IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1990/C-416

BETWEEN	CENTURY NATIONAL MERCHANT BANK AND TRUST COMPANY LIMITED	PLAINTIFF
AND	S. IAN JONES	FIRST DEFENDANT
AND	ELEANOR B. JONES	SECOND DEFENDANT

Dennis Goffe for Plaintiff instructed by Myers, Fletcher and Gordon.

Lowell Smith for Defendants instructed by Stephenson, Smith, Hemming & Green.

Heard: 19th November, 1991 and 31st January, 1992.

JUDGMENT

RECKORD, J.

This is an application by the plaintiff for summary judgment against the defendants for the sum of Eleven Million and Eighty Seven Thousand Dollars ($11,087,000.00) together with interest pursuant to Section 79 (1) of the Judicature (Civil Procedure Code) Act.

The plaintiff's case is as endorsed on the writ of summons and reads as follows:

1. The defendants made two (2) joint and several promissory notes dated March 7, 1989, both payable to the order of the plaintiff on demand.
2. One of the promissory notes was for Six Million Four Hundred and Fifty Seven Thousand Dollars ($6,457,000.00) with interest at the rate of 19 percent per annum as well after as before maturity.
3. The other promissory note was for Four Million Six Hundred and Thirty Thousand Dollars ($4,630,000.00) with interest at the rate of 19 percent per annum as well after as before maturity.
4. On November 13, 1990, at the plaintiff's place of business at 14-20 Port Royal Street, Kingston, the plaintiff presented the said notes to the defendant

for payment but they were dishonoured.

5. The plaintiff claims against the defendants jointly and against each of them severally the principal sum of Eleven Million and Eighty Seven Thousand Dollars ($11,087,000.00), together with interest thereon at a rate of 19 percent per annum from March 7, 1989 until payment or judgment. As at November 15, 1990, such interest amounted to $3,572,447.10.

Copies of the promissory notes were exhibited in the affidavit of Miss Yvette Sibble, the legal officer of the plaintiff's company who deponed that "I believe that there is no defence to this action."

Under Section 83 (1) of the Bills of Exchange Act a promissory note is defined as "an unconditional promise in writing, made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer."

The plaintiff bases its claim on the promissory note, not on the loan. The first defendant has not denied that the notes were presented and dishonoured. At paragraph 10 of his affidavit the first defendant complains "that at the time when the said notes were so delivered to me the information as to day, maker, payee, sum and rate of interest had not been filled in on either form."

At paragraph 11 he depones, "That it was not possible to insert in the documents at that time the actual amount for two reasons, viz.:

(i) It was necessary for a reconciliation of the balances in the account to be carried out and agreed upon;

(ii) Interest would continue to accrue daily until the accounts were actually transferred to the plaintiff."

Mr. Goffe for the plaintiff, submitted that it was not relevant that when the notes were signed there were blank spaces and referred the court to Section 20 of the Bills of Exchange Act which reads:

> "Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to

> fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.
>
> In order that any such instrument, when completed, may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.
>
> Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given."

Mr. Goffe contended that the plaintiff had complied strictly with the Act and that the defendant was estopped from denying liability. He cited the case of Lloyd's Bank Limited v. Cooke and Others (1907) 1 Kings Bench 794 the head note of which reads.

> "Where a defendant in an action brought by the payees of a promissory note against him, as maker of the note, had signed his name on a blank stamped piece of paper, and had entrusted the paper to another person with authority to fill it up as a promissory note for a certain sum payable to the plaintiffs and deliver it to the plaintiffs as security for an advance to be made by them, and that person had fraudulently filled the paper up as a promissory note for a larger amount and obtained by means of it an advance of that amount from the plaintiffs, who had no notice of the fraud:-
>
> Held, that the defendant was estopped from denying the validity of the note as between himself and the plaintiffs, and therefore the action was maintainable against him for the full amount of the note."

With reference to paragraph 21 of the first defendants affidavit Mr. Goffe submitted that "the note speaks for itself." The note did not bear the seal of the company and therefore it could not be regarded as being signed by the defendants on behalf of any company.

With regard to the proposed defence Mr. Goffe submitted that the matters alleged therein do not constitute a defence to a claim for summary judgment.

Mr. Goffe finally submitted that promissory notes, like bills of exchange, are negotiable instruments. They are treated as cash. A plaintiff not wishing his claim to be delayed or defeated by the debtor's allegations about other matters usually ask for a promissory note in addition to other security which is harder to realise. It defeats the business efficacy of the special contract the parties have made if the

court entertains counter-claims and counter allegations such as are well known in other kinds of commercial litigation. In support of these submissions he referred the court to decisions in the following cases:

Cebora SNC v. SIP (Industrial Products) Limited (1975) 1 Lloyd's report 271

Nova (Jersey) Knit Limited v. Kammgarn Spinnerei GmbH (1977) 2 AER P. 463.

In the first mentioned case, the Court of Appeal in England held that "the ordinary rule was that bills of exchange were to be treated as cash and judgment should be given upon them as for cash and was not to be held up by virtue of some counterclaim which the defendant might assert, and there was no justification for departing from it in the present case."

In the second, a decision of the House of Lords, it was held, inter alia, that a claim for unliquidated damages could not be raised by way of defence, set-off or counter-claim to an action on a bill of exchange.

On behalf of the defendants Mr. Smith submitted that there is a triable issue which warrants the matters to be dealt with fully in a trial. The defendants are not required to show that they must succeed or that there is a greater likelyhood that they will succeed. He invited the courts attention to the Supreme Court Practice Volume 1 - Order 14, rule 3, paragraph 4/2 at pages 136-137. The defence may show cause on the merits that he has a good defence. There was a dispute as to the amount due which requires the taking of accounts.

On the question of granting leave to defend he submitted that the general principle is that where the defendant shows he had a fair case he ought to have leave. Order 14 was not intended to shut out a defendant from laying out his case to the court. On the defendants' affidavits submitted, sufficient issues have been raised to entitle defendants to a trial. Section 20 of the Bills of Exchange Act requires that the bill must be filled up strictly in accordance with the authority given.

The correct amount must be relevant. No credit had been given to payments made which would have extinguished that note for the smaller amount which he referred to as the 'personal note.' The other note was the responsibility of the company, not the defendants. He referred to the case of Contract Discount Corporation Limited v. Furlong and Others (1948) 1 All E.R. 74 In this case the plaintiffs claimed £19,811.00 as being due and unpaid; Two of the defendants admitted that they were indebted to the plaintiffs but that "to the best of our knowledge, information and belief such amount will be found, upon full investigation to be £10,000.00 or there abouts."

The master refused leave to the defend. On appeal the judge varied the order by giving leave to defend as to the whole claim subject to payment into court of £10,000.00 and in default of such payment the plaintiffs were to have liberty to sign judgment for that sum and the defendants liberty to defend as to the residue of the claim. On appeal to the Court of Appeal the order was varied by substituting £8,000.00 for £10,000.00.

In his judgment Lord Green M.R. said at page 276 (A):

> "The amount owing to the plaintiffs can really only be ascertained on the taking of an account bringing in contra items in respect of which the plaintiffs themselves are accounting parties. If the defendants had been in a position to swear 'we admit that we are under a liability, but we do not know what it is. We have not got the materials. We do not know the state of the accounts in the books of the plaintiffs, and the company's books are not now available;' I should have thought that in a case of this kind, relating to a claim of this character, and depending, as it must, on matters of account, that would have justified, and, indeed, led, the court to give unconditional leave to defend. In a case which is essentially a matter of account, where the amount can only be ascertained from the plaintiffs' own accounts, it seems to me that it would be improper to deprive the defendants of their prima facie right to challenge the items in the account and insist on strict proof of them. That is why I mentioned particularly the fact which is, I think, important in this case, that these defendants are guarantors and not principal debtors. They are entitled to know the state of the account as between the plaintiffs and the principal debtors which they guaranteed. If there had been a denial of liability or a challenging of the account, with an admission, possibly, of the kind I have mentioned, but a refusal to admit the amount and a demand to have it checked by the ordinary accounting process, the proper order to make might very well have been an order for judgment for such

> an amount as should be found due on the taking of an account. The effect of that would have been to give summary judgment, but to leave the amount unspecified until the account was taken and certified. Judgment could then have been signed and execution issued."

This case, Mr. Smith submitted, is essentially a matter of account and it would be improper for the court to deprive the defendants of their prima facie right to challenge and insist on strict proof. From the facts it could be inferred that the plaintiff acted fraudulently and produced figures which the defendants cannot account for. He asked that the summons for summary judgment be dismissed and that leave be granted to the defendants to defend the action.

In reply Mr. Goffe said that the issue of fraud could not be raised at this stage. It does not arise in the affidavits or proposed defence. There has been no assertion that money was not lent. Missing from the defendants affidavits was a statment of what they say is owing. He proposed to the court to enter judgment for the plaintiff for such an amount as shall be found due on the taking of an account by the Registrar.

FINDINGS

There is nothing on the face of these two promissory notes to suggest that they were otherwise than personal loans to the two defendants. I find that they signed the notes and authorized the plaintiff to fill in the material particulars which it did within a reasonable time and strictly in accordance with the authority given. There is therefore no basis for the defendants claim that the note for the larger sum was negotiated on behalf of one of the defendants' companies. They are estopped from denying liability. This claim is therefore rejected.

The defendants further complain that the true balance due by them cannot be determined without a proper reconciliation of the account by the plaintiff. It is significant that notwithstanding that the plaintiff has made a claim for the full amount due on the notes, the defendants have not indicated a sum which, in their opinion, is their indebtedness to the plaintiff. Surely they must know how much they have paid.

The notes are dated March 7, 1989 - the demand was made on the 13th of November, 1990. In Miss Sibble's affidavit which is dated

13th December, 1990, and deponed that the defendants were indebted to the plaintiff in the sum of Eleven Million and Eighty Seven Thousand Dollars ($11,087,000.00) together with interest @ nineteen percent per annum from March 7, 1989 and were so indebted at the commencement of this action which was on the 15th of November, 1990.

The sum claimed are being challenged by these defendants. These can be checked by ordinary accounting processes.

I am satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendants.

Accordingly, leave is hereby granted for the plaintiff to enter final judgment against the defendants for such an amount as should be found due on the taking of an account by the Registrar together with the interest thereon up to the date of judgment.

Costs to the plaintiff to be agreed or taxed.