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COURT OF APPEALS

STATE OF NEW YORK

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JADE REALTY LLC,

Respondent,

-against-

No. 185

CITIGROUP COMMERCIAL MORTGAGE TRUST  
2005-EMG,

Appellant.

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27 Madison Avenue  
New York, New York 10010  
October 9, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

JANTRA VAN ROY, ESQ.  
ZEICHNER ELLMAN & KRAUSE LLP  
Attorneys for Appellant  
575 Lexington Avenue  
New York, NY 10022

MICHAEL A. FREEMAN, ESQ.  
GREENBERG FREEMAN LLP  
Attorneys for Respondent  
110 East 59th Street, 22nd Floor  
New York, NY 10022

Jessica Cahill  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 185, Jade Realty.  
2 Counselor, you want any rebuttal time?

3 MS. VAN ROY: Three minutes, please, Judge.

4 CHIEF JUDGE LIPPMAN: Three minutes. Go  
5 ahead.

6 MS. VAN ROY: Jantra Van Roy for appellant  
7 Citigroup and LaSalle. With me is my colleague  
8 Michael Simms.

9 May it please the Court?

10 JUDGE CIPARICK: Can you speak up a little  
11 bit?

12 MS. VAN ROY: In nineteen - - -

13 JUDGE CIPARICK: Can you speak up a little  
14 bit?

15 JUDGE GRAFFEO: I'm sorry, we can't hear  
16 you.

17 MS. VAN ROY: Yes.

18 CHIEF JUDGE LIPPMAN: Just move the mic up  
19 a little. I think that will help. Good.

20 JUDGE CIPARICK: Thank you.

21 MS. VAN ROY: In 1995, in Wallace, this  
22 Court taught that words omitted from a contract may  
23 be supplied or corrected - - -

24 CHIEF JUDGE LIPPMAN: Counselor, but is it  
25 your argument - - - why is this an absurd result by

1 not putting in words?

2 MS. VAN ROY: It - - - it leads - - -

3 CHIEF JUDGE LIPPMAN: What's absurd about  
4 it? Did Citibank might make a profit on this?

5 MS. VAN ROY: We're talking about a  
6 Citigroup commercial - - -

7 CHIEF JUDGE LIPPMAN: Yeah.

8 MS. VAN ROY: - - - real estate trust - - -

9 CHIEF JUDGE LIPPMAN: Yeah.

10 MS. VAN ROY: - - - not Citibank.

11 CHIEF JUDGE LIPPMAN: Did they make a  
12 profit on this transaction? Why it is absurd if they  
13 made a profit? Why can't we just leave it - - -

14 MS. VAN ROY: It's absurd in three ways.

15 CHIEF JUDGE LIPPMAN: - - - the way it was  
16 drafted by the bank in the first instance? What's  
17 wrong with that?

18 MS. VAN ROY: Absurd in three ways.

19 CHIEF JUDGE LIPPMAN: Go ahead.

20 MS. VAN ROY: There is the economic  
21 absurdity that both of the lower courts focused on.  
22 The result that a yield maintenance premium would  
23 rise over time instead of decrease over time. That's  
24 one absurdity. But that's not the absurdity that  
25 compels the inclusion of the missing words.

1                   The second absurdity is without the omitted  
2 words, which are simply a reference date - - -

3                   CHIEF JUDGE LIPPMAN: Right.

4                   MS. VAN ROY: - - - the voluntary  
5 prepayment provision of the note, which itself is  
6 unambiguous, cannot be enforced, has no meaning or  
7 effect.

8                   The third absurdity is that the calculation  
9 that the contract unambiguously directs to be  
10 performed in the event of a voluntary, no-default  
11 prepayment, that calculation cannot be performed  
12 without the missing reference date.

13                   JUDGE CIPARICK: But this was a scrivener's  
14 error - - - I'm sorry, a scrivener's error that was  
15 made by your predecessor.

16                   MS. VAN ROY: Correct, Judge, it was made  
17 by counsel to the - - -

18                   JUDGE CIPARICK: Or Emigrant, right.

19                   MS. VAN ROY: -- originating lender  
20 Emigrant.

21                   JUDGE CIPARICK: Right.

22                   JUDGE GRAFFEO: So - - - go ahead.

23                   JUDGE CIPARICK: No, so why should you now  
24 be able to come here and say that you can't abide by  
25 that?

1 MS. VAN ROY: Because it has long been the  
2 law of New York and the rule of this court that a  
3 scrivener's error, when it's demonstrably a  
4 scrivener's error and would lead to either absurdity  
5 or unenforceability of a key provision of the  
6 contract, and we have both here, it has long been the  
7 law - - -

8 JUDGE PIGOTT: What should the scrivener -  
9 - -

10 MS. VAN ROY: - - - that a scrivener's  
11 error should be corrected - - -

12 JUDGE PIGOTT: What should the - - -

13 MS. VAN ROY: - - - to enforce the  
14 intention of the provision - - -

15 JUDGE PIGOTT: What's should the scrivener  
16 put in that's not there?

17 MS. VAN ROY: The words "prepayment date"  
18 preceding or following the date of default.

19 JUDGE PIGOTT: Prepayment date or just  
20 prepayment or?

21 MS. VAN ROY: Oh, I'm sorry, date of  
22 prepayment or date of default. The syntax can be  
23 changed.

24 JUDGE GRAFFEO: You know, we also have a  
25 rule that says that an omission is not - - - does not

1 qualify as an ambiguity, so - - - correct?

2 MS. VAN ROY: Yes, Your Honor.

3 JUDGE GRAFFEO: So why is it that you get  
4 the benefit of the omission that your predecessor  
5 performed? I mean anytime somebody uses the form  
6 contract if they don't pay attention to that form and  
7 adjust it to fit the circumstances, why is it that  
8 you can come in and reform that?

9 MS. VAN ROY: It could be the law,  
10 certainly. It could be the rule of this court that  
11 any scrivener's error is not correctable and presumed  
12 to have either not been an error or, you know, bad  
13 luck to you. That has not been the law of New York.

14 JUDGE GRAFFEO: Well, say somebody had an  
15 interest rate and transposed the numbers, so the bank  
16 thought they were going to get 7.50 percent interest  
17 and instead the mortgage note says 5.70 percent  
18 interest? They get to come in and say we want to  
19 change that to seven and a half instead of 5.7?

20 MS. VAN ROY: Yes, but under a different  
21 theory. Under mutual mistake that can be - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but this isn't  
23 a mu - - -

24 MS. VAN ROY: This is not that.

25 CHIEF JUDGE LIPPMAN: - - - this is not a

1 mutual mistake.

2 MS. VAN ROY: Correct, Judge, this is not.

3 CHIEF JUDGE LIPPMAN: You acknowledge that  
4 this is not a mutual mistake.

5 MS. VAN ROY: We acknowledge that there was  
6 a mutual mistake. That is not the theory on which we  
7 believe this court should - - -

8 CHIEF JUDGE LIPPMAN: Why can't the  
9 agreement just mean that if you prepay, and you  
10 didn't default there's no yield maintenance fee? Why  
11 isn't that a perfectly logical result even if, even  
12 if - - - let's say that wasn't really the intent, but  
13 Emigrant made a mistake, that's the way it reads.  
14 What's wrong with that?

15 MS. VAN ROY: The first thing that's wrong  
16 with that - - -

17 CHIEF JUDGE LIPPMAN: What's absurd about  
18 that?

19 MS. VAN ROY: The first thing that's absurd  
20 about that, as we know, a promissory note is simply  
21 an agreement to pay at a certain rate for a  
22 designated term, and the right to voluntarily prepay  
23 is negotiated for in exchange for a consideration.  
24 So the economic reality, the business reality makes  
25 that wrong.



1           should ask first, are you looking for an  
2           interpretation, or are you looking for reformation  
3           here, or does it matter?

4                   MS. VAN ROY: We have not sought  
5           reformation for largely the reasons spelled out by  
6           the IAS Court in its opinion.

7                   JUDGE SMITH: You mean because - - -

8                   MS. VAN ROY: I think it does matter.

9                   JUDGE SMITH: Maybe you better explain to  
10          me what that reason is. What's wrong with  
11          reformation from your point of view?

12                   MS. VAN ROY: I think reformation may be  
13          appropriate. In fairness to the court, we have not  
14          proceeded on a theory of reformation, in part,  
15          because reformation requires mutual mistake.

16                   Plaintiff's principal - - - and excuse me  
17          for pointing, he's here in the courtroom - - - a  
18          sophisticated real estate commercial litigator - - -

19                   JUDGE SMITH: He says he didn't make a  
20          mistake.

21                   MS. VAN ROY: - - - has said I made no  
22          mistake.

23                   JUDGE SMITH: Isn't it possible that he's  
24          so sophisticated that he knows to testify to that and  
25          that a fact finder could disbelieve him. The

1 documents don't really corroborate him.

2 MS. VAN ROY: Then we would have had a  
3 factual dispute and it could be remanded - - -

4 JUDGE SMITH: Well, I guess I'm saying  
5 what's wrong - - -

6 MS. VAN ROY: - - - if this was a summary  
7 judgment.

8 JUDGE SMITH: - - - with saying that  
9 there's a factual dispute here that requires a trial?

10 MS. VAN ROY: What's wrong with it?  
11 There's nothing wrong with that except that it would  
12 require a trial and each of the parties have sought  
13 summary judgment. If summary judgment were  
14 inappropriate - - -

15 JUDGE SMITH: It has happened before that  
16 both sides' motions were denied.

17 MS. VAN ROY: Excuse me?

18 JUDGE SMITH: I don't understand the sound  
19 system here. It has happened before that both sides'  
20 motions for summary judgment were denied. Would that  
21 be an appropriate result here?

22 MS. VAN ROY: That could be an appropriate  
23 result, Judge.

24 JUDGE SMITH: But you also said we can  
25 essentially interpret the writing to mean what you

1 say it was intended to mean or indeed what everyone  
2 says it was intended to mean.

3 MS. VAN ROY: Correct, because - - - not  
4 solely because of the absurdity on which the lower  
5 courts focus, which is the economic, practical, real  
6 world absurdity, but because on the four corners of  
7 the document itself, putting aside what anyone's  
8 expectations about economic reality might be or what  
9 the result might be, on the four corners of the  
10 document a very unambig - - - a completely  
11 unambiguous provision called voluntary prepayment  
12 says when you prepay voluntarily you have to pay the  
13 yield maintenance amount and because the yield  
14 maintenance amount can't be calculated without the  
15 missing date.

16 Plaintiff concedes and his testimony so  
17 conceding is quoted by Justice Stallman in his  
18 decision - - - plaintiff's principal concedes that  
19 the bank envisioned a prepayment premium in the  
20 amount due upon a voluntary prepayment, but he sat on  
21 the mistake.

22 CHIEF JUDGE LIPPMAN: Counselor, would it  
23 be different if like in Reiss, the Appellate Division  
24 case, if in that case they knew that if this - - - if  
25 this agreement was interpreted the way it looked they

1 would lose money every year, and then that's kind of  
2 absurd, right, to join it.

3 Does it matter - - - again, I think I asked  
4 you this right at the beginning - - - does it matter  
5 that the bank got 5.48 percent interest here rather  
6 than losing money, which would make it absurd. But  
7 why is this absurd? Again, I come back to when they  
8 make money, the agreement says what it does, why  
9 doesn't that make sense to just - - - that's the  
10 rule?

11 MS. VAN ROY: They did not. In a loan  
12 agreement - - -

13 CHIEF JUDGE LIPPMAN: Yeah.

14 MS. VAN ROY: - - - I guess it depends. I  
15 don't want to mislead the court on what the  
16 definition of making money is. The lender - - - the  
17 noteholder in this case - - -

18 CHIEF JUDGE LIPPMAN: Right.

19 MS. VAN ROY: - - - did not receive the  
20 benefit of the five point something percent over a  
21 term of many years.

22 Instead - - - and which is what - - - why  
23 the agreement was designed to say you can do better  
24 borrower in the world. If rates come down, and you  
25 want to refinance be my guest, but you have to cover

1 the spread.

2 CHIEF JUDGE LIPPMAN: But they made money.

3 MS. VAN ROY: If making any interest at all

4 - - -

5 CHIEF JUDGE LIPPMAN: They didn't make - -  
6 - but your argument is they didn't make enough money.

7 MS. VAN ROY: They didn't lose principal.

8 The principal - - -

9 JUDGE GRAFFEO: I was just going to ask you  
10 that. They didn't lose any principal.

11 MS. VAN ROY: Correct, Judge, they did not.

12 JUDGE GRAFFEO: And they did make some  
13 interest on the principal.

14 MS. VAN ROY: For some years, absolutely.

15 JUDGE READ: So why doesn't that make it  
16 just unusual rather than absurd? I mean isn't there  
17 a difference? How is that absurd?

18 MS. VAN ROY: I think it's a commercial  
19 absurdity in CMBS. These loans were designed to be  
20 securitized for fixed income products. That is an  
21 economic absurdity. The lower courts did focus on  
22 that - - -

23 JUDGE PIGOTT: Does everyone know that?

24 MS. VAN ROY: - - - that is the not the  
25 absurdity we argue it requires.

1 JUDGE READ: There's no way it could have  
2 been negotiated differently here? I mean there's no  
3 way that this was anything other than a scrivener's  
4 error?

5 MS. VAN ROY: Oh, it was admitted - - -  
6 it's conceded by both sides that the closing attorney  
7 for the bank made an error.

8 JUDGE CIPARICK: So you want us to imply a  
9 term here, a term that's not within the four corners  
10 of this document, that's what you want us to do?

11 MS. VAN ROY: Correct, to supply words, as  
12 this court often has. In fact - - -

13 JUDGE READ: Well, not often. We don't  
14 very often do that.

15 MS. VAN ROY: Supply the words, no. This  
16 court has directed remittitur in Castellano (ph.),  
17 for example, where the contract, unlike this one,  
18 could be enforced as written. This one requires a  
19 calculation that simply can't be performed without  
20 the date. You need the date for the Treasury rate to  
21 stick in the formula.

22 In Castellano, the contract could be  
23 performed as written, but because of an absurd - - -  
24 by the way, economically absurd result - - -

25 JUDGE PIGOTT: Well, one of the things it

1           seems - - -

2                   MS. VAN ROY: - - - the court remitted for  
3 a finding. Yes.

4                   JUDGE PIGOTT: - - - that seems a little  
5 different here, in talking about an absurd result, is  
6 that if someone wants to prepay their note that's  
7 considered a default. That is odd. I mean if I go  
8 in to pay my car loan off, they don't say, well, you  
9 just defaulted, because you paid us all the money you  
10 owed?

11                   MS. VAN ROY: I didn't hear the entire  
12 question, but I think I got enough of it.

13                   First of all, in the consumer cases, by  
14 statute, this consumer-borrower is - - -

15                   JUDGE PIGOTT: I know that. But what I'm  
16 saying is you say, well, these are going to be  
17 securitized. Does everybody know that? I mean when  
18 you go and borrow four million dollars for your  
19 business are you supposed to know that these are  
20 going to be bundled and sold on an international  
21 market?

22                   MS. VAN ROY: I don't - - - I think Mr.  
23 Schreiber - - - his principal knows that practicing  
24 in the industry, but whether you know it or not the  
25 prepayment premium on voluntary prepayments is in the

1 note.

2 So whether - - - I was attempting to answer  
3 your colleague's question about why it's absurd in  
4 the real world out there. I was not arguing - - - we  
5 have not argued that that economic absurdity is what  
6 mandates the inclusion of the missing words. Rather,  
7 the fact that an unambiguous and key provision cannot  
8 be performed - - -

9 JUDGE PIGOTT: Well, the Appellate Division  
10 - - -

11 MS. VAN ROY: - - - and the calculation  
12 cannot be performed.

13 JUDGE PIGOTT: The Appellate Division had  
14 two reasons. They said, well, either the one you  
15 mentioned or that a contract is - - - either  
16 absurdity or unenforceability, and you're - - - is  
17 that true in either one of these cases? It's not  
18 absurd; it's not unenforceable.

19 MS. VAN ROY: We believe we have both here;  
20 absurdity and unenforceability or inability to  
21 perform a key term already in the contract.

22 JUDGE PIGOTT: But not the contract itself.  
23 Obviously, that can be enforced.

24 MS. VAN ROY: I'm having - - -

25 JUDGE PIGOTT: The contract can be enforced

1 as written, it's just that it costs you a hundred - -  
2 -

3 MS. VAN ROY: It cannot, Judge.

4 JUDGE PIGOTT: - - - it cost you 140  
5 something - - -

6 MS. VAN ROY: Our position is it cannot be  
7 enforced as written because one provision which is  
8 unambiguous, concededly so, says on voluntary  
9 prepayment they shall pay the yield maintenance  
10 amount, calculate according to the definition below.

11 The definition of yield maintenance amount  
12 says do the following mathematical calculation. Pick  
13 the Treasuries with the nearest maturity term, as of  
14 the date of default, plug that in here, subtract it  
15 from the note rate - - -

16 CHIEF JUDGE LIPPMAN: Okay, counselor.

17 MS. VAN ROY: - - - and there is no date of  
18 prepayment. There is no default here. So there's no  
19 rate.

20 CHIEF JUDGE LIPPMAN: Okay, counselor,  
21 you'll have rebuttal.

22 MS. VAN ROY: Thank you, Judge.

23 CHIEF JUDGE LIPPMAN: Thank you.

24 Counselor?

25 MR. FREEMAN: Good morning, Your Honors,

1 Michael Freeman for the respondent. May I first  
2 respond to Judge Simon's (sic) question regarding  
3 whether - - -

4 CHIEF JUDGE LIPPMAN: Judge Smith's  
5 question?

6 MR. FREEMAN: - - - trial is appropriate  
7 here?

8 CHIEF JUDGE LIPPMAN: Judge Smith's  
9 question?

10 MR. FREEMAN: Judge - - - no, Judge - - - I  
11 apologize, Judge Smith. I apologize.

12 CHIEF JUDGE LIPPMAN: That's okay. He's  
13 flattered, Judge Simon. Go ahead.

14 MR. FREEMAN: Judge Smith, this is an  
15 unambiguous contract and therefore unambiguous  
16 contracts must be interpreted as a matter of law for  
17 the court. They are not subject to fact questions  
18 for a jury. No one has ever conceded in this case -  
19 - -

20 JUDGE SMITH: Well, then - - -

21 MR. FREEMAN: - - - that the contract was  
22 anything but unambiguous.

23 JUDGE SMITH: - - - I was addressing - - -  
24 I was addressing the reformation claim that, of  
25 course, your adversary keeps saying she doesn't make.

1 So maybe I'm wasting my breath.

2 MR. FREEMAN: Right, the reformation claim

3 - - -

4 JUDGE SMITH: But if she had asserted a  
5 claim for reformation, would you agree with me that  
6 there's a triable issue?

7 MR. FREEMAN: Yes, but there's no  
8 reformation claim. There's never been a reformation  
9 claim. The reformation claim was waived.

10 I also want to raise another very important  
11 point - - -

12 JUDGE CIPARICK: Your client is getting  
13 tremendous windfall here, is he not?

14 MR. FREEMAN: No, Your Honor, there's no  
15 windfall here. This was - - - the contract was  
16 negotiated by sophisticated parties in a  
17 sophisticated business environment.

18 CHIEF JUDGE LIPPMAN: Counsel - - - and I  
19 think Judge Smith referred to this before - - - your  
20 client might be so sophisticated that he realized  
21 that if he acknowledged the mutual mistake this case  
22 might be in a different context, right?

23 MR. FREEMAN: Well, Your Honor, first I  
24 want to say that, you know, there was never any  
25 allegation anywhere that this was a mutual mistake,

1 which is why there's no reformation.

2 JUDGE SMITH: But it is in the answer. The  
3 answer pleads the defense of - - - it says - - - the  
4 answer says if there's an ambiguity, the ambiguity  
5 arose by mutual mistake.

6 MR. FREEMAN: That is correct. If the am -  
7 - - so what the court is suggesting that my client is  
8 taking advantage of a situ - - -

9 CHIEF JUDGE LIPPMAN: We're not suggesting.  
10 We're just saying it is - - - in its basics it looks  
11 like this could be a mutual mistake situation  
12 particularly when you have two sophisticated parties.  
13 You would acknowledge that that's - - - that wouldn't  
14 be unusual to look at this and say, hm, mutual  
15 mistake.

16 MR. FREEMAN: I mean there's no evidence in  
17 the record to that effect, Your Honor. Otherwise - -  
18 -

19 JUDGE PIGOTT: Didn't your client know  
20 there was a mistake?

21 MR. FREEMAN: Did my client know there was  
22 a mistake?

23 JUDGE PIGOTT: Yeah.

24 MR. FREEMAN: Yes, he knew there was a  
25 mistake. And in the context of a hard fought

1 negotiation - - -

2 JUDGE PIGOTT: Well, if it's a mistake, and  
3 they make it, isn't that a mutual mistake?

4 MR. FREEMAN: No, it's a unilateral  
5 mistake. It's a - - -

6 JUDGE PIGOTT: So that's when you get - - -

7 MR. FREEMAN: - - - mistake by the lender -  
8 - -

9 JUDGE PIGOTT: That's when you get to cute  
10 but textually correct, which really argues that it's,  
11 you know, two words missing.

12 MR. FREEMAN: Well, I think there's a very  
13 important difference that this court has articulated  
14 in many cases - - -

15 JUDGE PIGOTT: Except that there's several  
16 - - -

17 MR. FREEMAN: - - - between a mutual  
18 mistake and a unilateral mistake.

19 JUDGE PIGOTT: - - - there are several - -  
20 - but there's several paragraphs of yield maintenance  
21 allowance language that can only be read in terms of  
22 there being a default upon prepayment, right?

23 MR. FREEMAN: Well, our position in this  
24 case is that the contract is certainly enforceable as  
25 written and the contract is not absurd. There's no

1 economic absurdity. You have to knock out language -  
2 - -

3 JUDGE JONES: And to go back to your  
4 original point, these are both very sophisticated  
5 parties both represented by counsel?

6 MR. FREEMAN: Yes, they are - - - and the  
7 contract has to be enforced as written.

8 JUDGE SMITH: Is it the rule that if you  
9 have two sophisticated parties and one of them makes  
10 a mistake, the one who makes the mistake is out of  
11 luck?

12 MR. FREEMAN: That's exactly the rule, Your  
13 Honor.

14 JUDGE SMITH: So what about that case --  
15 there's an old case where somebody had just exchanged  
16 the words, party of the first part and party of the  
17 second part, obviously meaning the opposite, you say  
18 that case was wrongly decided? They should have  
19 enforced it as written?

20 MR. FREEMAN: I'm not familiar with that  
21 case, Your Honor. What I do want to - - -

22 JUDGE SMITH: Oh, Castelli (ph.) from a  
23 hundred years ago.

24 MR. FREEMAN: Okay, well what -- the point  
25 that I wanted to make, which is what the panel was

1 discussing with Ms. Van Roy earlier is that this is  
2 not a scrivener's error case. A scrivener's error -  
3 - - which is the Nash case from 1962 - - - a  
4 scrivener's error is when the parties have an  
5 agreement as to what the terms are going to be, and  
6 then in drafting the contract a mistake is made.  
7 There was never any - - -

8 JUDGE SMITH: Well, isn't that exactly - -  
9 - didn't they agree on the commitment letter?

10 MR. FREEMAN: They agreed that there would  
11 be a yield maintenance amount - - - that there would  
12 be a prepayment equal to the yield maintenance amount  
13 - - -

14 JUDGE GRAFFEO: And there was a formula,  
15 wasn't there?

16 MR. FREEMAN: It was - - - well, the  
17 commitment letter simply said during the first six  
18 years the prepayment penalty will be the yield  
19 maintenance amount. There was no language in the  
20 commitment letter saying what the yield maintenance  
21 amount when the note was drafted. Yes, Your Honor.

22 CHIEF JUDGE LIPPMAN: Isn't the result  
23 here, when we talk about absurd, I think it's clear  
24 that it's not absurd to a layman, you know, that they  
25 did make a profit, but in the business context isn't

1           it an absurd result? And what's the test? Is it  
2           whether it's absurd to an average person or absurd to  
3           two sophisticated people making an agreement in a  
4           business context? Which is it? Is it absurd in that  
5           context, and if it is, does it matter if it's not  
6           absurd to an average person, a layman looking at  
7           this?

8                       MR. FREEMAN: Your Honor, to answer that  
9           question I refer to Wallace where the contract clause  
10          in that case was extremely unconventional and one of  
11          the parties argued extremely disadvantageous to them,  
12          and what this court found was it is not absurd, but  
13          simply novel or unconventional.

14                      CHIEF JUDGE LIPPMAN: Yes, but we all - - -

15                      MR. FREEMAN: So I think that the test - -  
16          - the test - - -

17                      CHIEF JUDGE LIPPMAN: - - - we agree on  
18          conventional and novel.

19                      MR. FREEMAN: Yes.

20                      CHIEF JUDGE LIPPMAN: What about absurd in  
21          the business context?

22                      MR. FREEMAN: Well, again, I would point to  
23          Wallace. I mean it's not absurd in the business  
24          context. I mean there are reasons - - - there are  
25          economic reasons why this - - - a provision like this

1 would be in place. For example - - -

2 CHIEF JUDGE LIPPMAN: Why would they have  
3 made an agreement with that provision in it?

4 MR. FREEMAN: I'm not saying that they  
5 intentionally did it in this case. What I am  
6 suggesting is there is an economic reason why it  
7 could be. Let's say - - -

8 JUDGE SMITH: Well no one would ever do it  
9 this way. No one would ever write in a prepayment  
10 provision with no formula for calculating it.

11 MR. FREEMAN: Again, I would point to  
12 Wallace. No one would put a provision in a lease  
13 that provides for a thirty-year retrospective payment  
14 on a lease. What I would say is that perhaps there  
15 is a situation where the lender could benefit by a  
16 non-defaulting borrower during the first six years.  
17 They save on administration costs. Maybe they knew  
18 they were going to securitize these loans, so  
19 therefore it was to their advantage to have forming  
20 notes - - -

21 JUDGE SMITH: Suppose the error had been a  
22 simpler one. What was the interest rate here 5.48?

23 MR. FREEMAN: 5.48.

24 JUDGE SMITH: So suppose they had misplaced  
25 the decimal point and made it - - - well, suppose the

1 borrower drafts it and misplaces the decimal point  
2 and makes it 54.8 percent. Is it enforceable as  
3 written?

4 MR. FREEMAN: Well, there you would have a  
5 scrivener's error, because the parties had agreed - -  
6 -

7 JUDGE SMITH: So you distinguish between a  
8 purely -- yeah, what is a scrivener's error? In what  
9 sense is one thing a scrivener's error and the other  
10 not?

11 MR. FREEMAN: Well, a scrivener's error - -  
12 - you and I agree, Your Honor, that the interest rate  
13 is going to be 5.48 percent, and then in drafting the  
14 note I write 54.8 percent.

15 JUDGE SMITH: And you and I agree that in  
16 the event of voluntary prepayment there will be a  
17 yield maintenance amount, and in the course of  
18 drafting it I pick up the wrong language from the  
19 previous form and fail so to provide. Why is that  
20 different?

21 MR. FREEMAN: That is correct. Well, in  
22 this case, Your Honor, we have an agreement to pay a  
23 prepayment penalty equal to a yield maintenance  
24 amount. At the time that agreement is made my client  
25 has no idea what the terms are going to be. He has

1 certain expectations as to what the terms are going  
2 to be, but when the contract is presented to him - -  
3 -

4 JUDGE SMITH: I'm still not understanding  
5 why it's something other than a scrivener's error. I  
6 mean, it's a - - -

7 MR. FREEMAN: There was never an agreement.

8 JUDGE SMITH: - - - instead of a  
9 scrivener's error it's a copyist's error?

10 MR. FREEMAN: Not quite.

11 JUDGE GRAFFEO: You're saying the  
12 commitment letter didn't indicate what the formula  
13 was going to be, so that's why it's not a scrivener's  
14 error, because - - -

15 MR. FREEMAN: That's correct. There was  
16 never an agreement as to what - - -

17 JUDGE GRAFFEO: - - - your client didn't  
18 know that they had to pay, what is it, close to  
19 150,000?

20 MR. FREEMAN: That's exactly correct.  
21 There was never an agreement that during the first  
22 six years this is what the prepayment penalty was  
23 going to be. It was going to be an amount to be  
24 determined according to the formula.

25 JUDGE SMITH: Yeah, but isn't it - - - and

1 when you get the note, and it turns out there is no  
2 amount to be determined because there's no formula,  
3 why isn't that a scrivener's error?

4 MR. FREEMAN: Well, because the amount can  
5 be determined. It just cannot be determined - - -

6 JUDGE SMITH: And you say it can be  
7 determined at zero.

8 MR. FREEMAN: I would say zero or no value.  
9 I mean in this instance - - -

10 JUDGE CIPARICK: So what would you call it?  
11 Would you call it an omission? What would you call  
12 it if it's not a scrivener's error?

13 MR. FREEMAN: I would call it an  
14 underperformance by the lawyer for the lender in  
15 failing to extract every possible benefit that his  
16 client could have obtained in this case.

17 CHIEF JUDGE LIPPMAN: So it's a unilateral  
18 mistake rather than a scrivener's error.

19 MR. FREEMAN: It's a unilateral mistake by  
20 a lawyer who underperformed. I would use a  
21 hypothetical. Let's say there were two lawyers  
22 entering into a real estate contract and one hired a  
23 senior partner at Paul Weiss and the other hired a  
24 first-year graduate from law school. Are we to - - -

25 CHIEF JUDGE LIPPMAN: Well, let me ask you

1 another question that I asked your adversary. Does  
2 it matter that they made money in the 5.48? What if  
3 they had lost money? Exactly the same thing  
4 happened, a lawyer underperformance, whatever you  
5 want to call it, and they had lost money.

6 MR. FREEMAN: Different case.

7 CHIEF JUDGE LIPPMAN: Your adversary - - -  
8 is that a different case?

9 MR. FREEMAN: Different case, Your Honor,  
10 because - - -

11 CHIEF JUDGE LIPPMAN: Is that - - -

12 MR. FREEMAN: - - - of Reape.

13 CHIEF JUDGE LIPPMAN: - - - is that - - -

14 MR. FREEMAN: Because of Reape. I mean  
15 that's absurd.

16 CHIEF JUDGE LIPPMAN: So that's the  
17 difference between this and Reape?

18 MR. FREEMAN: Right.

19 CHIEF JUDGE LIPPMAN: That you'd never  
20 enter into something if you know you're going to lose  
21 money every year?

22 MR. FREEMAN: This is not a preposterous  
23 contract. This is a contract where the lender did  
24 not achieve everything they could have achieved, as a  
25 result of poor drafting by the lawyer. And it's my

1 client in the context of a sophisticated - - -

2 CHIEF JUDGE LIPPMAN: It really matters how  
3 big - - -

4 MR. FREEMAN: - - - business transaction.

5 CHIEF JUDGE LIPPMAN: - - - it really  
6 matters how big a mistake it is.

7 MR. FREEMAN: No, Your Honor, I would not  
8 classify - - -

9 CHIEF JUDGE LIPPMAN: If it was a bigger  
10 mistake, in other words if the result of what they  
11 did was that they lost money that would be - - - then  
12 it would be a Reape situation, but here his mistake  
13 wasn't quite as terrible, and they made a little  
14 money, is that a rule? Can we decide these cases  
15 based on the extent of the consequences from the  
16 mistake?

17 MR. FREEMAN: Well, Wallace did define - -  
18 - used the word "absurd" to determine what is absurd.  
19 I mean as you look - - -

20 CHIEF JUDGE LIPPMAN: If you lose money  
21 it's absurd, but if you make a little money it's  
22 okay.

23 MR. FREEMAN: I think that's right, Your  
24 Honor.

25 JUDGE PIGOTT: You don't make the argument

1 - - -

2 JUDGE GRAFFEO: Could your client have  
3 asked for a no prepayment penalty? The record  
4 doesn't show that that was part of the deal, was it?

5 MR. FREEMAN: The deal was as it was  
6 presented to him. I mean we're talking - - - it's  
7 somewhat of an ironic situation that the bank - - -

8 JUDGE GRAFFEO: I mean that's what this  
9 ends up, right, a contract that has no prepayment  
10 penalty?

11 MR. FREEMAN: Right. Well, I mean a lender  
12 goes to a bank, and it's generally the bank that  
13 dictates the terms of the deal, and it's somewhat  
14 ironic in this situation that the bank who in 99.9  
15 percent of the cases has the leverage to dictate what  
16 the terms of the agreement are going to be in this  
17 case is saying, you know, Your Honors, we made a  
18 mistake here.

19 JUDGE PIGOTT: But you don't -- you don't  
20 make - - -

21 MR. FREEMAN: We're looking for a relief.  
22 We're looking for the court to judicially spell check  
23 this agreement that the court - - - that the lender  
24 had.

25 JUDGE PIGOTT: You don't make the argument

1           though that they're trying to put - - - enforce a  
2           contract that you didn't agree to? You keep - - -  
3           you're not saying wait a minute, our agreement was  
4           what we got. You're arguing a gotcha. You're saying  
5           they made a mistake, we win.

6                   MR. FREEMAN: What I would say is that the  
7           contract, when you're dealing with sophisticated  
8           businessmen it has to be enforced as written, and we  
9           are looking to enforce the contract as written.  
10          You're absolutely right, Judge Pigott.

11                   JUDGE PIGOTT: Okay.

12                   CHIEF JUDGE LIPPMAN: So Wallace and Reiss  
13          control, end of story.

14                   MR. FREEMAN: Wallace and Reiss, and more  
15          recently NML v. Republic of Argentina, where the  
16          court pointed out that when you're dealing with  
17          sophisticated parties those terms apply to even a  
18          greater extent.

19                   CHIEF JUDGE LIPPMAN: Okay, counselor.  
20          Thanks, counselor.

21                   MR. FREEMAN: Thank you, Your Honors.

22                   CHIEF JUDGE LIPPMAN: Counselor, why don't  
23          Wallace and Reiss control?

24                   MS. VAN ROY: Oh, we believe Wallace does  
25          control and Reiss is somewhat inapposite. But the

1           commitment letter, as my colleague just indicated,  
2           did spell out the terms of the deal, and as was just  
3           admitted, it provided that on a voluntary prepayment  
4           with no default - - -

5                        CHIEF JUDGE LIPPMAN:  Yeah, but there's - -  
6           -

7                        MS. VAN ROY:  - - - the borrower pays it -  
8           - -

9                        CHIEF JUDGE LIPPMAN:  - - - but there's  
10          nothing to make that formula work.

11                       MS. VAN ROY:  Right, so the argument to pay  
12          the yield maintenance amount, which now cannot be  
13          done - - - perform the calculation without that  
14          missing date.  Their argument is, well, we knew that  
15          we had to pay a yield maintenance amount and we're  
16          sophisticated enough to know that that generally - -  
17          -

18                       CHIEF JUDGE LIPPMAN:  Their argument is you  
19          made a mistake, it's not on its face absurd, that  
20          money was made here, and therefore period.  End of  
21          the issue.

22                       MS. VAN ROY:  We believe it is absurd when  
23          - - -

24                       CHIEF JUDGE LIPPMAN:  Why is that not a  
25          rational - - - if you want to have a rule which makes

1           some sense going forward, why is that not a rational  
2           way to look at it?

3                   MS. VAN ROY: We believe the rule already  
4           exists and should be applied here, which is that when  
5           a key provision of a contract cannot be performed as  
6           required - - -

7                   CHIEF JUDGE LIPPMAN: Absurd by definition.

8                   MS. VAN ROY: - - - that is - - -

9                   CHIEF JUDGE LIPPMAN: Absurd by definition.

10                  MS. VAN ROY: - - - absurd by definition.

11           In addition, we've got - - -

12                   CHIEF JUDGE LIPPMAN: Regardless of the  
13           consequence.

14                  MS. VAN ROY: Not regardless of the  
15           consequence.

16                   CHIEF JUDGE LIPPMAN: Regardless - - - if  
17           you made - - - instead of making whatever you made,  
18           if you made a hundred times that, still the same  
19           rule?

20                  MS. VAN ROY: Absolutely, Judge, because  
21           there's no rule that says, well, if they intended  
22           that a party would profit by a hundred bucks a unit,  
23           but a typo - - - clear typo admitted by everyone typo  
24           - - - results in they only profit of a dollar a unit,  
25           now we don't correct it.

1 CHIEF JUDGE LIPPMAN: This is not a typo  
2 though, you acknowledge that?

3 MS. VAN ROY: This is a scrivener's error  
4 in the form of an omission created precisely by - - -

5 CHIEF JUDGE LIPPMAN: Is there's no  
6 consequence for what your adversary describes as  
7 "underlawyering" or - - -

8 MS. VAN ROY: Yes, there is a consequence.

9 CHIEF JUDGE LIPPMAN: What's the  
10 consequence?

11 MS. VAN ROY: And there are many decisions  
12 including - - - that say that the economic absurdity  
13 that may result is irrelevant. If the contract is  
14 complete on its face and can be performed as written,  
15 we perform it, too bad for the sophisticated lawyer  
16 that made the mistake.

17 That's not the case here. Here we have a  
18 contract that on its face, putting aside the  
19 economics out there, cannot be performed on its - - -  
20 cannot be performed as written.

21 CHIEF JUDGE LIPPMAN: Regardless of the  
22 consequences.

23 MS. VAN ROY: Regardless of the  
24 consequence.

25 JUDGE SMITH: Well, what about his theory?

1           You can do the calculation; it just produces no yield  
2           maintenance fee.

3                   MS. VAN ROY:  No, that's incorrect, Judge.  
4           You cannot do the calculation.  The calculation is  
5           pretty simple.

6                   JUDGE SMITH:  But he seizes on the words  
7           "if any".  He says - - -

8                   MS. VAN ROY:  He says - - -

9                   JUDGE SMITH:  - - - you take the difference  
10          if any.  He says, well, there isn't any, so you don't  
11          do the rest of the calculation, so you have a zero  
12          result.

13                   MS. VAN ROY:  That's incorrect.  The  
14          calculation is simple, and they've got it - - -  
15          they've got the bulk of it in their brief.  You take  
16          the note rate, you subtract an appropriate Treasury  
17          rate, and you come up with a difference - - -

18                   JUDGE SMITH:  A difference, if any.

19                   MS. VAN ROY:  If any, that's right.  So  
20          here - - -

21                   JUDGE SMITH:  And he says you don't come up  
22          with one, so you're done.

23                   MS. VAN ROY:  But for sure you've got to  
24          take the note rate and subtract a certain Treasury  
25          rate.  The Treasury rate fluctuates every day, so

1           which date do you pick? The date of default, it  
2           says, because the prior note, they admit, said you  
3           can't voluntarily prepay at all. You don't have the  
4           right. You want the right - - -

5                         JUDGE JONES: What difference does it make  
6           if there's no default?

7                         MS. VAN ROY: - - - let's come up with a  
8           number. Excuse me, Judge?

9                         JUDGE JONES: What difference does it make  
10          if there's no default?

11                        MS. VAN ROY: Because if there's a default  
12          you pay the prepayment premium plus additional  
13          default charges. If there's no default, you can just  
14          pay the spread and - - -

15                        JUDGE JONES: What I'm saying is that makes  
16          the yield maintenance zero. What's the difference?

17                        MS. VAN ROY: If the yield - - -

18                        JUDGE JONES: It makes the yield  
19          maintenance zero.

20                        JUDGE READ: So that's a way to interpret  
21          it as enforceable.

22                        MS. VAN ROY: I am not following, I  
23          apologize. The yield maintenance should never be  
24          zero, because it's the spread for the remaining term.  
25          That's all you pay if you have not defaulted, and you

1 want to refinance. You pay the yield maintenance  
2 amount, and you're out, and the principal, of course.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 MS. VAN ROY: If you did default, you pay  
5 additional default charges.

6 CHIEF JUDGE LIPPMAN: Thanks, counselor.

7 Thank you both. Appreciate it.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Jessica B. Cahill, certify that the foregoing transcript of proceedings in the Court of Appeals of Jade Realty LLC v. Citigroup Commercial Mortgage Trust 2005-EMG, No. 185 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

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