Michaelmas Term
[2022] UKPC 48
Privy Council Appeal No 0003 of 2021

JUDGMENT

Sagicor Bank Jamaica Ltd (Respondent) *v* YP Seaton and others (Appellants) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Hodge
Lord Kitchin
Lord Burrows
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
8 December 2022

Heard on 12 May 2022

Appellants
Richard Salter KC
Ivana Daskalova
(Instructed by DAC Beachcroft LLP (London))

Respondent
B St Michael Hylton KC
Kevin O Powell
Sundiata J Gibbs
(Instructed by Myers Fletcher & Gordon (London))

Appellants:
(1) YP Seaton
(2) Earthcrane Haulage Ltd
(3) YP Seaton & Associates Ltd

LORD HODGE (with whom Lord Kitchin, Lord Burrows, Lord Stephens and Lady Rose agree):

1. This appeal is concerned with a dispute between Sagicor Bank Jamaica Ltd ("Sagicor") and Mr Y. P. Seaton, who is a substantial businessman in Jamaica. The dispute was initially as to whether Sagicor's predecessor, Eagle commercial Bank Ltd ("Eagle"), was entitled to freeze foreign currency accounts held in his name and to debit accounts of Mr Seaton and of two appellant companies in his control for a sum of JM$15,254,583.69, of which JM$9,200,000 was debited from the foreign currency accounts in his name. In this judgment, where the context permits, the Board for the sake of simplicity refers to Eagle, its successor entities and Sagicor as "the Bank". The Bank raised legal proceedings seeking a ruling that it had been entitled to take the money from its customers' accounts. There was an extensive and complex trial before Sykes J, who held that the Bank was not entitled to do so. That ruling is not now challenged. In the same proceedings Mr Seaton sought a remedy for the Bank's breach of contract.

2. The issue on this appeal is to identify the remedy to which Mr Seaton is entitled to restore him to the position he would have been in if the Bank had not breached its contracts with him by freezing and debiting the bank accounts.

3. Again, for the sake of simplicity, where the context permits the Board will refer to Mr Seaton and his companies as "the Seaton parties".

1. Factual background

4. The events which have given rise to this dispute occurred approximately 30 years ago and the parties have faced significant difficulties in assembling evidence as to what occurred because Eagle failed as an enterprise and Sagicor as its successor has not to date been able to find all the relevant bank records.

5. In summary, Mr Seaton operated five foreign currency bank accounts, including a certificate of deposit, which he used for the business ventures of the Seaton parties. The dispute between the Seaton parties and the Bank arose in connection with banking arrangements which facilitated payments by the Jamaica Commodity Trading Company Ltd ("JCTC"), a statutory body responsible for the importation of products into Jamaica, under contracts for the purchase of milk powder from a Belgian supplier, Prolacto SA. After the termination of the milk powder contracts in 1991, JCTC demanded that the Bank return to it balances which it claimed it had deposited with the Bank. The Bank settled the claims by paying JCTC

JM$32.5 million and then sought to recover from the Seaton parties the sums it had paid to JCTC. The Bank did so by debiting JM$15,254,583.69 from the Seaton parties' accounts on 16 October 1992 and at a date prior to 6 August 1993 the Bank froze the five foreign currency accounts which Mr Seaton held at the Bank.

6. Mr Seaton's foreign currency accounts (held in his personal name) were in US dollars. The balances on the four accounts as at 7 May 1992 were:

102900024	US$39,608.24
101900579	US$2,831.17
102900172	US$24,550.59
101900561	US$361,892.23

In addition Mr Seaton held a certificate of deposit 301900809 (CD) on which he claims a balance as at 5 December 1993 of US$65,880.22. It is not now in dispute that monies taken from the foreign currency accounts amounted to JM$9,200,000 at the exchange rates prevailing in 1992. Sykes J in his judgment recorded that the Bank accepted that US$369,190.62 had been taken from one foreign currency account and US$9,173.50 from another. It is also not in dispute that Mr Seaton withdrew certain funds from the foreign currency accounts in about 1996 after the Bank unfroze those accounts.

7. The Bank commenced proceedings on 6 August 1993 in which it claimed payment of certain sums and a declaration that it had been entitled to debit the sum of JM$15,254,583.69 from the Seaton parties' accounts. Mr Seaton commenced proceedings against the Bank by writ of summons dated 26 August 1993 in which he claimed (i) repayment of the balances held by the Bank on the foreign currency accounts and accrued interest, and/or (ii) an account of the sums due to him on the foreign currency accounts. The claims of the parties were consolidated by order dated 9 February 1995. By order and judgment dated 10 November 2009 Mangatal J struck out certain paragraphs of Mr Seaton's witness statement.

8. After certain adjournments, a trial of the consolidated claims took place before Sykes J over 15 days on various dates between September 2011 and September 2013. By a judgment dated 17 March 2014 [2014] JMSC Civ 34 Sykes J

dismissed the Bank's claim. Sykes J ordered (i) the Bank to repay JM$15,254,583.69 with interest from 16 October 1992 to date, and (ii) an account to be taken of the dealings between Mr Seaton and the Bank in respect of the foreign currency accounts to determine what sums, if any, were payable to Mr Seaton. In a subsequent judgment dated 24 September 2014 [2014] JMSC Civ 139 Sykes J held that compound interest should be paid on the foreign currency accounts at the rate of 27.3% per year from 1992 until 2014 as an award of simple interest would not compensate Mr Seaton for the loss of the use of the money. The rate of 27.3% appears to have been the average interest rate over the period for borrowing money in Jamaican currency. Sykes J held that the measure of Mr Seaton's loss was the difference between the interest to which he was contractually entitled to receive on the foreign currency accounts and compound interest at the rate of 27.3%. He therefore ordered that the account be carried out on the basis that compound interest at the rate of 27.3% was applicable to the foreign currency accounts.

9. The Bank appealed the orders of Sykes J. In a judgment dated 31 July 2018 the Court of Appeal [2018] JMSC Civ 23 allowed the Bank's appeal and in an order on the same date set aside Sykes J's order for payment. The Court of Appeal substituted an order that the Bank should repay JM$9,200,000 as that was the sum which it had been proved that the Bank had withdrawn from Mr Seaton's foreign currency accounts, and Mr Seaton's claim did not extend to money that had been deducted from accounts held in the names of the other Seaton parties. The Court of Appeal ordered further that simple interest at the rate of 27.3% be paid on that sum, and that simple interest be paid on any sums found due on the accounting exercise at a rate to be agreed between the parties or determined by the court at the conclusion of the accounting.

10. The Seaton parties appeal to the Board with the permission of the Court of Appeal by order dated 26 October 2020. Before the Board, Mr Seaton did not pursue his claim for the monies deducted from accounts in the names of Seaton parties other than himself, that is for the difference between JM$15,254,583.69 and JM$9,200,000.

2. The parties' submissions

11. In a carefully structured submission Mr Richard Salter KC, who represents the Seaton parties, argues that Mr Seaton is entitled to be compensated for the breach of contract by the Bank under four headings. Those headings are: (i) the money which the Bank wrongfully withdrew from the accounts, (ii) compound interest at the contractual rates on the withdrawn money from 16 October 1992 until the date when the Bank repaid the money in 2019, (iii) a claim for the loss of use of the

withdrawn funds, and (iv) a claim for the loss of use of the money in the foreign currency accounts in the period in which they were wrongfully frozen.

12. Mr Salter submits that claims (i) and (ii) involve the reconstitution of the bank accounts as if there had been no breach of contract. He submits that claims (iii) and (iv) should be quantified by awarding compound interest on the relevant sums, which would be ascertained by the accounting exercise. If the Board were to award compound interest on the withdrawn sums at the specified borrowing rate as damages under claim (iii), Mr Salter accepts that Mr Seaton would not receive that sum in addition to the contractual interest under claim (ii) as that would involve double compensation. He submits that the entitlement under claim (iii) is therefore for the differential between the contractual interest due under claim (ii) and the compound interest at the borrowing rate calculated under claim (iii). In support of claims (iii) and (iv) Mr Salter relies on the judgment of the House of Lords in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* ("*Sempra Metals")* [2007] UKHL 34; [2008] 1 AC 561 and more recent first instance judgments which the Board discusses below.

13. Mr B. St Michael Hylton KC for the Bank submits in relation to claims (iii) and (iv) that the authorities do not support the rule for which Mr Salter advocates and that Mr Seaton had not pleaded or proved a sufficient case to entitle him to such interest as damages for breach of contract. In relation to claims (i) and (ii) he acknowledges that, as a general rule, the appropriate remedy for a bank's breach of contract by the withdrawal of funds or the failure to pay contractual interest to its customer on deposited sums is to reconstitute the account so that it complies with the customer's contractual entitlement.

14. Mr Hylton also argues that the parties had settled the claim for the withdrawal of the funds as the Bank had paid Mr Seaton the sum of JM$9,200,000 together with simple interest at the rate of 27.3% after the Court of Appeal handed down its judgment. He sought to produce some of the correspondence which had passed between the parties; but when Mr Salter objected and asserted that Mr Seaton had accepted the sums under reservation of his right of appeal to the Board, Mr Hylton did not press his argument that Mr Seaton was estopped from pursuing his appeal in relation to the withdrawn sums. The Board is satisfied that Mr Hylton was correct so to concede.

3. The relevant law and the Board's determination

15. Before the Board addresses the law, it observes that in the early 1990s and for several years thereafter Jamaica suffered from very high rates of inflation and that its currency suffered a significant depreciation in value in relation to foreign currencies. Thus, as the Seaton parties explain in their written case, JM$15,254,583.69 in October 1992 was the equivalent of £400,000 at the then exchange rate (JM$1 = GB £0.0262) but by February 2022 that sum was the equivalent of £72,000 (at the exchange rate JM$1 = GB £0.0047). It also appears to the Board that between 1992 and 2022 the exchange rate against the US dollar fell from US$ 1 = JM$ 22. 63 to US$1 = JM$ 154, but the Jamaican courts have not made any factual findings in this regard. These figures should therefore be treated simply as indicative of the fall in value of the Jamaican currency during this period rather than precise figures. Against the background of such inflation borrowers in Jamaica were required to pay high rates of interest which are reflected in the average interest rate of 27.3% which the Jamaican courts have applied to the claim by the Seaton parties. The Board also observes that the holding of funds in a foreign currency account for a significant time during the relevant period would have given rise to substantial profits measured in Jamaican dollars on the later conversion of those funds into Jamaican dollars.

16. Mr Seaton's pleaded claim is for breach of contract although, as discussed below, the first two claims are in substance claims in debt. It is trite law that the fundamental principle underlying the award of damages for breach of contract, which is a substitute for performance, is that the plaintiff or claimant is to be placed in the same position it would have been in, so far as can be achieved by a money award, as if the contract had been performed: *Robinson v Harman* (1848) 1 Ex 850, 855 per Parke B. More recent applications of that principle can be found *in Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12; [2007] 2 AC 353, paras 9 per Lord Bingham of Cornhill, 29 per Lord Scott of Foscote, and 57 per Lord Carswell; *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 2 Lloyd's Rep 469, [2015] Bus LR 987, para 76 per Lord Toulson; and *One Step (Support) Ltd* v *Morris-Garner* [2018] UKSC 20; [2019] AC 649, paras 31-35 per Lord Reed. (In this judgment the Board refers to "the plaintiff" in the context of Jamaican law and "the claimant" in the context of English law.)

17. That principle is qualified by legal rules in relation to, for example, remoteness of damage classically stated in *Hadley v Baxendale* (1854) 9 Exch 341 as discussed more recently by the House of Lords in *C Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350 and yet more recently by the Board in *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18; [2021] AC 23. No question of remoteness arises in relation to Mr Seaton's claim for the return of the principal sums withdrawn from his bank accounts and contractual interest thereon, because they are debt claims, but, as discussed below, such questions do arise in relation to his claim for interest as damages.

18. Mr Seaton's first two claims as presented by Mr Salter are for the return of the money which was withdrawn from his accounts and for interest on that money at the contractual rates to which he was entitled for holding the sums in the bank accounts. Mr Seaton was entitled to interest, which would be credited monthly, on the balances held in those accounts. He has a contractual right to the return of his money and compound interest at the contractual rates. In *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110, 127 Aitken LJ gave the classic description of the contract constituted by the relationship between banker and customer which is characterised as a debtor-creditor relationship. So far as relevant he stated:

> "The bank undertakes to receive money and collect bills for its customer's account. The proceeds so received are not held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch …"

19. The Board can give effect to the claim for repayment of the sums due on Mr Seaton's accounts as a claim in debt (i) by requiring the reconstitution of the foreign currency bank accounts as if the money had not been withdrawn from them, (ii) by adding interest to the principal sums which were or should have been in the bank accounts at the contractual rates which were applicable over the relevant period, and (iii) by applying the accrued interest on a monthly basis to the bank accounts as provided for in the contracts between Mr Seaton and the Bank. In Odgers, *Paget's Law of Banking*, 15th ed (2018), the editors (para 22.79) explain that the date from which the period of limitation of a customer's claim for repayment of a wrongful debit begins to run is the date of his or her demand for repayment because "the claim is in reality for repayment of a debt said to be owed in full (ie the amount standing to the customer's credit, without deduction of the disputed debit) as opposed to a claim that the wrongful debit is a breach of contract giving rise to a right in damages." Support for this proposition can be found in the judgment of Staughton J in *Limpgrange Ltd v Bank of Credit and Commerce International SA* [1986] FLR 36, 47 in which he explained the principle:

> "It was pleaded in the points of claim that, in breach of contract and their duty of care, BCCI had wrongly debited the company's accounts with the amounts of the disputed transfers, and that the company had thereby suffered loss

> and damage. Strictly speaking it seems to me that those are unnecessary averments. If debits were made without authority they should be disregarded, and the company can claim as money owed to it by BCCI the credit balance remaining when those debits are left out of account. Or, if there would still be an overdraft, the company would be liable to BCCI only for such amount as the account was overdrawn after deletion of the disputed debits."

20. Similarly, in relation to interest due on an account from which there has been a wrongful withdrawal the plaintiff is entitled to have the bank account reconstituted so as to give him or her the relevant contractual entitlement to interest. In *National Bank of Commerce v National Westminster Bank plc* [1990] 2 Lloyd's Rep 514, which was a case concerning a claim against a bank for reimbursement of unauthorised debits and a defence of limitation by the bank, Webster J analysed the claim as a claim in contract for repayment which required a demand for repayment by the customer as a precondition of the liability of the bank to repay. He followed (at p 517) Staughton J's approach in *Limpgrange Ltd* in holding that unauthorised debits were ineffective and should be disregarded, allowing the customer to claim them as money owed to it, in other words as a claim in debt, the balance remaining when the debits were left out of account. He adopted the same approach in relation to the customer's entitlement to interest at the contractual rate, holding (p 518):

> "The same considerations will apply to the claim for the interest to which, as the plaintiff alleges, he would have been entitled had the debits not been made, if it be the case that, had those debits not been made, by agreement between the parties interest would have accrued from time to time and been brought into the general account between the parties so as to constitute part of the debt owed by the defendant to the plaintiff."

21. The Board is satisfied that this is the correct approach to Mr Seaton's claims (i) and (ii). The task to be performed is to reconstitute the foreign currency bank accounts by adding back as at the date or dates of the withdrawal the sums which the Bank withdrew without authority and by calculating the interest which would have been due on the accounts in accordance with the contracts between the Bank and Mr Seaton if the sums withdrawn by the Bank had remained in those accounts until they were withdrawn by or paid to Mr Seaton. This is in principle straightforward but the Board understands that, as a result of the failure of Eagle, there may be a lack of evidence as to the rates of interest to which Mr Seaton was

entitled in his contracts with the Bank. The Board discusses in paras 41- 42 below how an accounting can address the absence of such evidence to give effect to Mr Seaton's contractual entitlements.

22. Mr Seaton's third and fourth claims for damages for breach of contract, which are a claim for the loss of use of the withdrawn funds and a claim for the loss of use of the money in the foreign currency accounts in the period in which they were wrongfully frozen, are more problematic. He relies for those claims principally on the speeches of the Law Lords in the House of Lords in *Sempra Metals*. That case contains dicta that a plaintiff who has suffered loss through a breach of contract may in certain circumstances claim interest as damages if he or she pleads and proves that the plaintiff has suffered such loss. The case turned on a claim for restitution for unjust enrichment, with which the Board is not concerned in this appeal, but their Lordships disapproved of dicta in the earlier cases of *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429 and *President of India v La Pintada Cia Navigacion SA* [1985] AC 104 that prevented the award of interest as damages for the non-payment in breach of contract of money owing.

23. In *Sempra Metals* Lord Hope of Craighead (para 16) stated:

> "the House … should hold that at common law, subject to the ordinary rules of remoteness which apply to all claims of damages, the loss suffered as a result of the late payment of money is recoverable. This is already the law where the claim is for a debt incurred by a building contractor to raise the necessary capital which has interest charges as one of its constituents. … The reality is that every creditor who is deprived of funds to which he is entitled and which he needs to run his business will have to incur an interest-bearing loan or employ other funds which could themselves have earned interest. It is a short step to say that interest losses will arise 'in the ordinary course of things' in such circumstances."

24. Lord Hope continued (para 17):

> "I also agree with Lord Nicholls [of Birkenhead] that the loss on the late payment of a debt may include an element of compound interest. But the claimant must claim and prove his actual interest losses if he wishes to recover compound

> interest, as is the case where the claim is for a sum which includes interest charges. The claimant would have to show, if his claim is for ancillary interest, that his actual losses were more than he would recover by way of interest under the statute. In practice, especially where the period over which interest is sought is short or whether the claimant does not have to borrow money to replace the debt, simple interest under section 35A of the Supreme Court Act 1981 [now the Senior Courts Act] is likely to be the more convenient remedy."

25. Lord Nicholls addressed this question in paras 94-97 of his speech. He stated:

> "94. … the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.
>
> 95. In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.
>
> 96. But an unparticularised and unproven claim simply for 'damages' will not suffice. General damages are not recoverable. The common law does not *assume* that delay in payment of a debt will of itself cause damage. Loss must be proved. To that extent the decision in the *London*,

> *Chatham and Dover Railway* case [1893] AC 429 remains extant. The decision in that case survives but is confined narrowly to claims of a similar nature to the simple claim for interest advanced in that case. Thus, that decision is to be understood as applying only to claims at common law for unparticularised and unproven interest losses as damages for breach of a contract to pay a debt and, which today comes to the same, claims for payment of a debt with interest. In the absence of agreement the restrictive exception to the general common law rules prevails in those cases.
>
> 97. The common law's unwillingness to presume interest losses where payment is delayed is, I readily accept, unrealistic. This is especially so at times when inflation abounds and prevailing rates of interest are high. To require proof of loss in each case may seem unduly formalistic. The common law can bear this reproach. If a party chooses not to prove his interest losses the remedy provided by statute is to be found in the statutory provisions." (Original emphasis.)

26. The references by Lord Hope to section 35A of the Senior Courts Act 1981 and by Lord Nicholls to "the remedy provided by statute" are to the statutory provision in English law which empowers the court in an action for the recovery of a debt or damages to include in its judgment an award of simple interest on the debt or damages in respect of which judgment is given. The equivalent statutory provision in Jamaica is section 3 of the Law Reform (Miscellaneous Provisions) Act 1955, which expressly does not authorise the giving of interest on interest.

27. Lord Scott of Foscote at para 132 concurred with the conclusion that interest losses caused by a breach of contract or by a tortious wrong were in principle recoverable but subject to proof of loss and the rules relating to remoteness of damages, obligations to mitigate damage and other relevant rules. Lord Mance (para 216) stated:

> "Loss of interest is recoverable as damages for breach of contract, if it was within the reasonable contemplation of the parties, in the sense explained in *C Czarnikow Ltd v Koufos* [1969] 1 AC 350 under either limb when the

> contract was made and is specifically pleaded and proved on that basis."

28. It is not necessary to address in any detail in this appeal, as the Board did in *Attorney General of the Virgin Islands v Global Water Associates Ltd*, the requirements and application of the rules of remoteness of damage. In that case the Board stated (paras 33 and 34):

> "…what was reasonably contemplated depends upon the knowledge which the parties possessed at that time [ie the time when the contract was made] or, in any event, which the party, who later commits the breach, then possessed … [T]he test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach."

The reason why it is not necessary in this case to consider the rules of remoteness of damage which have been developed out of the *Hadley v Baxendale* case is because of the exiguous nature of the pleadings and evidence which Mr Seaton put forward.

29. Mr Seaton's claim in his statement of claim was for the recovery, as a debt or alternatively as damages, of the principal sums withdrawn from his foreign currency accounts together with the contractual rate of interest applicable to those accounts. He averred that from about May 1992 he had demanded payment of sums deposited in his foreign currency accounts and the Bank had failed or refused to pay him the sums demanded or to pay the contractual interest due on the accounts. He pleaded at para 10 of the statement of claim:

> "In failing to pay to the plaintiff on demand the sums deposited with the defendant together with interest thereon at the rate of interest applicable on foreign accounts as set out in clause 4 hereof, the defendant committed a breach of its contract with the plaintiff and the defendant is indebted to the plaintiff for the said sums deposited by the plaintiff with the defendant and for said interest payable thereon."

Mr Seaton claimed payment of the principal sums and contractual interest. He also sought damages and the taking of an account showing (i) the principal sums deposited, (ii) the interest which was credited or should have been credited to those accounts and (iii) the bank charges and other costs which the Bank may be entitled to deduct. Nothing was pleaded about his entitlement to interest as damages for having been kept out of his money.

30. The evidence led at trial in support of a claim for interest as damages for having been kept out of his money was very limited. In the concluding paragraph of his witness statement Mr Seaton stated (para 57): "[t]hat by failing to provide me with the funds requested the bank breached its contractual duty to me and as a result of the said non-payment of those sums I have suffered undue hardship and loss of business." His oral evidence on this matter was similarly exiguous. On cross-examination he stated (transcript 12 March 2012 pm p 15):

> "A. I was just saying that there was evidence that I wrote to the Bank asking them to release my funds.
>
> Q. To you?
>
> A. To me. Because I needed them to do my business, I was prevented from …
>
> Q. You were prevented from accessing your own money?
>
> A. My own money.
>
> Q. This applied to which accounts, foreign currency and local?
>
> A. Both, all of them."

Later in the cross-examination he stated (Transcript 12 March 2012 pm p 31):

> "Q. And you said by the failure of the Plaintiff to pay such sums on the demand that this is, is submitting here, Plaintiff has suffered loss of business and then you demand

> payment of all these sums plus interest as shown in the "A" account stated?
>
> A. Yes, ma'am."

That witness statement and oral evidence was the whole evidence adduced in favour of the claim for interest as damages for breach of contract.

31. It is clear from the judgments of the House of Lords in *Sempra Metals* that to claim compound interest as damages for a breach of contract which has deprived the plaintiff of money it is necessary to plead and prove that the plaintiff has suffered the relevant loss. For example, the plaintiff may plead and prove that it has had to borrow money on which it has incurred interest charges as a borrower or that it has lost the opportunity to invest the promised money or that, in the absence of the money of which it has been wrongfully deprived, the plaintiff has had to use funds that otherwise would have earned such interest: Lord Hope at paras 16 and 17, Lord Nicholls at para 95, Lord Scott at para 132, and Lord Mance at para 216. If these strictures in *Sempra Metals* are good authority, Mr Seaton's third and fourth claims must fail.

32. Faced with this difficulty, Mr Salter relies on the judgment of Males J in *Equitas Ltd v Walsham Bros & Co Ltd* [2013] EWHC 3263 (Comm); [2014] Lloyd's rep IR 398; [2014] PNLR 8. In that case, which concerned a claim for compound interest as damages for breach of contract against a reinsurer which had failed to pay sums due to insurance syndicates causing the claimants to lose the opportunity to earn investment income, Males J, relying on *Sempra Metals*, stated that it was open to the court to infer a loss of income at the rate at which the syndicates could generally have borrowed the money and to award that sum as damages for breach of contract. In para 123 of his judgment the judge summarised his understanding of the law in the light of the *Sempra Metals* decision in five sub-paragraphs:

> "i) First, it is clear that damages are in principle recoverable, subject to ordinary principles of remoteness and mitigation, for breach of an obligation to remit money, where the failure to remit has caused a loss.
>
> ii) Second, unless there is some positive reason to do otherwise, the law will proceed on the basis, at any rate in the commercial context, that the claimant kept out of his money has suffered loss as a result. That represents

commercial reality and everyday experience. Specific evidence to that effect is not required and, if adduced, may well be somewhat hypothetical and thus of little assistance. For example, a business man may well be unable to say precisely what he would have done differently if a particular payment had been made to him when it ought to have been, especially if (as apparently in this case) he was unaware that the money was being withheld. Extensive disclosure, which would no doubt be demanded by the defendant, is unlikely to assist. But that does not mean that no loss has been suffered. In the present case the general evidence of the importance attached in the market to prompt remittance of funds is more than sufficient to justify the conclusion that the syndicates did suffer a loss by being kept out of their money. Accordingly the question in such a case is not whether a loss has been suffered, but how best that loss should be measured.

iii) A solvent claimant who seeks to recover damages which exceed the cost of borrowing to replace the money of which it has been deprived is likely to be met with the defence that the claim is too remote or that it has failed to mitigate by borrowing in order to replace the money lost, in which case its recovery may be limited to that borrowing cost, which will include the need to pay compound interest, that being the only basis on which money can be borrowed commercially. The position may, however, be different if there is good reason why the claimant should not have gone into the market to borrow the missing money, for example if it did not know and should not reasonably have known that the money was missing. …

iv) In other cases I consider that it is not necessary for the claimant to produce specific evidence of what it would have done with the money or what steps if any it took to borrow or otherwise to replace the money of which it was deprived. … Instead, at any rate in commercial cases and unless there is some positive reason to do otherwise, the law will proceed on the basis that the measure of the claimant's loss is the cost of borrowing to replace the money of which the claimant has been deprived regardless of whether that is what the claimant actually did. A

> conventional rate will be used which represents the cost to commercial entities such as the claimant and is not necessarily the rate at which the claimant itself could have borrowed or did in fact borrow. This avoids the need for protracted investigation of the particular claimant's financial affairs. As with other conventional measures … this approach has the advantage of certainty and predictability which is always important in the commercial context, as well as being broadly fair in the great majority of cases and avoiding expensive and often ultimately unproductive litigation.
>
> v) If a conventional borrowing cost is to be adopted in this way, the question whether interest should be simple or compound answers itself. … it is impossible to borrow commercially on simple interest terms. I respectfully agree with Lord Nicholls that the law must recognise and give effect to this reality if it is to achieve a fair and just outcome when assessing financial loss. To conclude that, at least in a typical commercial case, the normal and conventional measure of damages for breach of an obligation to remit funds consists of compound interest at a conventional rate is therefore both principled and predictable, as well as being in accordance with what was actually awarded in *Sempra Metals*."

33. The Board agrees with Males J that, in assessing a claim for financial loss caused by the failure to pay money that is contractually due, the law does not require a detailed examination of a plaintiff's financial affairs and that an extensive process of disclosure by the plaintiff to make or verify that assessment is likely to be unhelpful and is in any event disproportionate. The question of what evidence is required from which a court can infer that a plaintiff has suffered financial loss in the form of the incurring of borrowing costs will depend upon the circumstances of the particular case, as Lord Nicholls recognised in para 95 of his speech in *Sempra Metals* (para 25 above). The Board also does not question the judge's view that in the *Equitas Ltd* case the state of the insurance market at the relevant time and the evidence which was available of the importance in that market of prompt cash flow supported the inference that the claimant had suffered financial loss in the form of incurring borrowing costs to replace the withheld money. But the Board does not agree with Males J's conclusion that the common law has gone so far as to recognise that a claimant or plaintiff kept out of his or her money in a commercial context is as a norm entitled to claim and receive as damages for breach of contract interest on

the withheld sums that is calculated by reference to the cost of borrowing such sums at a conventional rate without evidence from which such a loss can be inferred. As the Board stated in its discussion of *Sempra Metals* in *National Housing Trust v Y P Seaton & Associates Co Ltd* [2015] UKPC 43; [2016] BLR 215, para 31, it is open to a plaintiff to plead and prove an actual loss of interest caused by late payment of a debt: "[s]uch claims are for actual or real damages, not theoretical and non-existent loss."

34. The Board has reached this view for the following four reasons. First, the existence of such a general rule is inconsistent with the speeches of the House of Lords in *Sempra Metals*. See Lord Hope at para 17 of his speech which is quoted in para 24 above and Lord Nicholls at paras 95 and 97 of his speech which is quoted in para 25 above. The Board notes that in *JSC BTA Bank v Ablyazov* [2013] EWHC 867 (Comm), in a judgment handed down several months before the *Equitas Ltd* judgment, Teare J correctly and clearly stated the effect of the *Sempra Metals* judgment on this matter: see paras 12-13 and 18-19 of his judgment. Secondly, while such a norm might promote legal certainty in relation to such claims, there is no principle on which it is based. Thirdly, one cannot now pray in aid, as Males J did, the outcome in *Sempra Metals*, which was to award compound interest as part of a claim for unjust enrichment. The United Kingdom Supreme Court overruled that element of the decision in *Sempra Metals* in its judgment in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2019] AC 929, a ruling that post-dated Males J's judgment by several years. Fourthly, so far as the Board can ascertain, the approach of Males J has not been followed in the practice of the commercial court in England and Wales. It was adopted by Stuart-Smith J in *Peacock v Imagine Property Developments Ltd* [2018] EWHC 1113 (TCC), para 143, as Mr Salter points out. But there is no general practice that follows the approach in *Equitas Ltd*, which is not consistent with principle or with the speeches of the House of Lords in *Sempra Metals*. The Board is therefore satisfied that the case of *Equitas Ltd* does not assist Mr Seaton's claim.

35. Mr Salter also referred the Board to the case of *Earl Terrace Properties Ltd v Nilsson Design Ltd* [2004] EWHC 136 (TCC); [2004] BLR 273. But that case provides no assistance to a claim for the calculation of damages as interest based on the cost of borrowing to replace withheld funds. What HHJ Thornton QC was addressing in that case was a claim in negligence against an architect in which the claimant development company sought damages arising from the delay in completion of the project in the form of financial loss resulting from its funds being held in the project for longer than they otherwise would have been. He held that where the claimant establishes that it has lost the opportunity to *use* the funds for a commercial purpose but cannot readily establish the precise loss it has incurred, that does not defeat its claim.

36. HHJ Thornton QC stated (para 90):

> "If the claimant can establish that he has lost the opportunity to use the funds for a commercial purpose but he cannot establish the precise loss that arose or cannot readily quantify it, the claimant may then quantify the loss by reference to a reasonable rate of return that could have been achieved from the funds. It will of course have to be established what that rate might be. Obvious guidance would be obtained by ascertaining what rate of interest could have been obtained by depositing the funds so as to earn a commercial rate of interest or by lending the money on relatively short-term terms. Such an assessment is permitted because the law allows an approximation of the loss to be made where a claimant can prove that he had been prevented from using funds for a commercial purpose as a result of a defendant's breach but where he cannot reasonably or readily identify the nature or extent of that loss."

As is evident from this passage the judge was addressing a claim for loss caused by an inability to use the withheld funds to earn money from a standardised low-risk investment, for example by depositing it in a bank, and not a claim for damages as interest based on the cost of borrowing. His reasoning, however, is consistent with the guidance in *Sempra Metals* only if the loss is pleaded and evidence is led from which the court can infer that the claimant or plaintiff has, on the balance of probability, suffered a loss of that nature. Otherwise, the points made in para 34 above in relation to the *Equitas Ltd* judgment apply equally to his judgment.

37. In summary, interest, including compound interest, may be awarded as damages for breach of contract. A plaintiff seeking interest as damages where the defendant has withheld money in breach of contract must plead and prove its loss. If a plaintiff pleads that it has incurred loss by having to borrow replacement funds, what it must prove are facts and circumstances from which a court may properly infer on the balance of probability that it has borrowed funds to replace that which has been withheld from it. What evidence will suffice to enable such an inference to be made will depend upon the facts of the particular case. For example, if a business operated an overdraft to provide its working capital, it may be relatively straightforward to infer that the non-payment of money due to it will have increased its borrowing. If the claim for financial loss is the loss of an opportunity to make a profit or earn interest through an investment, it may be possible to infer from the

way in which the plaintiff operates its business that it would have used the withheld funds profitably, for example if it could show that its practice was to deposit and earn interest on surplus cash. But if it claimed as loss an inability to pursue a particularly profitable project, the plaintiff could face a defence that it had failed to mitigate its loss by borrowing, as Males J noted in the third sub-paragraph quoted in para 32 above. Where, as will often be the case, it is not possible to prove that the money would be used on a particularly profitable venture, the commercial return on a deposit of funds or on relatively short-term lending may be an appropriate approximation of the plaintiff's loss, provided it is properly pleaded and proved

38. In this appeal, Mr Seaton has neither pleaded nor proved the form of loss for which he claims damages as a result of the Bank's breach of contract. Merely to say that he has been deprived of funds to use in his business tells the court nothing about whether he had borrowed money and would have used the funds to reduce that borrowing or that he was at the time investing funds in profitable business ventures and would have used the withheld funds to make further profits. There is the further complication that he had substantial funds invested in foreign currency accounts which earned compound interest, albeit at lower interest rates than were applied to accounts denominated in JM dollars, and at a time of high inflation the US dollar was appreciating in value significantly in relation to the JM dollar. He was therefore making a profit in JM dollars from holding funds in US dollar denominated accounts.

39. Mr Seaton's third and fourth claims for loss of use of the withdrawn funds and of the residual sums frozen in the foreign currency accounts therefore fail. He is however entitled under claim (ii) to interest at the contractual rates on those funds for the periods in which they remained or should have remained in those accounts.

4. The appropriate order

40. The Board is satisfied that the simplest means of giving effect to Mr Seaton's contractual entitlements is to set aside the order for payment of JM$9.2 million and to reconstitute the accounts in US dollars from 7 May 1992 in an accounting to be performed by the registrar. The starting sums for the account should be those stated in para 6 of this judgment, which in relation to the four accounts are the sums in those accounts on 7 May 1992. In relation to the certificate of deposit 301900809, the starting sum is that as at 5 December 1993 in accordance with Mr Seaton's claim. The accounting shall continue until the date on which the accounting is completed. The accounting should disregard any debits made to the accounts or the certificate of deposit which the Bank had no contractual right to make. Where Mr Seaton has withdrawn sums from the accounts or the certificate of deposit after they were

unfrozen or where the Bank has made payments to Mr Seaton in respect of sums due on those accounts or the certificate of deposit and those sums were paid in JM dollars, those payments are to be converted into US dollars at the rate of exchange prevailing in Jamaica on the date when Mr Seaton made each withdrawal or received each payment. The parties have agreed the relevant rates of exchange which will be reflected in the order.

41. The accounting should include interest on the sums in the reconstituted accounts at the contractual rates which applied or should have applied on those accounts. In so far as there is no reliable direct evidence as to the rates which the Bank was contractually bound to pay on the sums on those accounts, the parties have agreed that the accounting should deem the contractual interest rate to be the average annual interest rates for foreign currency time deposit accounts (ie the rates for call and up to one month time deposits) as published by the Bank of Jamaica. The interest payable is to be compounded with monthly rests since it appears from the bank statements which were before the Board that that is how interest was credited to sums held in these accounts.

42. It appears to the Board that interest on the 90-day certificate of deposit (301900809) will have to be calculated differently based on evidence of the contractual rate of interest due on the deposit of 5.5% per annum payable quarterly for the years 1993 to 1995 and 6.5% per annum payable quarterly for the period from 12 December 1995 to 12 March 1996. Thereafter interest on the certificate of deposit should be credited at a deemed contractual rate indicated by the Bank of Jamaica for time deposits of three months and less than six months. The interest is to be compounded on a quarterly basis.

43. The Board invites the parties to prepare a draft order on this basis to give guidance to the registrar, identifying (i) the sums withdrawn from the accounts by the Bank without authorisation and the dates of the withdrawal, (ii) the sums paid to Mr Seaton from the accounts and the certificate of deposit whether on Mr Seaton's authorisation or in response to an order of the court (as in the payment of JM$9.2 million in 2019) and the dates on which they were paid, (iii) the rates of interest to be applied to the sums in the accounts over time, (iv) the relevant exchange rates to be applied to the sums in (ii) above.

5. Conclusion

44. The Board will humbly advise His Majesty that the appeal be allowed in part but only to the extent of the reconstitution of the relevant accounts and the sums due under the certificate of deposit, by an accounting as set out above.

45. The Board invites the parties to make submissions in relation to costs within 21 days after their receipt of this advice.