

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2020/0064 formerly SLUHCV2010 /0121

BETWEEN:

FIRSTCARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Claimant

And

- 1. CHEMICAL MANUFACTURING AND INVESTMENT COMPANY LIMITED**
- 2. THE ROSERIE COMPANY LIMITED**

Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr. Deale Lee with Ms. Zinaida McNamara for the Claimant

Mrs. Cynthia Hinkson-Ouhla with Mrs. Esther Green-Ernest for the Defendants

2020: November 9, 10

December 17

2021: June 30

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** In this action the claimant FirstCaribbean International Bank (Barbados) Limited¹ (“the Bank”) claims against the defendants Chemical Manufacturing and Investment Company Limited (“Chemico”) as principal debtor, and The Roserie Company

¹ Formerly Barclays Bank Plc

Limited ("Roserie") as guarantor, debts due and owing together with interest and costs. The Bank asserts that despite demands for payment the debts remain outstanding

- [2] The defence to the claim is premised on the assertion that the Bank breached several express and implied terms of an agreement between the parties. The defendants deny owing the first of the two sums claimed, stating that they completed repayment of that loan. With respect of the second sum, they aver that the Bank without authorization, imposed an overdraft facility at higher than agreed interest rates, despite a requirement that Chemico's current account be operated strictly in credit.
- [3] The defendants further say that claim is prescribed, having been brought more than six years after the cause of action arose. In that regard it is to be noted that prescription of the claim was adjudicated as a preliminary issue and decided in favour of the Bank, in a decision of the Court delivered on 30th June 2017. The decision was upheld on appeal.

The Pleadings

- [4] The Bank is incorporated as a company under the Companies Act² and at all material times was authorized to conduct banking business in Saint Lucia. The Bank claims that two sums are due and owing by virtue of two credit facilities between the Bank and the defendants as follows:

1. The sum of \$4,918.68, together with interest on the outstanding principal balance of \$1,520.06 at the rate of 13.5% per annum from 15th October 2009 to the date of payment, by virtue of a loan for the principal sum of \$120,000.00 granted by the Bank to Chemico and secured by Hypothecary Obligation, Mortgage Debenture and Floating Charge from Chemico³ ("the Hypothec") and an unlimited Guarantee by Roserie⁴ ("the Guarantee") in favour of the Bank.

² Cap. 13.01 of the Revised Edition of the Laws of Saint Lucia

³ Dated 28th August 1995, registered in the Land Registry of Saint Lucia as Instrument No. 3343/95 over properties registered as Parcel Nos. 1018 81, 82, and 83 (stamped to cover \$1,020,000.00) – See Exhibit CS3

⁴ Dated 16th July 1996 – See Exhibit CS4

2. The sum of \$241,179.34, together with interest on the outstanding principal balance of \$238,888.63 at the rate of 25% per annum from 15th October 2009 to the date of payment, by virtue of a current account facility extended by the Bank to Chemico, also secured by the Hypothec and the Guarantee.
- [5] The Bank says these sums remain due and owing despite demands for payment.
- [6] The defendants say they were customers of the Bank from 1993 until 2003, when the Bank terminated the relationship by letters dated 28th October 2003 ("the Demand Letters") addressed to the Manager of Chemico and Roserie.
- [7] They admit the existence of the Hypothec, which secured a loan from the Bank to Chemico and state that it was an express term of the Hypothec that: (i) the secured loan would be repayable by installments and (ii) the debts shall become due and payable and the Hypothec enforceable immediately upon demand being made by the Bank. However, it was also an implied term of the Hypothec that the Bank would not exercise its power to demand repayment of the entire loan capriciously or arbitrarily. The defendants allege that the Bank, in the absence of any breach by them, terminated the agreement and demanded repayment of the entire outstanding balance of the loan, by issuing the Demand Letters.
- [8] The defendants also allege that it was a term of the agreement that they would operate their account on a strict credit basis. Despite this, after terminating the relationship and without the defendants' authority, the Bank continued to make payments and advances on their behalf, thus increasing the debt and imposing higher interest rates than agreed or existed on the date of termination of the relationship.
- [9] The defendants state that the Demand Letters were issued when relations broke down with the Bank over a dispute with Roserie concerning Customs Bond payments made by the Bank to the Customs and Excise Department, on behalf of Roserie. The Manager of Roserie had expressly instructed that the Bank should not pay the Bond as the matter was disputed and queried the debit which appeared on its operating account. The amount paid was for

outstanding duties allegedly owed for under-invoicing of imported vehicles, as part of the business undertaken by Roserie.

- [10] The defendants make further and alternative allegations against the Bank as follows: (i) the Bank, by terminating the agreement and continuing to conduct transactions on behalf of the defendants, created a fiduciary obligation to the defendants; (ii) the interest rate that had been agreed was 13% per annum, thus, the demand for interest at the rate of 25% is unconscionable and amounts to a penalty; (iii) the demand clause under which the Bank exercised its right to call in the loan is an unfair contractual term and should not be relied upon; (iv) the Bank failed in its obligation to advise Roserie as guarantor to seek independent legal advice about the unusual terms which appeared in the agreement.
- [11] In its reply, the Bank states that allegations of breach of implied terms must be specifically pleaded and particularized. The defendants have failed to do so and as such those allegations are unsustainable. The Bank denies the allegation that it continued to make advances to the defendants without their express authority, thereby increasing their indebtedness and applying a higher interest rate than agreed.
- [12] In relation to the defendants' averment concerning the issue of the Bond payments, the Bank states that it is confusing and bears no relevance to the present claim. The claim concerns the two amounts identified therein and is devoid of any reference to any further amounts under a Bond or other additional advances made on the defendants' behalf.
- [13] Regarding the assertion that the Bank has imposed an unconscionable interest rate, the Bank says that the rate charged is the default interest rate in relation to overdrawn credit facilities. In charging this rate, the Bank was motivated purely by commercial considerations including the high level of default loans in Saint Lucia and the extent of risk it undertook in extending credit facilities of this magnitude to the defendants. The Bank denies acting dishonestly, capriciously, or arbitrarily in imposing the default interest rate.

[14] The Bank further averred that the Hypothec was prepared by Chemico's Notary and signed by its directors, as having read, and understood the contents thereof. Chemico is therefore bound by same. Additionally, Roserie voluntarily signed a declaration declining independent legal advice. The Bank states that the demand clause is not an unusual or onerous term in these types of credit facilities or loans and is a well-known right within normal banking and commercial transactions.

The Issues

[15] In relation to the Banks claim for \$4,918.68 plus interest the defendants denied owing this sum and stated that if the amount relates to the loan granted to Chemico⁵ the balance of which was stated to be \$38,142.22 in the Demand Letters, they have completed repayment of that loan and there is no sum outstanding. It is noteworthy that during the case management stage of the proceedings, the Bank elected to discontinue this limb of the claim as contained in Court Order dated 16th November 2017. This fact was further confirmed by Counsel for the Bank at the commencement of trial and in written closing submissions⁶. It is therefore no longer an issue for determination by this Court.

[16] The remaining issues for the Court's consideration are as follows:

1. Whether the Bank unlawfully charged to Chemico's current account the sum of \$241,179.34 inclusive of interest, and whether by doing so the Bank owed fiduciary obligations to the Defendants, which were breached?
2. Whether interest charged at the rate of 25% per annum on the overdraft sums due on Chemico's current account is unlawful, and whether the Bank is precluded from claiming interest for periods exceeding five years, prior to the date of filing the claim

⁵ Stated to be the Second Defendant (Roserie) at paragraph 8 of the Amended Defence filed on 26th April 2010 but appears to be an error based on the letter dated 28th October 2003 from McNamara & Co, attorneys-at-law for the Bank, to Chemico exhibited to the witness statement of Thomas Roserie as "TR3" at page 57 of Trial Bundle 3.

⁶ Submissions of the Claimant pursuant to order of the Court dated 19th October 2017, filed on 9th October 2020 at para 3.

The Evidence

- [17] Mr. Curtis Small ("Mr Small") was the sole witness for the Bank. He is the Senior Manager of the Special Loans and Credit Risk Management Unit of the Bank and well acquainted with the defendants' accounts and securities. He stated that at all material times, Chemico maintained demand loans and current accounts with the Bank.
- [18] He testified that on 24th July 2001 the Bank issued a credit facility bearing account number 133450 to Chemico, for the purpose of transferring an overdraft on its operating account into a demand loan in the amount of \$120,000.00 with interest at 14.5% per annum ("the Demand Loan"). The Demand Loan was secured by the Hypothec and Guarantee, and the latter was for an unlimited sum. The Demand Loan was additionally secured by a letter of undertaking dated 17th July 1996 in which Chemico agreed that no dividends would be paid without the prior consent of the Bank. The credit facility letter and respective account statements, the Hypothec, the Guarantee, and the undertaking were exhibited to his witness statement.
- [19] Mr. Small stated that Chemico continued to maintain its current account number 1036143 ("the Current Account"), for daily operations of its business. Installment payments for the Demand Loan were made from the Current Account. Chemico also had a credit card facility with the Bank, payments for which were also made from the Current Account. He exhibits statements for that account showing payments in respect of the credit card commencing from March 2001. He says Chemico's management of the Current Account was generally acceptable with sufficient deposits made to cover the debits made to the Current Account. However, from September 2003 Chemico stopped making regular deposits. As a result, when the credit card payments were made from the account it became overdrawn. Chemico continued to use the credit card which resulted in further payments continued to become further overdrawn. Mr. Small exhibited copies of the credit card account statement confirming its continued use.
- [20] He states that the Current Account was subject to the Bank's agreement for operation of account, which required Chemico to pay forthwith any overdraft, indebtedness, or liability in favor of the Bank arising from the operation of the account. Despite this, Chemico failed to

make any payments towards the overdraft and as a result, interest and penalties continued to accrue. Consequently, by letter dated 8th October 2004 ("the 2004 Demand letter") demand was made on Chemico to pay the sum of \$71,374.58 then due as the overdraft on the Current Account, together with the sum of \$14,958.93 which remained outstanding on the Demand Loan. The Bank had previously made demand on Chemico for the repayment of the Demand Loan only. Copies of all the demand letters were exhibited with his witness statement. Despite the demands, Chemico failed or refused to repay the overdraft which accrued interest at the rate of 25% per annum. Mr. Small further stated that under the terms of the Guarantee, Roserie agreed to provide an unlimited guarantee of Chemico's debt or liabilities to the Bank. Demand was therefore made on Roserie to settle the debts as surety.

[21] After the demand on the defendants and following mutual discussions, Mr. Thomas Roserie ("Mr. Roserie") in his capacity as director of Chemico, made various undertakings on behalf of Chemico to settle the debt. These undertakings were confirmed in correspondence from the Bank's attorney-at-law dated 26th November 2004. Despite these undertakings the defendants failed or refused to settle the debts and remain indebted to the Bank in the amount of \$241,179.34 with interest accruing from 14th October 2009.

[22] Mr Roserie is the Managing Director of both defendants and gave written and oral testimony on their behalf. He confirmed that in 2001 Chemico's operating account with the Bank was overdrawn by \$120,000.00. The parties came to an arrangement whereby the said overdraft would be converted into the Demand Loan. He says part of the arrangement was that the operating account for Chemico, which was its Current Account would be operated strictly in credit.

[23] Mr. Roserie states that between February 2001 and September 2003, Roserie which was an importer of used vehicles was involved in a dispute with the Customs and Excise Department over payment of customs duties. As a result, the Bank decided to issue the Demand Letters not only to Roserie but also to Chemico, calling in all loans, to be paid within 14 days. When the Demand Letters were issued, the defendants were dutifully honoring their obligations to the Bank and had no history of defaulting on their loans.

- [24] Additionally, by letter dated 13th June 2003, he wrote to the Bank's Corporate Manager requesting a temporary overdraft facility to meet the payments of bills owed by Chemico for raw materials. Despite conveying the urgency of obtaining the temporary overdraft facility, he received no response from the Bank.
- [25] Mr. Roserie's evidence is that the Demand Letters stated the sum of \$38,142.00 as due on the Demand Loan and no reference was made to the larger sum of \$241,179.34, as the amount by which the Current Account was overdrawn. Chemico paid off the amount owed on the Demand Loan prior to the claim being filed, consequently, the Bank has withdrawn the claim in respect of the Demand Loan. However, as the Demand Loan was secured by the Hypothec, repayment of that loan effectively radiated the Hypothec.
- [26] After the claim was filed Chemico, being unaware of the origin of the overdraft and the source of a deposit made in October 2006, sought further information from the Bank by letters dated 28th June and 9th July 2010. The Bank failed to respond or acknowledge these requests until ordered by the court to provide the relevant information. After much delay, adjournments, and excuses for being unable to provide the information, in the face of a unless order to strike out the claim, the Bank by affidavit dated 8th July 2011 finally conceded that the deposit of \$3,590.21 was in fact an interest adjustment that was credited to the account because of a system error. This admission resulted in paragraph 2 of the Bank's Reply to Defence being struck out. Mr. Roserie says that throughout the proceedings, the Bank has acted in a high-handed manner and shows scant regard for court orders.
- [27] He states that the Bank has proffered the explanation that the overdraft arose from payments made by the Bank to settle the defendants' credit card payments. However, he never authorized, ratified, or gave any mandate to the Bank to allow the Current Account to be placed into overdraft. That facility was imposed on Chemico without its knowledge or consent, with the consequence that a much higher interest rate has also been imposed. He admits that the Current Account has been overdrawn since 17th September 2003 and Chemico has not made any deposits or withdrawals from that account since then. Further, although the Bank, on 2nd September 2003, returned a cheque in the sum of \$825.80 drawn by Chemico, because to honour it would have placed the Current Account in overdraft, yet

the Bank imposed an overdraft of \$59,000.00 at an interest rate of 25%. He believes it is evident that the overdraft facility was primarily for the Bank's benefit. Additionally, he says that clause 2 of the Hypothec prohibits the advance of any sums after demand is made and demand was made on 28th October 2003.

[28] Mr. Roserie further states that the agreement contained in the facility letter of June 2001, exhibited by the Bank was never signed by Chemico since the defendants were trying to obtain better terms elsewhere. Thus, the defendants never agreed to any overdraft facility in connection with the Current Account. After the Demand Letters, Chemico continued to make payments towards the Demand Loan and each payment was accompanied by a note to that effect. Mr. Roserie says that Roserie was responsible for guaranteeing the Demand Loan, which has been paid off, consequently, the Guarantee no longer subsists, and Roserie is released from liability.

[29] Mr. Augustin Emile ("Mr Emile") also testified on behalf of the defendants. He is an accountant by profession and has been the accountant for both defendants for over 30 years. He confirmed that Chemico was a longstanding customer of the Bank from 1995 and they enjoyed a cordial business relationship. However, by letter dated 28th October 2003, the Bank demanded full payment of the outstanding balance of Chemico's Demand Loan within 14 days. The outstanding balance as stated in the letter was \$38,142.22. The Bank then filed this claim on 12th February 2010 in which it claimed two amounts: namely the sum of \$4,918.68 which has already been repaid and the sum of \$241,179.34 with respect to an overdraft facility. The overdraft sum is in respect of the Current Account extended by the Bank to Chemico, after an overdraft of \$120,000.00 had been converted to a long-term loan and it was agreed that the Current Account would thereafter be operated strictly in credit. He says that in August 2003, the Current Account had a credit balance of \$603.86. The Bank, in enforcing its instructions that the account be operated strictly in credit, returned Chemico's cheque number for \$825.80, because to honor it would have caused the account to be overdrawn. Since that transaction, the Bank has been unilaterally operating an overdraft facility on the Current Account at the rate of 25% per annum, which is overbearing, unconscionable and punitive in nature, and is 138% above the Bank's base rate.

- [30] Mr Emile sets out the Bank's historical presentation of the figures in respect of the Current Account and notes that on 20th February 2004 it showed a balance of \$59,579.59 as owed. The amount in the claim is \$241,179.34 and the amount shown as owing on 31st October 2014 was sum of \$841,197.36. It then shows that on 24th November 2014, the Current Account was transferred to a loan account number 106998236, with an opening balance of \$851,568.28 but with an ending balance of even date of \$58,740.46. Mr. Emile says that the historical figures in the Banks evidence are confusing, and the Bank has not shown any mandate for granting a second loan. Whenever a bank approves or extends a line of credit to a customer, it is always accompanied by a written agreement signed by the borrower, which clearly states the principal amount and the interest rate. No such document exists.
- [31] He says that the overdraft was not mentioned at all in the facility letter or included as a secured sum and has arisen contrary to the agreement to operate the Current Account in credit. He says that contrary to the Bank assertion that the sums are secured by the Hypothec and the Guarantee, the securities referred to in the facility letter relate specifically to the Demand Loan. He repeats the assertion that clause 2 of the Hypothec forbids the advance of any sums after demand has been made and says the second loan was an unauthorized overdraft converted into an unauthorized loan. No request has ever been made by or on behalf of Chemico for either of these facilities.

Issue 1 : Did the Bank unlawfully charge overdraft sums to Chemico's Current Account and by doing so the Bank created fiduciary obligations to the Defendants, which were breached?

- [32] Relying on **Westminster Bank Limited v Hilton**⁷ the defendants submit that it is well established that with respect to the drawing and payment of a customer's cheques as against the money of the customer in a banker's hands, the relationship is one of principal and agent. If as the Bank contends, the relationship continued between the parties when Chemico continued to make payments towards the Demand Loan, then that relationship changed to

⁷ (1926) 4 LDAB 47

one of principal and agent. Article 1610 of the Civil Code⁸ addresses agency and provides that an agent is bound to exercise reasonable skill and all the care of a prudent administrator. Thus, the Bank owed fiduciary obligations to the defendants, which were breached.

[33] The defendants rely on the description of fiduciary obligations as articulated by Millet J in **Bristol and West Building Society v Mothew**⁹, where he said the distinguishing obligation of a fiduciary is the obligation of loyalty. He must act in good faith, he must not make a profit out of his trust, and he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. The defendants submit that the Bank breached its fiduciary obligation as it had no mandate to grant the unauthorized overdraft or convert it to a second loan, and the imposition of 25% interest is clearly aimed at making a profit. They argue that the Bank also breached the double employment rule which according to **Mothew**, automatically constitutes a breach of fiduciary duty.

[34] The defendants contend that **Mothew** supports the view that the consequence for breach of fiduciary duty is “primarily restitutionary or restorative” thus, the Bank should not be allowed to profit from its wrongdoing. They rely on the case of **Cantrave Ltd. v Lloyds Bank Plc**¹⁰ where it was said that payment made by a person without compulsion intending to discharge another’s debt will not discharge the debt unless he acted with that other’s authority or if the other subsequently ratifies the payment. That the case further establishes in the absence of authorization or ratification of a bank’s payment to a third party, the “mere fact” that the bank’s payment enured to the benefit of the company does not establish an equity in favour of the bank against the company.

[35] The defendants further contend that the course of dealings as revealed by the operation of the Current Account is that the Bank returned cheques which would create an overdraft but continued to make payments to settle the credit card despite the requirement to operate the account strictly in credit. Additionally, the Bank failed to adhere to the Eastern Caribbean Central Bank (“ECCB”) Prudential Guidelines which directs the circumstances in which an

⁸ Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

⁹ 1998 1 Ch

¹⁰ [2000] EWCA Civ 127

overdraft should be granted, and interest accrued. They claim that the Bank breached clause 7 of the Hypothec which prohibits advances after demand has been made and the Bank failed to satisfy itself that Chemico had been informed of the outstanding amounts.

[36] The defendants submit that the Bank did not act in good faith, which is statutorily implied in all contracts, by virtue of article 956¹¹ of the Civil Code. Counsel referred the Court to **Houle v Canadian National Bank**¹², a decision emanating from the Supreme Court of Canada in respect of the interpretation and application of article 1024 of the Quebec Code which is the equivalent to article 956 of the Civil Code. There the court concluded that the time has come to assert that malice or the absence of bad faith should no longer be the exclusive criteria to assess whether a contractual right has been abused. The applicable standard of “reasonableness” is compatible with sources of liability in civil law and moreover every contract contains an implicit obligation on the parties to exercise their rights in accordance with the rules of equity and fair play. The defendants submit that the English case of **Woodar Investment Development Ltd. v Wimpey Construction UK Ltd.**¹³ advances the view that abuse of contractual rights amounts to breach of contract. They were satisfactorily servicing their loans, by the Bank’s own admission, when the Demand Letters were issued and the reason for calling up the loans was the alleged Customs Bond dispute. In the circumstances although the Bank relied on its contractual right to call up the loans, the act of calling up loans which were not in arrears, was totally unreasonable and not done in good faith.

[37] Counsel for the Bank argued that this issue must be considered in the context of the relationship between the parties. What existed was a longstanding business relationship during which Chemico had an overdraft in place for a significant period. Following conversion to the Demand Loan Chemico managed to keep its account largely in credit, although on occasion it did go into overdraft, which was paid and cleared within a short time. Chemico was further aware that the credit card balances which arose from the use of its credit card were paid automatically from the Current Account. After deciding not to make further

¹¹ 956. 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.

¹² [1990] 3 SCR 122

¹³ [1980] 1 WLR 277

deposits to the Current Account, it did not seek to cancel the credit card or close the account. Instead, it continued to service the loan and use the credit card and would generate new balances. Thus, given the relatively small balances at the time (\$5,320.51 in September 2003, \$5,178.76 in November 2003, \$3,137.89 in December 2003, \$19,477.12 in January 2004 and \$16,673.27 in March 2004), it was reasonable, for the Bank to expect as had been the practice, that Chemico would deposit sufficient funds to cover these debts. Against this backdrop, the decision to allow the overdraft was reasonable.

[38] The Bank submits that Chemico's failure to alter the payment arrangements for the credit card constituted an offer for the grant of credit, sufficient to cover the balances. Counsel relied on paragraph 322 of Division C of the **Encyclopedia of Banking** which states that an overdraft is a loan of money, where a payment is made by a bank under an arrangement by which the customer may overdraw a lending of money to the customer by the bank. Prima facie, a customer is not in breach of his contract with the bank if he gives an instruction to make a payment without having the necessary funds or facility to cover the payment. 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. Paragraph 323 goes on to say that if a current account is opened by a customer, 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. A customer who seeks and obtains an overdraft facility can be taken to have agreed those standard terms unless a different arrangement is made or unless the term so implied is extortionate or contrary to all approved banking practice.

[39] The Bank points out that Mr. Emile conceded that this practice exists in Saint Lucia, therefore it cannot be argued that the Bank acted unlawfully in permitting Chemico's account to go into overdraft by settling its credit card balances.

[40] As to whether granting the overdraft gives rise to fiduciary obligations which were breached, the Bank says the overdraft is a loan, and referred to the case of **Mason and Anor v Godiva Mortgages Ltd**¹⁴ where it was said that the relationship of banker and customer was not one which gave rise to an obligation on the bank to consider and advise on the prudence of a loan which the customer requested. The Bank further says in **National Commercial Bank (Jamaica) Ltd v Hew and others**¹⁵ it was expressly stated that the banking relationship does not ordinarily give rise to a fiduciary duty and that the courts would be very careful to impose such duties on a commercial relationship. The Bank further submits that the case of **Barclays Bank Plc v Khaira**¹⁶ establishes that a bank owes no duty, in the normal course of events, to explain to the customer the nature and effects of the security or the proposed transaction. Additionally, as stated in **Re Potters Oil Ltd (No 2)**¹⁷ neither does enforcement of a right impose a duty of care. The Bank therefore submits that no fiduciary duty or otherwise was imposed on it when it granted the overdraft facility.

Analysis

[41] The case of **Office of Fair-Trading v Abbey National Plc**¹⁸, cited by the Bank articulates the principles in relation to overdraft facilities as follows:

[64] Prima facie a customer is not in breach of his contract with his bank if he gives instructions to make a payment without having the necessary funds or facility to cover the payment (whether at the time when the instructions are given by the customer or when they are received by the bank or both). He is taken to be requesting overdraft facilities: Lloyds Bank plc v Independent Insurance Co Ltd [2000] QB 110 at p 118G, [1999] 2 WLR 986, [1999] 1 All ER (Comm) 8 per Waller LJ. The nature of the contractual rights and obligations that arise in these circumstances was authoritatively explained by Goff J in Barclays Bank v WJ Simms & Cooke (Southern) Ltd [1980] QB 677 at p 699 C-H, [1979] 3 All ER 522, [1980] 2 WLR 218 as follows:

“It is a basic obligation owed by a bank to its customer that it will honour on presentation cheques drawn by the customer on the bank, provided that there are sufficient funds in the customer's account to meet the cheque, or the bank

¹⁴ [2018] EWHC 3227 QB

¹⁵ [2003] UKPC 51

¹⁶ [1992] 1 WLR 623

¹⁷ [1986] 1 WLR 201

¹⁸ [2008] EWHC 875 (Comm)

has agreed to provide the customer with overdraft facilities sufficient to meet the cheque. Where the bank honours such a cheque, it acts within its mandate, with the result that the bank is entitled to debit the customer's account with the amount of the cheque, and further that the bank's payment is effective to discharge the obligation of the customer to the payee on the cheque, because the bank has paid the cheque with the authority of the customer.

In other circumstances, the bank is under no obligation to honour its customer's cheques. If however a customer draws a cheque on the bank without funds in his account or agreed overdraft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide overdraft facilities sufficient to meet the cheque. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. If however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed overdraft facilities; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque.

...

[65] If a bank does pay in accordance with the customer's instructions in these circumstances, the customer is taken to have agreed to accept the bank's relevant standard terms, unless the parties have otherwise agreed and unless the terms are unreasonable or, as it was put by Pill LJ in Emerald Meats (London) Ltd v AIB Group (UK) plc [2002] EWCA Civ 460 at para 14, "extortionate or contrary to all approved banking practice."¹⁹ (Emphasis added)

- [42] It is gleaned from this dictum, as well as the statements in the **Encyclopedia of Banking Law**, that where a customer has a current account with a bank and gives instruction for payment at a time when there are insufficient funds to cover the instruction, the customer implicitly requests, and the bank has the discretion to grant an overdraft facility, subject to any contrary agreement between the bank and the customer. This issue therefore turns on whether there was any contrary agreement between the parties, the absence of which would place the Bank well within its right to grant the overdraft facility.

¹⁹ At paragraphs 64-65.

- [43] The defendants have said that they had a contrary agreement with the Bank after the Current Account went into overdraft of \$120,000.00 and was converted into the Demand Loan. It was agreed that from then on, the account would be operated strictly in credit. During cross examination, a letter dated 30th May 2001 was put to Mr. Small, in particular, the paragraph headed “*Overdraft*” which stated among other things that: “*Following the restructuring the current account will have to operate strictly in credit.*”
- [44] I have examined this letter and it refers to previous discussions and correspondence between the Bank and Mr. Roserie concerning restructuring the financing for his group of companies, of which Chemico is one. The letter states that the Bank has set out certain actions for restructuring the facilities, which represents a clear and concise strategy for arresting the situation, being cognizant of the various risk factors exhibited, and not allowing the situation to drag on indefinitely. The final paragraph notifies that the Bank wishes to put certain matters in place and requires a response by 20th June 2001 so that a formal facility letter can be issued setting out the terms and conditions.
- [45] The letter formed part of ongoing communication between the Bank and Mr. Roserie about proposals for restructuring the debts of his companies and is not the final agreement between the parties. It referred to a facility letter intended to represent the agreement between the parties. Additionally, the statement highlighted by the defendant does not to my mind necessarily suggest that the Bank was charged with monitoring the account and preventing it from becoming overdrawn by not honoring payments which would put the account into overdraft. It would equally have meant that the defendants should not allow the account to fall into debit by ensuring that there are always sufficient funds in the account to meet the liabilities payable from the account. In my view, this letter cannot be relied upon to say that there was an agreement between the Bank and the defendants that the Bank would operate the account strictly in credit.
- [46] The subsequent facility letter dated 24th July 2001 sets out the terms and conditions of the facility being offered, for conversion of the previous overdraft facility to the Demand Loan. It makes no mention of the requirement that the Current Account be operated strictly in credit. Counsel for the defendants argues that the facility letter was never signed, as the defendants

were searching for better terms. There is no dispute that Chemico accepted the Demand Loan and completed repayment and used and benefitted from the Current Account as well. Though not signed, the facility letter evidences the terms and conditions that the Bank offered the defendants and upon which it was prepared to grant the facility. The parties subsequently performed the agreement, and in the absence of any evidence to the contrary, it substantiates the terms of the agreement.

[47] Mr Small, did not agree in his witness statement or in cross examination that it was a term of the Demand Loan or Current Account that the account be operated strictly in credit. In fact, he states that the Current Account was not operated strictly in credit as there were instances in which the account was overdrawn but quickly settled by the defendants making the necessary deposits to bring the account back into credit. In cross examination, he admitted that the account was operated mainly in credit and that the Bank had in September 2003, returned the cheque of \$825.80 because the account had insufficient funds.

[48] Mr. Emile, in amplification of his witness statement, pointed out that the Bank, on at least four occasions during the months of August to October 2003 reversed transactions, including loan repayments and credit card payments that would have resulted in the Current Account being overdrawn. However, a credit card payment of \$5,320.51 in September 2003, which similarly placed the account into overdraft, was not reversed by the Bank. He went on to say that it was this failure by the Bank to reverse the September 2003 credit card payment, which formed the genesis of the debt. He held the view that it was the Bank's responsibility to have ensured that there were sufficient funds on the account to accommodate payments made, and if not, the Bank ought to have reversed the payment as it had done on previous occasions or cancelled the credit card.

[49] Mr Emile remained adamant that whether any money is deposited into the Current Account and how much, is in Chemico's discretion, despite also admitting that Chemico continued using the credit card, knowing that it had not deposited any monies into the account. He insisted that even if Chemico did not deposit funds into the account, it was to be operated in credit. He also agreed that interest is payable on outstanding credit card balances and agreed that outstanding balances may also incur charges. He admitted, without hesitation

that even if the credit card payments were not debited from the Current Account, but remained on the credit card, there would be a debt owed to the Bank. He suggested that the Bank ought to have taken this course and then sued Chemico for the outstanding credit card balance in the same way it had sued for the Demand Loan balance.

[50] In cross examination, it was put to Mr. Emile that there were other credit card payments that were made, and which placed the Current Account in overdraft, but which were not reversed, and he was pointed to a credit card payment of \$5,178.76 in November 2003 and \$3,137.88 in December 2003. Mr. Emile's response is that the Bank ought to have reversed these payments as well. What this evidence shows is that after October 2003, the Bank did not reverse any card payments as it had done on at least 4 prior occasions when there were insufficient funds in the account.

[51] Nonetheless, I find on the evidence that there was no agreement between Chemico and the Bank that the Bank would have maintained the account in credit in the manner the defendants suggest, by monitoring the account and reversing or correcting payments made when there were insufficient funds. The fact is the Current Account belonged to Chemico and it was Chemico's responsibility to monitor and maintain its account in such a manner that it could meet its liabilities. The defendants agreed that there was an arrangement with the Bank whereby the fixed monthly installments for the Demand Loan, as well as the credit card balances, would be automatically deducted from the Current Account. Therefore, they ought to have monitored their spending and their deposits to maintain their account in credit, as they had managed to do prior to October 2003. It is not acceptable to seek to cast this responsibility on the Bank.

[52] Although the Bank had on previous occasions reversed payments which would otherwise have put the Current Account in overdraft, it was under no obligation to do so for the benefit of the defendants. The legal authorities clearly establish that the Bank had the discretion to grant an overdraft, which the defendants would have implicitly requested, by their act of giving payment instructions by using the credit card, without the immediate funds to cover the payments. The fact that a dispute arose with the Bank which may have precipitated the Demand Letters does not absolve the defendants from paying their lawful debts. They

admitted to Chemico's use of the credit card after the dispute arose, without depositing any further funds to the account to cover its usage. If the relationship had turned so sour, Chemico ought to have stopped using the Bank's credit card. Instead, it continued to use the card and incurred debt.

[53] The defendants assertion that the Hypothec prohibited the Bank from making advances after the issue of a demand does not go to the question of whether the Bank had the authority or mandate to grant the overdraft, but to whether any such advances would be secured by the Hypothec. I will address this later in the judgment. Based on the foregoing I conclude that the Bank had the authority to grant the overdraft facility and lawfully charged to Chemico's Current Account the overdraft amounts plus interest.

Fiduciary Obligations

[54] The defendants allege that the Bank, in charging the overdraft sums to Chemico's account assumed fiduciary obligations towards them. They contend that the obligations arose because the Bank charged the sums to the Current Account when it had no mandate to do so and also appear to be saying that the Bank acting without mandate, was also a breach of the fiduciary duty.

[55] The cases cited on behalf of the defendants in support of the proposition that the Bank owed a fiduciary duty do not assist in that regard. **Westminster Bank Ltd v Hilton** relates to a situation where a customer gave an instruction to make or stop a payment by cheque on his behalf. In these circumstances, when carrying out that instruction, the bank acts as agent for the customer who is its principal and owes the duties normally associated with agency. In an action for negligence, the plaintiff relied upon the bank's admission that had they searched, they would have seen that a cheque with the same number had already been presented and honoured. It was held that the view of the bank officials, that the cheque presented, being after the date of the stop instructions, might be a duplicate cheque which they were bound to cash, was correct, and the plaintiff was not entitled to recover. The rationale was that:

"It is well established that the normal relation between a banker and his customer is that of debtor and creditor, but it is equally well established that quoad the drawing and payment of the customer's cheques as against money of the customer's in the banker's hands, the relation is that of principal and agent. The cheque is an order of the principal's addressed to the agent to pay out of the principal's money in the agent's hands the amount of the cheque to the payee thereof. Difficulty arises when, as in this case, the principal's order to his agent is ambiguous in character capable of conveying a command bearing different or inconsistent meanings."

[56] The case establishes that as it relates to drawing of cheques, between banker and customer the relationship is that of agency. It does not say this relationship gives rise to fiduciary duties, as the defendants suggest. In any event, the present case concerns the relationship of lender and borrower, and the Bank has established by the authorities cited that an overdraft is a loan advance where a customer has insufficient funds in his account and is not akin to giving instructions for drawing of a cheque, where the funds are available for that purpose.

[57] The defendants also relied on the case of **Bristol and West Building Society v Mothew**.²⁰ The case does not support the proposition that a bank owes a customer a fiduciary duty. To the contrary, it limits the circumstances in which such a relationship arises and cautions against imposition of a finding of such a duty in unwarranted cases, lest the utility of the obligation be defeated. That case concerned the relationship of solicitor and client in which there is a clear duty to provide advice, which gives rise to fiduciary obligations. This is not analogous to the relationship of banker and customer in which there is no such obligation on a bank to provide advice. The cases of **Mason and Another v Godiva Mortgages Ltd.** and **National Commercial Bank v Hew** cited by the Bank provide authority for this point. Even in **Mothew**, where a solicitor had represented both parties to a transaction, overlooked material information, provided incorrect advice, and was therefore found to have been negligent, it was held that this did not necessarily correlate to breach of fiduciary duty. The cases show that not every breach of duty amounts to breach of fiduciary duty, even where there is a fiduciary relationship.

²⁰ 1998 Ch.1

[58] In **Mothew**, concerning an allegation of breach of fiduciary duty, Millet LJ had this to say:

*“...A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; **he must not place himself in a position where his duty and his interest may conflict**; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.”²¹ (Emphasis added)*

[59] Earlier in his judgment Millet LJ said the following which gives an indication of the types of relationship that give rise to fiduciary obligations:

“In Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145, 205 Lord Browne-Wilkinson said:

*“The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on **those who take it upon themselves to act for or advise others**. Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed **on bailees, carriers, trustees, directors, agents** and others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description. **It is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable** for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold.”²² [Emphasis added]*

[60] These two passages are pellucid that a fiduciary relationship arises where one has undertaken to act on behalf of another in circumstances that give rise to a relationship of trust and confidence. 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

²¹ At page 18

²² At pages 16-17

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.

[61] As it pertains to the relationship between banker and customer, the relevant principle is captured in the following passages of **Mason and Another v Godiva Mortgages Ltd** which was cited by the Bank :

“32. The Masons' pleaded case is that Godiva owed a “a duty of care to not act negligently” (Particulars of Claim B13) and that it was “an implied term of the Mortgage that by entering into and administering the mortgage the Defendant agreed to act with all due skill and care to be expected of a reasonably competent lender and act in the best interests of the Claimant” (B14). The particulars of breach (B18) make clear that the duty alleged is a duty to assess and advise on the suitability of the mortgage in the light of the Masons' financial circumstances.

33. However, in Williams and Glyn's Bank v Barnes [1981] Com LR 205, 207, Ralph Gibson J considered and rejected a claim that the relationship of banker and customer was one which gave rise to an obligation on the bank to consider, and advise upon, the prudence of a loan for which the customer asked. He said this:

“in such circumstances, no duty in law arises upon the Bank either to consider the prudence of the lending from the customer's point of view, or to advise with reference to it. Such a duty could only arise by contract, express or implied, or upon the principles of assumption of responsibility and reliance stated in Hedley Byrne, or in cases of fiduciary duty. The same answer is to be given to the question even if the Bank knows or ought to know that the borrowing and application of the loan, as intended by the customer, are imprudent...

The essential reason why the principle in Donoghue v Stevenson cannot be extended to the transaction of lending in the way contended for by the Defendant is that, in this case, the Defendant asked for the loan, the Bank lent the money; and the Bank did no act other than that which the Bank was asked to do... The suggestion that a Bank, dealing with a businessman of full age and competence, without being asked, or assuming the responsibility to advise, must consider the prudence from the point of view of the customer of a lending which the Bank is asked to make, as a matter of obligation upon the Bank, and in the absence of fiduciary duty, is impossible to sustain.”

34. ... It is consistent with an observation made by Lord Jauncey of Tullichettle in *Smith v Bush* [1990] 1 AC 831, 872E: "the fact that A is prepared to lend money to B on the security of property owned by or to be acquired by him cannot per se impose upon A any duty of care to B. Much more is required."²³

[62] In **National Commercial Bank v Hew**, in which similar allegations were made, the Privy Council held that the relationship does not give rise to fiduciary obligations. In the circumstances, the Bank could not have owed a fiduciary duty to the defendants. I am also not persuaded that even if the Bank had no mandate, this would have amounted to a breach of fiduciary obligation, considering the dicta in **Mothew** which establishes that not every failure or omission is a breach of fiduciary duty and that what amounts to negligence may not amount to a breach of fiduciary obligation. As it has been determined that the overdraft sums were lawfully charged to the defendants' account, that contention is without merit.

[63] The defendants have argued that the Bank, by calling in the Demand Loan in circumstances where Chemico was not in arrears or defaulted on any term of the loan, was an abuse of its contractual right, which should not be countenance. In support Counsel relied on the case of **Houle v Canadian National Bank**. In that case, a notice to call in a demand loan was served on a company as a longstanding customer of the bank. The shareholders of the company were in the process of negotiating a sale of their shares in the company and had asked the bank to increase its rotating line of credit. The bank instructed an accounting firm to study the financial situation of the company and following the report, decided to call in the loan and realize the guarantees. Notice was served and the Bank immediately took possession of the company's assets and liquidated them within three hours of the notice. The shareholders alleged that the banks conduct resulted in a much lower sale price for their shares, and they incurred substantial losses.

[64] On the issue of abuse of contractual rights, the Supreme Court held that the doctrine of abuse of contractual rights is part of Quebec civil law. The doctrine serves the important social as well as economic function of controlling the exercise of contractual rights and is consistent with today's trend towards a just and fair approach to rights and obligations. Bad faith or malice in

²³ At paragraphs 32-34.

the exercise of a contractual right is no longer the only criterion for assessing whether such a right has been abused. The standard of the prudent and reasonable individual can also form the basis for liability resulting from an abuse of contractual rights, and abuse 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, which is based on art. 1024 C.C.L.C. and the underlying principle of good faith in the execution of contracts.

[65] The Quebec court found that there was no contest that the bank had the contractual right to recall the loan on demand and to realize its security without notice. The bank exercised this right after a reasoned decision, based on objective economic factors, and there is no evidence that there were any extraneous considerations to that decision. The court specifically held that while recalling 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. It was said that 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 payment of the loan, the bank effectively prevented any chance of the company's meeting its obligations. In that context it was said that bank acted in a sudden, impulsive, and detrimental manner, considering that there was never any warning that the bank was concerned about its loan and there was only a low risk of losing money or security, at least in the short term.

[66] It cannot be said that the facts of **Houle** are analogous to the present case. It was clearly oppressive and unreasonable for the bank in that case to have taken possession of and liquidated the company's assets within three hours, without any warning. It was therefore understandable that the court would have found such conduct to be an abuse of contractual rights.

[67] In the present case, the evidence reveals that the Bank and Mr. Roserie had been in discussions concerning restructuring the finances of his companies prior to the letter of 30th May 2001 and that the Bank, from that time, had concerns about the financial situation of the group of companies. Mr. Roserie and the Bank agree that there was also a dispute

between them from as early as February 2001 arising from the Customs Bond issue. A letter of demand was issued to Chemico in relation to the Demand Loan in October 2003 and thereafter Chemico and the Bank held discussions for amicable settlement of that debt. One year later, in October 2004, the demand was made for repayment of the overdraft, and Chemico was given 14 days in which to make payment. Chemico and the Bank thereafter continued discussions for amicable settlement of the debts owed, at least up to the letter of 26th November 2004 and the claim was not filed until 12th February 2010. In the circumstances, the Bank did not seek to enforce its rights with immediate effect, or without notice or forewarning. The Bank, in demanding repayment of the overdraft also gave a period within which to comply. Mr. Roserie admitted that the Current Account has been overdrawn since 17th September 2003 and Chemico has not made any deposits to the account from that time. 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 liquidate within a short time. The Bank 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.

Issue 2 : Is the interest charged at the rate of 25% per annum on the sum due on the overdrawn Current Account unlawful and is the Bank precluded from claiming such interest, for periods exceeding five years prior to the date of filing the claim?

- [68] With respect to the interest rate of 25%, the Bank has argued that where there are no agreed terms on an overdraft loan, the bank's standard practice becomes the basis of the agreement between the parties. Mr. Small testified that the Bank's standard practice is to charge 25% interest on overdrafts. As such, by requesting that the Bank honour payments made on the Current Account, Chemico agreed to be bound by the Bank's standard practice in relation to overdrafts. Further, the defendants have failed to adduce any evidence that the rate of interest is exorbitant other than attempting to compare it to the rate of interest payable on

the loan facility. However, such comparison is not ‘like for like’ as overdrafts are short-term lending facilities and subject to different interest rates.

- [69] With respect to the issue of prescription, the Bank submits that the Privy Council in **Nelson and others v First Caribbean International Bank Barbados Limited**²⁴ clearly states that arrears of interest are prescribed by five years. However, article 2085 of the Civil Code provides that a judicial demand interrupts prescription. Therefore, interest at the contractual rate continues to accrue since the filing of the claim in 2010. Additionally, prescription of interest by five years would not apply to interest that had been capitalized before the expiration of the five years.

Analysis

- [70] Articles 2129 and 2111 of the Civil Code states as follows:

“2129. In all the cases mentioned in articles 2111, 2121, 2122, 2123 and 2124, the debt is absolutely extinguished, and no action can be maintained after the delay for prescription has expired except in the case of promissory notes and bills of exchange, where prescription is precluded by a writing signed by the person liable upon them.”

*“2111. With the exception of what is due to the Crown, all arrears of rents, including life rents, **all arrears of interest**, of house rent or land rent, and generally all fruits natural or civil **are prescribed by 5 years**.” [Emphasis added]*

- [71] Pursuant to these articles interest is prescribed by the period of 5 years. The Privy Council in the **Nelson** case supports this interpretation and is accepted by the defendants. This claim, having been filed on 12th February 2010, interest payments due more than 5 years prior to that date are prescribed. Thus, the Bank is only entitled to recover interest accruing from 12th February 2005 onwards.

- [72] Counsel for the Bank made the bare submission that prescription of interest by five years would not apply to interest capitalized before the expiration of the five years. The submission

²⁴ [2014] UKPC 30

is without context, but I understand him to be saying that, when the Bank apparently converted the overdraft facility to the second loan the principal amount comprised the principal sum overdrawn on the Current Account to which accrued interest was capitalized. He suggests that second loan should not be disaggregated for the purpose of prescription of interest and the principal sum is owed in its entirety. There is no evidence concerning the second loan, save that Mr. Emile says that the defendants did not request or agree to any such loan. The Bank has not provided any evidence as to the circumstances in which the conversion from the overdraft facility to the second loan took place or its authority for doing so. In the circumstances, I cannot accept this submission and affirm that the Bank is only entitled to interest for the period 12th February 2005 to the date of repayment on the principal balance due on the overdraft advanced in relation to the Current Account.

[73] The overdraft claim is for the sum of \$241,179.34 together with interest on the outstanding principal balance of \$238,888.63 at the rate of 25% per annum from 15th October 2009 to the date of payment. The breakdown of the sum is given as principal outstanding balance of \$238,888.63 and interest of \$2,290.71. However, this breakdown is not supported by the evidence. The demand letter of 8th October 2004, states that the sum due and owing as of 28th September 2004 was \$71,374.58. Mr. Emile, in his evidence, states that the balance shown as owing on 20th February 2004 was \$59,579.59. In cross examination, Mr. Small was shown a document entitled – “Chemical Manufacturing & Inv. Co. Ltd. ... Calculation of Interest due on Transaction Account No 1036143 for the period 20th February 2004 to 14th October 2009”²⁵ which shows as the final entry “Total Interest between August 2003 and October 2009: \$181,599.75.” I note that the principal balance on 20th February 2004 according to that table is \$59,579.59. Another similar table follows, with interest for the period between 20th February 2004 and 30th June 2011 as \$308,572.12.

[74] The upshot of this is the principal balance is not as claimed in the statement of claim, which obviously includes, in large part, sums due for interest. It will be necessary for the Bank to provide (i) the correct principal balance separate from capitalized interest, and (ii) the interest accrued for the period 12th February 2005 to 12th February 2010, to arrive at the sum due

²⁵ Trial Bundle 1 at page 31.

and owing as of the date the claim was filed. The Bank has rightly stated that it would continue to be entitled to interest from the date the claim was filed to the date of payment.

[75] Concerning the Bank's submissions on the interest rate of 25% being lawful, the case of **Office of Fair Trading v Abbey National Plc** is authority for the principle that if a bank honours an overdraft in accordance with the customer's instructions where there is no prior agreement for an overdraft facility, the customer is taken to have agreed to accept the bank's relevant standard terms, unless the parties have agreed otherwise, or the terms are unreasonable, extortionate or contrary to all approved banking practice. Mr. Small's evidence is that the Bank's standard practice is to charge 25% interest on overdrafts. This remains uncontroverted. Mr. Emile, statement that such interest rate is 138% over and above the Bank's base rate is not sufficient to show that it is extortionate or against all approved banking practice. As Mr. Small points out it is a different type of lending facility from a long-term loan. No evidence was adduced on what other banks charged at the time for the same or similar facility.

[76] Counsel for the defendants inquired of Mr. Small whether he was aware of the ECCB Guidelines and what it stipulates in relation to interest on overdraft facilities. In submissions, Counsel stated that the ECCB Guidelines had been breached. These Guidelines were never adduced in evidence and no submissions were made on their legal status and effect or even what they provide and what is the alleged breach. Therefore, I can have no regard to the Guidelines, and accept the interest rate charged as lawful.

The Hypothec, Guarantee and Deed of the Charge

[77] Although not an issue which arose on the pleadings, both parties made submissions on whether the sums due on the overdraft facility are secured by the Hypothec, Guarantee or Deed of Charge²⁶, therefore I will address it.

²⁶ Deed of Charge Over Credit Balances by a Chargor for Own Liabilities executed on 26th August 1997

- [78] The defendants argue that Article 1603²⁷ of the Civil Code precludes such finding without the express authorization of the principal and the Bank has failed to produce evidence of any such authority. They challenge the Bank's reliance on the Deed of Charge, saying that the chargor is Roserie and the liability in the claim is that of Chemico. They submit that the Bank's proposition that Roserie is still liable as surety is misconstrued, and the Bank has failed to produce any evidence to show that Roserie is surety for the debt
- [79] The Bank submits that the defendants' position that the Guarantee was restricted to the Hypothec, does not withstand scrutiny as the Hypothec was executed on 28th August 1995, while the Guarantee was executed in July 1996. Furthermore, the Guarantee does not contain any express reference to the Hypothec or seek to limit its application to the Hypothec. Mr. Small explained that the Guarantee does not contain any limit for the sum secured under its terms and has not been withdrawn by Roserie. It is strengthened by the Deed of Charge²⁸ which states at paragraph 1 that it covers liabilities of the chargor arising whether as principal or surety. Thus, the Bank says the Deed of Charge would cover Roserie's liability as guarantor for the debts of Chemico and both the Guarantee and the Deed of Charge are expressed to be continuing securities, in that they continue to subsist until terminated.

Analysis

- [80] The Hypothec defines the Mortgagor as Chemico and the Mortgagee as the Bank and provides in paragraph 2 of the preamble, that the Chemico requests that the Bank advance the sum of \$1,020,000.00 at any one time and from time to time, which advances are to be secured by the Hypothec. The 'debts' are defined in paragraph 1(d) as all sums of money which, now or hereafter, at any one time and from time to time, may be due and owing by Chemico to the Bank including – *“(i) all monies advanced either by way of cash, overdraft or otherwise and for the time being outstanding up to a limit of the principal sum in the aggregate; (ii) all sums incurred by the Bank on behalf of Chemico or on any account or in*

²⁷ 1603. The agency may be either special, for a particular business, or general, for all the affairs of the principal.

any manner whatsoever, whether actually owing or contingently to become due and payable, whether incurred alone or jointly with any other party, whether as principal or surety or howsoever the same may arise whether from agreements or dealings between Chemico and the Bank or by or from any agreements or dealings with any third party by which the Bank may be or become in any manner whatsoever a creditor of the Chemico or upon any account or in any other manner whatsoever; and (iii) charges for interest, discount, commission and other usual banking charges and any other charge or expense which the Bank may charge or incur in respect of keeping Chemico's accounts".

[81] There is no dispute that the Hypothec was given by Chemico in favour of the Bank and is executed by Thomas Roserie and Sonia Roserie as directors of Chemico. It is expressly stated to include any sum due and owing to the Bank, howsoever incurred, whether at the date it was given or at any time thereafter, up to the principal sum. It is sufficiently wide to include the overdraft facility connected to the Current Account, which has been determined to be lawfully given. Consequently, there is no breach of Article 1603 of the Civil Code, as there is no basis for saying that the Hypothec as security for the overdraft, was not expressly authorized by Chemcio.

[82] The defendants also allege that the Bank breached clause 2 of the Hypothec, which prohibits advances of any sums after demand is made, and any advances made after 28th October 2003 are not secured. Clause 2 states inter alia that the Bank shall advance to Chemico, and until the Bank shall demand payment of the debts, continue to advance to Chemico, sums of money up to a limit of the principal sum at any one time and from time to time.

[83] I note that the demand letter of 28th October 2003, which the defendants say is the relevant demand, is in relation to the outstanding balance on the Demand Loan only. The Bank adduced in evidence the 2004 Demand Letter (dated 8th October 2004), which demanded payment of "\$71,374.58 by way of an overdraft facility with interest at the rate of 25% per annum or \$47.97 daily." This is the relevant demand letter as clause 2 of the Hypothec must logically be taken to refer to demand in relation to the overdraft facility and not some other

facility that may have been granted, considering that the Hypothec permits any number of advances to be made up to the principal sum whether at once or from time to time.

- [84] Neither party identified from the exhibits each or all the advances which were payments honoured by the Bank, that placed the Current Account into overdraft, and the dates of such advances. The few which have been referred to were made in September, November, and December of 2003 and were advanced prior to the 2004 Demand Letter. Any payments honoured before 8th October 2004 cannot be challenged and are therefore permissible under the terms of the Hypothec and secured by it.
- [85] In relation to the Guarantee, Chemico is defined as the principal. The signatory is Roserie as the guarantor. It states in paragraph 1 that in consideration of giving time, credit, banking facilities and accommodation to Chemico, Roserie as the undersigned guarantees to the Bank payment of, and to undertake on demand in writing made on Roserie to pay to the Bank, all sums of money which may now be or which hereafter may from time to time become due or owing to the Bank anywhere from or by Chemico, either as principal or surety and either solely or jointly with any other person, upon current banking account, bills of exchange, or promissory notes or upon loan or any other account whatsoever or for actual or contingent liability including all usual banking charges. At paragraph 2, it states that the Guarantee is to be a continuing security for the whole amount now due or owing to the Bank or which may hereafter at any time become due or owing to the Bank by Chemico, provided always that the total amount recoverable shall not exceed the sum of _____ in addition to such further sum for interest on that amount or on such less sum as may be due or owing.
- [86] The Guarantee is similarly wide in wording and covers any sum due from Chemico to the Bank howsoever incurred. Contrary to what the defendants suggest, it is unlimited. I accept the explanation by Mr. Small that the space to denote the maximum sum guaranteed was left blank because it was unlimited and if it had been intended to be limited, it would have stated the sum of such limit, in that space. I note further that in the facility letter of 24th July 2001 in respect of the Demand Loan which it also secures, it is described as an '*unlimited guarantee*'. There is no evidence that any challenge was taken to it being so described. The

Guarantee does not in any way refer to the Hypothec, nor does the Hypothec refer to it, so as to bind one to the other, such that it only guarantees the sums secured by the Hypothec.

[87] The Guarantee also states, by 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 Chemico or grant any other indulgence. It therefore does not prohibit the Bank from advancing further sums after demand is made, but rather expressly permits it. I therefore conclude that the Guarantee is wide enough and does secure the sums incurred by way overdraft in relation to the Current Account.

[88] The Deed of Charge was given by Roserie in favour of the Bank and states at paragraph 1 that *"In consideration of the Bank giving or continuing to give time, credit and/or banking facilities and accommodation to Roserie.....the party or parties named in Schedule 1....., as beneficial owner, charges by way of first fixed charge all sums of money specified in Schedule 2, as security for the payment of all money and the discharge of all liabilities now or at any time hereafter due owing or incurred to the Bank by Roserie on any account or in respect of any obligation howsoever incurred to the Bank by Roserie in whatsoever manner and whether actually or contingently and whether alone or together with another and **whether as principal or surety** and in whatsoever name or style together with interest, discount, commission and all other charges, costs and expenses for which Roserie may be or become liable....."*. Roserie is stated in Schedule 1 as the Chargor. The 'deposits' are defined to include all sums of money in any currency deposited by Roserie now or at any time hereafter to the credit of the accounts specified in Part 2 of Schedule 2. It also states at paragraph 4(a) that the Bank may at any time hereafter enforce this security without notice to Roserie and without any further or other consent from Roserie by applying or transferring as the Banks think fits all or part of any money or interest subject to this security at any time in or toward satisfaction of all such part of the secured sums as the Bank may determine. Paragraph 5 states that this Charge shall be a continuing security and shall be in addition to and shall not prejudice or be prejudiced by any securities now or hereafter held by the Bank.

[89] The Deed of Charge is also very wide in its terms. Although it is given by Roserie and the security is funds deposited in Roserie's account specified in Schedule 2, and although the liability (the overdraft) is that of Chemico, the Deed of Charge stipulates that it secures any monies owed by Roserie, even as a surety. By virtue of the Guarantee Roserie stands as surety for Chemico's debts. Therefore, the Deed of Charge secures the overdraft facility granted by the Bank to Chemico and is enforceable.

Conclusion

[90] Based on the foregoing, my findings are as follows:

1. The grant of an overdraft facility by the Bank in respect of Current Account Number 1036143 was lawful. Chemico having given payment instructions, by its use of the credit card, with insufficient funds in the account, implicitly requested the overdraft facility which the Bank was entitled to grant.
2. The conversion of the overdraft facility into a loan by the Bank unilaterally and without the authority or knowledge of the defendants was unlawful.
3. The Bank is entitled to interest on the overdraft facility on its usual standard terms. It has not been shown that the interest rate claimed is not the Bank's standard term for interest on an overdraft facility or that it is contrary to all approved banking practice or is extortionate. Therefore, interest at the rate of 25% per annum is recoverable.
4. As interest is prescribed by 5 years pursuant to articles 2111 and 2129 of the Civil Code, the Bank is only entitled to recover interest accruing within the 5 years immediately preceding the filing of the claim.
5. The sum claimed by the Bank at paragraph 3(2) of its statement of claim, does not give an accurate breakdown of principal and interest in respect of the overdraft facility. Therefore, in order for Court to determine the correct amount of the award, it will be necessary for the Bank to provide an accurate breakdown of the principal balance of sums advanced as overdraft on the Current Account and the interest that has accrued on the principal balance due from 12th February 2005 to the date of filing the claim.

6. The principal balance due on the overdraft facility, together with the applicable interest are secured by the Hypothec, the Guarantee, and the Deed of Charge.

[91] In light of these findings, I make the following orders:

1. Interest on the overdraft facility granted by the Bank in respect of Current Account number 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.
2. The Bank shall prepare a statement of account showing the principal balance due on the sums advanced as overdraft in respect of Current Account number 1036143, with interest computed for the period 12th February 2005 to the date of filing the claim and shall file and serve an affidavit exhibiting this statement on or before 21st July 2021, for approval of the Court.
3. The Defendants shall pay the Bank the principal sum due on the overdraft facility as approved by the Court, on or before a date to be set by the Court.
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.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar