

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2007/ 0197

BETWEEN:

**FIRST CARIBBEAN INTERNATIONAL BANK
(BARBADOS) LIMITED
FORMERLY CIBC CARIBBEAN LIMITED**

Claimant

And

- 1. EUGENE NELSON**
- 2. FERLYN NELSON**
- 3. ORILDA NELSON**

Defendants

Appearances: Renée St. Rose for the Claimant
Lydia Faisal and Carol Gideon-Clovis for the Defendants

2010: October 20th
2011: July 14th

JUDGMENT

- [1] **BELLE, J.:** The facts of this case are that on the 8th day of May 1998 the Claimants entered into an agreement for a loan with the Defendants in the total sum of \$258,000.00. The agreement also included provision for a second loan in the sum of \$12,000.00. The agreement consisted partly of a facility letter of even date prepared by the bank and sent to the Defendants for approval and signature if they were in agreement with its terms.
- [2] The money was borrowed for the purpose of refinancing of debts which the Defendants had incurred with other banks including, Barclays Bank, 1st National Bank, and NRDF and Saint Lucia Cooperative Bank. The loan from the latter bank representing the bulk

of the sum being refinanced was used for the total renovation of the Defendants' family home and business place comprising the property at Black Mallet in Castries.

[3] The property at Black Mallet was destroyed in a landslip that occurred in or about the month of October 1999. The property had been valued at \$564,000.00 at the time of the landslip. This was more than twice the value of the loan.

[4] The Claimant claims that it made repeated demands to settle the payments. The Defendants have failed to settle. The Claimant therefore instituted proceedings to recover the sums borrowed pursuant to the two loans.

[5] The Defendants say that they were discharged from paying the said debt by virtue of among other things, the fortuitous and total destruction of the property at Black Mallet. They put the Claimant to proof of the existence of the alleged loans.

[6] Indeed the Defendants aver that the Claimant attempted to cause the Defendants to sign a promissory note after the destruction of Block 08499 Parcel 933 in 1999. But the Defendants refused on the basis that this was unconscionable in light of the legal discharge afforded them by virtue of the nature and extent of their loss.

[7] The Defendant Mr Eugene Nelson stated in his evidence in chief that the stress associated with the loss of the property and the relocation of all them (the family) into a totally new environment was great. He said that he was totally affected by the Black Mallet disaster. He lost his business place and it was difficult to adjust to starting over. The Defendants were left in financial difficulty.

[8] At the end of his evidence in chief Mr Nelson stated:

"We had not paid the loan for more than 6 years when the instant claim SLUHCV2007/0197 was filed against us. We believe that it is unfair for the Bank to expect us to pay a loan in circumstances that prevailed against. As such we have surrendered to the Bank, the properties by which the Bank's loan was secured."

The Facility Letter

- [9] The main bone of contention between the parties is that the Claimant insists that the claim is a personal action based on the contract formed by the offer letter of 8th May 1998. The Defendant argues that the action cannot be based on the letter of 8th May 1998 and cannot be personal.
- [10] Claimant's counsel argues that the loan agreement took the form of a facility letter issued by the Claimant to the Defendants. In part they base this submission on the Eugene Nelso's admission under cross examination that he had negotiated the loan on the behalf of the Defendants and they had signed the Loan Agreement accepting the terms and conditions of the loan.
- [11] The argument continues that the facility letter sets out the terms of the loans and states that the "Mortgage financing has been approved under the following terms and conditions." The letter goes on to state the amount of the two loans , the term of each loan, the rate of interest to be applied to the loan and the terms of repayment. The repayment for the larger loan was \$2,840.80 monthly, amortized over a 20 year period and the second loan of \$12,000.00 was to be amortized over a 3 year period with payments of \$401.44. The payments were to commence no later than 30 June 1998 with interest only to be serviced in the interim.
- [12] The facility letter goes on to set out the Security for the loan the form of the hypothecary obligation, life insurance and comprehensive insurance for the full replacement of the structure. The loan fee is also set out. Further terms and conditions are set out in the facility letter. Indeed the facility letter contained terms to the effect that:

" (1) Drawdown may not be allowed until written confirmation is in place from the Bank's attorneys confirming documents have been in accordance with mortgage policy and it is safe to advance funds.

(2) The Hypothecary Obligation is to be registered in the names of Eugene Nelson and Ferlyn Nelson

(3) A recent surveyor's identification report, satisfactory to us will be furnished certifying boundaries and dimensions of the property , as well as the location of the building and any improvements thereon, comply with all local building , health inspection and other requirements.

(4) All costs in connection with the processing of the loan including appraisal fees , mortgage registration fees, legal fees , inspection fees, stamp duty and other disbursements of a like nature will be borne by you.

(5) A current property tax receipt is to be provided to us on an annual basis evidencing taxes are up to date.

(6) CIBC Caribbean Limited will have the right at any time to inspect the property including the building thereon held as security for the mortgage.

(7) This commitment will be deemed to expire if not accepted by, May 15, 1998 and if accepted will lapse if documentation is not completed and funds drawn down by June 30, 1998."

[13] It should be noted that the Letter ended with the following statement: *"If the foregoing terms and conditions are acceptable, kindly sign and return the attached copy of this letter along with your commitment fee of \$2,700.00 by 15th June 1998, as a formal indication of your agreement"*

[14] Each party signed the facility letter on 8th May 1998. It must be noted that the First Defendant willingly conceded that he and the other Defendants signed this Loan Agreement. He further stated under cross-examination that he signed because he accepted the terms. The First Defendant in his evidence went on to state that he received the sums referred to under the facility letter from the Claimant and he used the sums for the purposes of the loan. The purpose he identified was to use \$258,000.00 to repay existing debts to Barclays, 1st National Bank, a credit Union and NRDF. The First Defendant thought the \$12,000.00 was for an overdraft.

[15] The legal significance of the facility letter is a central bone of contention in this case with the Defendants' Counsel submitting that the offer letter standing on its own could not be good security for the loan and on that basis questioning whether it was capable of creating personal liability for the debts. On the other hand Counsel for the Claimant argued that the facility letter contained the terms and conditions upon which the Claimant Bank was prepared to make the loans available to the First Defendant. It specified the following:

- a. the security required;
- b. the expiry date of the loan offer if not accepted and funds disbursed by a given date;
- c. the content of the Hypothecary Obligation;
- d. circumstances in which the loan offer could be withdrawn.

[16] The Defendants' counsel identifies the following issues which arise on the facts with which I think the Claimant's counsel will agree:

1. Whether the offer letter (standing on its own) and upon which the Claimant has sued the Defendants is capable of creating personal liability for the debts concerned?

2. Whether the instant claim is a hypothecary or personal action and if either, what are the implications?

3. Whether the Defendants are discharged from their obligations under the hypothecary obligation?

To those I add the following:

4. Did the Bank have to accept the surrender of the Black Mallet and the Defendants' other property in settlement of the debt?

5. What is the law applicable in this case, governing the formation and terms of the contract?

6. Does the Claimant's claim for liquidated sums have to be accurate in every respect in order to be accepted as proved?

The Defendants Counsel's submissions

[17] Counsel contended that the facility letter is not a negotiable instrument and is incapable of being sued upon for the purpose of recovering the loans concerned.

[18] Counsel quoted from a section of Chitty on Contracts – Thirtieth Edition-Volume. 2 page 274 para. 34-001. This passage speaks to the effect of negotiable instruments.

Part of the quotation reads as follows:

"..... First in a simple contract, the parties entitled to enforce it are either parties to the contract when it is made, or in certain cases assignees. In the case of a negotiable instrument any holder becomes a party."

[19] Based on this authority counsel concluded that the promissory note is the specie of negotiable instrument that would have applied to the loan transactions in this case. She referred to the Commercial Code Ch. 244 Vol . V of the Revised Laws of Saint Lucia – part 3 page 241-Article 406.

"A promissory note is unconditional promise in writing made by one person to another , signed by the maker , engaging to pay on demand , or at a fixed or determinable future time, a sum certain in money to, or to the order if a specified person or to a bearer."

- [20] A similar description of the promissory note is offered from **Bullen & Leake & Jacobs-Precedents of Pleadings**- Sixteenth Edition-Vol. 1 page 227 para. 15.01.
- [21] Counsel referred to further extracts from **Chitty on Contract Thirtieth Edition** to support the conclusion that the facility letter with its several conditions cannot be said to be unconditional, and as such it does not comply with the definition of a negotiable instrument and could not be used in place of a negotiable instrument. In addition Ms Adriana Thomas in her evidence stated that the Claimant Bank did not use promissory notes as security. This led to the further conclusion that the only security that was accepted for the loan was the Hypothecary Obligation.
- [22] It was counsel's view that based on the terms of the Hypothecary Obligation and the law relating to such instruments no personal liability has been incurred by the defendants for the loans. It was also noted that the \$12,000.00 capital loan was an unsecured loan.
- [23] The Defendants' counsel's submissions were, in part, based on the Civil Code –Cap 4.01 –Revised Laws of Saint Lucia **Article 1908** which states:
- “ Hypothec is a real right , and is a charge upon immovables specially pledged by it for the fulfilment an obligation, in virtue of which charge the creditor may cause the immovables to be sold in the hands of the whomsoever they may be, and has a preference upon proceeds as fixed by the Code.”*
- Article 1942.**
“in order to secure his rights, the creditor has two remedies, namely, the hypothecary action and the action to interrupt prescription...”
- Article 1943**
“The hypothecary action may be brought by creditors whose claims are liquidated and exigible, against all persons holding as proprietors the whole or any portion of the immovable hypothecated for their claim.
- Article 1946**
“The object of the hypothecary action is to have the holder of the immovable condemned to surrender it, in order that it may be judicially sold, unless he prefers to pay the debt in principal and interest as secured by registration, together with costs.”
- Article 1960**

"The holder, against whom the hypothecary action is brought, may surrender the immovable before judgment, if he do not he may be condemned to surrender it within the usual delay or the period fixed by the court, and in default thereof to pay the plaintiff the full amount of his claim."

"The immovable must be surrendered in the condition in which it then is, the surrender being subject to the provisions contained in Articles 1939 and 1940."

- [24] Based on these provisions counsel for the Defendants opined that **Article 1942** limits the remedies of the Claimant to a hypothecary action or action to interrupt prescription only. According to counsel pursuant to **Article 1946** the choice is left with the debtor to surrender it to the creditor so that it may be sold unless the debtor prefers to pay the debt in full. The Civil Code in her view does not give the hypothecary creditor the option of pursuing the debtor personally. As such it is the duty of such a creditor to execute a negotiable instrument such as a promissory note in order to create and secure personal liability in addition to the two remedies available under the civil code. If the creditor fails to do so, he is restricted to the two remedies.
- [25] Counsel further contended that since the claimant specifically excluded all claims for the surrender of the hypothecated property the Claimant relies on a purely personal claim, which in counsel's view cannot stand because of the failure to rely on a negotiable instrument. The Claim is not a hypothecary action and remedies allowable on such an action cannot be granted to the claimant.
- [26] As far as the action to interrupt prescription is concerned counsel argued that the result of this action would determine whether or not prescription is in fact interrupted under Article 2085, as dismissal of a claim will preclude interruption. Counsel relied on the decision of the ECSC Court of Appeal in **David Sweetnam et al and The Government of Saint Lucia et al**, (No. 42 of 2005), per Gordon J.A.
- [27] Counsel concluded that based on these submissions the claim is in the form of a personal action. But for the purpose of completeness counsel addressed the possibility of a hypothecary action.

- [28] Counsel argued that even if the hypothecary claim were possible, since the Parcel 0848E 933 has been totally destroyed by virtue of the landslip of October 1999 the property has ceased to be an object of commerce.
- [29] Counsel argued as well that the Claimant's claim that despite the land slip, that the property is not totally destroyed, but the defendants are of the view that if this were the case then the Claimants would have to accept the property as it were devoid of any dwelling and depreciated in value and utility.
- [30] The argument continued that in order to obviate the need for a trial, and further to the Claimant's insistence that Parcel 0848E 933 was still in existence, the Defendants chose to voluntarily surrender to the claimants the hypothecated properties as they are entitled to do. However the Claimant totally ignored and rejected the Defendants' efforts by opting to proceed with the trial.
- [31] Counsel argued further that the fact that the property has ceased to be an object of commerce there are ramifications when the nature of hypothecated property changes or when it ceases to be an object of commerce pursuant to **Article 1966** of the Civil Code the privilege and the hypothec both become extinct and upon extinction of the obligations and privileges all, parties are liberated from further performance under the contract.
- [32] Finally counsel attacked the evidence of the quantum owed pursuant to the loan. In so doing she contended that there were significant discrepancies such as the fact that Ms. Thomas was not sure why the sum of \$1,437.00 was added to the loan on the 31st of October 2002. Secondly the sum of \$1,742 was charged to the loan account on the 23rd of January 2001, for legal fees to commence legal proceedings even though such proceedings were not filed until March 2007, five years later. Counsel was of the view that these cast doubt on the claimant's claim. Counsel also questioned why the loan portfolio was not audited. The answer given was that the Bank's auditors did not prepare statements for the court. But the Bank did have auditors.
- [33] Counsel was of the view that since there was doubt about sums added to the loan the court could not be certain that the sum claimed was verified. Consequently since there

is doubt about the quantum the claimant should be held to have failed to adequately discharge the burden of proof on quantum.

- [34] The Defendants therefore ask for the dismissal of the Claimant's claim with prescribed costs awarded to the defendants pursuant to Part 65 of the Civil Procedure Rules 2000.

The Claimant's submissions

- [35] Counsel for the Claimant argued that there was a contract formed between the parties. The terms of the loans had been set out and the Defendants signed and accepted the terms of the contract. Further the First Defendant received and used the proceeds of the loan which signified further acceptance of the terms of the loan and created a binding contract between the parties.

- [36] This argument counsel contended was based on the statutory authority of the Civil Code Cap 4.01 of the Revised Laws of Saint Lucia, 2008 which governs obligations and contracts.

- [37] **Article 1** counsel said, defined a contract as "an agreement, fulfilment of which may be enforced through the intervention of a court of justice. The conditions essential to a contract are contained in **Article 918**, and subsequent articles"

- [38] **Article 917** states that "*Obligations arise from contracts.*"

- [39] **Article 918** states "*A contract to be valid must have a subject and a lawful cause or consideration. The parties to it must be legally capable and their consent legally given.*"

- [40] Counsel argued that **Articles 925 to 944** set out what constitutes the nullity of a contract and none of these stated events are applicable to the case before the court.

- [41] Finally **Article 956** states "*the obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.*"

- [42] Counsel submitted that the Book Ninth of the Civil Code also governs loans and loans upon interest. In that regard **Article 1662** provides for two kinds of loans. Counsel further submitted that consequently the loan from the Claimant to the Defendant falls under the category Loan for Consumption. **Article 1662 (2)** states, *“the loan of things which are consumed by the use made of them, [is] called loan for consumption.”*
- [43] Counsel continued that **Article 1677** provides that *“Loan for consumption is a contract by which lender gives the borrower a certain quantity of things which are consumed by the use made of them, under the obligation by the latter to return a like quantity of things of the same kind and quality.”*
- [44] **Article 1679** states *“if the loan be in money the obligation which results from it is the repayment of the same numerical amount in money, current at the time of payment, whether the money has increased or diminished in value subsequently to the loan.”*
- [45] And **Article 1685** provides that the interest upon loans is either legal or convention.” *The rate of conventional interest may be fixed by agreement between the parties.”*
- [46] Based on these articles of the Civil Code counsel for the Claimant argued that the facility letter constituted a contract between the Claimant and the Defendants for a loan and the obligation that the Defendants repay the debt. The nub of the matter was that the Defendants were granted a loan for consumption in the form of money in the sums of \$258,000.00 and \$12,000.00 and agreed to repay the sums loaned, to return like quantity on the terms set out in the loan agreement with interest and by amortized monthly instalments over the term of the loan.
- [47] As earlier indicated it was evident that the Defendants agreed to and accepted the terms of the loan agreement and were bound to obey the loan in accordance with the terms set out. Indeed the First Defendant had conceded under cross-examination that he had not repaid the loan and that he still owed the Claimant the money.
- [48] On the issue of the Hypothecary Obligation, counsel for the Claimant argues that the hypothec creates all of the ordinary obligations and is not extinct by virtue of the immovable property subject to the hypothec ceasing to be an object of commerce. This

is not so because the immovable property has not ceased to exist and in any event there are two properties subject to the hypothec. **Article 1966 (1)** of the Civil Code provides that privileges and hypothecs become extinct:

“By the total loss of the property subject to the privilege or hypothec; by the changing of its nature; and, except in certain cases, by its ceasing to be an object of commerce.”

[49] Counsel relied on the authority of **The Law of Real Property – Quebec** by William Marler at page 466 Cap XIV: Extinction of Privileges and Hypothecs which the author states:

“Privileges and hypothecs are accessory rights and subsist no longer than the debt they secure. Consequently, if the debt is extinguished by payment, novation, release, compensation, prescription or otherwise, the privilege or hypothec attached to it is likewise extinguished, C.C. 2081-5”

[50] At page 467 of his book William Marler gives examples and sets out what constitutes “the total loss of the property subject to the privilege or hypothec”, “the change in the nature of the thing” and “the immovable ceasing to be an object of commerce.” The author states:

*“**The total loss of the thing subject to the privilege or hypothec:** A privilege or hypothec is a real right in the immovable subject to it. If the immovable ceases to exist the privilege or hypothec upon it must also cease to exist. C.C.2081-1, as when the sea has permanently invaded the land subject to it ; but if any part of the immovable remains the privilege or hypothec is not extinguished as to such remainder.”*

[51] Encouraged by this extract counsel argued that the property continues to exist and can be seen. Indeed the first defendant stated under cross examination that the building was demolished on the Black Mallet property and the land is still there and still exists. The land is covered by bush and trees but is still there.

[52] Counsel argued that the land has not ceased to exist but is no longer suitable for buildings, which should be demolished. No evidence led by the Defendants establishes that the land has disappeared nor was totally destroyed.

[53] As far as “the change in the nature of the thing” was concerned counsel again relied on William Marler who at page 467 of his book states:

"The hypothec upon an immovable extends to the immovables by destination attached to it. In the case of a factory, the hypothec upon it will extend to the machinery and utensils installed in it which have become immovable by destination. If the machinery and utensils are sold and removed from the building they lose their immovable character and the hypothec which affect them while they were part of the immovable, will be extinguished because of the change of their nature. While the hypothecary creditor may prevent such removal, and may exercise his recourse on the price if unpaid, supra Nos. 850,938, he will have only recourse in damages once the price has been paid and the things have passed into the hands of a purchaser in good faith."

[54] Based on this opinion counsel argued that there has been no change in the nature of the property to constitute an extinction of the Hypothec. The alleged protected area status does not establish that the Black Mallet property has changed in nature. Additionally there is no evidence of the Black Mallet property being declared a protected area.

[55] On the expression "ceasing to be an object of commerce," Counsel again relies on William Marler who at page 982 of his book states:

"The privilege or hypothec also becomes extinguished if the immovable subject to it ceases to be an object of commerce, as when a road, left open to the public, becomes a public road through the lapse of time."

[56] Counsel relying on this passage argues that the situation with the Black Mallet property does not equate with that referred to in the passage from William Marler's work. The Black Mallet property has not ceased to be an object of commerce and it cannot cease to do so solely on the basis that the Defendants are unable to obtain a loan or undertake a business transaction. Counsel argued that there is no provision in the hypothec making this applicable to its legal viability. The ability to use for a commercial transaction is not what was contemplated under **Article 1966 (1)** of the Civil Code.

[57] It is noteworthy that the Caribbean Institute of Forensic Investigations & Claims Adjusters Ltd. , the institution recruited by Mr. Eugene Nelson to investigate the structural damage to the dwelling house at Black Mallet stated in their report after the investigation, under the rubric "Supposed Cause of The Damage Observed" :

"From our observations it is evident that the land mass in this area is slipping downhill. The movement is progressive and up to the time of our last visit it appeared to have been moving at the rate of 1 inch per day."

[58] Under the heading "Repair Recommendations" the report states:

"While structural wall and column cracks are usually repairable, although extremely difficult in most cases, in this case we are of the opinion that repairs are impossible. The reason being that the damage observed are so extensive that the fundamental structural integrity of the buildings have been totally compromised. It is our view that there is no remedy in this situation except to demolish the buildings. It is also our view that as this land has obviously become unstable, reconstructing on this site is not recommended except if the land could be stabilized."

[59] The Claims Adjusters then valued the property at a market value of \$564,999.00. The Chartered Quantity Surveyor Ronald Gardner had valued the property at \$606,500 on the same date 14th October 1999.

[60] Counsel for the Claimant was of the view that the Defendants' argument that they are discharged from the hypothec should fail because it is not applicable to this situation. Secondly the claim against the Defendants is for the personal obligation under the Loan Agreement/facility letter and the Hypothecary Obligation. Thirdly the Hypothecary Obligation was registered against two properties and cannot be extinguished by any loss suffered with regard to one property.

[61] On the matter of prescription counsel argued that the term of the loan is for 20 years and not six years and therefore it has not yet expired and prescription will only begin to run after the expiry of 20 years. This is a matter of fact to be decided on the pleadings in relation to the number of years for which the Hypothec was granted and the number which have expired.

Hypothecary Action and Personal Action

[62] Of utmost importance is the fact that the Claimants state that they have not brought a Hypothecary action. Their action is a personal action. Counsel relies on the text The Law of Real Property –Quebec 1932 at page 443 Cap XIII: The Recourse of the Hypothecary Creditor where the learned author opines:

"The personal action is directed against the personal debtor , or against anyone who has personally obliged himself to pay, to the discharge of the

original debtor , the obligation secured by the hypothec, the action of the creditor to recover the debt being a sufficient acceptance of the indication of payment, Cratton v Lemay et al , 51 S.C. 493. The creditor asks that his debtor be condemned to pay the obligation in principal interest and costs.

[63] Marler defines the pure Hypothecary action :

"The pure hypothecary action is real and not personal, It does not arise from any personal obligation contracted by the holder of the immovable toward the creditor even when there is such an obligation. It is the exercise of the creditor's right of hypothec, in virtue of which he may follow the immovable hypothecated and cause it to be sold in the hands of whomsoever it may be, so that he may be paid out of the proceeds, C.C 2016."

[64] Counsel then referred to **Articles 1943 to 1950** of the Civil Code to shed further light on the Claimant's choice. Toward this end she cited Article 1946 which states:

"The object of the hypothecary action is to have the holder of the immovable condemned to surrender it , in order that it may be judicially sold, unless he prefers to pay the debt in principal, and interest as secured by registration, together with the costs."

[65] Counsel submitted that the Claimant has not filed an hypothecary action but a personal action. The Claimant has not asked for the property to be sold for payment or for the Defendants or the sureties to be condemned to surrender property in order that it be judicially sold. The attempt to surrender the Black Mallet property and the Piat property in the form of a Statutory Declaration filed on 17 February 2010 after the case management conference must be assessed in light of the legislative scheme.

[66] Counsel submitted that the statutory Declaration purporting to surrender the properties was misguided because the claimant cannot be bound to accept the properties in satisfaction of the personal obligations of the Defendants.

[67] Counsel submitted in conclusion that the Claimant has discharged the burden that a contract existed between the Claimant and the Defendants for the loan to Defendants and the repayment to the Claimant. The Claimant has discharged the burden of proving that the sums have not been repaid in accordance with the Loan Agreement and the Hypothec and consequently the principal balance , interest and all charges

due and considered part of the Debts remain due to the Claimant . The First Defendant has admitted that this sum is owing to the Claimant.

[68] Counsel's argument seems well founded because Mr. Eugeme Nelson stated in his witness statement that he visited the Bank on several occasions, seeking a solution to the problem of the debt and the loss of the property. During one such visit he suggested that the Defendants should be allowed to make payments towards the property at Piat in Gros Islet (parcel 1251B 615) and the vehicle in a smaller sum. However the Bank insisted that it could not "separate " the loan.

[69] Counsel added that the explanations which were given in relation the fees added by the court and the reduction of the loan on the books, in keeping with Central Bank guidelines, should be accepted by the court. I agree , since there has been no alternative explanation offered by the Defendants. Counsel was of the view that the Defendants have income earning capacity and should be required to pay the debt. It appears that the Defendants themselves accepted this when they went to the Bank to renegotiate the loan payments.

Analysis

[70] The court finds that on the facts the Defendants accepted that they entered into a contract for a loan and a hypothec over their properties as security for the loan.

[71] The discrepancies discovered in the accounting aspect of the Claim are not such as to render the entire claim doubtful. The burden to be discharged here is one on a balance of probabilities and unexplained figures should be straightened out by leading evidence which tends to correct the discrepancy rather than by mere comments aimed at denying the entire claim. Ms. Adriana Thomas was a completely credible witness for the Claimant even though she could not explain one of the sums added to the loan. On her credible evidence which remained unchallenged to a large extent I believe that she has told the truth.

[72] In my view Counsel for the Defendants has not raised convincing arguments to win my acceptance of the submission that the Claimant's facility letter is not sufficient to

establish the terms of a loan agreement. Furthermore the Claimant has shown that the hypothec is part of the agreement being the form of security arranged for the loan.

[73] The challenge to the hypothec also fails because the action is a personal action. Furthermore the Claimant's analysis of the hypothec also makes good sense. I must ask why would the legislature make it possible for a debtor to purposely cause the diminution of the value of his property, default on a loan, and then try to escape his obligation to repay the loan by opting to hand over the property, this being an option the lender must accept? This is not the situation at Bar , but a possible scenario, Nevertheless in my view a purposive interpretation of the legislation must be that even if surrender is a first option under the hypothecary action it is not the only option available if the proceeds from the land cannot meet the obligations under the loan.

[74] In this case there is no allegation that the Defendants deliberately acted to diminish the value of the property. However it is obvious that the property at Black Mallet would no longer attract a commercial buyer, at least not in the foreseeable future. Again it seems that it would reduce the legislation to absurdity if in all circumstances the creditor were required to sell the land under the Hypothecary Obligation as its only recourse

Conclusions

[75] I have concluded that there was an agreement for a loan entered into between the parties on the 8th May 1998 pursuant to the Bank's facility letter. I also conclude that this loan contract is enforceable. I have also concluded that a promissory note and hypothec are forms of security which become binding terms of the loan agreement. However there is no promissory note in this case. But I have also concluded that the Claimant bank can sue for the sum borrowed without reference to the Hypothecary Obligation which nevertheless remains alive as the security for the loan.

[76] Both as matters of fact and law, the Defendants clearly accepted the terms of the facility letter/loan agreement and the First Named Defendant accepted that he owed the money based on the said agreement. Based on the existence of this agreement the Claimant has brought a personal action.

- [77] Counsel has not shown why a promissory note is essential to a loan agreement except for the purposes of security. But she must accept that before one considers security one party must form the intention to lend and another should agree to borrow money and repay it to the lender.
- [78] Counsel for the Claimant has argued convincingly, and I hold that the hypothec has not become extinct, because the land has changed in character and ceased to be an object of commerce. I agree with her submissions that the land continues to be an object of commerce. The valuations of October 14th, 1999 of the Black Mallet property speak for themselves. That property still stands as part of the security for the repayment of the loan. There is no evidence that it is now part of a protected area, and although the bank did not accept the surrender of the land at Black Mallet the other land at Piat which forms part of the security is still quite marketable. This is another reason why the Hypothecary Obligation would not be extinct. It is secured by both properties.
- [79] It is notable that counsel for the Claimant consistently grounded her arguments on Articles of the Civil Code. She demonstrated how they operate in a coherent way to bring about the result which she advocated. On the other hand the Defendant picked the law as she deemed it convenient, which had the effect of making the law appear to be less coherent. This is another reason why I prefer counsel for the Claimant's arguments.
- [80] I also conclude that the evidence which could be considered questionable in relation to the details of the sums owed to the bank does not totally destroy the Claimant's case for the sum due or a sum very close to the sum claimed to be due and owing to the Bank. Indeed it is not good enough to raise questions about specific items in the total figure without providing a basis for saying that the other figures are incorrect if one expects the entire sum to be rejected as not having been proved.
- [81] Finally the Defendants claimed that the action has become prescribed pursuant to the Civil Code but retreated from this position in argument, stating instead that prescription depended on the outcome of the trial. Counsel for the Claimant's response was

prescription could not run within the period of 20 years from the date of agreement.

The relevant Article of the Civil Code, **Article 2121**, states:

“The following actions are prescribed by six years:

4. Upon inland or foreign bills of exchange, promissory notes or notes for the delivery of merchandise, whether negotiable or not, or upon any claim of a commercial nature, reckoning from maturity, bank notes, however being excepted from this prescription.”

[82] I therefore hold that the Claimant’s claim interrupts prescription and the Defendants are liable to pay the sums of \$346, 265.26 together with interest at the rate of 12% per annum from 13th March 2006 on the principal balance of \$263,255.08 less the sum of \$1437.00. The sum of money which Ms Thomas could not account , or \$261,818.08 with interest adjusted, to the date of payment and \$13,894.83 together with interest at the rate of 12.5% per annum from 13th March 2006 on the principal sum of \$7,287.21 to the date of payment which sums are due and owing to the Claimant.

[83] The Defendants must also pay the Claimant’s prescribed costs, pursuant to Part 65 of the CPR 2000.


Francis H V Belle
High Court Judge