THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P266 of 2018

Claim No. CV 2015-04245

Between

REPUBLIC BANK LIMITED

Appellant

And

TRI-STAR CARIBBEAN INC

Respondent

Panel: A. Mendonça, J.A.

G. Smith, J.A.

J. Jones, J.A.

Date of delivery: September 9, 2020

Appearances:

Mr. I. Benjamin SC and Mr. P. Rudder instructed by Ms. M. Ferdinand appeared on behalf of the Appellant

Mr. E. Prescott SC and Mr. A. Singh instructed by Ms. N. Persad appeared on behalf of the Respondent

I have read the judgment of Mendonça, J.A. I agree with it and have nothing to add.

/s/ G. Smith, J.A.

I have read the judgment of Mendonça, J.A. I agree with it and have nothing to add.

/s/ J. Jones, J.A.

JUDGMENT

Delivered by A. Mendonça, J.A.

1. There is before this Court an appeal by the Appellant, Republic Bank Limited (the Bank), and a counter-notice of appeal by the Respondent, Tri-Star Caribbean Inc (Tri-Star). The appeals concern the awards of interest and exemplary damages made by the Trial Judge. In short, the Bank's position with respect to the issue of interest is that the Trial Judge imposed a disproportionate and a punitive rate of interest on an erroneous legal basis and without any evidential foundation. In relation to the award of exemplary damages, the Bank contends that such an award ought not to have been made or alternatively, it is disproportionate. Tri-Star in its counter-notice of appeal contends that the interest awarded by the Trial Judge ought to have commenced from a date earlier than was ordered.

2. With that short introduction I will set out briefly the factual background to these appeals. Before I begin however, I wish to note that references hereafter to the Bank should properly be at times references to its predecessor, the liabilities of which have been assumed by the Bank. However, for the purposes of these appeals it is not necessary to distinguish between the two and for convenience I will refer simply to the Bank appreciating that the references may at times be to its predecessor.

3. The Bank at all material times carried on the business of banking in this jurisdiction. In April 2002, the Central Bank of Cuba (CBC) granted to the Bank a Representation Licence to operate in Cuba. The licence, however, prohibited the Bank from conducting directly any banking or financial asset or liability operation in Cuba.

4. Tri-Star is a company incorporated under the laws of Ontario, Canada. It was licenced by the Cuban Ministry of International Trade to carry on in Cuba the

business of the importation and sale of vehicles and ancillary automotive and industrial parts.

5. In 2004, Mr. Sarkis Yacoubian (Mr. Yacoubian), a Canadian national and a director of Tri-Star, visited the Bank's office in Cuba and arranged a discounting facility with that office. Tri-Star also opened a bank account which was held at the Bank's branch at Independence Square, Port of Spain, in this jurisdiction for the sole purpose of facilitating Tri-Star's business in Cuba.

6. Under the discounting facility the Bank would primarily discount bills of exchange presented by Tri-Star. In brief, the discounting facility operated in this way: Tri-Star's customers would purchase vehicles and other goods on payment due in the future in accordance with various instruments, primarily bills of exchange. Tri-Star would assign these instruments to the Bank which would advance 78% of the face value of the instrument assigned to it. The Bank would hold 18% as interest and a further 4% as retention in case of late payment to the Bank by Tri-Star's customers. Payment made by Tri-Star's customers and not due to the Bank would be credited to Tri-Star's account at Independence Square, Port of Spain.

7. The discounting facility seemingly operated well until July 2011 when Mr. Yacoubian was arrested and imprisoned in Cuba. According to Mr. Yacoubian, he was charged with "trumped up charges" of bribery, tax evasion and activities damaging to the Cuban economy. He was convicted and sentenced to a term of imprisonment and fined. The Canadian government secured his release in February 2014 and he was immediately flown to Canada. On Mr. Yacoubian's arrest, Tri-Star's office in Cuba closed. Indeed Tri-Star's Cuban business, which was Tri-Star's only business, was brought to an end following Mr. Yacoubian's arrest.

8. In February 2013 the CBC wrote to the Bank's representative in Cuba stating that by "Resolution No. 15 dated April 30, 2012" the Bank was instructed to

transfer to an account in judicial deposit the funds in Tri-Star's account with the bank relating to the discounting of bills of exchange and a BMW purchase agreement in respect of two of Tri-Star's customers. The Bank replied to the CBC by letter dated February 25, 2013 indicating its preparedness to comply but requested from the CBC the "resolution of the proper entity" which to the Bank's knowledge was the Ministry of Foreign Trade. The Bank added:

> "We have obtained references that the mentioned Resolution exists but it is not currently in our hands. Please remit copy of the same with a written instruction from your Office indicating that this Resolution is to be mandatorily fulfilled by our office, a fact that may help us complete transfer of the Letters of Exchange and funds of 'TriStar Caribbean Inc.' under custody of our Bank indicated in your communication as soon as possible."

9. The Bank was not provided with the Resolution and by letters dated April 28 and June 10, 2014 the Bank wrote to the CBC requesting an update on the matter and an indication as to the manner in which it should proceed. The Bank also pointed out that Mr. Yacoubian had requested return of the funds in Tri-Star's account with the Bank.

10. By letter dated July 16, 2014 the Bank again wrote to the CBC confirming that it would transfer the funds to the judicial deposit account and required confirmation of the account into which the monies were to be paid since the investigations of the Bank had indicated that the account previously referred to by the CBC was closed. The Bank indicated that after deductions for its commissions the amount to be transferred was US$1,078,256.37. The Bank also sought the CBC's direction in relation to a sum of US$33,727.32 "corresponding to credit for retention for previous operations".

11. Despite the Bank's letter of July 16, 2014, by May 22, 2015, the Bank had received no response from the CBC and the funds were not yet transferred to Cuba. The Bank on May 22, 2015 again wrote to the CBC requesting an update

on instructions to transfer the funds because Mr. Yacoubian had contacted the Bank's headquarters and the account to which the Bank was directed by the CBC to transfer the funds was closed.

12. By email dated May 26, 2015 Mr. Yacoubian was informed by the Bank that the funds could not be released to him due to a freeze order in place by the CBC. The bank further indicated that it will seek an update and will get back to Mr. Yacoubian.

13. Mr. Yacoubian in May 2015 was provided by the Bank with a statement of Tri-Star's monies held by it. That statement reflected a balance of US$1,111,983.69 being the total of the sums of $1,078,256.37 and $33,727.32. Mr. Yacoubian however observed that a sum of US$146,535.13, which in his view was owed to Tri-Star by the Bank, was not shown in the statement.

14. Tri-Star, through its attorneys-at-law, sent a pre-action protocol letter dated October 27, 2015 to the Bank. In the letter, payment was demanded on Tri-Star's behalf of the sums of US$1,111,983.69 and the additional sum of US$146,535.13. The Bank responded through its attorneys-at-law by letter dated November 18, 2015 stating, inter alia:

> "We are instructed that a Regulatory Order from the Central Bank of Cuba as well as a Ministerial Resolution was issued and served on Republic Bank Limited's Representative Office in Cuba in Havana directing that funds held in your client's account were to be paid into a judicial deposit account. Our client had no alternative but to comply, pending its review of the Regulatory Order and Ministerial Resolution so as not to have its licence revoked."

Contrary to the impression given in that paragraph, the Bank had not as yet paid the funds to the judicial deposit account.

15. These proceedings were commenced on December 11, 2015.

16. The Bank was subsequently instructed by the CBC by letter dated February 12, 2016 to transfer to the deposit account in Cuba the sum of US$1,078,256.37.

By another letter also dated February 12, 2016 the Bank was informed that the funds in the sum of US$33,727.32 were not affected by "the court-order freezing" of Tri-Star's account and was not the target "of any judicial seizure or confiscation order" and that these funds were at the Bank's disposal.

17. On February 19, 2016 the Bank remitted the sum of US$1,078,256.37 to Cuba and on July 21, 2016, after the commencement of these proceedings, the sum of US$33,727.32 was wired by the Bank to Tri-Star. Tri-Star however, actually received the sum of US$32,854.00 leaving a balance of US$873.32.

18. In these proceedings, Tri-Star sought (a) damages arising out of the Bank's wrongful detention and conversion of the sums of US$1,078,245.37, US$146,553.67 and US$33,727.32; (b) alternatively, damages for breach of contract; (c) interest on the sums claimed at the rate of 26% per annum or alternatively, at a rate equal to the Bank's percentage profit for the year ended 2015 or alternatively, at such rate as the court considers reasonable compounded annually from November 5, 2012 or alternatively, over such period or periods as the court considers reasonable; (d) an inquiry as to the profits the Bank made from its Cuban business after June 5, 2014; and (e) exemplary damages.

19. At the trial, Mr. Yacoubian gave evidence on behalf of Tri-Star and Ms. Davi Samaroo-Singh, who held the position of Country Manager of the Bank's office in Cuba from January 1, 2014 to September 2015, gave evidence on behalf of the Bank. I will refer to their evidence when and where necessary to address the issues in this appeal.

20. It is apparent from the relief sought by Tri-Star that its claim was founded in contract, detinue and conversion. Simply and briefly put, Tri-Star's case was that there existed a banker customer relationship between it and the Bank by reason of which the Bank owed certain duties to Tri-Star which included the duties to permit Tri-Star to have immediate access to the funds held in its

account and not to pay or deduct any monies from the account except under Tri-Star's lawful authority. Tri-Star contended that the failure by the Bank to provide access to the funds when it demanded payment, and the actions by the Bank in remitting the funds to Cuba and deducting the sum of US$146,553.67 were in breach of contract and constituted wrongful detention and conversion of its funds.

21. Tri-Star further contended that the Bank owed it a duty of care to inform it as and when its account achieved a positive balance. This it contends the Bank failed to do and as a consequence it suffered loss.

22. With specific reference to the loss Tri-Star claimed it suffered as a consequence of the Bank's failure to permit it access to its funds Tri-Star pleaded:

> "20. If Tri-Star had not been prevented from accessing its said monies, those monies would have been used in Tri-Star's business operations to generate profits. Tri-Star has therefore been denied the opportunity of using the detained funds for the purpose of profit generation. Furthermore, in its wrongful retention of the said sums of US$1,111,983.69 and US$146,535.13, the Predecessor and the Defendant were able to use the same to generate profits. For the year ending September, 2015, the Predecessor's profit attributable to shareholders was TT$1.22 billion."

Tri-Star also claimed an entitlement to interest at the same rate charged by the Bank or equivalent to the percentage profit earned by the Bank in 2015. This is pleaded at para 21 of the statement of case as follows:

> "21. Tri-Star will contend at the trial that it is entitled to compound interest at a rate of 26 per centum per annum on all monies standing in its account from November 5, 2012, the date Tri-Star's account showed a positive balance, 26 per centum per annum being the rate charged by the Predecessor to Tri-Star as aforesaid or alternatively, at a

rate equal to the Predecessor's percentage profit for the year ended 2015."

23. The essence of the Bank's defence was that it had the authority to transfer the funds to Cuba and/or it was under a legal obligation and duty to do so.

24. So far as the Bank's authority to transfer the monies to Cuba was concerned, it relied on the Financing Agreement and the General Services Agreement made between the Bank and Tri-Star that governed their relationship. The Trial Judge found that the Financing Agreement was specific to the discounting facility. However, once the funds were in Tri-Star's account at the Bank's branch at Independence Square, Port of Spain, the applicable agreement was the General Services Agreement to which the laws of this jurisdiction applied. There was no authority express or implied in that agreement authorising the Bank to remit Tri-Star's funds to Cuba.

25. In relation to the legal duty or obligation to remit the funds to Cuba, the Trial Judge considered the effect of the Representation Licence under which the Bank operated in Cuba and the Ministerial Resolution which the Bank claimed to have been issued by the Cuban authorities.

26. With respect to the Representation Licence, the Trial Judge held that the licence imposed no duty on the Bank to remit funds from a client's account and in any event it had no extra territorial effect and could not apply to Tri-Star's account in this jurisdiction. In relation to the Ministerial Resolution, the court noted that the Resolution was not before the court and held that there was no such resolution or at least none that could have sanctioned the Bank's actions. In the circumstances, the court held that the Bank had no authority to remit the funds to Cuba and to deny Tri-Star's access to its monies when it demanded such access.

27. In relation to the sum of US$146,553.67 the Bank's case was that sum was applied by it, as it was entitled to do, to reduce other discounts and liabilities on its books. The Trial Judge however held that the Bank did not establish that there were other discounts and labilities against which it was entitled to apply the said sum. Accordingly, the Bank was wrong to deduct this sum and withhold payment of same from Tri-Star.

28. With respect to the duty to inform Tri-Star when its account achieved a positive balance, here too the Trial Judge found in favour of Tri-Star holding that the Bank was under an implied contractual duty to do so.

29. In the circumstances, the Trial Judge found that the Bank was under a duty to permit Tri-Star access to its funds when demanded and there was no lawful excuse or reason not to do so. The Bank was therefore liable to Tri-Star in detinue, conversion and breach of contract. Accordingly, the Trial Judge ordered that the Bank pay to Tri-Star the monies held by the Bank and owed to Tri-Star which amounted to US$1,225,683.36.

30. In relation to the claim for interest, the Trial Judge stated:

> "104. The court has considered the submissions of the parties and the interest suggested by the claimant together with the principles enunciated in the case of ***Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another*** [2007] UKHL 34 (***Sempra***).
>
> 105. In his supplemental submissions forwarded to the court, attorney at law for the claimant suggested that the rate of interest ought to be 2% per month compounded monthly or 26% per annum. This was the rate which applied in this case to the defendant's charges in relation to the claimant.
>
> 106. In considering this issue, the court has reacquainted itself with the principles enunciated in ***Sempra***, having addressed the same in its judgment in HCA No. 4680 of 1988 ***Westmoorings Limited v Emile Elias & Company Limited***.
>
> 107. In ***Sempra***, the Revenue in the UK received payments of taxes prematurely which the court found to be an unjust

enrichment. Lord Hope of Craighead was of the respectful view that:

> *"[33] …The Revenue accepts that the money it received prematurely had a value, but it says that the restitutionary award should take the form of simple interest. I do not think that such an award would be consistent with principle.* ***Simple interest is an artificial construct which has no relation to the way money is obtained or turned to account in the real world. It is an imperfect way of measuring the time value of what was received prematurely. Restitution requires that the entirety of the time value of the money that was paid prematurely be transferred back to Sempra by the Revenue****.*
>
> *[34] All this points to the conclusion, subject to what I say later about onus (see [47], [48], below) that, for restitution to be given for the time value of the money which was paid prematurely, the principal sum to be awarded in this case should be calculated on the basis of compound interest."*
>
> [Emphasis added by the Trial Judge]

108. In like manner, any suggestion of a minimal rate of interest being awarded to the claimant would fail to take into account the commercial reality of what the defendant has done. Firstly, there is no doubt that the defendant would have had the use of the claimant's not insubstantial US dollar funds to be loaned to other parties as that is the recognized manner that a commercial bank would operate. It was not challenged in cross examination that the commercial lending rate that the defendant charged the claimant on the bills of exchange was the sum of 2% per month compounded monthly which was expressed as 26% per annum. That is the value of the profit that the defendant would have obtained as a result of the use of the claimant's funds during the time when it was wrongfully retained by the defendant. Further, by forwarding the claimant's funds to the CBC as mentioned, the defendant preserved its license to operate in Cuba and make profits.

109. The court does not have before it the extent of those profits and the court will not engage in a further inquiry to determine the extent of the profits that the defendant

would have earned as a result of its alleged compliance with the CBC in the absence of any proper documentation or regulatory orders.

110. Instead, the court will apply that same rate of interest of 26% per annum across the board as a useful measure of damages without having to do a detailed calculation of each aspect of the defendant's profits arising from its actions. In that regard, the court is of the respectful view that such a detailed calculation is not required in this general approach towards damages in these circumstances. That rate of interest will run from 28 April 2014 to date, as mentioned, in respect of all of the funds save for the sum of US$32,854.00 paid on 21 July 2016 as aforesaid in which case interest will cease to accrue from 21 July aforesaid."

The Trial Judge then made the following orders in relation to interest:

a) on the sum of US$1,225,683.36, that the Bank pay interest at the rate of 26% per annum payable in US dollars from April 28, 2014 to the date of judgment; and

b) that the Bank pay interest on the sum of US$32,854.00 at the rate of 26% per annum form April 28, 2014 to July 21, 2016 being the date it was paid by the Bank to Tri-Star.

31. The Trial Judge also awarded exemplary damages in favour of Tri-Star in the sum of $500,000.00. I will set out the Trial Judge's reasons for that award when I come to deal with the Bank's appeal with respect to that award. I will however first focus on the appeals by the parties in relation to interest which the Trial Judge ordered that the Bank pay. I will treat first with the Bank's appeal and then with Tri-Star's counter-notice of appeal.

32. Mr. Benjamin for the Bank, in summary, submitted that the Trial Judge erred in granting the awards of interest that he did. He argued that Tri-Star's claim for interest constituted special damages and should have been specifically

pleaded and proven. While Tri-Star alleged that it was denied the opportunity of using the funds which the Bank retained, Tri-Star did not particularise its alleged loss of opportunity. Further, Tri-Star led no evidence in support of the alleged loss. Mr. Benjamin further submitted that the Trial Judge's order for the payment of interest was made on the basis of unjust enrichment principles as explained in **Sempra Metals Ltd v Inland Revenue Commissioners and another [2008] 1 AC 561 (Sempra Metals)**. He argued that the Trial Judge was plainly wrong to do so as **Sempra Metals** was departed from and overruled in the case of **Prudential Assurance Co Ltd v Revenue and Customs Commissioners [2018] 3 WLR 652 (Prudential Assurance)** which was decided after the Trial Judge delivered his judgment.

33. In any event, Mr. Benjamin contended that the order for the payment of interest made by the Trial Judge and which was intended to transfer to Tri-Star the profit that the Bank would have earned as a result of having the use of Tri-Star's funds was not supported by the evidence as there was no evidence as to the Bank's profit or that the Bank had used the funds at all or after February 2016 when the Bank remitted the funds to Cuba. Mr. Benjamin accordingly submitted that the Judge's award of interest should be set aside and be replaced by an order for the payment by the Bank of simple interest at a much reduced rate from the dates as ordered by the Trial Judge.

34. Mr. Prescott for Tri-Star in summary argued that the claims in this case do not include any claim for restitution on the basis of unjust enrichment. There was no such plea by Tri-Star and the Trial Judge did not make a restitutionary order on the basis of unjust enrichment. Accordingly **Prudential Assurance** is of no relevance. Mr. Prescott further submitted that what the Trial Judge did was to make an award of interest as damages as opposed to interest on damages. It was submitted that the ability of the court to award compound interest as damages is uncontroversial. The court may do so either by reference to the gains made by the defendant or the loss suffered by the claimant. In this case,

Mr. Prescott argued that the Trial Judge's award is justifiable on either basis, that is to say, by reference to the loss suffered by Tri-Star which would be compensatory damages or by the gains to the bank which would be restitutionary damages. In relation to restitutionary damages, it was contended that there was ample evidence that the Bank ordinarily charged on transactions with Tri-Star a commercial lending rate of compound interest equivalent to 26% per annum. Indeed he said that was not disputed. Mr. Prescott further submitted that the Trial Judge was entitled to award restitutionary damages by reference to that rate as that was the rate of interest the Bank would have earned by lending Tri-Star's funds. It is irrelevant whether the funds were used by the Bank. What mattered was that the Bank had the opportunity to use the funds. The Bank's submissions that the evidence did not support the conclusion that it used the funds was therefore of no moment.

35. In relation to compensatory damages, it was submitted by Mr. Prescott that the Bank was wrong to say that Tri-Star did not plead or prove its claim for interest. He said that the claim was sufficiently pleaded and there was evidence of Tri-Star's loss.

36. In the circumstances, it was argued by Mr. Prescott, that the Trial Judge was entitled to make the award of interest which he did. This is however subject to Tri-Star's counter-notice of appeal in relation to the date from which the Trial judge ordered that interest should begin to accrue. I shall treat with Tri-Star's appeal later in this judgment.

37. Although Tri-Star submitted that the award of interest made by the Trial Judge is justifiable as restitutionary damages, that is, by reference to the gains made by the Bank, or as compensatory damages, that is, by reference to the loss suffered by Tri-Star, it seems clear to me that the Trial Judge's award is a restitutionary award meant to restore to Tri-Star what the Bank would have

made by the use of Tri-Star's money during the time the Bank wrongly retained the money. This can be seen by the Trial Judge's reference to the bank having use of Tri-Star's "not insubstantial US dollars" to be loaned to other parties as commercial banks would usually do and that the Bank's commercial lending rate was the sum of 2% per month compounded monthly which is equivalent to 26% per annum. The Trial Judge reasoned that although he did not have the extent of the profits the Bank earned, he would use that rate of interest as a useful measure of damages without having to do a detailed calculation of each aspect of the Bank's profits arising from its actions. It was on that basis the Trial Judge awarded compound interest expressed as 26% per annum. His intention was therefore to make restitution or to transfer or restore to Tri-Star what he saw was the benefit the Bank had derived from having the use of Tri-Star's funds. The Bank has taken issue with that and I will come to it shortly. But the question should first be asked whether the award is justifiable on ordinary compensatory principles as Tri-Star contends.

38. Under Section 25 of the Supreme Court of Judicature Act a claimant may recover simple interest on the debt or damages for which judgment is given. I will revisit this later in this judgment. A claimant may however take the position that the interest under that Act on the debt or damages is not adequate to compensate for the loss incurred by being kept out of his money and may seek to recover such loss. It is now settled that at common law a claimant may recover interest losses as damages in claims for non-payment of debts as well as other claims for breach of contract or tort and that the award of interest as damages may include an award of compound interest. This was the unanimous decision of the House of Lords in **Sempra Metals (supra)** overruling the then common law position, which did not recognise a claim for interest on the late payment of a debt unless the claim for damages was pleaded and proven as special damages under the second limb of **Hadley v Baxendale 156 E.R. 145**.

39. In **Sempra Metals (supra)** there were two claims. One to recover compound interest as damages and the other to recover compound interest as restitution. The latter claim was at the forefront as that was the claim favoured by the claimant. I will return to **Sempra Metals (supra)** in relation to the restitutionary claim when I consider the award made by the Trial Judge on the basis of restitution. However, in relation to the former claim of interest as compensatory damages, the House of Lords was unanimous in holding that at common law interest losses, which may include compound interest, may be recovered as damages in claims across the board. As Lord Hope stated at para 16:

> "…There is little that I would wish to add to what Lord Nicholls has said about the approach that should now be taken to claims at common law for damages for interest losses suffered as a result of the late payment of money. In my opinion a decision on this point is not essential to the resolution of the question which is at issue in this case, as the cause of action with which we are concerned here is different. But I agree with him that the House should take the opportunity of departing from Lord Brandon of Oakbrook's analysis in *President of India, v La Pintada Cia Navigation SA* [1985] AC 104 and that it should hold that at common law, subject to the ordinary rules of remoteness which apply to all claims of damages, the loss suffered as a result of the late payment of money is recoverable."

(See also para 94 per Lord Nicholls; para 132 per Lord Scott; para 165 per Lord Walker and para 217 per Lord Mance).

40. As is apparent from the above quotation, the claim for interest losses is subject to the ordinary rules of remoteness. It is also subject to the ordinary rules regarding the duty to mitigate and other relevant rules regarding the recovery of alleged losses. The claim for interest losses must however be pleaded and proven. In this regard, Lord Nicholls stated:

> "94. To this end, if your Lordships agree, the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject

to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.

95. In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.

96. But an unparticularised and unproved claim simply for 'damages' will not suffice. General damages are not recoverable. The common law does not *assume* that delay in payment of a debt will of itself cause damage. Loss must be proved. To that extent the decision in the *London, Chatham and Dover* case remains extant. The decision in that case survives but is confined narrowly to claims of a similar nature to the simple claim for interest advanced in that case. Thus, that decision is to be understood as applying only to claims at common law for unparticularised and unproven interest losses as damages for breach of a contract to pay a debt and, which today comes to the same, claims for payment of a debt with interest. In the absence of agreement the restrictive exception to the general common law rules prevails in those cases.

97. The common law's unwillingness to presume interest losses where payment is delayed is, I readily accept, unrealistic. This is especially so at times when inflation abounds and prevailing rates of interest are high. To require proof of loss in each case may seem unduly formalistic. The common law can bear this reproach. If a party chooses not to prove his interest losses the remedy provided by the law is to be found in the statutory provisions."

41. It is important to emphasise that the claim for interest losses is not one for general damages. The loss the claimant claims to have suffered must be pleaded and proved. This is certainly so in this case. Tri-Star's pleaded case as to the losses it suffered by the Bank's failure to permit it access to its money is to be found at paragraph 20 of its defence which I have set out earlier (see para 22 above). Tri-Star's pleaded case is therefore that had it not been prevented from accessing its monies, those monies would have been used in Tri-Star's business to generate profits. No particulars were however pleaded as to what those profits were likely to be.

42. The evidence of Mr. Yacoubian in support of Tri-Star's alleged losses provides no improvement on the pleaded case. He states at paragraphs 44 and 45 of his witness statement as follows:

> "44. With respect to the remaining issues, I say that the Cuban business was Tri-Star's only business and that business was brought completely to an end by the Cuban Authorities following my imprisonment. Tri-Star's principal asset following the closure of its business was the funds in the Account. After my release, it was necessary for me to rebuild Tri-Star's business outside of Cuba but because Republic Bank refused to provide Tri-Star with access to its funds as set out in this Witness Statement, Tri-Star has not had the capital and so has been unable to restart its business. As a result, it has lost the opportunity to carry on and build on that business for the last 3 years. I am the prime mover of Tri-Star. I am now 57 years old and as each year passes, I will have less energy to put into the restart and development of Tri-Star's business which will be to Tri-Star's long term detriment. Furthermore, because I am very fearful of recriminations from the Cuban Government, I only feel safe in Canada and Western Europe and so I am very limited to the places to which I can travel and so where I can have Tri-Star carry on business. In the meanwhile, Republic Bank, having facilitated the Cuban Government's unlawful expropriation of Tri-Star's funds, continues to do business in Cuba and to avail itself profit-making opportunities in that country to its commercial benefit.

45. Finally I say that in providing the discounting services to Tri-Star, Republic typically charged the equivalent of 26 per cent per annum being the simple interest rate equivalent of 2 per cent per month compounded."

It is relevant to note that Mr Yacoubian does not claim that the Bank's failure to permit access to Tri-Star's funds caused the closure of Tri-Star's business. For that he has blamed the Cuban authorities. In so far as Tri-Star's claim is for the loss of profits it would have generated if it had use of its funds, Mr. Yacoubian has given no evidence of what that profit was likely to be. He has provided no evidence of what business the Respondent intended to rebuild outside of Cuba and has not given any evidence, financial or otherwise, of the potential profitability of that business. In short, Tri-Star's pleading and evidence simply does not support a claim for losses as special damages on a compensatory basis.

43. Mr. Prescott, however, submitted that it is not necessary to adduce specific evidence to prove any interest losses. Once Tri-Star has been deprived of its monies, it was argued, there is the presumption that such losses were suffered and in commercial cases the appropriate compensation would be compound interest at the commercial rate in the relevant market. In support of this submission, the Respondent referred to the case of **Equitas Limited & Others v Walsham Brothers & Co Ltd (2013) EWHC 3264 (Comm)**.

44. **Equitas (supra)** concerned a claim for non-payment of insurance premia and a claim for loss of investment income on those premia. The judge concluded that he was entitled to award compound interest despite there being virtually no specific evidence of the loss actually suffered but only general evidence that the syndicates would have suffered loss because of the importance they attached in the market to the prompt remittance of funds. The judge in **Equitas (supra)** suggested that a similar approach was adopted in **Sempra**

Metals (supra) despite what was said about the necessity of the claimant to plead and prove his loss. The judge stated:

> "118. Thus *Sempra Metals* was a case where, despite what was said about the need to plead and prove a loss, the damages actually awarded were determined by taking a conventional rate and awarding compound interest. This did not depend on any evidence as to the taxpayer's actual loss, but was simply the interest which a substantial commercial company would have to pay to borrow the amount in question in the market at the relevant time, regardless of what the taxpayer had actually done. Although it may be that this approach was not the subject of specific argument in the House of Lords, it was clearly an approach which the House endorsed."

45. This he concluded as a consequence of an examination of what **Sempra Metals (supra)** said about the circumstances in which a conventional interest rate can be used, when compound interest can be awarded, and what is meant by the need for proof of loss in such circumstances. Following his examination of **Sempra Metals (supra)**, he summarised the principles he derived therefrom as follows:

> "123. …In the light of the judgments in *Sempra Metals* I would summarise the position as follows.
>
> i) First, it is clear that damages are in principle recoverable, subject to ordinary principles of remoteness and mitigation, for breach of an obligation to remit money, where the failure to remit has caused a loss.
>
> ii) Second, unless there is some positive reason to do otherwise, the law will proceed on the basis, at any rate in the commercial context, that a claimant kept out of its money has suffered loss as a result. That represents commercial reality and everyday experience. Specific evidence to that effect is not required and, even if adduced, may well be somewhat hypothetical and thus of little assistance.

For example, a business man may well be unable to say precisely what he would have done differently if a particular payment had been made to him when it ought to have been, especially if (as apparently in this case) he was unaware that the money was being withheld. Extensive disclosure, which would no doubt be demanded by the defendant, is unlikely to assist. But that does not mean that no loss has been suffered. In the present case the general evidence of the importance attached in the market to prompt remittance of funds is more than sufficient to justify the conclusion that the syndicates did suffer a loss by being kept out of their money. Accordingly the question in such a case is not whether a loss has been suffered, but how best that loss should be measured.

iii) A solvent claimant who seeks to recover damages which exceed the cost of borrowing to replace the money of which it has been deprived is likely to be met with the defence that the claim is too remote or that it has failed to mitigate by borrowing in order to replace the money lost, in which case its recovery may be limited to that borrowing cost, which will include the need to pay compound interest, that being the only basis on which money can be borrowed commercially. The position may, however, be different if there is a good reason why the claimant should not have gone into the market to borrow the missing money, for example if it did not know and should not reasonably have known that the money was missing. (Whether this is so in the present case is considered below by reference to Equitas's claims in respect of the period after 1 September 1996).

iv) In other cases I consider that it is not necessary for the claimant to produce specific evidence of what it would have done with the money or what steps if any it took to borrow or otherwise to replace the money of which it was deprived. As noted above, it may often be impossible or at any rate extremely difficult to produce such evidence, especially if that would mean attempting to disentangle a claimant's overall business operations in an artificial attempt

to attribute specific activity such as borrowing to the non-remittance of specific funds. Instead, at any rate in commercial cases and unless there is some positive reason to do otherwise, the law will proceed on the basis that the measure of the claimant's loss is the cost of borrowing to replace the money of which the claimant has been deprived regardless of whether that is what the claimant actually did. A conventional rate will be used which represents the cost to commercial entities such as the claimant and is not necessarily the rate at which the claimant itself could have borrowed or did in fact borrow. This avoids the need for protracted investigation of the particular claimant's financial affairs. As with other conventional measures (for example, the assessment of damages by reference to a market price in sale of goods cases) this approach has the advantage of certainty and predictability which is always important in the commercial context, as well as being broadly fair in the great majority of cases and avoiding expensive and often ultimately unproductive litigation.

v) If a conventional borrowing cost is to be adopted in this way, the question whether interest should be simple or compound answers itself. While simple interest has the virtue of simplicity as Lord Hope observed, it also has the certainty of error and injustice. As their Lordships noted, it is impossible to borrow commercially on simple interest terms. I respectfully agree with Lord Nicholls that the law must recognise and give effect to this reality if it is to achieve a fair and just outcome when assessing financial loss. To conclude that, at least in a typical commercial case, the normal and conventional measure of damages for breach of an obligation to remit funds consists of compound interest at a conventional rate is therefore both principled and predictable, as well as being in accordance with what was actually awarded in *Sempra Metals*."

46. It is important to recognise that **Sempra Metals (supra)** establishes that interest losses are recoverable for breach of contract or tort. These losses may include compound interest but the losses must be pleaded and proven. This is clear from the extracts of the judgments quoted above. The judge in **Equitas (supra)** felt sufficiently satisfied that the claimants had suffered loss by virtue of the general evidence of the importance they attached to the prompt remittance of funds. However, precisely what must be pleaded and proven depends upon the facts of each individual case. But **Sempra Metals (supra)** is however clear as to the need on the part of the claimant to plead and prove his interest losses. So that in **JSC BTA Bank v Ablyazov & others [2013] EWHC 867 (Comm)** the claimant bank failed to recover its interest losses when they were not pleaded.

47. Tri-Star's pleaded case is that if it had the use of its funds, it would have used the monies in its business to generate profits. As I have noted, there is no pleading as to what those profits would have been nor is there any evidence that establishes such a claim. Tri-Star has not pleaded that it borrowed money to finance its business operations. Indeed, the evidence of Mr. Yacoubian suggests that Tri-Star did not borrow any money for reasons that were not explained. In **Equitas (supra)**, on the basis of the claimant's pleadings and evidence before the court, it was seen as proper in principle to award as damages the cost of borrowing in the relevant market whether or not the money was in fact borrowed. However, on the basis of the pleadings and evidence in this case, to award damages on the basis of what it would cost to borrow money simply does not arise. To do so would be to compensate a loss that has not been suffered. That was not the pleaded case and the evidence points to the fact that Tri-Star did not borrow any monies. In my view, in the circumstances of this case, damages cannot be awarded on the basis of the borrowing cost of money. To the extent that **Equitas (supra)** decided that the cost of borrowing was the proper measure of damages even if the money was

not borrowed, I cannot agree that is so as a general rule. That is not applicable on the facts of this case and it is not appropriate to award damages on that basis.

48. It was argued by Mr. Prescott that insofar as Tri-Star paid interest to the Bank at the equivalent rate of 26% per annum, it can be assumed or inferred that that was the profit it made from its business and Tri-Star could therefore have recovered interest at 26 % per annum on a compensatory basis. It is however not appropriate to travel through the evidence and determine if it supports a loss that has not been pleaded. As Teare J remarked (at para 18) in **JSC BTA Bank (supra)**, "until it is said what actual losses are alleged to have been sustained it is not practicable to consider the question whether adequate evidence is available to enable the resulting issue or issues to be resolved." In any event, it does not follow from the fact that Tri-Star was prepared to pay 26% per annum on the discounting facility with the Bank that is the profit the whole of its business generated. Further, Mr. Yacoubian's evidence is that it was necessary for him to re-establish Tri-Star's business outside of Cuba and even if it is to be assumed that Tri-Star's profit in Cuba was 26%, there is no evidence of what profit (if any) a business restarted outside of Cuba may have earned.

49. It was necessary for Tri-Star to properly plead the profit it claimed to have lost as a consequence of being unable to restart its business due to the Bank's retention of its funds, and to lead evidence in support of such a plea. This it failed to do.

50. In view of the above, in my judgment, the Trial Judge was correct not to award interest losses on the basis of compensatory damages.

51. The next issue is whether the award made by the Trial Judge for restitutionary damages is correct.

52. As I alluded to earlier, the award made by the Trial Judge was made to reflect what the Bank would have earned by having the use of Tri-Star's funds during the time it was wrongfully detained by the Bank. In coming to that award the Trial Judge relied on **Sempra Metals (supra)**. He quoted paragraphs 33 and 34 of the judgment of Lord Hope in **Sempra Metals (supra)** (see para 30 above).

53. **Sempra Metals (supra)** concerned a claim by a taxpayer for compound interest in respect of tax mistakenly levied by the Inland Revenue before it was lawfully due. The majority of the House of Lords was of the view that a claim would lie by the taxpayer for restitution in unjust enrichment. The enrichment consisted of the premature payment of the tax. By that premature payment the taxpayer transferred to the inland revenue, in addition to the payment of its money as tax, the benefit of the opportunity to use the money for the period of prematurity. The enrichment that had to be reversed or restored was the value of the opportunity to use the money during the period of prematurity. Put another way, the enrichment which had to be restored was in essence the time value of the money during the period of prematurity. That value was the market value of the use of the money before it was lawfully due; that is to say the cost of borrowing an equivalent sum on the open market. That would include an element of compound interest. The House of Lords therefore held by a majority that the taxpayer was entitled in unjust enrichment for restitution of compound interest calculated at the cost of borrowing a sum equivalent to the sum which had been mistakenly prematurely levied by the Inland Revenue.

54. **Sempra Metals (supra)** was however departed from in **Prudential Assurance Co Ltd v Revenue and Customs Commissioners (supra)** to which reference was earlier made. In that case, in a unanimous judgment the Supreme Court held that **Sempra Metals (supra)** was incorrectly decided in so far as it held that there was a claim in restitution for compound interest on the tax mistakenly paid prematurely.

55. The Supreme Court reasoned that unjust enrichment is concerned with reversing normatively defective transfers of value usually by restoring the parties to their pre-transfer position. The transfer of value must have arisen from a direct dealing between the claimant and the defendant at the expense of the claimant. Adopting that reasoning, the Supreme Court reasoned that the value that may be derived from the opportunity to use money after its initial transfer to the defendant was not transferred directly from the claimant to the defendant but was only a consequential or causal connection between the claimant incurring a loss and the defendant incurring a benefit. That however is not sufficient to establish a further independent transfer of value at the expense of the claimant in the relevant sense. As a consequence, any value derived from the opportunity to use the money or by the use of the money after its initial transfer was not an enrichment to the defendant at the expense of the claimant. Accordingly, there was no right to the restitution of interest on the basis of unjust enrichment.

56. **Sempra Metals (supra)**, therefore, having been overruled by **Prudential Assurance (supra)** does not provide a sound basis to support the Trial Judge's order that the Bank should make restitution for the time value of Tri-Star's money by the payment of compound interest for the period of time the Bank remained in possession of the money after Tri-Star demanded payment.

57. **Prudential Assurance (supra)** was decided after the Trial Judge delivered his judgment in this matter. Therefore, he would not have had the benefit of it. Be that as it may, the fact however is in ordering the Bank to make restitution the Trial Judge relied on **Sempra Metals (supra),** which a unanimous Supreme Court in **Prudential Assurance (supra)** has held was wrongly decided.

58. Counsel for Tri-Star submitted that **Prudential Assurance (supra)** is of no relevance to this case since Tri-Star's case does not involve any claim for restitution on the basis of unjust enrichment and the Trial Judge did not make

an order for restitution on the basis of unjust enrichment. It was further submitted that there was considerable support in the authorities that restitutionary damages may be awarded in contract and tort cases and that this is such a case.

59. While it is true to say that this is not a claim in unjust enrichment, the fact of the matter, as I have mentioned above, is that the Trial Judge did apply **Sempra Metals (supra)** in making the restitutionary award and **Sempra Metals (supra)** cannot now be regarded as a sound basis to do so. In any event, I do not accept that **Prudential Assurance (supra)** is irrelevant on the basis that this claim is not one in unjust enrichment. It is relevant insofar as Tri-Star seeks restitution. As was noted in **McGregor on Damages**, 20th edition at para 14-002:

> "What then are restitutionary damages? In a nutshell, restitutionary damages are damages which require a defendant to give back a benefit transferred from the claimant. They focus on the benefit received by the defendant rather than any loss suffered by the claimant. They are the same remedy for a wrong as restitution is for unjust enrichment."

60. Of course, applying the reasoning in **Prudential Assurance (supra)**, an order that the Bank make restitution by a payment of compound interest for the time value of Tri-Star's money or the opportunity by the Bank to use the money while it was in its possession is not available. That was at least common ground between the parties. Certainly, Tri-Star did not argue that on the reasoning in **Prudential Assurance (supra)** an order for restitution can properly be made in this case.

61. As to the Respondent's submission that there is considerable support in the authorities for the award of restitutionary damages in tort and contract, the Respondent referred to five cases namely, **Lamine v Dorrel (1705) 2 Ld. Raym. 1216**, **Solloway v Mc Laughlin [1938] AC 247**, **Re Roberts (1880) 14 Ch. D. 49**,

One Step (Support) Limited v Morris-Garner and another [2018] 2 WLR 1353 and **Bank of America Canada v Mutual Trust Co. [2002] 2 SCR 601**.

62. The first four mentioned cases do not concern a restitutionary award of compound interest for the failure to pay money. Indeed, they contain no discussion of restitutionary damages or the payment of compound interest on money when it became due.

63. The first two cases are claims in conversion of debentures (**Lamine)** and shares **(Solloway**) and serve as examples of the general rule that a claimant can recover as compensatory damages the value of the property converted at the time of conversion. These cases are of no assistance to whether a court may order as restitutionary damages the payment of compound interest as a consequence of the late payment of money.

64. The same is true of **Re Roberts (supra)**. In that case, the mortgagor agreed to pay the principal sum secured by a deed of mortgage on the date specified in the deed with interest as therein stipulated. There was however no provision in the deed for the payment of interest if the principal sum was paid after the due date. The question arose as to what was the proper amount of damages for non-payment of the principal sum after the date it became due. The court awarded interest at 5% since "that is the usual commercial value of money". There was no assessment of the benefit earned by the defendant having had the use of or the opportunity to use the money after the due date and it would be overreaching to say that the award was a restitutionary one. Nor was the interest awarded expressed to be compound interest.

65. **One Step (Support) Limited (supra)** was not a case involving restitutionary damages or compound interest. The question there was "in what circumstances can damages for breach of contract be assessed by reference to the sum that the claimant could hypothetically have received in return for

releasing the defendant from the obligation which he failed to perform". That does not raise an issue of restitutionary damages.

66. It was submitted by Tri-Star that the Supreme Court in **One Step (Support) Limited (supra)** at para 30 of the judgment of Lord Reed recognised that restitutionary damages are available in cases where the claimant's actions prevented the owner from exercising his right to obtain the economic value of the use in question or where the claimant "takes something for nothing" for which the owner has required payment. I do not agree with that submission. At paragraph 30 of the judgment, the discussion related to user damages which are compensatory in nature and are not restitutionary damages. As the Supreme Court said in **Prudential Assurance (supra)**, awards of user damages are designed to compensate for loss (see para 47 of the judgment of the court).

67. The fifth case referred to by Tri-Star, i.e. the **Bank of America Canada (supra)** case, however, concerns an award of compound interest. This is a case from the Supreme Court in Canada. The court upheld the award of compound interest by the trial judge on different bases including, it seems, on the basis of restitution. In that regard the court said:

> "59. The respondent is a financial institution whose business is to make loans at compound interest. At the hearing, it was clear that loans made by the respondent since the time of the breach of contract would have been made at compound interest. The trial judge found that as the real estate market collapsed, the respondent was under pressure from each of the Office of the Superintendent of Financial Institutions and the Office of the Ministry of Financial Institutions at a time when the respondent needed the approval of these regulatory bodies to increase its multiplier and avoid any reduction of its capital base by the removal from it of any deemed "troubled" loans. Having fallen below the required ratio of capital to loans, it is reasonable to conclude that the money which should have been paid to the appellant was used by the respondent to support loans already made at compound interest rates.

> 60. If required to pay damages at only simple interest, the respondent would have earned compound interest on the appellant's money while paying only simple interest. By breaching the contract, the respondent would have conferred on itself a profit which the contract envisaged for the appellant."

68. It seems from the paragraphs quoted above that the court was of the view that a restitutionary award may be made on the simple basis that the defendant had the opportunity to use the money. The decision to award compound interest on the simple basis that the debtor would have had the opportunity to earn compound interest on the money in its possession is inconsistent with the learning in **Prudential Assurance (supra)** which ought to be followed in this jurisdiction.

69. In view of the above, **Sempra Metals (supra)** on which the Trial Judge relied in making the restitutionary award, cannot now provide a basis in law for an order that the Bank make restitution by the payment of compound interest on Tri-Star's money . The other authorities on which reliance was placed by Tri-Star do not advance its case. The fact that the Bank had the opportunity to use the money as a consequence of failure to pay the funds to Tri-Star is not a transfer of a benefit to which the law will respond on the facts of this case by an award of restitutionary damages in the nature of the payment of compound interest. Tri-Star's remedy in this case lay in compensatory damages where it was required to plead and prove its loss occasioned by the Bank's retention of its funds. Tri-Star has however failed so to do.

70. Mr. Benjamin further submitted that even if **Sempra Metals (supra)** were still good law, the evidence in this case does not support the Trial Judge's award for the payment of compound interest as restitution. I believe there is merit in that submission.

71. The intention of the Trial Judge in ordering the payment of compound interest by the Bank was to require it to make restitution of the profit it would have earned as a result of having the use of Tri-Star's funds during the period it was wrongfully detained by the bank. There was no evidence of what that profit amounted to. The Trial Judge however noted that there is no doubt that the bank would have had the use of the funds to lend them to parties as that is the recognised manner in which a commercial bank would operate. The Trial Judge concluded that that is what the bank would have done. There was evidence that the bank charged Tri-Star interest at 26% per annum and the Trial Judge used that rate as representative of the profit the Bank would have earned on the money from the date of the demand for payment which the Trial Judge found to be April 28, 2014 to the date of the judgment, i.e. July 31, 2018.

72. Mr. Benjamin argued that in coming to that conclusion the Trial Judge disregarded the fact that there was evidence that the bank did not make use of the funds for part or for the whole of that period. He referred to the evidence that the sum of US$1,078,256.37 was paid to Cuba on February 16, 2016 and that the funds were treated by the Bank as frozen since March 2013. In my view, these submissions are persuasive.

73. It seems to me whether the Bank made use of Tri-Star's funds is relevant if it were open to the court to make an order for the payment of interest on a restitutionary basis as decided in **Sempra Metals (supra)**. As Lord Nicholls observed (at para 118):

> "In the present case there can be nothing unjust in requiring the Inland Revenue to pay compound interest, by way of restitution, on the huge interest free loan constituted by Sempra's payment of ACT. But this will not always be so. For instance, a recipient of a payment made by a mistake shared by both parties might make no actual use of the money. He might pay the money into a current account at a bank yielding little or no interest. When the mistake comes to light he repays the money. In such a case, depending on

> the circumstances, it might well be most unfair that he should be out of pocket by having to make an additional payment, whether as compound interest or even simple interest, in respect of the 'time value' of the money he received."

74. There is indeed evidence that the Bank paid the sum of US$1,078,256.37 into the judicial deposit account in Cuba on February 19, 2016. The Bank would therefore not have had the use of the money after that date. Any order for the payment of Sempra restitutionary interest ought not to have gone beyond that date.

75. More significantly however, there is evidence that the bank treated Tri-Star's funds as having been frozen. This it seems to me would apply to all the funds save for the sum of US$146,553.67. This evidence was given by the Bank's witness, Ms. Davi Samaroo-Singh. She stated that the Bank considered Tri-Star's funds to be frozen. The Trial Judge, although finding there was no freezing order in place, did not consider that evidence of the Bank's witness. The natural inference is that in those circumstances the Bank would not have lent the money to other people as a commercial bank would do in ordinary circumstances. Given that from the moment the Cuban authorities instructed the Bank remit the monies to Cuba it indicated its willingness so to do, it is entirely credible that the Bank would have considered the funds to be frozen and would not have used them in the normal course of its business.

76. These conclusions do not mean that Tri-Star cannot recover any interest on the principal sums ordered to be paid by the Trial Judge. As I mentioned earlier, interest may be awarded under section 25 of the Supreme Court of Judicature Act (the Act). This section is as follows:

> "25. In any proceedings tried in any Court of record for recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date

when the cause of action arose and the date of the judgment, but nothing in this section—

(a) shall authorise the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange."

77. It is apparent from section 25 of the Act that the court has the jurisdiction to award interest on any debt or damages for which judgment is given. The power to do so is discretionary. The court may award interest at the rate it thinks fit on the whole or part of the debt or damages for the whole or part of the period from the date the cause of action arose to the date of judgment. It is relevant to note that the section specifically does not authorise "the giving of interest upon interest". In other words, the power given to the court by section 25 of the Act to award interest on the judgment debt or damages is limited to simple interest.

78. Interest is awarded under the Act to the claimant for being kept out of money which ought to have been paid to him and not as compensation for damages suffered or as punishment (see **Jefford v Gee [1970] 2 QB 130** and **Pampellone v The Royal Bank Trust Company (Trinidad) Limited Civil Appeal 70 of 1977**).

79. The rate of interest which has been awarded by the courts in this jurisdiction under section 25 of the Act has varied over the years. At one point, the rate of 6 % per annum applicable to judgment debts as provided for in the Remedies of Creditors Act was awarded under section 25 of the Act (See **Civil Appeal No. 16 of 1975 Hosein v Camacho** and **Civil Appeal No. 93 of 1978 Battoo Brothers Limited, Kassie v Leavitt**). The rate of interest on judgment debts was increased to 12% per annum when the Remedies of Creditors Act was amended in 2000. That rate was applied by the courts under section 25 of the

Act for a time (see for example **HCA 442 of 2000 Baldeo v Prestige Car Rentals Limited & Others**) until it became apparent that the rate was no longer a reasonable rate to be used given the fall in interest rates generally.

80. The rate of interest on judgment debts has recently been reduced to 5% per annum but even that rate, given the fall in interest rates generally, seems to me to be on the high side to award as interest on debt or damages under section 25 of the Act. The fact is that deposit and investment rates of interest have fallen drastically over the years and are now extremely low.

81. Recently, in **Civil Appeal 251 of 2012 The Attorney General of Trinidad and Tobago v Brown & Others** the Court of Appeal expressed the view in a claim for false imprisonment that the correct approach in awarding interest under the Act is to align the rate of interest to the rate of return on short term investments. This resulted in that case in the reduction of the rate of interest from 9 %, which was awarded by the court below, to 2.5%, which at the time was the short term investment rate.

82. The rate of 2.5% was also applied in a recent judgment in **Civil Appeal No. P151 of 2014 Water and Sewerage Authority of Trinidad and Tobago v Waterworks Limited** in a claim for damages under a building contract. That rate was also awarded in recent decisions of the High Court in **CV 2014-00112 Lett v SM Jaleel & Co. Ltd & anor** and **CV2011-00489 Holder v The Attorney General of Trinidad and Tobago**. However in a judgment delivered on July 31, 2020 the Court of Appeal in **Civil Appeal No. S349 of 2014 Adana Paul v Well Services Petroleum Company Limited** awarded interest on general damages at 3% per annum. In doing so, the court made reference to the Central Bank's repo rate which it noted was 3.5% per annum and found it not inappropriate to award interest of 3%.

83. In my view, the rate of interest on short-term investments is appropriate as was decided in the **Brown (supra)**. **Brown (supra)** was decided in 2015 but it

is improbable that since then there has been any upward movement in that rate of interest. I therefore propose to award interest at the rate of 2.5% per annum.

84. The question that next arises is from what date interest should be awarded. The Act gives the court a discretion to award interest for the whole of the period between the date the cause of action arose and the date of judgment or any part of that period. Tri-Star's counter-notice of appeal touches on the question as to the date(s) the cause(s) of action arose. It is therefore convenient to consider Tri-Star's appeal at this point.

85. The Trial Judge held that the causes of action arose from the date of Tri-Star's demand for the payment of the money. He found that the demand was made on April 28, 2014 and accordingly the causes of action arose on that date. Tri-Star contends that the Trial Judge erred in so holding. Tri-Star submitted that the interest should run from November 5, 2012 or alternatively March 14, 2014.

86. The submission that interest should run from November 5, 2012 relates to the Trial Judge's finding that the Bank was under a duty by virtue of an implied contractual term to inform Tri-Star when there was a positive balance in its account.

87. It was accepted by the Trial Judge that the usual practice was that Tri-Star, having been notified of a positive balance in its account, would clear out the account and repatriate the funds to Canada. Tri-Star would consequently give those instructions to the Bank on being informed of a positive balance.

88. It is not in dispute that on November 5, 2012 Tri-Star's account achieved a positive balance. The effect of the Trial Judge's decision is that on November 5, 2012 the Bank was under a contractual obligation to inform Tri-Star that there was a positive balance in the account. It was also not in dispute that the bank did not notify Tri-Star pursuant to its obligation so to do.

89. The Trial Judge was of the view that notwithstanding the Bank was in breach of contract, that the wrongful retention of the monies by the Bank only began upon Tri-Star's demand for payment of the money. I do not agree. In my judgment, so to hold overlooks or gives no effect to the finding that the Bank was in breach of contract for failing to inform Tri-Star that there was a positive balance in its account. Had Tri-Star been notified, the inference is that Tri-Star would have demanded payment by way of instructions to the bank to repatriate the funds. The breach by the Bank therefore resulted in Tri-Star being kept out of its money for longer than it needed to be. Tri-Star was therefore deprived of its monies by virtue of the failure to be informed that there was a positive balance in its account and the cause of action would have arisen when it ought to have been reasonably so informed. This, in my judgment, would be November 5, 2012, being the date the account went into positive territory. How this impacts on the running of interest I will come to shortly.

90. The other date to which reference was made by Tri-Star i.e. March 14, 2014 relates to the finding by the Trial Judge as to the date demand for the payment of the funds was made by Tri-Star. As noted above, the Trial Judge held that the cause of action arose on April 28, 2014 which was the date he found that a demand was made for payment of the funds by Mr. Yacoubian on behalf of Tri-Star.

91. Mr. Prescott submitted that the Trial Judge overlooked evidence that a demand was made at an earlier date, namely March 14, 2014. Mr. Benjamin submitted that that date was not pleaded nor did Tri-Star give evidence that a demand was given on this date. The Bank was therefore denied the opportunity to cross-examine Mr. Yacoubian or provide evidence in relation to this. He contended that it is now too late to permit Tri-Star to re-litigate the court's finding as to the date of demand.

92. It is correct that Tri-Star did not plead that it demanded payment of the funds on March 14 2014. In fact it pleaded that a demand was made on June 5, 2014. Mr. Yacoubian gave evidence to that effect. The Trial Judge however noted that Mr. Yacoubian could not remember the exact date the demand was made. The Trial Judge relied on a letter from the Bank to the CBC dated April 28, 2014 in which the Bank stated, *inter alia*, that Mr. Yacoubian had demanded a return of the funds.

93. The date of March 14, 2014 is contained in an internal memorandum to the Bank's managing director under the caption "Report on Tri-Star Caribbean Inc". In that memorandum it is stated "that Mr. Yacoubian had contacted [the Bank] via email (March 14, 2014) requesting all funds in the account be returned to his company." It is a reasonable inference that the date in parenthesis is the date of the email.

94. The Bank did not contend that the internal memorandum was not in evidence such that the Trial Judge should have had no regard to it. The document therefore provides some evidence that a demand was made by Mr. Yacoubian as early as March 14, 2014. In so far as the document is one to which the court could have paid regard and is the Bank's document, I do not agree that the Bank would be prejudiced in the manner suggested by Mr. Benjamin if it did consider the document as it should have done.

95. It is relevant to note that the Bank did not plead a precise or give evidence of a precise date when a demand was made. The Bank in its defence and evidence referred to a letter received from "the claimant's principal upon his release from prison requesting remittance to him of all funds". The date of the letter is not identified. It is not disputed that Mr. Yacoubian was released in February 2014. Further, the letter of April 28, 2014 from the Bank to the CBC, on which the Trial Judge placed reliance in coming to his finding as to the date of demand, did not state that the demand was made on the date of the letter.

It simply stated that the Bank had been contacted by Mr. Yacoubian and he had requested the return of the monies. The internal memorandum is therefore not contradictory of or inconsistent with the Bank's position on the date of demand.

96. In the circumstances, the court ought not to be precluded from considering the memorandum and it provides evidence of an earlier date of demand namely March 14, 2014, which seems to have been overlooked by the Trial Judge. Had the Trial Judge considered the memorandum, he would have found that a demand was made on March 14, 2014 for the payment of the funds.

97. In view of the above, the cause of action in relation to the claim to be informed of a positive balance accrued on November 5, 2012 and in relation to the obligation to permit Tri-Star access to its funds, on March 14, 2014. What does this mean for the date(s) from which interest should run under section 25 of the Act?

98. On November 5, 2012 while Tri-Star's account went into positive territory, not all monies due from Tri-Star's customers were paid. Monies continued to be paid by its customers thereafter. So while interest may run from November 5, 2012, it could not be on the whole amount that became due to Tri-Star and for which judgment was given. Monies continued to be paid by Tri-Star's customers until January 24, 2014 by which date it seems all monies due to Tri-Star were collected by the Bank. Interest should run from the date of each payment on the resulting balance beginning November 5, 2012. The statements of account in evidence show a final balance as at January 24, 2014 of US$1,111,983.69. I have calculated interest on the payments made from time to time at the rate of 2.5% to March 13, 2014 to be US$26,848.56. The sum of US$1,111,983.69 however does not include the sum of US$146,535.13. Interest on that sum, it seems to me, should run from the date of demand. Therefore, after March 13, 2014 interest should accrue on the principal sums

as ordered by the Trial Judge (which include the sum of US$146,535.13) from March 14, 2014 being the date of demand to the date of judgment.

99. I turn now to consider the Bank's appeal in relation to exemplary damages.

100. There was no real dispute between the parties as to the law relating to exemplary damages as set out by the Trial Judge in his judgment. In the circumstances, it is sufficient for me to provide only a very brief outline of the law.

101. Exemplary damages are awarded in this jurisdiction in claims in tort as well as in contract. In **Torres v Point Lisas Industrial Port Development Corporation Limited (2007) 74 WIR 431,** in relation to claims in tort I said (at para 77):

> "77. Exemplary damages are of course awarded in the law of tort. Damages in the usual sense of the term are awarded to compensate the victim of the wrong. The object of exemplary damages however is to punish and includes notions of condemnation or denunciation and deterrence (see *Rookes v Barnard* [1964] 1 All ER 367 at 407, [1964] AC 1129 at 1221). Exemplary damages are awarded where it is necessary to show that the law cannot be broken with impunity, to teach a wrongdoer that tort does not pay and to vindicate the strength of the law (see *Rookes v Bernard* [1964] 1 All ER 367 at 411, [1964] AC 1129 at 1227). An award of exemplary damages is therefore directed at the conduct of the wrongdoer. It is conduct that has been described in a variety of ways such as harsh, vindictive, reprehensible, malicious, wanton, wilful, arrogant, cynical, oppressive, as being in contempt of the plaintiff's rights, contumelious, as offending the ordinary standards of morality or decent conduct in the community and outrageous. In Privy Council Appeal No. 10 of 2002 *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449, Lord Nicholls explained the rationale for exemplary damages as punishment for 'outrageous conduct'. He stated (at para. 20):
>
> > "In the ordinary course the appropriate response of a court to the commission of a tort is to require the

> wrongdoer to make good the wronged person's loss, so far as a payment of money can achieve this. In appropriate circumstances this may include aggravated damages. Exceptionally, a defendant's conduct in committing a civil wrong is so outrageous that an order for payment of compensation is not an adequate response. Something more is needed from the court, to demonstrate that such conduct is altogether unacceptable to society. Then the wrong doer may be ordered to make a further payment, by way of condemnation and punishment".

102. In tort cases exemplary damages can be awarded in the categories of cases identified in **Rookes v Barnard [1964] AC 1129** namely, (1) oppressive, arbitrary or unconstitutional acts of government servants; (2) where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the claimant; and (3) where exemplary damages are authorised by statute.

103. In **AB and others v South West Water Services Ltd [1993] 1 All ER 609**, it was decided by the Court of Appeal that to attract an award of exemplary damages under the first two categories in **Rookes v Barnard (supra)**, that the claim must be in respect of a cause of action for which awards of exemplary damages had been made prior to 1964 (the year **Rookes v Barnard (supra)** was of course decided). That limitation was however rejected by the House of Lords in **Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29**. In that case it was held that it is not necessary before a court may make an award of exemplary damages that the cause of action had been recognised before **Rookes v Barnard (supra)** as justifying an award of exemplary damages.

104. Therefore, if the conduct of the tortfeasor is sufficiently outrageous and falls within the first two categories of **Rookes v Barnard (supra)** the claim can attract an award of exemplary damages. "Outrageous" will capture any of the epithets by which conduct sufficient to attract an award of exemplary

damages has been described. The focus should be on the features of the conduct of the wrongdoer rather than the cause of action. Of course, where statute authorises an award of exemplary damages a court may make such an award.

105. In **Torres (supra)** this Court held that exemplary damages may be awarded in breach of contract cases. The focus in such cases, as in tort, should be on the conduct of the defendant, and if the conduct is outrageous the claim may attract an award of exemplary damages. This can be seen by the following extracts of the judgments in that case:

> "54. I think that the proper approach would be to focus on the conduct of the defendant as a whole: Do the facts disclose reprehensible conduct tending to take advantage of every chance of success to the plaintiff's disadvantage? Was it outrageous, highhanded and egregious? Was the misconduct planned and deliberate? Did the defendant try to conceal the misconduct? If the breach was committed in such a manner in disregard of the plaintiff's rights, then an award of exemplary damages would be appropriate. It follows from what has been expressed above, however, that the award of exemplary damages in breach of contract cases ought to be rare."(per Warner, J.A.)
>
> …
>
> 98. The conduct that attracts exemplary damages does so, as Lord Nicholls stated in *A v Bottrill*, because it is so outrageous that an order for payment on ordinary compensatory principles is an inadequate response. If that is the broad based rationale for an award of exemplary damages I see no good reason that it should be limited to cases in tort. As the judges point out in the *Vorvis* case what is relevant is the quality of the conduct of the contract breaker and not the legal category of the wrong. I would think that in the vast majority of case the contract breach would not attract an award of exemplary damages but in the exceptional case exemplary damages should 'be allowed where the facts demand that they be awarded'."(per Mendonça, J.A.)

106. Mr. Benjamin submitted that the Trial Judge erred in making an award of exemplary damages. He submitted that an award should not have been made or alternatively, that the award is disproportionate and too high. Mr. Prescott essentially supported the Trial Judge's award of exemplary damages for the reasons given by him.

107. It is well settled that before an appellate court may interfere with the Trial Judge's assessment of damages it is generally necessary that the court be convinced either that the trial judge acted on some wrong principle or that the award was so extremely high or so extremely small as to make it in the judgment of the court an entirely erroneous estimate of the damage to which the claimant is entitled (see **Flint v Lovell [1935] 1 KB 354**).

108. In arriving at the award of exemplary damages the Trial Judge placed specific reliance on the following: (i) that there was a fiduciary relationship between Tri-Star and the Bank which was damaged by the Bank when it preferred its interests to that of Tri-Star; (ii) the failure on the part of the Bank to produce properly translated documents; (iii) the failure by the Bank to properly accord with an order for disclosure; and (iv) the circumstances surrounding the transfer of the funds to Cuba.

109. The Trial Judge was of the view that as there existed a fiduciary relationship between the Bank and Tri-Star, the Bank was obligated to put Tri-Star's interest before its own commercial interests and that relationship was damaged when the Bank preferred its own interest ahead of Tri-Star's. I, however, agree with Mr. Benjamin's submission that there did not exist a fiduciary relationship between the Bank and Tri-Star. The facts in this case do not support the existence of such a relationship. The Bank was involved in what may be described as no more than lending and deposit-taking activities in relation to Tri-Star and these activities are generally not fiduciary in character. There is nothing in this case to suggest that they were. The Bank

owed certain duties to Tri- Star arising out of its banker customer relationship with Tri-Star, but they did not include the duties of a fiduciary or the duty to put its own commercial interests ahead of that of Tri-Star's (See Paget's Law of Banking, 15th edition at para 4.26). Indeed, in the ordinary banker customer relationship a bank can be expected to put its own commercial interests ahead of its customer (see Ellinger's Modern Banking Law (5th ed) at pp 128-9).

110. With respect to the matters at (ii) and (iii) namely, the failure to produce properly translated documents and the failure to properly accord with the order for disclosure, it was submitted on behalf of the Bank that these are not matters which a court may properly rely on to make an award for exemplary damages. Further and in any event, the Trial Judge was wrong to castigate the Bank for failure to produce properly translated documents and to accord with the order for disclosure. There are therefore two questions in the light of these submissions. First, can such conduct give rise to an award of exemplary damages? And the second, in any event did the Bank fail to produce properly translated documents and/or to accord with the order for disclosure?

111. There are authorities which support the position that the court is entitled to look at the conduct of the defendant before the trial and during the trial in deciding whether to award exemplary damages. Once such case, to which reference was made by Tri-Star, is **Praed v Graham (1889) 24 QBD 53**. This was a case in libel and the court held that in assessing damages the jury is entitled to look at the whole of the conduct of the defendant from the time that the libel was published down to the time they gave their verdict. The case report is however silent as to the nature of the conduct in that case.

112. Other authorities which touch on the conduct of the defendant at the trial may be found at para 13-039 of McGregor on Damages (20th edition) namely, **Greenlands v Wilmshurst (1913) 3 KB 507** also a libel action where it was said that the impetuosity of defendant's counsel's attack on the plaintiff could

inflame damages; **Loudon v Ryder [1953] 2 QB 202** an assault case where apart from the manner in which the assault was carried out, the fact that the defendant defended the claim but led no evidence and offered no apology or contrition were matters that might increase exemplary damages; and **Ramzan v Brookwide Limited [2011] 2 All ER 38** where the defendant committed a more serious type of trespass followed by no contrition, no apology and an attempted cover-up by lying in evidence justified an award of exemplary damages.

113. The conduct in these cases properly sound in damages and are materially different from complaints that there was no proper disclosure or that the Appellant failed to produce properly translated documents at the trial. In the latter case, the court has power to attach little weight to improperly translated documents or exclude them from evidence. And so too where reliance is placed on documents which are not disclosed. However, despite that, I would not want to go so far as to say that those matters cannot support an award of exemplary damages. In that light, the question that now arises is whether the Trial Judge was correct to say that there was a failure by the bank to produce properly translated documents and to accord with the order for disclosure.

114. In relation to the former, it was not apparent from the record of appeal or during the hearing of the appeal that there was such a failure. Tri-Star made no criticism of the English translation of any documents nor did it point to any documents that were not properly translated. In the circumstances, I cannot agree with the Trial Judge's criticism that there was a failure to produce properly translated documents. It may be that the Trial Judge had in mind his pre-trial evidential ruling. In that ruling the Trial Judge struck out portions of the witness statement of Ms. Davi Samaroo-Singh, the Bank's witness, as well as the documents translated from Spanish into English, which were annexed to the witness statement. So far as is relevant to this discussion, the striking out was on the basis that the court was not satisfied that the documents were

properly translated as they were not official translations by someone who had established his/her expertise to translate the documents from Spanish to English.

115. In relation to that ruling, however, the Bank appealed and the appeal was compromised with the result that the order of the Trial Judge striking out the portions of the witness statement and the translated documents thereto annexed was set aside. That in my judgment signals two things. First, the Trial Judge's objection to the translation of the documents could no longer be considered valid or relevant and second, that Tri-Star was no longer objecting to the translations. It is not proper in those circumstances for the Trial Judge to persist in making reference to the Bank's failure to properly translate documents if that is what he had in mind.

116. In the circumstances of this case, the criticism that the Bank failed to produce properly translated documents is not one, in my view, that can be properly be made so as to give rise to an award of exemplary damages.

117. In relation to the criticism that there was a failure by the Bank to properly accord with the order for disclosure, it is to be noted that in this case there was standard disclosure and an order that the Bank make specific disclosure of certain categories of documents specified in the order for specific disclosure. They were both complied with on their face in that the Bank filed a list of documents in relation to standard disclosure and a supplemental list in response to the order for specific disclosure. Thereafter, the Trial Judge ordered the Bank to explain the circumstances arising from the order for specific disclosure. This the Bank did by an affidavit sworn by one Joel Chadha in which he stated that from searches conducted by the employees of the Bank he was informed and verily believed that there are no other documents that fell within the categories of documents specified in the order for specific

disclosure. Thereafter, Tri-Star made an application for the Bank to conduct further searches for the documents. That application was however dismissed.

118. It is difficult to say in view of what I have set out above that the Bank did not accord with the order for disclosure. The reasoning however that drew the Trial Judge to the conclusion that the Bank did not accord with the order for disclosure is that the Bank's witness in her witness statement said that she was able to speak to the matters in it partly form her own knowledge and partly from an examination of the Bank's record. The Trial Judge observed that some of the matters contained in the witness statement were before the witness worked at the Bank and to be able to give evidence of those matters arising before she worked at the Bank, the Trial Judge reasoned that it could not be from her own knowledge but had to be from the Bank's records. The Trial Judge formed the view from a perusal of the Bank's list of documents that there were no documents disclosed that enabled the witness to speak to those matters before she began working at the Bank. He concluded that there therefore must have been documents that were not disclosed.

119. Applying that reasoning, the Trial Judge in his pre-trial evidential ruling referred to earlier struck out portions of the Bank's witness statement on the basis of non-disclosure in that those portions must have been informed by documents that were not disclosed. The striking out of these portions of the witness statement was also the subject of the appeal referred to earlier which, as I have mentioned, was compromised and the Trial Judge's order set aside. Similarly here, as with the criticism relating to the failure to properly translate documents, it does not appear to me that it is appropriate for the Trial Judge to persist in his criticism that there was non-disclosure and to make that the basis for an award of exemplary damages.

120. This brings me to the transfer of the funds to Cuba. It is this that gave the Trial Judge the greatest concern. He said that the circumstances in which the

funds were paid to the judicial account in Cuba gave him "the greatest sense of disquiet, more a sense of revulsion". The facts relating to the transfer of the funds to the judicial account in Cuba are set out earlier in this judgment. It is convenient here to summarise them in brief.

121. In February 2013 the Cuban authorities instructed the Bank pursuant to a Resolution they claimed existed to transfer the funds to Cuba to the judicial deposit account. The Bank requested a copy of the Resolution to "properly document the transfer". The Resolution was never received by the Bank. The Bank, however, falsely represented to Tri-Star that the Resolution was served on it.

122. Notwithstanding the Bank did not receive a copy of the Resolution, it nevertheless in 2016 remitted Tri-Star's funds to Cuba, three years after the initial instructions from the Cuban authorities to do so. The transfer of the funds to Cuba occurred during the currency of these proceedings without any prior notification by the Bank to the court or to Tri-Star. In fact, the transfer was done shortly after the Bank had applied for an extension of time to file its defence and where in that application it represented that it had requested information from the Cuban authorities on the receipt of which the matter was "likely to be disposed of and that it would not be necessary further to litigate the claim".

123. Not only was there no prior communication by the Bank of its intention to remit the funds to Cuba, but the Bank, by a letter from its attorneys-at-law dated November 18, 2015 in response to the pre-action protocol letter from Tri-Star's attorneys-at-law, had falsely claimed that the funds had already been remitted to Cuba. I cannot accept Mr. Benjamin's submission that on a proper reading of that letter the Bank was in fact saying that the funds were still in Tri-Star's account in this jurisdiction. There is a very clear statement in the letter that the Bank had no alternative but to transfer the funds to Cuba

thereby clearly representing that the funds by the date of that letter (November 18, 2015) had already been remitted to Cuba.

124. There are other aspects of the Bank's conduct that may be regarded as outrageous in the circumstances of this case including that the Bank was told by the Cuban authorities that it had no interest in the sum of US$33,727.32 on February 12, 2016. Yet it was not until July 21, 2016 paid monies to Tri-Star. Further, the Bank attempted to retain for itself from Tri-Star's monies the sum of US$146,553.67 without any reason to do so as the Trial Judge held.

125. In view of those facts and on the totality of the evidence the Trial Judge considered that he was left with a "feeling of subterfuge" in relation to the remittance of the funds, that the transfer of the funds in 2016 after "prevaricating for almost three years" was with the "obvious intent to prevent the court making an order to maintain the funds in Trinidad until the matter was resolved"; that the Bank "clandestinely facilitated" the unlawful transfer of the funds and that the only logical explanation for the Bank transferring the funds when it did "is that these proceedings provided an avenue by which [Tri-Star] could have applied to the court to retain the funds within the jurisdiction and so thwart a purported order/request from the CBC"; that as the Bank did not receive the resolution to substantiate the transfer of any funds to Cuba it was aware that by transferring the funds it was taking a risk but took it anyway in pursuit of its own commercial aims and ends. The Trial Judge considered that the Bank's conduct brought it within the second category of **Rookes v Barnard (supra)** and that the conduct of the Bank was reprehensible and contumelious. Further, he was of the view that an award of exemplary damages in relation to the tort and contractual claims in this case was necessary to express outrage at the Bank's conduct.

126. In my judgment, it was open to the Trial Judge to come to those conclusions and an award of exemplary damages is justified in this case.

However, as I have concluded above, the Trial Judge was wrong to do so also on the basis that there was a fiduciary relationship between the parties or that there was a failure by the Bank to produce properly translated documents or to properly accord with the order for disclosure.

127. The question that now arises is whether the award made by the Trial Judge in the amount of $500,000.00 is disproportionate and too high as Mr. Benjamin contends.

128. As I have said, I agree with the Trial Judge's characterisation of the Bank's conduct as reprehensible and contumelious – in a word outrageous. The purpose of exemplary damages is of course to punish and to send a message that such conduct is unacceptable and requires censure. In **Torres (supra)** it was stated that the award of damages must be proportionate to the defendant's conduct and the end sought to be achieved. Further, proportionality should be looked at in several dimensions including (1) proportionate to the blameworthiness of the defendant's conduct, (2) proportionate to the degree of vulnerability of the claimant, (3) proportionate to the harm or potential harm directed specifically to the claimant, (4) proportionate to the need for deterrence, (5) proportionate after taking into account the other penalties both civil and criminal which have been or are likely to be inflicted on the defendant for the same conduct, and (6) proportionate to the advantage wrongfully gained by a defendant from the misconduct.

129. The Trial Judge was conscious of the need for the award to be proportionate. He referred to those matters as outlined in **Torres (supra),** to which I have made reference in the paragraph above, and stated that the award met the requirements of proportionality. There was, however, no discussion by the Trial Judge of the factors he took into account. It was necessary in my view that he do so in order to demonstrate that he took

account of relevant matters. In the circumstances, it is necessary that I consider in some detail the **Torres** criteria in relation to proportionality.

130. The first consideration is blameworthiness of the defendant's conduct. It was said in **Torres (supra)** that matters that may influence blameworthiness include whether the defendant's conduct was planned and deliberate, the intent and motive of the defendant, whether the defendant persisted in the outrageous conduct over a long period of time and whether there was an attempt to conceal or cover-up his conduct.

131. Mr. Benjamin submitted that there was no attempt by the Bank to conceal or cover-up its actions. They were done, he says, in accordance with the CBC's directions and Cuba's laws. The Bank's course of action does not reflect a cynical, planned or deliberate conduct. The Bank was in an invidious having to choose between its legal obligation to the Cuban authorities and Tri-Star as a customer of the bank.

132. The fact, however, is that the resolution which according to the Cuban authorities required the Bank to remit the monies to Cuba, if it existed, had no effect in this jurisdiction. It could not lawfully compel the Bank to transfer Tri-Star's funds in its account in this jurisdiction. The decision of the Bank to remit the funds to Cuba was the voluntary and deliberate decision of the Bank to protect its own interests and done in the circumstances as found by the Trial Judge. While the Bank could prefer its own commercial interests to that of its customer, the transfer of the funds was accompanied by subterfuge and misrepresentations deserving of censure. Those were products of the Bank's deliberate conduct.

133. In relation to the degree of vulnerability and the harm or potential harm directed specifically to Tri-Star, Mr. Benjamin submitted that Tri-Star was not a highly vulnerable party and that its business was not significantly harmed by the detention of its monies by the Bank. Further, it was submitted that the

Trial Judge failed to consider that the inability by Tri-Star to access its monies was as a consequence of Mr. Yacoubian's arrest which was or would be repaired by the Bank's compliance with the order for repayment.

134. I do not accept that Tri-Star was not a highly vulnerable party. The Bank was in possession of its funds and it was easily open to harm if the Bank should refuse payment of the funds, which the Bank did. By withholding the funds when Tri-Star demanded payment for same, the harm was directed at Tri-Star. I however accept that in this case it is appropriate to consider that the damage to Tri-Star's business was really caused by the arrest of Mr. Yacoubian and not by the retention of the funds by the Bank. Insofar as the harm consisted of the failure to pay Tri-Star when it demanded payment, that can be cured, as Mr. Benjamin submits, by the compliance with the Trial Judge's order for the payment of the funds to Tri-Star. If there may have been other harm to Tri-Star caused by the retention of the funds, this has not been established by Tri-Star. The fact that it did not do so, should not operate against the Bank.

135. With respect to the need for deterrence, one of the aims of an award of exemplary damages is to provide the incentive or impetus to ensure that steps are taken to prevent a repeat of the conduct. I agree with the submissions made on behalf of the Bank that the circumstances of this case are exceptional and unlikely to reoccur. There is no evidence that this conduct is typical of the Bank. The consideration that an incentive or impetus was required to ensure that the conduct is not repeated again does not assume any real significance in this case.

136. The consideration at (5) is not applicable on the facts of the case. There are no civil or criminal penalties which have been or are likely to be afflicted on the Bank for the same conduct.

137. In relation to the advantage wrongly gained by the Bank for its misconduct, an award of exemplary damages may be made to ensure that the Bank does

not profit from its own wrongful conduct. In this case, however, there was no evidence of any actual profit made by the Bank by either the withholding of the money or the transfer of the funds to Cuba. There is, however, a statement in the letter from the Bank's attorneys-at-law dated November 18, 2015 that the funds were remitted by the Bank so as not to have its licence in Cuba revoked. Consideration must therefore be given to this.

138. In view of the above, what then is the appropriate award. I do not believe that an award of $500,000.00 as exemplary damages as ordered by the Trial Judge meets the justice of this case. In my view, it is too high and disproportionate when consideration is given to the **Torres** criteria. Simply put, it seems to me to be an erroneous estimate. The Trial Judge did not demonstrate that he gave proper consideration to the **Torres** criteria and the award he made suggests that he did not. Further, the Trial Judge's award was based on an erroneous consideration of the existence of a fiduciary relationship between the parties and the failure by the Bank to produce properly translated documents and to properly accord with the order for disclosure.

139. In those circumstances, it is open to this court to reverse the order of the Trial Judge. In **CV 2015-03030 A.M Marketing Company Limited v The Port Authority of Trinidad and Tobago** the judge awarded as exemplary damages the sum of $100,000.00. In that case there were elements of attempts to mislead the court as well as the withholding of relevant evidence by the defendant. In my judgment, the conduct in this case is more egregious and an appropriate award of exemplary damages is $125,000.00.

140. In summary therefore, the orders of the Trial Judge set out at paragraphs 133.1, 133.2, 133.3 and 133.4 are set aside and replaced with the following:

a. The sum of US$26,848.56;

b. The payment of the wrongly retained and converted sum of US$1,225,683.36 together with interest at a rate of 2.5% per annum payable in US Dollars from March 14, 2014 to the date of judgment;

c. Interest on the wrongfully retained sum of US$32,854.00 at the rate of 2.5% per annum from March 14, 2014 to July 21, 2016;

d. Exemplary damages in the sum of TT$125,000.00 to be paid in US Dollars at the rate of $6.80 TT dollars to $1.00 US Dollar.

e. The Bank shall pay the Tri-Star's costs of the claim on the prescribed costs scale in the sum of $281,927.60.

141. We will hear the parties on the costs of the appeal.

A. Mendonça, J.A.