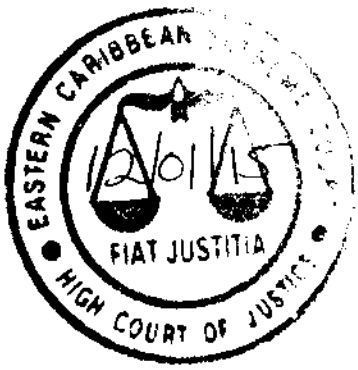

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO: SVGHCV2005/378

BETWEEN

BROWNE'S CONSTRUCTION LIMITED

Claimant

and

FIRST CARIBBEAN INTERNATIONAL BANK LIMITED

Defendant

Appearances:

Mr. Stanley John QC., Mr. Richard Williams and Ms. Keisal Peters for the Claimant.
Ms. Nicole Sylvester and Ms. Lekeisha John for the Defendant.

2012: June 19 – 20;
2013: October 21;
2014: May 21 – 22;
July 24 and 28;
2015: January 12.

JUDGMENT

[1] **THOM J.** The Claimant (Browne's construction) is a company involved in housing development. The Defendant (the Bank) is a company carrying on banking business in St. Vincent and the Grenadines.

[2] In June 1999 Browne's Construction and the Bank entered into a Loan Agreement whereby the Bank granted Browne's Construction a loan of EC$1,000,000 for its housing project at Brighton.

[3] The Loan Agreement included the following terms: (i) interest rate of 11% per annum; (ii) repayment to be by 60 monthly payments of $21,472.00 with the final payment to be made on 30th June 2004; (iii) Browne's Construction was required to (a) provide annual audited financial statements; (b) provide quarterly financial information, (c) maintain a debt to equity ratio of 2:1, (iv) Browne's Construction was required not to undertake the following without the prior approval of the Bank: (a) make capital expenditure, (b) make any dividend payment above 25% of net after tax profit, (c) make any reduction of shareholders loan and advances.

[4] The bank also provided Browne's Construction with an overdraft facility of a limit of $250,000 at an interest rate of 12 ½ % per annum.

[5] It is not disputed that Browne's Construction operated the overdraft facility in such a manner that it consistently exceeded $250,000.

[6] In November 2001 the Bank commenced acceleration of the loan repayment. This resulted in the loan being paid off approximately twenty months in advance of the scheduled repayment date.

[7] In May and June 2003 a total of three cheques issued by Browne's Construction were not honoured by the Bank, and in so doing the words "refer to drawer" were written on the cheques.

[8] Browne's Construction instituted this claim in which they contended that the overdraft facility was increased to $500,000 and the bank breached the Loan Agreement when they: (i) accelerated the loan repayment, (ii) failed to honour the three cheques drawn on the overdraft facility. Browne's Construction also made a claim in libel in relation to the words "refer to drawer" written on the cheques. Browne's Construction claims special damages of $19, 400.00 for additional interest paid as a result of the accelerated loan repayment and $1,045,000 being the cost of construction stoppage on nineteen houses at a profit of $55,000 per house. Browne's Construction also claims general damages for breach of contract and libel.

[9] The Bank in its defence denied that the overdraft facility was increased to $500,000 and contended that Browne's construction consistently exceeded the overdraft limit of $250,000. The Bank also denied Browne's Construction claim of breach of contract, libel and the losses alleged.

Evidence

[10] Three witnesses testified on behalf of Browne's Construction being Mr. Gideon Browne its Managing /director, Mr. McLauren Mornix payee of the June 2 dishonoured cheque, and Mr. Omar Davis an accountant who was deemed an expert witness. Three witnesses testified on behalf of the Bank, being, Mr. Alfred Hazell a former Manager Independent Business of the Bank, Mr. Andre Cadogan an employee who was assistant to Mr. Hazell at the material time, and Mr. Stanley DeFreitas an accountant who was deemed an expert witness.

Issues

[11] The issues which arise for determination are:

(a) Whether the bank was in breach of the Loan agreement when it:

(i) accelerated the repayment of the loan;

(ii) failed to honour the three cheques.

(b) Whether the words "refer to drawer" amount to libel of Browne's construction.

(c) If there was a breach of contract and/or libel, what quantum of damages should be awarded to Browne's Construction.

Breach of contract

Accelerated Repayment

[12] In support of his contention that the bank breached the Loan Agreement when it accelerated the repayments Mr. John Q.C. advanced three grounds: (a) There is no provision in the Loan agreement for accelerated repayment; (b) no demand

was made before the repayments were accelerated and (c) no notice of the acceleration was given to Browne's Construction.

[13] In relation to his contention that there was no provision for acceleration of repayment in the Loan agreement, Mr. John Q.C. referred the court to the testimony of Mr. Hazell where he stated:

> "The accelerated payment was not unilaterally done. It was done with the cooperation of Mr. Browne. He had to provide the deposits which came into the account. This agreement did not have accelerated payment provisions included. At the time the loan was negotiated it was understood that there would have to be accelerated payments made to the account. Repayment was from contracts based on sale of properties. I discussed this with Mr. Browne. I discussed that repayment was calculated on a five year term. If you work this amount it would not repay the loan. I do not recall if I gave those instructions to my lawyers. I did have discussions with Mr. Browne. It was understood that there would be lump sum payment to allow the loan to be repaid within a five year period. All loan facilities are demand loans. You make demand. You will write a letter of demand on the loan. No letter was written to Mr. Browne at the time I was at the bank. It is true that because no letter was written I say there was discussion and understanding."

Mr. John Q.C. submitted that the above testimony is contradicted by the Loan Agreement which provides for sixty monthly instalments of $21,742 and Mr. DeFreitas' testimony where he stated:

> "Whilst the Loan Agreement requires a monthly instalment payment of $21,742 plus interest, which suggests that the $1,000,000 demand term loan is repayable in forty six (46) months, the actual accounting by the parties indicate a blended (principal and interest) monthly instalment. Under this scenario, the loan is repayable in sixty three (63) months.."

[14] Mr John Q.C. further submitted that the basic contract rule is that the time when payment is due is a question of construction of the contractual terms. Thus a term loan is repayable on maturity subject to contractual provisions for earlier repayment in the event of default – see **Lloyds Bank Ltd v Margolis and others (1945) 1 All ER 734.**

[15] In relation to the need for a demand, Mr John Q.C. referred to clauses 1.7 and 2(d) of the Loan Agreement and clause 1 of the Debenture mortgages and submitted that based on those provisions the Bank was required to make a demand on Browne's construction before accelerating the repayment. Further where there is a right to repayment on demand, the right **should** not be exercised so as to unduly prejudiced the borrower's interest – see **Paget's Law of Banking 9th Edition p. 115.**

[16] In relation to the issue of notice Mr. John Q.C referred to clause 1.7 of the Loan Agreement and to the testimony of Mr. Hazell where he testified that clause 1.7 required the Bank to give Browne's Construction 30 days notice of the acceleration of repayment and that he sent out written notice by letter dated May 15, 2002. Mr John Q.C. submitted that this letter was after the acceleration had commenced in November 2001. It therefore did not constitute notice. Further it was not in accordance with the Loan Agreement or clauses 16 and19 of the Principal Mortgage Debenture which required notice to be given personally or by registered post. Also Browne's Construction did not sign the letter thereby agreeing to the terms.

[17] Ms. Sylvester in response submitted that the terms of the Loan Agreement provided for the Bank to review the operation of the loan and fixed the first review date for May 31, 200. A review of the operation of the loan showed that Browne's Construction failed to (a) provide audited financial statements for the years 2000, 2001 and 2002, and quarterly financial information; (b) maintain a debt to equity ratio of 2:1 but rather had a debt to equity ratio of 33:1 in 2000, 20:1 in 2001, and 9:1 in 2002; (c) Browne's Construction in breach of the covenant forbidding capital expenditures borrowed $886,142 and invested in or loaned to a related company and used $196,191 to repay shareholders loan to the company or amounts due to shareholders by the company during the period January1, 2000 to December 31, 2002. Ms. Sylvester submitted that as a result of the above breaches the Bank was entitled to vary the repayment schedule so as to safeguard against losses. Therefore the rescheduling of repayment cannot constitute a breach of contract.

Ms. Sylvester relied on the following passage from **Blair, Banks Liability and Risk 3rd Edition 2001 p.90:**

> " In general events of default could include the borrower's failure to pay any sums due, his breach of a covenant in the agreement, gross default, the coming to light of any misrepresentations made by the borrower."

[18] Ms. Sylvester further submitted that a demand was not the only action open to the bank under the agreement. A demand for immediate repayment of any outstanding amounts is one such action. The Loan Agreement provides examples of other actions which may be taken by the bank including the request for the provision of more financial information, a change in the interest rate or fees. Ms. Sylvester further submitted that the examples stated in the Agreement are not exhaustive and a variation in the repayment schedule of a customer aptly falls within the parameters of the provisions as a measure to be taken where the Bank wishes to manage its risks.

[19] In relation to the requirement for notice Ms. Sylvester submitted that the Bank complied with the provisions of the Loan Agreement and referred the Court to the evidence of Mr. Hazell mentioned earlier. Further it is of no moment if the discussions were in person or by telephone.

[20] Ms. Sylvester argued alternatively that the circumstances were not normal circumstances and therefore the Bank was not required to give notice to restructure the repayment schedule. Ms. Sylvester relied on the following factors to show that the circumstances were not normal: (a) the security for the loan was being depleted by the failure of Browne's Construction to advance the sums received from sale of properties towards the repayment of the loan, (b) Browne's Construction used funds to repay Shareholders loans to the company or advance amounts due to shareholders, the debt t equity ratio was not maintained, Browne's Construction has consistently failed to provide audited financial statements to the Bank and consistently exceeded the overdraft limit.

[21] Ms. Sylvester submitted further that if the Court is of the view that the Bank failed to give notice as stipulated in the Loan agreement, that the requirement for notice arises only where what has transpired amounts to a demand for immediate repayment of the loan. Since there was no demand for immediate repayment but only to vary the repayment schedule as part of their risk management measures the Bank was not required to provide notice.

Findings

[22] Clauses 1.7 and 2(d) of the Loan Agreement read as follows:

> "1.7 **Our Rights Re Demand Credits.** At CIBC we believe that the banker-customer relationship is based on mutual trust and respect. It is important for us to know all the relevant information (whether good or bad) about your business. CIBC is itself a business .Managing risks and maintaining our customer's ability to repay is critical to us . We can only continue to lend when assured (copy not clear) that we are likely to be repaid. As a result, if you do something that jeopardizes that relationship, or if we no longer feel that you are likely to repay all amounts borrowed, we may have to act. We may decide to act, for example, because of something you have done, information we receive about your business or changes to the economy that affect your business. Some actions that (copy not clear) we may decide to take include requiring you to give us more financial information, negotiating a change in the interest rate or fees, or asking you to get further (copy not clear) accounting assistance, put more cash into the business, provide more security or produce a satisfactory business plan. It is important to us that your business succeeds. We may, however, at our discretion, demand immediate payment of any outstanding amounts under any demand credit. We may also, (copy not clear) at any time and for any cause, cancel the unused portion of any demand credit. Under normal circumstances however we will give you 30 days notice.
>
> 2(d) **Demand of Fixed Rate Demand Instalment Loans.** If you have a Fixed Rate demand instalment loan and we make demand for payment, you will owe us (i) all outstanding principal, (ii) interest, (iii) any other mount due under this Agreement and (iv) a pre-payment fee. The prepayment fee is equal to the interest rate differential for the remainder of the term of the loan, in accordance with the standard formula used by CIBC in these situations."

[23] The effect of clause 1.7 is that the Bank may take action where the customer relationship is jeopardized or the Bank is of the opinion that they are not likely to be repaid the sums borrowed. Several actions are outlined which the Bank may take. I agree with the submission of Mr. John Q.C that acceleration is not one such action listed. However I also agree with the submission of Ms. Sylvester that the actions listed are not exhaustive. A demand for the repayment of the outstanding amount was one of several actions which the bank could have taken. The Bank did not make a demand for the repayment of the outstanding sums and so the provisions of clause 2 (d) did not come into operation. Rather the Bank accelerated the repayment of the loan. Having regard to the nature of the actions outlined in clause 1.7 including demand for the full amount outstanding, I am of the view that acceleration of the repayment is an action which was open to the Bank. Acceleration is a slightly less drastic measure that demand for repayment. In accelerating the repayment of the loan the Bank was not required to make a demand for repayment on Browne's construction. The next issue which arises is whether the bank was required to give Browne's Construction notice of the intended action to accelerate the repayment.

[24] Clause 1.7 specifically provides that in normal circumstances the Bank would give 30 days notice of any action it proposes to take. Clause 1.9 of the Loan Agreement outlines the manner in which notice should be given by the Bank. It reads:

> "We may give you any notice in person or by telephone or letter that is sent either by fax or by mail."

[25] I will deal first with whether notice was given by the Bank. The evidence of Browne's Construction is that it was not given any notice by the Bank. The evidence of Mr. Hazell is that based on his recollection notice was given to Browne's Construction. The notice may not have been in writing but the notice was given. He subsequently stated that notice was given in his letter of May 15, 2002. Mr. Hazell further testified that the letter was sent after there were several meetings with Mr. Browne. He also testified that at the time the loan was

negotiated Mr. Browne understood accelerated payment by way of lump sum would have to be made to the account to allow the loan to be repaid within a five year period.

[26] While I agree that the effect of clause 1.19 of the loan agreement is that notice may be given in writing or orally, having reviewed the evidence in particular the evidence of Mr. Hazell and the documentary evidence, I find that there is no evidence of any notice of the acceleration given to Browne's Construction orally or in writing. The letter of May 15, 2002 does not constitute notice since the acceleration commenced in November 2001. Also discussions at the time of negotiation of the loan do not constitute notice in accordance with clause 1.7. Mr. Hazell's testimony that discussions were held with Mr. Browne prior to the May 15, 2000 letter is supported by the Credit Application Report dated April 25, 2002, where it is stated that "We have met with Browne on several occasions since Nov 16/01 in an effort to finalize negotiations to restructure the company's credit facilities, but we have made little progress on this matter. In fact our relationship with Browne has soured to the extent that we are aware that he has approached another financial institution for additional financing, which may include the possible pay out of CIBC loans." Assuming this constituted notice to Browne's Construction that the Bank would accelerate the repayments, since the discussions took place from November 16, 2001, Browne's Construction would not have been given the required notice since the acceleration commenced on November 29, 2001. The onus was on the Bank to show that they gave 30 days notice, in my opinion they failed to adduce evidence of such notice. This is however not the end of the matter since Ms. Sylvester argued in the alternative that the Bank was not required to give notice because firstly, the Bank did not make a demand for repayment of the amount but acceleration of the repayment, in circumstances of acceleration notice is not required and secondly the circumstances were not normal.

[27] I respectfully disagree with Ms. Sylvester's submission that notice was required for demand for repayment but not for acceleration of repayment. The Bank was required to act within the terms of the Loan Agreement and the Loan Agreement

specifically provides in clause 1.7 that the Bank would give notice of any actions it proposed to take.

[28] In relation to the issue whether the circumstances were normal, Ms. Sylvester relied on the several breaches of Browne's Construction as factors showing that the circumstances were not normal. I am of the view that the circumstances that must be taken into consideration are those circumstances which existed in November 2001. The Bank's evidence of the various breaches by Browne's construction as outlined above including the several occasions of the overdraft being in excess of $500,000 was not contradicted by Browne's construction. These breaches were occurring since 2000. Notwithstanding those breaches the Bank in October 2000 sought approval to increase the credit facility to Browne's Construction and in so doing the Bank advised its Barbados office that they valued their relationship with Browne's Construction. The same breaches continued in 2001. There is no evidence of any circumstance in 2001 which was not in existence in 2000 when the Bank was recommending additional credit facility for Browne's Construction. In view of the above I am of the opinion that the circumstances in 2001 were not abnormal circumstances within the meaning of clause 1.7 so as to entitle the Bank to take action without giving notice to Browne's Construction. In failing to give notice of the acceleration of the repayment the bank acted in breach of the Loan Agreement.

Failure To Honour The Cheques

[29] Whether the Bank acted in breach of contract when it dishonoured the cheques depends on the quantum of the overdraft limit at the material time. Browne's Construction contends the overdraft limit was $500,000, while the Bank contends it was $250,000. It is not disputed that the Bank did not honour the following cheques issued by Browne's Construction; cheque dated May13, 2003 payable to Eastern Caribbean metals in the sum of $12,417.59; cheque dated May 28, 2003 payable to Eastern Caribbean Metals in the sum of $12,417.59; and cheques dated June 2, 2003 payable to Mr. McLauren Monix in the sum of $5000 and in so doing marked the cheques dated May 28, and June 28, "refer to drawer".

[30] It is also not disputed that on May 6, 2003 the Bank wrote to Browne's Construction after holding discussions with Browne's Construction indicating among other things that the overdraft limit is $450,000 and at that time the overdraft was at $432,430.

[31] It is agreed that that on May 28 Browne's Construction deposited $30,000 into the account.

[32] Mr. John Q.C. submitted that the Bank was obliged under the Loan agreement to permit Browne's Construction the account for the duration of the period of the scheduled repayments ending June 2004, up to the limit of $500,000. The limit was increased from $250, 000 to $500,000. Mr. John Q.C. relied on the documentary evidence from the Bank including the letter to Browne's Construction dated May 15, 2002 the material part of which reads:

> "As of the date of this letter, the Demand Loan has a principal outstanding balance of $404, 854.80, while the operating overdraft stands at $636,793.18 of which $136,793.18 is in excess of the authorized limit. Payment of the excess is to be in addition to the repayment outlined above."

[33] Mr. John Q.C. further submitted that having regard to the course of dealing between the Bank and Browne's Construction where cheques written when the limit exceeded $250,000 were consistently honoured by the Bank, the Bank was obliged to honour the three cheques. Mr. John relied on the following passage in the case of **Cummings v Shand (1806) 5H7N p.98:**

> "...No doubt, if a person has been accustomed to accept bills for the accommodation of another, he may refuse to do so any longer, for there is no tenancy of a man's credit which requires any time to put an end to it but that is not the case where a course of dealing has prevailed, and value has been given for the accommodation. It makes no difference whether the one party is a factor or a banker. If the circumstances are such as to justify the other in drawing though he has not a cash credit; he is entitled to do so until he has notice that the accommodation is dis-continued. The question then is whether there was between the plaintiff and the bank, a

course of business which could not be put an end to without reasonable notice..."

[34] Mr. John Q.C. next submitted that having regard to all of the circumstances of the case, the Bank is estopped from denying that the overdraft limit was at all material times up to $500,000 – see Re Home (a bankrupt Ex parte the Trustee v Kensington Borough council (1950) 2AER p.716. Therefore when the bank failed to honour the cheques at a time when the overdraft facility was not in excess of $500,00 the bank acted in breach of its contractual relationship with Browne's Construction.

[35] Ms. Sylvester in response submitted that under the original agreement the overdraft limit was capped at $250,000 but Browne's Construction was allowed temporary excesses. The letter of May 15, 2002 proposed an accommodation of $500,000 overdraft limit subject to certain conditions. However Browne's Construction refused to accept the conditions and did not sign the letter. Browne's Construction therefore cannot claim that the overdraft limit was $500,000. Ms. Sylvester agreed that Browne's Construction signed the letter of May 6, 2003 which stated the overdraft limit to be $450,000 and also that the existing overdraft facility would be fully liquidated upon receipt of the amounts due under contracts to be completed, 75% of which were to be applied towards liquidating the overdraft. However Browne's Construction did not comply with the terms of the letter and cannot rely on the letter.

Findings

[36] Where there is a contractual relationship of bank and customer, if the customer has sufficient funds in his account or sufficient credit available to cover the amount of the cheque drawn, then the bank is obliged to honour the cheque. When the Bank and Browne's Construction entered into the Loan Agreement in June 1999, the overdraft limit was $250,000. The evidence shows that the overdraft has been operated consistently at a level above $250,000. On several occasions the overdraft was in excess of $450,000. Mr. Hazell's evidence which I accept is that

he was in constant communication with Mr. Browne about the excess on the overdraft. Mr. Browne would then make payment to the account. Mr. Hazell explained that while approval was given for internal purposes for the overdraft limit to be $500,000 in April 2002, Mr. Browne was aware of it. The operative part of the letter of May 15, 2002 to Mr. Browne reads as follows

> "We refer to our meeting (G.Browne/E Chrichton/A Hazell) of May 9, 2002 at which we expressed our dissatisfaction with your disregard for the established credit limits, in particular the operating overdraft limit.The constant excesses on the operating overdraft account (#31901214) and the delays in closing contract sales at Brighton Development within targeted dates are of concern to CIBC.We are not prepared to tolerate further unauthorised excesses on the account..while nothing in this letter is a waiver of any default/breach of the credit, the bank will make available interim accommodation on a day to day basis until June 30, 2002, upon the following understandings 2. We will retain 50% of the net proceeds of all future sale closings to be applied in permanent reduction of your loans and overdrafts, both principal and interest. As of the date of this letter, the Demand Loan has a principal outstanding balance of $404,854.80 while the operating overdraft stands at $636,793.18 of which $136,793.18 is in excess of the authorised limit. Payment of the excess is to be in addition to the repayment outlined above.3. Under no circumstances will unauthorized excesses be tolerated and cheques will be returned unpaid if necessary."

The letter ends by stating:

> "Please acknowledge receipt and acceptance of the terms herein by signing and returning the attached copy of the letter to our offices by no later than May 24, 2002."

[37] It is not disputed that Browne's Construction did not sign the letter. This letter must be considered in the context of the operation of the credit facility and the relationship between Browne's Construction and the Bank. This letter was not an offer to Browne's Construction of an overdraft limit of $500,000 which Browne's Construction was required if it was desirous of accepting the offer to do so by signing the letter. Rather this letter simply confirmed that the overdraft limit to Browne's construction was $500,000. The Bank prior to this letter had allowed the

overdraft to consistently operate at this limit. In some instances it was above $500,000.

[38] On May 6, 2003, the bank wrote to Browne's construction as follows:

> "In response to your request for financing to assist with a land development project at Belvedere/Brighton, we are prepared to explore the possibility of providing financing. We also confirm receipt of the current financial statements and other requested details and have commenced our internal analysis and adjudication process. However, we wish to take this opportunity to reiterate our previous statements With respect to the existing overdraft availed to the company. While we are seeking to increase financing we require your cooperation to ensure that cheques issued do not at anytime exceed an overdraft balance of $450,000. Please note that your balance was $432,420 at the time writing(sic). Nonetheless, it is imperative that the limit be respected, as operation of same affects in part our decision to maintain longer – term facility as requested."

[39] Mr. Browne acknowledged this letter on May 8, 2003. Mr. Browne's testimony is in effect that this letter was as a result of discussions that he had with the Bank for further financing and he was led to believe he would be given further financing so he signed the letter. He alleged he was tricked into signing the letter. I do not accept Mr. Browne's testimony that he was tricked. Mr. Browne is a very experienced business man. Mr. Browne was fully aware and acknowledged that as the Bank considered further financing the overdraft limit which was always a concern for the bank would be $450,000. Further when Mr. Browne was informed around May13 that the overdraft was in excess, at that time the overdraft was at $449,890.50, Mr. Browne made a deposit into the account of $30,000. This in my view Mr. Browne did knowing that the limit was $450,000. In view of the above I find that the overdraft limit at the material time was $450,000. The case of **Cumming v Shand** does not assist Browne's Construction case. The May 6, 2003 letter was as a result of negotiations between the parties which Mr. Browne acknowledged and agreed when he signed the letter on May 8, 2003. There was therefore no need for any notice to be given to Browne's construction of the limit of the overdraft.

[40] It is not disputed that on May 13, 2003 the overdraft was at $449,890.50. The available balance was therefore insufficient to honour the cheque for $12,417.59. In view of my finding above that the limit was at that time $450,000 in refusing to honour the cheque the Bank was not in breach of contract.

[41] In relation to the cheque dated May 28, 2003, the evidence that the overdraft facility was at $419,890.50 was not disputed. The cheque being in the sum of $12,417.59 and the overdraft limit being $450,000, the Bank in failing to honour the cheque was in breach of contract. Similarly in relation to the cheque dated June 2, 2003, the Bank does not dispute that the overdraft facility was at $435,940.36. The cheque was for a sum of $5000. Honouring this cheque would not have resulted in the overdraft facility exceeding the limit agreed by the Bank. The fact that the Bank did not honour the cheque on May 29, does not amount to sufficient notice that the Bank was no longer providing credit facility in excess of $250,000 to Browne's Construction.

Libel

[42] It is not disputed that the cheques dated May 28, and June 2, 2003 were endorsed with the words "refer to drawer".

[43] Mr. John Q.C. submitted that it is generally accepted today that when a Bank endorses the term "refer to drawer" on a dishonoured cheque that term is capable of a defamatory meaning since the words tend to lower the claimant in the estimation of right thinking people – see **Gatley on Libel and Slander 10th Edition para.2.25 and Paget's Banking Law 9th Edition p. 241.** Mr. John also relied on the testimony of Mc Lauren Mornix where he stated that when the cheque was returned to him and he was told to refer it to Browne's Construction he formed the view that it was referred due to insufficient funds.

[44] Mr. John next submitted that the Bank's defence was not in compliance with CPR 10.5(3). He referred to the case of **Edwardo Lynch v Ralph Gonsalves SVGHCVAP 2005/018** where the Court of Appeal held that where there is no

defence to a material allegation in the statement of claim that allegation must be treated as admitted.

Findings

[45] I agree with Mr. John Q.C. that while in **Flach v L. & S. W. Bank (1915)** 31 T. L. R. p. 334 Scrutton LJ opined that the words "refer to drawer" were not defamatory because they were simply a statement by the Bank, "we are not paying. Go back to the drawer and ask him why", the later decisions such as **Hill v National Bank of New Zealand [1985] 1 NZLR p.736;** and **Baker v Australia and N. Z bank [1958]** NZLR p.907 the trend has been that an imputation which arises from such words is that the drawer does not have sufficient funds in the account and if there is no justification a claim in libel would succeed. The Bank pleaded in its defence that there was insufficient funds to honour the cheques. Having regard to my findings earlier that the overdraft facility was below the limit and therefore there was available credit and having regard to the evidence of Browne's Construction on this issue in particular the evidence of Mr. Mornix, this defence fails.

Damages

[46] Mr. John Q.C. submitted that Browne's Construction is entitled to such damages that was within the reasonable contemplation of the parties at the time the contract was entered into as a not unlikely result of that breach – see **Chitty on Contract vol 1 29th Edition para. 26-47 p. 1450 and the case of Barbados Mutual Life Assurance Society v Michael Piggott et al ANUHCVAP 2004/012.**

[47] Mr. John Q.C. also referred to the report from KPMG and the testimony of Mr. Omar Davis of the loss suffered by Browne's Construction as a result of the accelerated repayment. In the KPMG report the losses are stated as being: (a) **Additional Interest** in the sum of $19,400; (b) **Construction Opportunity Cost** a loss of contribution on 17 houses at an average of between $50,000 and $55,000, using the figure of $50,000, a total of $850,000; (c) **Related Party Effect** a sum of $45,000 being loss of related party's profits from resale; (d) **Other Effects**, the

company was unable to materialize profits, there was damage to its reputation and that of its owners, directors and related parties in a sum not less than $500,000.00

[48] Mr. Omar Davies in his report indicated the following losses: (a) **Interest cost** in the sum of $19,400 however at the trial Mr. Davis agreed that was an error and agreed the correct sum was the sum of $10,440.47 as stated by Mr. Defreitas in his report; (b) **Construction opportunity cost** in the sum of $1,045,000, being 19 houses at an average profit of $55,000' (c) **Payments to creditors and suppliers**, Browne's Construction was unable to pay its creditors and as a result its credit rating was damaged and that impacted negatively on its ability to access credit; (d) **Damage to related parties**, Browne's Construction was unable to pay its major supplier Browne's Hardware Supplies and as a result Browne's Hardware Supplies was unable to pay its suppliers; (e) **Damage to the company's reputation** as a result of the stoppage of the project and its inability to pay suppliers.

[49] Mr. John Q.C. next submitted that as a condition of the Loan Agreement, Mr. Browne had to take out a life policy of $1,000,000. Due to the acceleration Mr. Browne had to surrender the policy in 2003 and he received a surrender value of $52,000.00, rather than $68,480.00 if the Agreement had continued until June 30, 2004 thereby he lost $16,410.00.

[50] In relation to the dishonoured cheques Mr. John Q.C. relied on the case of **Carlos Maloney & Company Ltd v First Caribbean International Bank SVGHCV 2007/356,** where a sum of $30,000.00 was awarded for each cheque dishonoured as damages for distress, hurt, humiliation and damage to reputation.

[51] Ms. Sylvester urged the Court to accept the evidence of Mr. Defreitas rather than Mr. Davis. Ms. Sylvester referred to the error of Mr. Davis in the computation of the additional interest paid by Browne's construction as a result of the acceleration of repayment and further Mr. Davis failed to provide any objective information in support of his assertions on the loss of profit suffered by Browne's construction.

Findings

[52] I agree with the principles of law stated by Mr. John QC.

[53] The parties are in agreement that the additional interest paid is the sum of $10,440.47.00

[54] While Mr. John sought to rely on the report of KPMG entitled **Report on Transactions in Respect of a Business Loan From CIBC Caribbean Ltd.,** Mr. Brian Glasgow to whose witness statement the Report was attached did not attend the trial and therefore could not be crossed examined on the Report. I attach no weight to the opinions expressed in the Report.

[55] I agree with the submissions of Mr. John Q.C. that the only material difference between Mr. Davis and Mr. DeFreitas on the issue of construction opportunity cost is that Mr. DeFreitas contends that Mr. Davis treated the $55,000.00 average profit per house as net profit but he did not take into account the administrative expenses and overheads. I accept the evidence of Mr. Defreitas. He gave a very detailed analysis of the computation of the profit. He illustrated this using the documentary evidence adduced by Browne's construction. He explained that Mr. Davis confused contribution and net profit. The $55,000.00 represents contribution and not net profit, there were administrative expenses and overheads which had to be deducted in computing the net profit. In view of the above I will award damages on the sum of $14,097.00 as stated by Mr. DeFreitas. Also Mr. DeFreitas did testify under cross-examination that he had no difficulty with the number of houses being seventeen (17). I therefore find the loss under this head to be $239,649.00.

[56] In relation to losses under the heads payments to creditors and suppliers, damage to related parties and damage to company reputation as a result of the acceleration, no evidence was led by Browne's Construction of the losses alleged.

[57] In relation to the insurance policy, Mr Browne did not give any evidence in relation to the surrender of the Insurance policy in his witness statement or in his oral

testimony, nor is there any mention of it in the KPMG Report or the report of Mr. Davis. Mr. Davis simply states in his Report that as part of the security for the loan "Life Insurance assigned on the life of Gideon Browne in the minimum of $1,000,000.00. There is no evidence of surrender.

[58] In relation to the dishonoured cheques, I agree that a customer is entitled to damages for injury to credit and any additional expenses incurred in accessing alternative funds. The sums in this case were $12,417.59 and $5000.00. Browne's Construction did not lead any evidence of any cost incurred in borrowing the sums from another lender. In relation to loss of reputation and injury to credit, Mr. Browne stated the cheque was placed on the notice board at the facilities of Eastern Caribbean Metals and they refused to accept any more cheques from him. Unlike the case of **Carlos Maloney** where the bank had deposited Mr. Maloney funds into a wrong account and then dishonoured his cheques, the evidence in the case at bar shows that Browne's Construction had developed a reputation for consistently drawing cheques over and above their credit limit. Having regard to the circumstances of this case I am of the view that a sum of $20,000.00 should be awarded, being $10,000.00 in relation to each cheque.

[59] In conclusion I find that the bank was in breach of the Agreement when they accelerated the repayment and dishonoured the cheques dated May 28, and June 2, 2003. I also find that the words endorsed on the cheques were defamatory.

[60] It is hereby ordered:

(a) Judgment is entered for the Claimant.

(b) The Defendant shall pay the Claimant damages in the sum of $270,089.44 and interest at the rate of 6% per annum from today's date until final payment.

(c) The Defendant shall pay the claimant prescribed costs.

Gertel Thom
High Court Judge.