EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV2006/0552

BETWWEN:

OVERSEAS PROPERTY BOND MANAGEMENT LIMITED

Claimant

And

ANTIGUA COMMERCIAL BANK LIMITED
NATHANIEL "PADDY" JAMES
SAGICOR CAPITAL LIFE INSURANCE COMPANY LIMITED

Defendants

Appearances:
David Dorsett for the Claimant
Tracy Benn-Roberts & Safiya Roberts for the First Defendant
Septimus A. Rhudd for the Third Defendant

February 7, 2011
February 8, 2011
January 27, 2012

JUDGMENT

FLOYD, J.

[1] This is an action wherein the claimant seeks a number of declarations. A Notice for Interim Remedy was filed on October 18, 2006. An order was made by The Hon. Justice Thomas on November 8, 2006 restraining the respondents (the first and second defendants) from selling properties of the applicant (claimant) at Jolly Harbour. A claim form was filed on November 9, 2006 seeking an order that the

first and second defendants be restrained from selling specific properties at Jolly Harbour, that the charge in favour of timeshare owners prevails over the charge of the first defendant, that the first defendant is a trustee of the claimant regarding a contract of insurance issued by the third defendant on the life of Dirk Huber, deceased, that the claimant as a beneficiary of the first defendant had a legitimate expectation that the first defendant would seek to enforce its security with respect to a loan issued by the first defendant in the name of the claimant, that the first defendant by failing to enforce its security regarding the insurance policy issued on the life of Dirk Huber, deceased, has allowed the loan to escalate and exceed the amount of the sum, that the first defendant is in breach of its duties as a trustee of the claimant, that the third defendant pay the first defendant 1.2 million USD plus interest, special damages, general damages, interest and costs.

[2] The Hon. Justice Thomas granted an order on December 4, 2006 discharging the injunction on the undertaking of the first defendant not to sell the listed property until further order of the court.

[3] On January 29, 2007 the first defendant filed a defence and counter claim seeking sums outstanding plus interest or alternatively, striking out the claim with costs

[4] An amended claim form was filed on February 6, 2007 adding the third defendant as Sagicor Capital Life Insurance Company Ltd., seeking a declaration that the loan granted to the claimant by the first defendant is not enforceable and exemplary damages.

[5] A reply to the defence to the counter claim of the first defendant was filed on March 7, 2007 and a reply to the defence of the second defendant was filed on the same date. An amended reply to the defence of the second/third defendant was filed on March 8, 2007.

[6] A defence dated February 27, 2007 from the third defendant was also filed.

[7] The trial took place on February 7 and February 8, 2011 with written submissions to be filed by March 1, 2011.

THE EVIDENCE

[8] A number of witnesses were called to testify and witness statements were filed.

[9] Gloria Watt has been the managing director of the claimant since 2004. She has worked for the claimant since 1994. The claimant's business is selling timeshares and renting villas at Jolly Harbour, Antigua. On July 10, 2001, the first defendant approved a loan to Dirk Huber (now deceased). At the time, Mr. Huber was a director of the claimant company. Another company director at that time was Charles Watt, the late husband of Gloria Watt. Bridgette Niepp was the managing secretary of the claimant company at that time. She was also the mother of Dirk Huber. The loan was to purchase timeshare operations known as Jolly Harbour Ltd., a name Ms. Watt did not recognize. She believed the loan was to purchase timeshare operations known as Overseas Property Bond Management Ltd. (OPBM) at Jolly Harbour.

[10] Ms. Watt stated that the claimant conducts timeshare operations at Jolly Harbour and the timeshare owners have a 99 year charge on the property by virtue of the Timesharing (Licensing and Control) Act. The company owns the property but it cannot sell without the consent of the timeshare owners. The first defendant secured the loan by placing a charge on the claimant's property (parcels of land) and insurance on the life of Dirk Huber, assigned to the first defendant.

[11] Ms. Watt testified that the claimant never received the loan money. The money was never deposited into an account belonging to the claimant and the claimant did not benefit from the loan. She reasoned, therefore, that the claimant was not responsible for the loan repayment. She said this despite agreeing that the

company directors of the claimant signed the charge document found at page 27 of the Trial Bundle and a loan agreement with the first defendant bank found at page 23. Those documents are signed by Dirk Huber and Charles Watt for the claimant and Gregory de Gannes for the first defendant. The charge document pledges land titles belonging to the claimant to secure a loan of money from the first defendant. The charge document appears to be confirmed in a corporate resolution found at page 37 of the Trial Bundle, executed by Mr. Huber and Mr. Watt on behalf of the claimant company.

[12] Ms. Watt stated that the loan money was paid to Dirk Huber and not to the claimant. Mr. Huber was responsible for the loan repayment personally. Mr. Huber died on September 27, 2002. He had been with the claimant company since 1998. Ms. Watt became aware that Mr. Huber had a life insurance policy with the third defendant after he died. Although the claimant is not responsible for the loan, Ms. Watt submits that the claimant has the right to ask the third defendant insurance company to repay the bank upon the death of Mr. Huber. The loan money was not received by the claimant as shown by a disbursement statement found at page 58 of the Trial Bundle. The statement indicates a money transfer to West Indies Capital Co. Ltd. The document is from the first defendant bank but is signed by Mr. Huber and Mr. Watt as borrowers.

[13] Ms. Watt stated that the loan was part of a "fraudulent, cunning and corrupt scheme" to purchase Simon MacAuley's shares in the claimant company. The plan had been created between Mr. Huber and Mr. MacAuley. She described Mr. Huber as "cunning". In her opinion, the claimant company could never have serviced the loan because it's property (land parcels) is subject to a charge by timeshare owners. While denying liability of the claimant to pay the loan, Ms. Watt noted that if the insurance company had paid out on the policy on Mr. Huber's life, the indebtedness of the claimant to the first defendant would have been extinguished or substantially reduced. Ms. Watt also asserted that the claimant had the right to ask the third defendant insurance company to pay the loan since

the first defendant bank is asking the claimant to repay the loan.

[14] Nekisha Pryce testified and gave a witness statement. She is the office administrator of the claimant and has been with the claimant since 1997. She stated that Dirk Huber was the financial controller and Simon MacAuley owned the claimant company. In October 2002 she found a number of documents in the desk of Dirk Huber. She passed the documents over to Gloria Watt, the president and managing director of the claimant company.

[15] Dr. Fouad Naffouj testified and gave a witness statement. His statement indicated that Dirk Huber was his patient from February of 1999. However, his testimony revealed Dr. Naffouj knew Mr. Huber since 1997 or 1998 and likely began treating him as early as 1997. He performed a medical examination on Mr. Huber on or about May 10, 2001 for insurance purposes. At that time he had no evidence that Mr. Huber had HIV. Two or three HIV blood tests were conducted on Mr. Huber with negative results. Dr. Naffouj could not recall which laboratory conducted the tests but said the laboratories were in St. Martin and Antigua. His file would contain that information but he did not bring the file to court. Dr. Naffouj further indicated that he did not review his medical records before coming to court.

[16] Dr. Naffouj completed a life insurance application for Mr. Huber in 2001 indicating HIV status as negative. Dr. Naffouj agreed that it would have been better if he had attached the HIV test results to his witness statement. Mr. Huber had a stroke 6 months before he died. Dr. Naffouj treated him then but not afterwards. He said that up until the stroke, Mr. Huber was HIV negative.

[17] The death certificate for Mr. Huber found at page 69 of the Trial Bundle gave a cause of death of thrombosis, which is a clot. Blood clots can be caused by a number of things.

[18] It was not uncommon for Mr. Huber to drop by Dr. Naffouj's office and request

blood tests. HIV blood tests were done for the life insurance application of May 10, 2001 found at page 192 of the Trial Bundle. The application form at item 4 c indicates “no” for treatment of respiratory conditions such as bronchitis. However, a letter dated April 4, 2007 found at page 251 of the Trial Bundle signed by Dr. Naffouj indicates Mr. Huber was “treated many times for acute bronchitis, flu, UTI.” When confronted with this, Dr. Naffouj stated “maybe I missed that” and “it could have slipped my mind”. The life insurance application form was completed by Dr. Naffouj. He confirmed that he knew Mr. Huber had been treated for items like bronchitis yet he still wrote “no” on the form.

[19] Dr. Naffouj agreed he was not careful when completing the form. He agreed that he could have missed and in fact did miss important information. He denied, however, being careless in completing the form. At one point during his testimony, Dr. Naffouj began to rise in the witness box, stating “I am not getting paid for this” and complained that he was not told he would be in court for 3 hours.

[20] Dr. Naffouj indicated he did not provide blood test results for Mr. Huber to lawyers involved in this case because he was not asked, yet he did provide CT scan results to the lawyers.

[21] The application form was completed on May 10, 2001 but the physical examination was not done until May 23, 2001 (see page 191 of the Trial Bundle). However, the witness statement of Dr. Naffouj indicates he performed a complete medical examination on or about May 10, 2001. Dr. Naffouj stated he examined Mr. Huber on May 30, 2002 and ordered a brain CT scan. When asked to comment on Dr. Jason Belizaire’s finding of toxoplasmosis for Mr. Huber following the CAT scan results received on June 25, 2002, Dr. Naffouj agreed toxoplasmosis is a rare disease but is common among HIV patients who have opportunistic infections.

[22] Barbara Pompier testified and gave a witness statement. She has been the

agency manager of Sagicor Capital Life Insurance Ltd., formerly Capital Life Insurance Co. Ltd., the third defendant, for approximately 10 years. She has 25 years' experience with Sagicor. She said the application form found at page 192 and also at page 311 of the Trial Bundle is to be completed by a medical doctor in order to ascertain the health of prospective insureds. This provides information to the company so that it may assess the risk of insuring the applicant. She confirmed that an insurance policy was issued based on this information and application executed by Mr. Huber and Dr. Naffouj.

[23] Although the application for insurance was submitted in May 2001, it was incomplete. The applicant, Mr. Huber, and the physician, Dr. Naffouj, had answered the questions regarding illness in the negative. It was not until July 2001 that the insurance company received confirmation from Dr. Naffouj that Mr. Huber was HIV negative (see page 309 of the Trial Bundle). The insurance company has a contestability period of 2 years. If the company discovers within that time frame that the insured provided false or incorrect information, it may challenge the validity of the policy. In this case, the policy was issued in October – November 2001 and Mr. Huber died on September 27, 2002.

[24] Dr. Jason Belizaire testified and gave a witness statement. He is a medical doctor specializing in internal medicine. He provided copies of his medical file notes pertaining to Mr. Huber. They are found at pages 337-344 of the Trial Bundle. He first examined Mr. Huber on June 24, 2002.

[25] Dr. Belizaire said it is not customary to conclude an AIDS diagnosis without an HIV test but there are conditions that make it likely to conclude AIDS is present. There are AIDS defining diseases. This would lead to an HIV test. Results of the CAT scan were received on June 25, 2002. The test results showed Mr. Huber had central nervous system toxoplasmosis. Dr. Belizaire said this condition is an acquired immune deficiency syndrome (AIDS) defining illness that develops in the late stages of AIDS. The symptoms generally occur in an untreated individual after

approximately 5 to 7 years of contracting HIV. The condition does not, however, definitely mean the patient has AIDS. It is an indication of AIDS since it is found in people with a compromised immune system. Dr. Belizaire was of the view that Mr. Huber would have contracted HIV for a significant period prior to his death in September 2002.

[26] The death certificate found at page 69 of the Trial Bundle showed the cause of death as thrombotic thrombocytopenic purpura (TTP). Dr. Belizaire said this was a condition of low blood platelets often brought on by medicine or underlying disease. TTP is not synonymous with AIDS but it is not uncommon in AIDS patients.

[27] Geoffrey Simmons testified and gave a witness statement. He has worked for Antigua Commercial Bank Ltd., the first defendant, for approximately 20 years. He was recoveries supervisor and then consumer lending officer. He confirmed that on July 10, 2001, the first defendant bank approved a loan of $2.6 million ECD to Dirk Huber of the claimant company, in order to purchase timeshare operations known as Jolly Harbour Ltd., a business owned by Simon MacAuley. The bank required a charge to be registered in its favor on certain property belonging to the claimant. Mr. Huber was a director of the claimant company. Funds in the amount of $960,000 USD were sent by the first defendant bank to West Indies Capital Co. Ltd. on the instructions of the borrower. West Indies Capital Co. Ltd. was the majority shareholder in the claimant company and was to sell its interests to Dirk Huber. The disbursement statement found at page 162 of the Trial Bundle shows the borrowed amount of $2.6 million ECD was transferred along with $34,356.24 ECD from the account of the claimant company.

[28] The third defendant issued a life insurance policy on Dirk Huber and confirmed the first defendant had a second interest as assignee. The Antigua Barbuda Investment Bank (ABIB) had first interest. The first defendant was advised in October 2002 of the death of Mr. Huber. In December 2002 the third defendant

advised it was declining the claim on the policy as the deceased had failed to disclose his positive HIV status. The first defendant bank sought to have the third defendant insurance company reconsider its position, to no avail. No law suit was initiated by the bank against the insurance company to enforce its claim.

[29] The claimant remains significantly indebted to the first defendant. The bank demanded repayment of $3,429,545.82 ECD in June 2004. When no payment was made, the first defendant sought to sell the charged land. The claimant had made some loan repayments, however, it became delinquent with the last payment of $20,000 ECD received on April 18, 2005. As of the date of trial, the outstanding amount was $6,410,369.25 ECD made up of principal and interest.

SUBMISSIONS

[30] Learned counsel for the third defendant, Mr. Rhudd, submits that the issues include whether the third defendant was entitled to treat the insurance policy as void and whether the third defendant was in breach of contract by virtue of its decision not to pay out under the policy.

[31] Mr. Rhudd refers this court to the text Modern Insurance Law, 4th Ed., John Birds, P. 98, wherein the principle of good faith is described. "An insurer has the right to avoid the contract of insurance in its entirety if the insured was guilty of fraud, non-disclosure or misrepresentation before the contract was entered into." Mr. Rhudd submits that the applicant, Mr. Huber, suffered from HIV and knowingly failed to disclose that information in the insurance application. Mr. Rhudd submits that the court should accept the evidence of Dr. Belizaire in this regard and reject the evidence of Dr. Naffouj.

[32] Learned counsel submits the evidence shows Mr. Huber suffered from and died from an AIDS related illness that was present for some significant time. The failure of Dr. Naffouj to provide any HIV test results from a laboratory, despite references

to them, is significant. Dr. Naffouj could not identify the laboratory involved nor produce the test results. The failure of Dr. Naffouj to provide any of his medical records pertaining to his patient, Mr. Huber, is also significant.

[33] Mr. Rhudd asks this court to consider the manner in which Dr. Naffouj testified and gave his evidence. Mr. Rhudd describes Dr. Naffouj as evasive, defensive and confrontational. Dr. Naffouj conceded that he gave incorrect information in the insurance form regarding the treatment of Mr. Huber for bronchitis.

[34] Mr. Rhudd refers to several cases regarding material non-disclosure, material concealment and the duty of disclosing material facts in order to obtain insurance coverage including:

Banque Financiere de la Cite S.A. v. Westgate Insurance Co. Ltd. [1991] 2 A.C. 249

Woolcott v. Sun Alliance and London Insurance Ltd. [1978] 1 W.L.R. 493

London Assurance v. Nansell [1879] 11 Ch. D. 363

Anglo African Merchants Ltd. and Another v. Bailey and Others [1969] 2 W.L.R. 686

Learned counsel submits the third defendant was entitled to void the insurance policy since Mr. Huber knowingly withheld details of his health status, that is, his HIV positive condition.

[35] Mr. Rhudd submits that the third defendant is not in breach of contract by virtue of not paying out under the insurance policy on the life of Dirk Huber. In addition to relying on the non-disclosure argument, the third defendant takes the position that there is no locus standi on the part of the claimant to seek to compel the third

defendant to pay out on the policy. The claimant was not a party to the insurance contract and therefore has no interest in the policy. The third defendant relies on the amended statement of claim which asserts the insurance contract is between the insured, Dirk Huber, and the third defendant. The claimant was not a party to the contract has no interest in it and therefore could not sue on it. Learned counsel relies on the following cases:

Amsprop Trading Ltd. v. Harris Distribution Ltd. [1997] 1 W.L.R. 1025

Snelling v. John G. Snelling Ltd. and Others [1972] 2 W.L.R. 588

Mr. Rhudd submits that the third defendant is therefore not liable to the claimant.

[36] Learned counsel for the first defendant submits that the claimant was represented by its company director, Dirk Huber, in arranging a loan of $2.6 million ECD. The first defendant bank received security for repayment through a first charge on property (see page 27 of the Trial Bundle), commitment letter, personal guarantee and insurance policy on the life of Mr. Huber (see pages 34-40 and 65 of the Trial Bundle). At all material times, Dirk Huber and Charles Watt were the officers/directors of the claimant company. Those two directors completed a disbursement statement to have funds transferred to West Indies Capital Co. Ltd. $960,000 USD being the loan proceeds of $2.6 million ECD and $34,356.24 ECD from the bank account of the claimant company. Following the death of Dirk Huber, loan repayments ceased and the first defendant sought to exercise its power of sale on the claimant's land parcels. That resulted in an injunction and this action.

[37] Learned counsel for the first defendant raises several issues for the court's consideration. Ms. Benn-Roberts submits that it is perfectly legitimate for a person or company to give instructions to a bank, as the claimant did here through its directors, to disburse loan proceeds. It matters not if the loan money is not directly

received by the borrower. There is no illegality or fraud in such a transaction. Should the borrower subsequently default on the loan repayment, the bank can exercise its power of sale on the charged land in order to retire the debt. Further, the claimant company made some loan installment payments to the first defendant bank. This confirms the loan was made to the claimant and not to Mr. Huber personally.

[38] Learned counsel contends the bank's charges on the claimant's property are valid. They were genuinely executed by the directors of the claimant company to secure loan money from the first defendant bank. As such, the first defendant is a secured creditor. Once the loan fell into delinquency, the first defendant had the right to sell the charged property upon notice to the claimant. The property could then be sold at public auction, which the first defendant sought to do. The chargee is required to act in good faith having regard to the interests of the charger. The court was referred to a number of authorities including:

National Provincial and Union Bank of England v. Charnley [1924] 1 KB 431

Paget's Law of Banking 13th Ed. P. 745, P. 814

National Insurance Corp. v. Windmark Ltd. [2009] WL 634853

Halsbury's Laws of England Vol. 32, Para. 656

[39] Ms. Benn-Roberts submits that the first defendant is entitled to enforce its security rights through the property charges and not through the insurance policy Mr. Huber, director of the claimant company, had with the third defendant. The first defendant made efforts to have the third defendant pay out on the policy but the third defendant refused. As such, the first defendant is entitled to pursue the charges and is not obliged to take action against the third defendant, particularly as the first defendant is the second assignee on the insurance policy.

[40] Ms. Benn-Roberts submits that reference to s. 53 (1) of The Companies Act, 1995 No. 18 of 1995 of the Laws of Antigua and Barbuda in the amended claim form and statement of claim, has no relevance to the case against the first defendant. The section pertains to circumstances where a company provides financial assistance to one of its own directors, which is not the case at bar. The loan money in this case came from the bank.

[41] Ms. Benn-Roberts submits that the provisions of the Timesharing (Licensing and Control Act) CAP 427 of the Laws of Antigua and Barbuda, do not impact the first defendant's security by way of charge on the claimant's property. A timeshare interest must be registered pursuant to s. 18 of the Act on title to the property. There is, other than the testimony and evidence of Gloria Watt, no evidence of the registration of the timeshare owner's interest.

[42] Timeshare ownership is described in the case of Trustees for Coylumbridge Highland Lodges Club v. Assessor for Highland and Western Isles Valuation Joint Board (2010) W.L. 666345 as "the purchase of a right to occupy in perpetuity a particular holiday unit during a specific week or weeks in each year".

[43] The timeshare owner does not own the fee simple. Section 19 of the Act creates a charge on the premises and shall prevail against any purchaser of the premises. Ms. Benn-Roberts submits the property subject to a timeshare can be sold without the consent of the timeshare owner, however, the purchaser of the property cannot disturb the rights of the timeshare owner. Those rights are transferred to the purchaser. The first defendant bank's charges are therefore enforceable without the consent of the timeshare owners, whose rights of occupation remain.

[44] Learned counsel for the claimant, Dr. Dorsett, submitted a chronology and synopsis of the facts and reviewed the bases of the claim made on behalf of the claimant. Dr. Dorsett submits that the loan from the first defendant constituted

financial assistance for the acquisition of the claimant's shares and as such is contrary to s. 53(1) of The Companies Act, 1995. Further, by virtue of s. 19 of the Timesharing (Licensing & Control) Act, the timeshare owners have a charge on the claimant's property which prevails over the charge of the first defendant bank.

[45] Dr. Dorsett also submits that the first defendant acted in breach of trust by failing to enforce performance of the life insurance contract/policy held by the third defendant insurance company.

[46] In support of these submissions, learned counsel takes the position that the loan from the first defendant to the claimant was made with the full knowledge that the loaned money would be used by Dirk Huber, a director of the claimant company, to purchase shares in the claimant company from Simon MacAuley and West Indies Capital Co. Ltd. The evidence of Geoffrey Simmons confirms this. Mr. Simmons refers to a letter from Simon MacAuley to the Antigua Barbuda Investment Bank dated March 9, 2001 (see page 60 of the Trial Bundle), a letter from Simon MacAuley to Dirk Huber dated June 25, 2001 (see page 62 of the Trial Bundle) and a disbursement statement from the first defendant bank transferring funds to West Indies Capital Co. Ltd. (see page 58 of the Trial Bundle). This was set out in the Defence and Counterclaim of the first defendant at paragraphs 10 and 11.

[47] The funds were therefore knowingly loaned to the claimant company, which in turn allowed its director, Dirk Huber, to use them to purchase shares in the claimant company from Simon MacAuley. This contravened s. 53(1) of The Company's Act, 1995.

[48] When determining whether the loan money constituted "financial assistance" as set out in s. 53(1) of the Act, Dr. Dorsett referred to the case of MacNiven (HM Inspector of Taxes) v. Westmoreland Investments Ltd. [2001] UKHL 6, [2003]

1 AC 311 Para. 50. The court defined the term financial assistance as being a commercial concept with no technical meaning. The reference was to the language of ordinary commerce.

[49] Given the financial status of the claimant company as outlined in the letter from Simon MacAuley (see page 164 of the Trial Bundle), the loan money or financial assistance was given to the claimant company in circumstances prejudicial to the company, pursuant to s. 53(2) of the Act. The first defendant cannot rely on s. 55 of the Act to enforce its claim for repayment since it cannot be said that it had no notice of the contravention of s. 53 of the Act. Learned counsel submits the loan is therefore void and unenforceable.

[50] Dr. Dorsett submits that the principle of ex turpi causa non oritur actio applies in this case and refers to several decisions on point. The arrangement between the first defendant and Mr. Huber on behalf of the claimant was illegal, contrary to statute and therefore unenforceable. Dr. Dorsett referred this court to the leading case of Holman v. Johnson (1775) 1 Cowp 341, (1775) 98 ER 1120. He also referred to Heald v. O'Connor [1971] 1 WLR 497 as a case similar to the case at bar and illustrating illegal financial assistance. He further referred to Morrell and Morrell v. Workers Savings and Loan Bank [2007] UKPC 3 and the issue of illegality. The court held at paragraph 35 that "where the court is satisfied that all the relevant facts are before it and can see clearly from them that the contract had an illegal object, it may not enforce the contract." The issue of illegality was further explored in the case of Vakante v. Governing Body of Addey and Stanhope School (No. 2) [2004] EWCA Civ. 1065, [2005] ICR 231.

[51] In advancing his position that the first bank actively participated in the transaction in contravention of the legislation, learned counsel refers to the case of Re Trepca Mines Ltd. (No. 2) [1963] 1 Ch. 199. In the circumstances, the first defendant cannot recover.

[52] Dr. Dorsett refers to Snell's Equity 31st Ed. at 36-25 wherein it is stated that "a security may be tainted by the illegality of the transaction which gave rise to it" and thus is unenforceable. The supplemental reference in support is to the case of Fisher v. Bridges (1854) 3 El and BI 642, 118 E.R. 1283.

[53] In submitting that the first defendant cannot enforce its claim due to the illegality of not complying with the terms of The Company's Act, 1995, learned counsel refers to the principle of in pari delicto. The court should not assist a party in pursuance of an illegal or immoral contract. The parties should be left in the state they are in. Reference is made to Taylor v. Chester (1869) LR 4 QB 309.

[54] Dr. Dorsett directs the court to the issue of the timeshare. He refers to the Timesharing (Licensing and Control) Act and The Registered Land Act. The former was enacted in 1984 and the latter in 1974. Dr. Dorsett submits that the provisions of the Timesharing (Licensing and Control) Act take precedence over those of The Registered Land Act because the earlier statute is impliedly repealed by the latter. In support of this position, he refers to the Acts themselves and the case of Thorburn v. Sunderland City Council [2003] QB 151.

[55] The timeshare charges cannot be defeated by the first defendant's charge secured pursuant to The Registered Land Act even though the timeshare charges are not noted on the land register. Any purchaser of property would take it subject to the rights of the timeshare owners. The timeshare owners are in actual occupation of the land and no subsequent purchaser can diminish their rights. To support this proposition, reference was made to the case of Strand Securities Ltd. v. Caswell [1965] 1 Ch. 958.

[56] Learned counsel goes further and submits that the security interest of the timeshare owners not only takes precedence over the security of the bank but the first defendant bank cannot disturb that interest by disposing of the property at auction. To do so would induce a breach of contract by the claimant. Inducing a

breach of contract is a known tort. Reference was made to OBG Ltd. v. Allan [2007] UKHL 21, [2008] 1 AC 1. Dr Dorsett submits the loan is illegal as to its formation and therefore illegal as to its performance.

[57] Learned counsel also submits that the first defendant is in breach of trust by not seeking to demand payment by the third defendant on its insurance policy on the life of Dirk Huber. The first defendant was a trustee, having a right to the insurance funds upon the death of Mr. Huber to be applied to the loan proceeds. The beneficiary was the claimant company. As a trustee, the first defendant had a duty to pursue the insurance money including through the initiation of legal proceedings against the third defendant.

[58] In the case of Re Brodgen (1888) 38 Ch. D. 546 at 576 the court stated it knew "of nothing which would excuse the neglect of such action on the part of a trustee, unless it be a well-founded belief that such action on his part would result in failure and be fruitless." The first defendant could therefore only avoid liability for breach of trust if it held a well-founded belief that legal action against the third defendant would be fruitless, for example, if it was patently clear that the policy was void due to fraud, on the part of Mr. Huber as the third defendant alleges. Dr. Dorsett refers this court to the evidence of Barbara Pompier, witness for the third defendant, as indicating that the insurance company had no information that the certificate of Dr. Naffouj was in error. The first defendant therefore acted in breach of trust of its duty to act with reasonable diligence and as such is liable for the money that could have been obtained. In regard to this issue, learned counsel relies on the following additional cases: Wesdeutsche Landesbank Girozentrale v. Islington London Borough Counsel [1996] AC 669, Target Holdings Ltd. v. Redferns [1996] 1 AC 421, Speight v. Gaunt (1883) 9 App. Cas. 1.

[59] Finally, Dr Dorsett submits that the third defendant has wrongly failed to pay out on the life insurance policy of Dirk Huber causing loss and damage to the claimant. Learned counsel relies on the evidence of Dr. Naffouj that he had no

information indicating that Dirk Huber was HIV positive when the insurance application was completed. This court should not accept the evidence of Dr. Belizaire as to toxoplasmosis being an AIDS defining illness. Reference is made to Halsbury's Laws of England, 4th Ed., Vol. 17 at 78 that opinion evidence, conclusions drawn from perceived facts, is not admissible. Dr. Belizaire was not an expert witness. Dr. Belizaire gave no admissible evidence that Mr. Huber knew he was HIV positive.

[60] The standard of proof required in non-criminal proceedings is the balance of probability. Reference is made to Re H and Others (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563. Fraud is a serious allegation and accordingly very cogent evidence is required. The duty of disclosure is a duty of honesty. The question is whether the fact not disclosed was material to the risk. See the cases of Zeller v. British Caymonian Insurance Co. Ltd. [2008] UKPC 4 and Economides v. Commercial Assurance Co. PLC [1998] QB 587.

ISSUES

[61] Was there a valid loan made by the first defendant to the claimant?

[62] Was the loan contrary to the terms of The Companies Act, 1995?

[63] How does the charge of the first defendant on the property of the claimant affect the charge on the property by virtue of the Timesharing (Licensing and Control) Act?

[64] Was the third defendant entitled to treat the policy of insurance as void due to material non-disclosure?

[65] Was the third defendant in breach of contract by failing to pay the sum insured under the policy?

ANALYSIS

[66] I begin with an examination of the loan issued by the first defendant. The loan was in the amount of $2.6 million ECD (see page 23 of the Trial Bundle). It was applied for by Dirk Huber and Charles Watt, although it appears Mr. Huber was the leading party in the application process. Both Mr. Huber and Mr. Watt were directors of the claimant company and applied for the loan in that capacity.

[67] In her evidence, Gloria Watt, managing director of the claimant, sought to distance Mr. Huber and his role in the loan process from the claimant company. In her witness statement at paragraph 4 she describes the loan as being presented by Dirk Huber, who was at the time "a director of OPBM" (the claimant). At paragraph 10 she refers to Mr. Huber obtaining the loan in "dubious circumstances". She refers to a scheme whereby the claimant company was used to provide financial assistance to Dirk Huber and Simon MacAuley to acquire its own shares. Ms. Watt went further in her testimony by emphasizing the fact that the money loaned by the first defendant was never deposited into an account belonging to the claimant and the claimant did not benefit from the loan. She stated that the loan repayment was therefore not the responsibility of the claimant. Although Ms. Watt believed the claimant was not responsible for the loan, she had no difficulty stating that the claimant had every right to seek to have the third defendant insurance company repay the first defendant bank on the strength of the insurance policy on the life of Mr. Huber.

[68] Counsel for the claimant did not adopt such a position, preferring to emphasize the issue of whether the loan was contrary to The Companies Act, 1995. That is a sound approach. I am satisfied that the loan was between the first defendant bank and the claimant company. Mr. Huber and Mr. Watt applied for and received the loan on behalf of the claimant and as officers/directors of the claimant. All of the documents previously referred to including the loan agreement, charge, corporate

resolution, disbursement statement and various correspondence, refer to Mr. Huber and Mr. Watt in their capacity as company directors. Evidence from Geoffrey Simmons, recoveries supervisor for the first defendant, confirmed that the claimant made payments on the loan, the last payment being in April 2005. The disbursement statement transferred the loan money and a small amount from an account belonging to the claimant to West Indies Capital Co. Ltd.

[69] Based on all of that evidence, I am satisfied that there was a valid loan made between the claimant and the first defendant. The claimant was therefore, prima facie, responsible for the loan repayment.

[70] With regard to the insurance policy on the life of Dirk Huber, it is clear that Mr. Huber took out policy no. 06029205 with the third defendant in the amount of $1.2 million USD. The policy, found at pages 313-324 of the Trial Bundle, was issued on October 14, 2001. The policy was assigned to the first defendant and another bank (see pages 65, 66, 73-76 of the Trial Bundle). As was stated in the application for insurance and the letter confirming the loan and its terms, the policy was to assist in covering liability for the bank loan (see pages 23, 24, 80-84 of the Trial Bundle).

[71] The insurance policy was accepted by the third defendant based upon the completion of a written application, including a completed medical enquiry. The medical portion of the application was completed by Mr. Huber and Dr. Naffouj. In addition to this material, Dr. Naffouj submitted further letters to the third defendant at the request of the third defendant insurance company, confirming the health of Mr. Huber. The main health issue was the HIV status of Mr. Huber, which Dr. Naffouj advised was negative at the time of his examination for the purpose of life insurance on May 10, 2001.

[72] Following the death of Mr. Huber on September 27, 2002, the third defendant was asked to pay out on the policy. It was at that time that suspicions were raised as to

the health of Mr. Huber at the time of his insurance application and the written answers to questions in the application form. Supplemental information was obtained from Dr. Belizaire, who treated Mr. Huber subsequent to his insurance application. On the strength of that, the policy was denied.

[73] The validity of the policy rested with the information the third defendant received from Dr. Naffouj and Mr. Huber in applying for coverage. Barbara Pompier, agency manager for the third defendant, stated that the company relied on the information in the application and information provided by Dr. Naffouj. The credibility of Dr. Naffouj was therefore critical. From all the court can gather, no specific HIV result was ever submitted to the third defendant. Certainly, no test results were tendered in evidence in this trial. There was written communication from Dr. Naffouj dated July 8, 2001 "To Whom it May Concern" advising that Mr. Huber had tested negative for HIV (see page 309 of the Trial Bundle) and later a letter was signed by Dr. Naffouj "To Whom it May Concern" dated October 18, 2004 stating Mr. Huber had done blood tests for HIV with negative results prior to May 10, 2001 (see page 102 of the Trial Bundle).

[74] In his testimony, Dr. Naffouj said Mr. Huber had two or three HIV tests with negative results. He could not recall, however, which laboratory conducted those tests. He agreed it would have been better if he had attached the HIV test results to his witness statement. Although he stated his file would contain the test information, he confirmed that he did not bring his file to court nor did he review it prior to testifying. It is enlightening that Dr. Naffouj apparently provided CT scan results to counsel but not the blood test results. When challenged as to why, Dr. Naffouj said he was not asked for such test results. I find it very strange that a medical practitioner would come to court without reviewing his file and without bringing the file with him. Dr. Naffouj must have known the reason he was coming to court. I find the lack of production of any blood tests by Dr. Naffouj for Mr. Huber even more strange given the evidence of Dr. Naffouj that Mr. Huber frequently sought blood tests from him. The results would have formed a large portion of the

file, yet absolutely none were produced nor even reviewed by Dr. Naffouj. Dr. Naffouj seemed woefully unprepared to give his evidence.

[75] Such lack of preparation and indeed lack of attention was further illustrated when Dr. Naffouj agreed that while he wrote “no” in the insurance application at item 4 c for treatment for respiratory conditions such as bronchitis, in a subsequent letter dated April 4, 2007, he indicated Mr. Huber was treated many times for acute bronchitis and other conditions. By agreeing he may have missed that, he admits to a lack of thoroughness. Dr. Naffouj confirmed he knew Mr. Huber had been so treated yet he still wrote no on the form.

[76] This lack of attention was confirmed when Dr. Naffouj agreed he had not been careful when completing the form. This court noted that Dr. Naffouj agreed that he missed important information. Dr. Naffouj eventually became irritated and was plainly uncomfortable in giving his evidence, particularly once these mistakes were brought to his attention. He complained about the length of time his cross examination was taking and interestingly offered of his own volition that he was “not getting paid for this” when referring to his testimony.

[77] Dr. Naffouj did agree that toxoplasmosis was a rare disease but common among HIV patients. This coincided with the evidence of Dr. Belizaire. Dr. Belizaire is a medical practitioner with a specialization in internal medicine. To assist his testimony, unlike Dr. Naffouj, Dr. Belizaire provided copies of his medical file pertaining to Mr. Huber. Dr. Belizaire was fair in his testimony when he said that an HIV test was customary in order to diagnose AIDS, however, there were conditions that point to the presence of AIDS. There are AIDS defining illnesses, for example, toxoplasmosis is an AIDS defining illness. Significantly, Dr. Belizaire noted this condition develops in the later stages of AIDS. Dr. Belizaire examined Mr. Huber on June 24, 2002 and Mr. Huber died on September 27, 2002. Dr. Belizaire also fairly confirmed that the condition did not definitely indicate AIDS.

[78] Dr. Belizaire noted that the cause of death for Mr. Huber, thrombotic thrombocytopenic purpura, was a condition not uncommon in AIDS patients but also was not synonymous with AIDS.

[79] Dr. Belizaire testified that based on the information gathered, test results and data compiled for Mr. Huber, he reached a conclusion or a diagnosis. This was as a result of his knowledge and training. Dr. Belizaire concluded that Mr. Huber had contracted HIV for a significant period prior to his death.

[80] While Dr. Belizaire was not formally qualified as an expert witness, as I indicated during the trial, I allowed certain evidence to be given by him, just as I allowed evidence from Dr. Naffouj. The medical knowledge provided through their evidence was not obtained to assist the court in the classic sense as envisioned by the rules regarding expert evidence. Rather, the evidence was provided by specially trained witnesses who were called to provide evidence as to their work as medical professionals. They were present for examination in chief and cross examination. Their evidence was based on their observations of the patient and a review of test results and information gathered. I did not, however, allow the doctors to place in evidence any words uttered to them by Mr. Huber, based upon the classic interpretation of the hearsay rule.

[81] Overall, I found the testimony and evidence of Dr. Belizaire to be fair, measured and balanced. He openly referred to his clinical records. I have no difficulty accepting his evidence in its entirety. On the other hand, I found the evidence, testimony and demeanor of Dr. Naffouj to be evasive and confrontational. His failure to produce and refer to his clinical records is, at the very least, surprising. The records, in particular the test results, would have gone to the very heart of the matter for which he was called to give evidence. His admission that he missed important information and was not careful in completing the forms, while at least honest, reflects a serious lack of care and skill. I do not accept the evidence of Dr. Naffouj. That calls into question the entire insurance application and the veracity of

that document.

[82] I am satisfied that, on a balance of probabilities, the application for life insurance for Dirk Huber was not completed truthfully with full and complete disclosure of all current medical conditions and accurate information. There was a failure to disclose all material information on the part of the applicant. I am satisfied that Mr. Huber was HIV positive at the time of his application and that he knew of his condition at the time. Mr. Huber fell short in his duty to fully, accurately and truthfully answer all questions in the application form and to provide such accurate information to the medical practitioner completing the form. I find as well that Dr. Naffouj fell short in his duty to accurately and thoroughly complete the application for insurance for Mr. Huber. The third defendant, Sagicor Capital Life Insurance Company Ltd. therefore was well within its rights to deny the policy pay out and to decline to honour it in the manner that it did.

[83] I agree with learned counsel for the third defendant that there is no privity of contract between the claimant and the third party that would allow the claimant to seek to enforce the insurance policy. I agree that the claimant was not a party to the contract of insurance. It was between Mr. Huber and the third defendant. The policy was subsequently assigned to the first defendant and therefore the first defendant would have been in a position to seek to enforce the policy, however, the claimant has no such standing. Given my finding that the third defendant was entitled to treat the policy as void, I need go no further in this regard.

[84] By finding that the third defendant acted correctly and was entitled to deny payment on the life insurance policy, it follows that the third defendant is not in breach of contract for nonpayment.

[85] Learned counsel for the claimant makes a determined and persuasive argument regarding the legality of the loan from the first defendant to the claimant and the charges that flow from the loan agreement in order to secure it. He refers to The

Companies Act, 1995, in particular, s. 53. That section states that a company shall not give financial assistance to a director of the company for any purpose or to any person for the purpose of purchasing shares issued by the company when circumstances prejudicial to the company exist.

[86] In the case at bar, the first defendant issued a loan to the claimant. The particulars of the loan are set out at page 23 of the Trial Bundle in the form of a letter from Gregory de Gannes, (bank) manager, to Dirk Huber, director of OPBM Ltd. dated July 10, 2001. The letter grants a commercial loan for $2.6 million ECD "to assist with the purchase of time-share operations known as Jolly Harbour Limited". The letter lists security as, amongst other things, a first charge on certain properties, a caution over the properties, personal guarantee of directors and life insurance coverage on Dirk Huber for $2.6 million ECD. The letter is signed by Mr. de Gannes and on July 11, 2001 is signed by Mr. Huber and Mr. Watt. There is signed confirmation that Mr. Huber and Mr. Watt guarantee credit facility in the name of OPBM Ltd. for $2.6 million ECD. The loan clearly flows from Antigua Commercial Bank to OPBM Ltd.

[87] The purpose of the loan was confirmed in the evidence of Geoffrey Simmons, recovery supervisor for the first defendant bank. Mr. Simmons refers to letters dated March 9, 2001 and June 25, 2001 from Simon MacAuley. The letters found at pages 60-62 of the Trial Bundle confirm Mr. MacAuley was the managing director of OPBM Ltd. and the sole shareholder of that company. Mr. MacAuley had agreed to sell his shares in the company to Mr. Huber. The letters identify Mr. MacAuley's company as being West Indies Capital Co. Ltd. By way of disbursement statement found at page 58 of the Trial Bundle, Antigua Commercial Bank transferred a little over $2.6 million ECD to West Indies Capital Co. Ltd. at the signed direction of Dirk Huber and Charles Watt, dated July 11, 2001.

[88] Although the evidence of Mr. Simmons and the loan letter of July 10, 2001 refer to the purchase of Jolly Harbour Ltd., the letters from Mr. MacAuley and the evidence

of Gloria Watt clearly confirm the loan money was to facilitate the purchase of shares in OPBM Ltd.

[89] These facts accord with s. 53 of The Companies Act, 1995. The claimant, OPBM Ltd., received a bank loan from the first defendant, Antigua Commercial Bank Ltd. Those funds enabled one of its directors, Dirk Huber, to purchase shares issued by that same company, OPBM Ltd. I have no difficulty finding that the proceeds of the loan constituted "financial assistance" as referred to in s. 53(1) of the Act.

[90] Section 53 will not, however, come into play unless circumstances prejudicial to the company existed at the time of the provision of the financial assistance. Section 53 indicates when prejudicial circumstances exist. Essentially, they exist when the company will be unable to meet its liabilities after giving the financial assistance or the realizable value of the company assets would, after giving the financial assistance, be less than the company's liabilities and capital.

[91] Establishing the assets and liabilities for OPBM Ltd. at the time of the loan is difficult. The court was not provided with any corporate books and records. The only information is to be found in the letter of Simon MacAuley dated March 9, 2001 to Mr. Richardson of Antigua and Barbuda Investment Bank Ltd. This is the letter referred to by Mr. Simmons of Antigua Commercial Bank Ltd. It is understood therefore that the letter was known to the first defendant.

[92] That letter refers to outstanding liabilities totaling "approximately" $215,000 USD. It refers to other outstanding liabilities in the form of "loans to WIC". However, as no figure is given for that, this court must disregard that reference. The asset value of the company is indicated as being "approximately" $1.3 million USD comprised of $1.1 million USD in promissory notes which generate 14.9% interest plus $200,000 USD in inventory. This would leave a net asset value of $1,085,000 USD. This would equate to $2,929,500 ECD. This figure is compared to the loan figure of $2.6 million ECD. The loan document refers to an up-front commission of

$65,000 ECD or 2.5% of the amount borrowed, which learned counsel for the claimant submits should be added to the amount of the loan. I decline to do that. The up-front commission is a fee associated with the loan itself. It will not be considered as part of the "financial assistance" referred to in s. 53.

[93] Learned counsel also submits that this court should discount the net asset value by a "conservative sum" of 10%, in order to produce a realizable value of the company's assets. This court also declines to do that. If this court were to engage in calculating such estimated amounts it would also, in fairness, have to assign a figure to the 14.9% interest apparently generated on the promissory notes. All of the figures referred to in the letter of Mr. MacAuley are approximations. To go further and assign other estimated figures would take the exercise too far. Based on the figures actually referred to in the letter, the company's value was $2,929,500 ECD and the loan was $2.6 million ECD. As a result, I am satisfied that circumstances prejudicial to the company did not exist and therefore the loan agreement did not contravene the terms of The Companies Act, 1995, in particular s. 53.

[94] What is the status of the charges on the property of the claimant company? The claimant deals in the timeshare vacation business. However, as part of the loan obtained from the first defendant bank, charges were placed on the parcels of land that also serve as timeshare rentals. The property charges were designed to secure repayment of the loan. Entries in the Land Register indicating cautions and charges on property held by the claimant in favour of the first defendant are found at pages 41-56 of the Trial Bundle. Although not filed in evidence, there appears to be no issue that there are multiple individuals owning timeshare rights in the property owned by the claimant and which are subject to the first defendant's charges. Gloria Watt certainly testified to that.

[95] The Timesharing (Licensing and Control) Act CAP 427 of the Laws of Antigua and Barbuda at s. 6 states that "a purchaser may take, acquire, hold, lease, assign

and dispose of his right to occupy and use the facilities of a timesharing scheme, in the same manner as personal property." This right of occupation is to be registered pursuant to s. 18 of the Act by the registrar in the Register of Timesharing Intervals. Upon such registration, a charge is created pursuant to s. 19(1) of the Act for the duration of the purchaser's interest. Section 19(2) confirms that such a charge "shall prevail against any purchaser of the premises in good faith for value without actual notice of such charge."

[96] The rights of land owners are set out in The Registered Land Act CAP 374 of the Laws of Antigua and Barbuda. Section 23 states that a land owner registered with absolute title takes ownership but is subject to items such as "leases, charges and other encumbrances" shown in the register. Of course, the timeshare charge does not appear in the same register but as already noted it certainly exists.

[97] What is clear from a review of the case law and the legislation is that the timeshare charge is a right of occupation. As such, it is a charge that encumbers the property and moves with it, should the property be sold. Such a charge does not prevent the sale of the land parcel. As learned counsel for the claimant points out, any purchaser of the property would purchase the property subject to the rights of the timeshare owners.

[98] Section 19(3) of the Act confirms that the timesharing charge "shall prevail against any purchaser of the premises in good faith for value." The section does not say that the sale is void. Allowing the timeshare charge to prevail ensures the right of occupation of the timeshare owner continues uninterrupted, no matter whom or what entity actually owns the property. Title in the property is separate and apart from the right of occupation. Title may be transferred as long as the right of occupation continues.

[99] As such, I am satisfied that the charge of the first defendant does not affect the timeshare charges. They can effectively co-exist. The first defendant can therefore

exercise its rights to sell the property pursuant to the charges it holds. The sale of the property will not negate the timeshare charges. The owners of the timeshare charges will maintain their rights of occupation regardless of the owner of title to the property.

[100] The claimant offered up the charges on its property as security for the loan with the first defendant. The bank can therefore exercise its rights pursuant to these charges, even in the presence of the timeshare charges. The latter will remain in full force and effect, undisturbed regardless of the location of the ownership title to the property. Were it to be otherwise, the title to the property would be forever, or at least for as long as the timeshare rights existed, nontransferable. I am satisfied that is not the intent of the legislation.

ORDER

For all of the reasons noted above it is hereby ordered as follows:

[a] The claimant's claim is dismissed in its entirety.

[b] Judgment is entered for the first defendant, Antigua Commercial Bank Ltd., against the claimant.

[c] The first defendant may proceed to dispose of the charged properties described in the land registry as Registration Section: Southwest; Block 55 1186D, Parcels 51, 55, 56, 119, 120, 121, 137, and 138, by sale.

[d] Costs are awarded pursuant to the prescribed costs regime of the Civil Procedure Rules (CPR) 2000 payable by the claimant to both the first defendant and the third defendant.

Richard G. Floyd
High Court Judge