The Queen (*Plaintiff*) *v.* **Guildwood Nursing Home Ltd** (*Defendant*)

Cattanach J.—Calgary, February 12, 13; Ottawa, March 14, 1969.

Industrial Development Bank—Contract for loan—Breach of stipulated conditions—Cancellation of contract—Obligation of borrower to pay commitment fee and standby fee—Whether enforcible—Industrial Development Bank, R.S.C. 1952, c. 151.

On January 7, 1966, the Industrial Development Bank (an agent of the Crown) offered to lend defendant $500,000 to construct a nursing home in Ontario. The offer stipulated, *inter alia*, that defendant must obtain a firm price contract not exceeding $655,000, that the credit would lapse on April 30 unless extended in writing, and that if the credit lapsed defendant would pay a commitment fee of $9,550 as liquidated damages and a standby fee of 2% per annum on the amount of the loan unadvanced after April 30. Defendant accepted the offer by letter on January 26, and therein requested an extension of the lapsing date. The bank notified defendant on February 1 by telephone that the lapsing date was extended to October 21 and amended its records accordingly. Defendant was only able to obtain a firm price contract for $691,000 and then, having arranged financing from other sources, requested cancellation of the loan.

Held, defendant was liable to pay the commitment and standby fees stipulated in the contract, and also the bank's legal expenses.

The stipulation for a firm price contract not exceeding $655,000 was not a condition precedent but a mere estimate. The contract was not frustrated by defendant's inability to obtain a firm price not exceeding $655,000. The bank had implied power under the *Industrial Development Bank Act* to require payment of commitment and standby fees. Although the lapsing date was not extended in writing, the bank's written record thereof was sufficient, and in any event the parties had waived the requirement for writing by their conduct. The bank was not

relieved of its obligation because defendant had obtained capital elsewhere. Defendant's obligation to pay commitment and standby fees was not harsh and unconscionable, from which equity would grant relief.

ACTION.

C. R. O. Munro, Q.C., and *N. D. Mullins* for plaintiff.

A. J. Harben for defendant.

CATTANACH J.—By information of the Deputy Attorney General of Canada he seeks to recover on behalf of the Industrial Development Bank (hereinafter called "the Bank") which, by virtue of section 3 of the *Industrial Development Bank Act,* chapter 151, R.S.C. 1952 as amended, is an agent of Her Majesty in the right of Canada, the sum of $13,170.77 from the defendant.

The defendant is a body corporate duly incorporated pursuant to the laws of the Province of Ontario and has its chief place of business at Scarborough in that province. The officers, directors and principal shareholders of the defendant are Leon Libin, President, Alvin Libin, Vice-President, David Laven, Secretary and Marton Cohos, Treasurer, all of the City of Calgary, Alberta.

In 1965 the defendant contemplated the erection and operation of a nursing home at Scarborough to accommodate 156 persons at an estimated cost of $1,005,000. The land upon which to erect the home was under option at a price of $135,000. It was estimated that the cost of construction of the building would be $655,000 and the estimated cost of the furnishings and equipment was $175,000. Added to these amounts were professional fees in the amount of $40,000.

The defendant had funds available to it from shareholders' loans and from Domestic Finance Co. which was owned and controlled by Leon Libin and in which his brother Alvin also had a participating interest. It was expected that approximately $400,000 would be available from these sources subject to variation and it was accordingly estimated that a loan of approximately $600,000 would be required to complete the financing of the project.

I might mention that the shareholders in the defendant company were also shareholders in a similar nursing home which had been constructed and successfully operated by them in Calgary, Alberta. If my recollection of the evidence is correct, one factor in arriving at the estimated cost of the construction of the building in Scarborough was the cost of a smilar building in Calgary and I believe that a loan of $600,000 had been obtained from the Great West Life Company to assist in the financing of the construction of that building.

In any event in the early fall of 1965 the defendant was unable to obtain financing for the construction of the projected nursing home in Scarborough from the conventional commercial sources. The defendant was refused a

loan by the Great West Life, its source of funds for the construction of the Calgary home, and Canada Permanent Mortgage Corporation. Further, the services of a mortgage broker, Murray and Company, had been engaged without success.

Accordingly, Leon Libin arranged an appointment with officers of the Calgary branch of the Industrial Development Bank for August 25, 1965 to discuss a possible loan as another opportunity to obtain financing which had not been canvassed.

A comprehensive presentation was made to Mr. Sedgwick, a credit officer of the Bank. The proposal was discussed in detail, further information was requested and in the result, the defendant made an application dated August 30, 1965 for a loan in the amount of $600,000 which application was filed in evidence as Exhibit P7.

This application for a loan was personally delivered by Mr. Libin to Mr. Sedgwick on August 31, 1965 at which time the terms and conditions on the reverse side of the initial page of the application were discussed and explained. These conditions read as follows:

> The terms and conditions of any credit which may be authorized will be set forth in a letter of offer, for agreement and acceptance by the applicant—
>
> (A) If the offer of credit is accepted, it will lapse on a date which will be set out in the letter of offer, unless the security required by the Bank has by then been furnished and the credit drawn upon, or an extension of the lapsing date has been agreed upon it writing.
>
> (B) If the offer of credit lapses at any time after its acceptance in accordance with (A) above, or if the accepted credit is cancelled at the request of the applicant, the applicant, shall forthwith pay to the Bank a commitment fee of $50, plus 2% of the amount by which the credit exceeds $25,000.
>
> (C) If an applicant does not make use of all of the accepted credit within a reasonable period of time which will be set out in the offer of credit or subsequent correspondence, either because the security has not been supplied or for any other reason, the applicant may be required to pay to the Bank a standby fee equal to interest as from the lapsing date established, at the rate of 2% per annum, calculated on the daily balance of that portion of the credit which is not cancelled and not drawn. The standby fee, if any, is in addition to the commitment fee referred to in (B) above on a credit which lapses or is cancelled at the request of the applicant.
>
> (D) Prepayment in whole or in part may be made at any time, without notice, provided that:
>
> (i) if the prepayment is made within six years from the date on which the principal security documents are executed, an indemnity is paid to the Bank computed, on the amount prepaid, at the following rates:
>
> 5% during the first two years
> 4% during the third year
> 3% during the fourth year
> 2% during the fifth year
> 1% during the sixth year
> nil after the end of the sixth year,
>
> each year being computed from the date of execution of the principal security documents;
>
> (ii) partial prepayments shall be applied regressively on the then last maturing instalments of principal.

The application was then considered and investigated by the officers of the Calgary branch of the Bank and forwarded to the head office of the Bank in Montreal, P.Q. in early December 1965, together with a recommendation for its acceptance.

On December 23, 1965, Mr. Sedgwick advised Mr. Libin that the defendant's application for a loan of $600,000 had been declined, but that the Bank would be willing to loan the defendant an amount of $500,000 provided that a further $100,000 were forthcoming from Domestic Finance Co. to meet the estimated costs of the project. This proposal was apparently agreeable to the defendant and on January 7, 1966 an offer to loan that amount was prepared and forwarded to the defendant on that day. This offer was introduced in evidence as Exhibit P2. It was to the effect that a loan of $500,000 had been authorized to be secured as therein outlined. The offer also contained the heading "Contingent Conditions" reading as follows:

> Prior to disbursement the company shall obtain a firm price contract for construction of the proposed building for an amount not to exceed $655,000 and the contractor shall obtain a performance bond in the amount of at least 50% of the contract price.
>
> Prior to disbursement of this loan, the Bank will require evidence that a chartered bank operating credit of at least $50,000 has been established in the company's favour.

and the heading "Other Conditions" reading as follows:

> The loan is also subject to the terms and conditions set out in the attached Appendix "A"; your attention is drawn, in particular, to Item 5, which sets out the conditions under which the loan may be prepaid.
>
> Appendix "B" contains additional comment about provisions of the loan pertaining to insurance on fixed assets.

The purpose of the loan was outlined as follows:

> This loan is being made available to assist in financing the following programme:
>
> *Programme*
>
> | | |
> |---|---|
> | Purchase land | $ 135,000 |
> | Construct building | 655,000 |
> | Purchase equipment | 175,000 |
> | Professional fees | 40,000 |
> | | $1,005,000 |
>
> *Financing*
>
> | | |
> |---|---|
> | I.D.B. | $ 500,000 |
> | Shareholders' and other loans | 305,000 |
> | Domestic Finance Co. second mortgage loan | 200,000 |
> | | $1,005,000 |
>
> No material change should be made in the programme without the prior written consent of the Bank. If the actual cost of the programme should be greater than the above figures, the amount of the overrun shall be provided by the company or by its shareholders on a basis acceptable to the Bank prior to final disbursement of our loan. If the actual cost should be less than the above figures, the Bank may, at its discretion, reduce the amount of the loan accordingly.

The material conditions referred to in Appendix "A" under the heading "Other Conditions" are as follows:

(1) to become effective, this offer of credit must be accepted in writing by the applicant. The offer will lapse if we have not received written acceptance by January 28th, 1966.

(2) If the credit is accepted, it will lapse on April 30th, 1966 unless the security has then been furnished and the credit drawn upon, or an extension of the lapsing date agreed upon in writing.

(3) If, at any time after acceptance, this credit lapses or is cancelled at the request of the applicant, the applicant shall forthwith pay to the Bank a commitment fee of $9,550, which amount shall be retained by the Bank as liquidated damages and not as a penalty.

(4) The applicant shall, in addition to the commitment fee (if any), pay to the Bank a standby fee equal to interest at 2% per annum calculated on a daily basis on that portion of the credit which on each day after April 30th, 1966 is not cancelled by the applicant and is not advanced by the Bank. The standby fee shall become due and payable monthly commencing May 23rd, 1966, and shall terminate when the undisbursed balance is reduced to $25,000 or less. Standby fee shall not be charged on that portion of the credit which is intended to repay the outstanding balance of previous IDB credits (if any). No portion of the credit shall be considered cancelled by the applicant until the Bank receives from the applicant a written request for cancellation.

* * *

(6) Disbursement of the proceeds of the credit offered hereby is subject to delivery of the security outlined in this offer of credit in form and terms acceptable to the Bank and its solicitors.

(7) If, in the opinion of the Bank, a material adverse change in risk occurs before the proceeds of this credit are disbursed, disbursement may be withheld at the discretion of the Bank.

(8) This offer of credit may, at the discretion of the Bank, be cancelled or withdrawn in the event that the applicant is involved in any litigation, or in any proceedings before any government board, tribunal or agency, which have not been disclosed to the Bank.

* * *

(12) The applicant understands and agrees that it will be responsible for payment of all legal charges relative to the preparation, execution and registration of the security documents.

It will be observed from paragraph 1 of Appendix "A" that the offer would lapse if not accepted by January 28, 1966. In a telephone conversation between Mr. Sedgwick and Mr. Libin on January 26, 1966, Mr. Libin advised that the offer would be accepted and a letter of acceptance would be completed prior to the expiry date. However he intimated that construction could not be begun prior to April 30, 1966, the lapsing date referred to in paragraphs 2 and 4 of Appendix "A", and accordingly requested an extension of the lapsing date. He was requested by Mr. Sedgwick to make this request in writing.

By letter dated January 26, 1966 (Exhibit P3) the defendant accepted the offer of the Bank in the following terms:

> This will acknowledge receipt of your offer of credit dated January 7th, 1966. The terms and conditions set out in your letter and attached Appendices "A" and "B" have been carefully noted and acceptance of the loan on that basis is hereby confirmed.

> Please request your solicitors to proceed with preparation of security. The necessary material required to complete security will be furnished promptly on request.

This letter was signed by four persons being all the shareholders of the defendant.

By letter also dated January 26, 1966 the defendant requested an extension of the lapsing date in the following language:

> Enclosed please find our acceptance of your credit offer dated January 7, 1966. We would also like to make application to extend the lapse date in Clause 2, Appendix A from April 30th to October 30th as we cannot possibly make our first draw until some time later than April 30th as our program calls for the start of construction during the month of April.
>
> We trust you will find this request in order.

On receipt of such request Mr. Sedgwick recommended the extension of the lapsing date from April 30, 1966 to October 31, 1966 under date of January 26, 1966. In this recommendation he was supported by Mr. Russell, his superior, and the extension was authorized by the assistant general manager on January 28, 1966. This information was prepared on the Bank's form 46 entitled "Amendments to Authorization" Exhibit P8. This form was returned to the Calgary branch on January 31, 1966.

On February 1, 1966 Mr. Sedgwick advised Mr. Libin by telephone that the lapsing date had been extended from April 30, 1966 to October 31, 1966, but the information so communicated was not confirmed in writing. Paragraph 2 of Appendix "A" to the Bank's offer of credit specifically provided that an extension of the lapsing date may be agreed upon in writing.

In the meantime the defendant exercised its option on the land for the site of the nursing home at the price of $135,000 which was paid in cash in September 1965 from the shareholders' loans.

When the bank's offer of credit was received in the amount of $500,000, rather than $600,000 as had been applied for, the shareholders of the defendant met and reassessed their position. At that time the estimated cost of the construction of the building and the cost of its equipment still remained an estimate only. Tenders had not been called. To the defendant the Bank's offer was the best deal available. Conventional commercial credit was not available and the shareholders resolved to live with the deal and to raise the additional $100,000 required to meet their estimated costs by obtaining that further amount from Domestic Finance Co. As intimated before the Bank's offer of credit was accepted by letter dated January 26, 1966.

The building was put out to tenders in April 1966. The tenders received were all well in excess of the estimated cost of $655,000, ranging from $800,000 to over $900,000.

This information was relayed to the Bank but the Bank was adamant in restricting its offer of credit to $500,000.

Accordingly negotiations were undertaken with the contractors to reduce the amount of the tenders. In consultation with the architects changes were

made in the plans to reduce the cost. Eventually a contract was entered into with a builder on June 10, 1966 for the erection of the building at a maximum cost of $691,000 with the possibility of savings being effected to reduce that amount to $681,000. These figures are within $36,000 and $26,000 of the estimated cost of $655,000.

The defendant negotiated the supply of furnishings from Robert Simpson Company, Limited at a cost of $150,000, but the defendant still felt that a further loan of $100,000 was necessary to bring the project to its completion.

The defendant supported by the Robert Simpson Company and its chartered bank renewed their supplications to the Canada Permanent Mortgage Corporation and were offered a loan of $600,000.

Mr. Libin, on behalf of the defendant, then advised the Bank that this loan was available together with the suggestion that the Bank might meet that offer. This the Bank declined to do and was precluded from doing so since its purpose was to provide capital assistance to small enterprises to which credit or financed resources were not otherwise available. Such credit was now available to the defendant.

Accordingly the defendant accepted the loan of $600,000 from Canada Permanent Mortgage Corporation at the same interest rate of 8% offered by the Bank, but for a term of 20 years rather than that of 12 years offered by the Bank and with slightly more favourable conditions with respect to a commitment and standby fee.

The question then arose as to what should be done with respect to the offer of credit from the Bank. The matter was discussed with the officers of the Calgary branch of the Bank who pointed out to Mr. Libin that three courses were open to the defendant, (1) it could cancel the Bank's offer of credit in accordance with paragraph (4) of Appendix "A" to the Bank's offer of credit dated January 7, 1966, (2) it could allow the offer to lapse on October 31, 1966 simply by doing nothing, or (3) it could avail itself of the Bank's offer of credit of $500,000. The defendant adopted the first course and by letter dated August 10, 1966 (Exhibit 11) requested cancellation of the Bank's loan pointing out therein that due to problems and situations beyond its and the Bank's control it was unable to proceed with the loan.

It was made known to the defendant that the Bank would expect payment of the commitment fee of $9,550, the standby fee of $2,849.27 from April 30, 1966 to August 12, 1966 and legal expenses incurred in the amount of $771.50, the total of $13,170.77 now sought to be recovered from the defendant.

During his discussions with the Bank, Mr. Libin thought such amounts to be excessive and offered to pay the Bank its out of pocket expenses. This the Bank declined to do and by letter dated August 23, 1966 demanded payment of the full amount of the fees and charges above mentioned.

There is no dispute between the parties as to the correctness of the computation of these fees and charges but the dispute lies in the liability of the defendant therefor.

On behalf of the defendant it was submitted by counsel that there was no contract between the Bank and the defendant. Such submission is predicated upon the fact that under the terms of the Bank's offer of credit it was a condition that the defendant should, prior to any disbursement by the Bank, obtain a firm price contract for the construction of the building in an amount not in excess of $655,000 and that such condition renders void for uncertainty any contractual relationship between the Bank and the defendant.

The second position taken by the defendant is that this condition through no fault of the defendant and by force of circumstances beyond its control and to the knowledge of the Bank was not and could not be complied with and accordingly the contract was frustrated.

The third position of the defendant was that the Bank in exacting the commitment fee and standby fee was acting beyond its powers under the *Industrial Development Bank Act.*

It was the fourth position of the defendant that there was no obligation to pay the standby fee because there was no written extension of the lapsing date of April 30, 1966 as set out in the Bank's offer of credit.

The fifth position of the defendant was that of "supervening illegality". This argument, as I understood it, was that the loan would not, in fact, come into existence until monies were actually advanced by the Bank to the defendant, but prior to that time no loan would be made, the Bank only being in readiness to advance money when request was made by the defendant to draw it down. However, since the offer lapsed before any money was so drawn from the Bank it would be illegal for the Bank to then advance money because there was no contract and further because funds were then available from conventional sources and the Bank was precluded from advancing monies by section 15(1)(*b*) of the Act.

Sixth and finally the defendant submitted that the obligation to pay the commitment fee and a standby fee is harsh and unconscionable from which obligation equity will relieve.

As I read the material it is plain that the Bank's offer of credit to the defendant in the amount of $500,000 dated January 7, 1966 (Exhibit P2) which offer was accepted by the defendant by letter date January 26, 1966 (Exhibit P3) signed by all its shareholders, directors and officers being four in number, constitutes a binding contract, unless upon the true construction of these documents the essentials of a contract are absent and they amount to nothing more than agreement to make an agreement. If a vital term of a contract had not been agreed upon between the parties but is to be determined by a future agreement, then there is no contract between them. This principle was pointed out by Lord Dunedin in *May & Butcher v. The King*[1] but Lord Dunedin went on to say,

> . . . of course, it (the contract) may leave something which has still to be determined but then that determination must be a determination which does not depend upon the agreement between the parties.

[1] [1934] 2K.B. 17.

As I understand the submission of counsel for the defendant on this point, it was that in the heading "Contingent Conditions" in the Bank's offer of credit there was a condition that before the Bank made any disbursement the defendant should have obtained a firm price contract for the construction of the proposed nursing home not to exceed $655,000 and that a chartered bank will have established an operating credit in the defendant's favour of at least $50,000.

The condition of an operating credit of $50,000 by a chartered bank being provided to the defendant was fulfilled.

There is no question that the amount of $655,000 as the contemplated cost of the nursing home was merely an estimate made at a time prior to the call for and receipt of tenders. Both parties recognized this to be the circumstance and the Bank's offer of credit was predicated and formulated on that basis.

It was stated in the Bank's offer of credit that no material change in the proposed programme should be made without the prior consent of the bank and that if the actual cost of the programme should be greater than the figures set forth, the amount of the overrun should be provided by the defendant or its shareholders on a basis acceptable to the Bank prior to the final disbursement by the Bank. It was also provided that if the actual cost should be less than the estimate then the Bank, at its discretion, might reduce the amount of the loan correspondingly.

It was submitted on behalf of the defendant that the contingent condition of a firm price contract not to exceed $655,000 made the contract between the parties subject to a condition precedent which was not fulfilled and therefore there was no binding contract between the parties and that the contract was void for uncertainty. In addition clause 7 in Appendix "A" to the offer of credit is to the effect that if, in the opinion of the Bank, a material adverse change in risk occurs before the proceeds of the credit are disbursed, then disbursement may be withheld at the discretion of the Bank.

It was the submission of the defendant that if any of those contemplated conditions arose the Bank was vested with an unfettered discretion to withhold disbursement and there would be the necessity of negotiating a further agreement.

It is axiomatic that the governing principles of construction are applicable to every document but the effect of their application is to some extent governed by the nature of the document. Every effort must be made to give effect to the dealings between the parties.

As I appreciate the material here to be interpreted it is an agreement on the part of the Bank to loan money and on the part of the defendant to borrow that money.

Obviously the Bank is interested in being repaid and in minimizing its risk and it appears to me that the qualifications imposed in its offer of credit are reasonable for that purpose.

Both parties realized that the proposed cost of $655,000 for the construction of the nursing home was an estimate. Neither party expected that the firm price contract when received would be precisely $655,000. It might well be more and it might be less.

The possibility of an overrun was present to the minds of the parties. In his evidence Mr. Libin specifically mentioned that an overrun of between $25,000 or $30,000 would be assumed by the shareholders.

It was the Bank's stipulation that there should be no material change in the proposed programme. If there were a material change then the Bank reserved to itself the discretion whether it would proceed with the loan. It seems to me that for the Bank to come to the conclusion that there is a material adverse change in the risk it must come to that conclusion upon *bona fide* considerations.

In my opinion the parties to this agreement have left nothing to be negotiated in the future. They foresaw possibilities and provided against them. Neither do I think it to be unusual in commercial contracts for one party to reserve to itself the right, upon the happening of some future circumstance, to avoid the contract. This is what I think the Bank did in this contract and in my view this contract is what it purports to be—a valid binding contract between the parties and was intended by them to be.

The next position taken by the defendant is that the contract was frustrated. As I understand the doctrine of frustration it is to the effect that if the literal words of the contract were to be enforced in changed circumstances, would this involve a fundamental or radical change from the obligations originally undertaken? It is not hardship or inconvenience or material loss which calls the doctrine into play unless there is a radical change in the obligations.

The defendant submitted that through no fault of the defendant and by force of circumstances beyond its control and to the knowledge of the Bank the defendant was unable to obtain a firm price contract for the construction of the nursing home at an amount not in excess of $655,000 and that since this condition was not complied with the contract was frustrated.

In my view it is a fundmental principle that a contract is not discharged by a supervening event if the parties anticipated such event and provided for it.

The basic obligation under the present contract was that the Bank should loan and the defendant should borrow from the Bank $500,000.

On the facts as established in evidence and under the terms of the contract, the defendant was not precluded from accepting the loan, nor the Bank from extending it. Therefore there has been no change in circumstances. As I see the matter the defendant cancelled the loan because it was expedient for it to accept a more advantageous loan offered to it.

While it is true that the tenders originally received by the defendant were substantially in excess of $655,000, nevertheless, the actual construction contract entered into by it (Exhibit D7) was for an absolute maximum of $691,000 with a possibility of savings being effected so that the price would be $681,000 with resulting overruns of $36,000 or $26,000. As I

have intimated before overruns to this extent were contemplated and provided for by the parties in the contract. Accordingly in my view the doctrine of frustration is not applicable in the circumstance of this case.

Furthermore the parties anticipated that the defendant might not take the loan. Provision was made for it to lapse or to be cancelled by the defendant. It was provided in section 3 of Appendix "A" to the offer of credit if the credit lapsed or was cancelled by the defendant, then the defendant would pay to the Bank a commitment fee of $9,550 to be retained by the Bank as liquidated damages and by section 4 of Appendix "A" a standby fee.

It is the submission of the defendant that the exaction of a commitment fee and a standby fee is beyond the powers of the Bank. The basis of such submission is that the Bank is limited to those powers expressly conferred upon it by the statute by which the Bank was created. There is no express provision in that statute for the imposition of a commitment fee or a standby fee. Counsel for the defendant says that what is not expressly conferred is inferentially prohibited.

As against this submission it must be borne in mind that the Bank would have those powers which are implied from its expressed objects, that is those powers which are fairly incidental to, or consequential upon or reasonably necessary to the attainment of its expressed objects and it has also been held that the doctrine of *ultra vires* must be reasonably applied—(see *A. G. v. Great Eastern Rly*)[2].

By section 15(1) of the *Industrial Development Bank Act* the Bank "may lend or guarantee the loans of money" to a person meeting the qualifications set out in the section (which the defendant had met).

By section 24 the Bank was granted ancillary powers including those in subsection (e) to "do all such things as may be necessary for carrying out the intention and purposes of this Act and not specifically prohibited by this Act."

From section 26 of the Act it is apparent that the Bank might make a profit from its operations.

It is common business prudence that when a large commercial loan is negotiated there should be a contract to state the terms under which the funds are lent. Obviously such authority is inferentially vested in the Bank and it seems to me that Parliament intended it to be left to the Bank to negotiate the terms of the loan with the borrower.

Accordingly, in my opinion, it cannot be said that the Bank did not have the authority to require the payment of a commitment fee and a standby fee as it did in the present circumstances.

It was provided in section 2 of Appendix "A" to the Bank's offer of credit that if the credit was not accepted by the defendant it would lapse on April 30, 1966 unless an extension of the lapsing date were agreed upon in writing. By letter dated January 26, 1966 the defendant requested the extension of the lapsing date until October 30, 1966. The Bank informed the

[2] (1880) 5 App. Cas. 473.

defendant by telephone that the lapsing date had been extended to October 31, 1966 but did not confirm that verbal advice by letter to the defendant.

Accordingly the first question which arises is, did the loan lapse on April 30, 1966 because an extension thereof was not agreed upon in writing? An agreement in writing may be contained in more than one document. The request for the extension of the lapsing date was made by the defendant in its letter of January 26, 1966. On its part the Bank prepared a written memorandum for its own record (Exhibit P8) entitled "Form 46—Amendments to Authorization". The transaction here involved is described with certainty and the amendment is described therein as "extend the lapsing date from April 30, 1966 to October 31, 1966. Standby fee to be applicable commencing April 30, 1966". The defendant's request for an extension of the lapsing date was recommended on January 26, 1966 and signed by Mr. Sedgwick, the credit officer of the Bank dealing with this particular transaction and by his superior, Mr. Russell. The requested extension was authorized by the assistant general manager of the Bank and signed by him on January 28, 1966.

There was no suggestion that the assistant general manager was not the officer competent to bind the Bank.

This document constitutes part of the permanent records of the Bank and in my opinion is sufficient to bind the Bank. In the event of a dispute where it might be vital for the defendant to establish the existence of this document it would be required to be produced upon a notice to produce.

Therefore I conclude that the lapsing date was extended by an agreement in writing, although I cannot resist the temptation to say that considerable difficulty might well have been avoided by the simple expedient of confirming the telephonic advice to that effect by letter and that it would have been good business practice to do so.

In any event it seems clear to me that the parties by their conduct waived the requirement that the extension of the lapsing date should be agreed upon in writing. Both parties treated that date as having been extended and acted upon that assumption.

The defendant further argued that for the Bank to loan money to the defendant after the defendant had obtained capital assistance from a conventional source on reasonable terms was beyond the power of the Bank. To substantiate this position the defendant must take the position that a loan did not come into being until funds were actually advanced to the defendant. The simple answer to this submission is that the Bank entered into a contract with the defendant to lend money to the defendant at which time credit was not otherwise available to the defendant and that contract was valid when it was entered into.[3] Having entered into a contract which was binding upon it, the Bank would not be relieved of its obligation to

[3] While there is considerable doubt whether this contract is within the literal words of section 15(2) of the statute, it clearly falls within section 24(*e*) read with the preamble to the statute, having regard to the manner in which loans of this kind are customarily made in the ordinary course of business.

advance money to the defendant pursuant to the terms of that contract by reason of the circumstance that in the meantime the defendant was able to obtain credit from a conventional source.

Finally the defendant submitted that the obligation to pay the standby fee and the commitment fee was a harsh and unconscionable bargain from which equity would grant relief.

It is my understanding that the equitable remedy of recision is not available when a bargain which was fair and reasonable in the light of the circumstances existing at the time of the agreement merely because it turns out that one of the parties may have made a more advantageous bargain.

There was evidence that all lending institutions invariably require the payment of a commitment fee and a standby fee against the eventuality that the borrower does not draw upon the credit made available to it. If monies are actually drawn down then the commitment fee and the standby fee is absorbed in the normal interest payments. The evidence was to the effect that the standby and commitment fees exacted by conventional commercial lenders were slightly lower than those imposed by the Bank, but in view of the fact that the resources of the Bank were to be available to small enterprises to which credit is not otherwise available, it follows logically that the risk would be higher and the fees in question would be correspondingly higher.

Two of the officers of the defendant were themselves engaged in the lending business and if my recollection of the evidence is correct they exacted like fees from borrowers with whom they dealt. One of the other two officers of the defendant was a lawyer and the other an architect both of whom, because of their respective professions, were thoroughly familiar with transactions of this nature.

In the letter of acceptance dated January 26, 1966, which was signed by all four of the officers of the defendant, it was stated that they had carefully noted all terms and conditions of the offer of credit and accepted the loan on that basis. It was only when the defendant announced to the Bank that it had accepted a more favourable loan and was then informed that the Bank expected payment of the commitment fee, the standby fee and the solicitor's costs incurred, that an effort was made to reduce the amount of those fees. As a compromise the defendant offered to pay the Bank's out-of-pocket expenses but this the Bank declined to accept.

In my opinion for the reasons above stated none of the defences raised by the defendant are available to it.

At trial the defendant abandoned its reliance upon the *Unconscionable Transactions Act*[4] and the question of undue influence in paragraph 5(*b*) of its statement of defence.

It follows that there shall be judgment for the Informant in the sum of $13,170.77 and the costs of this action.

[4] Statutes of Alberta 1964, c. 99.