REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-04381

BETWEEN

GUARDIAN ASSET MANAGEMENT LIMITED

CLAIMANT

AND

DAVID DESLAURIERS

LEONORA DESLAURIES

DEFENDANTS

BEFORE THE HONOURABLE JUSTICE RICKY RAHIM

Appearances:

Mrs. D. Peake S.C. and Mr. K. Garcia instructed by Ms. S. Indarsingh for the Claimant.

Both Defendants in person and unrepresented.

Reasons

1. On the 25th October 2011 the Court gave oral judgment in this matter. These are the reasons for the decision made and delivered by the Court.

The Claim

2. This was a claim for the recovery of money due and owing by the Defendants to the Claimant on two (2) promissory notes pursuant to which the Claimant lent the Defendants the sum of $18,600,000.00.

3. The Claim Form and Statement of Case were filed on the 20th November 2009. The Claimant claimed the following:

   a. *Payment of the sum of $19,817,471.74 due and owing as at November 19, 2009 under a promissory note dated the 2nd day of October 2007.*

   b. *Interest on the sum of $17,827,418.53 at the rate of 13% per annum or $6,521.71 per day from 20th November 2009 until payment.*

   c. *Payment of the sum of $858,823.95 due and owing as at November 19, 2009 under a promissory note dated the 3rd day of October 2007.*

   d. *Interest on the sum of $772,581.47 at the rate of 13% per annum or $282.63 per day from the 20th day of November 2009 until payment.*

4. The Claimant asserted that the whole principal sum together with interest on same became due and owing by reason of the Defendants' failure and/or refusal and/or neglect to pay the sums due as at 2nd April 2009 under the promissory notes.

5. Consequently, the Claimant pleaded the following particulars at paragraph 6 of their Statement of Case:

    a. *At the request of the Defendants extensions of time for repayment of the said loan were granted by letters dated June 12 and 15, 2009 whereby the Claimant granted to the Defendants an extension for full payment of the said loan up to July 2, 2009.*

    b. *The Defendants failed to repay the sums due in respect of the said loan as at July 2, 2009 and sought additional time for repayment. The Claimant granted several further extensions to the Defendants to repay the said loan but each deadline passed with no payment being made towards liquidation of the said loan. As a result thereof a demand letter was issued dated October 14, 2009 via the Claimant's Attorneys calling upon the Defendants to settle their indebtedness under the said loan within 14 days thereafter.*

    c. *Following receipt of the demand letter, the first named Defendant requested a meeting with the Claimant which was accommodated. At the meeting the first named Defendant requested that further loans be advanced by the Claimant to the Defendants and made no proposal for settlement of the outstanding sum due under the said loan. The Claimant refused to advance any further loans to the*

Defendants whereupon the Claimant received a letter dated 30th October 2009 from the Attorneys for the Defendants requesting a 21 day extension of time to respond to the demand letter.

d. *Correspondence passed between the parties thereafter but to date the Claimant's debt remains due and owing.*

The Defence and Counterclaim

6. The Defence and Counterclaim was filed on the 18th February 2010 by which the Defendants counterclaimed, *inter alia*:

    a. *Damages for Negligence;*

    b. *Damages for Misrepresentation*

7. The Defendants denied that they were liable to pay the sums due and owing as of the dates indicated on the promissory notes. The Defendants explained in their defence that their failure to repay the loan by the due date was not a default as alleged by the Claimant since the Claimant had extended the time for repayment to the 2nd July 2009. They asserted that they were relieved of their obligation to repay the loan on the dates stipulated until such time as they were able to obtain additional financing to complete the project.

8. The Defendants claimed that the Claimant knew and/or that the Defendants had made it known to the Claimant that they did not have knowledge of the capacity of the

Claimant's lending ability. In this regard, the Defendants counterclaimed that the Claimant was under a duty of care to both advise or to disclose to the Defendants its lending limitation so that the Defendants could have made an informed decision before December 2008 when the Defendants claim they declined additional financing from RBTT Bank Limited. In addition and/or in the alternative the Defendants averred that the Claimant knew and/or it was reasonably foreseeable in the circumstances that the Defendants would have suffered loss and damages by its alleged omission to disclose its lending limitations.

9. The particulars of the counterclaim as pleaded at page 8 of the Defence and Counterclaim are as follows:

    a. *The Claimant failed and/or omitted to inquire as to its limitations as per its license as a non banking financial institution;*

    b. *The Claimant failed and/or omitted and or neglected to ascertain its proper lending capabilities;*

    c. *The Claimant failed to disclose in proper time or at the appropriate time its lending limitations;*

    d. *The Claimant permitted the Defendants to operate under a mistaken belief so as to render the Defendants incapable of making an informed decision in sufficient time;*

    e. *The Claimant failed, omitted or neglected to advise the Defendants in these circumstances that the Claimant would be unsuitable for financing this project;*

f. *The Claimant's representative's statements in encouraging the Defendants to treat with the Claimant for the additional financing were careless statements as to the availability of finance and/or that the loan facility will be continued or extended;*

g. *The Claimant was reckless as to its lending capacity;*

h. *The Claimant failed to ascertain the proper financing requirements for a construction project and to advise the Defendants of its limitations.*

10. Consequently, the Defendants pleaded that they were entitled to set-off the amount of such damages in satisfaction of the claim under the promissory notes since the Claimant failed to provide funding for the entire project.

Reply and Defence to Counterclaim

11. A Reply and Defence to Counterclaim was filed by the Claimant on the 16th April 2010.

12. The Claimant denied all matters pleaded in the Defendants' Counterclaim. Specifically, the Claimant denied that there was any promise or discussion with the Defendants for the financing of the entire "Hevron Heights" project. Further, the Claimant denied that there was any duty owed to the Defendants to discuss the Claimant's lending capabilities since the loan was for the agreed sum of $18, 600,000.00 which the Claimant was capable of advancing and never considered extending the loan further than this sum.

13. The Claimant maintained that the Defence raised no reasonable defence in law to the Claimant's claim under the promissory notes since the obligation to repay is independent of any underlying transaction and is enforceable free of set-offs and unliquidated cross-claims.

Agreed Facts

14. The following facts as appear in both the Claimant's Claim Form and Statement of Case and the Defendants' Defence and Counterclaim are not in dispute.

15. The Claimant is a public limited liability company having its registered address at No. 1 Guardian Drive, Westmoorings. The Defendants are and were at the material times persons engaged in a developmental project referred to as the "Hevron Heights" project, a project involving the construction of two multi-storey buildings in Champs Fleur.

16. The Claimant lent the Defendants the sum of $18,600,000.00 and the Defendants signed two promissory notes dated the 2nd October 2007 and the 3rd October 2007, pursuant to the said loan in favour of the Claimants. On the 2nd October 2007, a Deed of Mortgage was executed in favour of the Claimant following the loan.

17. By the terms of the first promissory note, the Defendants agreed to repay the sum of $17,827,418.53. By the second promissory note, the Defendants further undertook to repay the sum of $772,581.47.

18. Under the first promissory note, the terms of repayment were as follows:

(a) The principal balance of $17,827,418.53 with interest at the rate of 11% on or before April 2 2009.

(b) The payments were to be effected by interest-only payments on a quarterly per annum basis on the 2nd day of each month at the commencement of each quarter commencing on the 2nd day of January 2008 and ending on 2nd April 2009.

(c) Full payment of the principal sum of $17,827,418.53 with interest outstanding was to be made on the said sum 2nd April 2009.

(d) In the event of default interest on the balance outstanding at the default rate of 13% per annum or 2% above the borrowing rate of 11% per annum.

19. With regards to the second promissory note, the terms were:

(a) The principal balance $772,581.47 with interest at the rate of 11% on or before April 2 2009.

(b) The payments were to be effected by interest-only payments on a quarterly per annum basis on the 2nd day of each month at the commencement of each quarter commencing on the 2nd day of January 2008 and ending on 2nd April 2009.

(c) Full payment of the principal sum of $772,581.47 with interest outstanding was to be made on the said sum 2nd April 2009.

(d) In the event of default interest on the balance outstanding at the default rate of 13% per annum or 2% above the borrowing rate of 11% per annum.

20. The Defendants paid the quarterly interest-only payments up to the 2nd January 2009 in relation to both promissory notes but ceased payment after that date.

21. The Defendants accepted at paragraph 7 of their Defence and Counterclaim that they were liable to pay to the Claimant the sums under the promissory notes save for the quarterly interest-only payments already made.

The Evidence

22. The Claimant called one witness, Mr. Leon Ramdeen whose witness statement was filed on the 8th July 2011. Both Defendants relied on one witness, the Second Defendant, Mrs. Leonora Deslauriers. Her evidence in chief was contained in her witness statement which was filed on the 8th July 2011.

23. Further, both the Claimant and Defendants sought to rely on what was predominantly contained in email correspondence passing between both witnesses. The following is a timeline of the salient correspondence between the Claimant's representative (Mr. Ramdeen) and the Second Defendant but is not limited to the email correspondence only:

    21st – 26th June 2007 – Mr. Ramdeen emailed a loan proposal at the request of the Defendants. Discussions ensued on the terms of the proposed loan. It was agreed that in addition to a mortgage security, the Defendants would also execute promissory notes.

24th July 2007 – The Defendants sent a formal written loan application for a loan of $15,000,000.00 to the Claimant.

3rd – 16th September 2007 – There were discussions by email between the Defendant and Mr. Ramdeen for the Claimant to increase the loan amount to $18,600.00.00.

20th September 2007 – A loan offer was sent by the Claimant to the Defendants and signed by all parties.

2nd and 3rd October 2007 – Promissory notes were executed by the Defendants on the 2nd and 3rd October 2007. A Deed of Mortgage was also executed on the 2nd October 2007.

30th – 31st July 2008 – On the 30th July 2008 the Second Defendant emailed Mr. Ramdeen and requested a letter containing the pay off balance on the loan as at the 2nd October 2008. By letter dated the 31st July 2008 Mr. Ramdeen sent the requested information. In the Second Defendant's email of the 30th July 2008 the Second Defendant enquired of Mr. Ramdeen whether the Claimant would be interested in financing the balance of the "Hevron Heights" project.

30th September 2008 – The Second Defendant communicated via email that she would not be making the pay off by October 2008 but would instead continue with the quarterly interest payments.

17th and 26th November 2008 – On the 17th November the Second Defendant emailed Mr. Ramdeen indicating to him that the Defendants now had all their

accounts at RBTT Bank and that RBTT was interested in financing the "Hevron Heights" project. The Second Defendant enquired whether the Claimant would be interested in financing the project instead of RBTT or would rather repayment of the sum loaned on the 2nd January 2009. An email of the 26th November was sent from Mr. Ramdeen to the Second Defendant indicating the Claimant's preference of being repaid in January 2009.

22nd December 2008 to 4th January 2009 – In the email of the 22nd December 2008 the Second Defendant requested additional funding of $6,000,000.00. The correspondence during this period consisted of both email and telephone conversations set out in the witness statement of Mr. Ramdeen.

5th January 2009 – The Second Defendant further requested of the Claimant via email an advance of $1,000,000.00 of the $6,000,000.00 previously requested to repay suppliers who were owed monies by the Defendants. An alternative request in that email by the Second Defendant was permission to pay the interest payment later than its scheduled due date to allow repayment of the Defendants' suppliers.

19th and 20th January 2009 – The Second Defendant informed Mr. Ramdeen via emails on the 19th and 20th January 2009 that she no longer required the additional financing from the Claimant but would instead source the financing from Scotiabank.

March 2009 – The Second Defendant emailed Mr. Ramdeen and informed him that the Defendants had acquired a new financier for project.

April 2009 – On the 3rd April 2009 Mr. Ramdeen emailed the Second Defendant informing her that the Claimant was unable to entertain the request for additional financing but would allow an extension of time to repay the loan which had matured and become due on the 2nd April 2009 to allow time for the Defendants to seek refinancing. The Second Defendant responded via email on the 6th April 2009 indicating, inter alia, that the Claimant should inform customers of their lending limitations. By letter dated the 23rd April 2009 sent from the Defendants to the Claimant, the Defendants made certain allegations of the Claimant including the allegation that the Claimant promised to finance the entire project in 2007.

May, June 2009 – By letter dated the 1st May 2009 Mr. Ramdeen responded to the Defendants' letter of the 23rd April 2009 refuting the Defendants' allegations of the promise to finance the entire project and requesting repayment of the sum loaned. The correspondence that follows through to June 2009 between the Claimant and the Defendants relate to repayment of the loan balance.

Evidence for the Claimant

24. Evidence for the Claimant was given by Leon Ramdeen, Vice-President of Operations and Technology of the Claimant.

25. The evidence of Mr. Ramdeen was that the Defendants approached the Claimant around June 2007 for a loan to refinance their indebtedness to Republic Bank Limited, which at the time financed the "Hevron Heights" project. Mr. Ramdeen testified that their

discussions related solely to the possibility of the Claimant providing a loan to enable the Defendants to pay off their indebtedness to Republic Bank and sever their relationship with Republic Bank as the Defendants were unsatisfied with the services offered by Republic Bank. At no time, he said, was the issue of the Claimant financing the project discussed. He explained that at the time of discussing the loan proposal, there was no discussion on additional financing since the Second Defendant had anticipated that the funds from the sales of the units in the project would be sufficient to permit completion of the project.

26. Mr. Ramdeen further testified that in July 2008 the Second Defendant requested the pay off balance as at 2nd October 2008, with a view to paying off the loan. It was then, he said, that the Second Defendant first enquired as to whether the Claimant would like to continue with the financing of the rest of the project. In November 2008, the Second Defendant communicated with Mr. Ramdeen that RBTT was interested in financing the project and that she was aiming to repay the monies loaned by the Claimant on the 2nd January 2009. A salient part of her email of the 17th November reads:

> *"If GAM would really like to be paid off I am aiming for the Jan 2nd date. I am at the point that I need to get additional financing for this period of the project so just want to make sure that you prefer to be paid off rather than keep the business"*

27. In response to the enquiry of the Second Defendant the Claimant informed the Defendants that it would prefer repayment in January 2009.

28. Between November and December 2008 and January to March 2009 the Second Defendant requested additional funding for the project in the sum of $6,000,000.00. Mr. Ramdeen testified that at no time throughout their communications during this period did the second Defendant suggest that the Claimant was under an obligation to provide the additional financing for the project nor did the Claimant do anything more than consider it.

29. On the 3rd April 2009, Mr. Ramdeen confirmed to the Second Defendant by email that the Claimant was unable to entertain her requests for additional financing. This was followed by a letter dated the 6th April 2009 in which Mr. Ramdeen asserted that the Claimant reminded the Defendants of the balance due and indicated the Claimant's willingness to allow an extension of time for the Defendants to repay. The Claimant evinced that it was only in the Second Defendant's letter dated the 23rd April 2009, that she alleged that the Defendants were led to believe that the Claimant would see the project to the end. Mr Ramdeen denied these allegations in his Witness Statement.

30. Mr. Ramdeen maintained that he explained to the Defendants that the Claimant was not a bank and that the Claimant therefore had different lending capabilities to that of a bank. Subsequent to the passing of the due date, with no repayment, the Defendants were reminded that interest would be accruing on the balance of the loan left unpaid at the default rate in accordance with the terms of the promissory notes. Consequently, the Defendants acceded to repayment by the 2nd July 2009. Notwithstanding a subsequent request for an extension to pay by the Defendants, Mr. Ramdeen testified that to date repayment was not forthcoming.

Evidence for the Defendants

31. Evidence for the Defendants was given by the Second Defendant, Leonora Deslauriers.

32. The Second Defendant asserted that around July 2007 and in several meetings thereafter the Claimant approached and aggressively pursued them to finance the "Hevron Heights" project. She alleged they were induced into moving their business from Republic Bank and giving it to the Claimant based on the Claimant's representations that the only difference between the Claimant and a bank was that with the Claimant repayment could not be made before one year. The Second Defendant testified that the Claimant did not indicate to the Defendants that there was any limitation on their lending capability.

33. The Second Defendant averred that from November 2008 when she and Mr. Ramdeen were discussing whether the Claimant was minded to provide further financing, Mr. Ramdeen led the Defendants to believe that further financing would be forthcoming from the Claimant. Further, the Second Defendant maintained that it was only in December 2008 that the Defendants first became aware of the issue regarding the Claimant's lending limitation.

34. The Defendants contended that the Claimant knew that the Defendants' ability to repay the loan was dependent upon the Claimant fulfilling its promise to provide financing for the entire project and accordingly the provision of such additional financing was a condition precedent to the enforcement of any agreement to repay the initial loan on the dates indicated in the promissory notes.

Analysis

Failure of Consideration

35. The Defendants submitted that there was a failure of consideration on the part of the Claimant as it knew or was negligent in not knowing that the promissory notes were just part of the larger loan facility needed to complete the "Hevron Heights" Towers Project.

36. In this regard, the evidence of Mr. Ramdeen was that the Defendants approached the Claimant around June 2007 for a loan to refinance their indebtedness to Republic Bank in relation to the "Hevron Heights" project. He asserted that the discussions with the Defendants related solely to the possibility of the Claimant providing a loan to enable the Defendants to pay off their indebtedness to Republic Bank and sever their relationship with the Bank.

37. Mr. Ramdeen maintained that at no time was the issue of the Claimant financing the project discussed. He affirmed that at the time of discussing the loan proposal, there was no discussion on additional financing. Mr. Ramdeen also stated that the Second Defendant had anticipated that the funds from the sales of the units in the project would be sufficient to permit completion of the project. This meant that the further financing of the project by the Claimant was not contemplated at the time the original loan was granted and as such the loan could not be predicated on a promise to further finance the project.

38. Further, financing may have been contemplated by the Defendants after the original disbursement, but this does not derogate from the fact that at the time of entering into the

loan agreement, the further financing was not part of the consideration and therefore the Defendants cannot pray its failure in aid. This also meant that Mr. Ramdeen would have taken the word of the Second Defendant that the project could be completed through sales of the units. The Court observed that this may not necessarily have been naivety on the part of Mr. Ramdeen as it would have meant either completion of individual units which were then fully paid for allowing for completion of other units; or the deposit on units being sufficient to complete the entire project which is hardly likely; or that funds were being sourced elsewhere including from personal sources.

39. The Court accepted the evidence of Mr. Ramdeen , that he had been told that the balance of the project was being funded otherwise through some other means and he accepted same as being the truth. The Court also found that it would be unjust, having found that the Defendants did make such representation to Mr. Ramdeen, for the Second Defendant to now benefit from her own erroneous representation to Mr. Ramdeen.

Professional Negligence

40. It was submitted by the Defendants that Mr. Ramdeen's failure to understand the process of financing a construction job and his negligence in entering into a construction project without the required reasonable degree of care and skill of a professional caused the "Hevron Heights" Project to fail.

41. The Defendants further submitted that Mr. Ramdeen and the Claimant pursued the Defendants knowing that full financing of the project would be needed. The Defendants

opined that it should have been obvious to the Claimant that additional funding would have been needed to finish the project after Republic Bank was paid off. As a result of this, the Defendants proposed that Mr. Ramdeen did not exercise due care and skill.

42. The Defendants advanced the argument that by the emails of the Second Defendant prior to the signing of the promissory notes (the email of 24th June 2007 was specifically referred to in the Defendants' closing submission at paragraph 42), it was clear that in the Defendants' minds it was their intention to have a long term relationship with the Claimant with respect to the "Hevron Heights" project and Mr. Ramdeen, acting in his professional capacity, should have realized that the Defendants would require additional financing.

43. Consequently, the Defendants felt that Mr. Ramdeen failed to act with due care and skill of an Assistant Vice President of Operations and Technology in dealing with the Defendants expectation of funding to complete the "Hevron Heights" project.

44. The Defendants propounded that Mr. Ramdeen, acting in his professional capacity should have questioned the Defendants on the method the Defendants intended to employ to complete the project. This, the Defendants proposed, is what any reasonable professional exercising due care and skill would have asked if the Claimant had really not intended to finance the entire project.

45. In ***Rana Ramlal v The South West Regional Health Authority et al H.C.of T&T No. 1291 of 1998 at p. 55,*** **Dean-Armorer J** set out what is widely accepted as the law on negligence as follows:

"It is well established that the elements of actionable negligence are:

(1) the existence of a duty of care

(2) a breach of that duty by the Defendant

(3) Damage caused by the Defendant's breach of duty.

46. The test of ordinary negligence however differs to that of professional negligence. The time-honoured statement of the test of professional negligence is to be found in ***Bolam v Friern Hospital Management Committee [1957] 2 All ER 118***. At page 121 **McNair J** set out:

> *"Before I turn to that, I must explain what in law we mean by "negligence". In the ordinary case which does not involve any special skill, negligence in law means this: Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. <u>But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the</u>*

standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

47. The "Bolam test" has been cited with approval in this jurisdiction: ***see Deonarine v Ramlal Civil Appeal No. 28 of 2003.***

48. In ***Lanphier v Phipos*** ***(1838) 173 E.R. 581*** **Tindal CJ** stated the position in this way:

> *"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill and you will say whether, in this case the injury was occasioned by the want of such skill in the defendant."*

49. Having regard to the law and the submissions made by the Defendants, the Court asked the question *"what then was the duty of the Claimant in light of the circumstances"*. In making this determination it was necessary to examine the circumstances as arose on the evidence.

50. Many of the assertions made by the Defendants were inconsistent, contradictory or otherwise not supported by the documentary evidence proffered by the Defendants. The Court deduced the following from the evidence:

i. There was nothing in the correspondence between June and September 2007 prior to the granting of the loan to suggest that the Defendants were induced or aggressively pursued by the Claimant for the financing of the project. At the least, it is clear that the Defendants were dissatisfied with Republic Bank at the time. There was also no reliable evidence that the Claimant promised to see the financing of the project to its end or agreed to fund the project in 2 stages.

ii. The loan offer of the 20th September 2007 makes no reference to additional funding or that the Defendants' obligation to repay the loan was contingent upon additional financing being provided by the Claimant.

iii. The e-mail correspondence from the Second Defendant on the 30th July 2008 and the 17th November 2008 are inconsistent with the Defendants' case that the Claimant was under an obligation to provide further financing or that this was agreed from the start. If this was the case, it is difficult to understand why the Defendants thought it necessary to enquire of the Claimant's willingness to so do.

iv. The Second Defendant appears to have raised no objection to the Claimant's responses of the 31st July 2008 and the 26th November 2008 on her enquiries of additional financing. Mr. Ramdeen's e-mail of the 26th November 2008 advises that the Claimant "would have to accept the repayment of the facility in January 2009."

v. Between December 2008 and March 2009 the Second Defendant indicated that they were pursuing additional financing with both RBTT and Scotiabank while at the same time also seeking same from the Claimant. The documentary evidence over this period does not establish that the Claimant promised further financing or held out to the Defendants that they would do so. What it does show is that the Claimant agreed to consider the Defendants' application for further financing on the 3rd April 2009.

51. Thus, in answer to the question *"what then was the duty of the Claimant in light of the circumstances"* the Court opined that while Mr. Ramdeen was under a duty to ensure that the terms of the promissory note and the Claimant's position on the repayment of the loan were made known to the Defendants at the time of negotiating the loan, this duty did not extend, in the circumstances of this case, to questioning the Defendants on the method they intended to employ to complete the project. There is insufficient evidence appearing directly or by way of inference to lead this court to conclude that Mr. Ramdeen was at the time acting in the capacity of a lender who was actively pursuing the business of financing the "Hevron Heights" project. Additionally, this is particularly so since the Court had accepted the evidence of Mr. Ramdeen that it was represented to him specifically that additional funding was being sourced elsewhere.

52. In the circumstances of this case, the Court found that there was therefore no breach of a duty of care on the part of the Claimant and in particular Mr. Ramdeen as the Defendants on the evidence appeared quite clearly not to be relying **initially** on the Claimant for further financing of the project.

53. The Defendants in their submissions cited the case of ***Eckersley v Binnie [1988] 18 Con LR 1 @ p 90*** and the Court finds favour in the following dicta on the duty of a professional man by **Bingham L.J**:

> *"He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinary competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet."*

54. In this regard, the Court accepted, on the evidence that the Claimant did not undertake to finance the project. Mr. Ramdeen undertook to provide a loan to be repaid in a certain manner. The Defendants' expectation of funding for the entire project was not a term of the arrangement nor did the Claimant undertake to provide financing for same. The Court concluded that having regard to the undertaking by the Claimant to provide $18,600,000.00, Mr. Ramdeen, and by extension, the Claimant did in fact exercise the requisite duty of care having regard to the undertaking, namely to provide a loan for a particular purpose, that is to repay Republic Bank Limited and nothing more.

Negligent Misrepresentation

55. The Defendants also claim negligent misrepresentation, that is, misrepresentation which was made carelessly, or without reasonable grounds for believing it to be true.

56. The crux of the submission by the Defendants was that Mr. Ramdeen knew of the need for additional finance to complete the project and held out to the Defendants that the Claimant would provide the additional finance. This was compounded by the Defendants' belief that Mr. Ramdeen was familiar with the construction industry and how projects such as these were financed.

57. The Defendants submitted that based on the statements made by Mr. Ramdeen and Mr. St Cyr (the Claimant's General Manager at the material time) they (the Defendants) were at ease with moving their business to the Claimant because they knew the Claimant were part of the Guardian Holdings Group, a large parent company with a huge asset base. The Defendants reasoned that as nothing was mentioned about the Claimant's lending limit, the Defendants viewed the Claimant and Guardian Holdings Group as equal in size and lending capacity.

58. The Defendants alleged that had they been told by the Claimant that it was not the Claimant's intention to see the project through to the end, they would not have agreed to do business with the Claimant.

59. In ***Hedley Byrne and Co Ltd v Heller and Partners Ltd [1963] 2 All ER 575*** the Court laid down the principle that a negligent misrepresentation, which causes financial loss

may give rise to an action in damages for negligence, despite the absence of any fiduciary or contractual relationship between the parties. At p 606 Lord Devlin explained:

> *"The House clearly considered the view of Derry v Peek, exemplified in Le Lievre v Gould, to be too narrow. It considered that outside contract (for contract was not pleaded in the case), there could be a special relationship between parties which imposed a duty to give careful advice and accurate information. The majority of their lordships did not extend the application of this principle beyond the breach of a fiduciary obligation, but none of them said anything at all to show that it was limited to fiduciary obligation. Your lordships can therefore proceed on the footing that there is such a general principle and that it is for you to say to what cases, beyond those of fiduciary obligation, it can properly be extended."*

60. In addition to this common law principle, ***Section 3*** of the ***Misrepresentation Act Chap 82:35*** confers liability for loss suffered arising out of misrepresentations whether made fraudulently or otherwise.

61. In ***Angela Alexander (Trading as Prestige of Maritime Centre) v Maritime Leasing Company Limited CV 2006-****02235* the relevant law was set by out by **Stollmeyer J** as follows:

> *"In brief, the law is clear and well settled. The representation must be a statement of a present or past fact as distinct from a statement of opinion, or of intention or of law (see e.g. Chitty on Contracts 25th Ed. Vol. 1 para. 394).*

> *"A mere statement of opinion, which proves to be unfounded, will not be treated as a misrepresentation, nor will a simple statement of intention which is not put into effect; for as a general rule these cannot be regarded as representations of fact, except insofar as they show that the opinion or intention is held by the person expressing it."*

There are, of course, exceptions to this general position. One is where the person expressing the opinion did not hold it. Another is where that person could not, as a reasonable person, having his knowledge of the facts, have held that opinion. It will be for the person to whom the representation was made to prove this, but it was not done by the Claimant here. Similarly, "mere puffs" or commendatory statements do not amount to representations, and an opinion or commendatory statement expressed in good faith does not amount to a representation.

> *"With regard to a statement of intention, this may be looked upon as a misrepresentation of existing fact, if, at the time it was made, there was not the will or the ability to put that intention into effect; for the promisor's state of mind was not what he led the other party to believe it to be."*

62. Further, if the representation is to have any effect in law it ought to have operated on the mind of the representee and the burden of proof lies squarely on the representee: ***Manas Ltd v Trinidad Broadcasting Ltd. H.C.A. 1104 of 2006.***

63. However, having applied much scrutiny to the evidence, in particular the communication between the witnesses over the period, this court found that there was indeed nothing said or done on the part of Mr. Ramdeen which amounted to a representation either expressed or implied that the Claimant would finance the project. For reasons set out hereafter, the court does not believe the Second Defendant when she testified in cross examination that Mr. Ramdeen made these representations off the record.

64. In analyzing the evidence, it appeared to this Court that in several of the email correspondence, the language employed by the Second Defendant lacked clarity and certainty. If the Second Defendant was genuinely of the impression that a representation was being made by the Claimant to her by the emails, that impression appeared to be of her own making to say the least having regard to what appeared to be her unconventional method of expressing herself in the relevant correspondence. As a matter of common usage of language, in no way could the several conversations passing between the parties have been interpreted so as to saddle the Claimant with a representation in relation to the financing of the balance of the project. It followed that there having been no representation there could have been no misrepresentation in relation to the financing of the project and the court so held. The Defendants therefore could rely neither on the common law doctrine nor the Misrepresentation Act as providing a successful defence in the circumstances.

65. The Defendants further submitted that Mr. Ramdeen should have told the Defendants that the Claimant had a lending limit of 25% of the Claimant's capital base per customer, that it could not finance the entire project and that the it had no intention to see the project

through. The Defendants also submitted that Mr. Ramdeen's conduct led the Defendants to believe that they would be receiving additional financing from the Claimant. It therefore appeared to the Court that the Defendants were relying on the purported failure of disclosure and the conduct of Mr. Ramdeen as capable of constituting misrepresentation.

66. The general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances. For the same reason it is not possible to set up an estoppel on the basis of an omission to disclose unless a duty to disclose can be established in the particular circumstances of the case: ***Chitty on Contracts 30th Edn Vol 1: General Principles, para 6-014***. The common law exceptions to this general rule are where the contract is within the class of contracts *uberrimae fidei*, where there is a fiduciary relationship between the parties, and where failure to disclose some fact distorts a positive representation.

67. The Court can find no evidence to support the contention of the Defendants of misleading conduct by Mr. Ramdeen. The lending limit of the Claimant, if there was one, as the evidence in this regard is unclear, was of no relevance to the loan granted to the Defendants. The lending limit would only have become relevant should the Claimant had agreed to finance the project or represented that it would have done so. Put another way, in the Court's view, the fact that the Claimant saw no need to discuss a lending limit with the Defendants may well be evidence from which the inference can be drawn that it was never represented by the Claimant that it would finance the project.

68. The Second Defendant by her testimony appeared to be saying that several of the overtures made to her were made, as it were, off the record, in that Mr. Ramdeen refused to put them in writing so as not to leave a trail of the conversations. This having been essentially said in cross examination, one would have expected the assertion to be borne out in the Witness Statement of the Second Defendant, the issue being crucial to the case for the Defendants according to the submissions presented. But it was not. The only reference to this, in a rather obscure and general manner, is to be found at paragraph 26 of the Witness Statement, which reads:

> *"For the next three months he led us to believe that further financing would be coming".*

The basis of this assertion was not stated in the Witness Statement and the answer in cross-examination appears to this Court to be an afterthought.

69. Therefore, the non disclosure of the lending limit in this case did not amount to misconduct by Mr. Ramdeen. Although a fiduciary relationship may have existed between the parties, Mr. Ramdeen's non disclosure did not distort a positive representation, the Court having already found that there was no representation to finance the project.

70. In summary therefore the Court found that on the evidence there was no negligence, negligent or any other type of misrepresentation, or failure of consideration as pleaded and submitted by the Defendants.

71. The Court wishes to reiterate that in this regard it found that the purpose of the loan was simply to liquidate a debt owing at the time to Republic Bank Limited.

Promissory Notes

72. The Court found that in any event, should the Court have been incorrect in its assessment of the evidence and the relevant law supra, in this case, the arguments advanced did not provide a defence in law, to a claim on promissory notes which are treated as cash and under which the obligation to pay is independent of any underlying transaction and that such obligation is enforceable free of set-offs and unliquidated cross-claims. See for the general rule, ***Bullen and Leake Precedents of Pleadings 17th ed at page 220, para 15-01***.

73. The defences available on a claim on a bill of exchange or promissory note are limited. These have been specified as traditionally being *"illegality, fraud, duress, failure or absence of consideration, satisfaction of the bill or note, material alteration or non est factum"*. In such an action, save in exceptional circumstances or upon strong grounds, a Defendant will not be allowed to set up a set off or counterclaim for damages for breach of some other contract or the commission of a tort and the Claimant is entitled to judgment for the amount of its claim without a stay of execution. This obtains whether the counterclaim is connected with or arises out of, or is independent of the contract in respect of which the promissory note is given – See **1995 Supreme Court Practice** at page 142.

74. In ***Knit Ltd v Kammgarn Spinnerei GmbH*** ***[1977] 1 WLR 713***, a case cited by the Defendants' previous attorneys in submissions on this issue, Lord Russell of Kilowen stated at page 732:

> *"It is in my opinion well established that* ***a claim for unliquidated damages under a contract of sale is no defence to a claim under a bill of exchange accepted by the purchaser; nor is it available as set off or counterclaim.*** *This is a deep rooted concept of English commercial law. A vendor and purchaser who agree upon payment by acceptance of bills of exchange do so not simply upon the basis that credit is given to the purchaser so that the vendor must in due course sue for the price under the contract of sale.* ***The bill is itself a contract separate from the contract of sale. Its purpose is not merely to serve as a negotiable instrument, it is also to avoid postponement of the purchaser's liability to the vendor himself, postponement grounded upon some allegation of failure in some respect by the vendor under the underlying contract,*** *unless it be total or quantified partial failure of consideration." (Emphasis mine)*

75. However, in ***Byles on Bills of Exchange and Cheques 28th ed at page 415*** it is stated:

> *"The principle described above only precludes reliance by way of the defence of set-off upon an unliquidated cross claim. The (arguable) existence of a defence to liability is an answer to an application for summary judgment. As between immediate parties at least there is no reason why an innocent mis-representation*

inducing the bill, or entitling the party liable to rescind the contract in consideration of which it was drawn should not amount to a defence."

76. Two points are to be noted. Firstly, there is no allegation of innocent misrepresentation. Secondly, the Defendants have admitted liability for the sums claimed under the promissory notes but not as of the dates indicated on them. The admission of liability is made subject to the defence of set off as pleaded which, in the view of the Court, plainly fails to make out a case that the Defendants were either induced into making the promissory notes by way of misrepresentation or that there was negligence on the part of the Claimant. Therefore, even if misrepresentation could be, **in an appropriate case**, recognised as a valid defence to a claim on a promissory note, the instant case is not such a case.

77. The Defendants cannot avoid liability on the basis of the set off and counterclaim pleaded. There are no exceptional circumstances or good reason why judgment should be withheld in this action, a claim based purely on valid promissory notes that have not been honoured.

Dispensation

78. The Court therefore made the following order on the 25th October 2011:

Judgment for the Claimant against both Defendants as follows-

1. *In the sum of Nineteen Million, Eight Hundred and Seventeen Thousand, Four Hundred and Seventy One Dollars and Seventy Four cents* ***($19, 817,471.74)*** *being the sum due and owing as at November 19th 2009 under a promissory note dated the 2nd day of October 2007.*

2. *Interest on the sum of $17, 827,418.53 at the rate of* ***13%*** *per annum on a 365 day basis from the 20th November 2009 until payment.*

3. *In the sum of* ***($858,823.95)*** *being the sum due and owing as at November 19th 2009 under a promissory note dated the 3rd day of October 2007.*

4. *Interest on the sum of $772,581.47 at the rate of* ***13%*** *per annum on a 365 day basis from the 20th November 2009 until payment.*

5. *The Counterclaim is dismissed.*

6. *Both Defendants are to pay the prescribed costs of the Claimant in the sum of $337,381.48 on the basis of the value of the claim being $20,676,295.69.*

Dated this 19th January 2012

Ricky Rahim

Judge