IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CONSOLIDATED CLAIMS NOS. 2013CD00032 AND 2015CD00118

BETWEEN	**EW LEWIS INVESTMENT AND FINANCE LIMITED**	**1ST CLAIMANT**
	EW LEWIS INVESTMENT VENTURE CAPITAL LIMITED	**2ND CLAIMANT**
AND	**PLANTATION DEVELOPMENT COMPANY LIMITED**	**1ST DEFENDANT**
	CHRISTOPHER KERR	**2ND DEFENDANT**
	PLANTATION HOLDINGS COMPANY LIMITED	**3RD DEFENDANT**

Contract – Loan – Promissory Notes – Whether loan repaid – Whether interest rate agreed – Whether documentation created a sham transaction – Whether illegality tainted contract – Whether evidence admissible – Stamp Duty Act – Whether documents improperly stamped – Whether late stamping permissible – Whether equitable mortgage created – Hearsay objections to witness statement – Failure to take objections at case management – Whether trial judge has discretion to refuse to entertain late application – Whether self-serving evidence of communication to a third party admissible – Whether trial judge has a discretion to exclude documentary evidence which was deliberately not disclosed.

Gillian Mullings instructed by Naylor & Mullings for the Claimants

Hugh Wildman & Duke Foote instructed by Hugh Wildman & Company for the Defendants

Heard: **20th November 2023, 21st November 2023, 22nd November 2023, 23rd November 2023, 19th January 2024 and 8th March 2024**

In Open Court

Cor: Batts, J.

[1] On the first morning of trial the Claimants' counsel indicated that not many documents had been agreed. The Defendants' counsel urged upon the court an Amended Notice of Application filed on the 21st of June 2016 to, among other things, strike out the claim. The primary basis being that the relevant promissory notes had not been stamped. The Claimants' counsel responded that, save for one document, all had been stamped within the relevant period. That one document was stamped out of time.

[2] Having heard submissions, I made the following ruling:

> *"a). On a true construction of section 26 and the Schedule to the Stamp Duty Act (re Bills of Exchange and Promissory Notes) adhesive stamps are permissible as payment of duty.*
>
> *b). If the document is stamped late (i.e. after 7 days) then it is not admissible in order to be enforced as a promissory note but can be admitted as corroborative evidence in proof of a loan,* ***Dyche v Richards et al [2014] JMC Civ 23****.*
>
> *c). Having read the Particulars of Claim and the Claim in 00032 CD2013, the claim is for money loaned and not just about enforcement of a promissory note."*

Upon the Defendants' counsel applying for leave to appeal I ruled as follows:

"The words of the Act and the decision in the Dyche case are such that I do not think the appeal has any real prospect of success and therefore the application is refused."

[3] I invited counsel for the Claimants to open to her case and the case opened to was straight forward. The 1st and 3rd Defendants were incorporated by the 2nd Defendant for the purpose of effecting certain developments. In this regard, the 1st Claimant extended short-term (90 day) credit facilities. These were evidenced by promissory notes the security for which was the undertaking of Jennifer Messado, then an attorney-at-law, to make payments on the loans. The Promissory Notes were "*rolled over*" and as such the last note reflected the total due and owing. Although some payments were made the loans were not paid off. Later on, titles were pledged and, a final promissory note executed on the 29th July 2011. The loans have not been repaid and the Claimant seeks orders allowing for the registration of charges on the titles as equitable mortgages as well as a judgment for the balance due and owing.

[4] The Claimants called one witness, Mr. Everton Lewis. His witness statements dated the 26th of February 2018, the 19th of March 2018 and the 13th of April 2019 stood as his evidence in chief. He was extensively cross-examined. I will not restate all his evidence nor will I, in this judgment, restate all the evidence of any other witness. Suffice it to say in the course of Mr. Lewis' cross-examination, the Defendants' counsel put to the witness certain emails. Objection was taken on the basis that there had not been disclosure of those emails. The Defendants' counsel indicated that non-disclosure was deliberate as he had no obligation to disclose documents intended to be used in cross-examination. I made the following ruling:

> *"I will not allow the use of those documents which the Defendant failed to disclose deliberately under what is clearly a misapprehension of the import of disclosure rules in civil proceedings. Leave to appeal is refused."*

[5] When Mr. Lewis' evidence in chief was being led some 42 promissory notes were tendered and admitted as exhibit 3. Mr. Wildman's objection, which was the same as the point taken in limine and on which I had already ruled, was noted. Mr.

Wildman also attempted to object, on the ground of hearsay, to aspects of the evidence in chief contained in Mr. Lewis' witness statement dated 26th February 2018 and which had been served on the 19th March, 2018. I refused to entertain the application. There had been approximately eight case management dates since the witness statement was served. The Defendants had had ample opportunities to object and/or seek to strike out the statements or parts of them but had not done so. The Claimants were therefore entitled to come to trial in the safe assumption that the statement would be the evidence in chief of their witness. If a part or parts were now struck out the Claimants would need time to obtain further evidence or to consider how the claim would be further prosecuted. This would waste the court's time. These rules, as an English judge once said, are not like a game of "*snap*" to be used to obtain an unfair advantage at trial. I indicated to counsel, however, that my ruling did not preclude submissions as to the weight of the evidence or cross-examination of the witness to undergird its unreliability. However, given the failure to take objection at the pre-trial stages, it was too late and would be unfair to the Claimants to entertain such objections at the trial.

[6] Mr. Wildman made a further objection to the admissibility of the promissory notes. This being they were insufficiently stamped. The objection was similarly overruled having regard to the terms of the Stamp Duty Act. In the result the 42 promissory notes were admitted as exhibit 3. On the morning of the 21st November 2023 Mr. Wildman took aim at one of the notes in exhibit 3, an unstamped copy of which was attached to the Claim Form filed in 2013. It was then unstamped. This fact, submitted Mr. Wildman, suggested there was fraud as the same note was now before the court bearing a stamp. I indicated to Mr. Wildman that he could raise the issue in cross-examination as the note was already an exhibit. The Claimants' witness, in the course of amplification, explained that a file copy of the note was given to their attorneys while the original stamped note was kept on file. It was the original stamped note which is now exhibited. My finding on this aspect of the evidence is indicated at paragraph 16 below.

[7] Mr. Wildman also objected when the Claimants attempted to put in evidence six documents being copies of instructions, to Capital and Credit Merchant Bank, to make payments on behalf of the Claimant. He urged that the documents were self-serving and ones to which the Defendants were not privy. He relied on **R v. Roberts [1930] All ER 196**. I admitted the documents as Exhibit 4 (a) to (f) as proof that money was advanced on behalf of the Defendants. I fell into error. Having reviewed the matter, and the authorities, the documents ought not to have been admitted as proof of their content. I will therefore disregard those documents in considering my decision.

[8] The sole witness for the Defendants was Mr. Christopher Kerr. He described himself as a real estate developer. He is a director of the 1st and 3rd Defendant companies, see paragraph 1 of his witness statement filed 23rd February 2018. I find it prudent to note here that the reason for the 3rd Defendant being a party in this matter is this company is the registered owner of the properties at Volume 1026 Folio 46, Volume 1426 Folio 679 and Volume 1190 Folio 266 of the Register Book of Titles. These properties, alongside one other registered in the 2nd Defendant's name, had been pledged as security for the loan to the 1st Defendant by the 2nd Defendant in his capacity as a director of the 3rd Defendant, see exhibit 3 (promissory note dated 29th July 2011).

[9] Mr. Kerr's witness statements dated the 22nd February, 2018, 27th April 2018 and 28th March 2019 stood as his evidence in chief. In amplification the witness said some things that are worthy of quotation:

> *"Q: Please show Mr. Lewis' witness statement dated 19th March, 2018. Please comment on paragraph 12.*
>
> *A: First we had no conversation about financial business loan. No time spoke US dollar loan as I don't earn US dollars. We spoke about interest rate 18-20%. He said he not going to stamp any document, promissory note or title.*

He did not want any title just undertaking from attorney and attorney would pay him from sales proceeds. When I introduce him to Mrs. Messado he and Mrs. Messado develop very unusual relationship. They live in same area and grand kids go to each other house.

Q: *paragraph 19 comment*

A: *he is suggesting I pledged property. I never gave him any title or anything. It was going smoothly and we had a disagreement. We run promissory note to satisfy regulator. He told me he run company he can take off the interest. He come to my house and at his office. I sign the promissory note. Not going stamp and undertakings would suffice. When I pay loan I realize most of my money going to interest.*

I ask that he put the money paid to principal borrowed sum and deal with interest later. He refused. I refuse to continue paying. He promised at outset that interest could be put away. He can determine how much interest to pay.

Q: *look at paragraph 13 of Lewis statement dated 18th April 2019.*

A: *Mr. Johnson is my friend. Mr. Lewis told me he could fund the development. I ask Ike to come. He knows Mr. Lewis as an industry person. Ike was not my agent just ask him a favour as a friend.*

At that meeting we ask that if there was a debt furnish us with information.

I ask Mr. Lewis on several occasions how much I owe you. He never provided any details.

I wanted that as my business partner died. He was the one dealt with money matters.

I only been to Mr. Lewis office twice. Once when he was setting it up and next to meet with a person he gave a loan to, a contractor to me. Surprised he said

I gave him titles. Mrs. Messado would have him fund her clients. Surprised to hear him saying these things."

[10] Cross examination revealed that Mr. Kerr had been a pilot who flew his own plane. In Montego Bay, where he first did business with the Claimant in the 1990's, he operated a car rental company and a trucking business and worked in a Cambio. He was, therefore, not a novice to business by the time his borrowing relationship with the Claimants commenced. He said the following during cross examination.

"Q: company formed 2005 promissory note 2005, now say Mr. Lewis provide some financing, it can't be true based on what you said before

A: prior to negotiating the deal we agreed the documents only for regulators. Just to satisfy regulators. We will do this business a certain way not to pledge or stamp just undertaking from attorney. He will circumvent alot of charges to register and stamp documents and he would work out something with us.

I have never seen a document with a stamp on it until 2018.

Q: you said Mrs. Messado did it without your authority

A: no, times she gave him documents

Q: look at exhibit 3 all the promissory notes, see your signature on them all.

A: (Looks carefully) I see two that does not look like my signature.

Q: dates on those which do not appear to be your signature

A: 4th February, 2019 and 8th May, 2019

Q: Apart from those on every other one the interest rate, the date of payment and amount are fixed

A: yes."

Later,

"Q: suggest if you don't know when payments were made you don't know if loan is paid up.

A: I know loan is paid up because my attorney communicated that to me. Interest was to be discussed. We can have a conversation about interest but not principal.

Q: if you can't say what interest and principal was then you cannot say whether you paid loan

A: the arrangement we had we could conclude there is interest rate fixed

Q: there was interest but you had not agreed it

A: yes. What is on document was not agreed. It is for auditing purposes"

[11] The significance of these aspects of his evidence I will discuss later in this judgment. In answer to the court he stated:

"J: you say you sign documents for the Claimant. Were you ever asked to sign a mortgage.

A: Yes

J: one or more than one

A: yes sir

J: *did you sign it*

A: *no sir*

J: *did you tell him why*

A: *yes, after*

J: *what reason*

A: *when I reviewed the document it was not what was in our deal*

J: *in what way*

A: *the amount of interest in the document was not what we agreed, we should have come together to agree interest."*

[12] There were two named Claimants however the evidence suggests it is the 1st Claimant which loaned the money, and which is licensed to do so (see exhibit 1). All promissory notes were in that Claimant's name. By Deed of Assignment dated 23rd April 2012, exhibits 1 (k) and (l), the 1st Claimant assigned the loans to the 2nd Claimant. The validity of the assignment was not challenged in these proceedings. There were three Defendants. Having reviewed the documentation it is the 1st Defendant which is liable as the borrower. The 2nd Defendant guaranteed the repayment personally, see paragraph 7 in the 'CHARGE' section of the Promissory Note dated the 29th July 2011 (see exhibit 3). The 3rd Defendant owned property, the title for which was handed over to the Claimants and noted on the promissory note as security for the loan, see exhibit 3.

[13] In the final analysis, and notwithstanding the plethora of documentation and the extensive written and oral evidence, the factual and legal issues before me were straightforward. The Claimants assert that over a period of years they gave loans to the Defendants. These were primarily short term and in the nature of bridging finance. They also advanced money to purchase motor vehicles and fixtures and fittings and other material for developments in which the Defendants were involved. The Claimants' witness explained that due to the long association with the 2nd Defendant, he was satisfied to secure these loans by promissory note,

deposit of titles and an attorney's undertaking to repay loans from the proceeds of sale of completed units in the development. The loans were "*rolled over*" and promissory notes periodically executed to reflect the balance at that time. However, at some stage, the regulator (the Financial Services Commission) required that he obtain signed mortgages to support the loans. Upon being asked to execute those mortgages the Defendant's principal refused to do so. This caused the Claimants serious problems and lead to a breakdown in relations. The Claimants say that although some payments were made by the attorney (who was Mrs. Jennifer Messado) the loans have not been discharged. The balance due and owing is stated as $214,270,394.47, as at 26th February 2018, inclusive of interest and fees, see paragraph 27 of witness statement of Everton Lewis filed on the 27th February 2018. There is a daily interest accrual of $56,907.35. A quarterly fee of 1% is also claimed.

[14] The Defendants' case, on the pleadings and on the evidence, is that no money is owed. It was put to the Claimants' witness that the debt had been fully repaid. The Defendants' witness says that the principal has been fully paid but, as the interest rate was to be agreed, there is no liability. It is the Defendants' case that the promissory notes were not genuine as they were concocted to satisfy the regulator and did not reflect a true agreement. It was also contended that the documents were not properly stamped and that there could be no reliance on them. It was also submitted that, as the transaction was tainted with illegality, there was no evidential basis to find for the Claimants and the court ought not to lend aid to an illegality.

[15] Let me say that I carefully observed each witness giving evidence. I considered their demeanour and manner of communication. By this measure I prefer the evidence of Mr. Everton Lewis to that of Mr. Christopher Kerr. Mr. Lewis impressed me as a truthful witness. Mr. Kerr, on the other hand, was not very sure of what he wanted to say. He was shaken in cross-examination on certain matters. He appeared to want to speak the truth but was motivated by a desire to avoid a

lawful debt. His uncertainty is, in no small measure, due to the death of his business partner who as he said was responsible for the financial side of their business. I find that Mr. Kerr is mistaken in several areas of his evidence.

[16] My view of the witnesses aside the Claimants' case is supported by the documentation. The promissory notes support the loans and the fact that interest was agreed. I reject the assertion that Mr. Kerr signed them as a favour to Mr. Lewis and intended them to be bogus or a sham, see paragraph 5 of his witness statement dated 28th March 2019. In the first place as a person with prior experience in business he knew, or ought reasonably to have known, that putting one's signature to such a document creates a binding obligation. There is no suggestion of "*non est factum*" nor could there be on the evidence. Mr. Kerr acknowledged the signatures as his own on the vast majority and, importantly, on the final one dated the 29th July 2011. The idea that the promissory notes were shams also runs counter to his reason for refusing to sign the mortgages. If, as he said, he refused to sign the mortgage because it did not reflect their agreement on interest, why then did he sign the promissory notes which all had the interest rates clearly stated. I find that the refusal to sign the mortgage was for some other reason not having to do with interest rates. It may well be that he did not wish the properties charged. As Mr. Lewis explained the non-registration of mortgages made the sale of completed units easier because no question of having to discharge mortgages arose. Whatever the reason, the fact is that if the stated interest rate was objectionable on the mortgage, it was also objectionable on the promissory notes. Finally on this question it is ludicrous, and most improbable, that a company in the business of lending money would loan significant funds without a rate of interest specified. More so, in the context of the Jamaican dollar which is known to depreciate overtime. I regard the case, that interest was not agreed and that the promissory notes signed were shams to deceive the regulator, as most improbable and I reject that assertion.

[17] I pause to indicate that had I found otherwise I would have been forced to refer this matter to the Director of Public Prosecutions for consideration as to whether

criminal proceedings ought to be brought. However, I find that the promissory notes were genuinely executed for the purpose of securing sums advanced. I say no more on that score. This finding of fact makes it unnecessary to consider the question whether a party to an illegality can rely on that illegality to evade a lawful debt. Mr. Wildman urged upon me that a court ought to take no cognizance of an illegal contract and hence I ought to dismiss the claim. The matter of "*ex turpi causa*" has recently received attention at the highest level in other jurisdictions and with varying results. In this regard an article by Merrick Ricardo Watson entitled "*From Everet v. Williams to Moore Stephens v. Stone Rolls and Beyond: Rethinking ex turpi causa in an Era of Modern Commercial Fraud: a View from the Caribbean*", published in the **West Indian Law Journal 2020-2022 Vol. 41 Numbers 1 & 2 pages 113-170**, is worthy of consideration. Had I found that the promissory notes were instruments of fraud, and intended to deceive the revenue it would not have precluded recovery of the debt. This is because the loan and advances were not themselves illegal. The Claimants were at the time of making the loan licensed to conduct that business. The Defendants admit receiving the loan. Therefore, although the promissory notes may have been inadmissible in evidence, viva voce evidence of the loan was acceptable. This is consistent with the modern, and preferred, application of the illegality rule in many jurisdictions in the Commonwealth. In the event however, due to my findings of fact, the question of the effect of illegality did not arise for my determination.

[18] On the question of whether attaching an unstamped promissory note to the Claim Form proved fraud, I again demurred. I accept Mr. Lewis' explanation (see paragraph 6 above). In any event the law does not preclude late stamping. Therefore, the promissory notes stand as evidence of the loan and its terms. I, however, accept that the promissory notes were stamped in time. In the event I am wrong on this I accept them as evidence of the loans and their terms.

[19] The question whether and who delivered titles to the Claimant is largely irrelevant. It is common ground that titles were handed over to secure the loans and this was

done with the Defendants' acquiescence and on their behalf. The effect of a hand over in such circumstances is to create an equitable mortgage given that, as I find, the purpose was to secure the sums owed. I find as a fact that at all material times Mrs. Jennifer Messado was the Defendants' attorney at law. This is why in his witness statements, dated 22nd February 2018 and 27th April, 2018, both at paragraph 20, Mr. Christopher Kerr said he gave the Claimant three titles. During cross examination he said that it was Mrs. Messado who did so, see evidence noted at paragraph 10 above. He also asserts, which I reject, that the delivery of splinter titles for 54 Norbrook Drive by Mrs. Messado was unauthorized. Mrs. Messado in any event had actual or ostensible authority to act as she did. Surely the Claimants were entitled to rely on this as she was at all material times the Defendants attorney-at law, see paragraph 13 witness statement of Christopher Kerr. In the context of this case, it is a distinction without a difference. The legal consequence of the delivery of the titles for the purpose of securing the loan is that equitable mortgages were created.

[20] On the matter of whether a statement of account was presented I again reject the Defendants' assertion. I accept that exhibit 5 "*updated loan summary*" was given to the Defendants. In cross-examination Mr. Kerr stated it was the first he was seeing the document while looking at it in court. This is rather odd given that it was disclosed to the Defendants by the Claimants' list of documents (see document 1131, page 129 of the Judge's Bundle). Mr. Kerr is either having a failed memory or his attorneys have been delinquent. The denial further shakes his credibility because at paragraph 9, of his witness statement dated 28th March 2018, Mr. Kerr referenced the statement as a disclosed document. I find as a fact that the Claimants did render an account and that the Defendants have failed to pay.

[21] The Claimants have petitioned for an order that they may exercise the powers of a legal mortgagee at statute, common law and equity, see particulars of claim filed on 12th December 2017 in claim 2015CD00118. However, no submissions have

been presented which persuade me that such an order is necessary. It suffices, I think, to declare that the 2nd Claimant is an equitable mortgagee. It is for the Registrar of Titles to act accordingly and/or for the Claimants to advise themselves as to the method of enforcement. The 3rd Defendant, although not a borrower, acted through its directors when it pledged its titles to secure the loans to the 1st Defendant.

[22] The sum due on the face of the final promissory note of the 29th July 2011 is $89,393,356.01. An interest rate of 20% per annum applies from the date of its maturity to the date of delivery of this judgment, a period of 11 years. The total now due is therefore $286,058,739.23.

[23] As stated in paragraph 12 above the 2nd Claimant is the assignee of rights under the loan agreement. The Claimants could not have known whether the validity of the Deed of Assignment would be challenged. It was therefore not unreasonable for the 1st and 2nd Claimants to commence this claim. An order for costs in their favour is appropriate.

[24] There will therefore be judgment as follows:

i. Judgment is entered for the 2nd Claimant against the 1st and 2nd Defendants in the sum of JMD $286,058,739.23 inclusive of interest;

ii. Interest thereon at a rate of 20% per annum from the date of judgment until payment.

iii. It is hereby Declared that the 2nd Claimant is an equitable mortgagee with respect to the following properties:

   a. the land situated at 7 Central Avenue, St. Andrew registered at Volume 1026 Folio 46 of the Register Book of Titles;

   b. the land situated at 3 St. Michael Terrace registered at Volume 1401 Folio 899 of the Register Book of Titles;

   c. the land situated at 31 Dewsbury Avenue registered at Volume 1426 Folio 679 of the Register Book of Titles, and;

d. the land situated at 2 Norbrook Road, Kingston 8 in the parish of St. Andrew registered at Volume 1190 Folio 266 of the Register Book of Titles.

iv. Costs to the 1st and 2nd Claimants against the 1st, 2nd and 3rd Defendants, to be taxed if not agreed.

David Batts
Puisne Judge.