

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN  
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Cause No. G70 of 2012

6

7 BETWEEN: EDNA BROWN SEYMOUR

8

PLAINTIFF

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10 AND: FIRSTCARIBBEAN INTERNATIONAL  
11 BANK (CAYMAN) LIMITED

12

1<sup>ST</sup> DEFENDANT

13

14 AND: ANDRE ALEXANDER

15

2<sup>ND</sup> DEFENDANT

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17 Appearances: Mr. Nick Dunne of Walkers for the Applicant

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Mr. Clyde Allen of Chambers for the Defendant

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21 Before: Hon. Justice Henderson

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24 Heard: July 11, 2013

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RULING

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6 1. On November 23<sup>rd</sup>, 2012 I heard an application by the first defendant, FirstCaribbean  
7 International Bank (Cayman) Limited to strike out the statement of claim because it  
8 disclosed no reasonable cause of action. During that hearing I indicated to Mr. Allen, of  
9 counsel to the plaintiff, that I considered his pleading to be deficient. Rather than strike it  
10 out I adjourned the hearing generally and suggested that he file an amended statement of  
11 claim. That was done at 11:00 a.m. on July 9, 2013, over seven months after the initial  
12 hearing and less than 24 hours before the resumption of this application.

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14 2. Notwithstanding the considerable amount of time which has been taken in the re-drafting  
15 of this document, the result is a confusing amalgam of disjointed but repetitious  
16 allegations of fact combined with an improbable array of legal characterisations to be  
17 placed on those facts.

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19 3. The background is this. The plaintiff, Edna Brown Seymour, owns a property in  
20 Savannah. After Hurricane Ivan the property was in need of repairs and the plaintiff  
21 needed a loan to complete those. She applied for that to the bank. The second defendant,

1 Andre Alexander, is alleged to have been the small business officer at the bank.  
2 According to the pleading, virtually all of Ms. Brown Seymour's dealings were with Mr.  
3 Alexander. Ms. Brown Seymour provided two estimates for the necessary work to the  
4 bank. These were in the amount of \$171,000 and \$139,000. It is alleged that the bank  
5 offered to lend \$169,000 to Ms. Brown Seymour on the strength of a mortgage on the  
6 property and that she accepted the offer on November 28<sup>th</sup> 2005.

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8 4. The plaintiff says that subsequent to the parties entering into the mortgage contract, Mr.  
9 Alexander said to Ms. Brown Seymour that her receipt of the loan proceeds would be  
10 conditional upon her selecting a contractor to be recommended by Mr. Alexander  
11 himself. Mr. Alexander recommended Mr. Owen Powiss, who was then in the  
12 construction business in Grand Cayman. Mr. Alexander is said to have told Ms. Brown  
13 Seymour that if she used Mr. Powiss this would save her \$30,000.

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15 5. The pleading, which is repetitious in the extreme, alleges that the plaintiff could not read  
16 or write and that a relationship of trust and confidence arose between Mr. Alexander and  
17 Ms. Brown Seymour. It is alleged that Mr. Alexander assumed fiduciary obligations to  
18 Ms. Brown Seymour, notwithstanding that they were arms-length parties negotiating a  
19 mortgage loan. It is said also that Mr. Alexander exercised undue influence over Ms  
20 Brown Seymour. For good measure, it is alleged that he defrauded her by making false  
21 representations which she was induced to act upon to her detriment and that he was  
22 negligent in making those representations. It is alleged that he made "representations and



1 warranties”, presumably in relation to the contract between Mr. Powiss and Ms. Brown  
2 Seymour.

3  
4 6. Accepting the advice of Mr. Alexander, Ms. Brown Seymour obtained an estimate from  
5 Mr. Powiss in the amount of \$106,500. One of the more confusing sentences in the  
6 statement of claim says that “the plaintiff will rely on the contents of that document for  
7 its full terms and conditions from which the representations and warranties can be  
8 inferred”.

9  
10 7. Ms. Brown Seymour accepted the offer of Mr. Powiss and retained him to do the work.  
11 It is alleged that Mr. Powiss sent his invoices directly to Mr. Alexander who then  
12 approved the release of funds to the contractor. It would also appear (although the  
13 pleading is unclear) that Ms. Brown Seymour and the bank set aside their first agreement  
14 and entered into a fresh agreement for a loan of \$106,500.

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16 8. Mr. Powiss failed to complete the work. He has now disappeared.



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18 9. Apparently (although this, like many other allegations, is unclear) Ms. Brown Seymour  
19 had a separate loan at an institution referred to as the Credit Union Bank. It is said that  
20 the bank - that's the FirstCaribbean International Bank - made an additional loan to her in  
21 or about November, 2005 for the purpose of taking over this indebtedness from the Credit  
22 Union Bank. A variety of figures are contained in the pleading which are difficult to  
23 reconcile; there is an allegation that the two loans together amounted to \$169,080 in

1 paragraph 16. Elsewhere the amount is said to be \$155,277 (paragraph 21). This sort of  
2 contradiction is symptomatic of the pleading as a whole. It is now estimated that a  
3 further \$88,735 is needed to complete the repair work.  
4

5 10. After characterising these facts as amounting to fraud, fraudulent and innocent  
6 misrepresentation, undue influence, breach of fiduciary duty and negligence on the part  
7 of the bank, the pleading says that the result in law is that the mortgage should be set  
8 aside. Confusingly, the prayer also asks for “rectification of the register to reflect the  
9 correct amount of money loaned for the purpose of registering a legal charge against the  
10 property”.

11  
12 11. The heart of the case pleaded seems to amount to this. It is said that Mr. Alexander  
13 established a sort of paternal relationship with Ms. Brown Seymour in which she placed  
14 her trust in him to act in her best interests. He steered her toward Mr. Powiss, who  
15 promised to do the work at a lower cost than the two estimates she had received but failed  
16 to do so. Mr. Alexander, who was alleged to have been a servant or agent of the bank  
17 throughout, is said to have lied to Ms. Brown Seymour and to have exercised undue  
18 influence over her to persuade her to hire Mr. Powiss.  
19

20 12. On this application I must approach my task on the footing that everything alleged in the  
21 pleading can be proved. On this basis, it would appear that Ms. Brown Seymour has a  
22 viable action against Mr. Alexander and would have one also (had the limitation period



1 not passed some time ago) against Mr. Powiss. The question, however, is whether she  
2 has a reasonable cause of action against the bank.

3  
4 13. The plaintiff entered into her initial contract with the bank on November 28, 2005 before  
5 the various acts by Mr. Alexander of which she now complains. Thus, she showed herself  
6 willing to borrow the sum of \$169,000 from the bank in exchange for a mortgage on her  
7 residence. Subsequently, the loan agreement was re-written for the lower amount of  
8 \$106,475. When it became necessary to complete the work which Mr. Powiss left  
9 unfinished, she appears to have borrowed a further sum which raised the indebtedness to  
10 \$169,000. Assuming Mr. Alexander has been guilty of everything alleged against him, it  
11 does not seem to me that there can be any causal link between the plaintiff's willingness  
12 to enter into her contract with the bank and any fraud, undue influence, et cetera brought  
13 to bear upon her by Mr. Alexander. His purpose was to induce her to hire Mr. Powiss.  
14 She had already decided to borrow money from the bank and nothing needed to be said or  
15 done to induce her to do that. All the allegations of fact in the pleading are directed to the  
16 proposition that Mr. Alexander should not have induced the plaintiff to hire Mr. Powiss.

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18 14. There are other deficiencies are well. As the bank has argued, on the most charitable of  
19 interpretations Ms. Brown Seymour must have been aware of her complaint against Mr.  
20 Alexander and the bank by September, 2006 when she borrowed additional money to  
21 fund remedial works. Therefore, the limitation period has now passed and she should not  
22 be permitted to advance a new cause of action. The allegation of undue influence is  
23 entirely new.



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2 15. The pleading of undue influence should allege that the plaintiff placed her trust and  
3 confidence in the defendant and that the transaction into which she was induced to enter  
4 is one “that calls for explanation” or “is not readily explicable by the relationship  
5 between the parties”. See *RBS v Etridge* (2) [2001] UKHL 44. Ms. Brown Seymour’s  
6 pleading says nothing at all about whether the contract she entered into with Mr. Powiss  
7 calls for an explanation. It is said that he breached the contract and failed to complete the  
8 work; that in itself says nothing about why the initial decision to hire him calls for an  
9 explanation. Moreover, there is no suggestion about why the mortgage contract with the  
10 bank, which is the real target of the claim, “calls for an explanation”.

11  
12 16. Of fundamental difficulty with this misconceived action against the bank is the equating  
13 of Mr. Alexander’s statement to Ms. Brown Seymour that hiring Mr. Powiss would save  
14 her \$30,000 with a representation of fact. The statement is essentially an assertion of  
15 opinion and a prediction of a future outcome. It is not a representation of past or present  
16 fact. The pleading assumes throughout that this statement can be treated as a  
17 misrepresentation of an existing fact and as a “warranty”. There is no merit in that view.  
18 For essentially the same reason, the statement by Mr. Alexander about Mr. Powiss cannot  
19 form the basis of a claim in fraud. As for negligence, the pleading says (in paragraph  
20 18a) that Mr. Alexander “failed to select someone who would provide an estimate that  
21 covered the actual materials and services to be performed” but an estimate is just that: an  
22 opinion as to how much a certain job will cost. There is no air of reality to the suggestion  
23 that a business advisor commits an act of negligence by failing to select a contractor who



1 "would" provide an estimate that covers the "actual" costs of materials and services  
2 which have not yet been rendered.  
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4 17. Overall I am satisfied that the pleading is not in such a form as to disclose any reasonable  
5 cause of action against the bank. The application is allowed and the statement of claim is  
6 set aside as against the first defendant.  
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8 Dated this 11<sup>th</sup> day of July, 2013

9 *Henderson, J.*

10 Henderson, J.  
11 Judge of the Grand Court  
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