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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **31/05/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING S BENCH DIVISION

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Between:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND
Plaintiff /Respondent

and

JOHN CONWAY
Defendant/Appellant

_____

Craig Dunford KC (instructed by DWF (NI) LLP) for the Plaintiff/Respondent
Patrick Lyttle KC with Richard Shields (instructed by Shean Dickson Merrick Solicitors) for the Defendant/Appellant

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SIMPSON J

Introduction

[1] This is an appeal by the defendant from an order of Master Bell dated 20 September 2021 whereby he struck out a number of paragraphs from the defendant s Re-Amended Defence and Counterclaim dated 12 March 2014. Describing them in the recitals to the Order as obviously and almost uncontestably bad" (sic) the Master struck out paragraphs 3, part of paragraph 4, paragraphs 5-10, part of paragraph 11, paragraphs 12(a) to (g), paragraphs 28 and 31 of the pleading.

[2] I deal in detail with each of the impugned paragraphs in due course in this judgment when considering whether or not the Master was correct.

[3] The appeal is by way of rehearing, and the parties are in agreement that although the summons refers to all the provisions of Order 18 Rule 19(1) of the Rules of the Court of Judicature (NI) 1980, the court should treat the application as being brought under Order 18 Rule 19(1)(a). This provides:

Striking out pleadings and indorsements

> 19.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be…"

[4] It is common case that the test is as set out by Humphreys J in *McIlroy-Rose v McKeating* [2021] NICh 17, thus:

> [23] Ground (a) must be determined on the face of the pleading without evidence and the cause pleaded must be unarguable or almost uncontestably bad, all the averments in the pleading being assumed to be true. Gillen J stated in *Rush v PSNI* [2011] NIJB 28 at paragraph [10] as follows:
>
> > Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out.'"

[5] When considering an application under Order 18 Rule 19(1)(a) the court can look at documents specifically referred to in the pleadings. In *Day v William Hill (Park Lane)* [1949] 1 KB 632 the Court of Appeal was considering what the court could consider in an application under the then English rule in Order 25 Rule 4, which provided that the court could only look at the pleading. Giving the lead judgment, Singleton LJ said that if documents are referred to in a pleading, they become part of the pleading and so it is open to the court to read them."

[6] In Valentine s *Civil Proceedings: The Supreme Court* the learned author cites the case of *Lee v Hayes* (1865) 17 ICLR as support for the same proposition. In that case Monaghan CJ said:

> "… this court holds that it is entitled to look at and treat as incorporated in the plaint any document referred to therein…"

[7] In *Scania (Great Britain) Ltd v Andrews and others* (unreported Court of Appeal) [1989] Lexis Citation 3032, on the same point, Staughton LJ said: I turn to consider the pleadings of Scania as they stand, including the documents which they refer to."; and in another Court of Appeal case, *Swinney and anor v Chief Constable of Northumbria Police Force* [1997] QB 464, Hirst LJ said, 474G:

> It is plainly right to treat these as part of the pleaded case, since they are contained in a document which is specifically referred to in the pleadings."

[8] The three documents which are discussed below — viz. the Commercial Finance Agreement, the Charge on Book Debts and the Deed of Guarantee and Indemnity — are all referred to in the Re-Amended Defence and Counterclaim, and I consider that I am entitled to take them into consideration in this application under Rule 19(1)(a).

Background

[9] The defendant was a director and the sole shareholder of Meteor Controls International Ltd, (Meteor") a company which carried on business as a distributor of electrical supplies, principally the manufacture and sale of electrical timing switches and electrical wholesale. Much of the business was in the Republic of Ireland and involved trading in both euros and sterling. Meteor was placed into liquidation in June 2009. The defendant claims to be a creditor of the company.

[10] On foot of a Commercial Finance Agreement (the CFA") dated 16 July 2002, between The Governor and Company of the Bank of Ireland and Meteor Controls International Ltd." the plaintiff (the Bank") bought the commercial debts of Meteor. The CFA involved invoice discounting whereby, essentially, the Bank paid Meteor a percentage of each trade debt (stated to be 80%) and then benefitted from the whole of the invoice amount when collected from the debtor.

[11] Clause 1.1 states: This Agreement sets out the terms and conditions upon which we will purchase the Debts payable by your Debtors." Clause 3.2 provides:

> Until the termination of this Agreement you will sell to us with full title guarantee, and we will purchase from you all Debts to which this Agreement applies which are either Outstanding on the date of this Agreement is made or created after the date of this Agreement was made."

[12] Condition 2.2 of the Terms and Conditions incorporated into the Agreement states, where material:

> You hereby transfer to us all debts … created after the date of the Agreement until the ending of this Agreement. The ownership of [the] Debts shall vest in [the Bank] without further formality at the moment the Debts are created…"

[13] Condition 6.1 provides:

> As the purchaser of Debts we alone shall have the sole and absolute discretion as to how to collect and enforce payment of them. We can do this in whatever way we see fit. Until we give you notice to the contrary you must collect Debts and manage Debtor s accounts for us as our undisclosed agent. You must act promptly and efficiently when carrying out your duties as our agent. However, you are not our agent for any other purposes."

[14] Condition 14.1 provides:

> This Agreement contains all the terms agreed between you and us to the exclusion of any agreement, statement or representation however made by or on our behalf prior to the execution of this Agreement. Except as otherwise provided for herein no variation of this Agreement shall be valid unless it is in writing and signed on our behalf by an authorised signatory."

[15] On the same date Meteor provided the Bank with a Charge on Book Debts, by which Meteor charged to the Bank by way of fixed equitable charge" the debts purchased by the Bank and future debts.

[16] On 5 November 2008 the defendant entered into a Deed of Guarantee and Indemnity (the Guarantee") with the Bank whereby the defendant became guarantor of a £200,000 term loan provided to Meteor by the Bank which, according to the facility letter, was provided to settle outstanding Foreign Exchange contracts recently cancelled."

[17] The following handwritten note, apparently in the defendant s writing, appears under the heading PERSONAL GUARANTORS (sic) CERTIFICATE CONCERNING INDEPENDENT LEGAL ADVICE":

> I confirm that prior to execution of the above guarantee I was independent advised (sic) of the nature, terms and

effects of the guarantee by Mallon Solicitors and I have signed this voluntarily."

[18] There is no reference in the Guarantee to the CFA and there is no connection between the two. The Guarantee was executed some six years after the CFA.

[19] In 2010 the Bank issued these proceedings to recover payment of the liability of the defendant under the Guarantee.

[20] In September 2013, without the consent of the liquidator, the defendant issued proceedings on behalf of Meteor against the Governor and Company of the Bank of Ireland. In those proceedings (2013/91477) the defendant sues the Bank for damages for a number of causes of action, viz. breach of statutory duty, breach of contract, negligence, negligent misstatement, fraud and misrepresentation." The rights under those proceedings were subsequently assigned to the defendant by the liquidator, and the Statement of Claim in those proceedings describes Mr Conway as the assignee from [Meteor] of a chose in action against the [Bank] comprised in a Writ of Summons issued 6 September 2013…The title of the proceedings was amended by order of the Court on the 5 August 2016."

[21] The relationship between the Bank and the defendant, if not already bad, was certainly soured by actions of employees of the Bank which notoriously featured in a BBCNI Spotlight investigation, broadcast in November 2015 on BBC Northern Ireland. The defendant had recorded Bank employees on his premises and the recording appeared to show the employees of the Bank acting in an unscrupulous, and potentially dishonest or even fraudulent manner in relation to the collection of book debts. In his submissions Mr Dunford KC conceded that the behaviour of the Bank s employees was despicable."

[22] The defendant s underlying complaint is that he believes that when Meteor went into liquidation there was some £2.3 million of good book debt" at a time when there was £1.8 million of liability to the Bank. Thus, he says, there was a surplus of some £500,000 which, if properly collected by the Bank, would have meant that Meteor would not have had any indebtedness to the Bank. He seeks to link the Guarantee and the CFA by reference to a comment made by an identified Bank employee, prior to his execution of the Guarantee, that it would only be called upon if there was a shortfall between Meteor s liabilities to the Bank following the collection of book debts. He says he relied upon this representation in executing the Guarantee. In the circumstances, he says, it would be inequitable to allow the Bank to rely on the Guarantee to seek to recover £200,000 from him.

[23] Further suspicions on the part of the defendant were fueled, according to Mr Lyttle KC s submissions, by the fact that this application to strike out part of the pleadings only came after an application by his client for further discovery. He described the application as opportunistic", a description denied by Mr Dunford. The Master chose to deal first with the strike out application — in my view entirely

appropriately, as the content of the remaining pleading will determine the extent of discovery. The end result, however, says Mr Lyttle, is that the Bank avoids scrutiny for its actions by not having to make discovery of significant documentation. Mr Lyttle also made submissions on sections of the Consumer Credit Act 1974. I note that the provisions of that Act are relied upon by the defendant in paragraph 13 of the Re-Amended Defence and Counterclaim, which is not under attack in this application.

[24] Having set something of the scene, I turn to consider the paragraphs struck out by the Master and, for ease of understanding, and, I hope, the avoidance of confusion, I will deal separately with related paragraphs in discrete portions of the judgment.

Paragraphs 3 and 4

[25] I am not satisfied that paragraphs 3 and 4(a) should be struck out. While it may be highly unlikely that the defendant will be able to satisfy a court of the matters pleaded, it seems to me that there are evidential factors which, if proved, could persuade a court that, notwithstanding his handwritten addition to the Guarantee, nevertheless he should not be bound by it. Therefore, I am not persuaded, as I have to be at this stage, that the allegations in paragraph 3 and paragraph 4(a) are unarguable or almost uncontestably bad." In the circumstances I allow the defendant s appeal in relation to paragraphs 3 and 4(a).

[26] Sub-paragraphs (b) and (c) of paragraph 4 assert that the defendant was under economic duress and did not enter into the Guarantee of his own free will. In the decision of the Supreme Court in *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* [2021] UKSC 40 Lord Burrows identified the essential elements of the tort (with which the other justices agreed):

> **The essential elements of duress**
>
> [78] Where it is alleged that one contracting party (the defendant) has induced the other contracting party (the claimant) to enter into the contract between them by duress, the case law has laid down that there are two essential elements that a claimant needs to establish in order to succeed in a claim for rescission of the contract. The first is a threat (or pressure exerted) by the defendant that is illegitimate. The second is that that illegitimate threat (or pressure) caused the claimant to enter into the contract. As Lord Goff said, in the context of economic duress, in *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck)* [1992] 2 AC 152, 165:
>
> > it is now accepted that economic pressure may be sufficient to amount to duress [which would

> entitle a party to avoid a contract] provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract . . .
>
> [79] It is also important that, in the context of economic duress … there is a third element. This is that the claimant must have had no reasonable alternative to giving in to the threat (or pressure): see, for example, Dyson J in *DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo-Services ASA* [2000] BLR 530, para 131; *Borrelli v Ting* [2010] Bus LR 1718, para 35."

[27] Lord Hodge, giving the judgment with which all the others agreed, differed from Lord Burrows in one aspect of the matter, as he articulated in para [2]:

> Where I respectfully disagree with [Lord Burrows] is in my analysis of what the law has recognised as an illegitimate threat or pressure. As I will seek to show, the courts have developed the common law doctrine of duress to include lawful act economic duress by drawing on the rules of equity in relation to undue influence and treating as illegitimate conduct which, when the law of duress was less developed, had been identified by equity as giving rise to an agreement which it was unconscionable for the party who had conducted himself or herself in that way to seek to enforce. In other words, morally reprehensible behaviour which in equity was judged to render the enforcement of a contract unconscionable in the context of undue influence has been treated by English common law as illegitimate pressure in the context of duress."

[28] At paragraph [3] he sounded a note of caution:

> The boundaries of the doctrine of lawful act duress are not fixed and the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities. In any development of the doctrine of lawful act duress it will also be important to bear in mind not only that analogous remedies already exist in equity, such as the doctrines of undue influence and unconscionable bargains, but also the absence in English law of any overriding doctrine of good faith in contracting or any doctrine of imbalance of bargaining power."

[29] In *Pau On v Lau Yiu Long* [1980] AC 614, mentioned without disapproval in the *Times Travel* case, Lord Scarman said, 636C/D:

> In their Lordships view, there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act."

[30] In my view the defendant s pleading fails to demonstrate the essential elements of the tort as identified by Lord Burrows. No particulars of the allegations in sub-paragraphs (b) and (c) of paragraph 4 are set out; they amount merely to a bare assertion. In the circumstances I consider the pleading at paragraph 4 (b) and (c) to be unarguable and almost uncontestably bad. I dismiss the defendant s appeal in relation to these sub-paragraphs.

[31] Sub-paragraphs (d) and (e) assert that the agreement [the Guarantee] has become frustrated by the catastrophic and unforeseen economic crisis" caused by the reckless behaviour of banks in the British Isles in injecting cash into the property market. Such allegations as a basis for the frustration of a Deed of Guarantee, which paragraph 4 is dealing with, are entirely unarguable. I dismiss the defendant s appeal in relation to these two sub-paragraphs.

[32] Paragraph 4(f) alleges that there is a lack of mutual obligation and refer to the necessity in a contract for such mutual obligation. However, the Guarantee was not a contract; it is a Deed. There is no such requirement for mutual obligation. Paragraph 4(g) alleges uncertainty. A reading of the Deed could not reasonably lead to the conclusion that there is any uncertainty in its terms and effects.

[33] In the circumstances I consider the allegations in sub-paragraphs (f) and (g) to be unarguable and I dismiss the appeal in relation to these two sub-paragraphs.

[34] Accordingly, sub-paragraphs (b) to (g) inclusive in paragraph 4 will be struck out.

Paragraphs 5 and 6

[35] Paragraph 5 asserts that the Bank owed a fiduciary duty to the defendant who was their customer which was a paramount obligation." Paragraph 6 sets out particulars of breach of the duty.

[36] Without intending to be prescriptive, broadly speaking fiduciaries are persons or organisations who act on behalf of others and who are required to put that other s

interests ahead of their own, the paradigm example of a fiduciary relationship being that of trustee and beneficiary. In *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98B Lord Mustill, giving the judgment of the Privy Council, said:

> To describe someone as a fiduciary, without more, is meaningless. As Frankfurter J. said in *S.E.C. Chenery Corporation* (1943) 318 U.S. 80, 885-86, cited in Goff and Jones, *The Law of Restitution*, 4th ed. (1993), p. 644: B
>
> > To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?'"

[37] In 2014 the Law Commission in its report *Fiduciary Duties of Investment Intermediaries* dealt with the meaning of fiduciary duty in Chapter 3. Where material it said (omitting citations):

> **WHO IS SUBJECT TO FIDUCIARY DUTIES?**
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> 3.14 This is a notoriously intractable question, and is far from settled. A former Chief Justice of the High Court of Australia has said that the fiduciary relationship is a concept in search of a principle.' What is relatively clear is that fiduciary relationships arise in two main circumstances:
>
> (1) Status-based fiduciaries — where a relationship falls within a previously recognised category, such as a solicitor and client; and
>
> (2) Fact-based fiduciaries — where the particular facts and circumstances of a relationship justify the imposition of fiduciary duties.
>
> …
>
> **An undertaking to act for or on behalf of another person**
>
> 3.17 Several academics have emphasised the importance of an undertaking to act on behalf of another as the touchstone of a fiduciary relationship. It has been said that a fiduciary is, simply, someone who undertakes to act for or on behalf of another in some particular matter or

matters.' In his seminal work *Fiduciary Obligations*, Paul Finn said that:

> For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another s interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter.

3.18 This view has judicial support. In *Bristol and West Building Society v Mothew*, Lord Justice Millett said that:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.

Legitimate expectations

3.19 A similar view, building on the idea of an undertaking, is that:

> What must be shown … is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement.

3.20 This view has growing judicial support. The Privy Council has noted that:

> The [fiduciary] concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position

> in such a way which is adverse to the interests of the principal.

…

3.23 James Edelman has argued that the courts are moving to coalesce the factors of trust, vulnerability, confidence, power and/or discretion into a single test based upon the legitimate expectations of the principal. The focus of this approach is on the undertaking: did the putative fiduciary, by his words or conduct, give rise to an understanding or expectation in a reasonable person that they would behave in a particular way. As Edelman notes:

> The greater the degree of trust, vulnerability, power and confidence reposed in the fiduciary, the more likely that a reasonable person would have such an expectation.

3.24 We think that this is a useful way to determine when fiduciary relationships arise. The key test is whether there is a legitimate expectation that one party will act in another s interest. However, discretion, power to act and vulnerability are indicators of such an expectation.

…

The duty of loyalty

3.27 As we noted above, the distinguishing duty of a fiduciary is the duty of loyalty. As Lord Justice Millett noted in *Bristol and West Building Society v Mothew*:

> The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

A breach of fiduciary obligation, therefore, connotes disloyalty or infidelity.'"

[38] Much of this is reflected in the 34th edition of *Snell s Equity*, in which the authors say: The categories of fiduciary relationship are not closed." The paragraph in the text (7-005) goes on to state:

> Fiduciary duties may be owed despite the fact that the relationship does not fall within one of the settled categories of fiduciary relationships, provided the circumstances justify the imposition of such duties. Identifying the kind of circumstances that justify the imposition of fiduciary duties is difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship, preferring to preserve flexibility in the concept… Thus, it has been said that the fiduciary relationship is a concept in each of a principle.
>
> There is, however, growing judicial support for the view that:
>
> > a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.
>
> …Hence, it has been said that:
>
> > fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct or affairs of another.
> >
> > The concept enraptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal.'"

[39] At paragraph 7-006 the authors state that

> "… banks … do not ordinarily owe fiduciary duties…But it is possible for the circumstances of the relationship between such a person and the other party to the relationship to justify the imposition of fiduciary duties, provided those circumstances are such that it is reasonable

> to expect that the fiduciary will subordinate his interests and act solely in the interests of the principal."

[40] Paragraph 7.008 begins with the words, which are a quote from *Bristol and West Building Society v Mothew*:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary."

[41] I am satisfied that this is not a case of a status based fiduciary relationship, and Mr Lyttle KC did not seek to argue for this. Clearly, if there was any fiduciary relationship between the Bank and the defendant it has to be fact based, and in my consideration of this I bear in mind (1) that the categories of fiduciary relationship are not closed and (2) whether such a relationship arises depends on the particular facts of this case.

[42] Mr Lyttle points to conditions 6.1 (set out above) and 13.4.1 and 13.4.5 of the Terms and Conditions of the CFA as being material. Condition 6.1 permits the Bank to collect and enforce debts in whatever way we see fit." Conditions 13.4.1 requires Meteor, at the end of the Agreement, to repurchase all outstanding debts from the Bank at a price defined in the condition; and condition 13.4.5 provides that the Bank will repay to Meteor any relevant credit balance. In addition, he points to Clauses 2 and 3.2, which are set out above. In essence Mr Lyttle submits that the defendant was owed a duty by the Bank to collect debts in a way which would not cause him any loss or disadvantage.

[43] In my view on the facts of this case there can be no question of the Bank owing a fiduciary duty to the defendant on foot of the CFA. I come to this conclusion for a number of reasons.

[44] First, although paragraph 5 of the Re-Amended Defence and Counterclaim states that The plaintiff at all times owed a fiduciary duty to the defendant who was their customer which was a paramount obligation", in relation to the facts of this case it was Meteor which was the customer of the Bank, not the defendant. While the defendant may have been a customer in relation to other accounts, he was not the Bank s customer in relation to the CFA.

[45] Secondly, the CFA was not entered into between the Bank and the defendant; it is an agreement between the Bank and Meteor. Thirdly, there is nothing in the wording of the CFA itself which could lead to the conclusion that the CFA created any fiduciary duty owed by the Bank to the defendant. Fourthly, in any event, as is clear beyond peradventure from the wording of the CFA, Meteor was the agent of the Bank for the particular purposes of the collection of debts and the managing of debtors accounts. If any duties were owed by either party to the CFA, they were owed by Meteor to the Bank. Fifthly, the Bank bought the debts on foot of the CFA. The debts

were no longer those of Meteor, which had received a percentage of the debt from the Bank to assist the company s cashflow. The Bank was entitled to collect or enforce the debts at its own discretion in its own commercial interests, not with the defendant s interests as paramount.

[46] Looking again at the cited paragraphs of *Snell* and the above statements in the Law Commission s report I see no basis on which it could be postulated that it was reasonable in the factual circumstances of this case to expect the Bank to subordinate its interests and act solely in the interests of the defendant nor can I see any basis for a legitimate expectation that the Bank would act in the interests of the defendant.

[47] I therefore reject the defendant s case that the CFA created a fiduciary relationship between the Bank and the defendant or that it created any fiduciary duties owed by the Bank to the defendant.

[48] Further, in my view, there is no basis for imposing on the Bank any fiduciary duty arising from the Guarantee. I repeat all of the above guidance.

[49] The Guarantee involves a commercial transaction between the Bank and the defendant. Its wording contains nothing which could be read as imposing any fiduciary duty to the defendant on the part of the Bank. In *Governor & Company of the Bank of Scotland v A Ltd and others* [2001] EWCA Civ 52; [2001] WLR 751, the Lord Chief Justice, Lord Woolf, said (paragraph [25]):

> "… on the face of it the relationship between a bank and its customer is not a fiduciary relationship. It is a commercial relationship founded in contract into which the intrusion of equitable doctrines such as constructive notice may result in the well-known words of Lindley LJ in *Manchester Trust v Furness* [1895] 2 QB 539, 545, in doing infinite mischief and paralysing the trade of the country.' The need for certainty in commercial transactions underpinned many of the submissions which Mr Downes made on behalf of the respondents."

[50] In *Goldcorp* (op cit) Lord Mustill said (98E/F)

> But the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself."

[51] A further citation from paragraph 7.005 of *Snell* states (where material):

> It has been said to be of the first importance not to impose fiduciary obligations on parties to a purely commercial relationship.' However, it is altogether too simplistic, if

> not superficial, to suggest that commercial transactions stand outside the fiduciary regime.' … The reason fiduciary duties do not commonly arise in commercial settings outside the settled categories of fiduciary relationships is that it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party. But if that expectation is not inappropriate in the circumstances of the relationship between the parties, then first defendant duties will arise."

[52] Accordingly, I have to look to the facts of this case to ascertain whether there is anything arising from those facts which leads to the conclusion that the Bank was required to subordinate its interests and act solely in the interests of the defendant or which gives rise to a legitimate expectation that the Bank would act in the interests of the defendant.

[53] The Guarantee was entered into by the defendant in order to provide security to the Bank for a term loan of £200,000 to a company of which he was the sole director and shareholder. The term loan was provided to the company to clear liabilities of the company. Such loans are regularly made in the course of business by banks to corporate entities, and it is a similarly regular feature that persons associated with the corporate entity are called upon to provide security in the form of personal guarantees. There is nothing whatsoever in the circumstances of the defendant entering into the Guarantee which could impose fiduciary duties on the plaintiff and there is nothing in the document from which the court could infer the creation of a fiduciary obligation on the part of the Bank and I find nothing of assistance to the defendant's arguments about fiduciary duty in the submissions made in respect of the Consumer Credit Act 1974.

[54] In my view, therefore, paragraph 5 which asserts the existence of a fiduciary duty between the parties to this action and paragraph 6 which sets out the particulars of breach of the asserted fiduciary duty are unarguable and uncontestably bad. I dismiss the defendant s appeal in relation to these paragraphs of the Re-Amended Defence and Counterclaim.

Paragraphs 7 and 8

[55] Paragraph 7 asserts that because of the Bank s expertise in financial markets, and because of the continuing relationship between the Bank and the defendant the Bank was under a duty to take reasonable care in advising the defendant as to whether he should prudently enter into such an agreement" and paragraph 8 alleges that the Bank was negligent in failing to advise the defendant not to enter into the agreement.

[56] At this stage the pleading is still referring to the Deed of Guarantee when it refers to agreement.' The particulars in paragraph 8 refer to (a) unsustainable levels of bank lending, and its effect on currency fluctuations; (b) that banks generally were protected from losses by the injection of public funds, so that it would be inequitable to permit the Bank to recover losses from the defendant; and (c) that any loss sustained by the Bank was due to its own acts or omissions.

[57] As to the first two particulars there is no possible basis on which they could sustain any allegation of negligence. As to the third, this was a Deed of Guarantee, entered into by the defendant to provide security for bank lending to a company of which he was the sole director and shareholder. The Bank is fully entitled to turn to him if there are loses, however sustained. In all the circumstances I consider that the allegations in paragraphs 7 and 8 are unarguable. I dismiss the defendant s appeal in relation to these two paragraphs.

Paragraph 9

[58] Paragraph 9 refers to the charge over the book debts of the company, which I referred to in paragraph [15] above. It is alleged from about the date the company had been placed into administration the Bank, negligently, in breach of contract and in breach of its fiduciary duty to the defendant and to the company the [Bank] failed to take all necessary and reasonable steps to collect the outstanding moneys…" It is also alleged that the Bank acted unlawfully and fraudulently in its recovery of the book debts. Paragraph 9 ends: In this capacity the plaintiff … owed a fiduciary duty to the company, the defendant and to all creditors of the company." The particulars in paragraph 9 relate to the various reprehensible behaviours on the part of employees of the Bank highlighted in the Spotlight investigation and asserts that senior management must have been aware of this.

[59] The charge over the book debts of Meteor was made between the Bank and Meteor. The defendant is not a party to the charge. Therefore, where paragraph 9 asserts a breach of contract, the defendant cannot make such a case. It is unarguable. Further, where paragraph 9 asserts a breach of fiduciary duty, for the reasons which I have given above it is also unarguable. Accordingly, those allegations will be struck out.

[60] The allegation that the Bank acted negligently in relation to creditors of Meteor, of whom (so the pleadings assert) the defendant was one, is not on the face of the pleadings unarguable or uncontestably bad. It may turn out that on the facts of this case the Bank owed no duty to creditors, but I cannot say at this strike out stage of the proceedings that facts subsequently to be proved at trial could not establish a duty owed by the Bank to creditors, including the defendant. Further, I consider that there is sufficient of an arguable case to allow the allegations of unlawful/fraudulent behaviour to go to trial, but only insofar as they relate to the defendant qua creditor of the company. Paragraph 9 should be recast to reflect what I say. The particulars of

negligence and fraud as they are presently articulated in sub-paragraphs (a) to (j) may remain.

[61] To that extent, I allow the defendant s appeal in relation to paragraph 9.

Paragraph 10

[62] This asserts that the defendant is entitled to set off sums which the plaintiff failed to recover as book debts on behalf of the company." No factual basis for this is pleaded; no contractual or other provision is pleaded as support for this bare assertion of an entitlement on the part of the defendant.

[63] In my view it is unarguable and uncontestably bad on the face of the pleadings. I dismiss the appeal in relation to paragraph 10.

Paragraph 11

[64] This pleads that the plaintiff negligently, in breach of contract and in breach of its fiduciary duty to the defendant attempted to create and/or increase his personal indebtedness to the plaintiff." Four particulars (a) to (d) follow. The Master struck out the words and in breach of its fiduciary duty to", together with particulars (c) and (d).

[65] In my view the Master was correct to strike out the reference to fiduciary duty, for the reasons I have already identified. However, I consider that the factual circumstances raised by sub-paragraphs (c) and (d) are neither unarguable nor uncontestably bad when pleaded as particulars of eg negligence on the part of the Bank as alleged in the surviving parts of paragraph 11. To that extent I will allow the appeal and reinstate sub-paragraphs (c) and (d) of paragraph 11.

Paragraph 12

[66] The Master stuck out sub-paragraphs (a) to (g) inclusive, leaving only subparagraph (h) and the narrative in paragraph 12 prior to the word Particulars." The narrative asserts that the plaintiff is estopped from enforcing the Guarantee because of its conduct, described as reckless, contumelious, unlawful, fraudulent, and done in bad faith and that the Guarantee is discharged and vitiated by such conduct. One of the particulars in paragraph 12, particular (b), relates to alleged representations made to the defendant by an employee of the Bank, prior to the defendant entering into the Guarantee, that it would only be called upon if there was a shortfall between the liabilities of Meteor and the moneys recovered by the Bank following the Bank s collection of debts. Misrepresentation in such circumstances is, in my opinion, eminently a triable issue. The defendant may or may not succeed in proving that a misrepresentation was made, and may or may not succeed in proving reliance, but at this stage of the proceedings I cannot say such an allegation is unarguable or almost uncontestably bad.

[67] As to the behaviour of the Bank alleged in paragraph 12 and the associated particulars, and the potential consequences of such behaviour, I note that in *Dubai Islamic Bank PJSC v PSI Energy Holding Co. BSC and others* [2011] EWHC 2718 (Comm) Hamblen J referred (paragraph [39]) to:

> "… the principle set out in the Privy Council decision of *Black v Ottoman Bank* (1862) 12 Moo P.C.C. 472 that a surety would be discharged if there has been some positive act done by [the creditor] to the prejudice of the surety, or such degree of negligence, as in the language of Vice-Chancellor Wood in *Dawson v Lawes*, to imply connivance and amount to fraud.'" Fraud, in this context, has been said to encompass conduct which is unfair to a surety."

[68] At paragraph [43] he said:

> The case law accordingly provides support for the defendants argument that a surety may be discharged where a creditor causes a default or acts in bad faith towards the surety, or positively acts so as to prejudice the surety in an unfair way."

[69] Whether or not the defendant is able to establish a sufficient evidential basis to allow for a submission that the Bank is estopped from enforcing the Guarantee or that the behaviour of the Bank is such as to discharge or vitiate the Guarantee I do not know, but again I am of the view, at this strike-out stage, that the allegations are not unarguable or uncontestably bad.

[70] Accordingly, I allow the defendant s appeal in relation to paragraph 12 of the Re-Amended Defence and Counterclaim and all the particulars pleaded in subparagraphs (a) to (g) will be reinstated.

Paragraph 28

[71] This paragraph appears in the Counterclaim, and essentially alleges that it was unlawful for the Bank to set off the amount of £149,000 as this was not permitted by the terms of the CFA. The Bank s riposte is that it is permitted by virtue of Clause 11.2 of the Global Markets Terms and Conditions entered into between the Bank and Meteor. The Global Markets Terms and Conditions document is not referred to in the Re-Amended Defence and Counterclaim. I am unable to take this document into consideration in this application under Order 18 Rule 19(1)(a).

[72] I note, further, that this issue is also raised in paragraph 13 of the Re-Amended Defence and Counterclaim, a paragraph which is not under attack by the plaintiff or

under consideration in this application, so the matter will have to be aired in court in due course.

[73] While the plaintiff may well be entirely correct in what it says, evidence will have to be led proving the Global Markets Terms and Conditions, their effect, and whether they entitled the Bank to do as it did. In the circumstances, on the pleadings, the point made in paragraph 28 is not unarguable. I allow the appeal in relation to paragraph 28.

Paragraph 31

[74] This paragraph, also in the Counterclaim, asserts that the alleged fraudulent and reckless conduct on the part of the Bank in relation to the collection of book debts caused loss and damage to the company s value." If there was substance in this point, it would be for the company to make it, not the defendant. In the circumstances this proposition made by the defendant is unarguable. Accordingly, I dismiss the appeal in relation to this paragraph.

Conclusion

[75] The appeal from the Master is allowed in relation to paragraphs 3 and 4(a); paragraph 9 but striking out any allegation of breach of contract or breach of fiduciary duty; paragraph 11, in relation to sub-paragraphs (c) and (d); paragraph 12; and paragraph 28.

[76] The appeal from the Master is dismissed in relation to paragraphs 4 (b) to (g) inclusive; paragraphs 5 and 6; paragraphs 7 and 8; paragraph 10; paragraph 11, in relation to the words and in breach of its fiduciary duty to"; and paragraph 31.

[77] In my view the appropriate approach to costs is to leave the issue of costs, both before the Master and before me, to be determined by the trial judge.