Privy Council Appeal No 47 of 2007

Victor Lowe *Appellant*

v.

National Insurance Bank of Jamaica *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 2nd April 2008, Delivered the 6th May 2008

Present at the hearing:-

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

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*[Delivered by **Lord Scott of Foscote**]*

1. At the conclusion of the hearing their Lordships informed the parties that, for reasons to be given later, they would humble advise Her Majesty that this appeal should be dismissed with costs. These are the reasons.

2. This is a hopeless appeal. The litigation arises out of a financing arrangement made between the respondent Bank ("the Bank") and a Jamaican company, Pathway Technologies Ltd ("Pathway") pursuant to a scheme sponsored by the Jamaican government for encouraging investment in Jamaica by lending government funds for the purposes of

approved projects. The appellant, Mr Victor Lowe, is the executive chairman of Pathway.

3. Pursuant to the government scheme, and following what Mr Lowe has described in his affidavit sworn on 11 March 2004 as "extensive negotiations", an offer of a loan of J$153 million was made by the Bank to Pathway by a letter dated 20 April 2001. The letter said that the loan had been approved by the government, that the Bank was acting as agent of the government and that the letter set out "the final terms and conditions" of the loan. The 20 April letter was signed by the President of the Bank and, on 23 April 2001, the letter was countersigned by Mr Lowe, thereby indicating Pathway's acceptance of the terms and conditions. The terms and conditions of the loan were set out under a number of headings. One of these was:

> "Security: Debenture over fixed and floating assets of the Company stamped to cover J$153 million with power to up stamp. The loan shall be evidenced by Promissory Notes duly executed by the Company for amounts advanced"

Another of the terms and conditions was headed "Pre-conditions to Disbursements". There were sixteen of these Pre-conditions. Pre-condition 6 required the "Finalisation and execution of security documents i.e. Debenture and Loan Agreement". Pre-condition 9 required "Evidence of [US$1.5 million] placed in a Jamaican Bank account hypothecated to [the Bank]." The Pre-condition ended by saying "[The Bank] is to authorise all drawdowns".

4. The offer letter of 20 April 2001 was followed by a formal Loan Agreement dated 12 November 2001 executed by the Bank, the affixing of whose seal was witnessed by the President of the Bank, and by Pathway, the affixing of whose seal was witnessed by Mr Lowe. The Loan Agreement recited that a loan of J$153 million was to be made by the Bank to Pathway at the request of the government and out of funds supplied by the government, that the loan was to be made "subject to the terms and conditions hereinafter contained" and that the Bank was to administer the loan facility on behalf of the government. The "terms and conditions" contained in the Loan Agreement more or less repeated, in effect if not in identical language, the terms and conditions that had been set out in the offer letter. Thus, paragraph 5 of the Loan Agreement, headed "Security Documentation", said much the same as had been said in the offer letter against the heading "Security" and paragraph 10 of the

Loan Agreement, headed "Conditions Precedent to Disbursement" more or less repeated the "Pre-conditions to Disbursement" contained in the offer letter. Thus, Condition Precedent (ix) in the Loan Agreement required, as Pre-condition 9 had done in the offer letter, that the US$1.5 million was to be "placed in a Jamaican Bank account hypothecated to [the Bank]" and similarly ended by saying "[The Bank] is to authorise all drawdowns". It is the meaning and effect of Condition Precedent (ix) that is central to the issue in this appeal.

5. Condition Precedent (ix) had required US$1.5 million to be hypothecated to the Bank but was subsequently varied by agreement so as to require only US$1 million to be hypothecated. The Condition did not specify by whom the requisite sum was to be provided but in the event it was provided by Mr Lowe. A letter dated 7 May 2001 to the Bank from Dehring Bunting & Golding Ltd, a Jamaican merchant bank, said this :

> "Re: *Hypothecation of Funds i.n.o. Mr Victor Lowe*
> On the instructions of our mutual client, we write to advise that we currently manage funds for and on behalf of Victor Lowe. These funds have been hypothecated on your behalf in the sum of United States Dollars One Million (US$1,000,000) in order to satisfy a requirement under the Pathway Technologies Limited project. Only claims received from you in writing shall be honoured. This hypothecation will remain in force until written cancellation has been received from [the Bank]"

A copy of the letter was sent to Mr Lowe. It is not in dispute that this letter satisfied the requirements of Condition Precedent (ix) of the Loan Agreement.

6. Following the execution of the Loan Agreement disbursements of J$150,826,211 odd were made to Pathway pursuant to the loan facility thereby established. But it appears that, unfortunately, Pathway's business did not prosper and Mr Lowe, and other directors, had to make considerably more capital injections into the company than had been foreseen initially. This led to Mr Lowe writing to the Bank on 7 March 2002 and again on 15 March requesting "the immediate release" of the US$1 million hypothecated fund so that that fund, too, could be injected into Pathway. The Bank's response was to seek answers to a number of questions about Pathway's affairs as a preliminary to considering the request that Mr Lowe had made. By a letter of 22 March 2002 Mr Lowe answered the questions that had been asked. Nothing much seems then to have happened for over a year regarding the hypothecated fund but by a

letter to Mr Lowe of 8 August 2003 the Bank agreed to the release of the hypothecated fund subject to a number of conditions. Following some further negotiation, agreement regarding the hypothecated fund was reached and the terms of the agreement were set out in a letter dated 14 August 2003 signed by the President of the Bank and by Mr Lowe. The agreement was that Dehring Bunting & Golding would be authorised to sell the US$1 million hypothecated fund for Jamaican dollars and that from the proceeds J$1 million would be paid to the Bank "to clear all accrued interest and reduce the principal short term debt" owed by Pathway to the Bank and J$59 million would be invested on terms to be approved by the Bank and "hypothecated to [the Bank] as a continuing security for facilities provided to [Pathway] by [the Bank] until the said facilities are repaid in full."

7. Notwithstanding this agreement reached in August 2003 and recorded in the letter above referred to, Mr Lowe on 16 March 2004 commenced proceedings against the Bank claiming some US$4.5 million as damages for the Bank's failure to release to Pathway the US$1 million hypothecated fund. This failure, it was contended, had led to the collapse of Pathway and to the loss by Mr Lowe of his entire investment in Pathway. Hence the claim for US$4.5 million as damages. Mr Lowe sought, also, a declaration that he had no personal liability to the Bank for any obligations of Pathway and an injunction compelling Pathway to release the J$59 million hypothecated to the Bank under the agreement of 14 August 2003. The Bank's response to these claims was to make an application to the court for them to be dealt with summarily and dismissed. The Bank's application succeeded before Ms Justice McDonald (Ag) and Mr Lowe's claim was dismissed. The Court of Appeal dismissed Mr Lowe's appeal. But he now appeals to the Privy Council.

8. Mr Lowe's whole case depends upon the proposition that his US$1 million held by Dehring Bunting & Golding Ltd and hypothecated to the Bank did not become by that hypothecation a security for the payment by Pathway of its indebtedness to the Bank under the Loan Agreement. Their Lordships have described this appeal as hopeless. It is hopeless because that proposition, on which the appeal depends, is one that it is impossible to accept. Hypothecation is a word well-known in the legal lexicon. It signifies in its most usual meaning the pledging of something as security for a debt or demand without the pledger parting with the possession of the thing pledged: see Jowitt's Dictionary of English Law 2nd Ed. (1977), Vol.1 where the editor goes on to say that

> "In modern times ... to hypothecate property is to charge it with the payment of a sum of money or the performance of an obligation, giving the person in whose favour it exists neither the right to the possession of the property, nor the right to sell it, but merely the right of realisation by judicial proceedings ..."

It would usually be the debtor who would be the hypothecator, but there is no reason why the owner of property should not hypothecate his property as security for someone else's debt. That being the normal meaning of hypothecation, what is there in the present case to attribute to the parties' use of the word "hypothecated" in Pre-condition 9 of the 20 April 2001 offer letter, in Condition Precedent ix of the Loan Agreement and in Dehring Bunting & Golding Ltd's letter of 7 May 2001 any other meaning than that the property in question, the US$1 million, was a security for Pathway's indebtedness to the Bank?

9. Mr Lowe has, through his counsel, offered a number of reasons why a different construction should be placed on the word. He has referred (paragraph 7 of his affidavit of 11 March 2004) to oral agreements between himself and the President of the Bank "leading up to" the offer letter of 20 April 2001. Any such oral agreements are inadmissible as aids to construction either of the offer letter or of the Loan Agreement and no claim for rectification of either instrument has been made. Mr Lowe has pointed out that in the offer letter and in the Loan Agreement the "Security" referred to consisted of the Debenture and the Promissory Note or Notes and oddly (in the Loan Agreement) the Loan Agreement itself, and did not include the hypothecated fund. But each of the instruments referred to was a "Security" to be provided by Pathway itself. The omission of any reference to the hypothecated fund, a fund to be provided by anyone willing to provide it, under the same "Security" heading does not seem to their Lordships at all surprising and does not begin to justify a departure from the normal meaning of the word. Mr Lowe contended that the US$1 million was being "hypothecated" to the purposes of the "Project" towards which the J$153 million was to be applied and has pointed to the reference in Dehring Bunting & Golding Ltd's letter of 7 May 2001 to "a requirement under the Pathway Technologies Limited project". The "requirement" for the hypothecated fund to be provided was a requirement imposed by the contractual arrangements between Pathway and the Bank under which the Bank was to advance funds to Pathway in order to finance "the establishment of two (2) call centres" i.e. "the Project" (see para.3(ii) of the Loan Agreement, and "Use of Funds" in the offer letter). Both in the offer letter and in the Loan Agreement the requisite hypothecation is expressed to be a hypothecation to the Bank. It is not expressed to be a

hypothecation to Pathway. It is the Bank, as the offer letter and the Loan Agreement expressly recognise, that must authorise any drawdown of the US$1 million. There is nothing in the Dehring Bunting & Golding letter of 7 May 2001 that deprives the word "hypothecated" of its normal meaning of a security. Moreover, the 14 August 2003 letter in referring to the J$59 million says expressly that that substituted hypothecated fund is to be "a continuing security for facilities provided to [Pathway] by [the Bank] until the said facilities are repaid in full".

10. In their Lordships' opinion the proposition that the US$1 million hypothecated fund was not a security for the indebtedness of Pathway to the Bank is unarguable. It follows that the Bank had no obligation to authorise the release of the fund to Pathway save on terms acceptable to the Bank.

11. Even if that had not been so, the agreement recorded by the 14 August 2003 letter expressly stated that the new hypothecated fund, namely, the J$59 million, was to be a security for Pathway's indebtedness to the Bank. Mr Lowe has contended that he was constrained by duress to enter into that agreement and that he ought not to be held bound by it. The duress he apparently relies on consists of the advantage he considers was taken by the Bank of his parlous financial position. This absurd proposition was, understandably, given short shrift in the courts below (see p.13 of the judgment of McDonald J (Ag) and pp 7-8 in the judgment of Harrison P in the Court of Appeal) and does not warrant any further attention from their Lordships.