EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2015/0008

BETWEEN:

BROWNE'S CONSTRUCTION LIMITED

Appellant

and

FIRST CARIBBEAN INTERNATIONAL BANK LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Stanley John, QC with him Ms. Keisal Peters instructed by
Williams & Williams for the Appellant
Mr. Roger Forde, QC with him Mr. Jadric Cummings for the Respondent

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2018: July 20.

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Civil appeal – Damages for breach of contract – Calculation of net profit – Whether learned judge applied irrelevant considerations in assessing damages – Whether learned judge erred in findings of fact – Appellate caution in reversing judge's evaluation of the facts – Damages for Libel – Whether learned judge erred in award of general damages – Appellate court ought not to interfere with judge's award of general damages unless it can be shown that the damages awarded bears no relation whatsoever to the injury sustained

ORAL JUDGMENT

[1] PEREIRA CJ: This appeal arises from the decision of the trial judge in which she found the respondent, First Caribbean International Bank Limited ("the Bank"), in breach of the terms of a Loan Agreement entered into between the appellant company, Browne's Construction Limited ("Browne's"), and the Bank in respect of a housing project being

undertaken by Browne's. The breach was occasioned by the Bank, without notice, unilaterally accelerating the installment payments on the loan. In addition to the loan facility, an overdraft facility was also provided by the Bank initially at a limit of $250,000.00 but which the learned trial judge found was later set at $450,000.00. In addition to claiming damages for breach of the Loan Agreement, Browne's sought damages for defamation in respect of cheques issued to various third parties which were returned by the Bank with the notation "refer to drawer".

[2] The trial judge, after conducting a full trial and seeing and hearing witnesses including expert witnesses called by each of the parties, assessed the total loss flowing from the breach of the Loan Agreement under the head "Construction Opportunity Cost" as $239,649.00 treating the sum of $14,097.00 as the net profit lost on each of 17 houses under the housing project.

[3] In respect of the claim for defamation, she found that Browne's had been defamed in respect of two cheques: one in the sum of $12,417.59 and another in the sum of $5,000.00. She awarded general damages in the sum of $10,000.00 in respect of each cheque for a total of $20,000.00.

[4] Browne's being dissatisfied with the quantum of the awards in respect of these sums appealed raising some 6 grounds or appeal. Grounds 1 and 2, which challenged the judge's findings that notice could be given orally under the Loan Agreement and the limit of the overdraft facility respectively, were abandoned. Ground 5, which challenged the judge's finding on the number of houses which were unable to be constructed as 17 rather than 21, was also abandoned. This left, in essence, three remaining grounds of appeal, namely:

(a) whether the judge erred in accepting the evidence of Mr. Stanley Defreitas ("Mr. Defreitas"), the Bank's expert, to the effect that "there were

administrative expenses and overheads which had to be deducted in computing the net profit";[1]

(b) as a consequence of (a), the judge erred in making a further deduction for the same administrative expenses which on the evidence had already been paid;

(c) the judge applied irrelevant considerations in assessing the damages for libel at $10,000.00 per cheque.

[5] The issues at (a) and (b) were sensibly argued and can conveniently be considered together. They concern the learned judge's findings at paragraph 55 of her judgment in which she stated:

> "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."

[6] Mr. John, QC on behalf of Browne's, argues in essence that notwithstanding the learned judge's agreement with the principles applicable to assessing damages for breach of contract in cases of this nature, she misapplied the principles as set out in Chitty on Contracts[2] and such cases as Barbados Mutual Life Assurance Society v Michael Pigott et al.[3] In Pigott, Barrow JA, after reviewing a number of authorities,

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[1] At para. 55 of the lower court judgment.

[2] 29th edn, Volume 1, Sweet & Maxwell, 2004.

[3] ANUHCVAP2004/0012 (delivered 27th June 2005, unreported).

succinctly stated the principle governing the measure of damages this way, "the normal measure of damages for breach of contract to lend money is the higher cost of borrowing from another lender but that there are exceptions to that measure where the lender had it in his contemplation that if he defaulted on his obligation certain losses would follow".[4] Furthermore, the learned judge referred to the modern statement of the rule as set out by Chitty on Contracts at paragraph 46 of her judgment.

[7] The nub of Browne's complaint is that, rather than accepting the figure of $55,000.00 as put forward by Browne's expert, Mr. Omar L. Davis ("Mr. Davis"), as representing net loss, or, put another way, the net profit that Browne's would have earned on each house constructed, her acceptance of Mr. Defreitas' approach and his criticism of Mr. Davis' approach as not taking into account the administrative expenses and overheads was wrong, and in essence amounted to a double deduction. Counsel sought to establish by answers to questions in cross examination that Mr. Defreitas had agreed that on Mr. Davis' figure of $55,000.00 overheads and administrative expenses had already been factored in. However, having reviewed the transcript, we are satisfied that this does not reflect the tenor of his evidence. It is also apparent that the learned judge who saw and heard him did not form that view from his answers.

[8] Counsel placed reliance on the case of C.C.C. Films (London) Ltd v Impact Quadrant Films Ltd[5] In which Hutchinson J made the following observation in respect of the terms "loss of profit" and "recovery of expenditure", "When Lord Denning M.R. speaks in *Anglia Television* of the plaintiffs not having suffered loss of profits … he is referring, … to profits after recoupment of expenditure – net profits".

[9] In our view, that was the exercise undertaken by the judge in light of the evidence before her. She was entitled to reject the approach adopted by Mr. Davis and to accept the approach put forward by Mr. Defreitas. In paragraph 55, she explained her reasons for so doing. She explained that Mr. Defreitas gave a very detailed analysis of the

[4] At para. 21.
[5] [1984] 3 WLR 245.

computation of the profit using the documentary evidence adduced by Browne's. Accordingly, there was evidence before the learned judge on which she could have reasonably come to the conclusion that the average profit per house, or, "average unit profit" as called in the "net profit analysis" contained in the opinion of Mr. Defreitas and part of the evidence, more accurately reflected the loss to Browne's under this head.

[10] Mr. Forde, QC on behalf of the Bank referred to a plethora of authorities which emphasise the caution which must be exercised by an appellate court beginning with the decision of the Privy Council in Beacon Insurance Company Limited v Maharaj Bookstore Limited.[6] That decision reviewed and approved several other authorities in explaining the rule that a Court of Appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. This rule is rightly explained by:

> "reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."[7]

[11] As to a Court of Appeal being slow to reverse a trial judge's evaluation of facts, the observation by Lord Hoffman in Biogen Inc v Medeva PLC[8] is apposite. He said:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor

[6] [2014] UKPC 21.
[7] Per Lord Neuberger at para. 53 of In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911.
[8] [1996] UKHL 18.

> qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.[9]

Also of similar effect are the cases of Langsam v Beachcroft LLP[10] and FAGE UK Ltd v Chobani UK Ltd.[11]

[12] We are unable to say that the judge erred in her findings of fact. On the evaluation of the facts before her, having seen and heard the witnesses, she was entitled, applying the principles in measuring Browne's loss flowing from the breach under this head, to reach the conclusion she did. It has not been shown that the learned judge got it wrong. Her finding is supported by the evidence which she accepted based on her explained preference for accepting the Bank's expert evidence on this issue. No basis has accordingly been established by Browne's warranting interference by this Court.

Damages in Respect of the Dishonoured Cheques

[13] The measure of damages to be awarded here would reflect reputational injury; Browne's being a corporate entity has no feelings which can be hurt. Counsel for Browne's relied on Carlos Maloney & Company Limited v First Caribbean International Bank (Barbados) Limited[12] in which the trial judge awarded the sum of $30,000.00 as compensation in respect of the libel committed in respect of each of the 6 dishonoured cheques. There, the Bank had erroneously credited deposits made by the claimant to another's account.

[14] Browne's took issue with the fact that the judge took into account that it (Browne's) had developed a reputation for consistently drawing cheques over and above its credit limit and contends that this was an irrelevant consideration. We disagree. Even though the learned judge did not delve into great detail on this issue, she was entitled to take it into account as it was more probable than not that employees of the Bank

[9] At para. 54.
[10] [2012] EWCA Civ 1230 at para. 72.
[11] [2014] EWCA Civ 5 at para. 114..
[12] SVGHCV2007/0356 (delivered 20th August 2009, unreported).

tasked with handling Browne's account would have been aware of the company's practice of overdrawing its account. Therefore, the dishonouring of the cheques would have had little, if any, impact on their opinion of Browne's. The judge would have also had regard to the extent of the publication. No evidence was put forward showing that publication by the Bank was any wider than perhaps employees of the Bank, and the acceptor of the cheques. Evidence was indeed led showing that one entity in respect of a dishonored cheque placed it on the notice board of its business. But, as counsel for the Bank points out, that is not a publication by the Bank. Additionally, the sting of the words used is also relevant. The notation on the cheques was "refer to drawer". As counsel for the Bank pointed out, and we agree, such a notation, though considered defamatory, is not one with a particularly deep sting. Such a notation can occur for many reasons - one of which may be as simple as an incorrect date or a conflict between words and figures appearing on a cheque.

[15] Similar principles apply in relation to an appellate court's slowness to interfere with a trial judge's award of general damages. Unless it can be shown that the damages awarded bear no relation whatsoever to the injury sustained an appellate court should not interfere. It must be shown that the judge exceeded the generous ambit of her discretion and was plainly wrong. We are unable to say that the judge was plainly wrong and it is not open to this Court to substitute its view for what one of the judges here may have awarded were he or she sitting as the trial judge on the matter. No basis has been shown for disturbing this award either.

Conclusion

[16] For these reasons the appeal is dismissed. Browne's shall bear the Bank's costs on this appeal fixed at 2/3 of the prescribed costs in the court below in accordance with rule 65.13 of the Civil Procedure Rules 2000.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar