COMMONWEALTH OF DOMINICA

DOMHCV2011/0097

BETWEEN:

FIRST CARIBBEAN INTERNATINAL BANK (BARBADOS) LIMITED FORMERLY KNOWN AS BARCLAYS BANK PLC **Claimant**

and

MARINOR ENTERPRISES LIMITED **Defendants**

MICHEAL ASTAPHAN

Before: **The Hon. Justice Brian Cottle**

Appearances:

Mr. Alick Lawrence for the Claimants
Mr. G.O.N Emmanuel for the Defendants

[2012: April 20th]
[July 27th]
[December 13th]

JUDGMENT

[1] **COTTLE J:** The claimants are a banking enterprise. The first defendant obtained credit facilities from the claimants. The loans were secured by deposit of the certificates of title to certain real estate of which the first defendant is the registered proprietor. The second defendant personally guaranteed the loans. By a written agreement dated 1st December 2000 between the claimants and the first defendant the claimants agreed to lend to the first defendant $1,340,000.00. The interest rate was expressed to be 10%. The monthly installments to repay were agreed at $16,860.00 for the first year, to be reviewed at 30th November 2001. It was also agreed that any rental income earned from certain property intended to be renovated would be applied to the permanent reduction of the loan granted.

[2] A sum of $180,000.00 of the funds agreed to be loaned was intended to be used for the renovation of the building which was earmarked for rental. It is common ground that all the loan funds were disbursed by the claimants and received by the first defendant except the sum of $180.000.00. Under the agreement the bank required "an estimate from a builder/contractor for the cost of renovation work to be carried out on the property and drawings against the additional $180,000.00 will be against certificates from the builder/contractor".

[3] The defendants failed to service the loan and the claimants brought the instant claim seeking repayment of principal, interest, and other charges. Alternatively the claimants sought to have the mortgaged property sold in accordance with the procedure set out in the Title by Registration Act. In their defense the defendants do not deny that all the loan funds were disbursed and received save for the sum of $180,000.00. However, they aver that the failure to disburse the $180,000.00 which was to be used to renovate the building for rental meant that they lost the projected rental which they calculated at over 1 million dollars by the time of filing. As a consequence the defendants deny any indebtedness to the claimant bank.

[4] The defendants also averred that the bank breached certain fiduciary duties to the defendant company. The particulars of the breach aver that the bank through its collection facility was to get in money from overseas customers to whom the defendant had sold its goods. The bank delivered the documents to the customers which enabled them to take possession of these goods. The customers did not pay. Despite this, the defendant company says, the bank paid itself a commission on the funds to be collected and debited the defendants' account accordingly.

[5] In their reply the bank pleaded a failure of the defendant to meet a condition precedent to the disbursement of the $180,000.00, namely the absence of an estimate from a builder/contractor and the absence of any certificates from a builder/contractor certifying the renovation carried out. During the course of the trial other issues surfaced- counsel for the defendant identified these issues as:

a. ***Whether the First Caribbean International Bank has locus standi to bring this action on behalf of Barclays Bank?***

b. ***Whether Barclays Bank breached the banker/customer agreement as modified by the Pre-Shipment Guarantee Scheme when the bank failed to confirm a letter of credit in a timely manner as set out in the correspondence***

c. ***Whether the debit of the sum of $140,833.57 by Barclays Bank of the 1st defendant's current account to clear the first Stocking Loan Facility (Account No.1309311 guaranteed by the Eastern Caribbean Central Bank Pre-Shipment Guarantee Scheme and Post Shipment Guarantee Scheme on the 11th day of August, 1989 was in breach of the terms and conditions of the banker/customer agreement as modified by the Pre-Shipment Guarantee Scheme?***

d. ***Whether Barclays Bank had an obligation under the banker/customer agreement as modified by the Pre-Shipment Guarantee scheme to conduct due diligence of the creditworthiness of the 1st defendant's overseas customers and make arrangements to collect monies due under bills at sight or bills 30 days sight prior to the loan agreement dated February 10, 1995***

e. ***Whether, and in consequence of the foregoing, Barclays Bank breached the banker/customer agreement as modified by the Pre-***

Shipment Guarantee Scheme when the Bank debited the sums as set out in the schedule attached to letter dated June 13 1995 from the Bank to the 1st Defendant?

f. ***Whether and in consequence of the foregoing, Barclays Bank breached the banker/customer agreement as modified by the Pre Shipment Guarantee Scheme when the bank debited the sum as set out in the schedule dated March 2, 2004 prepared by the Bank to the 1st Defendant.***

g. ***Whether the Defendants are entitled to a set-off, cross-claim and/or counterclaim for the aforementioned breaches by Barclays Bank in the present claim for mortgage debt under an agreement dated the 1st day of December, 2000 between the Barclays Bank and the 1st Defendant, under which Barclays Bank agreed to lend to the first-named Defendant the sum of one million five hundred and forty thousand dollars ($1,540.000.00) with interest at Barclays Bank's Base rate which then was 10% per annum?***

[5] The issue of Locus standi was not pursued with much vigor by the defendants at the trial. They were right to adopt that approach. The acquisition of the business of Barclays Bank by First Caribbean International Bank was a matter that received wide publicity. The defendants were well aware of it and cannot now avoid liability on this basis alone. Only the matters which are identified in the pleadings as being contested between the parties stand to be determined by the court. The issue of locus standi was not raised in the defense and cannot now be raised by the defendants.

[6] The defendant company led evidence aimed at establishing that the claimants were in breach of the banker/customer relationship, as modified by a pre-shipment guarantee scheme. Several difficulties arise here for the defendants. Firstly, there is no mention of this averment in the defense which was filed by the defendants. Secondly there is no evidence that the pre-shipment guarantee scheme operated by the Eastern Caribbean Central Bank affords the defendants any contractual rights. The pre-shipment guarantee scheme operated only as an agreement between the Eastern Caribbean Central Bank and the claimants and conferred no rights on the defendants on which they can now rely to allege breach of agreement.

[7] The defendants could not show any contract entered into between themselves, the bank and the Eastern Caribbean Central Bank. In any event all of the shipments for which no payment was received by the bank on behalf of the defendant company post-dated the cessation of the pre-shipment guarantee scheme as the defendants acknowledged in their own correspondence. I now turn to consider the effects of the failure of the claimants to get in payment from overseas customers to which the defendant company had sold goods.

[8] At the trial the second defendant, the operating mind of the first defendant, was cross-examined about the customers who had failed to pay. He blamed the bank for failing to conduct due diligence checks about the creditworthiness of these customers. It is unclear why this would be an incident of a banker/customer relationship. Also he admitted that all the sales by the defendant company which are now being considered were sales by the defendant company on a credit basis. The bank

was obliged to deliver the shipping documents upon the customers' promise to pay within 30 days. I fail to see how the bank attracts liability if those customers later fail or refuse to honour the promise to pay.

[9] The defendants also complain that the bank paid themselves commissions without having collected repayment from consignee customers. This complaint is ill founded. The defendants signed the shipping documents. They expressly authorised the bank to make the deductions. The failure of the defendant company to realize the import and meaning of the documents they sign cannot absolve the defendant company from responsibility for their own actions.

[10] The defendants also allege that the deductions were made from the account without their knowledge or consent. Again, against a backdrop of having expressly authorized the deductions this complaint is without merit. Additionally the evidence revealed that the defendants were in fact notified of all deductions save one. It is reasonable to infer that despite the absence of evidence that notice was also given for that single instance as well.

The failure to disburse the $180.000.00

[11] As noted above, it is common ground that this sum was not disbursed. However the written loan agreement sets out the conditions which applied to the disbursement. At the trial the defendants did not lead evidence that an estimate was ever provided. It was put to the claimants' witness that such an estimate was provided. This was denied. No such estimate was put into evidence by the defendants. In the circumstances I find that there is no evidence of the existence of the estimate.

[12] It must be noted that in their letter withdrawing the facility of $180.000.00 the claimants did not say that the withdrawal was due to the failure to provide the estimate. The letter is dated 16th January 2003. This is more than two years after the facility was made available. Up to that time the defendants had done nothing to draw down on the loan funds. While the agreement of 1st December 2000 did not specify a time for the defendants to provide the estimate and begin accessing the funds, in the circumstances a reasonable time must be inferred.

[13] The defendants in their closing submissions urged the court to conclude that the failure of the bank to advert to the absence of the estimate in their letter of January 2003 withdrawing the availability of the $180,000.00 should be taken to mean that such an estimate was in fact provided. I do not share that view. It was for the defendants to establish that they had fulfilled the requirements entitling them to the disbursment of the $180,000.00 before they can complain of a failure to provide the finance.

[14] For purpose of completeness there was evidence led by the defendant of instances of an apparent failure by the bank in the discharge of their obligations under the banker/customer relationship.

i. The debt of $140,833.87. The first defendant maintained several accounts with the claimant bank. There was a stocking loan account and a current account. The bank credited $140,833.87 to the first defendant's current account. This sum represented the proceeds of sale of the company's goods. According to an internal memorandum of the bank, which was produced at trial by the defendants, those sums ought to have been

applied to clear off the stocking loan. When the error was discovered the funds were debited from the current account and applied to clear off the stocking loan. The defendants complain that the bank was wrong to correct its error in applying the funds received. This court was not able to understand why this action of the bank in belatedly applying the funds to clear off the defendant's loan was wrong. It is to be noted that the defendants did not make any complaint at the time that the bank took a wrong course of action.

ii. The Guareski letter of credit
The bank was tardy in confirming a letter of credit to a firm of French suppliers. The defendants suffered loss as a result. The bank accepted liability and paid compensation to the first defendant. The witness for the first defendant, the second defendant, admitted that the bank had paid compensation. The first defendant accepted the cheque.

[15] As the defendants have already been compensated for this matter I cannot see how it can now be raised by the defendants as a set off against their admittedly unpaid loan. Having carefully considered the matters raised by the defendants as outlined above I conclude that they offer no basis upon which a court can set off any sums against the defendants' obligations under the 2000 loan agreement. I therefore find for the claimants in terms of the relief claimed. Judgment is entered for the claimants for the payment of the balance of principal interest and other charges in the sum of $1,238,024.34 as at 7th February 2006.

[16] There will be interest on this amount at the contractually agreed rate of 9% per annum from 7th February2006 until repayment. Further or in the alternative, the mortgaged property of the first defendant is to be sold in accordance with the procedure laid down in the Title by Registration Act. The defendants will pay the claimants' prescribed costs on the judgment amount.

Brian Cottle
High Court Judge