

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

SAINT LUCIA

SLUHCMAP2021/0003

BETWEEN:

**[1] CHEMICAL MANUFACTURING AND INVESTMENT COMPANY
LIMITED**

[2] THE ROSERIE COMPANY LIMITED

Appellants

and

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

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

2023: March 23;
December 22.

Commercial appeal – Appellate court’s interference with findings of fact – Debt – Lawfulness of the overdraft on the Current Account - Rate of interest on principal sum – Eastern Caribbean Central Bank Guidelines on the rate of interest on overdrafts – Fiduciary duty – Whether the Bank owed fiduciary obligations to appellants – Propriety of the demands made by the Bank for repayment of the loans and the effect of the demands on the issue of prescription – Late evidence – The admission and consideration of the evidence by the learned trial judge after delivery of judgment

The appellants were customers of the First Caribbean International Bank (Barbados) Limited (“the Bank”) since 1993. From 2000 to 2001, the appellants and the Bank engaged in negotiations regarding the restructuring of the appellants’ borrowings from the Bank. At the time, the first appellant (“Chemico”) had an overdraft facility with the Bank on their current account number 1036143 (“the Current Account”) which was overdrawn by approximately \$120,000.00. The second appellant (“Roserie”) had a

separate loan account and overdraft facility. On 24th July 2001, the Bank issued a facility letter to Chemico with terms for converting the overdraft to a demand loan. The overdraft was transferred to account number 133504 and converted to a demand loan for \$120,000.00.

In September 2003, Chemico stopped making deposits to the Current Account but continued to use the credit card issued to Chemico by the Bank ("the Barclaycard"). The Bank, without consulting Chemico, deducted the credit card charges from the Current Account thereby putting the account into overdraft. On 28th October 2003, the Bank demanded payment from Chemico of the outstanding balance of \$38,142.22 on the demand loan. A year later, on 8th October 2004, the Bank issued a second letter demanding payment from Chemico of \$14,958.33 as the balance of principal and interest due on the demand loan, and \$71,374.58 on the overdraft facility on the Current Account with interest at the rate of 25% per annum.

The Bank started proceedings against the appellants on 17th February 2010 in the Commercial Court claiming: (i) \$4,918.68 plus interest of 13.5% per annum as the amount outstanding on the demand loan; and (ii) \$241,179.34 on the current account facility plus interest on the principal balance at the rate of 25% per annum from 15th October 2009 to the date of payment. The appellants denied liability for the amounts claimed on several grounds.

The learned trial judge delivered her judgment on 30th June 2021, ordering that: (a) interest on the overdraft facility granted by the Bank in respect of the Current Account occurring prior to 12th February 2005 is prescribed. The defendants shall pay interest at the rate of 25% per annum on the principal balance due on the overdraft facility as approved by the court, from the date of the claim to the date of payment; (b) the Bank shall prepare a statement of account showing the principal balance due on the sums advanced as overdraft in respect of the Current Account, with interest computed for the period of 12th February 2005 to the date of filing the claim and shall file and serve an affidavit exhibiting the statement on or before 21st July 2021, for approval of the court; (c) the defendants shall pay the Bank the principal sum due on the overdraft facility as approved by the court, on or before the date to be set by the court; and (d) 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. ("The First Order").

The appellants appealed against the First Order. The main issues for determination extracted from the appellants' grounds of appeal are: (i) the lawfulness of the overdraft on the Current Account (including Chemico's position that the Bank agreed to keep the Account in credit); (ii) the interest rate of 25% per annum charged on the balance from time to time on the overdraft including the effect of the Eastern Caribbean Central Bank Guidelines on the rate of interest on overdrafts; (iii) whether the Bank owed fiduciary obligations to Chemico; (iv) the propriety of the demands made by the Bank for repayment of the loans and the effect of the demands on the issue of prescription; and (v) the admission and consideration of the evidence by the learned judge after delivering the Judgment on 30th June 2021.

Held: allowing the appeal in part and making the orders at paragraph 74 of this judgment, that:

1. When there is an express agreement between a bank and its customer for the customer to have overdraft privileges on his account, the bank is obliged to honour cheques drawn on the account even if the account does not have sufficient funds to meet the cheque. When there is no agreement between the customer and the bank for an overdraft facility and there are insufficient funds in the account to pay a cheque drawn on the account, the cheque is treated as an offer to the bank to either honour the cheque using the bank's funds and putting the account into overdraft, or returning the cheque unpaid. If the bank honours the cheque and the account goes into overdraft, the overdraft will be on the bank's usual terms as to interest and other charges on an overdrawn account. The bank's usual terms on overdrafts will not apply if there is a contrary agreement with the customer. The judge erred by treating this case as analogous to one where the customer issues a cheque when there are insufficient funds in the account to cover the cheque. This is not what happened in this case and the Bank's rights were circumscribed by its terms and conditions for the use of the Barclaycard. In the circumstances, the findings of the judge that the Bank was entitled to charge interest on the overdraft on the Current Account at its standard rate for overdrafts is reversed. The Bank was entitled to charge interest on the monies used to honour the Barclaycard charges only on the terms of its credit card contract with Chemico.

Lloyds Bank plc v Voller [2000] 2 All ER (Comm) 978, 982, CA applied; **Office of Fair Trading v Abbey National Bank plc** [2008] EWHC 875 (Comm) applied; **Emerald Meats (London) Ltd v AIB Group (UK) Ltd** [2002] EWCA Civ 460 applied.

2. The evidence led by the Bank about its standard rate of interest is contained in paragraph 12 of the witness statement of Mr. Small where he said, 'the first defendant (Chemico) failed and or refused to pay the overdraft which continued to accrue interest at the rate of 25% per annum'. The trial judge found that Mr. Small's evidence is that the Bank's standard practice is to charge 25% on overdrafts. However, this is evidence of the rate that the Bank was charging Chemico on its overdraft. It is not evidence of a general practice for charging interest on an unauthorised overdraft. Based on the trial judge's nuanced treatment of the evidence, and the paucity of the evidence on the issue, this Court can review the trial judge's finding as she appears to have misapprehended the evidence or was wrong in making the finding of fact. The Bank's evidence falls short of proving that it had a standard practice for charging interest at 25% per annum on an unauthorised overdraft.
3. Chemico had the benefit of the purchases made by the Barclaycard and agreed in its evidence that Chemico had an obligation to pay its credit card bills. In the circumstances, Chemico is liable to repay the \$58,172.32 that was advanced by the Bank to pay the Barclaycard charges from which it benefited.
4. A party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid by him. Chemico is liable to repay the amounts advanced by the Bank

to settle the credit card charges with interest. The Bank's claim for interest on the overdraft at 25% per annum is rejected and there is no evidence of the rate of interest on its credit cards. However, there is evidence of the rate of interest on demand loans of 4% per annum above the Bank's base rate of 10.5%. Using this rate of interest, Chemico shall repay the principal sum of \$58,172.32 with interest at the rate of 14.5% per annum from 12th February 2005 to the date of the final order on 16th August 2021, and thereafter at the statutory rate of 6% per annum on the outstanding balance of the principal sum until payment in full.

Civil Code of Saint Lucia Chap 4:01 Revised Laws of Saint Lucia 2020 applied; **Andrey Adamovsky et al v Andriy Malitskiy et al** BVIHCPMAP2014/0022 (delivered 3rd February 2017, unreported) followed.

5. Clause 2 of the Hypothec provides that there should be no advances after the Bank demands payment of 'the Debts'. The Debts include the outstanding balance on the demand loan, payment of which was demanded by the letter of 28th October 2003. The Bank demanded payment of what was at least part of 'the Debt'. This was sufficient to trigger clause 2 and any payments or advances made after 28th October 2003 are not secured by the Hypothec. The credit card charges made before 28th October 2003 are secured by the Hypothec. These are the payments of \$5,320.51 and \$432.84 made on 17th September 2003 and 18th October 2003 respectively. The total amount of \$5,753.35 is secured by the Hypothec and the payments of \$44,467.04 made after that date are not secured.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This appeal concerns a dispute between the respondent, First Caribbean International Bank (Barbados) Limited ("the Bank"), and the appellants, Chemical Manufacturing and Investment Company Limited ("Chemico") and The Roserie Company Limited ("Roserie"),¹ concerning overdraft charges and accrued interest on Chemico's current account number 1036143 at the Bank ("the Current Account" or "the Account"). Following the completion of the evidence and submissions at the trial, the learned trial judge made the following orders:

- "(a) Interest on the overdraft facility granted by the Bank in respect of the Current Account 1036143 accruing prior to 12th February 2005 is prescribed. The defendants shall pay interest at the rate of 25% per annum on the principal balance due on the overdraft facility as approved by the court, from the date of the claim to the date of payment.
- (b) The Bank shall prepare a statement of account showing the principal balance due on the sums advanced as overdraft in respect of the Current Account number 1036143, with interest

¹ I will refer to Chemico and Roserie together as "the appellants".

computed for the period 12th February 2005 to the date of filing the claim and shall file and serve an affidavit exhibiting the statement on or before 21st July 2021, for approval of the court.

- (c) The Defendants shall pay the Bank and the principal sum due on the overdraft facility as approved by the Court, on or before the date to be set by the Court.
- (d) ...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**.² ("the First Order")

[2] The Bank complied with paragraph (b) of the First Order by filing an affidavit of Mr. Ian Nathaniel on 21st July 2021. On 19th August 2021, the learned judge entered judgment for the Bank against the appellants for the principal sum of \$58,172.32 with interest at the rate of 25% per annum from 12th February 2005 until payment in full ("the Second Order"). The Second Order also provided that the Bank could not take any steps to enforce the judgment debt until on or after 16th August 2022.

[3] The appellants appealed against the First Order. The Bank did not counter-appeal against paragraph (a) of the First Order prescribing that part of the claim for accrued interest that accrued before 12th February 2005.

Background

[4] The appellants were customers of the Bank since 1993. In the latter part of 2000 going into 2001, the Bank and the appellants engaged in negotiations regarding the restructuring of the appellants' borrowings from the Bank. At the time, Chemico had an overdraft facility with the Bank on the Current Account which was overdrawn by approximately \$120,000.00. Roserie had a separate loan account and overdraft facility. This appeal is concerned with Chemico's overdraft facility.

[5] On 24th July 2001, the Bank issued a facility letter to Chemico with terms for converting the overdraft to a demand loan. The letter was not signed by Chemico but the learned judge found that the parties acted on its terms and that

² The Civil Procedure Rules 2000 were repealed on 31st July 2023 and replaced by the Civil Procedure Rules (Revised Edition) 2023.

in the absence of evidence to the contrary it substantiated the terms of the agreement for the establishment of a demand loan.³ I adopt this finding. The overdraft was transferred to account number 133504 and converted to a demand loan for \$120,000.00 ("the Demand Loan"). The facility letter stated that the loan was repayable on demand by the Bank 'at any time, whether or not the borrower has complied with any formulae or requirements referred to in this letter'; that the loan was repayable by monthly instalments of \$4,131.00 for 36 months commencing 1st August 2001 and carried interest at 4% per annum above the Bank's base rate of 10.5%; that the loan was secured by: (i) mortgage debenture dated 28th August 1995 ("the Hypothec"), (ii) an unlimited guarantee dated 17th July 1996 by Roserie, and (iii) a letter of undertaking not to pay dividends without the Bank's consent.

[6] Chemico continued to operate the Current Account as its operating account and paid the monthly instalments on the Demand Loan by standing order from the Current Account. The loan was serviced satisfactorily and in fact was paid off before the Bank filed its claim in 2010. The Bank also deducted payments of \$1,690.31 and \$3,059.00 from the Current Account in July and August 2003 respectively to cover payments made on the credit card issued to Chemico by the Bank ("the Barclaycard"). No issue arises regarding these payments, probably because there were sufficient funds in the Current Account to cover the payments when they were made and the payments did not put the Account into debit. Also, in September 2003 the Bank returned a cheque for \$825.80 drawn on the Current Account. Honouring the cheque would have put the Account into overdraft.

[7] The Current Account went into overdraft in September 2003 after Chemico stopped making deposits and withdrawals to the Account but, as the evidence shows, continued to use the Barclaycard. On 28th October 2003, the Bank demanded payment from Chemico of the outstanding balance of \$38,142.22 on the Demand Loan. No reason was given in the letter for the demand. Approximately one year later, on 8th October 2004, the Bank issued a second

³ SLUHCM2020/0064 formerly SLUHCV2010/0121 (delivered 30th June 2021, unreported) at paragraph 46.

letter demanding payment from Chemico of \$14,958.93 as the balance of principal and interest due on the Demand Loan, and \$71,374.58 on the overdraft facility on the Current Account with interest at the rate of 25% per annum. The second demand letter stated that the loan facilities were not being serviced by Chemico in a satisfactory manner and demanded that Roserie pay the outstanding amounts within 14 days. The demand letter ended with a cryptic statement that 'the company remains contingently liable for the outstanding bonds of \$50,000.00'. This is probably a reference to an ongoing dispute between Roserie and the Customs Department of Saint Lucia which Mr. Thomas Roserie, the managing director of both companies, said in his evidence was the reason why the Bank issued the demands. I will say more about the Bank's reason for making the demands later in this judgment.⁴

- [8] Chemico continued to use the Barclaycard without making arrangements with the Bank to settle the charges made on the card. The Bank, without consulting Chemico, deducted the credit card charges from the Current Account thereby putting the Account into overdraft. The deductions were summarised by Ms. Andriana Thomas in the Bank's Reply to Requests for Information filed on 12th October 2011 as follows:

<u>Payments Made</u>	<u>Amounts Paid</u>
17 September 2003	\$5,320.51
18 October 2003	\$ 432.84
17 November 2003	\$5,178.76
18 December 2003	\$3,137.88
17 January 2004	\$19,477.13
17 March 2004	<u>\$16,673.27</u>
TOTAL	<u>\$50,220.39</u>

- [9] Ms. Thomas also attached to the Bank's Reply to Requests for Information filed on 8th July 2011 a copy of Chemico's credit card statement showing details of the credit card charges made on the Barclaycard.

Proceedings in the Commercial Court

⁴ See paragraphs 61-67 below.

[10] The Bank started proceedings against the appellants on 17th February 2010 in the Commercial Court claiming:

- (i) \$4,918.68 plus interest of 13.5% per annum as the amount outstanding on the Demand Loan; and
- (ii) \$241,179.34 on the current account facility plus interest on the principal balance at the rate of 25% per annum from 15th October 2009 to the date of payment.

[11] The appellants denied liability for the amounts claimed on several grounds including:

- (a) the Demand Loan had been repaid in full before the filing of the claim. The Bank eventually conceded this point and this part of the claim was withdrawn, somewhat belatedly, in 2011;
- (b) the overdraft facility on the Current Account was unauthorised and unlawful;
- (c) the Bank had agreed that the Current Account would be operated strictly in credit;
- (d) the overdraft interest of 25% per annum is unconscionable and amounts to a penalty;
- (e) the claim for arrears of interest is prescribed having accrued more than five years before the claim was filed;
- (f) the demand clause under which the Bank demanded payment of the loan(s) is unfair and cannot be relied on by the Bank; and
- (g) the Bank had fiduciary obligations to the appellants.

[12] The learned trial judge tried the case over three days in November and December 2020. Mr. Curtis Small, senior manager at the Bank's headquarters in Bridgetown, Barbados, gave evidence for the Bank. Mr. Thomas Roserie and Mr. Augustin Emile, the appellants' accountant, gave evidence for the

appellants. All the witnesses gave witness statements and were cross examined. The learned trial judge delivered her written judgment on 30th June 2021 (“the Judgment”) making the First Order.

- [13] The Bank complied with paragraph (b) of the First Order by filing an affidavit by Mr. Ian Nathaniel. Mr. Nathaniel deposed that the principal balance on the overdraft on 12th February 2005 was \$58,172.32 and the amount of accrued interest at 25% per annum from 25th February 2005 to the date of the claim on 12th February 2010 was \$72,755.24, making a total claim of \$130,927.56 on the overdrawn Current Account. The learned judge then conducted a further hearing on 16th August 2021 when both sides were present and represented by counsel. The judge made her final order in the terms set out in the Second Order.

The appeal

- [14] The appellants appealed against the First Order. The notice of appeal lists 14 grounds of appeal with six sub-grounds in ground (7). Many of the issues raised by the grounds of appeal overlap, and it is not necessary to deal with some of the grounds in order to dispose of the main issues in the appeal. The main issues that I extract from the grounds of appeal and counsel’s submission are:

- (i) The lawfulness of the overdraft on the Current Account (including Chemico’s position that the Bank agreed to keep the Account in credit).
- (ii) The interest rate of 25% per annum charged on the balance from time to time on the overdraft including the effect of the Eastern Caribbean Central Bank Guidelines on the rate of interest on overdrafts (“the Guidelines”).
- (iii) Whether the Bank owed fiduciary obligations to Chemico.
- (iv) The propriety of the demands made by the Bank for repayment of the loans and the effect of the demands on the issue of prescription.

- (v) The admission and consideration of the evidence by the learned judge after delivering the Judgment on 30th June 2021.

[15] Some of the issues in this appeal involve challenges to findings of fact by the trial judge and I will therefore comment briefly on the role of an appellate court in reviewing a trial judge's findings of fact.

Appellate approach to findings of fact

[16] The starting point for considering the approach of an appellate court to reviewing the findings of fact by a trial judge is the 1947 decision of the House of Lords in **Watt (or Thomas) v Thomas**,⁵ where, for the reasons set out in the opinions of their Lordships, the general rule is that an appellate court will be slow to interfere with the findings of fact by the trial judge especially where those findings are based on the trial judge's assessment of the demeanour and credibility of the witnesses. In this situation the appellate court will interfere only if it is satisfied that the trial judge misapprehended the evidence or was blatantly wrong in making the finding of fact.

[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. We were reminded on this by Lewison LJ in **Fage UK Ltd v Chobani UK Ltd**:⁶

"114. 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."⁷

⁵ [1947] AC 484 at 488.

⁶ [2014] EWCA Civ 5.

⁷ This passage was cited with approval by Lord Briggs in *Ming Siu Hung and others v JF Ming Inc and another* [2012] UKPC 1 on appeal from this Court.

[18] The inclination of the appellate court to interfere with inferences drawn by the trial judge varies from case to case. When the inferences are drawn from disputed oral evidence the appellate court will be very reluctant to interfere. But when the inference is based on undisputed primary facts or documents, the Court of Appeal will generally be more inclined to interfere as in this situation it is in as good a position as the trial judge to draw the proper inferences.⁸

[19] I will be guided by these principles in assessing the judge's findings and the grounds of appeal to which I now turn.

The lawfulness of the overdraft on the Current Account

[20] A good starting point for the issue of the overdraft is to determine whether the Bank was entitled to settle the Barclaycard charges by debiting the Current Account with the charges when there were no or insufficient funds in the Account to cover the charges. The inevitable result was that the Current Account went into overdraft.

[21] The appellants did not authorise the Bank to settle the amounts due on the Barclaycard by debiting the Current Account and disputed the amounts charged to the Account. Their position is that the Bank agreed in a letter dated 30th May 2001 to Mr. Roserie that following the restructuring of the appellants' loans 'the current account will have to operate strictly in credit'.⁹ Therefore, the Bank could not conduct transactions that had the effect of putting the Current Account into overdraft and it was the Bank who put the Account in overdraft. This is illustrated by the fact that in September 2003 the Bank returned Chemico's cheque for \$825.80 drawn on the Current Account. Honouring the cheque would have put the Account into overdraft which would have been inconsistent with the Bank's mandate that the Account be operated strictly in credit.

⁸ Per Lord Hodge in *Beacon Insurance v Maharaj Bookstores Ltd.* [2014] UKPC 21 at paragraph 17.

⁹ See appellants' submissions filed 13th May 2022.

[22] Mr. Roserie testified that Chemico did not settle the overdraft because it did not authorise the Bank to overdraw the Account and the overdraft was in breach of the Bank's agreement to keep the account in credit. Further, the Bank did not send the credit card statements to Chemico. He said in cross examination "I have not authorized any overdrafts, neither have I requested the Bank to make any advances, so I can only pay the Bank monies that I know that is just being owed."¹⁰

[23] Mr. Roserie also confirmed in cross examination that the credit card was used to pay Chemico's operational expenses and one of those expenses would have been the Barclaycard charges.¹¹

[24] The Bank's position regarding the overdraft is best understood by reference to the legal principles regarding unauthorised overdrafts. These principles are clearly set out in the Bank's skeleton argument filed on 10th November 2022. In paragraph 21, learned counsel Mr. Bota McNamara, referred to paragraph 322 division C of the **Encyclopaedia of Banking Law**¹² for the following general principle relating to overdrawn accounts:

"An overdraft is a loan of money: 'a payment by a bank under an arrangement by which the customer may overdraw a lending by the bank to the customer of the money'. A bank is only obliged to let its customer overdraw if it has agreed to do so or if such an agreement can be inferred from their course of dealings. 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 his contract with his bank if he gives 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). In such circumstances, the customer's payment instruction stands as an offer to the bank to extend credit to him, which the bank has the option of accepting or rejecting."

¹⁰ Record of Appeal (Transcript) page 64 lines 19-22.

¹¹ Record of Appeal (Transcript) page 48 lines 5-15.

¹² Encyclopaedia of Banking Law by Peter Cresswell, Phillip R. Wood and P.M Phillips 2nd Edition.

Similar principles are set out in the decided cases including **Office of Fair Trading v Abbey National Bank plc**,¹³ **Lloyds Bank plc v Voller**,¹⁴ and **Emerald Meats (London) Ltd v AIB Group (UK) Ltd**.¹⁵

[25] In **Lloyds Bank plc v Voller** Wall J said:

“In my judgment, the position is very simple and well established as a matter of banking law and practice. It is this. If a current account is opened by a customer with a bank with no express agreement as to what the overdraft facility should be, then, in circumstances where the customer draws a cheque on the account which causes the account to go into overdraft, the customer, by necessary implication, requests the bank to grant the customer an overdraft of the necessary amount, on its usual terms as to interest and other charges. In deciding to honour the cheque the bank, by implication, accepts the offer. It is plain that the account in question, the personal account, operated for a very substantial period of time, with cheques being drawn by Mr Voller on the overdrawn account, and the cheques being honoured by the bank. Thus, the only proper conclusion which can be drawn, in the absence of any evidence that there was a different agreement between Mr Voller and the bank, is that the bank granted him overdraft facilities at the standard rate for overdrafts. It would have been open to the bank to have charged him the unauthorised rate but it did not do so.”

[26] I extract the following principles from the cases:

- (a) When there is an express agreement between a bank and its customer for the customer to have overdraft privileges on his account the bank is obliged to honour cheques drawn on the account even if the account does not have sufficient funds to meet the cheque.
- (b) When there is no agreement between the customer and the bank for an overdraft facility and there are insufficient funds in the account to pay a cheque drawn on the account, the cheque is treated as an offer to the bank to either honour the cheque using the bank's funds and putting the account into overdraft or returning the cheque unpaid.

¹³ [2008] EWHC 875 (Comm) at [64].

¹⁴ [2000] 2 All ER (Comm) 978, 982, CA, per Wall J.

¹⁵ [2002] EWCA Civ 460 at [14].

- (c) If the bank honours the cheque and the account goes into overdraft, the overdraft will be on the bank's usual terms as to interest and other charges on an overdrawn account.
- (d) The bank's usual terms on overdrafts will not apply if there is a contrary agreement with the customer.

[27] Chemico argued that the principles in the cases do not apply to the unauthorised overdraft created by the Bank for the following reasons:

- (1) The Bank did not have a proper mandate to cause the Current Account to go into overdraft.
- (2) The interest rate of 25% per annum on the overdraft is exorbitant and the burden of showing that there was a practice of charging 25% per annum on an overdraft was on the Bank.
- (3) The principles in the English cases do not apply and the matter is governed by the Guidelines relating to overdraft accounts.
- (4) There is an express contrary agreement in this case based on the Bank's agreement in the letter of 30th May 2001 that the Current Account would be kept strictly in credit.
- (5) The Hypothec prevents the Bank from making advances to Chemico after the loans were demanded and the overdraft consisted of advances made by the Bank after it demanded payment of the loans.

Analysis

[28] Chemico relied on the fact that it did not authorise the Bank to overdraw the Current Account by debiting it with the charges made on the Barclaycard. The only time that it could be treated as having issued a mandate to the Bank, or to put it in the language of the cases, as having made an offer to the Bank to extend temporary credit to it, was when it issued the cheque for \$825.80. However, the Bank did not accept the offer when it refused payment on the

cheque. This was consistent with the terms of its letter in May 2001 agreeing to keep the Current Account strictly in credit. The Bank took a different position when Chemico used the Barclaycard and there was no money in the Current Account. Instead of declining the charges or honouring them and applying its rate for credit card charges on outstanding balances, the Bank chose to honour the charges and settle them by debiting the overdrawn Current Account and charging Chemico interest at 25% per annum on the overdrawn balance from time to time. The key issue in this case is whether the Bank was entitled to do this.

[29] The form of borrowing on a credit card is different from borrowing on an overdraft. A credit card has its own rules, usually in the form of the bank's standard contract. The terms can be varied for each customer. The Bank did not give evidence, written or oral, of the terms on which the Barclaycard was issued and used by Chemico. Such evidence could have included the rate of interest on outstanding credit card balances. The cases cited by the Bank do not apply to credit cards and counsel has not brought to the Court's attention a case that says that the use of a credit card is an offer to the bank to honour the charges incurred and charge interest at the bank's standard rate for overdrafts. The onus was on the Bank to produce evidence, written or oral, of the consequences of using the Barclaycard above the agreed limits.

[30] The learned trial judge found that Chemico (through its officers) was aware of the use of the Barclaycard and that the charges were being settled from the Current Account. It did not cancel the card or close the account. Further, it was reasonable for the Bank to expect that Chemico would deposit sufficient funds to clear the overdraft. In the circumstances it was a reasonable decision for the Bank to allow the Account to go into overdraft and the overdraft is not unlawful. These are findings of fact by the judge and the role of this Court is to determine whether the judge came to her conclusions on a proper basis.

[31] In my opinion the judge erred by treating this case as analogous to one where the customer issues a cheque when there are insufficient funds in the account to cover the cheque. In this situation the Bank has the right to treat the cheque

as an offer to extend credit to the customer on its standard terms for overdrafts by debiting the account on which the cheque was drawn. This is not what happened in this case and the Bank's rights were circumscribed by its terms and conditions for the use of the Barclaycard. The Bank did not assist the court below by producing evidence of the terms of the Barclaycard. Instead, it opted to disregard its terms for credit cards and rely on its terms for an unauthorised overdraft facility. In the circumstances, I would reverse the judge's finding that the Bank was entitled to charge interest on the overdrawn Current Account at its standard rate for overdrafts. The Bank was entitled to charge interest on the monies used to honour the Barclaycard charges only on the terms of its credit card contract with Chemico. The terms would have included the agreed rate of interest on that facility. Regrettably, the Bank did not lead evidence on this important part of its claim.

The 25% per annum interest rate on the overdraft

[32] The next issue is whether the Bank was entitled to charge interest at the rate of 25% per annum on the overdraft. This is the situation that is addressed in the cases that were cited and relied on by the Bank. The general principle is that a bank is entitled to charge interest at its standard rate for such overdrafts. But having found that the unauthorised overdraft was improper this issue is academic. I will deal with it only out of deference to the submissions of counsel.

[33] The evidence led by the Bank about its standard rate of interest on overdrafts is sparse. It is contained in in paragraph 12 of the witness statement of Mr. Small where he said:

“The first defendant (Chemico) failed and or refused to pay the overdraft which continued to accrue interest at the rate of 25% per annum.”

Mr. Small did not elaborate on this statement in his oral evidence and he was not cross-examined on the issue. The trial judge found in paragraph 75 of her judgment that ‘Mr. Small's evidence is that the Bank's standard practice is to charge 25% on overdrafts’.¹⁶ However, I do not think his evidence goes this

¹⁶ Paragraph 75 of the Judgment.

far. He said that the overdraft 'continued to accrue interest at the rate of 25% per annum'. This is evidence of the rate that the Bank was charging Chemico on its overdraft. It is not evidence of a general practice for charging interest on an unauthorised overdraft. Based on the trial judge's nuanced treatment of the evidence, and the paucity of the evidence on the issue, this Court can review the trial judge's finding as she appears to have misapprehended the evidence or was blatantly wrong in making the finding of fact.

[34] I find that the Bank's evidence falls short of proving that it had a standard practice for charging interest of 25% on an unauthorised overdraft. If it was necessary, I would interfere with the finding that the Bank had a standard practice for charging interest on overdrafts. However, the overdraft was not properly created and a finding about interest on overdrafts is not necessary.

[35] The issue in this appeal is whether the Bank can charge interest on the amounts that it paid to settle the Barclaycard charges. A credit card account is different from an unauthorised overdraft. The credit card account has its own rules which are usually brought to the customer's attention. If the rules were not brought to Chemico's attention, the Bank could have led evidence about its rules for charging interest on unpaid credit card balances. Instead, the Bank resorted to common law principles to justify overdrawing Chemico's account and charging 25% interest on the unauthorised overdraft. The Bank's entitlement was to charge interest on the amounts advanced in accordance with the terms of the credit card facility. There being no such evidence the Court is not in a position to make an award of interest in accordance with the terms of the Barclaycard.

[36] It is indisputable that Chemico received the benefit of the amounts advanced by the Bank to cover the Barclaycard charges. Mr. Roserie admitted in his evidence that Chemico benefitted from the use of the card,¹⁷ and that Chemico had an obligation to pay the credit card bills.¹⁸ Chemico's dispute with the Bank relates to the creation of the overdraft and charging interest

¹⁷ Transcript 20th November 2020 page 66 lines 18-25.

¹⁸ Transcript 20th November 2020 page 58 lines 22-25.

thereon at the rate of 25% per annum. The trial judge accepted the evidence of Mr. Ian Nathaniel and found that the amount advanced as at the date when recoverable interest charges started to accrue was \$58,172.32 (“the Principal Sum”). Having had the benefit of the purchases made by the Barclaycard, and agreeing that Chemico had an obligation to pay its credit card bills, I would order that Chemico repay the \$58,172.32 that was advanced by the Bank to pay the Barclaycard charges from which it benefited.

Interest on the Principal Sum

- [37] The Bank claimed interest on the principal balance of the overdraft at the rate of 25% per annum ‘or any other interest as the Court deems fit’ from 15th October 2009 to the date of payment. For the reasons set out above I have rejected the claim for an overdraft and for interest thereon at the rate of 25% per annum. However, Chemico has had the benefit of the Principal Sum on loan from the Bank since September 2003. This Court has accepted that a claimant who has been kept out of his money by the wrongful act of the defendant is entitled to repayment of the money with interest as compensation for being denied the use of his money. In **Andrey Adamovsky et al v Andriy Malitskiy et al**¹⁹ Michel JA noted that:

“It cannot be disputed that a party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. This latter award is what is referred to as an award of pre-judgment interest.

- [38] The right to order a party to pay pre-judgment interest has statutory force in Saint Lucia in article 1009A of the **Civil Code of Saint Lucia** (the “**Civil Code**”)²⁰ which provides that:

“In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this article— (a) shall

¹⁹ BVIHMAP2014/0022 (delivered 3rd February 2017, unreported) at paragraph 13.

²⁰ Chap 4:01 Revised Laws of Saint Lucia 2020

authorise the giving of interest upon interest, except in the cases mentioned in article 1009; or (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise.”

[39] The claim for the recovery of the Principal Sum falls within the principles established by this Court and the provisions of article 1009A. It is for the recovery of a debt and the Court can, in its discretion, award interest on the amount awarded from the date when the demand for payment was made on 8th October 2004 to the date of judgment, at such rate as the Court thinks fit. The Bank’s claim for interest on the overdraft at 25% per annum has been rejected and there is no evidence of the rate of interest on its credit cards. However, there is evidence of the rate of interest on demand loans of 4% per annum above the Bank’s base rate of 10.5%. I appreciate that this is the rate that applied in 2003 when the Demand Loan was established and that interest rates fluctuate, but it is a rate that I think is appropriate in this case. The recoverable interest started accruing on 12th February 2005 because the trial judge found that interest accruing before that date was prescribed and there was no counter appeal against this part of the judge’s order.

[40] I would therefore order that Chemico repay the Principal Sum of \$58,172.32 with interest at the rate of 14.5% per annum from 12th February 2005 to the date of the final order on 16th August 2021, and thereafter at the statutory rate of 6% per annum on the Principal Sum until payment in full.

The ECCB Guidelines

[41] The appellants submitted that the Guidelines govern the terms of the overdraft and not the principles in the cases.

[42] Section 184 of the **Banking Act**²¹ provides that “the Central Bank (of the Eastern Caribbean) may issue such prudential standards as may be required from time to time for giving effect to the provisions of this Act”. The Central Bank issued Prudential Credit Guidelines in or about June 1997 which are

²¹ Revised Laws of Saint Lucia Chapter 12.01.

described by counsel and in this judgment as ‘the Guidelines’. Learned counsel for the appellants, Mrs. Cynthia Hinkson-Ouhla, submitted that the Guidelines were made pursuant to a statute and any inconsistency between the Guidelines and the common law principles in the cases cited by learned counsel for the Bank should be resolved in favour of the Guidelines.

[43] The learned judge rejected this submission, finding at paragraph 76 of the Judgment that ‘[t]hese Guidelines were never adduced in evidence and no submissions were made on the legal status and effect or even what they provide and what is the alleged breach’. The learned judge cannot be faulted for summarily dismissing the submission on the Guidelines.

[44] Mrs. Hinkson-Ouhla produced the Guidelines for the benefit of this Court but there is still no proof that they were ever passed into law. In fact, I do not think they are meant to be passed into law. They are what they say they are – guidelines for the practice of banking in the Eastern Caribbean. Mrs. Hinkson-Ouhla has not provided the court with any authority to suggest that the Guidelines should prevail over principles of law established by the cases decided by the highest courts in England. The trial judge was correct to direct herself in accordance with the common law principles established by the decided cases and not the Guidelines.

Express contrary agreement

[45] Chemico’s next challenge to the lawfulness of the overdraft is that the letter dated 30th May 2001 from the Bank to the appellants was a part of the contract for the setting up and operating of the Current Account and that the letter provided that the Account would be operated ‘strictly in credit’.²² The trial judge found that the letter was a part of the negotiations between the parties leading up to the facility letter of 24th July 2001 but the terms of the letter, including the requirement to keep the account strictly in credit, did not find its way into the facility letter. The learned judge concluded that “[i]n my view, this letter cannot be relied upon to say that there was an agreement between the

²² See paragraph 21 above.

Bank and the defendants that the Bank would operate the account strictly in credit.”²³ This finding is consistent with the legal principle that pre-contract statements that do not find their way into the final contract (the facility letter) are generally not a part of the final contract. I agree with the learned judge that the requirement that the Account be kept strictly in credit did not form a part of the agreement for the establishment and operation of the Current Account.

[46] I also agree with learned judge’s comment that “the statement highlighted by the defendant [keeping the account strictly in credit] does not to my mind necessarily suggest that the Bank was charged with monitoring the account and preventing it from becoming overdrawn by not honouring payments which would put the account into overdraft.”²⁴ It was not the responsibility of the Bank to ensure that the Current Account was kept strictly in credit. This was the responsibility of Chemico as the customer.

[47] In short, I reject the suggestion that the statement in the letter of 30th May 2001 that the Current Account be kept strictly in credit formed a part of the agreement with the Bank and that it imposed an obligation on the Bank not to allow any transaction that would have the effect of putting the Account into overdraft. The responsibility for monitoring the activities of the Account was entirely that of the customer. However, the letter is evidence of the parties’ intention regarding the operation of the Current Account. It was not withdrawn by the Bank and formed a part of the background to the dispute. I considered it when assessing the facts, in particular, that the Bank’s conduct of returning the cheque for \$825.80 which would have put the Current Account into overdraft.²⁵

²³ Paragraph 45 of the Judgment.

²⁴ Ibid.

²⁵ See paragraph 21 above.

Conclusion on the lawfulness of the overdraft and the use of the Barclaycard

[48] In summary, I find that Chemico's use of the Barclaycard did not give the Bank the right to debit the Current Account and create the overdraft. The Bank's rights are contained in the terms of the Barclaycard and the Bank did not lead evidence about these terms. Therefore, the Bank was not entitled to charge interest on the overdraft balance at its standard rate of interest or any other rate. Its rights are those contained in its agreement with Chemico for the use of the Barclaycard of which there is no evidence. It is not for this Court to speculate about the rate of interest on the Barclaycard for charges above the agreed limits (if any) of the card. However, Chemico has had the benefit of the use of the Barclaycard and must repay the Principal Sum with interest at 14.5% per annum.

[49] I will now deal with other challenges to the trial judge's decision raised by the appellants.

Security for the amounts owing

[50] In addition to challenging the Bank's right to overdraw the Current Account, Chemico raised two points regarding the security for the loans, namely:

- (a) it asserted in ground (12) of the notice of appeal that the learned trial judge misdirected herself and failed to appreciate that the payment of a debt (presumably the Demand Loan) discharged the Hypothec that secures the debt and released the guarantors of any obligation; and
- (b) Chemico argued in its skeleton argument, without a corresponding ground of appeal, that clause 2 of the Hypothec prohibited the Bank from making any further advances to Chemico after demanding payment of the Demand Loan. As the amounts claimed on the overdraft were advanced after the Bank demanded payment of the loan in October 2003 the monies advanced after that date were not secured by the Hypothec.

[51] The first point is without merit. Clause 1(d) of the Hypothec states that it is for:

“[A]ll sums of money which now or hereafter at any other time and from time to time may be due and owing by the Mortgagor [Chemico] to the Mortgagee [the Bank] by virtue of these presents and including (without prejudice to the generality of the foregoing) (i) all monies advanced ... by way of cash, overdraft or otherwise and for the time being outstanding up to a limit of the principal amount in the aggregate.”

This is the classic description of what is known in the banking industry as an all-monies security. It secures all amounts advanced to the borrower from time to time while the security is in place. There is no doubt that the Hypothec secured the Demand Loan – this was a part of the agreement in the facility letter. The fact that the Demand Loan was subsequently paid in full did not discharge the Hypothec. It was a continuing security for any amounts advanced to Chemico. The amounts outstanding on the overdraft were incurred while the Demand Loan was still outstanding and the Hypothec was in place. Therefore, the overdraft charges are caught by the Hypothec and kept it alive while the balance remained outstanding. Subject to my finding in the succeeding paragraphs on the effect of the demands for payment, I would affirm the trial judge’s finding at paragraph 81 of the Judgment that the Hypothec was ‘sufficiently wide to include the overdraft’.

[52] The second point requires careful consideration. The Hypothec is a continuing security for the borrowings of Chemico up to the principal sum of \$1,020,000.00. Clause 2 provides that:

“...[T]he Mortgagee shall advance to the Mortgagor and until the Mortgagee shall demand payment of the Debts continue to advance to the Mortgagor sums of money up to a limit of the Principal Sum and at any one time and from time to time.”

[53] Chemico submitted in this Court and in the court below that the effect of clause 2 is that the Bank, having made a demand for payment of the Demand Loan on 28th October 2003, any money advanced to Chemico after that date was in breach of clause 2 of the Hypothec and was not secured by the Hypothec. In other words, the overdraft is not secured by the Hypothec.

[54] The learned judge dealt with this issue in paragraphs 83 and 84 of the Judgment. She noted that the demand letter of 28th October 2003 was for payment of the demand loan and was not the effective letter for the purposes of clause 2. The judge found that the effective demand for the purposes of clause 2 was the letter of 8th October 2004 which demanded payment of the outstanding balances of the Demand Loan and the overdraft within 14 days. Any payments made prior to this date are not prohibited by clause 2 and are secured by the Hypothec.

[55] With the utmost respect to the learned trial judge, I do not agree with this conclusion. Clause 2 provides that there should be no advances after the Bank demands payment of 'the Debts'. The Debts include the outstanding balance on the Demand Loan, payment of which was demanded by the demand letter of 28th October 2003. It is unclear whether there was any other outstanding balance due to the Bank at the time, but this is not the point. The Bank demanded payment of what was at least a part of 'the Debt'. This was sufficient to trigger clause 2 and any payments or advances made after 28th October 2003 are not secured by the Hypothec.

[56] In the circumstances the credit card charges made before 28th October 2003 are secured by the Hypothec. These would be the payments of \$5,320.51 and \$432.84 made on 17th September 2003 and 18th October 2003 respectively. The total amount of \$5,753.35 is secured by the Hypothec. The payments made after that date are not secured. These payments amount to \$44,467.04.

Did the Bank owe fiduciary obligations to the appellants

[57] Chemico asserted in ground 13 of the notice of appeal that the trial judge failed to appreciate that the special circumstances of this case, particularly the factual matrix, removed the case from the ambit applicable to the general rules of debtor and creditor and created a fiduciary relationship between the parties. In paragraph 4.34 of their skeleton argument the appellants relied on the case of **Westminster Bank Ltd v Hilton**²⁶ and the statement of Lord Atkinson that

²⁶ (1926) 43 TLR 124.

“the drawing and payment of the customer’s cheques as against the customer’s money in the banker’s hands the relation is that of principal and agent.” This was followed immediately by the appellants’ submission that ‘[t]he latter relationship is fiduciary in nature’. The trial judge noted in paragraph 56 of the Judgment that the case does not say that this type of agency gives rise to fiduciary duties. I agree with the learned judge’s observation.

[58] Chemico also relied on the general statement in **Bowstead & Reynolds on Agency**²⁷ that an agency relationship gives rise to fiduciary duties. This is generally correct, but it does not mean that every agency creates duties that a bank owes fiduciary duties to its customers in all transactions. What Chemico had to do in this case was to provide evidence of a breach of duty, fiduciary or otherwise, by the Bank. The fiduciary duty can arise, for example, when a Bank advises the customer on the prudence or business efficacy of taking a loan from the bank and/or acquiring property, or the bank was negligent or careless in the management of the customer’s affairs, or the bank acted on behalf of the customer in its dealings with third parties.

[59] The learned trial judge reviewed the evidence and the authorities cited by counsel on both sides and concluded at paragraph 60 that:

“The Bank, in lending to the defendants, whether in respect of the Demand Loan or the overdraft did not undertake to act on their behalf. The Bank, at all material times was acting on its own behalf and in its own interest. It did not owe the defendants a duty to advise them, it did not assume responsibility for their property or affairs or otherwise owe them a duty to take care of their interests.”

[60] I agree with and adopt the trial judge’s conclusion. The facts of this case disclose an uncomplicated relationship of banker and customer with the customer incurring charges on its credit card without making any arrangements to settle the charges. There is nothing in the facts that casts any fiduciary obligation on the Bank to look after the appellants’ interests. The fact that the Bank acted without an official mandate from Chemico when it debited the Current Account with the credit card charges was in breach of its

²⁷ Bowstead and Reynolds on Agency by Peter Watts 23rd Edition

contractual relationship with its customer, but it did not create any fiduciary obligations to Chemico and there was no breach of fiduciary duty by the Bank.

The Bank's right to demand payment of the amounts outstanding on the loans

- [61] Chemico disputed the Bank's right to demand payment of the amounts outstanding on the Demand Loan and the overdraft. The general rule is that a demand loan is repayable on demand by the Bank. The same is true of an overdraft facility which is also repayable on demand unless the terms and circumstances of the overdraft show that a term must be implied requiring the bank to give reasonable notice before the right to repayment arises.²⁸
- [62] The appellants complained that the Bank exercised its contractual rights unfairly by demanding payment on the loans when they were not in arrears. This is factually correct in respect of the Demand Loan because when the demand letter was issued on 28th October 2003, the instalment payments were up to date and there is no evidence that the appellants ever defaulted on payments for this loan. The complaint in respect of the overdraft is that the Bank did not have the right to create the facility, far less to demand payment of the outstanding amount of the facility as it did in its letter of 8th October 2004. These complaints are inconsistent with the general principle that a demand loan, or a loan that does not have a provision for repayment, such as an overdraft, is repayable on demand unless there is a term in the lending that takes away the right to demand payment.
- [63] The terms of the Demand Loan are contained in the facility letter which states that the loan is repayable on demand by the Bank at any time. The primary security for the loan, the Hypothec, is to the same effect. It provides in clause 5 that '[t]he Mortgagor covenants with the Mortgagee to pay the Debts on demand...'.

²⁸ Encyclopaedia of Banking Law by Peter Cresswell, Phillip R. Wood and P.M Phillips 2nd Edition.

[64] Chemico did not seriously dispute the Bank's right to demand payment of the loans but submitted that the demand for the Demand Loan was unfair because the loan was paid up to date when the demand was made in October 2003. As to the overdraft, the demand was unlawful because the overdraft itself was unlawful. Chemico relied on article 956 of the **Civil Code** and the decision of the Supreme Court of Canada in **Houle v Canadian National Bank**²⁹ to support its position that the demand for payment of the loans was unfair and an abuse of the exercise of the Bank's contractual powers. Article 956 provides that:

"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."

[65] The Canadian Supreme Court considered article 1024 of the Civil Code of Lower Canada, which is in identical terms as article 956 in Saint Lucia's Civil Code, in **Houle**. The relevant facts in **Houle** are that the shareholders of the borrower were contemplating selling their shares in the company. The company's bank instructed a firm of accountants to prepare a financial report of the company. Upon receipt of the report the bank called in its line of credit, took possession of the secured assets (the shares) and sold them within three hours. The shareholders alleged that the sale resulted in a lower sale price and significant losses to them and sought damages from the bank. On appeal, the Supreme Court acknowledged the right of the bank to demand payment of the loan but found that the bank's conduct of effecting an immediate sale of the shares without giving the company a chance to fulfill its obligations was an abuse of its contractual rights.

[66] The trial judge carried out a careful analysis of **Houle** at paragraphs 63-67 of the Judgment. She found that the case confirms that a bank has the right to demand repayment of a loan that is repayable on demand without giving notice to the borrower, even if the borrower is not in default of its obligations under the loan. Further, the reasoning of the Supreme Court was pellucid in finding that it was not the demand for payment, but the immediate sale of the

²⁹ [1990] 3 S.C.R. 122.

shares without giving the borrower a chance to comply with the demand for payment, that made the bank's conduct unfair and abusive of its contractual obligations. The trial judge distinguished **Houle** on the facts pointing out that the Bank had concerns about Chemico's loans since 2003; there were no payments into the Current Account since October 2003 resulting in the Account becoming overdrawn; Chemico was given 14 days' notice to pay the amounts due; and the Bank did not take steps to enforce payment until February 2010. She found at paragraph 67 of the Judgment that:

"Thus, it is not accurate to say that at the time demand was made in relation to the overdraft that the defendants were not in arrears or default. **Houle** clarified that the fact of exercising the right to call in the loan is not what amounted to abuse, but rather it was the harsh and oppressive manner in which the assets were liquidated within a short time. The Bank's conduct in calling in the Demand Loan in the circumstances of this case does not, to my mind, rise to the level of unreasonableness which could amount to abuse of contractual rights."

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

Late evidence

- [68] The orders that the judge made at the conclusion of the evidence and submissions are set out in the First Order. Paragraph (b) of the First Order ordered the Bank to prepare a statement of account showing the principal balance due on the sums advanced as overdraft in respect of the Current Account, with interest computed for the period 12th February 2005 to the date of filing the claim. The Bank complied with the order by filing the affidavit of Mr. Ian Nathaniel on 21st July 2021. The reason for making this order is apparent. The trial judge decided that the amount of the claim up to 12th February 2005 was prescribed so she had to determine the amount of the principal amount on the overdraft as of that date and award interest from that date to the date of the filing of the claim on 12th February 2010, and thereafter. The new evidence had nothing to do with the issue of liability for the amounts claimed as suggested by Chemico. The judge had already settled this issue.

[69] The issue for this court is whether the judge had jurisdiction to order additional evidence having delivered the Judgment on 30th June 2021. The effect of paragraph (b) of the First Order is that the Judgment was not complete and contemplated a further order by the trial judge. It is arguable that this created an interlocutory order and not a final judgment and leave to appeal was required. However, the Bank did not apply to strike out the notice of appeal and did not file a counter notice of appeal raising the issue. The matter proceeded as if the appeal was regularly filed.

[70] I find that the judge was entitled to make the order that she did in paragraph (b) of the First Order. She then conducted a hearing on the new evidence. Chemico's representatives and counsel were present at the hearing and there is no indication that they applied for leave to file evidence in reply. The judge proceeded to make a final order which is set out in paragraph 2 of this judgment.

[71] I would dismiss the appeal against the trial judge's decision to rely on the evidence that was filed after the First Order was made.

The guarantee

[72] Chemico submitted that the trial judge erred in finding that the guarantee is an unlimited guarantee and that any doubt about the meaning of the document should have been resolved in favour of Chemico. The difficulty that I have with this submission is that there was no ambiguity in the wording of the guarantee. The trial judge was entitled to find as she did that the presence of a blank space in the guarantee as to the amount guaranteed means that the amount guaranteed was unlimited. The rule of construction that a document should be construed against the party that prepared the document, in this case, the Bank, does not come into play because there is no ambiguity in the meaning of the guarantee.

[73] I would dismiss this ground of appeal.

Disposal

[74] I would allow the appeal in part and make the following orders:

- (a) The order for the repayment of the Principal Sum of \$ 58,172.32 is affirmed.
- (b) Chemico shall pay interest on the Principal Sum at the rate of 14.5% from 12th February 2005 to the date of the final order on 16th August 2021, and thereafter at the statutory rate of 6% per annum until payment.
- (c) The amounts comprising the Principal Sum are not secured by the Hypothec except the \$5,753.35 that was advanced before the Bank demanded payment of the demand loan on 28th October 2003. Accrued interest on this amount is also secured.
- (d) Both parties have had successes and failures in the appeal and I would order that each party bear their own costs of the appeal and in the court below.

I concur.

Gertel Thom
Justice of Appeal

I concur.

Vicki Ann Ellis
Justice of Appeal

By the Court

Deputy Chief Registrar