JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 3/70

BEFORE: The Hon. Mr. Justice Luckhoo, Ag.P.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Robinson, J.A.(Ag.).

B E T W E E N STEWART GREGG - DEFENDANT/APPELLANT

A N D ALBERT O. McCULLOCH - PLAINTIFF/RESPONDENT

Norman Hill Q.C., and R.N.A. Henriques for the Defendant/Appellant.

Hugh Small for the Plaintiff/Respondent.

February 24, March 24, 1972

ROBINSON J.A.(Ag.).

This is an appeal from the decision of Mr. Justice Rowe granting leave to the respondent to enter summary judgment under Order XIV upon a writ of summons specially endorsed and filed on July 14, 1969.

The plaintiff's claim is against the defendant to recover the sum of £1,266.3.8 being the amount owing by the defendant to the plaintiff on a promissory note dated July 14, 1967 for $2,800 (Bahamian) which said note was dishonoured by non-payment.

The defendant entered appearance and filed his defence on October 3, 1969 and on November 11, the plaintiff took out a summons for summary judgment supported by an affidavit in which he deponed inter alia that he verily believed that there is no defence to the action, that the defence is a sham and filed only for the purpose of delay. The promissory note is exhibited with this affidavit.

The defendant filed an affidavit in reply.

The only evidence in this matter is that contained in the two affidavits.

The material portions of the plaintiff's affidavit are

(1) that he made a loan of £1,266.3.8 to the defendant personally and as a consequence, the defendant made the promissory note agreeing to pay him (the plaintiff), his heirs or assigns, on demand, the sum of B$2,800.

(8) The plaintiff well knew that the promissory note was executed by him on behalf of the company and that the money, the subject of the note, was used to buy the said five cars on behalf of the company.

The promissory note itself, to which reference has already been made, is prepared on ordinary paper and nowhere on that note does the name of the company (S.G. Motor Sales & Service Ltd) appear nor any part of that name. There is no indication on that note that the transaction was made on behalf of the company. In the result, the question is whether there is a triable issue in the circumstances of this case; whether leave could properly have been granted the plaintiff to enter summary judgment against the defendant under Order XIV. Rowe J. held that the transaction was caught by s.107(4)(b) of the Companies Act 1965 and accordingly granted leave in terms of the summons, the subject of this appeal.

At the hearing before this court, Mr. Norman Hill, Counsel for the defendant-appellant submitted inter alia:

(1) On the evidence, there are triable issues.

If there is disclosed in the affidavits, a triable issue, then the application of s.107(4) of the Companies Act 1965 could not prevent or preclude a determination of these issues of fact relating to the transaction.

(2) If the promissory note was given by the defendant on behalf of the company, the plaintiff would be hard pressed to satisfy the court, in view of that fact, that he did not have the company repay the money or repaid himself as president of the company.

Not until demand is made against the company and refused, would the secondary liability in the defendant arise.

(3) It is moreso appropriate that the trial proceed because the effect of this summary judgment may be to have enabled the plaintiff to be repaid twice and thereby injustice would be done to the defendant; the plaintiff may still rely on s.107 at the conclusion of a proper judicial investigation.

(4) If the defendant entered this transaction on behalf of the company and what he says is true, then there can be no consideration to form a contract between the plaintiff and the defendant.

Where there is no consideration, s.107(4) does not apply.

(5) Payment is a question of fact and if money was paid, the plaintiff could not succeed at the end of the day.

6. Rowe, J. erred in law when he held that the transaction was caught by s.107(4) of the Companies Act 1965.

Reference was made to various authorities which shall be dealt with presently.

Mr. Small, counsel for the plaintiff-respondent in reply, submitted:-

(1) The defendant signed a promissory note which, on its face, involves only himself and no one else. Even if the matter were to be further ventilated by examination of the background, it appears that there is no answer available to the defendant in the evidence put before the court in his affidavit which would raise an issue to be tried having regard to the provisions of s.107(4) of the Companies Act 1965.

(2) S.107(4) is not a question of primary and secondary liability. That section places liability squarely on the shoulders of the person who defaults and he is only excused liability if the company honours the obligation which he purported to have incurred on its behalf.

(3) The defendant says the Order can cause the plaintiff to be paid twice. This is a defence which the defendant must plead.

(4) In the circumstances of this case, the defendant cannot use his defence to investigate the company's business.

Section 107(4) of the Companies Act 7/65 provides as follows:-

"If an officer of a company or any person on its behalf issues or authorises the issue of any business letter of the company or any notice or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods wherein its name is not mentioned in manner aforesaid,

he shall be liable to a fine not exceeding fifty pounds, and shall further be personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount thereof unless it is duly paid by the company."

S.107(1) provides for the manner in which the name of a company ought to be affixed on its business address, seal and its written documents inclusive of promissory notes purporting to be signed by or on behalf of the company.

In the context of these provisions and in view of the facts of this case, has the defendant got an arguable defence? Does the defence disclose a triable issue? Accepting that the defendant signed the note as agent for the company in the circumstances alleged, is he solely liable "to pay on demand" on that note to the holder of the note; does the note give rise to

legal liability in the company to pay the plaintiff when the note itself makes no mention whatsoever of the company's name or any part of it AND could the plaintiff enforce any such liability as against the company.

S.107(4) of the Companies Act is in terms similar to s.108(4) of the Companies Act 1948 of the United Kingdom.

In the case of Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd. and another (1968) 2 AER 987, the plaintiff company drew a ninety day bill of exchange on a company whose correct name was "Michael Jackson (Fancy Goods) Ltd." but which was referred to in the bill and the form of acceptance prepared by the plaintiff company as "M. Jackson (Fancy Goods) Ltd." J., a director and the secretary of the drawee company at the time, signed the acceptance of the bill without correcting the error in the name of the company. The bill was dishonoured on maturity, J. having severed his connexion with the drawee company and it having gone into liquidation. An action was brought seeking to make J. personally liable on the bill by virtue of s.108 of the Companies Act 1948. It was held that although the name attributed to the drawee company in the bill of exchange was a misdescription and J., by signing the bill on behalf of the drawee company, had contravened s.108 of the Companies Act 1948 and rendered himself personally liable under that section on the bill, the plaintiff company was estopped from enforcing that liability, since they themselves were responsible for the wrong description and had impliedly represented that they would treat acceptance in that form as being regular and not giving rise to personal liability. Mr. Justice Donaldson, in his judgment at p.990 says -

> "I have therefore no doubt that Mr. Jackson committed an offence under s.108 of the Act of 1948, although a court might well decide to impose no penalty. I have also no doubt that he is liable to the plaintiffs who are admitted to be the holders of the bill of exchange since this is what the statute says."

Mr. Jackson only escaped personal liability because it was the plaintiff company who induced the situation by making an error in its own name in the bill and the form of acceptance. The company could not seek to rely on their own error as entitling them to relief.

Donaldson J. in course of his judgment referred to the cases of Penrose v. Martyr, 1858, EB & E 499 and Atkins v Wardle 1889, 58 L.J.Q.B.377.

He summarises this latter case at p.990 as follows:-

> "There the drawer of the bill was a shareholder in 'The South Shields Salt Water Baths Company Limited' but he drew on 'Salt Water Baths Company Limited, South Shields' and the directors accepted on behalf of 'South Shields Salt Water Baths Co.' which was equally incorrect. No question of confusion as to identity or as to the status of the drawers as a limited liability company could have arisen. Nevertheless the directors were held to be personally liable."

At p.989 the learned Judge pointed out that s.108 of the Companies Act 1948 has a respectable pedigree dating back to 1856 "but there has been no reported case on the topic for over half a century."

In the case of Penrose v. Martyr (supra), the word "limited" was omitted from the name of the company. The defendant as secretary of the company, accepted the bill as "Secretary to the said company". The court held the defendant personally liable thereon because the bill did not bear the full name of the company.

In these cases, some attempt at least, was made to mention in the document the particular company concerned whereas in the instant case, the promissory note bears nothing of the kind and is simply written out on plain paper. If an officer (of a company) or person contracts on behalf of a company without using the company's full name, indeed without using the word "limited" as part of the name, such person will incur personal liability under s.108(4) of the Companies Act (U.K.) or s.107(4) of the same Act of Jamaica.

The rule that the language used by a person shall always be taken most strongly as against himself, seems to apply in these cases.

In McCollin v. Gilpin and Others (1880) 5 Q.B.D. 390 the following agreement was signed by the defendants and the plaintiff:

> "Agreement between the T. company of the one part, and W.M. (plaintiff) on the other part. In consideration for the advance of £500 paid by the said W.M. to the said company, we the undersigned, three of the directors of the said company, hereby agree to repay the said sum of £500, with interest in six calendar months from this date hereof. And we hereby assign to the said W.M., as security for the said advance of £500, the machines and tools, as invoiced to him 3rd June 1878".

This agreement was not sealed with the seal of the company nor countersigned by the secretary, pursuant to tne articles of association, nor did the defendants express that they signed on behalf of the company. Upon default, the plaintiff took possession of the machinery and tools belonging to the company. The court held inter alia that the "defendants were personally liable for the repayment of the £500, notwithstanding the heading of the agreement, which must be rejected, since the agreement was not signed in a form binding on the company".

It is clear, from the authorities, that the promissory note in the instant case cannot be relied on as against the company "S.G. Motor Sales & Service Limited". One asks ones-self the question - what would the position be if the plaintiff had assigned that note to another person? Could that person look to the company for payment. (The note itself is expressed to pay on demand to the plaintiff, "his heirs or assigns".) The company is either "bound" with the resultant liability to pay or it is not. This Court holds that it is not "bound" and there is no legal liability in the company to pay. S.107(4) of the Companies Act 1965 provides, in brief, that an officer or agent of the company who signs a promissory note on its behalf which does not contain its name is liable on the note to the holder of it if the company does not satisfy the obligation which it embodies. This latter part of the section, underlined, does not impose any legal liability on the company to pay. The law puts this liability in the maker of the note, the defendant. The plaintiff has brought action against him; he is liable to pay unless the amount is duly paid by the company. He has not alleged payment by the company.

The defendant is saying, I am not liable if the company has paid. If he doesn't show by affidavit or otherwise that the company has paid, (and this has not been done) then he is personally liable. The defendant has not alleged or shown that the company has duly paid the amount. Assuming that he acted on behalf of the company, the transaction comes within the ambit of s.107(4) of the Companies Act 1965. There would only be a triable issue if the defendant had alleged that the company had duly paid the amount. Therefore, on the state of the pleadings, there was no triable issue.

In the result, this court holds that there was no triable issue before Rowe J. and his decision is affirmed.

The appeal is dismissed with costs to the plaintiff-respondent to be taxed or agreed.

(2) that he made demand on September 25, 1967 and no payment has been made by the defendant.

(3) that the loan was made to the defendant himself who represented that he needed it for his own personal affairs; it was not a loan to the defendant as agent for or on behalf of or in any manner connected with a company called S.G. Motor Sales & Service Ltd or any other company.

The promissory note reads:-

July 14, 1967.

I Stewart Gregg, promise to pay on demand to Albert O. McCulloch, his heirs or assigns, the sum of B$2,800 for value received.

Signed S. Gregg
STEWART GREGG

The defendant in his affidavit deponed inter alia that:-

(1) He is not indebted to the plaintiff.

(2) He holds 50% of the shares in S.G. Motor Sales & Services Ltd, a company incorporated in Freeport, Bahamas in or about January 1967.

(3) Shortly before the month of July 1967, he agreed that the plaintiff should acquire 49% of the shares of the said company.

(4) In July 1967, the plaintiff advanced the sum of $2,800 (Bahamian) to him on behalf of the company pursuant to an agreement between them that the plaintiff should advance this sum of money to the company for the purpose of purchasing second hand cars for sale by the company.

(5) After the advance was made, the plaintiff was issued 49% of the shares of the company and appointed President thereof while he (the defendant) was made Vice President. It is observed that at the time when the advance was made by the plaintiff, and the promissory note made, the plaintiff then had no interest in the company.

(6) Five cars were bought for the company and brought into Freeport and placed on the property of the company; he returned to Jamaica shortly after (17th November 1967) through illness and cannot say whether or not the cars have been sold.

(7) On his return to Jamaica, he received a letter from the plaintiff as president of the company, terminating his services with the company.