THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-02715

BETWEEN

RBC ROYAL BANK (TRINIDAD AND TOBAGO) LIMITED

Claimant

AND

GRANNIES ENTERPRISES LIMITED

First Defendant

HARVEY DON KISSUN

Second Defendant

STEPHNE KISSUN

Third Defendant

Appearances

Claimant: Sashi Indarsingh
Defendants: Keith C. Scotland instructed by Jacqueline Chang

Before the Honourable Mr. Justice Devindra Rampersad

Date of Delivery: March 15, 2022

JUDGMENT

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Introduction

1. The claimant has brought this claim with respect to certain monies due and owing to it from the first defendant and guaranteed by the second and third defendants. The defendants have not contested the principal sum. The only issue for determination is the issue of interest along with damages arising out of the claimant's alleged breach of contract or in tort for negligence.

2. The case raises the issue of the duty of care that arises between banker and client and the timeous execution of instructions and requests. In that regard, the court has received guidance from the Court of Appeal decisions referred to below and has expressed its own thoughts as well.

3. Whereas there is no doubt that the claimant is entitled to judgment on the principal that is owing, the interest due has been adjusted through the counterclaim by way of set-off as the court has found that the claimant has failed to act in a proper and timeous manner in respect of the first defendant.

Background

4. The claimant and the first defendant are commercial parties with the claimant being a licensed financial institution conducting the business of banking in Trinidad and Tobago and the first defendant being a limited liability company conducting the business of food catering and a commercial customer of the claimant. The second and third defendants are directors of the first defendant.

5. The subject matter of these proceedings concern the claim brought by the claimant for monies that are due and owing by the defendants on loans that were extended by the claimant to the first defendant secured by four contracts of guarantee and postponements of claim executed by the second and third defendants in order to secure the debts of the first defendant. As such, the relationships among the claimant, the first defendant, and the second and

third defendants are that of lender, borrower and sureties respectively as well as a relationship of a banker and customer.

6. The third defendant, Ms. Stephne Kissun, gave viva voce evidence at the trial on behalf of all the defendants. Ms. Kissun ran the day-to-day operations of the first defendant and met with the claimant in order to request the loans taken by the first defendant.

7. The defendants were able to qualify for a number of loans with the claimant due to the size and success of the defendants business over the years. By 2014, the first defendant applied for and was granted by the claimant a number of credit facilities. The first defendant's credit facilities as set out in the loan agreements dated 28 April 2014 and 22 December 2014 totalled to around $2.7 million dollars.

8. In addition, the second and third defendants had a number of other personal credit facilities with the claimant which included a loan in the sum of $6,500,000 for their home in Bel Air, La Romain. The second and third defendants also had a loan in the sum of $3,200,000 with the Trinidad and Tobago Mortgage Finance Company for the purchase of a property situated at Independence Avenue, San Fernando.

9. In the year 2015, the first defendant defaulted on its loans and the credit facilities extended under the Loan Agreements dated 28 April 2014 and 22 December 2014. Three of the nine credit facilities extended by the claimant to the first defendant under these two loan agreements are the subject of this claim.

10. The claimant brought this action against the defendants for breach of the contract for the Loan Agreements for payment of the outstanding monies due.

11. The defendants admitted to entering into the Loan Agreements and Contracts of Guarantee and admitted to owing the principal balances due on each of the debts as claimed by the claimant. The claim was therefore defended solely on the basis that they were not liable for the interest claimed on account of the

alleged negligence and breach of implied terms of the contract on the part of the claimant.

The Salient Facts

12. There is no doubt that the defendants have been dealing with the claimant since 2008, in relation to the first defendant, and even before that with respect to the second and third defendants.

13. The subject of these proceedings emanated, in its last loan incarnation, out of a loan agreement dated 28 April 2014 (the Loan Agreement) in which, as the claimant's witness described it, "a suite of credit facilities" was offered by the claimant and accepted by the first defendant. The credit facilities amounted to a total of approximately $2.3 million.

14. Among the security held were 3 vehicles and a Certificate of Deposit on Roytrin Mutual Fund Units in the sum of $761,047.48.

15. On 22 December 2014, a further credit facility by way of a commercial demand loan in the sum of $400,000.00 (the Second Loan Agreement) was granted to the first named defendant to assist with the costs to complete the renovation of the second and third named defendants' property at Lot 13 Lazzari St., Mon Repos.

16. The claimant's case is that the first defendant defaulted on all of its credit facilities in or around June 30, 2015 to September 9, 2015 and the accounts were transferred to the Special Loans Department for recovery action. That is when it came to the attention of the claimant's sole witness.

17. By letter dated 14 December 2015, the claimant notified the first defendant of its intention to call in all the securities on the Loan Agreement and the Second Loan Agreement.

18. On 5 January 2016, the funds in the Roytrin Mutual Fund account stood at $739,959.99 and this was applied on 5 January and 7 January 2016 towards liquidating the balances due on four of the loans in the first named defendant's name. No explanation was given for this delay of twenty-two to twenty-four days between the decision to call in the securities and the actual application of the Roytrin funds.

19. On 22 June 2016, the claimant notified the second and third named defendants by letter indicating how the Roytrin funds were disbursed. That was more than six months later. No explanation was given for this delay by the claimant.

20. Almost 2 years later, despite the fact that no payments were made towards the account and the arrears by the defendants directly since June/September 2015 and indirectly through the application of the Roytrin funds in January 2016, on 20 April 2018, two demand letters were issued on behalf of the claimant to the first defendant in respect of the balances then remaining outstanding for the following credit facilities:

    20.1. MG 1319190539 - the original loan of $252,076.15 taken for the purchase of kitchen equipment etc. and the balance of which stood at $222,387.76. No payment had been made on this account since September 9, 2015 and the balance to 21 September 2020 had increased to $267,678.96. Interest accumulates on the same at 11% per annum or $51.38 per day;

    20.2. The Business Visa card – the credit facility originally having been granted for the sum of $30,000 but which had accumulated to the sum of $67,817.93. According to the claimant's witness, the first named defendant was over the limit on this credit card since 2014. The last time that the first defendant made payment towards this account was on June 22, 2015 but a portion of the Roytrin funds were applied towards the balance owing in January 2016 and the balance as at September 21, 2020 was $97,283.43. The daily interest at the rate of 25.2% per annum amounted to $33.37 per day;

20.3. LD 1435870000 - the demand loan taken for the renovations at Lazzari Street property, the balance of which stood in the sum of $330,765.71. The last time that a payment was made was on June 22, 2015 and on 7 January 2016, the bank applied a portion of the proceeds of the monies from the Roytrin account towards partial settlement. The balance as at 21 September 2020 is $390,982.74 and interest accrues at the rate of 10% per annum or $68.98 per day.

No explanation was given by the claimant for this delay of almost 2 years.

21. The claimant said that in response to those demands for payment, the defendants requested an opportunity to secure alternative financing which, as at July 2018, had not materialized. As a result, legal proceedings were brought.

Lazzari Street property:

22. The title deed for this property and the mortgage, referred to by the second defendant, was not provided to the court as part of the documents for the court's consideration. The second defendant, in her evidence, went into great detail about arrangements and finances relating to that property and pointed out certain errors made. Those errors, to this court's understanding, emanated from the fact that the arrangement between the claimant and the second and third defendants in relation to that property had nothing to do with the first defendant in law.

23. The second defendant said that between $110,000 and $120,000 was owed with respect to this property and the proposal to renovate the same for $1.48 million was offered by Solange Martinez through a bridging loan with the written agreement that it would be converted to a mortgage. That mortgage is not before the court, as mentioned. No time frames were given for these issues and matters i.e. the outstanding balance and the bridging loan.

24. Nevertheless, the second defendant gave unchallenged evidence to the effect that the said $110,000-$120,000 was not paid off from the $1.48 million loan and that was not discovered until 2014. Obviously, therefore, this happened

sometime prior to the December 2014 Second Loan Agreement. The second defendant went on to say that the $400,000.00 demand loan that was given was meant to replace funds taken from the company's business account to pay for outstanding interest on the bridging loan and that was done without their consent. Obviously, as mentioned, there was no mortgage or loan agreement prior to December 2014 relating to the Lazzari Street property and involving the first defendant so it seems to the court that monies were erroneously taken out from the first defendant's account to pay interest and the outstanding balance on the bridging loan. Regrettably, this aspect of the case is not very clear to all except to say that this money was not related to anything incurred by the first defendant on the documents before this court. Nevertheless, the court recognizes that the Second Loan Agreement was made with the first defendant and signed by the second defendant as its managing director.

The Defendants' Timelines

25. The second defendant was very vague with the timelines and even though she spoke about matters and conversations, she did not assist the court with many of the dates when these things allegedly transpired.

26. The second defendant spoke about the $400,000.00 demand loan in relation to the Lazzari Street property. She said that an agreement was reached between herself and Ms. Martinez as follows:

> *"22. … we agreed orally, that the commercial demand loan of $400,000.00 would be added to the mortgage loan for the property on Lazzari Street registered as DE 201301047068. The loan would then be structured so that funds were only disbursed by certified checks according to invoices from the suppliers and ensuring that I had no other access to these funds.*
>
> *23. We further agreed that those 2 loans would be amalgamated and converted to one mortgage loan. That course of action however,*

never took place and the bank defaulting in adhering to the said oral agreement ".

27. This agreement was not challenged in cross examination. Obviously, it would have had to have occurred at some point in time after 22 December 2014 when the Second Loan Agreement was entered into since reference was made to the same. No loan application was provided by the claimant in relation to the Second Loan Agreement and the details are therefore very sketchy from the claimant's side. Nevertheless, as mentioned, there is no opposing evidence from the claimant in relation to what the second defendant said that she agreed to with Ms. Martinez. That agreement makes perfect sense since, as discussed above, the Lazzari Street property was seemingly being dealt with under a separate mortgage arising out of and subsequent to the initial bridging loan and that did not seem to form part of the first defendant's portfolio or responsibility. Consequently, it seems that the defendants expected that the $400,000 ought to have fallen to the second and third defendants pursuant to whatever mortgage arrangement they had with the claimant in relation to that property. That is the only way that the evidence quoted above would make sense.

28. Therefore, the defendants' contention in relation to this agreement makes sense, on a balance of probabilities, if the construction mentioned above is correct. This is part of the mismanagement that the defendants allege against the claimant. Again, if the construction is correct, this is an apparent co-mingling of the liabilities of two different sets of entities – the first defendant as a separate corporate entity, and the second and third defendants in their personal rights.

29. Moving on to the timeline, it is clear that there was a meeting held in September 2015 after the accounts were transferred to the Special Loans Department for recovery action.

30. Emanating from that meeting is a proposal in writing exhibited to the second defendant's witness statement. It is dated 23 October 2015 (it actually states

"2105" which seems to be an obvious typographical error). In that document, steps were identified towards liquidating the loans owing to the claimant. It seems that the intention was to not only clear off the first defendant's loans but also the personal loans being held by the second and third defendants. The steps were identified by reference to several headings:

30.1. **Personnel loan** - This seems to be another spelling error as it may more properly be described as reference to the "*personal loan"* being held in relation to the Lazzari Street property. It was proposed that that property be sold and they had suggested that the asking price was $2.6 million which would provide a surplus to "*service loans that are in arrears*."

Discussion

30.2. The second defendant said in her witness statement that she had gotten a prospective purchaser to buy the property for $2.7 million but no evidence of that, not of any other purchase price comparable was provided to the court.

30.3. **Grannie's Enterprises Limited** - It was proposed that the fixed deposit (really the Roytrin Mutual Funds) being held by the claimant be "broken" to liquidate the overdraft that was owing at the time and the balance would be used to pay off the existing loan that would have been expiring in 2017 and a refinance done.

Discussion

30.4. This was a clear indication of the willingness, in October 2015, to have the problem that was facing the defendants addressed in part by the application of the Roytrin funds towards the outstanding debt at the time.

30.5. **Credit Cards & Personnel (sic) Overdraft** - It was suggested that after steps one and two above were completed, then there would be a reassessment of what was due and owing and they were projecting a better cash flow towards servicing this category of credit.

30.6. **Vehicle** - the second and third defendants indicated their willingness to move to a sale of the vehicle i.e. the Land Rover, to liquidate that loan.

30.7. **Sale of approximately 10 Acres of land at El Reposo Estate, Gran Couva** - A proposal was made to sell this parcel of land which they had suggested was worth $4 million that they would use to liquidate any outstanding loan balances.

Discussion

30.8. No evidence of any sale in this regard or even any offers was presented to the court for the court to see what the second and third defendants were speaking about.

31. At the same time, the second and third defendants indicated in the same letter that they were pursuing collections on the first defendant's receivables. No financial records or reports were provided to assist the court to understand the level of receivables that were being referred to.

32. In closing, the second and third defendants requested that there be a freeze on the loan interest especially in relation to the Lazzari Street property.

33. There is no evidence of any response and the claimant's witness confirmed that. The letter was addressed to Indar Mahase, Head of the Regional Special Loans Department at the time and was copied to Donna Marie Geesy, Manager of the Department. Neither of them attended to give evidence to explain what the second defendant described as their outright rejection of the proposal. What is clear, however, was that the second and third defendants were immediately amenable to the liquidation of as much of the debt as possible from the proceeds of the Roytrin Mutual Funds. Notwithstanding that indication, the claimant did not make a decision to encash those mutual funds

until it was so indicated by its correspondence sent out on 14 December 2015 and the actual encashment process did not take place until 5 and 7 January 2016.

34. On 28 June 2016, the second and third defendants wrote a letter of complaint to Mr. Darryl White, the claimant's Managing Director and Mr. Jesus Pazos, the Market Head Business Banking of the claimant and copied the letter to several other parties, including Mr. Mahase and Ms. Geesy. There is no response to that letter before this court and no one has denied having received the same.

35. In that letter, the second and third defendants spoke about the entire history of the relationship with the claimant and their current concerns. This was generally in keeping with her witness statement and her evidence before this court. In the letter, she spoke about meeting with Ms. Geesy in August 2015 to discuss how to proceed with loans and liquidation. That included:

    35.1. Selling the Lazzari Street property for a projected $2.6 million;

    35.2. Selling the 10 acre parcel of land in Gran Couva for which they had a buyer for $7 million[1];

    35.3. Cashing in the Roytrin Mutual Funds;

    35.4. Refinancing all loans with no additional funding.

36. This defendant then spoke about the October 2015 meeting in greater detail. Part of that included a request made by these defendants to receive financial statements on interest paid to complete financials for the first defendant for 2014 – 2015. It was set out in the said letter that these financials were required so that they could approach other financial institutions and it was keeping back the process of trying to get financing.

[1] Again, no evidence was provided of this

36.1. This was information, though requested in October 2015, was not received until August 4, 2016 and no explanation was given for this delay.

37. The complaint letter went on to accuse the claimant of mismanagement, withholding important information, making their lives miserable and causing immense embarrassment, stress and strain. They complained about getting the run-around and painted a picture of pure frustration.

38. One can imagine that frustration. Providing proposals and meeting with the claimant's representatives in August and October 2015 and having been rejected for no apparent valid or reasonable reason, and then having complained to the upper echelons of the claimant's management in June 2016 about this treatment and the failure to reach some sort of resolution, and again being ignored.

39. The second defendant's evidence is not one of the defendants just throwing their hands up in the air and sitting back and doing nothing but of making approaches and proposals and being rebuffed without any resolution or any attempt to work with them to resolve the situation.

40. On top of that, the claimant then waited a further over 2 years after that letter to Mr. White to litigate the matter, all the while accumulating interest in the meantime. No doubt, having regard to the accession as to the principal due and owing by the first defendant, the only issue was in respect of the interest only. The issue of judgment and enforcement could therefore, conceivably, have been reached since the October 2015 meeting when:

40.1. The Roytrin Mutual Funds could have been encashed;

40.2. The properties could have been agreed to be sold;

40.3. The outstanding balances could have been minimised or possibly liquidated from the proceeds of any sale(s).

41. There is no doubt that the burden was on the defendants to mitigate their losses by getting purchasers for the subject lands but the uncontroverted and uncorroborated, evidence is that they attempted to and were thwarted by the claimant who held mortgages in relation to the same and refused to consent to the sales.

The Law

42. The relationship of banker to customer is one of contract.[2] This consists of a general contract which is basic to all transactions, together with special contracts which arise only as they are brought into being in relationship to specific transactions or banking services. The essential distinction is between obligations which come into existence upon the creation of the banker-customer relationship and obligations which are subsequently assumed by specific agreement; or, from the standpoint of the customer, between services which a bank is obliged to provide if asked, and services which many bankers habitually do, but are not bound to provide. These services such as banker's drafts, letters of credit and foreign currency for travel abroad probably fall into the second category of services which the bank is not bound to supply, but this has not been judicially determined.[3]

43. The relationship of the customer and the bank is a relationship that embraces mutual duties and obligations. It is a relationship giving rise to a contract between the two parties. [4]

[2] ***Foley v Hill*** (1848) 2 HL Cas 28

[3] This point was expressly left open by Staughton J in ***Libyan Arab Foreign Bank v Bankers Trust Co*** [1989] QB 728 at 749E, [1989] 3 All ER 252 at 269b

[4] Paget's Law of Banking, Odgers, John, and John R. Paget. 15th ed., LexisNexis, 2018, *"The Relationship and Contract of Banker and Customer"*

44. In the case of ***Woods v Martins Bank Ltd***[5] the question was whether a bank had assumed an advisory duty to someone by agreeing to take care of his affairs. Salmon J held that the relationship of banker and customer existed between the parties from the time when the bank accepted instructions from the claimant to collect monies from a building society, to pay part to a company he was going to finance and 'retain to my order the balance of the proceeds', although there was at that time no account.

45. The learned judge confirmed that even if he was wrong as to when the claimant became a customer, that was not determinative as the duty of care itself arose when the bank assumed it by agreeing to advise. In other words, when determining whether a duty of care has arisen, the ordinary question of assumption of responsibility must be applied and the label of customer may or may not follow from that but has no legal significance.

Implied duties owed by the bank – duties of care

46. It was stated in *Paget's Law of Banking*[6] that it is impossible to give an exhaustive list of the duties of care owed by banker and customer to each other because in any given case, the court is concerned with the particular contract (largely expressed in a bank's standard terms) or, in the case of an alleged duty of care in tort, the proximity of the parties, reasonableness and justice on the particular facts.

47. The author postulated that a bank is under a contractual duty to exercise reasonable care and skill in carrying out its part with regard to operations covered by its contract with its customer. The duty to exercise reasonable care and skill extends over the whole range of banking of business covered by the contract with the customer. Accordingly, the duty applies to interpreting,

[5] [1959] 1 QB 55 at 63, [1958] 3 All ER 166 at 173

[6] Odgers, John, and John R. Paget. 15th ed., LexisNexis, 2018.

ascertaining and acting in accordance with the instructions of the customer. The standard of reasonable care and skill is an objective one.[7]

48. According to Paget's Law of Banking[8], the duties of care owed by a bank to its customer include the following:

48.1. A bank owes a duty of care in giving information (about a product or otherwise) to a customer.

48.2. A bank owes a duty of care in giving financial and investment advice, and in explaining the effect of security documents.

48.3. Where providing a service, a bank owes a statutory duty to exercise reasonable care and skill that is implied by section 13 of the Supply of Goods and Services Act 1982[9].

48.4. A paying bank owes a duty of care (the 'Quincecare duty'[10]) to protect the customer from the fraud of agents such as directors and partners in issuing cheques and other payment orders, arising out of the general duty of care owed when executing the customer's orders.

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[7] Encyclopaedia of Banking Law, Division C, "The relationship of Bank and Customer", "The banks duty to exercise reasonable care and skill"

[8] Odgers, John, and John R. Paget. 15th ed., LexisNexis, 2018., Chapter 4 "The Relationship and Contract of Banker and Customer – Implied Duties owed by the bank: duties of care"

[9] This is the UK legislation which provides an implied term about care and skill: "In a relevant contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill."

The local legislation - ***The Financial Institutions Act*** Chap 79:09, SECOND SCHEDULE, E provides under the rubric "Integrity and skills"

> *"The business of the licensee or financial holding company is, or in the case of an institution which has applied for a licence or a permit, will be carried on with integrity and the professional skills appropriate to the nature and scale of its activities"*

[10] The Quincecare duty was first articulated in ***Barclays Bank PLC v Quincecare Ltd*** *[1992] 4 All ER 363.* This duty obliges banks to refrain from executing a customer's order if, and for so long as, the bank is "on inquiry"; that is, it has reasonable grounds, although not necessarily proof, for believing that the order is an attempt to defraud the customer.

48.5. Various statutory protections in favour of the paying and the collecting bank depend on the absence of negligence or gross negligence[11].

49. Further, as agent, the bank owes its customer a duty of care in carrying out payment instructions. It was held by Webster J in ***Royal Products Ltd v Midland Bank Ltd*** and ***Bank of Valletta Ltd***[12] that in an ordinary banking transaction, in carrying out its part of the transaction, the defendant bank owed the appellant a duty to use reasonable care and skill and would be liable vicariously for the breach of that duty by any servant or agent to whom they delegated the carrying out of instructions.

The bank's duty to provide information

50. In the case of ***Cunnington v Barclays Bank plc***[13] it was held that the bank owed an implied contractual duty to forward information to a customer where it knew that the customer was relying on it to do so in connection with a proposed transaction of which the bank was aware. However, in ***Suriya & Douglas v Midland Bank***[14]**,** the Court of Appeal rejected the argument of the claimant firm of solicitors that there should be implied into the contract between banker and customer a term requiring the bank to inform its customers of the introduction by the bank of new and more advantageous forms of account.

Concurrent liability in tort and contract

51. Having regard to the nature of its legal responsibilities, the question arises of whether the bank owes a duty of care in tort to the appellant in its provision

[11] See PART V - Restrictions and Prohibitions in ***The Financial Institutions Act*** supra

[12] [1981] 2 Lloyds Rep 194 at 198

[13] (3 April 1996, unreported).

[14] [1999] 1 All ER 612, CA

of banking services to the appellant. There is no question that such a duty of care exists in contract and specifically, in carrying out payment instructions. Such a duty may exist in tort independently of and concurrently with a contractual duty – this was recognised and accepted by the Court of Appeal in ***Bank of Commerce Trinidad and Tobago Ltd v David Lakhan***[15] applying ***Henderson v Merrett Syndicates Ltd***[16]***.***

52. In ***Lakhan***, the bank failed to remit payment of a life insurance premium to an insurance company, causing the policy to lapse. The premiums were payable monthly and the life assured had signed a "standing order with the bank by which the bank undertook to remit to the insurer, the monthly premiums on or before a particular date each month." The bank made admissions that it had misfiled the 'standing orders' book which then resulted in its failure to remit premiums for 3 consecutive months. Upon the death of the life assured, it was found that the policy lapsed. The defendant instituted action against the bank in both contract and tort for the loss of the lump sum payment due upon her death.

53. It was stated by Hamel-Smith JA that, "The failure, therefore, of the appellant to so remit the premiums was tantamount to a breach of that duty of care."

54. The basis of the decision in ***Henderson***[17] as it relates to the breach of duty in tort was founded on the principle established in ***Hedley Byrne & Co Ltd v Heller & Partners Ltd***[18] that an assumption of responsibility by one party coupled with a concomitant reliance by the other, can give rise to a tortuous duty of

[15] Civ App. No. 23 of 1991

[16] [1995] 2 AC 145

[17] Ibid.

[18] ***Hedley Byrne & Co Ltd v Heller & Partners Ltd*** *[1964] AC 465*

care. However, this approach has not always been met with universal approval as in the cases of ***Smith v Bush***[19] and ***Caparo v Dickman***[20]***.***

55. In fact, Lord Bridge in ***Caparo v Dickman***, stated the following:

> *"…in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care, are that there should exist between the party owing the duty and the party to whom it is owed, a relationship characterised by the law as 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."*

56. In the case of ***David Walcott v Royal Bank of Trinidad and Tobago,*** Beareaux JA delivered a helpful judgment explaining the banker-customer relationship. He opined:

> *"[53] There was an implied term that the Bank would have carried out the appellant's instructions timeously so that the account would be replenished with funds in sufficient time to honour subsequent cheques. The failure to transfer the funds from the fixed deposit to the chequing account was a breach of that implied term.*
>
> *[54] There is nothing in the contractual relationship between the Bank and the appellant which negatives the existence of a concurrent and equivalent duty of care in tort. The appellant was therefore entitled to pursue his relief either in contract or in tort. By not effecting the appellant's instructions by 4:00 pm on 28 December 1995, (or certainly by 8:00 am on the following day) the Bank left the appellant's current account, with insufficient funds, which resulted in two cheques being dishonoured when presented for payment. The absence of funds in the appellant's current account, at the time of presentation of both cheques, was a direct result of the Bank's default.*
>
> *[55] In my judgment, there was no negligence in the dishonouring of the first and second cheques.* ***The negligence lay in the failure to timeously credit the current account with the funds from the fixed deposit. The consequence of the negligence was the dishonouring of the cheques."***

[19] [1990] AC 831 at 862

[20] [1990] 2 AC 605, 628

[Emphasis added]

Claimant's submissions

57. The claimant relied on the authority of ***Royal Products v Midland Bank***[21] where it was held by Webster J that in carrying out of its ordinary banking duties, the defendant bank owed the appellant a duty to use reasonable care and skill and they would be vicariously liable for the breach of that duty by any servant or agent to whom they delegated the carrying out of the payment instructions to the customer.

58. The claimant submitted that it was not disputing that such a duty exists as it relates to the provision of services to the defendants as its customer. However, it was stated that the defendants:

    58.1. Did not establish any breach of this duty;

    58.2. The evidence points to delay on the part of the defendants and not the claimant in the preparation of its financial statements; and

    58.3. Does not establish any basis for the court to deprive the claimant of all interest that accrued on the first defendant's debts in accordance with the parties' contractual obligations and as pleaded in the statement of case.

The service of providing audit letters

59. The claimant submitted that it did not dispute that it provided audit letters to the first defendant regarding their commercial customers' loan facilities for the purpose of assisting in the preparation of their audited account. However, the claimant denied that any alleged failure on the part of the defendants to secure financing with another institution when their loans became delinquent is on account of any breach of duty or care on its part.

[21][1981] 2 Lloyds Rep 194

60. In response to the defendants' allegation of delay of the claimant that led to the interest accruing from the time the defendant's request for an audit letter in respect of their accounts which took 9 months to supply (and it was through this said delay that other financial institutions lost interest in taking over their loans)[22], the claimant stated that all the evidence in support[23] put forward by the defendants were shown to be without merit.

61. It was stated that the only audit letter that the defendants stated that they experienced a delay in receiving was the 2015 audit letter. However, there was an audit letter for the financial year 2014 dated 24 October 2014 issued pursuant to the request made on 7 October 2014 attached to the claimant's reply and defence to counterclaim.

62. It was therefore submitted by the claimants that consequent on the defendants own evidence, it cannot maintain the allegation of financial institutions losing interest in taking over the business accounts due to the claimant's actions. It was stated that First Citizens Bank requested financial statements as at September 2014. Further, that pursuant to the defendants' letter dated 27 June 2016, they did not prepare financial statements since 2013 and therefore was unable to comply with the said requests from the financial institutions for the financials. The claimant maintained that it supplied audit letters on a timely basis up to the financial year 2014.

The allegations of mismanagement and failure by the claimant to refinance the first defendant

63. It was submitted that the onus rests on the defendants to prove the allegations made in their defence and that the defendants have failed to meet this evidential burden required of them to establish their claims for negligence and

[22] As per paragraph 33 and 34 of the Witness Statement of Stephne Kissun

[23] The defendants annexed letter dated 21 October 2015 from the first defendant's accountant requesting information on its loans for the period 1 October 2014 – 30 September 2015, an email dated 9 March 2016 from Stephne Kissun requesting financial statements, an email dated 9 September 2015 from Ravi Ramlogan of First Citizens Bank Limited entitled: Request for Financial Statements September 2014 and an email dated 8 March 2016 from Rajiv Dookie with a requested list of documents.

alleged mismanagement of their account and by extension, the claimant's breach of contract.

64. It was submitted that the allegations of mismanagement are general and not specific or grounded in fact. The general allegation was that the claimant was applying monies from the first defendant's account to pay loans without authorization from the defendants.

65. The claimant referenced the letter dated 27 June 2016 addressed to the claimant's managing director Daryl White where requests were made as it relates to financial information and statements of loans. The claimant then stated that shortly after receiving this letter, it complied with the requests and by letter dated 4 August 2016, and provided the defendants a detailed account of all payments made on all of the first defendant's loan accounts.

The alleged breach of the obligation to refinance

66. The claimants stated that this allegation is also without merit and that the defendant's witness accepted that the claimant was entitled to refuse the request to refinance their loans.

67. It was stated that the claimant as a lender or a prospected lender on a request for a refinance owes no obligation or duty of care to a borrower or a prospective borrower to accede to this request.[24] The claimant, in pursuing its own commercial interest, rightly refused the defendants request for a refinance.

The claim against the second and third named defendants as guarantors

68. Under the contracts of guarantee and postponement of claim, the obligation rests on the second and third defendants. The claimant is claiming the total

[24] The claimant relied on the authority of ***Deslauriers and anot v Guardian Asset Management Limited*** [2017] UKPC 34, paragraph 22

sum of $864,000.00 under the four guarantees executed by the second and third named defendants.

69. The claimant relied on Myers J in the case of ***First Citizens Bank Limited v Panderson Limited, Pearl Anderson and Jeremiah Prescod***[25] as it relates to the law on contracts of guarantees:

> *"A guarantee is a collateral contract by which the promisor undertakes to be answerable to the promise for the debt, default of miscarriage of another person whose primary liability for the promise must exist or be contemplated."*

70. It was stated that the defendants did not plead any defence to this claim by the claimant for payment under the contracts of guarantee brought against the second and third defendants. All that was stated on behalf of the defendants was if the first named defendant was not liable for the contractually agreed interest, then they cannot be asked to pay anything more than what the principal debtor owes to the claimant. However, the claimant stated that once the sum is owed by the first defendant to the claimant, the second and third defendants accept that they are automatically liable for this sum under their contracts of guarantee.

The defendants' submissions

71. The defendants set out the claimant's evidence from its sole witness, Vanessa Charles-Roberts using her witness statement and her viva voce evidence at trial and submitted that the claimant was unable to refute the defendants' pleading that they entered into an oral arrangement and or agreement with the bank through its personnel, Solange Martinez, to amalgamate the commercial demand loan with the Lazzari Street mortgage loan.

72. Moreover, the claimant's evidence showed that they did not deny the existence of the oral agreement, but rather, that they were unaware of it. The

[25] HCA No 211 of 1995, as per paragraph 14

defendant's evidence on the other hand, was not only by oral evidence but also in the form of the unchallenged letter of complaint dated 27 June 2016 annexed to the witness statement of Stephne Kissun.

73. The defendants also relied on the case of ***Royal Products v Midland Bank***[26] to state that the bank owes a duty as it relates to the provision of services to the defendants as its customer.[27] It was stated that it would be a matter for this Honourable Court to consider the status and role within the bank of any person or entity with whom the customer deals and the capacity within which that person offered any alleged advice.

74. It was submitted that there was no assertion or contention by the defendants that the bank proffered advice such as of an investment nature. The types of service or lack thereof which the defendants have complained about are more of a rudimentary and ordinary nature and fall within the 'normal' banking duties.

75. Further, the defendant provided the learning which confirms the existence of two principal types of duty owed by banks to customers when selling financial products:

    75.1. When providing advice, the duty to ensure that such advice is full and accurate and, in some cases, to comply with the relevant regulatory regime.

    75.2. When providing information only, the duty to take reasonable steps not to misstate or mislead in accordance with ***Hedley Byrne***[28] principles.

76. The defendants also relied on the case of ***David Walcott v Royal Bank of Trinidad and Tobago***[29] as it relates to the learning on the banker-customer

[26] [1981] 2 Lloyds Rep 194

[27] Also in the case of ***Selanger United Estates Ltd v Cradock (No. 3)*** [1968] 1 WLR 1555

[28] ***Hedley Byrne & Co Ltd v Heller & Partners Ltd*** [1964] AC 465

[29] Civ App 158/2006

relationship and stated that the defendant in the instant case have complained of the same treatment by the same institution and that their case is that the bank:

76.1. Mismanaged its accounts by the unauthorised transfer and application of funds from one account to another;

76.2. Failed to act in a timeous manner in terms of acceding to their instructions to break their Roytrin fixed deposit and apply the funds to their various loans.

77. ***Joachimson v Swiss Bank Corporation***[30] was also relied on to show the nature of banker/customer relationship as per Atkin L J. Additionally, the defendants' counsel quoted Lord Bridge in ***Caparo v Dickman***[31] where the proximity of the parties is taken into account where a duty of care is owed.

Damages

78. As it relates to the issue of damages, the defendant relied on the findings of Bereaux JA in ***David Walcott*** (supra) where $5000 in damages was awarded in respect of the breach as nominal damages and the bank paid two-thirds of the appellant's costs of the appeal and costs of the High Court.

The defendant's application of the law to the facts

79. It was submitted that the defendants have established a breach of the common law duty as well as in contract.

80. As it relates to the mismanagement of accounts, it was stated that the onus was on the claimant to properly manage the defendant's accounts so to prevent them from falling into arrears in the first instance and presenting the incurrence of the interest sums claimed.

81. Further, in applying the principles of ***David Walcott,*** it was submitted that the relationship between the bank and the first defendant was such that met the

[30] 1921 3 KB 110, 127

[31] 1990 2 AC 605, 628

requirements of the *'proximity and reasonableness'* test. It was stated that the bank erred in that it did not provide the level and kind of service required of it in the handling of the defendants' accounts which are the subject of this claim.

82. It was stated that it was undisputed that the bank managed the first defendant's business accounts and loan facilities since 2007. The relationship was one which was ordinarily serviced at the Point Lisas branch to which the defendants had not known any problems with how their accounts were being managed there. The defendants were not always made aware as to how their funds were being applied, and complained of funds being arbitrarily applied and transferred. Further, that the funds were not being paid to principal sums, but only to interest which cause the loans to fall into arrears. In fact, at the trial, Stephne Kissun gave evidence that Taran Ramlochan took funds to pay interest on their bridging loan without their consent. The claimant advanced to evidence to rebut these assertions.

83. Ms Kissun gave oral evidence that they made complaints of this issue to Vishal Sookhoo, Ms. Martinez, Indar Mahase and Ms Geesy, which culminated in the email to Indar Mahase on 23 October 2015, and finally the seven page letter of complaint to Darryl White in June 2016, which to date, was never responded to.

84. It was stated that the defendants first made complaints to the bank about the mismanagement of their accounts since in or around 2014, and not in 2016 as contended by the claimant. It was submitted that but for this mismanagement, the subject loans would not have fallen into arrears in the first place.

85. It was stated that like in ***David Walcott***, the claimant in the instant matter, erred in that it acted in breach of its duty in tort and contract when it failed and or refused to accede to the defendants' unambiguous instructions in a timely manner which led to the occasioned losses now in contention.

86. It was also stated that the claimant's witness, under cross examination, accepted that based on the order statement, the defendants requested that the Roytrin funds be applied before 2015 when the arrears started.

Lazzari Street loan and the $400,000.00 overdraft facility

87. It was stated that Stephne Kissun gave evidence that to compensate for the mismanagement, the bank offered the defendants the $400,000.00 overdraft over 3 months but that she requested a longer period from Solange Martinez.

88. Ms Kissun pleaded in her amended defence and counterclaim that she entered into an oral agreement that the claimant through its servant and or agent, Solange Martinez that the $400,000.00 commercial demand loan would be added to the Lazzari Street residential mortgage. Further, that both loans would be amalgamated and converted into one mortgage loan. It was pleaded the claimant breached the agreement when it failed to amalgamate the two loans.

89. There was a letter dated 2 January 2019 from the claimant addressed to her and her husband which provided a breakdown of how the $2.3 million sale proceeds from the Lazzari Street property was distributed. According to Ms Kissun, they tried tirelessly to get a sale for the Lazzari Street property so as to, "save our credit and financial standing" but this was "denied" by the bank. She further articulated that the bank "sold the property for only $2,300,000.00 at a loss of $400,000.00".

90. The defendants case was that is the $400,000.00 loan had been duly merged with the Lazzari Street Loan and converted into one mortgage loan as specifically discussed, requested and agreed upon between the bank and the defendants, the subsequent sale proceeds would have been appropriately applied to that $400k and settled accordingly. Thus, the defendants would now be facing a claim with respect to the default in payment of this $400k loan with interest.

Selling of Gran Couva Land

91. As per the witness statement of Stephne Kissun, it was asserted that the bank estimated the value of the Gran Couva land to be worth $4,000,000.00 She

further stated that it was held as collateral for the Bel Air and Lazzari Street properties.

92. It was submitted that the sale of the Gran Couva land, had it been proceeded with by the bank as repeatedly requested by the defendants, could have provided ample funds to settle the $400,000.00 commercial demand loan which is the subject of these proceedings.

93. It was submitted that the claimant showed no good reason as to why the Gran Couva lands could not have been sold, especially since, it was never released by the bank. As such, the claimant acted in breach of its duty to sell the lands to enable it to clear off the sums claimed, as was repeatedly requested by the defendants to do so.

Guarantees

94. It was stated that the defendants do not dispute the claims under this head however, the claimants cannot be unjustly enriched.

95. In conclusion, the defendant submitted that:

95.1. The claimants having admitted the existence of a duty of care, breached their duty as outlined above by way of a plethora of unchallenged uncontroverted evidence of the third defendant and in application of the principles enunciated in the case of ***David Walcott v Royal Bank of Trinidad and Tobago***[32]***.***

95.2. The claimant's witness was unable to dislodge the key areas of Ms Kissun's evidence.

95.3. The said breaches included:

95.3.1. A failure to provide pertinent financials in a timeous manner, as was repeatedly requested by the defendants and or their accountants;

[32] Civ App 158/2006

95.3.2. Failure and or refusal to provide refinancing and or the failure to provide reasons for rejection of same;

95.3.3. The mismanagement of the defendants accounts with the arbitrary application and transfer of their account funds;

95.3.4. The failure and or refusal to accept the defendants' instructions to break their Roytrin fixed deposit funds and apply same to their respective loans in a timely manner;

95.3.5. Failure and or refusal to sell Gran Couva lands so as to settle the defendants' various loans.

96. It was stated that the defendants suffered losses in terms of the non-settlement of the principal balance sum of $336,350.58 due on the commercial demand loan, that being the $400,000.00 loan. Contrary to the oral agreement with Solange Martinez that the said loan ought properly to have been amalgamated with the Lazzari street loan and paid off from the sale proceeds of the said property when it was eventually sold in 2018, it remains outstanding.

Discussion and Resolution

97. Prima facie, the claimant's case on the statement of case in relation to the outstanding principal was made out and therefore the court is now called upon to exercise its judgment and discretion to find that the claimant was negligent and is now liable to the defendants for some type of damages on the counterclaim. The nub of the counterclaim put forward by the defendants is in negligence. There is also the implied duty under contract and the statutorily identified duty under the Financial Institutions Act, SECOND SCHEDULE, E under the rubric "Integrity and skills" quoted under footnote 9 above.

98. The loan agreements entered into on or around 28 April 2014 and 22 December 2014 were both between the claimant and the first defendant – not the second and third defendants in their personal rights. The agreements

referred to a right to set-off the claimant's funds in or towards satisfaction of sums due and payable from the claimant under those facilities afforded. It did not give the claimant the right to appropriate funds belonging to the second and third defendants to be used for the first defendant's debts or arrears. It goes without saying that the opposite is also true in light of the principle of separate corporate identity.

The Second Loan - $400 K

99. Firstly, the court will consider the uncontroverted evidence in relation to the oral agreement relating to the $400,000.00 owing pursuant to the second loan agreement entered into on 22 December 2014. That agreement was referred to at paragraph 11A of the amended defence and counterclaim and was not countered by the claimant in its reply and defence to the counterclaim. As a result, by operation of Part 10 of the CPR, the averments set out therein are deemed to be admitted. Further, and in any event, since the claimant did not proffer evidence in that regard, the court accepts and holds that there was an agreement that that $400,000.00 would be transferred to the liability and responsibility of the second and third defendants in their personal right against the Lazzari Street property. Again, it was not at all challenged that this $400,000.00 loan arose as a result of monies been taken from the first defendant's accounts to meet the second and third defendants' liabilities which is contrary to the established principle of separate corporate identity. That fact is supported by the purpose stated on the loan agreement i.e. "*To **assist** with costs to complete renovation to Lazzari Street property.*" [Emphasis added]

100. If, as agreed, that liability was to be transferred back to where it belonged i.e. back to the second and third defendants by way of its addition to the mortgage on Lazzari Street, then a reasonable time to have achieved that purpose would be about three months depending on when that agreement took place. If one uses the date of the second loan, it takes us to 22 March 2015. There is no positive evidence in relation to the date of the agreement but it should not

matter. The claimant's representatives knew the facts and knew what was happening and ought to have known that they had dropped the ball and should have moved with alacrity to remedy the situation.

101. The court however has to note the following concerns.

102. Firstly, the defendants have not sought specific performance of that agreement in the reliefs. With good reason. Their failure to service their loans may have rendered the grant of an equitable remedy impossible. Instead, they rely on the claimant having acted in breach of contract and/or refused to adhere to the said agreement as a result of which they suffered loss. The claim, in that regard, was for the sum of $336,350.58 but the rationale for that sum was not properly established in the pleadings nor in the witness statement[33]. However, the claimant's witness said that at paragraph 16.3 of her witness statement that the figure outstanding on that loan was $330,765.71 as at 20 April 2018 and $390,982.74 as at 21 September 2020.

103. Secondly, there is no evidence from the claimant to suggest that the alleged agreement was something that was or was not possible in the circumstances having regard to the obvious financial situation of the defendants at the time. There is nothing before the court to suggest that the agreement was not possible at the time, for example, because of any lack of the possibility of the second and third defendants qualifying personally for any further credit facility.

104. Thirdly, and most importantly, the court has to bear in mind that the first defendant signed the loan agreement acknowledging liability for the same in full awareness of the facts relating to it. No doubt, the law of contract allows a contract to be created where consideration passes to a third party[34].

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[33] The sum of $62,769.72 was applied out of the Roytrin funds towards this loan which left a balance due on the principal of $337,230.28.

[34] ***Pau On v Lau Yiu Long*** [1980] AC 614, 632., ***Re Casey's Patents. Stewart v Casey*** [1890 S. 2069], ***National Merchant Buying Society Ltd v Bellamy and anor*** *[2012] EWHC 2563 (Ch)*

105. In this case, the second defendant signed the loan agreement as the first defendant's managing director in relation to a benefit which she and the third defendant personally received. Further, notwithstanding that, as mentioned, none of the defendants made any payments to the same directly except for the payment from the Roytrin account mentioned above. Further, the defendants have not substantiated what damages they are entitled to for any alleged breach but, had the contract been performed, the $400,000.00 would have been liquidated from the first defendant's liability and fallen to the second and third defendants instead.

106. Fourthly, although the issue was not mentioned in the letter dated 23 October 2015 to Indar Mahase, it was mentioned in the letter of complaint dated 28 June 2016 to Darryl White and Jesus Pazos. In that letter, at paragraph "f", it was stated that:

> *"In December 2014 IBC sent our personal loan accounts to business banking and to obtain the TT 400,000.00 extension as an Overdraft combining personnel (sic) with business. We were informed that this OD will then be passed over to the 1.6 million when we received the completion certificate. However, we were also told the $400,000 OD was for three months as a precautionary until the completion certificate was granted and this was based on Grannie's receivables. We did explain the RBC advisor the repayment of the 400 K OD for three months was not practical and not with the business climate at the time. We were told the 400,000 will be added to the loan of 1.6 million dollars again upon receiving the completion certificate.*

107. Clearly, therefore, the unchallenged evidence from the defendants is that there was this arrangement for the $400,000.00 to be transferred to the second and third defendants in their personal capacities under a loan for the Lazzari Street property. However, despite the court opining with respect to a reasonable time frame being 22 March 2015, it is obvious that the parties had something else in mind as per the letter of complaint. What was mentioned in there about the completion certificate was not mentioned in the second defendant's witness statement. That inconsistency, however, is crucial in that there was an agreed time frame for the transfer of the loan to be done. That

was not something that was pleaded i.e. that the transfer would be done upon the production of the completion certificate. The complaint letter, obviously, would have been more contemporaneous than the witness statement in these proceedings and therefore it reveals what the court feels to be an undetermined fact. If the transfer was to have been done when the completion certificate was done, there is no evidence of exactly when that date was.

108. However, the court bears in mind that by the time of that letter of complaint on 28 June 2016, the completion certificate had been provided and the evidence before the court is that the loan was never transferred to the $1.6 million loan for Lazzari Street. To my mind, that ought to have been done having regard to the way in which the loan arose and the reason for it having been granted.

109. Having wrongly taken the monies from the first defendant's account and then secured it with the second loan, the claimant ought to have done everything in its power to correct this anomaly. Really, the first defendant ought not to have been responsible any further for those monies beyond the said 3-month period administrative period for the transfer of the loan but the second defendant revealed what seemed to have been an agreed timeframe as mentioned above related to the grant of the completion certificate for Lazzari Street. That requirement seems to make perfect sense.

110. Further, though, the court is of the respectful view that the payment of interest thereon ought not to have fallen to the first defendant after the completion certificate was granted and, using the date of the letter of complaint of 28 June 2016 as the cut-off date with no other evidence available, the court so holds. What that means is that when the Lazzari Street property was sold, the proceeds of sale ought to have been used to settle the outstanding debt including this $400,000.00 loan. If there was a deficit, as seems evident from the claimant's letter dated 2 January 2019 directed to the second and third defendants in their personal capacities in relation to the property owned by

them personally, then the liability would be theirs and not the first defendant's.

111. Therefore, to my mind, the sum of $400,000.00 ought to be deducted from the monies owed by the first defendant along with the interest thereon from 28 June 2016. The court notes further that, despite the amended counterclaim, the claimant chose not to call Solange Martinez as a witness to refute the allegation of the agreement nor to explain her absence otherwise.

112. The court accepts the uncontroverted evidence that the funds were incorrectly deducted from the first defendant's account and secured by a demand loan with the agreement that it would be transferred to its rightful place under the mortgage for the Lazzari Street property once the completion certificate was provided.

113. Even though the court is satisfied that the claimant can rely on the valid contract it had with the first defendant by way of the second loan agreement, the court finds that the agreement to transfer the loan was valid in itself and its validity was not challenged by the claimant on the pleadings.

114. Therefore, the court directs that the first defendant's liability would therefore have to be adjusted accordingly to give effect to the benefit that this agreement would have had if it had been performed. The sum of $390,982.74 together with interest at the rate of $68.98 per day from the 22 September 2020 shall be deducted from the claimant's claim as the court is satisfied that it was improperly charged to the first defendant and, despite the fact that the 2nd defendant signed on behalf of the first defendant in relation to the loan document, the court accepts that there was an agreement for it to be transferred to the 2nd and 3rd defendants' liability which the claimant failed to do.

115. The court asked the further question of the parties whether that sum ought to be written off as damages and the court received further submissions on the point. The basis for this query was how the court should deal with the question of damages in relation to this aspect of the counterclaim. Had the contract

been performed, the first defendant would not have been called upon to pay the sum of money but it would have fallen to the second and third defendants instead. At least, that would have been the position after the grant of the completion certificate. The appropriate measure of damages in relation to a breach of contract is to place the parties in the position they would have been had the contract been performed. In this case, the court accepts that the claimant acknowledged its misstep and entered into this agreement for which there is sufficient consideration in this court's respectful opinion. Had the contract been performed, it would have been the second and third defendants who would have been liable for the sum rather than the first defendant and therefore the first defendant would not have been sued in the manner in which it was nor would the first and second defendants have been sued in respect thereof as guarantors. Importantly, though, is had the contract been performed, that sum that was owing would not have been wiped away. There would still have been a liability in relation to the second and third defendants.

116. Therefore, having considered the submissions and the facts set out above, the court is not minded to write off that amount or to set it off totally by way of an award of damages in that amount. Instead, the court will award nominal damages in that regard for the failure to adhere to the agreement and abide by the instructions that had been agreed upon along with the other matters mentioned below in relation to negligence.

117. Further, the claimant ought reasonably to have applied the proceeds of the Roytrin Mutual Fund towards the outstanding Business Credit Card Account firstly since it carries the highest rate of interest of 25.2% per annum, rather than towards this loan which had a lower rate of interest. The principal balance on the credit card as at 27 March 2018 and 20 July 2018 was $48,330.18[35]. The court does not have the balance as at the time when the Roytrin Mutual Funds was encashed in January 2016 but it stands to reason

[35] See paragraph 23.2.3 of Vanessa Charles-Roberts witness statement and the demand letter exhibited as "VCR 11" thereto.

that it would have been less than the amount owing in 2018. Using the 2018 figures would leave a credit balance after paying off the credit card balance in the sum of $14,439.54 out of the $62,769.72 that ought to have been applied from the Roytrin funds. That extra monies could have been applied elsewhere and therefore the court will take it into account in the order that it makes.

118. As mentioned, therefore, court does not have the interest outstanding as at the date that the Roytrin Mutual Funds was liquidated. However, the court will deal with that interest factor in the next section.

The Roytrin Mutual Funds encashment

119. As mentioned above, the meeting of the 23 October 2015 proposed the liquidation of the Roytrin Funds to pay off outstanding debts. The court is of the respectful view that the claimant ought to have considered that prospect, notwithstanding that it was part of an entire proposal set out in the letter of 23 October 2015, in the same manner that it eventually did as indicated by its letter of 14 December 2015. No explanation was given for this delay but, obviously, interest continued to accrue on a daily basis to the detriment of the defendants. In the circumstances, the court does not see why a period of one week from the 23 October proposal should not have catapulted the claimant to a decision that was eventually the inevitable outcome. The first defendant was in arrears on the credit card since 2014, according to its witness, accruing interest at 25.2% per annum. Payments on all loans had not been made since September 2015. The claimant was holding the almost liquid cash equivalent of the Roytrin funds. What else had to be considered? Whatever else that may have been, it was not disclosed to the court. Further still, even when cashed, why take 2 days to complete making payments? Surely, interest was continuing to accrue over those 2 days? There is no doubt that the bank would have exacted interest to the very day that a payment is made and there is no reason why the reverse ought not to apply. That is, why the bank should not be called upon to account for its delay in applying funds when interest continues to accrue.

120. As a result, the court is of the respectful view that the Roytrin funds should have been cashed by 31 October 2015 at the latest. Interest accrued after that date and deducted on the accounts that were paid out of its proceeds in January 2016 should be calculated and paid over to any other outstanding sums due for interest on the Demand Loan Account No. MG 1319190539.

Damages for Negligence

121. There is no doubt that the claimant had a duty of care towards its customer to, amongst other things, provide timeous responses and accounts. Further, the claimant, as a bank, is under a duty of care to keep proper accounts of the first defendant's loans, and funds held with the claimant, and keep the first defendant informed in a timely manner of the manner in which those funds are being utilized.

122. The second defendant's allegations in relation to this are set out above in her unchallenged evidence:

123. Interest on the bridging loan for the Lazzari Street property was not was taken out for over a year and a half and then it was taken out of the first defendant's account without the first defendant's consent and despite the fact that the property was owned by the second and third defendants;

124. Those funds were then made the subject of a demand loan payable by the first defendant when it was agreed that it would be added to the second and third defendant's personal loan on the said Lazzari Street property;

125. The first defendant requested a summary of their accounts and discovered that money had been taken out but only applied to interest and nothing on the principal sum. Ms. Solange Martinez, the claimant's then representative, was then told that the first defendant would be directly instructing them how the funds would be disbursed to mitigate their poor handling and within a 24 hour period, the account was transferred to Special Loans Collection Unit.

126. The first defendant's representatives met with the head of collections unit – Indar Mahase and Donna Geesey - in September 2015 requesting financing well before the arrears kicked in full force but that was refused without an explanation;

127. A request was made by the company's accountants Microfirm F.T. Ltd for the total loans owed on October 21, 2015 and a proposal was prepared and handed to Indar Mahase which he flatly refused without written explanation;

128. The first defendant's accountant requested copies of a statement of accounts from the bank to prepare financial statements in order, according to the second defendant, to approach other financiers and it took 9 months for a response from the claimant;

129. A joint letter was sent to the claimant's Managing Director on 27 June 2016 to which there was no response or attempt at resolution.

130. There were other unsubstantiated instances of mishandling of the second and third defendants' other properties, sales of which in a timely fashion could have ameliorated the first defendant's financial position.

131. Even though the effect of these actions were not specifically proven, the court has no doubt that the claimant breached its duty of care and the court will make an order for the award of nominal damages in this regard.

132. The court does not find, though, that there was any duty on the claimant to have refinanced the first defendant's loan as that is an economic decision to be made by the claimant's financial advice team and its management to decide whether they wish to take a different or further risk with the first defendant. Neither was there any evidence of prospective purchasers for the claimant to have been held liable for blocking sales of the second and third defendants' properties unreasonably.

133. The court is of the respectful view that the claimant is entitled to its outstanding principal on Demand Loan Account Number MG1319190539 but requires an enquiry into the interest that would have accrued on the other outstanding loans from 1 November 2015 when the Roytrin Mutual Funds ought to have been encashed as mentioned above.

134. Also, as mentioned, the court will deduct the principal balance on the $400,000.00 loan identified as LD 1435870000 together with all interest thereon from 28 June 2016. In other words, the first defendant would only be responsible for all interest that accrued on this sum up until 27 June 2016.

135. Since these matters arise under the counterclaim, the court will grant the orders under the counterclaim first since that impacts upon the nature and amount of the claim that the claimant would be entitled to.

136. On the counterclaim, the court orders that the claimant prepare:

136.1. An account of the value of the Roytrin Mutual Funds as at 1 November 2015; and

136.2. An account of the amount of principal and interest due and owing on Business Visa Platinum Credit Card Account No. 4521-1048-1522-2155 as at 1 November 2015[36], identified separately;

136.3. The value of the Roytrin Mutual Funds as at 1 November 2015 shall then be applied in the following order to:

136.3.1. The amount of principal and interest due and owing on Business Visa Platinum Credit Card Account No. 4521-1048-1522-2155 as at 1 November 2015;

136.3.2. The other loan interest and principal balances at the said 1 November 2015 i.e.

[36] The date by which the claimant ought to have liquidated the Roytrin Mutual Funds

136.3.2.1. Overdraft Number 100022110064878 and ;

136.3.2.2. LD 1423970000;

136.3.2.3. LD 1435870000 – to interest only and not principal in light of the accepted agreement;

136.3.2.4. MG 1423990525;

136.4. An account of all principal and interest remaining on the said loans after the application of the proceeds as at 1 November 2015 as mentioned in the preceding paragraph showing which ones were liquidated and which still had balances due and owing after the said application of funds;

136.5. An account of all principal and interest outstanding on LD 1435870000 from inception to 27 June 2016, identified separately and taking into account any deductions attributable as a result of the foregoing paragraphs;

And file, serve and email the same to the court by way of a supplemental witness statement of Vanessa Charles-Roberts by Monday 1 November 2021.

137. The court declares that the first defendant would be liable for all interest from inception to 27 June 2016 on LD 1435870000 and thereafter its liability would cease and would fall to the account of the second and third defendants in their personal capacities. The liability for the principal outstanding and any interest which may accrue after 28 June 2016 on this loan remains that of the second and third defendants in their personal rights.

138. Of course, the second and third defendants were not sued in their personal capacities but as guarantors and therefore the court cannot give judgment for the claimant against them in that regard in relation to LD 1435870000.

139. Any credit left over in the accounting process mentioned above shall be applied to the first defendant's other debt in Demand Loan Account Number

MG1319190539 and to outstanding interest on LD 1435870000. If there is a deficit, the claimant shall be entitled to judgment thereon.

140. The claimant shall pay to the first defendant nominal damages for negligence and breach of contract in the sum of $25,000.00.

141. There shall be no order as to costs as both sides have been somewhat successful on their claims.

142. Further hearing in this matter in relation to the amounts due on the claim was adjourned on 13 October 2021 to enter a final order in respect of the claim after consideration of the said supplemental witness statement.

Further Evidence Received and Order on the Claim

143. Pursuant to the court's order and direction made and given on 13 October 2021, as extended, a supplemental witness statement was filed by Mrs. Vanessa Charles-Roberts on 8 November 2021 which revealed that, in keeping with the court's directions, after taking into account all of the matters raised by the court:

143.1. The amount owing on the Demand Loan Account Number MG 1319190539 as at 8 November 2021 was the sum of $284,805.29 with interest accruing thereafter at the rate of $44.37 per day.

143.2. With respect to the interest on the Commercial Demand Loan Account Number LD 1435870000, that interest was identified as $27,943.02. That falls to the account of the first defendant as mentioned above.

143.3. The balance remaining on that loan, which falls to the account of the second and third defendants, amounts to the sum of $500,504.02 as at 8 November 2021 together with interest thereafter at the rate of $77.55 per day.

144. There will therefore be judgment for the claimant against the defendants in the sums of:

144.1. **$290,440.28**[37] in respect of Demand Loan Account Number MG 1319190539;

144.2. **$27,943.02** being the interest due on Commercial Demand Loan Account Number LD 1435870000;

Amounting to a total of **$318,383.30**.

145. As mentioned above, since both parties have succeeded somewhat in their claims, there will be no order as to costs on the claim and counterclaim.

/s/ D. Rampersad J.

[37] $284,805.29 plus ($44.37 multiplied by 127 days)