THE EASTERN CARIBBEAN SUPREME COURT

SAINT CHRISTOPHER AND NEVIS (NEVIS CIRCUIT)

IN THE HIGH COURT OF JUSTICE

NEVHCV2016/0099

BETWEEN:

GENERAL BUSINESS COMPANY LIMITED

AND

RBTT BANK (SKN) LIMITED

Appearances:

Mrs. Dahlia Joseph-Rowe and Miss Jerri-Lee Bussue for the claimant
Mr. Anthony Gonsalves QC, for the defendant

2018: 12th June

2019: 26th September

JUDGMENT

[1] **CHARLES-CLARKE, J**: This is an action by the claimant General Business Company Limited (GBCL), against the defendant RBTT (SKN) Limited (The Bank), for breach of contract. By claim form and statement of claim filed on September 5, 2016 GBCL brought an action in the High Court, against the Bank seeking the following relief:-

i)An injunction restraining the Bank from deducting EC$12,385.00 or any sums from any of GBCL's accounts with the Bank;

ii) Refund of the sum of EC$84,730.00 plus any further sum deducted by the Bank;

iii) Damages;

iv) Interest;

v) Costs; and

vi) Such further or other relief as the Court deems just.

Background

[2] At December 2002 GBCL was granted a loan facility with the Bank in the amount of EC$1.2 m at a rate of 12% payable in monthly instalments of EC$14,403.00 for 180 months. During the term of the loan facility the Bank made several reductions in the interest rate as follows:

December 6, 2002	-	10%
June 10, 2005	-	9.5 %
May 14, 2008	-	9%
September 25, 2012	-	8%

[3] The Bank did not inform GBCL of the reductions in interest rate from 10% to 9.5% in 2005 and the rate was not changed in the Bank's system until 2007 when GBCL made enquiries. In 2007 the Bank credited GBCL's account with the overpayment of interest in the sum of EC$9890.57 which went towards the principal payments on the loan. The further reduction of the interest rate to 9% in May 2008 brought GBCL's monthly loan payment to EC$12,385.00. The rate of interest was further reduced to 8% in September 2012 but the Bank again failed to make the adjustment on GBCL's account and continued to deduct the same monthly payment of EC$12,385.00. Upon making enquiries GBCL was advised by the Bank that the original maturity date of the loan facility was extended from February 2017 to August 2017 due to three missed loan payments, in March 2002, January 2003 and March 2003, and late payments in November 2002 and February 2003.

[4] At a meeting convened on November 14, 2014 between the then country manager Sandra Fontinelle and branch manager Deidra Walters of the Bank, and Mr. Evered Herbert, Managing Director of GBCL and his attorney, to discuss the concerns of GBCL, Mr. Herbert queried the correct application of the interest on the loan facility and the monthly deductions being made by the bank from September 25, 2012. He requested that the Bank furnish the records to support its claim that GBCL had missed three payments and made late payments. However the Bank did not furnish any records to show the missed and late payments.

[5] Thereafter the Bank issued a letter from Ms. Deidra Walters to GBCL's attorney-at-law, dated January 9, 2015, in the following terms:

> *'We are pleased to note that we have come to an amicably (sic) settlement, whereby we have credited the above captioned account with the amount of (XCD$39,551.34) Thirty nine Thousand Five Hundred Fifty One Dollars and Thirty Four cents backdated to July 01, 2008. The maturity date for that facility is now February 2016, with a final payment of XCD$2,024.70 instead of XCD$12,385.00. We have enclosed a copy for your record.*
>
> *We are also enclosing a spreadsheet of the loan payments for that period which your client raise in our meeting of November 13, 2014 and his other two operating accounts held with us.*
>
> *We again express our sincere gratitude for patience in allowing us to have with (sic) settled in this manner and at the same time our sincere apologies for the time this took to be resolved."*

[6] A letter in response dated January 23, 2015 was sent to the Bank from GBCL's attorney which stated:

> *'(We) are pleased to advise that our client agrees to your proposal. We confirm that our client agrees to the new maturity date on its facility with the bank is February 2016 with a final pay of XCD$2,024.70.*
>
> *Our client requests that the Bank covers its legal fees in the sum of XCD$1200.00 plus vat. We trust that you would consider the proposed fees as well as the request for the bank to settle same reasonable in all the circumstances of the matter.*
>
> *We look forward to hearing from you'.*

[7] The Bank did not respond to that letter but paid the legal fees in the sum of EC$1200.00. However in February 2016 the Bank deducted the sum of EC$12,365.00 instead of EC$2024.70.

[8] At March 10, 2016 GBCL's attorney wrote to the Bank indicating that it had breached the terms of the settlement agreement and asked that the funds deducted be credited to GBCL's account.

[9] At March 23rd 2016 the Bank wrote to GBCL's attorney indicating that the date of February 2016 was a typographical error and instead should have been February 2017.

[10] At March 29, 2016, GBCL's attorneys wrote to the Bank notifying it that it was not authorized to deduct any monies from GBCL's account. There was no response from the Bank.

[11] In June 2016 GBCL's attorney raised the outstanding issues with the Bank's new country manager Mr Chad Allen who responded via email dated July 6, 2016 indicating that the Bank would conform with its written agreement in the following terms:

> *'We do recognize the protracted delay in closing on the outstanding matter and confirm that based on all internal discussion we will conform to letter dated January 9, 2015. We are finalizing the reversal of entries to backdate as at February 2016.*
>
> *A subsequent update will be provided advising the completion of same. Please feel free to contact me if you have any questions.'*

[12] A further email from Chad Allen dated 25th August 2016 sent to GBCL's attorney indicating that the maturity date of February 2016 would stand, read as follows:

> *..As a follow-up to our recent discussion regarding our mutual client "The General Business Ltd" we took the opportunity to conduct a further review of payments made and balance outstanding since July 2008 to July 2016. Please see attached spreadsheet for ease of reference with two amortization schedules which reflect the original schedule to the left and actual payments and dates to the right up to July 2016. Both calculations*

support payments being completed in February 2017 which aligns with the initial amortization schedule provided.

Whilst we recognize the erroneous final payment date indicated previously, the repayment schedule remains consistent and in keeping with our standards. We welcome any questions you may have in this regard and encourage client to continue making payments.

Issues

[13] The issues which the court has to determine are:

i) Whether there was an agreement between GBCL and the Bank created by the letters of January 9, 2015 and January, 23rd 2015?

ii) If so, did this agreement constitute an enforceable contract between the parties?

iii) Was there a breach of contract by the Bank?

[14] Both parties agree that the issue is on the narrow point of whether there was a contract between the parties created by the exchange of the letters, on the terms set out above. The Bank having credited the claimant's account in the sum of EC$39,551.34 that is the amount of the late and missed payments, the outstanding issue is whether the Bank agreed to a maturity date of February 2016 with GBCL instead of February 2017.

The Claimant's Case

[15] GBCL contends that the Bank's letter of January 9, 2015 was an offer to settle the dispute between the parties by crediting the sum of EC$39,551.34 to GBCL's account and by proposing that the new maturity date of the loan will be February 2016. GBCL asserts that its reply of January 23rd, 2015 was an acceptance of that proposal and therefore a contract was created between the parties. Accordingly the Bank was bound to abide by the new maturity date and payment amount. GBCL argued that the Bank breached that agreement by continuing to deduct the monthly payment from GBCL's account after February 2016 and until February 2017.

[16] GBCL relied on the evidence of Mr. Evered Herbert who stated that after the interest rate was reduced in September 2012 and the Bank continued to deduct the same monthly payment of EC$12,385.00 he started making enquiries about the new maturity date of the loan. After exchanging several items of correspondence the Bank replied that there had been missed payments and late payments which amounted to $39,551.34 and this extended the maturity date to August 2017. However the Bank provided no records to substantiate this.

[17] According to Mr. Herbert based on representations made by the Bank to GBCL that if the interest was reduced and the payment remained constant a benefit would be gained in a more rapid principal reduction. This led him to believe that the effect would be to shorten the maturity date. He referred to his letter to the Bank dated March 27, 2013[1] wherein he stated: '*It seems logical to me that the interest rate having been reduced while the monthly payment remains static, then the maturity date should change to sometime earlier than February 2017 (as is the case with General Business for example)'*.

[18] Mr. Herbert also stated in his witness statement[2] that at the meeting of 14th November 2014 after he set out the history of loan and the reductions in the interest rates Ms. Fontinelle commented that each time the interest rate was reduced the Bank should have closed off the loan and start a new loan at the reduced interest rate as that would be cleaner and avoid any errors. Ms. Fontinelle then said to him *'Mr. Herbert you have made your case*' and asked him what he wanted and he responded: *' a) a maturity date earlier than February 2017; b) compensation for the inconvenience caused and c) payment of his lawyer's fees'*. Ms. Fontinelle then said she would consider the matter and get back to him.

[19] According to Mr. Herbert the next time he heard from the Bank was when he received the letter of January 9, 2015. He naturally took this to be the Bank's settlement

[1] Trial Bundle 3 Pg 24
[2] Trial Bundle 2 Pg 17. Para 12& 13

proposal. GBCL's attorney responded by letter dated January 23, 2015 accepting the terms of the Bank's letter of January 9, 2015. Therefore when in February 2016 the Bank deducted EC$12,385.00 from GBCL's account Mr. Herbert instructed his attorneys to write to the bank to rectify the error. According to Mr. Herbert the first time he saw the date of February 2016 was when he received the letter of January 9, 2015 from the Bank.

[20] Learned Counsel for GBCL argued that as the next communication from the Bank was the Bank's letter of January 9, 2015 it was reasonable for GBCL to construe it as an offer for settlement. She further contends that there was consideration as GBCL was deprived of the opportunity of negotiating further in an effort to arrive at terms more favourable to GBCL. She referred to the case of **Centrovincial Estates v Merchant Investors Assurance Co. Ltd**[3] where the court stated on the issue of consideration:

> "where the nature of an offer is to enter into a bilateral contract, the contract becomes binding when the offeree gives the requested promise to the promisor in the manner contemplated by the offer, the mutual promises alone will suffice to conclude the contract. In our opinion subject to what is said below relating to consideration, it is contrary to well established principles of contract to suggest that the offeror under a bilateral contract can withdraw an unambiguous offer, after it has been accepted in the manner contemplated by the offer, merely because he has made a mistake which the offeree neither knew nor could reasonably have known at the time when he accepted it". [p.6]
>
> "In our opinion, on the assumption that consideration is necessary to support the agreement alleged by them, they have plainly given it, if only because, by their letter of the 23rd June 1983 they have deprived themselves of the right to put forward any figure other than [GBP] 65,000 as the relevant current market value" or to have this rental value referred to an independent surveyor or valuer." [p.7]

The Defendant's Case

[21] The Bank denies that the dispute was settled by way of a settlement agreement contained in its letter dated January 9, 2015 and correspondence from counsel for GBCL dated January 25, 2015. The defendant contends that:

[3] [1983] Com.Lk. R. 158] at pg. 6-7

a) The letter from the Bank dated January 9, 2015 was not an offer for settlement, but was merely memorializing the agreement that had been previously agreed between the parties at the meeting held in November, 2014, which meeting was led by Ms. Sandra Fontinelle country manager of the Bank. After the meeting there was nothing left open for GBCL to accept.

b) The dispute had been resolved at the referenced meeting. At that meeting, it was never discussed, nor was it ever agreed as it could not have been, that the maturity date for GBCL's loan would be accelerated to February 2016;

c) The reference to the new maturity date of February 2016 was a typographical error, and should have referred to February 2017;

d) GBCL and its legal practitioners acting reasonably would have been aware that the reference to February 2016 must have been an error, when viewed against the backdrop of the meeting and the spreadsheet enclosed.

e) The purported acceptance by GBCL was a re-characterization of the Bank's letter and an attempt to "Snap up" what it chose to determine to be an offer for settlement.

[22] The Bank relied on the evidence of Ms. Sandra Fontinelle, the then country manager who stated in evidence that at the meeting the parties agreed to resolve the matter of the late and non-payments by crediting the sum of EC$39,551.34 backdated to July 1, 2008 the effect of which was to return the maturity date to February 2017. According to her that was all that was discussed at the meeting and nothing was left open. Ms Fontinelle stated that subsequent to the meeting and before the Bank's letter of January 9, 2015 the Bank credited the sum to the client's account as from July 1, 2008. She further stated that there was never any agreement between the claimant and the Bank to accelerate the maturity date of the claimant's loan to February 2016 and this date never arose in discussions with the claimant.

[23] The Bank asserts that in determining whether this was or could reasonably have been interpreted to be an offer the Court must examine the letter in detail. Learned Queens Counsel for the Bank argued that firstly the letter from its very content and structure was simply not an offer. Secondly, if (which is not admitted) the letter could have been an offer, then in spite of any objective appearance, if GBCL knew or ought to have known that the Bank did not have the requisite intention to be bound (as would be the case here if GBCL knew or ought to have known that the Bank was making an error) there would be no offer. Learned Queens Counsel submitted that in considering whether the Bank's letter of January 9th 2015 was capable of being an offer, the court should apply an objective test. He argued that an apparent intention to be bound may suffice - that is, A may be bound if his words or conduct are such to induce a reasonable person to believe that he intend to be bound, even though he in fact had no such intention. This was held to be the case where, for example, a university had made an offer of a place to an intending student as a result of a clerical error: **Moran v University College Salford**[4] or where a solicitor who had been instructed by his client to settle a claim for $155,000.00 by mistake offered to settle for a higher sum of 150,000 pounds sterling: **O.T. Africa Line Ltd. v Vickers plc.**[5] But if the state of mind of the offeror does not have the requisite intention, the offeror is not bound. In that case the objective test does not apply in favour of the offeree as he knows of the offeror's actual intention: **Ignazio Messina & Co. v Polskie Linie Oceaniczn**[6]**.** It is the Bank's position that based on what was discussed and agreed at the meeting, GBCL would have known that there was not to be any acceleration in the original maturity date.

[24] Learned counsel for the Bank further argued that if the Bank's letter was an offer capable of acceptance it constituted a mistake in communication which would negative consent and referred to the case of **Bell v Lever Brothers Ltd**[7]**.** Therefore the effect would be to render the contract void ab initio or there would be no contract on the

[4] [No. 2 The times November 23, 1993],
[5] [1996 1 Lloyd's Rep. 700]
[6] [1995 2 Lloyds Rep, 56 571] [Chitty at 2-003]
[7] [1932 AC, 161, 217]

terms apparently agreed. Accordingly if one party made a mistake in his offer and the other knew this purported to snap up the apparent offer, the result may be that there is a contract on the terms the first party actually intended: (**Chittys on Contract 29th Edn. para 5-057).** He referred to the case of **Hartog v Colin and Shields**[8] where the defendants offered the plaintiffs some argentine hare skins for sale but by mistake offered so much per pound instead of per piece. The negotiations had proceeded on the basis of so much per piece. The court held that the plaintiffs who accepted the offer of so much per piece and sued for non–delivery, must have known that the offer did not express the true intention of the defendants and therefore the contract was void. Also **Belle River Community Arena Inc v Kaufmann Co. Ltd**[9] where it was held that an offer contained in a tender cannot be accepted when it was apparent that the tender was based upon a serious mistake in calculating the totals.

[25] Learned counsel argued that it is sufficient that the party ought to have known that the other party's offer contained an error. Therefore rectification should be made if the other party actually knows of the mistake or willfully shuts his eyes to the obvious, or willfully or recklessly fails to make such enquiries as an honest and reasonable man would make.

[26] Finally learned counsel for the Bank submitted that the surrounding circumstances and the terms of the letter suggest it was informative only and that GBCL would have known this. Moreover the inclusion of the spreadsheet and the direct reference to the spreadsheet showed a maturity date of February 2017 with payment of EC$2,024.70 would indicate that the Bank did not intend a maturity date of February 2016. Therefore GBCL knew or ought to have known or were reckless in not investigating whether the Bank had made an error in stating that the maturity date was February 2016. Learned counsel also argued that the email dated July 6, 2016 did not confirm the terms of the agreement but indicates the Bank would take a certain course of action. Therefore the Bank was under no obligation to take that position or to maintain it as no consideration had been given and no estoppel was pleaded. **Schuldenfrei v**

[8] [(1939 2 AER 566]
[9] [(1978) 87 DLR (3d) 761]

Hilton[10]**.** Further what the Bank had stated in its letter of January 2015 as the new maturity date had not been agreed on in the November 2014 meeting.

[27] Learned counsel for GBCL invited the court to reject the defence of mistake raised by the Bank as it is not supported by the evidence. Learned counsel argued that there was a two week window after receiving the letter of Jan 9, 2015 during which the Bank could have learnt of its alleged error and corrected it before GBCL responded. The Bank had a further opportunity to do so when GBCL responded and repeated the terms of the Bank's offer in its letter of January 23, 2015. The Bank did not respond to GBCL's letter but instead paid the cost requested by GBCL in its response.

[28] Counsel for GBCL further argued that Ms. Sandra Fontinelle in her evidence indicated that she had discussions with Deidre Walters before the letter of January 9, 2015 was sent out although she did not see the letter. Further the Bank indicated by email from Chad Allen dated July 16, 2016 that based on all internal discussions it would conform with the letter dated January 9, 2015 and was finalizing the reversal entries to backdate as at February 2016.

[29] Learned Counsel for GBCL distinguished the case of **Hartog v Colin & Sheilds** relied upon by the defendant where the offer was accepted the same day it was made. In that case since all negotiations between the parties for the purchase and sale of hare skins referred to the price per piece instead of per pound the plaintiff must have realized and did in fact know that a mistake had occurred. Counsel also distinguished the case of **Belle River Community Arena Inc. v W.J.C.Kauffmann Co. Ltd** where the defendant sought to withdraw a bid for construction works after it was made when he realized his offer was substantially too low. The plaintiff's acceptance of the offer one month later was rejected by the court on the ground that the offer could not be accepted after the plaintiff had knowledge of the mistake.

[30] Counsel for GBCL further argued that upon application of the objective test the Bank is bound by its letter of January 9, 2015 because its words were such as to induce a

[10] (Inspector of Taxes) [1988] STC 404

reasonable person to believe that it intends to be bound even if the Bank had no such intention. They also relied on the case of **Moran V University College Salford.** Therefore she argued, Mr. Herbert's belief that the Bank intended to be bound was reasonable.

[31] Finally learned counsel for GBCL submitted that because GBCL had no knowledge of the mistake the Bank's counterclaim for rectification relief must fail. She argued that the Bank had provided no evidence at the trial that GBCL had actual knowledge of the Bank's mistake. Reliance was placed on the learning in Chitty's On Contract at 5-096 which states:

> "The burden of proof is on the party seeking rectification. He must produce '*convincing proof*' not only that the document to be rectified was not in accordance with the parties' intentions at the time of its execution, but also that the document in its proposed form does accord with their intentions."

The Law

[32] **Halsbury Laws of England[11] Vol.22 (5th Edition) 2012** para 201 a contract is defined as '*a promise or set of promises which the law will enforce'*. It may also be used to describe any or all of the following: (1) that series of promises of acts themselves constituting the contract; (2) the document or documents constituting or evidencing that series of promises or acts, or their performance; (3) the legal relations resulting from that series. In order to establish a contract, whether it be an express contract or a contract implied by law, there has to be shown a meeting of minds of the parties, with a definition of the contractual terms reasonably clearly made out, with an intention to affect the legal relationship: that is that the agreement that is made is one which is properly to be regarded as being enforceable by the court if one or the other fails to comply with it; and it still remains a part of the law of this country……. that there must be consideration moving in order to establish a contract ' **Horrocks v Forray[12],** per Megaw, LJ.

[11] Vol. 22 5th Ed. 2012, para 201
[12] [1976] 2 All ER 737 at 742 CA

[33] According to **Chitty's on Contract**[13]

> Para 2- The main elements of a valid contract are as follows: 'First the parties must "mean business"; they must intend to enter into legal relations…… Secondly there must be an agreement, that is, a promise of which an offer has been legally accepted. Thirdly, either the promise must be contained in a deed under seal, or it must be supported by consideration. Nevertheless these elements are not invariably present – a party may be held to have contracted even though he had no subjective intent to enter into legal relations, a contract under seal will bind the promisor without any acceptance by the promisee, and there are cases where contracts are not readily explicable in terms of offer and acceptance or of bargain. But in most situations a valid contract will contain these three elements.
>
> However even where these elements exist a contract is liable to be defeated by the presence of other factors such as the absence of a particular form, mistake, misrepresentation, duress, undue influence, incapacity, or illegality.
>
> Para 3 – A promise is an undertaking that a certain state of affairs exists or that something shall happen in the near future. … In the law of contract a promise results from the acceptance of a proposal or offer:…..
>
> An agreement is a manifestation of mutual assent by two or more persons to one another. An offer and its acceptance when received, usually constitute an agreement. The law, however, is normally content with the outward manifestation of agreement, and is not concerned whether the parties were really agreed. Agreement it has been said is not a mental state but an act, and as an act is a matter of inference from conduct. The parties are to be judged not by what is in their minds but by what they have said, written or done. For reasons of commercial convenience, a

[13] Twenty sixth Edn. Vol 1.; (see also 29th Edn. para 1-001)

contract may be held to exist even where the parties are manifestly not in agreement. For example, if A sends an offer to B by post, and then changes his mind and sends a letter revoking the offer, but B posts an acceptance of the offer after A posted his letter of revocation, but before B received it, there may be a contract though the parties were never ad idem. Again a contract may exist although the letter is lost in the post and never reaches the offeror.

Para – 15 A void contract is one which produces no legal effects whatsoever. Neither party should be able to sue the other on the contract. …. In one situation that is where a contract is void for mistake, these consequences would appear to follow from the fact that the contract is void.

Discussion and Analysis

[34] In deciding whether the Bank's letter of January 9, 2015 and GBCL's letter in response of January 25, 2015 created a contract between the parties I will apply the principles of contract law enunciated above.

[35] Firstly the background of the transactions between the parties and the relations between them are of a business or commercial nature which clearly have legal implications. All the disputed issues arise from the existence of a legal instrument namely a mortgage loan between GBCL and the Bank which gives rise to legal relations.

[36] Secondly, in considering whether there was an agreement I will look at the terms of the letters and the conduct of the parties. In **Lovell & Christmas Ltd v Wall**[14] at p. 85 Cozens – Hardy MR stated:

'If there is one principle more clearly established than another in English law it is surely this: It is for the court to construe a written document. It is irrelevant and

[14] 1911 104 LT 85

improper to ask what the parties, prior to the execution of the instrument, intended or understood'.

[37] The wording of the Bank's letter of January 9, 2015 to wit: *'we are pleased to note that we have come to an amicable settlement,' ….* clearly indicates that the Bank had taken a decision to settle the outstanding issues with GBCL. These issues concerned the reductions in the interest rate and the queries about the earlier maturity date which were raised by GBCL by way of previous correspondence and at the meeting held in November 14th 2014.

[38] What follows are the proposed terms of the settlement to wit: '*whereby we have credited the above captioned account with the amount of (XCD$39,551.34) Thirty Nine thousand Five Hundred Fifty One Dollars and Thirty Four cents back dated to July 01, 2008. The maturity date for that facility is now February 2016, with a final payment of XCD$2,024.70 instead of its regular monthly payments of XCD$12,385. We have enclosed a copy for your record'*. However that decision had to be communicated to GBCL for their approval or acceptance, which the Bank did by letter dated January 9, 2015.

[39] I am of the view that by its letter of January 9, 2015 the Bank was making an offer or promise or giving an undertaking to do certain things i.e to settle the outstanding dispute and to arrive at an amicable agreement and the manner in which it proposed to do so. The fact that the Bank used the term *'amicable agreement'* clearly denotes that it was seeking to have the matter between the parties settled peacefully in order to end the outstanding dispute and satisfy the concerns raised by GBCL. The use of the term *'amicable agreement'* implies this was not an arbitrary or unilateral decision which the Bank could make on its own but one which required consensus ad idem or a meeting of minds or mutual assent by the parties. Indeed it was open to GBCL to disagree with the Bank's decision and reject the Bank's offer and seek other remedies.

[40] I believe that GBCL's response by letter dated January 25, 2015 was an acceptance of the Bank's promise to do certain things. In its letter dated January 25, 2015 GBCL

stated "(*we) are in receipt of your letter dated January 9, 2015 containing your Bank's proposal for settlement. We are pleased to advise that our client agrees to your proposal. We confirm that our client agrees to the new maturity date on its facility with the bank is February 2016 with a final payment of XCD$2,024.70".* This clearly connotes an acceptance of the offer. It was at this stage when the offer was accepted by GBCL that there was an agreement as there was mutual assent or a meeting of minds by both parties.

[41] I will now consider the conduct of the parties relating to the letter of January 9, 2015 to determine whether there was in fact an agreement. The evidence discloses there were concerns by GBCL over the fact that the account had not been adjusted to reflect the reduced interest rate and GBCL felt that with a reduced interest rate and the continued deduction of the same monthly payments this should have resulted in an earlier maturity date. There was correspondence between GBCL and the Bank concerning these issues and a meeting was held in November 2014 to seek to resolve them. The Bank denies that there was any discussion about the maturity date at that meeting.

[42] According to Sandra Fontinelle in her evidence at the trial there was never any discussion of an earlier maturity date at the meeting held on 14th November 2014.
In cross examination Ms. Fontinelle stated that when she attended the meeting she was not aware the claimant was seeking an early maturity date. She said she reviewed the file but could not recall seeing a letter dated March 27, 2013 from Evered Herbert. However in her witness statement she referred to a letter from Deidre Walters dated December 12, 2013[15] to Mr. Herbert which referred to a maturity date. She further stated in cross examination that they had two meetings which included Mr. Herbert, his attorney, Deidra and herself which was held to discuss Mr. Herbert's concerns but she does not recall what was discussed at the November 2014 meeting.

[43] It was not clear from Ms. Fontinelle's evidence whether the issue of an earlier maturity date was discussed at the meeting or that the Bank did not intend to comply with Mr.

[15] Trial Bundle 3 – Agreed Doc P.27

Herbert's request for an earlier maturity date. She stated that she did not have an agreement signed by Mr. Herbert and herself and that the letter of January 9, 2015 was to memorialize the agreement reached at the meeting.

[44] I therefore accept Mr. Herbert's evidence that this issue of the earlier maturity date was raised and discussed at the meeting. I believe this was always a concern of Mr. Herbert who had made several queries and written to Deidre Walters by letters dated March 27, 2013[16] and December 27, 2013 in which he clearly asked *'about the NEW maturity date for the loans for General Business and Evered Herbert' a*fter the interest was changed. Ms. Walters had responded by letter dated December 23, 2013[17]. It would therefore be very strange if Mr. Herbert did not raise this issue at the meeting of November 2014.

[45] The next time Mr. Herbert heard from the Bank was when he received the letter of January 9, 2015. In that letter the Bank stated inter alia *'The maturity date for that facility is* ***now*** *February 2016'*. The use of the word ***'now'*** clearly connotes there was a change in the maturity date from what was previously indicated. As Mr. Herbert had always requested an earlier maturity date it was reasonable for him to believe that this was an offer by the Bank based on his discussions with Ms. Fontinelle and Ms. Deidre Walters. Further Ms. Fontinelle stated in cross-examination that when the interest rate was reduced on a loan either *a) the client pays less per month if it is mutually agreed or b) if not agreed the principal would be reduced faster than originally projected if everything else remained equal'*. Therefore GBCL's contention that the letter dated January 9, 2015 was a proposal and its acceptance of the proposal was not unreasonable in light of the ongoing discussions and what had transpired at the meeting of 14th November 2014.

[46] I will now examine the Bank's conduct after it issued the letter of January 9, 2015. Following GBCL'S response on January 23, 2015 indicating that it accepted the terms

[16] Trial Bundle 3 – Agreed Doc. Pg. 24
[17] Trial Bundle 3 – Agreed Doc. Pg. 28-29

of the proposal, specifically referring to the new maturity date nothing was done by the Bank. Instead the Bank paid the cost of GBCL's attorney as requested in GBCL's letter. The Bank acted on that letter and did not object to the reference by GBCL to the ***'new maturity date'*** nor did it indicate there was an error. However the Bank continued to deduct the sum of $12,385.00 from GBCL's account up to February 2017.

[47] Ms. Fontinelle agreed that the Bank received correspondence from GBCL's attorney acknowledging receipt of the Bank's letter of January 9, 2015 and that the letter indicated the claimant agreed with the proposal purporting to confirm the maturity date was February 2016. According to her the Bank did not pick up the error of the maturity date of February 2016 and continued to operate under the maturity date of February 2017. She stated that upon receipt of a letter from GBCL's attorney complaining that the claimant's account should have been deducted with $2024.70 instead of $12,385.00 and that the Bank has breached the agreement accepted by GBCL's attorney, the Bank wrote a letter dated March 21, 2016 indicating that there was a typographical error, and that the new maturity date should have been February 2017 instead of 2016.

[48] She further stated in cross examination that she does not recall if the Bank called to say it was not a proposal and the letter did not say there was a previous settlement agreement for a maturity date of February 2016. She agreed that the Bank paid the claimant's lawyer's fees of $1200.00. She did not recall if January 9, 2015 was the first time the Bank made the suggestion of a proposal of $39, 551.34 to the claimant. She did not agree that the amount of $39,551.34 was unilaterally credited by the Bank to Mr. Herbert's account to correct the error on the account but was deemed by the Bank to be an amount that would satisfy Mr. Herbert's concerns. She stated that they (the Bank) would have engaged Mr. Herbert before crediting his account, but there was no written evidence of engagement. She further said the payment of $39,551.34 was not an agreement unless Mr. Herbert accepted by letter dated 23rd January 2015.

[49] The situation was further compounded by the email dated July 6, 2016 from Chad Allen who replaced Ms. Sandra Fontinelle as the Bank's country manager in August 2015. This was in response to queries from GBCL's attorney concerning the issue of the new maturity date of February 2016. In his email there is an acknowledgement by Mr. Allen that the Bank would honour the new maturity date of February 2016. However in a subsequent email dated July 25, 2016 Mr. Allen resiled from his earlier position and indicated that the maturity date was in fact February 2017.

[50] In his witness statement Mr. Allen stated '*Upon my initial review of the letter from Deidra Walters dated January 9, 2015 to the claimant attorney regarding the maturity date of February 2016, it seemed to align with the aforesaid maturity date and hence my email to the claimant's attorney dated June 6, 2016 indicating the Bank's intention to conform to the letter dated January 9, 2015'.* He explained that the change in his position was based on further and more detailed review of the file and exhibits which made him realize that subsequent correspondence from the Bank acknowledged the date of February 2016 to be a typographical error and that a spreadsheet (amortization schedule) had been provided to the claimant's attorney showing a maturity date of February 2017. He further stated that he did not see any mention of a maturity date of February 2016 nor could he '*identify any mathematical or other basis for there being a maturity date of February 2016'.*

[51] However in cross examination Mr. Allen stated that at the time he wrote the email of July 6, 2015 he had spoken to Deidra Walters and Sandra Fontinelle and also his internal IT personnel. Neither Sandra Fontinelle nor Deidra Walters told him that it was agreed at the settlement meeting that the February 2017 date would stand. He had also reviewed the file and was of the view that the bank had to honour the maturity date of February 2016. He stated that when he wrote the email he was in the process of taking steps to make entry reversals dating back to February 2016. However he did not agree that the only agreement between the parties was in the exchange of letters of January 9, and 23, 2015, or that the bank had made several errors in handling Mr. Herbert's account but agreed it had made some errors.

[52] In its defence the Bank relied heavily upon the amortization schedule or spreadsheet attached to the letter of January 9, 2015 which indicated a maturity date of February 2017, and argued that the letter and the amortization schedule formed one document. Both Sandra Fontinelle and Chad Allen stated in evidence that the amortization schedule showed a maturity date of February 2017. However in cross examination Sandra Fontinelle admitted that the first page on the amortization table shows a maturity date of August 2017 and on the next page the maturity date is February 2017. Ms. Fontinelle explained that the maturity date would be set based on the contracted date of payment but if the payment is not made exactly on the contracted date it can throw the maturity date off. According to her the assumption made with a maturity date is that payments are made on time. She stated that after careful review of the amortization table she could not say if the maturity date was August 2017. She stated that based on the amortization table $39,551.34 was credited to the account backdated to July 1, 2008. Interestingly she stated *'If I am a client reading this I would say the maturity date is August 1, 2017. I would have to look at the impact of the $39,551.34 to say what impact it would have on the final maturity date*'. In my view this supports the claimant's position that the amortization schedule could not be relied upon. Indeed the letter of January 9, 2015 did not indicate the correct maturity date on the amortization schedule.

[53] On the other hand Mr. Allen disagreed that the amortization schedule was an inaccurate reflection of GBCL's loan account, and that GBCL should not rely upon it. According to him it was therefore unreasonable for GBCL to conclude that the maturity date of February 2016 was on account of the Bank settling the issue in relation to the interest rate when the monthly payment remained the same.

[54] Mr. Allen stated in evidence that the spreadsheet showed a maturity date of February 2017 and it was unimaginable the Bank would agree to waive a year's loan service payments. He stated that the interest rate of 1% when applied to the loan between September 2012 and February 2017 would represent just a little under $14,000.00. It was therefore not logical that the Bank would offer $148,000 for loss of interest

amounting to $14,000. He thought it was unusual for one party to forego ten times the amount in issue. To his knowledge it is not something the Bank would have done and it would not have been reasonable for Mr. Herbert to consider the Bank's letter of January 9, 2015 without also considering the amortization schedule.

[55] In response to this argument counsel for GBCL asked the court to disregard any calculations arrived at and given in evidence at the trial as this was not pleaded by the defendant. I agree with counsel for the claimant that the defendant cannot introduce at the trial any matter or facts that were not pleaded as the other party would not get the opportunity to respond.[18] However there was no objection by counsel for the claimant at the time that evidence was led. Moreover, the matter was addressed by Mr. Herbert in cross examination.

[56] Regarding the amortization schedule Mr. Herbert stated in cross examination that it is correct to say that the letter and amortization schedule formed a complete communication from the bank to him and it would be improper for him to look at the letter alone without the amortization schedule. He agreed that the amortization schedule attached to the letter showed a balance of EC$132,823 as at February 2016 and a balance of zero on February 1st 2017. He admitted there was a substantial conflict between the letter and the amortization schedule, but when he reviewed the amortization schedule and the letter he did not recognize the conflict. He did not peruse the amortization schedule until sometime after the dispute arose. He agreed that if the Bank were to change the maturity date to February 2016 this would result in a benefit of the principal amount of EC$132,823.00, plus any interest that would accrue after that date. He considered this to be a substantial amount of money. But that did not surprise him because in September 2012 there was an interest reduction from 9% to 8%. At that time the principal was EC$543,829.34. The difference in the interest rate from September 2012 to February 2017 was 1%. He did not calculate it and could not say if it was EC$14,000.00. In response to defence counsel he stated that he thought it would be logical if he lost EC$14,000.00 for the Bank to offer to compensate him by EC$148,000.00.

[18] CPR 2000, R. 10.7

[57] Mr. Herbert also stated that at the meeting it was not agreed that the Bank would credit his account with the missed payments and the Bank never informed him of how the missed payments were arrived at. He stated that para (a) of the letter of January 9, 2015, indicates the Bank had already credited the account with the sum of $39,551.34 and it was not open to him to indicate whether the Bank would credit his account. He admitted that he did not see the word 'offer' or 'offer for settlement' nor did he see the word 'proposal' or 'proposal for settlement' in the letter. The letter did not ask him to respond or indicate his position. It was his view that the letter of 9th January 2015 was an offer and that if he had seen the amortization schedule he would have seen the discrepancies.

[58] While the Bank argues that the January 9, 2015 letter and the amortization schedule were one document and Mr. Herbert accepts this, there are clearly discrepancies between the two documents. The amortization schedule revealed two different maturity dates and the letter a third. Moreover no explanation of the amortization schedule was provided in the letter of January 9, 2015. The letter of January 9, 2015 clearly stated the maturity date is ***now*** February 2016, therefore GBCL was entitled to rely upon it given the use of the word ***'now'***. GBCL sought to confirm this in their response of January 23, 2015 by accepting the date stated by the Bank as February 2016 and the Bank did not deny this. GBCL could not have known that the Bank did not intend what was stated in the January 9, 2015 letter unless the Bank had responded to GBCL's letter of January 23, 2015 and indicated this. It is therefore unreasonable for the Bank to argue that GBCL should have known that the Bank could not have intended a maturity date of February 2016.

[59] Further the initial approach by Mr. Chad Allen when he assumed the position of country manager was that the Bank should conform with the agreement. This contradicts his position that it was unimaginable that the Bank would forego one year's servicing of the loan. When he sent the email on July 6, 2016 Mr. Allen seemed to have no difficulty in the Bank foregoing a year's loan service as he believed there was an agreement made between the Bank and GBCL which the Bank should honour.

Indeed Mr. Allen was prepared to implement the agreement and indicated *he "was finalizing the reversal of entries backdating as at February 2016".* This lends further support to the claimant's position that there was an agreement.

[60] I remind myself that the law, is normally content with the outward manifestation of an agreement, and is not concerned whether the parties were really agreed. 'Agreement it has been said is not a mental state but an act, and as an act is a matter of inference from conduct. The parties are to be judged not by what is in their minds but by what they have said, written or done' (**See Chitty's on Contract[19]).** I therefore find that there was an outward manifestation of an agreement based on what was stated in the Bank's letter of January 2015 and the Bank's conduct thereafter of failing to respond to GBCL's letter of acceptance of January 23, 2015 or to revoke the offer, amounted to consent.

[61] The Bank asserts that GBCL gave no consideration under the agreement. In **Centrovincial Estates v Merchant Investors Assurance Co.[20]** it was stated that :

> 'while the court will not generally concern itself with the adequacy of consideration, by examining a bargain to see whether it is fair minded and beneficial to both sides, it will generally require some consideration to support a promise. A party to a contract can only enforce a promise not given under seal if in return for it he has given something of value in the eyes of the law (See **Halsbury Laws of England 4th Edition**)'.

[62] There is no question that GBCL had experienced a loss and did not benefit from the reduced interest rate from September 2012 as the Bank continued to deduct the same monthly payments up until February 2017 when they deducted the sum of $2023.00. I therefore agree with counsel for GBCL that GBCL was deprived of the opportunity of negotiating further in an effort to arrive at terms more favourable to it. Applying the principles espoused at para 7 in **Centrovincial,** I find this to be the consideration GBCL gave to satisfy the terms of the contract.

[19] Op. cit
[20] 1983 WL. at pg. 6-7

[63] I do not accept the Bank's argument that GBCL knew or ought to have known that the Bank did not have the requisite intention to be bound by the terms of the letter or that the Bank had made an error but chose to 'snap up' the offer. There was nothing to indicate to GBCL that the Bank's intention was different to what was stated in the letter of January 9, 2015. The Bank failed to act after it received the letter of January 23, 2015 from GBCL. It would be unfair to expect Mr. Herbert to conclude that the Bank had made a mistake or was wrong in its calculations given the history of the Bank's dealing with the account. The letter was clearly indicating the Bank's intention after discussions and it was not for Mr. Herbert to decide the Bank's calculations were wrong in the face of the clear words of the letter. An offer had been made by the Bank's letter of January 9, 2015 and there was an acceptance by GBCL's letter of January 23rd 2015. It would therefore be contrary to well established principles of contract law to suggest that the Bank can withdraw its offer, after it has been accepted by GBCL, merely because it has made a mistake which GBCL neither knew nor could reasonably have known at the time when it accepted it (See **Centrovincial**)[21].

[64] It is the law that rectification could be ordered even for a unilateral mistake if the other party knew of the mistake. But this knowledge must be actual knowledge. It is not enough that the party against whom rectification is sought may have suspected that a mistake had been made, but if a party willfully shuts its eyes to the obvious or willfully and recklessly fails to make such enquiries as an honest and reasonable man would make, that will count as actual knowledge. It has been suggested that it is not sufficient that he contributed to the mistake unless he did so knowingly….. (See **Chitty's on Contract**)[22].

[65] I do not accept learned counsel for the Bank's argument that by failing to read the spreadsheet GBCL willfully shut its eyes or recklessly failed to make enquiries to what Mr. Herbert admitted to be substantial conflicts. The spreadsheet itself contained two different maturity dates and other discrepancies. Moreover the Bank issued the letter without recognizing the error and failed to correct it more than one year later. It was

[21] Op. cit.
[22] 29th Edn para 5-100

therefore unreasonable for the Bank to expect Mr. Herbert to be the one to realise there was an error. Accordingly I find there was *consensus ad idem* or a meeting of minds between the parties. Therefore the issue of rectification does not arise.

[66] I therefore conclude that there was a contract between the parties created by the Bank's letter of January 9, and GBCL's letter of January 23, 2015 and that the Bank has breached the terms of the contract that the maturity date of GBCL's loan facility is February 2016.

[67] Accordingly it is hereby ordered that:

i) The Bank shall repay GBCL the amount deducted from the account from February 2016 onwards less $2024.70.

ii) The claim for an injunction is no longer necessary and is hereby dismissed;

iii) The Bank' s counterclaim is dismissed;

iv) Interest shall be payable at the statutory rate;

v) Costs shall be prescribed as per CPR 65.5

Victoria Charles-Clarke
High Court Judge

By The Court

Registrar