

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. ANUHCV 2014/0579

BETWEEN:

ABI BANK LIMITED (IN RECEIVERSHIP)

Claimant

and

FLAT POINT DEVELOPMENT LIMITED

Defendant

Appearances:

Ms. Safiya Roberts, Counsel for the Claimant

Mr. Wesley George appearing with Ms. Jacqueline Walwyn, Counsel for the Defendant

2022: September 20th
October 14th
2023: January 20th

JUDGMENT

- [1] **ROBERTSON, J.:** The Claimant has initiated these proceedings seeking specified sums of money together with attorney's collection fees, interest and cost arising from a banking relationship which existed between the Claimant and the Defendant. Specifically, the Claimant seeks to be paid monies which were advanced by virtue of an overdraft facility offered by the Claimant to the Defendant. The Defendant defends this claim and asserts that any loss which the Claimant sustained arose from the negligence of the Claimant and the failure of the Claimant to mitigate losses. The Defendant also asserts that at a minimum the Defendant is entitled to a full and complete account of all monies deposited into and withdrawn from the Defendant's account. During these proceedings certain account statements for Defendant was disclosed.
- [2] This Court has determined for the reasons indicated hereunder that the Defendant is liable to the Claimant for principal sum due and owing on the overdraft facility together with interest thereon at 15% per annum.

Relevant Background

- [3] The Claimant is a bank authorized to engage in commercial banking operations in Antigua and Barbuda. The Defendant is engaged as a developer and builder of tourist and residential resorts. The Defendant is also the owner of a property development company known as Emerald Cove. Emerald Cove offered luxury private residents in a secure environment. The Defendant is wholly owned by Emerald Cove Engineering N.V., a company incorporated in Curacao. The Defendant is the sister company of Emerald Cove Estates Limited, a company incorporated in this jurisdiction.
- [4] In or about the 19th of December, 2005 the Defendant commenced operating a chequing account (number *****5735) with the Claimant. The checking account had an overdraft facility. Although there appears to be no formal overdraft facility agreement the evidence of both Parties is that there was an overdraft facility with a limit of EC\$ 1,000,000.00 which carried an interest rate of 15% per annum. The Claimant contends that to this there was a penalty of 23% per annum if the limit was exceeded. In or about February 2008 the overdraft limit on the Defendant's chequing account was increased from EC\$1,000,000.00 to EC\$2,700,000.00.
- [5] On 14th October, 2010 the Managing Director for the Defendant, Elisa Gamondi, approached the Claimant to request that the overdraft facility be increased from EC\$2.7 million to EC\$15 million. The Parties negotiated and by correspondence dated 2nd March, 2011 the Claimant presented an offer to increase the overdraft facility with certain terms and conditions. The increased overdraft facility reflected an increase from EC\$2.7 million to EC\$5 million. The relevant elements of the letter of offer are:
- a) The overdraft facility would be increased to EC\$5,000,000.00 to facilitate the construction/ development of Emerald Cove.
 - b) That the period of the facility was 12 months subject to annual reviews.
 - c) The overdraft facility was payable upon demand.
 - d) The expiry date of the facility was 3rd March, 2012.
 - e) The interest rate was to be 10.5% per annum for the time being.
 - f) Finance fees stand at 0.25% of \$5,000,000.00 or \$12,500.00 which sum was to be debited from the Defendant's account.
 - g) The collateral was to be a first demand charge of EC\$5,000,000.00 over a new apartment complex building situated at Emerald Cove valued at US\$9.693 million and the assignment of All Risks Insurance over property being offered as collateral.
 - h) In the event that the overdraft facility exceeds the authorized limit the Defendant's account would be charged a penalty of .0625% per day above the quoted rate.
 - i) The Claimant was to be provided with forecast income and expense statement for 2011 and a 3-to-5-year business plan.
 - j) The security requirements were required to be put in place.
 - k) A signed and sealed Board Resolution was to be received from the Defendant requesting a loan in the sum of EC\$5,000,000.00.

- l) The Defendant's acceptance of the commitment shall constitute the Defendant's agreement to pay, or cause to be paid and whether or not facilities close and or are processed, all commission and expenses of the Claimant in connection with the Loan including but not limited to fees of our external counsel, collection fees, insurance premiums, discharge fees, stamp duty and such out of pocket expenses (where applicable) as may be incurred.
- m) The Claimant is to be provided with evidence of the payment of property taxes and insurance premiums annually. If these commitments and insurance premiums are not paid, the Claimant reserves the right to charge the Defendant's account with the amounts due with interest on the sums payable.
- n) Continuation of the facility is subject to there being no material adverse changes occurring in the company or its officers' financial condition or should they become bankrupt, or subject to bankruptcy, receivership or insolvency proceedings.
- o) The Defendant to agree to submit audited financial statements within one hundred and twenty days of the fiscal year-end, not to further encumber their fixed assets without prior written approval of the Claimant which approval was not to be unreasonably withheld and not to dispose of the whole or substantial part of fixed and floating assets other than in the ordinary course of trading without the prior written approval of the Claimant.
- p) The offer of financing will remain available for a period of thirty (30) days from the date of the letter of offer and the offer will lapse if not accepted. The Defendant is to evidence acceptance of the terms and conditions indicated in the offer by signing a copy the letter of offer. In default, to the Defendant committing to the terms the Claimant is to have no further obligation under the commitment letter.

[6] After the dispatch of the letter of offer there were negotiations between the Claimant and the Defendant. The managing director for the defendant noted that the interest rate stated in the offer was 10.5% while the agreed interest was 9.5%. In the emailed communication between Lisa Wall, at the Claimant bank and Elisa Gamondi of the Defendant on 9th May, 2011 it was confirmed that the interest rate on the overdraft facility was to be 9.5%. The representative of the Defendant requested a corrected version of the letter of offer to be issued and sent to the Defendant for execution. It is clear that neither the letter of offer dated 2nd March, 2011 nor any other letter of offer for an overdraft facility was signed by the Defendant.

[7] It is noted that the limit on the existing overdraft facility was increased by the Claimant to EC\$5,000,000.00 on or about February 2011. The Claimant removed the limit on the overdraft facility on 4th October, 2011. There is no evidence that there was communication with the Parties on the removal of the overdraft limit.

Issues

[8] The issues for determination are:

- a) What are the terms which govern the Defendant's overdraft chequing account?
- b) Is the Claimant liable in negligence as alleged by the Defendant?

The Law

[9] The relationship between a Bank and its client is contractual in nature, however, in relation to drawing and paying of cheques against the money of the customer in the bank's hands, the relationship is that of principal and agent. In the case of **David Walcott v The Royal Bank of Trinidad and Tobago**¹, a case from the Republic of Trinidad and Tobago, Bereaux J.A. considered the matter and referred to the case of **Westminster Bank Ltd v Hilton**² where Lord Atkinson stated that:

"It is well established that the normal relationship between banker and his customer is that of debtor and creditor, but it is equally well established that quoad the drawing and payment of the customer's cheques as against money of the customer's in the banker's hands, the relationship is that of principal and agent. The cheque is an order of the principal's addressed to the agent to pay out of the principal's money in the agent's hands the amount of the cheque to the payee thereof".

[10] The relevant principle in relation to overdraft chequing facilities was expressed in the case of **Lloyd's Bank Plc v Independent Insurance Co Ltd.**³ where the Court quoted the dicta in **Barclays Bank Ltd. v. W. J. Simms Son & Cooke (Southern) Ltd.**⁴ where it was noted that:

"It is a basic obligation owed by a bank to its customers that it will honour on presentation cheques drawn by the customer on the bank, provided that there are sufficient funds in the customer's account to meet the cheque, or the bank has agreed to provide the customer with overdraft facilities sufficient to meet the cheque. Where the bank honours such a cheque, it acts within its mandate, with the result that the bank is entitled to debit the customer's account with the amount of the cheque, and further that the bank's payment is effective to discharge the obligation of the customer to the payee on the cheque, because the bank has paid the cheque with the authority of the customer. In other circumstances, the bank is under no obligation to honour its customer's cheques. **If, however a customer draws a cheque on the bank without funds in his account or agreed overdraft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide overdraft facilities sufficient to meet the cheque. The bank has an option whether or not**

¹ Civ App. 158/2006

² 43 TLR 124.

³ [2000] Q.B. 110

⁴ [1980] Q.B. 677, 699-700.

to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. If however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed overdraft facilities; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque. In other cases, however, a bank which pays a cheque drawn or purported to be drawn by its customer pays without mandate." (**Emphasis Added.**)

- [11] In the circumstances of this case, it is noted that although there appeared to be no document specifically governing an overdraft facility the parties agree that the Defendant had the benefit of an overdraft facility. It is the evidence of the representative for the Defendant that the Defendant had an overdraft facility with a limit of EC\$1,000,000.00 and later EC\$2,800,000.00 at a rate of 15% per annum. This is different from the evidence of the Claimant that the overdraft facility was increased to EC\$2,700,000.00. The Court accepts the evidence of the Claimant with reference to the quantum of the increase since the Defendant's witness was not a director at the relevant time.
- [12] Sometime in 2011 the Defendant required an extension of the overdraft facility in order to facilitate property development. The Parties discussed that there be an increase in the overdraft facility to EC\$5,000,000.00 at an interest rate of 9.5%. Neither the letter of offer dated 2nd March, 2011 nor any other letter or agreement was countersigned by the Defendant. Additionally, the Defendant at no time acted in performance of the letter of offer dated 2nd March, 2011. The Defendant did not, as the offer required, submit collateral. The collateral required by the letter of offer was that the Claimant was to have the first demand charge for EC\$5,000,000.00 over a new apartment complex building situated at Emerald Cove called D3 01 and valued at US\$9.693M. There is also no evidence that the Defendant obtained assignment of All Risk Insurance over property being offered as collateral as was required in the Claimant's letter of offer. Further the Defendant would have also been required to, among other things, provide audited financial statements within 120 days from the end of the fiscal year. There is no evidence that this was done.

The Terms of the Overdraft Facility

- [13] The evidence of the representative for the Claimant is that the bank operated overdraft facilities with varying terms. The general overdraft facility incurs interest at 15%. If there is no limit on the overdraft facility or if the limit is removed, the facility incurs an interest rate of 15% plus a penalty of 23% per annum. The penalty is applied after the expiry date on the facility. Overdraft facilities which have a limit on the customer's account and the customer uses the overdraft facility up to the limit incurs an interest charge of 15 per cent. If the customer exceeds the limit and the bank honours the cheques

drawn on the facility the customer's account incurs the annual penalty of 23% in addition to the 15% interest rate.

- [14] In the circumstances of this case several limits were placed on the overdraft facility used by the Defendant. Specifically, on 3rd February, 2008 the limit was EC\$1,000,000.00, this was increased to EC\$2,700,000.00 on 26th February, 2008 and further increased to EC\$5,000,000.00 on 20th February, 2011. It is noted that this increase to EC\$5,000,000.00 was done during the period that the increased limit was being negotiated and a week and a half prior to the letter of offer which was issued on 2nd March, 2011. The limit on the overdraft facility was removed on 4th October, 2011 which meant that the facility was now without a limit. The evidence from the Claimant's representative is that the terms of the bank regarding such facility is that the facility accrues interest at 15% and a penalty at 23% per annum.
- [15] It is noted that in the evidence of the representative for the Defendant, the Defendant admitted that the Defendant understood the rate of interest on the overdraft facility to be 15%. The evidence of the representative is that "Based on financial records of the Defendant Company, the rate of interest then was 15% per annum". The correspondence from Elisa Gamondi, the Managing Director of Emerald Cove Estates Ltd and the Defendant noted that the Defendant was incurring interest at 15% per annum on the overdraft facility.
- [16] On the matter of the application of 23% penalty this Court notes that the Claimant has, save the oral evidence of its representative, produced no evidence which support that the imposition of such a penalty was a standard term of the bank in the operation of certain overdraft facilities or that the application of the penalty was a term of agreement between the Parties. Counsel for the Claimant has asked the Court to refer to the correspondence from Ms. Mary White, Attorney-at-Law for the Defendant dated 1st February, 2012 addressed to the Claimant. Counsel refers to the fact that in that correspondence Ms. White indicated that:
- "A banking relationship existed between yourselves and our client since ...by virtue of this relationship they extended into an agreement with you for a line of credit up to a maximum amount of EC\$5,000,000.00 bearing an interest rate of 15% per annum as an interim facility while ongoing discussions were in progress between yourselves and our client towards obtaining a commercial loan for a similar amount to be secured by a charge against one of the apartment buildings situate at Emerald Cove at an interest rate of 9.5% per annum thus reducing their financing costs by a minimum of 30% of their prevailing rates: see Exhibit attached hereto. Our instructions are that our clients were in ongoing discussion on the contents of Exhibit 1 but never received a redraft of the same, but in lieu of their expectation they received Exhibit 2. Our..."
- [17] It is noted that the exhibits to which reference was made in this correspondence are not before court. Thus, this Court is unable to consider the content of the correspondence in its full context. Accordingly, this Court is not prepared, without supporting evidence, to accept that it was a standard term of the Claimant's operation of certain overdraft facilities that a 23% penalty is applicable or that

such a term was known and /or agreed by the Defendant. Further the removal of the overdraft limit was without discussions with the Defendant so that the Defendant would not have been in a position to consider the implications of there not being a limit on the overdraft facility.

Negligence and Mitigation

- [18] The Defendant pleads that any losses which the Court may find arising would have arisen as a result of the negligence of the Claimant and/or the Claimant's failure to mitigate losses. The Defendant pleads that the Claimant failed to comply with the Defendant's request to transfer funds of Emerald Cove Limited; that the Claimant failed to comply with its internal anti-money laundering procedures following the full satisfaction of all due diligent requirements; that the Claimant failed to make any or any adequate enquiries regarding the Defendant's ability to repay the funds advanced in the overdraft facility and that the Claimant provided an overdraft facility without confirming the terms and conditions for that facility.
- [19] The law which relates to negligence has long been settled. Our Court of Appeal in the case of **Clement Lawrence and another v First St. Vincent Bank Limited**⁵ stated that 'the test to determine whether a duty of care existed in negligence is a three-way test. There must be (i) reasonable foreseeability of damage; (ii) a relationship characterized by proximity or neighbourhood between the wrongdoer and the person damaged; and (iii) the law would consider it fair, just and reasonable to impose a duty of care.
- [20] In the circumstances of this case the Defendant alleges that the Claimant failed in its duty to make any or adequate enquires regarding the Defendant's ability to repay the funds advanced in the overdraft facility and provided an overdraft facility without confirming that the terms and conditions of that facility were acceptable to the claimant.
- [21] It is settled law that at common law the remedy of tort can arise in a relationship governed in contract. This matter was authoritatively settled in the case of **Henderson v Merritt Syndicates Ltd**⁶. In the circumstances of this case the Defendant has raised this matter not through the issuance of a counter-claim but as a grounds in its defence.
- [22] If the Court were to consider negligence this Court notes that the Defendant is a commercial entity in the practice of engaging in large scale projects. The Claimant is not under an obligation to advance advise to the Defendant on its ability to repay the funds accessed by the Defendant in the overdraft facility. That is a matter for the Defendant to address. It is noted that the Privy Council in the case of **National Commercial Bank (Jamaica) Ltd v Hew**⁷ and others noted the dicta of Lord Finlay LC in the case of **Banbury v Bank of Montreal** and quoted that:

⁵ SVGCVAP2014/0016.

⁶ [1995] 2 A.C. 145.

⁷ [2003] UKPC 51.

"[13] The legal context in which this question falls to be decided is well established. In **Banbury v Bank of Montreal** [1918] AC 626 at 654, Lord Finlay LC said:

'While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business... If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. **He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently. (My Emphasis)**

[14] In relation to a failure to advise a customer, Warne & Elliot: *Banking Litigation* (1999) p 28 states:

'A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given.'

- [23] Similarly, the Claimant is also not under a legal obligation to ascertain the reason the letter of offer for a concessionary interest rate was not signed by the Defendant. If, as the Defendant represents, the Defendant did not receive a second letter of offer reflecting the interest rate as at 9.5% it was for the Defendant to engage the Claimant to have the matter addressed.
- [24] The second matter to which the Defendant has alleged negligence is with respect to what the Defendant has termed the failure of the Claimant to comply with instructions to transfer funds which would liquate the outstanding balance in the overdraft facility and the Claimant's decision to return funds deposited in account belonging to Emerald Cove Estates Ltd. after the Defendant complied with the Claimant's due diligence requests.
- [25] The evidence of the Defendant is that on 19th August, 2011 the Emerald Cove Estates Ltd and the Defendant Company opened a Euro Account to facilitate payments by a European Company known as ALFARAPIR KER KET when that company was purchasing certain parcels of the Defendant's property for the sum of € 6,668,647.00. This sum was deposited into an escrow account held with the Claimant. On 30th August, 2011 Emerald Cove Estates Ltd. received the sum of €2,000,000.00 into the account from the escrow account.
- [26] The Defendant and its affiliated company on 7th September, 2011 gave three instructions to the Claimant. Firstly, the managing director of Emerald Cove Estate Ltd, Emerald Cove Group, instructed the Claimant to transfer €1,500,000.00 to the Defendant's account *****5737 debiting the said amount to Emerald Cove Estate Ltd Euro account *****3637. Secondly, Guillerno Guerra requested that the Claimant transfer the equivalent of EC\$1,850,000.00 to the Defendant's account *****5735,

debiting the said amount from the Defendant's Euro account *****5737. These transfers were approved by the General Manager of the Claimant and the fact of the approval was communicated to the Defendant on 8th September, 2011. The Claimant received third instructions for the claimant to transfer of US\$52,000.00 (approximately €37,500.00) to the Defendant's US currency account *****5716. The overdraft facility granted to the Defendant was on chequing account *****5735. The statement on the account in evidence shows that on 6th September, 2011 the balance on the account stood at EC\$5,061,725.38. On 8th September, 2011 the balance on the said account was EC\$3,242,240.36. The difference in the account is approximately, EC\$1,819,485.02. This suggests that the Claimant complied with the instructions of the Defendant and paid the funds into the overdraft facility. However, it is noted that the funds paid did not liquidate the overdraft facility.

- [27] On 13th September, 2011 the Claimant wrote to the Directors of the Emerald Cove Estates Ltd. to inform that pursuant to section 18 of the **Money Laundering (Prevention) Act 1996** as amended by section 11 of the **Money Laundering (Prevention) (Amendment) Act 1999** the Claimant required Emerald Cove Estates Ltd to furnish certain information for the account holder and investors. The investor was Alfapapir Kft. The Claimant provided a list of items which were required. The Claimant also advised that the operation of the account was placed on 'hold' until the relevant documentation/information was received.
- [28] The requirement for this information was received by Emerald Cove Estates Ltd. The managing director of Emerald Cove Estates Ltd. wrote to their attorneys at law, Commodore & Associates, requesting that there be compliance with the requests made by the Claimant. This correspondence was copied to the Claimant. The Attorney-at-Law for Emerald Cove Estates Ltd wrote to the Claimant indicating, among other things, that certain information for Emerald Cove Engineering N.V. Antigua Branch was in the possession of the Claimant, information on Emerald Cove Engineering N.V. Antigua Branch, photo identification for two officers and an indication that Alfapapir Kft required communication from the Claimant in order to respond to the Claimant's request for information dated 13th September, 2022. A request was also made for the hold to be removed from the account in question.
- [29] There is no evidence that the Emerald Cove Estates Limited fully complied with the due diligence request made by the Claimant. Additionally, there is no evidence of any documentation being received regarding Alfapapir Kft.
- [30] On 30th September, 2011 the Claimant issued internal instructions that the euro funds received on 26th August, 2011 were to be returned to the sender.
- [31] The counsel for the Defendant contends that the Claimant was negligent since the Claimant only partially complied with the instructions given by Elisa Garmondi, managing director, Emerald Cove Estates Ltd and Guillermo Guerra, General Manager of the Defendant. Specifically, the Defendant notes that the Claimant was instructed to transfer from the Emerald Cove Estates Ltd. Euro account number *****3637 the sum of €1.5 million to Flat Point Euro account number *****5737. The Counsel further contends that the Claimant gave no explanation for failing to give full effect to the

instructions to transfer the sum of €2 million to the Defendant and that this sum would have been sufficient to settle the overdrawn account number *****5735. However, this Court does not accept this explanation since the overdrawn account was the account number *****5735 and not the account number *****5737, which was the account that the Defendant asked for the funds to be transferred. There was nothing which prohibited, if desired, the Defendant from giving instructions seeking to credit the overdrawn account as it had done this on 7th September, 2011.

- [32] Additionally, the Claimant cannot be said to have acted negligently when the Claimant notified the Defendant that certain documents were required in order to comply with the provisions of the Money Laundering Prevention Legislation and that action was required by the Defendant to ensure that the Claimant complied with the Money Laundering Prevention Legislation. This is particularly in the context that the Defendant is a company in operation and the query raised by the Claimant was being handled by the Attorneys- at-Law for the Defendant. In the circumstances of this case this Court is not of the view that it is fair, just and reasonable to impose a duty of care on the Claimant.
- [33] As a consequence of the matters stated herein the Court finds in favour of the Claimant and orders that the Defendant pay to the Claimant the principal sum outstanding in the overdrawn account Number *****5735 standing at EC\$5,784,157.56 together with overdraft interest at 15% per annum as of 27th October, 2014. The Claimant has indicated this interest to be EC\$2, 234, 240, 72.
- [34] Accordingly, this Court orders that the Defendant pay to the Claimant the principal sum outstanding in the overdrawn account Number *****5735 standing at EC\$5,784,157.56 together with overdraft interest at 15% per annum of EC\$2,234,240.72 as of 27th October, 2014. The Defendant to pay to the Claimant prescribed costs.

Marissa Robertson
High Court Judge

By the Court

Registrar