IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. H-138/1999

BETWEEN	*COLLIN HUSBANDS*	*CLAIMANT*
A N D	*JAMAICA REDEVELOPMENT FOUNDATION INC.*	*RESPONDENT*

IN CHAMBERS

Miss M. Wong instructed by Myers, Fletcher and Gordon for the defendant.
Mr. M. Hussey for Claimant.

Heard: September 16th & October 1st, 2003

Williams, J. (Ag.)

This is a notice of application for Court orders that summary judgment be granted to the defendants on their counterclaim on the ground that the claimant has no real prospect of succeeding on its claim or the defendant's counterclaim.

This matter has its genesis in 1995 when the claimant entered into an agreement with the National Commercial Bank, at its Oxford Place branch [herein after referred to as the bank,] whereby the bank agreed to provide credit facilities to the claimant. Indeed, the original action was brought against the said bank by way of a Writ issued on November 17, 1999. By an order of Mr. Justice W. James on the 4th July 2003, the Jamaica Redevelopment Foundation Inc. was substituted as defendants in the action as the debts, subject of the action had been assigned to them by the bank.

The claimant alleged the agreement was not in writing but that he had signed a blank standard form mortgage document mortgaging his property at 9 Livingston Monor, 11

Charlton Road as security for the credit facility. The applicable interest rate was not discussed and upon receiving the copy of the completed document to adopt, the claimant is alleging to have refused from so adopting, with that interest rate. He also claimed paying certain sums towards liquidating the debt and was seeking inter alia:-

(a) a declaration that he was not indebted to the bank.

(b) An injunction restraining the defendant from selling or otherwise disposing of the property.

(c) A refund of amounts overpaid by the plaintiff account being taken of the appropriate rate of interest.

The claimant was initially concerned with obtaining an interlocutory injunction restraining the bank from selling or otherwise disposing of the property. An interim injunction was obtained and extended from time to time until hearing into that issue was adjourned sine die on the 10th of October,2002.

A defence and counterclaim was filed on behalf on behalf of the bank in May 2000 and a reply in September 2002 whereby the claimant confined himself to a bare denial of the counterclaim.

In June 2003 a more detailed reply and defence to counterclaim was filed on behalf of the claimant.

This application was then made in July 2003, under the new Civil Procedure Rules 2002.

The defendant in its application for summary judgment relied on the affidavit evidence of Carolyn Schwals who was the acting senior assistant manager of the Baywest Center branch of the National Commercial Bank.

It is contended that the claimant opened a current account with the bank in February 1995 and signed a form for request for banking facilities in respect of a loan account and borrowed five hundred thousand dollars ($500,000) repayable at the end of two months with interest. The claimant executed the standard form instrument of mortgage. Both these documents were signed in blank.

The bank contends that there was no complaint about the rate of interest on the overdraft facilities extended through his current account and monies were paid in reduction of that balance. The claimant it is claimed remains indebted to the bank and wrote to them in November 1996 acknowledging the debt and seeking to reschedule repaying this debt. There was exhibited the form of request for banking facilities in respect of a loan account and the letters exchanged between the claimant and the bank.

At the hearing in chambers the claimant had failed to file and serve any affidavit evidence in response to this application. This was despite the fact that the matter had first been listed for hearing on the 4th of July 2003 and adjourned to September 16 for the hearing at the Case Management Conference.

Mr. Hussey explained that his affidavit had been filed shortly before he attended for the hearing. On questions put to him, Mr. Hussey indicated that this affidavit contained a chronological sequence of events between the original parties as already outlined in the pleadings before the Court. The Court was reluctant to further delay the hearing of this matter and thus proceeded without this affidavit.

Miss Wong for the defendant/Applicant indicated that the only aspect which she would address was the question of the interest rate being charged which was filled in on the relevant documents signed in blank by the plaintiff.

She relied on the case of **Donovan Crawford et al vs. Financial Institutions Service Ltd. SCCA 64 and 88/99** and she referred to the observation of Forte, P. at page 7 where he stated:-

> "The equitable remedy of rectification has always been available to correct or complete a document which does not express the intention of the parties".
>
> Further at page 8 he stated:-
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> "If the documents recording the contract can be rectified, then in order to do so, the intentions of the parties as to how the blanks should be filled in must be inferred from the surrounding circumstances unless of course there is admission by the guarantor as to the identity of the principal debtor."

She urged that in that case it was "**much worst**" in that it was the name of the mortgagor and the properties mortgaged which had not been inserted yet the Court of Appeal upheld the insertion made having considered the intentions of the parties at the time of the negotiations. She argued that in the instant case where the interest rate was to be inserted the equitable doctrine of rectification applies and reliance could be had on the terms of the agreement the claimant had signed.

The form of request for banking facilities contained the following clause:

"I/We hereby agree that you shall be entitled to charge compound interest on the same loan account calculated on daily balances with monthly rests and the rate charged from time to time shall be or such rate as you may charge at your sole discretion. You shall not be bound to notify me/us in advance of any such change in the rate of interest but on written request from us you shall be obliged to specify the rate of interest being charged at the time of such request. This agreement as to interest shall continue notwithstanding the death, insanity or bankruptcy of any of us".

For the claimant, Mr. Hussey urged that there was merit to the claim and the defence on the counterclaim and the matter should proceed to trial. While the claimant was not denying signing the documents, it was argued that a fiduciary duty was owed to the claimant by the bank which required a need for proper advise in terms of the full effect of the documents signed as regards security for the loan and no such explanation was given. He further urged that the amount of interest charged was punitive and excessive and that equity would allow the Court to enquire into the rate and determine the appropriate one. He neglected to give any indication of what this appropriate rate was or how it could be arrived at.

He went on however to seek to rely on the Court of Appeal decision of **National Commercial Bank v. Hew and Hew SCCA 101/2000** in relation to the issue of the breach of fiduciary duty.

Miss Wong was quick to indicate that the privy council decision handed down earlier this year overturned that decision and in any event could not be considered relevant to this instant case.

Under the new rules, the Court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue or that the defendant has no real prospect of successfully defending the claim or issue- see **CPR 2002 r 15 (2)**

The approach to be taken by the Courts has been discussed in the case of Swain v. Hillman 2001 AllER where it was held that the words "**real prospect**" needed no further explanation or amplification as real is directed at realistic as opposed to fanciful prospect raised in it.

Lord Woolf MR at page 94 reminded that this procedure is not meant to dispense with the need for trial where there are issues to be investigated at the trial.

Lord Justice Judge added

> "To give summary judgment against a litigant on paper without permitting him to advance his case before hearing is a serious step..... If there is a real prospect of success the discretion to give summary judgment does not arise merely because the court concedes that success in improbable.

In applying this standard to the instant case, I will consider separating what appears to be the two (2) main thrust of the claimant's case.

Firstly there is the issue of the signing of the document in blank by the claimant and subsequent insertion of the applicable interest rate by the bank.

In the case of Crawford et al v. Financial Institutions [supra] Langrin J. A. referred to Riggs Asset Finance Limited v. Blue Circle Ltd. 1994 an unreported English Court of Appeal decision and at page 56 he highlighted the comments of Miller L.J. :-

> "In the absence of any evidence of implication in the fraud on the part of the plaintiff or notice of the mis-representation alleged to have been made to Mr. Drury, Mr. Drury's only defence was one of non est factum and that defence in the case of an ordinary person of normal understanding is not open to a person who knowingly signs a document in blank".
> He went on further to say at page 4 –
> "If a man signs a document in blank he has only himself to blame if some unscrupulous person afterwards completes in a manner he did not intend".

In the instant case, the claimant having signed the relevant document in blank, must have in the circumstances intended for the bank to complete it. Given the terms of the document he signed it was clear the question as to interest was to be determined at the bank's "sole discretion".

Mr. Hussey accepted his client signed the document but said the bank had failed to advise the claimant properly and thereby had breached it fiduciary duty. Significantly this was never part of the pleadings of the claimant. There is no allegation that the claimant asked for advice in which case the bank would have owed a duty to advise with reasonable care and skill and having failed to do so give rise to questions of negligence. The argument newly introduced by Mr. Hussey is just that they did not advise. The fact that this was never pleaded could properly dispense with the argument for the purposes of this application. However, I feel compelled to refer to a statement made by the authors of Pagets' Law of Banking 11th edition at page 521

> ".....the weight of authority does not lend support to there being any duty owed by the bank to the prospective giver of security (whether a customer or not) to proffer an explanation as to the nature and effect of the security document to be executed."

In any event, the claimant had clearly acknowledged his indebtedness and proposed repayment of the balance as well as the interest charges accruing.

In conclusion I find that in all the circumstances the prospects of the claimant succeeding on its claim or the defendants counterclaim are not realistic.

Thus summary judgment needs be granted to the defendant on its application.

There will be judgment for the defendant in the sum of $2,565,304.78 with interest at rate of 32% per annum from the 4th December, 1999 to the date of judgment with cost in accordance with the CPR 2002.