

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC (COM) 2020/0020

BETWEEN:

BETTETO FRETT

Claimant

AND

FIRSTBANK PUERTO RICO

Defendant

Appearances

Mr. Hugh Wildman instructed by Maximea & Co and Mr. Israel Bruce instructed by
McW Todman & Co for the Claimant
Ms. Hazel-Ann Hannaway-Boreland and Ms. Jhneil Stewart of Harneys for the
Defendant

2022 September 22 and 23
October 3 (written submissions)
November 4

JUDGMENT

- [1] **JACK, J [Ag.]:** The claimant (“Mr. Frett”) is a businessman active on Tortola. He is also a professional property valuer with a formal qualification as a property appraiser. The defendant (“FirstBank”) had a long-standing commercial relationship with Mr. Frett. It both lent him money periodically and gave him work carrying out property valuations.
- [2] In March 2012 Mr. Frett borrowed some \$6.7 million from FirstBank under three loan agreements, all repayable on 1st April 2019. The loans were charged on land in Road Town and in the West End. Following Hurricane Irma in September 2017,

both properties sustained damage. Mr. Frett ceased to make loan repayments. The bank received insurance monies. Some was advanced to Mr. Frett, but some was held back. Mr. Frett wished to redevelop the Road Town property into an hotel. He claims FirstBank was initially willing to advance monies for that purpose, but later refused, thereby causing him damage. Mr. Frett also alleges that FirstBank underinsured the two properties. In the current proceedings he claims damages and an injunction restraining the bank from selling the properties under the terms of its charge.

- [3] The bank counterclaims for monies due under the loans and for consequential relief under the bank's power of sale of the properties.

Procedural and witnesses

- [4] The trial was heard over two days with the parties agreeing that closings should be in writing. Mr. Wildman was unable to appear on the first day of the trial, but his junior Mr. Bruce appeared for Mr. Frett alone that day. I heard live evidence from Mr. Frett himself and his expert, Mr. Michael Dennis. FirstBank called Mr. Dion Stoutt, a trained architect, as its expert. As lay witnesses, it called Mr. Dwane Mason, who had been a commercial loan officer with FirstBank, but was no longer in its employ; Mr. Gabriel Echandi Guzmán, a civil engineer, who had been instructed by the bank to investigate the prospects of the hotel project as part of the bank's due diligence, whilst the bank was considering whether to advance monies to Mr. Frett; and Mr. Carlos Navarro, who was and is one of FirstBank's managers and who made the substantive decisions on FirstBank's behalf.

- [5] I remind myself of the approach which a judge ought to take to oral evidence. Care needs to be taken not to put too heavy a weight on a witness's demeanour. In general, contemporaneous documentation is of greater significance. I remind myself of the caselaw cited in my judgment in **IsZo Capital LP v Nam Tai Property Inc.**¹

¹[2021] ECSCJ No 478 at [75] to [79].

- [6] I shall consider the evidence of the experts separately.
- [7] So far as the lay witnesses are concerned, I did not find Mr. Frett a satisfactory witness. I do not think he was deliberately lying, but as a businessman he took such a rose-tinted view of the prospects of success of his hotel project that he failed to take an objective view of the contemporaneous facts. On some matters I had no hesitation in preferring FirstBank's evidence. For example, Mr. Frett denied that Mr. Echandi had asked for plans for air-conditioning or sewage and asserted that Mr. Echandi was only interested in the number of rooms. Given that Mr. Echandi was being asked to conduct due diligence on the bank's behalf, I do not find this evidence of Mr. Frett credible.
- [8] Mr. Mason was an open witness and comparatively little of his evidence was challenged. He no longer worked for FirstBank and had no ongoing interest in the case. His testimony was supported by contemporaneous documentation. I found him a witness of truth.
- [9] Mr. Echandi too was an independent witness who had no personal interest in the case. His account of his dealings with Mr. Frett, whilst he was conducting due diligence on the bank's behalf, and his attempts to obtain full sets of plans were inherently plausible. He said his computer had crashed, which meant he had lost many of the photographs which he had taken of the Road Town building. He was not seriously challenged on his computer having crashed, so I accept this explanation of the lack of photographic documentation of his inspections. I found him a witness of truth.
- [10] Mr. Navarro I found an impressive witness. He was an experienced banker. He clearly bore Mr. Frett, whom he had known for a significant length of time, no ill-will. His evidence of meetings with Mr. Frett was supported by contemporaneous minutes. His explanation of why the bank was unhappy with Mr. Frett proceeding with the completion of just the second and third floors (so as to produce a 34 bed

hotel instead of a 54 bed hotel) was inherently plausible. A 34 bed project was a quite different commercial proposition to a 54 bed project.

The facts

[11] It is common ground that by a loan agreement of 5th June 2009, FirstBank granted Mr. Frett a loan of \$780,000. The loan was secured by a mortgage granted over two separate parcels of land. The first (“the Road Town property”) was a building near the Pier Park, which I shall describe shortly. The second (“the West End property”) was land in the West End, comprising a laundrette, supermarket, office and restaurant. In March 2012, in a process described as “troubled debt restructuring”, the earlier loan was wrapped into new loans in the amount of \$6,168,000, \$173,000 and \$350,000, to be amortized over 25, 15 and 7 years respectively. All again were secured by a charge over the properties. The loans were repayable on 1st April 2019.

[12] Clause 5.4 of the loan agreement provided that Mr. Frett was

“to insure and keep insured the assets and property of the Obligors to the full replacement value thereof, and in respect of the Property, combined coverage of no less than eight million five hundred thousand United States dollars (US\$8,500.000.00), by policies to be approved by the Bank against all such risks as are from time to time required by the Bank to be covered by insurance with such insurance companies underwriters war risks or other mutual insurance associations and through such broker as the Bank shall from time to time approve in writing.”

[13] Clause 9(b) of the charge provided that (subject to an irrelevant proviso):

“any moneys received on any insurance whatsoever in respect of loss or damage to the said buildings or any part thereof (whether effected or maintained by the Chargor in pursuance of the obligation under the agreement in that behalf contained in time (a) hereof or independently of or otherwise than in pursuance of such obligation) shall as the Bank requires either be applied in making good the loss or damage in respect of which the moneys are received or be paid to the Bank in or towards payment of the moneys for the time being hereby secured.”

[14] The Road Town property comprises a four storey block. At the front there is a ground (first) floor with a second and third floor above. At the back, there are the three storeys plus a basement. The basement is of no relevance to the issues in this action. Up until the damage wrought by Hurricane Irma in September 2017, the first floor was used by a jewellery shop; the second and third floors were rented by the BVI Government for use as government offices. In addition, Mr. Frett had added an adjoining building, which was in use as a restaurant. That building was destroyed by fire on 8th April 2014. Mr. Frett had not insured it, so that building was a write-off.

The insurance

[15] On 1st June 2014 FirstBank took out insurance with Nagico, the insurance company which Mr. Frett used. Mr. Frett asserts that he had kept up the insurance throughout up to June 2014. I find as a fact, however, that there were periods where he had not paid the premiums on time and the insurance had lapsed temporarily: see, eg, trial bundle p 873. That fact, coupled with the uninsured loss on the adjacent building, caused FirstBank to take over the payment of the insurance. Mr. Frett was well aware of this. Indeed, on 11th August 2016 FirstBank granted Mr. Frett a loan facility in the sum of \$72,000 to regularise the bank's paying the insurance due in 2016-17.

Underinsurance and the aftermath of Irma

[16] In his original statement of claim, Mr. Frett complained that the bank had underinsured the buildings. This allegation was, however, based on valuations made by BCQS, a firm of valuers, as to the value of the buildings. No valuation of the reinstatement cost of the buildings was adduced in evidence, although the reinstatement value is the critical parameter for assessing whether a building is adequately insured. In the event, Mr. Wildman's closing written submissions on Mr. Frett's behalf limited his case to two complaints: first, that the bank had not taken improvements made by Mr. Frett into account when fixing the sum assured; and second, that, save in relation to the launderette at the West End property where

there was protection against loss of rent, it did not insure the properties against loss of rental income. The loss in relation to the first head is quantified at \$558,517. The loss in relation to rental income is not quantified. I shall come back to all these insurance issues and to FirstBank's defences to this aspect of Mr. Frett's claim.

- [17] After Irma, both the Government and the jeweller's vacated the Road Town property. Mr. Frett ceased to service the loans from FirstBank and has indeed made no payments since September 2017. Insurance payments totalling \$2,398,067 were made to the bank by Nagico between January and April 2018.

The hotel project

- [18] With the Road Town property empty, Mr. Frett decided to convert the property into a 3-star hotel. This would have the reception and 20 bedrooms on the first floor. The second and third floor would each have 17 bedrooms. At one point consideration was given to having a bar on the roof and a swimming pool, but these were later abandoned.

- [19] At no point did Mr. Frett draw up a specification of works. Nor was any attempt made to find a prime contractor to perform the project. Instead, Mr. Frett intended to be himself the prime contractor. He also took on what would normally be the rôle of the contract administrator. The only formal documentation prepared by him was four floor plans. Everything else was effectively in his head. For what was intended to be a turn-key hotel project, this is in my judgment surprising and unprofessional. He said that he intended to purchase goods, such as lavatories, from China for installation in the proposed hotel, but no bills of lading or other evidence of the purchase was put in evidence. The goods never reached Tortola. It is unclear whether a definite order for the goods had been made at all, as opposed to negotiations.

Mr. Frett's case

- [20] In Mr. Wildman's closing submissions, Mr. Frett's case on this was put as follows:

“11. After the passage of the hurricane the Claimant informed the Defendant bank of his intention to change the use of the building from commercial renting space to being that of a hotel. The Claimant was asked to do an income stream for the change of use. Initially, after the bank was informed by the Claimant of this change for a period of one month the Defendant bank did not agree. However, the Defendant bank subsequently agreed to the change of use based on the projections given to the Claimant by the Defendant. The Claimant was asked to demonstrate that the work for the completion of the hotel with the amount of funds held by the bank for the Claimant based on the insurance payout to the bank.

12. The Claimant was able to do substantial work in transforming the building at Road Town from commercial to a hotel project. There were three floors to be completed. First, second and third floors. The evidence revealed that of the three floors two of the floors were 80% completed. The second and third floors comprised of 34 rooms in total. And the ground floor which was to be used as a lobby was incomplete. The Claimant insists that based on the quantum of work done on the hotel the sum of \$850,000.00 or there about would be sufficient to complete all three floors to make it into a viable hotel project, given the fact that what was being done was for rooms for accommodation. It was never intended to be [a] five star hotel. The Claimant had gone to the length of ordering materials from China to complete the project. However, the Defendant bank refused to provide any further funding so the Claimant was unable to complete the purchase from China for the material to complete the hotel project.

13. It is interesting to note, that the bank's explanation for refusing to provide the funding is to be found in the testimony of Mr. Navarro, who stated that they received insufficient funds and that there was no consensus on the funds required to complete the project. Mr. Navarro admitted that he was told by the Claimant that only two floors were going to be completed for the hotel project and that materials were coming from China. The Claimant's evidence as to the cost for completing the hotel project was supported by Mr. Michael Dennis, a quantity surveyor expert, who was asked to do an assessment of the scope of work done by the Claimant on the hotel project, and the projected cost for completion. At paragraph 7 of his statement Mr. Dennis said this: 'Upon conclusion of my analysis, I have come to the opinion that the cost to complete the outstanding works to the proposed hotel rooms and lobby to the first floor, second floor and the third floor of the [Road Town] building... is in the region of US\$856,000.00.'

14. Mr. Dennis's evidence clearly contradicted the Defendant's case as to whether there was uncertainty as to the amount for completion of the hotel project, as his evidence was clear that had the Claimant received the \$850,000.00 he would have been able to complete including bringing in materials from China; and to turn the property in a viable hotel earning income project. Mr. Dennis was clear of his analysis was based on his

objective view having visited the site, and was not influenced by anything said to him by the Claimant or the Defendant. His evidence on these critical issues remains unchallenged.”

The terms of the charge

- [21] Before considering the cost of completing the hotel project, it is worth stepping back to look at the terms of clause 9(b) of the charge. This gave FirstBank the option that any insurance monies “either be applied in making good the loss or damage in respect of which the moneys are received or be paid to the Bank in or towards payment of the moneys for the time being hereby secured.” Mr. Wildman argued that the “language of the Charge is pellucidly clear. In its literal form, it means what it says: the bank can only utilize the funds to deal with the damage sustained or may pay down on the debt. It cannot use the insurance proceeds to do both.”
- [22] In oral opening, Mr. Bruce (appearing with Mr. Wildman) made clear that on his argument the bank could not give part of the insurance monies to Mr. Frett and then use the rest of the monies to pay off part of the loan. This necessarily follows, he submitted, from the “either... or” formulation of clause 9(b). Once FirstBank advanced some of the monies for making good, it was obliged to advance the whole of the monies for that purpose. FirstBank had made its election and must be bound by it.
- [23] I disagree. It is well established that “or” in some contexts can mean “and”. As Lord Kenyon CJ said as long ago as 1789:²

“Now there is no doubt on the intention of the parties: and where sense requires it, there are many cases to shew that we may construe the word ‘or’ into ‘and’, and ‘and’ into ‘or’,... in order to effectuate the intent of the parties. Here, therefore, in order to give effect to the intention of the surrenderor, we must say, that, when he used the word “or”, he meant ‘and’.”

² Wright v Burrill v Kemp 3 Term Rep 470 at p 473.

[24] Lord Wilberforce was to the same effect in **Federal Steam Navigation Co Ltd v Department of Trade and Industry**, where he said:³

“My Lords, it is important to state precisely what we are asked to decide in this appeal. It is to determine the meaning of the following phrase — extracted from s 1(1) of the **Oil in Navigable Waters Act 1955**:⁴

‘If any oil... is discharged from a British ship... the owner or master of the ship shall... be guilty of an offence under this section.’

To say that what we have to decide is whether ‘or’ is conjunctive or disjunctive or, putting it more bluntly, whether ‘or’ means ‘and’, appears to me, with respect, to be a dangerous simplification. It is the meaning of the phrase as a whole that concerns us.

The appellants ask us to say that, in this context, ‘or’ has an alternative and exclusionary sense, so that either the master or the owner is guilty but not both. Thus, once either one or the other has pleaded or been found guilty or, maybe, has been proceeded against, proceedings against the other cannot be brought. This strange result — *modus ponendo tollens* —

‘See how the fates their gifts allot,

If A is guilty, B is not,’

was rejected by the judge at the trial, and rejected unanimously by the Court of Appeal (Criminal Division)⁵ which court pungently pointed out anomalies and absurdities to which it would give rise. I agree with these courts: for myself, indeed, to give the phrase this signification is to make it legally meaningless.”

[25] In my judgment, it makes no sense to prevent the bank dividing the insurance monies, some to pay any arrears, some to affect reinstatement. Take a simple case. Suppose the property is damaged in a hurricane or storm. Urgent work is needed to make the roof watertight again, so that further damage is averted. It would be surprising if a bank agreeing to advance emergency monies from the insurer for that limited purpose had no choice but to apply all monies which might subsequently be received from the insurer for reinstatement. At the point when emergency works were needed, it might be impossible to know what the long-term prognosis for the building was.

³[1974] 1 WLR 505 at p 520, [1974] 2 All ER 97 at p 110.

⁴3 & 4 Eliz II c 25.

⁵[1973] 3 All ER 849, [1973] 1 WLR 1373.

[26] In my judgment, FirstBank had a discretion as to what part of the money it would advance for reinstatement and what part to retain as part repayment of the loans and interest.

[27] There is a further answer to the point. Mr. Frett was not proposing to reinstate the Road Town property as a shop and offices. He wanted to redevelop it as an hotel. Therefore, even if I am wrong in holding that the bank had a choice, in my judgment Mr. Frett could not oblige FirstBank under clause 9(b) to advance the insurance monies, because the monies were not going to be used to reinstate the building into its previous use as a shop and offices.

The issues in the claim and counterclaim

[28] The “either... or” way of putting the point is any event not something pleaded in the statement of claim. Ms. Hannaway-Boreland rightly complains that Mr. Frett’s case is constantly being changed, which is impermissible without an amendment being made. The parties prior to the pre-trial review agreed an extensive memorandum. This included a comprehensive list of issues. Subsequently, Mr. Frett changed his legal representation. His new counsel comprehensively ignored the list of issues prepared by their predecessors.

[29] Among the issues in the list were four related to the counterclaim. In effect the issues raised amounted to non-admissions. In opening, no mention was made of any issues regarding the counterclaim, nor were any points put to FirstBank’s witnesses in the course of cross-examination. No submissions were made in the written closing on his behalf. In these circumstances, it is not in my judgment open to Mr. Frett to raise any issues regarding the counterclaim. Thus, subject to the right to set-off his substantive claim against monies owed to the bank, Mr. Frett is liable to FirstBank on its counterclaim. I should add that I would in any event have found for FirstBank on its counterclaim on the facts.

Duty of good faith

- [30] The statement of claim at para 20 pleads that there “is to be implied into the Charge agreement in order to give it business efficacy a term that such exercise of discretion would be done in good faith.”
- [31] As to this allegation, English law is notoriously reluctant to imply duties of good faith. The main inroad into that principle is in relation to “relationship contracts”, where there is a duty to act vis-à-vis the other party act with integrity and in a spirit of coöperation: see **Yam Seng Pte v International Trade Corp**,⁶ **Sheikh Tahnoon Shakhboot Al Nehayan v Kent**⁷ and **Candey Ltd v Bosheh**.⁸
- [32] A contract between a bank and a customer will rarely be of this type: **Ian Hope-Ross v Martin Dinning et al**,⁹ which establishes that “the relationship between the [customer] appellants on the one hand, and the Banks on the other hand, is primarily that of debtor and creditor.”
- [33] The absence of any relationship which could give rise to a duty of good faith is particularly marked here, because FirstBank and Mr. Frett had not just conflicting interests but were already by 2012 in actual conflict. As noted, the 2012 loans were part of a “troubled debt restructuring”. This went back to a loan taken out by Mr. Frett on 23rd June 2008 which Mr. Frett failed timeously to repay. After accepting the 2012 loans Mr. Frett continued to be an unreliable payer (see Mr. Mason’s evidence, which I accept) and let the insurance lapse on various occasions. No duty of good faith can in my judgment be implied so as to give business efficacy to these parties’ agreements.
- [34] Even if there were a duty on the part of the bank to exercise in good faith any discretions it might have, there is no evidence that FirstBank was acting in bad faith. Mr. Navarro was the bank manager who determined whether to advance monies to Mr. Frett once the insurance monies had been received. It was not put to him that

⁶ [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, [2013] 1 CLC 662, [2013] 1 Lloyd’s Rep 526.

⁷ [2018] EWHC 333 (Comm), [2018] 1 CLC 216.

⁸ [2022] EWCA Civ 1103 at [30].

⁹ [2021] ECSCJ No 540 (Court of Appeal on appeal from Antigua and Barbuda) at [36].

he was acting in bad faith in refusing to advance the monies requested by Mr. Frett to complete the hotel. The highest Mr. Frett's case gets is that, if FirstBank had advanced \$835,000, he could have completed the hotel. Whether \$835,000 or a similar amount was enough is in dispute and I shall come back to this issue, however, I find as a fact that FirstBank did not act in bad faith in reaching the view that eight hundred odd thousand was insufficient to complete the hotel.

- [35] The only pleaded contractual case against the bank in respect of its duty to advance the insurance monies to Mr. Frett is the implied term as to good faith. Since, as I hold, there was no such implied term nor any such duty, Mr. Frett's case on this fails. Further even if there were such a term or duty, as a matter of fact there was no bad faith on the bank's part.

Promissory estoppel

- [36] Mr. Wildman's closing submissions on Mr. Frett's behalf submit:

"that the conduct of the Defendant bank has given rise to a promissory estoppel, which prevents the Defendant bank from denying that it is liable for breach of contract between itself and the Claimant. This aspect of the case can be viewed in this way. It was admitted by Mr. Mason and indeed Mr. Navarro, and clearly stated in the evidence of the Claimant, that the Defendant bank, agreed after one month of opposition, to the Claimant embarking on transforming the Road Town project from a commercial venture to a hotel. In fact, the evidence is clear that the Defendant bank was willing to offer all the necessary funding to the Claimant to complete the project. This was a clear variation of the original contract which allows for the Claimant to do commercial buildings in the form of offices. With this new agreement the Claimant expended vast resources to bring the property to a substantial level of completion. This is clearly supported by the evidence of Mr. Dennis. He was quite clear that of the three floors the second and the third floors were 80% completed, comprising a total of 34 rooms. Further, Mr. Navarro admitted in evidence under cross examination that he knew the Claimant was awaiting funds from the Defendant bank to import materials from China to complete the project. These funds were never forthcoming, these funds were never given to the Claimant, despite the clear promise or representation if you will that the Defendant bank, that the funds would be provided the funds for the completion of the hotel.

What is the legal import of this? The Claimant submits that by going back on its word, by refusing to provide the necessary funding of \$850,000.00 to

complete the project, the Defendant bank caused the Claimant to suffer significant loss. The principle of promissory estoppel is apt in the circumstances.”

[37] None of this is pleaded. Nor does it appear in the statement of issues in the pre-trial memorandum. It therefore fails *in limine*. Further, promissory estoppel is not (as is being asserted in this passage of the submissions) a cause of action. It is a shield not a sword.

[38] Moreover any representation must be clear and unequivocal, precise and unambiguous: **Chitty on Contracts**.¹⁰ A representation that FirstBank would provide “all the necessary funding” fails on the facts. The bank, I find as a fact, never made such an open-ended commitment, nor could Mr. Frett ever have sensibly thought that the bank would assume such an open-ended commitment. Mr. Frett, for example, produced various estimates of the cost of the completing the hotel project. At pages 1552 and 1553 of the trial bundle he set out his original estimate of completion costs at \$2,162,454.81, which he had been able to reduce to \$1,926,483.83. This was much more than the \$835,000 which was Mr. Frett’s final position on the sums needed to complete the hotel. The bank, I find as a fact, never agreed to advance whatever sum Mr. Frett said he needed. Such a commitment would be wholly uncommercial.

[39] I base these findings of fact on an examination of the contemporaneous documentation. There was an important meeting on 6th March 2019 between Mr. Frett and representatives of FirstBank, including Mr. Navarro. The bank made it clear that it was unwilling assume incremental risks and told Mr. Frett that he should be identifying other sources of finance. Mr. Frett asked if the bank would consider refinancing the monies lent him. He was told “that his request would be considered like any credit application and subject to the credit requirements of the Bank’s credit policy with regard to the type of loan being requested.” He was warned that after

¹⁰ 34th Ed (2021) at para 6-098.

the maturity date of the current lending on 1st April 2019 “the Bank will pursue repayment of the indebtedness due by all means at its disposition”.

[40] On 28th March 2019 Mr. Frett sent a long letter to FirstBank setting out his position. This included an assertion “that the Bank... gave... the ‘green light’ to continue with the [Hotel] Project with the reassurance that the Bank would see [him] through to completion.”

[41] This was followed by a further meeting on 19th April 2019. At this meeting:

“CN [Mr. Navarro] indicated that the Bank was willing to forego its rights under the defaulted and matured credit facilities and was willing to consider a transaction with Mr. Frett for the completion of the Hotel project if terms agreeable to both parties were reached. BF [Mr. Frett] indicated that he was in agreement with the proposed approach.

CN indicated that the first step... was for BF to provide a detailed costs to complete for... the completion of the Hotel project. BF... indicated he could provide it by Wednesday, April 24, 2019.

CN indicated that the Costs to Complete was to be provided in sufficient details so that it could be verified and its reasonableness be determined by the Bank’s inspecting engineer... [O]nce the costs to complete are determined and agreed to between the Bank and BF, an agreement is to be reached with regard to how these required costs are to be funded.”

[42] Mr. Frett agreed with this way forward. Any previous understandings (assuming there were any) would have been superseded in my judgment. Under cover an email of 18th April 2019, he sent a new estimated completion cost for the hotel project. The original estimate to complete the three floors was \$1,703,772 plus the cost of an elevator put at \$150,000. This estimate he had been able to reduce to \$1,089,212 plus the elevator at \$150,000. However, he added various new items which increased the total by a little under \$250,000, including a swimming pool.

[43] Mr. Frett’s case at trial was that this estimate contained, what he said was, an obvious error. The first floor had not really been begun, whereas the second and

third floors were 80 per cent complete, so the cost of completing those floors was very much less, he said.

- [44] Due diligence for FirstBank was conducted by Mr. Echandi Guzmán. He visited the property a number of times following Irma. His evidence of events from April 2019 in his witness statement (preserving the language idiosyncrasies) was this:

"I asked for construction plans in order to review and validate Mr. Frett's estimates. We also asked for a revised cost to complete the work, because the estimate for \$1.3 million was not detailed and we found it to be a bit low which he said he would provide by Wednesday 24 April 2019. However, we did not get the revised estimate... so I held a meeting with Mr. Frett's office manager, Ms. Wilson... When she used the AIA form [American Institute of Architects] to redo the estimate she came up with \$1.8 million, which was successfully validated on site... Later, Mr. Frett sent a revised estimate for \$833,000 (1 million less). He removed various things including furniture and room equipment, power generator, water cistern and the roof top restaurant brackets proposed, to cut estimate for the elevator in half and did the same for the air conditioning cost. The amount of the \$833,000 estimate was an exact match with the amount Mr. Frett had in the Bank from the insurance proceeds. Then Mr. Frett sent me the construction plans... The plans... were given to me on 13th August 2019. It was then relayed to Mr. Frett that the plans were insufficient, because when we examine hotel projects I would expect to receive more than just four pages of construction plans. He only sent us the floorplans for each level. He did not send any architectural sections, architectural notes, door and window schedules, plumbing plans and notes, electrical plans and notes, site plans, air conditioning plans and notes, sanitary plans and notes, or Technical Specifications for the construction. So in my view what he submitted was insufficient... The last time I visited the property all of the wiring was hanging from the steel beams, [employees of Mr. Frett whom he housed there] were living with exposed wiring, they had temporary doors which were 40 installed on each of the living quarters. So the dry wall would have been to be repaired whenever property doors were installed for those rooms. The electrical wiring was all done without conduits.

...

[B]y the time of 7 May 2019 site visit... there were works, but a lot of it was deficient and had to be redone. There was faulty electrical wiring meant that those electrical wirings had to be placed inside conduit and some of the drywall would have to be removed and replaced. There was also no sanitary and no portable water works done. Based on the way the works were done, he would have to remove dryer wall to install sanitary and water works and to put the electrical conduit in, then redo the drywall areas would all have to be replace after."

[45] I accept that evidence. The bank was entitled in my judgment to take the view that hotel project was not viable. It follows that FirstBank were justified in refusing to advance monies to Mr. Frett. It should be noted in relation to this issue that this conclusion does not require the Court to reach any view on whether Mr. Echandi was right or wrong. It is sufficient that FirstBank had (as they did have) proper grounds for refusing to finance the hotel project.

The experts

[46] I turn to consider the experts' evidence. Strictly this is not necessary, since Mr. Frett's claim in respect of the hotel project has already failed. However, as the matter may go further, I should express my view.

[47] There were a number of difficulties with Mr. Dennis's evidence. Firstly, it was not clear whether the building in 2021 was in the state it had been in 2019. In particular, Mr. Frett had used the building to house his employees. Mr. Echandi, when he inspected in 2019, was horrified to discover the conditions in which the employees were living, with electrical cables hanging loose. The electrical works in Mr. Dennis's Appendix 4.3 was limited to "the supply and installation of light fixture, switches, outlets, etc. including making connection to existing wired installation." This suggests that at least the electrical issues which had caused Mr. Echandi's concern had been fixed.

[48] Secondly, although Mr. Frett's proposal to the bank was posited on this being a turn-key project, Mr. Dennis did not include any furnishings in his estimate of costs. Nor were standard items like ice machines included. Further, insofar as he put costs for items like lavatories in his estimate, he simply took the prices for Chinese goods with which Mr. Frett provided him. He did not assess whether these prices were realistic or still obtainable.

[49] Thirdly, Mr. Dennis makes no comment on the evidence of Mr. Echandi, which included an extensive report. In my judgment it was of great importance that the experts engaged with this evidence, since it was contemporaneous evidence by a professional man.

[50] There were also some difficulties with Mr. Stoutt's evidence. He had not inspected the building and was reliant on the documents and evidence of others. Nonetheless he engages fully with the contemporaneous evidence of Mr. Echandi. He says that "the most important document in the bundle" he had received was the AIA form prepared by Mr. Frett's office manager which gave a \$1.8 million estimate to complete the turn-key project. He then advances good reasons why it was not sensible to strip out items like the swimming pool, vending and ice machines etc, because "removing those elements listed would be something to question. Can you want to stay there vs somewhere else." He points out that various items like the generator and scaffolding needed to be included at a cost of some \$300,000.

[51] I prefer the evidence of Mr. Stoutt. Mr. Dennis excluded items which were necessary for the opening of an hotel on a turn-key basis; Mr. Stoutt did not. Mr. Stoutt considered the important evidence of Mr. Echandi, whereas Mr. Dennis did not engage with that evidence.

[52] Accordingly, I find as a fact that the hotel project could not be completed with only the insurance monies of about \$850,000. Mr. Frett has therefore failed to show he has suffered any of the consequential losses he now claims.

The insurance claim

[53] As to the claim in relation to insurance, the duty to insure was on Mr. Frett. When Mr. Frett proved unreliable in keeping up the Nagico policy, FirstBank was entitled to pay the insurance itself. However, in my judgment they were doing this on their own behalf and in their own interest in order to protect their own security. As such the bank owed Mr. Frett no duty of care or any fiduciary duty. It was entirely a matter

for the bank what, if any, insurance it took out. Accordingly, Mr. Frett's claim fails on this ground.

[54] Even if I am wrong in this, however, Mr. Frett has failed to prove that there was any underinsurance. As I have noted above, the valuation report obtained by him does not consider the reinstatement cost of the building, so the materiality of the improvements said to have been affected by Mr. Frett on the insurable value of the properties cannot be assessed. Further, Mr. Frett himself did not insure the properties against loss of rent, except in respect of the West End launderette (where the bank continued the policy's coverage of loss of rent). Mr. Frett cannot in my judgment complain, if FirstBank continue the insurance arrangements he himself had put in place. On these grounds too, Mr. Frett's claim in respect of insurance fails.

Conclusion

[55] It follows that Mr. Frett's claim stands to be dismissed and FirstBank's counterclaim succeeds.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar