JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 94/2003

BEFORE:	**THE HONOURABLE MR. JUSTICE PANTON, J.A.** **THE HONOURABLE MR. JUSTICE K HARRISON, J.A.** **THE HONOURABLE MRS. JUSTICE HARRIS, J.A.**	
BETWEEN:	**COLLIN HUSBANDS**	**APPELLANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC.**	**RESPONDENT**

Mr. Dennis Daly, Q.C., instructed by Daly, Thwaites & Co. for the appellant

Ms. Maliaca Wong instructed by Myers, Fletcher & Gordon for the respondent

March 8 & 10, 2006 & June 15, 2007

PANTON, J.A:

I have read in draft the reasons for judgment written by Harris, J.A. I am in full agreement with her reasoning and have nothing to add. The appeal is without merit.

HARRISON, J.A:

I too agree.

HARRIS, J.A:

On March 10, 2006 we dismissed this appeal, affirmed the order of the court below with costs to the respondent to be agreed or taxed. We made a promise to put our reasons in writing. This promise we now fulfill.

On February 7, 1995 the appellant opened a current account with the National Commercial Bank (hereinafter referred to as 'the Bank'), Oxford Place and executed a standard Form of Request for Banking Facilities in Respect of Loan account (hereinafter referred to as 'Form of Request'). It was agreed that the Bank would lend the appellant the sum of $500,000.00 repayable with interest. The appellant executed a standard form of a mortgage instrument on the security of his property at 9 Livingston Manor, 11 Charlton Road in the parish of Saint Andrew, registered at Volume 1213, and Folio 399.

The current account went into overdraft by February 28, 1995. However, between February and March 21, 1995 the appellant was permitted to continue drawing on the loan. As a consequence of the facilities accorded him, he became indebted to the bank on the current account as well as on the loan.

He fell into arrears on both loans and despite several requests for payment towards liquidating his indebtedness, no payment was received by the Bank until November 2, 1995 when he paid $200,000.00 towards reducing the balance on the current account. On November 7, 1995 the Bank transferred $50,000.00 from the current account to reduce the balance on the loan account.

The appellant commenced this action by filing a Writ of Summons, claiming, among other things, that no agreement existed between the Bank and himself with respect to the rate of interest payable and that the schedule to the mortgage instrument had been executed by him in blank.

A defence and counterclaim was filed by the Bank in which it was averred that although the schedule to the mortgage instrument had been executed in blank, at the time of its execution, the appellant had authorized the Bank to complete the schedule when the registration of the mortgage was effected. It was their further averment that prior to November 1995 the appellant raised no objection to the rate of interest imposed.

Their counterclaim is that as of December 3, 1999 the appellant was indebted to them in the sum of $2,565,304.78 being the balance due and owing together with interest thereon with further interest accruing at the rate of 32% per annum. A reply and defence to counterclaim was filed by the appellant in which he denied owing the sum of $2,565,304.78.

On January 30, 2002 the appellant's debt was assigned to the respondent. On July 4, 2003 by an order of the Honourable Mr Justice James, they were substituted as defendant.

The matter was listed for Case Management Conference on July 14, 2003. On July 4, 2003 the respondent filed a notice of application for summary judgment on the counterclaim. On July 14, 2003 the Case Management Conference was adjourned to September 16, 2003 with the consent of the

parties. On the morning of September 16, the appellant filed an affidavit in response to one which was filed by the respondent in support of their application. The hearing of the application proceeded but the appellant's affidavit was not considered.

The learned judge Williams, J. (Ag.) (as she then was), subsequently made the following order:

> "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 (sic) in accordance with the CPR 2002."

Four grounds of appeal were filed by the appellant:

Ground A

> "That the learned judge at the Case Management Conference erred in law in considering and granting summary judgment to the defendant on its counterclaim without regard to the Claimant's affidavit because the said affidavit was filed out of time despite the fact that the judge was aware that it had been filed in court on the morning of the hearing."

Mr. Daly, Q.C., argued that the learned judge was in error to have granted summary judgment on the basis of the respondent's affidavit notwithstanding the presence of the appellant's affidavit which ought to have been considered by her.

Rule 15.2 of the Civil Procedure Rules 2002 (CPR) authorizes the court to pronounce summary judgment on a claim or on a particular issue, without trial, where the claimant has no real prospect of maintaining a claim successfully, or,

where a defendant has no real prospect of successfully defending the claim.

Under rule 15.5 (2) a respondent who desires to rely on evidence must file and serve an affidavit on the applicant not less than 7 days prior to the hearing of an application for summary judgment . The rule reads:

> " (2) A respondent who wishes to rely on evidence must –
>
> (a) file affidavit evidence; and
>
> (b) serve copies on the applicant and any other respondent to the application, not less than 7 days before the summary judgment hearing."

The affidavit of the appellant filed on September 16, 2003 was not served on the respondent. The non-service of the affidavit was clearly in contravention of rule 15.5 (2) (b). The breach gave the learned judge the right to disregard the appellant's affidavit. She was therefore correct in not taking it into consideration.

This ground is unsustainable.

Ground B

> "(B) That the learned judge erred in law and in fact in finding that the circumstances of the case the claimant by signing the document in blank must have intended for the bank to complete it, including the determination in its sole discretion, of the rate of interest."

Mr. Daly, Q.C., argued that the appellant asserted that no agreement was reached in relation to the rate of interest payable on the loan yet the learned judge incorrectly concluded that it was obvious from the terms of the documents signed by him that interest was to be determined at the Bank's discretion.

In treating with the issue of the appellant's signing of the mortgage document in blank, the learned judge said:

> "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 misrepresentation 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"." (page 74 of the record)

She went on to say:

> "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 defendant's counterclaim are not realistic.
>
> Thus summary judgment needs be granted to the defendant on its application". (page 75 of the record)

The Form of Request exhibited to an affidavit of Carolyn Schwab sworn on March 20, 2000 in support of the application for summary judgment, assigns to the Bank the right to charge compound interest at their discretion. Paragraph 2 of the Form of Request reads:

> "I/We hereby agree that you shall be entitled to charge compound interest on the said loan account calculated on daily balances with monthly rests (sic) and that 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 change in the rate of interest but on receipt of a 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."

Paragraph (e) of the Instrument of Mortgage also grants to the Bank a right to charge interest in terms similar to those laid down in the Form of Request.

It is patently obvious that the rate of interest was determinable at the sole discretion of the bank. They had the exclusive right so to do. The Form of Request and the Mortgage Instrument so specify. These documents were executed by the appellant and he must be regarded as having read them, was fully cognizant of their contents and as a result made some payments.

Mr. Daly, Q.C., further contended that the learned judge's conclusion presupposes that the contract between the parties had been completed without the appellant's knowledge of the rate of interest payable. In support of his

contention he sought to rely on the case of ***Financial Institutions Services*** **Ltd. v** ***Negril Holdings Ltd. and Negril Investment Company Ltd,*** Privy Council Appeal No. 37 of 2003 delivered on July *22,* 2004.

That case is distinguishable from the case under consideration. In ***Financial Institution Services Ltd v Negril Holdings Ltd and Negril Holding Ltd*** (supra) the respondents were not privy to the rate of interest imposed on them by a Bank from which they had secured overdraft facilities. The court was required, among other things, to construe the meaning of the phrase "The Bank's unusual rate of interest" which was contained in a clause of the account opening agreements between the Bank and the respondents.

In the present case, the appellant knew that the overdraft and the loan attracted compound interest. He was liable to pay such rate of interest as stipulated by the Bank. There can be no doubt that the Form of Request and the Mortgage Instrument do not only identify compound interest as the type of interest payable but they also demonstrate that interest is payable at the Bank's sole discretion.

Additionally, under clause 2(e) of the Mortgage Instrument as well as paragraph 2 of the Form of Request, the Bank was not required to notify the customer of a change in interest rate. No evidence was adduced by the appellant to show that at anytime during the life of the overdraft or the loan a request was made by him as to the prevailing rate of interest.

It is also of significance that in a letter dated November 26, 1996 from the appellant to the Bank exhibited to Mrs. Schwab's affidavit, the appellant made reference to the loan and sought to have the Bank waive payment of accrued interest charges of $400,000.00. He then proposed paying interest charges on the sum of $600,000.00.

In a letter dated April 8, 1997 addressed to the appellant from the respondent, the appellant was informed of his outstanding liability as of that date and that interest at the rate of 45% per annum was accruing thereon. There is nothing to show that even up to April, 1997 any objection had been advanced by him as to that rate of interest charged.

It is clear that he accepted that the respondent's right to fix the rate of interest was discretionary. Payments were made by him. He made no protest as to the interest paid. He obviously has no valid complaint in respect of this ground.

This ground is clearly unmeritorious.

Grounds C and D

> "(C) That the learned judge erred in ignoring the fact, alleged by the claimant in his Statement of Claim and subsequent affidavits, that he did not receive a copy of the mortgage from the defendant until over two years after the mortgage was brought into effect by the defendant in its apparently sole discretion.
>
> (D) That the learned trial judge erred in accepting the assertion in the defendant's counterclaim that the amount to which the Claimant was indebted to the defendant was $2,565,304.78

> without ascertaining the accuracy of the calculation or the amount and validity of the interest rate computed and charged".

Between February 1995 and April 1997, the appellant paid various amounts to reduce the balance on the overdraft. In May 1995 there were discussions between the parties relating to his delinquency in respect of the repayment of the loan. At that time, no complaints were made by the appellant as to the rate of interest charged.

The Bank was entitled to charge compound interest and interest at variable rates at its discretion, as prescribed by the Form of Request and the Mortgage Instrument. It is indubitable that the appellant was aware of and had consented to the rates of interest charged.

This ground is equally without merit.

The appellant's claim raises no arguable issue. It is clear that there is no defence to the counterclaim, as, his defence to the counterclaim advances no arguable point. He has no real prospect of successfully sustaining his claim. The learned judge was correct in making the findings of fact as she did. Her findings and conclusions were fully justified on the pleadings and the evidence before her. All four grounds of appeal fail.

PANTON, J.A.

ORDER:

The appeal is dismissed and the order of the court below affirmed.

Costs to the respondent.