IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2000/D055

BETWEEN	MICHAEL DELFOSSE	PLAINTIFF
A N D	ALVIN WIGNALL	DEFENDANT

Mr. Audel Cunningham for plaintiff.

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

Heard: 31st July, 2001

Campbell, J.

On the 8th June 2000, the plaintiff commenced an action to recover the sum of six hundred thousand dollars ($600,000) with interest, in respect of a Promissory Note that he claimed, was executed by the defendant.

The defendant entered appearance on the 15th June 2000 and filed a defence, denying any agreement between himself and the plaintiff for a loan of six hundred thousand dollars or at all.

Paragraph 3, of the Defence, states as follows:

> The Defendant avers, that at no time did the Plaintiff lend to the Defendant, nor did the Defendant borrow or receive from the Plaintiff, the sum of $600,000 or any money at all.

On the 23rd October 2000, the plaintiff sought Summary Judgment of the action pursuant to Section 79(1) of the Judicature (Civic Procedure code) Law, on the basis that the defendant had no good defence to the claim.

On 6th March 2001, the defendant was granted leave to amend his defence and to add a counterclaim.

The Amended Defence at paragraph 4 stated

> The defendant repeats paragraph 3 of this defence
>
> and states further that there was no consideration to support the alleged Promissory Note referred to in paragraph 1 of the Statement of Claim, and the said Promissory Note is void and of no legal effect and unenforceable against the defendant.

And at paragraph 5

> Further and/or alternatively the said Promissory Note has not been duly stamped in accordance with the provisions of the Stamp Duty Act and is therefore unenforceable.

And at paragraph 6

> Further and/or in the alternative there was no note or memorandum in writing of any alleged contract between the plaintiff and the defendant whereby the defendant agreed to pay the plaintiff the sum of $600,000.00 as required by the Money Lending Act.

The Counterclaim sought: -

(I) A declaration that the Defendant is not personally liable to the Plaintiff in respect of the Promissory Note dated April 3, 1998.

(II) A declaration that the Promissory Note is void and unenforceable.

(III) Alternatively,

(a) An Order that the alleged Promissory Note be wholly set aside.

(b) A declaration that the rate of interest in respect of the aforesaid transaction was excessive, harsh and unconscionable.

(c) An Order that the said transaction be reopened and that an account be taken between the parties.

(d) An order that in taking such account, the Defendant may be released 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 judge to be reasonable.

(IV) Such further and other relief as to this Honourable Court allows rest.

On the 29th November 2000, the plaintiff filed an affidavit in support of his application for Summary Judgment in which, the deponent, Mr. Michael Delfosse, states:

2. That on or about the 3rd day of April 1998, I loaned to the Defendant, Alvin Wignall, for his personal use and benefit and/or the use and benefit of another, the sum of Six Hundred Thousand Dollars ($600,000.00) and that the said Defendant on said day duly executed Promissory Note in acknowledgment of the said debt. I hereby exhibit hereto marked "MDI" for identity a copy of said Promissory Note.

3. That as is apparent from a perusal of said Promissory Note, the said note was to be repaid within one month of the date thereof, and further

that the Defendant pledged his property at No. 55 Henrick Avenue, Kingston 20 in the Parish of Saint Andrew in respect of which he was the registered proprietor, as security for the repayment of the said loan.

4. That at the time of the Defendant's execution of said Promissory Note, he had already mortgaged his interest in the premises to O.B.F. Finance Company Limited, whose interest therein had been duly noted on Certificate of Title as a first legal mortgage of the premises.

Paragraph 5

That having regard to the terms of the executed Promissory Note aforesaid, I verily believed that said document operated as an equitable mortgage by the Defendant of his interest in the premises to me and upon the date for repayment of the said sum of Six Hundred Thousand Dollars ($600,000.00) having passed without his making any steps or arrangements to discharge his indebtness to me, I decided to lodge a caveat the Certificate of Title for the premises in order to protect my interests therein and in order to secure the repayment of the loan aforesaid, to me....

The defendant, Mr. Alvin Wignall, filed an affidavit in opposition to the application, in which he states inter alia, that

> "he is 81 years of age, and had made his home at #55 Herrick Avenue, for the last thirty years, until 21st day of February 2000."

"He was introduced to the plaintiff by his daughter Noreen Beadle sometime between 1997and 1998. In 1998, the plaintiff told him, he was trying to assist his daughter in her loan application to the National Housing Trust. His daughter, Noreen earlier indicated she would be seeking a loan to fund the repair of the house at #55 Herrick Avenue."

At paragraph 8 of his affidavit, he states

> That sometime in 1998, the Plaintiff came to my church in Duhaney Park and told me that he was trying to assist my daughter with her loan application to National Housing Trust, and that he wanted me to sign a document, which he then presented to me, to ensure that he continue assisting her.
>
> 9. That without reading the document presented to me by the Plaintiff, I signed same in his presence.
>
> 10. That subsequent to signing the document, I informed my daughter of the Plaintiff's visit. My daughter has since informed me that on the recommendation of her son, she sought the assistance of the Plaintiff in getting the loan. She informed me further however, that she thereafter discovered that the Plaintiff was unable to assist her as she hoped and she accordingly told him that she would proceed with the application without him

He avers that he was 'tricked' by the plaintiff. He stated that there was no agreement between himself and the plaintiff for a loan, and there was no consideration for the alleged Promissory Note. To these averments the plaintiff has filed, no response neither has there been any response to the irregularities alleged in the Amended Defence.

In his submission, Counsel, for the plaintiff urged that the defence, raised was one of non est factum. It was submitted that such a defence was not available to the defendant. He relied on the authority of Maud Gallie

(deceased) v Angelia Building Society (formerly Northampton Town and County Building Society) 1970 3 ALLER 961.

We were referred to the Judgment of Lord Reid at pg. 963 letter g.

> "The plea cannot be available to anyone who was content to sign."

It was further contended that no consideration needs be shown on the face of the Promissory Note. He however, conceded that Section 3 of the Stamp Duty Act made it obligatory that the Promissory Note be stamped before it could be admitted in evidence, however the lack of stamping may be remedied by Counsel undertaking to do so. He submitted further that no note or memorandum was required pursuant to the Money Lending Act, because the transaction was not a money lending contract but an issue involving the law of negotiated instruments and that claims of excessive interest payments were irrelevant, as this was not a matter under the Money Lending Act. Moreover, the defendant was estopped from denying that the Promissory Note was not his after he had signed it.

For his part, the defendant counsel submitted that although there was a presumption that there was consideration for the Promissory Note, it was a rebuttable presumption, and that the Defendant may show, by adducing evidence, that there was an absence or failure of consideration. Additionally,

the Stamp Duty Act precluded the Commissioner from stamping the note after seven days.

The essence of the defendant's contention is that the Promissory Note he signed was signed under a mistake of fact. That had he been aware of the true nature of the transaction he would not have signed the note.

A payment made under the influence of a mistake is not binding.

> " In Varley v Cooke 1 Giff 234 Stuart, V.C., said that if a man having no mind or intention to execute a particular instrument does what he does with the mind and intention to execute a deed of a different kind and for a different purpose from that which by fraud and deceit was substituted, the deed is not voidable but void, and no estate passes at least as between the parties to the instrument and parties taking notice." ("Kerr on Fraud and mistake seventh edition page 446.")

The question of illegality, in the signing of the Promissory Note, is germane to the issue of consideration, which has been joined between the parties. Illegality, has the effect of shifting the presumption that consideration has been given.

The learned authors, of Cheshire, Fifoot and Furmston in the Law of Contract, 12 Edition at page 522, states:

> "As regards consideration, there is another respect in which negotiable instruments are free from a general principle of contract law. The general rule requires proof

> by a plaintiff to an action for breach of contract that he has given consideration, but in the case of a negotiable instrument the consideration is presumed to have been given. This is on the defendant to prove that none has been given.
>
> Moreover, the holder is presumed to have taken the instrument in good faith and without notice of any illegality or other defect in the title of the person who negotiated it to him. There is this difference, however, between a plea of no consideration and a plea of illegality, that, once it has been shown that the instrument is vitiated by illegality as between previous parties, the burden of proving that he himself took in good faith passes to the holder."

In Baker v Barclay Bank Ltd. 2 1955 AER 571, Devlin J referred to Fitch v Jones (1855) 5E. & B. 238 where Lord Campbell, C.J. said at page 244.

> "It is whether in such a case as this it lies on the plaintiff to show that there was consideration for the endorsements, or the defendant to show that there was none, or in other words whether the facts proved raised a presumption there was no consideration. It is clear that, when there is illegality, or fraud, shown in the previous holder, a presumption that there is no consideration for the endorsement does arise."

No fraud has been specifically pleaded and particularized by the defendant.

The plaintiff has urged the court that the defendant should be estopped from relying on this defence. The plaintiff did not however plead estoppel, and if it had been pleaded, evidence would have to be led to support such a plea.

The defendant would then have the right to traverse those pleadings. These are facts that the court would have to resolve.

In Ayns v Moore (1940) I.K.B. 278 at page 288. Hall J. said:

> "Assuming that the plaintiff desired to say that the defendant was estopped from relying on this evidence by his conduct, it was clearly necessary for the plaintiff to plead estoppel with particularity and I cannot here find any pleading which can be regarded as covering satisfactorily or at all an allegation of estoppel. Secondly, assuming that an estoppel had been pleaded, it would then have necessary for evidence to be given in support of that plea, but no such evidence has been forthcoming. Accordingly, the defendant is not preluded from relying on the defence of fraud.

Several issues of law were raised; non compliance with statutory requirement as to stamping, the issue of payment at a fixed or determinable future time. In this regard, paragraph 3 of the plaintiffs affidavit states.

> That it is apparent from a perusal of said Promissory Note, the said loan was to be repaid within one month of the date thereof."

The Courts have held that the word "on or before" a certain date involve an element of contingency so that an instrument requiring payment in this way is not a valid bill. (See Williamson vs Rider, [1963] 1QB 89]. It is arguable

that similarly, 'within one month' is indeterminate and not fixed, therefore involve an element of contingency.

In my judgment triable issues have been raised by the defendant on his pleadings and in the submissions on his behalf.

The application for Summary Judgment is dismissed. The defendant is given unconditional leave to defend.

Costs of this application to the defendant.