IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M149 of 1987

BETWEEN	DAVID MCFARLANE	PLAINTIFF
A N D	COLIN WILLIAMSON	DEFENDANT

Gayle Nelson for the Plaintiff

Mrs. Margaret McCaulay for the Defendant instructed by Mrs. Karen Hyman-Clarke of Clough, Long and Company.

Hearing on May 12th, June 12th, 13th and 15th, 1989.

JUDGMENT

BINGHAM J.

In this matter the plaintiff's claim was commenced by a writ filed and served on the defendant's Attorneys on 15th April 1987. The endorsement on the writ sought the recovery of money, Seventy Five Thousand Six Hundred Dollars ($75,600 J.A.) allegedly paid to the defendant as a loan on 18th March, 1987. The writ was accompanied by a Statement of Claim which read as follows:-

1. " The Plaintiff is and was at all material times the Managing Director of a Pest Control Company.
2. The Defendant was at all Material times a Farmer and a Businessman.
3. On or about the 18th March 1987, the Plaintiff loaned to the Defendant the sum of Seventy-Five Thousand Six Hundred Dollars ($75,600.00) upon the Defendant's promise to repay the said sum within seven days and in any event at an interest rate of 12½% per annum.
4. The Defendant to date has failed to repay the said loan or any of it and has refused or neglected to pay the same.
5. The Plaintiff's claim is against the Defendant for the sum of Seventy-five Thousand Six Hundred Dollars ($75,600.00) being moneys due and owing from the Defendant to the Plaintiff.

6. The Plaintiff also claims:-

a. Interest on the sum.

b. Costs.

c. Further and other relief."

An appearance was entered by the defendant's Attorney's on 28th April, 1987 and in the Defence dated 12th May, 1987 and served upon the Plaintiff's Attorney on the same day apart from admitting the fact that the defendant was a Farmer and a Businessman it sought to deny each and every other allegation set out in the Statement of Claim.

A short reply was filed and served on the defendant's Attorneys in which issue was joined with the defence as to what was pleaded therein.

With such brief allegations in which the parties choosed for reasons best known to themselves to exclude from the pleadings the circumstances relating to the alleged sum due and recoverable as a loan, one could conclude that they seemed to be approaching the trial of the action with caution "holding their cards close to their chest."

The hearing in this matter commenced on 8th May 1989 some two years after the filing of the writ and as the pleadings stood up to them, the matter was not expected to occupy much of the Court's time. This is further borne out by the fact that at the hearing of the Summons for Directions the estimated length of the hearing was fixed at one day. As it turned out, however, the matter occupied the attention of the Court for some six days as on 8th May and up to 12th May, 1989, when the hearing eventually commenced the action had to be adjourned for one reason or the other. From 8th May to 10th May this was due to the absence of the defendant abroad and the need for learned Counsel who had been briefed in the matter to appear for the defendant requesting an adjournment in order to cause an amended defence to be filed and served on the other side. This amended Defence while repeating the allegations set out in the original Defence denying the loan, at paragraph 5 and 6 went on to allege that:-

"5. On the day in question, the plaintiff was present at the Defendant's place of business at 25 Grants Pen Road for the purpose of exchanging Jamaican Currency for the sum of money in United States Currency.

while the Plaintiff was counting the Jamaican currency in the presence of the Defendant's servants, armed robbers entered the premises and robbed the plaintiff of a sum of money in Jamaican Currency the precise sum being unknown to the Defendant. The matter was reported immediately to the Police at Constant Spring who arrived shortly afterwards and took statements. (emphasis mine.)

6. The Defendant was not present at the time."

There is apart from the allegations setting out the circumstances in which the sum alleged to have been a loan was taken away nothing alleging that this purported transaction was illegal or unenforce/able as having breached any of the provisions of the Exchange Control Act. It is trite law that if this was the purpose or objective behind the amended defence the pleadings certainly did not proceed far enough. If what was intended was to raise a Statutory Defence or the illegality of the transaction then it was a necessary requirement of the rules governing pleadings that such a defence had to be specifically pleaded and in this regard section 178 and 216 of the Civil Procedure Code Act state that:-

"178 The defendant or Plaintiff (as the case may be) must raise by his pleading all matters which show the action or Counter Claim not to be maintainable, or that the transaction is either void or voidable in point of law and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite side by surprise or would cause issues of fact not arising out of the preceeding pleadings, as for instance fraud, statute of limitations, release, payment, performance facts showing illegality either by Statute or Common law, or Statute of Frauds."

Section 216

" 216 In every case in which a party shall plead the general issue, intending to give the special matter in evidence by virtue of any Act or Law he shall insert in the margin of his pleading the words "By Statute" or"Law" (as the case may be) together with a reference to the number of section of the Act or Law on which he relies; otherwise such defence shall be taken not to have been pleaded by virtue of any Act or Law." (emphasis mine.)

At the hearing which commenced on 12th May, 1989, therefore, the issues raised on the pleadings were as follows:-

1. Was there a transaction between the parties involving $75,600?
2. If so what was the nature of this transaction?
3. At the time that the money was taken away from the defendant's office had the property in it and therefore the risk passed to the defendant?

Needless to say this last issue is crucial to the determination of the whole case.

The plaintiff gave evidence and under examination by his Attorney his account took up most of the first morning's session. When the Court resumed its sitting in the afternoon following certain questions earlier put to the plaintiff in cross examination along lines in keeping with the requirements of Section 8 of the Money lending Act, which approach no doubt had its genesis in Counsel's mind based upon the allegations set out in paragraph 3 of the Statement of Claim, there was now an application made to amend paragraph 4 of the Defence by inserting the following words at the end of this paragraph.

> " which is not admitted there was a loan it is unenforceable as it is in breach of Section 8 of the Money lending Act." (emphasis mine.)

This application was opposed by Learned Counsel for the Defence but after some argument he conceeded that there was in effect no proper basis for the objection as the power to grant the amendment resided in the Court and this it could exercise at any stage of the proceeding even up to Judgment. The amendment was granted on terms which prompted the Attorney for the plaintiff to file a lengthy Amended Reply to which I will return in part later on in this Judgment. Needless, to say that the effect of this amendment to the Defence now sought to raise a fourth issue to the proceedings as to the Statutory Defence that was now pleaded. It may be convenient to dispose of the issue raised by the application at this stage for although at first glance the older authorities for which Shoucair vs. United Dominion Corporation (Jamaica) Limited. [1963] 8 JLR 189 per Douglas J (Supreme Court [1966] 9 JLR 361 - (Court of Appeal) [1968]10JLR 501 - (Privy Council) would seem to apposite to the facts in this cases although this authority does offer some guidance as the defence introduced would in the light of the allegations set out in paragraph 3 of the Statement of Claim seem on the face of it to be unanswerable.

However, as Learned Counsel for the plaintiff by his subsequent researches argued, and in my view his contention is very sound as by the amendment to Section 13 (1) (b) of the Moneylending Act placed on interest rates introduced in 1974 the ceiling exempts loans or contracts which bear an interest rate not in excess of 12½% per annum from the provisions of the Act.

Accordingly in so far as Section 8 of the said Act enacts that:-

> " No contract for the repayment by a borrower of money lent to him or to an agent on his behalf after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this section be amde and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be.
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> 2. The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount fo the principal of the loan, and the interest charged on the loan expressed in terms of a rate per centum per annum."

Section 13 (1) provides that:-

" 13 (1) This Act shall not apply to

(a) .....

(b) .....

(c) .....

(d) .....

(e) any loan or contract or security for the repayment of money lent at a rate of interest not exceeding twelve and a half per cent per annum." (emphasis mine.)

In this regard, therefore, in so far as the Statement of Claim in paragraph 3 sought to allege that the loan was "repayable within seven days and in any event with interest at 12½% per annum," this if true did not offend Section 8 of the Act.

The effect of this conclusion has resulted in removing what emerged during the actual hearing which lasted for some three days, is that the two issues which occupied most of the Court's attention and engaged the industry of Counsel are no longer of relevance in the final determination of the matter.

One is, therefore, left with the original issues as they stood after the pleadings were deemed to be closed following the hearing of the Summons for Directions.

Given the common ground in the evidence that there was a robbery at the office at the defendant's warehouse on Grants Pen Road, in Saint Andrew on 18th March, 1987, in which the money $75,600 was taken by two gunmen and that these facts are not in dispute, the critical issue of fact upon which the matter turns, therefore, is what were the circumstances existing at the time that the money was taken?

In this regard the evidence of the plaintiff is all the evidence that one has in relation to what in fact took place at the defendant's office on 18th March, 1987. No evidence has been forthcoming from the defendant's workers, Mrs. Wilkins and Mr. Stephenson otherwise called "Heavy" both of whom were present at the time of the incident. The defendant while testifying admitted to the Court that Mr. Stephenson o/c "Heavy" is still employed to him and there is no evidence that he was not available to give evidence at the trial. Although the plaintiff was rigourously cross-examined his evidence has not been shaken to the extent as to cause me to conclude that his testimony is not credible when examined as a whole. He testified as to the handing over of the money to Mrs. Wilkins, her checking of it and later on in cross examination he stated that it was following this that while Mr. Stephenson was checking the money and arranging it into lots that the robbers entered the office and relieved them of the money. By then, however, the plaintiff had received his receipt for the money.

It is trite law that the risk passes with physical transfer and/or delivery of the goods and by the same reasoning the property in goods also passes (see Section 21 of The Sale of Goods Act.)

The physical handing over the money, therefore, in my view would clearly have been sufficient to pass the property in it and with it the risk to the defendants. There is no issue here as to the fact that Mrs. Wilkins and Mr. Stephenson was the defendant's employees and therefore, his agents in this transaction.

Moreover, it is reasonable to infer that the receipt (Exhibit 2) received by the plaintiff would only have been handed over after Mrs. Wilkins had satisfied herself that the sum requested by the defendant was in fact what was received by her and her acceptance of it by tendering a receipt to the plaintiff in this regard puts the issue as to the fact that the property in the money had passed to the defendant beyond question.

It is not disputed that the money was taken thereafter by two gunmen. There is no evidence that these persons were acting in concert with either of the parties or to suggest in the least that the robbery was "faked."

It is rather unfortunate, therefore, that Mr. Nelson for the Plaintiff choosed in his Amended Reply to make the sort of allegations as he has done at paragraph 11. Such allegations as well as those stated in paragraph 10 not having formed part of his original Statement of Clain was not allowed as they sought to raise new matters and all that I would wish to state is that where such instructions are in fact received by Counsel it is a matter that ought to have been investigated with the most scrupulous care, and in any event, ought not to have been introduced as part of these proceedings. It certainly does not redound to Counsel's benefit or show his conduct in the matter in a favourable light.

Before parting with this case it is of note to observe that the many previous transactions between the parties involving as they did on the evidence, what amounted to clear breaches of the provisions of the Exchange Control Act, and in particular section 3 and 7 of the Act, the evidence on a preponderance of probability leads me to conclude that the arrangement made in relation to the payment of the sum in question for $75,600 was in effect another of these transactions and this regard the defendants account is to be preferred.

The law applicable to such contracts would accordingly make the contract, prima facie illegal and therefore void. See observations of Douglas J in Watkins vs. Roblin [1964] 8 JLR 444 at page 446 H - I. There is this difference, however, on the facts of this case:-

1. The defence did not seek to rely upon or plead the illegality arising from the transaction, ot the statute in this case namely the Exchange Control Act.
2. Even if it had been pleaded on the facts in this case I would be prepared to hold that the object of the Exchange Control Act when examined as to its scope goes not to the formation of the contract but its performance and in this regard the transaction would not be caught by the provisions of the Act until the money was paid to the plaintiff's son in the United States by the foreign principal acting on behalf of the defendant.

As the matter eventually turned out there was no performance of the agreement as the events intervening resulted in the whole transaction being frustrated. per dictum of Douglas J referred to supra in Watkin v Roblin referred to supra at 447 C - F. There is also a fuller exposition of the proper approach to be adopted in such cases where the question of illegality is pleaded in avoidance of such claims. In this regard the case of Barbara Grant vs. Derrick Williams Civil Appeal 20/1985 unreported judgment of the Court of Appeal of Jamaica (Kerr, Carberry and White JJA) delivered on 25th June, 1987 is also of relevance.

In light of my earlier observations however, all this now becomes a matter of only passing academic interest.

Be that as it may, therefore, the result is that having fully considered the matter based upon the pleadings, the issues raised, and the evidence adduced on both sides, the plaintiff must succeed on his claim and judgment is accordingly entered for him for $75,600 and interest at 12½% calculated as from 18th March, 1987.

The plaintiff must also have his costs of the hearing such costs be taxed if not agreed.

Stay of execution requested by Counsel for the defendant.

Court-stay of execution granted for six (6) weeks.