In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: Nos. 137 and 88

Bank of NT Butterfield & Son Limited v F & E Holdings Limited
AND
F & E Holdings Limited v Bank of NT Butterfield & Son Limited

JUDGMENT
(In Chambers)

Date of Hearing: **29 November 2024**
Date of Judgment: **4 December 2024**

Appearances: *Keith Robinson* of Carey Olsen Bermuda Limited for the Plaintiff
Jerome Lynch KC of Trott & Duncan Ltd for the Defendant

Introduction

1. This is the Court's decision on an application for summary judgment made by the Plaintiff in proceedings 2024 No 137 (hereafter "the Bank") against the Defendant (hereafter "F & E") for the repayment of a loan facility granted to F & E under a Credit Facility Letter dated 19 July 2018 (the "Credit Facility Letter"[1]). The claim in the Writ is for BD$14,722,570.95 for repayment of both the principal and interest owing under the Credit Facility Letter, but the present application for summary judgment is for BD$14,493,731.33 which represents the present outstanding unpaid principal of the loan. The remainder of the Bank's claims for interest and contractual recovery costs will be determined at the trial of the action.

[1] This was produced at pages 37 to 58 (including amendments) of the Hearing Bundle (HB37-58)

2. F & E claims that it is entitled to set off against the loan principal an amount of BD$1,402,965.67 which represents payment of interest under the Credit Facility Letter that F & E claims it has "overpaid". F & E says that the Court should enter judgment for the sum of BD$13,090,765.66 instead of the amount claimed on the basis of a legal or an equitable set-off[2]. F & E issued an Originating Summons 2024 No 88[3] seeking declaratory relief to the effect that the Bank had breached the terms of the Credit Facility Letter by issuing a notice of intention to close certain of F & E's accounts (the "Closure Notice") on 15 November 2022[4]. One of the declarations sought[5] is that F & E is entitled to set off the post-facility agreement payments against the outstanding principal due under the Credit Facility Letter. By Order dated 25 July 2024 the 2024 No 88 proceedings were consolidated with the present action.

3. One of the accounts in respect of which the Closure Notice was given was the account through which the debt service payments were required to be paid (account #20-006-060-586603-100). F & E claims that this had the effect of terminating the Credit Facility Letter and says that it was thereby discharged from the obligation to pay the contractual rate of interest from the date of the Closure Notice onwards. The details of this claim are explained in more detail below. But as a result of the alleged wrongful termination of the Credit Facility Letter, F & E says it has the right to set-off the amount of the interest payments it made after the date of the Closure Notice.

4. The Bank's right to recover the principal amount outstanding on the loan is undisputed. The issue in dispute on this application is simply whether F & E is entitled to assert a set-off in respect of the payments it made after the date of the Closure Notice. F & E says that the Bank has to establish its right to claim the remainder of the principal at the trial.

Summary and disposition

5. The Court has concluded (i) that the Bank is entitled to enter judgment for the full amount of the unpaid principal in the amount of BD$14,493,731.33 and (ii) that F & E is not entitled to set off the sum of BD$1,402,965.67 against that sum in the summary judgment application. The Court's reasons for reaching this conclusion are that:

    a. The total amount of the principal owed by F & E is undisputed and is presently due and owing.

    b. Even if F & E can establish that the Closure Notice (the details of which are explained below) had the effect of wrongly terminating the Credit Facility Letter, F & E's acceptance of the alleged repudiation by the Bank would have triggered F & E's liability to repay the outstanding principal sum immediately (irrespective of the position on interest).

[2] The precise basis of the claim is not yet fully pleaded.
[3] HB 256-9
[4] HB 147
[5] HB 258 at paragraph 7

c. The effect of Schedule C1 (a) of the terms and conditions of the Credit Facility Letter is to prevent F & E from withholding repayment of the principal on the grounds of a cross claim or set-off.

d. F & E continued to service the debt after the Closure Notice had been given and thereby affirmed the contract after the date of the alleged fundamental breach of contract now relied upon by F & E as a repudiation. As a matter of law, F & E cannot approbate and reprobate (i.e. "suck and blow") and its rights are limited to a claim in damages for breach of contract which will have to be established at a trial.

Brief background facts

6. By the terms of the Credit Facility Letter dated 19 July 2019 F & E borrowed BD$15,800,000 from the Bank over a 15-year term in two tranches of BD$7,900,000 on the grant of security over certain real property interests and on the terms and conditions set out in the Schedules to the Credit Facility Letter.

7. One of the terms of the loan contained in Schedule C 1 (a) provides:

> *"So long as any amount is or may be due and owing to the Bank under this Facility Letter...the Borrower [F & E]...agree[s]...(a) to repay all principal amounts, all interest accrued thereon and all other amounts which may become owing under this Facility Letter in full to the Bank, without withholdings of tax or other monies, in accordance with the terms of this Facility Letter."*[6]

8. The meaning of this term and its legal effect will be briefly analyzed below.

9. The 2019 loan replaced an earlier loan made by the Bank to F & E in 2013, the details of which are not relevant to the present application. The two tranches were given separate loan account numbers (#200-B-425-2309-60028 and #200-B-425-2309-60058).

10. F & E serviced the debt according to the monthly amortization schedule of blended payments of principal and interest and complied with the terms of the Credit Facility Letter.

11. On 15 November 2022 the Bank notified F & E that following a routine account "review" it had decided to close certain of F & E's accounts with the Bank, including the account through which F & E was required to make its monthly debt service payments under the Credit Facility Agreement (#20-006-060-586603-100). The Closure Notice[7] stated:

> *"...we are writing to tell you, with notice, we will be closing your account(s) referenced above. The effective date of the account closure will be 15 May 2023.*
>
> *If you have other products associated with the account(s), such as loans, credit facilities or credit cards, a representative will be in touch with you shortly to discuss these...*

[6] HB 46
[7] HB147

We recognize that this may have some administrative impact on you and we are committed to helping you during the notice period to transfer your account(s) to another institution."

12. The effective date of the closure of these accounts was to be 15 May 2023 to give F & E a period of six months to make other arrangements. This was referred to as a "transition period". It was not alleged that F & E was in breach of the terms of the Credit Facility Letter, nor had any "event of default" (as defined in the Credit Facility Letter) occurred at the time the Closure Notice was given. It should be noted that the two loan accounts referred to in paragraph 9 above were not referenced in the Closure Notice, but the account from which the debt service payments for the loans were to be made was included in the list of accounts to be closed.

13. Mr. DeSilva is the President and a director of F & E. Naturally Mr. DeSilva queried the basis of the Closure Notice, at first thinking this was potentially a "spam" email[8]. Mr. Feldman (the Head of Corporate Banking at the Bank) responded that the Closure Notice was genuine:

"This is an official notice from Butterfield relating to the account closure of F & E Holdings Limited and all related products including loans. There is a six-month period granted to transition the business to another banking institution."

14. During the next several months F & E attempted to make alternative arrangements to replace the financing so as to repay the debt under the Credit Facility Letter to the Bank, and correspondence passed between the parties with that end in mind, the details of which are not necessary to set out in any detail in this judgment.

15. In or about August 2023 Mr. DeSilva made a transfer on behalf of F & E of US$12 million to the Bank as a partial repayment of the principal and made proposals for the repayment of the balance. The Bank declined to accept the payment of US$12 million on the grounds that it had concerns over the source of funds and refunded the monies that had been tendered in partial repayment of the loan.

16. Throughout the period these efforts were being made to make a transition to another bank, F & E continued to service the debt as usual "in good faith"[9], notwithstanding F & E's position that the Credit Facility Letter had been wrongly terminated by the Bank. Mr. Lynch KC submitted that this was the sensible thing for F & E to do on a commercial basis, especially when F & E was seeking to find another lender to replace the Bank. The implication was that a new bank would be unlikely to agree to advance funding to enable F & E to repay the debt if F & E was in default under the terms of the Credit Facility Letter, although no express evidence was given in relation to that point.

17. Ultimately F & E's efforts to find alternative financing from a source that the Bank would accept proved unsuccessful. The debt remains unpaid. Negotiations broke down, and no further payments were made to service the debt, and events of default were declared under the Credit Facility Letter[10], making the debt repayable on demand both as to principal and interest.

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[8] HB 410
[9] Mr. DeSilva's first affidavit HB 264 at para 17.
[10] HB 30 and 160

18. In response to these developments on 21 February 2024 F & E's attorneys wrote to the Bank's attorneys stating that F & E was taking the position that the Closure Notice was in breach of the terms of the Credit Facility Letter and that the closure of the debt service account represented a fundamental breach of the loan agreement, which F & E had accepted, and stated that F & E would consider itself no longer bound by the Credit Facility Letter with effect from 1 March 2024[11]. F & E issued an Originating Summons on 16 April 2024[12] seeking a declaration that the Bank wrongly terminated the Credit Facility Agreement by closing the debt service account and that F & E had accepted the Bank's repudiatory breach and were no longer bound by the terms of the Credit Facility Agreement.

19. On 3 June 2024 these proceedings[13] were commenced to recover the unpaid loan and accumulated interest and costs and expenses. F & E filed a Defence[14] stating that F & E acknowledged the liability to pay the principal due but asserting that the Bank was not entitled to claim interest at the contractual rate because the Bank had repudiated the Credit Facility Agreement, repeating the same position that had formed the basis of F & E's claim for declaratory relief.

20. On 11 July 2024 this application was issued seeking summary judgment for the principal of the loan. The application was supported by an affidavit sworn by Mr. McGuinness[15] who annexed the documents and explained the background history of the claim. Mr. DeSilva put in an affidavit[16] in response, setting out F & E's position. In it he admitted F & E's liability to pay the principal sum[17], but claimed that F & E was entitled to set-off against the principal all the payments of interest that F & E had made after the Closure Notice. It was said that these payments had been overpaid, and that the Bank was not entitled to interest at the contractual rate because the Credit Facility Agreement had been terminated.

The interest payments made after the Closure Notice

21. The following payments of interest were made by F & E Holdings after the date of the Closure Notice[18].

15 December 2022	$83,900.15
16 January 2023	$80,017.90
15 February 2023	$88,605.07
15 March 2023	$80,989.70
17 April 2023	$89,384.96
15 May 2023	$86,593.14
15 June 2023	$90,530.08
15 July 2023	$87,390.35
15 August 2023	$90,057.12
15 September 2023	$89,827.49

[11] HB368
[12] HB256-9
[13] HB1-3
[14] HB15-19
[15] HB25-34
[16] HB192-8
[17] HB193 paragraphs 7 and 8
[18] Supplementary HB tab 11

15 October 2023	$86,706.25
15 November 2023	$89,346.00
15 December 2023	$86,237.42
15 January 2024	$88,858.65
15 February 2024	$88,621.64
15 March 2024	$82,682.50
15 April 2024	$ 46.22
23 April 2024	$ 334.00
3 May 2024	$ 49.50
16 May 2024	$ 407.40
22 May 2024	$ 450.00
3 June 2024	$ 3,500.00
12 July 2024	$ 430.13
Total	**$1,402,965.67**

Analysis of the legal position

22. The first point to note is that F & E has not disputed its liability to pay the principal sum but has in fact positively admitted its liability to pay that sum. Mr. Lynch KC artfully suggested in argument that the principal sum that F & E had admitted liability for was the net amount of the principal sum less the mount of the overpaid interest.

23. However, the Court cannot accept that submission. First of all, it is clear on the documents that the principal sum was the original amount of BD$15,800,000 from which the debt service payments have reduced to BD$14,493,731.33[19]. Secondly, in order to arrive at the figure that Mr. Lynch contends for, the amount to be set off must be set of that principal amount, which is in itself an express admission of the amount of the principal sum due (ie he seeks to deduct the interest payments of BD$1,402,965.67 from BD$14,493,731.33 in order to reach his client's figure of BD$13,090,765.66). Therefore, there is no dispute as to the amount of the principal sum due, and since Mr. DeSilva has admitted in his evidence that F & E accepts liability for the principal, the Bank is entitled to succeed on its claim for summary judgment without more. The question as to whether the Court should grant a stay of enforcement in respect of the amount of F & E's cross claim is dealt with below.

24. Mr. Lynch KC argues that there is a *bona fide* dispute raised by the pleading in the Originating Summons and in Mr. DeSilva's evidence and say that this entitles his client to leave to defend the Bank's claim (at least insofar as it relates to the cross claim of BD$1,402,965.67). Again, with due respect to his argument, the Court cannot accept that submission.

25. In the first place, on F & E's case, if the Credit Facility Letter was brought to an end by the Closure Notice as Mr. Lynch contends, then F & E's liability to repay the principal (and any unpaid interest) as at the date of the termination would have crystallized immediately. Mr. Lynch KC's case is that the Closure Notice (taken together with Mr. Feldman's email) can only be understood as having immediate effect, irrespective of the references to a notice period and a transition period of six months. The Court is not

[19] HB212

at this stage making any determination of the case made by F & E because there is no pleading as yet, and no application has been made for the summary determination of that claim, so the Court makes no comment on its strengths or weaknesses. Taking the case put by Mr. Lynch KC at its highest, and assuming he is able to establish it at a trial, it means that his client was liable to repay the debt either at the date of the Closure Notice, or at the date that F & E notified the Bank that it was accepting the Bank's repudiatory breach of contract (probably 1 March 2024 based on the 21 February 2024 letter referred to above). Therefore, the Bank would be entitled to summary judgement for the principal in any event.

26. In the second place, to allow F & E to set off the interest it has paid against the principal sum at this stage would in effect give F & E judgment for its claim in the Originating Summons proceedings. It would assume that F & E will succeed in establishing its claim to recover the interest payments on the basis that the Closure Notice did terminate the Credit Facility Letter immediately. It is possible that at a trial the Court will decide the point against F & E and hold that the Closure Notice did not have that effect, or that the Closure Notice did not take effect until the notice period expired. Again, the Court expresses no present view on these possible outcomes but makes these observations to illustrate that to allow F & E to set off its claim at this stage would not be appropriate. Again, the question whether a stay should be granted as to enforcement of the judgment to the extent of the cross claim is dealt with below.

The no set-off clause

27. Since the date of the Closure Notice, F & E has failed to repay the debt, leaving aside disputes over the Bank's rights to claim interest, and F & E is in breach of its repayment obligations under the Credit Facility Letter[20].

28. Under the terms of the Credit Facility Letter at Schedule C1 (a) (referred to in paragraph 7 above) F & E has agreed to repay all principal amounts in full without withholding tax or other monies. Mr. Robinson submits that this is a no set-off clause, and although the words no set-off are not used, the clause has the same effect. He says the case law is clear that a no set-off clause is to be given full effect by the court, even where a cross claim or set off could arise, the payer must pay now and argue later.

29. Reliance is placed on two cases. In **AMC III Purple BV v Amethyst Radiotherapy Ltd** Butcher J held[21] that a no set-off clause has effect to prevent a party from deducting the value of cross claims from payments that are due under the terms of the contract, relying on earlier Court of Appeal authority. A similar result was reached in **Venson Automotive Solutions Ltd v Morrison's Facilities Services Ltd** Deputy Judge Dias said[22]

> *"the courts have repeatedly emphasized that the purpose of these no set-off provisions is to ensure that there is no interruption to the claimant's cashflow, but that these clauses do not affect the underlying obligations of the parties. These are to be finally determined at trial in the usual way....the rights under a no set-off provision must be capable of enforcement at the summary judgment*

[20] A list of the various events of default that the Bank relies upon is set out at HB159
[21] [2019] EWHC 1503 (Comm) at paragraph 22
[22] [2019] EWHC 3089 at paragraph 20

stage...If they had to wait determination at trial, the clause would be rendered nugatory."

30. It is clear that the effect of the term is intended to ensure that borrowers are not entitled to deduct sums from their regular bank repayments. This is an obviously sensible provision, otherwise endless confusion could be wrought in determining the borrower's liability under the loan at any given time.

31. This Court agrees that the effect of the clause is to prevent deductions being made from payments under the loan facility and applies the principle set out above that the Court must enforce the term at the summary judgment stage. Therefore, F & E is not entitled to set off the value of its claim to recovery of interest but must pursue its claim to trial if it wishes to establish its right to reclaim the interest paid under the Credit Facility Letter after the date of the Closure Notice.

32. There is a further obstacle to F & E's claim. Mr. Robinson relies upon the well-known passage in **Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd**[23] that a payment made under a mistake of fact[24] cannot be recovered if the money is paid to discharge a debt owed to the payee. In this case F & E Holdings made the payment to discharge its liability to interest under the Credit Facility Agreement. Therefore, it is said that there is nothing in the claim at all. This is a question which will have to be fully argued at the trial, and the Court makes no final determination of it on its merits at this stage, save to observe that it supports the view that the cross claim needs to be established before the Court would allow a set off at this stage of the action.

Affirmation of the contract

33. As described above, F & E continued to make payments of principal and interest after the date of the Closure Notice. It is basic to the law of contract that a party cannot take the position that he or she is accepting the repudiation of the contract because of a fundamental breach and then continue to perform his or her obligations under it. The law does not allow a party to approbate and reprobate, or to use a colloquial term, to "suck and blow" at the same time. The affirmation is irrevocable, and the affirming party loses his or her ability to treat the contract as repudiated but retains a right to seek damages for breach[25].

34. Therefore, to the extent that F & E seeks to assert a claim for recovery of the payments of interest at the contractual rate, or to claim that it was discharged from paying interest at the contractual rate, it will have to do so within the terms of the contract, and/or by way of damages for breach of contract. This also supports the Court's view that it would not be appropriate to allow F & E to set off its claim against the Bank's claim for repayment of the outstanding principal at this stage of the proceedings.

Conclusions

35. Therefore, for the reasons given above, the Bank is entitled to enter judgment for the principal sum of BD$14,493,731.33. F & E is not entitled at this stage to set off the

[23] [1980] QB 677, 695 per Robert Goff J (as he then was).
[24] It is yet not clear how (or if) F & E puts its case on mistake.
[25] **Bentsen v Taylor Sons & Co** [1893] 2 QB 274

amounts it paid in contractual interest until there has been a determination of its claim at the trial of the proceedings 2024 No 88 (as consolidated with 2024 No 137).

36. The remainder of the Bank's claims for interest and contractual enforcement costs in these proceedings and F & E's cross claims for declarations as to the legal effect of the Closure Notice and its claims to recover interest that it paid after the Closure Notice was given in are to be restored for directions to be given at the first Chambers date available and convenient to the parties.

4 December 2024

THE HON. ANDREW MARTIN
PUISNE JUDGE