ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 2004

BETWEEN:

BARBADOS MUTUAL LIFE ASSURANCE SOCIETY

Appellant

and

[1] MICHAEL PIGOTT
[2] WEST MALL LIMITED

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal [Ag.]

Appearances:

Dr. Richard Cheltenham, Q.C. with Mr. William Archibald and Mr. Michael Archibald for the Appellant
Mr. Dane Hamilton for the Respondents

2005: May 30; 31;
June 27.

JUDGMENT

[1] BARROW, J.A. [AG.]: The trial Judge found that the Appellant's failure to disburse a loan of $2.25 million to West Mall Limited (the Respondent) was a breach of contract for which the Respondent was entitled to damages that included compensation for losses resulting from the failure of the specific project for which the loan funds were to be used. The appeal is against findings of facts, the evaluation of those facts, the inferences drawn from them, and the interpretation of the loan agreement. The appeal is also against the measure of

damages and the order that damages were to be assessed by the Master on further evidence, by affidavit.

The Factual Outline

[2] Michael Pigott owned 5 acres of land at American Road, St. John's, Antigua. The land was charged to Antigua Commercial Bank (ACB). Three companies that Mr. Pigott controlled, which conducted businesses on the land, were in financial difficulties and he decided to restructure. He decided to convert the user of the land to a shopping mall to be called West Mall and to form a company, to be called West Mall Limited, to operate the mall.

[3] The Appellant, by letter dated 20th April 1999, offered to lend $2.25 million on certain terms and conditions and the Respondent accepted that offer.[1] The letter (the loan letter) specified that loan funds were to be used for two purposes – the initial drawdown of $1.5 million was to clear liabilities charged on the land and the remainder of $750 thousand was to construct and renovate buildings. Mr. Pigott personally committed $450 thousand, to be spent on the construction; these were funds that he expected from an insurance claim. In May 1999, with the knowledge of the Appellant, Mr. Pigott commenced building work on the project.

[4] Shortly after he commenced work, Mr. Pigott requested disbursement of loan funds. This was not forthcoming. On or about 1st July 1999 the Respondent obtained bridging finance in the amount of $450 thousand from Barclays Bank. That financing was obtained on the strength of irrevocable instructions that the Respondent gave in a letter of that date to the Appellant to pay that sum to Barclays "from proceeds of loan approved under your commitment letter dated 20th

[1] In fact the Respondent company was not incorporated until some months after the loan offer was accepted but the judge found, and the challenge to that finding was not pursued on the appeal as argued, that the Respondent adopted the pre-incorporation contract and became substituted as the proper party to the contract. It was in consequence of this finding that Mr. Pigott was dismissed as a party to the claim.

April 1999." The Appellant signed and returned a copy of the letter to indicate its acceptance of those instructions and to confirm that it would "act as directed."

[5] The Judge found as a fact that by the end of July 1999 the Respondent had complied with all conditions of the agreement so as to be entitled to performance by the Appellant. It is a finding that the Appellant vigorously disputed.

[6] The Mall did not open on the scheduled date, 31st August 1999. The continued efforts of the Respondent to have the loan disbursed did not succeed. Events occurred that increased the costs of the project. The Respondent applied for additional funding and this was rejected. The Respondent ceased work on the mall in October 1999.

[7] In two letters to the Respondent, dated 21st December 1999 and 19th January 2000, the Appellant adverted to the change of circumstances, in that the project cost had increased, and required to be satisfied that the Respondent had sufficient funds to complete. The Appellant referred to clause M in the loan letter that gave it the right to withdraw its offer or delay disbursement. It requested information on the funding of a shortfall in the loan funds and a valuation. The Respondent provided both. The Appellant did not respond to any of Mr. Pigott's representations. ACB grew tired of waiting and exercised its power of sale as chargee. A forced sale proved disastrous for Mr. Pigott's businesses. Barclays demanded repayment of the bridging loan and obtained a judgment against the Respondent. In May 2000 the (claimants) Respondents filed the claim from which the present appeal now lies.

Borrower's obligation to provide security

[8] In defending against the Respondent's claim the Appellant contended that it had no obligation to disburse loan funds because the Respondent did not and could not satisfy the condition that they were to provide unencumbered land as security for the loan. The Appellant argued that it was only after the land was discharged

from its charge in favour of ACB and transferred to the Respondent, that the Appellant could become obliged to disburse loan funds. As the land was never discharged the condition was never satisfied, the Appellant argued.

[9] The Judge observed that as a matter of standard legal practice what takes place in situations such as this is for contemporaneous transactions to take place with all necessary parties represented at a physical exchange of documents. The usual scenario, as I understood what the Judge described, would have been for ACB to deliver a discharge of charge against payment of the Appellant's cheque for $1.5 million. At the same time Mr. Pigott, the title-holder of the land, would have delivered a transfer of land in favour of the Respondent, to the Respondent. Also at the same time the Respondent would have delivered that transfer as well as a charge created by the Respondent in favour of the Appellant, to the Appellant. In the experience of the members of this Court that sort of arrangement happens routinely. The Judge described as circuitous and disingenuous the Appellant's argument that the Respondent needed, before it was able to qualify for disbursement from the Appellant of the loan funds, to first pay to ACB the very sum that the Respondent was borrowing from the Appellant to pay to ACB.

[10] On appeal Dr. Cheltenham repeated and expanded on this argument at length. I found no merit in the arguments advanced. I do not agree that the Judge found that the Appellant was obliged to advance money before the security was in place; that is not what she said. The Judge said that there would be nothing "naïve and unbusinesslike"[2] in the Appellant disbursing funds before the security was in place. She said this in the context of the scenario of the exchange of documents just described above. I understood her to mean 'before the security was registered', when she referred to 'before the security was in place. I confess to sharing the view of the Judge.

[2] These were counsel's submission, we were told.

Sufficiency of loan funds to discharge charge

[11] On another limb of this argument, I find that it was not in issue, as Counsel sought to make it on appeal, whether the money to be advanced was sufficient to obtain the release of the charge on the land held by ACB. The premise of the agreement that the first drawdown should be used to repay the moneys charged on the land was that it was sufficient for the purpose. As a matter of business sense one cannot conceive that the Appellant would ever have agreed to lend money that was insufficient to discharge the encumbrance on the land and so leave the Appellant unable to get that land as security. This is clearly borne out by the letter of offer from the Appellant that specified the purposes and amounts of the disbursements of the loan. The Appellant specified that there would be a first advance of $1.5 million 'or the stipulated amount due to clear the liabilities at [ACB] against the property.' There can be no mistaking the import of that wording: the Appellant was quite specific that it would disburse whatever amount it took to obtain the release from ACB. The sufficiency of the earmarked funds was not an issue and can provide no justification for the failure of the Appellant to disburse loan funds.

Request for a second charge

[12] Dr. Cheltenham also argued that the request by ACB to the Appellant for the latter's consent to ACB taking a second charge on the property was justification for the Appellant's refusal to disburse loan funds. There is no evidence that this ever became a sticking point. The evidence is that in its letter dated December 21, 1999 the Appellant stated that what was delaying disbursement was information from the Respondent stating how it proposed to finance the completion of the building. The absence of any reference to a second mortgage indicates that this was not the reason for the Appellant's failure to disburse. The absence from that letter of any reference to the acreage of the land also meets the further criticism

that the Judge was wrong to find that the security agreed by the parties applied to 1.2 acres and not 5 acres. The acreage that was being offered in the proposed charge document was a non-issue.

Allegation that borrower lacked funds to complete

[13] Another main contention of the Appellant was that the Judge ought to have found that the Respondent lacked funding to complete the building and therefore did not satisfy a condition that needed to be satisfied before disbursement. Counsel argued that the changed circumstances of Mr. Pigott and the Respondent meant that they were unable to complete construction with the amount of $750 thousand that had been earmarked for construction. In particular, Counsel pointed to the loss to the Respondent of $450 thousand that Mr. Pigott was to have received as insurance proceeds but which ACB later applied in reduction of what was owed to ACB.

[14] It is an argument that was made to the Judge and with which she dealt fully. I can find no basis for differing from her conclusion on the evidence. In short, the Judge found that the Respondent responded to the concern about sufficiency of funds to complete that had been raised by the Appellant. There was no indication from the Appellant that the responses were inadequate. Mr. Pigott got Antigua Barbuda Investment Bank Ltd to write a letter to the Appellant, dated January 29, 2000, saying that Mr. Pigott was "financially capable of meeting the projected shortfall" that the bank had been told was "in the low five-figure range". Dr. Cheltenham scoffed at the worth of such a letter. I do not share his derision. In my view, a bank would not write such a letter, intended to be relied on by a lender, unless the bank knew for a fact that such financial capacity existed. In any event, as the Judge found, the Appellant simply did not react to receipt of that assurance. I can see no justification for Counsel to now advance it as being the case that the concern was not met.

Interpretation of the agreement

[15] Dr. Cheltenham also criticised the interpretation by the Judge of clause M of the loan letter. He stated that the clause was not ambiguous and the Judge was wrong to rely on the *contra proferentem* rule of construction that says that when there is an ambiguity in the meaning of a document the Court should adopt the meaning that goes against the party who prepared the document. I do not think there is any dispute about the meaning of the clause; the issue was as to its application. Clause M provided that the Appellant could withdraw its offer of a loan if any change in the borrower's circumstances took place which the Appellant, in its sole discretion, determined to be unacceptable. The clause also provided that the Appellant could delay disbursement pending satisfactory completion of all the terms and conditions contained in the letter.

[16] It was accepted by Dr. Cheltenham that this clause did not permit the Appellant to act unreasonably and in bad faith; it could not as a matter of sheer caprice withdraw from its obligation. As the Judge observed it was a misnomer to refer, after the borrower had accepted the terms of the loan letter, to what was therefore an agreement, as an offer. In the result, the Judge found that no unacceptable changes had taken place in the borrower's circumstances.

[17] It may be fair to deduce that this finding of the Judge was based, to some extent if not largely, upon the fact that the Appellant never invoked the clause. The Appellant never gave as its reason, for not disbursing the loan funds, that it had determined that the circumstances of the borrower had changed unacceptably. The very terms of the Appellant's letter of January 19, 2000, in which it adverted to clause M as the basis for its delay in disbursing funds, which it said was due to its concern about the Respondent having sufficient funds to place along with the mortgage funds to complete the building, confirm that the Appellant had not determined that the borrower's circumstances had unacceptably changed, so as to

cause it to withdraw from its agreement to lend the money. Instead, the Appellant was requiring proof of ability to complete. As earlier discussed, Mr. Pigott provided such proof and there was no response to say that what he provided was insufficient.

Repudiation of the lender

[18] It remains unclear why the Appellant failed to communicate a decision whether it would proceed or not proceed with the loan. Up to the date of its last communication, the letter of January 19, 2000, it was still conveying the position that it would proceed with the loan if Mr. Pigott was able to show that he could fund the cost of building that was not covered by the loan funds. To simply do nothing after that, as the evidence indicated, was extraordinary. The Judge described the conduct of the Appellant as deplorable; she held that it amounted to a repudiation of its obligation. Dr. Cheltenham argued that this finding was perverse. With respect, I must disagree. There was ample material before the Judge to enable her to so find. It is not the issue whether or not this Court agrees with that finding; the issue is whether she could fairly have come to that conclusion on the evidence. I am clear that she could.

Measure of damages

[19] Two aspects of the Judge's decision in relation to damages were challenged; the measure of damages and the direction that damages be assessed on affidavit evidence before a Master. As to the first, the Judge held that the Appellant knew the specific purpose for which the loan funds were required and so the Respondent was entitled to recover under both limbs of the rule in Hadley v Baxendale.[3] According to this rule, a defendant is liable for the usual loss resulting from a breach of the promise in question, but he may also be liable for unusual losses when he possesses knowledge of special circumstances that

[3] (1984) 9 Exch. 341

would make a breach liable to cause more loss. The Judge rejected the argument of Dr. Cheltenham that the Respondent was limited to recovering the normal measure of damages of a contract to lend money, which was the increased cost, if any, of obtaining the loan from another lender.

[20] Dr. Cheltenham renewed the argument on appeal. He argued that as there had been no claim for a higher cost of borrowing money elsewhere the Judge ought to have awarded nominal damages to the Respondent. He also argued that the losses claimed, such as lost revenue for the period September 1999 to February 2000, totalling just over $1 million, were not in the contemplation of the parties. The Judge made no finding as to what was in the contemplation of the parties. Instead, she referred the matter to the Master.

[21] There was no dispute as to the law governing the measure of damages which is clearly set out in a number of authorities relied on by Counsel on both sides including South African Territories v Wallington[4]; Wadsworth v Lydell[5]; Manchester and Oldham Bank Limited v Cook[6] and Astor Properties v Tunbridge Wells Equitable Friendly Society[7]. Those cases show that the normal measure of damages for breach of contract to lend money is the higher cost of borrowing from another lender but that there are exceptions to that measure where the lender had it in his contemplation that if he defaulted on his obligation certain losses would follow. The issue between the parties was what was in the contemplation of the lender.

[22] In his reply Dr. Cheltenham extended his argument to introduce the issue of causation. He argued that any loss that the Respondent suffered arose from its inability to borrow from another lender because it was (or its principal and related companies were) in such a terrible financial state that no one would lend. The

[4] (1898) AC 309
[5] (1981) 2 All ER 401
[6] (1884) 49 LT 674
[7] (1936) 1 All ER 531

cause of any such loss, on this submission, was not the Appellant's failure to lend but the Respondent's inability to obtain a loan elsewhere.

Assessment referred to the Master

[23] The decision of the trial Judge to direct that damages were to be assessed by the Master left these issues undetermined. That is the second aspect of the Judge's decision on damages that Dr. Cheltenham challenged. The reason why the Judge made that order for assessment was because she found a need for greater assistance from Counsel on the matter of damages. When a trial Judge considers that more input is needed from Counsel it is a prudent course not to proceed without such assistance. However, in my view of the circumstances of this case, the appropriate course would have been to arrange another sitting before the Judge for her to consider the further submissions and addresses of Counsel. Because there had not been, at any stage before, any order or indication that damages would have been tried separately, both sides were obliged to present all their evidence and their entire case for a complete trial. The response to the Court's inquiry from Mr. Dane Hamilton, Counsel for the Respondent, indicated that the parties had so proceeded. Therefore, on the further sitting it would not have been appropriate to receive further evidence.

[24] In the circumstances I would dismiss the appeal and affirm that judgment be entered for the Respondent for damages to be assessed and prescribed costs, based on the amount of the damages that are awarded. However I would remit the claim to the High Court for the trial Judge, who heard the evidence and made the findings of fact, to adjudicate on the damages to be awarded after considering the further submissions and addresses of Counsel.

[25] The Judge had awarded the costs of a counterclaim, which was discontinued after the third day of trial, to the Respondent. The Judge referred to the counterclaim as being for $450,000.00 and awarded 50% of the prescribed costs of the

counterclaim. The Appellant argued that the counterclaim was clearly a mistake[8] and that the Respondent at all times knew that it was not in any danger of being made liable on the counterclaim. The Appellant also argued that minimal effort went into the counterclaim and that an award of $500.00 would be appropriate. There is no need to set out the examination that I have given to these assertions because the costs regime of the Civil Procedure Rules 2000 is quite clear that a party who does not discontinue a counterclaim until trial is liable for 100% of the value of the counterclaim.[9] It was for the Appellant to have acted appropriately; it should not look to this Court to subvert clear rules to compensate for the Appellant's mistake. It should be a matter of some relief to the Appellant that the Respondent did not cross-appeal the order for reduced costs.

[26] At the conclusion of the hearing Counsel informed the Court that they had agreed that the successful party on the appeal should recover costs in the amount of $60,000.00. I would therefore award that amount as costs to the Respondent.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

[8] The pleadings were not settled by Dr. Cheltenham, who discontinued the counterclaim when he came in as leading counsel after the third day of trial.
[9] See Parts 37.6(1), 37.7(1) and 65, Appendix C(5)