[2012] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 36/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE PHILLIPS JA

BETWEEN	**LEIGHTON McKNIGHT**	**1st APPELLANT**
AND	**NOVELETTE McKNIGHT**	**2nd APPELLANT**
AND	**JAMAICA MORTGAGE BANK**	**RESPONDENT**

Michael Hylton QC and Sundiata Gibbs instructed by Michael Hylton & Associates for the appellants

Garth McBean and Stuart Stimpson instructed by Ramsay Stimpson for the respondent

16 March 2011, 31 July and 28 September 2012

PANTON P

[1] I have read the judgment of Harris JA and agree with the reasoning and conclusion. I have nothing to add.

HARRIS JA

[2] This is an appeal against the decision of E J Brown J (Ag), (as he then was) contained in an order dated 22 March 2010, whereby he made the following orders in favour of the appellants:

"(1) The Claimants are awarded damages in the sum of $5,270,775.95

(2) Costs to the Claimants to be taxed or agreed.

(3) A stay of execution is granted until April 5, 2010."

On 31 July 2012, we ordered that the appeal is dismissed and awarded costs to the respondent to be agreed if not taxed. We now put our reasons in writing as promised.

Background

[3] The appellants are the proprietors of land situated at 21 Dillsbury Avenue, Kingston 6 in the parish of Saint Andrew, registered at Volume 1110 Folio 985 in the Register Book of Titles (hereafter referred to as "the property"). On 25 August 2004, the appellants and KES Development Company Limited (hereafter referred to as "KES") entered into a joint venture agreement to construct eight townhouses on the property. Under that agreement, KES was responsible to secure its own financing for the project. At the end of the construction, two of the townhouses were to be transferred to the appellants and the six, remaining, were to be transferred to KES. The appellants were to provide KES with a mortgage free title to facilitate the transfer of splinter titles for the remaining six townhouses.

[4] KES obtained a loan from Jamaica Mortgage Bank (hereafter referred to as "the bank") and subsequently defaulted thereon. It is apparent that the bank, discovering that it was without security for the loan, sought to have the appellants' consent to have the property charged with a mortgage for the security of the sum of $41,339,100.41 as

"interest for the Dillsbury project". The bank, following the refusal of the appellants to agree to the proposal, in October 2007, claiming to have an interest in the property, lodged a caveat against the certificate of title for the property without the appellant's knowledge. Up to that time, the townhouses were incomplete.

[5] In an affidavit filed by the 1st appellant on 5 February 2010, he averred that on 15 June 2005, one Mr David McBean entered into two agreements in respect of lot seven, one with the appellants and the other with KES. The agreement with the appellants was for the sale of lot seven to him and the agreement with KES was for the construction of a townhouse on that lot. Mr McBean paid a deposit of US$30,000.00 to KES' attorneys-at-law Mesdame Jennifer Messado and Company for construction of the unit. Upon KES' failure to fulfill its contractual obligations, Mr McBean requested and obtained a partial refund of his deposit. On 2 November 2009, Mr McBean entered into an agreement with the appellants to purchase the unit and the land for a sum of $55,000,000.00.

[6] It was an averment of the 1st appellant, that after becoming aware that KES had difficulty in completing the project, the appellants made arrangements with a new developer and another financial institution to complete the construction of the townhouses but discovered, in June 2008, that the caveat had been lodged by the respondent. He also averred that the existence of the caveat prevented the appellants from obtaining financing for them to complete the construction.

[7] The appellants, discovering the existence of the caveat, sought to enforce their proprietary rights by invoking section 140 of the Registration of Titles Act by which provision a caveatee may "summon the caveator to attend before the Supreme Court or a Judge in Chambers to show cause why such caveat should not be removed". As a consequence, on 23 September 2008, they filed a fixed date claim form seeking the following:

> "1. An order pursuant to section 140 of the Registration of Titles Act that the caveat lodged by the defendant against the Certificate of Title for 21 Dillsbury Avenue registered at Volume 1110 Folio 985 of the Register Book of Titles be removed forthwith;
>
> 2. an order for damages to be assessed and paid to the claimants pursuant to section 143 of the Registration of Titles Act for damages caused to the claimants as a result of the wrongful lodgment of the said caveat;
>
> 3. interest; and
>
> 4. costs."

[8] The matter came on for hearing on 24 February 2009 and on 6 April 2009, N McIntosh J (as she then was) held that the respondent had no reasonable cause to lodge the caveat against the appellants' title and ordered its removal. The caveat was removed on 16 April 2009. She also ordered that damages be assessed pursuant to section 143 of the Registration of Titles Act and that the appellants' claim for interest be addressed at the time of the assessment of damages.

[9] In an affidavit of the 1st appellant filed on 12 June 2009, the appellants claimed damages of $26,004,303.71. This, they claimed under the following four heads:

"a. Increased construction costs;

b. Increased financing costs;

c. Loss of Interest on the proceeds of sale of the two townhouses owned by us in the development; and

d. Other additional expenditures incurred as a result of the delay caused by the lodging of the caveat."

The following were specified as claims for their loss:

a.	Increased construction costs	15,661,147.07
b.	Increased financing costs	1,914,983.09
		17,576,130.16
*Less amounts to be recovered from purchasers		12,737,967.09 4,838,163.07
c.	Loss of interest on sale proceeds	20,733,527.76
d.	Other expenditure	432,612.88
	Total	**$26,004,303.71**

[10] The learned trial judge awarded the sums claimed for items (a), (b) and (d) above, but rejected the claim for item (c), that is, loss of interest on the proceeds of sale. The appellants now challenge the learned judge's decision. It is against the failure of the learned judge to have made an award in respect of item (c) that this appeal lies.

Grounds of appeal

[11] The notice of appeal was duly filed on 24 March 2010 and the appellants relied on three grounds. These are:

"(a) The learned judge's finding that there was no agreement in place is contrary to the unchallenged documentary and other evidence.

(b) The learned judge erred in finding that the delay caused by the lodgment of the caveat did not cause the Appellants actual loss in respect of Lot 7 and Lot 8.

(c) The learned judge erred in concluding that the Appellants' loss was not reasonably foreseeable."

The Submissions

Ground (a): The learned judge's finding - no agreement - contrary to the evidence

[12] Counsel for the appellants Mr Michael Hylton QC, in addressing this ground, submitted that the learned trial judge's finding that there was no agreement for sale in place in respect of townhouses seven and eight during the life of the caveat led him to the conclusion that the wrongful lodgment of the caveat did not cause the appellants actual loss in respect of those units. Learned Queen's Counsel contended that the learned trial judge was wrong in two respects. First, he argued, the judge assumed that loss would only have been suffered if the appellants had entered into agreements for sale at the time the caveat existed and second, he held that no agreement for sale had been entered into.

[13] The evidence, counsel contended, was that the appellants intended to complete and sell the two townhouses. There was no evidence, he argued, that market conditions had changed over the 12 months that the caveat had delayed the development. In those circumstances, on a balance of probabilities, their receipt of the purchase price of the townhouses would have been delayed, whether they had entered into an agreement at that time or not, he further argued. For this submission, Queen's

Counsel relied on the judgment of the Court of Appeal of Singapore in ***Ho Soo Fong and Anor v Standard Chartered Bank*** [2007] 2 SLR 181; [2007] SGCA 4. He also contended that if they had not already entered into an agreement, the caveat would have delayed their doing so or delayed the completion of any agreement they executed. However, learned Queen's Counsel argued, the unchallenged documentary evidence before the learned trial judge showed that an agreement for sale in respect of lot number seven existed during the life of the caveat. There is no purchaser for lot eight although Mr McBean has agreed to purchase lot seven for $55,000,000.00. Therefore, by the learned trial judge's own reasoning, there had been actual loss suffered by the appellants, he submitted.

[14] Mr Garth McBean, in response, submitted that the learned trial judge's finding is correct for two reasons. Firstly, in respect of townhouse number eight, there was no agreement for sale exhibited or any evidence of such an agreement during the currency of the caveat and there was also no evidence of any offers for the sale of same, he argued.

[15] Secondly, counsel argued, with respect to townhouse number seven, the 1st appellant, in the affidavit, in referring to and exhibiting an agreement for sale with Mr David McBean entered into on 15 June 2005, said "…KES Development did not complete the project. As a result Mr McBean requested and obtained a partial refund of his deposit". This statement, counsel contended, was evidence from which the learned trial judge could and did draw a reasonable inference in his judgment that the

agreement or contract was terminated or no longer subsisted during the currency of the caveat.

[16] Finally, counsel argued, the learned trial judge's finding that there was no contract subsisting during the currency of the caveat is fortified by evidence in the 1st appellant's affidavit that in or about November 2009, seven months after the caveat was removed, Mr McBean entered into a new contract for townhouse number seven.

Ground (b): The learned judge erred - delay by the lodgment of the caveat not causing the appellants actual loss

[17] The appellants, learned Queen's Counsel argued, were entitled to the use of the premises as they had intended. Based on affidavit evidence of the 1st appellant, when the appellants entered into the joint venture agreement with KES they had contemplated living in one of the townhouses, he argued. However, he submitted, as a result of the delay in the project, they had long shelved that idea and instead purchased a residence elsewhere. Therefore, counsel contended, at all material times the appellants had intended to sell their two townhouses on completion and to invest the proceeds of sale. This intention, counsel argued, was evident as early as 15 June 2005 when the appellants entered into the agreement with Mr David McBean for the sale of townhouse number seven. If the caveat had not been lodged, the construction of the two townhouses would have resumed 12 months earlier and would presumably have been completed 12 months earlier and all things being equal, the appellants would have sold their townhouses and received the proceeds of sale 12 months earlier, counsel argued. He further submitted that the bank's action caused the appellants to

suffer damages from the loss of the use of their money and that this loss was entirely foreseeable.

[18] To this end, learned Queen's Counsel submitted that the measure of damages for a delay in receiving money is the interest which could be earned on that money. For this submission, counsel prayed in aid the cases of ***BCIC v Perrier*** (1996) 33 JLR 119 and ***Westpoint Corporation Property Limited v The Registrar of Titles et al*** [2005] WASC 273.

[19] On the other hand, Mr McBean submitted that, on a balance of probabilities, there was no evidence before the learned trial judge that the appellants suffered loss. The reasons for this, he argued, are that there was no evidence of the state of the real estate market during the relevant period, or at all to show that on a balance of probabilities the townhouses would have been sold nor was there any evidence to show that the townhouses would have been completed within the 12 months. Such evidence, it was argued, could have been produced from an expert in the construction industry.

[20] Counsel further submitted that section 146 of the New Zealand Land Transfer Act 1952, which is similar to section 143 of the Registration of Titles Act, was considered in the case of ***Savill v Chase Holdings (Wellington)*** [1989] 1 NZLR 257 in which the court laid down the criteria to be satisfied in a proof of a claim for damages where a caveat had been wrongly entered.

[21] The test to determine whether the respondent's wrongful act in fact caused the appellants damage is commonly called the "but for test" whereby it must be shown that the respondent's wrongful act is the cause of the damage which would not have occurred but for it, counsel argued.

[22] Counsel further submitted that although the wrongful lodgment of a caveat is not a tort or breach of contract but is governed by statute, the principles of causation apply to determine whether the loss claimed or alleged by the appellants was caused by the wrongful lodgment of the caveat. He further submitted that there were other factors which would have caused a delay in the completion of the townhouses. The reasons being, he submitted, five caveats were lodged on the appellants' title between 10 March 2005 and 10 October 2007 (before the respondent's caveat was lodged) which would have had to be removed. Further, he argued, the appellants required building approval which could not have been obtained unless the restrictive covenants two and three entered on the appellants' title were modified. Without these modifications, he argued, the sale of the townhouses could not have been completed as splinter titles could only be issued after subdivision approval was granted. There is no evidence of the efforts made by the appellants to sell the townhouses and as to the length of time it would have taken to have the above rectified. Also, there is no proof that new financing was in place neither was there evidence of offers from prospective purchasers to indicate that these townhouses would have been sold within the time alleged. Thus, no tangible evidence has been produced to show that but for the caveat, the two townhouses would have been sold, counsel submitted.

Ground (c): The learned judge erred in concluding that the appellants' loss was not reasonably foreseeable.

[23] Learned Queen's Counsel for the appellants submitted that the learned trial judge misapplied the reasonable foreseeability test. He argued that the learned trial judge held that the appellants' loss was not reasonably foreseeable based on the respondent's lack of knowledge of the strength of the housing market in 2009, despite his finding of fact that financing was available to the appellants but was not extended as a result of the wrongfully lodged caveat.

[24] Learned Queen's Counsel submitted that a reasonable bank with that knowledge would have foreseen that the lodgment of the caveat would have hindered the appellants' ability to obtain funding from another financial institution and thereby delay their ability to complete the project and sell the townhouses. He therefore submitted that the reasonable foreseeability test was satisfied in the instant case.

[25] For the respondent, counsel submitted that the learned trial judge was correct in finding that there was a lack of objective circumstances that would be in the mind of the respondent as a reasonable man, for the following reasons: that there was no evidence of any existing contract, prospects for sale of the townhouses nor the state of the market for the townhouses during the currency of the caveat and that the evidence of the respondent's representative was that it was always his understanding that one of the townhouses would be used as a residence for the appellants.

[26] In light of the foregoing, counsel submitted, there was no evidence that the respondent could have reasonably foreseen that the appellants would have sold the townhouses while the caveat was in place.

Analysis

[27] The heart of the issues in this case is whether the appellants had suffered actual loss, which had been foreseen by the respondent, by having not had the opportunity to sell lots seven and eight due to the existence of the respondent's caveat and to invest the proceeds of sale and earn interest thereon. It is not disputed that Mr David McBean entered into two contracts in 2005: one with the appellants to purchase the land only of lot number seven and the other with KES for the construction of a townhouse on that lot. Neither has it been disputed that after KES defaulted on the repayment of the loan to the respondent Mr McBean requested and obtained a partial refund of his deposit.

[28] The learned trial judge found that there was no agreement for sale in place in respect of lots seven or eight prior to or during the existence of the caveat which mainly underpinned his decision that the appellants would not have sustained any loss. In his reasons for so concluding, he said at paragraph 23 of his judgment:

> "The Claimants' evidence relating to the status of David McBean vis-à-vis lot 7 is more than a trifle puzzling. If it is that by 'partial refund' is meant that only so much was retained as was forfeited by the terms of the agreement, then the contractual relationship was thereby severed. And if that was the case, David McBean would have had no subsisting interest in lot 7 during the currency of the caveat. However, if 'partial refund' means that funds were retained

> to represent consideration under the contract, the position may be otherwise."

[29] He went on to say at paragraph 24:

> "Without an interpretation of the terms of [the] agreement, the position cannot be ascertained with absolute certainty. However, the court is driven to accept the submission of counsel Mr. McBean. The court feels so constrained by the language of the Claimants' affidavit. That is, they deponed that after the lifting of the caveat David McBean 'has agreed to purchase unit 7. That position is fortified by the agreement for sale in November, 2009."

The learned judge having concluded that there was no proposed sale which could have led to actual loss by the appellants went on to ask the following questions: "Was it then a foreseeable loss? Or was it too remote?"

In answering these questions, he said at paragraph 26:

> "Foreseeability is not a mystical concept floating in metaphysical space to be plucked by the hand of the mystic seeker; it must attach itself to objective circumstances. So, what were the objective circumstances obtaining in 2009 when the project would have been completed but for the lodging of the caveat? In other words, what were the objective circumstances which would have seized the mind of the reasonable man in the position of the Defendant. For example, in the context of the all-embracing global economic decline, was there a slump or an upturn in the local real estate market? Were townhouses being sold like hot bread so that a reasonable man in the position of the Defendant could be fixed with foresight of the consequences.[?] In short, without that kind of data, it does not appear just nor possible to say that there was a probability that lots 7 and 8 would have been sold one year earlier. Without such relevant information, it cannot be said the circumstances were such that the sale of the townhouses within the temporal limits claimed was foreseeable."

[30] A claimant who seeks to obtain damages arising from a defendant's wrongful entry of a caveat against his title must establish certain facts. In the New Zealand case of ***Savill v Chase Holdings***, cited by Mr McBean, the court was concerned, among other things, with the question as to whether a company was entitled to damages if certain caveats on an instrument of title were removed. On appeal, the Privy Council upheld a decision of the High Court and the Court of Appeal. In the High Court, Tipping J at page 287, pronounced the criteria as to proof of damages to be as follows:

> "A person claiming damages under this section must prove three things; firstly that there has been a caveat lodged by the defendant, secondly that such caveat was lodged without reasonable cause, and thirdly that he has sustained damage thereby…The onus of proof in all respects is on the person who seeks compensation."

As, in all civil cases, the standard of proof is on the balance of probabilities.

[31] It is common ground that the caveat had been wrongly entered by the respondent. The question now is whether the appellants had been able to show that the delay occasioned by the caveat deprived them of the opportunity to sell the lots with buildings thereon and invest the proceeds of sale. Mr Hylton said that whether the appellants had entered into an agreement after the time of the lodging of the caveat or not, the delay in entering the agreement was caused by the caveat and would nonetheless have resulted in damages to the appellants.

[32] It is a settled principle of law that in ascribing culpability to a defendant for a wrongful act, the test of the extent of liability is reasonable foreseeability - see ***Overseas Tankship (U.K.) v Morts Dock and Engineering Co (The Wagon***

Mound) [1961] 2 WLR 126, [1961] 1 All ER 404. Since ***The Wagon Mound,*** there have been a plethora of cases which establish that in order to recover damages for a wrongful act, it must be shown that such damage was either reasonably foreseeable or ought reasonably to have been foreseeable. Foreseeability is the essential test. What is reasonably foreseeable is dependent upon the actual or implied knowledge of the parties, or that of the party who commits the breach - see **Victoria Laundry v Newman** [1949] 2 K B 528, [1949] 1 All ER 997.

[33] It must be shown that, a defendant, as a reasonable man, foresaw or could have foreseen the acts resulting in a claimant sustaining damage. There must be evidence of a direct or indirect connection between the damage of which the claimant complains and the act of the defendant to satisfy the court's evaluation of the mischief of which the claimant complains. It must be established that any damage sustained was reasonably foreesable or could have been reasonably foreseeable by the defendant. The complaint as to the damages suffered must not be remote.

[34] The law acknowledges a claimant's loss of opportunity. However, in evaluating the loss, the court will not engage in any speculative exercise. The court will only embark on an evaluation as to loss if the claimant adduces evidence on which, on the balance of probabilities, it can find that damages were sustained.

[35] The focus of the learned trial judge appears to be on the question as to whether there was a contract in place between the appellants and Mr McBean at the time that the agreement of sale for lot seven was entered into. His finding that there

was no agreement for sale in place before or during the life of the caveat would be incorrect. It cannot be said that a contract with Mr McBean had never been in place at any time. The contention of the appellants is that they had intended to sell their two townhouses on completion and invest the proceeds of sale. This intention, Mr Hylton argued, was evident as early as 15 June 2005 when the appellants entered into an agreement for sale of townhouse number seven. As I understand the evidence, an attempt was made to sell only one townhouse. Contractual arrangements were made to sell it to Mr McBean. The 1st appellant, in cross examination, said he did not recall telling Mr Patrick Peart, a Project Director of the respondent company that the appellants had intended to keep one of the townhouses or that he had abandoned the plan to live in the townhouse sometime in 2007. He declared that he purchased accommodation at Earls Court in or about August 2007. A part of Mr McBean's deposit was refunded at his request.

[36] In paragraph 6 of his third affidavit filed on 12 June 2009, the 1st appellant stated that, prior to the lodgment of the caveat, arrangements were made with a new developer and financing arranged for the completion of the project. At paragraph 13 of the 1st appellant's affidavit of 4 February 2010, he stated as follows:

> "I refer to paragraph 6 of my 3rd Affidavit. The phrase 'just prior to lodgment of the caveat' was an error. It should have read 'just prior to the discovery of the lodgment of the caveat.' "

However, paragraph 12 of the affidavit of Donna Stone filed on 22 July 2009 shows that the 1st appellant, in his affidavit of 16 July 2009 exhibited a letter to which he

referred to as a letter of commitment from Pelican Investment Company dated 7 February 2008, several months after the lodging of the caveat. In light of the 1st appellant's assertion, this financing would have been available in February 2008. Yet, the 1st appellant stated in his affidavit of June 2008 that when the caveat was lodged they were only a few weeks from restarting the project. He could not have obtained financing in February 2008 as this would have been after the lodging of the caveat and prior to his discovery of its presence. Further, Mrs Stone's affidavit also showed that the purported letter of commitment was in fact a letter of intent containing certain conditions and legal issues to be satisfied by the appellants, none of which was with reference to the respondent's caveat.

[37] The learned judge, in examining the question whether financial arrangements were secured by the appellants, dealt with it against the background of the letter from Pelican Investment Company. He had this to say at paragraphs 12, 13 and 15 of his judgment:

> "(12) We come now to the question of whether financing was in place. As the submission is understood, the letter relied on is inchoate. Real proof would be a letter of commitment. The letter from PFL declares the institution's willingness to provide the funds, "subject to a satisfactory resolution of all illegal issues relating to the development" as well as submission of a number of items.
>
> (13) No more than a cursory glance at the list of items is needed to arrive at the conclusion that compliance would involve some time lag. As to what that would be precisely, it remains unknown. Further, Mr. McBean's submission cannot be faulted that there is an absence of evidence that they had been met. The most that can be said is that the caveat is not the sole cause of the delay. However, as adverted to earlier,

> the Defendant is not being tagged with the entire period of the delay. Of necessity, the ascertainment of the proportion of delay must involve an element of arbitariness, but the unreasonable lodgement of the caveat itself lasted ten (10) months.
>
> (14)…
>
> (15) So, no commitment letter could have been issued. The Defendant will not be allowed to convert its own sword into a shield. What then of the further contention that the letter from PFL post dates the lodging of the caveat. It is misconceived to submit that the lodging of the caveat did not prevent it being issued or that its issuance evidences available financing in spite of the presence of the caveat, because the operative date is when the caveat was discovered. Further, it would mean losing sight of the gravamen of the Claimants' claim namely, that the efforts to secure financing collapsed upon discovery of the caveat. The force of the claim lies not in the absence of financing but in a thwarting of it by virtue of the presence of the caveat. The court finds itself at a loss as to how this submission advances the cause of the Defendant. The court accepts the letter of intent as sufficient proof that financing was available but not extended because of the caveat."

[38] I am constrained to disagree with the learned judge in finding that the letter of intent was adequate proof of the availability of financing which was not extended due to the caveat. It is perfectly true that the letter of intent signified proof of the availability of financing, but that is not sufficient to show that a firm refinancing agreement had been in place from which funds could have been disbursed to enable the appellants to proceed with the project. There were conditions in the letter of intent which remained unsatisfied by the appellants. Accordingly, it is difficult to understand their claim that they had secured financing for the completion and sale of the townhouses, but for the respondent's caveat, despite the fact that there is no

evidence that a concluded agreement for refinancing was in place. What is clear, is that, by reason of certain deficiencies on the part of the appellants, a letter of commitment was not obtained. They could not have proceeded with the construction of the townhouses during the life of the respondent's caveat, as they would wish the court to believe.

[39] The respondent's caveat was not the only one which was endorsed on the certificate of title, as rightly pointed out by Mr McBean. There were five other caveats lodged on the appellants' title prior to the respondent's caveat. An examination of the certificate of title for the property reveals that the other caveats were lodged on 10 May 2005, 15 May 2006, 15 May 2006, 20 February 2007 and 10 October 2007. There is no evidence from the appellants that these caveats which preceded that of the respondent's were removed prior to or during the life of the respondent's caveat. It is unlikely that any financial institution would have approved financing before all caveats are removed, as Mr McBean indicated. As a consequence, it could not be said that the respondent's caveat would have in any way affected the appellants being able to build and dispose of the two units or that the caveat precluded them from doing so.

[40] Further, as Mr McBean correctly stated, in order for the appellants to enter into a contract for the sale of the units, a building approval would have been required. Section 10 (1) of the Kingston and Saint Andrew Building Act requires a party who wishes to erect a building to notify the Building Authority and such notification must be

accompanied by plans. Section 10 (2) makes it an offence to commence construction without the written approval of the Building Authority. The section reads:

> "(2) Every person who shall erect, or begin to erect or re-erect, or extend, or cause or procure the erection, re-erection or extension of any such building or any part thereof, without previously obtaining the written approval of the Building Authority;…shall be guilty of an offence against this Act, and liable to a penalty not exceeding fifty thousand dollars..."

[41] Bearing in mind that the appellants' new developer, in obedience to the statutory provisions, would have had to secure building approval prior to the commencement of construction, the appellants ought to have placed before the court evidence of the grant of such approval. There being no evidence of the requisite approval being granted, it is somewhat difficult to comprehend the appellants' assertion that they could have proceeded with the construction and sale of lots seven or eight, when, without doubt, a fundamental pre-construction requirement for the sale of the units, remained unfulfilled. It follows that it could not be said that the lodging of the caveat delayed the sale of the townhouses.

[42] Further, as pointed out by Mr McBean, there are several restrictive covenants on the certificate of title. It has been observed that an endorsement dated 8 June 2009 appearing on the certificate of title discloses that three covenants were modified. No evidence had been proffered to show the date of the order modifying the covenants but assuming they were modified in 2009, the three restrictive covenants would have had to be removed before building approval could be obtained.

[43] There is nothing to show that the lodgment of the caveat resulted in the appellants failure to obtain or secure refinancing which ultimately caused them loss. It follows that it has not been established that the respondent could have reasonably foreseen or ought reasonably to have foreseen that the appellants would have been unable to construct the townhouses for lack of financing due to the existence of the caveat.

[44] The case ***Ho Soo Fong*** on which Mr Hylton relied does not offer the appellants in the case under review any assistance. However, I think it is necessary to set out the facts of the case and the conclusion. In that case the appellants, ***Ho Soo Fong*** ("HSF") and his wife, together with ***Ho Soo Kheng*** ("HSK"), owned several properties, including 179 Syed Alwi Road, which was mortgaged to the Bank of East Asia ("BEA"). In early 2001, they approached Standard Chartered Bank ("the respondent") for the refinancing of three properties which they owned, ie. 150 Braddell Road, 77 Syed Alwi Road and 26F Poh Huat Road. The respondent agreed to grant loan facilities secured by these three properties, subject to, inter alia, a cancellation fee, and subsequently lodged caveats against them. However, the respondent's agent informed the appellants that the respondent could not refinance 179 Syed Alwi Road as the mortgaged amount was in excess of the policy guidelines for non-corporate loans. A pre-condition for the disbursement of the loans, required the appellants and HSK to fully settle pending court actions against Ho Pak Kim Realty Co Pte Ltd (of which HSF and HSK were directors).

[45] After more than a year, the appellants were unable to draw down the loan facilities as the respondent took the view that the appellants and HSK had not settled all the pending court actions. After it became clear that the respondent would not disburse the loans, the appellants and HSK wrote to the respondent on 7 October 2002 and cancelled the three loan facilities, whereupon the respondent demanded the payment of cancellation fees. Commencing on 21 October 2002 the appellants and HSK made repeated requests to the respondent that the caveats lodged against the three properties be withdrawn. The requests were accompanied by offers to partially pay off the cancellation fees.

[46] The respondent was warned by the appellants that its caveats were preventing the appellants from seeking refinancing of the caveated properties with other banks, and that any delay or refusal in removing the caveats might cause the appellants to lose their properties by sale by the mortgagees. On 16 October 2003 BEA sold 179 Syed Alwi Road in the exercise of its powers of sale.

[47] On 27 February 2004, the appellants and HSK applied to the High Court for orders for the withdrawal of the caveats by the respondent and for an inquiry as to the damages. On 30 June 2004, the respondent withdrew the caveats without admission of liability. The High Court subsequently found that the respondent had no caveatable interest in the three properties, and its refusal to withdraw the caveats was wrongful or without reasonable cause. The High Court directed that damages to the appellants be assessed.

[48] At the inquiry as to damages, the appellants made several claims and argued, among other things, that the respondent's caveat on 26F Poh Huat Road prevented them from obtaining additional refinancing from Hong Leong Finance which could have been used to pay the mortgagee bank to stave off the mortgagee sale of 179 Syed Alwi Road. As a result, they had suffered loss flowing from the respondent's refusal to remove its caveat. It was held that the loss was unrecoverable as the respondent was without actual knowledge that the property would have been sold had the appellants been unable to obtain the refinancing and that since the appellants' loss was caused by their own impecuniosity in not being able to prevent the forced sale of the property, the loss was not recoverable as a matter of law.

[49] In allowing the appeal, the court held that it was not necessary for the respondent to have had actual knowledge that the appellants' inability to refinance 26 Poh Huat Road would lead to the forced sale of 179 Syed Alwi Road and that it was only necessary to show that the forced sale was foreseeable in the light of the respondent's knowledge of the appellants' financial condition. The court held that the warnings, together with the respondent's knowledge of the financial condition of the appellants, made it foreseeable to the respondent that 179 Syed Alwi Road would be sold in a mortgagee sale had the caveat on 26F Poh Huat Road remained to prevent the appellants from seeking alternative refinancing.

[50] That case is easily distinguishable from the case at bar. The circumstances in ***Ho Soo Fong*** were remarkably different from the present case and would in fact have

given rise to liability on the part of the bank in that case. In ***Ho Soo*** **Fong**, the existence of the caveats resulted in the forced sale of the caveated property after the caveator had been warned that the caveats were preventing the appellants from securing refinancing and that the delay in removing the caveats might have caused the appellants to lose their properties as the bank was fully aware of the financial condition of the appellants. Consequently, the bank would have foreseen that the mortgaged property would have been sold if the caveat remained on the property thereby precluding the appellants from obtaining refinancing. In the instant case, the appellants have not met the reasonable forseeable threshold. The respondent would, of course, have been aware that they would have had to seek new financing. However, as the evidence discloses, they had not secured refinancing due to their failure to put the appropriate processes in place in order to secure definite refinancing. This, the respondent, as a reasonable bank, could not have reasonably foreseen. Consequently, it could not be said that the appellants were prevented from constructing and selling the units due to the presence of the respondent's caveat on the document of title.

[51] I am of the view that the learned trial judge did not err in concluding that the appellants' loss was not reasonably foreseeable. An appellate court is a court of review and will not disturb the finding of a trial judge on findings of facts unless it is shown that he has wrongly exercised his discretion, or has applied the wrong principles, or was palpably wrong - see ***Watt v Thomas*** [1947] 1 All ER 582; ***Industrial Chemical Company (Jamaica) Limited v Ellis*** (1986) 35 WIR 303; ***Clark v Edwards*** (1979) 12 JLR 133; and ***Ivanhoe Baker v Michael Simpson*** SCCA No 50/2000 delivered

on 20 December 2001. The learned trial judge was correct in not making an award for the loss of interest claimed by the appellants.

[52] In light of the foregoing, in my opinion, the appeal should be dismissed with costs to the respondent to be taxed, if not agreed.

PHILLIPS JA

[53] I too have read the draft judgment of Harris JA and agree with her reasoning and conclusion.