NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. C.L HCV1550/2005

BETWEEN	DERMOTT LEWIS BLAKE	1ST CLAIMANT
AND	JOAN BLAKE	2ND CLAIMANT
AND	KEITH HUSLIN	DEFENDANT

Mr. Abe Dabdoub instructed by Clough Long & Company for claimants

Mr. P. Beswick instructed by Ballantyne Beswick & Company for defendant

Heard: 20th and 24th March 2006 and 3rd April 2006

Sinclair-Haynes, J

Mr. Dermott Lewis Blake and Miss Joan Blake (claimants) agreed to grant Mr. Keith Huslin (defendant) a mortgage in the sum of US$141,000.00 with interest on the said sum at 10 percent per annum. The loan was secured by property registered at Volume 1357 Folio 167 of the Register Book of Titles.

By letter dated June 16, 2003, Mr. Huslin instructed the claimants to disburse the sum of J$589,675.00 to an account held by L'Oreal Caribe. This account was operated by Mr. David Gray, his business partner.

On June 18, 2003, Mr. Huslin wrote a note to Clough Long & Company, the claimants' attorneys, which instructed them to disburse the sum of $600,000.00. Five Hundred and Ninety-Three Thousand Two Hundred and Thirty-One Dollars ($593,231.00 was to be paid to L'Oreal and $6,769.00 to Clough Long & Company.

On June 19, 2003, Mr. Huslin executed the mortgage deed. However, First Global Bank Ltd. had a first mortgage over the property. The claimants sought to protect their interest in the property by lodging a caveat. On the said day, the sum of $589,675.00 was wired to the account of L'Oreal Caribe.

The defendant has not made any payments under the mortgage agreement. Consequently, the claimants have instituted proceedings against the defendant.

They have sought, inter alia, the following relief:

> Should the first mortgagee sell the property, it shall account to them for any surplus of the sale proceeds.

The claim was served on the defendant on June 5, 2005. The defendant failed to comply with Rule 10.3 (1) which provides:

> "The general rule is that the period for filing a defence is the period of 42 days after the service of the claim form."

On August 22, 2005, he applied to the court to have the time for filing and delivering his defence enlarged to August 22, 2006.

Defendant's Application

On September 8, 2005, the defendant filed an affidavit in support of his application to which he attached a defence. In his affidavit, he averred that upon receipt of the claim he consulted his attorneys for advice. The second week of June he consulted another attorney (his present attorney). However, it was not until the last week of July 2005 that he was able to pay his attorney's retainer. He was instructed to return to his attorney by mid August 2005. He did not contact them until September 7, 2005 because he had forgotten to do so and he had lost his cell phone. He stated, however, that his

attorney made several efforts to contact him. He also averred that he has a good defence to the claimants' claim because he instructed the claimants' attorneys not to proceed with the loan and he did not collect the money.

In his defence which was attached to his affidavit, he stated that 20 minutes after he executed the mortgage he and his partner, the holder of the L'Oreal Caribe account, Mr. Gray, returned to Mr Clough's office and informed him not to proceed with the mortgage loan. He stated that Mr. Clough tried to dissuade him but he insisted that he did not wish to proceed with the loan because the interest rate was too high for United States currency. Further, he stated that Mr. Gray returned to Mr. Clough's office, collected the mortgage documents and destroyed them. Subsequently, he discovered that the money was disbursed. According to him, the money was disbursed without his knowledge and in contravention of his instructions to Mr. Clough.

Submissions by Mr. Abe Dabdoub

Mr. Dabdoub resisted the defendant's application for an extension. He contended trenchantly that the defendant has advanced no good explanation to excuse his delay as forgetfulness and the loss of his cell phone are not good reasons. Further, he contended, it was the defendant's responsibility to contact his lawyer. He relied on **Winston Jones v Contraxx Enterprise Ltd**. Supreme Court Civil Appeal No. 40/2004 and **Norma McNaughty v Clifton Wright et al** Supreme Court Civil Appeal No. 20/2005 delivered on May 25, 2005.

He denied vehemently the allegations that the defendant returned to Mr. Clough's office 20 minutes after and expressed the wish to cancel the mortgage. He insisted that Mr. Clough did not try to dissuade the defendant from cancelling the loan. Also, Mr.

Gray did not return to Mr. Clough's office and collect the signed documents with the intention of destroying them.

Mr. Dabdoub contended that the onus was on the defendant to show that he has a real prospect of successfully defending the claim and he has failed to do so. He relied on **Paulette Smellie v Richard Dougherty** (Suit No. CLS 134/01) (unreported).

He submitted, inter alia, that a contract cannot be repudiated by one party. He relied on **White & Carter Councils Ltd v McGregor** [1962] 2 WLR HL 17, **Khatijaban Liva Hasham v Zenab** [1960] 2 WLR, **Woodar Investment Development Ltd and Wimprey Construction UK Ltd.** [1980] 1WLR, **Sinason-teicher Trading Inter-American Grain Corp. v Oil Cakes & Oil Seeds Trading Co. Ltd** [1954] 1 WLR.

Further, he submitted that that a mortgage cannot be varied by oral evidence.

Submissions by Mr. Paul Beswick

Mr. Beswick relied on Rule 26.1 (2) (c) which states:

> "Except where the rules provide otherwise, the court may–
>
> (c) extend or shorten the time for compliance with any rule practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

He submitted that the reasons advanced by the defendant for his delay are credible explanations.

He also submitted that in considering the question of merit in defence and the likelihood of success, the court need not be satisfied that there is a real likelihood of

success but merely that the defendant has an arguable case which carries some degree of conviction. He relied on **Day v RAC Motoring Services Ltd.** [1991] 1 AER 100.

Further, he submitted that the court should refrain from attempting to try disputed issues of facts at an early stage that should be reserved for trial. He submitted that Mr. Huslin's assertion that he countermanded the instructions to the claimants' attorneys-at-law raises serious questions of fact and law as to the legitimacy of the mortgage contract and subsequent disbursement which, if believed by a tribunal of fact, judgment would be entered against the claimants and in favour of the defendant.

Importantly, he argues that judgment has not yet been entered against the defendants; therefore they have acquired no rights under a judgment which would defeat the granting of leave to enter defence out of time as the court takes a different view when judgment is actually entered.

Further, he submitted that a mortgage contract is a unilateral contract. A unilateral contract is executory. The undertaking to pay over the proceeds of the mortgage therefore binds the mortgagees and not the mortgagor. It is the disbursement of the sum which binds the mortgagor and if the mortgagor directs that the disbursement should not take place there is no mortgage contract in existence and there can be no mortgage contract arising. He submitted that on the evidence of the defendant, he instructed the mortgagees' attorney to cancel the mortgage agreement. The existence of this allegation means that the court is open to find at trial:

1. that the mortgagees' attorney-at-law ought not have proceeded with disbursement to any party;

2. that there was no undertaking in writing given by the claimant upon which the defendant could rely;

3. the defendant had a right to withdraw the offer on the basis that the interest rate was too high;

4. that the defendant was unrepresented in a matter involving a large sum of money. There existed the possibility for misunderstanding and mistake by the defendant who was unrepresented. He could not have agreed to a contract which was presented to him by an attorney representing the other side.

The Law

Rule 26.1 (2) (c) states:

(2) "Except where these rules provide otherwise, the court may:

(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

However, in determining whether to exercise my discretion in accordance with Rule 26.1(2) (c), I must be mindful of and I am obliged to give effect to the overriding objective of enabling the court to deal with the cases justly.

Rule 1.1 (2) states:

"Dealing justly with a case includes -

(a) ensuring, so far as practicable that the parties are on an equal footing and are not prejudiced by their financial position;

(b) saving expense;

(c) .....

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot services to other cases."

Ruling

Is this a case which ought to engage the court's limited time? Would it be fair to allow the defendant added time to file his defence in the circumstances?

The defendant has advanced reasons for the delay in filing his defence with which I am not impressed. He averred that he was not able to pay his attorney until the last week of July. He was able to pay his attorney the last week of July 2005, yet, he did not pay him until September 7, 2005 after his daughter contacted him. The reasons advanced for not paying his attorney i.e. forgetfulness and loss of his cellular phone, are flimsy. He had a duty to contact his attorney. His attitude to the filing of the defence appears to have been a cavalier one. He was instructed by his attorneys to contact them but he neglected to do so. In my view, the delay was inexcusable.

Smith JA in **Norma McNaughty v Clayton Wright et al** stated at page 12:

> "Nonetheless, I am constrained to repeat what Court of Appeal has said *ad nauseum* namely that orders or requirements as to time are made to be complied with and are not to be lightly ignored. No court should be astute to find excuses for such failure since obedience to the orders of the court and compliance with the rules of the court are the foundations for achieving the overriding objective of enabling the court to deal with cases justly."

See also **Keith O'Connor v Paul Haufman et al** Supreme Court Civil Appeal No.2002 delivered on April 7, 2006.

Other important considerations are whether the delay has prejudiced the claimant and whether it amounts to an abuse of process. However, the claimant has led no evidence in that regard nor has he raised such an objection. Although I am of the view that the defendant's delay in filing his defence was without good excuse, I do not find that he acted contumeliously.

Whether the defendant has a good defence to the claim

It is antithesis the overriding objective that a claim which is really hopeless should continue (See **Harris (Elizabeth) v Bolt Burdon** (a firm) (2000) Lawtell, 2nd February, Court of Appeal.

In determining whether it is just to exercise my discretion in favour of the defendant, I must also consider whether he has a realistic prospect of success as opposed to a fanciful prospect of success (See **Swain v Hillman** [2001] 1 All ER 91).

I disagree with the submissions of Mr. Beswick that the test is whether the defendant has an arguable case which carries some degree of conviction The application of that test would be erroneous (**Sinclair v Chief Constable of West Yorkshire** (2000) LTL December 12. The advent of the new rules and the position taken by the courts in light of the overriding objective to conserve time and to deal expeditiously with matters has resulted in the standard being raised. The test is, undoubtedly, whether the defendant has a real prospect of successfully defending the claim.

I am mindful that it is inappropriate to decide that the defendant has no real prospect of defending the claim successfully if there are issues of facts which could be decided in the defendant's favour even if there is substantial evidence against the defendant. See **Munn v Northwest Water Ltd** (2000) LTL 18/7/00 **and Harris (Elizabeth) v Bolt Burdon.**

In the instant case, there is the issue of fact as to whether the defendant countermanded his instructions to the claimants' attorney.

Assuming, without accepting, that the defendant's version of the facts are believed, does he have a realistic prospect of defending the claim?

The case of **White v Carter Council Ltd and McGregor** [1962] 2 WLR 17 is instructive as the facts are analogous to the instant case. The appellants in that case were advertising contractors who agreed with a representative of the respondent to display advertisements for his garage for three years. On the same day, the respondent wrote the appellant to cancel the contract on the ground that the representative had no specific authority to make the contract. The appellant disregarded the cancellation and displayed the advertisements in accordance with the contract and sued for the full sum due under the contract. The respondent refused to pay the sums due under the contract.

It was argued on behalf of the respondent that as he had repudiated the contract before anything had been done under it, the appellants were not entitled to carry out the contract and sue for the contract price. It was further argued that the only remedy would have been in damages if they had sued for damages and they had not sued for damages. Lord Reid expressed the following view:

> "The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses, disregard or refuse to accept and then the contract remains in full effect."

Lord Reid also expressed the view that the case **Langford & Company v Dutch** [1952] SC 15 was wrongly decided. In the case of **Langford,** an advertising contractor agreed to exhibit a film for one year. Four days after the agreement was made it was repudiated by the advertiser. The contractor refused to accept the repudiation, exhibited

the film and sued for the contract price. The action was dismissed by the Sheriff-Substitute. On appeal, the decision was affirmed. Lord President Cooper was of the opinion that the law did not permit the advertiser to force the defendant to accept a year's advertising which she did not want. Their claim would only be in damages for breach of contract.

It is useful to quote the words expressed by the Lord President Cooper:

> "On averments the only reasonable and proper course, which the pursuer should have adopted, would have been to treat the defender as having repudiated the contract and as being on that account liable in damages...."

Lord Reid, in holding that the Lord President had erred, stated at page 22:

> "It might be, but it never has been the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support an attempt to enforce them in an unreasonable way. One reason why that is not the law is, no doubt, because it was thought that it would create too much uncertainty to require the court to decide whether it was reasonable or equitable to allow a party to enforce his full rights under contract. The Lord President cannot have meant that."

In concurring with Lord Reid, Lord Hudson at page 36 said:

> "It is settled as a fundamental rule of the law of contract that repudiation by one of the parties to a contract does not itself discharge it."

Assuming, therefore, that the defendant is believed by a tribunal of fact that some twelve minutes after the mortgage deed was executed, he orally repudiated it, his repudiation if not accepted by the claimant is of no effect.

In his judgment, Lord Hudson referred to two quotations which confirm the position of the court. Viscount Simmons' speech in **Heyman v Darwin's Ltd** [1942] AC

356, 361 in which he cited with approval the following statement made by Scrutton LJ in **Golding v London and Edinburgh Insurance Co. Ltd:**

> "I have never been able to understand what effect the repudiation of one party has unless the other party accepts the repudiation."

And Asquith L J in **Howard v Pickford Tool Co. Ltd:**

> "An unaccepted repudiation is a thing writ in water and of no value to anybody. It confers no legal rights of any sort of kind."

I must disagree with Mr. Beswick's submission that a mortgage contract is unilateral and executory therefore unless the mortgage money is actually paid over in accordance with the mortgage, there is no mortgage agreement. The mortgage contract is a deed, signed and sealed. It is, therefore, not an inchoate agreement but a valid contract which subsists since the claimant has chosen the option of ignoring the repudiation. The parties are contractually bound by it and it is, therefore, enforceable against them.

This agreement may be extinguished by agreement. For the defendant to succeed, the existence of *"animus contrahentium"* must be shown. He has not done so.

Mr. Dabdoub contends that in any event oral evidence cannot be relied upon to add or vary a deed or a written contract. He placed reliance on **Jacobs v Batavia & General Trust** (1924) 1 CL 287. In the instant case, however, the defendant's contention is that the contract was rescinded not varied.

A deed may be impliedly rescinded by oral agreement where there is a clear intention to rescind as distinguished from an intention to vary. See **Morris v Baron & Company** [1918] AC 1. Viscount Haldane enunciated at page 18:

> "It was not decided by **Noble v Ward** that the Statute of Fraud prevents an oral agreement, if it plainly purports to do so, from

> rescinding in its entirety a previous written contract. Even although itself incapable of being sued on, an oral contract may have that effect. The question is whether there is an intention in any event to rescind, independent of any further intention which may exist to substitute a second contract. I think **Noble v Ward** affirms what seems to result from principle, that in such a case the agreement to rescind must receive effect."

At page 28, he further opined:

> "The Statute of Fraud does not make the oral contract void, but it prevents an action upon it; ..."

This principle was given approval by the Privy Council in **United Dominions Corporation (Jamaica) Ltd. v Michael Mitri Shoucair** [1976] 10 JLR page 501.

In the instant case, there is no such agreement between the parties to rescind the contract. The defendant's case is that Mr. Clough tried in vain to convince him not to rescind the contract. In any event, the repudiation was not communicated to the claimants. Mr. Clough was not a party to the contract, he was merely the attorney.

In the circumstances, I hold that the mortgage contract constitutes a binding operative contract which was not superseded by the defendant's repudiation.

The defendant is, therefore, not released from his obligation under the contract as the claimant has chosen to disregard the repudiation. The contract, therefore, remains in full effect.

The defendant's case is entirely without substance and in the circumstances has no real prospect of success since it is unsustainable as a matter of law.

In the circumstances, it is hereby ordered that:

1. The Notice of Application filed herein on the 22nd day of August, 2005 on behalf of the defendant is refused.

2. The mortgage presently being protected by Caveat Number 1288965 endorsed on the Original Certificate of Title registered at

Volume 1357 Folio 167 of the Register Book of Titles be endorsed on the Certificate of Title as a registered legal mortgage.

3. The claimants who are second mortgagees of the said property may proceed by sale to recover sums owing under the said mortgage after the first mortgagee First Global Bank Limited has been paid.

4. The first mortgagee shall account to the claimants as to the amount owed to it under its mortgage.

5. Should the first mortgagee sell the said property, it shall account to the claimants for any surplus of sale proceeds.

6. Should the first mortgagee sell the said property, it shall pay to the claimants from the surplus the sum due to them.

7. The claimants are at liberty to pay out to the first mortgagee all or any monies due to it.

IT IS FURTHER ORDERED that any excess over and above that to satisfy the mortgages and the cost of these proceedings be paid to the defendant.