

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. L-232 OF 1985

| | | |
|---------|----------------|-----------|
| BETWEEN | DAVID LYN-FATT | PLAINTIFF |
| A N D | KEITH SCOTT | DEFENDANT |

Heron Dale instructed by O.G. Dale & Company for Plaintiff.

Michael Hylton instructed by Myers, Fletcher & Gordon for Defendant.

February 27 - March 1, 1990 and 30th September, 1992.

Malcolm J.

On the 11th December, 1985 the Plaintiff filed a Writ of Summons herein the endorsement thereto reads as follows:-

"The Plaintiff's claim against the Defendant is to recover the sum of \$52,916.66 being money lent by the Plaintiff to the Defendant and interest thereon at the agreed rate of 12½% per annum

Particulars

| | |
|------------------|---------------------------------|
| 14th April, 1983 | Principal lent \$40,000.00 |
| | Int. at 12½ from the 14/4/1983, |
| | to the 14th November, 1985 |
| | 2 years and 7 months and |
| | continuing |
| | <u>\$12,916.66</u> |
| | \$52,916.66 |
| Amount Due: | \$52,916.66 |

And the Plaintiff also claims interest on the amount of the said loan at the said rate from the date of the writ herein until payment or judgment." etc.

A Defence dated the 21st day of May, 1986 duly followed and reads:

1. In answer to the Statement of Claim as amplified by the Further and Better Particulars delivered herein the Defendant admits receiving the sum of \$40,000.00 from the Plaintiff on or about the 14th April, 1983 and that he executed the document appended to the Further and Better Particulars.
2. The Defendant says that in March, 1983, the Plaintiff and himself commenced discussions relating to the formation of a Company to purchase certain assets owned by the Defendant and a company controlled by him known as "Paul Mountain Quarry Limited."

3. In April 1983, the Plaintiff agreed to advance the sum of \$40,000.00 to the Defendant in respect of certain obligations which the Plaintiff would assume under the contract once all the details had been worked out.
 4. The Defendant will say that he signed the document so as to provide the Plaintiff with an acknowledgement of the sum paid and as security in respect thereof in the event that the intended contract did not materialize.
 5. In fact the intended contract did materialize and the Defendant refers to and will rely upon the Agreement in writing made between the Plaintiff and the Defendant and dated the 4th July, 1884.
- Sic.
6. The defendant will say that the sum of \$40,000.00 represented partial compliance with the Plaintiff's obligations under Clause F (A) on page 6 thereof and that on the execution of the aforesaid Agreement the Promissory Note ceased to have any validity or importance.
 7. In the premises the Defendant denies that he is liable to the Plaintiff for the amount claimed or any amount."

The Plaintiff filed a Reply bearing date 19th June, 1986. Paragraphs 1 and 2 are not sufficiently important to warrant mention.

Paragraph 3 reads as follows:-

3. "The Plaintiff says that the Defendant represented to him that he had a mortgage on his home, he was in arrears and would stand to lose it if the amount was not paid up and the loan was given to him.
4. The Plaintiff says that the Defendant and himself agreed to form a company known as Jamaica Limestone Quarries Ltd. for the purpose of a Quarry operation and that this Agreement was separate and unrelated to the loan made to the Defendant on the 14th day of April, 1983." etc.

So the battle lines are drawn and the central issue is clear and sharp. The Crux of the matter can be put in two ways - the plaintiff's evidence in chief:-

"loan of \$40,000.00 has no connection with Quarry business" or a quote from Mr. Hylton's address:- "Basically the crux is whether the \$40,000.00 is a separate loan transaction from the Quarry agreement."

The oral evidence came from two witnesses only - the Plaintiff and the Defendant. In addition the court had the benefit of scrutinizing the 5 documentary exhibits.

The Plaintiff's Version

The Plaintiff David Lyn-Fatt stated that he was a businessman and recounted that on the 14th April, 1983 he loaned the Defendant Keith Scott the amount of \$40,000.00. He said and I quote:- "He was supposed to pay it back on demand - interest at the rate of 12½% payable monthly on the last of each month commencing April 30, 1983. He never paid any interest or any amount at all. I made demand about one year after the first payment was due - made demand in writing. Can't recollect if I spoke to him about it. I sued for full amount. The same day I lent Defendant the money I went to Myers, Fletcher and Gordon with a cheque. I spoke to Mr. Ivor Alexander. Mr. Scott was there. I gave Mr. Scott the cheque. Mr. Alexander drew up a promissory note for the amount of \$40,000.00 Mr. Scott witnessed it.

A photocopy of this document was tendered in evidence as Ex. 1 and reads as follows:-

"Promissory Note"

For value received the undersigned Keith Scott Hereby Promise to pay to David Lyn-Fatt on demand the principal sum of FORTY THOUSAND DOLLARS (\$40,000.00) and in the meantime to pay interest thereon at the rate of 12½% per annum, such interest to be paid monthly on the last day of each and every month commencing 30th April, 1983.

Signed by the said Keith Scott)

in the presence of:

)

Keith Scott

Ivor Alexander "

The Plaintiff testified that he met the Defendant through a friend of his, the loan was made about a month after and that the request for the loan was made about 1 week before the 14/4/83. The request was made at his business place at 3 Musgrave Avenue,

The witness said:-

"He said he was in financial problems, he had a mortgage on his house on which he needed money to pay, I said yes I will lend you the money but we will have to go to my lawyer Ivor Alexander to have the proper documents drawn up to have the money lent. It is not true that the amount I gave him - the \$40,000.00 was by way of an advance in a business transaction it was a loan to him."

The plaintiff stated that about 2 -3 days after the loan transaction the defendant Scott came to him, told him he had a quarry that was causing him financial difficulties and he was asking him to "help him out" by coming into the company.

He said it was agreed to form a new company named "Jamaica Limestone Quarry" which would take over the operation of "Paul Mountain Quarry." It was at this juncture he used the words I have already alluded to earlier to wit - "Loan of \$40,000.00 has no connection with quarry business." He said he went to see it before he agreed - he continued "I put a lot of money into this company."

In cross-examination by Mr. Hylton he said it was after and not before the Promissory Note was signed that the quarry business was discussed. He said the agreement was to purchase land equipment owned by Mr. Scott. He said - "It was agreed that I would put up money to buy land some in cash" (meaning obviously at the outset) and some paid over a time. It was agreed that the sum I would put up would be \$50,000.00.....

It was finally agreed that I would own the majority of shares in the new company.

Then there was mention of his knowing one Stanley Hohn and a man named Dulab Dukaran who used to drive his truck. To Mr. Hylton the plaintiff continued that he did not remember having any discussion about quarry business and that it fell through.

Plaintiff was shown a document by Mr. Hylton and his comment was that he never saw this document before. It was marked "A" for identity and subsequently during the Defendant's evidence, it was tendered in evidence as Ex. 5. The following suggestion was put to the plaintiff:- "That document was the draft agreement prepared for signature of yourself, Dukaran and Scott" the Plaintiff denied this.

He was shown another document which was by consent tendered in evidence as Ex. 2 - Mr. Lyn-Fatt said - "This is a copy of the Workers Bank Agreement" he continued by stating that he made some of the payments mentioned in the document. He said it was not true that at the time he signed it he had already taken over the quarry. The sums he was agreeing to pay to Workers Bank were sums owed by Paul Mountain Quarry.

Mr. Lyn-Fatt was shown another document subsequently tendered as Ex. 3 and he

was asked if that was the original of document between Scott and himself re: the taking over of the quarry. He replied that it looked like it - asked to look at Page 8 he said "This looks like my signature."

"A" of this agreement at Page 1 et seq - provides for the appointment of the parties as sole first directors. There follows provisions re voting rights, application by the plaintiff for the allotment to him of ordinary shares etc.

"B" of the Agreement at Page 4 makes interesting reading. It is as follows:-

"At the date of incorporation of the Company Paul Mountain Quarry Ltd. was indebted to the financial institution and individual mentioned below in the amounts set out:-

| | |
|--|---------------------|
| Workers Savings and Loan Bank | \$240,000.00 |
| National Commercial Bank Jamaica Limited | \$ 31,000.00 |
| Jamaica Development Bank | \$185,000.00 |
| Ryan S. Peralto | <u>\$ 62,500.00</u> |
| | <u>\$518,500.00</u> |

which indebtedness is secured by the Paul Mountain Assets."

"E" of the agreement at Page 5 reads:-

"The sum of Five Hundred and Eighteen Thousand Five Hundred Dollars (\$518,500.00) to be expended by Lyn-Fatt in settlement of Paul Mountain Quarry Limited's indebtedness shall be a debt due to Lyn-Fatt from the company and shall be secured by a Promissory Note issued by the company in the form of the draft attached hereto marked "A" for identity and subject to the provisions of clause 1 hereof."

The said agreement goes on to recite at I of Page 7 the following:-

"The parties agree to procure that all monies advanced by or owing to them shall be secured by promissory notes issued by the company on similar terms. All monies applied in discharge of monies advanced by or owing to the parties shall be applied rateably between the parties in proportion to the amounts for the time being due to them respectively. The company by its execution hereof signified its agreement to abide by the provisions of this Clause.

Mr. Lyn-Fatt stated that it was not true that the \$40,000.00 handed over to Mr. Scott, the subject matter of this suit was a part of the \$50,000.00 payable under Ex. 3. Here, by way of comment, is one of the truly vital areas of dispute in this case. To continue, the plaintiff's evidence as disclosed in ~~cross~~-examination reads in part:-

Suggestion: "Oral agreement was made many weeks prior to the Promissory Note."

Answer: No Sir

Can't remember why the \$50,000.00 was to be paid in cash. I agree it is because Mr. Scott owed some money - don't know if creditors were pressing for payment.

Suggestion: It was agreed that you would advance \$40,000.00 under agreement for purpose of paying creditors.

Answer: Not true. Not true that the reason for the signing of the Promissory Note was to secure \$40,000.00 pending the preparation of final agreement.

He said he didn't bring the action until 1985 because everytime he contacted Mr. Alexander he said there was a conflict of interest in the case because, and here I quote:

"We were both represented by the same set of Attorneys - then it was after this I went to Mr. Dale."

He agreed that Mr. Scott, the Defendant, made a report to the police concerning certain activities he was carrying out at the quarry and consequently he was arrested and charged. This was in October or November, 1985. He denied however that that was why he sued the defendant. He said the charge preferred against him by the police was in respect of one motor missing from the quarry but he was dismissed of the said charge. Further in re-examination by Mr. Dale the plaintiff said inter alia:

"I was Managing Director and the Defendant was Operations Manager.....
the arrangement was first put in writing at the Worker's Bank."

He was subsequently shown a letter dated 17th May, 1983 from Myers, Fletcher and Gordon to himself and the Defendant - (tendered by consent as Exhibit 4). He said that this was the letter prepared by the lawyers embodying the terms agreed on. It begins thus:- "As a result of several discussions we now take this opportunity of reducing to writing the agreement arrived at between the parties as follows." etc.

It is of interest to note Paragraph 3 of the 7 paragraphs:-

"3 The land and Screening Plant owned by Keith Scott will be sold by him to the new company for a price of \$155,600 which shall be paid as to \$50,000 in cash and the balance on terms to be agreed which shall be set out in the Agreement for Sale when prepared."

Of course it will be recalled that it was earlier in the case suggested to Mr. Lyn-Fatt that, it was agreed that he would advance \$40,000 under the agreement for paying creditors to which he disagreed. Then immediately followed this piece of testimony:-

"Not true the reason for the signing of the promissory note was to secure \$40,000 pending preparation of final agreement."

The Defendant's Version

Mr. Keith Scott recounted on oath that sometime in 1982, August to September, one Stanley Hohn introduced him to the Plaintiff. He testified:- "He knew I was in financial difficulties with my quarry operating business and introduced me to a potential investor, that person being the plaintiff also one Gulab Dukaran." The defendant was shown Exhibit 5 and commented that he had seen it before - it had been presented for his consideration - it was never signed by the three parties - he didn't sign because he needed time to consult his lawyers.

The evidence of the Defendant thereafter read as follows:-

"Mr. Lyn-Fatt said he was no longer interested in a relationship with Dukaran and he put forward new proposals. I and plaintiff eventually reached an agreement. This was sometime in January, 1983. The agreement was subsequently made by mid March 1983. Mr. Lyn-Fatt took over the quarry sometime between January and March, 1983. In April 1983 I signed promissory note for \$40,000. I informed Mr. Lyn-Fatt that the pressures for arrears of payment in relation to land and machinery to do with said quarry were such that I urgently needed \$40,000. Plaintiff said yes he would make the advance of \$40,000 against further payments due to me when the formal agreement was drawn up. He said he needed something to hold pending the signing of formal documents. Prior to this suit Mr. Lyn-Fatt never demanded this \$40,000 or interest. I never got any letter of demand from anyone else. After his arrest and charge I was served with a Writ."

Some of Mr. Scott's answers to Mr. Dale in cross-examination were strange, mystifying and one can even say - displayed how even businessmen can be duped - if of course he was speaking the truth. Speaking of Mr. Lyn-Fatt he said:-

"He was buying 2/3 of business - he took over possession and I was totally excluded. He was Owner, Manager and took the workers. I was not involved - never signed a single cheque..... my involvement was negligible to nil from 1983 to 1985. Never got involved again. I got involved in 1987 - 1988. I got back with help of wife and friends.....It was my understanding that it was an advance to me to clear up expenses relating to quarry. It was not intention that \$40,000 was repayable to plaintiff." Then follows the question: "Why didn't you have inserted in the Promissory Note what was meant?" Answer: "I was not a sharp lawyer enough to pick it up and I was relying on the good faith of Mr. Lyn-Fatt and myself. In 1983 \$40,000 was still a lot of money - I have been a businessman from 1972 plaintiff sic. was so committed that I had no doubt I could reasonably expect a substantial amount in a short time - \$50,000 in short time. I permitted plaintiff to take over my quarry without any written agreement only oral."

.....Equipment then was 1.3 million - Agricultural Value was \$6,- \$8,000.00 per acre roughly 50 acres in quarry business.

Further XX'd he said the first signed document evidencing any transaction was the promissory note dated April 1983 - the second signed document between us was on 21/4/83 - Worker's Bank Agreement. He went on to state there was nothing in the document (Exhibit 2) which said any amount should be paid to him. He testified further that this document indicated where payments should be paid and how. To his Attorney Mr. Hylton in re-examination he said that at the time he signed the promissory note he was not legally represented.

The Submissions

Mr. Hylton's opening observation at the end of the evidence that:- "basically the crux is whether the \$40,000.00 is a separate loan transaction from the quarry agreement accurately represents the position and in my view cannot be faulted. He said it was conceded on both sides that \$40,000.00 was handed over on the 14/4/83. Seven days after i.e. 21/4/83 it was agreed (as evidenced by Exhibit 2) that \$215,000.00 would be paid out by the plaintiff.

The plaintiff said he had not been put in possession of the quarry before he paid that money to Workers Bank and he submitted that it was inconceivable that Mr. Lyn-Fatt would have paid out that large sum when there was no written agreement - The Defendant's account that the plaintiff took possession from January or February 1983 is more probable.

Mr. Hylton did say however and I quote him as I have it recorded:-
"Defendant's case does have a weakness in the reason for signing document - plaintiff would have something to hold on to - agreement was on the way." To borrow Mr. Hylton's word - "inconceivable" this piece of evidence and the thinking behind it is well nigh "inconceivable."

Mr. Hylton rounded off his submissions by asking the court to accept and say that all things pointed to fact that the \$40,000.00 was a part payment on the land as the defendant said and not a loan as the plaintiff claimed.

Mr. Dale in his address invited the Court to examine the pleadings and to observe that the Defence never pleaded that no demand was made for the amount claimed.

He submitted that Paragraph 1 of the Defence was in conflict with the sworn evidence of the Defendant as he testified that it was in February '83' that the plaintiff "took over operations." He further submitted that the Defendant was saying that Mr. Lyn-Fatt should give him \$50,000.00 yet he had failed and pleaded:-
"no set off or Counter Claim."

He said that nowhere in the agreement does it say that the \$40,000.00 and here I quote him "is submerged in the terms of the Agreement."

He referred the Court to Phipson on Evidence 11th Edition - Paragraphs 781 and 782 on the subject of extrinsic evidence. He did not elaborate or place great emphasis on it. In any event I did not regard it as of great assistance in the determination of the issues herein.

Conclusion and Findings

To accept the defendant's version would be to stretch the Courts imagination and credulity to unbelievable limits as in my view his case is consistent with neither logic nor the truth.

On the salient and crucial aspects of the case I accept the plaintiff as a witness of truth and believe him that Mr. Scott having been introduced to him made

a request for a loan and said:- "he was in financial problems, he had a mortgage on his house which he needed money to pay off." I accept as a fact that the plaintiff replied:- "yes I will lend you the money but we will have to go to my lawyers Ivor Alexander to have the proper documents drawn up to have the money lent."

I find that, as both sides agree, on the 14/4/83 the sum of \$40,000.00 was handed over by Mr. Lyn-Fatt to the defendant Scott by way of a loan. A Promissory Note Exhibit 1 was duly signed by the defendant and witnessed by Mr. Ivor Alexander in furtherance of the above transaction. I am of the opinion and I so find that Mr. Scott knew and realised it was a straight forward loan that had to be repaid.

I believe the plaintiff when he said:- "It is not true the amount I gave him - the \$40,000.00 was by way of an advance in a business transaction - it was a loan to him."

I accept as true the following testimony by the plaintiff:- "Mr. Scott made proposals to me about a business arrangement - about 2 - 3 days after he got the money at 3 Musgrave Avenue. Said he had a quarry and he was having financial difficulties and he was asking me to help him out by coming into the Company."

It is my view that, on a balance of probabilities and on a consideration of the evidence, both oral and documentary, the plaintiff has proved his case to my satisfaction. Accordingly there will be Judgment for the Plaintiff against the Defendant in the sum of \$52,916.00 with interest at the agreed rate of 12½% per annum from the date hereof.

Costs to plaintiff to be agreed or taxed.