[2012] JMSC Civil123

INTHE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 00578 OF 2008

BETWEEN	**GEORGE HEMMINGS**	**CLAIMANT**
AND	**BALDWIN SMITH**	**DEFENDANT**

Mr. Ronald Paris, instructed by Paris & Company for the claimant.

Mr. Willwood Adams, instructed by Robertson, Smith, Ledgister & Company for the defendant.

Alleged Breach of Loan Agreement – Whether Agreement Made with Company or Individual – Agreement for Purchase of Motor Vehicle – Credibility.

Heard December 8, 2011 and September 20, 2012.

Coram: F. Williams, J.

Background

[1] The breach of a loan agreement for which a 2002 BMW X5 motor vehicle was used as the collateral is at the heart of this claim.

[2] The claimant/borrower alleges that it is the defendant/lender who is in breach of the loan agreement. On the other hand, the defendant/lender claims that it is the claimant/borrower who is in breach; and that, further, the agreement was between the claimant and his (the defendant's) company – Southern Finance Company Limited (hereinafter referred to as "the company"), and not with him personally.

How did the loan agreement come about and what were its terms?

The Agreement for the Loan

[3] The agreement that is the source of contention in this matter, was entered into by the claimant and defendant (or his company) in February, 2007. The written loan agreement was admitted into evidence by consent as Exhibit 1. It is headed: "Loan Payment Agreement" (hereinafter referred to as "the Agreement"). It does not mention who the lender is (whether the defendant himself or the company); but sets out the claimant's name; and the amount of the loan ($1,088,909). The term of the loan is stated to be two years; the interest rate, 30%; and the monthly payments, of $78,277.95, are also set out therein. The document is signed by the claimant and dated March 1, 2007. It also states that the due date for payment is the first of each month and that the security used for the loan is a: "2002 X5 BMW – Chassis # 5UXFA53582LP30217 – Color – Silver", (hereinafter referred to as "the said motor vehicle").

[4] The Agreement also contains a term dealing with a penalty to be applied if the loan is paid off before a certain period. It reads as follows:-

> *"The Borrower hereby agrees to the terms and agreement hereby stated above and has been notified and knowledgeable of pre-payment penalty if loan is paid in full before six month (sic). If borrower so desired (sic) to pay said loan before six month then two (2) month notice must be given in writing in advance whereby he is liable for six (6) month interest in full payment (sic)".*

[5] There is another document put before the court, headed: "Southern Finance Company Limited"; with the sub-heading: "Finance Contract Agreement". The document is dated March 1, 2007. However, it is not signed by the claimant; and, in any event, was not admitted into evidence as an exhibit.

The other Exhibits

[6] There were 8 exhibits in all in this case. Apart from Exhibit 1 that was already dealt with, there were:-

a. Exhibit 2 – A letter dated May 10, 2007 from the defendant to the claimant.

b. Exhibit 3 - claimant's statement of account showing how he says he re-paid the loan.
c. Agreement dated November 11, 2007 which the claimant says is an agreement for the defendant to buy the BMW X5 from him for $5 million.
d. Exhibit 5 – Certificate of Incorporation of Southern Finance Company Limited dated August 7, 2003.
e. Exhibit 6 – Copy of the motor-vehicle certificate of title, showing the transfer of the BMW X5 motor vehicle from the claimant to the defendant and another person.
f. Exhibit 7 – A bill of sale from the Bank of Nova Scotia Jamaica Limited over the said BMW X5 motor vehicle in the sum of $1.1 million dated December 19, 2007.
g. Exhibit 8 – Paragraphs 15 and 19 of a document (a letter dated November 30, 2007), written by the defendant to the claimant, in respect of the payment and use of the sum of $465,000.

The Claimant's Case

[7] The claimant is a businessman who resides in Montego Bay in the parish of St. James. Some time in early 2007, he found himself in need of funds to do certain personal and business transactions. To this end he spoke with his best friend, (and the defendant's cousin), Neil Bennett, who introduced him to the defendant.

[8] He had discussions with the defendant, indicating to him that he wanted some $1.8 million to borrow. After some discussion and after signing Exhibit 1, the claimant was given the sum of $1,088,909, which he said was paid into the account of his said friend, Mr. Bennett. In order to provide security for the said loan, the claimant was required to transfer to the defendant and one Lorraine Patterson, his ownership of the said motor vehicle.

[9] A condition of the transfer of the vehicle to the defendant and Ms. Patterson, was that the vehicle would have been transferred back to the claimant when the loan was liquidated. Additionally, the claimant was to have retained possession of the said motor vehicle for the duration of the loan.

[10] The claimant contends that he made the following payments towards liquidating the loan:-

PAYMENT	DATE	AMOUNT
First payment	April 2, 2007 (for 1.3.2007)	$79,000
Second payment	May 1, 2007 (for 1.4.2007)	$79,000
Third payment	May 9, 2007 (for 1.5.2007 & beyond.)	$700,000
Fourth payment	May 21, 2007	$100,000
Fifth payment	June 6, 2007	$250,000
Sixth payment	August 21, 2007	$150,000
Seventh payment	September 11, 2007	$465,000
TOTAL		**$1, 823,000**.

[11] The last payment was originally made in respect of what the defendant told the claimant was the cost of obtaining certificates of title for a residential lot owned by the claimant, on which his home is built, and lots owned by others in a sub-division; but in respect of which he and the other owners were having difficulty obtaining the said titles. The defendant's promises of expediting the obtaining of the certificates of title did not bear fruit, and so the claimant requested that the said sum be credited to his transaction with the defendant in respect of the said motor vehicle.

[12] The claimant pressed the defendant for receipts for the payments he made; but these were not forthcoming. The defendant shortly thereafter sent him a letter, dated May 10, 2007 (Exhibit 2), indicating, *inter alia*, that the balance due on the loan was $690, 646.01. Up to that point the claimant contends that he was in advance or ahead of the payment schedule.

[13] Matters came to a head in late October to early November of 2007. The claimant, who left the island on October 26, 2007, had left the said motor vehicle with the defendant who had prevailed upon him to do so, on the basis that repairs to the vehicle could be done less expensively in Mandeville than in Montego Bay. The claimant states that he cut short this overseas visit when he learnt that the promises

made by the defendant for an early delivery of the certificates of title did not come to fruition.

[14] On his return to Jamaica, the claimant contends that he received certain information about the defendant that caused him to lose confidence and trust in him. He informed the defendant that he wished to break off all the agreements that he had had with him and demanded that the vehicle be returned to him. The defendant has since refused to hand the vehicle over or to cause it to be handed over (it now being at the Mandeville Police Station).

[15] On November 16, 2007 the claimant contends that, on his informing the defendant that he (the claimant) no longer wanted the said motor vehicle; but that the defendant would have to buy it from him, the defendant executed an agreement (hereinafter referred to as "the second agreement"), to do so in the sum of $5 million. Payment was to have been effected in two installments, with the second and final one being due on November 30, 2007. The defendant, however, has failed to make any payments pursuant to this agreement.

[16] It is a further part of the claimant's case that he did not receive any other payments that the defendant contends that he has made to him.

The Defendant's Case

[17] In relation to the early stages of their interaction and how the loan came about, the defendant's case is similar to that of the claimant. The date on which the agreement was made; the amount of the loan; that the said motor vehicle was to have been used as security and so on are confirmed by the defendant in his witness statement.

[18] There are, however, variations from the claimant's case in several respects: for example, the defendant contends that it was agreed that he would advance to the claimant further sums of money, not exceeding $400,000. Also, he contends that it was further agreed between them that the claimant would leave the said motor vehicle with him (the defendant) on his (the claimant's) absences from Jamaica.

[19] Unlike the claimant, the defendant contends that the claimant made only four payments on the loan, amounting to $829,000 as follows:-

PAYMENT	DATE	AMOUNT
First payment	April 7, 2007	$79,000
Second payment	June, 2007	$150,000
Third payment	August, 2007	$100,000
Fourth payment	September, 2007	$500,000
TOTAL		**$829,000**

[20] The defendant further contends that the said motor vehicle was left with him by the claimant, not because he had intimated that repairs could have been done less expensively in Mandeville than in Montego Bay; but was left with him simply pursuant to the agreement, a term of which required it to have been left with him whenever the claimant was to have been absent from the island.

[21] The defendant confirms that on the claimant's return to the island in November of 2007, the claimant did make a demand on him for the return of the vehicle; but that he, the defendant, refused to do so in order to protect his security, the claimant's payments on the loan being in arrears.

[22] The defendant denies agreeing to buy the claimant's vehicle from him as the second agreement suggests; and contends that he signed the document only because he wished to assist the claimant who needed the document to show to his suppliers of motor vehicles that he had on the wharf, in order to have them cleared.

[23] Apart from the loan that is reflected in the loan documents, the defendant states that he also advanced to the claimant various sums amounting to $392,000.

[24] By his calculations, the claimant owes him the following amounts and total:-

a. Balance – principal sum of $1.4 million $708,912.36
b. Outstanding interest thereon $194,950.89

c. Subsequent advances		$392,400.00
d. To repair motor car		$133,000.00
	TOTAL	**$1,905,000.00**

[25] He argues that he is entitled to retain the security to cover this sum.

The Issues

[26] The defendant, in his skeleton arguments filed prior to the trial of this matter, has stated that there is only one issue. That issue he puts as:-

> *"[W]hether the Finance Contract Agreement entered into on the 1st day of March 2007 between Southern Finance Company Limited and George Hemmings was a valid and legally binding one".*

[27] The claimant, on the other hand, has stated that there are some four issues for the consideration of and determination by the court. These are:-

1. "Did the parties enter into a valid and enforceable contract evidenced by the Loan Payment Agreement...?
2. Did the Claimant repay the Loan with agreed interest in full to the Defendant?
3. Did the Defendant breach the agreement made between the parties when he... retained possession of the Claimant's BMW motor vehicle...?
4. Is there any legal impediment to the Court enforcing the agreement contained in the document dated the 16th November, 2007 and in granting judgment for the Claimant in the sum of $5,000,000 set out therein?"

[28] In the court's view, the facts speak to the existence of more than one issue. In fact, even on the defendant's case itself an issue arises as to whether the agreement with the claimant was entered into by the defendant himself or Southern Finance Company Limited. Indeed, this was taken as a preliminary point by counsel for the

defendant (that is, that the agreement was between the claimant and the company and not the defendant personally). However, the court ruled that a determination of that issue had to be decided on the basis of the court's assessment of the evidence in the case. The court now proposes to do that assessment.

Was the Agreement with the Defendant Personally or the Company?

[29] In paragraph 3 of the Particulars of Claim the claimant mentions that the defendant informed him that he was the owner of the company. However, throughout the said Particulars of Claim, all the arrangements are averred to have been made between the claimant on the one hand; and the defendant, on the other; and not with the company.

[30] In the Defence, which was filed on August 12, 2008, the averments are to similar effect – that is, that the arrangements were made between the claimant on the one hand and the defendant (personally), on the other.

[31] Further, in the defendant's witness statement, filed on the 29th day of October, 2008, and allowed at the trial hereof to stand as his evidence-in-chief, the position is the very same. In the witness statement, the defendant uses the words "I" and "me" throughout to describe his interaction with the claimant in making the arrangements that led up to the loan and their interaction with respect to the administration of the loan thereafter.

[32] An examination of the transfer documents in respect of the said motor vehicle is also instructive – showing as it does that the transfer was effected not to the company, to which, as a registered legal entity, the said motor vehicle could have been legitimately transferred; but instead to the defendant personally and Ms. Patterson. The defendant's attempt to explain away this somewhat curious state of affairs by saying that that was done because he and Ms. Patterson held the lines of credit which the claimant was seeking to access cannot be accepted. The reason for this is that it flies in the face of his efforts to build a case based on his contention that the transactions were between the claimant and the company; and not with him personally. Additionally, such documents that seem to have been done on the

company's letterhead and to which reference was made during the course of the trial, are not signed by the claimant.

[33] Further, whichever case one accepts at the end of the day, when one looks at the way in which both parties indicate that the loan(s) was or were administered – with several payments allegedly having been made without any documentation or paper trail, those circumstances are more suggestive of a personal, somewhat informal arrangement, rather than a loan being administered by a company borrowing from a reputable bank (the Bank of Nova Scotia Jamaica Limited), for on-lending to an individual, which would presumably require more formality and accountability in the form of proper record keeping.

[34] In the circumstances, the court finds that the agreement in respect of the loan was entered into and existed between the claimant and the defendant personally (and not the company). The ancient and oft-cited case of **Salomon v Salomon** [1897] AC, 22, H.L, is authority for the proposition that a company is an entirely different and separate person from its shareholder(s).

[35] So, in relation to the sole issue posed by the defendant and the first issue posed by the claimant, we may now proceed to examine the validity of the loan agreement – with the understanding that that agreement existed between the claimant and defendant personally.

Was the Loan Agreement Valid and Enforceable?

[36] An indication of the answer to this issue lies in the fact that neither party is making any contention contrary to its validity: that is, they are both of the view that the agreement is valid and enforceable. The issues that are joined between them relate to matters such as how the agreement was performed and which party might be in breach. Although their failure to raise a challenge to the validity of the contract is not conclusive, it must be said that neither has the court, having perused the loan agreement, seen any legal impediment in the way of finding the loan agreement to be valid and enforceable.

[37] A perusal of Exhibit 1 (in which the agreement is contained) reveals all the expected and usual features of a loan agreement, such as the amount of the loan, the term of the loan and the relevant rate of interest. There is no consideration or principle of law of which the court is aware that would make the loan agreement invalid or unenforceable and so the court will give effect to the intention of the parties which is reflected in the said agreement. Accordingly, the court finds the loan agreement to be valid and enforceable.

Did the Claimant Repay the Loan with Agreed Interest in Full to the Defendant?

[38] As indicated previously, this is the issue that has been most doggedly contested by the parties, with the claimant contending that he has paid off the loan; and the defendant, on the other hand, contending that he has not.

[39] There is agreement by the defendant that the claimant made the first of the payments that the claimant asserts that he made. This was the payment made in April, amounting to $79,000. There is also the contention on the part of the defendant that the payments that he received from the claimant total $829,000. That is all that he admits receiving.

[40] It should also be remembered that the claimant states in evidence that he requested the defendant to credit to the loan payments the sum of $465,000 which was originally paid in respect of the land transactions. The defendant, however, has not directly addressed this sum in his witness statement or in the amplification of his evidence-in-chief. In cross-examination it was put to him that he had received the said sum, but this suggestion he denied. It was at that point that the claimant's counsel sought to tender into evidence a certain portion of a letter written by the defendant to the claimant, and dated November 30, 2007. Paragraphs 15 and 19 of the said letter (and not the letter in its entirety), were together admitted into evidence as Exhibit 8. They read as follows:

> "*15. You then stated how I can help you obtain a much smaller amount of funds in the amount of $2,500,000 and I stated I will proceed by using my personal security to do so but I have to used (sic) the $465,000 to carry out*

the transaction and in so doing deduct it from the balance of the old payment agreement, you verbally agreed"

"19. After a proper calculation adding all funds you give me including the $465,000.00 that was agreed to be deducted that is on contract regarding the X5 to be resold to you, I have treat (sic) the transaction as a loan given to you although you sold me the X5 by way of sale-transfer agreement which is titled in my name and appointee should anything happen to me beyond my control, your balance owing". (Emphasis added).

[41] These paragraphs, in the court's view, when read against the background of the defendant's failure to mention this said sum in his pleadings or his witness statement, raise a question about the reliability of the defendant's evidence and the accuracy of his calculations. Conversely, it lends credence to the claimant's testimony as to the payment of this sum to the defendant and inclines the court to have rather more confidence in the reliability of his testimony.

[42] Then there is the contention of the defendant that there were further breaches of the loan agreement on the part of the claimant by virtue of his making payments before their due dates and in amounts that were greater than the sums actually due. (see page 5 of the defendant's skeleton arguments). A perusal of the loan agreement, however, (Exhibit 1), shows that the only penalty that is prescribed and the only early payment that is proscribed is payment of the loan (that is, liquidation), within the first six months of its currency. Nothing else is proscribed. So that while the court accepts the statement of general contractual principles set out in the case cited by counsel for the defendant – that is **Photo Productions Ltd. v Securicor Transport Ltd**. [1980] 1 All ER, 556 – in the particular facts and circumstances of this case, it does not view early payment of installments or of the loan itself as amounting to fundamental breach.

[43] It is contended as well by the defendant that there was an error in the calculation of the monthly payment and that the correct sum was $98,588.33 (and not

$78,277.76). Again, this argument is being advanced for the first time in the defendant's skeleton arguments and had not before been put forward in his defence or witness statement in this matter.

[44] And there are other matters that are cause for concern on the defendant's case. For example, the defendant's *viva voce* evidence is to the effect that he obtained from the bank with which he had the lines of credit, the sum of $1.8 million. Of this he loaned $1.4 to the claimant, deducting nearly $400,000 for various fees and expenses. The other $400,000 he used for his own purposes as he had "...outstanding credit with the bank and it went to pay off one of the security. My company would be responsible for that $400,000 and the interest". However, Exhibit 1 states that the amount of the loan that was applied for was $1.8 million and the amount approved was $1.4 million, which would tie in with the claimant's contention that he had requested a loan of $1.8 million and that the defendant had told him that he had only been able to obtain the sum of $1.4 million (see paragraphs 4 and 7 of the claimant's witness statement).

[45] Further, in Exhibit 2 (letter dated May 10, 2007), the defendant gives the impression that as at that date the balance on the loan was $690,909. He also admitted in cross-examination that after May 10, 2007 he received from the claimant on account of the loan some $750,000. On the court's understanding of the evidence, that sum does not include the $465,000 which was paid on the land deal. Would that not mean that the defendant would have received from the claimant after May 10, 2007 the sum of $1,215,000 (or, at the very least, $750,000), to clear a balance of $690,909?

[46] These are some of the factors that have conspired to undermine what the defendant would wish the court to regard as the reliability of his case; and that, on the other hand, have combined to incline the court to regard the claimant as being the more credible party and the claimant's case as being the more reliable on a balance of probabilities.

[47] In light of these findings, the court is driven to find as well that the claimant had liquidated the loan at the time he demanded the return of the said motor vehicle in

November of 2007 and that the defendant was in breach of the collateral agreement in respect of the said motor vehicle by not returning it when the claimant demanded it.

Any Legal Impediment to the Court
Enforcing the Agreement dated the 16th November, 2007?

[48] It is Exhibit 4 that forms the subject of the dispute on this issue. It is headed "Payment Agreement". Its terms are sufficiently concise and of sufficient importance for them to be set out in full. Those terms are as follows:-

> *"This agreement was made on this 16th day of November between Baldwin Smith and George Hemmings, whereas Baldwin Smith agrees to pay the total sum of $5,000,000 to George Hemmings for 2002 BMW X5 with first payment due on the 23rd November 2007 in the amount of $2,500,000 and second payment due on 30th, November 2007 in the Amount of $2,500,000.*
>
> *It is agreed that this price will include 4 rims and tires and that this the final payment and no more."*

It is signed and dated by both parties and witnessed.

[49] The claimant's stance in relation to this document is that it relates to the said motor vehicle that is at the heart of this suit. The defendant, on the other hand, contends that the agreement has nothing to do with the said motor vehicle; but relates to an entirely different vehicle altogether and also has nothing to do with the original transaction. His position is that he signed this document at the request of the claimant, who had three or so vehicles on the wharf to be cleared and who needed to convince his suppliers that he would shortly be receiving that much money (see paragraph 12 of the defendant's witness statement).

[50] What the defendant is really saying is that this document has come about because he conspired with the claimant to deceive a third party or third parties. In

other words, by signing this document he gave a false impression which he realized might have been acted on by others. Were he attempting to sue on this agreement, whilst indicating what he says is the true underlying basis for its creation, it is unlikely that the court would assist him in his quest to enforce it (see, for the example, **Brown Jenkinson Co. Ltd v Percy Dalton (London) Limited** [1957] 2 Q.B. 621).

[51] So, he is not arguing *non est factum* or trying to advance a defence of duress, undue influence or any defence of that sort. He is admitting to signing the document of his own free will and knowing of its legal significance with a view to deceiving another or others. He has assisted in the creation of what he hopes will be regarded by this court as something in the nature of a legal fiction and unenforceable. The question that arises at this point is whether that explanation should be accepted.

[52] It should be remembered that we are here dealing with someone who is a businessman and management consultant who has been running a finance company since its incorporation in 2003, engaged in the business of giving loans. It was he who prepared the loan payment agreement (Exhibit 1). He is someone with some business experience. Is it likely that he would have signed another agreement with no connection to the first one, dealing with a vehicle of the same year, model and make as in the previous agreement without seeking to distinguish the one vehicle from the other? Further, is he likely to have assisted the claimant in the way that he said he did (by creating a false document to deceive others) at a time when the claimant (on the defendant's account of the claimant's performance in servicing the loan) had proven himself so unreliable in making the loan payments?

[53] Additionally, since, on the face of it, the second agreement suggests an outright sale of the said motor vehicle, is it likely that the defendant would have entered into such an agreement without having some other document created to protect himself and to explain the true situation, similar to his creating documents relating to a loan and a sale in respect of the first agreement? In the court's view, the answer to these questions must be "no".

[54] This, therefore, means that the court rejects the explanation for the creation of the second agreement that has been advanced by the defendant; and finds that the

document was created pursuant to his intention to purchase the said motor vehicle from the claimant, the latter having, to the defendant's knowledge, liquidated the loan at the time the second agreement was created. In addition, there is, so far as the court can discern, no legal impediment to its enforcement.

Conclusion

[55] At the heart of this trial is the matter of credibility. This turns on the court's assessment of the witnesses and their evidence. Having conducted such an assessment, the court (for the reasons discussed above), regards the claimant as the more credible and reliable witness and finds that he has proven his case against the defendant on a balance of probabilities.

[56] From the evidence, as a result of the defendant's wrongfully retaining the said motor vehicle, when the loan had been liquidated, it was taken to the Mandeville Police Station, where it lies a virtual wreck, in a state of general deterioration, with several of its parts having gone missing. It is therefore not in the state in which it was in 2007 when the defendant wrongfully retained it, but is now an asset of (on the court's understanding of the evidence), considerably less value. There is also an existing bill of sale over the said motor vehicle in favour of the Bank of Nova Scotia Jamaica Limited, which, in the court's view, it would be best that the defendant himself resolve with the bank.

[57] In the court's view, the best way of achieving justice in this case is by awarding judgment to the claimant in the sum of $5,000,000 for the defendant's breach of the said second agreement, with interest. He must also have his costs.

[58] Before parting with this matter, I wish to apologize to the parties and their counsel for the delay in the delivery of this judgment. It was in fact started some time ago, but was overtaken by matters of greater urgency.

The orders are therefore as follows:

a. **Judgment for the claimant in the sum of $5,000,000 with interest thereon at the rate of 6% per annum from December 1, 2007 to September 20, 2012.**
b. **Costs to the claimant to be agreed or taxed.**