COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2011/CLE/gen/01769

IN THE MATTER of the Property comprised in an Indenture of Mortgage dated the 5th day of March, A.D. 2004 and made between April R. Penn as Borrower and First Caribbean International Bank (Bahamas) Limited as Lender.

AND IN THE MATTER of Order 77 of the Rules of the Supreme Court, 1978

BETWEEN

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Plaintiff

-AND-

APRIL RAQUEL PENN

Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Raynard Rigby KC with him Ms. Asha Lewis of Baycourt Chambers for the Plaintiff
Mr. Wayne Munroe KC (initially) with him Mr. Sidney Cambridge with Ms, Krystian Butler of Munroe & Associates for the Defendant

Hearing Dates: 25, 26 May 2021, 14 October 2021, 22 November 2021, 17 February 2022, 11 May 2022

Breach of contract – Lender/Borrower relationship –Loan – Whether the Firm was selected by the Defendant or was acting for the Plaintiff or the Defendant

The Plaintiff, a financial institution, granted a Loan to the Defendant in the amount of $150,850 together with interest at a rate of 9.5% per annum to assist her to purchase a lot of land and to construct a duplex thereon. The Defendant contracted to pay $1,317.97 monthly for 300 months until the loan was fully liquidated. She failed to make the agreed payments and fell into arrears whereupon an outstanding balance of $187,594.26 was

due and owing. That sum has increased to $304,760.70 as of 29 January 2020 and interest continues to accrue. The Plaintiff demanded the outstanding balance but the Defendant has failed and/or refused to satisfy or settle the outstanding amount.

The Defendant filed a Defence and Counterclaim alleging that she is not indebted to the Plaintiff. She admitted that she signed the Loan but alleged that the Deed of Mortgage was void and/or voidable because of: i) total failure of consideration; (ii) mistake and/or frustration. Additionally, she alleged that, if any sum was outstanding (*but not admitting liability for any outstanding sum*), the same was due to the Plaintiff's negligence.

The Defendant alleged that, under the commitment letter, it was the duty of the Plaintiff to render good and marketable title and that the law firm that was involved in providing a Title Opinion and drafting the Mortgage Deed represented the Plaintiff and not her. Therefore, the Plaintiff should have sued the law firm and not her.

HELD: Judgment for the Plaintiff in the sum of of $321,092.62 as of 20 May 2021 with interest accruing at the contractual rate of 9.5% per annum to today's date (31 January 2023) and thereafter, at the statutory rate of 6.25% to the date of payment. The Counterclaim is dismissed. Each party will pay their own costs.

1. The Defendant breached the terms of the commitment letter and the mortgage facility by failing to make payments and failing to keep moneys in her account to service the Loan.

2. The commitment letter (with the covenants) must be construed to align with commonsense and standard banking business and practices: **Marley v Rawlings and another** [2014] 1 All ER 807; **Rainy Sky SA & Ors. v Kookmin Bank** [2012] 1 All ER 1137 and **Costain Ltd v Tarmac Holdings Ltd** [2017] EWHC 319 (TCC)) relied upon.

3. The commonsense approach is that the Firm was selected and was paid for the purpose of investigating title to the property and therefore, the law firm alone owed a duty to the Defendant in respect of the same. Further, as the Conveyance is in the name of the Defendant, she had the duty to ensure that she received what she bargained for in relation to the property.

4. The evidence before the Court does not suggest or intimate that the Plaintiff was a party to the identification of the property or that it played any role in the title investigation of it to serve as collateral. What is clear is that the Defendant had already selected the property by the time of the Loan's approval as she signed the conveyance in February 2004, one month prior to the execution of the commitment letter.

5. A reasonable inference to be drawn from the facts of this case is that the Defendant selected the legal firm to represent her a month before she approached the Plaintiff for financing.

6. On the clear and unequivocal provisions of the commitment letter, it is correct for this Court to find that the intentions of both parties were limited to the Plaintiff contracting to advance the amount borrowed and the Defendant contracting to pay the Loan. The duty to investigate title to the property to serve as collateral resides with the Defendant and her lawyers.

7. There was no frustration of the facility agreement and the doctrine of frustration has no applicability to the present case. In addition, mistake is not applicable to the facts of this case. Nor are the principles of estoppel.

JUDGMENT

Charles Snr. J:
Introduction

[1] This is a claim by First Caribbean International Bank (Bahamas) Limited ("the Plaintiff" or "the Bank") for the sum of $187,594.26 representing outstanding principal as well as interest and costs due under a mortgage facility and a counterclaim by the Defendant ("Ms. Penn") for damages arising from a claim of frustration, misrepresentation and defect of title.

The Pleadings

[2] In its Writ of Summons indorsed with a Statement of Claim filed on 28 December 2011, the Plaintiff, a financial institution, alleged that, on 4 March 2004, it granted a Demand Loan ("the Loan") in the amount of $150,850.00 together with interest at a rate of 9.5% per annum to Ms. Penn who was a customer of the Bank. The Loan was secured by a Deed of Mortgage dated 5 March 2004 in the Bank's favour. The Deed of Mortgage between the parties was provided for Lot No. 20 in Bricknoch Subdivision in Carmichael Road in the Western District in the Island of New Providence (interchangeably "the Lot" or "the Property").

[3] The Bank alleged that it was an express term of the Loan that Ms. Penn would pay a monthly sum of $1,317.97 until the Loan was fully liquidated.

[4] The Bank next alleged that Ms. Penn failed to make the agreed payments and has fallen into arrears whereupon an outstanding balance of $187,594.26 is due and owing. That sum has increased to $304,760.70 as of 29 January 2020, being the principal sum of $164,718.24 and interest of $140,042.46 and interest continues to accrue at a daily rate of $27.23.

[5] In paragraph 6 of the Statement of Claim, the Bank further alleged that it notified Ms. Penn of her breach by letter dated 4 March 2009 and demanded that she pay all sums due and owing under the Loan but Ms. Penn has failed and/or refused to pay the said sums or any part of it to the Bank and remains in breach of the terms of the Loan.

[6] In paragraph 7, the Bank averred that the Deed of Mortgage dated 5 March 2004 between the parties provided for Ms. Penn to secure a Mortgage over the Lot to the favour of the Bank and thereby the aforesaid Deed served as collateral for the Loan. However, since the grant of the Mortgage, the Property was condemned and is useless for the purposes intended.

[7] The Bank asserted that it has suffered loss and damage and claimed the outstanding sums.

[8] Ms. Penn filed a Defence and Counterclaim on 21 March 2012. Since then, she had amended her Defence and Counterclaim on at least five occasions; on 31 July 2013, 30 September 2013, 30 October 2013, 19 July 2016 and the last titled “Re-Re Amended Defence and Counterclaim Defence” was filed on 20 January 2020 with leave of the Court. On 24 February 2020, the Bank filed an Amended Reply & Defence to Counterclaim.

[9] After seeking leave of the Court to file the Re-Re-Amended Defence and Counterclaim Defence (filed by her present attorney and which alleged, among other things, fraud and *nudum pactum*), Ms. Penn, resiled from that Defence, and in her Closing Submissions, she relied on her Amended Defence and Counterclaim

which was filed by one of her previous attorneys on 31 July 2013. I shall therefore consider Ms. Penn's case based on that Defence.

[10] The gist of her Amended Defence and Counterclaim filed on 31 July 2013 is that she is not indebted to the Bank. She admitted that she signed the Loan but alleged that the Deed of Mortgage was void and/or voidable due to:

i) Total failure of consideration.
ii) Mistake and/ or
iii) Frustration.

[11] Additionally, Ms. Penn alleged that, if any sum was outstanding (*but not admitting liability for any outstanding sum*), the same was due to the Bank's negligence.

[12] In paragraph 5 of the Amended Defence and Counterclaim, Ms. Penn alleged that, while it was an express term of the Loan that the monthly premium would be paid regularly until the Loan is liquidated, the Bank or its servants and/or agents, in unlawfully neglecting to withdraw payments from her salary lodged at its Bank, has caused the said payments to fall into arrears thereby causing the said agreement to become frustrated.

[13] In paragraph 6, Ms. Penn alleged that the Bank never served a Demand or Notice on her. Further, that the Loan and Deed of Mortgage are void and/or voidable due to the total failure of consideration, mistake and/or frustration on the subject matter of the contract.

[14] Succinctly put, Ms. Penn alleged that any loss or damage suffered by the Bank was not due to her fault, negligence or breach.

[15] By Counterclaim, she asserted that, at all material times, she was a local investor wanting to build a duplex for her use as her residence with a second apartment for rental income. The project was funded by a Mortgage/Construction loan from the Bank.

[16] Ms. Penn further asserted that the Bank was negligent in releasing funds without checking to ensure that the building was being constructed properly or without checking to ensure that the land was properly suited for that purpose.

[17] In paragraph 22, she alleged that she ceased to make payments on the Loan upon becoming aware that the Property was found unsuitable and eventually condemned by the authorities.

[18] Ms. Penn also alleged that the building works were substandard and the partially completed structure collapsed into a sink hole caused by covered debris beneath the foundation.

[19] Also, it was later discovered that the Property (the security) had been conveyed previously two times to two separate parties prior to it being sold by the same vendor to her. Title to the Property was not good and marketable. Neither party could ever have good title.

[20] Ms. Penn averred that the Bank had a list of approved attorneys that she was invited to choose from for the purpose of rendering a Title Opinion to the Bank as a prerequisite to the Loan. The Attorneys for the Bank had certified that title was good and marketable for the purpose of the Mortgage to her.

[21] Consequently:

i) The Mortgage failed to be proper security;

ii) The Bank is in breach of the contract to her by way of the commitment letter from the Bank to her, wherein her obligations as Borrower/ Mortgagor were premised firstly on her obtaining good and marketable title;

iii) Relying on the Title Opinion provided to them, the Bank disbursed the loan in various stages. Firstly, to the Vendor for the balance of the property purchase price and then to her contractors at various

stages of completion of building works as certified by the Bank's evaluators;

iv) Ms. Penn made interest only payments during the construction phases pursuant to the commitment letter/ agreement;

v) Within months of the Loan, it was discovered that the Property was unsuitable, and that the land had to be "back-filled and packed" to support the foundation;

vi) Further, and after the commencement of this action, in 2016 it was discovered that the Property had been conveyed two times previously. These earlier conveyances were on record and the attorneys for the Bank ought to have seen them and should have advised that there was no title to convey to her; and

vii) Further, she counterclaimed for the return of personal moneys she injected into the project (above and beyond the loan) in the amount of $30,140.02 with interest pursuant to the Civil Procedure (Award of Interest) Act, 1992; and for damages to be assessed for loss of rental income, peaceful enjoyment, costs and further or other relief.

[22] By Reply and Defence to Counterclaim filed on 12 April 2012 and Amended Reply and Defence to Counterclaim filed on 24 February 2020, the Bank denied, at paragraph 3, that it refused to accept or to apply payments to Ms. Penn's Loan. The Bank also denied that the agreement was fraudulent as alleged. The Bank next denied that it was negligent and alleged that it owed no duty, whether contractual or otherwise, to determine if there were defects to the Property. The Bank averred that at all material times it acted on the Title Opinion of McKinney, Bancroft & Hughes ("the Firm") which led it to disburse the Loan proceeds to Ms. Penn and accept the Property as security thereto. The Bank also alleged that Ms. Penn selected the Firm arising from her employment and it would not have proceeded to issue the sums under the facility arrangement had it not been for its receipt of a Title Opinion from that Firm indicating that title to the Property was good and marketable. The Bank also contended that once Ms. Penn identified an

attorney to act for her, the Bank issued instructions to that attorney to investigate title and to prepare its standard loan documents.

[23] In a nutshell, the Bank put Ms. Penn to prove the allegations in her Counterclaim.

Agreed facts

[24] The following facts have been agreed between the parties in an Agreed Statement of Facts and Issues filed on 21 February 2020.

[25] Ms. Penn was a customer of the Bank.

[26] On or about 4 March 2004, the Bank granted a Demand Loan ("the Loan") to Ms. Penn in the amount of $150,850.00 with an interest of 9.5% per annum which was secured by a Deed of Mortgage on 5 March 2004. The Deed of Mortgage between the parties was provided for the Lot.

[27] The purpose of the Loan to Ms. Penn was to assist her with the purchase of the Lot and the construction of a duplex on it.

[28] It was an express term of the Loan that Ms. Penn would pay to the Bank the monthly sum of $1,317.97 until the Loan was fully liquidated. Ms. Penn fell into arrears on or about 6 June 2007. Her last payment in the sum of $217.25 was made on 9 May 2007.

[29] The Commitment Letter dated 4 March 2004 and signed by the parties ("the commitment letter") specifically provided for 300 regular monthly payments of $1,317.97 inclusive of interest.

[30] By letter dated 4 March 2009, the Bank notified Ms. Penn of her breach of the terms of the Loan and demanded payment of the outstanding balance. Ms. Penn continues to be in breach of the Loan and has failed and/or refused to satisfy or settle the outstanding amount.

[31] Since the commencement of this action, Ms. Penn has tendered no payments towards the reduction of the outstanding debt and therefore, interest has continued to accrue as a result thereof. Ms. Penn is indebted to the Bank in the total sum of $304,760.70 as of 29 January 2020, being the principal sum of $164,718.24 and interest of $140,042.46 and interest continues to accrue at a daily rate of $27.23.

The evidence

[32] The Bank called two witnesses, Mr. Garth McDonald and Ms. Cherise Archer. Mr. McDonald filed a Witness Statement on 4 April 2014, a Supplemental Witness Statement on 3 December 2015 and a Second Supplemental Witness Statement on 24 February 2020. They stood as his evidence in chief.

[33] Ms. Archer filed a Witness Statement on 4 February 2022 which stood as her evidence in chief.

[34] Ms. Penn's evidence in chief is contained in her Witness Statement filed on 30 October 2013 and a Supplemental Witness Statement filed on 18 July 2016. Her witness, Mr. Rodrick Wood, deemed an expert in Surveying, filed his Witness Statement along with a Land Survey Report on 18 July 2016.

[35] All witnesses were extensively cross-examined. I had the opportunity to see, hear and observe them as they testified. On a balance of probabilities, I prefer the evidence of the witnesses for the Bank. I found both Mr. McDonald and Ms. Archer to be honest witnesses and I accepted their testimony that Ms. Penn and not the Bank was the one that chose the Firm. I did not believe Ms. Penn that she was not given a List of Attorneys to choose from and the Bank chose the Firm. She insisted that the Firm was the attorneys for the Bank so if that is true, who then was her attorney? She was the purchaser of real property and it is standard practice that the Bank has a List of Attorneys for prospective purchasers to choose from. She chose the Firm because she was an employee with them and she stood to benefit by not paying legal fees. On top of that, even stamp and recording fees were not paid in one go but deducted from her salary. If I understood her well, at one point,

she stated that the Firm acted for both parties. If that is the case, then the Firm also owes her a duty in the preparation of the Title Opinion and the Mortgage Deed.

The issues

[36] The parties have agreed that the following issues are to be determined by the Court namely:

1. Whether Ms. Penn breached the terms of the commitment letter and mortgage facility by failing to make payments to the Bank in accordance with the terms of the facility;

2. Whether Ms. Penn breached the terms of the commitment letter and mortgage facility by failing to keep sums on her savings account for the standing order to be processed thereby falling into default;

3. Whether the construction and the degree of the obligation created by the covenants under the commitment letter gave rise to a duty on behalf of the Bank to render good and marketable title;

4. Whether the dispute over the title being good and marketable gave unto Ms. Penn a right to breach the facility with the Bank and;

5. Whether the dispute over the suitability of the land gave unto Ms. Penn a right to breach the facility with the Bank.

Issues 1 and 2: Whether Ms. Penn breached the terms of the commitment letter and mortgage facility by failing to make payments and failing to keep moneys in her account to service the Loan

[37] Issue 1 and 2 are interwoven so I shall consider them together. The commitment letter was signed by both parties on 4 March 2004 and it expressly provided under Scheduled Payments that Ms. Penn will make 300 regular monthly payments of $1,317.97 inclusive of interest. It was an express term of the Loan that Ms. Penn would pay to the Bank the monthly sum of $1,317.97 until the Loan was fully

liquidated. Ms. Penn fell into arrears on or about 6 June 2007. Her last payment in the sum of $217.25 was made on 9 May 2007.

[38] By letter dated 4 March 2009, the Bank notified Ms. Penn of her breach of the terms of the Loan and demanded payment of the outstanding balance. She continues to be in breach of the Loan and has failed and/or refused to satisfy or settle the outstanding amount.

[39] Ms. Penn's evidence is clear that she ceased payments under the Loan and the Loan fell into arrears. During cross-examination, she stated that" *monies were coming out of my account where my salaries went and the payments initially ceased when I was no longer employed…I didn't have a job*". When she got a job at Plus Center at the Town Center Mall, she continued payments "*until I wasn't able to anymore….That was some time in 2007 when I spoke with the bank and the manager at the time had agreed that they would try to sell the property and that's where we was.*" She could not recall whether she resumed payment after 2007 but this is not material as the parties agreed that her last payment in the sum of $217.25 was made on 9 May 2007.

[40] In brief, Ms. Penn breached the terms of the commitment letter and the mortgage facility by failing to make payments and failing to keep moneys in the account to service the Loan.

Issue 3: Whether the construction and the degree of the obligation created by the covenants in the commitment letter gave rise to a duty on behalf of the Bank to render good and marketable title

[41] Ms. Penn contended that the covenants in the commitment letter gives rise to a duty on behalf of the Bank to render good and marketable title. On the other hand, the Bank argued that the covenants in the commitment letter are general and unambiguous terms governing the Loan.

[42] At page 2 of the commitment letter signed by both parties are the covenants. Quoting selectively, it states:

"Covenants:

The mortgage is of course, to be in the name of April Penn.

Title and all matters pertaining to the mortgage loan, will be in a form satisfactory to the *Bank's Attorneys-at-Law*.

……
The legal work for the preparation and completion of the mortgage will be done *on the Bank's behalf by its Attorneys-at-Law*." [Emphasis added]

[43] Mr. Cambridge submitted that these covenants were prerequisite fundamental contract obligations against the Bank that had to be performed and that had to remain in effect before the Borrower could become eligible to issue the Mortgage to the Bank, or for the Mortgage to remain good loan security.

[44] Mr. Cambridge further submitted that the Bank breached these fundamental contract terms from the inception of the Mortgage relationship and ideally, it should be suing their Attorney, the Firm, for issuing an incorrect Title Opinion that it relied upon in granting the Loan and accepting the Mortgage as the Loan security. According to him, Ms. Penn is the resultant victim of damage and loss resulting from contractual events to which she was not privy.

[45] Mr. Cambridge referred to Clause 3 of the Mortgage Deed which specifically provides:

"Charge

1.1 The Mortgagor as Beneficial Owner …..hereby grants and conveys and assigns unto the Bank ALL THAT the Mortgaged Premises as a continuing security to the Bank with the payment of all money covenanted to be paid by the Mortgagor under this Indenture TO HOLD the same unto and to the use of the Bank in fee simple and absolutely subject to the Incumbrances and to the proviso for redemption hereinafter contained." [Emphasis added]

[46] Also, Clause 12 provides:

"Discharge of the charge

> **If the Mortgagor shall pay to the bank all the Secured Sums the Bank at any time thereafter at the request and cost of the Mortgagor will reconvey or reassign the Mortgaged Premises to the Mortgagor or as the Mortgagor shall direct."**

[47] Mr. Cambridge argued that these covenants could not possibly crystallise because of the lack of 'good title' from the inception. According to him, firstly, Ms. Penn had no title to secure the Bank with and secondly, the Bank could not reconvey/or release title back to Ms. Penn once the loan was satisfied. Again, Ms. Penn had not or could not receive any benefit from these arrangements for reasons aforementioned.

[48] Mr. Cambridge relied on the case of **Harold Elliott and H. Elliott Builders) Limited v Pierson** [1948] 1 All ER 939; [1948] Ch. 452 at p. 455 where Harman JA stated:

> **"….it is said that the contract cannot be enforced because it was made by Mr Elliott and because he had nothing himself but a leasehold interest and no legal right as against the company, though it is conceded that he in fact had the power to oblige it to join him in the necessary assurance. In my judgment, this defence is misconceived. At law A may contract to sell to B any defined subject-matter and can enforce the contract if by the time when he is obliged to do so he has obtained a sufficient interest or can compel other interested parties to concur in the sale. It matters not at all that at the date of the contract A had no interest if he obtains it in time to fulfil the bargain. To this doctrine equity made a qualification in cases of specific performance of contracts for the sale of land. The exception arises, I think, out of the peculiar difficulty of making a title to land in England which is also recognised in the rule as to damages on failure to make a good title (known as the rule in *Bain v Fothergill)*. The rule is that if after contract the purchaser discovers that the vendor has no sufficient title he need not wait to see if he can obtain one before the completion date but may repudiate**…."

[49] In **Harold Elliott**, it was held that an informal contract in writing for the sale of a business with the assets and freehold could be enforced by specific performance. In my opinion, this case is unhelpful considering the facts of the present case.

[50] Mr. Cambridge also referred to the Title Opinion by the Firm to the Bank which he stated, is specifically addressed to the Loan Officer at The Bank and it is in

response to the Bank's request to the Firm for a Title Opinion to be prepared to be relied on exclusively by the Bank. According to him, Ms. Penn was never privy to these contractual arrangements. Also, at page 3, the letter further provides:

> **"Subject to the above observations, we are of the opinion that the Borrower has a good and marketable title to the above mentioned properties."**

[51] Mr. Cambridge asserted that the Title Opinion was grossly incorrect as the defects were discovered after the funds were disbursed. He argued that the defects were of a nature whereby they ought to have been detected by the Firm beforehand. Consequently, all contractual agreements between the Bank and Ms. Penn became fully frustrated and Ms. Penn had a duty to mitigate her losses by ceasing any further personal investments into construction and to suspend paying the Loan.

[52] In forceful but unattractive submissions by Mr. Cambridge, he argued that the covenants in the commitment letter imposed a duty on the Bank to select and appoint an attorney or that the attorney appointed was the Bank's attorney.

[53] As Mr. Rigby KC, who represented the Bank, correctly submitted, this is contrary to the evidence which was adduced at the trial.

[54] On this issue, this is how the cross examination went: see Transcript of Proceedings dated 17 February 2022 at p. 43, line 32 to p.47, line 9:

> "Q: Okay, now, you say at paragraph 6 of your witness statement that the Bank chose Campbell Cleare. You see that.
>
> A: Yes, sir.
>
> Q: Is that correct?
>
> A: Yes. Sir.
>
> Q: Did you have any involvement in choosing Mr. Cleare as your attorney?
>
> A: Do you want me to speak to how it came about?

Q: Did you have any involvement in the choice of Mr. Cleare as your attorney?

A: Yes, He was recommended and I accepted. He was recommended by the bank and I accept.

Q: When you said he was recommended, are you saying that he was on a list given to you by the bank?

A: I never receive a list from the bank.

Q: Did you speak to Mr. Cleare prior to signing the commitment letter?

A: Yes, because he would have already prepared the conveyance for me to sign. That was signed in February, the month prior to me signing the commitment letter.

……

Q: So you engaged Mr. Cleare to prepare the conveyance?

A: I'm assuming the bank must have given him instructions to.

……

Q: Now, you worked with him at the time at Mckinney, correct?

A: Yes, I worked in the Accounts Department.

……..

Q: Did he offer you a special rate because you were an employee at the firm?

A: ……

Q: Okay. …Did you have any discussions with Mr. Cleare about the legal fees?

A: No, sir.

Q: At no time.

A: About the legal fees? No, sir,

…….

Q: So McKinney, Bancroft & Hughes told you, Mr. Cleare, in particular, that you would only have to pay for the stamping and the recording fees on the transaction.

A: Well, actually what happened is that I dealt with his secretary at the time and they would have paid for it and then funds would come from my salary.

Q: I see. So they advanced the stamp duty for you and they –

A: Yes, sir.

…….

Q: Ma'am, you indicated earlier that McKinney would pay the stamp duty and they would take the funds from your salary

A: Yes, sir.." [Emphasis added]

[55] The evidence, as I found it, demonstrates that Ms. Penn was employed at the Firm at the time of the Loan and she selected the Firm to prepare the title deeds and to investigate title. In her evidence, Ms. Penn stated that she did not have to pay legal fees incurred because she was a staff at the Firm. In addition, she did not have to pay stamp fees and recording fees at the inception as the Firm paid it and it was subsequently deducted from her salary.

[56] Although Ms. Penn tried to suggest that she did not select the Firm to be her attorney, I find that she did. There were obvious perquisites to be derived by selecting the Firm namely (i) she did not have to pay legal fees and (ii) she did not advance the stamping and recording fees as it was taken out of her monthly salary.

[57] This finding is bolstered in the Second Supplemental Witness Statement of Mr. McDonald where he stated that Ms. Penn selected the Firm and the Bank sent the instructions to the Firm in a letter dated 4 March 2004 signed by its Personal Banking Representative, Gia Williams, to the attention of Mr. H. Campbell Cleare III of the Firm. The letter states in part:

> **"No doubt you will provide us with the Certificate of Title in due course. Further to this, we also request that you will provide us with copies of the mortgage documents for our files once they have been executed by April Penn, until the originals are returned from the Registry for recording and stamping."**[Emphasis added]

[58] I agree with Mr. Rigby KC that there are no words in the letter to reasonably infer that the Bank agreed to assume any responsibility or duty to the preparation of the title deeds or the investigation of title.

[59] Mr. McDonald, who withstood the rigours of cross examination, also confirmed the Bank's practice in the selection of the attorney. He stated that the *"attorney acts for and on behalf of the customer, primarily to ensure that the customer in any real estate transaction can ensure that the client is protected ..."*

[60] In her evidence in chief, Ms. Archer also confirmed that Ms. Penn selected the Firm to prepare the legal work. During cross examination, Ms. Archer reiterated that Ms. Penn selected the attorney from the Bank's approved listing of attorneys.

[61] I agree with Mr. Rigby KC that the commitment letter (with the covenants) must be construed to align with commonsense and standard banking business and practices. In this regard, he cited the cases of **Marley v Rawlings and another** [2014] 1 All ER 807; **Rainy Sky SA & Ors v Kookmin Bank** [2012] 1 All ER 1137 and **Costain Ltd v Tarmac Holdings Ltd** [2017] EWHC 319 (TCC)).

[62] In **Costain,** Coulson J expressed the importance of applying common sense to agreements:

> **[28] The modern starting point is the judgment of Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, (2011) 138 ConLR 1, [2011] 1 WLR 2900 (at [21]):**
>
> **'The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.'**

> **[29] More recently, in *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 Lord Neuberger summarised the relevant principles in clear terms:**
>
> **'[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 4 All ER 677, [2009] AC 1101 (at [14]). And it does so by focusing on the meaning of the relevant words, in this case cl 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* [1971] 3 All ER 237 at 240–241, [1971] 1 WLR 1381 at 1384–1385 and *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570 at 573–575, [1976] 1 WLR 989 at 995–997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, [2002] 1 AC 251 (at [8]), per Lord Bingham of Cornhill, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras [21]–[30] …"**

[63] Mr. Rigby KC contended that the terms of the commitment letter are clear and that there are no terms in it and the Mortgage which can lead to a conclusion that the Bank agreed to undertake a review of the title to the Property or that the Bank had a duty to ensure that Ms. Penn was purchasing clear title to the Property.

[64] According to Mr. Rigby KC, the commonsense approach is that the Firm was selected and paid for the purpose of investigating title to the Property and therefore, the Firm alone owed a duty to Ms. Penn in respect of the same. Further, as the Conveyance is in the name of Ms. Penn, she had the duty to ensure that she received what she bargained for in relation to the Property.

[65] The commitment letter is clear. Reading the covenants (inelegantly drafted) in the commitment letter in conjunction with the letter that Gia Williams wrote to the Firm on the same day, the Bank was granting a Loan of $150,850.00 to Ms. Penn to

assist her with the purchase of the Lot and construction of a duplex. Ms. Penn was required to pay $1,317.97 each month for 300 months. No larger duty was superimposed in the commitment letter as none was agreed between the parties.

[66] The evidence before the Court does not suggest or intimate that the Bank was a party to the identification of the Property or that it played any role in the title investigation of it to serve as collateral. What is clear is that Ms. Penn had already selected the Lot by the time of the approval of the Loan as she signed the conveyance in February 2004, one month prior to the execution of the commitment letter.

[67] It is also true that Campbell Cleare was the attorney who prepared the conveyance in February 2004 and therefore, a reasonable inference to be drawn is that Ms. Penn **selected her attorney long before she approached the Bank for financing**.

[68] The Bank relied on the case of **FCIB v Ambrose Gibson** 2009/CLE/gen/01892. Sir Michael Barnett, then Chief Justice held that the inelegant drafting of the commitment letter was not a bar to the Bank enforcing its rights to demand repayment of the debt. At paras. 14-19, Sir Michael stated:

> **"14. With respect, in my judgment the construction of the customer is commercially absurd. As I pointed out during the course of the hearing, if the customer's argument was correct then a customer need only draw 99% of the loan and claim that he was not obliged to repay it because a full drawdown was not made. It also contradicts the covenant to repay the loan over 24 years.**
>
> **15. In Mannai Investment Co. Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 Lord Steyn said:**
>
> > **"*In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them and the standard of the reasonable commercial person***

> ***is hostile to technical interpretations and undue emphasis on niceties of language*".**
>
> **16. In construing the agreement between the Bank and the customer, the Court is obliged to look at both the commitment letter and the mortgage deed as one complete transaction. In Smith v Chadwick (1882) 20 Ch. D. 27 Jessel MR said:**
>
> > **"*When documents are actually contemporaneous, that is, two deeds executed at the same moment, a very common case, or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to shew the meaning of a sentence, and be equally read, although not contained in one deed, but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose*".**
>
> **17. In this case, the commitment letter of the 29 May, 2003 specifically refers to the contemplated mortgage and the security for the loan was the mortgage over Lot #23. The fact that the mortgage was executed five (5) months after the commitment letter does not prevent it from being considered as part of the same transaction. See McVeigh V National Australian Bank Ltd [2000] FCA 187 (FC).**
>
> **18. In my judgment, although the language of the commitment letter leaves much to be desired, it would be wrong to construe the agreement between the parties as meaning that no interest was payable until the entire $112,210.44 was drawdown.**
>
> **19. Firstly, such a construction made no sense and secondly, the parties never ever acted pursuant to that agreement as if that was the agreement. Once it is agreed that the transaction was a loan and not a gift there is an obligation to repay and that the money lent accrue interest at an agreed interest rate. In the mortgage deed the customer agreed, "*That on demand made to the mortgagor or as and when the Secured Sum or any part of them are due for payment the Mortgagor shall pay to the Bank the Secured Sums or as the case may be the part of them due to be paid".***

[69] There was no evidence before this Court that the Bank breached the express terms of the loan facility.

[70] In my judgment, looking at all the documents including the commitment letter and the mortgage deed, I find as a fact that the Bank did not assume any larger role or

duty towards Ms. Penn and certainly did not agree to investigate title and to assume responsibility for clear title. The commitment letter sets out all of the salient terms which governed the relationship between the parties and it accorded with the general practice and procedures of the Bank and the traditional banker-customer relationship.

Issues 4 and 5: Whether the dispute over title gave Ms. Penn a right to breach the contract and whether the dispute over the suitability of the land gave unto Ms. Penn a right to breach the facility with the Bank.

[71] During cross-examination, Mr. Rigby KC posed the following questions to Ms. Penn: see Transcript of Proceedings -17 February 2022 at p. 69 –line 14 et seq:

> Q: When did you first discover that there was a title defect?
>
> A: When my lawyer would have brought it to my attention. My previous lawyers brought it to my attention that there may have been, I guess, after they would have received some documents and then more searches happened and then we sought a surveyor to check out what was happening.
>
> ……
>
> Q: And that's Mr.
>
> ……..
>
> Mr. Rigby: Mr. Wood
>
> Q: So you first discovered the issue with the title in 2016.
>
> A: Well it was confirmed by the surveyor in 2016.
>
> ……..
>
> Q: I see, But at the time, 2015/2016, you were not making any payments to the Bank under the loan
>
> A: No, sir."

[72] Ms. Penn engaged Mr. Wood, deemed an expert in this action, to conduct a boundary survey and research on the Lot. His findings are:

> "1. …..

2. …..
3. The parcel of land (Lot 20) was conveyed from Alice Mable Rolle to April Penn by the conveyance, on record at the Registrar General's office with reference number Vol. 8940 pg. 1390150 and recording date of 11th June 2004 and described in the schedule as lot number 20 on plan 3430 N.P….

4. 85 percent of the parcel described above and conveyed to April Penn was also conveyed from Alice Mable Rolle to Michael and Leah Patton, by conveyance on record at the Registrar General's office at Vol. 8712 Pg. 633-638 with recording date August 28th 2003. The parcel in this document was described as being lot number 22 on a survey plan drawn by Jefferson Simmons (see plan on page 3) who is a draftsman at the Surveyor General's office but not a qualified or registered land surveyor.

5. The difference in the parcel sizes and positions is due to a 7 feet shift in the lot location on plan 3430 NP. However, with 85 percent of Lot 22, sold to The Pattons being included in Lot 20 sold to Ms. Penn, these two parcels of land have the same location and were sold by the same vendor.

6. By my research, I am unable to determine that the area where April Penn's building is under construction was excavated and refilled with material that is not suitable for building a subdivision and homes on because it cannot bear the load of these structures…."

[73] Mr. Wood referred to a conveyance with recording date of 28 August 2003. As Mr. Rigby KC correctly stated, by no account did he suggest that the Bank was a party to that conveyance or knew of its existence prior to disbursing the proceeds of the Loan to Ms. Penn.

[74] On the clear and unequivocal provisions of the commitment letter, it is correct for this Court to find that the intentions of both parties were limited to the Bank

contracting to advance the amount borrowed and Ms. Penn contracting to pay the Loan. The duty to investigate title to the Lot to serve as collateral resides with Ms. Penn and her lawyers.

[75] As I see it, Ms. Penn selected the Firm for the purpose of investigating title to the Property and the Firm alone owed a duty to Ms. Penn.

[76] The failure of Ms. Penn to continue to pay the Loan was a breach of the agreement and any dispute as to defects of title ought to have been directed at the Firm and not the Bank.

Frustration and mistake

[77] In her pleadings, Ms. Penn averred that the Loan dated 4 March 2004 and the Deed of Mortgage dated 5 March 2004 are void and/or voidable because of total failure of consideration, mistake and/or frustration of the subject matter of the contract. She denied liability for any outstanding balance to the Bank and averred that if any sum was outstanding, it was due to the Bank's negligence because her salary was deposited with the Bank.

[78] To be succinct, Ms. Penn has raised every possible defence there is in contract law without any evidence to support them and has essentially convoluted what is a straightforward case of a banker/lender customer/borrower relationship. The fact that Ms. Penn's title to the Lot is allegedly defective does not render the loan facility a frustrated bargain.

[79] Based on the facts of this case, there was no frustration of the facility agreement and the doctrine of frustration has no applicability to the present case.

[80] In addition, mistake is not applicable to the facts of this case. Nor are the principles of estoppel.

The Counterclaim

[81] There is no merit in the Counterclaim. Therefore, I shall dismiss it.

Conclusion

[82] The simple facts of this case is this Ms. Penn wanted to purchase the Lot to build a duplex. She was working at the Firm. There are some perquisites involved in using the Firm as her attorney; the primary one being that she did not have to pay legal fees. The Mortgage was prepared by the Firm in February 2004, a month before she signed the commitment letter. The Firm had to provide the Certificate of Title in due course. After the Loan was approved and drawn down, it was discovered, not only that the building works were substandard and the partially completed structure collapsed into a sink hole caused by covered debris beneath the foundation but that the title to the property was not good and marketable as the security had been conveyed two times to two separate parties prior to it being sold by the same vendor to her. The Title Opinion provided by the Firm was lacking.

[83] Although Ms. Penn vehemently denied that the Firm, her previous employer, represented her, a rhetorical question can be posed: if the Firm represented the Bank, then who represented her? Was she purchasing real property without legal representation and/or did she expect the Bank or the Bank's attorney to look out to protect her interest?

[84] The reasonable inference to be drawn from these facts is that (i) Ms. Penn selected the attorney (ii) the attorney (an employee of the Firm) worked on her behalf and rendered the Title Opinion to the Bank and (iii) the work carried out by the attorney was to be paid by Ms. Penn but was gratis due to the fact that she was an employee at the Firm.

[85] In my judgment, Ms. Penn breached the terms of the commitment letter/ mortgage deed and consequently, the Bank is entitled to recover the sums due and owing under the mortgage.

[86] For all of these reasons, there will be Judgment for the Bank in the amount of $321,092.62 as of 20 May 2021 with interest accruing at the contractual rate to

today's date (31 January 2023) and thereafter, at the statutory rate of 6.25% from today's date to the date of payment.

[87] As the Bank is the successful party in this action, the normal order is for Ms. Penn to pay costs to the Bank. Given the unfortunate facts of this case, I will make an order that each party bear their own costs.

Dated this 31st day of January 2023

Indra H. Charles
Senior Judge