BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT OF JUSTICE

(Civil Jurisdiction)

Suit No. 817 of 2008

IN THE MATTER OF the property comprised in a Deed of Mortgage dated the 27th day of October 2005 and made between Olympiad Inc., the Mortgagor, and RBTT Bank Barbados Ltd, the Mortgagee

AND IN THE MATTER OF the Property Act, Cap 236 of the Laws of Barbados

BETWEEN:

RBTT BANK BARBADOS LIMITED **Claimant**

AND

OLYMPIAD INCORPORATED **First Defendant**

JEFFREY WINSTON CHANDLER **Second Defendant**

Before:

The Hon. Madam Justice Elneth O. Kentish **Judge of the High Court**

Appearances:

Mr. Garth St. E.W. Patterson, Q.C. in association with Ms. Onika E. Stewart and Ms. Tammi Pilgrim of Lex Caribbean, Attorneys-at-law for the Claimant

Mr. Mark W. Goodridge, Q.C. in association with Ms. Debbie Ann-Marie Browne of Jones & Goodridge, Attorneys-at-law for the First and Second Defendants

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2013: February 6

2014: March 28

DECISION

NATURE OF APPLICATION

[1] By an Originating Summons filed on 20 May 2008 the Claimant instituted an action pursuant to s. 98 of the Property Act, Cap 236 of the Laws of Barbados seeking delivery

by the First and Second Defendants to the Claimant of possession of property which had been mortgaged by the First Defendant to the Claimant under a Deed of Charge dated 27 October 2005 and recorded in the Land Registry on 15 June 2006 as Deed No. 5262 of 2006.

[2] The Claimant also sought the principal outstanding on the loan together with interest, banking charges, legal and other costs, charges and expenses.

THE PARTIES

[3] The Claimant, RBTT Bank Barbados Limited, is a former Act company incorporated under the provisions of the Companies Act, Cap 308 of the Laws of Barbados under the name Caribbean Commercial Bank which by special resolution duly filed with the Registrar of Corporate Affairs changed its name to RBTT Bank Barbados Limited.

[4] The First Defendant, Olympiad Incorporated, is also a limited liability company incorporated under the Companies Act.

[5] The Second Defendant, Mr. Jeffrey Winston Chandler, is a Director of the First Defendant and is and was at all material times authorized to act as agent on its behalf.

THE BACKGROUND

[6] In March 2005, the First and Second Defendants entered into negotiations with a third party for the purchase of a plot of land measuring approximately 67 000 square feet situate at the Garrison in the parish of Saint Michael and called "Lexham" (hereinafter referred to as "the property"). They agreed to purchase the property for the sum of $1.6 million.

[7] The Defendants sought to purchase the property in order to construct thereon an office building that satisfied the specifications provided by the Delegation of the European Community to Barbados and the Eastern Caribbean so that the First Defendant could then lease this building to the European Community. A Memorandum of Understanding dated 13 June 2006 had been signed between Mr. Amos Tincani, the Head of the Delegation of the European Community, and the Second Defendant, as the Director of the First

Defendant, in which the parties agreed that a lease of 10 years was to take effect on completion of the building.

[8] The Memorandum specified that completion of the building was to take place within 12 months from the date of the Memorandum's execution. It was further agreed that if the availability of the building was delayed for more than 4 months, the Commission had the right to cancel the lease made between the parties without any obligation to compensate the First Defendant.

[9] Annexed to the Memorandum was a copy of the lease signed by the parties. This lease provided, *inter alia*, that rent for the use of the building was to be fixed at a rate of $68 000.00 per month and that the lessee would also pay maintenance charges of $5 521.00 per month.

[10] To finance the project, the Second Defendant approached the Claimant on behalf of the First Defendant. He explained the purpose of the construction and requested a loan of $5.6 million to cover not only the cost of the construction but the $1.6 million required to purchase the land.

The Indicative Term Sheet

[11] The Claimant responded to this request by a letter dated 8 April 2005 addressed to the First Defendant ("the Indicative Term Sheet"). That Indicative Term Sheet set out certain terms and conditions for consideration by the directors of the Defendant. The paragraphs preceding the terms and conditions, highlighted in bold, stipulated that:

> "**This document contains illustrative terms for discussion only. This is not an offer.**
>
> **The following terms and conditions are provided for the exclusive use of the Directors of Olympiad Inc. and may not be shown to other parties without the prior written approval of RBTT Bank Barbados Limited.**
>
> **They do not constitute or imply any offer or commitment whatsoever on the part of the Bank and are subject to negotiations and satisfactory documentation. Any such offer can then be made after approval of the Bank's credit authority**."

[12] The terms and conditions include the name of the Borrower and the Lender and the purpose of the loan facility. The Indicative Term Sheet stated that the purpose of the loan was:

> "To assist with the construction of a property at the Garrison, St. . [sic] Michael to be called Lexum."

[13] As to the availability of the loan, the Term Sheet provided:

> "The facility will be come [sic] available on confirmation that all monies due in respect of the purchase of the land have been paid and all security items are in place."

[14] The Term Sheet specified the interest rate and negotiation fees. In relation to the latter it stated:

> "$28,000.00 (A negotiating fee of 0.50% of the agreed facility). This fee is payable on acceptance of the terms and conditions of the facility granted."

[15] Repayment was to be "Monthly, from rental income". Under a clause entitled "Offer Period" the Indicative Term Sheet further provided that:

> "i. The offer when issued will be available to the borrower for acceptance within thirty (30) days from the date of the letter, after which date the offer will lapse unless extended in writing by the Bank.
>
> ii. Acceptance will be signified by completion of the formalities in the Acceptance Clauses stated below."

[16] The Acceptance Clause provided:

> "The Borrower's acceptance of the offer when issued will be signified by the Borrower providing the Bank (at the office address at the beginning of this letter) with the following:
>
> i. The enclosed duplicate of the Letter of Offer duly signed on the Borrower's behalf as evidence of acceptance of the terms and conditions stated herein.
>
> ii. A certified true copy of a resolution of the Borrower's Board of Directors:
>
> - Accepting the loan on the terms and conditions stated,
> - Authorising a specified person, or person, to endorse and return to the Bank the duplicate of this letter, and
> - Authorising the Bank to accept instructions in connection with the Loans signed in accordance with a copy (certified by the

Secretary or a Director of the Borrower) of the specimen signatures of those persons authorized to sign all notices, certificates and other documents to be delivered by the Borrower hereunder, and

iii. A copy of the By-Laws of the Borrower certified by the Secretary or a Director of the Borrower as true and complete as at the date of acceptance of the Letter of Offer."

[17] Finally, the Indicative Term Sheet reiterated in its final paragraph that:

> "**The terms outlined above are illustrative only and are subject to further negotiation and to credit approval."**

The Loan of $840 000.00

[18] The Defendants were unable to finance the purchase of the property on their own. By letter dated 22 August 2005 the Claimant offered to provide the Defendants with a loan facility of $840 000.00 on the terms and conditions outlined in that letter in order to facilitate their purchase of the property.

[19] The opening paragraph of the letter states:

> "Dear Sirs:
>
> **On the basis of the information presented to us, we are pleased to advise that the Bank will make available to your company the following facility for the purpose and on the terms and conditions outlined below."**

[20] The letter further provided that the loan facility was advanced for the purpose of "assist[ing] with the purchase of land at The Garrison, St. Michael" and was available "immediately upon acceptance of this letter and perfection of security". The following security was to be obtained:

> "First Legal Mortgage stamped to secure $840,000.00 over property at The Garrison, St. Michael.
>
> Assignment of funds from CORI Development Inc, value $95,000.00
>
> Assignment of funds from savings account, value $50,000.00
>
> Personal Guarantee from Jeffrey Chandler for $840,000.00"

[21] As in the Indicative Term Sheet, the letter also set out the relevant interest rate, the manner of repayment, the negotiation fee and the late/penalty fees. Unlike the Indicative Term Sheet, there was no clause pertaining to an offer period or setting out how acceptance of the offer was to be signified. Instead, the concluding paragraph of the letter read:

> "Kindly confirm your acceptance of the above terms and conditions by having the authorized signatories of **Olympiad Inc**. sign under the **Company Stamp** on or before September 02, 2005, failing which this offer will lapse and the facility will not be available to you."

[22] The Second Defendant signed the letter in his capacity as sole director of the First Defendant, affixed the First Defendant's company stamp and returned the letter to the Claimant. The security required by the letter was also obtained.

The Mortgage

[23] One of the securities required for the loan of $840 000.00 was a Deed of Charge by way of Legal Mortgage over the property. This deed was executed by the Claimant and the First Defendant on 27 October 2005 and recorded in the Land Registry on 15 June 2006 as Deed No. 5262 of 2006.

[24] The Deed of Charge contained a number of clauses common to mortgage deeds. By clause 1 thereof, the First Defendant covenanted to pay to the Claimant on demand all sums of money that shall become owing to the Claimant.

[25] By clause 5, set out below, the Claimant also reserved its statutory power of sale:

> "5. It is hereby agreed and declared that the power of sale implied by statute shall not be exercised unless (i) default shall be made in payment of the monies hereby covenanted to be paid by the Mortgagor or some part thereof in accordance with the statutory provisions in that behalf and also for the space of one calendar month next after a notice in writing requiring such payment shall by or on behalf of the Mortgagee have been given to or left at or sent by prepaid registered post addressed to the Mortgagor at its usual or last known place of business in this Island or left upon or affixed to some part of the Property; or (ii) unless the Mortgagor shall be adjudged bankrupt or make any proposal or give notice of intention to do so or make any composition or arrangement with their or its creditors; or (iii) any other creditor shall take proceedings against the Property or any part thereof; or (iv) unless there shall be a breach or non-compliance by the Mortgagor of any of

the covenants and provisions hereinbefore contained and on the part of the Mortgagor to be kept observed and performed."

[26] The First Defendant defaulted in the payments due to the Claimant under the Mortgage and by a letter of demand dated 25 February 2008, the Claimant requested the First Defendant to pay the amount outstanding under the Mortgage together with legal costs within 14 days of the date of that letter. The Claimant also warned the First Defendant that legal proceedings would be instituted, should the sums not be paid as requested.

[27] Despite the letter of demand, the First Defendant failed to pay the outstanding sums within the time stipulated therein. Accordingly, the Claimant served a Statutory Notice dated 14 April 2008 on the Defendant, giving it notice that if the principal and interest owing under the mortgage were not paid, the Claimant would apply to the Court to have the property sold.

[28] The sums owed to the Claimant by the First Defendant were never paid and the Claimant instituted this action for possession of the mortgaged property.

EVIDENCE

[29] The Claimant's action is supported by the affidavit of Pamela Suzette McShine dated 23 June 2008 and filed on 11 July 2008.

[30] In response to this affidavit and in order to resist the action for possession the Second Defendant deposed and filed an affidavit on 21 May 2009. By affidavit filed on 14 August 2009, one of the Claimant's officers, Andrew Puckerin, responded to the allegations raised in the Second Defendant's affidavit.

[31] To support its case, the Defendants also filed on 5 February 2010 affidavits by William Grant and Richard Edwards while the Claimant filed the affidavit of Maureen Haque on 5 February 2013.

[32] On 6 February 2013, the Court ordered that the Claimant do produce minutes of all meetings held between officers of the Claimant and the Defendants, statements of all accounts between the Claimant and the Defendants, detailed statements as to how the sums claimed had been calculated, the detailed transfer of any monies from any accounts

held by the Defendants at the Claimant's Bank and details of all monies paid to the Claimant by the Defendants.

[33] Pursuant to the Court's order for discovery, the Claimant filed on 8 February 2013, the second affidavit of Maureen Haque.

THE DEFENCE

[34] The First Defendant does not deny that it entered into the mortgage with the Claimant. It also does not deny that it defaulted on the sums to be paid under the mortgage or that the Claimant satisfied all procedural requirements necessary to enforce its security.

[35] The Defendants submit, however, that it would not be just and equitable for the Court to grant the order for possession sought by the Claimant because the Claimant had made certain false representations to the Second Defendant that induced the First Defendant to enter into a contractual agreement with the Claimant for a loan of $5.6 million to carry out the construction of the office building for the Delegation of the European Commission. And it is said that the Claimant breached the terms of that agreement.

[36] The Second Defendant deposed that the Defendants had approached the Claimant for funding in relation to the entire project. He contended that the Claimant was well aware that purchase of the property was only the first stage of the project and that it was from the rental proceeds in the lease of the completed office building that the First Defendant expected to repay the Claimant.

[37] According to the Second Defendant, the First Defendant had only intended to pay the deposit on the purchase price of the property from its own funds. He deposed, however, that the Claimant had represented to him in the course of discussions that in order to receive the loan sought by the First Defendant, the First Defendant would be required to inject a further $160 000.00 towards the purchase price of the property. The Claimant would then provide a loan facility for the sum of $840 000.00 to complete the purchase. The Second Defendant's evidence on this point was supported by the affidavit evidence of Richard Edwards, the First Defendant's project manager.

[38] The Second Defendant claimed that it was on reliance of this "advice and undertaking given by The Bank" that (i) the additional $600 000.00 was paid to the Claimant to be

used towards the purchase price; and (ii) the First Defendant accepted the loan facility of $840 000.00 offered to it by the Claimant. The Claimant denied this allegation.

[39] The Second Defendant also alleged that it was requested by the Claimant to pay the sum of $40 000.00 into an account held with the Claimant which account was to be debited from time to time with bridging loan payments. He stated that the Claimant had withdrawn $28 000.00 from the sum deposited into this account "as negotiation fees in respect of the loan of $5.6 million" and the Second Defendant was subsequently requested by the Claimant to bring the bridging loans up to date.

[40] The Claimant, through the affidavit of Andrew Puckerin, maintained that (i) the Second Defendant had at all times represented to the Claimant that the First Defendant would be financing the purchase of the property; and (ii) it was the Second Defendant that approached the Claimant seeking a loan of $840 000.00 from the Claimant to complete the purchase of the property.

[41] The Claimant agreed that the Second Defendant deposited $40 000.00 into an account held by it, but pointed out that this was a condition precedent to the approval of the loan of $840 000.00 and that the monies in that account was used only to cover interest payments in relation to that loan and not any bridging loan payments, as alleged by the Defendants. Mr. Puckerin further deposed that he was obliged to request that the Defendants bring the interest charges owing on the account up to date as they were in default of the mortgage.

[42] Mr. Puckerin denied the Defendants' allegation that he had at any time advised the Defendants that the necessary documentation would be sent off to Trinidad by a specific period of time and also denied that he had failed to send off the documentation as promised. He deposed that he could make no such promise as the Defendants had failed to submit an updated proposal as requested and, further, that he remained in constant communication in relation to their account, which was in arrears.

[43] The Second Defendant alleged the existence of a conflict of interest on the part of Mr. Puckerin, who appeared to have primary responsibility for the Defendant's loan application and loan facility with the Claimant. The Second Defendant deposed that Mr. Puckerin had expressed an interest in investing in their project but had been rejected.

This allegation is juxtaposed next to a further allegation by the Second Defendant that the Claimant through Mr. Puckerin kept "raising the bar continuously" and requested the injection of a further $400 000.00 into the project.

[44] The final representation attributed to the Claimant is that in a meeting held with the Second Defendant, William Grant and Richard Edwards, Andrew Puckerin "agreed on behalf of The Bank that it would be acceptable if the $400,000.00 were injected by way of work on the foundations and infrastructure of the building".

[45] William Grant and Richard Edwards have both deposed that in August 2006 they attended a meeting held between the Second Defendant in his capacity as director of the First Defendant and the Claimant, represented by Andrew Puckerin. Richard Edwards deposed that:

> "5. At the aforesaid meeting, the Bank made it clear through its said Officer that the First Defendant would have to provide proof that it had injected at least a further $400,000.00 into the project before the Bank would approve the loan for the financing of the building on the said site. It was further agreed that the work on site to the said value could be carried out for the purposes of the fund injection but a Quantity Surveyor's Report would have to be presented to the Bank to verify that work to the said value had been carried out.
>
> 6. Pursuant to the said agreement made at the said meeting in August 2006, works were carried out to the foundations of the said building at the said site and the firm of C & H Associates Ltd, a firm rendering Engineering Consultancy and Quantity Surveyor services, was commissioned by the First Defendant for the carrying out of a valuation thereof.
>
> 7…
>
> 9. Based on the valuation contained in said Report, it was understood by me that the Plaintiff would complete the financing of the said construction as agreed in the said meeting in August 2006."

[46] Mr. Grant similarly deposed that he left the meeting "with the understanding and belief that upon completion of work at the site to the value of $400,000.00, the Bank would advance the additional loan funds to the First Defendant."

[47] The Second Defendant deposed at para 21 of his affidavit that after the First Defendant had completed work on the construction in relation to the project which had been valued at $448 814.33 and sent a Valuation Report in connection with that work to the Claimant:

> "21. The Company was of the view that it had now overcome every obstacle which had been put in its path by the Bank in relation to the project but at this point Mr. Puckerin telephoned the Second Defendant and told him that the Bank needed a new contract from the European Community with a new extension."

[48] Mr. Puckerin has firmly denied the existence of any conflict of interest on his part. I find that this allegation is wholly unsubstantiated. More importantly, this allegation has little relevance to this matter as the Defendants have not at any time sought to argue that the Court should deny the relief sought by the Claimant on the basis of Mr. Puckerin's alleged conflict of interest.

[49] The Claimant through Mr. Puckerin has also firmly denied that the meeting of August 2006 occurred. It also denied that it made any agreement or representation that upon the injection of $400 000.00 to the project in the form of work done on the construction, the loan would be granted.

[50] The Claimant also denied receiving the report of the quantity surveyor. It pointed out that by its letter dated 25 September 2006, the Bank had opined that the project was underfunded and had requested a valuation of the preliminary work to determine the level of financing that would be required. In that letter, the Claimant had also expressed concern as to whether there was sufficient cashflow to meet the debt service requirements for the loan requested and the failure of the First Defendant to meet the interest payments required by the loan granted and warned:

> "The interest payments are now 179 days overdue and unless we receive your firm proposals for the payment of the outstanding interest immediately, as well as provide evidence of your ability to service the loan on a continuous basis going forward, we will have no alternative but to call in this debt.
>
> Consequently we will be unable to give any further consideration for financing to assist with construction of the aforementioned building."

[51] In its letter dated 27 November 2006 addressed to the directors of the First Defendant, the Claimant wrote:

> "We refer to previous correspondence concerning the loan of $840,000.00 to your company to assist with the purchase of a property called Lexum located at the Garrison, St. Michael which was purchased to facilitate the construction of a building on behalf of the European Commission, and we

> acknowledged having received your loan application for funding to assist with the construction of the building.
>
> Since then we have met to discuss the provision of the financing to assist with the construction of the building, and having done so, concluded that there was insufficient cashflow to meet the debt service requirements for the facility, and we have been awaiting your further update and proposals in this regard.
>
> To date we have not received your further proposal including a valuation of the preliminary work to determine the level of financing which would be required to complete the said building."

[52] The letter also expressed concern as to whether construction of the building would be completed in the time frame required by the Memorandum. It indicated that "a decision on the way forward" would be made by 15 December 2006 and requested a response before that date. The Defendants do not appear to have responded. Mr. Puckerin deposed that as the Defendants never provided any further proposals or valuations, the Claimant did not have the information necessary to make an informed decision.

[53] In these circumstances, the Claimant never issued any letter offering the Defendants a loan of $5.6 million, as it had done for the sum of $840 000.00.

ISSUES

[54] The parties have agreed that the following issues arise for determination by the Court:

1) Was there a contract between the Claimant and the Defendants in relation to a loan of $5.6 million?
2) If such a contract existed, was the Claimant in breach of that contract?
3) If the Claimant was in breach of the said contract, does that breach prohibit the Claimant from recovering the sum of $840 000.00 plus interest accrued under the mortgage made between the Claimant and the First Defendant on 27 October 2005 and recorded on 15 June 2006 or obtaining possession of the property subject to that Mortgage?
4) Were there any representations by the Claimant to the Defendants which reasonably led the Defendants to believe that the Claimant would advance to the Defendants the sum of $5.6 million or would not take steps to recover possession of the property?

LAW AND DISCUSSION

[55] The Defendants have sought to resist the Claimant's application for the sums due under the mortgage and possession of the mortgaged property by raising an action for breach of contract, not breach of the terms of the mortgage contract or even the breach of the agreement for the loan of $840 000.00, but for breach of an entirely different contract altogether.

[56] Counsel for the Defendants has argued that a contract was created between the parties under which the Claimant agreed to loan $5.6 million to the Defendants and that the Claimant has reneged on the terms of this agreement causing damage and loss to the Defendants and should, accordingly, not be permitted to obtain the order of possession sought. The Claimant, however, has denied the existence of any such contract and its Counsel has put the Defendants to strict proof.

[57] A contract may be defined as an agreement whose terms and conditions are legally enforceable. The existence of a contract is considered to require, at least in most instances, an offer, acceptance of that offer and valuable consideration. It is for this reason that **Chitty on Contracts (Thirtieth Edition): Volume 1** provides at para 2-001:

> "The normal test for determining whether a contract exists is to ask whether an offer has been made by one party and accepted by the other."

[58] Mr. Patterson argued that the Claimant had made no offer to grant the Defendant a loan of $5.6 million and a contract could therefore not exist. He drew the Court's attention to the following definition of an offer provided by **Chitty** at para 2-003:

> "An offer is an expression of willingness to contract made with the intention (actual or apparent) that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed. Under the objective test of agreement, an apparent intention to be bound may suffice, i.e the alleged offeror (A) may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though in fact he has no such intention."

[59] **Chitty** further states at para 2-008 that:

> "A statement is clearly not an offer if it expressly provides that the person who makes it is *not* to be bound merely by the other party's notification of assent but only when he himself has signed the document in which the statement is contained."

[60] As to the principles to be borne in mind by the court when it considers whether a contract had been created, Counsel for the Claimant pointed the Court to the English case of ***G. Percy Trentham Ltd v. Archital Luxfer Ltd [1992] Adj. L.R. 07/20***, and specifically the following dictum of Lord Justice Steyn at para 6:

> "It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men and in the present case that means that the yardstick is the reasonable expectations of honest businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by the exchange of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But is [sic] is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance…The third matter is the impact of the fact that the transaction is executed rather than executory… The fact that a transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations…Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See Trollope & Colls Ltd v Atomic Power Construction Ltd [1963] 1 W.L.R. 333."

[61] For his part, Mr. Goodridge pointed out that although there may be no express contract, the existence of a contract could, in certain instances, be inferred from the conduct of the parties. He referred the court to the following paragraph of **Cheshire, Fifoot and Furmston's Law of Contract (Fourteenth edition) at p. 69**:

> "The rules thus developed by the common law as to the making, acceptance and revocation of offers illustrate the almost self-evident truth that while contract is ultimately based upon the assumption of agreement, the courts, like all human tribunals, cannot peer into the minds of the parties and must be content with external phenomena. The existence of a contract, in many cases, is to be inferred only from conduct. To do justice, however, the courts may have to go beyond the immediate references to be drawn from words and acts and may be tempted or driven to construct a contract between persons who would seem, at first sight, not to be in contractual relationship with each other at all.

[62] Mr. Goodridge argued that although the Claimant had not sent any Letter of Offer to the Defendants by which it offered to lend them the sum of $5.6 million, it was clear from its representations and conduct that it had agreed to lend this sum.

[63] Counsel submitted further that the making of some other contract may constitute consideration for a contract and contended that the consideration for the agreement to lend $5.6 million was the making of the agreement for the loan of $840 000.00 pursuant to which the mortgage had been executed. As authority for this submission, Mr. Goodridge cited **Cheshire, Fifoot and Furmston** as well as to the English cases of ***Heilbut Symons & Co. v. Buckleton (1913) AC 30*** and ***Webster v. Higgin [1948] 2 All ER 127***.

[64] It is clear from the authorities cited by Mr. Goodridge that consideration for the making of a contract may indeed be the making of some other contract, although rarely so. Lord Moulton observed at p. 47 of ***Heilbut (supra)*** that:

> "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100l., and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. ***They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown***. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the

> effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter [Emphasis added]."

[65] In ***Heilbut*** it was held that from the totality of the evidence before the Court the parties had never intended that an innocent representation made on behalf of the appellants would lead to the creation of a separate and independent contract.

[66] In contrast, it was clear from the facts of ***Webster v Higgin*** (and held by the English Court of Appeal) that a separate contract had emerged in that case when the vendor of a second hand motor car selling the car on hire purchase terms told the purchaser during negotiations that it would guarantee that the car was in good condition and that the purchaser would have no problems with it.

[67] Where one party alleges that an agreement is to be inferred from the conduct of the parties, that party must prove that the parties had intended to enter into contractual relations: **Chitty (*supra*) at para 2-160**.

[68] In ***Blackpool and Fylde Aero Club v. Blackpool BC [1990] 1 WLR 1195 at 1202*** (cited in **Chitty at para 2-160)** Bingham L.J. warned that

> "…contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for."

[69] I now turn to consider the evidence in this case that, according to Mr. Goodridge, shows that the parties had entered into a contract in relation to the loan of $5.6 million.

[70] Mr. Goodridge relied on the Indicative Term Sheet sent by the Claimant to the Defendants. This Indicative Term Sheet, he submitted, was evidence of the existence of negotiations between the parties for the loan of the sum of $5.6 million. Of this there is no dispute. He further submitted that the Indicative Term Sheet made it apparent that the Claimant was at all times aware that the sole reason for the First Defendant's purchase of the property was to construct a commercial office for leasing to the European Community. On this there is also no dispute. However, these facts are far from sufficient to demonstrate the existence of a contract.

[71] Mr. Patterson argued that the Indicative Term Sheet demonstrated that no contract had come into existence. Counsel submitted that the Indicative Term Sheet summarized the salient terms and conditions under which the Claimant would offer the loan to the Defendants and specifically stipulated that it did not "constitute or imply any offer or commitment whatsoever on the part of the Bank and [the terms contained therein] are subject to negotiations and satisfactory documentation". Mr. Patterson argued that the language used in the document was intended to prevent the formation of any contract except upon the satisfaction of all of the terms and conditions outlined therein.

[72] I accept this submission. The opening paragraph of the Indicative Term Sheet stipulated in bold that the document "contains illustrative terms for discussion only" and it is clear from this paragraph that the Indicative Term Sheet was intended to set out the parameters for the negotiation of the loan of $5.6 million from the Claimant to the First Defendant. Great care was taken to ensure that it was abundantly clear that the terms were "illustrative only" and "subject to further negotiation and credit approval". It was only on the satisfaction of the conditions contained in the Indicative Term Sheet and approval of the Claimant's credit authority that the Claimant would agree to offer the First Defendant the loan facility of $5.6 million.

[73] Of particular note, according to Mr. Patterson, was the two-step procedure set out by the Indicative Term Sheet for the formation of a contract. The Indicative Term Sheet provided that an offer could only be made by the Claimant sending duplicate copies of a Letter of Offer to the Defendants. A binding agreement was created when this offer was accepted by the First Defendant and acceptance of this offer was to be signified by the return of a copy of the Letter of Offer signed by the Defendant together with a certified copy of a resolution of the First Defendant's Board of Directors accepting the loan on the terms and conditions stated and a copy of its by-laws certified by its Secretary or a Director as true and complete as at the date of acceptance.

[74] It was the submission of Mr. Patterson that the Defendants had failed to discharge their burden to prove that the agreement whose existence they alleged had been concluded. They were unable to produce any Letter of Offer duly executed by the Claimant, the first step in completing a loan facility agreement. Not only had they been unable to produce a

Letter of Offer, but they were also unable to produce any evidence that demonstrated their acceptance of any purported offer. As there had been no offer by the Bank to provide a loan of $5.6 million to the Defendants, no contract could exist between the parties in relation to a loan facility for that sum.

[75] By its plain and unambiguous language, the Indicative Term Sheet demonstrated that not only did it lack contractual force but also how the agreement for the loan of $5.6 million was to be created and the conditions necessary for the creation of that contract. Counsel for the Defendants has largely ignored the clauses to this effect and simply cherry-picked the ones he found useful to his case. He cannot do so. He must take the document in its entirety.

[76] Counsel for the Defendants has conceded that no Letter of Offer was ever sent. He has nonetheless contended that, in contradiction of the unambiguous terms of the Indicative Term Sheet, a contract had been created between the parties as a result of the conduct of the Claimant, particularly representations made by or on its behalf.

[77] It is possible that while parties may stipulate that a contract should be carried out in a particular way, the document in which they so stipulate may itself form a binding contract or a separate preliminary contract may come into existence, for e.g. where one party begins to render the services requested by the other, or subsequent events show that the parties' intention not to be bound until a document has been executed has changed: **Chitty (supra) at para 2-116**. This must, of course, be objectively ascertainable.

[78] An objective examination of the conduct to which the Defendants have pointed the Court does not, however, demonstrate a separate contract between the parties has entered into existence here.

[79] To prove that a separate contract had been created, Counsel for the Defendants pointed to (i) the execution of the agreement for the loan of $840 000.00 and the mortgage by which this was secured, both of which they say were made pursuant to an alleged misrepresentation; (ii) the deposit of $40 000.00 by the Defendant into an account with the Claimant and the Claimant's debiting of that account with the sum of $28 000.00 to pay legal fees incurred in respect of the alleged agreement; (iii) the receipt by the Claimant of the Memorandum executed between the Defendants and the European

Commission Delegation; (iv) the injection of $400 000.00 into the construction of the commercial office building on the basis of another alleged misrepresentation; and (v) the Valuation Report attaching a monetary value to the work completed on the construction of the office by the Defendants.

[80] One of the conditions of the Indicative Term Sheet was that "all monies due in respect of the purchase of the land have [to be] paid." I find that the loan facility of $840 000.00 and the mortgage to secure that loan facility were both executed to permit the Defendants to satisfy that particular condition.

[81] Moreover, one of the conditions set out in the loan agreement for the $840 000.00 was that the Second Defendant was to assign the funds in a savings account he had with the Claimant to the payment of fees, expenses and interest payments for the loan of $840 000.00. There is no documentary evidence to support the allegation that this account was debited with the sum of $28 000.00 or that this sum was debited to pay for the negotiation fees for the loan of $5.6 million. Indeed, the Indicative Term Sheet specified that the negotiation fees were only payable after the Letter of Offer had been sent by the Claimant and had been accepted by the Defendants in the manner specified.

[82] Finally, in light of the Indicative Term Sheet, the Court does not accept that the Claimant made the representations attributed to it. Even if it had, however, these representations are not in themselves sufficient to displace the clear terms of the Indicative Term Sheet. Similarly, the fact that the Memorandum was sent provides little assistance to the Defendants. Likewise, even if the Valuation Report were sent to the Claimant, as alleged, that fact would also, to my mind, do little to advance the case of the Defendants.

[83] In these circumstances, I hold that no contract existed between the parties in relation to the loan of $5.6 million. Accordingly, the issues of whether the Claimant breached the terms of this contract and whether any such breaches prohibited the Claimant from recovering the relief sought in its application do not arise for consideration.

Were there any representations by the Claimant to the Defendants which reasonably led the Defendants to believe that the Claimant would advance to the Defendants the sum of $5.6 million or would not take steps to recover possession of the property?

[84] The fourth and final issue is whether there were any representations by the Claimant to the Defendants which could and did reasonably lead the Defendants to believe the Bank would advance to the Defendants the sum of $5.6 million or would not take steps to recover possession of the property.

[85] I have carefully examined all the affidavit evidence before me. In none of the affidavits filed on behalf of the Defendants do the Defendants at any time aver to any representation made to the Second Defendant by the Claimant that it would not take steps to recover possession of the mortgaged property.

[86] In these circumstances I am satisfied and find that the Claimant at no time represented to the Second Defendant that it would not take steps to recover possession of the mortgaged property.

[87] I now turn to consider whether there were any representations made by the Bank to the Defendants which would reasonably lead the Defendants to believe that the Claimant would advance to the Defendants the sum of $5.6 million. For this allegation, the Defendants have produced some evidence, mostly through the affidavit of the Second Defendant.

[88] In his affidavit, the Second Defendant deposed that the Claimant through Mr. Puckerin represented in a meeting held on or about June 2005 that if the Defendant injected funds to purchase the property, the Bank would advance $840 000.00 to complete the purchase and a further $4 million to carry out the construction. He further alleged that on or about August 2006 the Bank represented that it would make the loan facility for the construction available if the Defendants injected $400 000.00 into the construction of the building and provided proof of the same. The allegation relating to the injection of $400 000.00 finds support in the affidavits of William Grant and Richard Edwards both filed on behalf of the Defendants. Both allegations are, however, firmly denied by Andrew Puckerin, the officer of the Claimant to whom the representations are attributed.

[89] Mr. Patterson has submitted that this evidence cannot be considered in isolation from the terms of the Indicative Term Sheet on the basis of which the parties entered into negotiation for the loan. He argued that viewed against the context of that document such representations, even if true, could not have led a reasonable person to believe that the

Claimant had agreed to advance the sum of $5.6 million after the Defendants had either used $840 000.00 of their funds to purchase the land or injected $400 000.00 into the construction of the property when the Indicative Term Sheet set out clear conditions that had to be satisfied before the loan facility would be granted. His submission is persuasive.

[90] Any representations allegedly made by one party which the other party claims induced him to act must be considered not from the perspective of the party alleging misrepresentation but from the perspective of a reasonable person in the position of the parties. Such a person would be aware of the great care taken by a bank in drafting the terms and conditions under which a loan facility is granted. Such a person would, to my judgment, find it quite difficult to accept the allegations of the Defendants, particularly when considered against the backdrop of the Indicative Term Sheet.

[91] Accordingly, I find, on a balance of probabilities, that no representations were made to the Defendants by or on behalf of the Claimant that it would advance to the First Defendant the sum of $5.6 million as has been alleged.

[92] Accordingly, I reject the submission of the Defendants that the Claimant is not entitled to the relief sought under and by virtue of the Defendants' failure to comply with the terms of the Deed of Charge dated 27 October 2005.

DISPOSAL

[93] For the foregoing reasons, I hereby order that:

(i) the Defendants do on or before 30 April 2014 deliver to the Claimant possession of the property comprised in the Deed of Charge dated 27 October 2005 and recorded in the Land Registry on 15 June 2006 as Deed No. 5262 of 2006;

(ii) the Defendants shall pay to the Claimant its costs of the action to be agreed or taxed; and

(iii) a stay of execution is granted for six weeks.

ELNETH O. KENTISH

Judge of the High Court