

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

Judgment Book

IN COMMON LAW

SUIT NO. C.L. 1996/N-049

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	PLAINTIFF
A N D	STEPHEN HEW	1 ST DEFENDANT
A N D	CLIFTON HEW	2 ND DEFENDANT
A N D	ANNIE HEW	3 RD DEFENDANT

CONSOLIDATED WITH SUIT NO. C.L. 1996/H-102

BETWEEN	STEPHEN HEW	PLAINTIFF
A N D	NATIONAL COMMERCIAL BANK (A Company registered with the Companies Act)	1 ST DEFENDANT
A N D	JEFFREY COBHAM	2 ND DEFENDANT

Mr. Michael Hylton Q.C. and Miss Haydee Gordon instructed by Myers, Fletcher & Gordon representing the Plaintiffs in N-049 and the Defendants in H-102.

Lord Anthony Gifford Q.C., Mrs. Sandra Bright and Ms. Garrie Gaye Brown instructed by Messrs. Gifford, Thompson & Bright representing the Defendants in N-049 and the Plaintiff in H-102.

Heard: 10th, 11th, 12th & 13th April; 5th & 6th June and
31st July, 2000.

REID, J. :

On 28th May 1996, the National Commercial Bank of Jamaica (hereinafter called

the Bank) filed a writ of summons with statement of claim endorsed against the defendants – named for the recovery of two sums of money owing together with interest accruing at the rate of 54 per cent per annum from 3rd May, 1996 until the date of payment.

The first defendant counter-claimed for damages for negligence and breach of fiduciary duty by the Bank, claiming damages which by virtue of the counter-claim would extinguish or offset any indebtedness arising from the loans.

In the action sub-nomine C.L. 1996/H-102 Mr. Stephen Hew who will hereafter be referred to simply as Mr. Hew, issued a writ of summons against the bank as also against Mr. Jeffrey Cobham the manager for damages for negligence and breach of fiduciary duties.

Since the main issues are those raised by the plaintiff Hew upon whom lies the burden of proving negligence and or breach of fiduciary duty, it was agreed that the hearing should begin with his testimony.

BACKGROUND TO THE LITIGATION

Mr. Hew. is the registered proprietor of two parcels of land, one of 95 acres and the other of 45 acres at Ironshore in St. James a prime residential area near to Montego Bay. He also had a registered title to a parcel of six acres in Glendevon St. James, an area not nearly as desirable as the Ironshore property for residential

purposes. At a district in St. James called Barrett Town, he also owed approximately five acres in elevation overlooking a prime location called Sea Castle which is close to Rose Hall another well known and prime area situated along the main road from Montego Bay as one proceeds to Falmouth. For the Barrett Town land Mr. Hew did not have a registered title.

Mr. Hew had been in the business of furniture as well as having other business interests but according to him, had no experience in the development of lands for sale, for subdivision and sale for residential purposes. He held accounts with the Bank, N.C.B. and had developed cordial relations with its managers in particular, Mr. Dunbar McFarlane and Mr. Jeffrey Cobham, in that order, the latter being manager of the Sam Sharpe Square Branch in Montego Bay from 1984 to 1991.

Mr. Hew had various loan transactions with the Bank and the Bank retained the certificates of titles to the Ironshore and Glendevon lands respectively by way of security for moneys advanced. He had cherished for many years a dream to borrow a million Pounds. Judicial notice can be taken that a few years following the attainment of Independence status in Jamaica, the national currency was converted from Pounds Sterling to dollars at a conversion rate of Two Dollars as the equivalent of One Pound Sterling. Mr. Hew had expressed that dream wish to each of the managers aforesaid.

In early 1989 an overdraft facility of \$2 Million Dollars was granted to him and he availed himself of it through his account up until about June 1989. The letter confirming that facility was sent in September 1989 and the mortgages upstamped

to the value of \$1,750,000.00 on the 45 acre Ironshore property in April 1960 and on the 95 acre parcel at Ironshore on 27th December, 1989 to secure \$5 Million. Central to the principal issues raised is the nature of the relationship that obtained between Mr. Hew as customer and the Bank through its manager Mr. Cobham; as well as the conversations between them at a time before the facility was granted, also the implication of such dialogue. The case presented on behalf of Mr. Hew is that he was totally dependent on Mr. Cobham as to how the facility should be granted and for what purposes to be applied. Mr. Cobham, it is averred, had insisted that the facility was to be applied towards financing the building of houses on the Barrett Town property. On behalf of the Bank, it is pleaded that that facility was not so limited but rather, for the purpose of financing infrastructure both at Barrett Town and Ironshore.

It is the case for the plaintiff Hew that the facility had been utilized to the extent that the level of the overdraft had exceeded the \$2 Million mark by the end of April 1990. A further facility of \$1 Million under the heading of guarantees was also utilised, thus bringing the overdraft by the end of 1991 to a level in excess of \$3 Million. In about the month of May 1991, although two houses had been completed and others were in stages of being erected, no sale had been consummated as there was still no registered title. Following the aggregation of a considerable debt, the Bank informed Mr. Hew that no further credit facility would be forthcoming.

Mr. Lord Gifford Q.C., in his opening address points out it will be the case in essence for Mr. Hew that the Bank had undertaken a particular duty of care to give advice to him, and upon which it was known that he would rely. The advice was to build on Barretrt Town lands and that the loan would not otherwise be approved. Such advice, it would be shown, was demonstrably negligent having regard to all the circumstances.

The further negligent act or omission is the manner in which the funds had been advanced to him. Had the advances been by a demand loan, the rate of interest payable would have been less.

At this stage it might be useful to examine the pleadings which are set out at length as the issues particularly of breach of fiduciary care so require.

THE PLEADINGS SUIT C.L. 1996/H-102

It is common ground that the Bank is a registered Company under the Companies Act and conducts the business of banking with branches in many Towns of the Island. Mr. Cobham, the second defendant was at the material time, manager at the Montego Bay branch.

Paragraph 3 of the statement of claim, reads:-

“The plaintiff has for many years as a customer relied on the first defendant branch in particular through its manager whilst acting in the course of his duty, for advice on all his commercial transaction, and it is known to whomsoever is the manager at any given time that he so relies and this dependence has become more total as the plaintiff has advanced in age.”

Paragraph 4.

Paragraph 5.

“The defendant Bank has held itself out at all material times to the plaintiff as having the capacity and expertise to give him financial advice on loans.”

Paragraph 6.

“That a clear fiduciary relationship has developed and has existed at all material times and the defendants or the plaintiff a fiduciary duty to observe reasonable skill and care in giving advice to the plaintiff.”

Paragraph 7.

Paragraph 8.

“That in or about the year 1989 the said Mr. Dunbar McFarlane introduced the Plaintiff to the second Defendant, another manager attached to the said Montego Bay Branch and shortly thereafter in or about the year 1990 the plaintiff approached the latter manager (the second defendant) to borrow the sum of One Million Dollars for the purpose of building houses for all and made it clear to the second defendant that in particular at his age he was solely dependent on the second defendant acting on behalf of the bank for advice as to the site amongst other things which the second defendant in his well considered judgment thought to be most suitable.”

