IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A.019/1991

BETWEEN	AUBURN COURT LIMITED	PLAINTIFF
A N D	JAMAICA CITIZENS BANK LIMITED	DEFENDANT

Dr. Lloyd Barnett & Rudolph Francis for the Plaintiff.

Michael Hylton & Alexander Williams instructed by Messrs Myers, Fletcher & Gordon, Manton & Hart for the Defendant.

Heard: November 21, 23, 24 & 25, 1994 & April 18, 1997.

JAMES, W.A. J.

In this action the plaintiff claims against the defendants the following order/declarations:

(1) that an account be taken between them and that the defendants account to the plaintiff for the sums of money paid to them by the plaintiff, Jihije Limited and Delbert Perrier in relation to a judgment debt in Suit No. C.L. J576/1985 for the sum of $4,929,710.66.

(ii) a declaration that the unpaid balance of the mortgage loans secured by the registration of mortgage No.424336 and mortgage No.436171 on Certificate of Title registered at Volume 955 Folio 565 & 566 of the Register Book of Titles merged into the judgment debt in Suit No. C.L. J.576/1985 entered on either 15th or the 24th day of January, 1986.

(iii) a declaration that the unpaid balance of the mortgage loan (the existence of which is not admitted) secured by the registration of mortgage No.363566 on Certificate of Title registered at Volume 1108 Folio 908 of the Register Book of Titles merged in the judgment debt in Suit No. C.L. J.576/1985 entered on either the 15th or

the 24th day of January 1986.

At the commencement of the trial of this action the plaintiffs applied to amend the sub-paragraphs numbered (iii) & (iv) by adding:

> 'And that the appropriate rate of interest payable under the said judgment debt as from the date thereof to 24/6/91 is simple interest @ the rate of 6% p.a."

No objections were raised by the defendant and the Court granted the amendment.

The judgment was obtained in Suit No. C.L. J.576/1985 for the sum of $4,929,710.66 in respect of loans to the plaintiff under several instruments bearing dates from the 17th February 1984 and up to 25th March, 1985.

The parties submitted an agreed bundle as Exhibit 1 containing photo-copies of the various documents relied on by them. The first document is a debenture created under the Companies Act by the plaintiff in favour of the defendants and dated 14th January, 1981 for $500,000.00. The second is mortgage instrument No.424336 dated 17th February, 1984 for $200,000.00. The third is a Time or Demand Promissory Note for $1,600,000.00 dated 25th January, 1985. The 4th is a mortgage instrument No.136171 for $2,600,000.00 dated 25th March, 1985.

It is to be noted that with reference to Clause 2(h) of mortgage instrument No.424336 dated 17th February 1984 the following covenant states:

> "If the rate of interest payable hereunder is higher than the rate payable at law on a judgment debt the taking of any judgment on any of the covenants herein contained shall not operate as a merger of the said covenant in such judgment or affect the Bank's right to interest at such higher rate as well after as before judgment."

With reference to Clause 2(a) of mortgage instrument No.136171 dated 25th March, 1985 is the following covenant:

> "That the mortgagor will on demand pay to the Bank ..... all such sums of money which are now are or at any time hereafter may be due or owing .....

> together with interest to the date of repayment at the rate specified in the schedule hereto or at such other rate or rates of interest as the Bank shall from time to time charge .... The said interest shall be computed daily at the rate aforesaid or at such other rate or rates as the Bank shall from time to time charge on the money so due or owing (whether under this instrument or on any judgment which may be recovered hereunder) and the Mortgagor shall pay the same on such day in every month as the Bank may from time to time determine ...."

In addition to the foregoing instruments Delbert Perrier obtained a mortgage for $500,000.00 on premises registered at Volume 1108 Folio 908 on 21st January, 1981. These premises are commonly known as 53½ Molynes Road. Delbert Perrier is a director of the plaintiff.

It would appear that this loan as well as the other made on 14th January, 1981 for $500,000.00 are not a part of the plaintiff's case.

Dr. Barnett submitted that the defendant proceeded to obtain a judgment which incorporated the amounts it claimed to be due under all the security documents without any regard to the differences in the terms and conditions of the different instruments or the statutory requirements in respect to notice or registration of such securities. He further submitted that the only reasonable ground on which the defendant could be regarded as so acting is that it decided to proceed on the basis of the judgment rather than the specific provisions of the individual security documents.

He bolstered his submissions by referring to Section 93 of the Companies Act. Section 93(1) requires the registration of charges so far as any security on the Company's property is conferred.

Subsection 9 says the expression "charge" includes "mortgage". He also relied on the provisions of Section 94 of the Companies Act as well as Section 103 of the Registration of Titles Act.

Section 103 states:-

> "The proprietor of any land under the operation of this Act may mortgage the same by signing a mortgage thereof in the form in the Eight Schedule and may charge the same with the payment of an annuity by signing a charge thereof in the form in the Ninth Schedule."

He submitted that its the registration of mortgages as is required under Section 103 of the Registration of Titles Act by which provision is made for the statutory power of sale to become exercisable. This requires the mortgage to be registered in a form which compels a statement of the true principal sum and the rate of interest payable.

Dr. Barnett then referred to the endorsement on Writ in Suit No. C.L. J.576/85 which gave particulars of 3 loans viz.

Time loan

Principal	$200,000,000.00
Interest to 8/11/85	530,733.26

Demand loan

Principal	$1,600,000.00
Interest to 8/11/85	347,288.88
Overdraft as @ 11/11/85	245,844.60
	$4,723,866.74

It claimed continuing interest on the Time loan at the rate of $1,977.77 per day, on the Demand loan at the rate of $1,511.11 per day from the 8/11/85 to the date of payment, and on the overdraft at the rate of 38% per annum.

Dr. Barnett then referred to a letter dated 8th January, 1986 (See pages 62 & 63 of Exhibit 1) from Elon Beckford, Managing director of the defendants to Delbert Perrier. In that letter the total indebtedness was $4,043,059.89. But on the 15th January, 1986 the defendant in Suit No. C.L. J576/85 obtained judgment for $4,929,710.66.

He further submitted that the defendant elected to consolidate all the debts, and obtained a lump sum judgment which included interest accumulated at different rates under different instruments

containing different terms and conditions. He said that in those circumstances the terms of those instruments could no longer be applied to the consolidated sums.

He then submitted that some of the instruments gave power to increase the rate of interest while others did not. Others excluded the need for notification and others required notification. He submitted that by charging interest upon interest the defendant was applying the technique of obtaining judgment for a lump sum to impose a penalty on the debtor. This he says is not allowed by the law.

He submitted that the defendant treated all the debts not only as being consolidated but merged them in the judgment and that by their subsequent conduct confirmed that that was what was done and that was their understanding.

In support of his contention he referred to Snell's Principles of Equity, 28th Edition, Chap.2 Section 1. Penalties. At page 528 (b) Difference in essence:-

> "The essence of a penalty is a payment of money stipulated as in interrorem of the offending party, while the essence of liquidated damages is a genuine covenanted pre-estimate of damage."

and (e) Payment of a smaller sum states:

> "Where the payment of a smaller sum is secured by a larger, the larger sum is a penalty. This will be the case whether the larger sum becomes payable only on the failure to perform the stipulation for payment of the smaller sum or on breach of any of a number of stipulations of which the undertaking to pay the smaller sum is only one. The Court will not sever the stipulations. In cases of this kind the sum is clearly penal, for the breach of the contract to pay the smaller sum would give rise to nothing more than a right of action for that smaller amount, and if parties have agreed that the breach shall give rise to a claim to a larger amount, there is clearly no genuine pre-estimate of damage. But if on a loan repayable by instalments it is agreed that on default as to any one instalment the whole amount shall become payable forthwith, the agreement is not penal and no relief against it will be granted."

He also referred to Paget's Law of Banking Eight Edition at page 115 where in the case of Lloyd's Bank Limited v. Brooks (1950) 6 Legal Decisions Affecting Bankers, 161, Lynskey, J. held that the bank was under a duty to keep a customer correctly informed as to the position of her account, a duty not to over credit her statement of account .....

The parties also agreed and tendered into evidence as Exhibit 3 a bundle called Supplementary Index to Judge's Bundle.

After referring to the reports of the Registrar of the Supreme Court he submitted that by virtue of the Order of the Registrar the defendant obtained interest at the rate of 6% p.a.

In respect of a letter from the Attorney-at-Law for the defendant to the Attorney-at-Law for the plaintiff dated 5th August, 1988 containing a summary statement of the plaintiff's indebtedness, Dr. Barnett submitted that the figures shown in that summary statement are 'rounded' figures and not a statement of how they have been arrived at.

Dr. Barnett then referred to the Formal Order made by Theobalds,J on the 4th July 1991. He submitted that the result of the formal order is that $1.7 million which results from the calculation of the amount due on the basis of applying the statutory rate of 6% interest to the judgment debt was paid over absolutely to the defendant. That the balance of the amount claimed by the defendant viz: $4.7 Million was placed in an account pending completion of the present proceedings so that the successful party would be entitled to that sum and interest thereon.

Dr. Barnett next dealt with the legal question of merger. He submitted that having regard to the terms of the various instruments on obtaining a judgment the outstanding amounts merged into the judgment debt and therefore attracted interest at the statutory rate of 6% per annum.

He further submitted that by reason of the nature of the judgment obtained which consolidated the various debts and included

and at least one loan in his private capacity which loan he testified formed no part of this action.

He testified that the amounts referred to in the Order of Theobalds J have been paid although not within the four (4 weeks) period stipulated in the said Order.

Mae Tapper an Accountant prepared statements of account showing the plaintiff's indebtedness to the defendants as also a summary of Principal and interest paid January 15, 1986 to April 30, 1991. These documents were tendered and admitted in evidence as exhibits 4, 6 & 7 respectively. She used 6% per annum as the rate of interest for calculating the interest due.

It was as a result of her calculations that the sum of approximately $1.7M was stated as the plaintiff's indebtedness to the defendant.

Mr. Hylton commenced his submission by agreeing with the plaintiff that the issues to be determined are:

(1) What is the appropriate rate of interest.

(2) What is the correct balance.

He submitted that in respect of the determination of the correct rate of interest the issue depended on whether there was a merger of the debt with the judgment.

He then stated that if the answer is in the affirmative then the rate of interest is 6%. If it is in the negative the appropriate rate is that charged by the defendant.

Mr. Hylton submitted that issues relating to the stamping of mortgages are relevant only where there is a question of priorities and that such considerations do not arise as between lender and borrower.

He submitted that if the Court comes to the finding that there has not been a merger that would be the end of the case and the plaintiff would have paid the correct amount. If the finding is to the contrary the result would be that there has been an overpayment by the plaintiff and an account would have to be taken to establish the true balance.

the accumulated interests, it is not open to the defendants to apply a rate of interest other than the statutory rate.

He cited and relied on the following cases:

Re European Central Railway Company 1876 Ch. Div. Vol. IV 33

Exparte Fewings Ch. Div. Vol. XXV 338.

In the European Cantral Railway Company case the Court of Appeal held that the original debt was merged in the judgment, and that the claimant was only entitled to interest in the judgment at 4%.

A similar decision was reached in the Court of Appeal in Exparte Fewings.

In Economic Life Assurance Society & Usbourne & Others 1902 A.C. 147 the House of Lords held that though the personal remedy on a covenant to pay a debt merges in a judgment and a judgment carries only 4% interest, yet upon the true constrution of the mortgage deed the mortgagee were entitled to retain their security until they were paid the principal sum and interest at 5%.

The Earl of Halsbury L.C. expressed this decision thus:

> "Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment."

Finally with reference to the Economic Life Assurance Society case Lord Davey said that this question (of merger) is one of construction of the deeds only.....

The case of Arbuthnot v. Bunsilall 1890 L.J. 234 Sterling J. referring to Fry, L.J. Re Fewings said: "Where there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment ....."

The plaintiff called Delbert Perrier and Mae Tapper as witnesses. Delbert Perrier executed mortgage documents on behalf the plaintiff

A Fred Cuthbert, Senior Manager, Loans Department of defendants gave evidence on behalf the defendant. Nothing new was established except he stated that if a payment is made in one year and is not reflected in the statement of account for that year, that would make a difference in the calculation of the interest due on that account. It would also affect the balance due.

Mr. Hylton continued his submissions and cited as an authority in respect of estoppel Section 178 of the C.P.C. which provides that the defendant or plaintiff must raise it by his pleadings.

He further said that the plaintiff did not file a reply so that the opportunity the plaintiff had was lost.

He also referred to Bullen & Leake & Jacobs Precedents of Pleadings 12th Edition at page 1056. Pleading which states:

> "Every estoppel must be specifically pleaded not only because it is a material fact, but also because it raises matters which might take the opposite party by surprise and usually raises issues of fact not arising out of the preceding pleading."

Mr. Hylton continued his submissions and delivered a written submissions. With reference to the mortgage instrument No.424336 dated 17th February 1984 and referred to Clause 2(h) thereof which reads:

> "If the rate of interest payable hereunder is higher than the rate payable by law on a judgment debt, the taking of any judgment or any of the covenants herein contained shall not operate as a merger of the said covenant in such judgment or affect the Bank's right to interest at such higher rate as well after as before judgment."

He also referred to Clause 4(r) and 4(u) of the Mortgage instrument dated 25th March, 1985 and is No.136171.

Clause 4(r) reads:

> "The mortgage hereby created shall be in addition and without prejudice to any and every other remedy lien or security which the Bank may or but for the same would have for all the moneys hereby secured or any part thereof.

4(u) This security shall not be considered as satisfied or discharged by any intermediate payment of the whole or part of the moneys owing as aforesaid but shall constitute and be a continuing security to the Bank notwithstanding any settlement of account or other matter or thing whatsoever and shall be in addition to any other security or securities which the Bank may from time to time hold or take from the Mortgagor and shall not be affected or prejudiced by or affect or prejudice in any way any other security or securities as it may hold or take from the Mortgagor and the Bank shall be at liberty to realise such securities as it may hold or take from the Mortgagor in such order and manner and to pay, apply and appropriate any money at any time or times paid by or on behalf of the Mortgagor or resulting from a realisation of this or any other security or any part thereof to such account (including a new account) or item or indebtedness and in such sequence priority and order as the Bank may in its absolute discretion from time to time determine any direction from the Mortgagor to the contrary notwithstanding."

In so far as the two mortgages referred to above are concerned, having accepted the principles laid down in Economic Life Assurance Society & Usbourne (supra) I hold as a matter of law that a covenant to pay interest may be so expressed as not to merge in a judgment for the principal.

The defendant can therefore claim the rate of interest under the above two mortgages viz: Nos. 424336 and 136171 as the covenants specifically made provisions against their being a merger in the circumstances which prevail in this case.

It must be noted that the judgment was obtained for sum/sums other than those in respect of the two mortgages to which reference has already been made. At least one demand loan of 1.6 million has been recovered in the judgment dated 15th January, 1986.

The interest on that loan is 26% per annum.

Any calculation of interest at a rate higher than the judgment rate of 6% is considered unfortunate and wrong. Unlike the clauses in the mortgage instruments which preserved the covenanted rate of interest, no such similar clause or provision is agreed in the demand

Promissory note.

The loan obtained on the demand Promissory note therefore is held to have merged in the judgment dated 15th January, 1986.

I do not think it is necessary for me to determine the issues dealing with registration and stamping of mortgages. These issues although addressed by Counsel for plaintiff did not arise in the pleadings for my determination. The fact is there is a judgment obtained 15th January, 1986.

Judgment

(1) An account of all moneys received by the defendant or by any person on its behalf from 17/2/84 to 15/1/86 and of the manner in which the said sums have been applied by the defendant.

(2) To account and establish what balances are due as of 15/1/86 on (a) the mortgage loans #424336 and #136171 and (b) on the Demand Promissory Note.

(3) To calculate the rates of interest on the amount found to be due as of 15/1/86 on the mortgage loans at the covenanted rate of interest and to calculate the interest on the Demand Promissory Note at the rate of 6% per annum.

(4) That all account and calculations be made to the Registrar of the Supreme Court within six (6) weeks of the Order.

On the question of costs - because of the partial success of each party, I make no order as to costs or put another way, each party bears his own Costs.