IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2000 C. L. N. 145

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**1ST CLAIMANT**
A N D	**JAMAICA REDEVELOPMENT FOUNDATION INC.**	**2ND CLAIMANT**
AND	**DONOVAN FOOTE**	**DEFENDANT**

Mr. Maurice Manning instructed by Nunes, Scholefield DeLeon & Co. for Claimants

Mr. Donovan Foote in person

Practice and Procedure – Trial Date – Defence previously struck out – No judgment in default entered – Whether evidence required in proof of Claim – Requirements for claiming interest - Counterclaim not struck out – No defence to Counterclaim – Inconsistency between orders requested on Claim and on Counterclaim

October 24, 25, 26, November 3 and 16, 2006

BROOKS, J.

Jamaica Redevelopment Foundation Inc. has, after a number of intervening transactions eventually acquired debts owed to the National Commercial Bank Jamaica Limited (N.C.B.). One such debt was said to be owed by Mr. Donovan Foote. N.C.B. had filed this action against Mr. Foote before it was divested of this dubious asset.

The claim was initially defended by Mr. Foote but his defence was recently struck out because of his failure to obey certain orders of the court.

Jamaica Redevelopment has appeared at this hearing because, at the time of the striking out, the case had been already set before the court for trial. It has sought to prove

its claim in this forum rather than to proceed by the default procedure provided by rule 12 of the Civil Procedure Rules (CPR).

There were some evidential gaps in the attempt to prove Jamaica Redevelopment's claim. The gaps arose from the fact that the witness who was called, was an officer of Jamaica Redevelopment who had no personal knowledge of Mr. Foote's dealing with N.C.B. or of the details of the transactions on Mr. Foote's account. An instrument of mortgage, which had been executed by Mr. Foote, was placed in evidence, but it took the matter only a little further, as it had been executed some five years before the claim was filed. In addition, there was no evidence forthcoming as to what payments, if any, had been made against the debt or even as to the interest which was added thereto. The document however did specify a rate of interest which the debt attracted.

The questions which are for the court to decide are firstly; whether in the absence of a defence any part of the claim nay be deemed to be admitted. Secondly, if the interest and interest rate claimed cannot be taken to have been admitted, what proof is required of Jamaica Redevelopment in order for it to secure other than a nominal rate of interest. The relevant part of the Amended Statement of Claim states as follows:

> "2. The Claimants' claim against the Defendant is to recover the sums of $6,515,380.00 together with interest at the rate of 25% per annum, being the amount due and owing in respect of Loan (sic), the particulars of which are set out hereunder:-
>
> | | | Particulars |
> |---|---|---|
> | 00.05.01 | Principal | $2,708,627.00 |
> | | Interest | $3,806,753.00 |
> | | | $6,515,380.00 |
>
> ....
>
> AND THE CLAIMANTS CLAIM:-
>
> (i) The sum of $6,515,380.00
>
> (ii) Interest on the sum of $2,708,627.00 at the rate of 25% per annum from the 2nd day of May, 2000 to the date of payment or Judgment.
>
> (iii) Further or other relief..."

Question 1 – Is any part of the claim deemed admitted in the absence of a defence?

There is authority for the principle that where there is an application for judgment in default of either, an acknowledgment of service or a defence being filed, the particulars of claim are deemed to be admitted as to the issue of liability. (See *Young v. Thomas* [1892] 2 Ch. 134.)

Bowen, L.J. in that case, at p 137, said:

> "there is no doubt that, in determining the rights of the parties in the action, the statement of claim alone is to be looked to, and the reason of this rule is obvious, namely, that the facts stated therein are taken to be admitted by the defendant; and, as has been decided by Lord Justice Kay in *Smith v. Buchan* (36 W.R. 631), no evidence can be admitted as to those facts."

Young's case was decided on the terms of the then Order 27 rule 11.

In *Arnold Marshall and anor. v. Contemporary Homes Ltd.*, (1990) 27 J.L.R. 17, the Court of Appeal considered that Section 254 of the then Civil Procedure Code should have been interpreted so that on a motion or summons for judgment, the court cannot receive evidence but must give judgment according to the pleadings alone (Per Rowe P. at page 19).

Those cases, as well as Section 254, long pre-date the CPR, which is what now determines procedure. I have reviewed rule 12 which prescribes the procedure in respect of default judgments and have found no provision which covers the particular situation in the instant case. Rule 12.13 prevents a defendant who has a judgment in default entered against him, from contesting any issue except those relating to costs and the enforcement of the judgment. I am prepared to apply the reasoning in *Young v. Thomas*, and hold that in light of the absence of a defence and the restrictions placed on the Defendant by rule 12.13 of the CPR, Jamaica Redevelopment is entitled to default judgment in support of

the sum claimed. I therefore find that the claim in respect of the principal of $2,708,627.00 has therefore been proved by virtue of the absence of a defence.

What, however, of the claim for interest in the sum of $3,806,753.00? It is noted that this claim was filed prior to the advent of the CPR. There was however, a Case Management Conference held on 26th October 2005. Rule 73.3 (7) makes it clear, that the CPR applies to this claim, from the date that notice of the Case Management Conference is given. The requirements of rule 8.7 (3) in respect of the items to be included in the Particulars of Claim, when interest is claimed, therefore applies. Rule 8.7 (3) states:

> "A claimant who is seeking interest must –
> (a) say so in the claim form, and
> (b) include in the claim form or particulars of claim details of –
> (i) the basis of entitlement;
> (ii) the rate;
> (iii) the date from which it is claimed;
> (iv) the date to which it is claimed; and
> (v) where the claim is for a specified sum of money.
> - the total amount of interest claimed to the date of the claim; and
> - the daily rate at which interest will accrue after the date of the claim."

There was no amendment of the statement of claim to comply with this rule. The provisions of the rule have not all been complied with. The use of the word 'and' at the end of rule 8.7 (3) (iv) demonstrates that all the provisions of the rule are to be satisfied. What is the effect of this failure? Does the claimants' claim for interest automatically fail, or does the court have any basis on which to award interest?

Rule 12.8 (2) contemplates a situation where a claimant who claims a specified sum of money has not specified a rate of interest. In that instance the rule stipulates that the claimant may apply to have judgment entered for either:

(a) the sum of money claimed together with interest at the statutory rate from the date of the claim to the date of entering judgment; or

(b) the sum of money claimed and for interest to be assessed.

Rule 12.11(2) stipulates the consequences where the provisions of rule 8.7(3) have not been complied with on the claim form. It states:

> "Where the claim includes any other claim for interest, the default judgment shall include judgment for an amount of interest to be decided by the court, or at the statutory rate."

I conclude therefore that a failure to comply with the provision of rule 8.7(3) does not automatically prevent Jamaica Redevelopment from securing interest where there is an application to the court for a final judgment. It must however prove its entitlement to interest. It is not automatically entitled to the sum of $3,806,753 pleaded as interest owed. If I am wrong in this approach then the claim for the interest, as pleaded, may well be theirs as of right, as per the reasoning concerning liability, set out above.

Question 2 - Where a rate of interest is not deemed to be admitted, what proof should a claimant provide when claiming interest?

There are a number of significant authorities in this area. Mr. Manning for the claimant cited *Long Yong (PTE)Ltd. v Forbes Manufacturing and Marketing Ltd.* (1986) 23 J.L.R. 29, (1986) 40 WIR 229. In that case and in the later case of *British Caribbean Insurance Company Ltd. v Perrier* (1996) 33 J.L.R. 119, Carey J.A. made it clear that for

the claimant to secure an award of interest he must first plead it. That has been done by Jamaica Redevelopment.

In the *British Caribbean Insurance Company* case the Court of Appeal also made it clear that "the rate of interest in commercial cases must be realistic if it is to serve its purpose", (per Carey J.A. at p. 127 B). The Court referred to the fact that "the judge (at first instance) had an undoubted power to award interest under section 3 of the Law Reform (Miscellaneous Provisions) Act", (per Carey J.A. at page 125 I).

The period for which interest is to be paid, is that period for which the money has been withheld by the defendant. The principle of *restitutio in integrum* is that which is applied in these circumstances. Unlike the *British Caribbean Insurance Company* case however, there was an agreed rate of interest between N.C.B. and Mr. Foote. That rate should therefore be the guide as to the quantum of N.C.B's loss. The agreed rate was stipulated in the mortgage instrument as, "20% above prime". There was however, no evidence was given as to what was the "prime" rate.

The *British Caribbean Insurance Company* case is also helpful with regard to the information to which the trial judgment may have regard, in assessing the question of interest. Carey J.A. at page 127B said that he could, "see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate."

Mr. Manning has provided an excerpt form the Statistical Digest for May 2006 published by the Bank of Jamaica. It sets out the Commercial Bank Weighted Loan Rates, and in particular, average weighted rates for the period March 1993 to April 2006.

For what period is interest to be awarded in this case? Jamaica Redevelopment has not provided any evidence concerning the fortunes of the debt up to the date of the filing of the action. In light of that deficiency, I find that the court is prohibited from awarding interest for any period prior to May 1, 2000. There is nothing to indicate what would be the principal, from time to time, which attracted interest. Interest may however be awarded for the period May 1, 2000 to date. What is the procedure to be followed?

I note from the Bank of Jamaica publication that the weighted average as at June 2000 was 23.48% per annum. The rate has trended steadily down since that time, and at April 2006 it stood at 17.67%.

It is noted from the same publication that mortgage credit rates have been consistently higher than the Commercial Bank Weighted Loan Rates, though they also have trended downward from 27.35% in June 2000 to 25.01% per annum in April 2006. The rate has fallen as low as 19.01% on a number of occasions during that time period.

In light of the agreement between the parties that the applicable rate would be "20% above prime" and despite the absence of evidence as to what has been the "prime" rate over the period, I am prepared to say that 25% as claimed by Jamaica Redevelopment is not an unreasonable rate to be applied for the entire period. I find that I am given a discretion by Section 3 0f the Law Reform (Miscellaneous Provisions) Act, despite *provisio* (b) to that section, which requires the agreed rate to be used. I hold that the absence of the evidence concerning the prime rate allows that discretion. In addition I think that I may properly justify the use of the rate of 25% by holding that the "prime rate" would not be less than 5% in the Jamaican economy.

I must record that, for the purposes of the taking of the evidence and the submissions in respect thereof, I have treated Mr. Foote as if the provisions of rule 12.13 applied to him despite the fact that no default judgment existed against him. I am of the view that the absence of a Defence and his arrant disregard of previous orders of this court warranted my approach. In this regard I am guided by the judgment of Smith J.A. in a procedural appeal in the case of *Blagrove v Metropolitan Management Transport Holdings Ltd & aonr.* SCCA 111/2005 (delivered 10th January, 2006).

What is the status of the Defendant's Counterclaim?

On 26th October 2006, I expressed myself in the terms set out above. Mr. Foote thereafter pointed out that the Counterclaim had not been defended and had not been addressed in the order striking out the Defence. Mr. Foote submitted that since there had been no Defence filed in respect of the Counterclaim, the court should grant judgment in default of defence. He cited rule 18.7 to show that even though there had been a striking out of the Defence, the Counterclaim continued to subsist. He also cited the rule concerning the overriding objective and dealing with cases justly, to support his entitlement to judgment on the Counterclaim. No cases were cited in support of the submission. The court requested further submissions from the parties and adjourned the matter.

Mr. Manning did not attend the adjourned hearing, apparently from a scheduling error, but the court heard Mr. Foote's submissions. He repeated his earlier submissions, and asked for a declaration in respect of paragraph 1 of the Counterclaim. He said that he was abandoning the claims set out in paragraphs 2, 3 and 4 thereof.

The court asked Mr. Foote to comment on the applicability of rule 39.to this case. Rule 39.9 states as follows:

> "Where the court considers that a decision made on an issue substantially disposes of the claim or makes a trial unnecessary, it may dismiss the claim or give such other judgment or make such other order as may be just."

It should be noted that the term "claim", as used in the rule must necessarily include a reference to a Counterclaim. Rule 39.1 (8) assists in that interpretation.

In answer to the court, Mr. Foote submitted that rule 39.9 would apply in the case of a trial, but that these proceedings were not a trial. It was, he said, a default hearing, there being no defence to the Counterclaim. He submitted that the court in making a ruling on the Counterclaim could move to dismiss the claim on a preliminary point under its power under rule 26.1 (2) (j) or striking out the claim under rule 26.3 (1) (a). He asked the court to "either dismiss or strike out the claim in the circumstances".

Rule 26 addresses the court's powers of case management. Rule 26.1 (2) (j) speaks to dismissing or giving judgment on a claim after a decision on a preliminary issue. Rule 26.3 (1) (a) is concerned with dismissing a claim upon a party's failure to obey a rule, practice direction or an order of the court. Rule 26.1 (2) (j) is the equivalent to rule 39.9, but at the Case Management Conference stage. I do not think it applies here.

In respect of rule 26.3 (1) (a), Mr. Foote cited the failure to serve him with a witness statement. The submission is untenable as the rules provide for a special procedure if the opponent does not reciprocate (rule 29.7). It is not that Jamaica Redevelopment utilized the procedure afforded by rule 29.7, but Mr. Foote himself filed

no witness statement. He is not entitled to complain in these circumstances. In any event, because of the evidential gaps, the witness statement was of little help to Jamaica Redevelopment.

I now deal with Mr. Foote's substantive point concerning the Counterclaim. Before setting out the Counterclaim, I should point out that the Defence was to the effect that there were, "a series of transactions" between NCB and the Defendant concerning "a loan that the Plaintiff made to the Defendant". It continued to say that the terms of the loan, "were never made known and/or clear to the Defendant", but that payment of "certain sums" had been made to NCB in reduction of the debt. No particulars of the payments were provided. The Defence concluded that the rates of interest charged on the transactions were "excessive...should have been on a reducing balance...and... (were) harsh and unconscionable". The Counterclaim states as follows:

> "6. The Defendant repeat (sic) paragraph 1 to 5 inclusive of the Defence.
> And the defendant Counterclaim (sic):
> (1) A declaration that the rate of interest charged in respect of each of the aforesaid transactions was excessive, and the said transactions were and each of them was harsh and unconscionable.
> (2) An order that the said transactions may be reopened, and that an account may be taken between the parties.
> (3) An order that in taking of such account the Defendant may be relieved from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges as the Court may adjudge to be reasonable.
> (4) And such further or other relief as may be just."

Having considered Rule 39.9 and Mr. Foote's submissions I have arrived at the conclusion that Mr. Foote is not entitled to the judgment which he seeks. This is not an

administrative action of filing a judgment in default of the defence to Counterclaim. As in the case of Jamaica Redevelopment, Mr. Foote seeks a judicial decision. It is untenable for Mr. Foote, himself an Attorney-at-Law, to contend that he entered into a contract the terms of which "were never made known and/or clear to (him)". The basis for the Counterclaim is undermined, not only for that untenable proposition, but because of its failure to provide any particulars of the payments said to have been made against the loan. I find that the Counterclaim has no reasonable likelihood of success in those circumstances.

The court having been convinced of the existence of the debt and NCB's entitlement to interest, it could not then derogate from an order to that effect, by thereafter stating that the interest rate applied to the loan was excessive and that the transaction be re-opened.

I am of the view that I may properly invoke the provisions of rule 39.9 in this unusual situation. I shall treat the decision made in respect of the claim as having disposed of the issues raised by the Counterclaim. I shall also strike out the Counterclaim as having no reasonable prospect of success. There shall however be no costs to the Claimants on the Counterclaim in light of their default.

Having regard to the foregoing, the judgment is as follows:

1. Judgment to the claimant on the claim in the sum of $2,708,627.00 with interest thereon at the rate of 25% per annum from May 1, 2000 until the date of payment.
2. The Counterclaim is hereby struck out.
3. Costs to the claimant in the sum of $60,000.00.