IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W. 200 OF 1985

BETWEEN	SLIDIE BASIL JOSEPH WHITTER	PLAINTIFF
A N D	PAUL DeLISSER	DEFENDANT

Enos Grant for the plaintiff instructed by Orrin Tonsingh.
Hugh Small instructed by Lynda Mair of Myers, Fletcher & Gordon and Manton & Hart for the defendant.

HEARD: July 4 and 12, 1985

JUDGMENT

CHAMBERS

DOWNER J.

At the hearing of this Summons for summary judgment Mr. Grant for the plaintiff Joseph Whitter boldly applied for liberty to sign a final judgment against the money-lender Paul DeLisser on the grounds that the loan transaction involving ONE MILLION SIX HUNDRED THOUSAND DOLLARS ($1,609,000) is unenforceable pursuant to the Money-lending Act and that the mortgage falls within the provisions of the said Act and is therefore likewise unenforceable. As consequential relief the prayer is that the defendant be ordered to deliver up the titles to six (6) parcels of property on the Ironshore Estate which is reputed to be valued at THIRTEEN MILLION DOLLARS ($13,000,000). If Mr. Grant's submissions are correct, then without a hearing on the merits, Joseph Whitter will be enriched by over a Million Dollars and this Court would not hesitate so to rule if the plaintiff shows there can be no answer to his claim or the defendant fails to show that he has a substantial defence.

THE ISSUES OF FACTS

It is convenient to examine the nature of the claim as adumbrated in paragraphs 1,2,3,4,6 and 7 of the Statement of Claim, because the defence as settled by Mr. Small does not admit the

allegations. Those averments must be examined together with the affidavit evidence in order to ascertain whether issues for trial emerge, bearing in mind the amount of money involved.

The gist of these claims is that sometime in July 1983 Whitter and DeLisser entered into a loan transaction for ONE MILLION SIX HUNDRED THOUSAND DOLLARS ($1,600,000) for one (1) year at the rate of 12½% per annum being secured by mortgages on the Registered Titles of six (6) Lots in the Ironshore Estate. The agreed sum was paid over to the borrower and his creditors and finder's fees of ONE HUNDRED AND TWELVE THOUSAND DOLLARS ($112,000) paid over to the defendant, although it seems arguable that this sum was to be deducted from the loan and paid to the Attorney-at-Law Ripton McPherson. He appears to have been acting on behalf of both parties as an Attorney.

Another aspect which emerges is that the plaintiff stated that he signed an instrument of mortgage of which paragraph 9 in part reads:-

> " That immediately upon the happening of any of the events aforesaid the principal sum shall be deemed to become immediately due and payable and so remain until full payment and be recoverable by suit or otherwise as and for monies then payable under the covenants hereof provided that the mortgagor shall pay interest at the rate of 15% per annum in respect of any interest instalment which is due and unpaid for a period of fourteen days after the date of which such interest ought to be paid as to which time is to be the essence of the contract ....."

Further, the plaintiff also stated that he had defaulted on the payment of principal and interest and that in February 1985 a demand had been made for the principal, interest and other charges and as that demand was not met, the relevant properties were advertised for sale by public auction. It is on this factual basis that the Statement of Claim and Summons pray for the declarations mentioned previously, and there was an additional prayer for an

Injunction to restrain the sale.

The affidavit of the plaintiff sets out in detail the evidence on which the pleaded Statement of Claim is based and the important points to note are,that the rate of interest is alleged to be 19½% as evidenced in a letter of Ripton McPherson and Co. dated 18th July, 1983. There is also exhibited a note dated 18th July, 1983 by the plaintiff that he had agreed to pay a finder's fee to Mr. Ripton McPherson for arranging the loan and that it should be deducted from the loan. Further, in that note, it was stipulated that if certain sums were paid within a specific time period substantial refunds would be made to the borrower. Also exhibited was the letter of July 18th written on Whitter's instructions from National Commercial Bank to DeLisser transferring the Titles to the six (6) parcels of land in issue. It was noteworthy because it showed what the plaintiff did on that day in pursuance of the contract. Moreover, although the defendant has exhibited a memorandum dated 19th July with new terms referring to the same parcels of land, there was no reference in that latter document to the first one, or any indication that Whitter gave any further instructions about the Titles between the preparation of the first and second documents. It strikes me as an odd transaction and will be of importance to my decision.

There is no affidavit from the defendant in person, but one of his Attorneys has explained by affidavit that the defendant was in the Cayman Islands at the time the documents were filed. Further, a letter from Ripton McPherson & Co. is exhibited, dated 19th July which states that the interest on the loan was to be 12½%, that a finder's fee of 7% on the loan was to be deducted from the loan and like the letter of the 18th July previously referred to, the plaintiff added a subscription that he received the original letter and that no money had been received or security given.

It would be of importance to determine which of these two letters is to be the note or memorandum required by the Act, as if the first is the relevant note, the Act applies. On the other hand, if the second is found to be the note then the Act does not apply. Then again the Mortgage Instrument stipulates the rate of interest to be 12½% in the schedule and tends to support the latter letter, but there is Clause 9 of the Mortgage Instrument which stipulates interest for 15%/in case of default which is not set out in the memorandum as Mr. Grant points out. Mr. Small however, contends that the offending clause can be severed and so preserve the contract and the security.

As for the refusal to admit paragraph 2 of the Statement of Claim, which states that in July, 1983 a contract was entered, the defendant points out that no specific date has been alleged as to when the loan transaction was entered. This is an important fact, as the note exhibited by the plaintiff is dated July 18th, that by the defendant July 19th and the cheques paid over to complete the loan were all dated July 19th. Further, on the issue of the finder's fee, the plaintiff states that he paid to the borrower ONE HUNDRED AND TWELVE THOUSAND DOLLARS ($112,000) and he has exhibited a cheque dated the 19th of July in that regard. This must be considered together with the letter of 18th July by Whitter acknowledging that Ripton McPherson was acting on behalf of Paul DeLisser. So the issues raised was whether DeLisser received the monies on his own account, as the cheque was made out to him. Turning to paragraph 6 of the Statement of Claim which reads as follows:-

> " That the plaintiff has been repaying the said loan but since from about September,1984 he has defaulted in the payment of principal and interest of the said loan."

It is not clear to me as to what issues the defendant is not admitting. Was it that the plaintiff was not repaying the loan?

Or was it that he had not defaulted on the principal? Some amendment on both sides might prove helpful in due course. My conclusion is that in the light of the above examination, there are substantial issues of fact to be tried, as the paragraphs in the Statement of Claim have been traversed.

THE ISSUES OF LAW

If Mr. Small was not expansive on the issues of fact, it was because his main thrust was that there were substantial issues of Law to be tried. Mr. Grant on the other hand, contended that the logic of the decision in Orakpo v. Manson Investment Ltd. (1977) 3 W.L.R. 229 was so compelling that judgment ought to be entered forthwith for the plaintiff. Compelling as that decision was, it must be noted that the subject matter was the inadequacy of the note or memorandum in stating the terms of the contract pursuant to the Act and further, that ruling was to the effect that because the doctrine of subrogation did not apply, the contract was unenforceable and the borrower was entitled to have his title deeds returned to him as the security was also unenforceable. That was a cogent submission especially as the memorandum of the 18th July in this case states that the interest was at the rate of 19½%. That ONE MILLION SIX HUNDRED THOUSAND DOLLARS ($1,600,000) was to be paid on or before 18th July and there was no finder's fee or any reference to another document on this matter. But all the cheques exhibited by the plaintiff were dated 19th July, so it is open to a Court to find that these monies did not relate to the memorandum of the 18th July.

Central to the defence as envisaged by paragraph 2 of the settled defence, although not developed by Mr. Small, was that both the loan and the mortgage were exempt from the provisions of the Act, as the relevant memorandum dated 19th July fixes a rate of interest of 12½%, stipulates a finder's

> event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly."

The submission before me was that there was a substantial issue to be tried as to whether the finder's fee was an amount recoverable by the borrower pursuant to Section 12, and if it should be used to set off his indebtedness, or it should be treated as interest in accordance with Section 2.

In relation to Section 9 of the Act which reads:-

> " Subject as hereinafter provided, any contract made after the commencement of this Act for the loan of money shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract:
>
> Provided that provision may be made by any such contract that if default is made in the payment upon the due date of any sum payable to the lender under the contract, whether in respect of principal or interest, the lender shall be entitled to charge simple interest on that sum from the date of the default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan:
>
> Provided further that any such provision for the payment of simple interest in the circumstances aforesaid shall be in writing and signed personally by the borrower."

The plaintiff avers that Clause 9 of the mortgage by stipulating the rate of 15% when any interest instalment is unpaid for 14 days is caught by Section 9 which prohibits compound interest, states that such a provision is illegal. The defence on the other hand, contends that it was a matter of construction whether the offending clause in the mortgage was severable and cites the important authority of Carney v. Herbert et al (1985) 1 All E.R. 438 as to the approach it would be contending for at a trial. In that case Lord Brightman approved the approach of Jordan C.J. in McFarlane's

case (1938) 38 S.R. (N.S.W.) 337 where he stated that " If the elimination of invalid promises changing the extent only but not the kind of contract the valid promises are severable." This approach is also followed in Thomas Brown & Son Ltd. v. Fazal Dean 108 C.L.R. 391 which has been described in the Privy Council as a classic case. To my mind this is a difficult and an important point of law. That such an approach is pertinent to the provisions of the Money-lending Act is illustrated by the observations of Megarry J. in Spector v. Ageda (1971) 3 All E.R. 417. At 428 he said:-

> " No authority has been put before me which states the law applicable to a subsequent transaction which is based on a contract which is illegal only in part, and I do not wish to decide more than is necessary to dispose of this case. It seems to me that where, as here, the subsequent transaction is entered into by a person who not only knows of the partial illegality of the prior contract but also is in a real degree responsible for it and wishes to avoid the consequencies of it (as I think Mrs. Spector probably did), then unless that partial illegality is shown it relate solely to some defined portion of the subsequent transaction, so that only that defined portion is affected, the whole of the subsequent transaction will be affected by the illegality. I can't see why the Court should be astute to limit the effects of the illegality and make some artificial apportionment of the subsequent transaction for this purpose. When the illegality affects only a small part of the prior contract, it may seem somewhat Draconian to hold that the whole of the subsequent transaction is affected by the illegality: but illegality is illegality, and it is not for the Courts to devise means of preventing those who are implicated from burning their fingers more than to a limited extent."

The implications of law which Meggary J. envisaged were worked out in the Australian cases; albeit for statutes other than the Money-lending Act.

CONCLUSION

This is a puzzling case. If the Attorney-at-Law Miss Audrey May Wilson after preparing the first memorandum discovered she had made an error, could she take the transaction out of the Act by merely preparing another memorandum on the following day to which the Act did not apply? It is because I have doubts that she had the power she purported to exercise that the defendant may well find that the formidable case deployed by Mr. Grant cannot be met at a trial. Also I find the second note odd. Did she not realize that her unilateral action could not terminate the terms of the contract of July 18th? It is on such basic decisions of contract law that there will be a determination whether Mr. Whitter retains the ONE MILLION SIX HUNDRED THOUSAND DOLLARS ($1,600,000) and recovers his Titles, or Mr. DeLisser recovers his money or enforces his security. Could Mr. DeLisser by merely paying over the money on the 19th of July deprive Mr. Whitter of the protection of the Act?

So what is to be done? In some way this is an exceptional case as the amount of money involved is large and the issues are not easy. I find some comfort in Kodak Ltd. v. Alpha Film Corp. (1930) 2 K.B. 340 and Fieldrank v. E. Stein (1961) 1 W.L.R. 1287 in that I can grant the defendant conditional leave to defend. So I rule; That the defendant file and deliver his defence within fourteen (14) days of the service of the amended Statement of Claim on his Attorney-at-Law. It follows that failure to comply with this condition will result in the plaintiff being entitled to enter final judgment in this action. Leave to appeal was granted although on second thoughts, I doubt that this was necessary. See Gordon v. Craddock (1964) 1 Q.B. 503 and Section 10 Judicature (Appellate) Jurisdiction Act. Also an Interlocutory Injunction is

granted in terms of the Summons dated 7th May, 1985. Costs are to be costs in the cause.

fee and the mortgage also speaks of 12½%. If this finding be made, then Section 13 (e) of the Act states emphatically that it should not be applied to;

> " Any loan or contract or security for the repayment of money lent at a rate of interest not exceeding 12½% per annum."

The problem I have with this line of argument is this: Is a trial Court likely to accept the second memorandum in preference to the first? It is difficult to say, especially as the whole purpose of the Act was to protect borrowers. To my mind an important fact would be what rate of interest Whitter was paying before he defaulted. In fairness to the defendant I should point out that the mortgage was dated 19th July.

The next line of defence is that the finder's fee of ONE HUNDRED AND TWELVE THOUSAND DOLLARS ($112,000) was not part of the principal debt. The plaintiff contended that it should be treated as interest in accordance with the definition of Section 2 of the Act which reads:-

> " 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."
> " 'Principal' means in relation to a loan the amount actual lent to the borrower."

The defendant on the other hand, relied on Section 12 which reads as follows:-

> " Any agreement between a lender or intending lender of money and a borrower or intending borrower for the payment by the borrower or intending borrower to the lender or intending lender of any sum on account of costs, charges or expenses incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal, and if any sum is paid to a lender or intending lender by a borrower or intending borrower as for or on account of any such costs, charges or expenses, that sum shall be recoverable as a debt due to the borrower or intending borrower, or, in the