

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
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(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	<u>\$ 78.58</u>
	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 Plaintiff 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 Limited, 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 guarantee 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 117-69-16 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 disclose 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 claim by 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 on the 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 Resolution 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."

