CL 227/2012

IN THE SUPREME COURT
TURKS AND CACIOS ISLANDS

BETWEEN

SEAN RODGERS
-and-

NYOSHI NATSHA RODGERS

Plaintiffs

-AND-

SCOTIABANK (TURKS AND CAICOS) LTD.

Defendants

BEFORE THE CHIEF JUSTICE, THE HON. MRS. JUSTICE MARGARET RAMSAY-HALE

Mr. Finbar Grant for the Plaintiffs
Mr. Neale Coleman for the Defendant
Heard on the 27 and 28 February 2018

JUDGMENT

1. These proceedings have their genesis **in** an application by the Defendant, Scotiabank (Turks and Caicos) Ltd. ("the Bank") in CL 196/2012 for leave to sell property known as Parcel 60609/68 Norway and Five Cays by private treaty.

2. Pursuant to a loan agreement ("the Agreement") made between the Plaintiffs, Mr. and Mrs. Rodgers, and the Bank, the Bank loaned the Plaintiffs the sum of US$387,350, secured by way of charge over the property dated the 24January 2008, to complete construction of a two storey residential development. The Bank alleged in its application for sale that it had made demand for the repayment of the monies advanced under the Agreement, that the amount advanced under the loan with interest remained outstanding. The Plaintiffs successfully applied to stay those proceedings and incepted these proceedings in which they accept that they failed to complete the development within the time limited by the Agreement but assert that this failure was a result of divers breaches of the Agreement by the Bank.

3. In his opening statement on behalf of the Plaintiffs, Mr. Grant asserted that banks in this jurisdiction take advantage of the extremely high costs of building in the Islands to bully customers into signing disadvantageous mortgage agreements and then compound the cost of borrowing by delaying construction thereby manipulating borrowers into a position where default is inevitable and then taking advantage of the situation to "flip" the borrowers' property and alleged that the

Bank in this case deliberately acted in a manner designed to cause the Plaintiffs to be unable to meet their obligations under the loan agreement so they could sell the property.

The Claim

4. The pleaded claim is in breach of contract. The particulars of the breach are set out in paragraph 14 of the Amended Statement of Claim which allege that the Bank:

(a) *Failed to provide the Plaintiff with the principal sum promised to be able to complete their building.*

(b) *They hove refused to allow the plaintiff drawn* (sic) *downs in the amount and manner as requested.*

(c) *Prevented the Plaintiff from been* (sic) *able to finished* (sic) *the building in the contracted time.*

5. There is a further allegation of breach which relates to the interest rate applied by the Bank to the amounts loaned to the Plaintiffs *after* the November date set for the completion of the development which is a matter of construction of the agreement and which I will leave until I have resolved the allegations of breach which are central to the claim.

The Facts

6. I have considered all the evidence and the demeanour of the witnesses as they gave their evidence and make the following findings of fact:

7. After some initial difficulty in getting a loan to build their dream house, Mr. Rodgers and his wife finally succeeded in qualifying for a Home Building Loan from the Bank. The maximum sum for which they qualified was $387,350. The money was loaned on the strength of an estimate provided by quantity surveyors, Construction Advisory Services Ltd. ("CASL") **which** stated that the cost to build the proposed 7,638 sf home would be $465,036, the value of the measured Works on the site was $114,440 and the balance needed to complete the construction was $350,595.

8. The terms of the Agreement are set out in a commitment letter dated the 18 November 2007.

Under the heading **Construction Period,** the terms for the repayment of the loan are set out as follows:

"On demand. Construction is to be completed, the loan fully advanced and the amortizing period commenced nine months from the date of the first draw, as certified by an Architect's/Quantity Surveyor's Certificate. Payments of Interest are due monthly on the last business day of the month."

9. The Agreement provides at clause 6 under the head, **Other Terms and Conditions:**

"All overruns to be met by the Borrower from his own resources, when first identified."

10. The Agreement also provides that,

> "*Construction and final drawdown to be completed by November 2008. If for any reason the Bank allows the Borrower to extend the construction period beyond this date, interest will be charged at the prevailing residential mortgage rate plus 3%.*"

11. Mr. Rodgers complained that, from the very beginning, the Bank was slow to respond to his requests for drawdowns. The delays, he said, led to increased costs and also delayed the completion of the project. He gave, as examples, the price of steel which nearly doubled over the course of the project and an at least 6 week delay in pouring the second floor which increased the costs from $3,200 to over $20,000 due to the additional costs of renting the jacks attendant on that delay.

12. Mrs. White-Garland, who gave evidence on behalf of the Bank, explained *inter alio* that when the customer qualifies and the Bank starts making disbursements under the loan, the Bank thereafter seeks to monitor and manage the loan, ensuring at the time of each drawdown that the funds disbursed align with the construction stage, that there are no cost overruns and no mid-stream changes to the project. From her evidence *I* infer that, where there is a variation in the cost to complete, whether because of costs overruns or changes to the project, then the Bank may pay out less than the amount required for the next stage or require the borrower to fund the difference in costs before paying out further funds, to ensure that the funds remaining in the loan can complete the construction.

13. The first drawdown for construction purposes was in February 2008 in the sum of $91,030. It appears from the evidence, that consistent with the Agreement Mr. Rodgers submitted an updated report from CASL in May 2008 and applied for a further draw down. The Bank manager responsible for authorising the payments out under the Agreement, Mrs. Veichweg-Gardiner, gave evidence that she became concerned because she observed a disparity between the value of the measured Works in 2007 and the value of $153,833 ascribed to the measured Works in May 2008, as the difference in value of $39,993 did not reflect the injection into the construction of the $91,030 which had been paid out by the Bank.

14. The disparity suggested to her that either the scope of the Works had changed or that the monies paid out to Mr. Rodgers was not being used for the development.

15. Mrs. Veichweg-Gardiner, in the absence of a satisfactory explanation for the disparity, commissioned a Report from BCQS. This necessarily affected the application for a drawdown that had been made by Mr. Rodgers.

16. The Report provided by BCQS valued the existing Works at $240,000. This sum was consistent with the value of the Works when measured before the loan was approved ($114,440) and the sum paid out by the Bank ($91,030) and might have provided some comfort to the Bank save for the fact that BCQS put the total estimated costs of the Works at $760,000 with the sum required to complete the Works estimated $520,000. This sum was vastly different from the $281,000 estimated by CASL and exceeded the remainder of the loan which stood, at the end of June, at $272,333.

17. Mrs. Veichweg-Gardiner called a meeting to determine the way forward. Mr. Simon Taylor of BCQS, who gave evidence on behalf of the Bank, said he suggested at that meeting that the ground floor be completed and made habitable and so become a potential revenue earner. He estimated the cost of completing the ground floor to be in the region of $150,000 to $200,000. Mrs. Veichweg-Gardiner said this plan of action was agreed with Mr. Rodgers. Mr. Rodgers agrees that it was mooted that he should use the remainder of the money to complete the bottom floor but he had not agreed to proceed in that way as he needed to finish the upstairs apartments, so they could be rented to cover the costs of the mortgage.

18. At that meeting, Mr. Rodgers also challenged BCQS's estimate to complete, asserting that as he was a contractor he could complete the project for less. It was agreed that he would meet with Mr. Taylor and provide him with invoices and other material that would justify the downward revision of the estimate. Mr. Rodgers subsequently provided an estimate from a company called 'S&N Contracting' dated 19 August 2008 for the completion of the "Rodgers Residence in South Dock" to BCQS, together with invoices and quotations from various suppliers and contractors in support of the stated estimate to complete of $391,189.18.

19. BCQS took those invoices and quotations into account and revised their estimated costs of the construction downwards to $695,000 from $760,000 in an updated Report prepared for the Bank on 8 October. The measured Works on the site were valued at $270,000, just $30,000 more than measured in June, despite further drawdowns totaling $83,815.48'. Their estimate of the cost to complete was $425,000.

20. Whether we accept BCQS estimate or the estimate provided by S&N Contractors, it is plain that the estimate to complete the works exceeded the remainder of the loan.

21. On the 20th October, a further $60,000 was disbursed by the Bank.

22. After this drawdown, Mrs, Veichweg-Gardiner advised Mr. Rodgers that it appeared to the Bank that the cost to complete the project continued to increase and the lower floor was not near completion. In her view, the Plaintiffs would be unable to complete the construction by November as set out in the loan agreement.

23. In November, Mr. Rodgers instructed BCQS to carry out an updated estimate of the costs to complete as further construction works had taken place. They valued the Works on site at $312,000 and estimated the cost to complete the Works at $383,000.

24. The total funds disbursed by the Bank by November was $248,832. Given that the value of the measured Works when the loan was granted ($144,440) the measured Works on the site plainly did not reflect the $234,845.48 [2] paid out by the Bank and raised the question whether the monies disbursed to the Plaintiffs for construction purposes' had indeed been spent on the site.

The Bank disbursed the sum of $10,000 on 26 June, $48,390.48 on 10 July and $25,425 in September

[2] If the value of the Works reflected the amount disbursed by the Bank, that sum would be in the range of $349,000

[3] At 20 October, when the $60,000 was disbursed, the *total* amount paid out was $248, 832.58 which included, in addition to the sums paid out for construction, amounts paid out to purchase the freehold, fees associated with the loan and interest payments on the disbursed funds.

25. The Bank ceased funding the construction for the reason, among others, that the Plaintiffs would be unable to complete the construction of the building with the funds remaining by the end of November as agreed, the possibility of making the ground floor habitable was no longer attainable with the remainder of the funds available and Mr. Rodgers had not demonstrated that he and his wife had any personal resources with which to meet the shortfall between the loan fund remaining and the cost to complete (or the costs overruns, *per* Mrs. Veichweg-Gardiner).

26. After the Bank ceased to pay out the funds under the Agreement, Mr. Rodgers left the Island to travel to the United States to join his wife as they were expecting their first child. He returned in January 2009 and tried repeatedly to see Mrs. Veichweg-Gardiner who refused to meet with him.

27. Mr. Rodgers instructed his attorneys to write a letter before action to the Bank. That letter was sent on 17 August 2009, addressed to the Bank's manager, Mr. Cochran. Mr. Rodgers says that he received a call from Mr. Cochran who asked him to call off the dogs and work with the Bank towards a resolution. The letter from the Bank's attorneys, Misick and Stanbrook, dated 26 August 2009, however, tells a different story as it states categorically that the Bank was within its rights to cease funding of the construction in the circumstances where the Plaintiffs had either grossly underestimated the costs of the construction or, subsequent to the loan, had changed the building to the extent that the costs to complete had spiraled out of control with the result that the project could not be completed with the balance of the loan funds

28. No further action was taken by either side.

29. Mr. Rodgers thereafter met with someone from the Bank's Barbados office who, he said, assured him that the remainder of the monies would be paid although this never happened. [r] During his *viva voce* testimony, however, it became clear that this bank officer was concerned with the consolidation of bad debts and perhaps with structuring a new payment schedule, so the Bank could recover monies loaned. It transpired that Mr. Rodgers had a small personal loan that was in default in and unpaid credit card debt in addition to the construction loan in respect of which outstanding interest payments were not being made. On oath he did not repeat the assertion that the Bank had, through this officer from Barbados, given him any assurance that the balance of the loan funds would be paid.

30. In 2011, Mr. Rodgers and his wife decided to approach RBC Royal Bank to refinance the project. They needed information from Scotiabank but when they went to the Bank, he was told that nothing could be done as the "*situation was in the lawyers hands*" which caused him to conclude - a year and several months later with the project at a standstill and payments still outstanding on the loan - that they had been "*double crossed*" by Mr. Cochran as he had not stopped the Bank's lawyers from pursuing the defaulted loan. [s]

31. On 28 July 2011, he contacted the incoming managing director of the Bank, Cecil Arnold, by email in which he set out his dealings with the Bank and advised Mr. Arnold that he wished to refinance the loan with RBC. In his witness statement he says that,

- Witness statement dated 14 April 2014 Email to Cecil Arnold dated 28 July 2011

"We were given assurance from the Royal Bank of Canada. However, to complete the process we were required to have a letter from Scotia Bank (sic) and in this regard my wife and I approached the Scotia Bank (sic) again and was after some time able to secure a meeting with a Mr. Arnold again another Senior Manager and at that time Head Manager of the Bank. We explained the issues to him and requested a letter and other documents that was requested by the Royal Bank of Canada to process the loan, Mr. Arnold told us that he did not want us to move our loan but to stay with Scotia and we would be given the reminder (sic) of the principal sum promised in the agreement and additional moneys to compensate for the increase cost of completing the building due to the Bank's delay in handling the matter. Given his assurance my wife and I did not return to Royal Bank but did as Mr. Arnold suggested.'"

32. Mr. Rodgers' earlier evidence, given on affidavit in 2012, was not in the same terms. Then he said, at paragraph 10 that ,

"I „explained to Mr. Arnol (sic) that we had been to Royall (sic) Bank on a few occasions and they now was (sic) willing to pay Scotia their money and take over the mortgage all they need from Scotia was a satisfactory letter... Mr. Arnold convinced me to keep the mortgage at Scotia and we can and will get everything worked out and be able to complete our home without moving the loan.

33. It was not put to Mr. Arnold in cross-examination that he had promised to give Mr. Rodgers the remainder of the loan and additional moneys to compensate for the increased costs of completing the building and it was an assertion that he completely rejected in his witness statement'. Mr. Arnold said that he had told Mr. Rodgers that the Bank didn't want to lose his business and would work with him, which he described as a normal conversation they have with their customers. I accept his evidence.

34. After he met with Mr. Rodgers and reviewed his file, Mr. Arnold sent Mr. Rodgers an email in which he suggested that, if he settled his bad debt of USD 8,085.85 and existing credit card debt of $6,125, the Bank would be able to provide funding for completion of the property. Mr. Rodgers said he did not receive that email but there is nothing in the evidence to suggest that he could have settled those debts.

35. Mr. Rodgers subsequently met with Mrs. White-Garland, the manager with responsibility for restructuring mortgage loans, with a view to refinancing the construction loan. Her evidence was that she advised Mr. Rodgers to resume the interest payments on the construction loan which had ceased when the Bank had ceased to fund the account. All payments to that date had been made out of the loan funds and not out of Mr. Rodgers' own resources. According to Mrs. White-Garland, Mr. Rodgers explained that interest payments were not in his budget plan and the negotiations came to an end.

36. At the end of July 2011, Mr. Rodgers had unpaid credit card and loan debts and unpaid accrued interest on the construction loan he was seeking to refinance and no budget for meeting current

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[6] Para 12 witness statement dated 16 April 2014
[7] Para 13 witness statement dated 12 August 2014

interest payments. He did not return to RBC to pursue the refinancing of the loan and had no personal resources with which to continue building his home.

37. On or about **11** August 2011 the Bank served a demand notice pursuant to section 72 of the **Registered Land Ordinance. In** March 2012, the Bank exercised its power of sale under the charge and advertised the property for sale by public auction. In September 2012, it commenced proceedings by originating summons in CL 196/2012 to sell the property by private treaty.

Breach of Contract Claim

38. The allegations of breach relied on by the Plaintiffs are not made out: the Bank's delays in making payments may have delayed the construction, but such delays as there were and any concomitant increase in costs, were occasioned by the discrepancies in the value of the measured Works for which Mr. Rodgers was entirely responsible.

39. Mr. Rodgers maintained throughout the trial that, because of his experience as a contractor and his building skills, he could have completed the development for the remaining sum borrowed if he had been permitted by the Bank to do so. Had he been able to make up the shortfall between the amount needed to complete and the amount remaining in the Bank, he would have been entitled to call on the Bank to pay out the remaining sum, but not otherwise. Mr. Rodgers failed to demonstrate then, or now, that he had access to other funds which would permit him to complete the project.

40. It had been contended by the Bank that the Plaintiffs had not met the interest payments from their own resources in breach of the terms of their agreement but had instead relied on the loan funds to meet that obligation. The Plaintiffs assert that it was always agreed that the interest payments would be paid from the loan. This is not an issue which I have to resolve to determine the question before the Court but the fact, that the Plaintiffs could not pay the interest on the loan from their own resources, would have given the Bank reason to consider that they would be unable to finish the project from their own resources.

41. I do not think it necessary to consider the case of *Alghussein Establishment v Eton College* [1988] 1 WLR 587 on which Mr. Grant as relied. The principle to be extracted from that case - that a party to a contract would not be permitted to take advantage of its own breach to avoid a contract and thereby escape his obligations - is inapt given the facts as I have found them.

42. The Plaintiffs' claim for breach of contract on the ground that the Bank breached its obligation to pay out the entire sum under the loan agreement is dismissed. Before I leave this issue, I would also state that the allegation made against the Bank of predatory lending was wholly unsubstantiated by the evidence, scandalous and ought not to have been made.

Unpleaded Claims

43. The Plaintiffs, in their closing argument, also sought to raise an estoppel against the Bank. Mr. Coleman submits and I accept that, as the estoppel claim **is** not pleaded,

the Plaintiffs are barred from raising the point this stage: see Ord 18 r 8. Nonetheless, Mr. Coleman did address it and I will consider whether the claim is made out on the facts.

44. The claims articulated by Mr. Grant on behalf of the Plaintiffs are that:

The Bank's continued lending to the Plaintiffs, in the circumstances where they were always aware that the development could not be completed for the amount loaned to the Plaintiffs, was conduct over the course of the loan which estopped the Bank from terminating the facility on the ground that the remaining funds were insufficient to complete the construction *(waiver by estoppel).*

Alternatively, the Bank promised through their newly appointed Managing Director of the Bank, Mr. Cecil Arnold, to work with the Plaintiffs to restructure the loan and that the Plaintiffs relied on this promise to their detriment, the alleged detriment being their failure to pursue alternative financing through RBC *(promissory estoppel).*

45. No authorities were cited to the Court in support of the plea of waiver by estoppel but for the plea to be established, there must be an unequivocal representation by the defendant that he is waiving its rights under the contract.

46. In *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, Rix U summarised the law as set out by Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971]AC 850 at 882-883 and Lord Goff of Chieveley in *Motor Oil Hellos (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 (HL) as explaining the difference between waiver by election, for which Mr. Grant does not contend in this case, and waiver by estoppel for which he does. At para 38 of the judgment he states:

"*Estoppel, however, is a promise supported not by consideration but by reliance. It is a promise not to rely upon a defence (per lord Diplock) or a right (per Lord Goff). It requires a representation, in words or conduct, which must be unequivocal and must have been relied upon in circumstances where it would be inequitable for the promise to be withdrawn. The need for such unfairness probably means that the reliance of the representee has to constitute a detriment, but even the detriment has, I would think, to be such as to make it inequitable for the promise to be withdrawn. For these reasons, the estoppel may not be irrevocable, but may be suspensory only. An unequivocal representation without the necessary reliance, and reliance without the necessary unequivocal representation, are each insufficient. It follows that, as concepts each in their own way designed to hold parties to fair dealings with one another, waiver by estoppel is the more flexible doctrine.*"

47. Nothing said by Mrs. Veichweg -Gardiner and nothing done by her in in approving the drawdowns through to the month of October could amount to an unequivocal representation that the Bank did not intend to rely on its right to terminate the construction loan agreement if the construction could not be completed by November. The representation made by Mrs. Viechweg-Gardiner was that the Bank would continue to fund the construction if the funds were used to complete the ground floor as this would allow the Plaintiffs to move into their new home and start paying their mortgage. The Plaintiffs could then complete the construction of the building out of their own resources in their own time. Mr. Rodgers accepts that this had been proposed though he is emphatic that he did not agree. It seems to me that even if there had a been a promise by the Bank not to enforce its right to terminate the loan, it was conditioned on

the ground floor being made habitable and that it was not inequitable for Bank to enforce its right once it became clear that

the building would remain incomplete and uninhabitable even if the remainder of the monies were paid out.

48. Mr. Grant's submission in closing, that the Bank knew when it granted the loan that the funds were insufficient to complete the project, was a submission intended to support his opening statement that the Bank was guilty of predatory lending with the intention of procuring the Rodgers' land for its own purposes. The suggestion is scandalous and wholly unsupported by the facts. The CASL report, on which the Bank relied in making the loan, estimated the amount needed to complete the project at $430,000, valued the measured Works on the site at $114,440 such that the amount needed to complete the development was well within the amount loaned.

49. In my judgment the plea of waiver by estoppel is not made out either on the facts or on the law.

50. In support of the alternative submission, Mr. Grant relies on the case of *Emery and Another v 1./CB Bank Plc,* an unreported decision of the UK Court of Appeal issued 15 May 1997. In *Emery,* the plaintiffs were in arrears of mortgage. The Bank's area recoveries officer wrote to the plaintiffs and indicated that he was prepared to accept the sum of 700 UKP per week towards the monthly payments which would include a small contribution to the arrears and requested that they provide him with their accounts after which he would contact with them again regarding payments on their account. The payments were duty made but, payments notwithstanding and without further reference to the plaintiffs as promised, the Bank made formal demand for payment of the outstanding balance of the loan.

51. The judge at first instance struck out the plaintiffs' claim on the ground that the arrangement amounted to nothing more than a temporary waiver pending further investigation and was not a new agreement whereby the bank was bound and precluded from enforcing their rights. The Court of Appeal reversed the judge below and held that an arguable case had been made out of the defendants having been estopped on the basis of the agreement alleged by Ms. Emery or, alternatively, on the promise of the bank's officer to contact them to further discuss the matter of payments on her account, reversing the first instance judge.

52. Nourse U delivering the decision of the Court, set out the requirements of promissory estoppel at page 5 [8] of the judgment, citing Chitty on Contracts,

"*For the equitable doctrine to operate there must be a legal relationship giving rise to certain rights and duties between the parties; a promise or a representation by one party that he will not enforce against the other his strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party.*"

53. The evidence in this matter does not disclose any representation by word or conduct by Mr. Arnold that the Bank would advance the remainder of the funds under the loan agreement. The promise was to work with him towards refinancing the loan. Those talks failed. There was no detrimental reliance. Mr. Grant submits that but for Mr. Arnold's promise to refinance the loan, Mr. Rodgers would have gotten a loan from RBC but that cannot be detrimental reliance. There is no evidence that he had a firm commitment from RBC to take over the construction loan and no

reason was advanced as to why those negotiations could not be recommenced after the meeting with Mrs. White-Garland failed to bear fruit.

54. The plea of promissory estoppel is not made out.

The Interest Rate

55. The section 72 Notice makes demand for the sum of $293,508.62 being the amount the Bank asserts was outstanding on 7 April 2011 with interest accruing at the rate of 12.75%, a 3 point increase over the rate of 9.75% originally applied to the loan. The Plaintiffs contend that the Bank was not entitled to apply that rate of interest to the loan interest at that rate as the Bank did not comply with without giving them Notice as required by the section 2(b)(2) of the Charge documents.

56. Both of the Bank officers said in their evidence that the interest rate of 12.75% which was applied to the outstanding sum was not the rate set out in the Charge document, but the rate set out in the Agreement.

57. The Agreement provides for an interest rate of 9.75% to be paid on the construction loan, such interest rate to be increased to 3% over 8.75% (the prevailing residential mortgage rate) in the event "*the Bank allows the Borrower to extend the construction period beyond this date.*"

58. Not much consideration was given to the construction of the Agreement or to the meaning and effect of the words I have highlighted above. If this is the clause that the Bank relies on as entitling it to charge 12.75% then I would wish to hear from Counsel for the Bank on the construction of the phrase "*allows the Borrower to extend the Construction period....*" The question is relevant, not to this claim in breach of contract, but to the Bank's demand for repayment and is therefore a question best considered in the context of those proceedings which remain extant.

Conclusion

59. The Plaintiff's claim for breach of contract is dismissed. I will hear Counsel on the matter of the interest and orders consequential on the dismissal of the claim including orders in the matter of CL 196/12 which had been stayed on the application of the Plaintiffs.

DATED 19' MARCH 2018

CHIEF JUSTICE