JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 94/04

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (AG.)

BETWEEN	**VICTOR LOWE**	**APPELLANT**
AND	**NATIONAL INVESTMENT BANK OF JAMAICA LTD**	**RESPONDENT**

Christopher Dunkley and Ms. Judith Carter instructed by Cowan, Dunkley, Cowan for Appellant

Charles Piper instructed by Piper & Samuda for respondent

March 22, 23, 27 & April 7, 2006

HARRISON, P:

This is an appeal from the decision of Miss Justice McDonald (Ag.) on 21st September 2004 dismissing the appellant's notice of application for court orders filed on 31st March 2004 and dismissing summarily the fixed date claim dated 16th March 2004 with costs to the respondent.

By a loan agreement dated 12th November 2001 between Pathway Technologies Ltd ("Pathway") and National Investment Bank of Jamaica Ltd

("NIBJ"), the latter agreed to lend to Pathway the sum of $153,000,000.00 "to promote and implement "... a policy to encourage economic development through co-operation with private sector participants in information technology."

The Government of Jamaica acting through the Ministry of Industry, Commerce and Technology ("MICT") had established the Information Technology Revolving Loan Fund (IT Fund") "to offer financing by way of loans for IT projects approved by the Government." NIBJ was appointed by the Government as its agent and trustee to administer the operations of the Fund.

The obligations of NIBJ under the loan agreement inter alia, were to:

> "a) negotiate, draft, enter into and execute all documents including security documents related to any loan from the IT Fund with Project Sponsor(s) approved by the Loan Approval Committee appointed by MIC&T pursuant to issuance of a Commitment Letter issued by NIBJ to the said Project Sponsor;
>
> b) disburse the approved Fund Loan and monitor the operation of the Project from signature of all legal documents until the loan is repaid in full;
>
> c) receive and collect payment installments of the loan and take steps for the recovery of overdue installments or where appropriate the whole of the loan and the enforcement of the loan obligations or security thereunder."

These obligations of NIBJ were therefore restricted to disbursement and recovery of repayment of "the loan approved by the Loan Approval Committee." Its obligations did not extend to the "provision of working capital" as claimed by the appellant.

The appellant is the executive chairman of Pathway.

The purpose of the loan, as evidenced by the loan agreement, was stated hereunder:

> "3. **PURPOSE OF LOAN**
>
> The Loan shall be used exclusively for:
>
> (i) retrofitting of designated building space
>
> (ii) financing telecommunications infrastructure and equipment purchase for the establishment of two (2) Call Centres (hereinafter called 'the Project')."

Clause 5 of the loan agreement captioned "Security and documentation" reads:

> "Repayment of the Loan and all other monies payable pursuant thereto shall be secured and evidenced by way of the undermentioned securities:
>
> (i) This Loan Agreement;
> (ii) Promissory Note;
> (iii) Registered First Debenture over the fixed and floating assets of the Company to be stamped to cover One Hundred and Fifty-Three Million Jamaican Dollars (J$153,000,000.00) with power to upstamp the Debenture to cover the amount of the loan outstanding from time to time without need for further approval of the Company;" (Emphasis added)

Clause 6 stipulates that the disbursement of the loan "shall be made in tranches":

Clause 10 captioned "Conditions precedent to disbursement" (of the loan) placed reciprocal obligations on Pathway, inter alia, namely:

> "(iv) Submission of a resolution stating the names and addresses of the authorized officers of the company and warranting that all assets pledged as security for the loan are free and clear from any encumbrance.
> (iv) Finalization and execution of security documentation i.e Debenture, Loan Agreement and Promissory Note(s)." (Emphasis added)

Pathway was required to provide other information relating to incorporation, resolution and the transfer of other assets to Pathway.

Those two clauses 10(iv) and 10(v) show that, in addition to the security documentation namely, the debenture, loan agreement and promissory note, referred to previously in clause 5, and repeated in clause 10 (v) specifically, "assets pledged as security for the loan" was contemplated by the parties. "Assets pledged" was therefore intended and understood to be a further "security for the loan."

Clause 10 (ix) required Pathway to provide:

> "(ix) Evidence of One Million Five Hundred Thousand United States Dollars (US$1.5M) placed in a Jamaican Bank account hypothecated to NIBJ. US$1 Million to be placed prior to disbursement and US500,000.00 within 120 days of NIBJ's payment on last Letter of Credit to BNS. NIBJ is to authorize all drawdowns." (Emphasis added)

This therefore was the "assets pledged" in the context of the conditions precedent to disbursement and particularly, clause 10(iv).

Nowhere in the agreement was NIBJ required to permit Pathway to drawdown funds from the hypothecated fund as "working capital" as claimed by the appellant in his affidavit dated 11th March 2004. He said, at paragraph 7:

> "7. That it was orally agreed during the various meetings and discussions between myself and Rex James, President of NIBJ leading up to the Term Letter, that the hypothecated funds would be released by NIBJ pari passu upon my injection into Pathway of working capital."

No oral agreement simpliciter may alter the terms of the written agreement.

Pathway was required, by clause 10(x) to provide evidence of issued and paid up capital of US$3,277,000.00 and an additional US$500,000.00 "prior to commencement of call centre two (2)".

The letter dated 14th August 2003 from NIBJ to the appellant and which was signed by the appellant on 9th October 2003, confirms that the appellant sought and received the facilitation by NIBJ for the US$1,000,000.00 in the hypothecated fund to be re-invested in Jamaican Dollars. The appellant wished to take advantage of the higher interest rate payable. The said letter is an acceptance that the appellant acknowledged that the money, US$1,000,000.00, was in fact hypothecated to NIBJ as a security in the loan agreement and accepted and signed in agreement that it was a "continuing security." The said letter, inter alia reads:

> "Whereas the National Investment Bank of Jamaica has extended credit facilities to Pathway Technologies Limited in consideration for which Victor Lowe has provided as continuing security the hypothecation of funds amounting to US$1,000,000 held at Dehring,

> Bunting and Golding to remain in effect until written cancellation has been received from NIBJ.
> ...
>
> 2. From the proceeds of sale DB&G will:
>
> (a)...
> (b) Invest the sum of J$59M on terms to be approved by NIBJ. This said amount will be hypothecated to NIBJ as a continuing security for facilities provided to Pathway Technologies by NIBJ until the said facilities are repaid in full.
>
> ...
>
> Nothing contained in this letter is to be construed or interpreted as a rescheduling of facilities extended to Pathway by NIBJ. All rights under the Loan Agreement Debenture and Promissory Notes are hereby reserved." (Emphasis added)

The terms of the agreement were being adhered to, as to the pledged security.

The re-investment was effected for the benefit of Pathway.

Part 27 of the Civil Procedure Rules 2002 empowers a judge to effectively manage a case, as the particular circumstances permit. Rule 27.2(8) reads:

> "The Court may, however, treat the first hearing as the trial of the claim if it is not defended or the court considers that the claim can be dealt with summarily." (Emphasis added)

The first alternative is here inapplicable.

The fixed date claim form filed by the appellant claims:

> "The said sum of (US$4,576,556.00) representing the Claimant's direct investment in Pathways, lost as a result of the Defendant's wrongful withholding of the release of the hypothecated funds and the prior facility of United States ($1,000,000.00)."

It also sought declarations and an injunction. The basis of its claim for losses was its contention that the agreement mandated NIBJ to release from the hypothecated fund amounts of money for injection as working capital at the request of Pathway, and which monies NIBJ wrongfully withheld thereby creating the loss. This claim sounds in damages.

We see no basis in the agreement of 24th November 2001, nor in the later letter of agreement dated 14th August 2003 to support such a contention. Hypothecation is derived from the old Roman Law action "hypotheca" which permitted a person to sue another for the latter's breach of a pledge of land or goods.

The phrase in clause 10(ix) of the agreement "NIBJ is to authorize all drawdowns", is not referable to "injection of working capital". Such authority can only be considered in the context of the security of such an asset with NIBJ being the sole authority to order Dehring, Bunting and Golding to effect the cancellation of the hypothecated fund. The letter dated 7th May 2001 from Dehring, Bunting and Golding to NIBJ acknowledges the existence of such authority. It reads, inter alia:

> "This hypothecation will remain in force until written cancellation has been received from the NIBJ."

There was no evidence capable of amounting to acts of duress exerted on the appellant as claimed. No duress could arise from the clear provisions of the contract, in circumstances where NIBJ refused to do what the contract did not

permit, that is, to allow drawdowns from the hypothecated fund to finance working capital.

In all the circumstances the learned judge properly addressed her mind to the appellant's statement of case in view of the dictum of Lord Templeman in ***Eldemire v. Eldemire*** Privy Council Appeal No. 33/89.

We are of the view that the said judge correctly found that the hypothecated fund was a security for the loan and this was confirmed by both parties to the loan as evidenced by the letter dated 14th August 2003. Equally correct was the finding of the judge that there was no agreement for the release of the hypothecated fund.

The learned judge, as a consequence was correct to dismiss the application for court orders by the appellant and to dismiss accordingly the substantive case, in accordance with the provisions of rule 27.2(8).

Consequently, the appeal is dismissed with costs to the respondent to be agreed or taxed.

COOKE, J.A.

I have read the judgment of Harrison, P. and I agree with his reasoning and conclusion.

McCALLA, J.A. (AG.)

I have read the judgment of Harrison, P. and I agree with his reasoning and conclusion.

HARRISON, P.

ORDER

The appeal is dismissed with costs to the respondent to be agreed or taxed.