IN THE SUPREME COURT OF JUDICTURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T047OF 1997

BETWEEN	KINGSOL THOMAS	CLAIMANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	DEFENDANT

Mr. Earl P. deLisser for the Claimant
Miss Tenneshia Watkins instructed by Vaccianna & Whittingham for the Defendant

Heard: 14th April, 2010 and 7th May 2010

Banker – Customer Relationship; Negligence; CPR r. 29 vis-a-viz evidence on behalf of a bank; Evidence Act, Part II; Banking Act, Fourth Schedule

CORAM: E.J. BROWN, J (Ag.)

1. This claim began its long, torturous journey to judgment in the pre CPR era and meandered glacially though the labyrinth of the crushing backlog of the nation's superior court. The claimant's Writ of Summons, a document now confined to the archives, was filed on 7th April, 1997. From the endorsement thereon, the claimant seeks to recover damages of $2,332,697.50 for negligence arising from the inordinate delay in effecting repairs to his motor vehicle and an injunction preventing the sale of certain real estate given as additional security for the loan to purchase the motor vehicle.

2. The injunctive relief was not pursued at the trial. The claim for negligence is predicated on the defendant's delivery of a motor vehicle, registered CC7503, belonging to the claimant to a garage where it remained unrepaired from about the17th April, 1993, to the 20th July, 1994. How did the defendant came to so intermeddle in what at first blush appears to be the private affairs of the claimant?

CLAIMANT'S EVIDENCE

3. The statement of claim discloses that the claimant received a loan of $400,000.00 from the defendant in 1992 to purchase the motor vehicle. The loan was initially secured by the motor vehicle itself. Consequently, the defendant held a lien on the vehicle. This loan should have been liquidated by monthly instalments of $23,000.00 commencing on the 4th August, 1992.

4. In March, 1993, the motor vehicle was involved in an accident. For the purposes of effecting repairs, the claimant took it to a garage in Spanish Town. On or about the 17th April, 1993, the defendant caused the vehicle to be removed from the Spanish Town garage to another at 139 Barbican Road, Kingston 8. This was supposedly to facilitate the effecting of repairs within two weeks. There the vehicle remained until it was eventually repaired by the claimant's mechanics. That work took approximately one week. The sum claimed is itemised under the particulars of special damages as loss of income.

5. The claimant in his witness statement alleged that the delay in effecting the repairs dealt him a double whammy, to use what it is hoped is a forgivable colloquialism. Because the truck was disabled for so long he lost his contract of employment which resulted in his loan falling into arrears. That was so as the repayment of the loan was to be from income generated by the truck, according to the claimant.

6. With the loan in arrears, and apparently no payments being made, further security was taken for the loan. The initial security being a motor vehicle which was just sitting in the garage, no doubt, it had depreciated. It is a noticeable coincidence that the repairs to the motor vehicle were effected in the same month the additional security was given. The claimant didn't resume repaying the loan until September. Even so it was below the monthly requirement. The vehicle was eventually seized and sold.

7. In cross examination the claimant said he didn't know Mr. Eric Maragh, the branch manager, prior to going to the bank. All his dealings with the defendant were through Mr. Maragh. He first said he was up to date with his payments at the time of the accident. However, a document was shown to him which he identified as a photocopy of a letter dated 2nd December, 1992, he had written to the bank. He accepted that that letter was written in response to a demand made upon him by the bank to settle his loan.

8. The claimant thereafter agreed that the loan was in arrears before the accident. The claimant testified that at the time of receipt of the bank's demand letter, he had been in arrears for about one and a half months. It was his evidence also that he made one payment after the accident. That was while the vehicle was at the Spanish Town garage. However, like the later payment in September, 1994, this was less than the requisite instalment.

9. As the cross examination continued, the claimant gave what the court considered to be evidence that was structurally destructive of his claim. When the truck was bought he had insured it against the event which has brought him here. His insurers indemnified him within perhaps one month of the accident occurring. The claimant frankly admitted that his was the responsibility to see the vehicle repaired.

10. Although he had access to the premises at Barbican Road, the claimant took no steps to effect the repairs. The claimant's evidence ipsissima verba was:

Unfortunately I couldn't take any steps to repair the truck whilst it was at the garage at Barbican because the bank manager said he was going to get it repaired in two weeks.

The claimant however agreed steps could have been taken but said it was Mr. Maragh who was giving the instructions. The claimant said he didn't know what steps to take.

DEFENDANT'S EVIDENCE

11. Mr. Kevin Walker was called on behalf of the defendant. He was the Manager of defendant's Debt Recovery Unit. He gave a witness statement which was allowed to stand as his evidence in chief under the provision of r.29.8(2) of the Civil Procedure Rules 2002, (C.P.R.). That notwithstanding under cross examination Mr. Walker disclaimed personal knowledge of the matters asserted therein. Whatever he certified as true had been gleaned from the bank's files and inquiries of the defendant's employees.

CLAIMANT'S SUBMISSIONS

12. In a compact submission at the close of the case for the defence, learned counsel Mr. Earl deLisser posited that there was in effect no evidence in defence of the action as that of its only witness was hearsay. He argued that the bank's records had not been produced under Part II of the Evidence Act. Additionally the bank did not seek to rely on the exception under the Banking Act.

13. On the other hand, learned counsel submitted with the freshing condour characteristic of the advocate alive to his role as an officer of the court, that the claimant was dilatory. That was the effect of the submission that it is open to the court to say the sixty (60) weeks wait was a bit much. The concession extended to the recognition that the claimant could have at least consulted a lawyer within a reasonable time.

DEFENDANT'S SUBMISSIONS

14. For the defendant, learned counsel Miss Tenneshia Watkins conceded an awareness of the evidential difficulty ab initio. Learned counsel went on to submit that it is still for the claimant to prove his case, a task he failed to discharge. Counsel submitted that the claimant ought not to be accepted as a credible witness. Further, since the banker-customer relationship is not one that presupposes a fiduciary bond without more, the claimant must prove a duty of care, the breach of which resulted in damage.

RATIOCINATION

15. So, is learned counsel for the claimant correct that the witness statement of Mr. Kevin Walker is not meet for the court's consideration? The general rule is that any fact which needs to be proved by the evidence of witnesses at a trial is to be proved, by their oral evidence: CPR r.29.2(1)(a). That rule is excepted to allow a witness' statement to stand as his evidence in chief: CPR r.29.8(2).

16. Before the court is competent to so order, the witness statement must conform with CPR r.29.5. For present purposes r.29.5(1)(c) and (b) and 29.5(2) are germane. Under r.29.5(1)(c), the statement must:

Sufficiently identify any document to which the statement refers without repeating its contents unless this is necessary in order to identify the document.

CPR r.29.5(1)(d) reads:

Must not include any matters of information and belief which is not admissible and, where admissible, state the source of any matters of information and belief.

Rule 29.5(2) states:

The court may order that any inadmissible scandalous, or otherwise oppressive matter be struck out of any witness statement

17. A witness while giving oral evidence would not be allowed to speak to the contents of a document not admitted into evidence. Similarly, the witness in oral testimony would be barred from giving hearsay evidence. In short, the witness statement ought properly to declare only such matters as the witness would have been competent to speak to in oral testimony.

18. The witness statement of Mr. Kevin Walker appears to have ran afoul of both rules. He spoke most eloquently to details of the transaction between the defendant and the claimant which, on his admission came from the bank's records. The CPR r.29.5(1)(c) required him to proceed no further than such details as would identify the document. Secondly, even if the information garnered from his enquiries was admissible, he nowhere in his statement disclosed that such matter was to his information and belief. Neither did he state the source.

19. The defendant was not without an alternative to this flagrant breach of the rules. By virtue of section 33 of the Evidence Act, a copy of any entry in a banker's book is to be received as prima facie evidence of "the matters, transactions and accounts therein recorded; in all legal proceedings." Further, the statutory vow of silence imposed on bank officials under section 45(1) of the Banking Act is waived in matters of this nature. No offence is committed where:

> (d) the information is disclosed in connection with civil proceedings –
>
> (i) arising between the bank and the Customer relating to the customer's banking transaction.
> (Fourth Schedule – Banking Act)

No copies of banker's books were produced. It is axiomatic that the submission of learned counsel for the claimant viz-a-viz the witness statement cannot in any way be faulted.

20. The claim in consequence of the foregoing falls to be considered only on the claimant's evidence. Has the claimant discharged his burden of proof on a balance of probabilities? Since the claim is one of negligence arising from the banker-customer relationship, attention is now turned to its nature. From as long ago as 1848, the House of Lords held the banker-customer relationship to be essentially that of debtor-creditor: Foley v. Hill (1848) 2 H.L.C. 28, 9 E.R. 1002. That position was refined by the US Supreme Court in Bank of Marin v. England, 385 US 99, 101 (1966), as follows, 'the relationship of bank and depositor is that of debtor and creditor, founded upon contract.' That characterization accords with the submission of learned counsel

for the defence. Since it is debtor-creditor, it excludes trusteeship or fiduciary relations between the banker and customer.

21. Although that is the case, in the opinion of the learned authors of Paget's Law of Banking 12th edition 8.12:

> What emerges from the decision **[Headley Byrne &C. Ltd. v. Heller Partners Ltd [1964] A.C. 465]** is that there may be a special relationship between two parties deriving neither from contract nor from fiduciary responsibility, but from a relationship of proximity, which will give rise to a duty to take care in giving a reference.

The instant case is not one of special relationship. It is founded upon contract.

22. The court understood the claimant to be saying there was an agreement, collateral to the loan agreement, for the bank to see to the repairs of the truck, warranted by Mr. Maragh to be completed within two weeks. That it was the breach of this warranty which resulted in the inordinate delay in making the repairs and catapulting the claimant into arrears. Was there negligence on the part of the defendant?

23. A useful definition of negligence is provided by Ross Cranston, the learned author of **Principles of Banking Law**, (1977) at page 156:

> Negligence is defined to mean the breach of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of a contract, or of any common law duty to take reasonable care or exercise reasonable skill.

The claimant must prove, at the requisite standard, the breach of an obligation to take reasonable care in the choice of repairmen on the part of the defendant.

24. That such an obligation was assumed by Mr. Maragh and warranted by him is evidenced by no more than the claimant's say so, therefore, the claimant's credibility takes centre stage. In embarking upon this aspect of the analysis, the court is not unmindful of the passage of time between the accrual of the cause of action and the trial, with its resultant deleterious effect on the claimant's memory.

25. The court finds it mutually inconsistent to assert that the loan should be repaid from income generated by the truck and yet there was a fixed sum to be repaid each month. The one articulates a relationship of considerable flexibility and the other rigidity. Even worse, it could never be a counsel of prudence for a financial institution to depart from what is notoriously prudent banking practice, and agree to repayment from income earned from the employment of the truck. The arrangement begs the question of what would become of the loan in the event unfortunate circumstances befell the truck, as they did. Without holding the claimant to any standard above a balance of probabilities, in the absence of more than the claimant's assertion, the court is disinclined to accepting it as true.

26. Likewise, without anything more tangible than the claimant's word, the court is unable to accept that the removal of the truck from Spanish Town to Barbican Road included a promise to have it repaired in two weeks or at all. For reasons undisclosed the claimant did nothing until the bank requested additional security for the loan. That is a little more than passing strange.

27. Accepting as the claimant has, that the responsibility to repair the truck was his, the discharge of that responsibility does not square with a promise to repair which remained unfulfilled for over a year. The claimant had not only the responsibility; he had the opportunity, since he had access to the premises at Barbican Road. Further, he had the capability to effect repairs, having received a cheque from his insurers about one month after reporting the accident. The claimant had the responsibility, opportunity and capability yet he made himself a prisoner of inertia.

28. As a result, the claimant faces an unassailable hurdle, the "but for" test. There cannot be an affirmative answer to the question, but for the defendant's wrongful conduct the claimant would not have suffered the damage claimed. The post accident conduct of the bank in obtaining further security for the loan explodes the assertion of a promise to repair. Further, the claimant's own confession of responsibility to repair lays the consequences of that failure at his feet. So, factually, there is a want of causation to ground the claim.

29. The claimant showed himself to be the very personification of delinquency, but vainly asserts that the defendant caused his loan to go into arrears. It is curiouser and curiouser that an ordinarily prudent man such as the claimant would stand by and watch his asset depreciate in value while his employment contract became increasingly imperilled. I find that there was no collateral contract, or otherwise, whereby the defendant warranted to have the vehicle repaired. Consequently, there was no duty owed to the claimant which was breached. *Au contraire*, it was the claimant who was the author and finisher of his fate.

Judgment for the defendant. Costs to be agreed or taxed.