Judgment Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT E114/96

BETWEEN	MUTUAL SECURITY BANK LTD	PLAINTIFF
A N D	RAYMOND CLOUGH	DEFENDANT

D. Morrison Q.C. instructed by Miss Carol Aina of Dunn, Cox & Orrett for plaintiff.

W. Spaulding, Q.C. Enos Grant and Miss Simone Collings instructed by Clough, Long & Co. for defendant.

Mrs. Pryia Levers for third party Roger Khemlani

Heard: 3rd & 4th October, 1996

HARRISON, PAUL J.

Notice of objection - preliminary objection

1. An undertaking was given by defendant - as a solicitor/attorney-at-law to the plaintiff by a letter dated 15th February, 1994.

2. The consideration for this undertaking was the release by the plaintiff of mortgages held as mortgagees on certain lots including lots 23 and 27 part of Manor Centre, Constant Spring Road, St. Andrew.

The defendant in the said undertaking promised to remit to the plaintiff the net balance of proceeds of sale of the said lots, on completion. Completion was effected on the said lots in January 1995 and October, 1994, respectively.

3. The defendant contends that his client Roger Khemlani, the mortgagor to the plaintiff of the said lots, agreed on 14th October, 1994 with the defendant that he offset against the said net balance of proceeds, fees owed to him, as attorney for the said Khemlani, as agreed between Khemlani and the plaintiff.

4. The defendant contends that he spoke to the plaintiff's agent a Mrs. Reid who "confirmed on behalf of the plaintiff that she agreed that he should set-off the fees against the proceeds of the sale." He also wrote to the plaintiff on 20th October, 1994 confirming this.

5. The defendant has taken a preliminary objection to the plaintiff's notice of motion - for enforcement of the said undertaking, contending

(a) the substance of the plaintiff's complaint is an allegation of fraud against the defendant which necessitated that the plaintiff proceed by writ.

(b) the terms of the undertaking were modified by directives of Khemlani to the defendant on 14th October, 1994 confirmed by the plaintiff and acted upon by the defendant with no protest by the plaintiff, whose conduct further confirms the said modification, therefore the use of the originating motion in the court is not an appropriate process.

The Court has jurisdiction over attorneys-at-law as agreed, i.e. an inherent jurisdiction, to supervise their conduct. This exercise of this jurisdiction is discretionary. An undertaking given by an attorney-at-law is expected by the Court to be honoured. The Court will exercise its jurisdiction, in its discretion, where the terms of the undertaking are clear.

An application to the Court for the enforcement of the said undertaking may be made by motion - see Cordery's, Law relating to Solicitors, 8th Edition,

page 110. However, if there are substantial disputes of facts and competing issues, a motion is inappropriate for the resolving of the disputes.

Section 5 of the Legal Profession Act makes an attorney-at-law, "... subject to all such liabilities as attach by law to a solicitor."

Hamilton J, in United Mining Ltd. v Becher [1608 - 1610] All E.R. Rep. 876 confirmed the use of the originating summons as appropriate, in the exercise of the jurisdiction, to enforce such undertakings to ensure in attorneys, "... the proper and professional observation of undertakings professionally given ..." In Geoffrey Silver et al v Barnes [1971] 1 All E.R. 473, Lord Denning reaffirmed the said summary jurisdiction of the Court concerning such undertakings, recognized its exercise in a clear case, but held in that case that the process of the originating summons was inappropriate, because it was arguable whether the solicitor had the authority to give the undertaking.

Carey, J.A., in Morris v Gen. Legal Council, Court of Appeal No. 31/82 - 32/1/85, referring to United Mining and Re Hilliard (1845) 2 Dow. & L 919, stated that the court enforced these undertakings, "... to ensure a uniform code of honourable conduct ..." by its officers. In the instant case the defendant maintains that there is a "veiled allegation of fraud" on the part of the defendant. The plaintiff has not alleged fraud. This Court is of the view that if the plaintiff is alleging fraud, it would necessarily have to do so specially and clearly. This Court cannot be seen as guiding the plaintiff into the area of fraud, and so force it to fashion a plea on which it does not rely. In any event any allegation of fraud,

even if it was subtley implied, which this Court finds is not, it would be irrelevant to these proceedings, because a Court would not make that the determinant as to whether or not an undertaking admittedly given, should or should not be enforced by the Court. See United Mining v Becher, supra.

I do not see in the plaintiff's complaint, a conversion that is fraudulent and so satisfy the provisions of the offence under section 24 of the Larceny Act, as argued by the defendant. Prima facie the plaintiff is complaining of a claim by the defendant of a right to treat the undertaking as modified by oral agreements, and avail himself of consequential set offs.

In Re Hilliard, a challenge that the undertaking was void in breach of the Statute of Frauds was regarded as appropriate to be dealt with by motion. Carey, J.A., in Morris v G.L.C. confirmed the exercise of the court's discretion even if "some technicial defence is open to a party ..."

Patterson, J.A. in Melville v Chukka COVE Ltd. SCCA 41/95 - 25th February, 1996, referred to the words of Lord Templeman in Eldemire v Eldemire (unreported) P.C. Nos 33/89 13/90, when he said:

> "..... an originating summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the Court will direct the defendants who have given conflicting evidence by affidavit to be examined and cross-examined .... and will decide the disputed facts."

In the instant case, the undertaking was given in clear terms. A question arises whether or not as the defendant contends, the oral agreement, the subsequent correspondence and the subsequent conduct of the parties, have together modified the written document, varying its terms and therefore no longer binding the defendant as he had originally resolved.

I therefore hold that the issue can be conveniently resolved by the means of the said motion. The preliminary objection therefore fails.

Matter of cost reserved.
Part-heard and adjourned sine die.