

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 393

BETWEEN:

**HSBC BANK BERMUDA LIMITED
(FORMERLY THE BANK OF BERMUDA)**

Plaintiff

-and-

**(1) LEROY SCOTT WALES
(2) KIMBERLEE ANN WALES**

Defendant

Before: **Hon. Assistant Justice Kessaram**

Appearances: John Hindess, Marshall Diel & Myers, for the Plaintiff
Bruce Swan, Apex Law Group, for the Defendatns

Date of Hearing: **6th November 2018**

Date of Judgment: **18th December 2018**

JUDGMENT (Preliminary Issue)

Duty of lending bank to customer – whether bank owes customer a duty of care – whether bank owes customer a duty to advise customer as to purpose for which loan sought

1. In this case HSBC Bank Bermuda Limited (“the Bank”) seeks to recover certain debts owed by the Defendants. The Bank’s claim is made by Originating Summons dated 18th October 2017. On this date the debts claimed were as follows:

- a. BD\$725,884.71 being the principal and interest due under a loan secured by a mortgage dated 19th May 2008 on certain real property situate at 13 Woodlawn Road, Sandys Parish (“the Mortgage Loan”); and
 - b. BD\$2,607.04 being the principal and interest due under a promissory note dated 6th October 2017.
2. In the course of the proceedings, the Bank withdrew its claim for the payment of the sum due under the said promissory note which it acknowledged had been paid in full, and sought instead to recover against only Mr. Wales the sum of \$28,078.58 which it alleged was due under a promissory note dated 5th October 2007 (“the Promissory Note Debt”). No formal amendment of the Bank’s Originating Summons has yet been sought.
3. The matter was listed for trial on 12th September 2018. Being a claim made by Originating Summons, no formal pleadings were exchanged. Consequently, it was not clear to what issues the evidence of the Defendants was directed. What emerged from counsel’s addresses to the Court, however, was a question as to the duties owed by the Bank to the Defendants at the time of the creation of the Mortgage Loan. I therefore ordered that there be a trial of a preliminary issue in the following terms, namely, whether or not on the evidence before the Court the Plaintiff Bank owe a duty of care to the Defendants in entertaining their application for the Mortgage Loan.
4. The trial of this issue took place on 6th November 2018. This is the judgment of the Court on that issue. The question at issue relates only to the granting of the Mortgage Loan. The First Defendant’s liability to the Bank for repayment of the Promissory Note Debt is a separate and distinct issue and is not affected by this Judgment.

The Facts

5. The Defendants (Mr. and Mrs. Wales) are husband and wife. The Second Defendant's father offered to sell to the Defendants his property at 13 Woodlawn Road, Sandys Parish. The property had been a burden to Mrs. Wales' father, who was elderly and was experiencing medical problems. The terms were somewhat unusual. The father offered to sell the property for whatever amount the Defendants could borrow from the Bank on the security of the property. Mrs. Wales was skeptical as to whether the Bank would lend them any amount as her husband was the only person with a job. At the time the Bank was offering 100% mortgages.
6. The Defendants met with a mortgage officer of the Bank and provided information to her which she entered on a loan application form ("the Loan Application Form"). The form required personal information about the Defendants, their employment information and information as to their monthly income. The form also asked for credit information, i.e., as to their assets and liabilities. The information they provided to the Bank as shown on the form stated that Mr. Wales was an employee of the Bermuda Government as an operations engineer and earned \$2880 per month with a loan expense of \$586 paid monthly. Mrs. Wales was not shown as having any income or expenses.
7. The Loan Application Form described the purpose of the loan as being for the purchase of a three-apartment home from the father. The amount of the loan applied for was shown on the form as \$1 million.
8. The Loan Application Form signed on 1st February 2008 also showed that the Defendants' assets consisted of money in certain bank accounts, i.e., two chequing accounts with a total credit balance of \$10,327.82; two savings/deposit accounts with a total balance of \$31,316.14; and three investment accounts with a total balance of \$63,063.64; making an overall total of \$104,707.60. In other assets, the Loan Application Form showed that the Defendants owned a car worth \$28,000, against which there was a loan of \$27,000 which was being repaid at the rate of \$589 per month. Finally, the Loan Application Form showed that the Defendants owed debts on credit cards in the total amount of \$5,497.26.

9. The Loan Application Form also showed that the Defendants (a) had no outstanding judgments against them; (b) had other means of securing a loan; and (c) they had no outstanding debts with any of two named debt collection agencies.
10. The Loan Application Form contained a statement which (by signing the form) the Defendants acknowledged to be true. The statement reads: *“The information I have given is true and correct to the best of my knowledge and nothing which might affect The Bank of Bermuda Limited’s . . . decision to make this loan or mortgage has been withheld”*.
11. The mortgage officer stated in her affidavit evidence that the Defendants advised her that they were purchasing the property as an investment. This description is not admitted in the evidence given on behalf of both Defendants (in the affidavit of Mrs. Wales). However, Mrs. Wales admits meeting with the mortgage officer and telling her about the income of the property in response to questions posed by the Bank. Mrs. Wales even went so far as to relate what she had been told by the Rent Commissioner as to their ability to charge \$3,400 for one apartment and \$2,450 for another apartment in the building.
12. The Bank commissioned an appraisal of the property from Bermuda Realty Company Limited. This was completed on 13th February 2008. It showed that the ARV of the property was \$54,600 which, if realized, would produce an income of \$4,550 per month. This amount would cover the monthly mortgage payment of \$3,657.05 that would be payable in repayment of a loan of \$550,000 (the amount ultimately approved and lent to the Defendants) at the Bank’s Personal Base Rate of 4.5% plus 2.5% over a period of 26 years. The appraisal also showed that the fair market value of the property was \$1.1 million.
13. The commentary at the end of the report included the following statement:

“We have also been asked to provide comment upon the likely range of rental values for the units. For the refurbished 2 bed/1 bath unit (upper South) we would venture a range of \$3,000 - \$3,300 per month. For the dated 3 bed/1 bath unit (upper North) we would venture a range of \$3,000

- \$3,200 per month and for the dated 2 bed/1 bath unit (lower North), \$2,000 - \$2,500 per month. In order to achieve these rents, a redecoration and good janitorial clean of the units should be done as well as a tidying up of the grounds plus any external works needing attention. As you are aware, the rental market is prone to fairly quick change so the above rates should be viewed as a guide only”.

14. However, the property was mired in legal problems. One apartment was occupied by the father’s daughter and her sons. The daughter claimed a proprietary interest in the apartment and argued that the amount she was paying per month to the father (\$700) was not rent but assistance for his upkeep. Another apartment was occupied by the father’s ex-wife and her sons. In her affidavit, Mrs. Wales states that they were living in the apartment rent-free; that the ex-wife had a life interest in the apartment and that the sons were supposed to pay rent, but never did.
15. Significantly, the Bank was not made aware of these legal entanglements¹. Mrs. Wales does not say in her affidavit that she told the Bank of these problems. She could not have known about the proprietary estoppel claim (unless her father told her, which is not asserted) since it only commenced after the Defendants acquired the property.
16. As noted, the Defendants were approved for a loan secured by a mortgage on the property in the amount of \$550,000. The terms of the offer of finance were contained in a letter dated 5th March 2008 addressed to the Defendants and which was signed by them on 19th May 2008. In it (under the heading “*Legal Advice*”) it was recommended to the Defendants that they seek legal advice concerning the matter. The offer letter also contained the statement “*By signing this letter, you represent and warrant that all the information provided by you to the Bank is complete and accurate*”.
17. It is not clear how soon after the acquisition of the property by the Defendants that legal proceedings were commenced against the father in relation to the property.

¹ The Bank pleaded a general denial of Mrs. Wales’ averments except in so far as they amounted to admissions of the Bank’s case: see the affidavit of the mortgage officer at para. 13.

It must have been soon after the acquisition by the Defendants as Mrs. Wales testified in her affidavit that the litigation was settled after two years in or about 5th May 2010². During this period an injunction was in effect against the Defendants preventing them from receiving the income of the property.

18. The record of payments of the monthly installments of the Mortgage Loan show steady payments from June 2008 to the end of 2011. It appears from the evidence, however, that the installments of the Mortgage Loan were being met out of the borrowed funds, i.e., were being paid by the father.

19. Eventually, the Bank commenced these proceedings to enforce payment of the Mortgage Loan and the Promissory Note Debt.

The Issues

20. Initially the Defendants pleaded in their Defence that they “*fully denies [sic] the claim as plead and does [sic] not believe [the Bank] did not [sic] act in a fair and just manner based on what would be expected of a proper Mortgagee in the circumstances*”.

21. In argument before me it became clear that what the Defendants complained about was the fact that the Defendants, being inexperienced in financial matters, were relying on the Bank to advise them whether they should borrow the funds for the purposes they had in mind. They assumed that the Bank’s approval of their loan application was the Bank’s approval of their plan to acquire the building and was tantamount to advice that it was a sound investment. The Defendants’ case is that the Bank should not have lent them the \$550,000 at all or should have advised them against borrowing on the terms that they did; or should have encouraged them to take advice.

² The terms of settlement included the payment of \$50,000 to the challengers; which sum the Defendants borrowed from the Bank on the promise of repayment contained in a promissory note dated 5th May 2010 giving rise to the Promissory Note Debt which is also a subject of the Bank’s claim in these proceedings although not a part of the preliminary issue.

The Law

22. The basic principle regarding the duties owed by a lending bank to its customer is stated in *Warne & Elliot Banking Litigation* (1999) at p. 28 (quoted in the judgment of Lord Millett in *National Commercial Bank (Jamaica) Ltd. v Hew and others* [2003] UKPC 51 at [13]):

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

23. Although it is under no legal obligation to give advice, if the bank does give advice then it must do so using reasonable skill and care. The following passage from the judgment of Lord Finlay LC in the case of *Banbury v Bank of Montreal* [1918] AC 628 was cited with approval in the *National Commercial Bank (Jamaica) Ltd* case (cited above):

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

24. The Defendants sought to rely on a decision of the High Court of Northern Ireland (*Allied Irish Banks plc v Coughlan* [2016] IEHC 752) to support a finding by the Court that the Bank could not enforce the loan because of the unfairness of its terms. The Defendants’ written submissions state that “. . . *the Plaintiff* [the

Bank] *has to be held to account for their unfair contractual terms wherein they bound the Defendants to a mortgage a property that the Defendants could not repay [sic]*". This proposition was not fully developed in submissions. It was not explained how principles relating to unfair contractual terms founded on the provisions of foreign legislation (i.e., the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995)³ which has no counterpart in Bermuda law can be imported into this case.

25. It is not in my view correct to say that by granting them the Mortgage Loan the Bank was implicitly advising the Defendants that the purchase of the property was a sound investment which they could afford to make. There is nothing in the evidence to suggest that the relationship between the Bank and the Defendants in this case was other than the conventional relationship of lender/borrower. The parties' mutual rights and obligations were contained in the Offer to Finance letter dated 5th March 2008. It is plainly on its face not a contract to provide advice. If there was no duty on the Bank contractual or otherwise to advise the Defendants (no basis for such a duty was put forward by the Defendants⁴), it is difficult to see how it can be inferred from the mere making of the loan that the Bank considered and advised that the investment was sound. In this regard I would adopt the words of Lord Millett on appeal to the Privy Council in the case of *National Commercial Bank (Jamaica) Ltd v Hew et al* [2003] UKPC 51 at [22] where he said:

"This is a useful illustration of the truism that the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound".

³ EEC law imports into consumer contracts obligations of good faith and fair and equitable dealing that require the legitimate interests of the consumer to be taken into account.

⁴ It would not be appropriate to imply any duty on the Bank to advise the Defendants having regard to the fact that the Offer to Finance letter expressly encouraged the Defendants to take independent legal advice. In the circumstances it would not be fair and equitable to imply such a duty: see the dictum of Kawaley CJ in *Bird v Magzone (Bda) Ltd. and The Bank of NT Butterfield & Son Limited* [2005] Bda L.R. 55 at p. 22.

26. Having regard to what I have found it is my judgment that on the evidence before the Court, the Plaintiff did not owe the Defendants a duty of care in entertaining their application for the Mortgage Loan.

27. In the circumstances, I invite the parties to seek a listing of this matter before the Court for further directions for trial on the remaining issues. I am minded to reserve the costs of the preliminary issue to the final disposition of this action but will hear the parties on this matter if they so wish.

Dated the 18th day of December 2018.

David Kessaram
Hon. Acting Justice