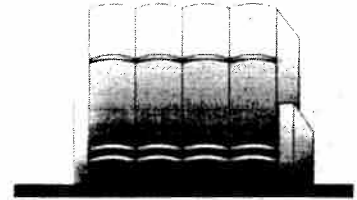


**BANKS AND GIVING
ADVICE:
THE NCB CASE**



A recent judgement against National Commercial Bank Jamaica Limited ("NCB") and one of its senior officers has again raised important issues regarding the duties of commercial bankers to their customers. This case highlights the importance to a banker of avoiding crossing the sometimes very thin and often obscure line between giving banking advice and giving investment advice, although it appears to interpret the current authorities further in the customer's favour than many people expected.

A quick review of the pleadings and facts of this case are instructive. NCB sued a customer for the recovery of sums of money with interest at the rate at 54% per annum, totalling around \$132,500,000. The customer counter-claimed for damages for negligence and breach of fiduciary duty by NCB and a senior officer.

The customer owned several parcels of land, some of which were prime residential lots with registered titles. One particular parcel of land was less well suited than the others for residential development and the title was not registered. The customer's lawyers argued that, whilst being in business generally, the customer had no experience in land development. He had banked with NCB for many years and had very cordial relations with its managers in whom he had placed much trust and confidence.

In 1989, NCB loaned the customer \$2,000,000 on the security of the unregistered lands for the residential development of those lands, in the form of an overdraft. The debt was not serviced and grew considerably. The customer gave evidence that he was totally dependent on NCB and its managers for guidance in this matter. Following the aggregation of considerable debt, NCB advised the customer that no further credit facilities would be forthcoming.

In summary, the case for the customer was that NCB had undertaken a particular duty of care to give advice, upon which it was known by NCB

that the customer would rely. The advice was to build on specific lands and such advice was demonstrably negligent having regard to all the circumstances. The further negligent act or omission was the manner in which the funds had been advanced to him, in that had the advances been by a demand loan, the rate of interest payable would have been lower.

In reviewing the evidence, the Judge seemed to have paid particular attention to the "chain of correspondence" between the customer and NCB. The Judge also placed heavy reliance on the NCB manager's involvement in the details of the development in obtaining subdivision approvals and dealing with attorneys and made this key observation: "At the core of the resolution of the issues involved is whether or not the bank manager had crossed the line between, on the one hand, explaining an ordinary banking transaction in the ordinary course of a normal business relationship between banker and customer, and on the other hand, entering into a relationship in which he had a dominating influence, and therefore was under a duty to see that Mr. Hew (the customer) was afforded the benefit of independent advice."

The Judge felt that in the circumstances of this case NCB and the manager did cross that line. In making his findings, the Judge was not able to find any negligence or cause of action in negligence against NCB. However, he did find the existence of a relationship under which a customer reposed trust and confidence in a banker, which had led to an unconscionable arrangement, thus raising a presumption of undue influence.

Because of this undue influence, the customer had entered into an arrangement which resulted in the loss of his land and the suit by NCB. The Judge appeared to feel that NCB should have been particularly aware that the customer was relying on the manager's advice, as he was elderly and unsophisticated in business matters, despite evidence from NCB that the customer, whilst elderly, was well aware of the commercial risks.

The Judgement in the sum of \$18,000,000 in the customer's favour is presently being appealed by NCB. Whatever the outcome, bankers and their management teams will need to keep in mind the following issues:-

1. Careful instructions need to be given to all officers who deal with customers that their dealings ought strictly to relate to banking issues, not issues of "investment".
2. If a bank does decide to assume the responsibilities and duties of advising customers on their investments or the viability of certain transactions, it will owe a duty of care, even for gratuitous advice.
3. Whether or not such a branch manager has given investment advice is a matter of fact, to be determined on the circumstances of each case. Even where a banker is not authorized to give investment advice, he may be said to have ostensible authority, thus entitling a customer to presume that he has such authority. This ostensible authority can ground a claim for negligence or undue influence if his advice causes the customer damage or loss.

NEW INSURANCE ACT

Work has been ongoing for some time now on a new Insurance Act. Intended to deal more effectively with modern developments in the insurance industry it will, when enacted, repeal and replace the existing Insurance Act.

It is intended that the "Insurance Czar," whoever that is eventually chosen to be, will have a full range of enforcement powers similar to those applicable to banks, that the "fit and proper" tests applicable to directors and officers of banks would also be imposed in respect of the management of insurance companies and that special treatment be applied to insurance policies of a banking, interest sensitive nature. Indeed, generally speaking, insurance companies will be subjected to a far greater degree of regulation than has hitherto been the case, following the trend already set in the banking sector as well as the securities industry.

PALM TREE JUSTICE IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Six men were convicted of murder in Jamaica and sentenced to death; their convictions and sentence were upheld by the Court of Appeal and the English Privy Council. They all petitioned the Governor General for mercy and the English Privy Council (hereinafter referred to as the Privy Council) by majority decided:-

1. That the convicted men were entitled to know what the material the Jamaican Privy Council had before it in considering their application;
2. That the convicted men were entitled to make representations to the Jamaican Privy Council as to why mercy should be granted;
3. That the convicted men had a right not to be executed before the Inter-American Commission on Human Rights and the United Nations Human Rights Commission had finally reported on petitions which the convicted men had submitted to those bodies.

In order to arrive at the first conclusion the Privy Council referred to Section 13 of the Constitution of Jamaica which provides that every person in Jamaica is entitled to "protection of the law, which meant in effect the due process of the law." In this, the Privy Council agreed with the Jamaican Court of Appeal per Forté, P. Thereafter the Privy Council had no difficulty in concluding that while the ultimate decision as to whether the exercise of the prerogative of mercy was for the Governor General acting on the recommendations of the Jamaican Privy Council and while the merits were not for Courts to review, it did not follow that the whole process was beyond review of the Courts.

In other words, the Courts would be entitled to review the procedure adopted by the Governor General and Jamaican Privy Council of Jamaica in arriving at their conclusion. They therefore, found that there were compelling reasons, why the Governor General and the Privy Council of Jamaica should be required to receive the representations of a man condemned to die and why he should have an opportunity to see and comment on the other material which was before that body.

In so holding, the Privy Council had literally to overrule its own decision in the cases of de Freitas v. Benny 1976 AC 239 and Reckley v. Minister of Public Safety and Immigration (2) 1996 A.C. 527. These two cases said clearly (one from Trinidad and Tobago and the other from the Bahamas) that the prerogative of mercy was not the subject of legal rights, and the convicted person had no right to have his case considered in connection with the exercise of the prerogative of mercy. These decisions were side-stepped by the Privy Council and for this they were severely criticized in the dissenting opinion of Lord Hoffman.

It is quite clear that the majority of the Privy Council were doctrinally opposed to hanging and were prepared to bend the law in favour of the convicted men. Lord Hoffman warned that such a course would mean that "the rule of law itself would be damaged and there would be no stability in the administration of justice in the Caribbean."

The majority of the Privy Council had no difficulty in holding that the convicted men should not be executed before the Inter-American Commission on Human Rights had finally reported on their petitions. They realised that the rules of the Inter-American Commission were not a part of the domestic law of Jamaica. Nevertheless, since the Government of Jamaica had signed a treaty acceding to the American Convention and to the International Covenant, certain expectations were raised among the people, and they were entitled to the protection of the law under Section 13 of the Constitution. Accordingly, the time limit of six months which had been set by the Governor General for receiving the report of the Inter-American Commission was too short and hence illegal.

The convicted men complained that their treatment in prison and the prison conditions amounted to in-human or degrading treatment so that it would be inappropriate to execute them. The majority of the Privy Council held that while they were not prepared to say that those allegations constituted a violation of Section 17 of the Jamaican Constitution yet they considered that these were serious matters which ought to have been investigated.

In the final analysis, because of the five year period set by the Privy Council in the case of Pratt v. Morgan it meant that most of the convicted men would have been imprisoned for more than five years from initial conviction sentences. Accordingly, the sentences of death were set aside in all the cases and commuted to life imprisonment.

Altogether, this was a brilliant exercise in what could legitimately be described as palm-tree justice.

THE COMPANIES BILL AN UPDATE

The Companies Bill has been in the making since 1996. The idea behind introducing new companies legislation was to modernize Jamaican company law to harmonize it with other Commonwealth jurisdictions, both inside and outside the Caribbean. The main changes were originally in the areas of the formalities of incorporation, directors' responsibilities and duties, the denomination of share capital, registration of charges, and insolvency. However, as will be seen, not all survived.

The Bill has now passed through Joint Select Committee stage, and much debate surrounded all of those major changes. A simplified incorporation procedure has been introduced. A new test has been agreed for the duty of directors, which combines objective standards with a due diligence defence and imposes a greater duty of care on directors. This is to be welcomed in an increasingly sophisticated commercial marketplace. The question of changing the system of share capital from a "par" system to a "no par value" system was hotly debated, with some suggesting that a dual system could prevail. However, it was decided that this would lead to confusion and the new no par system was finally approved. The effect of this will be to show the true value of the company to the investor, rather than an artificial nominal value (although reform will be needed to the Stamp Duty Act, which currently imposes a rather anti-investor rate on authorized share capital).

The administration proceedings lifted from the United Kingdom's Insolvency Act 1986, meant to allow a company to "trade out" of a precarious financial position by preventing enforcement of security and the commencement of winding-up proceedings during the period of the order, were deleted entirely. It was argued that the entire system of bankruptcy and insolvency law needed revision as it was outdated, and that the insertion of a part of the United Kingdom's provisions without comprehensive overhaul of existing laws was premature. The Minister agreed to set in motion the machinery to begin such review.

The fines for non-compliance with various sections have been dramatically increased and should have deterrent effect.

The Bill is expected to be laid before Parliament this year and passed into law by the beginning of 2001. Practitioners and business people must update themselves on the many new provisions in order to "hit the ground running."

LIST OF LEGISLATION PASSED FOR THE YEAR 2000

Act No. 1	The Telecommunications Act, 2000
Act No. 2	An Act to Amend the Judicature (Resident Magistrates) Act
Act No. 3	An Act to Amend the Land Bonds Act
Act No. 4	An Act to Amend the Professions Supplementary to Medicine Act
Act No. 5	The Beach Control (Licence Fees) (Validation) Act, 2000
Act No. 6	The Endangered Species (Protection, Conservation and Regulation of Trade) Act, 2000
Act No. 7	The Appropriation Act 2000
Act No. 8	Chief Technical Director (Transfer of Functions and Change of Statutory References) Act, 2000
Act No. 9	An Act to Amend the Betting, Gaming and Lotteries Act
Act No. 10	An Act to Amend the Trespass Act
Act No. 11	An Act to Amend the Larceny Act
Act No. 12	An Act to Amend the Praedial Larceny Act
Act No. 13	An Act to Amend the Malicious Injuries to Property Act
Act No. 14	An Act to amend the Offices of the Utilities Regulation Act

FINANCIAL GLEANER ARTICLES PUBLISHED

1. Occupiers' Liability: A Duty to Visitors
2. Private Nuisance: The Good Neighbour's Rule for Businessmen
3. Limitation Periods: Procrastinators Beware!
4. Keeping Banking Secrets
5. Some Statutory Requirements for Doing Business in Jamaica
6. Testamentary Capacity: Who can make a valid Will
7. Domain Names: Promoting Your Business on the Internet
8. Trespass and the Internet
9. Commercial Letters of Credit: Facilitators of Trade
10. Products Liability
11. Standby Letters of Credit
12. Operating a Day Care Centre
13. Corporate Taxation - Personal Liability for Directors and Officers

14. Franchising Jamaican Goods
15. Maintaining Your Investment
16. The Public Defender - A Businessman's Friend
17. Trade Marks: To register or not to register
18. Shipping Goods by Sea
19. Recovery of Costs by a Successful Litigant
20. Employers' Liability for Repetitive Strain Injury
21. The Duty of the Banker to his Customer
22. Protection of Potential Judgement Property
23. What's in a Name
24. The Law of Bailment
25. Customers' Duties to their Bankers
26. Restitution
27. The Abolition of Slavery Act
28. Lifting the Veil
29. Factoring: Easing your cash flow
30. A Windfall for Employees or not?
31. Holding Prize Competitions
32. Managing the Affairs of the Mentally Incompetent
33. Regulating the Internet
34. Regulations Coming for Managed Funds
35. A Question of Trust
36. Tracing - Can I Get my Money Back?
37. A Guarantor's Liability
38. E-MAIL: A Storehouse of Liability
39. AUDITORS: Watchdog or Bloodhound
40. Legal Personality - Suing Associations
41. How the Real Estate Board works for you

Seasons Greetings and Best Wishes for a Prosperous New Year from all of us at DUNN COX ORRETT & ASHENHEIM

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