

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2014/0179

BETWEEN:

BANK OF SAINT VINCENT AND THE GRENADINES

CLAIMANT

AND

CLINT HAZELL
MILDRED HAZELL
HAZECO COTTAGES LIMITED

DEFENDANTS

Appearances:

Mr. Richard Williams and Mr. Grahame Bollers for the Claimant

Mr. Joseph Delves for the Defendants

Mr. Norman Robinson Representative for Bank of St. Vincent and the Grenadines present

First and Second named Defendants present

2019: 13th-14th May
10th, 11th, 17th and 18th October

2020: 9th July

JUDGMENT

Byer, J.:

- [1] This case was one in which it became clear to the court that the casual manner in which some businesses conduct their affairs within our societies can inevitably lead to parties misunderstanding their obligations and liabilities. That being said, this case produced voluminous bundles of documents and evidence and during the course of the trial it became evident that the bundles used by counsel and the court were not identical. Therefore this court wishes to put on record, that any reference to documents contained in the five trial bundles produced for trial are references to the pages as are shown on the trial bundles that were used by the court at trial.
- [2] This claim commenced by way of Fixed Dated Claim Form filed on 10 October 2014, making it almost 6 years ago seeking the following orders:

- i. An order that the defendants do deliver up possession of the mortgaged premises to the claimant more particularly described as:

FIRST SCHEDULE

ALL THAT LOT PIECE OR PARCEL OF LAND situate at Lower Bay Bequia in the State of Saint Vincent and the Grenadines being Lot Number Two (2) admeasuring Thirteen Thousand Five Hundred and Twenty Two Square Feet (13,522 sq ft) and abutted and bounded on the North by lands of Helena Stapleton on the South by a Twelve Foot (12ft) Road on the East by lands of Ralph Peters and on the West by Lot Number One (1) or as the same is more particularly delineated and shown on a Plan or Diagram drawn by Sebastian Alexander Licensed Land Surveyor and approved and lodged at the Lands and Surveys Department of the State of Saint Vincent and the Grenadines in April 1990 or howsoever otherwise the same may be butted bounded known distinguished or described together with all buildings and erections thereon and all ways waters watercourses rights lights liberties privileges easements and appurtenances thereto belonging or usually held used occupied or enjoyed therewith or reputed to belong or be appurtenant thereto

SECOND SCHEDULE

ALL THOSE TWO LOTS PIECES OR PARCELS OF LAND situate at Ottley Hall in the State of Saint Vincent and the Grenadines being Lot Number Five (5) admeasuring Two Roods and Six Poles (2rds 6pls) and abutted and bounded on the North by Lot Number Three (3) on the South by Montrose Estate on the South West by Lot Number Eight (8) and on the East by Lot Number Four (4) and on the West by a Private Road AND ALSO unnumbered lot containing by admeasurement 1 rood 34 poles and abutted and bounded on the North by Lot Number Six (6) on the South by Lot Number Eight (8) on the East by a Private Road and on the West by Lot Number Seven (7) or as the same is more particularly delineated and shown on a Plan or Diagram drawn by Kelvin Joslyn Licensed Land Surveyor and approved and lodged at the Lands and Surveys Department of the State of Saint Vincent and the Grenadines on the 3rd day of May 1976 as Plan Number A215 or howsoever otherwise the same may be butted bounded known distinguished or described together with all buildings and erections thereon and all ways waters watercourses rights lights liberties privileges easements and appurtenances thereto belonging or usually held used occupied or enjoyed therewith or reputed to belong or be appurtenant thereto

THIRD SCHEDULE

ALL THAT LOT PIECE OR PARCEL OF LAND situate at Ottley Hall in the parish of Saint Andrew in the State of Saint Vincent and the Grenadines being Lot Number Three (3) admeasuring One Acre Eleven Poles (1ac 11pls) and abutted and bounded on the North by lands of Anitha Muriel Henderson on the South partly by Lot Number Four (4) and partly by Lot Number Five (5) on the East by a Private Driveway and on the West by a Private Road or as the same is more particularly delineated and shown on a Plan or Diagram drawn by Sebastian Alexander Licensed Land Surveyor and approved and lodged at the Lands and Surveys Department of the State of Saint Vincent and the Grenadines on the 29th day of April 1976 or howsoever otherwise the same may be butted bounded known distinguished or described together with all buildings and erections thereon and all ways waters watercourses rights lights liberties privileges easements and appurtenances thereto

belonging or usually held used occupied or enjoyed therewith or reputed to belong or be appurtenant thereto

- ii. An order that the said properties described in Mortgage Deed No. 973 of 2009 be sold to satisfy the Mortgage Debt.
- iii. An order for Foreclosure against the properties more particularly described in Deed No. 973 of 2009.
- iv. An order that the defendants do pay the sum of Three Million One Hundred and Sixty Thousand Two Hundred and Thirty Dollars and Seventy-Six Cents (\$3,160,230.76) due and owing under the Mortgage.
- v. Costs.
- vi. Such further or other reliefs.

[3] The claim was made pursuant to Part 66.4 CPR 2000 which governs the procedure for a mortgagee to claim either judgment for the payment of a sum of money or possession of the property the subject of the Mortgage. This claim sought both. The Fixed Date Claim Form was supported by an affidavit of Bernard Hamilton also filed on 10 October 2014 in which he purported to set out the circumstances giving rise to the claim as filed. I will return to this affidavit later in this judgment as this was the affidavit together with any further evidence that must satisfy the requirements of Part 66.4 to ground the claimant's claim for the reliefs as sought.

[4] Upon the service of this claim, the defendants filed a 65 paragraph Defence and Counterclaim on 26 November 2014 claiming by their Counterclaim, the following:

- i. A declaration that the claimant bank had fiduciary duties to the defendants and that it breached those duties.
- ii. Disgorgement of any gains made by the bank in breach of their fiduciary duties; alternatively, equitable compensation or damages; and
- iii. An order setting aside the subject transaction.
- iv. A declaration that the claimant bank breached its contractual duties to the defendants.
- v. Damages of \$35,415.71; or alternatively an account by the bank of all monies directly paid to the Contractor reconciled with proof that the work paid for was in fact completed.
- vi. An order for payment by the bank of the amount found to be due on the taking of such account.
- vii. Damages
- viii. Interest pursuant to Section 27 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act.

ix. Costs.

- [5] The claimants responded by way of Reply and Defence to Counterclaim in which they denied all the allegations made by the defendants in their pleadings and categorically denied that any of the actions of the defendants in the loan process were either directed or influenced by employees of the bank.
- [6] The matter came on for trial and generated an 800 plus transcript of the evidence led, making this trial and the issues to be determined primarily fact driven.

Background

- [7] This Claim involved the claimant bank's rights and remedies as mortgagee to recover monies owed to it by the defendants pursuant to a Demand Legal Mortgage made between the claimant as mortgagee and the defendants as mortgagors dated 16 March 2009 and registered at the Land Registry bearing Deed Number 973 of 2009 (the Mortgage).
- [8] Under the terms of the Mortgage, the claimant loaned the defendants the sum of Two Million Seventy-Five Thousand Nine Hundred Dollars (\$2,075,900.00) with; (a) interest at the rate of 10% per annum on the sum of One Million Three Hundred and Nineteen Thousand Dollars (\$1,319,000.00); (b) 10% per annum on the sum of Seven Hundred and Seven Thousand Dollars (\$707,000.00) and (c) 9% per annum on the sum of Forty-Nine Thousand Nine Hundred Dollars (\$49,900.00).
- [9] The sums were to be repaid by installment payments as set out in the Mortgage and in furtherance of the loan the defendants mortgaged the properties listed in the schedules to the Mortgage.
- [10] In 2014, the claimant commenced these proceedings against the defendants contending that the loans were in chronic default and that by virtue of a demand letter dated 29 April 2013, it demanded payment of all monies owed to the claimant from the defendants.
- [11] The claimant contends that the defendants failed or refused to comply with the demand and as of 8 October 2014, the defendant's total indebtedness to the claimant stood at Three Million One Hundred and Sixty-Two Thousand and Thirty-Six Dollars and Fifty-Six Cents (\$3,162,036.56).
- [12] The defendant's case is that on 11 January 2006, they had a meeting with Donette Lyttle an employee of the claimant bank to discuss a loan for the purpose of purchasing 2 acres of land at Belmont at a cost of \$528,073.00. At that meeting the defendants also discussed their plans for a twin island development which involved building 6 apartments on their land in Bequia and 12 apartments on their land at Gunn Hill.
- [13] The defendants contend that they showed Ms. Lyttle their business proposal and she requested the financial statements for their business HazeCo Tours and she also suggested that the defendants seek "counsel" from the claimant's property loans officer.

- [14] The defendants further contend that they had a second meeting with Ms. Lyttle where they discussed their business proposal and presented updated HazeCo Tours financial statements along with construction estimates for building both the Bequia and Gunn Hill projects.
- [15] The defendants contend that the claimant's personnel were banking and financial experts and were being guided by them as they had no experience in these matters, they did what they were told and amended the business plan to show two phases of development.
- [16] Sometime in 2008, they received a call from an officer of the claimant bank to come in for further consultation. At that meeting the defendants contended that both Messrs. Branch and Robinson were present and the defendants were directed by the claimant to amend the development plan. The claimant also stated that The Grenadines had a strong tourism market and thus dictated that the Lower Bay project should be Phase 1 and that the defendants should access a hotel construction duty free concession from the Government of Saint Vincent and the Grenadines which the claimant "advised" was valued at 30% of the project. They were further advised to amend their business plan. The claimant worked out the concession and presented these note/jottings to the defendants. As a result of this "advice" from the claimant they prepared a third business plan which they allege was done on the advice and instructions of the claimant.
- [17] The defendants further allege that the claimant under-funded the project by deducting the 30% value of the concession from the loan and only loaned them \$1,387,000.00 which was \$369,366.69 less than the Fraser Construction estimate and \$513,000.00 less than the claimant's quantity surveyor's estimate to complete the project. As a result of the claimant's breach of duties to the defendants the project was never able to generate an income and they were unable to repay the sums disbursed.
- [18] The defendants allege that they reasonably expected that the claimant was giving and would continue to give them unbiased advice as to the suitability of the transaction and that the bank led them to believe that they could rely on the advice given. They further allege that from 11 January 2006, when they were first advised by Ms. Lyttle that the claimant had established a fiduciary relationship with and duties to the defendants. From this relationship established, as contended by the defendants, the claimant having failed to uphold their owed duties, the entirety of the transaction between the parties should be set aside and damages awarded to them for all loss suffered.
- [19] This case, as this court has already stated was therefore very fact sensitive and although the parties were at slight variance as to what issues the court had to determine, this court, has distilled the following as the salient matters to be addressed.

Issues

- [20] (i) Did the claimant and the defendants enter into a valid Demand Mortgage?
(a) If so, should it be set aside for undue influence on the part of the claimant and/or
(b) For breach of a fiduciary duty owed to the defendants by the claimant?

(ii) Was there a valid demand made by the claimant under the said Mortgage resulting in the calling in of the loan?

(iii) If there was a valid demand, what remedies is the claimant entitled to under the said Mortgage?

(iv) Was the claimant under a duty of care to the defendants in how they managed the account of the defendants? If they were, are they in breach of any such duty so as to substantiate an award of damages to the defendant for the said breach?

Issue #1- Did the claimant and the Defendant enter into a valid demand Mortgage?

(a) If so should it be set aside for undue influence on the part of the claimant and /or

(b) For breach of a fiduciary duty owed to the defendants by the claimant?

[21] The claimant's submission on this issue is that the defendants have never denied that they had entered into a Mortgage with the claimant. Indeed, the claimant relied on paragraph 38 of the Defence and Counterclaim filed on behalf of the defendants to substantiate this point.

[22] By paragraph 38, paragraphs 8 and 9 of the Statement of Claim were admitted. Paragraphs 8 and 9 are set out here in their entirety:

*"8. By virtue of a **Demand** Legal Mortgage made between the Claimant and the Defendants and dated the 16th day of March 2009 and bearing registration Number 973 of 2009 the Defendants conveyed properties at Lower Bay and Gunn Hill to the Claimant as security for the said loans totaling \$2,075,900.00 at the agreed interest rates of Ten Percentum (10%) per annum on the sum of \$1,319,000.00, Ten Percentum (10%) on the sum of \$707,000.00 and Nine Percentum (9%) per annum on the sum of \$49,900.00.*

9. The properties referred to are more particularly set out and described in the schedules as:

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- [23] The defendants in their submission indeed do not deny that the defendants and the claimant entered into a valid Mortgage, however they are of the view and submitted thusly that the claimant must therefore be bound by the terms of the Mortgage Deed which would have superseded any offer letters that came before it and could not therefore seek to claim the sums or the interest rates as stated in the offer letters as they were not only not binding as they had not been executed by the appropriate parties but that further the terms of those offer letters would now have been superseded by the terms of the Mortgage.
- [24] Therefore the submission of the defendants is that the claimant being bound by the Mortgage would not be entitled to the relief as claimed in the Fixed Date Claim Form as the same were in fact based on the offer letters of the claimant to the defendant in 2008 and 2010.
- [25] This court will return to this submission with regard to the relief that the claimant is entitled to when it considers the propriety of the demand sent later in this judgment.

Court's Analysis and Considerations

- [26] In this court's mind, there is no divergence between the parties as to the existence of a valid Mortgage.

[27] Indeed it is crystal clear to this court that when the parties executed the Mortgage Deed that that Mortgage became the governing document as between the parties. As was succinctly stated by Lord Russell of Killowen in the case of **Knight Sugar Co. v Alberta Railway and Irrigation Company**¹ “...where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed....all the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance ...”

[28] I therefore find that there was indeed a valid Mortgage as between the parties, however the next question must be, whether in spite of there being a valid Mortgage, are there other circumstances which should cause the same to be set aside.

(a) Should the Mortgage be set aside due to undue influence exerted on the defendants?

[29] The claimant's submission on this point is that the law regarding the establishment of the parameters for undue influence is settled² and on the basis of those principles, they submitted that there was no evidence before the court that there was any actual or presumed influence over the defendants to induce them to sign the Mortgage.

[30] The claimant submitted that rather it was the defendants who approached the claimant with their dream to develop an eco-tourism product and in the grant of the Mortgage, the defendants were not disadvantaged nor did the claimant derive any unfair advantage.

[31] The defendants on the other hand linked this issue with whether the claimant acted in the role of a fiduciary in giving advice to the defendants on how to author the documents used to apply for the loan (the business plans). It was upon the giving of this advice, which advice the defendants submit they relied on, that the defendants contend that a relationship was created giving rise to the presumption of undue influence which could only result in the setting aside of the transaction in all the circumstances of this case.

Court's Considerations and Analysis

[32] The starting point for the court on this issue is to determine what amounts to undue influence.

[33] In the case of **Robert Murray v Reuben Deuberry et al**³ the Court of Appeal by Floissac CJ:
“15. The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another party (the complainant) to enter into the transaction. According to the doctrine, if the transaction is the product of the undue influence and was not the voluntary and spontaneous act of the complainant exercising his own independent will and judgment with full appreciation of the nature and effect of the transaction, the transaction is voidable at the option of the complainant. This means that the

¹ [1938] 1 ALL ER 266 at 269

² **Robert Murray v Rueben Deuberry** 16/1993

³ Op Cit

complainant may elect to have the transaction rescinded if he has not in the meantime lost his right of rescission.

16. The modern tendency is to classify undue influence under two heads namely Class 1(actual undue influence) and Class 2 (presumed undue influence). Class 2 is further classified under two sub-heads. The first sub-head is Class 2(A) which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitor and client, medical advisor and patient, parent and child and clergyman or religious advisor and parishioner or disciple. The second sub-head is Class 2(B) which is descriptive of the legal presumption which arises from a relationship whereunder the complainant generally reposed trust and confidence in the dominant party.

17. In *Barclays Bank PLC v O'Brian* (1994) 1 A.C. 180 at 189 & 190, Lord Browne-Wilkinson explained Class 2(B) in these words:

"Even if there is no relationship falling within Class 2(A), if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a Class 2(B) case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned."

18. In order to establish a legal presumption that a dominant party exerted undue influence over a complainant to enter into a transaction, the complainant must prove (1) that at or shortly before the execution of the transaction, there existed as between the dominant party (or his agent) and the complainant a relationship of trust and confidence from which undue influence by the dominant party over the complainant will legally be presumed and (2) that the transaction was to the manifest disadvantage of the complainant to a degree where it may be said to be unfair to the complainant or to be otherwise unconscionable." (My emphasis added).

[34] Therefore there is a need to identify the class or category that the defendant claims to have found themselves.

[35] As my sister St. Rose-Albertini J in the case of **The Bank of Nova Scotia v Paramount Appliances Limited and ors**⁴ stated⁵ where she was considering similar allegations of undue influence against the Bank of Nova Scotia, given the nature of the relationship as between a bank and a customer where there is no evidence of actual undue influence, what must be considered is whether there is the establishment of a case of **presumed influence** under 2(B).

[36] I also consider that in the case at bar, the only applicable categorization would be presumed influence under category 2(B) and as such "...the court is required to carefully examine all the evidence to determine whether on a balance of probabilities there was a relationship of trust and

⁴ SLUHCV2015/0456

⁵ Op Cit at paragraph 33

confidence with the bank which influenced the transactions such that the loans were disadvantageous to the defendants and may have been unfair or unconscionable.”⁶

- [37] Indeed, “whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence.”⁷
- [38] In the law “undue influence” in short means “that influence [which] has been misused.”⁸
- [39] In order to make this assessment, it is incumbent on the court therefore to undertake a “meticulous examination”⁹ of the facts to see whether the transaction could have fallen within this conduct on the part of the claimant.
- [40] The claimant’s answer to this allegation was that there was simply no evidence. However in making that submission, it did not appear to this court that the claimant had in fact addressed their minds to any in depth analysis of the evidence as it was presented to this court. The defendants as I indicated previously did not address the court on this as a separate issue but rather dealt with it as a necessary corollary to whether the defendants had reposed trust and confidence in the claimant as their bankers on the transaction.
- [41] Therefore, what is the evidence before this court that surrounds the execution of the Mortgage by the defendants? In assessing this evidence the court must consider whether the “...defendants habitually, frequently or repeatedly expressed or indicated their trust and confidence in the bank , such that the bank assumed the position of a dominant party and exerted that influence to the obvious detriment of the defendants”¹⁰. (My emphasis added)
- [42] In the evidence of the joint witness statement of the defendants, they had this to say at paragraph 16; “As the Bank’s personnel were banking and financial experts and professionals and being guided by them, and as we had no experience in these matters, we did exactly what we were told by the Bank and therefore amended the business plan to include two (2) phases which were as follows:
- i. Phase One (1)
 - a. Purchase of two (2) acre site at Belmont, Bequia
 - b. Construction Bequia – Seven (7) Cottages, pool and supporting amenities
 - c. Construction St. Vincent – Main Office, including three (3) cottage units
 - d. Construction St. Vincent – Pool
 - ii. Phase Two (2)
 - a. Construction St. Vincent – Eight (8) Cottages

⁶ Op Cit

⁷ Per Lord Scarman in **National Westminster Bank Plc v Morgan(A.P.)** [1985] UKHL J0307-1

⁸ **Royal Bank of Canada v Benetton (St Lucia) Ltd and anr** Claim No. 143/1995 per Hariprashad–Charles J at paragraph 22

⁹ Per Sir Eric Sachs in **Lloyds Bank Limited v Herbert James Bundy** [1974] EWCA Civ J0730-4

¹⁰ **The Bank of Nova Scotia v Paramount Appliances and Ors** Op Cit at paragraph 34

b. Construction Bequia – Three (3) Deluxe two (2) bed villas

This was a second Business Plan. This version had a page called Development Plan that the first plan did not have.”

And again in paragraph 17; *“Given the discussions so far, we reasonably expected that the Bank was giving and would continue to give unbiased advice for their benefit as to the suitability of the transaction. We further reasonably believed that there was no conflict in their interests and the Bank’s and that both parties were interested in the viability and success of the venture. The Bank led us to believe that we could rely on the advice given.”*

- [43] At page 620 of the transcript¹¹ line 3027 the First defendant maintained that the bank was the one who was directing them on how to apply for the loan. She reiterated that she followed the instructions of the bank and that she never questioned the information that she says was given by them. That she never gave the calculations that she was given a second thought or that she digressed from what they gave her. In cross examination when she was asked why she did not check the figures before she applied for the loan she told counsel for the claimants *“Mr. Williams I depended on the expertise of the bank”*¹².
- [44] This was the refrain that the defendants repeatedly used in answer to the questions as to why they never sought clarification or explanation as to the information and direction that they say was provided to them by the claimant but rather slavishly relied on it and adopted the directives as their own.
- [45] The defendants stated clearly that they placed confidence and trust in the bank to guide them appropriately as they believed that their interest and the bank’s were ad idem as to ensuring the project was viable and successful.
- [46] In contradistinction the bank’s officers all gave evidence that they in no way, shape or form had they solicited the business of the defendants and that it was the defendants who after having been turned down by Scotia approached the claimant bank to fund the project.
- [47] From the cross examination of the bank’s officers, it was clear that the defendants were not originally customers of the bank. Mr. Norman Robinson, the officer who put together the proposal for the loan, in fact told this court¹³ that his knowledge of the defendants was from knowing them to be business people in the community but not as customers of the bank.
- [48] There was no evidence before the court that in fact these defendants had *“habitually, frequently or repeatedly expressed or **indicated**”* their trust and confidence in the bank at the time of the execution of the transaction or before the transaction. To this court there was no history between these parties establishing any such connection or relationship.
- [49] Indeed, even if this court were to accept that the defendant’s contact with the claimant lasted some two years before the execution of the Mortgage, in this court’s mind, the defendant’s ability to rely

¹¹ Prepared and provided to the court by the claimant

¹² Page 645 lines 4228 of the Transcript

¹³ Page 66 lines 392–395, page 67 lines 419–423 and page 68 lines 464–469

on presumed undue influence could not manifest itself from the interactions based on a single (though ongoing) transaction between a bank and a loan applicant. Rather this court is of the view that to rely on any such relationship the onus was on the defendant to show that they had been in constant contact with the claimant over a substantial period of time on a myriad of transactions resulting in the establishment of close and constant contact as existed in the Jamaican case of **Financial Investments Services Limited v Negril Holdings et al**¹⁴.

- [50] In that case the respondent company and its principal were found to have relied on the advice in the person of the principal of the Appellant financial institution. The court in a majority decision dismissed the appeal against the findings of the trial judge who determined that the extent of the reliance and interaction between the two individuals amounted to the establishment of a relationship that raised the presumption of undue influence and a fiduciary relationship.
- [51] The trial judge in acknowledging that not only was the principal of the respondent a self declared “non book man” who did no reading but that further the financial institution by its principal clearly and unequivocally offered himself to the respondent to help him and to do anything and everything any other financial advisor would do, found that these circumstances gave rise to a “special relationship” with the appellant over a six year period. This finding was upheld by the Court of Appeal and the subject transactions were set aside as a result.
- [52] In the case at bar, this court is not satisfied on a balance of probabilities that what occurred with the defendants who though unfortunately have found themselves “sucked into a whirlpool of indebtedness against which they could not swim to the drowning of their very being”¹⁵ was due to an over bearing of their will but rather the exercise of a lack of prudence and results of their own “folly”¹⁶ together with a desire to have their long awaited project started. In this court’s mind, this finding is reinforced by the evidence of the First defendant in her cross examination when she told this court in answer to what were her intentions when she and her husband returned to St Vincent:

“RICHARD WILLIAMS: *I know, but in light of the fact that your husband did hotel and restaurant management – it was a dream to come back to St. Vincent and ...*

MILDRED HAZELL: *well the thing was we were coming back to St. Vincent and the only thing we saw that we could get work in was the service industry.”*¹⁷

“RICHARD WILLIAMS: *very good. So when you came back to St. Vincent, getting into the service industry was your goal, your dream*

MILDRED HAZELL: *well we said it was the only way we could see that we could make a living but the idea of a tour company did not materialize until after I worked with Forestry.”*¹⁸

¹⁴ JM 2002 CA 8 Civ App 103/1997

¹⁵ **Financial Holdings Case** Op Cit at paragraph 18

¹⁶ **National Westminster Bank** Case Op Cit at page 831

¹⁷ Transcript page 587 lines 1404-1408

¹⁸ Transcript page 589 lines 1494-1495 and lines 1506-1508

And in answer to questions as to why she never queried the information they alleged they obtained from the claimant:

"RICHARD WILLIAMS: *good, now you signed this offer letter?*

MILDRED HAZELL: *I signed it, but I did not pick up on that*

RICHARD WILLIAMS: *hmm, so you did not notice it?*

MILDRED HAZELL: *I did not notice that*

RICHARD WILLIAMS: *you did not read this?*

MILDRED HAZELL: *well to tell the honest truth it was done so fast I did not read all the stuff on it, otherwise I would have queried it myself*

RICHARD WILLIAMS: *you would have queried it yourself*

MILDRED HAZELL: *yes I would have, it was not until after I started to look at some of the stuff.*

RICHARD WILLIAMS: *but I guess you were anxious to move on with the project*

MILDRED HAZELL: *yes*

RICHARD WILLIAMS: *very good, and the bank had finally...*

MILDRED HAZELL: *agreed...*

RICHARD WILLIAMS: *agreed to lend you some funds....*¹⁹

- [53] In this court's mind the facts that therefore emerged at trial, do not support the contention of the defendants that there one, the existence of a relationship between the claimant and the defendant built over a period of time and that two, that that relationship was one in which the defendants reposed trust which was indicated and known to the claimant leading to the claimant having acquired a "dominating influence"²⁰ on the defendants.
- [54] Neither is this court, on the facts presented, prepared to find that the transaction to which the defendants were the beneficiaries of several financial advances by the claimant, to the point where they were able to commence their project (regardless of whether the money was sufficient to complete the project itself) resulted in a "manifest disadvantage"²¹ to them.
- [55] Indeed as much as the court empathizes with the fact that the defendants have found themselves in the level of indebtedness that presently exists, the court accepts that the defendants were businesspeople who had run a successful business for many years prior to approaching the bank

¹⁹ Transcript page 599 lines 1998-2003 to page 600 lines 2004-2024

²⁰ **National Westminster Bank** Case Op Cit page 827 per Lord Scarman

²¹ **National Westminster Bank** Case Op Cit page 827 per Lord Scarman

on this project. Granted, they may not have had the experience in building or being involved in a project of this magnitude but this court accepts that these defendants were “intelligent business [people] who ran a profitable business.”²²

- [56] This finding is even supported by the fact that the defendants had access to an accountant²³ who had helped (on the admission of the First and Second defendant) in the preparation of the financial projections for the business plans that were submitted to the bank. It therefore is clear in this court’s mind that they chose for whatever reason not to avail themselves of independent financial advice before embarking on such a large scale investment. In these circumstances, I cannot agree that the will of the defendants were overborne by the claimant or that they were “victimized.”²⁴ I therefore find that the Mortgage Deed should not be set aside for undue influence.

(b) *For breach of a fiduciary duty owed to the defendants by the claimant?*

- [57] However having made that finding, it is still open to this court to consider whether the claimant owed a fiduciary duty to the defendants and if so, whether the claimant has breached that duty.
- [58] The claimant’s position on this issue is that it was the defendants who approached the bank with their business plans seeking to market their project in the hope to obtain funding from the bank.
- [59] The claimant submits that the bank’s officers never gave the defendants advice or directives as to what was to be contained in the business plans or as to the viability of the project.
- [60] In fact as far as the claimant is concerned and upon which they submitted, based on their pleadings in response to the counterclaim on this issue, the failure of the project was not due to any negligent advice that they may have given to the defendants but rather that the defendants had mismanaged the project while holding themselves out to be competent business people.
- [61] The defendants have made this a large part of their claim against the claimant. Indeed while accepting that there is no general duty for a bank to advise its customers they submitted that it was clear on the evidence that the claimant had issued advice to the defendants convincing the defendants that the advice would ensure that the loan being sought by the defendants would and could have been granted and that the sum would have satisfied their needs for the project.
- [62] The defendants submitted that the evidence clearly showed that they were inexperienced in the business they sought to launch and that it was the advice of the bank through its officers that led to the noted changes to the business plans that were submitted to their detriment.
- [63] Indeed the defendants’ submission is that the advice of the claimant was so clear that they even provided that advice in writing by presenting jottings with calculations that they were to follow indicating the ascribed percentage for duty free concessions and the ultimate deduction to the loan sum.

²² **Royal Bank of Canada** Case Op Cit at paragraph 43

²³ Transcript page 834 lines 582-585

²⁴ **Allard v Skinner** 36 Ch.D. 145 per Lindley LJ

- [64] These they submit were all given by the claimant and accepted by the defendants who relied on advice that they believed was unbiased and was in the interest of both parties.
- [65] The defendants further submit that the claimant breached this duty having established the relationship. The breach resulted in the defendants suffering loss and as a consequence the transaction should be set aside.

Court's Analysis and Considerations

- [66] The starting point for the court on this issue must be to identify and define the parameters of a relationship that creates a fiduciary duty.
- [67] In the case of **Mothew v Bristol & West Building Society**²⁵ Millet LJ gave a definition of a fiduciary duty. He said, *"the expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties"*.
- [68] Indeed Lord Browne-Wilkinson in the case of **Henderson v Merrett Syndicates Ltd**²⁶ clarified that the duty *"...arises from the circumstances in which the defendants were acting not from their status or description. It is the fact that they have all assume[d] responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold."*
- [69] In the case at bar, the complaint of the defendants is that the claimant took on the role as a fiduciary in advising them on the project and more importantly its viability. The main complaint in this regard is that the claimant through its officers gave advice to the defendants on how to amend their business plans which resulted in the project being underfunded and heavily indebted to the claimant.
- [70] I do not think that it was lost on either side to this matter that generally speaking the relationship between a banker and their customer "does not partake of a fiduciary character."²⁷ Indeed the Lord Chancellor in the **Foley**²⁸ case went on to state that "th[e] trade of a banker is to receive money and use it as if it were his own he becoming debtor to the person who has lent or deposited with him the money to use as his own...that being the trade of a banker and that being the nature of the relation in which he stands to his customer ...I cannot confound the situation of a banker with that of a trustee and conclude that the banker is a debtor with a fiduciary character."
- [71] However since the 19th Century, the law has now evolved that in particular instances where the facts support the contention, there may be a finding of a special relationship as between the banker and the customer in which it can be determined that there was reliance by the customer on the banker for the provision of advice. It is however clear that this reliance does not have to amount to

²⁵ [1996] EWCA Civ J0724-2 paragraph 57

²⁶ [1994] 3 WLR 761 at 799

²⁷ **Foley v Hill** [1848] 2 H.L.C.28, 9 E.R. 1002

²⁸ Op Cit

an overpowering of the will of the customer as they enter a contract with the bank (which would amount to undue influence) but that there was reliance on guidance and advice and the other person was aware that there was such reliance and that other person obtained a benefit from the transaction or has some other interest in the transaction being concluded²⁹.

- [72] In addition to this reliance and having knowledge of the said reliance, in order for the court to consider that the line has been crossed from the normal customer/banker relationship, the party who raises this plea must also show that there was a level of confidentiality as between the parties. In the **Lloyds Bank v Bundy case**³⁰ the court considered that the word “confidentiality” was to “convey that extra quality in the relevant confidence that is implicit in the phrase “confidential relationship”...It imports some quality beyond that interest in the confidence that can well exist between trustworthy persons who in business affairs deal with each other at arm’s length...”³¹
- [73] For this court to determine whether this “special relationship” existed in the instant case, the facts of this case as they emerged from the evidence must be examined.
- [74] As this matter was raised by the defendants on their Counterclaim, it is their role to prove this allegation. It is for the defendants to prove that there was reliance by them on the advice of the claimant and the claimant ought to have known of this reliance and to ensure that any such advice was not negligent.
- [75] When the court listened and saw the Second named defendant as she gave her evidence before the court, the court was struck by her steadfast position that it was the bank that provided the advice to them on “how to do the loan.”³²
- [76] Indeed the Second named defendant, in defending the allegation insisted that it was the claimant who had provided her with a document, clearly calculating the percentage and quantum of the duty free concession that the defendants applied for to assist the project. The Second defendant had this to say when pressed about her reliance on this document.

“RICHARD WILLIAMS: so Mr. Robinson gave you this whole paper here...

MILDRED HAZELL: well I was supposed to do phase 1 and phase 2

RICHARD WILLIAMS: but Miss you already had that in the second business plan just as how you have it there.

MILDRED HAZELL: Mr. Williams I don’t know why he gave me that, maybe it was for me to put in the 30% duty free concession.

RICHARD WILLIAMS: so he give you this whole paper here for you to follow this one line?

²⁹ **Lloyds Bank Ltd v Bundy** Op Cit at paragraph 39 per Sir Erich Sachs

³⁰ Ibid

³¹ Per Sir Eric Sachs at paragraph 40

³² Transcript page 620 lines 3027-3028

MILDRED HAZELL: *well I suppose so, he gave it to me.*

RICHARD WILLIAMS: *when he gave it to you, you looked at it?*

MILDRED HAZELL: *no I took it home and then I took off the 30% and put it in. He told me to put in the 30% and the 10% overall.*

RICHARD WILLIAMS: *ok, so whether he gave you the note or not ... you put in the 30% because he told you so.*

MILDRED HAZELL: *well he told me so but he gave me this.*

RICHARD WILLIAMS: *whether he gave you this note or not you would have still put in the 30% because Mr. Robinson told you so.*

MILDRED HAZELL: *he gave me the note verifying the 30%.*

MILDRED HAZELL: *I put in the 30% because I was told to do.”³³*

- [77] Even when it came to the amount of money being lent by the bank the Second named defendant's evidence was that when the bank approved the loan they never questioned the amount loaned as the “bank was the expert”³⁴.
- [78] The evidence of the Second named defendant was therefore replete with what I called her “mantra”. The bank was the expert, we relied on them, we never questioned any information and we never sought clarification.
- [79] In response to this allegation, all of the officers of the claimant, made it clear that they never advised the defendants on this project. Yet still on cross examination, Mr. Norman Robinson the employee who dealt face to face with the defendants and the Second named defendant in particular, admitted that when he first saw the proposal he thought it was a good project,³⁵ and that he encouraged the defendants to continue it and develop it³⁶ and that he saw no reason to advise the defendants to get independent advice.
- [80] When the evidence of the other officers is considered, they add nothing to the nub of this issue since they all interacted with the defendants after the loan was approved. Mr. Robinson was the sole one who was there at the start; it was therefore his actions that the defendants complain of as having been advice which turned out to be negligent.
- [81] From Mr. Robinson's evidence alone it is not clear to this court that the defendants have established this claim but it is instructive in this court's mind that his evidence must be put into context as to how events unfolded to the approval of the loan.

³³ Transcript page 637 lines 3812-3860

³⁴ Transcript page 751 line 9419

³⁵ Transcript page 66 lines 373-376

³⁶ Transcript page 66 lines 382-285

- [82] The defendants maintain that when they approached the claimant and had their initial conversation with Ms. Lyttle, they already had prepared a business plan. It was unfortunate that the plans were in fact not dated but I accept the evidence of the Second named defendant as to the order in which the plans were created.
- [83] The first plan³⁷ was clearly a broad introduction to the project with no differentiation as to the sums required for the development of the Bequia land and the Gunn Hill land. This plan spoke to an investment sum of \$3,257,032.14 to be obtained by a twenty year loan³⁸.
- [84] This court also accepts on a balance of probabilities that this was the plan that was seen by Ms. Lyttle at the very first meeting the defendants had with the claimant. This was not disputed by the claimants as they did not call Ms. Lyttle to give evidence that would have contradicted this evidence by the defendants. Indeed Mr. Robinson in his evidence on cross examination stated that the plan that was presented to him in 2007 was the second plan substantiating the claim of the defendants that there was an initial plan³⁹.
- [85] I am in fact fortified in this by the admission of all the officers of the bank who spoke to the genesis of the infamous note. All agreed that the note had the handwriting of Ms. Lyttle in which she stated that there needed to be details in the plan as to the use of funds and how much was needed for each aspect of the project.
- [86] Thus by 2007 when Mr. Robinson was the “representative of the bank”⁴⁰ he saw a second plan. In this plan⁴¹ we now see a development plan added which spoke of two separate phases of construction with a breakdown as to how the funds would be utilized but no mention of the intention of acquiring duty free concessions.
- [87] This second plan was the document that Mr. Robinson admitted seeing for the first time. It is with the advent of the third plan that in this court’s mind the usual parameters of customer and banker became blurred.
- [88] In the third plan⁴² for the first time, the development plan added on the second plan, now spoke of duty free concessions to be obtained and the quantum of that concession.
- [89] It is the case of the claimant that they never knew how or in what manner the percentage for the concession would be calculated⁴³.

³⁷ Page 5 of Trial Bundle #5

³⁸ Page 26 of Trial Bundle #5

³⁹ Transcript page 70 line 532

⁴⁰ Transcript page 70 line 552

⁴¹ Page 39 Trial Bundle #5

⁴² Page 74 Trial Bundle #5

⁴³ Transcript page 60 line 110; page 225 lines 1959-1961; page 352 lines 1288-1304

- [90] The evidence of the defendants clearly states that it was the bank who gave them the figure to attribute to the concession, resulting in that 30 percent being taken off the top of the loan amount and resulting in the project being underfunded from the start.
- [91] When this court analyses the evidence surrounding this issue of the changes that were undertaken in the third plan, I accept that the bank made it clear to the defendants that they needed to access the duty free concessions under the Hotels Aid Act to assist in the construction of the project. In fact, Mr. Robinson in his witness statement admits that he raised the issue of concessions with the defendants⁴⁴. I also accept that it was the claimant and not the defendants who provided the information on the quantum of the concession.
- [92] The evidence of the claimant is that by offer letter dated 9 December 2008, one of the conditions of the offer was "*confirmation of duty free concession of 30% of cost before funds are disbursed*"⁴⁵ but confirmation in writing was not in fact given to the defendants until April 2009⁴⁶ a date after the offer letter was in fact signed.
- [93] I prefer the evidence of the defendants in this regard that they were advised as to the percentage of the concession and additionally that they were advised as to the sum to be loaned to them. The defendants may not have been particularly prudent in accepting without question that information conveyed to them by the claimant but I accept that they wanted this project to succeed and sought the advice of the claimant, a fact which the claimant knew.
- [94] I also accept that the claimant at the time of the loan negotiations with the defendant was itself in the midst of negotiations to sell its operations to another entity. Indeed the evidence of Mr. Robinson confirmed that the claimant was not in a sound financial position in 2007/2008⁴⁷ and that the claimant in fact was in a "precarious [financial] state."⁴⁸ It was in this context that he then also went on to agree that since loans are attributed as assets on a banking institutions books, that the more loans they had meant it would have been a good thing⁴⁹ for the ongoing sale negotiations of the bank to the St. Lucian entity.
- [95] It is therefore against this backdrop that this court finds that in an eagerness to place themselves in a position to negotiate the ultimate sale of the claimant to its then present owners, that the claimant through its employee knew that the defendants were relying on his advice, that the defendants had gotten the encouragement from him to continue the project after seeing the second business plan and had guided the defendants on how to present the best case they could for the claimant to approve the loan.
- [96] In the case of **Verity and anr v Lloyds Bank PLC**⁵⁰ Taylor J in assessing a similar set of circumstances in which the claim was made for breach of the bank's duty to advise, while he

⁴⁴ Paragraph 4 of the Witness Statement filed on the 29/3/18

⁴⁵ Page 54 of Trial Bundle #4

⁴⁶ Document #1 on Second Supplemental List of Documents filed 8/10/19

⁴⁷ Transcript page 63 lines 225-229

⁴⁸ Transcript page 63 lines 241-244

⁴⁹ Transcript page 64 lines 276-278

⁵⁰ 13 Legal Decisions Affecting Bankers (LDAB) 147

accepted that generally the law is that there is no duty imposed on the bank when approached by a customer seeking to borrow monies, the learned judge there found that having accepted the version of events of the plaintiff/customer that they had relied on the advice of the bank through its officer found that a fiduciary relationship existed.

- [97] Mr. Robinson having taken on himself to advise the defendants, a fact that I accept on the balance of probabilities, I further find that a fiduciary relationship existed and "...the law in these circumstances impose[d] an obligation on him to advise with reasonable care and skill."⁵¹ Therefore there was an obligation on the claimant to additionally take into consideration the defendants lack of knowledge of building contracts, what it meant in real terms to rely on the 30 percent concession, the need to independently check the financial projections and the quantity surveyors report, the need to ensure that the loan would complete the project and what it would mean if the project failed or stalled.
- [98] This was a considerable amount of money and if the claimant took on the role of advisor, they did so at their detriment and they also therefore needed to advise completely on all aspects of the transaction.
- [99] Indeed this court is aware that the claimant's position is that the way in which the project was mismanaged resulted in the failure of the same. As a result this court was taken on a painstaking mathematical exercise with the Second defendant in an attempt to justify the contention that the defendants were the authors of their own fate. This court in looking at those reasons for the failure do not completely discount that they may have had some impact on the eventual outcome of the project, however I am satisfied that they were not the main reasons for the perceived failure but rather they provided the backdrop for the "domino effect" which commenced with the negligent advice.
- [100] That being said, to what remedy are the defendants entitled.
- [101] In the text Principles of Lender Liability by Parker Hood the learned author stated⁵² that the remedy for such a breach are: 1) disgorgement of any gain made by the lender in breach of duty – either by way of a constructive trust or an account of profits, 2) damages to compensate the borrower for any loss suffered and 3) setting aside the transaction.
- [102] The defendants have submitted that they should be entitled to both damages and the setting aside of the transaction. This position has however not been adequately addressed as to the reasoning behind such a draconian order and this court is of the view that having found that there was no undue influence but that the advice of the claimant guided the defendants continuing with the project that the setting aside of the transaction is not warranted in all the circumstances.
- [103] I therefore find that the defendants are entitled to damages for compensation for the breach of the duty on the part of the claimant. I have however not been provided with any assistance as to how the quantum of damages should be calculated and I order that the defendants must file an application for an assessment of damages to justify any award of damages under this head.

⁵¹ **Standard Investments Ltd v Canadian Imperial Bank Ltd** 52 O.R. (2d) 473

⁵² Paragraph 4.20 page 198

Issue #2: Was there a valid demand made by the claimant under the said Mortgage resulting in the calling in of the loan?

- [104] The claimant submitted on this issue that under the terms of the Mortgage between the claimant and the defendants, there was a clear term that a prior written demand was required to trigger the defendants obligation to repay the entire sum due.
- [105] The claimant's contention was that this was in fact done when the attorney at law on the record for the claimant issued the demand letter under the specific instructions of the manager of the claimant at the time, Mr. Derry Williams.
- [106] In defence of the contention of the defendants who pleaded that the attorney at law was not a person within the group of specified persons who could issue the Demand Notice, the claimant made it clear that the attorney having been instructed was an agent of the claimant, such agency having been established upon the instructions being issued.
- [107] They submitted to the court that the Mortgage document being the contract as between the parties had to be construed in a commercially relevant manner and as such the parties having used the word "may" in the clause as to the specific persons who are empowered to send the demand notice, meant that the list was not meant to be exhaustive and that the powers could therefore be delegated to an agent.
- [108] The defendants on this issue pleaded⁵³ that even if they received letters from the attorney at law for the claimant, they do not accept that the same was a proper demand within the terms of the Mortgage.
- [109] It is on this basis that the defendants submitted that the letter that was sent by the attorney at law on record was not one of the persons within the meaning of the clause that provided for the issuance of a demand letter that could trigger the claimant's claim to seek payment of the Mortgage and to exercise its power of sale.

Court's Analysis and Considerations

- [110] Central to this issue is the wording of the clause under which the claimant sought to issue the demand notice to call in the loan under the Mortgage and exercise its power of sale.
- [111] The clause in its entirety states as follows at 5(ii):
*"(ii) A demand for payment or any other notice under this security **may** be made by any Manager or officer of the MORTGAGEE by a letter sent by registered post addressed to or in care of the MORTGAGORS at the address herein set out or at the last known place of abode or place of business in the State of Saint Vincent and the Grenadines or elsewhere of the MORTGAGORS and every demand or notice so made shall be deemed to have been made or given on the day after the letter was posted....."*
(My emphasis added)

⁵³ Defence and Counterclaim paragraph 47

- [112] It is this demand notice that then triggers the power of sale conferred on the mortgagee. By clause 7(i) (a) it clearly states that:

"7. IT SHALL BE LAWFUL FOR THE MORTGAGEE and every person for the time being entitled to receive and give a discharge for the Principal Loan or the balance thereof hereby secured when the same has become due to sell or concur with any other person in selling the said hereditaments or any part thereof whether subject to the prior charges (if any) then affecting the same or discharge therefrom and in the latter case upon such terms as to the payment of such charges as the MORTGAGEE shall think fit and either together or in lots by public auction or private contract subject to such conditions respecting title or evidence of title or other matter as the MORTGAGEE may think fit with power to vary the contract for sale and to resell without being answerable for any loss occasioned thereby and to convey the property sold for such estate and interest therein as is the subject of the present Mortgage freed from all estate interest and rights to which the said Mortgage has priority but subject to all estate interest and rights which have priority to the said Mortgage

PROVIDED ALWAYS AND IT IS HEREBY DECLARED as follows:-

- (i) The power of sale conferred shall not be exercised unless and until at least one of the following events shall have happened namely*

(a) Notice requiring payment of the Principal Loan of the balance due thereon has been served on the MORTGAGORS and default has been made in payment of the Principal Loan demanded for three (3) months after such service of notice....."

- [113] It is therefore imperative in order for the claimant to rely on this pivotal power in the Mortgage Deed, to ensure that they have complied with their contractual requirements.
- [114] The question that must therefore be asked is twofold. Firstly, what amounts to a demand and secondly who can issue this demand.
- [115] With regard to what amounts to a demand, the Australian court in the case of **Re Colonial Finance, Mortgage, Investment and Guarantee Corporation Limited**⁵⁴ considered this very issue. The court by Walker J held that the demand which gives rise to the liability of the bound party "*...must be a clear intimation that payment is required...nothing more is necessary and the word "demand" need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional but the nature of the language is immaterial provided it has this effect.*"
- [116] This definition was followed in the English case of **Re A Company**⁵⁵ in which the trial judge had to consider whether a telex message could amount to a statutory demand notice under the terms of the Companies Act to deem a company insolvent. The court found that the notice could not amount

⁵⁴ [1905] 6 SRNSW 6

⁵⁵ [1985] BCLC 37

to a demand having found *inter alia* that it was too unspecific and did not adhere to the definition utilized in the **Re Colonial Finance** case⁵⁶.

[117] In light of these authorities it is therefore incumbent on this court to assess what was in fact sent to defendants in terms of the language of the correspondence.

[118] The letter is dated 29 April 2013⁵⁷. As this letter is central to whether the claimant is entitled to rely on their power of sale it is prudent that the same be reproduced in its entirety here.

WILLIAMS & WILLIAMS
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Mr. Clint & Mrs. Mildred Hazell
HazeCo Cottages Limited
Gunn Hill
Kingstown
ST. Vincent

Dear Sir/Madam:

Re: Delinquent Indebtedness to Bank of St. Vincent and the Grenadines formerly the National Commercial Bank (SVG) Ltd. Loans #105209, #34809, #163410 N/O Hazeco Tours & #20080011 N/O Mildred Hazell

Outstanding Balance as at date of writing

	#105209-- HT	#34809 --HT	#163410 -- HT	#20080011 -- MH
Principal Amount:	\$1,329,390.08	\$716,682.01	\$208,086.76	\$47,802.67
Interest Outstanding:	\$430,385.79	\$258,501.57	\$52,780.08	\$12,090.37
Late Fees:	\$-114.50	\$200.00	\$0.00	\$0.00
Aggregate Amt Due:	\$1,759,661.37	\$975,383.58	\$260,866.84	\$59,893.04



**REGISTRAR'S
OFFICE---FILE**

Chambers
Middle Street
P.O. Box 589
St. Vincent
West Indies

April 29th, 2013

⁵⁶ Also followed in the case of **Bank of Credit and Commerce International SA v Allen Blattner** [1986] EWCA Civ J1120-7

⁵⁷ Page 91 of Trial Bundle #4

April, 29th, 2013

Mr. Clint & Mrs. Mildred Hazell
Hazeco Cottages Limited

We are instructed by Mr. Derry Williams, General Manager of the creditor, *Bank of St. Vincent and the Grenadines*, formerly the *National Commercial Bank (SVG) Ltd. (NCB)* to issue a demand notice for the above captioned sums

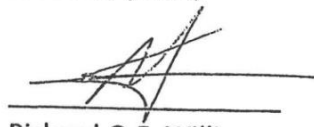
TAKE NOTICE that we hereby make demand (on behalf of our clients the Bank of Saint Vincent and the Grenadines) for full settlement of the abovementioned delinquent loans on or before **May 31st, 2013**. Kindly take note that interest continues to accrue on the outstanding balances, at a daily factor of \$400.6381, \$196.3512, \$62.711 and \$11.7870 respectively.

Please be advised that in the event full settlement of the balances is not received at any of the *Bank of St. Vincent* office, situated at Bedford St., or Upper Halifax St, Kingstown, St. Vincent, by the stipulated date, we will proceed with the necessary legal action to effect recovery against the assets held as collateral and detailed hereunder.

Details of the Security held by the Bank:

- Legal Mortgage over 13,522 square feet of land situated at Lower Bay, Bequia in the state of St. Vincent and the Grenadines together with all buildings and erections thereon.
- Legal Mortgage over Two Roods Six Poles AND One Rood 34 Poles land situate at Ottley Hall in the state of St. Vincent and the Grenadines together with all buildings and erections thereon.
- Legal Mortgage over One Acre, Eleven Poles land situate at Ottley Hall in the state of St. Vincent and the Grenadines together with all buildings and erections thereon.
- Ship Mortgage over the vessel *Spirit of the Sea*

Sincerely yours,



Richard O.F. Williams

- [119] From the terms of the letter it is clear in this court's mind that the same was definitively requesting full payment of the sums due and what would be occasioned failing payment. In this court's mind this certainly amounted to a demand.
- [120] However the second question must now be addressed. Could this notice have been issued by the attorneys for the claimant and not specifically from a "manager" or "officer" of the claimant?
- [121] This court has no difficulty with the reliance placed on the definition of officer as contained in the Companies Act as offered by the defendants, but it is clear that there was no intention on the part of the claimant to indicate that their attorneys at law were an officer of the claimant.
- [122] This court accepts that the attorneys who dispatched this letter were in fact acting on the instructions of the claimant. The opening ambit of the letter was that they were acting on the instructions of the manager. It would indeed be an unusual set of circumstances, if an attorney who states clearly that he acts under instructions from his client is not clothed with the authority of the client to perform that function that they purport to do. Of course it was open to the claimant to state plainly that they had not instructed and that the attorney was acting without the requisite authority, but that was not done in the instant case and indeed in the evidence of Mr. Hamilton⁵⁸ the action of the attorney was in fact adopted.
- [123] Additionally, I wholeheartedly adopt the words of my sister Lanns J in the case of **Orin Roberts v Financial Services Regulatory Commission**⁵⁹ in which she stated:
- "The word 'may' assumes importance. What is the purport and effect of the word 'may'... Black's Law Dictionary, Sixth Edition states: "Word "may" usually is employed to imply permissive, optional, or discretionary, and not mandatory action or conduct." The commentary continues as follows: "Courts not infrequently construe "may" as "shall" or "must" to the end that justice may not be the slave of grammar. ... However, as a general rule the word "may" will not be treated as a word of command unless there is something in context or subject matter... to indicate that it was used in such sense."*
- [124] This court is satisfied that there was nothing in the Mortgage that gives the contention that the context for the word "may" is to be read as a command. This was a commercial contract as between these parties, there is nothing to suggest that there was therefore an absolute need for the manager or an officer, so strictly identified to give the notice on behalf of the claimant mortgagee, once that notice was given on the authority of the appropriate individual and that it amounted to a demand in law. Indeed it is the court's task to *"ascertain the objective meaning of the language which the parties have chosen to express their agreement...this is not a literalist exercise ...but that the court must consider the contract as a whole ..."*⁶⁰
- [125] I therefore find that there was a valid demand under the terms of the Mortgage. Having said so the next and more important issue is to what reliefs are the claimant entitled to under the Mortgage.

⁵⁸ Witness Statement of Bernard Hamilton paragraph 23

⁵⁹ SKBHCV2016/0019 at paragraph 49

⁶⁰ **Wood v Capita Insurance Services Limited** [2017] UKSC 24

Issue #3- If there was a valid demand, what remedies is the claimant entitled to under the said Mortgage?

- [126] This court having already determined that there was in fact a valid demand, must now address its mind to whether the claimant is entitled to any remedies and what they may in fact be.
- [127] Throughout the trial the claimant has maintained that it is entitled to the claim as stated in the Fixed Date Claim Form filed on 10 October 2014 for an order for possession, an order to exercise their power of sale, an order for foreclosure and for the payment of the judgment debt.

Court's Analysis and Considerations

- [128] This Fixed Date Claim Form was filed pursuant to Part 66 CPR 2000 which clearly sets out the procedural requirements for a claim considered to be a Mortgage Claim.
- [129] In support of the Fixed Date Claim, the claimant filed an affidavit in support by Bernard Hamilton.
- [130] This Mortgage Claim morphed into a full trial and the defendants have in fact submitted that there having been no evidence given as to the outstanding amounts owed or unpaid that the claimant is not entitled to the prayers as sought and should be denied the same.
- [131] Mortgage claims as indicated are all governed by Part 66. In particular, this court has already determined⁶¹ that the provisions of Part 66.4 which govern the procedure for claims for possession or payment of Mortgage are mandatory provisions. Thus, in the case at bar it is necessary for the court to consider whether the claimant has in fact met those requirements to entitle them to the reliefs as prayed.
- [132] Part 66.4 mandates a party to file evidence by Affidavit –
“1. (a) exhibiting a copy of the original Mortgage;
(b) exhibiting a copy of any other document which sets out the terms of the Mortgage; and
(c) giving particulars of –
 (i) the amount of the advance;
 (ii) the interest payable under the Mortgage;
 (iii) the amount of any periodic payments required to be made whether or not such payments include interest;
 (iv) the amount of repayments that have been made;
 (v) the amount of any repayments or interest due but unpaid at the date of the claim and at the date of affidavit;
 (vi) the amount remaining under the Mortgage
 (vii) if the claim includes a claim for interest to judgment – the daily rate at which such interest accrues.
2. If the claimant seeks possession of the Mortgaged property, the claimant must also file with the claim form evidence by affidavit-

⁶¹ **RBTT Bank Caribbean Ltd v Marie Adams also known as Marie Hazell** SVGHCV2019/0025

- (i) giving details of any person other than the defendant and the defendant's family who to the claimant's knowledge is in occupation of the Mortgaged property and
- (ii) stating the circumstances under which the right of possession arises.

3. If the Mortgage creates a tenancy other than a tenancy at will between the mortgagor and the mortgagee, the affidavit must show how and when the tenancy was determined and if the service of a notice when and how that notice was served."

[133] These are the provisions that are mandatory. The affidavit filed by the claimant's Bernard Hamilton on 10 October 2014 (the 2014 affidavit) purports to give the information as required in the above provisions and in fact there is some attempt under paragraph 19 of that said affidavit to do so.

[134] Paragraph 19 in its entirety states as follows:

"19. In satisfaction of the requirement under Part 66.4 (1) (c) I say the following:

(a) Under Facility No:1 (LOAN #105209)

- (i) The amount of any periodic payments required to be made stating whether or not such payments include interest;
Interest only during show period (May – Oct);
Lump sum payments during peak period including interest (Nov – Apr);
Term – 180 months;
Average Interest - \$12,342.17 per month
- (ii) The amount of repayments that have been made: **\$64,513.51 (Interest only)**
- (iii) The amount of any repayments or interest due but unpaid at the date of the claim and at the date of the affidavit: **\$1,989,948.96**
- (iv) The amount remaining due under the Mortgage: **\$1,989,948.96**

(b) Under Facility No 3 LOAN #34809

- (i) The amount of any periodic payments required to be made stating whether or not such payments include interest;
Interest only during show period (May – Oct)
Lump sum only during peak period including interest (Nov – April)
Term – 180 months;
Average Interest per month \$5,972.35
- (ii) The amount of repayments that have been made: **\$44,151.50**
- (iii) The amount of any repayments or interest due but unpaid at the date of the claim and at the date of the affidavit: **\$1,079,057.01**
- (iv) The amount remaining due under the Mortgage: **\$1,079,057.01**

(c) Under Facility No 4 LOAN #163410

- (i) The amount of any periodic payments required to be made stating whether or not such payments include interest;
Interest only during show period (May – Oct)
Lump sum payments during peak period including interest (Nov – April)
Term – 180 months;
Average Interest per month \$244.24
- (ii) The amount of repayments that have been made: **\$281,467.00**

- (iii) *The amount of any repayments or interest due but unpaid at the date of the claim and at the date of the affidavit: **\$26,974.01***
- (iv) *The amount remaining due under the Mortgage: **\$26,974.01***

(d) Under Facility No; 5 LOAN #20080011

- (i) *The amount of any periodic payments required to be made stating whether or not such payments include interest: **\$585 per month inclusive of interest***
- (ii) *The amount of repayments that have been made: **\$10,114.51***
- (iii) *The amount of any repayments or interest due but unpaid at the date of the claim and at the date of the affidavit: **\$18,313.91***
- (iv) *The amount remaining due under the Mortgage: **\$66,116.58**⁶²*

- [135] It is clear from paragraph 19, the claimants were claiming payment under the terms of an offer letter of 24 November 2010 (the offer letter) and not the Mortgage dated 16 March 2009. It is also clear when one reads that offer letter that it succinctly stated that the claimant was now extending further facilities but the inference was that there was no need for the parties to have executed a further charge, as the security *inter alia* was considered expressly to have been a continuing legal Mortgage over the properties at Gunn Hill and Lower Bay Bequia. To this court's mind this was indicative that the claimant considered their existing security held sufficient equity to cover these further advanced sums.
- [136] What the defendants have however sought to argue is that even if these sums were advanced, a point they wisely did not dispute in that there is no equivocation to their clients having received the sums that the offer letter was signed by the parties after the offer had expired and as such there was no effective acceptance.
- [137] Indeed this court finds that on the face of the documents the offer letter⁶³ plainly stated that the offer would expire on 30 September 2009 and just as plainly the said letter had been signed on 25 November 2010 which was in fact one day after the date of the actual letter.
- [138] This court may well surmise that the offer letter had been prepared many months prior to its formal submission to the defendants or may have been the creation of a template. Whatever may have been the reason for the same, this court is not one of speculation and all that can be said, is what in fact exists before it is a letter signed agreeing to its terms long after expiration of the said offer.
- [139] However it is also clear to the court that the offer was in fact made after it was said to have expired. In fact, the undisputed evidence of the claimant is that it was not until 2010 that the loans of the defendants were in arrears. Therefore, there would have been no need before 2010 to have had any discussion of refinancing.
- [140] There is no dispute that where an offer states a fixed time limit for acceptance it will lapse in accordance with its own terms if not accepted in that stipulated time⁶⁴. However, it is also clear that any such time limit is "*normally imposed for the benefit of the offer or ... in principle the offeror may*

⁶² Paragraph 19 at page 14 of Trial Bundle #1

⁶³ Page 87 Trial Bundle #4

⁶⁴ **The Law of Contract (Common Law Series)** para 2.241

waive the time limit either expressly or impliedly. He may be held impliedly to have waived the time limit if he leads the offeree reasonably to believe that he will not insist on it or if acceptance is made after expiry of the permitted time and he nevertheless acts as if there is a binding contract. If the time limit is to be extended by waiver or estoppel there must be some further act of reliance on the presumed contract by the offeree. However if the offeree purports to accept out of time and the offeror makes no objection, the exchange may be more simply analysed as involving a fresh offer constituted by the purported acceptance which the (original) offeror accepts by conduct.”⁶⁵ (My emphasis added)

- [141] In this court’s mind the above exposition of the law is on all fours with the present case at bar. The claimant offered the new financing (be as it may after the expiry date), the defendants executed the offer, which in this court’s mind in turn became an offer to the claimant for the sums identified therein which was then accepted by the claimant by the payment of the sums to afford restructuring and acceptance by the defendants who have now had the benefit of the financing. The finding of this court therefore is that there is a binding contract between the parties.
- [142] That being said, this court in assessing the evidence that supports the claim is not satisfied that the procedural requirements in Part 66.4 have been met and in particular Part 66.4 (2) which sets out what this court considers are mandatory prerequisites to the prayer for possession of the property. Additionally, the claimant in the witness statement of Mr. Hamilton appeared to have attempted to update the information that had been cited in his paragraph 19 of the 2014 Affidavit by his reference in paragraph 28 of his witness statement filed on 6 April 2018.
- [143] By paragraph 28 Mr. Hamilton made reference to the outstanding sums as owed as of the date of the witness statement relying on the loan activity statements which in any event do not provide the information as required under Part 66.4 (1) (c).
- [144] That being said, I am satisfied that the claimant is not entitled to rely on the terms of the Mortgage they having failed to follow the requisite procedural requirements to obtain a judgment for payment under the Mortgage or for possession. However I am satisfied that the claimant and the defendants have a binding simple contract by the terms of the offer letter and as such the claimant is entitled to judgment on the sums found due and owing pursuant to the terms of that contractual document.
- [145] To be clear, the claimant therefore having failed to adequately or at all adhere to Part 66.4 is not entitled to the order of possession, foreclosure, sale of the property or judgment under the Mortgage but is entitled to judgment for all sums contractually due to them by virtue of the offer letter of 2010.

Issue #4: Were the claimants under a duty of care to the defendants in how they managed the account of the defendants? If they were, are they in breach of any such duty to substantiate an award of damages to the defendant for the said breach?

- [146] The claimant’s submission on this issue is that there was no evidence that the claimant had breached any contractual duty to the defendants by paying the contractor directly and there was no

⁶⁵ Ibid paragraph 2.242

evidence that showed that the defendants had suffered any loss from any such payments which were duly authorized in any event.

- [147] The claimant further submitted that in relation to the complaint by the defendants that they had suffered loss from the dishonoring of their cheques by the claimant, that this loss if any, was entirely due to the defendants and the way they mismanaged the funds from the loan facilities.
- [148] The defendants on their counterclaim raised three sub issues with regard to breach of duty by the claimant to them. The first was that they tried to sell the property in 2014 in breach of their duty to act in good faith. They submitted that this good faith included the duty to ensure that they got the best possible price when selling and that this was not done when they inadequately advertised the property for sale for approximately four weeks in a depressed economy during the world economic downturn.
- [149] Secondly, the defendants contended that the claimant having paid the contractor directly without ensuring that the work had been done, resulted in the contractor being paid over \$35,000.00 on claims for work which he had not performed. Having made these payments, the defendants submit that the claimant breached their duty to use reasonable care and skill in handling their customer's accounts. For the defendants these payments amounted to a failure on the part of the claimant and they should be made to repay those sums found due as a result of any such payments.
- [150] Thirdly, that the claimant in failing to honour their cheques breached their duty to the defendants in their general duty to handle the affairs of the defendants so as not to cause them damage and loss.

Court's Analysis and Considerations

- [151] "A bank is under a contractual duty to exercise reasonable care and skill in carrying out its part with regard to operations covered by its contract with its customer. The duty to exercise reasonable care and skill extends over the whole range of banking business covered by the contract with the customer. Accordingly, the duty applies to interpreting, ascertaining, and acting in accordance with the instructions of the customer. The standard of reasonable care and skill is an objective one. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts which can vary almost infinitely."⁶⁶
- [152] It is therefore without demur that the claimant owed a duty of care to the defendants. It can only be when an assessment is made of the factual matrix leading up to the breaches complained of by the defendants that the court will consider whether the actions of the claimant amounted to a breach of any owed duty.

Exercising the Power of Sale

- [153] This is the first complaint of the defendants as against the claimant. In **Colson v Williams**⁶⁷ Kekewich J stated that "a mortgagee is not a trustee of his power of sale to the mortgagor." Indeed

⁶⁶ **Encyclopedia of Banking Law** para 41

⁶⁷ L.J. 1889 Volume 58 page 539 at 540

he went on to expound on this principle by stating that in fact the "...court has nothing to do with the motives of the mortgagee. If he from whatever motive deems it right to realize his security although he may be guilty of spite, although he may even look forward with complaisance or satisfaction to the ruin of his debtor still if he chooses to exercise his power he can do so; but whether he acts from a good or bad motive, whether he acts merely as a man of business deserving to realize his security or whether he acts from some other or any of the reasons which may influence the human mind, he is equally bound to remember that there is the equity of redemption behind him and that being so he cannot do that which would otherwise be possible and in many circumstances easy."

- [154] The Court in Jamaica⁶⁸ in applying this dicta however clearly found that even when the mortgagee wishes to exercise this power they had to do so taking into account the rights of the mortgagor⁶⁹.
- [155] In the case at bar, the claimant in this court's mind manifestly acted in a manner which would have "unfairly prejudice[d]"⁷⁰ the mortgagor when they sought to advertise the defendant's properties for the relatively short period of four weeks. In fact under extensive cross examination the claimant's Mr. Hamilton stated the period for advertising for sale was 17 October to November 2014⁷¹ during an admittedly harsh phase of the country's economic stability it having been in the midst of an economic downturn⁷². Mr. Hamilton also further agreed that during the period that was set for the advertisement it would have been "difficult" to sell the properties⁷³.
- [156] I am satisfied that on the basis of these admissions, that I find myself in agreement with the defendants that the action of the claimant in attempting to sell the property in the manner they did, was in fact a breach of their duty to the defendants. However the property was not sold and "in order for the defendants to succeed on a claim for breach of ... duty he must satisfy the court that he has suffered some damage."⁷⁴ In this case there is no evidence that any such damage was suffered and I therefore decline to make any order in this regard.

Payments Made Directly To the Contractor

- [157] It is to be noted that the claimant did not deny that payments had been made directly to the contractor but defended their action on the ground that the defendants knew of the payments and had issued signed instructions to the claimant for such payments. However, it was unclear to the court what in fact the procedure was in relation to making these payments to the contractor.
- [158] Indeed it was with great interest that the very first witness for the claimant Mr. Franklyn Browne, who was purportedly charged with certifying work to allow for payments categorically told this court

⁶⁸ **Dreckett v Rapid Vulcanizing Ltd** JM 1983 SC 10

⁶⁹ Ibid paragraph 16

⁷⁰ **Palk v Mortgage Services Funding PLC** [1993] CH 330

⁷¹ Transcript page 306 lines 5676-5679

⁷² Transcript page 306 lines 5681-5684

⁷³ Transcript page 307 lines 5708-5710

⁷⁴ **Apple Fields and Ors Limited v Damesh Holdings Ltd** [2004] 3LRC 221

it was not his responsibility to certify the contractor's work⁷⁵ but he was unable to provide the name of the person who did do so even though he was engaged by the bank to issue certificates that the work was completed to a certain stage⁷⁶. This evidence was however in direct contradiction to Mr. Hamilton⁷⁷ and Mr. Branch⁷⁸ who made it clear that it was the remit of Mr. Browne to give the bank the certifications so that parties including the contractor could be paid.

- [159] The claimant has not relied on any such certifications but rather on the "permission" given by the defendants through the purported execution of promissory notes which allowed for drawdowns to be made. This court is at a loss as to how the claimant could have made these payments without some formal notification whether by the certification process or otherwise that the work was in fact completed by the contractor. The action of the claimant in this regard left the defendants open to liability to repay funds that in this court's mind had been improperly paid. In this court's mind this was a clear breach of the claimant's duty to the defendant to conduct the defendant's business with appropriate skill and care. The evidence of the defendants that they then had to pay for the work themselves that had not in fact been completed by the contractor remains uncontradicted in this court's mind.
- [160] I therefore order that an account is to be undertaken by the claimant of all monies directly paid to the contractor and reconciled with proof that the work paid for was in fact completed by him. Once that figure has been ascertained, the claimant is to make payment to the defendants of all sums incorrectly paid to the contractor.

Dishonoring of the Defendants Cheques

- [161] During the currency of the project it is not disputed by either side that the defendants found themselves several times over drawn on their account as a result of cheques that they issued to pay merchants.
- [162] The claimant made it clear that it was in the discretion of the bank as to which cheques were returned⁷⁹ and that any charges that were generated as a result of that occurring were system generated⁸⁰ since there was in fact no operating over draft facility on the said account. This court therefore accepts from all the evidence that there was really no reason why the defendants' account went into overdraft in circumstances in which the defendants authorized drawdowns to their account for which they then issued cheques. The drawdowns were in the same institution that the cheques were presented for honoring. This court further accepts on a balance of probabilities that the claimant was in fact responsible for the account going into overdraft despite its denial of the same through Mr. Branch⁸¹.

⁷⁵ Transcript page 22 at lines 393-396

⁷⁶ Transcript page 24 at lines 457-462

⁷⁷ Transcript page 231 at lines 2244-2252

⁷⁸ Transcript page 363 at lines 1782-1803

⁷⁹ Transcript page 428 at lines 4745-4746

⁸⁰ Transcript page 429 at lines 4776-4777

⁸¹ Transcript page 415 at lines 4159-4165

[163] Even if the court accepts that the claimant was only strictly obliged to let the defendants over draw their account if there was an agreement to do so or there had been a course of business which allowed for that⁸², the mere fact that the claimant admitted to a discretion to allow the same to operate in that manner and in fact allowed the defendants to do so from time to time, in this court's mind resulted in the establishment of that facility even without formally creating the same.

[164] However, as unfavorable as the actions of the claimant may have been to the defendants, I do not find that these actions amounted to a breach of duty on the part of the claimant. It would have been an entirely different scenario if the defendants in fact had an agreed overdraft limit and the claimant still dishonored their cheques. This was discretion in all the circumstances and the most that this court is prepared to say is that the claimant should have exercised that discretion more consistently and more equitably.

[165] I therefore do not find that the claimant was in breach of any duty to the defendants in this regard.

The order of the court is therefore as follows:

On the claim:

1. The prayer for delivery up of possession of the Mortgaged premises to the claimant is denied.
2. The prayer for an order for sale of the Mortgaged premises is denied.
3. The prayer for foreclosure against the properties is denied.
4. An order that the defendants are to pay the sum of \$4,098,443.40 pursuant to calculations obtaining in the offer letter of the 24th November 2010 is granted.
5. Prescribed costs to the claimant on this sum pursuant to Part 65.5 CPR 2000.

On the counterclaim:

1. The declaration that the claimant owed fiduciary duties to the defendants and is in breach of the same is granted in part – only in relation to the duty of advice.
2. Damages are to be assessed on this limited portion of the declaration as made as there was no information for the court to make a finding at this juncture.
3. The defendants are therefore at liberty to file an application for assessment of damages within 28 days of this order and the same is to be heard by a Master of the High Court.
4. The prayer for an order setting aside the transaction is denied.

⁸² Paget's Law of Banking (13th Ed) paragraph 11.16

5. The declaration that the claimant has breached its contractual duties to the defendants is granted in part-only in relation to the duty with regard to direct payments made to the contractor.
6. Therefore there is to be an account by the claimant of all monies directly paid to the contractor reconciled with proof that the work paid for was in fact completed by the contractor.
7. The prayer for an order for payment of that sum found due and owing is granted.
8. The prayer for damages is denied.
9. All sums due to the defendants as damages are to be set off as against due by the defendant to the claimants.
10. Prescribed costs to the defendants on the total sums found due and owing pursuant to Part 65.5 CPR 2000.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar