SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2004/0876

BETWEEN:

BANK OF ST. LUCIA LIMITED

Claimant

and

[1] SHERY ALEXANDER HEINIS
[2] ERIC HEINIS

Defendants

Appearances:

Mr. Thaddeus M. Antoine and Ms. Thea Alexander for Claimant
Mr. Shawn Innocent for the Defendants

2010: January 27, 28;
April 23, 24;
2011: November 11.

JUDGMENT

Historical Background

[1] **GEORGES, J. [AG.]:** In this action the claimant bank is a limited liability company duly incorporated under the **Companies Act** of Saint Lucia (Cap. 13.01) with registered offices at No. 1 Bridge Street, Castries, Saint Lucia.

[2] By an agreement in writing dated 31st March 2001 made between the National Commercial Bank of Saint Lucia Limited (NCB) and the Saint Lucia Development Bank Limited (SLDB) the two financial institutions were amalgamated pursuant to section 220 of the **Companies Act** and became part of the East Caribbean Financial Holding Company Limited ("the Amalgamated Company") which was duly registered by the Registrar of Companies and a Certificate of Amalgamation

issued on 30th June 2001.

[3] The Agreement of Amalgamation specifically provided inter alia that the Amalgamated Company would possess all the property assets rights and privileges and obligations of the NCB and the SLDB such as existed immediately before amalgamation. The Agreement also specifically provided that the Amalgamated Company would own certain subsidiary companies through which Banking operations would be conducted.

[4] The Claimant Bank is one such subsidiary through which Banking operations were conducted and as such would be entitled to any sums outstanding to the Amalgamated Company.

The Claim

[5] By claim form and statement of claim filed 19th November 2004, the claimant bank claims against the defendants jointly and severally the sum of $287,554.70 together with interest of $87,229.38 continuing at the rate of 10% per annum from 23rd August 2004 at a daily rate of $78.7821 being the balance due and owing by the defendants jointly and severally to the SLDB under (1) Deed of Hypothecary Obligation executed on 20th January 1995, at Castries in Saint Lucia and registered in the Land Registry on 26th January 1995 as Instrument No. 352/95; (2) Deed of Hypothecary Obligation executed on 23rd January 1998 at Castries, Saint Lucia and registered in the Land Registry on 4th February 1998 as Instrument No. 423/98 and (3) Deed of Hypothecary Obligation executed on 29th June 2001 at Castries in Saint Lucia and registered in the Land Registry on 8th August 2001 as Instrument No. 3290/2001.

The Loans

[6] At the request of the defendants the claimant bank granted a demand loan and two supplementary loans to the defendants payable at the rate of 10% per annum.

[7] On 28th November 1994 the first loan was granted in favour of the first defendant

(Shery) by SLDB to construct Phase 1 of a residential home at Bonne Terre in the registration quarter of Gros Islet according to approved plans 505/94 submitted to SLDB.

[8] At the time that the first loan was granted Shery was the owner of the land at Bonne Terre comprising 9,928 square feet and the said loan was secured by a Deed of Hypothecary Obligation executed on 20th January 1995 and registered at the Land Registry of Saint Lucia on 26th January 1995 as Instrument No. 352/95.

[9] The first additional loan application was dated 17th September 1997. The second defendant (Eric) joined Shery for this additional loan to complete Phase 2 of their home.

[10] That second loan was granted on 17th December 1997 and was secured by a Deed of Hypothecary Obligation by both defendants on 23rd January 1998 and registered at the Land Registry on 4th February 1998 as Instrument No. 423/98. The purpose of the loan was for completion of a masonry structure of floor area 1,800 square feet.

[11] The second additional mortgage was approved on 8th March 2001 and was accepted on 14th March 2001. This was secured by a Deed of Hypothecary Obligation executed on 29th June 2001 and registered at the Land Registry on 8th August 2001 as Instrument No. 3290/2001. The first disbursement under the second additional mortgage was made on 3rd July 2001 and the claimant bank suspended disbursements on the 3rd loan facility in August 2001.

The Proceedings

[12] In this action the claimant bank claims against the defendants jointly and severally:

(i) the sum of $287,554.70;

(ii) interest on the said sum of $287,554.70 of $87,229.38 continuing at the rate of 10% per annum at a daily rate of $78.7821 from 23rd August 2004 until date of payment;

(iii) such other further relief as the court thinks fit; and

(iv) costs.

[13] In a nutshell the claimant bank ("the Bank") alleges that the defendants had not used the funds under the loan facilities for their intended purpose whilst the defendants although acknowledging liability to the Bank in respect of the three loans advanced to them by the Bank contend that they are not indebted to the Bank for the amount claimed as they are entitled to set off against the claim damages which they alleged that they suffered and which allegedly occurred as a result of the Bank's repudiation of the third loan agreement by its suspension of disbursement of funds under that facility.

[14] The defendants further contend that the Bank failed to distribute funds under the loan in a timely manner and/or failed to honour the obligations stipulated in the loan agreements. Essentially the defendants aver that the Bank repudiated their loan contract with them in circumstances which entitled them to stop monthly repayments towards the loan amount. They further deny owing any amounts under the three Deeds of Hypothecary Obligation or any interest owed on the sum of $287,554.70 at the rate of 10% per annum from 23rd August 2004.

[15] A Schedule of Expenses and Losses (at pages 12 and 13 of Trial Bundle) attached to the Counterclaim sets out special damages allegedly suffered/incurred by the defendants totaling $839,646.57 which the defendants say (at paragraph 8 of their defence) they will seek to extinguish their liability to the Bank by setting off as much of it as necessary.

[16] It is trite law that special damage must not only be specially pleaded but more importantly it must be strictly proved. None of the alleged heads of damage has in any shape or form been substantiated by the defendants. They cannot therefore in my view be sustained as a result. More on this later.

Historical overview of case

[17] A cursory persual of the file relating to this matter readily reveals that this case has had a chequered history spanning over six years. The initial trial dates of 11th and

12th December 2006 were adjourned and so were successive trial dates with Justice Brian Cottle on 7th April 2008 whilst fixing new trial dates of 19th and 20th January 2009 adjourned the matter to 21st April 2008 for both Counsel to attend to show cause why a wasted costs order should not be made against them personally for the enforced adjournment. On 5th November 2008 the legal practitioner for the defendants had his application to be removed from the record granted. The rescheduled trial dates of 19th and 20th January 2009 were further rescheduled to 23rd and 24th March 2009 as lead Counsel for the claimant was scheduled to be out of Island until the end of January 2009 attending to a family matter all of this being arranged by correspondence with the Court Office only.

[18] And so it went on. At case management the number of witnesses for the defendants was limited to 13. Only five witness statements were in fact filed by the defendants - all out of time - and only the two defendants themselves testified at the trial. The second defendant had to apply for relief from sanctions for late filing of his own witness statement which was six months late. In paragraph 10 of his supporting affidavit he lamented that:

> "10. After Mr. Moyston's withdrawal from the case I tried desperately to retain other counsel in the matter to no avail. Several of the lawyers I consulted refused to take up the case for the defendants for one reason or the other. However, I am certain that the reason for their refusal was due largely to the fact that they all appeared intimidated by the sheer volume of material involved in the case and the novelty of the factual and legal issues raised therein."

Expert Report

[19] In a Pre-trial review order dated 26th October 2006 Justice Ola Mae Edwards (as she then was) ordered and directed that an Expert Witness who is an Accountant be disclosed and may be called as an Expert Witness at the trial for the defendants and Counsel calling the Expert Witness should give written instructions to the Accountant regarding his obligations to the court and the contents of the Report under Parts 32.2, 32.3 and 32.4 of the Civil Procedure Rules 2000 (CPR) for the preparation of the Expert Report which was to be submitted to the court on or before 10th November 2006.

[20] As has been the usual practice/pattern in this case Counsel for the defendants failed to submit the Expert's Report by the stipulated date and applied on 9th November 2006 for an extension of time to do so (without seeking relief from sanctions) pleading in his supporting affidavit that "after approaching several chartered accountants one Cuthbert P. Nathoniel was retained on 6th October 2009 but that he needed a further 20 days beyond the stipulated date for submitting the Report to complete and submit his Report to the court."

[21] Counsel filed a certificate of urgency on 8th November 2006 stating "**that should this matter not be dealt with as a matter of urgency the Applicants (Defendants) may be unable to rely on the Expert Witness which is essential for them to establish the loss and damage they had suffered as a result of the respondent's action as regards this claim.** A draft order was submitted with the application but nothing further occurred until the Expert's Report was simply filed on 5th December 2006 without leave or order of the court or application for relief from sanctions. The CPR is designed to ensure the efficient expeditious and efficacious disposal of cases and must be strictly adhered to. At the close of the trial Counsel were ordered to file and serve written submissions on or before 14th May 2010 but again failed to comply. (Emphasis supplied)

[22] Rule 32.6(4) CPR stipulates that:

> "(4) The oral or written expert witness' evidence may not be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the witness intends to give."

There is no evidence that the Expert's Report was ever served and the Expert himself did not attend the trial. See also Rule 32.14(2) and (3) CPR relating to the contents of the Report.

[23] As learned Counsel for the defendants himself recognized (at paragraph 21 supra) the court cannot in the circumstances rely on the Expert Witness/Report which is essential to establish the special loss and/ or damage which the defendants allege that they have suffered as a result of the Bank's action as regards this claim. The defendant's counterclaim must therefore inevitably fail as indicated at paragraph

16 and is accordingly struck off.

Factual issues

[24] The circumstances which gave rise to this claim have been briefly summarised in paragraphs 12 to 15 and the main issues which fall to be determined are:

(1) Whether the defendants breached the loan agreement when they failed to use the loan for the purpose for which the funds were intended?

The first loan agreement contained the following stipulations, that is:

(i) The loan shall be disbursed on the presentation of bills, receipts and or statements of expenses incurred.

(ii) To implement the project in accordance with the approved plans, advice and recommendations of the Bank's technical credit officers.

(iii) The mortgagor will be responsible for meeting any amount by which the costs of the project exceeds $169,640.00.

(iv) Failure to fulfill any of the foregoing conditions shall constitute a breach of the loan agreement and the Bank shall have the right to suspend or recall the loan.

It was intended that the construction of the residential property would be undertaken in two phases. The initial phase of the construction was funded by the hypothecary obligation.

The loan agreement was signed by the parties on 6th December 1994 and the defendants signed a SLDB Client/Contractor Agreement.

[25] It should be noted that the client/contractor contract (Core Bundle No. 3 Tab 10) signed and dated 24th February 1998 was a commitment to the client from the contractor to construct a house as per drawing 505/94 approved by the Development Control Authority (DCA) and made provision inter alia for the supervision by SLDB housing officers. Based on the contract the commencement

date was 2nd March 1998 and completion date 2nd September 1998.

Mr. Heinis was again the contractor of the second phase of the construction and would be handling 80% of the labour involving masonry carpentry steel bending plumbing drainage electrical and painting which would have been done free of cost.

On 20th July 1998 Mr. Rene on whose appraisal dated 16th December 1997 the loan had been processed and approved reported that work had been progressing very slow and indicated that the client (i.e. Mr. Heinis who was responsible for 80% of the work) was hardly on site.

[26] The second loan application for the second phase of the construction was financed by an additional hypothec for a further sum of $113,000.00 making an aggregate of $254,714.00 dated 23rd January 1998. That loan was granted on the same terms and conditions as the first loan agreement save for an express stipulation that completion of the project would be 24 weeks. The defendants again signed a Client/Contractor Building Agreement on the Bank's prescribed form.

[27] In November 2000 the defendants sought financing from the claimant to complete the third phase of the project. The loan application was approved by SLDB as appears by Offer Letter from SLDB dated 14th March 2001. This Loan Offer was made on the same terms and conditions as the previous two loan agreements save and except that it was stated to be for the purpose of re-financing of an existing SLDB loan, construction and bank fees. The defendants executed a second additional hypothec in favour of SLDB on 29th June 2001. This hypothec was registered on 8th August 2001 and the first disbursement under the third hypothec was made on 3rd July 2001.

[28] By letter dated 5th September 2001 the claimant bank wrote warning the defendants of deviations from the approved building proposal and the likely consequences thereof including the suspension of the loan disbursements

pending the clarification by the defendants of certain issues that caused the claimant bank some concerns. The claimant bank eventually suspended making disbursements to the defendant under the loan agreement.

[29] The claimant bank has, by the witness statements of Elizabeth Bousquet the Bank's Building Officer (at pages 37 – 40 of her witness statement) as well as in cross-examination and Mr. Paul Felicien the Bank's Senior Loans Officer (at pages 41 – 49 of his witness statement) and in his cross-examination stated that the defendants had not strictly adhered to the terms and conditions under the first and second loans. Under the first loan application for instance the loan agreement stipulated and the defendants in their pretrial memorandum (at paragraph 2.1) note, that the loan agreement said that the 'loan shall be disbursed on the presentation of bills, receipts and or statements of expenses incurred.' Yet as per all Saint Lucia Development Bank appraisal forms for the month of March 1995 in particular, (being the 2nd, 13th, 23rd, 30th) it was highlighted by the claimant bank that the defendants had not submitted receipts before requesting additional disbursements.

[30] Further, according to the defendants own pre-trial memorandum (at page 3 paragraph 4.1) the second loan application 'was granted on the same terms and conditions as the first loan agreement' such terms stipulated in the offer letter of 1997 (at page 77 of the trial bundle paragraph 7) that the defendants undertook 'to complete construction of a masonry residential structure and any other purpose which the Bank may subsequently agree to from time to time' such as 'to implement the project in accordance with the approved plans, advice and recommendations of the Bank's Technical Officers.'

[31] It has been well documented in the witness statement of Elizabeth Bousquet (at page 37 paragraph 5 of the trial bundle) as well as in her extensive cross-examination that the second named defendant 'made it difficult, and never wanted to take professional advice as it related to Development Control Authority (DCA) requirements for his residential building and the claimant's disbursement and

supervision policies'.

At paragraph 7.3.3 of his witness statement filed 13th March 2009 the second-named defendant admitted deviating from the approved plans for which the loan was granted. And indeed at a meeting at the Bank on the morning of Wednesday, 15th August 2001 to which Ms. Bousquet was invited Mr. Heinis in a heated exchange with Ms. Bousquet is alleged to have confirmed that he was building a six-apartment complex which he intended to rent out on both a long term and short term basis contrary to his original plans. This would plainly have been a change of user necessitating DCA approval.

[32] These examples clearly show that the defendants had breached the contracts under both the first and second loan agreements but the Bank was working with them to keep them on track and in accordance with the loan agreement. And both Mr. Martin James Recoveries and Securities Manager of the claimant bank and Mr. Irvin Springer Senior Business Development Officer confirmed in cross-examination that banks are in the habit of helping people once a client displays a capacity to repay and there is sufficient collateral provided that the deviations do not go contrary to DCA guidelines. Mr. Springer noted that from documents on file from Housing Officers the client persistently kept deviating from the original plans.

[33] It is therefore self-evident that the defendants had breached the loan agreement when they failed to use the loan for the purpose for which the funds were intended. A fortiori they both acknowledge and conceded that instead of a two-storey residential building (as was agreed) a three-storey building was erected on the site plainly deviating from the original approved plans.

[34] As Mr. Springer quite rightly noted in the Recommendations of his Report dated 21st August 2001 (which is appended to his witness statement) the main reason for this situation arising was due to the fact that the Bank really appears to have had no idea what Mr. Heinis was doing and Mr. Heinis had the effrontery to say that this was because they (the Bank) never asked – which could not be true for when questioned about it on site by the Bank's Housing Officers he gave no

explanation or answer!

[35] Not surprisingly having carried out his investigations at the behest of Mr. Marius St. Rose the then Managing Director of the claimant bank regarding a dispute between the Bank and Mr. Heinis following a 32-page letter of complaint by Mr. Heinis to Mr. St. Rose dated 2nd August 2001 he declared that he was in the end left with doubt as to Mr. Heinis' competence to have undertaken that project as client/contractor. And I am myself satisfied from the evidence as a whole that this is what has in fact largely precipitated this action.

[36] I have placed a great deal of reliance on the evidence of Mr. Irvin Springer who impressed as a knowledgeable and experienced banker and whose expertise and evidence was clear concise and convincing and was substantially borne out by the testimony of Elizabeth Bousquet and Paul Felicien.

[37] (2) The second issue or question is whether the claimant bank was in breach of the loan agreements?

The defendants complain that the Bank delayed disbursement payments which resulted in damage and loss being incurred by them. Notwithstanding all the problems faced by the Bank as a result of the breaches of the loan agreements by the defendants and the defendants allegations that the Bank had delayed disbursements to them the defendants nevertheless requested yet a further loan – the third and final loan being for the 'refinancing of an existing Saint Lucia Development Bank loan construction and bank fees.'

It is clear that the defendants continued through with the first and second loans. This in effect constituted a waiver on their part of whatever alleged breaches may have been committed by the Bank.

[38] What now obtains is that the defendants agreed to a new loan with new terms and conditions. They had been warned by the Housing Credit Officers, by Ms. Bousquet and other Bank officials that they were to remain on track and complete

the loan according to the agreed terms and conditions. When the defendants breached the third loan agreement for the first time by failing to adhere to the approved plans once again the claimant bank suspended disbursement of any further funds in keeping with the terms of the loan contract.

Further the claimant bank contends that there was in fact no delay in processing the third loan as a result of the amalgamation of the East Caribbean Financial Holding Company. The claimant bank has had a longstanding relationship with the defendants and despite the defendants deviations in construction of the building the Bank endeavoured to assist them in completing their home. There was wastage of materials and misuse of funds as the defendants deviated from the approved plans.

[39] Moreover with regard to the third loan facility the claimant bank endeavoured to continue to investigate and gather information to determine how the money was being spent by the defendants as they persisted in breaching the terms of the loan and the Bank wanted to be sure that disbursements were being applied for the purpose for which they were intended before any further funds were disbursed. Further, letters of instructions to the defendants' solicitor to prepare the mortgage was received on 14th March 2001. The letter of undertaking was received from the defendants' solicitor on 25th June 2001 and the first disbursement under the third loan was released on 3rd July 2001. There really was no significant or unusual delay to complain of.

[40] (3) The third factual issue or question is whether the claimant bank was in breach of the loan agreement when it suspended disbursement of funds under the third loan facility?

Here the claimant bank contends that regardless of whether the bank suspended the loan that did not relieve the defendants from the amount of the debt then due and owing to it with interest from the time it became due. And the defendants in fact acknowledged that but counterclaimed by way of set-off which the court has struck off.

The defendants breached the terms of all three loans. However, under the new terms and conditions of the third loan and after making it clear to the defendants that further deviations and breaches would not be tolerated the defendants breached the third loan as well when the second-named defendant was constructing a concrete slab on the western side of the building rather than focusing on completion of the original building as agreed and for which the third loan was approved and intended. Therefore when the defendants breached the third loan agreement the claimant bank suspended the loan which they were contractually entitled to do. The defendants therefore owe the amount claimed together with interest and costs.

Legal submissions

[41] According to Section 1 of the **Civil Code of Saint Lucia Cap. 242** ("the code") a Contract means an agreement, the fulfillment of which may be enforced through the intervention of a court of justice".

Article 917 of the Code states that "Obligations arise from contracts..." In accordance with Article 917 of the Code obligations which arose from the contract between the claimant and the defendants they would construct their home in accordance with the terms of a loan contract which included repaying the loan in monthly installments comprising principal and interest at an agreed rate.

[42] The defendants allegedly breached the contract in that they disregarded the recommendations and advice of the bank officials and have carried on construction contrary to the approved plans on the basis of which the loans were given. The defendants admit to deviating from the approved plans on the assumption that DCA approval was not required. The claimant bank is therefore legally entitled to bring this action against the defendants to enforce the contract and to recover the debt which they owe. Included in the said agreement is an express clause which states: "that failure to fulfill any of the foregoing conditions or requirements of the loan in relation to security, insurance etc shall constitute a breach of the loan agreement and the Bank shall have the right to suspend or

recall the loan."

[43] Counsel for the claimant submitted that the claimant bank was not in breach of any of the terms of the contract but that it in fact was the defendants who had breached the terms of the contract by persistently deviating from the approved plans and by not accepting the advice and recommendations of the Bank housing officers as they originally agreed. Counsel further submitted that the claimant bank did not delay in the disbursement of funds or otherwise under the second loan facility. One of the conditions of the agreement was that "the loan shall be disbursed on the presentation of bills, receipts and or statements of expense incurred." The defendants frequently failed to submit receipts showing that the building materials had been purchased. The Bank's housing officers had to carry out site inspections to first ensure that the materials had been ordered and secondly that they were being used on site before further loan disbursements were made.

[44] Counsel further contended that the claimant bank did not breach the contract in the distribution of disbursements nor in any way cause delay under the second loan facility. The claimant bank always discussed with the second defendant about the wastage of materials and the slow pace of construction. In fact the Bank tried to work with the defendants despite the fact that they had been deviating from the approved plans.

[45] It is the claimant's case that even if the Bank had delayed in disbursing the funds (which is denied) the defendants acceptance of those funds and the complete distribution of the loan under the second facility and the offer and acceptance of a third loan by the defendants would constitute a waiver and the defendants could not now rely on the defence of delay on the part of the Bank under the terms of the original agreement. **Chitty on Contracts 29th Edition Vol. 1** paragraph 22-041 states that "Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract the court may hold that he has waived his right to require that the contract be performed in

this respect according to its original tenor." Therefore if the claimant bank had disbursed the loan late which the Bank maintains it did not, the defendants' acceptance of the third loan and the completion of the distribution of all the funds under the second loan would mean that the defendants are bound by the waiver. That in my view is not only good law but also makes good sense.

[46] Claimant counsel further submitted that having shown how all the funds had been disbursed under the second loan it remains to be determined whether the claimant bank was in breach of the third loan facility. Learned Counsel submitted that the claimant bank had not delayed in approving the third loan rather any delays were on the part of the defendants. The letter of undertaking for instance was received by the defendants' solicitor on 25th June 2001 a delay of over 3 months from the acceptance date of 14th March 2001. The claimant bank was only in a position to disburse funds under the third loan at that point. The first disbursement in actual fact followed days later on 3rd of July 2001.

[47] The third loan was suspended by the Bank in August 2001 leaving an undrawn amount of approximately $97,000.00. However it was clearly within the claimant bank's rights to do so as the defendants had breached the terms of the new agreement under the third loan by deviating from the approved plans. When the Bank's housing officers inspected the site they noticed that the newly disbursed funds were being used contrary to the approved plans whereupon the Bank suspended the loan in keeping with the terms of the loan contract/agreement.

[48] Finally Counsel for the claimant submitted that even if the Bank had breached the agreement by suspending funds or by delaying the disbursements of funds as the defendants contend that would not have discharged them from repaying the debt which they had legally contracted with interest from the date that it became due. This was in fact the view held by Justice Dunbar Cenac in the consolidated actions of **Dominica Aid Bank and Royal George and Royal George and Dominica Aid Bank**[1] in which the learned Judge held that "even if the Claimant Bank was in

[1] Suit No. 282 of 1995; Suit No. 361 of 2000 (unreported.)

breach of contract to pay to the defendant the meagre sum of $1,050.00 (allegedly owed by the Bank) to the defendant the amount recoverable would be limited to the amount of the debt with interest from the time it became due (see **Halsbury's Laws** 4th Edition Volume 12 paragraph 1179) and not to absolve the defendant of his responsibility of repaying the debt under the contract. Cenac J held that "the defendant cannot hide under the term "breach of contract" in order not to fulfill his obligation under the contract."

[49] This case serves to illustrate (only to the limited extent) that even if the defendants' claim in the instant case were correct that the claimant bank had in fact breached the contract when they were late in disbursing funds and/or in suspending funds to the defendants, the defendants would still be liable to repay the claimant bank's debt with interest from the date when it became due.

[50] The claimant however maintains and I find as a fact that there is no breach of any term of the contract by the claimant bank. The defendants breached the loan agreement by not adhering to the conditions of the contract/agreement and by failing to make the payments due thereby dishonouring their obligations to the claimant bank. As stated at paragraph 23 the defendants' counterclaim by way of set-off was struck out for the reasons stated.

Conclusion

[51] In the result judgment is entered for the claimant against the defendants jointly and severally for the sum of $287,554.70 with interest on the said sum of $287, 554.70 of $87, 229.38 continuing at the rate of 10% per annum at a daily rate of $78.7821 from 23rd August 2004 until date of payment and prescribed costs of $42,250.00 in accordance with CPR 65.5(2)(b)(i).

Ephraim Georges
High Court Judge [Ag.]