Admissibility of interviews made under caution.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

(1) FIONA MORGAN **First Applicant**

(2) NEIL MORGAN **Second Applicant**

(3) BLUE SKY EQUITY TRADING LLP **Third Applicant**

-AND-

(1) BANK JULIUS BAER INTERNATIONAL LIMITED **First Respondent**

(2) BANK JULIUS BAER & CO LIMITED **Second Respondent**

Application for Injunction

Case heard on: 29th, September, 2017

Decision handed down on: 24th, October, 2017

Before: John Russell Finch, Esq., O.B.E., Judge of the Royal Court

Counsel for the Applicants: Advocate J T Le Tissier
Counsel for the Respondents: Advocate M G Shepherd

Cases and Materials referred to in Judgment:

American Cyanamid v Ethicon [1975] 1 All ER 504;

Blindley Health Investment Ltd v Bass [2014] EWCA 1366 (Ch);

Cayne v Global Natural Resources plc [1984] 1 All E.R. 225;

Combe v Combe [1951] 2 KB 515;

Fellowes & Son v Fisher [1976] 1 QB 122, CA;

James v Heim Gallery (London) Ltd (1980) 256 EG (CA) 819;

Mears Ltd v Shoreline Housing Partnership Ltd [2013] EWCA Civ 639 and [2015] EWHC 1396;

National Commercial Bank Jamaica Ltd v Olint Coup Ltd (Practice Note) [2009] UKPC 16;

Ninemia Maritime Corporation v Trave Schiffarthsgessellschaft MGH und Co KG (The Neidersacken) [1983] 2 Lloyds Rep 600;

NWL Ltd v Woods [1979] 3 All ER 614;

Roger v Roger 2003-4 GLR 1;

Seechurn v Ace Insurance SA-NV [2002] EWCA Civ. 67;

Series 5 Software v Clarke [1996] 1 All ER 853;

Smith v Education Council of the States of Guernsey (CA No. 7/2002);

Smith v Inner London Education Authority [1978] 1 All ER 411, CA;

Smith-Kline Beecham plc v Apotex [2007] Ch 71

Technocom v Roscomm and Klabin 2003-4 GLR 403;

The Quaker Oats Co v Alltrades Distributors Ltd [1981] FSR 9;

Vertex Data Service Ltd v Powergen Retail Ltd [2006] EWHC 1340 (Comm).

Chitty on Contracts (32nd edition) paragraph 27-005;

Gee on Injunctions (6th edition) paragraphs 2-004 to 2-014;

Snell's Equity (33rd edition) paragraphs 12-011 to 12-015, 12-018 and 18-052;

Wilken and Ghaly – *The Law of Waiver, Variation and Estoppel* (3rd edition) paragraph 9.01;

The White Book, Section 15, paragraphs 15-260 15-49.

The Law Reform (Miscellaneous Provisions) Guernsey Law, 1987, sections 1(c) and 4.

Introduction

1. The Applicants (hereafter collectively designated as "A"), have applied for injunctive relief:

    (i) against the two Respondents ("R") restraining them from foreclosing, suspending, or otherwise bringing to an end a loan facility dated 31st March, 2016, signed on behalf of the Third Applicant (Blue Sky) on 16th March 2016;
    (ii) against selling or otherwise disposing of the assets held by the Second Respondent ("BJB") as security for the Blue Sky loan;
    (iii) for demanding repayment of the loan; or
    (iv) against altering or otherwise changing the terms of the loan.

    An application to serve the First Respondent ("JBIL") out of the jurisdiction was not proceeded with as R's Advocate accepts service. The case was heard on 29th September, 2017 and oral submissions took up the whole day. Both parties have provided comprehensive bundles of authorities, affidavits and skeleton arguments. At the end of this hearing an interim injunction was made until 25th October, 2017, during which period a decision and judgment would be produced. The Cause in the case is located at divider 7 of A's bundle and sets out the history as seen by A and the basis of the claims. The full hearing followed an interim order made on 31st August, 2017.

2. The parties to the case are:

   (i) Mr and Mrs Morgan, who reside in England;
   (ii) Blue Sky Equity Trading LLP established in England, wholly owned by the Morgans and their children;
   (iii) the First Respondent is Julius Baer International Limited, incorporated in England;
   (iv) the Second Respondent is Bank Julius Baer & Co Limited, incorporated in Switzerland with a Guernsey branch.

3. In early 2012, Mr Morgan obtained a "Lombard loan" from BJB. This is a long term loan facility under which funds are lent at a specified rate of interest with the loan secured against assets, normally shares, to be held by the lender. Mrs Morgan was added as a borrower around 6th July, 2014 with a new agreement. Around 16th May, 2016 Blue Sky was substituted as the borrower in place of the Morgans, again in a new agreement. This was largely down to inheritance tax considerations. Mr and Mrs Morgan signed this loan as designated members of Blue Sky. Mr Morgan, it should be noted, had signed the Lombard loan on 27th April, 2012. It is submitted on behalf of A that when arranging and negotiating the loan, Mr Morgan expressed concern about the "Credit Conditions" of the loan, especially paragraph 2.1 (A's divider 3, page 100), which would permit BJB to demand repayment of the loan immediately. It is claimed on behalf of A that what is now deemed "Assurances" were made by Mr Porter of JBIL to the effect that BJB would not demand repayment unless there was a serious problem with the loan. Mr Porter was the main relationship manager of JBIL. The question of Mr Porter's authority and dealings with the loan is a vexed one, with competing versions between the main parties. The protagonists have differing recollections and different perspectives on written communications between them. It is also submitted by A that JBIL made a "Representation" that notwithstanding paragraph 2.1 of the Credit Conditions, there would not be any demand for repayment if the loan was not in default, security was adequate and all payments had been made.

4. Unfortunately, for reasons that cannot be determined with any finality, unless and until oral evidence is received at any subsequent trial, relationships soured. Again, the causes are viewed differently by the persons involved. Mr Morgan, as certain of his correspondence makes clear, is an enemy of what he perceives to be "bureaucracy", as exemplified by the requirements laid down by compliance for form-filling and other, frequently time-consuming requirements. A "personal disagreement" allegedly took place between him and Mr Durlacher, Chief Executive Officer of JBIL. This bubbled away for much of 2015, and, according to Mr Morgan, came to a head around 25th July, 2016. Again the accounts fundamentally differ on what took place. It is alleged by Mr Morgan that Mr Durlacher in "a fit of pique" indicated that the loan would be called in and hung-up the telephone. On 2nd August, 2016 BJB wrote to Blue Sky and required repayment by 31st August, 2016, in accordance with paragraph 2.1 of the Credit Conditions. After a meeting and further discussion the date of repayment was extended to 31st August, 2017. Mr Morgan's account is disputed in all material respects by Mr Durlacher. This, necessarily brief, sketch of the background will be augmented where necessary below.

Test for Injunctions

5. The power to grant injunctions in Guernsey is found in Section 1(c) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987. There is a discretionary power to grant mandatory and prohibitory injunctions. Under Section 4 of that Law:

   > "The Court shall not exercise any power conferred by section 1 ….. of this Law unless satisfied it is just and convenient to do so."

In Guernsey, the familiar test followed by the English Courts in American Cyanamid v Ethicon [1975] 1 All ER 504 (Tab 3 of R's authorities) is followed, see especially Technocom v Roscomm and Klabin 2003-4 GLR 403 at paragraph 47 (Tab 8 of R's authorities). In that case, Day LB stated (following the American Cyanamid case) and using the summary in the *White Book*, that the position is that when an application is made:

> "1. Is there a serious issue to be tried?
> If the answer to that question is yes, then further related issues arise, they are.
> 2. Would damages be an adequate remedy for a party injured by the Court's grant of, or its failure to grant an injunction? If not, where does the "balance of convenience" lie?
>
> The first question indicates a threshold requirement."

In paragraph 48 Day LB added that the guidelines are to be treated as guidelines, not as a statute, and the "balance of convenience" is more fundamental and more weighty than mere "convenience". Also in appropriate, "though limited" cases, the relative strength of the evidence and other special factors is relevant. Day LB equated "the balance of convenience" with the balance of the risk of injustice.

6. Based on the American Cyanamid case, A need only show a real possibility of success, and not a probability; in other words (as cases have put it) "not frivolous or vexatious", there is "a serious question to be tried", or "a real prospect that he will succeed" (at trial). These formulations amount to the same thing (Smith v Inner London Education Authority [1978] 1 All ER 411 C.A. at 419 per Browne LJ). R's skeleton at paragraph 16 also quotes the formula of Mustill J in Ninemia Maritime Corporation v Trave Schiffarthsgessellschaft MGH und Co KG (The Neidersacken) [1983] 2 Lloyds Rep 600 (Tab 5 of R's authorities):

> "In these circumstances I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than a 50 per cent chance of success."

Snell's Equity (33rd edition) at 18-052 puts it this way, when defining a "serious question to be tried":

> "This means something more than the claimant can avoid having the action struck out as frivolous and vexatious in the sense of being one which no reasonable person could treat as *bona fide.* He does not have to show a *prima facie* case, but only an issue for which there is some supporting material and the outcome of which is uncertain."
>
> (See Cayne v Global Natural Resources plc [1984] 1 All E.R. 225.)

It is R's contention that this threshold test (however expressed) is not made out.

How the Case is put

7. A's case was put under the following heads:

> (i) promissory estoppel;
> (ii) estoppel by representation;
> (iii) estoppel by convention;
> (iv) misrepresentation (which was not argued at the hearing); and

(v) breach of a collateral contract.

Oral argument, of course, tends to concentrate the mind and at the hearing most attention was devoted to the question of a collateral contract and breach of a negative covenant, but picking through the wording the heads of claim amount, on the facts, to variations on the same theme. Put very simply, A alleges that R, in particular Mr Porter, made the "Assurances" and "Representation" referred to in paragraph 3 above. Mr Porter and R's other deponents strongly repudiate this. The facts are viewed very differently by each side. This is as good a place as any to refer to the warnings given by courts in England about avoiding a trial on conflicting affidavits. However, an assessment can be made on undisputed facts where the strength of one party's case is disproportionate to that of the other (The Quaker Oats Co v Alltrades Distributors Ltd [1981] FSR 9 at 13, 14).

It will be necessary to consider the various heads of estoppel put forward on behalf of A before looking at the main plank of A's case, the alleged breach of a collateral contract. Although the Court must eschew any attempt to evaluate the affidavit evidence, as in a trial, it can as stated, properly act upon what is apparent on the face of the documents.

Promissory Estoppel

8. The definition at paragraph 12-018 of *Snell* is as follows (see paragraph 4 of A's supplementary skeleton):

> "Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn the other party acts upon it, altering his or her position, so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it."

Furthermore, the person claiming the estoppel must show that the promise or representation "must be made intending to affect the legal relations between the parties" (Seechurn v Ace Insurance SA-NV [2002] EWCA Civ. 67 at [24]).

9. It was submitted by A that they entered into the Lombard Loan in reliance on the (as mentioned in paragraph 3 above) "Assurances" and "Representation". This, according to A's skeleton at paragraph 47, "gives rise to a promissory estoppel binding upon the Defendants". R is therefore estopped from demanding repayment of the Lombard Loan where there is no breach of the conditions by A "as to do so would be unconscionable further or alternatively unjust". The remedy is available in Guernsey; see Roger v Roger 2003-4 GLR 1 (Tab 7 of R's authorities). However, as R's skeleton points out (at paragraphs 25 and 26) the alleged promise and/or representation on the facts (Mr Morgan's first affidavit, paragraphs 59-60) preceded the legal relationship that came into being when the loan documentation was signed. The alleged details of what was said are set out in paragraphs 53-58. Contrary to A's submissions the authorities make it clear that there must be some pre-existing relationship between them. It is normally, but not always a contractual one; but this pre-existing relationship must at least be analogous to contract. An example from the English cases is the observation by Buckley LJ in James v Heim Gallery (London) Ltd (1980) 256 EG (CA) 819 at 821, "The promise must be one relating to a legal relationship of some kind, existing between the promisor and the promisee". In A's supplementary skeleton at paragraph 3, it is stated boldly that "The 'pre-existing' requirement is not accepted". With respect, the weight of the authorities is against this contention in relation to this form of estoppel.

Estoppel by Representation

10. This has as yet not been specifically recognized in the Courts of Guernsey. A's submissions to the effect that it would be are based principally upon observations of Rokison JA in Roger v Roger (supra) at [19]:

> "Guernsey law has, as we understand it, generally followed and applied English equitable principles in appropriate cases, and we see no reason to exclude the possibility of proprietary estoppel being invoked in an appropriate case."

As A submitted (paragraph 10 of the supplementary skeleton) the fact that other branches of estoppel are available in this jurisdiction means that there is no good reason that this part of the doctrine should not also be available. This does not require a radical re-casting of Guernsey law, but a natural and incremental development. There remains the Statement in *Snell*, at paragraph 12-005 (Tab 12 of R's authorities) that:

> "Estoppel by representation of fact at common law was treated as a rule of evidence and not as a cause of action; this continues to be the case."

A referred to two decisions in respect of the same case: Mears Ltd v Shoreline Housing Partnership Ltd [2013] EWCA Civ 639: and subsequently the trial at [2015] EWHC 1396 (A's supplementary authorities documents 3 and 4). At this juncture it is as well to mention that although estoppel by representation is a common-law doctrine, it was recognized by the courts of equity and that, in broader terms, the approach of the English courts has been to treat the various forms of equity as parts of the same doctrine. So in the Mears case at trial after an appellate decision, Akenhead J said (at paragraph 45 "Conclusion") that it amounted to being merged "into one general principle, shorn of limitations".

11. This case was tried after an appeal on a refusal to strike-out. The appeal was dismissed. For the purposes of the present case it is necessary to consider the observations of Gloster LJ at paragraph 23:

> "… this is not a case where the Claimant is seeking to set-up a contract by estoppel, in a situation where there was no contract at all. ……. This is a case where the estoppels are alleged to have qualified the terms of the contract themselves, and where it is alleged that the parties have conducted their *contractual* relationship on the basis of an assumed and shared state of facts or law (citation omitted)."

So far this recent decision rather chimes in with A's legal submissions. But on considering Akenhead J's judgment there is a useful passage on estoppel by representation at paragraph 52:

> "Estoppel by representation may in some cases overlap with estoppel by convention, but it is, in legal terms, distinct. Wilken and Ghaly (*The Law of Waiver, Variation and Estoppel*, 3rd Ed) summarise the elements of the estoppel at Paragraph 9.01 by reference to two parties A and B as follows:
>
> > "First A, makes a false representation of fact to B….. second, in making the representation, A intended or knew that it was likely to be acted upon. B believing the representation, acts to its detriment in reliance on the representation. Fourth, A subsequently seeks to deny the truth of the representation. Fifth, no defence to the estoppel can be raised by A."
>
> They go on to say at Paragraph 9.04 that the "weight of the authority favours the view that estoppel by representation is a rule of evidence rather than of substantive law". The doctrine does not, in itself amount to a cause of action ….."

Assuming for the purposes of the present case that A's application of the approach in Mears is justified, then the purported "Assurances" and "Representations" made to Mr Morgan do not fall within the ambit of this definition. In *Snell* at paragraph 12-005 the old examples of the application of estoppel by representation seem to accord with this definition: sale of land or goods where the true owner falsely represented that the person holding himself out as seller was indeed the owner; and a company issuing share certificates indicating they were fully paid, could not assert the contrary. Accordingly, whilst recognising the increased flexibility demonstrated in both reports of Mears, the alleged words to Mr Morgan do not fall within the scope of this definition, cited by Akenhead J. If it transpires that this view of the law is technically incorrect, or nowadays too restrictive, it is still necessary to undertake the exercise mentioned in paragraph 5 above. The case cannot be tried on the affidavits but it is appropriate and sometimes useful to have recourse to what appears on the face of the evidence (see the observations on damages and balance of convenience at paragraphs 19-21 below).

Estoppel by Convention

12. This is recognised in Guernsey under the case of Smith v Education Council of the States of Guernsey (CA no. 7/2002) (Tab 6 of R's authorities). Estoppel by convention is simply defined in *Snell* paragraph 12-011 as:

> "… a further doctrine that may also prevent a party from denying the truth of a matter where another has acted on the basis of its truth."

Furthermore, it is pointed out that "the circumstances in which an estoppel by convention is likely to arise are likely to be rare and the facts unusual". (Blindley Health Investment Limited v Bass [2014] EWHC 1366 (Ch) at [133]). After discussing the cases, *Snell* goes on (at paragraph 12-015) to state:

> "This does not mean, however, that an estoppel by convention operates as an independent cause of action: as is the case with an estoppel by representation, the estoppel instead determines the position against which the parties' rights are determined."

R's skeleton refers to Smith-Kline Beecham PLC v Apotex [2007] CH71 at 103 (Tab 9 of R's authorities). There, Jacob LJ said:

> "an estoppel cannot be used as a key element of a claim (sword not shield) and particularly cannot operate to create a legal relationship where there was none at the outset."
>
> (Jacob LJ was referring to both estoppel by convention and estoppel by representation.)

13. However, A also uses the Mears case in this context (paragraphs 20-22 of supplementary skeleton). Attention is drawn specifically to Akenhead J's observations at paragraph [51] of the trial report. This comprises a helpful summary of the concept. The most relevant part is contained in sub-paragraph (e):

> "Whilst estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative or does not even raise some sort of presumption one way or the other. While a party cannot in terms found a cause of action on an estoppel, it may,

> as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on the estoppel, it would necessarily have failed."

It follows that A's submissions under this head are to be preferred to R's on the basis of this recent case. It is also worthy of note that at paragraph (d) of his formulation, Akenhead J referred specifically to "unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position". Contrary to what was concluded in respect of estoppel by representation (paragraph 10 above) the definition does not inhibit A's use of it as a ground for relief. But again, at the risk of further repetition, it is necessary to go to the evidence and work with the undoubted or undisputed facts shown on the documents.

14. Without the high authority of the English Court of Appeal in the Mears case, which is regarded as persuasive in Guernsey and therefore likely to be followed, A's submissions on estoppel would not be well-founded. However, both that decision and Akenhead J's application of it in the subsequent trial are clear. The customary distinction between 'sword and shield' dating back at least to the celebrated case of Combe v Combe [1951] 2 KB 215 is not wholly blurred in favour of a doctrine of estoppel that seems to blend together all the different types. In relation to Promissory Estoppel, a pre-existing legal relationship is required, and for Estoppel by Representation the definition (cited in Mears) relates to a false representation. Nevertheless, Estoppel by Convention is applicable, if the facts sufficiently substantiate it. This is closely inter-related to the collateral contract point, dealt with next and how the facts, as presented, appear in the context of both estoppel by convention and collateral contract.

Breach of a Collateral Contract

15. R's skeleton at paragraph 38 sets out their position. If there is a collateral contract (which is not admitted) and damages are a proper remedy i.e. if damages suffice, then no injunctive remedy can follow. A (paragraph 23 of supplementary skeleton) takes issue with R's submissions that an injunction should not be issued, as the ultimate remedy available to A at trial would be limited to damages. There are two aspects to this part of the case: breach of a negative covenant and adequacy of damages. In relation to the former, A's key submission is that, "Where a term of a contract seeks to restrict a party from doing something, the court may grant an injunction to restrain breach of that term". (Paragraph 24 of supplementary skeleton). R responds that this alternative remedy "though creatively cast, is an application for specific performance. The relief sought is to require the Respondents to act in accordance with the alleged collateral contract". (Paragraph 39 of R's skeleton).

16. A prays in aid *Chitty on Contracts* (32nd edition) at paragraph 27-065 onwards (pages 120 – 131 of A's bundle). Interestingly enough, the question of the adequacy of damages in such a situation is not considered relevant:

> "Where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction. In such cases an injunction is normally granted as a matter of course so that the fact that "damages would be an adequate remedy … is not generally of a relevant consideration where the injunction restrains the breach of a negative covenant". But as the remedy is an equitable one, it is in principle a discretionary remedy and it may be refused on the ground that its award would cause such "particular hardship" to the defendant as to be oppressive to him. An injunction would not be "oppressive" merely because observance of the contract was burdensome to the defendant ……."

17. In oral submissions on behalf of R it was suggested that even if the collateral contract is made out, the remedy is in damages. Attention was drawn to *Gee on Injunctions* (6th edition) paragraphs 2-004 to 2-014 (Tab 14 of R's authorities). In paragraph 2-006 it is stated:

> "An injunction or decree of specific performance will not be made to require people who do not desire to maintain a close personal relationship, which involves mutual trust and confidence to do so. The court will not grant an injunction which would in the particular circumstances put the defendant in a position where he would in practice be compelled to continue with such a contract …"

And in paragraph 2-007 (discussing sold distribution agreements):

> "The court will not specifically enforce a sole distribution agreement because of the difficulty of supervising such a contract and because of the undesirability of yoking together a supplier and a distributor in a close relationship for services requiring mutual trust and confidence ….."

Finally, in that paragraph:

> "In Vertex Data Service Ltd v Powergen Retail Ltd [2006] EWHC 1340 (Comm) the court declined to grant an interim injunction compelling companies to work together under a contract requiring continual co-operation at an operational level on a daily basis where the relationship had broken-down and where there was a lack of certainty on what had to be done if there was to be performance in accordance with the ontract."

R strongly drew attention to the "yoking" risk perceived if an injunction was upheld.

18. The position appears to be (as stated in *Gee* at paragraph 2-014):

> "There is a strong presumption that the covenant will be enforced by injunction, albeit the matter remains discretionary."

(Footnote 67 makes the point that the use of "exceptional" to describe cases in which an injunction is not to be granted "is not helpful"). However, in the particular charged circumstances of the present time "mutual trust and confidence" does not exist. There is a stark difference between the protagonists on what may or may not have been said. Mr Morgan's rather pugilistic letter-writing demonstrates his dislike of R, and R terminated the relationship because (in effect) they could not get on with him anymore. There is, in all the circumstances, a lot to be said for R's submission that A's remedy sought here is, in effect, an application for specific performance. Leaving aside the question of the availability of that particular remedy under Guernsey law, the forcing of R to act in accordance with the alleged collateral contract would not be appropriate in the light of the considerations set out in *Gee.* The "yoking" would be of two horses pulling in different directions and riddled with mutual mistrust.

19. In relation to the question of the adequacy of damages it is for A to demonstrate that loss would be suffered for which damages are not an adequate remedy. Attention was drawn to passages in the *White Book* (especially A's pages 133-135 of the bundle). The well-established formulation of principles by Browne LJ in Fellowes & Son v Fisher [1976] 1 QB 122, CA at 137 applying the Cyanamid case is set out there (at paragraph 15-10):

> "(1) The governing principle is that the court should first consider whether, if the claimant succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages would be adequate remedy and the defendant would

be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the claimant's claim appeared to be at that stage.

(2) If, on the other hand, damages would not be an adequate remedy, the court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the claimant's undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the claimant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

(4) It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

(5) The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.

(6) If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the written evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.

(7) In addition to the factors already mentioned, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

The *White Book* points out at paragraph 15-11, that the matter should be approached in two stages: Firstly, applying guidelines (1) and (2) and secondly, the remainder of those guidelines. In oral submissions on behalf of A, attention was drawn to Mr Morgan's first affidavit at paragraph 89 (Tab 3 of A's bundle, page 18). This principally refers to the fact that "substantial proportions" of the shares held as security have been slowly recovering in value since the 2009 crash. If sold, this will "crystallise and formalise a significant loss in the value of the shares". Nor do Mr and Mrs Morgan have the liquidity to re-purchase the shares, due to unavailability of cash.

20. R's riposte to this is that Mr Morgan has already estimated his losses, i.e., in the region of £1.5 million (paragraph 88 of first affidavit). Losses on the sale of shares could be quantified at trial. Costs of alternative lending, tax losses, losses in respect of any increases in share values, and loss of time in finding a new facility, can be compensated by way of damages. In general, R's oral submissions fastened upon these factors and the lack of particulars in the relevant paragraphs of the affidavit (especially 96-97 and 103-104). It is not impossible to work out the consequences. R also suggested that Mr Morgan has been given over a year to make enquiries of other lenders and R's actions have been "extraordinarily patient". In general terms, a permanent injunction would have a deleterious effect on banks wishing to exit themselves from arrangements, who would be frozen into them even if they did not want to.

The Balance of Convenience

21. Linked with these considerations is the "balance of convenience". The correct approach is summarised in the *White Book* at paragraph 15-12 as the court having to take "Whatever course seems likely to cause the least irremediable prejudice to one party over the other" (National Commercial Bank Jamaica Ltd v Olint Coup Ltd (Practice Note) [2009] UKPC 16. Guideline (6) in the formulation reproduced in paragraph 19 above is restrictive of the court's consideration of the "relative strength of each party's case". Paragraph 15-15 of the *White Book*, however, draws attention to those circumstances where, without holding anything resembling a trial, a view is taken that one party's case is much stronger than the other. This factor can then be taken into account – see Series 5 Software v Clarke [1996] 1 All ER 853 at 856. In his judgment Laddie J (at 865), approved the court reaching a "clear view" of the relative strength of the parties' cases. He pointed out that this would be the same approach as is followed in Scotland, another jurisdiction whose judgments are of high persuasive authority in the Bailiwick of Guernsey. At 866 he quoted Lord Fraser of Tullybelton's observations in NWL Ltd v Woods [1979] 3 All ER 614 at 628:

> "… the court is in use to have regard to the relative strength of the cases put forward in averment and argument by each party at the interlocutory stage as one of the many factors that may go to make up the balance of convenience."

Laddie J considered that there was "no reason in principle why the practice here should differ from the practice in Scotland". This, with respect, accords with common-sense, a consideration that should be welcome in all forms of judicial proceedings. Accordingly, it will be necessary to assess if such an exercise is feasible and profitable in the present case, from what is apparent on the face of the papers.

Observations on the Facts

22. R was at pains to point out that "the Bank" is composed of two entities: the First Respondent, JBIL and the Second Respondent, BJB. The latter is the lender, the former deals with the relationship management. These are different functions, and each entity has different obligations. This is of particular relevance when considering the role of Mr Porter, who is an employee of JBIL. Although there is a degree of conflicting evidence that cannot be resolved at this stage in the proceedings, there is material that assists in deciding if some sort of collateral contract existed that varied the written terms of the loans. R suggested that Mr Porter was no more than a "post-box". He had no power to bind BJB. He deals with the day-to-day handling of the relationship with customers such as Mr Morgan. All banking services are provided by BJB; JBIL does not carry-on the acceptance of deposits or lending activities. BJB has a branch in Guernsey. Mr Porter works in London. There was a good deal of discussion between Messrs Porter and Morgan prior to the 2012 agreement being signed. As an employee of JBIL, Mr Porter did not have the power to bind BJB. Only the lender, BJB, has the authority to terminate a loan. The role that Mr Porter claims is set out in paragraph 33 of his affidavit:

> "I always emphasized to Mr Morgan that I was simply a "post box" when it came to the credit terms. I do not promise things because I know that I cannot make the decision. I can help him understand what is proposed and relay his wishes, but I do not make decisions in respect of credit terms."

23. On the documents it is apparent that whilst Mr Morgan evidently enjoyed a frequently good personal relationship with Mr Porter, he was well aware of his limited role. This surfaced with particular clarity on 12th May 2016, in a recorded telephone conversation between the two individuals. When asked if he is "just the piano player or something", Mr Porter replies,

"I am, unfortunately, I am" and then offers Mr Morgan a call to credit "cause I can't make decisions" (page 127 of R's exhibits bundle). At the end (page 133) Mr Porter agrees that it is a case of "pass the parcel". In his affidavit, at paragraph 53, Mr Porter describes the position as him being a mere "conduit" and not able to bind BJB.

24. But to look at events properly, it is necessary to consider the exact legal and factual elements behind the loans. There were three: the original 2012 loan, the parties to which were Mr Morgan and BJB; a second one in July 2014 when Mrs Morgan was involved; the parties being the Morgans and BJB; the third was the 2016 loan, the parties to which were Blue Sky Equity Trading (set up by the Morgans) and BJB. A law student looking at the facts and the separate loan documentation would find it easy to describe these as three separate agreements, arising on different occasions. The first was signed on 27.04.12; the second on 06.07.14; the third (Blue Sky) on 16.05.16. On 20.03.12, Mr Morgan raised the repayment question in respect of the first pending loan with Mr Porter; on the 21.03.12, the response was forthcoming. A reply from the Credit Office was quoted:

> "The Bank is not in the business of extending credit one day and asking repayment on the next. In my time in credit, we have only ever made a demand under the facility due to a breach of terms/event of default and I am pleased to say the amount of times we have had to do it are very few …"

Mr Porter himself added:

> "Additionally, I would also comment that in my 20 years at the Bank I have never had the experience where a client has funds granted and then we subsequently request a return unless there was a serious change of circumstances. We wish for our clients to have trust in us that we are a sensible yet prudent institution."

The same day and then on the 22nd, Mr Morgan asked if this could be placed in the loan documents, but then accepted "your reassurances". That same day Mr Porter replied, stating:

> "I fully understand your concerns but again would wish to reassure you that the bank is not in the habit of demanding the return of loaned funds unless there is a serious breach of the terms." (Pages 40-45 exhibits to Mr Morgan's first affidavit in A's bundle.)

25. It is Mr Porter's position (paragraphs 24-28 of his affidavit) that he was simply speaking of personal experience, not purporting to amend the proposed written terms or offer a side contract. In paragraph 28 he maintains:

> "… I would never have offered to amend the terms of Mr Morgan's loan because I did not have the power to do so, and all other contemporaneous documents support my recollection."

So Mr Morgan went ahead and signed the loan documentation. It is evident that the Morgans are not innocents in the world of finance e.g. at paragraph 102 of his first affidavit Mr Morgan indicates, "We are successful entrepreneurs who run various different companies within excess of 300 employees". The 2014 loan was, as stated, a new one, with Mr and Mrs Morgan entering into a new facility. It is a fresh agreement, at pages 63-90 of Mr Porter's exhibits. Again, the condition in paragraph 2.1 of the Credit Conditions was operative. It is not a question, as Mr Morgan puts it (paragraph 65 of his first affidavit), of "adding" Mrs Morgan, but in law a totally new contract. There is nothing in R's documents to show that the alleged collateral agreement surfaced once more. It was in 2014 that the relationships between the protagonists began to break down.

26. As Mr Porter puts it at paragraph 42 of his affidavit, despite there being "some issues in the relationship with Mr Morgan, it remained ongoing". Mr Morgan deals somewhat tersely with this third agreement in paragraphs 67-68 of his first affidavit. He refers to Blue Sky being "substituted" and this being "simply a clerical exercise". There was a meeting at his house on 31st October 2015 to discuss this "new facility". Mr Porter noted it (pages 96-100 of his exhibits). During the course of the discussion it is stated that Mr Morgan referred to the US regulatory requirement (FATCA) as a "steaming pile of horse shit" and was impatient about what he regards as unnecessary bureaucracy throughout. It is worthy of note that when sending copy agreements for signature on 29th April 2016, Mr Porter stated (top of page 107 of exhibits):

> "As promised we now have pleasure in attaching the following credit documents for signature. Please note that I am entirely guided by Bruno Sutter and the Credit Team on this. So, please address any questions, observations or comments to me, for further passage to Bruno and Paul Dallamore, who is head of credit at the Bank in Guernsey."

And in a further e-mail on 4th May, 2016:

> "The credit agreement will be in the name of Blue Sky and prepared by the Credit Team in Guernsey."

However, perhaps most significantly from the documents, on 16th May 2016, Mr Morgan telephoned Mr Porter to express unhappiness about some of the wording. This related to the period of time within which Blue Sky could respond to margin calls; see page 112 of Mr Porter's exhibits. Mr Morgan wanted this taken out. The call concluded, according to Mr Porter's note as follows:

> (Mr Morgan) "The terms as always been agreed are fine – what stands in writing already stands and should be duplicated for Blue Sky."
>
> (Mr Porter) "Fine, I will send the email back and we'll get the agreement changed."

Blue Sky signed-up that same day. The terms of the Clause 2.1 were the same as in the preceding two agreements. See pages 105-129 of the exhibits to Mr Dallamore's affidavits. At page 112 (and all the pages are initialled by the signatories), the Clause is set out as before.

27. Mr Porter also draws attention to the transcript of a telephone conversation on 27th June, 2016 (i.e., after the execution of the loan agreement) between Mr Morgan and Annabel Bosman, Head of Relationship Management at JBIL, this (at pages 124-125 of Mr Porter's exhibits) was a complaint about margin calls. During the course of that conversation, Mr Morgan described himself as "an experienced borrower" and later, "Because I raised the subject because the documentation says you can call the loan in at any time, I'm well aware of that". The response was "which is the premise of the Lombard loan" and Mr Morgan's reply began, "Yes, I understand that". There is no reference to any collateral agreement, or apparent defect in understanding.

28. Mr Morgan's third affidavit deals with these and various other points, perhaps understandably in the circumstances, rather shortly (divider 6 of A's bundle). However, his observations, unlike those in the affidavits provided on behalf of R, are detailed in criticism, but short on specifics. Indeed, whatever might be resolved at a trial, his bold assertions (as R submitted at the hearing) do not match the circumstantial detail in R's affidavits. Mr Morgan also takes up some space making a number of rather over-robust comments on R generally and in respect of various employees of the Respondents. He contends, at paragraph 8 of his first affidavit, that

the three loans were, in effect, continuous "subject only to a few bureaucratic and clerical changes". They were not and, as already mentioned, amounted to quite separate contracts with different borrowers, which came into effect at different times.

29. From the written evidence BJB decided to terminate the Blue Sky loan, for the reasons set out in Mr Dallamore's affidavit, paragraphs 47-50. After further communications a meeting ensued on 5th September, 2016 at Mr Morgan's home, with Annabel Bosman (who took a note transcribed at pages 101-102 of the exhibits to Mr Durlacher's affidavit), Mr Durlacher and Mr Morgan. The gist of this, if the note is accepted as accurate, is that R's representatives agreed to a "sensible timeframe" for alternative facilities to be obtained by Mr Morgan. Indeed, in due course an extended period of time was given to allow for this to take place. R's Letter of Demand was dated 2nd August, 2016, giving the date of 31st October, 2016, but "as a gesture of goodwill" on 10th November, 2016, this was extended to 31st August, 2017. A proposal by Mr Morgan in March 2017 to avoid the calling-in of the Blue Sky loan was rejected on 6th April 2017, (see pages 111-115 of Mr Durlacher's exhibits). The relevance of this extended period is not just to show R's actions, but the time-period not only gave a reasonable window for obtaining a new facility, but was an opportunity for Mr Morgan to detail his losses for any trial (see paragraph 20 above).

Conclusions

30. With some renewed apology, it is once more repeated that the case has not been "tried" on the affidavits and exhibits. Nevertheless, the guiding principles summarised in paragraphs 5 and 6 above have been followed. The various types of estoppel necessarily overlap and some considerations are common to them. Promissory estoppel is available in Guernsey, but is not applicable, due to the lack of a pre-existing legal relationship (paragraphs 8 and 9 above) here. Estoppel by representation should be available in Guernsey, as part of the organic and ordered development of its legal system. If other species of estoppel are available, it is hard to see any logical reason to dismiss it. But the English authorities are clear in saying it does not "in itself amount to a cause of action". It is a rule of evidence, not a substantive law. This goes back to the impression that estoppel generally is a mechanism of defence and not attack. Estoppel by convention has assumed a larger role since the Mears case (supra) was decided. It is only applicable in "rare circumstances" and on "unusual" facts. At a pinch, quite a few cases might be forced into that mould, but there is nothing startling on the face of these three loan agreements under consideration. Again, this species of estoppel does not operate "as an independent cause of action", but as Mears makes clear a party may rely upon it to succeed if without its use, it would necessarily have failed. Factually its basis in the present case is the same as that put forward in support of a collateral contract subsisting. Looking at the cases put forward by the parties, and for the reasons set out in paragraphs 20-21 above, R's detailed account of the facts, at this stage of the proceedings, far outweighs A's generalised assertions. Specifically, as Mr Morgan put it, Mr Porter was engaged in passing the parcel.

31. The next question concerns the related issues of the adequacy of damages and "the balance of convenience". If at a trial A succeeds in establishing one or more of his heads of claim by more persuasive and detailed evidence, than he presently relies upon, then damages seem to be the appropriate remedy. By analogy with specific performance the parties should not be forced into being "yoked" together, where mutual trust and confidence are absent. Furthermore, the practice of the Scottish courts (applied by Laddie J in England) on the "relative strength" of the parties' cases shows that here the "least irremediable prejudice" would be occasioned by the award of damages. In this context, as has already been observed, A would be able to enlarge on paragraph 88 of his first affidavit and provide further and better particulars of his loss. The alternative remedy of an injunction would inhibit banks from ending relationships in similar circumstances and (as Mr Durlacher's affidavit, paragraph 42 puts it), in effect, allow Mr Morgan "a perpetual banking facility". That was not the relationship entered into by Blue Sky and BJB.

Costs

32. Written representations are requested from the parties within 14 days of the date of handing-down of this final judgment. This period can be extended by agreement if necessary, without recourse to the Court.

33. Application refused.

J R Finch
Judge of the Royal Court