

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 2392/2005

BETWEEN CEDRIC MCDONALD CLAIMANT
AND LIFE OF JAMAICA LIMITED DEFENDANT

G. McBean and A. Reynolds instructed by Patrick Bailey & Company for Claimant

W. Scott & N. Walker instructed by Hart, Muirhead & Fatta for Defendant

Heard: Nov. 26, 2008, Jan 27, Feb.19 and October 27, 2009

Breach of Contract

Lawrence-Beswick J

The claimant, Mr. McDonald, alleges in this suit that the defendant, Life of Jamaica Limited (LOJ), breached a contract to grant financing to him and further or alternatively misrepresented that it had granted a loan to him. Mr. McDonald claims that because of this wrongful conduct or negligence, he has suffered losses and incurred expenses.

LOJ denies entering into a contract with Mr. McDonald or making any misrepresentation to him.

Mr. McDonald and his wife borrowed \$5 million from Victoria Mutual Building Society (VMBS) in or around 1998. Their payments on the loan fell into arrears and VMBS advised them that they owed a principal of \$7,486,818.60 and arrears of \$2,454,896.72. VMBS intended to sell the McDonalds' family home to recover these outstanding amounts.

Mr. McDonald sought financing from LOJ under a Special Mortgage Loan Facility offered to staff members. He had been employed there from 1984. No funds were disbursed to him and he received a letter dated September 19, 2003 from LOJ indicating that the LOJ Board had refused his application for a loan.

The Contract

One issue to be determined is whether or not there is a contract between LOJ and Mr. McDonald. In order for a contract to be valid there must be, *inter alia*, an offer, an acceptance of the offer, consideration, and the intention to create legal relations.

The first question therefore is whether LOJ made an offer to Mr. McDonald to provide monies for him to repay VMBS via a Special Mortgage Loan Facility.

a. The Offer

Mr. McDonald's unchallenged evidence is that his family home was under threat of being auctioned by VMBS for non payment of his mortgage loan. Mr. McDonald asserts that in desperation he asked LOJ's Chief Financial Officer (CFO) to intervene to prevent that sale. In my view, Mr. McDonald in sharing his difficulties with LOJ was inviting them to offer to lend him the money he needed.

The CFO later informed him that VMBS had withdrawn the property from auction pending a payment on his behalf by LOJ and that LOJ should send a letter of undertaking. Further correspondence and conversation followed between Mr. McDonald and LOJ.

Counsel for Mr. McDonald submitted that this response by the CFO to Mr. McDonald's request for help constituted an offer by LOJ to him to provide the Special Loan Facility. Counsel for LOJ submitted that LOJ did not offer to lend Mr. McDonald \$8,595,281.79, the amount being claimed, and that there were no clear terms of any offer allegedly made.

However, Mrs. Grant-Taffe, Vice President/Legal Counsel for LOJ, outlined several offers which LOJ had made to Mr. McDonald for LOJ to provide financing but which were not fully agreed to by Mr. McDonald. Indeed, she swore in her witness statement that LOJ “renewed” its offer to the McDonalds on the “same terms and conditions” in a letter dated March 31, 2003, although she was unable to say when the original offer was made.

That letter of March 31, 2003 is pivotal to the determination of the agreement, if any, between the parties.

The letter states, *inter alia*:

“With reference to your application we hereby offer to provide you with Mortgage Finance on the following terms and conditions.....”

Thereafter certain terms and conditions concerning LOJ granting the principal sum of \$8,595,281.79 are detailed.

This letter, to my mind, contained an offer by LOJ to Mr. McDonald to provide Mortgage Financing. I accept Mr. McDonald’s evidence as true, concerning the various conversations between senior members of LOJ and himself in which they assured him that the loan would be available to him. I infer that these conversations were between August 4, 2002 when VMBS informed Mr. McDonald of the arrears and November 11, 2002 when Mr. McDonald received a copy of an undertaking from LOJ to pay VMBS Mr. McDonald’s debt.

I regard Mrs. Grants-Taffe’s evidence as true that the March 31, 2003 letter renewed LOJ’s offer which had been earlier made in the “*same terms and conditions.*” (Emphasis supplied)

I am fortified in my view that there was an offer earlier than that in the March 2003 letter, by the unchallenged evidence that Mr. McDonald received in his dip at his office, a letter of irrevocable undertaking by LOJ to VMBS, dated November 11, 2002, to purchase the mortgage which Mr. McDonald had with VMBS in the outstanding amount of \$8,195,056.47 plus any further charges which accrued to the date of transfer. Mr. McDonald's evidence was that he regarded this letter as confirmation of the discussions which he had had with officers of LOJ concerning the Special Mortgage Loan Facility which LOJ was offering to him. It was this initial offer which was subsequently renewed on March 31, 2003.

There is further evidence to support my view of an initial offer being made as it is unchallenged that in December 2002, Mr. McDonald received a copy of a letter from VMBS to LOJ advising that the then current amount owed to VMBS by Mr. McDonald was \$8,595,281.79 and confirming that they were acting on the undertaking which LOJ had given and therefore enclosing the Duplicate Certificate of Title and Discharge of Mortgage, duly executed and stamped, concerning Mr. McDonald's home.

The outstanding amount for which the November 2002 undertaking was given was approximately \$8,195,056.47 which is obviously different from the \$8,595,281.79 of December 2002 letter. Counsel for LOJ therefore urges me to find that November letter of undertaking could not represent an agreement for the later larger amount of the December 2002 letter which is the amount being claimed.

The November 11, 2002 undertaking is for \$8,195,056.47 plus "*any further charges accrued to the date of the transfer.*" I regard the December 2002 figure of \$8,595,281.79 as including those further charges.

Counsel for LOJ submitted that an offer was eventually made to Mr. McDonald to provide a mortgage loan based on the valuation of the property as appraised on October 28, 2002 at \$18.5 million. This, it was argued, was what was reflected in the commitment letter of March 31, 2003 and further that it was a conditional offer which the McDonalds accepted by signing the commitment letter knowing that they would have to comply with conditions before the agreement would have effect. Counsel for LOJ argued that having not received the monies from LOJ, Mr. McDonald increased the amount he was requesting by way of a new application. He did not submit all documents, thereby failing to comply with the conditions and therefore the application for the larger amount was refused and with it, the application for the smaller amount.

The parties are not agreed as to whether or not Mr. McDonald submitted the documents though they are agreed that LOJ did not insist in writing that the Special Conditions needed to be met. In LOJ's internal memorandum dated June 12, 2003, the Mortgage Department sought approval from the Investment and Finance Committee for Mr. McDonald's mortgage application and mentioned specified outstanding items as waived. It read:

“A waiver ... [concerning this matter] ... has been granted for the provision of a new valuation report and surveyor's identification report.”

I infer that all that had been requested of Mr. McDonald had been submitted or waived so as to allow approval to be sought by LOJ internally. I do not believe that Mr. McDonald's application would be placed before the Board for consideration with documents outstanding and not accounted for.

I therefore find on a balance of probabilities that LOJ offered to Mr. McDonald the sum of \$8,595,281.79 on specified terms and conditions.

Did Mr. McDonald accept the offer? That is the next question.

b. The Acceptance

Mr. McDonald's evidence is that he immediately provided LOJ with all the documents and information requested by them, and signed various documents at the behest of LOJ's legal department but did not provide the closing costs. He states that he had requested of Mrs. McLure, the President and Chief Executive Officer (CEO) of LOJ, to be allowed time to pay that amount, and she assured him that that was not a problem and would not impede the granting of the loan facility.

I accept that evidence concerning the closing costs as true and find support for my view from the fact that Mr. McDonald's uncontradicted evidence is that nobody informed him that the loan could not be disbursed without that payment. I regard Mrs. McClure's assurance as amounting to a waiver of the payment of the closing costs at that time, and I have already accepted that Mr. McDonald submitted all documents. Further, Mrs. Grant-Taffe's evidence is unchallenged that the McDonalds accepted the offer by signing and returning the letter on April 10, 2003.

In my view, providing the documents required and seeking and obtaining time to pay the certain specified amount represented an acceptance by Mr. McDonald of LOJ's "renewed" offer of March 2003. Indeed the earlier offer was also accepted as is clear from the fact that LOJ gave an irrevocable undertaking to VMBS on November 11, 2002 concerning the amount outstanding on Mr. McDonald's mortgage.

Counsel for LOJ argued that the undertakings and commitment by LOJ were to purchase Mr. McDonald's mortgage from VMBS, not to grant Mr. McDonald a loan.

That argument does not find favour with me. The letter of November 2002 from VMBS to LOJ is relied on by Counsel for LOJ to show that a Court Order was in existence restraining

Mr. McDonald from dealing with the premises and therefore VMBS could not lawfully grant a mortgage to Mr. McDonald as this would be in breach of the Court Order. He argued that LOJ could only take a transfer of the mortgage with VMBS.

The letter states:

“It appears that there *could* be a Court Order restraining the owners from dealing with the property in any way. If this status has not changed, Life of Jamaica would have to consider taking transfer of the mortgage instead of attempting to grant a new mortgage....” [Emphasis supplied]

This letter, in my view, was focussed on seeking to assist Mr. McDonald without breaking the law. This was not mortgagees contracting with each other to transfer a mortgage for their own business purposes.

The unchallenged evidence of Mr. McDonald is that he was seeking help from LOJ in desperate circumstances. I do not accept that simply changing one mortgagee for another would provide relief for the desperate circumstances. Mr. McDonald clearly needed more assistance in order to save his home. I find on a balance of probabilities that it was the special loan facility from LOJ that Mr. McDonald sought.

LOJ had earlier treated with him very kindly. They had allowed him to resign to get access to pension funds for extremely urgent matters and thereafter immediately re-employed him. Mr. McDonald was looking to them again for help and in my view accepted their offer to provide the Special Loan Facility.

c. Consideration

LOJ's Counsel argued that there was a complete absence of consideration from this alleged contract.

The learned authors of the **Law of Contract** by Treitel 11th edition at p.68 state that “consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value).” Here the consideration was executory. LOJ promised to grant a loan to Mr. McDonald who in turn promised to make specified payments to LOJ.

d. Intention to create Legal Relations

I find that in the commercial scenario of this transaction, the parties intended to create legal relations.

The Payment

Life of Jamaica did not make the payment to VMBS. According to Mr. McDonald, he made enquiries about that and he was told to wait.

Interest continued to accrue on the mortgage loan with VMBS and VMBS made more demands on Mr. McDonald. The amount due continued to increase.

In order to try to meet their commitments, Mr. and Mrs. McDonald listed the family home for sale, and also another townhouse which they owned.

The family home was listed for some six (6) months. Mr. McDonald regarded none of the offers being received as being reasonable.

It is uncontradicted that in July 2003, Mr. McDonald asked Mrs. McLure, LOJ’s CEO, by telephone, to increase the loan granted to him by \$2,000,000.00 to assist in repaying a private loan that had been made to him whilst he was awaiting the financing by LOJ.

According to Mr. McDonald, Mrs. McLure assured him that she would arrange for that to be done.

Mr. McDonald continued to wait for disbursement of the loan until about September 19, 2003 when he received a telephone call from Mr. Michael Fraser, Deputy CEO of LOJ advising him that the LOJ Company Board had refused his loan.

Mr. Fraser also showed Mr. McDonald copies of LOJ's letter to its attorneys-at-law returning documents which had been sent to LOJ under LOJ's undertaking, and seeking release from their undertakings.

A copy of that September 19, 2003 letter did not reach Mr. McDonald via his dip which he testifies was the usual method of communication in LOJ but instead reached his home by mail, about one week later.

In an effort to prevent the sale of his property which was now imminent, Mr. McDonald obtained the assistance of a friend, Mr. D. Gordon, who broke a fixed deposit so as to lend him \$10,248,400.00. The understanding was that Mr. McDonald would pay him interest lost on that deposit plus \$250,000.00 in consideration for breaking his deposit.

Mr. McDonald alleges that these interest payments were onerous and he and his wife were therefore forced to sell their home at an undervalue in order to meet these pressing obligations, because LOJ had failed to disburse the loan.

Conditions or Warranties

Counsel for LOJ argued that LOJ's offer to lend \$8,595,281.79 was conditional and that Mr. McDonald did not comply. Instead, he counter offered \$12,510,000.00. In my view it was not open to Mr. McDonald to counteroffer \$12,510,000.00. I infer from the memorandum of June 12, 2003 that the sum of money which Mr. McDonald needed to settle the outstanding mortgage amount and associated costs increased to \$12,510,000.00. The evidence is that LOJ

did not offer to lend that larger sum. Meanwhile the original contract in my view remained in force.

The memorandum of June 12, 2003, repeated the requirement that Mr. and Mrs. McDonald would be required to provide life insurance assigned to LOJ. This referred to the loan of the larger sum of \$12.511 million. I infer that Mr. McDonald had not provided this life insurance.

The question arises as to whether LOJ is entitled to avoid any contractual obligations it may have had with Mr. McDonald.

The question to be determined is the effect of his failure to supply the insurance required. Was the supply of the requested information a condition or warranty of the contract?

The learned author, Sir Guenter Treitel in **The Law of Contract**, 11th edition stated at paragraph 1727 that the test as to whether a term of a contract may be held to be a condition was to be found in **Bettini v Gye** [1876] 1QBD 83 and is:

“Whether the particular stipulation goes to the root of the matter, so that failure to perform it would render the performance of the rest of the contract a thing different in substance from what the defendant had stipulated for.”

If LOJ disbursed the funds without the life insurance policies, the contract to provide the funds would not, in my view, have changed in substance. That life insurance stipulation would therefore not be a condition, but would rather be a warranty whose breach would not avoid the contract, but rather could give rise to an action for damages.

Wilful default

A question arises as the effect of a clause in the letter dated March 21, 2003 from LOJ to Mr. and Mrs. McDonald. Clause 22 states:

“If for any reason other than the wilful (sic) default of Life of Jamaica the mortgage shall not be completed, the same shall not give rise to any claim against Life of Jamaica for damages, costs or expenses or otherwise.”

This clause is described in the letter as a term and condition of the offer to provide mortgage finance. Of paramount importance therefore, is the question as to whether the mortgage was not completed because of the wilful default of LOJ.

In the absence of an acceptable explanation for the refusal of the mortgage loan, the only reasonable inference is that LOJ’s conduct was wilful as contemplated by Clause 22. There is no evidence that LOJ made any effort to negotiate any conditions to have the assignment of the mortgage completed.

Conclusion

I find therefore that on or before November 11, 2002, Mr. McDonald and LOJ entered into a contract whereby LOJ promised to grant a loan on specified terms to Mr. McDonald and he promised to repay the loan in specified terms. Those specifications were oral but were the same as were subsequently reduced into writing on March 31, 2003.

I find on a balance of probabilities that Mr. McDonald contracted with LOJ to obtain \$8.5 million to repay a mortgage loan with VMBS and that by wilful default LOJ did not disburse the funds, in breach of the contract. In view of this, I need make no determination as to the misrepresentation claim

Loss

Mr. McDonald claims damages arising mainly from the sale of his matrimonial home.

He quantified the losses he suffered and expenses incurred as being:

a.	Difference of mortgage and loan to the claimant by Mr. Gordon	-	\$3,253,177.00
b.	Cost of breaking deposit by Mr. Gordon to facilitate Claimant	-	51,600.00
c.	Having to sell property below market value	-	5,500,000.00
d.	Legal fees	-	1,435,400.00
e.	Difference to pay out to Credit Union	-	938,960.00
f.	Interest accrued to Purchaser	-	184,960.00
g.	Commission to Realtor	-	1,187,375.00
h.	Stamp Duty and withdrawal of Caveat re Loan	-	<u>224,140.00</u>
			\$12,775,612.00

However, Counsel for Mr. McDonald subsequently conceded that there was no evidence of (b) (c) and (e) supra, i.e. “the cost of breaking the deposit by Mr. Gordon to facilitate claimant” and “having to sell property below market value” and “difference to pay out to Credit Union.”

As it concerns the claim at (a), i.e. the “difference of mortgage and loan to the claimant by Mr. Gordon”, I accept as true the evidence that Mr. McDonald authorised attorneys-at-law to pay \$11,848,458.90 to Mr. D. Gordon who had provided him, at an additional cost, with the funds which LOJ had failed to provide. The amount which LOJ failed to pay was \$8,595,281.79. I therefore award the difference between these sums as a loss suffered by Mr. McDonald, i.e., \$3,253,177.11 under (a) above.

As it concerns the claim at (d), the evidence of the legal fees incurred shows a total amount of \$1,430,025 and I accept its veracity.

There is evidence of \$184,960.20 being refunded on Mr. McDonald's behalf as interest to the purchaser of his home which was sold because of the failure of LOJ to provide the agreed funds. I see no basis for LOJ being responsible for any such interest as claimed under (f) supra.

Unchallenged evidence of the commission paid to the realtor to sell the home is exhibited as being \$1,187,375. I make that award as claimed at (g) above.

The claim at (h) is for Stamp duty and withdrawal of caveat re loan. The unchallenged evidence supporting this is exhibited in the Statement of Account from attorneys-at-law concerning the loan from Mr. D. Gordon and lists "stamp duty" and "registration fee lodging caveat" totalling \$119,135. Expenses surrounding the withdrawal of the discharge of the mortgage and caveat for the loan from Mr. Gordon are also in the Statement of Account exhibited and show \$73,750 for "registration fee on withdrawal of caveat" and \$ 3,125 for "stamp duty". The evidence supporting this claim totals \$196,010.

The award which I make for the claims at paragraphs (a) (d) (f) (g) and (h) therefore totals \$6,066,587.11. There has been no claim for, nor evidence of, commercial interest.

Order

Order is judgment for the claimant in the amount of \$6,066,587.11 with interest at the rate of 6% per annum from date of service of claim. Costs to the claimant to be agreed or taxed.