THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2012/0079

BETWEEN:

CALVERT SAMUEL — FIRST CLAIMANT

JAIMASON SAMUEL — SECOND CLAIMANT

and

FIRST ST. VINCENT BANK LIMITED — DEFENDANT

Appearances:
Mr. Duane Daniel with Ms. Jenell Gibson for the Claimants
Mr. Stanley John Q.C. with Ms. Keisal Peters for the Defendant

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2018: September 25
November 29

JUDGMENT

BACKGROUND:

[1] On September 17, 1982 the defendant issued a Certificate of Deposit No.379 (hereinafter called the certificate) in the sum of $50,000.00 in favour of Brent Samuel and/or Jamar Samuel and/or Jaimason Samuel with the First claimant stated as trustee.

[2] Between January 2011 to August 2011, several attempts were made by the claimants to surrender the certificate at the offices of the defendant, however the defendant refused to pay over to the claimants the benefit of the certificate. .

[3] The defendant's contention is that between September 1982 and February 1984 the First claimant (in his personal capacity) received advances from the defendant in the sum of $50,863.96.

[4] The defendant's further contention is that the periodic advances which were made by the defendant to the First claimant were, by agreement, secured by the said certificate. The defendant's case on its pleadings and from their submissions is that given the informal manner in which the defendant conducted their business at the time, that the First claimant although having

received advances and using the certificate to do so, was able to retain the original certificate in his possession.

[5] The First claimant contends that he never instructed, authorised or agreed with the defendant that the certificate should be for his personal use and that it was not he, but rather, his sons who were the beneficial owners of the proceeds of the certificate. The First claimant has maintained that he was at all material times the trustee of the funds held by virtue of the certificate.

[6] The First claimant also avers that at no time was payment ever demanded of him, nor was he notified of the fact that the certificate would be utilized in order to satisfy any existing loans.

[7] It was against this backdrop that the present claim found its way before the court with the claimants seeking the full payment of all sums stated as due to them by way of the face value of the issued certificate.

[8] However, before I delve into the issues surrounding the gravamen of this case, I must address a preliminary issue that arose at the commencement of the trial. On the morning of the trial of the matter, after the Court had dismissed the defendant's application for relief from sanctions and extension of time as it related to their witness statements filed out of time, defendant's counsel raised the issue that the claimants were also in breach of the case management order. The submission was that the List of Documents had been filed one day late on behalf of the claimants. The defendants sought to invoke Part 28.13 (1) of the CPR 2000 and asked for an order of court that the claimants should not be entitled to rely on the documents listed in their List of Documents.

[9] Upon that submission being made this court undertook a forensic analysis of what this meant in real terms vis a vis documents disclosed by the claimant and the defendant themselves.

[10] The List of Documents filed by the claimant referred to ten (10) items, four (4) of which were reproduced in the List of Documents of the defendant and which upon further questioning by the court, Counsel for the defendant conceded were already before the court. What was regarded as the nub of this submission and to which the defendant now sought to exclude, was the certificate that was issued by the defendant and which was exhibited to the Statement of Claim filed since 12 March 2012.

[11] In this court's mind, this application was entirely inappropriate in the circumstances when it was clear from the pleadings of the defendant themselves that they also sought to rely on this very document as the rationale for having advanced the sums to the First claimant and the basis upon which they liquidated the outstanding sums.

[12] However, the defendant persisted in their submission and relied on the parameters of Part 28.13 CPR 2000 in that the claimants by filing their List of Documents out of time, were unable to rely on the same. Part 28.13 (1) of CPR 2000states as follows:

"(1) A party who fails to give disclosure by the date ordered, or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection."(My emphasis added)

[13] In answer to this submission, counsel for the claimants advanced two authorities both out of this jurisdiction which dealt with the issue of late disclosure. In the case of RBTT Bank Caribbean Ltd (formerly known as Caribbean Banking Corporation Limited) v Robertson et al[1] Thom J as she then was had this to say:

> *"The issue to be determined is whether the defendants should be permitted to put documentary evidence to a witness in examination at trial and tender such documents in evidence where the defendants have failed to comply with a Case Management Order to give standard disclosure.*
>
> *In Halsbury's Laws of England Vol. 13 (4th Edition) paragraph 1 the Learned Authors in dealing with the functions of discovery stated:*
>
> > *"The function of discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in apprising the strength or weakness of their respective cases and thus provide the basis for the fair disposal of the proceedings before or at the trial."*
>
> *Even though this statement was made prior to the coming into effect of CPR 2000 the purpose of discovery remains the same under CPR 2000."*

Additionally, she made it clear that Part 28.13 gave the court a *discretion* as to the sanction to be applied to the issue of late disclosure and said that "in exercising this discretion the court must take into account the circumstances of the case".

[14] In the RBTT case, the court found that the documents which were in contention had been brought to the notice of the objecting party some nine (9) months before the commencement of trial and in fact had been pleaded in the defence stating that they were in fact in the custody of the claimants. The Learned Judge in those circumstances found that the claimant could not have said to suffer any prejudice if the documents were admitted at trial.

[15] This ruling was mirrored in the case of Ferrari v Central Water and Sewage Authority[2]. Thom J again found that even with late disclosure there was no prejudice to the objecting party if the documents were permitted to be entered at trial and she ruled in favour of the defendant to rely on the same.

[16] In the case at bar, the claimants in their statement of claim specifically pleaded that the certificate had been issued to them by the defendant. In response the defendant bank admitted that the certificate had been issued to the claimants. In fact as stated earlier, it is the existence of this certificate that allowed the defendants as stated by their case, to have liquidated the sums due to them from the First claimant.

[17] Like the Learned Judge in the cases cited above, I do not see how the defendants could now state that they would be prejudiced by the reliance on a document for which the very same defendant is

[1] SVGHCV 2003/0017
[2] SVGHCV2004/302

the issuer AND is the crux of their case as to their entitlement to have utilized the funds evidenced by that very document.

[18] As so eloquently stated by counsel for the claimant:

"The mischief which Part 28.13 of the CPR seeks to avoid is to prevent trial by ambush where the parties are confronted with documents which they have not had a proper opportunity to examine and/or challenge. It also seeks to provide the parties with the relevant material before the trial so as to assist them in apprising the strength or weakness of their respective cases."[3]

I find that no such circumstances exist in this case and as such the claimant is at liberty to rely on the document entitled the Certificate of Deposit from the Saint Vincent Agricultural Credit and Loan Bank Ltd.

[19] That having been dealt with, in looking at this matter, I am in agreement with counsel for the claimants that there are essentially two substantive issues to be determined by this court, namely:

(i) Whether the Certificate of Deposit No.379 was held on trust by the First claimant.

(ii) Whether the defendant was entitled to liquidate the Certificate of Deposit No.379 in order to satisfy an outstanding loan in the name of the First claimant in his personal capacity.

However, given the nature of the defendant's claim the court must also consider:

(iii) Whether the claimants are, or either of them, is barred by section 7 and/or 8 of the Limitation Act CAP 129 and/or section 60 of the Banking Act CAP 127 and additionally

(iv) Whether or not the claimants are, or either of them is barred by equitable principles such as estoppel, acquiescence, and/or abandonment from claiming the remedies which they seek.

Issue # 1- Was the Certificate of Deposit No.379 held on trust by the First Claimant

[20] In order for this court to make a determination on this central point, it is therefore necessary for close scrutiny to be had of the circumstances in which this trust purportedly came into effect.

[21] By the background facts it is agreed by both sides that the First claimant approached the defendant bank and deposited a sum of money. The said sum was to be held according to the First claimant for the benefit of Brent, Jamar and Jaimason Samuel, all of whom the court accepts at the time of the deposit were minors. The defendant bank issued to the claimant a certificate for Brent and/or Jamar and/or Jaimason with the claimant as trustee.

[22] It is without a doubt, now recognized, that an express trust of money can be created without writing or indeed using the word trust or similar provided that in substance sufficient intention to create a trust has been manifested. It is however still necessary to have the three certainties, i.e. certainty of words, subject matter and objects as without any of these certainties a trust will not be created.[4]

[3] Paragraph 23 Claimant's Submission filed 5th October 2018

[4] Re **Kayford** [1975] 1 ALL ER 604; "Trust Accounts' Trading in the Twilight Zone" – (2007) 23 IL and P 112

[23] Therefore, the nub of the entire matter is whether those three certainties exist in this case at bar and whether in fact a trust was created.

Certainty of Words (or Intention)

[24] According to the learned authors Gilbert Kodilyne and Trevor Carmichael in the book Commonwealth Caribbean Trusts Law[5], *"the fundamental principle is that an express trust is created where the settlor shows an intention to do so. It is therefore necessary that the settlor's intention to create a trust as opposed to a mere moral obligation, be indicated with sufficient certainty. It is a question of construction of the words used in the will or trust document coupled with any admissible extrinsic evidence as to whether the settlor intended to establish a trust."*

[25] In the submissions of counsel for the claimant, counsel submitted to this court that this requirement was met by the very document that was issued by the defendant. The Certificate clearly stated the following:

"This is to certify that the Saint Vincent Agricultural Credit & Loan Bank Ltd, a company carrying on Banking Business and having its Registered Office at Lot 112, Granby Street, Kingstown in the State of Saint Vincent and the Grenadines has accepted from Brent&/or Jamar &/or Jaimason Samuel trustee Calvert Samuel Largo Height (hereinafter called the "Depositor") the sum of fifty thousand dollars ($50,000.00) on FIXED DEPOSIT…"

[26] The claimants submitted that this clearly showed a certainty of words. They relied on the fact that the beneficial owners of the account are first identified followed by the words "trustee Calvert Samuel". This, counsel submitted to the court, made a clear statement of the intention of the First claimant to create a trust in favour of his minor sons. Counsel further submitted that the use of the word "trustee" was more than adequate to satisfy this requirement of certainty of words and therefore concluded that this first requirement had been met.

[27] Counsel for the defendants on the other hand, says that no such intention of the First named claimant to create a trust can be evinced by the mere words in the certificate. The defendant, relied on the Court of Appeal decision in Shelley Ross v Royal Bank (Trust Company) Ltd[6] where the court held inter alia that it would not assist in completing an incomplete gift by holding that the alleged donor is trustee for the alleged donee, unless it is clearly established that the donor intended to make himself a trustee. In that case *"in or about the year 1972, during his lifetime, Mr. Esbon Anthony Ross, visited the defendant Bank and inquired as to how he could put Term Deposits into the name of his daughter Shelley Ross without her having to pay tax on the interest which accrued on the said deposit. He was advised that he would have to make the deposit in his name, so that he would receive the interest and pay income tax on it. During the said discussion Mr. Ross expressed the desire to make a specific allocation to Shelley but he did not mention the amount of the allocation. Following his death, the Court was asked to determine whether the*

[5] Page 41
[6] SKBHC 1978/0003

proceeds of the fixed deposit formed part of Mr. Ross' estate or whether they were the property of the Appellant Shelley Ross".[7]

The court held per Peterkin JA that although there may have been an intention on the part of the deceased to benefit his daughter, the evidence of what transpired could not support that this was in fact what occurred.

[28] The defendants therefore contend that in the instant case, similar considerations must arise. The defendants submit that in this case, there is no evidence of either an oral or written declaration of trust on the part of the First claimant which records the terms on which the fixed deposit would be held on trust. Counsel for the defendants further submitted that the fact that the deposit was made with the personal funds of the First claimant and that even where the Certificate was issued and stated to have the First named claimant as trustee, this document was not a declaration of trust but rather a receipt given to the claimants for the money received which could not evidence the establishment of a trust, similar to the circumstances as found in the Shelley Ross case.

***Court's** Analysis and Considerations*

[29] In determining the intention of a settlor to a trust, it is accepted that there must be two questions which must be considered. Firstly, whether the settlor intended the trustee to owe legally enforceable duties rather than duties of a merely social or moral nature and secondly, whether the settlor intended to create a legal relationship which was to involve trust duties as distinct from some kind of legal relationship.[8]

[30] In answering those questions it is also accepted that there is no need for any particular form of writing or for there even to be, requirements to writing at all[9]. However, despite the fact that there is no need for specific words to be used, it must be clearly established that *"the donor intended to make himself a trustee".*[10]

[31] Indeed, in the cases where there have been express declarations of trust, the courts have determined that there cannot be reliance on other circumstances, for example, parol evidence to establish what is clear on the face of the documents. However, *"unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to astute to discover indications of such an intention."*[11] Thus in order to determine the intention in that case at bar the factual context of what transpired must be examined.

[32] The First claimant's evidence by his witness statement is that:

"4. On the 17th day of September, 1982 I visited the office of the Defendant and made a deposit of $50,000.00 to a fixed account for the use and benefit of my three (3) sons.

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[7] Paragraph 8.8 Defendant's Submissions filed 5th October 2018
[8] Snell's Equity 33rd Ed Para 22-013
[9] **Shelley Ross** case op cit per Peterkin JA
[10] **Antrobus v Smith** [1803 to 1813} AE Reprint 531
[11] Per French CJ in **Byrnes v Kendle** [2011] HCA 26 243 CLR 253

5. I was issued with a Certificate of Deposit No.379 for the said sum in favour of Brent Samuel and or Jamar Samuel and or Jaimason Samuel, my then minor sons and myself the trustee."

[33] The First claimant maintained on cross examination that the monies were for the benefit of his sons. The Second named claimant in fact repeated this position in his witness statement when he said at paragraph 4:

"4. Some years ago, I was informed by my father, the 1st Claimant that he had a fixed deposit with the Defendant in the sum of $50,000.00 in my name as well as the names of my other two brothers, Brent Samuel and Jamar Samuel, and as such, I was a beneficiary of such fixed deposit since the money deposited there was for our use and benefit."

[34] So the only evidence that was before the Court with regard to this purported intention were these two statements by the claimants. However, what in this court's mind is more telling is that the other two named "beneficiaries" were not named as parties to the proceedings as the purported true owners of this sum of money AND the First claimant was not a party in his capacity as Trustee but rather in his personal capacity.

[35] Additionally, when one examines the correspondence that flowed between counsel for the First claimant and the defendant in the correspondence seeking clarification of the state of the certificate, it is instructive to see what counsel for the claimant said:

"Mr. Kingsley Daniel etc

Dear Sir,

RE: Certificate of Deposit No# 379

I write on behalf of my client, Mr. Calvert Samuel, of Queens Drive.

I am instructed that on September 17, 1982, my client made a fixed deposit of fifty thousand dollars ($50,000.00) to the Saint Vincent Agricultural Credit & Loan Bank Ltd, the predecessor of the First St. Vincent Bank Ltd. Proof of same is attached herewith.

I am further instructed that my client enlisted the assistance of his son Mr. Jaimason Samuel who was listed as a beneficiary of the fixed deposit, to withdraw the amount deposited on his behalf as he was out of state, but was instructed to submit a notarized letter authorizing Mr. Jaimason Samuel to make the withdrawal. My client adhered to the instructions of your institution and upon submission of the requested letter Mr. Jaimason Samuel was advised that the withdrawal must ***be made by my client in person…***

Please be advised that the manner in which this matter is being handled has proved frustrating to my client. Kindly provide us with the details and status of my clients account along with the requirements for redeeming his certificate of deposit." [My emphasis added]

[36] At no time do we see that the First claimant making mention of any trust relationship or that he was not adhering to the defendant's request on the basis that the money did not belong to him, but rather, the complaint was that he did everything and still did not get his money.

[37] In fact, besides the certificate on the face of it, stating that the same was "on trust", in this court's mind, nothing else pointed to that relationship having been created. Indeed *"the mere opening of an account …by one person in trust for another is not necessarily sufficient to make that person a trustee for the other person. All the relevant circumstances must be examined in order to determine whether the depositor really intended to create a trust."*[12]

[38] I therefore find that even though the First claimant may have intended to have created some deposit that may have benefitted his sons, I do not accept that what he did (like the testator in the Shelley Ross case) went far enough to do so in fact.

[39] Additionally, and perhaps even more importantly, I also accept from the circumstances that existed and the evidence that was elicited, that on a balance of probabilities, that the First claimant maintained control of this fixed deposit and utilized it for the purposes of securing the advancement of monies to him in his personal capacity.

[40] On the extensive cross examination of the First claimant, it became abundantly clear that he had been painted into a corner upon his admission that he had received monies from the defendant institution, that he had negotiated the same and that he was responsible for repayment of the same.

[41] In this court's mind, these admissions were integral to the defendant's case that the First claimant had additionally pledged the fixed deposit to secure these sums.

[42] It was not lost on the court and what became apparent from the documents that were used in trial, was that the defendant utilized a very primitive method of accounting and banking which included the use of certificates of deposit as a loose security arrangement. The entire institution in the early 1980s seemed to run on the "good will" of its customers.

[43] The claimants were unable to refute the statements contained in the documents of the defendants where the statement was made that the First claimant was one customer who benefitted from the loose arrangement and on a balance of probabilities, I accept that the First claimant had availed himself of the facility to retain the original certificate knowing full well that he had given the bank authority to utilize funds on nonpayment.

[44] In fact, any other interpretation would make a mockery of the defendant institution, casual as its business practices were at that time.

[45] I am further fortified in this finding by the admitted fact that the First claimant had not for a period of in excess twenty-five (25) years made any inquiries of any sort of the defendant in relation to the

[12] **Kauter v Hilton** referred to in the case of **Byrnes v Kendle** op cit. at paragraph 16

fixed deposit and I accept that this was because he well knew that there were no monies there to collect.

[46] I therefore find that based on all of the above that the certainty of intention has not been made out in all the circumstances.

[47] With the finding of the court that there was no valid trust, in light of the determination that the requisite intention was absent in all the circumstances, I agree with counsel for the defendants that the certificate did not create a trust account. What instead had been created was an account held by the First claimant and the funds therein belonged to the First claimant solely.[13]

[48] Having so found, it is now left to determine what is the position with the remainder of the claim as filed by the claimants and whether they would be entitled to the prayers as claimed.

[49] However before this court embarks on that exercise, it must address its mind to the locus standi of the Second claimant. There is no trust. The account belonged to the First claimant as found by this court. What cause of action can the Second claimant therefore maintain as against the defendants?

[50] In the submission by counsel for the defendants, she rightfully, in this court's mind stated, that if there was indeed a breach by the defendants to pay under the certificate, that the most that the defendants would be liable for would have been breach of contract, to which the Second named defendant was not a party.[14]

[51] I therefore find that the Second named claimant has no cause of action which he can maintain and I dismiss the claim by the Second named claimant. The issue of costs will be addressed at the end of this judgment.

Issue # 2 - Whether the Defendant was entitled to liquidate the Certificate of Deposit held by them in order to satisfy an outstanding loan in the name of the First claimant in his personal capacity.

[52] Having already found that there was no trust in relation to the certificate, the sole question must be for the court, as to what are the obligations that the defendant has as to a customer in such circumstances as in the case at bar.

[53] I accept on a balance of probabilities that the certificate was used as security to the defendant bank on behalf of the First claimant to support sums advanced to him between March 1982 and February 1984 totaling $51,700.00.[15]

[54] I so find based on two fronts. Firstly there were the admissions of the First claimant himself that he negotiated sums shown on cheques put to him in cross examination. Those cheques were reflected on the hand written General Ledger which also formed part of the documentary evidence in this case and clearly thereon, the security was said to have been "FD+S-1266" which in this court's mind could be deciphered as Fixed Deposit and Savings account 1266.

[13] Defendant's submissions filed on 5th October 2018 at paragraph 8.34.
[14] Defendant's submissions filed on 5th October 2018 at paragraph 9.5
[15] Document exhibited to the Statement of claim as CS3 filed 12th March 2013.

[55] Secondly and to a lesser extent, this court also took cognizance of produced documents which purportedly encapsulated the minutes of the Board of Directors of the defendant institution in 1984, August and October.

[56] These documents despite not being challenged did not appear to be authenticated in anyway. I therefore put little weight on the same, save and except to rely on them to show that the records of the defendant made constant reference to this "loose and informal" policy of the bank. Thus we see in the board meeting of the 22nd August 1984 it was clearly recorded that "*the chairman did not like the idea of people using fixed deposits as security; mention was made of Calvert Samuel*". Then in October 1984, there was again mention of this loose arrangement where it was reported that the manager at the time ***"****Mr. Jack indicated that a legal mortgage is being prepared for (two redacted persons) and (one such person) asked that his fixed deposit be accepted as a guarantee for payment."*

[57] What these documents establish in this court's mind, far from being determinative of the issue as to whether the First claimant specifically did use his fixed deposit as security, is that on a balance of probabilities that there was an informal and quite likely inappropriate practice by the defendant led by the then manager, that allowed fixed deposits to be used as security without there being any formal assignment of the said certificate.

[58] Having also found that no trust existed, I also accept that the First claimant maintained an account for the purposes of receiving funds advanced to him from time to time which for all intents and purposes amounted to a loan account.

[59] In general terms, where the customer of a bank has two or more accounts at the bank, the bank is entitled to utilize a credit balance on one account(s) to reduce or cover a debit balance on another account. This is called the banker's right of set off or the "banker's right to combine accounts".[16]

[60] This right has been discussed in the authorities as if the same involved two separate obligations or appearing to encapsulate two different obligations by the use of the words "set off" or "combining" but on close scrutiny, whether it is considered as set off in the true sense of the word or a combining of the accounts on the basis of a pure accounting exercise, it is really one right in favour of a banking institution.

[61] As observed by Roskill J in the case of National Westminster Bank Ltd v. Halesowen Presswork & Assemblies Ltd[17] this right is "*the manifestation of a right analogous to the exercise of the banker's right of lien, a right which is of general application and not in principle (apart from special agreement whether express or implied) limited to current or other similar accounts"*.

[62] In this court's mind it is therefore abundantly clear that this right exists outside of any other legal agreement that may arise between the bank and its customer. Thus in the case at bar, this court is satisfied that beyond the banker/customer relationship there existed no other kind of relationship which could give rise to any special obligations beyond those arising from the relationship itself.

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[16] **National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd** [1972] AC 785 at 819 quoted with approval in Paget's Law of Banking Chapter 14

[17] OP cit

[63] I also find that there were no matters which presented itself in the case at bar that could have stood as a bar to the exercise of this right. There was no express agreement excluding such set off, the accounts to which the bank referred were not held in different currencies nor were they held in different capacities, this court already having found that the fixed deposit was not a trust account.

[64] Therefore, the only question that must be left for the court is whether that right of combining accounts or set off could be enforced where the accounts are substantially different, that is a fixed deposit and a loan account.

[65] In general it has been held by the courts that a bank would not normally be able to combine a loan account and a current account, that is, an account that is used for ongoing expenses and business.

[66] In the words of the House of Lords in the case of Halesowen Presswork and Assemblies Ltd v. Westminster Bank Ltd[18]:

"If a banker permits his customer to have two accounts, one – sometimes called a "loan account" – which records the indebtedness of the customer to the bank in respect of advances made to him and the other a current account which the customer keeps in credit and uses for the purpose of his trade or business or ordinary expenditure, then, unless the bank makes it clear to the customer that it is retaining the right at any moment to apply the credit balance on the current account in reduction of the debt on the loan account, it will be an implied term of the arrangement that the bank will not, so long as it lasts, consolidate the two accounts."

[67] However, this is the specific position regarding current and loan accounts, and although counsel for the claimants submitted that this settled position should also apply to the position of a fixed deposit, she did not posit any authority for this proposition. At paragraph 65 the submission was as set out below:

"In the case of a fixed deposit account, the intention of the customer is clearly to make an investment on which returns in the form of interest, are payable upon maturity. The customer is entitled to rely on the belief that despite the existence of any outstanding loans, the bank will not attempt to consolidate his fixed deposit account with his loan account, as the purpose of the former is clearly to function as a form of investment. The First Claimant was entitled to rely on the belief that the funds which he held on trust would be safely kept as a fixed deposit and that it would continue to grow over the years as interest accumulated on it. It is submitted that in the absence of evidence of any contrary intention on the part of the First Claimant that such an account was to be treated in the same way as a current account. That is, there should be an implied term that funds held in Certificate of Deposit #379 would not be applied to satisfy any outstanding loans."

[68] This court however is not in agreement with this sweeping submission that similar considerations must apply to the bank's right regarding a fixed deposit. In fact, as was stated by the learned authors of Paget's Law of Banking [19] "*it is an open question as to whether the banker's right of set off applies to accounts other than loan accounts or current accounts….it is submitted that ultimately*

[18] [1972] AC 785
[19] Op Cit

the question is one of determining the intentions of the parties and construing the terms of their relationship."[20]

[69] The test must ultimately be therefore what was the intention. Having found earlier in this judgment that the First claimant had dealt with the fixed deposit to defeat the creation of a trust, I also found that on a balance of probabilities the First claimant had in fact utilized the same as security for the advances made to him over the course of the period, 1982 to 1984.

[70] It is in those specific and limited circumstances that I therefore find that the defendants were entitled to utilize the funds of the fixed deposit to clear the sums owed by the First claimant to the defendant. I make it clear that this finding is not a general finding of law that is applicable to all circumstances but that the agreement as between the parties made it possible in the case at bar. "The critical question must always be 'what is the contract?' and not whether a particular account or accounts bear one title rather than another".[21]

[71] That being said, a further question must arise at this juncture. That is, is there any money due and owing to the claimants as a result of the payment of the outstanding loan amount?

Issue #3 - Are the C**laimant's entitled** to any sums as owed on the Certificate of Deposit?

[72] It would appear to this court that indeed at the time that the Certificate had been utilized to pay the outstanding loan, that the sum of $50,000.00 would have attracted interest for the period 1982 to 1985. However, the sum owed on the loan was $50,863.96.

[73] Upon the submissions of the claimant it is stated that the defendant admitted that the Certificate of Deposit in 1985, at the time of application to the loan stood at $63,265.95. This figure is in fact pleaded in the Amended defence at paragraph 4.It is stated therein that as of September 1985 the accrued interest on the fixed deposit was $13,265.95. From this sum of $63,265.95 a payment was made to clear the loan which stood at $50,863.96. On a pure mathematical calculation stand point, the balance on the fixed deposit would have been $12,401.99. This sum was never paid to the claimant and the defendants now submit that they are barred from such payment.

[74] The nub of the submissions made on behalf of the defendants in this regard all surround the issue of time, whether it be limitation as to the period that the claimant can claim any accumulated interest or whether it be the period of time the claimants took to bring their claim in all the circumstances.

[75] With regard to the period for which the claimants can claim interest, the defendants submit that the Limitation Act CAP 129 and in particular sections 7 and 8, limit the period that any interest on any sums that may be owing to the claimant can be claimed.

[76] By section 7, the time is limited as to when a claim is made on a simple contract. The Certificate created such a contract with the defendant bank and I find that this section would therefore apply.

[77] Demand for payment was made in 2011 of the balance that would have been due to the claimant in 1985, some 26 years previously. It cannot be open to the claimant to claim for this entire period.

[20] Op cit Para 14.22
[21] Per Roskill J in Halesowen case

I therefore find that the claimant would have been entitled to the interest that accrued from 2005 to May 2011 that is six (6) years prior to the demand having been made. However, it must also now be considered whether this money would be payable at all.

[78] This court however having found that neither a trust account nor a fiduciary relationship of any kind existed as between these parties, I therefore also find that the equitable defences that were raised as a bar by the defendants do not apply in these circumstances.

[79] However, I must also state for completeness that I do not accept that any interest owed to the claimants would run on the original $50,000.00 as submitted by the claimants. This could only have arisen if this court found that the bank was not entitled to use the funds on the fixed deposit to liquidate the loan of the first claimant. Having found to the contrary, the First claimant certainly was entitled to be paid the balance of the money after the payment of the loan. Having however sat on his rights, he is limited to the accrued interest on the $12,401.99 at 8% per annum for the period 2005 to 2011. I therefore order that the defendant bank is to account to the First claimant for this interest and the principal balance owing and the same are to be paid to him forthwith.

THE ORDER OF THE COURT IS THEREFORE AS FOLLOWS:

1. An account of the proceeds of Certificate No.379 issued on 17th day of September 1982 is denied and instead an account is to be rendered on the balance of that Certificate of Deposit as of 25th September 1985 being the date when the same was used to liquidate the outstanding loan.

2. Payment of the principal sum of $50,000.00 is denied.

3. Interest from the 17th September 1982 and continuing at a rate of 8% Per Annum until judgment is denied however interest is to be paid from September 2005 to May 2011 being the date when demand was made of the defendant, on the sum found to be owing.

4. Prescribed costs pursuant to Part 65.5 CPR 2000 to the claimant on the sum awarded plus interest.

5. I also award to the defendants the sum equal to half of the costs on the dismissal of the claim of the Second named claimant on a prescribed costs basis on an unvalued claim pursuant to Part 65.5 CPR 2000.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar