IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. J.822/1987]
SUIT NO. C.L. J.230/1988] Consoldiated

BETWEEN	JAMAICA CITIZENS BANK LIMITED	PLAINTIFF
A N D	LEON REID	DEFENDANT

Mr. Michael Hylton for the Plaintiff.

Mr. Enos Grant instructed by Mr. Gayle Nelson for the Defendant.

HEARD: 14th, 15th, 16th, 18th, 23rd, 24th June, 1993 and January 16th, 1995.

BECKFORD J. (AG.)

In handing down this judgment, I sincerely regret the delay which was due to several unfavourable factors and pray that no undue inconvenience was casued to the parties.

This is a consolidation of Suits C.L. J-822 of 1987 and C.L. J-230 of 1988 the parties in both suits being identical.

In the first suit the plaintiff as mortgagee seeks possession of premises 7A Temple Mead from the defendant as mortgagor, whom the plaintiff claims to be in default under three mortgages.

The second suit is a claim by the plaintiff to recover the sum of $M1.2 together with interest which the plaintiff alleges is the balance due to it from the defendant for moneys loaned.

The defendant for his part denies that he is a debtor of the plaintiff and says if there is a debtor in the matter, that debtor is a company - Reid's Real Estate Corporation Limited, of which he is a director and shareholder. Further, any debt incurred by the said company was repaid. The defendant says further that any documents signed by him were signed in blank as agent of this company and later filled in by the plaintiff in the defendant's absence.

The defendant counterclaims that the plaintiff sold his premises at 1 Hendon Drive without authority, or in the alternative, at an undervaluation. He seeks a taking of accounts and re-opening of the sales transactions or in the alternative a sum of $7,510,000.00 damages with interest thereon.

In reply the plaintiff denies that the sale was improper or that any documents were signed in blank; maintains that the defendant and not the company is the debtor and denies that the debt was ever repaid.

Those are the issues.

Both sides agreed on three bundles of documents containing:

(a) copies of Certificate of Title, mortgage documents, valuation reports, promissory notes, various letters from the plaintiff to the defendant and from the previous attorneys for the defendant to the plaintiff.

These bundles were by consent admitted in evidence as Exhibit 1 to 3 respectively. Added to these were seven other exhibits relating to:

(b) several bank statements for Reid's Real Estate Corporation Limited for May, July, August and September 1993; copies of mortgage documents, Certificate of Title and a note relating to the date of Mr. Creary's departure from the plaintiff's bank.

Evidence on behalf of the plaintiff came through two witnesses, Mr. Errol Lyle a former employee and Mr. Fred Cuthbert presently employed as manager in charge of loan restructuring at the plaintiff's bank.

Mr. Errol Lyle was between January, 1982 and December, 1992 the Assistant General Manager in charge of credit at the plaintiff's bank, King Street Branch (the relevant branch) with responsibility for delinquent credit accounts. In the course of his duties, he became acquainted with the defendant who operated what he described as not merely a "delinquent" but a "critical" account.

As a member of an in-house Credit Committee he gave evidence of three loans being approved in favour of the defendant and evidenced on three promissory notes, for the purpose of construction work at Temple Mead (the subject matter of the first action).

The first loan was in the sum of $488,816.00 for which a promissory note dated 23rd August, 1984 was executed. The second loan was for $238,604.64 evidenced by a promissory note dated 31st August, 1984. In 1985 when the defendant sought further lending facilities, the committee agreed to consolidate these loans together with an overdraft operated by the company for work done on Temple Mead, in one loan of $M1.2 together with interest and this was evidenced by a promissory note dated 2nd May, 1985.

Witness said the defendant was required to execute mortgages in addition to the promissory notes to cover the total amount of $M1.2 in respect of the said Temple Mead premises. He gave evidence of the system adopted in the creation of a mortgage but said he was not present when any of the instant mortgages were executed.

Mr. Lyle admitted that the plaintiff as mortgagee, sold premises 1 Hendon Drive of which the defendant was the mortgagor. He said it was in an effort to lessen the defendant's indebtedness, as the defendant had defaulted on his mortgage payments in relation to those premises.

The second and final witness for the plainttiff, Mr. Fred Cuthbert, gave evidence of dealing with the defendant's account which he called a "non-performing asset." He said he personally did the calculations which were included in the Further and Better Particulars filed by the plaintiff on the 10th May, 1993. Interest, he said, is calculated on a daily basis and is added to the outstanding figure so as to give a current paying out figure.

The defendant's loan is the type of loan on which the bank can vary the interest rate. At all times the interest charged on the defendnat's account was the prevailing rate charged by the bank so that as of the 14th June, 1993 the defendant owed the plaintiff $M4,134602.42.

The only witness for the defendant was the defendant himself. He described himself as a businessman and company director of Reid's Real Estate Corporation Limited and other companies. He said the business of the company was real estate development for which the company would go to their bankers and get "a loan or mortgage or bridge financing or anything." The company, he stressed, would get the loan although the Registered Titles to any properties used as security would be in his (the defendnat's) name. He denied the creation of any mortgages or indebtedness to the plaintiff saying there was an overdraft operated solely by the company. This overdraft was secured by title deeds for 7A Temple Mead, 11 Clifton Close and 1 Hendon Drive and in no other way and that he was not asked and did not sign any guarantees for the company.

He gave evidece of having establised and maintained a business relationship based on mutual confidence with the plaintiff's several officers. As a result he signed a number of blank forms which he says he now sees attached to the several mortgages. He admitted that some of the blank forms he signed started with the

words: "Encumberances....." and others with the words "Date of mortgage....." with each paragraph containing the words "mortgagor and/or mortgagee." He signed in blank a form headed time or demand promissory note "just printed information with blank spaces - I signed that." He said he went to the plaintiff in 1985 and was told something about consolidating loans and he signed another of the time or demand promissory note. This he said he signed on behalf of his company and did not intend any personal liability. He agreed that at no time when he appended his signature did he signify that he was signing on behalf of his company.

The defendant said he later sought from the plaintiff copies of all documents he had signed and now saw that all the single blank sheets of paper he had signed were now attached to mortgages and filled in with amounts and dates. The promissory notes had also been completed and he recognized his signature on the documents.

His evidence was that the plaintiff could have made a demand on him in accordance with the mortgages under which they sold his premises. He did not know - "I get a lot of letter" he said. He said the plaintiff sold his premises at 1 Hendon Drive for $450,000.00 which was not a proper value yet he gave no evidence of the value of the premises in 1988. The valuation he gave was for $M2.6 in 1991 some four years after the sale. He said the valuation the plaintiff got of $464,700.00 in the event of a forced sale was wrong but there was no proof from him as to why it was wrong.

Defendant agreed that he had a valuation done on the Temple Mead premises in 1984 and that valuation disclosed that there were two mortgages in favour of the plaintiff registered on the title, yet he maintained that he did not know that the plaintiff had registered any mortgages on his property.

At the conclusion of the evidence both attorneys for the plaintiff and the defendant made oral and written submissions of fact and law for which I am deeply indebted to them.

In relation to the claim for possession of premises 7A Temple Mead, the plaintiff tendered in evidence a copy of the registered title with mortgages with an upstamping totalling $M1.2 registered thereon. This was at pages 1-3 of Exhibit 1 followed by mortgages numbered 368663, 4213052 and 431350 with miscellaneous instrument #92150 at pages 4-7; 10-14; 24-28 and 30-32 at Exhibit 1. Also exhibited at page 33 is a letter dated 14th March, 1986 in accordance with paragraph 2(f) of the mortgage

document demanding payment within 14 days. There was no evidence of any repayment of the loan. The next exhibit was the notice andvertising the premises for sale by auction (at page 13 Exhibit 2). Next comes letter dated 23rd December, 1986 at Page 16 of Exhibit 2 in relation to the aborted auction sale. The plaintiff then sought to sell by private treaty which fell through by virtue of the defendant's refusal to give up possession. This is the evidence in relation to the possession.

I turn now to the law in relation to that evidence. Section 68 of The Registration of Titles Act provides that:-

> ".....every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and.....be conclusive evidence that the person named in such certificate.....or having any estate or interest in.....the land therein described is .....possessed of such estate or interest....." (emphasis mine)

It is clear that the court cannot go behind this registered title unless fraud is proved. The defendant says section 68 does not avail the plaintiff here and that the plaintiff should have called the attesting witnesses to the mortgages 368663, 421305 and 431350 to prove that the documents were completed at the time the defendant appended his signature; that there were no blank spaces; that the amounts of the mortgage, the date, the rate of interest and property mortgaged were not inserted after the defendant signed the documents.

However what is the defendant's position if he did in fact sign in the manner he claims? There is a heavy burden of proof on the defendant who is relying on the plea of non est factum. He must show that he acted in a reasonable manner. Here is a businessman and company director who deals in real estate yet he is asking the court to believe that he does not know what is meant by security or colateral in relation to his land. he said he signed the pages in reliance on the plaintiff's officers whom he trusted.

In Saunders v. Anglia Building Society [1970] 3 AER 961 at P. 963 Lord Reid said:-

> "The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitors or other trusted advisers without making any enquiry as to their purpose or effect. But the essence of the plea non est fac-

> tum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such belief unless he had taken steps or been given information which gave him grounds for his belief.....Further the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser."

It would seem to me that this passage is germane to the instant case. The defendant was not induced to sign a document of a class or character different from that which he intended to sign. He knew that what he signed was meant to deal with his land. The defendant says that as a responsbile businessman dealing in real estate he signed pages in blank and handed them to the plaintiff leaving the details to be filled in at a later date by some other person. It is not open to the defendant to say that he did not consent to whatever the completed documents contained.

I reject the defence's submission and find that, the defendant, not having denied his signature at pages 7, 13, 14, 27 and 28 of Exhibit 1 in relation to mortgages 368663, 421305 and 431350 these mortgages are valid.

In relation to the date on the mortgage documents, the general rule is that a date on a deed is not essential so long as the document is dated before action is brought on it, (see Goddard's Case (1584) 2 Co. Rep. 46) so that the fact that the dates on the documents may not be the dates on which the defendant signed them cannot operate to make them void as claimed by the defendant.

The certificate appended to the document is in the form of the 17th schedule in accordance with Sec. 152 of the Registration of Titles Act. It is the banker who witnessed the signature of the mortgagor or that is required to go afterward before a Justice of the Peace to swear that he witnessed the signature; not the defendant.

It was contended that the several pages were not "stapled" together at the time the defendant appended his signature. In my view the pages bearing the defendant's signature contain words such as "encumberances," and/or "date of mortgage," "mortgagor," and these words should have alerted a businessman who deals in real estate. At page 31 of Exhibit 3 is a copy of a discharge of mortgage in respect of other premises not before the court between the same plaintiff and the same defendant, yet the same defendant says that he does not know what a mortgage is. No reasons were given why the instant mortgages were different from others he had successfully negotiated with the plaintiff. I do not find that the presumption of regularity was rebutted.

If as the defendant claims, he signed the documents in blank he cannot rely on the plea of non est factum and he cannot be heard to say that the documents are void.

In United Dominions Trust v. Western [1976] 1 QB 513 the question of a signatory's liability where he signed a document in blank leaving another party to complete the document was extensively argued. It was held that the doctrine would not apply. Per Lord Reid:

> "for the doctrine of non est factum to distinguish between the careless signing of a completed document and a document in blank is neither right on the authorities nor acceptable to common sense."

In that case the defendant agreed to purchase a car requiring hire purchase facilities. He signed the plaintiff's Finance Company's Standard Form in blank, leaving the dealers to fill in the figures. The dealers inserted false figures. It was held that if a person signed in blank an agreement which he knew would be completed by some other person it was not open to the signatory to say that he did not consent to whatever figures the completed document contained.

In that case even though fraud was proved the defendant could not claim non est factum nor can the Defendant in the instant case.

Defendant says he signed as agent for his company but no where on the documents is it so stated. Since he has chosen to sign the document in his own name, even if the plaintiff knew that he was acting as agent for the company, defendant is still personally liable because he failed to so state on the deed.

On the law I find that the mortgages 368663, 421305 and 431350 are valid. Having so found I look at the actions of the plaintiff in relation to the mortgaged property. Paragraph 2(f) of these documents provide in part:

> "The statutory power of sale and of appointing a Receiver and all ancillary powers conferred on mortgagees by the Registration of Titles Law may be exercised by the Bank upon any default <u>after any demand</u> for payment of the moneys hereby secured or any part thereof or immediately upon any other default or non-compliance with any of the covenants conditions or obligations on the part of the mortgagor herein contained or hereunder implied <u>without its being necessary</u> in any one or more of such cases <u>to serve notice or demand</u> on the Mortgagor anything in the Registration of Titles Law or any other law to the contrary notwithstanding....."

So in accordance with paragraph 2(f) of the mortgage documents, the plaintiff by letter, from Myers, Fletcher and Gordon dated 14th March, 1986 informed the defendant that he is in default on his loan and should settle within fourteen days. That is at P. 33 of Exhibit 1. There was no evidence of the loans to which these mortgages speak being repaid. The defendant is therefore in default.

Section 161 of the Registration of Titles Act provides:

> "No action of ejectment or other action, suit or proceedings, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act except in any of the following cases, that is to say: (a) the case of a mortgage as against a mortgagor in default."

The plaintiff is thus entitled to possession of the Temple Mead Property as against the defendant.

In relation to the second suit the sum of money claimed is evidenced by a promissory note dated the 2nd May, 1995 and exhibited at page 22 of Exhibit 1. The defendant in addition to his plea of non est factum said the plaintiff's pleadings are incorrect and must fail because the pleadings did not "include a pleading that the loan was made at the request of or with the agreement of the defendant and/or that the rate of interest was agreed on by the defendant." In relation to the pleadings I reject the defendant's submission - the promissory note being the evidence by which the plaintiff seeks to prove his claim of the loan.

The defendant has not denied his signature on the promissory note (on page 22 of Exhibit 1). He says he signed as agent for the companybut no where on the document is the company mentioned.

In Abdul Karim Basma v. Weeks and Others [1950] 2 All ER 147 it was held that an agent, who contracted in his own name, did not cease to be contractually bound because it was proved that the other party knew when the contract was made, that he was acting as agent.

So here the defendant is bound by his signature even if the plaintiff knew he was acting as agent for the company.

In Aldous v. Cornwell (1868) LR 3 QB 573 it was held that the addition to a promissory note of the words "on demand" was immaterial. The principle on which an alteration avoids an instrument is, that it varies the contract between the parties. There is no difference between a promissory note which expresses no time for payment

and one to which the words "on demand" are added.

In Bishop of Credition v. Bishop of Exeter (1905) 2 CL 455 the alteration of the date of the deed was held to be immaterial. An alteration which merely expressed what would otherwise be implied as immaterial and did not affect the liability under the contract.

The promissory note is a printed document with blank spaces headed Time or Demand Promissory Note and it speaks to interest payment. Defendant agrees he went to the plaintiff in 1985 and was told about consolidating the loans and that as a result of that he signed a blank promissory note.

In Howatson v. Webb [1908 1 CL 1] the defendant was fraudulently induced by his former employer to execute a mortgage. Without reading the document the defendant signed what he believed to be a conveyance but what was in fact was a mortgage. It was held that the defendant's plea of non est factum failed because the deed was not of a wholly different class and character from that which the defendant believed it to be. In the instant case the defendant signed what he knew to be a promissory note and so is bound by what he signed.

The initials to which the Defendant refers on the document do not seem to be of any significance since no where on the document are there any erasures or delineations. The words ON DEMAND are clear and do not need initialling. I hold that what the defendant refers to as initials is in fact scribbling to the side of the document which is untidy but does not affect either its clarity or validity.

I do not find that the name LEON REID in script below the defendant's signature constitutes another signature but merely a clear rendition of the name in the signature above.

As to the interest, the promissoty note dated 2nd May, 1985 on which the plaintiff relies, at the relevant section reads "with interest from date at 31% per cent per annum, or such other rate as the holder may from time to time charge." In Multiservice Bookbinding Ltd. v. Marden [1979] 1 CLD a rate of interest limited to the rate of exchange was held to be valid.

The promissory note the defendant signed stated that the interest rate may vary from the stated interest rate. For the reasons stated above the defendant is bound by the promissory note and liable to repay the loan with the interest accrued thereon.

The defendant counter claims that the sale of 1 Hendon Drive is invalid. The issues are twofold viz:

(1) whether mortgage no 431176 endoresed on the title for 1 Hendon Drive is valid and;

(2) if it is valid, whether the plaintiff acted reasonably in selling at the price it did.

Having dealt at length with the validity of the mortgages in relation to the Temple Mead property the findings in relation this mortgage is the same. The basic complaint is the same except for the signature of the person witnessing the defendant's signature.

The defendant put in evidence exhibit 6 which bears out his contention that the plaintiff's employee (Mr. Carey) who witnessed the defendant's signature was now working for the plaintiff in September, 1984 the date of the mortgage relating to 1 Hendon Drive. Therefore he says this mortgage must be null and void.

Defendant did not deny his signature on the document. The fact that Mr. Carey was not employed to the plaintiff does not preclude his going before a Justice of the Peace at anytime after leaving the plaintiff's employ and saying "I witnessed this person's signature please endorse this certificate accordingly."

There was no evidence or even a suggestion that Mr. Carey had refused or been incapable of procuring the certificate to mortgage 431176. Sicne the deed was dated before action was brought on it I find this mortgage in respect of Hendon Drive to be valid.

Now the mortgage having been found to be valid did the defendant act reasonably in selling at the price he did? The duty of the mortgagee in exercising his power of sale is clearly set out in Moses Dreckett v. Rapid Vulcanizing Company Limited SCCA 35/83. The mortgagee in exercise of a power of sale sold the mortgage premises for $6,400.00, the exact amount which was owed. The purchaser resold the property a few years later for $14,400.00 and the mortgagor sued claiming that the mortgagee had sold at an undervalue.

It was held that the duty of the mortgagee is to act in good faith and without negligence to obtain the best price which is available at the time of sale.

A mortgagee with a power of sale is not bound to wait till a more advanteageous sale can be effected.

In the instant case the defendant profferred two valuations of the Hendon Drive

premises, one done in 1984 and the other in 1991 for $523,000.00 and $1,67,000.00 respectively (Pages 46 and 49 of Exhibit 3). The plaintiff's valuation was for $619,000.00 (see P. 15 of Exhibit 2) and dated 17/12/86, but that valuation in case of a forced sale was put at $464,700.00. Neither the defendant nor the plaintiff gave a valuation of the premises for 1988 when the property was sold.

By 1991 when the defendant's valuation was done the property was in a considerably different state. Plaintiff's valuation was done in 1991 the area of building was 6,229 square feet, in 1986 the area of building was 3,722 square feet.

In Colson v. Williams L.J.?1889 Vol. 58 P. 540 it was stated that "A mortgagee is not a trustee of his power of sale for the mortgagor," so that whilst the mortgagee must act in accordance with the terms and conditions of the mortgage he is not bound to as the defence claims "protect the interest of Mr. Reid" in exercising the power of sale.

That the plaintiff relied on the valuation of the auctioneer who sold the premises cannot without more be evidence of unreasonable behaviour. Some impropriety and/or negligence must be shown to warrant the setting aside of the sale of the premises.

Section 106 of the Registration of Titles Act provides:

> "If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for the purpose fixed, the mortgagee or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the property or regularity of any such sale; and the Registrar upon production of a trnasfer made in professed exercise of the power of sale conferred by this act or by the mortgage or charge shall not be concerned or required to make any of the enquiries aforesaid; and any person dammified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power." (emphasis mine)

Since the mortgagee may sell if there is a default payment either for one month after notice or for such period as the mortgage may fix one must first look at the

mortgage document itself.

I have already dealt with this in relation to the other mortgage documents and find threfore that the plaintiff's power of sale was correctly exercised. The defendant therefore fails on his counterclaim.

The first suit is for possession of the Temple Mead property because of the defendant's default in payment on the mortgages affecting the property; whilst the second is for the outstanding balance with interest on the same mortgages.

The plaintiff did not elect as between both suits and it would be inequitable to permit both possession of the mortgaged property and the claim for the outstanding amount on the same mortgages.

No recent valuation of the premises was presented so this leaves the court in a state of uncertainity as to whether or not the sale of the property would extinguish the debt. There is however no uncertainity in relation to the quantified sum of the loan together with the interest.

Accordingly there will be judgment for the plaintiff against the defendant on the claim and the counterclaim in the sum of $2,094,101.99 together with interest at the rate of $879.23 daily until the 30th April, 1990 and $1157.33 daily thereafter until today. Costs on the claim and counterclaim to the plaintiff to be agreed or taxed.

Cases referred to:

1. Saunders v Anglia Building Society [1970] 3 All ER 961
2. Goddard's Case (1584) 2 Co. Rep 46
3. United Dominions Trust v Western [1976] 1 QB 513
4. Abdul Karim Bacha v Weeks and Others [1950] 2 All ER 147
5. Aldous v Cornwell (1868) LR 3 QB 573
6. Bishop of Carlisle v Bishop of Exeter (1905) 2 Ch 455
7. Howard v Webb (1908) 1 Ch 1
8. Montgomerie Bank Building Ltd v Nardeen [1979] (CL)
9. Morris Dowdell v Rapid Vulcanising Co Ltd SCCA 35/83
10. Colson v Whitehead LJ 1889 Var 58 P 830