10-12-08

IN THE COURT OF APPEAL FOR THE CAYMAN ISLANDS

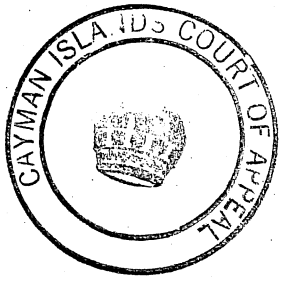
CICA NO.10 OF 2008

GRAND COURT CAUSE NO.708 OF 2002

BETWEEN

Cayman National Bank

Plaintiff/Respondent



- and -

Orren Merren

Defendant/Applicant

BEFORE: **THE HON. MR. JUSTICE FORTE, P. (Acting)**
THE HON. MR. JUSTICE MOTTLEY, J.A.
THE HON. MR. JUSTICE VOS, J.A.

Appearances: Mr. Ross McDonough of Campbells, counsel for the Plaintiff/Respondent, Cayman National Bank. Mr. Stuart Diamond of Diamond Law Associates for the Defendant/Applicant, H. Orren Merren.

Heard: 27th November, 2008 **Judgment delivered: 10th December 2008**

Judgment

VOS, J.A.

Introduction

1. On 25th August 2008, the Court of Appeal (Zacca P, Forte and Mottley JA) granted H. Orren Merren, the Defendant (Mr. Merren), ex parte leave to appeal from the Honourable Justice Quin's judgment against him (dated 10th June 2008) in the sum of CI$419,161.16 and costs. This is Mr. Merren's *inter partes* application for leave to appeal, which this Court ordered should be treated as the hearing of the appeal.

2. Mr. Merren has raised a number of defences to the claims made by Cayman National Bank (the "Bank"), and has pleaded a lengthy counterclaim. The Bank's application to the Judge to strike out the counterclaim was withdrawn. The Judge rejected all Mr. Merren's submissions, and held as follows:-

> "*I have carefully reviewed the evidence sworn to by Mr. Balderamos, in his affidavit, and the evidence sworn to by the Defendant, Mr. Merren, in his two affidavits, and find that there is clear evidence that the debt set out in the plaintiff's statement of claim, is owed. The evidence before me confirms that the debt is not challenged. ...*
>
> *I have reviewed the defence and the defendant's affidavit evidence, in which he alleges that the plaintiff exerted undue influence and economic duress, and further, that the plaintiff breached its duty of care, duty of good faith, its express or implied prior contractual undertakings, by allowing or permitting a series of unauthorised overdrafts to arise in the defendant's accounts. I can find no evidence to support these various defences...*
>
> *He [Mr. Merren] was an experienced legal practitioner, who in fact acted for the bank and advised the bank in matters of banking law. Accordingly, in my view, he was aware of the status of the accounts, and how they operated. He also had the use of the money, which the bank lent him. Accordingly, although I sympathise with the position he has found himself in, I can find no credible defence for him to properly rely upon him*".

3. The background facts are very straightforward. Mr. Merren has banked with the plaintiff Bank since March 1983. He has held numerous loan and other accounts both personally, and in the name of his law firm, Orren Merren & Company, of which he was the sole principal. In addition, he has operated accounts in the names of various businesses with which he was associated. For reasons which will appear, the details of these accounts are not relevant to the issues which have arisen on this appeal.

4. Mr. Merren signed a guarantee in favour of the Bank on 7th June 2001, guaranteeing the liabilities of Fix-It Limited up to an amount of CI$20,000 (the "Fix-It Guarantee"). Clause 1(B) of the Fix-It Guarantee provided that the CI$20,000 limitation was to be <u>exclusive</u> of interest, charges and expenses.

The issues

5. The issues raised in written and oral argument fall broadly into the following categories:-

   (1) Was the Judge justified in relying on allegedly 'without prejudice' admissions as to his indebtedness made by Mr. Merren?

   (2) Can Mr. Merren now question the quantum of the Bank's claim to charges and interest? If so, how much is established by the Bank?

   (3) Has Mr. Merren made out a fair and reasonable probability that he has a real bona fide defence or cross-claim based on undue influence in relation to the lending and/or the Fix-It guarantee? If so, what is the quantum of that claim?

   (4) Has Mr. Merren made out a fair and reasonable probability that he has a real bona fide defence or cross-claim based on alleged economic duress? If so, what is the quantum of that claim?

   (5) Has Mr. Merren made out a fair and reasonable probability that he has a real bona fide defence or cross-claim based on the Bank's alleged breach of its duty of good faith/ contractual undertakings in permitting unauthorised overdrafts or its other dealings with him? If so, what is the quantum of that claim?

   (6) Has Mr. Merren made out a fair and reasonable probability that he has a real bona fide cross-claim for Mr. Benson Ebanks's alleged breach of confidence? If so, what is the quantum of that claim?

6. I shall deal with each of these issues in turn. Before doing so, however, I need to set out the appropriate approach to an Order 14 GCR application, where there are evidential disputes and potential cross-claims raised.

The proper approach to an Order 14 application where there is a conflict of evidence

7. The proper approach to an Order 14 application, where there is conflicting or competing affidavit evidence was settled in England in National Westminster Bank v. Daniel [1993] 1 WLR 1453, where Glidewell LJ reviewed the history, and concluded by applying the dictum of Ackner LJ in Banque de Paris et des Pays-Bas (Suisse)

S.A. v. Costa de Naray [1984] 1 Lloyd's Rep. 21 at page 23, where he said:

> *"It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence".*

8. Glidewell LJ concluded as follows:

> *"I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p. 23, "Is there a fair or reasonable probability of the defendants having a real or bona fide defence?" The test posed by Lloyd L.J. in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 "Is what the defendant says credible?," amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence. In this case the deputy judge adopted Ackner L.J.'s test, and therefore we cannot say that he misdirected himself. It follows, in my judgment, that essentially we can only differ from him if we can say that he was wholly wrong in the decision to which he came".*

9. In the Cayman Islands, there are two reported first instance cases, to which we have been referred, as follows:-

   (1) In Panier v. Burns [2002] CILR Note 6, Graham J expressly applied National Westminster bank v. Daniel supra.

   (2) In Zuiderent v. Christiansen [2004-05] CILR Note 23, Sanderson J purported to apply Panier v. Burns in suggesting that the appropriate test should be applied in two stages as follows:

      (a) Is what the Defendant says credible?

      (b) Has he shown that that there is a fair and reasonable probability that he has a real *bona fide* defence?

10. In my judgment, the test is not really in two stages, because the two stages, as Glidewell LJ pointed out in Daniel, amount to much the

same thing because "*If [the evidence] is not credible, then there is no fair or reasonable probability of the defendant having a defence*".

11. No harm would be done, it seems to me, by adopting the two stage approach, even if, in reality, a negative answer to the first question would inevitably lead to a negative answer to the second question. For my part, however, I would prefer to regard the test as simply requiring the Court to ask whether the defendant has shown a fair or reasonable probability that he has a real or bona fide defence. It can be noted that the words used in Daniel and Banque de Paris were "*real or bona fide*" not "*real bona fide*".

12. Accordingly, by citing Zuiderent, it seems to me that, despite the slightly different formulation I have indicated above, the Judge had in mind substantively the right test. The contrary has not been argued before us.

First issue: Was the Judge justified in relying on allegedly 'without prejudice' admissions as to his indebtedness made by Mr. Merren?

13. In Bradford & Bingley plc v. Rashid [2006] 1 WLR 2006, the majority of the House of Lords (Lords Walker, Brown and Mance) held that the without prejudice privilege did not apply to apparently open communications designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability.

14. It seems to me that the Mr. Merren's memorandum to Mr. Balderamos dated 21st October 2002, which was not headed "without prejudice" falls squarely into the category of communication to which their Lordships were referring. Accordingly, it cannot be accorded 'without prejudice' status, and the Judge was fully entitled to place appropriate reliance upon it.

15. It is also suggested on Mr. Merren's behalf that, properly read and placed in context, the 21st October 2002 memorandum does not anyway amount to an admission of liability. I beg to differ. The memorandum was indeed a clear indication, after these proceedings had been issued, that Mr. Merren accepted that he owed the Bank not less than CI$244,950.74.

Second issue: Can Mr. Merren now question the quantum of the Bank's claim to charges and interest? If so, how much is established by the Bank?

16. Mr. Merren raises a number of issues as to the quantum of the Bank's claim for the first time in this Court. The Bank contends that it is not open to him to do so.

17. In essence, Mr. Merren argues that:-

(1) The Bank only served the statements on which it relied the day before the summary judgment hearing at first instance, and he had little or no opportunity to check the figures.

(2) The Judge allowed compound interest as it accrued on the accounts, when he should instead only have allowed the per diem simple interest claim made in the writ, or the rates allowed under the Judicature Law.

(3) Interest on sums over CI$20,000 payable on the Fix-It Guarantee should have been disallowed, in addition to the excess of principal over CI$20,000.

18. Mr. Merren excuses his failure to make these quantum points to the Judge at first instance on the basis that the Bank only served its detailed statements the day before the hearing. But, of course, Mr. Merren could have applied, but did not, apply for an adjournment had he wished to do so.

19. In my judgment, Mr. Merren should be permitted to raise his new quantum issues on appeal in this case. But his doing so will avail him less than it might otherwise have done, because of his admission as to quantum as late as October 2002.

20. The important point that, it seems to me, remains open to him, despite the admission, is the question of interest on the accrued debt after the issue of the writ. On this point, it seems to me that the Bank is seeking to have its cake and eat it. It decided not to pursue its writ for many years whilst it negotiated with Mr. Merren. But once it did pursue the writ, it abandoned the interest claim made in it, and sought to substitute a vastly more favourable compound interest claim on the basis of the ongoing accounts.

21. On 26th September 2002, the Bank issued a specially indorsed writ claiming simple interest under section 34(1) of the Judicature Law (1995 Revision).

22. There are three reasons why it cannot now claim more:-

(1) First, the specially indorsed Statement of Claim, on its proper construction, claims no more than "*interest upon the amounts due in respect of the loan, the overdraft facilities and the [Fix-It] Guarantee pursuant to section 34(1) of the Judicature Law (1995 Revision)*". The interest claimed was particularised specifically as being at 4.5% (the then current rate specified under the Judgment Debts (Rates of Interest) Rules 1995 or at a daily rate of CI$30.88. It seems to me that this pleading adequately makes clear that the rates specified from time to time under the 1995 Rules will be claimed, but does not allow for a claim to be made for contractual interest on the principal sum claimed of CI$250,471.86, which was demanded as at the 12th July 2002.

(2) Secondly, Order 14 Rules 1 and 3 of the Grand Court Rules do not permit the Court to award more than what is specifically claimed in the writ. Order 14 Rule 1(1) provides that "*Where in an action to which this Rule applies a statement of claim has been served on a defendant ... the plaintiff may, on the ground that the defendant has no defence* ***to a claim included in the writ, or to a particular part of that claim*** *... apply to the Court for judgment against the defendant*" (emphasis added). Order 14 Rule 3(1) similarly provides that: "... *the Court may give such judgment for the plaintiff against that defendant* ***on that claim or part*** *as may be just ...* (emphasis added)". Neither provision allows the Court to award interest on a basis that is unpleaded (as the note in the 1999 English Rules of the Supreme Court at 14/4/26 makes clear).

(3) Thirdly, the Bank has not, despite being invited by this Court to consider whether it wanted to do so, applied for leave to amend its Statement of Claim. I am not suggesting that leave would have been given to amend to claim the contractual interest after the Writ, which the Judge awarded, but it is, at least, certain that it could not make that claim without the amendment being drafted and allowed.

23. The Judge was, therefore, wrong to award interest on an unpleaded basis. It is also noteworthy that the statements exhibited to Mr. Balderamos's affidavit include entries in respect of the Bank's legal fees, which could not have been claimed after the date of the writ without being specifically pleaded and dealt with in the evidence.

24. In submissions before this Court, there were considerable debate as to the proper award of principal and interest to which the Bank was entitled on its pleaded case and under Order 14. In my judgment, the Judge was right to rely on Mr. Merren's admission in his 21st October

2002 memorandum that CI$244,950.74 (which is less than the principal claimed in the writ) was due to the Bank. The Bank also accepted that figure, by adjusting Mr. Merren's accounts to show that figure as being the principal sum due.

25. It was, therefore, appropriate in my judgment under Order 14, on the basis of the evidence before the Judge, and on the basis of the Bank's pleading, for Judgment to be awarded for the admitted principal sum of CI$244,950.74 plus interest at the judgment rates prescribed from time to time from 27th September 2002 to the date of the Order. By agreement, the parties have calculated the sum due on this basis up to 27th November 2008 as amounting to:-

Principal:	CI$ 244,950.74
Interest from 27th September 2002 To 27th November 2008 at prescribed rates:	CI$ 73,930.55
Total:	CI$ 318,881.29
Continuing daily rate at 7.25%:	CI$ 48.65 per day

26. Subject to the issues that I shall now deal with, judgment ought to have been, and ought to be awarded, in the above sums.

27. The third point that Mr. Merren makes is that the Judge ought to have given credit for the excess over CI$20,000 of the claim made under the Fix-It Guarantee as at the date of demand, rather than as at the date of judgment. This point is untenable, once one understands that the Fix-It Guarantee expressly provided that the CI$20,000 limit excluded interest, expenses and costs.

28. For this reason, it seems to me that there was no basis for reducing the amount owed under the Fix-It Guarantee to CI$20,000 including interest. Mr. McDonough acknowledged, however, that in order to reverse the Judge's decision on this point, he would have to have served a Respondent's notice. He was not instructed to seek to do so.

29. Accordingly, though it seems that the Judge was not justified in reducing the Fix-It claim to CI$20,000, since the excess over CI$20,000 would inevitably have reflected interest for the long period since the demand, which must have been before the writ, Mr. McDonough cannot overturn that decision without a Respondent's Notice and does not seek to do so.

30. Thus, the Judge's deduction of CI$2,516.32 from the judgment sum will stand.

Third issue: Has Mr. Merren made out a fair and reasonable probability that he has a real bona fide defence or cross-claim based on undue influence in relation to the lending and/or the Fix-it guarantee? If so, what is the quantum of that claim?

31. Mr. Merren's main claims are that: "*any loan extended to him by the [Bank] is vitiated by undue influence*", and that the Fix-It Guarantee was "*obtained and/or is vitiated by undue influence*" (paragraphs 2,3 and 5 of the draft amended Defence).

32. Mr. Merren contends, in outline, that his relationship with the Bank was one of trust and confidence, which they abused in a number of ways, including, for example, pressurising him to part with shares in Jefferson Financial Corp. Ltd ("JFC") on manifestly disadvantageous terms, and in taking loans at the behest of Mr. Merren's employees managing his accounts in his absence.

33. The problem with Mr. Merren's undue influence claim is that it seems to me that it is based on a misunderstanding of the doctrine itself. It is useful to cite some crucial paragraphs from the speech of Lord Nicholls in the recent House of Lords' decision in Royal Bank of Scotland v. Etridge [2002] 2 AC 773:-

> "***6.*** *The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.*

7. Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: "how the intention was produced", in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (Huguenin v Baseley 14 Ves 273, 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.

***8.** Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage...*

10.** The law has long recognised the need to prevent abuse of influence in these "relationship" cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see Treitel, The Law of Contract, 10th ed (1999), pp 380-381.* ***For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see National Westminster Bank plc v Morgan [1985] AC 686, 707-709.

11. Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several

expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

12 In CIBC Mortgages plc v Pitt [1994] 1 AC 200 your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. ***The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out.***

14. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.

15. ... Again, more recently, in National Westminster Bank plc v Morgan [1985] AC 686, 707, Lord Scarman noted that a relationship of banker and customer may become one in which a banker acquires a dominating influence. If he does, and a manifestly disadvantageous transaction is proved, "there would then be room" for a court to presume that it resulted from the exercise of undue influence. ...

20. Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such

advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case. ...

21 As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.

24. ... So something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted.

25 This was the approach adopted by Lord Scarman in National Westminster Bank plc v Morgan [1985] AC 686, 703-707. He cited Lindley LJ's observations in Allcard v Skinner 36 Ch D 145, 185, which I have set out above. ***He noted that whatever the legal character of the transaction, it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties' relationship, it was procured by the exercise of undue influence. Lord Scarman concluded, at p 704: "the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue***

influence had been exercised to procure it." *(Emphasis added.)*"

34. The relationship that Mr. Merren describes may well be one of trust and confidence, but it is very hard for him to make good the contentions that the transactions were manifestly disadvantageous to him, or that they call for explanation. As a result, Mr. Merren will find it hard to reverse the burden of proof. Without doing so, the evidence that he has put forward in support of his undue influence claim seems to me to be likely to be inadequate, because, on any analysis, he was himself a solicitor versed in banking law, and it would seem difficult to infer from the matters he relies upon that his consent to the transactions in question can have been vitiated by an abuse of the Bank's confidential relationship with him.

35. The evidence of Mr. Merren is characterised more by allegations of the conclusions to be drawn, than of the facts and matters upon which he relies as demonstrating how and why, in specific terms, the Bank took advantage of him. I can make good the point with a few examples:-

(1) Mr. Merren says that the Bank was "*pressurising me relentlessly in circumstances where they knew I was vulnerable to them*" (paragraph 19 of Merren (2)). But nowhere is it said what form the pressure took, or how it was carried out.

(2) It is said that the Bank "*wrongfully attempted to exert pressure*" on Mr. and Mrs. Merren to transfer their JFC shares on manifestly disadvantageous terms (paragraph 6f of Mr. Merren's fist affidavit), but in fact those shares were never transferred, and it is hard to see which transaction of loan can have been affected by undue influence as a result of the unsuccessful attempt.

(3) In paragraph 30 of Merren (2), he says that the Bank did not suggest they obtained independent legal advice before "*enticing and/or pressurising us to sign certain documentation (E.g. Joy's guarantee of CayLaw's loan or my guarantee of Fix-It's loan or transfer (sic) our jointly held shares*". But nowhere does Mr. Merren describe the pressure that he alleges. There is no account of who applied the alleged pressure or the circumstances in which it was acted upon.

36. In addition, Mr. Merren's suggestion that the Bank exercised undue influence by allowing cheques to be drawn by his staff in his absence is fanciful. His mandate must have required the Bank to pay on instructions from specified staff up to limits that he (Mr. Merren) must have agreed with the Bank.

37. In my judgment, Mr. Merren has failed to show a fair or reasonable probability that he has a real or bona fide defence or counterclaim based on the vitiation of loan transactions or the Fix-It Guarantee on the basis of undue influence.

Fourth issue: Has Mr. Merren made out a fair and reasonable probability that he has a real bona fide defence or cross-claim based on alleged economic duress? If so, what is the quantum of that claim?

38. The issues in relation to alleged economic duress is very similar to that in relation to undue influence. Mr. Merren's evidence is long on allegations using the word 'duress', but short on details of how, when and by whom, that duress was exercised. It is not even clear precisely which transactions Mr. Merren alleges were entered into under duress.

39. As the passage cited above from Etridge makes clear, duress is a species of coercion that is even harder to prove than undue influence. It does not seem to me that the evidence advanced by Mr. Merren comes anywhere close to establishing even a prima facie case of duress.

40. In Pao On v. Lao Yui Long [1980] AC 614, the Privy Council considered the kind of arguments advanced by Mr. Merren and cautioned against the law being extended beyond pure duress in the following passage in Lord Scarman's speech at page 634:

> *"Their Lordships' knowledge of this developing branch of American law is necessarily limited. In their judgment it would be carrying audacity to the point of foolhardiness for them to attempt to extract from the American case law a principle to provide an answer to the question now under consideration. That question, their Lordships repeat is* ***whether, in a case where duress is not established, public policy may nevertheless invalidate the consideration if there has been a threat to repudiate a pre-existing contractual obligation or an unfair use of a dominating bargaining position. Their Lordships' conclusion is that where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. It would also create unacceptable anomaly****. It is unnecessary because justice requires that men, who have negotiated at arm's length, be held*

to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal. Such a rule of public policy as is now being considered would be unhelpful because it would render the law uncertain. ***It would become a question of fact and degree to determine in each case whether there had been, short of duress, an unfair use of a strong bargaining position****. It would create anomaly because, if public policy invalidates the consideration, the effect is to make the contract void. But unless the facts are such as to support a plea of "non est factum," which is not suggested in this case, duress does no more than confer upon the victim the opportunity, if taken in time, to avoid the contract.* ***It would be strange if conduct less than duress could render a contract void, whereas duress does no more than render a contract voidable***" (emphasis added).

41. In my judgment, Mr. Merren has failed to show a fair or reasonable probability that he has a real or bona fide defence or cross-claim, based on the vitiation of any of his transactions with the Bank as a result of duress, economic or otherwise. For the avoidance of doubt, he has also failed in his evidence to show any chance that he could establish that the Bank abused its dominant bargaining position, even if such a cause of action existed (as to which I say nothing).

Fifth issue: Has Mr. Merren made out a fair and reasonable probability that he has a real bona fide defence or cross-claim based on the Bank's alleged breach of its duty of good faith/ contractual undertakings in permitting unauthorised overdrafts or its other dealings with him? If so, what is the quantum of that claim?

42. The points upon which Mr. Merren relies under this head seem to me to be that:-

(1) Ms Joyce Cantlay's actions in reversing the consolidation of his accounts in June 2001, which caused excess overdraft charges to accrue on some 5 or 6 accounts rather than just 1.

(2) The bouncing of cheques in June 2001, which Mr. Merren alleges caused him loss.

43. These allegations seem to me to provide a prima facie case of breach of contract or duty on behalf of the Bank, because Mr. Merren's evidence is that he agreed the consolidation with Mr. Balderamos, and Ms Joyce Cantley then unilaterally reversed it. Mr. Stuart Diamond, on Mr. Merren's behalf, explained in submissions that the cheques were bounced because of the reversal of the consolidation, leaving no credit balances on the non-loan accounts to pay the cheques for which Mr. Merren had made provision. Thus the two allegations are intimately inter-connected.

44. The problem with these claims, however, is that they have already been compromised by the agreement made between Mr. Merren and the Bank on or shortly after the 21st October 2002, when the Bank allowed Mr. Merren a reversal of certain charges applied to his account as a result of these incidents of which he had already made complaint. This can be seen from Mr. Merren's own memorandum dated 21st October 2002 and the table he attached to it. At that stage, Mr. Merren had already complained about the reversal of the consolidation and the bounced cheques (see, for example, Mr. Merren's letter to Mr. Eric J Crutchley, the Bank's Chairman on 10th October 2001). The Banks' agreement to reduce the sum due as at 21st October 2002 from the CI$250,471.86 claimed in the writ dated 26th September 2002 to the sum of CI$244,950.74 calculated by Mr. Merren on 21st October 2002, took these matters into account.

45. As far as I understand Mr. Merren's case, he is not suggesting that the bank breached any contract, or duty owed to him, after the 21st October 2002, save in respect of the other heads of claim raised that I am dealing with under issues numbered 3, 4 and 6.

46. In my judgment, therefore, Mr. Merren has failed to show a fair or reasonable probability that he has a real or bona fide defence or cross-claim, based on the claims he makes for breach of contract or breach of duty, beyond those claims that he intimated and were accepted by the Bank in October 2001.

Sixth issue: Has Mr. Merren made out a fair and reasonable probability that he has a real bona fide cross-claim for Mr. Benson Ebanks's alleged breach of confidence? If so, what is the quantum of that claim?

47. The evidence in paragraphs 35-51 of Mr. Merren's second affidavit sets out a compelling case of breach of confidence perpetrated by Mr. Benson Ebanks. In short, Mr. Merren alleges that in March 2006, Mr.

Ebanks gratuitously disclosed to a third party in a shop in West Bay that Mr. Merren was not meeting his obligations to the Bank.

48. Mr. Ross McDonough, for the Bank, has argued that this cannot have been a breach of the duty of confidence owed by the Bank to its customer, because the writ in this action had already been filed in the Public Registry, and Mr. Ebanks was doing no more than stating what was already public knowledge.

49. Chitty on Contracts 29th Edition 2004 (a new edition has recently been published, but I do not have that version available) cites Atkin LJ's seminal judgment in Tournier v. National Provincial Bank [1924] 1 K.B. 461 at page 485, and comments that the duty of confidence does not prevent a banker from "*referring to or disclosing information which the enquirer can readily obtain from another source such as a caution in bankruptcy proceedings and, presumably, a caveat*". The case of Christofi v. Barclays Bank plc [1998] 1 WLR 1425; affirmed [2000] 1 WLR 937 is cited. Chadwick LJ (soon to be the President of this Court) made clear towards the end of his judgment in that case the principle on which the Court was acting when he said: "*I cannot persuade myself that it is necessary, as a matter of law, to impose on a bank an obligation not to disclose information to the very person who must be taken to have that information under a statutory scheme*". The situation with which Chadwick LJ was dealing, which gave rise to the statement in Chitty that I have cited, was far from this case. Without pre-judging the issue that will arise at any subsequent trial of the claim for breach of confidence, I do not believe that Mr. McDonough's argument would necessarily be a defence to the claim Mr. Merren makes.

50. At this stage, I cannot evaluate whether the facts are true, but there is, it seems to me, a fair or reasonable probability that Mr. Merren has a real and bona fide cross-claim, based on breach of confidence. The Judge, it seems to me, must have been wrong completely to ignore the facts outlined concerning this claim.

51. The question remains, however, as to how much that claim is worth. This is something on which the evidence is silent. Mr. Diamond has submitted for Mr. Merren that such a claim might be worth, as a maximum, CI$200,000. Mr. McDonough, on the other hand, submits that the claim would not be worth more than CI$2,000 – 3,000, even if it succeeded.

52. Damages for breach of confidence are not often very large, and that is particularly the case when the complainant is not able to point to any special loss caused by the breach. That said, the complainant here is a professional man with a reputation that is important to him. Doing the best I can, I consider that substantive damages could be awarded for

this breach, if it were made out, and Mr. Merren should have leave to defend the claim up to CI$10,000 on the basis of it.

Conclusions

53. In this case, the only arguable cross-claim is an unliquidated one. A note in the English Rules of the Supreme Court for 1999 at paragraph 14/4/14 at page 179 suggests that, in these circumstances, the appropriate order is conditional leave to defend "*based on satisfying or securing the claim* ***abated by the probable extent of the counterclaim***" (emphasis added). As I have said the probable extent of the only viable counterclaim is, in my judgment, CI$10,000.

54. The question then arises whether there should be conditional leave to defend in relation to the balance of the Bank's claim. In my judgment, that would be inappropriate in this case:-

(1) First, it would obviously be inappropriate to force the Bank to wait, perhaps for years, whilst a modest cross-claim was pursued in order to obtain money that is due, and has been due for many years.

(2) Secondly, though Mr. Diamond submitted that Mr. Merren might be able to comply with an order that he pay into Court some CI$300,000 within 3 months, he also pointed out that the economic crisis made it hard to realise assets, so that he might not be able to do so more quickly (and I infer even if 3 months were allowed).

(3) Thirdly, the remaining cross-claims, which I do not regard as real or bona fide ones, may also be pursued, because the Bank did not proceed before the Judge with its application to strike them out. Though nothing I say should be taken as an encouragement to Mr. Merren to pursue such claims, such a course would obviously delay the resolution of the one cross-claim that I do regard as viable.

55. For the reasons I have given, therefore, I would allow the Bank to recover judgment for CI$ 318,881.29 (including interest up to 27th November 2008), and thereafter interest up to judgment at the daily rate of CI$ 48.65, less the sum of CI$ 2,516.32 in respect of the excess deducted by the Judge for the Fix-It Guarantee, and less CI$ 10,000 to allow for the cross-claim for breach of confidence. This totals CI$

306,364.97. In respect of the sum of CI$10,000, therefore, Mr. Merren is allowed unconditional leave to defend the Bank's action.

56. I would therefore grant Mr. Merren *inter partes* leave to appeal and allow the appeal in part, substituting a judgment in the Bank's favour for the total sum of CI$ 306,364.97, with interest from 27th November 2008 at the daily rate of CI$ 48.65.

Footnote

57. Both parties relied in this case on correspondence exhibited to affidavits. Unfortunately, however, no complete chronological bundle of that correspondence was provided to the Court, making it very difficult to see the exchanges in context. It would be of great assistance to the Court, in cases such as this in future, if the parties were to prepare a properly paginated chronological bundle of the correspondence relied on by both sides.

Vos, J.A.

I have read in draft the Judgment of Vos, J.A. and agree with the decision and reasons therefore.

Forte, P. (Acting).

CAYMAN ISLANDS COURT OF APPEAL

I have read in draft the Judgment of Vos, J.A. and agree with the decision and reasons therefore.

Mottley, J.A.