

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2021/0012

BETWEEN:

**[1] THE ROSERIE COMPANY LIMITED
[2] THOMAS ROSERIE
[3] SONIA ROSERIE
[4] CHEMICAL MANUFACTURER AND INVESTMENT
COMPANY**

Appellants

and

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Respondent

Before:

The Hon. Mde. Margaret Price Findlay	Justice of Appeal
The Hon. Mr. Eddy D. Ventose	Justice of Appeal
The Hon. Mr. Gerard St. C Farara	Justice of Appeal [Ag.]

Appearances:

Mrs. Cynthia Hinkson-Ouhla for the Appellants
Mr. Bota McNamara with Ms. Zinaida McNamara for the Respondent

2024: July 3;
October 16.

Civil Appeal – Recovery of debts – Abuse of contractual rights – Article 956 of the Civil Code of Saint Lucia - Whether the Bank calling in its loans was an abuse of its contractual right with the appellants - Conflict of interest – Whether judge failed to consider the nature of the relations between the Comptroller of Customs and the Bank’s Corporate Manager - Whether the judge erred in striking out a paragraph of the witness statement of the 2nd named appellant on the basis that it raised new issues – Whether, in the circumstances, the relationship of banker and customer gave rise to fiduciary obligations – Whether Bank owed the appellants a duty of care – Whether guarantees were valid – Whether the 3rd named appellant’s waiver was sufficient to meet the legal requirement for independent legal advice – Interest on overdraft facility – Article 1685 and 1686 of the Civil Code of Saint Lucia

The appellants had been customers of the respondent, First Caribbean International Bank (Barbados) Limited (the "Bank") since 1993. The 1st named appellant, the Roserie Company Ltd (the "Roserie Company"), was engaged in the importation and sale of used vehicles which were subject to import duties as determined by the Customs and Excise Department in accordance with the applicable laws of Saint Lucia. The Bank advanced credit facilities to the Roserie Company along with customs bonds to which the Bank was surety.

On 31st December 2009, the Bank filed a recovery of debts claim against the appellants, being the Roserie Company as the principal debtor and Thomas Roserie, Sonia Roserie and Chemical Manufacturing and Investment Company Limited ("Chemico") all as guarantors to the debts of the Roserie Company. The debts had been incurred by virtue of loans from the Bank which were secured by various hypothecary obligations, mortgage debentures, floating charges and an unlimited continuing guarantee by Chemico in favour of the Bank. The appellants opposed the claim and, in their defence, alleged that the Bank acted in breach of the implied terms of the agreement, acted unconscionably and arbitrarily, and abused its superior bargaining power when it unlawfully called in all their loans. The appellants admitted to executing a bond with the Bank for the payment of duties owed to the Customs and Excise Department but denied liability for the stated amounts in the claim form.

In the court below the learned trial judge found in the Bank's favour. The judge determined, *inter alia*, that the Bank reserved the right to demand the loans at any time, thus there was no question that it was within the Bank's right to call in the loans at any time and without cause; that the relationship of banker and customer does not give rise to fiduciary obligations; that there was no evidence of any conflict of interest existing between the Bank and the appellants in relation to these loans to give rise to such obligations; that the Bank in calling the loans in the circumstances of the present case did not give rise to the level of unreasonableness which could amount to an abuse of its contractual right.

The appellants appealed the decision of the learned trial judge listing seven grounds of appeal in their notice of appeal. The issues for determination were: (i) whether the learned trial judge misdirected herself in striking out paragraph 20 of the witness statement of Mr. Thomas Roserie on the basis that it raised new issues which were not foreshadowed in any way in the pleadings; (ii) whether the learned trial judge misdirected herself when she upheld the respondent's objection that the inference deduced from the fact that two brothers were negotiating an alleged customs debt for which statutory legislation exists permitting the Comptroller of Customs to pay a moiety to persons who assist in recovering the debt was sufficient basis to disallow the evidence; (iii) whether the learned trial judge failed to give full consideration to the full ambit of the English common law which acknowledges the principle that abuse of a contractual right constitutes a breach of contract; (iv) whether the learned trial judge failed to appreciate that in all the circumstances of the case, the relationship between the Bank and the appellants was more than merely that of debtor and creditor but had metamorphosized into a fiduciary relationship; (v) whether the learned trial judge erred in law in ruling that the Bank did not owe the appellants a duty of care; (vi) whether the learned trial judge misdirected herself in accepting that all of the guarantees were valid; and (vii) whether

the learned trial judge erred in law when she ruled that Mrs. Roserie's waiver was sufficient to meet the legal requirement of independent legal advice.

Held: dismissing the appeal; affirming the judgment and order of the court below save and except that on the second payment to Customs in the sum of \$1,597,731.28, interest will accrue on that sum at the statutory rate of 6% per annum from 4th May 2009 to date of payment; and ordering costs in the appeal to the respondent to be assessed by a judge of the Commercial Court if not agreed within 21 days of this judgment, that:

1. It is important for a party who wants to run a particular case to plead it so that the other party/parties can know the issues which need to be addressed in their defence and in the evidence and submissions, and the court can know what issues it is being asked to decide. The crux of grounds of appeal (i) and (ii) is the appellants' contention that the judge ought to have assessed the potential conflict of interest stemming from the relationship between the Bank's Corporate Manager and the Comptroller of Customs. These matters were not pleaded and were raised for the first time in a witness statement and in closing submissions. A departure from a pleaded case can be permitted where it is just to do so such as where the pleadings cause no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. The appellants argued that the court had granted them permission to disclose specific information, including the nature of the relationship between the Comptroller of Customs and the Bank's Corporate Manager. However, no evidence of such an order was presented, nor was this Court directed to it during oral arguments. Therefore, producing the birth certificates without explicitly pleading the allegations of conflict of interest was not permissible under rule 10.5 of the Civil Procedure Rules (Revised Edition) 2023. The judge striking out paragraph 20 of Mr. Thomas Roserie's witness statement did not prejudice the appellant's case. Furthermore, the trial judge did not err in disregarding these issues which had not been raised in the appellants' pleaded case. Grounds 1 and 2 are accordingly dismissed.

Rule 10.5 of the **Civil Procedure Rules (Revised Edition) 2023** considered; **East Caribbean Flour Mills v Ormiston Ken Boyea** SVGHCVAP2006/0012 (delivered 16th July 2007, unreported) followed; **Charles Russell Speechlys LLP v Beneficial House (Birmingham) Regeneration LLP** [2021] EWHC 3458 (QB) applied; **Loveridge & Loveridge v Healey** [2004] EWCA Civ 173 applied.

2. It was not an abuse of the Bank's contractual rights in demanding payment of the loans. Under the Civil Code of Saint Lucia, good faith is presumed and legally implied throughout the contractual process, from inception to its completion. An abuse of rights may occur when the contractual right is not exercised in a reasonable manner, i.e. in accordance with the rules of equity and fair play. However, the general rule is that a demand loan is repayable on demand by the Bank. In the case at bar, the Bank reserved the right to demand the loans at any time, in all the hypothecs and the facility letter, thus, there was no question that it was within the Bank's right to call in the loans at any time,

and without cause. The Bank therefore acted within its contractual right in demanding loan repayment.

Article 956 of the **Civil Code of Saint Lucia** applied; **Houle v Canadian National Bank** [1990] 3 SCR 122 applied; **Hall v Royal Bank of Scotland** [2009] EWHC 3163 (QB) considered; **Chemical Manufacturing and Investment Company Limited et al v First Caribbean International Bank (Barbados) Limited** [2021] UKPC 4 followed; **Cukurova Finance International Ltd and another v Alfa Telecom Turkey Ltd (Nos 3 to 5)** [2016] AC 923 applied.

3. The relationship between banker and customer does not ordinarily give rise to a fiduciary relationship or to a trustee/beneficiary relationship. Under ordinary circumstances a bank is not a trustee or fiduciary of money deposited by a customer, but simply a debtor. There is a term implied by law in the contract between a bank and its customer that the bank must carry out the services with reasonable care and skill. The requirement to exercise reasonable care and skill only applies, and is only capable of applying, insofar as the contract gives the supplier any latitude in how the relevant services are carried out. A performance bond stood on a similar footing to a letter of credit and a bank giving such a guarantee must honour it according to its terms unless it had notice of clear fraud. Therefore, the Bank's relationship with the Roserie Company was not fiduciary, negating any duty of care. Furthermore, the trial judge correctly determined that the Bank's payment of the assessments was mandatory, leaving no discretion regarding payment to the Customs and Excise Department upon demand, having regard to section 136(1) of the Customs and Excise Act of St. Lucia. Consequently, grounds 4 and 5 also fail.

The Encyclopaedia of Banking Division C, The Relationship of Bank and Customer, 5A Banks as Fiduciaries, Issue 187 considered; **Paget's Law of Banking** Part IX, Letters of Credit and Demand Guarantees, Chapter 35, Demand Guarantees and Performance Bonds considered; **Ian Hope Ross et al v Martin Dinning et al** AXAHCVAP2020/0005 (delivered 30th April 2021, unreported) followed; **Fahad Al Tamimi v Mohamad Khodari** [2009] EWCA Civ 1042 considered; **Kotonou v National Westminster Bank plc** [2010] EWHC 1659 (Ch) considered; **Philipp v Barclays Bank UK plc** [2023] UKSC 25 applied; **Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. and another** [1978] Q.B. 159 considered; **Bolivinter Oil SA v Chase Manhattan Bank** [1984] 1 All ER 351 applied.

4. A guarantee is an agreement by which one person (the surety) agrees to answer for an existing or future liability of another (the principal) to a third party (the creditor). There are three factors which affect the validity of a guarantee which are: misrepresentation, non-disclosure and failure to explain. In relation to the failure to explain, it is for the surety to satisfy herself as to the nature and extent of the obligations she is assuming, and it is not for the creditor to explain the meaning or effect of the guarantee to her. Therefore, the fact that Mrs. Roserie was not given independent legal advice does not, without more, invalidate the guarantee.

The Encyclopaedia of Banking Barclays Division E, Securities, Guarantees 1, Contracts of guarantee, Issue, 187 considered; **Bank plc v Khaira** [1993] 1 FLR 343 applied.

5. In any event, the judge's ruling that Mrs. Roserie's waiver was sufficient to meet the legal requirement of independent legal advice is unassailable. The court in deciding whether a duty to obtain independent legal advice will arise, must examine the circumstances in which the documents were signed. The law gives relief to one who, without independent advice, enters into a contract upon terms that are very unfair, however the relationship must be one where there is a degree of trust and confidence. The banker and customer relationship does not fall into the category of a relationship 'of trust and confidence' or 'of ascendancy and dependency'. There is nothing in the facts that suggests that there was unconscionable conduct.

Royal Bank of Scotland plc v Etridge (No.2) [2001] UKHL 44 applied; **National Commercial Bank (Jamaica) Ltd v Hew** [2003] UKPC 51 followed; **Bank plc v Khaira** [1993] 1 FLR 343 applied.

6. Additionally, the judge did not err in her conclusion that all the guarantees were wide enough to secure the liabilities of the Roserie Company up to their respective limits and was unlimited in the case of Chemico and as a result, the guarantees were valid and enforceable as against the respective appellants. The facts of this case disclose: an uncomplicated relationship of banker and customer; that the hypothecs were executed before the appellants' notary who ought to have explained all clauses and ramifications to them; and that they were duly executed by the respective appellants. For these reasons, the judge was correct to hold that the guarantees were valid and enforceable against the respective appellants. Thus, grounds 6 and 7 of the appeal also fail.
7. In the absence of a contractual right to interest, interest is awardable pursuant to statute. The Civil Code of Saint Lucia prescribes that the rate of legal interest is fixed by law at 6% per annum. In the absence of an agreement between the Bank and the appellants, the legal rate of 6% is applicable. The Bank therefore erred in imposing a 25% interest rate on the overdrafts.

Articles 1685 and 1686 of the **Civil Code of Saint Lucia** applied.

JUDGMENT

- [1] **PRICE FINDLAY JA:** By their notice of appeal filed on 28th September 2021, the appellants, appealed against the decision of the learned judge delivered 7th July and re-issued 16th August 2021 (the "Judgment").¹ Paragraph 123 of the Judgment made the following orders:

¹SLUHCM2020/0063 formerly SLUHCv2009/1067 (delivered 7th July and 16th August 2021, unreported) at para. 57.

- “1. Judgment is entered for the claimant against the defendants for the following principal sums:
 - i. The sum of \$370,214.30 together with interest at the rate of 12% per annum from 31st December 2004 to date of payment.
 - ii. The sum of \$929,757.86 together with interest at the rate of 11.5% per annum from 31st December 2004 to date of payment.
 - iii. The sum of \$500,034.77 together with interest at the rate of 14.5% per annum from 31st December 2004 to date of payment.
 - iv. The sum of \$2,774,152.75 together with interest at the rate of 11.5% per annum from 31st December 2004 to date of payment, except that on the second payment to customs in the sum of \$1,597,731.28 which forms part of this debt, interest will accrue at 11.5% per annum from 4th May 2009 to date of payment.
2. All interest claimed for periods prior to 31st December 2004 is prescribed and any such capitalized interest must be excised from the debts at paragraph 1 above, and the sums adjusted accordingly.
3. The defendants shall take all necessary steps to liquidate the debts on or before 30th June 2024...
4. As the action commenced as a civil claim prior to the introduction of the Commercial Division, the defendants shall pay the Bank's costs in accordance with the regime of prescribed costs under Part 65 of the Civil Procedure Rules 2000 which is applicable to civil claims.”

Background

- [2] First Caribbean International Bank (Barbados) Limited (the “Bank”) filed a claim on 31st December 2009 against (i) The Roserie Company Limited (the “Roserie Company”), (ii) Mr. Thomas Roserie, (iii) Mrs. Sonia Roserie, and (iv) Chemical Manufacturer and Investment Company Limited (“Chemico”) (collectively “the appellants”) for recovery of various debts, interest and costs.
- [3] The appellants were customers of the Bank since 1993. The Roserie Company was engaged in the importation and sale of used vehicles which were subject to import duties as determined by the Customs and Excise Department in accordance with the applicable laws of Saint Lucia. The Bank advanced credit

facilities to the Roserie Company along with customs bonds to which the Bank was surety.

[4] The Bank claimed against the first, second and third named appellants jointly and severally for:

- (1) The sum of \$634,541.51 together with interest on the principal balance of \$370,214.30 at the rate of 12% per annum from 15th October 2009 to the date of payment. This is by virtue of a loan, being Loan Account Number 1250269, for the principal sum of \$600,000.00 granted to Roserie and secured by a Hypothecary Obligation dated 5th June 1998, registered in the Land registry as Instrument No. 2235/98 over property registered as Block 0849D Parcel 270 in favour of the Bank.
- (2) The sum of \$1,571,645.11 together with interest on the principal balance of \$929,757.86 at the rate of 11.5% per annum from 15th October 2009 to the date of payment. This is by virtue of a loan, being Loan Account Number 2691661, for the principal sum of \$1,200,000.00 granted to Roserie and secured by a Hypothecary Obligation dated 7th December 1999, registered in the Land Registry as instrument No. 5291/99 over properties registered as Block 0848CD Parcels 48 & 50 in favour of the Bank.

Against the first and fourth named appellants jointly and severally for:

- (3) The sum of \$935,450.66 together with interest on the principal balance of \$500,034.77 at the rate of 14.5% per annum from 15th October 2009 to the date of payment. This is by virtue of a loan, being Loan Account Number 2696787, for the principal sum of \$774,685.65 granted to Roserie, and secured by a Hypothecary Obligation, Mortgage Debenture and Floating Charge dated 21st June 1996 registered in the Land registry as instrument No. 4492/96 over properties registered as Block 1021B Parcels 102 & 103 and Block 1315B parcels 33 and 34 by Roserie as principal debtor with Mr. Thomas Roserie and Mrs. Sonia Roserie as surety, in favour of the Bank. This sum is also secured by an unlimited continuing guarantee by Chemico in favour of the Bank.

And further against the first named appellant for:

- (4) The sum of \$3,485,408.82 together with interest on the principal balance of \$2,774,152.76 at the rate of 11.5% per annum from 15th October 2009 to the date of payment. This is by virtue of a current account facility extended by the Bank to Roserie which was converted to a demand loan, being Loan Account Number 106433212, on 16th March 2003. This sum arose by two payments made by the Bank in 2003 and 2009 to Customs and Excise Department, for duties payable on used vehicles imported by Roserie. The sums were paid under customs bonds held by Roserie with the Bank.

- [5] The appellants opposed the claim and, in their defence, alleged that the Bank acted in breach of the implied terms of the agreement and acted unconscionably, arbitrarily and abused its superior bargaining power when it unlawfully called in all their loans. The appellants admitted to executing a bond with the Bank for payment of duties owed to the Customs and Excise Department but denied liability for the stated amounts in the claim form.
- [6] The debts under loan accounts numbers 1250269 and 2691661 existed prior to the Facility Letter which came into existence in 2001. Loan account number 2696787 came into existence on the terms contained in the Facility Letter. Prior to the Bank calling up all the loans, the parties were negotiating the terms of the final Facility Letter. The appellants claimed that they had not signed the agreement. Nevertheless, the Bank proceeded with transactions involving their accounts, including deductions and payments. Therefore, in the circumstances, the Bank owed them a duty of care to manage their accounts skillfully and carefully in accordance with Articles 987 and 985 of the **Civil Code of Saint Lucia** (the “**Civil Code**”).² Further on the date when the Bank demanded repayment, the loans were not in arrears and the irrational manner in which the Bank called up the loans was unreasonable and a breach of their contractual rights.³

The Decision in the court below

- [7] The agreed issues that came up for consideration before the learned judge at trial were:
- (a) Whether the Bank unlawfully called in the loans advanced to Roserie, under Loan Account Numbers 1250269, 2691661 and 2696787 in breach of contractual obligations between the parties, and by so doing breached fiduciary obligations which were owed to the defendants.
 - (b) Whether the sum claimed under Loan Account Number 106433212, to Roserie in relation to payment of duties under several customs bonds held with the Bank as surety, is due and payable to the Bank.

² Chap 4.01 of the Revised Laws of Saint Lucia 2021.

³ See appellants’ submissions in the court below filed on 6th October 2020.

- (c) Whether the Bank unlawfully called in the loans advanced to Roserie, under Loan Account Number 106433212, in breach of contractual obligations between the parties and by so doing breached fiduciary obligations which were owed to the defendants.
- (d) Whether the Bank has claimed prescribed interest on the loan balances, and is precluded from doing so by law.
- (e) Whether the Bank included unusual and unfair clauses in the respective hypothecs and failed to explain their implications to Thomas Roserie, Sonia Roserie, and Chemico and if that is so, what is the effect on the loans granted.

[8] The learned trial judge in her written judgment determined that the Bank reserved the right to demand the loans at any time in all the hypothecs and Facility Letter, thus there was no question that it was within the Bank's right to call in the loans at any time and without cause.⁴ The judge also accepted that the relationship of banker and customer does not give rise to fiduciary obligations. Further, the court found that there was no evidence of any conflict of interest existing between the Bank and the appellants in relation to these loans to give rise to such obligations. Additionally, the judge found that the Bank in calling the loans in the circumstances of the present case did not give rise to the level of unreasonableness which could amount to an abuse of its contractual right. Therefore, the Bank was within its right to make an informed decision concerning whether to call up the loans. Having found that there was a prolonged period between the initial demand in 2003 and in filing the claim in 2009, the learned judge was of the view that, calling up the loans could not amount to abuse or bad faith as asserted by the appellants.

[9] The trial judge also accepted on the totality of the evidence presented that the payments made by the Bank to customs under the bonds were obligatory. Further, pursuant to section 136 of the **Customs (Control and Management)**

⁴ SLUHCM2020/0063 formerly SLUHCV2009/1067 delivered (7th July and 16th August 2021, unreported) at para. 57.

Act (“Customs Act”),⁵ payment was a mandatory requirement to trigger a dispute over the amount demanded as duties and it was a condition of the bonds that sums expended by the Bank were to be repaid by the Roserie Company. The judge determined that the Bank did not act in breach of the stipulation in the Facility Letter when it debited the first payment to the company’s current account and subsequently converted it to a loan and thus it could not be said that such action was extortionate or contrary to all approved banking practices.

- [10] On the issue of whether the Bank claimed prescribed interests on the loan balances, the judge determined that the Bank was only entitled to recover interest accruing from 31st December 2004 onwards since according to Articles 2129 and 2111 of the **Civil Code** interest is prescribed by the period of 5 years.
- [11] Concerning the issue of whether the Bank included unusual and unfair clauses in the respective hypothecs and failed to explain the implications to the second, third and fourth appellants, the judge found that the hypothecs could not be impugned as they were executed before the appellants’ Notary who ought to have explained all the clauses and ramifications to them and having been duly executed by the respective appellants, they stood as authentic documents and were unassailable. Also, regarding the issue of the second, third and fourth appellants’ contention that they should be released from their obligations under the respective guarantees, the judge found that the guarantees were wide enough to secure liabilities of the Roserie Company up to their respective limits and in the case of Chemico, the liability is unlimited. Consequently, the judge found no justification in the appellants’ assertion that the Bank conducted their affairs without consulting them and was satisfied that the guarantees were valid and enforceable against the respective appellants as the debts of the Roserie Company continue to subsist and have not been fully discharged or extinguished.
- [12] Consequently, the judge entered judgment for the Bank against the appellants in the sums outlined in paragraph 1 of this judgment.

⁵ Chap 15.05 Revised Laws of Saint Lucia 2021.

The appeal

[13] The appellants appealed against the decision of the learned trial judge and in the notice of appeal set out the following grounds of appeal:

- (i) The learned trial judge misdirected herself in striking out paragraph 20 of the witness statement of Mr. Thomas Roserie on the basis that it raised new issues which were not foreshadowed in any way in the pleadings. In so holding the learned trial judge failed to consider the fact that the issue of the nature of the relationship between the Comptroller of Customs and the Bank's Corporate Manager was raised in an application made by the appellants for specific disclosure.
- (ii) The learned trial judge misdirected herself when she upheld the respondent's objection that the inference deduced from the fact that two brothers were negotiating an alleged customs debt for which statutory legislation exists permitting the Comptroller of Customs to pay a moiety to persons who assist in recovering the debt was sufficient basis to disallow the evidence.
- (iii) The learned trial judge failed to appreciate that despite her refusal to accept the decision in **Houle v Canadian National Bank**⁶ which interpreted Article 956 of the Saint Lucia **Civil Code**, English common law also acknowledges the principle that abuse of a contractual right constitutes a breach of contract as stated in **Woodar Investment Development v Wimpey Construction**⁷ thus in failing to give consideration to the full ambit of the English common law, the judge failed to apply the relevant law.
- (iv) The learned trial judge failed to appreciate that in all the circumstances of the case, the relationship between the Bank and the appellants was more than merely that of debtor and creditor but had metamorphosized into a fiduciary relationship.

⁶ [1990] 3 SCR 122.

⁷ [1980] 1 ALL ER 571.

- (v) The learned trial judge erred in law in ruling that the Bank did not owe the appellants a duty of care.
- (vi) The learned trial judge misdirected herself in accepting that all of the guarantees were valid.
- (vii) The learned trial judge erred in law when she ruled that Mrs. Sonia Roserie's waiver was sufficient to meet the legal requirement of independent legal advice.

Appeals against findings of fact

- [14] The Privy Council in **Byers and others v Chen Ningning**⁸ highlighted the starting point of an appeal court when reviewing findings of fact from the lower courts. In paragraph 29 of the Board's judgment, Lord Kitchin said this:

"It is well established that, where a trial judge has reached a conclusion on an issue of fact, it will only be on rare occasions that an appellate court will intervene. Lord Reed summarised the position in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, para 67: in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

- [15] Webster JA [Ag.] in **Chemical Manufacturing and Investment Company Limited et al v First Caribbean International Bank (Barbados) Limited**⁹ further expressed the appellate court's approach to findings of fact in paragraph 17 as follows:

"[17] The degree of reluctance of an appellate court to interfere is less when the findings being challenged are based on the trial judge's evaluation of the facts or the inferences that he or she draws from the primary facts. But even in this situation the appellate court must proceed with caution because the reluctance to interfere also applies to the evaluation of the facts and the inferences to be drawn from them...."

⁸ [2021] UKPC 4.

⁹ SLUHCMAP2021/0003 (delivered on 22nd December 2023, unreported).

Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The appellate court will only interfere and overturn a finding of fact where it is satisfied that the finding is one that no reasonable judge could have reached.”

- [16] In light of these guiding principles, I will examine the judge's findings and address each ground of appeal in turn.

Grounds 1 and 2 - Conflict of Interest

- [17] The crux of grounds 1 and 2 is the appellants' contention that the judge ought to have assessed the potential conflict of interest stemming from the relationship between the Bank's Corporate Manager and the Comptroller of Customs.

Appellants' submissions

- [18] The appellants submitted that the judge erred when she upheld the Bank's objection and struck out paragraph 20 of Mr. Thomas Roserie's witness statement. They further assert that the truth of the familial relationship was not denied in that the Bank's Corporate Manager and the Comptroller of Customs were brothers, and the objection was based on the notion that the matters were raised for the first time in the witness statement.
- [19] The appellants indicated that by letter dated 13th January 2015, they sought further and better information from the Bank which included a request for information regarding the nature of the relationship between the Bank's Corporate Manager and the Comptroller of Customs, however they received no response. Consequently, by application dated 9th November 2017 and filed on 10th November 2017 the appellants filed for specific disclosure seeking information of the nature of the relationship between the two individuals. The appellants further submitted that they were given permission by the court to provide the specific information and that they produced the birth certificates of the parties which clearly indicate that they are brothers. They also claim that responses to further and better particulars are considered part of the evidence in the pleadings.

[20] Regarding ground 2, the appellants submitted that the inference of collusion as deduced by the Bank and accepted by the court was a clear indication that the two individuals ought not to be dealing with each other in these circumstances. Thus, on that basis, the judge erred in striking out the evidence.

[21] The appellants asserted that correspondence existed between the two brothers concerning the customs debt and that, given the facts and applicable law, a conflict of interest was evident. Furthermore, the learned judge erred in ruling that paragraph 20 of Mr. Roserie's witness statement should be struck out and therefore misapplied the legal principles to the evaluation of the evidence. They contended that the judge ought to have assessed the relevance of such evidence. Consequently, by neglecting to address this issue, the judge committed an error and failed to consider crucial evidence.

Respondent's submissions

[22] The respondent submitted that the issues relating to the allegations of conflict of interest or inferences of collusion on the part of a Bank official and the Comptroller of Customs were raised for the first time in a witness statement and closing submissions and were not set out or foreshadowed in their defence. Thus, the Bank was not notified that it was required to answer to these matters, which represented distinct and special allegations of fact that needed to be specifically pleaded.

[23] The Bank further relied on the authority of **East Caribbean Flour Mills v Ormiston Ken Boyea**¹⁰ that the unpleaded matters should be struck from the record and not form part of the deliberation of this Court in the same way as they were before the court below.

Discussion

[24] The learned trial judge at paragraph 7 of the written judgment stated:

“[7] It is true that these matters were not pleaded and were raised for the first time in a witness statement and in closing submissions. It is simply not permissible under the court rules to raise these new issues

¹⁰ SVGHCVP2006/0012 (delivered 16th July 2007, unreported).

which have not been foreshadowed in any way in the pleadings, in a witness statement. It is also settled law that new issues may not be introduced in submissions. Consequently, these matters will be disregarded.”

[25] At paragraph 33 in **East Caribbean Flour Mills v Ormiston Ken Boyea** Barrow JA stated the following:

“[33] Parts 8.7 (1) and 10.7 (1) of CPR 2000 provided the starting point for the judge’s determination of what were the issues between the parties and, therefore, what was relevant. The judge noted the obligation on both a claimant and a defendant to set out all the facts on which they wish to rely. In relation to a claimant the provision reads:

8.7 (1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.

In relation to a defendant the comparable provision states:

10.7 (1) The defendant may not rely on any allegation or factual [argument] which is not set out in the defence, but which could have been set out there, unless the court gives permission.”

Barrow JA went on further at paragraphs 43 and 44 to hold that:

“[43] Lord Hope’s reproduction and approval of the exposition by Lord Woolf MR in **McPhilemy v Times Newspapers Ltd**¹¹ on the reduced need for extensive pleadings now that witness statements are required to be exchanged, should be seen as a clear statement that there is no difference in their Lordships’ views on the role and requirements of pleadings. The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The “pleadings should make clear the general nature of the case,” in Lord Woolf’s words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose...

[44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. The issue in the **Three Rivers**¹² case was the need to give adequate particulars, not the form or document in which they must be given. In deciding that it was only the pleadings that she should look at to decide what were the issues between the parties the judge erred, in my respectful view. If particulars were given, for instance, in other witness statements the judge was obliged to look at

¹¹ [1999] 3 All ER 775.

¹² *Three Rivers District Council v Bank of England* [2001] UKHL 16.

these witness statements to see what were the issues between the parties. It follows, in my view, that once the material in Mr. McAuley's witness statement and Report could properly be regarded as particulars of allegations already made in the pleadings such material was relevant and, therefore, admissible."

[26] The Court in **Charles Russell Speechlys LLP v Beneficial House (Birmingham) Regeneration LLP**¹³ on the issue of pleadings reviewed previous court decisions and stated:

"55. The overarching principle is that the pleadings frame the limits of the action. They identify the issues and the extent of the dispute between the parties; see **Blay v Pollard** [1930] 1 KB 628 per Scrutton LJ at 624 and **McPhilemy v Times Newspapers Ltd** [1999] 3 All ER 775 per Lord Woolf MR. As Mummery LJ stated in **Boake Allen Ltd & others v HMRC** [2006] EWCA Civ 25 at [131]:

"While it is good sense not to be pernicky about pleadings, the basic requirement that material facts should be pleaded is there for a good reason - so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial."

56. Lord Justice Rimer referred to the role of pleadings in providing advance notice of what a party has to address at trial in **Lombard North Central v Automobile World (UK) Ltd** [2010] EWCA Civ 20:

"It remains a basic principle of our system of civil procedure that the factual case the parties wish to assert at trial must ordinarily be set out in their statements of case ('pleadings'). That is not a principle based on mere formalism. It is essential to the conduct of a fair trial that each side should know in advance what case the other is making, and thus what case it has to meet and prepare for. It is the function of the pleadings to provide that information."

[27] Rule 10.5 of the **Civil Procedure Rules (Revised Edition) 2023** ("CPR") stipulates that the defence must set out the facts on which the defendant relies to dispute the claim. Further rule 10.5 (3), (4) and (5) states that:

¹³ [2021] EWHC 3458 (QB).

- (3) “In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –
 - (a) are admitted;
 - (b) are denied;
 - (c) are neither admitted nor denied, because the defendant does not know whether they are true; and
 - (d) the defendant wishes the claimant to prove.
- (4) If the defendant denies any of the allegations in the claim form or statement of claim –
 - (a) the defendant must state the reasons for doing so; and
 - (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant’s own version must be set out in the defence.
- (5) If, in relation to any allegation in the claim form or statement of claim, the defendant does not –
 - (a) admit it; or
 - (b) deny it and put forward a different version of events; the defendant must state the reasons for resisting the allegation.”

[28] It is important for a party who wants to run a particular case to plead it so that the other party/parties can know the issues which need to be addressed in their defence and in the evidence and submissions, and the court can know what issues it is being asked to decide.¹⁴ A departure from a pleaded case can be permitted where it is just to do so. The English Court of Appeal in **Loveridge & Loveridge v Healey**¹⁵ noted that:

“Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended.”

[29] The appellants argued that the court had granted them permission to disclose specific information, including the nature of the relationship between the Comptroller of Customs and the Bank's Corporate Manager. However, no evidence of such an order was presented, nor was this Court directed to it during oral arguments. Therefore, producing the birth certificates without explicitly

¹⁴ *Satyam Enterprises Ltd v Burton and another* [2021] EWCA Civ 287 per Nugee LJ at para. 35.

¹⁵ [2004] EWCA Civ 173 at para. 23.

pleading the allegations of conflict of interest was not permissible under CPR 10.5.

- [30] As a result, I find that the appellants were not prejudiced by the judge striking out paragraph 20 of Mr. Thomas Roserie's witness statement. Furthermore, I am of the view that the trial judge did not err in disregarding these issues which had not been raised in the appellants' pleaded case. Therefore, I dismiss grounds 1 and 2.

**Ground 3 - Abuse of a contractual right
Appellants' submissions**

- [31] The appellants argued that it was an abuse of contract by the Bank to make the demand for repayment of the loans. The appellants submitted that the evidence reveals that there was no mandate at the date the various loans were called up since the parties were still in the process of negotiation and the Facility Letter had not been signed by Mr. Roserie. They also asserted that the amounts paid to Customs had not yet arisen and was not included in the original demand letters of 28th October 2003. Further with regards to the customs debt they had instructed the Bank not to pay and thus the Bank acted in defiance of these instructions. Additionally, the Bank not only proceeded to pay the demanded amount but granted an unauthorised overdraft on the Roserie Company's operating account imposing an interest rate of 25%, which interest rate was said to be illegal.
- [32] Additionally, it was the appellant's contention that the Bank breached the agreement and failed to follow the Eastern Caribbean Central Bank ("ECCB") Prudential guidelines. The appellants submitted that the Bank is bound by contractual terms and owes the customer a duty of care.
- [33] The appellants relied on the cases of **Houle v Canadian National Bank**¹⁶ as authority for the argument that abuse of contractual rights is a breach of contract. They also submitted that the English law contains similar

¹⁶ [1990] 3 SCR 122.

pronouncements such as in the case of **Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd**.¹⁷ Further, the appellants submitted that in accordance with Article 2066 of the **Civil Code**, good faith is always presumed and in seeking to ensure that good faith is not abused, the court will imply a term of good faith as to how it should be exercised. They also assert that Article 956 of the **Civil Code** encapsulates that contractual rights have to be reasonably exercised in a manner that is not abusive and in good faith.

- [34] The appellants also contended that the learned judge failed to appreciate the ruling in **Sonia Johnny v The Attorney General**¹⁸ in that the ruling of the Court of Appeal was that English law was the applicable law because it did not conflict with the express provision of Article 956 and that the judge failed to consider the full ambit of the law in dismissing the principles espoused in **Houle** which were a part of English law. Therefore, the finding that there was no restriction on the Bank's right to demand payment cannot be upheld.

Respondent's submissions

- [35] In relation to the **Houle** case the respondent submitted that the court there found that the mere recall of the loan was not in itself an abuse of the bank's contractual right but rather it was the quick liquidation of the company's assets that amounted to an abuse. Thus, whilst the bank in that case had the right to recall the loan, having done so, the bank ought to have given the respondent sufficient time to satisfy the demand. The abuse arose from breach of the implied term that the bank would not unreasonably seek to realise its security and that issuing the demand and realising the security three hours later was clearly unreasonable and amounted to a breach of the contract. In contrast, the respondent argued that in the case at bar there were no restrictions or impositions, or bad faith and that the Bank acted within its legal rights.
- [36] It was also argued that Article 956 of the **Civil Code** must be interpreted in accordance with the decision in **Houle** which imports the concept of abuse of contractual rights into Quebec civil law. Further, the respondent contended that

¹⁷ [1980] 1 All ER 571.

¹⁸ SLUHCVP2017/0036 (delivered 13th December 2019, unreported).

the learned judge correctly concluded that the law relating to the implication of terms in the contract is the law of England and that applying and interpreting Article 956, regard must be had to English law on the subject.

- [37] The Bank also relied on **Hall v Royal Bank of Scotland plc**¹⁹ to assert that in relation to contractual rights, apart from terms in the contract, the common law provides the principle that debts are payable immediately and on demand.

Discussion

- [38] In relation to contracts, the **Civil Code**, presumes and legally implies good faith throughout the contractual process, from its inception to its completion. This principle underscores the expectation of honesty, fairness, and transparency in all contractual dealings. Article 956 states:

“956. The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.”

- [39] In the case of **Houle**, the court considered Article 1024 of the Civil Code of Lower Canada (the Quebec Code) which mirrors what is contained in Article 956 in the **Civil Code of Saint Lucia**. The court was of the view that:

“An abuse of rights may occur when the contractual right is not exercised in a reasonable manner, i.e. in accordance with the rules of equity and fair play. The abuse of a contractual right gives rise to contractual liability. This liability is based on art. 1024 C.C.L.C. and the underlying principle of good faith in the execution of contracts. Since the abuse of a contractual right gives rise to contractual liability, it follows that only the parties to the contract may claim for the breach of that contractual obligation (art. 1023 C.C.L.C.)...

In this case, *it is not contested that the bank had the contractual rights to recall the loan on demand and to realize on its security without notice*. The bank exercised its right to recall the loan after a reasoned decision, based on objective economic factors, and there is no evidence that there were any extraneous considerations to that decision. *While the recalling of the loan was not in itself an abuse of the bank's contractual rights, the quick liquidation of the company's assets did amount to an abuse of rights*. A creditor should not realize its securities or take possession of assets before giving the debtor, depending on the circumstances of each case, a reasonable time to meet its obligations. By liquidating the assets only three hours after demanding

¹⁹ [2009] EWHC 3163 (QB).

payment of the loan, the bank effectively prevented any chance of the company's meeting its obligations..." (Emphasis added)

- [40] In the case at bar, the learned trial judge at paragraphs 50, 55 and 57 of the Judgment stated that:

"[50] ...The parties are consistent in their evidence, that the debts under Loan Accounts Numbers 1250269, 2691661 existed prior to the Facility Letter which came into existence in 2001. By the defendants own account these loans were based on loan agreements, they were fully secured by hypothecs and were being serviced by monthly instalments and were not in arrears.... Mr. Roserie and Mr. Emily (sic) both confirm that there were outstanding balances on both loans when the Bank demanded repayment.

...

[55] The relevant clause in the respective hypothecs under which the loans were demanded expressly stated that so long as the debts remained outstanding the mortgagor (Roserie Ltd) would repay the debts on demand, and in the meantime by instalment as may be stipulated by the mortgagee (the Bank). The letter expressly stated that all facilities would remain payable on demand by the lender, at any time.

...

[57] *Consequently the Bank reserved the right to demand the loans at any time, in all the hypothecs and the Facility Letter, thus, there is no question that it was within the Bank's right to call in the loans at any time, and without cause.*" I agree on the authority of **Hall v Royal Bank of Scotland plc**²⁰ cited by Counsel for the Bank that in keeping with normal banking practice there is no restriction on the Bank's right to demand repayment." (Emphasis added)

- [41] In analysing **Hall v Royal Bank of Scotland plc**, I note that the court held that the expression 'in accordance with normal banking practice' did not cut down Royal Bank of Scotland's right to demand repayment of the loan. Further in **Chemical Manufacturing** (the sister appeal to this case) the Court stated at paragraph 61 that 'the general rule is that a demand loan is repayable on demand by the Bank'.

- [42] On the issue of the Bank's right to demand payment of the amounts outstanding on the loans, Webster JA [Ag.] determined at paragraph 67:

"I agree with the trial judge's analysis of Houle and how it applies to the demands made by the Bank. There is nothing useful that I can add. The

²⁰ [2009] EWHC 3163 (QB).

Bank did not abuse its contractual rights in demanding payment of the loans.”

- [43] The Privy Council in **Cukurova Finance International Ltd and another v Alfa Telecom Turkey Ltd (Nos 3 to 5)**²¹ observed at paragraph [78]:

“... the Board considers that if a chargee enforces his security for the proper purpose of satisfying the debt, the mere fact that he may have additional purposes, however significant, which are collateral to that object, cannot vitiate his enforcement of the security. If the law were otherwise, the result would be that the exercise of the right to enforce the charge for its proper purpose would be indefinitely impeded because of other aspects of the chargee's state of mind which were by definition irrelevant.”

- [44] I do not agree with the appellants that **Houle** supports their contention that the Bank's actions in calling in the loans was abusive. While the Supreme Court in **Houle** upheld the Bank's right to demand payment, it found that it was the *immediate sale of shares* without giving the company a chance to fulfil its obligations which was abusive. Thus, ‘whatever term will be implied into a contract depends upon the terms and the context of the particular contract involved.’²² I am of the view that the Bank acted within its contractual rights in demanding loan repayment. This ground also fails.

Grounds 4 and 5 - Whether the nature of the relationship between the Bank and the appellants transitioned from that of a debtor and creditor to a fiduciary relationship, thereby imposing upon the Bank a duty of care

Appellants' submissions

- [45] The appellants accepted that the general law is that ordinarily the relationship between the Bank and its customer is that of debtor/creditor, however regarding the payment of money from the client's account, the Bank is the agent. They further relied on Articles 1601 to 1661 of the **Civil Code**. Article 1601 defines the word ‘Agency’ as:

“1601. Agency is a contract by which a person, called the principal, commits a lawful business to the management of another, called the agent, who by his or her acceptance binds himself or herself to perform it. The

²¹ [2016] AC 923.

²² SLUHCVP2017/0036 *Sonia Johnny v The Attorney General* (delivered 13th December 2019, unreported) at para. 17.

acceptance may be implied from the acts of the agent, and in some cases form (sic) his or her silence.”

- [46] Further the appellants seek to rely on the definition of agency in section 4 of **Bowstead & Reynolds on Agency**²³ which states:

“(4) A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal’s relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.”

- [47] The appellants further relied on **Barclays Bank plc v Quincecare Ltd**²⁴ to assert the existence of a principal/agency relationship between the Bank and the 1st appellant where Lord Steyn stated that:

“Primarily, the relationship between a banker and customer is that of debtor and creditor. But quoad the drawing and payment of the customer’s cheques as against the money of the customer’s in the banker’s hands the relationship is that of principal and agent: see *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124 at 126 per Lord Atkinson. Similarly, when the bank in the present case acted on an order to transfer by immediate money transfer money from the Quincecare current account to Philip Evans & Co in Bournemouth, the bank was acting as Quincecare’s agent. As agent the bank owed fiduciary duties to Quincecare.”²⁵

- [48] The appellants therefore submitted that the learned trial judge erred in law when she failed to accept that there existed for the purposes of the handling of the monies in the current account a relationship which was fiduciary by nature. Furthermore, the Bank, in defiance of the express instructions not to pay the alleged customs debts, proceeded to make payment to customs by debiting the Roserie Company’s operating account. The payment was therefore made with no mandate. They also relied on **Philipp v Barclays Bank UK plc**²⁶ to assert that the Bank had a responsibility to carry out the customer’s mandate and that failure to follow the customer’s mandate was a breach of the Bank’s duty to the customer and any unmandated dealings with the funds created a relationship of principal/agent which is fiduciary in nature.

²³ 21st Edn. Thomson Reuters, Chapter 1 - Nature of the Subject, Agency and Authority.

²⁴ [1992] 4 All ER 363.

²⁵ Ibid at 375.

²⁶ [2023] UKSC 25.

- [49] Moreover, the appellants claimed that the Bank failed in its obligation to provide the Roserie Company with the assessment or to enquire whether one had been undertaken before accepting that the appellants were liable for the new sum which allegedly arose in 2008. This behaviour they contend, failed to meet the requirement of good faith and ought not to be acceptable as good banking practice. This removed the transactions from that of mere debtor/creditor relationship and gave rise to fiduciary obligations in managing the appellants' accounts.

Respondent's submissions

- [50] The Bank argued that the payments made to customs under the bonds were obligatory. Therefore, it was not a matter of protecting its own interest but doing what it was obligated to do under the **Customs Act** and the bonds provided by the Bank to customs for the benefit of the Roserie Company. Also, if there was any issue with the amount paid by the Bank under the bonds and **Customs Act**, the **Act** provided a complete regime for the appellants to utilise once the demanded debt to customs was made. Therefore, once the Bank fulfilled its legal duties under Part VIII of the **Customs Act** and paid the customs debt under the bonds, it had the right to recover those payments from The Roserie Company as it was a condition of the bonds that The Roserie Company would reimburse the Bank for any sums it paid on the company's behalf. Additionally, Articles 1051, 1117 to 1127, 1826, 1844, 1845 and 1846 of the **Civil Code** support the Bank's right to reclaim these payments.
- [51] Furthermore, when the Roserie Company could not repay the Bank immediately, the resulting overdraft and subsequent loan (Loan Account Number 106433212) were in accordance with the general principle that when a customer (like Roserie) has a current account with insufficient funds to cover a required payment (as per the bonds), the customer is essentially requesting an overdraft, which the Bank has the discretion to grant. The Bank herein relied on the dicta

of the court in **Office of Fair Trading v Abbey National Bank plc and others**²⁷ and **The Encyclopaedia of Banking Law**,²⁸ where the latter states as follows:

“...Unless there has been agreement to the contrary, where there are insufficient funds credited to the customer's account to cover the full amount of the customer's payment instruction, the bank may ignore the instruction completely. Prima facie, a customer is not in breach of their contract with the bank if they give an instruction to make a payment without having the necessary funds or facility to cover the payment (whether at the time when the instruction is given by the customer or when it is received by the bank or both)⁵. In such circumstances, the customer's payment instruction stands as an offer to the bank to extend credit which the bank has the option of accepting or rejecting.”

- [52] The respondent also posited that the Privy Council decision in **National Commercial Bank (Jamaica) Ltd v Hew**²⁹ established that the relationship of banker and customer does not give rise to fiduciary obligations. The respondent further submitted that the **Quincecare** duty is not applicable in this case since the duty is no more than an application of orthodox principles of the law of agency and a bank's general duty of care to interpret, ascertain and act in accordance with its customer's instructions, however in this case the Bank prioritised its legal duty to pay customs under the **Customs Act**. In summary the Bank argued that its actions were lawful based on its customer relationship with the Roserie Company and its own legal obligations and did not misuse its power or act unfairly.

Discussion

- [53] The Court of Appeal in **Ian Hope Ross et al v Martin Dinning et al**³⁰ held that the relationship between banker and customer does not ordinarily give rise to a fiduciary relationship or to a trustee/beneficiary relationship. The relationship between banker and customer is purely one of debtor and creditor.
- [54] The trial judge noted that the evidence confirmed that the bond payments were made in August 2003 and May 2009, further the appellants admitted that the

²⁷ [2008] EWHC 875 (Comm).

²⁸ Division C, The Relationship of Bank and Customer, Overdrafts, loans and facility letters, Repayment on demand, para. 322.

²⁹ [2003] UKPC 51.

³⁰ AXAHCVPAP2020/0005 (delivered 30th April 2021, unreported).

first assessment/demand was done sometime in 2002 and was paid in 2003.

The learned judge further noted at paragraphs [84] to [87]:

“[84] I have taken judicial notice of Part 12 of the Customs Act which contains a comprehensive regime for resolving disputes with Customs.... The onus was on Roserie Ltd to exercise its rights under the Customs Act to resolve disputes with Customs in relation to the assessments, the demands and the payments made by the Bank under the bonds. This was the avenue open to defendants to seek to obtain justification of these matters and a refund, if in fact there was overpayment, to be repaid to the Bank. In cross examination Mr. Roserie stated that when he inquired about challenging the assessment, he discovered that the period within which to do so had already elapsed and he did nothing further. Unfortunate as this might be, it cannot be cured circuitously by raising these matters in this claim. I do not believe it is within the purview of this Court to seek to unravel the issues in this way, as these were disputes to be pursued with all the relevant parties, within the confines of the Customs Act.”

...

[86] It is unrefuted that the Bank was jointly and severally liable under the bonds and was called upon to pay the duties owed by Roserie Ltd...

[87] On the totality of the evidence, I accept that the payments made by the Bank to Customs under the bonds were obligatory. Pursuant to section 136 of the Customs act payment was a mandatory requirement to trigger a dispute over the amount demanded as duty. It was a condition of the bonds that sums expended by the Bank were to be repaid by Roserie Ltd. Mr. Roserie and Mr. Emile both admitted this. I therefore conclude that these sums are due and payable to the Bank and will deal with the interest component separately in this judgment.”

[55] **The Encyclopaedia of Banking**³¹ states that ‘core banking activities of deposit-taking and lending are not fiduciary in character.’ In support of this the case of **Fahad Al Tamimi v Mohamad Khodari**³² is referenced where the court states that:

“The relationship between a lender and a borrower is not in principle a fiduciary relationship. The relationship between a bank manager and a customer may in certain circumstances acquire a fiduciary character.”

[56] **The Encyclopaedia of Banking** citing **Kotonou v National Westminster Bank plc**³³ states further:

³¹ Division C, The Relationship of Bank and Customer, 5A Banks as Fiduciaries, Issue 187.

³² [2009] EWCA Civ 1042, per Wilson LJ at [42].

³³ [2010] EWHC 1659 (Ch).

“the fact that the bank holds third party security to cover the customer's indebtedness does not convert the banker-customer relationship into a fiduciary one.”

[57] **Paget's Law of Banking**³⁴ explains that:

“A demand guarantee is an autonomous obligation of the guarantor to pay a sum on demand... the contract of guarantee may stipulate that the demand is to be made in a particular form... but it is the fact that the obligation to make payment is triggered by demand which is the defining characteristic of a demand guarantee. There will always be a principal, a guarantor and a beneficiary....The above definition embraces instruments known as demand bonds, sometimes referred to as performance bonds. These are simply a form of demand guarantee. ... The principal which underlies demand guarantees is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by disputes under the underlying contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it matters not whether between himself and the principal he is entitled to payment. The guarantor must honour the demand, the principal must reimburse the guarantor and any disputes between the principal and the beneficiary, including claim by the principal that the drawing was a breach of the contract between them, must be resolved in separate proceedings to which the bank will not be a party.”

[58] The Supreme Court in **Philipp v Barclays Bank UK plc** at paragraph 8 when considering the bank's mandate in the said case stated that:

“The starting point in understanding the contract between a bank and a customer who holds a current account with the bank is the decision of the House of Lords in *Foley v Hill* (1848) 2 HL Cas 28. It established conclusively that under ordinary circumstances a bank is not a trustee or fiduciary of money deposited by a customer, but simply a debtor.”

Later at paragraphs 34 and 35 the Supreme Court confirmed that:

“34. As with any contract for the supply of services in the course of a business, there is a term implied by law in the contract between a bank and its customer that the bank must carry out the services with reasonable care and skill...

35. The requirement to exercise reasonable care and skill only applies, and is only capable of applying, insofar as the contract gives the supplier any latitude in how the relevant services are carried out.”

In concluding on the **Quincecare** duty Lord Leggatt affirmed that:

³⁴ Part IX, Letters of Credit and Demand Guarantees, Chapter 35, Demand Guarantees and Performance Bonds – Nature of Demand Guarantees and Performance Bonds.

“97. In summary, the duty of a bank which has come to be referred to as the “Quincecare duty” is not, as that epithet might suggest, some special or idiosyncratic rule of law. Properly understood, it is simply an application of the general duty of care owed by a bank to interpret, ascertain and act in accordance with its customer's instructions. Where a bank is “put on inquiry” in the sense of having reasonable grounds for believing that a payment instruction given by an agent purportedly on behalf of the customer is an attempt to defraud the customer, this duty requires the bank to refrain from executing the instruction without first making inquiries to verify that the instruction has actually been authorised by the customer. If the bank executes the instruction without making such inquiries and the instruction proves to have been given without the customer's authority, the bank will be in breach of duty. It will also in making the payment be acting outside the scope of its own authority from the customer and will therefore not be entitled to debit the payment to the customer's account.”

[59] Further section 136 (1) of the **Customs Act** provides that:

“136. Appeal to the Comptroller

(1) Where any amount of duty demanded by an officer is disputed by the person required to pay that amount, that person shall pay that amount but then may, at any time before the expiration of 3 months from the date of payment, require the Comptroller, by a notice in writing under this subsection, to reconsider the amount of duty demanded.”

[60] In **Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. and another**³⁵ the court held that a performance bond stood on a similar footing to a letter of credit and a bank giving such a guarantee must honour it according to its terms unless it had notice of clear fraud. Further, the Court of Appeal in **Bolivinter Oil SA v Chase Manhattan Bank**³⁶ observed that:

“The unique value of a ... bond or guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic.”

[61] The court noted that it was only in the most exceptional cases, that a bank would be allowed to derogate from its irrevocable undertaking, if not, the bank's greatest asset, will be undermined, namely its reputation for financial and

³⁵ [1977] E. No. 1065, [1978] Q.B. 159.

³⁶ [1984] 1 All ER 351 at 352.

contractual probity. Therefore, the Roserie Company could only challenge the demanded sums by appealing to the Comptroller. Having carefully analysed the factual matrix of the case and the relevant law, I conclude that the Bank's relationship with the Roserie Company was not fiduciary, negating any duty of care and the trial judge correctly determined that the Bank's payment of the assessments were mandatory, leaving no discretion regarding payment to the Customs and Excise Department upon demand. Consequently, grounds 4 and 5 are dismissed.

Ground 6 - Validity of Guarantees Appellants' submissions

- [62] The appellants argued that the trial judge misdirected herself in accepting that all of the guarantees were valid. They contend that they sought specific disclosure of the unlimited guarantee however the Bank in response indicated that it did not have possession of the document. Further, a document with a blank space where the amount of guarantee should be, was produced as evidence of the unlimited guarantee but there is no evidence to show that this was the usual practice. All other guarantees stated the extent of the guarantee.

Respondent's submissions

- [63] With respect to the guarantees given, the respondent submitted that the court below was satisfied that the evidence before the court demonstrated that the grant of the guarantees was in accordance with the legal requirements.

Discussion

- [64] **The Encyclopaedia of Banking**³⁷ describes a guarantee as:

“Guarantees are...an agreement by which one person, the surety, agrees to answer for an existing or future liability of another, the principal, to a third party, the creditor. A contract of guarantee is a contract whereby the surety, the guarantor, undertakes responsibility to the creditor for the liability of the principal debtor to the creditor. For a contract to be one of guarantee there must exist or be contemplated some obligation of the principal debtor to which the guarantee is to be ancillary or secondary.”

³⁷ Division E, Securities, Guarantees 1, Contracts of guarantee, Issue, 187.

- [65] The appellants in the court below contended that Mr. Roserie, Mrs. Roserie and Chemico as guarantors should be released from their obligations under the respective guarantees because (i) Mrs. Roserie was not given independent legal advice; (ii) the Bank has no mandate for the loans; and (iii) the documents submitted by the Bank do not support or create any liability on the guarantors.³⁸
- [66] The trial judge at paragraph 117 of her judgment noted that all the loans were duly authorised. She further indicated that she examined the three guarantees exhibited by the Bank which were in standard form and worded widely to cover any sum due from the Roserie Company to the Bank, howsoever incurred. She further stated that in the case of Mr. and Mrs. Roserie the guarantees extended to limited sums of \$100,000.00, \$300,000.00 and \$500,000.00 respectively, whereas in the case of Chemico the guarantee had no limit and the space for inserting a limit was left blank.
- [67] The judge found at paragraph 118 that the guarantee by Chemico was produced by the Bank as Exhibit CS5 and was signed by Mr. Thomas Roserie on behalf of the company and attached to it was a Board resolution approving the same. The judge noted that the said resolution bore two signatures purporting to be that of the Chairman and Secretary of Chemico. Therefore, the judge found that it was not open to appellants to challenge the mandate for the unlimited guarantee. The judge further noted at paragraph 120:
- “[120] All the guarantees expressly state at paragraph 10, that the Bank is at liberty, without thereby affecting its rights under the guarantee, at any time and from time to time, whether before or after any demand for payment made by the Bank, to grant further credit to Roserie Ltd. or grant any other indulgence. The guarantees, therefore do not prohibit the Bank from advancing further sums after demand is made, but rather expressly permits it.”
- [68] The judge therefore concluded that all the guarantees were wide enough to secure the liabilities of the Roserie Company up to their respective limits and was unlimited in the case of Chemico. As a result, she held that the guarantees were valid and enforceable as against the respective appellants.

³⁸ See paragraph 115 of judgment in the court below.

[69] **The Encyclopaedia of Banking** states that there are three factors which affect the validity of a guarantee which are: misrepresentation, non-disclosure and failure to explain. The appellants submit that Mrs. Roserie was not given independent legal advice. It is noteworthy that the **Encyclopaedia** states with respect to failure to explain that:

“In the ordinary case of principal debtor and guarantor, the creditor owes no duty of care to the guarantor; in the normal case it is for the surety to satisfy himself as to the nature and extent of the obligations he is assuming and it is not for the creditor to explain the meaning or effect of the guarantee to him. This is the case whether the prospective guarantor is a customer of the bank or not. Similarly, the bank is not obliged to advise the prospective guarantor as to the financial wisdom of the transaction or to recommend that the customer take legal advice. Of course, if the bank does give the prospective guarantor an explanation of the guarantee, it must be sufficiently accurate and complete and must not be misleading.”³⁹

[70] This was affirmed in **Barclays Bank plc v Khaira**⁴⁰ where the court determined that business efficacy does not suggest the need for a term imposing upon the bank a liability to proffer explanations before guarantees are signed.

[71] I am therefore satisfied that the learned judge did not err and would dismiss this ground of appeal.

Ground 7 – Independent Legal advice Appellants’ submissions

[72] On this issue, the appellants argued that the learned trial judge erred in law when she ruled that Mrs. Roserie’s waiver was sufficient to meet the legal requirement of independent legal advice. Additionally, the appellants contended that the evidence given by Mrs. Roserie is that she is a beautician and was not involved in the day-to-day management of the business. Furthermore, she signed a document on 16th January 1998 in the presence of the Bank’s employer stating she declined to receive independent legal advice however the document was not explained to her. Further, the evidence revealed that Mrs. Roserie signed the hypothec in the presence of her lawyer but the signatures on the

³⁹ Encyclopaedia of Banking Law, Issue 187 at [710]– [720].

⁴⁰ [1993] 1 FLR 343.

guarantee were witnessed by the Bank's employee. Consequently, the appellants assert that this cannot be relied on by the Bank to absolve it from the obligation to ensure that Mrs. Roserie did in fact receive independent legal advice.

- [73] The appellants also relied on **Royal Bank of Scotland plc v Etridge (No.2)**⁴¹ as authority for the proposition that a bank is put on enquiry whenever a wife offers to stand surety for her husband's debts. As a result, the Bank could only have discharged its obligation if it had received notification from Mrs. Roserie's solicitor that he had explained the implications to her of the risks she would incur by standing as surety.

Respondent's submissions

- [74] The respondent on the other hand relied on **Barclays Bank plc v Khaira** to establish that in the normal course of events the Bank had no duty to explain to Mrs. Roserie the nature and effect of the security of the proposed transaction. The respondent further concluded that the appeal is a mix of law and fact, however deference is to be shown to the findings of the learned trial judge especially in relation to the findings of the fact.

Discussion

- [75] The House of Lords in **Royal Bank of Scotland plc v Etridge (No.2)** established guidelines for banks and solicitors when advising a wife who intends to pledge her property as collateral for her husband's debts. Lord Nicholls indicated at paragraph 44 stated 'that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts.' Also, at paragraphs 54 and 56 he went on to state that:

"54. The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.

.....

⁴¹ [2001] UKHL 44.

56... Ordinarily it will be reasonable that a bank should be able to rely upon confirmation from a solicitor, acting for the wife, that he has advised the wife appropriately.”

[76] Whilst the law gives relief to one who, without independent advice, enters into a contract upon terms that are very unfair,⁴² the relationship must be one where there is a degree of trust and confidence. The Privy Council in **National Commercial Bank (Jamaica) Ltd v Hew** noted that the banker and customer relationship does not fall into the category of a relationship ‘of trust and confidence’ or ‘of ascendancy and dependency’ but the existence of the necessary relationship may be proved as a fact in any particular case.⁴³

[77] Further, the court in **Barclays Bank plc v Khaira** stated that:

“...if the duty of care is said to arise out of that contract with the bank, then there is the added difficulty of establishing some kind of implied term. Business efficacy does not suggest the need for a term imposing upon the bank a liability to proffer explanations before guarantees are signed. Where a relationship is governed by contract, the courts will not search for a liability in tort.”⁴⁴

[78] This Court in deciding whether a duty to obtain independent legal advice will arise must examine the circumstances in which the documents were signed. The judge at paragraph 119 of the Judgment stated that:

“Mrs Roserie admitted to signing a waiver of independent legal advice at the Bank’s offices, which she exhibited. She admitted in cross examination that she understood the nature of the guarantees, that she agreed to guarantee the debts of Roserie Ltd and was comfortable to sign the guarantees because Mr Roserie always had debts and had developed a good record of repaying his debts.”

[79] For these reasons I agree with trial judge in holding that the guarantees are valid and enforceable as against the respective appellants. The facts of this case disclose an uncomplicated relationship of banker and customer. There is nothing in the facts that suggests that there was unconscionable conduct. The judge found that all three hypothecs were in the typical standard form of hypothecs and did not depart in any way from the ordinary and usual clauses used in such

⁴² *Lloyds Bank Ltd. v Bundy* [1975] QB 326.

⁴³ [2003] UKPC 51 at para. 31.

⁴⁴ [1993] 1 FLR 343 at 361.

instruments. Further, she found that the hypothecs were executed before the appellants' notary who ought to have explained all clauses and ramifications to them and were duly executed by the respective appellants. Thus, on the facts, Mrs. Roserie has not shown how the Bank could have assumed the responsibility to advise her in these circumstances. Consequently, this ground of appeal is also dismissed.

Interest

[80] The appellants argued that the Bank did not have any authority to pay the amount to customs by debiting the Roserie Company's operating account, creating an unauthorised overdraft, and imposing a 25% interest rate on the unmandated loan. The unauthorised overdraft could not legally carry any interest rate.

[81] It is the usual practice for banks to provide expressly for the charging of interest on overdrafts and loans in the express terms of the loan agreement or in their standard terms of business.⁴⁵ The trial judge noted that in accordance with ECCB Financial Reporting Standards the overdraft was converted to a demand loan account 106433212 in 2005.⁴⁶

[82] According to **Paget's Law of Banking**, in the absence of a contractual right to interest, interest is awardable pursuant to statute. Articles 1685 and 1686 of the **Civil Code** provides that:

"1685. Interest upon loans is either legal or convention. The rate of legal interest is fixed by law at 6% yearly. The rate of conventional interest may be fixed by agreement between the parties.

1686. An acquittance for the principal debt creates a presumption of payment of the interest, unless the latter is expressly excluded."

[83] During oral submissions counsel for the Bank agreed that in the absence of agreement between the Bank and the appellants for this loan, the legal rate of 6% is applicable. The abnormal interest rate on overdrafts would require notice,

⁴⁵ See *Financial Institutions Services Ltd v Negril Holdings Ltd* [2004] UKPC 40 and *Encyclopaedia of Banking*, Division C, *The Relationship of Bank and Customer*, paragraph [329].

⁴⁶ See paragraph 96 of the Judgment in the court below.

thus without notice being available, the Bank erred in imposing a 25% interest rate on the overdrafts.

- [84] Therefore, the Bank would be only entitled to no more interest on the balance owed on loan account number 106433212 from 4th May 2009 than the statutory interest rate of 6%. The respondent having conceded this point, the appellants succeed on this ground.

Disposition

- [85] In summary, I conclude that the judge was correct to hold that there was no justification for the appellants' assertion that the Bank conducted their affairs without consulting them. The debts of the Roserie Company are valid and enforceable against the respective appellants save and except to the issue of interest.
- [86] I would therefore dismiss the appeal and affirm the Judgment and order of the court below set out in paragraph 1 save and except that on the second payment to Customs in the sum of \$1,597,731.28, interest will accrue on that sum at the statutory rate of 6% per annum from 4th May 2009 to date of payment.
- [87] The respondent will have its costs in the appeal to be assessed by a judge of the Commercial Court if not agreed within 21 days of this decision.

I concur.

Eddy Ventose
Justice of Appeal

I concur.

Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar