiff Reidell's case.

The Plaintiff did not challenge the validity of the instrument of hypothecation in her pleadings. In giving evidence both Mrs. Reidell and Mr. Alton Jenoure stated that at the time of its execution the form of hypothecation did not contain the name of the person in respect of whose debts it was being given. Even if this were so on the evidence before me - oral and documentary - it is clear to my mind that both parties conducted their mutual affairs on the basis which was agreed and assumed by both to be true, that the certificates of deposit were intended to be a collateral security for the liabilities of Eden Country Club Ltd. This was certainly the basis on which the Plaintiff Reidell and the Defendant had agreed for the Defendant to provide and on which the Defendant had in fact provided, a line of credit and over-draft facilities.

These circumstances, I think, give rise to an "estoppel by convention" which estopped each party as against the other from questioning the truth of the facts assumed to be true.

In the Amalgamated case (1981) 3 All E.R. 577 at p. 583 (h) Lord Denning M.R. had this to say:

"Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations. It may be used to complete a contract which would otherwise be incomplete: It may be used to introduce terms and conditions into a contract which would not otherwise be there: If it can be used to introduce terms which were not already there, it must also be available to add to or vary terms which are already there or to interpret them. If parties to a contract by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to enquire whether their particular interpretation is correct or not, or whether they had in mind the original terms or not. Suffice it that they have by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."

At p. 584 (e) the then Master of the Rolls concluded:

"So I come to this conlusion, when the parties to a contract are both under a common mistake as to the meaning or effect of it and thereafter embark on a course of dealing on the footing of that mistake thereby replacing the original terms of the contract by a conventional basis on which they both conduct affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them."

I accordingly hold that the Plaintiff Reidell cannot now challenge the validity of the hypothecation instrument.

On the evidence before this Court, she is certainly not entitled to the release of her Certificate of Deposit merely by virtue of the fact that account 117-691-6 had "a zero balance and thereafter was never drawn against".

The liabilities of account 117 were transferred pursuant to an arrangement between the parties to the Company's (Eden's) account 114. In paragraph 31 of the Plaintiff Reidell's Defence to Conterclaim, she admitted that there was an overdraft of $62,544.95 on the Company's account 114 as at 31st March, 1979.

Since the Plaintiff Reidell is, on the the term of her guarantees liable in the sum of $77,000.00 and interest thereon at 14% p.a. from date of demand for payment, that is, the 1st August 1980, the Defendant is entitled to apply the Plaintiff's certificates of deposit to the liquidation of the Company's liabilites.

In its Defence and Counterclaim the Defendant at paragraph 9 stated that the account of Eden Country Club Limited was overdrawn in the sum of $96,838.46 as at 31st July, 1982 and was throughout the relevant period overdrawn. The Plaintiff Reidell did not deny this.

Summary

1. Judgment for the Defendant in respect of Plaintiff's claim for release of Certificate of Deposit.

2. Judgment for Defendant on Counterclaim.

Conclusion

1. Suit No. E. 051 of 1980

   (i) Court grants Declaration that Plaintiff Eden Country Club Limited is entitled to have its account 114 credited with the following sums:

   (a) $3,000

   (b) $38,288.00

   (c) $1,950.50

   (ii) Costs to the Plaintiff to be taxed if not agreed.

2. **Suit No. R. 080 of 1982**

   (i) Judgment for the Defandant on Claim and Counterclaim

   (ii) Court grants Declaration that the Defandant is legally and beneficially entitled to Times Saving Certificate No. 2254 and/or funds represented thereby.

(iii) Judgment to be entered for Defendant in the sum of $98,560.00 less sums of $3,000.00 and $38,288.00 improperly debited from the Company's account that is $98,560.00 - $41,288.00 = $57,272.00 with interest at 14% p.a. from June 1980 to date of Judgment.

(iv) That the amount, when realised from the said Time Savings Certificate no. 2254 be applied towards satisfaction of the said judgment.

(v) Costs to the Defendant to be taxed if not agreed.