IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B.017 OF 1992)
) CONSOLIDATED
SUIT NO. C.L. B.055 OF 1993)

BETWEEN	ENOCH BLAKE PAMELA BLAKE	PLAINTIFFS
A N D	FIRST JAMAICA NATIONAL BANK	DEFENDANT

Mr. P. Alexander Beswick and Miss Donna Dodd instructed by Marion Rose Green & Company for Plaintiffs.

Mr. Michael Hylton & Miss Debbie Fraser instructed by Myers Fletcher & Gordon for Defendant.

November 15, 16, 17, 18, 1993, May 4, 5, 6, & October 7, 1994.

LANGRIN, J.

In October, 1987 Enoch Blake, a practising Attorney-at-Law and his wife entered into a demand loan agreement with the defendant, a bank carrying on business in this city. The plaintiffs are the registered owners of Lot 3, Temple Hall in the parish of St. Andrew. They decided to construct a housing development and approached the defendant, bank for interim financing. Pursuant to this on October 12, 1987 the plaintiffs entered into a written agreement with the defendant whereby the latter agreed to extend credit to the former by way of a demand loan to the extent of $890,000 plus interest. As security for this loan the plaintiffs handed over to the defendant individual titles to six lots (the subdivision of lot 3) with five houses thereon, the assignment of a life insurance policy on the life of the second plaintiff in the sum of ($1.6 million dollars) one million six hundred thousand dollars and a legal mortgage over their residence in Temple Hall.

It was stipulated that the agreement should run from October 12, 1987 to October 11, 1988. By October 24, 1988 the total disbursement made equalled $870,809.52. During this period the plaintiff failed to make a number of interest payments on the 24th of the month as stated in the loan agreement.

Between October 1988 and August, 1989 the plaintiffs requested a number of advances to complete roadways and other infrastructure but no disbursements were made until 21st August, 1989.

On May 13, 1992 the plaintiffs' instituted civil proceedings in the Supreme Court to recover damages for alleged breaches of trust and contract. On the 5th October 1992 the defendant advised the plaintiffs that they had given instructions to a firm of Auctioneers to advertise their houses for sale at a public auction. The plaintiffs obtained a loan and on January 14, 1993 paid to the defendant bank one million, nine hundred thousand dollars ($1.9m) in an effort to save their home. Of this sum, ninety four thousand seven hundred and twenty seven dollars and eighty six cents ($94,727.86) was apportioned by the defendant as attorneys fees.

The plaintiffs have complained that as a result of the defendant's failure to supply the requested advances they have lost the benefit of the said agreement as well as the revenue and profit they would otherwise have received as a result of the early completion of the Scheme. Consequently they were put to great inconvenience and expense and have suffered loss and damage to the extent of a sum exceeding ($4.09m) Four million and ninety thousand dollars.

The plaintiffs' however, sought to call several witnesses to adduce evidence that was not really a dispute between the parties. In fact, Mr. Michael Hylton, Learned Counsel for Defendant quite skillfully extracted from them evidence which was helpful to his defence. In the end of what could properly be described as a protracted case for the plaintiff, the defence rested its case.

Carol Newman, the plaintiffs' secretary testified under cross-examination that she was aware that the Blakes' were in default. Mr. Enoch Blake in his testimony admitted that all transfers of lots were signed by Mrs. Blake and himself. Neither did he deny a suggestion put to him that the transfers went directly to purchasers' mortgagees and Attorneys-at-Law representing purchasers. Exhibits 5, 6 and 7 comprising transfers of the lots confirm that the lots were transferred by the plaintiffs and not by the defendant.

My conclusion on the evidence is that when the bank ceased to disburse the loan the scheme was not completed. Indeed the roads

were yet to be done. The plaintiffs were in default of repaying the loan as well as the monthly interests. It was the plaintiffs themselves who had actually transferred the lots complained of to the purchasers.

It seems to me, therefore, that the only real issue in this case relatesto the construction and the proper analysis of the rights and obligations conferred and imposed by the Demand Loan Agreement and the Mortgage Instrument.

Breach of Contract

It was submitted on behalf of the plaintiff by Learned Counsel, Miss Dodd, that the defendant failed to disburse the maximum amount of loan granted issuing only $870,807.52 instead of $890,000.00. They contend that although the agreement was for the period October 1987 to October 1988 the defendant by implication had extended the contract period by disbursing $5723.00 consistent with Quantity Surveyor's Certificate outside the contract period and could therefore have distributed other sums.

The relevant parts of the loan agreement dated October 12, 1987 and signed by the parties are referred to as under:-

"Re: Demand Loan Application - $890,000.00

We are pleased to advise that a line of credit has been approved on your behalf to assist with the construction of five dwelling units in Temple Hall.

The terms of the facility are as follows:-

Loan:	$890,000.00
Interest Rate:	24%
Security:	Registered Collateral mortgage over Two Acres of land in Temple Hall, St. Andrew registered at Volume 1167 Folio 818. Personal covenants of Enoch Blake and Pamella Blake supported by assigned Life Insurance on Enoch Blake.
Period:	The period for full repayment of this facility will not exceed one year from the date of disbursement.

Repayment: Interest to be paid on the 24th of each month, commencing the month of first disbursement. At the expiration of one year from date of disbursement full principal balance must be repaid.

Legal Fees: These will be for your account. If for any reason this transaction is not completed, the amount involved shall constitute a debt owing by you and you will forward this sum to the bank in demand."

The loan facility was for a period of one year. At the end of the year the defendant had upon request from the plaintiff advanced $19,192.48 less than the agreed amount. The fact that the bank advanced $5,723.00 as per quantity surveyor's certificate on August 2, 1987 does not mean as the plaintiff contends that the defendant bank had waived the initial agreement and by implication had extended the loan period.

The mortgage instrument duly executed by the parties at clause 4 stipulates as under:-

"4 (b) That in case of any breach or non-observance of any of the covenants or conditions herein contained or implied the Bank may (but shall not be under any obligation to) pay and advance all sums of money necessary for the due performance thereof and all moneys so advanced by the Bank shall be payable to the Bank on demand and until repaid shall be charged on the mortgaged premises and bear interest at the rate for the time being payable hereunder and be recoverable under these presents accordingly.

(c) That if default shall be made by the Mortgagor in payment of the moneys hereby secured or any part thereof or in the performance or observance of any of the covenants herein contained or implied and such default be continued for seven days the Bank may give the Mortgagor notice in writing .... and all moneys intended to be

hereby secured shall become due and payable .....

(e) That no neglect omission or forbearance on the part of the Bank to take advantage of or enforce any right or remedy arising out of any breach or non-observance of any covenant or condition herein contained or implied shall be deemed to be or operate as a general waiver of such covenant or condition or the right to enforce or take advantage of the same in respect of any breach or non-observance thereof either original or recurring.

(f) That the Bank shall not be liable for any involuntary loss which may occur by reason of the exercise or execution (whether contemporaneously or otherwise) of any or all of its rights remedies and powers conferred given or implied by this instrument or by law."

Clause 2 of the mortgage instrument stipulates that the Bank may extend credit and other banking facilities "for so long as the bank may think fit to do." "Consequently, the bank has a discretion to advance sums outside of the period stipulated but it is under no obligation to do so." It is a well known principle of the common law of contract that "..... If one party puts forward a printed form of words for signature by the other, and it is afterwards found that those words are inconsistent with the main object and intention of a transaction as disclosed by the words specially agreed, the Court will reject or limit the printed word so as to ensure that the main object of the transaction is achieved". Per Lord Denning in Nue Chatel Asphalt Co. v. Barnett (1957) 1 AER 362. Here the onus is on the plaintiff to prove that this was not the parties intention and that once the Bank made advances outside of the contract period it was under an obligation to continue to do so. In my view, this was definitely not the defendant's intention. Indeed such a clause as there was in the mortgage instrument is a very common one. All the clause intended was that the bank was at liberty to advance loans to the plaintiffs so long as it suited

them beneficially.

In any event, even if the bank had by implication extended the period the plaintiffs had constantly failed to make interest payments on the 24th of each month as stipulated in the loan agreement.

The mortgage instrument states at Clause 4(b) that in the case of any breach of the covenants or conditions in the mortgage instrument "the bank may (but shall not be under any obligation to) pay and advance all sums of money necessary for the due performance thereof ....." Thus the bank was not obliged to advance sums once the plaintiffs begun defaulting on their payments. Finally, clause 4(e) which deals with the question of waiver would render nugatory the contention advanced by the plaintiff that the defendant had waived its rights under the agreement when it made disbursements outside the one year period.

I am of the opinion therefore that the plaintiff's claim of breach of contract is misconceived and therefore fails.

Breach of Trust

Plaintiffs' counsel submitted that the defendant is guilty of breach of trust in that it transferred titles to individual purchasers of lots without taking any steps to ensure that moneys outstanding to the plaintiffs from such purchases were secured. These sums were not a part of the purchase price and included escalation costs, installation costs as well as interest on the purchase price.

A mortgagee is not a trustee of his power of sale of the mortgaged property. The power is his beneficially and provided that he exercises it in good faith the Court will not interfere. See Warner v. Jacobs (1882) 20 chan. 220; Waring v. London and Manchester Co. (1935) Ch. 310. The mortgagee has a duty to take reasonable care to obtain a proper price and becomes a trustee for the mortgagor for any surplus proceeds of sale. See Cuckmere Brick Co. v. Mutual Finance Ltd. C.A (1971) Ch.949.

In the present case the defendant handed over titles to individual purchasers upon their Attorney's undertaking to pay the

balance of the purchase price over to the defendant. This was an arrangement made between the plaintiffs, the defendant and the purchasers. The Bank was under no obligation whether legally or by implication to look out for the plaintiffs' interest in securing what was owed to them. This was not a part of any agreement and cannot be claimed upon mere implication. Indeed it would seem that the plaintiffs themselves were 'negligent' in handing over instruments of transfers to purchasers without ensuring how and when sums outstanding to them would be realized.

If the plaintiff can prove bad faith on the part of the defendant then they could have had a valid claim, if other factors were present. While they have alluded to the fact that the mortgagees acted in bad faith because of the first plaintiff's involvement in politics no credible evidence was adduced to make this a live issue fit and proper for consideration. In fact it was not even pleaded. Despite the losses sustained by the plaintiffs, a claim of breach of trust on the part of the defendant is again unfounded.

Negligence in enforcing agreements entered into between the Plaintiffs and Purchasers

The plaintiffs appear to have abandoned their claim since no arguments were advanced at the hearing on this issue. However, in the absence of any contractual agreement between the plaintiffs and defendant to secure their rights there is no duty or obligation on the part of the defendant to do so.

This claim also fails.

Costs, Fees and Expenses

The plaintiffs further contended that the $94,727.86 paid over to defendant for fees has been unreasonably incurred and should have been taxed. They concede that it is already too late for taxation but that damages should be awarded.

This sum which represents the mortgagees costs, expenses and Attorney's fees regarding the mortgage was added to the security debt. Messrs. Clinton Hart & Co. claim that the sum of $44,000.00 comprise the cost of various correspondences, undertakings and releases plus advice given to the Bank. In respect of Suit C.L 1992/B171

the plaintiff was not charged for the preparation and negotiation of the mortgage. The remaining balance of the total sum charged that is ascribed to Messrs Myers, Fletcher & Gordon fees, the break down is unknown.

Clause 2(f) of the Mortgage Instrument provides:

> "On demand to repay to the Bank all money properly paid and all costs charges and expenses properly incurred hereunder by the Bank including but not limited to the cost of and incident to the preparation completion protection forclosure realisation and enforcement of this security (as to such costs charges and expenses on a full indemnity basis) together with interest thereon from the time of paying or incurring the same until repayment at the rate aforesaid and until so repaid such costs charges and expenses shall be charged upon the mortgaged property and shall be added to the principal money hereby secured and interest thereon as aforesaid shall be charged upon the mortgaged property."

Clause 3 further states:

> "Without prejudice and in addition to any other remedy of the Bank in respect thereof the Mortgagor HEREBY COVENANTS with the Bank that on demand the Mortgagor will pay to the Bank the amount of all mortgagee's expenses incurred by the Bank in relation to the security hereby constituted with interest thereon from the date when the Mortgagor becomes liable therefor until payment thereof at the rate for the time being payable hereunder in respect of the moneys hereby secured in the manner hereby provided with regard to the interest on the principal sum hereby secured and the mortgagor HEREBY CHARGES the mortgaged property with the payment of such expenses and the interest thereon and for the avoidance of doubt it is hereby declared that the expression "mortgagee's expenses" includes not only all such expenses as would otherwise be allowable on the taking of an account between the mortgagor and a mortgagee but also (and in so far as they are not so allowable) includes all moneys costs charges and expenses paid and all liabilities incurred by the Bank (including legal costs charges and expenses ascertained as between attorney-at-law and own client) on or in connection with or incidential to the generality of the foregoing shall include by the Bank in or in connection with or incidential to, amongst other things ....."

The mortgage instrument by virtue of the above clauses make provision for the mortgagee to charge to the plaintiff any cost charges and

expenses incurred by the mortgagee pertaining to the mortgage whether it is litigation or non-litigation costs.

The plaintiffs have accepted in principle that a mortgagee has the legal right to add its costs to the mortgage security. However, the plaintiff contended in their pleadings that the attorneys fees incurred as a consequence of Suit No. C.L. 1992/B171 was wrongly added to the mortgage debt and it should have been taxed. In addition the sum of $94,727.86 was wrongly added to the mortgage.

On behalf of the defendant it was submitted that in a situation where the mortgage is about to be discharged the defendant is entitled to add the costs, expenses and charges. The defendant relied not only on their legal right to do so but also on their contractual right as well. In addition the evidence adduced from the plaintiffs' witnesses clearly demonstrated that the Attorneys fees did not depart from the established scale of fees and therefore were properly incurred and not unreasonable.

The issue which I have to resolve is whether on the true construction of the clauses in the mortgage agreement the defendant was entitled to add the costs incurred to the mortgage debt.

The principle that a mortgagee is entitled to add to the secured debt his costs, charges and expenses is firmly embedded in the law. The underlying basis being that a mortgagee acting reasonably as such is entitled to be indemnified against all expenses.

Costs, charges and expenses include anything done whether for the protection or enforcement of the mortgagees rights in relation to the mortgage debt or security. Therefore the cost of correspondence with the mortgagor as to the legal mortgage and the cost of an action for the recovery of debt are included in costs properly incurred. See National Provincial Bank of England v. Games (1886) 31 Ch. D.582.

It must be noted that the costs, charges and expenses must be "properly" incurred. "Properly" means reasonably as well as honestly incurred. The Court will examine the costs, charges and expenses sought to be added to the security (by way of taxation) and disallow those that it considered not properly incurred subject

of course to the express contractual provisions.

The Court in Gomba Holding U.K. Ltd. v. Minories Finance Ltd. No.2 (1992) 4 AER 588 had to construe clauses in a Mortgage Debenture and Guarantee Agreements that gave the mortgagee a contractual right to retain or recover costs from the mortgaged property. The language used in the agreement was in wide terms, that if interpreted on its face would entitle the mortgagee to recover reasonable as well as unreasonable amounts. The Court stated that the language used justified an approach that would hold the mortgagee prima facie entitled to recover the full amount of actual costs but leaves open the right of the mortgagor to have excluded any costs that were incurred in bad faith or were unreasonably incurred or were unreasonable in amount.

In Re Adelphi Hotel (Brighton) Limited District Bank v.Adelphi Hotel (Brighton) Limited (1953) 2 AER 498 it was held by Valsey J. "what a mortgagee is entitled to is that which is covered by the words, "costs, charges and expenses properly incurred", and it is for the Taxing Master to say what these are ....."

Therefore, if a charge of misconduct is made against him and proved, the mortgagee will be deprived of his costs. Misconduct being such inequitable conduct on his part as to amount to a violation or culpable neglect of duty under the mortgage contract or if his conduct is otherwise improper. See Cotterell v. Stratton (1872) 8 Ch. App. 295.

I accept the defendant's submission that the plaintiffs have neither pleaded or adduced any evidence to show that these costs are unreasonable or were improperly incurred. According to the evidence given by the plaintiffs' witnesses the fees appear to be reasonable. Both Herbert Grant and Mrs. Grace McKoy, Attorneys-at-Law testified that in their experience such clauses are common. No evidence was adduced to suggest that the defendant's bill of costs departed from the scale of fees.

In my judgment, based on the foregoing arguments pertaining to the alleged breaches of conduct, trust and negligence by the Bank/ mortgagees the plaintiffs' contention as to the costs wrongfully

added are unsustainable. There is no proof of misconduct that forfeited the mortgagees rights to recover costs. Therefore applying the principles as stated in the Gomba case (supra) on the true construction of clause 2(f) and clause 3 read in their context and together gave the defendant a contractual right to add properly incurred costs to the mortgage debt, subject of course to the plaintiffs' right to object on taxation. Because the mortgage debt was discharged by the plaintiffs and the defendant released its security after exercising its contractual right at the time in relation to the legal fees it is now too late to deal with the question of taxation of costs. Besides, there is no foundation of fact on which this issue could be dealt with.

Accordingly, for the foregoing reasons there is judgment for the defendant in respect of the consolidated action with costs to the defendant to be taxed if not agreed.