

SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2005/0740

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED FORMERLY
BARCLAYS BANK PLC.

Claimant

AND

MALCOLM BRAYSHAW

Defendant

Appearances:

Mr. Geoffrey Duboulay with Mrs. Cheryl Goddard-Dorville for the Claimant.
Mrs. Carol Gideon-Clovis for the Defendant

2010: March 2nd;
2011: January 31st .

JUDGMENT

[1] WILKINSON J.: The Bank by its statement of claim filed 10th October 2005, claimed the following relief:

- (i) the sum of \$15,407.97;
- (ii) together with interest at the rate of 12 percent per annum or the daily rate of \$4.97 per day from 29th September 2005 until date of payment;
- (iii) costs.

Mr. Brayshaw in his counterclaim claimed the following relief:

- (i) damages arising from overpayment to be assessed;
- (ii) interest
- (iii) costs.

- [2] Mr. Brayshaw borrowed by way of mortgage four hundred thousand dollars (\$400,000.00) from the Bank for the purpose of purchasing land and thereupon constructing a restaurant. The purchase of the land and construction of the restaurant did not occur simultaneously.
- [3] The Bank alleges that in addition to the four hundred thousand dollars (\$400,000.00) which it lent Mr. Brayshaw, he received a further sum by way of an overdraft facility, and at 29th September 2001, the balance due on the overdraft facility was fifteen thousand, four hundred and seven dollars and ninety seven cents (\$15,407.97) inclusive of bank charges and interest.
- [4] Mr. Brayshaw in his defence alleged that he never requested the overdraft facility from the Bank. He had two accounts, a chequing account number 1203620, and a bridging loan account 1064122. The bridging loan was converted to a mortgage. Chequing account number 1203620 was opened for the purpose of writing cheques to pay for the construction of his restaurant and the Bank had control of whether the chequing account would be overdrawn or not. At each stage of construction the Bank had to approve completion of a stage and at that juncture there would be a drawn down on the bridging loan and deposit made to the chequing account to cover cost for the next stage of construction.
- [5] The Bank in its reply stated that Mr. Brayshaw's request for an overdraft facility was manifested by his presentation of cheques for payment when there were insufficient funds in his account and the Bank honoured his request for overdraft facility by paying certain of his cheques. The overdraft facility was for Mr. Brayshaw's benefit and use and was never intended to be a gift. In the circumstances, Mr. Brayshaw was unjustly enriched at the expense of the Bank. The Bank denied that the overdraft was caused by late deposits from the draw downs on the bridging loan. The manner in which the draw downs were to occur was set out in the Bank's letter of terms and conditions dated 13th August 2001, and this letter was acknowledged and terms agreed upon by Mr. Brayshaw at 20th August 2001.
- [6] At the case management conference on 28th April 2009, the Master ordered that witness statements were to stand as examination in chief and that all witnesses were to attend for cross-examination unless such attendance was dispense with in writing. When the matter came on for pre-trial review at 11th February 2010, the Court was informed that the Defendant was seriously ill

and the Court was given a medical certificate dated 26th May 2009, issued by Dr. N. Fahmi. It stated that the Defendant had right side paralysis, was unable to communicate fully and unable to comprehend to the full extent of a normal individual. The witness statement of the Mr. Brayshaw bore a certificate of truth signed by his Counsel who is the same Counsel that pursued the trial on his behalf. She stated to the Court that the witness statement was given on Mr. Brayshaw's instructions, and that he could not give the certificate because he was unable to write or sign his name as a result of a stroke. Counsel for the respective Parties at that time agreed to continue with the trial in the absence of the Mr. Brayshaw and to put sole reliance on his witness statement. The case management order of 28th April 2009 was therefore varied to exclude Mr. Brayshaw's attendance at the trial for cross-examination due to ill health.

- [7] At trial Counsel for the Bank opened his case by saying that he was in a dilemma as he was not able to cross-examine Mr. Brayshaw and cross-examination had become necessary because there were conflicts within his witness statement, and between his witness statement and his defence. Counsel for Mr. Brayshaw said that she had seen Mr. Brayshaw shortly before the trial and he was still in the same state as reported by his doctor. Counsel for the Bank did not doubt the state of Mr. Brayshaw's health. Since the Court was not prepared to allow this matter to be another one of the many matters that are left in abeyance, it was ordered that the matter be proceeded with as previously agreed at the pre-trial review.
- [8] In closing submissions Counsel for the Bank again raised the matter of the Mr. Brayshaw's absence at trial and questioned Mr. Brayshaw's ability or lack of ability thereof to give a witness statement when the medical certificate at 26th May 2009, described him among other things as unable to comprehend to the full extent of a normal healthy individual. He said that a question for the Court was Mr. Brayshaw's ability to comprehend at 24th November 2009, when the witness statement was made, some 6 months after the doctor's diagnosis.
- [9] A second related issue he said was the Bank's inability to cross-exam Mr. Brayshaw. He said that the Bank's inability to cross-examine Mr. Brayshaw on his witness statement placed the Bank at a disadvantage as there was no opportunity to impugn the evidence given by Mr. Brayshaw.

[10] In light of the medical report submitted to the Court on behalf of Mr. Brayshaw, and the contents of which medical report was not doubted by Counsel for the Bank, there were three choices that the Bank could have made at the pre-trial review. The Bank could have firstly, discontinued the suit, secondly, sought an indefinite adjournment, although given the medical report, it was not likely that the matter would be brought back on, and thirdly, pursue the trial as agreed at the pre-trial review hearing. In any event, I don't believe that Court would have been correct in the face of the contents of the medical report to simply move to enter judgment for the Bank and disregard any rights that Mr. Brayshaw had to a hearing of his side of the matter, imperfect as the situation might have been.

[11] In light of Mr. Brayshaw's absence at the trial, I think it necessary to set out the arrangements between himself and the Bank in detail.

Bank's evidence:

[12] The sole witness for the Bank was Ms. Adriana Thomas, a credit counselor. She stated that she was well acquainted with Mr. Brayshaw's accounts. Mr. Brayshaw had amongst other accounts, two accounts being number 1403787 for a mortgage of four hundred thousand dollars (\$400,000.00) to assist with the purchase of land, and construction of a restaurant, and a chequing account number 1203620 opened on 13th August 2001, wherein draw downs from the mortgage account were to be placed for use to pay for the construction, and after the entire mortgage funds were drawn down, from where loan payments for the mortgage were to be deducted. This arrangement was set out in a letter to Mr. Brayshaw dated 13th August 2001. The letter amongst other matters stated the following:

"Mr. Malcolm and or Mrs. Mathilda Brayshaw

....

Dear Mr. and Mrs. Brayshaw,

Further to our recent discussion, we are pleased to confirm the release of the additional funds for the completion of the project. According to our records, the amount of EC\$110,840 was agreed to be spent in total on Construction, Furniture & Equipment and including Contingencies. It therefore follows that any costs overruns on the project over and above this amount will need to be funded by yourselves.

In terms of the drawings against the loan, an official from our offices will be required to visit the property on completion of each stage and thereafter funds will be released for the next stage. Please therefore contact us two days prior to the funds being required so that we may arrange to undertake a site visit

As advised by Mr. Brayshaw today, the construction period is expected to take approximately two (2) months. We have therefore extended our records to end of October 2001 for completion of the project. Repayment of the loan will commence on 30th November 2001, at EC\$4,676. per month, as indicated in our letter of 6th April 1999...."

By letter dated 20th August 2001, Mr. Brayshaw wrote stating:

" Mr. Chirstian Paul

....

Dear Mr. Paul,

Your letter of 13 August has been received and we agree to the contents....."

- [13] During construction of the restaurant there were a total of eight (8) draw downs. On Friday 10th August 2001, Mr. Brayshaw requested the first draw down of sixteen thousand, three hundred and ninety dollars and sixty-three cents (\$16,390.63), but only eleven thousand dollars (\$11,000.00) was deposited on 14th August 2001 to the chequing account. The days between Friday 10th August and Tuesday 14th August were not working days, they being the weekend and a public holiday at Saint Lucia. There was a shortfall of five thousand, three hundred and ninety dollars and thirty-six cents (\$5,390.36) on the first draw down requested.
- [14] Mr. Brayshaw's second request for a draw down of eleven thousand, eight hundred and ninety-eight dollars and seven cents (\$11,898.07) was received by letter dated Friday 17th August 2001. A site visit was conducted on Monday 20th August 2001, and on Tuesday 21st August 2001, seventeen thousand, two hundred and eighty-eight dollars and forty-three cents (\$17,288.43) was disbursed and deposited to the chequing account. The deposit of seventeen thousand, two hundred and eighty-eight dollars and forty-three cents (\$17,288.43) was made up of the requested sum of eleven thousand, eight hundred and ninety-eight dollars and seven cents (\$11,898.07) and the shortfall on the first drawdown of five thousand, three hundred and ninety dollars and thirty-six cents (\$5,390.36).

- [15] Mr. Brayshaw's third request for a draw down was made by letter dated Wednesday 22nd August 2001, and received by the Bank on Thursday 23rd August 2001. He said that they would be starting construction of the wall and roof phase the following week and requested two amounts being sixteen thousand, three hundred and thirty-four dollars (\$16,334.00) and seventeen thousand, seven hundred and forty-three dollars and eight cents (\$17,743.08) being a total of thirty four thousand, and seventy- seven dollars and eight cents (\$34,077.08). He asked for the money to be deposited by Monday 27th August 2001. The Bank conducted a site visit on Friday 24th August 2001, and only sixteen thousand, three hundred and thirty-four dollars (\$16,334.00) of the requested sum was deposited on Monday 27th August 2001. The Bank by letter dated Monday 27th August 2001, informed Mr. Brayshaw that on the site visit at Friday 24th August 2001, it was noted that construction of the flooring was at an advanced stage, however, the agreement was that drawings on the loan would be done on an individual stage basis and as such the Bank was unable to disburse the funds for both the wall and roof stages together. He was informed that only sixteen thousand, three hundred and thirty- four dollars (\$16,334.00) was deposited to his account and that draw down for the roof would occur when the walls were completed.
- [16] Mr. Brayshaw's fourth request for a draw down of seventeen thousand, seven hundred and forty-three dollars and eight cents (\$17,743.08) was made by letter dated Wednesday 29th August 2001. A site visit was conducted by the Bank on Friday 31st August 2001. Two working days following the site visit i.e. Wednesday 5th September 2001, the sum of seventeen thousand, seven hundred and forty-three dollars and eight cents (\$17,743.08) was deposited to the chequing account.
- [17] A fifth request for draw down of twelve thousand, one hundred and sixty-one dollars and thirty-nine cents (\$12,161.39) was made by letter dated Sunday 9th September 2001 and received by the Bank on Monday 10th September 2001. A site visit was conducted by the Bank on Monday 10th September 2001, and the sum of twelve thousand, one hundred and sixty-one dollars and thirty-nine cents (\$12,161.39) was deposited into the chequing account on Tuesday 11th September 2001.
- [18] A sixth request for draw down funds was made by Mr. Brayshaw by letter dated Tuesday 18th September 2001 and received by the Bank on Wednesday 19th September 2001. A site visit was

conducted on Thursday 20th September 2001, and eight thousand, four hundred and sixty-one dollars and forty-six cents (\$8,461.46) was deposited into the chequing account on Monday 24th September 2001.

[19] The seventh request for draw down of twelve thousand, one hundred and forty-five dollars (\$12,145.00) was made by Mr. Brayshaw by letter dated Saturday 22nd September 2001, and received by the Bank on Monday 24th September 2001. On the Thursday 4th October 2001 the Bank deposited twelve thousand, one hundred and forty-five dollars (\$12,145.00) into the chequing account.

[20] On Tuesday 16th October 2001, Mr. Brayshaw wrote to the Bank requesting the "...transfer of the balance of the loan to our account." He stated that this final draw down was to purchase equipment and supplies. On Friday 19th October 2001, the Bank deposited nineteen thousand, nine hundred and seventy-one dollars and seventy-three cents (\$19, 971.73) into the chequing account.

[21] On the final draw down the Bank wrote to Mr. Brayshaw as follows:

" We refer to your facsimile of 16th October 2001 requesting the balance of on the Barfincor Mortgage loan of \$19,971.73 be drawn and credited to your account.

In keeping with arrangements made in our letter of 13 August 2001, the site was visited on the 17 October 2001 and from our point of view the building appears to be completed save for a few plumbing fixtures. We have therefore released the balance of the funds on the Barfincor Mortgage loan and have credited your account #1203620. The relevant credit advis(c)e is enclosed.

The Barfincor mortgage loan is now fully drawn and as per our facility letter dated 09 April 1999 monthly repayments of \$4,676.00 are to commence one month from the final drawing. Therefore in keeping with this condition we would expect to receive your first installment on the 19 November 2001 with monthly installments to follow on the 19th of each month thereafter.

We would also want to establish a standing order to effect these payments. Contact us so that we can put these arrangements in place.

...."

- [22] At 15th November 2001, the chequing account had a credit balance of nine dollars and thirty-six cents (\$9.36). Commencing 16th November 2001 and ending 30th November 2001, Mr. Brayshaw wrote 9 cheques of various sums which the Bank returned and on each returned cheque he was charged a fee of eighty dollars (\$80.00). Total bank charges on the returned cheques was seven hundred and twenty dollars (\$720.00). All of the eighty dollars (\$80.00) charges were debited to the chequing account notwithstanding that there were insufficient funds to cover the charges.
- [23] A partial ledger for the mortgage and full ledger for the chequing account were disclosed together with several letters exchanged between Mr. Brayshaw and the Bank. The chequing account ledger revealed that from the end of November 2001, Mr. Brayshaw no longer wrote cheques against the account, there were intermittent deposits, the standing order debits of four thousand six hundred and seventy-six dollars (\$4,676.00) and of which several were reversed up to 2nd May 2003, charges and interest. The account balance at 29th July 2005, stood at fifty six thousand three hundred and seventy-four dollars and sixty cents (\$56,374.60) overdrawn. The Bank then posted 2 entries at 15th August 2005, a credit described as "REVERSAL OF INTEREST" for forty six thousand and seventy-two dollars and sixty-three cents (\$46,072.63), and a debit described as "INT. CHG 20/02/04 for four thousand eight hundred and seven dollars and forty-six cents (\$4,807.46) bringing the balance on the chequing account to fifteen thousand one hundred and nine dollars and forty three cents (\$15,109.43) overdrawn. The Bank at 15th August 2005, closed off the account and transferred the fifteen thousand one hundred and nine dollars and forty three cents (\$15,109.43) to a loan.
- [24] Between the first and final draw down of the loan the chequing account went into overdraft on several occasions and the Bank wrote several letters to Mr. Brayshaw about the overdraft situations. By letter dated 27th August 2001, the Bank said to Mr. Brayshaw:

"...

On a related matter we advise that at the close of business on the 24 August 2001 your current account #1203620 was overdrawn \$875.82. We reiterate that this account is to be maintained in credit at all times and cheques should not be written in anticipation of loan drawings."(My emphasis)

By letter dated 10th October 2001, the Bank wrote:

"On a related matter we advise that at the close of business on the 09 October 2001 your current account #1203620 was overdrawn \$875.82 and we would be grateful if you could make the necessary arrangements to rectify the account. We again advise that this account is to be maintained in credit at all times and cheques should not be written in anticipation of loan drawings".

On 1st February 2002, the Bank wrote:

"At the close of business on the 30th January 2002 the captioned account was overdrawn \$753.69 as a result of the processing of a standing order to your Barfincor loan. As no overdraft facility has been arranged for this account kindly make the necessary arrangements to rectify the account by the 15th February 2002.

Please note that while the account remains overdrawn, interest will be applied at the rate of 25 % per annum calculated on a daily basis. This rate is applicable to all overdrawn balances where no specific arrangement are in place."

Identical letters save and except for the overdraft sum stated were written to Mr. Brayshaw at 11th March 2002, and 4th April 2002.

[25] In the letter of 4th June 2002, the Bank wrote:

" We note that the account is now only utilized to facilitate the processing of the standing order to the loan at Barfincor and therefore may not be required otherwise. If this is so, alternative arrangements can be made to facilitate payment directly with Barfincor through any of our branches. Kindly advise whether you wish the account to remain (in) operation or you prefer to utilize the direct method of payment to Barfincor. If it is the former then you would need to deposit sufficient funds to clear the overdrawn balance.... We should be grateful if you would advise your option by 24th June 2002."

[26] In the letter of 23rd January 2003, the Bank wrote:

"In the past we have resisted the application of our Account Control fee (2%) which is levied on accounts frequently overdrawn. However, in view of the frequency of these overdrawn positions and the cost involved in controlling and monitoring the account, we have little choice but to now commence the levying of the fee. Therefore kindly note that commencing 31st January 2003 the 2% Account Control fee (minimum EC\$81.) will be levied on highest balance of the month.

This 2% fee will be in addition to interest charges.

Your Finance Corporation loan is presently reflecting an arrears position of \$5,903.06 and we urge that a considerable effort be made to update the loan."

[27] In the letter dated 11th June 2003, the Bank also wrote:

"The overdrawn balance goes back to as far as 3rd October 2002 when an overdrawn balance of \$2,925.09 was reflected. Since then our standing order payment of \$4,676.00 was processed to credit the loan on 28th February 2003. Interest and excess fees have increased the balance to the existing position. It is therefore in your interest to clear this balance and we ask that you contact the undersigned to discuss the position if you are unable to do so immediately. (My emphasis)

Please note that the standing order arrangement (\$4,676.00) to credit your Finance Corporation loan has been canceled since no funds are being deposited to the account to cause the payments. It is part of our policy to cancel standing orders once there are insufficient funds on three consecutive occasions..." (My emphasis)

[28] Bank officer, Mr. Don John by interoffice memo dated 22nd August 2003, wrote to Mr. Johnny Cyril the following:

"...Spoke to Mr. Brayshaw this morning advising the status of his debts with the branch and at the corporation. Emphasis was placed on the encroachment on the c/a. It was highlighted to customer that if deposits are not received to clear the account all his debts including his mortgage at the Fincor will be transferred to DRU.

He stated that the decline in the tourism industry is the main reason contributing factor to the cashflow constrain(t)s they have been experiencing. This position will be expected to improve by November when the tourism industry approaches the peak season.

Mr. Brayshaw said at the time he is not in a position to clear the encroachment but will be making deposits to reduce the debt and a monthly payment will be made to the LTMF...."

[29] At 13th June 2005, Mr. Brayshaw wrote to the Bank as follows:

"There appears to be a miscalculation on overdraft interest as I calculate the rate to be 14 % for one month in April. This would be about 200% compounded annually. Unless the Bank has been taken over by the Mafia this rate is totally out of context with international banking rates."

[30] In response on 16th August 2005, the Bank wrote:

".... We have reviewed your account and note that interest is being calculated erroneously and we sincerely apologize for this error. The monthly accrual of interest from February 2004 to present has been re-calculated and we have made the necessary adjustments to your account. The correct amount due as at August 11, 2005 is fifteen thousand one hundred and nine dollars and forty-three cents (\$15,109.43).

Due to the protracted settlement of this account and for easier management of your account this balance has been termed out to a loan facility and the details are as follows:

Loan Account No.	106482532
Amount:	\$15,109.43
Interest Rate:	12 % per annum
Maturity Date:	August 30, 2005

Once again we offer our apologies and anticipate hearing from you in regards to settling this amount by August 30, 2005.

...."

- [31] Under cross-examination Ms. Thomas described an overdraft facility as where there is insufficient funds on an account but the Bank honours cheques and it could also honour a standing order. A standing order she said was established by the client with signed instructions and it gave the Bank instructions to pay monies on a specific date, for a specific period for example a debt or to a third party such as for an insurance premium. She said that there could be instances where cheques and a standing order would be honoured even though these were insufficient funds. When asked if this could be done without the client's authority, she said that the standing order authorized the Bank to make the payment and this was the client's signed instructions. When pressed further with the question of if she could say what method the Bank used to decide whether to pay or not to pay, she said that based on Mr. Brayshaw's statement she could see that Mr. Brayshaw made periodic deposits and so could only assume that he had been contacted, and he made deposits and so the standing orders were honoured in every case where he made a deposit.
- [32] When asked why the Bank never produced the standing order signed by Mr. Brayshaw, Ms. Thomas responded that the Bank had a retention period of between 4 to 7 years and once the standing order was cancelled, it was filed away with cancelled documents. In response to the question as to why if the Bank's policy was to store documents for a fixed period, and the standing order was only cancelled in 2003, had the Bank had not able to produce the standing order, Ms. Thomas responded that it appeared to have been misfiled.
- [33] Referring Ms. Thomas to one of the instances where the Bank processed the standing order for the loan payment for four thousand six hundred and seventy-six dollars (\$4,676.00) and the account became overdrawn by seven hundred and fifty-three dollars and sixty-nine cents (\$753.69), Counsel for the Mr. Brayshaw asked if was the Bank's policy not to process standing orders when

there was insufficient funds, then why was the standing order processed? She responded that the Bank exercised the discretion to honour or not to honour the standing order.

Mr. Malcolm Brayshaw's evidence:

- [34] In Mr. Brayshaw's witness statement it was stated that he was a retired businessman who was presently unable to speak clearly or move without the aid of a wheelchair as a result of a stroke. It was also stated that his attorney-at-law had read out to him the contents of his witness statement and that his witness statement contained details which he had given to her before suffering the stroke. He was familiar with the suit commenced against him in 2005.
- [35] He said that the Bank had filed another suit against him and his wife and which suit was intertwined with the present proceedings before the Court, Suit No: 2005/0727. That suit was for the loan to buy land and build the restaurant. Himself and his wife, Matilda Brayshaw were given a loan in the amount of four hundred thousand dollars (\$400,000.00) with interest at 11 percent per annum in 1999 to buy land and construct a building, the restaurant. The monies for construction of the restaurant were disbursed in 8 tranches totaling one hundred and fifteen thousand, and fifteen dollars and nine cents (\$115,015.09) and against this sum he wrote cheques totaling one hundred and thirteen thousand, six hundred and ninety-one dollars and eighty-one cents (\$113,691.81). There was a difference of one thousand, four hundred and thirteen dollars and twenty eight-cents (\$1,413.28) in favour of the Bank. It was acknowledged that it was the chequing account number that was the subject of the proceedings before the Court.
- [36] Whilst construction was ongoing he wrote cheques against the chequing account, the first cheque was for two thousand dollars (\$2,000.00) on 10th August 2001, and the last was for two hundred and fifty dollars (\$250.00) on the 15th November 2001. At 16th November 2001, he wrote a cheque for one thousand, four hundred and four dollars and sixty-six cents (\$1,404.66) which was not honoured, nor were subsequent cheques.
- [37] The Bank has claimed fifteen thousand, four hundred and seven dollars and ninety-seven cents (\$15,407.97), however, despite several requests from his Counsel that the Bank provide information to justify its claim, it had not done so and there were no particulars in the Bank's claim. He also sought particulars of the standing order and the Bank did not provide them.

- [38] The Bank charged him interest on the account although his repayments already included interest at the rate of 11 percent. From August 2001, to March 2003, there were 31 instances totaling interest of one thousand five hundred and three dollars and ninety two cents (\$1,503.92).
- [39] He never requested an overdraft facility. Further the Bank never met or paid any of his cheques when there were insufficient funds in his account.
- [40] In relation to the loan, he never requested a standing order to be set up against his account to pay the loan and the Bank has not been able to provide him with any request which must be made for such a facility to be provided to a customer. He could not tell the Court where the monies were coming from for the standing order as he did not understand how the Bank could have taken such action without him requesting them to set up the standing order. In any event while the Bank was paying the loan by way of the standing order, he was also making counter payments and so for some months he was paying twice. In addition the repayment of four thousand six hundred and seventy-six dollars (\$4,676.00) included interest yet the Bank was charging him interest on charges generated and excess fees at a rate of 2 percent on top of the payments which included interest, and overdraft charges.
- [41] The Bank was paid four hundred and twenty-two thousand, six hundred and ninety-two dollars and eighty-eight cents (\$422,692.88) at around 25th May 2006, by Messrs. Gordon & Gordon in full and final settlement of the loan, and at 7th June 2006, signed off a radiation of the loan, and sent him a letter dated 28th September 2006, acknowledging that the loan had been paid off. The radiation meant that his wife and himself, no longer owned the Bank any monies.
- [42] Also stated was that there was not one instance in the documents produced by the Bank where he issued a cheque and the Bank had met that request in order to establish an overdraft facility. He said that he paid the Bank all charges for bounced cheques, he paid the Bank a total of four thousand, three hundred and fifty dollars (\$4,350.00). He now realized the he had overpaid on the amount which was outstanding as it relates to the eighty dollars (\$80.00) charges for return cheques and he would like his money refunded. The amount that he ought to have paid was eight hundred and eighty dollars (\$880.00).

[43] **Law:**

At Halsbury's Laws of England¹ it is stated:

"38 Banker.....The characteristics usually found in bankers are (1) that they accept money from, and collect cheques for, their customers and place them to their credit; (2) that they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and (3) that they keep current accounts in their books."

"50. Paying Banker. A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose, or provided the cheques are within the limits of an agreed overdraft, and may so pay them within a reasonable period after the bank's advertised closing time.... He must either pay cheques or refuse payment at once;...."(My emphasis)

"52.Funds to be available. There must be sufficient funds to cover the whole amount of the cheques presented, for in the absence of special arrangement there is in England no obligation on the banker to pay any part of a cheque for an amount exceeding the available balance. A cheque is not an assignment of funds in the banker's hands".

"91. Bank statements as evidence. Entries in statements of account to the credit of the customer are, when delivered to him, prima facie evidence against the banker; when it is returned by the customer without objection, entries to his debit are prima facie evidence against him. Where credits appear by mistake in the statement, and the customer alters his position in reliance on it, the bank cannot afterwards debit the account with the amount; but, in the absence of any change of position, credits mistakenly entered may be rectified within a reasonable time. However, a bank would not be permitted to retain money paid in, but omitted to be credited, even if the customer had not noticed its omission from his bank statement."

[44] Counsel for the Bank submitted that Mr. Brayshaw had been unjustly enriched by the Bank extending an overdraft facility to him. On the issue of unjust enrichment in *Banque Financiere de la Cite v. Parc (Battersea) Ltd. and Others*² Lord Steyn said:

"After all, unjust enrichment ranks next to contract and tort as part of the law of obligations. It is an independent source of rights and obligations.

Four questions arise. (1) Has O.O.L. benefited or been enriched? (2) Was the enrichment at the expense of B.F.C.? (3) Was the enrichment unjust? (4) Are there any defences?"³

¹ Fourth Edition. Vol. 3:Banking.

² [1999] 1 AC 221 at p. 227

³ *Ibid.* p. 227

[45] In *Sempra Metals Ltd. (formerly Metallgesellschaft Ltd.) v. Inland Revenue Commissioners and Another*⁴ Lord Hope of Craighead said:

“In this case the enrichment consists, not of the payment of a sum of money as such, but of its payment prematurely. As Professor Birks pointed out, the availability of money to use is not unequivocally enriching in the same degree as the receipt of money: *Unjust Enrichment*, p 53. But money has a value, and in my opinion the measure of the right to subtraction of the enrichment that resulted from its receipt does not depend on proof by Sempra of what the revenue actually did with it. It was the opportunity to turn the money to account during the period of the enrichment that passed from Sempra to the Revenue. This is the benefit which the defendant is presumed to have derived from money in its hands, as Lord Walker puts it in para.180.”⁵ (My emphasis)

Issues:

1. Whether Mr. Brayshaw was granted an overdraft facility.
2. Was Mr. Brayshaw enriched by the Bank’s extension of an overdraft facility.
3. Should the Court find that there was unjust enrichment, then what sum is Mr. Brayshaw liable to pay the Bank inclusive of interest and charges.

Findings:

[46] While Mr. Brayshaw’s evidence is that he did not request the overdraft, it is clear however, that in the earlier part of operating the chequing account he wrote cheques when there were insufficient funds in the account, and continued to do so despite the Bank’s several letters advising him not to write cheques in anticipation of the draw downs from the loan. In several of those instances, particularly when the earlier draw downs were due to be made, the cheques were not returned but rather honoured by the Bank with the result that the account went into overdraft. In these circumstances, I find that Mr. Brayshaw by his actions sought and was granted an overdraft facility during the earlier part of the operation of the chequing account.

[47] As to whether Mr. Brayshaw was enriched by the extended overdraft facility, when I seek to answer the 4 questions which Lord Steyn⁶ has proposed, and set the facts against Lord Hope of Craighead’s⁷ description of enrichment, I find that Mr. Brayshaw was enriched.

⁴ [2007] 3 WLR 354

⁵ *Ibid.* p.368

⁶ *Banque Financiere de la Cite v. Parc (Battersea) Ltd and Others.*

⁷ [2007] 3 WLR 354.

- [48] The matter however, does not rest there. The issue then is what sum must Mr. Brayshaw pay the Bank and in this regard the burden now moves to the Bank to prove its claim of fifteen thousand one hundred and nine dollars and forty-three cents (\$15,109.43).
- [49] According to the chequing account ledger, some of the overdraft interest and charges now disputed were generated by the processing of the standing order which overdrew the account or increased an existing overdraft. Looking at the mortgage ledger in some instances the mortgage was credited with the money debited with the use of the standing order, and in some instances the standing order was reversed. The Bank by letter at 19th October 2001 told Mr. Brayshaw that it wished to establish a standing order to effect the repayment of the loan and to contact the Bank to make the arrangements for the standing order. Mr. Brayshaw denied that he signed the standing order. Unfortunately the Bank was not able to produce a standing order signed by Mr. Brayshaw, and so the question of whether or not a standing order was signed remained unanswered.
- [50] The production of the signed standing order was important to the case because a signed standing order would have been proof that Mr. Brayshaw authorized the monthly debit to his account. A signed standing order would have assisted the Court in determining whether Mr. Brayshaw was to be liable for many of the various overdraft fees, and interest charges generated at its processing to the chequing account.
- [51] On close inspection of both the chequing account ledger and the partial mortgage ledger, I have found several items of concern. Firstly, following Mr. Brayshaw's letter of 13th June 2005, about the Bank charging an interest rate of approximately 200 percent compound interest annually, the Bank responded at 15th August 2005, by posting a credit entry titled "REVERSAL OF INT" for forty six thousand and seventy-two dollars and sixty-three cents (\$46,072.63) and a debit entry titled "INT CHG 20/02/04" for four thousand eight hundred and seven dollars and forty-six cents (\$4,807.46), a net adjustment of forty-one thousand two hundred and sixty-five dollars and seventeen cents (\$41,265.17). These postings brought the chequing account balance which was at fifty-six thousand three hundred and seventy-four dollars and sixty cents (\$56,374.60) down to fifteen thousand one hundred and nine dollars and forty-three cents (\$15,109.43) overdraft. The Bank followed up these postings with the letter to Mr. Brayshaw of 16th August 2005. The letter simply stated that interest had been calculated erroneously, apologized for the error, informed that the sum due had been recalculated and was fifteen thousand one hundred and nine dollars and forty-

three cents (\$15,109.43). Not a single detail was provided in the letter as to how the Bank had calculated the credit and the debit entries and finally arrived at fifteen thousand one hundred and nine dollars and forty-three cents (\$15,109.43) as the sum due.

[52] I believe that the provision of details should be done in the ordinary course of business but further in this matter there were 2 events which occurred sometime before August 15th 2005 which point to an explanation being necessary. Firstly, as early as 4th June 2002, the Bank wrote Mr. Brayshaw and told him that his chequing account was overdrawn five thousand four hundred and ninety-three dollars and twelve cents (\$5,493.12), and it had observed that the chequing account was at that time only being utilized for processing of the standing order, therefore the overdraft was not being increased by the payment of cheques. Secondly, approximately 1 year later at 11th June 2003, the Bank informed Mr. Brayshaw that the standing order had been cancelled and the overdraft was nine thousand and twenty-four dollars and eighty-nine cents (\$9,024.89). Against the background of no cheques being issues, and the standing order being cancelled, the chequing account balance between 15th June 2003, and 29th July 2005, a period of approximately 2 years, escalated from nine thousand and twenty-four dollars and eighty nine dollars (\$9,024.89) to fifty-six thousand three hundred and seventy-four dollars and sixty cents (\$56,374.60). Having recognized its error, it was the Bank's responsibility to give a detailed explanation of the adjustments that it had made and not simply assert the figure of fifteen thousand one hundred and nine dollars and forty-three cents (\$15,109.43) as being the overdraft inclusive of interest and charges owed. Without details in the Bank's letter or subsequent explanation at trial there was a failure to assist the Court in ascertaining the sum due from Mr. Brayshaw in the face of what could only be described as substantial adjustments.

[53] A review of the ledgers also revealed that when standing order deductions of four thousand six hundred and seventy-six (\$4,676.00) were debited to the chequing account, they were not credited to the mortgage on the same date or always posted with a value date, being the date of deduction. This meant that if the payment overdrawed the chequing account, then interest was being generated by that overdraft, but at the same time with the payment not being credited to the mortgage on the same day, Mr. Brayshaw was not getting the benefit of the mortgage reduction, including interest due. The only way to avoid the lost of benefit was to backdate the entry on the mortgage to the value date of the deduction of the standing order. Examples are at 30th August 2002, the standing

order was debited to the chequing account overdrawing the chequing account two thousand seven hundred and sixty-six dollars and ninety-seventy cents (\$2,766.97), but not posted to the mortgage account until 2nd September 2002, at 28th February 2003, the standing order was processed but only credited to the mortgage at 3rd March 2003, with no value date adjustment and at 30th October 2002, the standing order was debited to the chequing account but posted to the mortgage at 31st October 2002. This particular payment was reversed on November 1st 2002 from the chequing account and off the mortgage on 4th November 2002.

[54] Another observation from the chequing account ledger is that standing orders which were processed on one date and subsequently reversed were never reversed or backdated with the value date of the original posting. Two issues arise here, firstly this meant that Mr. Brayshaw ended up paying interest on the overdraft generated by the posting of the standing order, but did not have the benefit on the mortgage even if both postings were to be subsequently reversed. Secondly, there seemed to have been no fixed time within which the Bank had to make a decision whether or not to reverse the standing order for insufficient funds or because it was increasing the overdraft. Clearly, this leaves the issue of interest generated by the posting of the standing order just hanging. While the Court is aware that Banking regulations usually require that cheques being returned for insufficient funds, the returning Bank must do so within a fixed time, and the returned cheques were usually value dated to the date that the cheque was debited to the chequing account, no such time frame it appears exist in relation to a standing order. Examples are the standing order processed at 30th July 2002, was reversed on 2nd August 2002, and the standing order processed 30th April 2003, was reversed on 2nd May 2003. Overdraft interest accrued between the debit date and the reversal date.

[55] Having regard firstly, to the failure of the Bank to provide a detailed explanation or breakdown for the substantial entries at 15th August 2005 to assist Mr. Brayshaw to understand the sum claimed and which explanation would have assisted the Court, and the discrepancies seen upon review of the mortgage and chequing account ledgers, the Bank has not proved to the Court that Mr. Brayshaw owes the Bank fifteen thousand one hundred and nine dollars and forty-three cents (\$15,109.43).

[56] In addressing Mr. Brayshaw's counterclaim, I do find as stated prior that he benefitted in some instances from an overdraft facility when he issued cheques which were honoured and in some

instances when the standing order was debited to the account and the money applied to the mortgage notwithstanding that there were insufficient funds on the account. In those circumstances, he was liable for the sums applied to the mortgage and to some of the charges and interest applied. He therefore has not proved that the Bank owed him any sum.

[57] The Bank's claim and Mr. Brayshaw's counterclaim are both dismissed.

Rosalyn E Wilkinson
High Court Judge