[2013] JMSC Civil 156

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 06428 of 2011

BETWEEN	**NORTH AMERICAN HOLDINGS COMPANY LIMITED**	**CLAIMANT**
AND	**HOWARD WEBBER**	**DEFENDANT**
AND	**DEVON EVANS**	**DEFENDANT TO COUNTERCLAIM**

Mr. Keith Bishop, instructed by Bishop & Partners for the claimant.

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the defendant.

Application to Set Aside Moneylending Transaction- The Moneylending Act – Promissory Note – The Bills of Exchange Act – Whether Interest Rate Charged Harsh and Excessive – Whether "Loan Fee" Caught by Provisions of Moneylending Act – Whether Court to Reopen Entire Transaction.

In Chambers

Heard: October 30, 2013.

Coram: F. Williams, J.

The Nature of the Application

[1] In this matter, the primary question that falls for the court's determination is whether the "loan fee" referred to in the promissory notes in this claim, might be regarded as "excessive"; or whether the transaction reflected therein might be regarded as "harsh or unconscionable"; so that the court might reopen it.

The Promissory Notes

[2] The promissory notes that stand at the centre of the controversy between the parties are dated the 14th day of May, 2010. One was executed by the claimant company as promisor and the defendant, Mr. Webber, as promisee. The other was executed by Mr. Devon Evans in favour of Mr. Webber and bears the same date.

[3] The importance of these documents and their terms merit the material portions of the said terms being set out as follows:

> "(i) [The claimant] unconditionally and irrevocably promises to pay to Howard Webber… on or before Twenty Four Months 24 months from date hereof [the 14th day of May 2010], the principal amount of …USD$750,000.00 in addition to a loan fee of…USD$500,000…
>
> (ii) The Loan Fee due and payable to the Borrower shall be as set out hereunder:
>
> (a) The sum of… USD$300,000.00 if the principal is repaid to the lender on or before May 6, 2011…
>
> (b) In addition to the First year loan fee the sum of …USD$200,000.00 on or before the 6th May, 2012...
>
> (3) …the Borrower shall have the right to repay the principal amount due under the following terms and conditions:-
>
> (a) In the event the Borrower elects to repay the principal sum of May 6, 2012, the Borrower shall pay the sum equivalent to one-half of the First Year Loan Fee in the sum of… USD$150,000.00 on or before the 30 days from May 6, 2011.
>
> (b) Further to clause 3(a) the Borrower thereafter shall pay the Principal + one-half of the first year + the

Second Year Loan Fee on or before the May 6, 2012."

The Background to the Bringing of this Claim

[4] It was because of the failure of the claimant to honour the requirements under the security documentation (including an instrument of mortgage executed over a dwelling house at 4 Parkhurst Drive, St. Andrew); and repay the loan in full, that the defendant called on the claimant to pay pursuant to the provisions of the promissory note.

[5] By way of claim form filed on the 28th day of October, 2011, the claimant has sought, *inter alia*, the following relief in respect of the promissory notes and the loan fee or rate of interest that are being challenged:

> "b. An order that the Claimant deliver to the Registrar of the Supreme Court, the Duplicate Certificate of Title of the Claimant's premises, which is registered at Volume 1325 Folio 756.
>
> c. An order that the amount of US$500,000 interest charged on loan of US$750,000 for two years pursuant to instrument of mortgage dated the 14th of May, 2010 is excessive and that in any event the transaction is harsh and/or unconscionable
>
> d. An order that the court reopens the transactions between the parties and take an account between the parties herein, close the previous dealings and create a new obligation between the Claimant and the Defendant.
>
> e. An order that the Defendant, not being an organization, person or entity exempted pursuant to section 13 of the Moneylending Act and (sic) therefore is not entitled to the excessive and unreasonable interest charged under the Instrument of Mortgage dated the 14th day of May, 2010."

The Nature of a Promissory Note

[6] There really is no (or not much) dispute between the parties as to the nature and legal effect of a promissory note; and as regards the particular promissory notes that are before the court for consideration. The main nature and legal effect of a promissory note might be seen from the definition of a promissory note in section 83 (1) of the Bills of Exchange Act. This is the definition:

> "83.-(1) A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer."

[7] The authorities cited by learned counsel for the defendant also support the general view of the nature of the promissory note – in particular its essence of being an "unconditional promise" as described in the Bills of Exchange Act. In one of them – that is that of **Century National Merchant Bank and Trust Company Limited v Ian Jones and Eleanor Jones** [1999] 29 JLR 4 – Reckord, J upheld the submissions of Mr. Dennis Goffe, QC, to the effect that promissory notes are treated as cash. They are usually used in addition to other security documentation that might be harder to realize. The learned judge's decision was upheld by the Court of Appeal, rejecting the appellants' attempts to prevent the enforcement of the promissory notes on the bases that they were not personally liable for the note, as it was executed on behalf of a company; and that, summary judgment could not be entered against them, as there first had to be a proper reconciliation of the account.

[8] Of at least equal significance is one of the cases cited in the said judgment – the case of **Cebora SNC v SIP (Industrial Products) Limited** (1976) 1 Lloyd's Reports, 271 in which the English Court of Appeal made the following remarks – per Sachs, LJ at pages 278-279 :

> "Any erosion of the certainty of the application by our courts of the application of the Law Merchant relating to bills of exchange is likely to work to the detriment of this country, which depends on international trade to a degree that needs no emphasis. For some generations, one of those certainties has been that the bona fide holder for value of a bill of exchange is entitled, save in truly exceptional circumstances, on its maturity to have treated as cash,

> so that in an action upon it the Court will refuse to regard either as a Defence or as grounds for a stay of execution, any set-off, legal or equitable, or any counterclaim, whether arising on the particular transaction upon which the bills of exchange came into existence, or, a fortiori, arising in any other way. This rule of practice is thus, in effect, pay upon the bill of exchange first and pursue claims later."

[9] The sole disagreement between counsel in this matter in relation to the effect of a promissory note is that counsel for the defendant contends that this view of the promissory note is to be taken to mean that it should not be open to question and provides a complete answer to the challenge in respect of the interest rate or loan fee in this case. The view propounded is that the claimant is bound by the promissory notes on this view of their nature. This, indeed, is the first issue that learned counsel for the defendant states should be considered and resolved in his client's favour.

[10] A reading of the cases, however, show that in none of them was the issue of whether the interest rate was excessive or the transaction harsh or unconscionable discussed. The cases cited dealt with attempts by defendants to set up counterclaims and set-offs and so on. In the court's view, the view being put forward of the nature and effect of a promissory note, though undoubtedly correct, must be considered against the background of other legislation that has a bearing on the issue. In this case, one such piece of legislation is the very Moneylending Act that is so important to the resolution of this matter. In the result therefore, the court holds that, whilst the principal sum is not open to challenge in the circumstances (which will shortly be adverted to), of this case, it is open to the claimant to challenge that aspect of the transaction relating to interest.

[11] What are these circumstances? For a full appreciation of these circumstances, as well as the court's view of its purview and remit in this matter, it is necessary to recount the orders made by D. McIntosh, J on March 28, 2012. These were the more important of the orders:

> "(1) The court enters judgment on admission for the defendant in the sum of US$750,000.00 which becomes due and payable by the 6th day of March, 2012.
>
> (2) The issue concerning the Loan Fee to be considered on the 12th November, 2012 at 2:00 p.m. for 2 hours.
>
> (3) Both Attorneys-at-law to file written submissions in respect of the Loan Fee by the 29th day of October, 2012."

[12] The reciting of the terms of the orders is important mainly for two reasons: first, it shows that the matter of the Loan Fee was specifically left to be addressed by counsel at a later date. Second, it shows that there is an order by which judgment was entered in the defendant's favour. The court's view and interpretation of these orders is that it (the court), is restricted in dealing with this matter to consider only the matter of the loan fee. It could not, therefore, even were it to find that the transaction is harsh and unconscionable and one that should be reopened, deal with the issue of the principal mentioned in the promissory note. Were it to do so, it would be in effect purporting in a sense to exercise some sort of appellate function; or purporting to disturb the order of a judge made inter partes. This would, undoubtedly, be inappropriate. Should it decide to reopen the transaction, therefore, it might only do so in respect of the loan fee. It is not at liberty to disturb the judgment in respect of the principal.

[13] There are two or, (depending on how the court resolves one of these), perhaps three issues that remain for the court's determination. Counsel in the matter have expressed them in different words or terms; but the substance of the issues stated by them is similar. One issue is the applicability or otherwise of the Moneylending Act to the loan fee. The issues will be addressed as stated by the parties.

<u>Issue: (a) Whether or not the Defendant</u>
<u>is exempted from the Moneylending Act (claimant)</u>
<u>(b) Is the loan transaction subject to the Moneylending Act (the defendant)?</u>

[14] Section 13 of the Moneylending Act is the section that treats with exemptions. There are, under this section, certain categories of persons and institutions that are exempt from the operation of the Moneylending Act. Among these are institutions licensed under the Banking Act; the Insurance Act; the Financial Institutions Act, and so on. Also exempt, pursuant to section 13 (1) (i) is:

> "any loan or contract or security for the repayment of money lent at such rate of interest not exceeding such rate per annum as the Minister may by order *prescribe;"

[15] It is not in dispute that the rate prescribed by the Minister at the time was 20%.

[16] There is also no dispute that the rate of interest or loan fees that were applicable in the two years were in excess of the said 20%: - for the first year of the loan it was 40%; and for the second year, it was approximately 26% or thereabouts.

[17] The only other provision of this section which could possibly be applicable is 13(1) (h) which exempts:

> "any person whose main business is not the lending of money and who lends money solely incidental to the conduct of such business…"

[18] There is insufficient evidence before the court to make a definitive determination that this provision would be applicable to this transaction.

[19] It might safely be concluded, therefore, that (considering the issue as it has been framed by learned counsel for the claimant), the defendant is not exempted from the Moneylending Act. We may now examine other provisions in the Act to see whether the transaction is subject to the Moneylending Act.

[20] An important starting point in a consideration of this matter is to consider the definition of the word “interest” in the Moneylending Act, where, in section 1(2), it is defined as follows:

> “(2) In this Act-
>
> "interest" does not include any sum lawfully charged in accordance with the provisions of this Act by a lender of money for or on account of costs, charges or expenses, but save as aforesaid includes any amount, by whatsoever name called, in excess of the principal, paid or payable to a lender in consideration of or otherwise in respect of the loan;”

[21]First of all it will be noted that this provision excludes “any sum lawfully charged in accordance with the provisions of this Act by a lender of money for or on account of costs, charges or expenses…”

[22] In the court’s view, this part of the provision itself leads to a consideration of two other matters: (i) whether this can be said to be a sum lawfully charged in accordance with the provisions of this Act; and (ii) whether it can be said to be charged on account of “costs, charges or expenses”.

[23] In respect of the first matter, section 3 of the Act is of the utmost importance. It reads as follows:

> “3.-(1) Where, in any proceedings in respect of any money lent after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the prescribed rate per annum, the court shall, unless the contrary is proved, presume for the purposes of section 2 that the interest charged is excessive and that the transaction is harsh and unconscionable,

> but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding the prescribed rate per annum, is excessive.
>
> (2) In this section "prescribed rate" means such rate as the Minister may from time to time, by order, *prescribe".

[24] This section raises a number of important points. For one, it shows that even in cases in which the applicable rate of interest is below that prescribed by the relevant Minister, the court's powers are such that it may still, in its discretion, and subject to a consideration to the available evidence, find the interest charged to be excessive and reopen a particular transaction.

[25] For another, linking this section with section 13, it shows that once, on the face of it (as here) there is evidence to show that the rate of interest charged in any case exceeds the prescribed rate, that raises a presumption (rebuttable, though it may be) that the rate is excessive. This presumption will hold sway "unless the contrary is proved". This means that once the presumption is raised, the onus falls on the party propounding the validity of the transaction and the appropriateness of the rate of interest charged, to prove it to the court's satisfaction. That was not done in this case. Indeed, no attempt was made to do so.

[26] Yet another consideration is whether the loan fee that was charged can fairly be said to fall within the category of sums charged on account of "costs, charges or expenses". Would any such costs, charges and/or expenses relating to a loan be such as to amount to all of 40% in the first year and some 26% in the second year of a loan? In the court's view, this is highly improbable. Additionally, there is no evidence seeking to establish the reasonableness of these sums.

[27] In the court's view, therefore, it cannot fairly be said that the "loan fee" in this case might be considered to rank with "any sum lawfully charged in accordance with the provisions of this Act by a lender of money for or on account of costs, charges or expenses…" It is not lawfully charged as it exceeds the rate prescribed by the

Minister; and, although it is described in the promissory note as a “fee”, its quantum makes it highly doubtful that its true purpose is for costs, charges or expenses relating to the loan, to be dealt with.

[28] This conclusion makes the loan fee in this case fall within the description contained near the end of section 1(2) – that is, that of:

> “any amount, by whatsoever name called, in excess of the principal, paid or payable to a lender in consideration of or otherwise in respect of the loan”.

[29] The discussion of these issues answers not only the issues previously stated (as to the applicability of the Moneylending Act); but also another issue stated by learned counsel for the defendant – that is, (as stated by the defendant - whether the transaction is in breach of the Moneylending Act; and (as stated by the claimant), whether or not the sum of US$500,000 representing interest or loan fee for a loan of US$750,000 over a two year period is excessive. The answer to these issues is “yes”.

[30] This conclusion on these foregoing issues, brings us to a consideration of section 2 of the Moneylending Act – that is, that section empowering the court to reopen a transaction. That section reads as follows:

> “2.-(1) Where proceedings are taken in any court by any person for the recovery of any money lent either before or after the commencement of this Act, or the enforcement of any agreement or security made or taken in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, enquiries, fines, bonuses, premiums, renewals or any other charges, are excessive, or that, in any case, the transaction is harsh or unconscionable, the court may reopen the transaction, and take an account between the parties, and

> shall, notwithstanding any statement or settlement of account, or any note, security or agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly chargeable and due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and shall set aside, either wholly or in part, or revise, or alter any security given, or agreement made in respect of money lent, and if the lender has parted with the security, may order him to indemnify the borrower or other person who gave such security."

[31] As previously discussed, because of the orders made in this matter by D, McIntosh, J, the court is not at liberty to reopen the transaction in its entirety or to make any order affecting the principal sum. Any action on its part must relate solely to the rate of interest. This takes us to the final issue: that is, what rate of interest should the court substitute for the loan fees that the court finds to be usurious?

The Appropriate Rate of Interest

[32] In seeking to find the answer to this question, the court was greatly assisted by the cases cited. Several of them were cited; but for convenience only two of them will be considered – the principles that they discuss amounting, more or less, to a common theme in all.

[33] One of the cases is that of Brooks, J (as he then was). It is **Dorrell Smith v Linnett May Chin** – Suit No. S 222 of 2000. In that case Brooks, J had the task of deciding, as the sole issue, the rate of interest that would be payable on unpaid money in a contract for the sale of land. The learned judge reviewed a number of authorities, including **Noel Sale v Sonia Allen** – Suit No. CL S 139 of 1981, delivered on June 30, 1989; and **Peter Williams and others v United General Insurance Company Limited** – SCCA No. 82 of 1997, delivered November 30,

1998; and **British Caribbean Insurance Company Limited v Perrier** (1996) 33 JLR 119.

[34] Having reviewed the authorities, Brooks, J concluded:

> "Based on the more modern decisions, and despite **Esdaile v Stephenson**, I find that the court may properly apply a rate other than the equitable rate of 4%, even if the parties have not agreed on a specific rate. That is, provided that evidence is supplied to the court to support such other rate."

[35] The learned judge at the end of the day applied the rate of 21%, that being the rate that he found was contemplated by the parties in the agreement and the mortgage instrument prepared pursuant thereto.

[36] In the **Perrier** case, Carey, JA had to review the question of the appropriate rate of interest in commercial cases. At first instance, counsel had sought to have the court refer to and rely on contents of the Statistical Digest published by the Bank of Jamaica. Said Carey, JA on the point:

> "It seems to me clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award…I can see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate award".

[37] Relying on these cases, learned counsel for the defendant has asked the court not to consider a rate of less than 9% per annum and submits that a rate of 13% per annum would be more appropriate. His basis for these submissions comes, in relation to the rate of 9%, on what he says is the evidence contained in the affidavit of the defendant filed March 27, 2012, that in order to have provided the claimant and Devon Evans with the sum of US$750,000, he was forced to surrender bonds

that were then yielding him interest at the rate of 9% per annum. In relation to the rate of 13%, he submits that evidence in relation to this rate is to be found in paragraph 23 of the said affidavit in which the defendant states that the rate at which he would have been obliged to borrow the sum of US$750,000 was 13%. This evidence is unchallenged, it is submitted. It is also submitted that this is evidence of the type discussed in the **Perrier** case.

[38] Further, it is submitted that the case of **Estate Imorette Palmer (deceased) v Cornerstone Investments and Finance Company Limited** – Privy Council Appeal No. 23 of 2006, delivered on July 16, 2007- is not applicable to this case. On the other hand, it was submitted on behalf of the claimant that the **Palmer** case does in fact apply and ought to be followed by this court in reopening the transaction and retransferring the security for the loan to the claimant.

[39] The **Palmer** case was one concerning a moneylending transaction that revolved around sections 2(1); 8 and 13(1) (i) of the Act. There were three issues that fell for the Board's consideration. These were: (i) whether the Moneylending Act applied to the transaction; (the Board found that it did); (ii) what (if the Act applied) would be the effect of the Act on the moneylending transaction and the mortgage and guarantee security given by the appellant in support of it. (The Board held that the mortgage and guarantee were unenforceable). (iii) Whether the statutory jurisdiction to give relief to the moneylender should be exercised, if the security documents were found to be unenforceable. (The Board concluded that it should not restore the appellants' liability under the guarantee and mortgage).

[40] As previously observed, the remit of this court in resolving the issues that are to be determined in the instant case has been restricted by the order or D. McIntosh, J. Its remit, therefore, is not as wide as that of the Board in the **Palmer** case. So, that, whilst the **Palmer** case is helpful and instructive generally in relation to issues that fall for determination under the Moneylending Act, its applicability to this particular case is limited by virtue of the order of D. McIntosh, J; as well as by the different factual circumstances of the two cases.

Resolution

[41] At the end of the day, therefore, the court is unable to reopen the entire transaction and deal with the issue of the principal. It can only do so in relation to the rate of interest or loan fee charged. In that regard, the court finds acceptable the evidence as to the rate of 13% per annum as a reasonable substitute for the usurious and clearly excessive interest or loan-fee rates of 40% and some 26% reflected in the promissory notes in what was a harsh and unconscionable transaction.

[42] So far as the question of costs is concerned, the court recognizes that, although the claimant has been successful in having the court declare the loan-fee provision of the promissory notes to be in contravention of the Moneylending Act; the defendant has also been successful in having the court reopen not the entire transaction; but only that part of the transaction relating to the loan fee. In these circumstances where, as the court considers it, there has been a partial victory on both sides, it seems to the court that an order for each party to bear its own costs would be the best in the circumstances.

[43] The court, in light of the foregoing, is minded to make the following orders: It is hereby ordered and declared that -

(1) In relation to the loan fee or rate of interest applied to the sum of US$750,000, the promissory notes of the 14th day of May, 2010 contravene the provisions of the Moneylending Act, the loan fee or rate of interest being excessive and the transaction being harsh and/or unconscionable.

(2) The rate of interest that is to be charged on the principal sum of US$750,000 is 13% per annum from May 6, 2011 to the date of payment.

(3) Each party to bear its own costs.