IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1996 - M 105

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

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

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

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

COOKE, J.

JUDGMENT

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

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

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

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

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

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

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

(a) Check his foreign savings accounts.

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

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

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

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

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

On the evening visit he would:

(g) Produce lodgment for that day.

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

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

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

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

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

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

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

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

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

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

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

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

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

This witness further said:

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

Mr. Reynolds admitted that there was:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) J$300,000 Overdraft

(b) J$250,000 Demand Loan

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

"I did not accept proposal in that letter."

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

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

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

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

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

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

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

Mr. Reynolds paints a different picture. He said:

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

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

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

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

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

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

[a] Demand loan - J$50,000

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

The loans were to be utilised as follows:

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

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

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

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

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

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

AGREEMENT RE
OPERATION OF ACCOUNT

To: **WORKERS SAVINGS & LOAN BANK**

It begins:

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

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

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

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

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

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

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

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

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

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