

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Coastal Securities LTD,

Claimant,

and

No. 95-04412

Mowell Financial Group, Inc.,

Respondent.

Consolidated with:

In the Matter of the Arbitration Between

Ellington Mortgage Partners, LP,

Claimant,

and

No. 96-00467

Raymond James & Associates, Inc.,

Respondent and Third-Party Claimant,

and

Waterside Development Co.,
and James P. Scherr,

Third-Party Respondent and Third-Party Claimants,

and

Bear, Stearns & Co., Inc.,

Third-Party Respondent and Third-Party Claimant,

and

Coastal Securities LTD,

Third-Party Respondent.

REPRESENTATION OF PARTIES

Claimant and third-party respondent Coastal Securities LTD was represented by David D. Sterling, Esquire, of Baker & Botts, located in Houston, Texas.

Claimant Ellington Mortgage Partners, LP was represented by Christopher Hall, Esquire, of Piliero, Goldstein, Jenkins & Hall, located in New York, New York.

Respondent Mowell Financial Group, Inc. was represented by Donald A. Loft, Esquire, of Morris, Manning & Martin, located in Atlanta, Georgia.

Respondent and third-party claimant Raymond James & Associates, Inc. was represented by John N. Critchlow, located in St. Petersburg, Florida.

Third-party respondent and third-party claimant Waterside Development Co. and third-party respondent claimant James P. Scherr were represented by Adam D. Palmer, Esquire, of Elk Bankier Palmer & Christu, located in Boca Raton, Florida. (Waterside Development Co. is a sole proprietorship, and James P. Scherr is its sole proprietor; thus, they have been considered at times throughout the arbitration of this matter to be one and the same.)

Third-party respondent and third-party claimant Bear Stearns & Co. was represented by James M. Hubbert, Esquire of Bear Stearns & Co., Inc., located in New York, New York.

CASE INFORMATION

No. 95-04412

Claimant Coastal Securities LTD's Statement of Claim was filed on or about September 14, 1995. Claimant Coastal Securities LTD's Amendment to the Statement of Claim was filed on or about November 14, 1995. Claimant Coastal Securities LTD's Second Amendment to the Statement of Claim was filed on or about December 6, 1995. Claimant Coastal Securities LTD's Submission Agreement was signed on September 8, 1995, by Dwayne Whitehead, President of Coastal Securities LTD.

Respondent Raymond James & Associates, Inc.'s Statement of Answer was filed on or about October 24, 1995. Respondent Raymond James & Associates, Inc.'s Response to the Amendment to the Statement of Claim was filed on or about November 27, 1995. Respondent Raymond James & Associates, Inc. Response to the Second Amendment to the Statement of Claim was filed on or about December 7, 1995. Respondent Raymond James & Associates, Inc.'s Submission Agreement was signed on October 17, 1995, by John B. Mowell, President of Mowell Financial Group, Inc.

No. 96-00467

Claimant Ellington Mortgage Partners, LP's Statement of Claim was filed on or about January 31, 1996. Claimant Ellington Mortgage Partners, LP's Submission Agreement was signed on January 28, 1996, by Michael Vranos, of Ellington Mortgage Partners, LP.

Respondent and third-party claimant Raymond James & Associates, Inc.'s Statement of Answer and Third-Party Claim was filed on or about May 29, 1996. Respondent and third-party claimant Raymond James & Associates, Inc.'s Submission Agreement was signed on May 28, 1996, by Paul L. Matecki, Corporate Counsel of Raymond James & Associates, Inc.

Third-party respondent and third-party claimant Waterside Development Co. and third-party claimant James P. Scherr's Statement of Answer and Third-Party Claim was filed on or about June 28, 1996. Third-party respondent and third-party claimants Waterside Development Co. and James P. Scherr's joint Submission Agreement was signed on June 8, 1996 by James P. Scherr, Sole Proprietor.

Third-party respondent and third-party claimant Bear, Stearns & Co., Inc.'s Statement of Answer and Third-Party Claim was filed on or about July 29, 1996. Third-party respondent and third-party claimant Bear, Stearns & Co., Inc.'s Submission Agreement was signed on July 22, 1996, by Mark Bear, Senior Managing Director of Bear, Stearns & Co., Inc.

Third-party respondent Coastal Securities LTD did not file a third-party Statement of Answer with NASD Regulation, Inc. Office of Dispute Resolution.

HEARING INFORMATION

No pre-hearing conferences were held.

The hearing was held on November 20, 1996 for two (2) sessions.

The hearing was held in Houston, Texas.

CASE SUMMARY

No. 95-04412

Claimant Coastal Securities LTD ("Coastal") alleged that respondent Mowell Financial Group, Inc. ("Mowell") refused to deliver bonds to Coastal, which Coastal purchased from Mowell. According to Coastal, Tracy Hagelin ("Hagelin"), its registered representative, had, at a previous employer, conducted business with Don Reinhard ("Reinhard"), a principal with Mowell. Claimant contended that Reinhard told Hagelin while she was at a previous employer that Mowell's trading had to be done through a third party because Mowell's clearing agent, Raymond, James & Associates, Inc. ("Raymond"), would not allow Mowell's principal to do business with anyone in Houston, Texas.

Coastal asserted that: Mowell's principal contacted its representative to sell bonds; since Coastal was on Raymond James' restricted list, Coastal and Mowell agreed that the trading would be executed through Pershing, a third party; and a contract was formed on August 10, 1995 for an inverse IO, FNR 1993-103 SA (the "Security") with a face value of \$8,000,000 at a level of 6½, for which Coastal had a buyer, and which was to settle on August 15, 1995. However, Coastal complained, Mowell's principal called later in the day on August 10, 1995 stating that Raymond James informed him that he could not trade through Pershing and that Coastal needed to figure out how to settle the trade. Coastal further asserted that the following day Mowell's principal called and admitted that he did the trade, but stated that the only way it could be settled would be through Raymond James, which could not be done and meant that there was no trade. Coastal contended that on August 14, 1995, it was able to work out an agreement with Raymond James, but that Mowell subsequently denied that any such trade ever existed. Finally, Coastal asserted that by this time the bonds were trading at a higher price, in the meantime Coastal's customer sold the bonds, and that Mowell has refused to deliver the bonds upon its request. Coastal made legal claims of breach of contract and promissory estoppel, and demanded specific performance in order to deliver the bonds to its customer.

Respondent Mowell denied the allegations set forth in the Statement of Claim. Mowell stated that Coastal was on Raymond James' restricted list. Mowell further stated that although it had once conducted a third party transaction through Coastal's representative while she was with her previous employer, Raymond James restricted any further trades with restricted parties, even if through third parties. Nonetheless, Mowell contended that a transaction was proposed on the sale of bonds on August 10, 1995, but only with Coastal failing to disclose that it had not been removed from Raymond James' restricted list. Mowell then stated that upon discovering that Coastal was still on the restricted list, it immediately called Coastal informing it that no transaction was possible, unless and until it came off of Raymond James' restricted list, and that the transaction could not even be conducted through a third party. Subsequently, according to Mowell, after it learned that Coastal attempted to open accounts on Mowell's behalf without its permission and attempted to obtain proprietary information about Mowell, it decided to cease doing any business with Coastal, which was communicated to Coastal on August 10, 1995. Mowell allegedly claimed on August 14, 1995 to have resolved its situation with Raymond James, but Mowell responded by stating that whether or not such arrangements had been made, it was not going to do any business with Coastal. Mowell asserted that the bonds were resold, that Mowell gained nothing from their sale elsewhere and that it had no ulterior motive for refusing the Coastal trade. Coastal made the following defenses: (1) there was no contract; (2) discussions regarding the proposed transactions were fraudulently induced by Coastal; (3) the potential transaction failed due to Coastal's inability to timely satisfy an essential condition precedent; (4) Coastal's claim for specific performance was barred since the bonds had been sold, and an equitable remedy was also barred by the doctrine of unclean hands; and (5) Coastal's promissory estoppel claim was barred because no adequate representation or expectation was ever made.

No. 96-00467

Claimant Ellington Mortgage Partners, LP ("Ellington") alleged that respondent Raymond James refused to deliver a security pursuant to a contract between Ellington and Raymond James. Ellington asserted that on August 10, 1995, it entered into a contract with Raymond James for the purchase of an inverse floater security specifically known as Cusip No. 31359BBP1, Federal National Mortgage Association Trust 1993 103-SA Guaranteed REMIC Pass Thru Certificates, FNMA Collateralized, DTD 07/25/93, with an \$8,000,000 face amount, the Security, for a price of 7 1/8 and a settlement date of August 15, 1995. According to Ellington, Raymond James confirmed this transaction, orally and in writing. Ellington further asserted that it tendered payment on August 15, 1995, but Raymond James failed to deliver the Security, which constituted a breach of contract. Ellington claimed damages as a result of forgone coupon interest payments due from August 1995 forward and had been damaged further in an amount exceeding \$297,000.

Respondent and third-party claimant Raymond James denied the claims asserted against it. Raymond James admitted that it and Ellington agreed to a trade, which was confirmed, but denied making any assurances following the trade that it would make delivery. Raymond James explained that it advised Ellington as early as August 15, 1995, that the entity which agreed to sell the Security to it had failed to do so. Furthermore, Raymond James brought a third party claim against Waterside Development Co. ("Waterside") claiming that on August 10, 1995, Raymond James entered into a written agreement with Waterside for the purchase of the Security at a price of \$581,194.22, which was to settle on or before August 15, 1995, which Raymond James relied upon in entering into the agreement with Ellington, and which Waterside had refused or been unable to deliver.

Third-party respondent Waterside admitted that it entered into a contract for the Security with Raymond James, that the transaction was confirmed in writing, and that it had not delivered the Security to Raymond James. Waterside contended, however, that it promptly advised Raymond James that Bear, Stearns & Co., Inc. ("Bear Stearns"), the entity that agreed to sell the Security to Waterside, failed to deliver the Security. Waterside made the following affirmative defenses: (1) any liability for the failure to deliver the Security to Raymond was the fault of Bear Stearns; (2) Raymond was either contributorily negligent or voluntarily assumed the risk of loss; (3) the claim asserted by Raymond James was barred due to a failure of consideration; (4) Raymond's claim against it was barred due to Raymond James' failure to mitigate damages; and (5) Waterside was entitled to indemnification and contribution from Bear Stearns and others who were actively and directly at fault. Waterside, and its sole proprietor, James P. Scherr ("Scherr") brought third-party claims against Bear Stearns alleging that an agreement was entered into on or about August 10, 1995, for the purchase of the Security at a purchase price of \$582,444.67, which was to settle on or before August 15, 1995, confirmed in writing and relied upon in entering into the agreement with Waterside yet Bear Stearns had refused or failed to deliver.

Third-party respondent Bear Stearns admitted that it entered into an agreement for the Security with Waterside and Scherr, as they stated, for a purchase price of \$582,444.67. Bear Stearns also admitted that it had not delivered the Security, and further stated that it promptly advised Scherr that

Coastal Securities LTD, the entity that agreed to sell the Security to Bear, Stearns, failed to deliver the Security. Bear Stearns made the following affirmative defenses: (1) any liability for the failure to deliver the Security to Waterside or Scherr was the sole and exclusive fault of Coastal; (2) Waterside and Scherr were precluded from asserting a claim against Bear Stearns in this proceeding because they had a last clear chance to avoid injury, but failed to take reasonable and necessary care to avoid the loss at issue; (3) Waterside's claims were barred by a failure of consideration in that Waterside or Scherr did not tender payment; (4) Waterside's claims were barred since Waterside and Scherr did not take reasonable action to mitigate its damages; (5) Bear Stearns was entitled to indemnification and contribution from Coastal; and (6) at all relevant times Bear Stearns acted in good faith and in accordance with industry standards of conduct. In addition, Bear Stearns asserted a third-party claim against Coastal whereby it alleged that it entered into an agreement for the purchase of the Security on or about August 10, 1995, for a purchase price of \$551,194.44, which was confirmed in writing, which was relied upon in its agreement with Mr. Scherr, and which Coastal had failed to deliver.

RELIEF REQUESTED

Claimant Coastal Securities LTD requested: an award ordering Mowell Financial Group, Inc. and Coastal Securities LTD to deliver the FNR 1993-103 SA bonds with a face value of \$8,000,000; and an award for actual damages in an undisclosed amount, plus pre-award and post-award interest, attorney fees, costs and expenses.

Respondent Mowell Financial Group, Inc. requested that the claims asserted against it be dismissed in their entirety and that they be awarded their costs and attorneys' fees.

Claimant Ellington Mortgage Partners, LP requested an award in an amount not exceeding \$297,000 for compensatory damages, plus interest and attorney fees.

Respondent and third-party claimant Raymond, James & Associates, Inc. requested that an award be entered in its favor and against Waterside Development Co. to indemnify Raymond, James & Associates, Inc. for any liability it may have to Ellington Mortgage Partners, LP.

Third-party respondent and third-party claimants Waterside Development Co. and James P. Scherr requested that an award be entered in their favor and against Bear Stearns & Co., Inc. for its failure to deliver, and further ordering Bear Stearns & Co., Inc. to indemnify Waterside Development Co. and its sole proprietor, James P. Scherr, for all liability and damages that it may have to bear due to Bear Stearns & Co., Inc.'s failure to deliver.

Third-party respondent and third-party claimant Bear Stearns & Co., Inc. requested that all claims asserted against it be dismissed in their entirety or in the alternative that an award be entered in favor of Bear Stearns & Co., Inc. against Coastal Securities LTD for all damages sustained by Bear Stearns & Co., Inc.

OTHER ISSUES CONSIDERED & DECIDED

Prior to the hearing in this matter, Raymond James & Associates, Inc., Waterside Development Co., and Bear Stearns and Co., Inc. moved for the consolidation of case Nos. 95-04412 and 96-00467, and Ellington Mortgage Partners, LP and Mowell Financial Group, Inc. objected to consolidation. After careful review and consideration of these motions and objections, the undersigned arbitrators determined on or about August 12, 1996 that the motions to consolidate would be granted pursuant to §10314(d) of the NASD Code of Arbitration Procedure (the "Code").

On or about April 4, 1996, Mowell Financial Group, Inc. moved for dismissal of the case and for a change in the hearing location. Following review and consideration, Resp

Pursuant to an agreement entered into and signed November 15, 1996, Raymond James & Associates, Inc. and Waterside Development Co. and its sole proprietor, James P. Scherr resolved and settled their differences in accordance with the following principal terms and conditions: Waterside Development Co. and James P. Scherr assigned all their claims against Bear Stearns & Co., Inc., asserted in this arbitration, to Raymond James & Associates, Inc., and Raymond James & Associates, Inc. agreed to indemnify Waterside Development Co. and James P. Scherr from and against all claims which were raised or could have been raised in this arbitration.

The parties have agreed that the Award in this matter may be executed in counterpart copies of that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Mowell Financial Group, Inc. and Raymond James & Associates, Inc. are hereby, jointly and severally, liable for and shall pay claimant Ellington Mortgage Partners, LP the sum of \$135,000 in actual damages;
2. Respondents Mowell Financial Group, Inc. and Raymond James & Associates, Inc. are hereby, jointly and severally, liable for and shall pay claimant Ellington Mortgage Partners, LP the amount of \$15,671 for its attorney fees. In deciding to award attorneys' fees, the arbitrators considered the pleadings, the evidence and the testimony presented by the parties;

3. With respect to all parties in this matter, all notations and references to the inverse IO FNR 1993-103SA, the security at issue, are to be cleared and expunged from all records and bookkeeping; and
4. The Statement of Claim and amendments submitted by claimant Coastal Securities LTD is hereby denied in its entirety;
5. The Third-Party Claim submitted by respondent and third-party claimant Raymond James & Associates, Inc. is hereby denied in its entirety;
6. The Third-Party Claim filed by third-party respondent and third-party claimant Waterside Development Co. and third-party respondent James P. Scherr is hereby denied in its entirety;
7. The Third-Party Claim submitted by third-party respondent and third-party claimant Bear Stearns & Co., Inc. is hereby denied in its entirety; and

8. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there were two (2) hearing sessions $\times \$750 = \$1,500$ in forum fees. Pursuant to §10205(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Coastal Securities LTD. Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$350 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Coastal Securities LTD.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 and the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Ellington Mortgage Partners, LP.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 previously deposited with NASD

Regulation, Inc. Office of Dispute Resolution by third-party claimants Waterside Development Co. and James P. Scherr.

Third-party claimant Bear Stearns & Co., Inc. is liable and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable filing fee in the amount of \$500 pursuant to §10205(c) of the Code and the \$300 member surcharge pursuant to 10333 of the Code.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by third-party claimant Raymond James & Associates, Inc. Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$350 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by respondent and third-party claimant Raymond James & Associates, Inc.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$350 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by respondent Mowell Financial Group, Inc.

In addition, respondents Raymond, James & Associates, Inc. and Mowell Financial Group, Inc. are hereby, jointly and, severally liable for and shall pay to claimant Coastal Securities LTD the sum of \$950 as reimbursement of the hearing session deposit and filing fee. Respondents Raymond, James & Associates, Inc. and Mowell Financial Group, Inc. are also, jointly and severally, liable for and shall pay to claimant Ellington Mortgage Partners LP the amount of \$950 as reimbursement of the hearing session deposit and claim filing fee.

Signed:

Thomas A. Thornhill, Jr.
Thomas A. Thornhill, Jr.
Industry Arbitrator, Presiding Chair

Thomas H. Vann
Thomas H. Vann
industry Arbitrator

Daniel R. Schmieder, Esquire
Daniel R. Schmieder, Esquire
Industry Arbitrator

Dated:

January 8, 1997

January 9, 1997

January 9, 1997

Date served by the NASD Regulation, Inc.: January 10, 1997