[2016] JMCC COMM 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013HCV05748/ 2015CD0013

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**CLAIMANT**
AND	**HUMPHREY LEE MCPHERSON**	**DEFENDANT**

Loan- Application to strike out defence as showing no real prospect of success – Application for summary judgment – Whether fact that promissory note not signed a defence – Whether fact that bank wrongly debited trust account a defence – Loan admitted and repayment not alleged

Mr. Hadrian Christie instructed by Patterson, Mair, Hamilton for the Claimant

Defendant appears in person.

In Chambers

Heard: 22nd January 2016, 5th February, 2016

BATTS, J.

[1] By Notice of Application filed on the 9 May 2014 the Claimant applied for the following:

a) Transferral to the commercial list

b) That Defence and Counterclaim filed on the 8th January 2014 be struck out.

c) Summary Judgment

d) That Applicant be permitted to discontinue its claim with costs in favour of the Claimant

e) Alternatively, that Claimant be compelled to respond to Claimant's request for Information filed on 20th March 2014.

[2] By Order made on the 4th February 2015 the Court:

a) Transferred the matter to the Commercial list

b) Granted permission to the Defendant to amend his Defence and counterclaim.

c) Granted permission for both parties to file further Affidavits

d) Ordered skeleton submissions and a list of authorities

e) Ordered the Defendant to respond to the request for information

[3] By Order made on the 14th October 2015 certain paragraphs of the Defendants affidavit were ordered struck out and the Defendant was directed to re-file an affidavit without those paragraphs. Paragraphs (b), (c) and (d) of the Claimant's application came on for hearing before me on the 22nd January, 2016. The Defendant an attorney at law insisted that he would represent himself, regrettably he has paid no heed to the old adage about an attorney who chooses to represent himself.

[4] In addition to the respective statements of case both parties filed Affidavits. However, the factual differences are very few and at the end of the day I find hardly any that are germane. In an Amended Claim and Particulars of Claim filed on the 4th March 2014 the following is alleged:

a) By agreement dated 22 December 2008 the Claimant agreed to lend $7,100,000 to the Defendant. This was by way of consolidation of debts in respect of loan accounts #231045019 and #23104069.

b) The Defendant instructed the Claimant that account #232188324 (a client trust account) should be the account from which payment should be deducted monthly to service the new loan account #231051622.

c) By letter dated 9th December 2008 the Defendant instructed the Claimant to debit funds from account #232188324 and account #232188136 in Order to convert funds to United States dollars and place them on Fixed Deposit.

d) A Fixed Deposit account numbered 237197445 was opened in consequence.

e) All the Defendant's Fixed Deposits where used as security for the loan and these totalled US$76,800.00.

f) The loan amount of $7,100,000 was disbursed and applied in accordance with instructions from the Defendant.

g) The Defendant was obliged pursuant to the terms of the agreement to pay $195,086.40 monthly. His last such payment was made on the 30th October 2009 .

h) As at the 31st January 2014 the balance due was $1,984,559.26. That amount stood to the Defendants credit in account #23218316 and was applied toward the indebtedness.

i) The Claimant seeks a Declaration that it was entitled to apply US$76,800 and J$1,984,559.26 held in the Defendant's accounts, towards the loan account.

[5] By Amended Defence and Counterclaim filed on the 20th March 2015 the Defendant contends:

a) The letter of commitment dated 22nd December 2008 was superseded by a letter of commitment dated 24th September 2009.

b) The sum loaned was $6,533,861.00 and not $7,100,000.00.

c) The Defendant denies that he instructed the Claimant to use current account #232188324 as the account from which monthly payments were to be deducted.

d) He contends that he did not instruct the Claimant to use Fixed Deposits #237194284 or Fixed Deposit #237194918 as security for the loan. It was a separate fund of US$19,300.00 that was to be so utilised.

e) The Defendant does not admit executing a Promissory Note dated 22nd December 2008 and denies executing one for the facility underlying letter of commitment dated 24 September 2009.

f) The Defendant admits that he stopped making payment on the loan. He did so because the Claimant (i) failed to issue a promissory note underlying letter of commitment dated 24 September 2009; (ii) failed to address issues raised in letters to the Claimant, and (iii) made withdrawals from his trust account #232188324 without his permission.

g) The Defendant contends that the Claimants' application of the fixed Deposits and US dollar current account to the Defendant's loan account #231051627 is fraudulent, illegal, null and void.

h) By way of counterclaim, the Defendant seeks (i) Declarations that the loan agreements are illegal, null and void; and (ii) Special damages and damages for unlawful inappropriate and/or unauthorised use of Defendants funds. The Defendant also claims for an accounting.

[6] In his Amended Answer to Request for Information filed on the 17th March 2014 the Defendant stated:

a) No operative account or Promissory Note exists for the letter of Commitment dated 24th September, 2009 for the amount of $6,533,861.00 "purportedly" loaned

as the loan was not “consummated” and prior loan was “terminated.”

b) Account # 232188324 is a Claimant’s Trust Account.

c) The Promissory Note marked ‘D’ and attached to the Claim Form filed on 18th October 2013 in relation to paragraph 5 of the Defence, the letter of commitment dated 22nd December 2008 is irrelevant immaterial and has no legal effect as ‘underwriting’ the terminated Letter of Commitment dated 22nd December 2008 for the loan of $7,100,000.00.

d) The Defendant owes no money to the Claimant for the reasons stated above, and demanded that his Fixed Deposit of US$76,000.00 be returned.

[7] Each party filed written Submissions and Bundles of Authorities. I have read all Affidavits and Submissions. I do not propose to repeat them in this judgment but will reference only so much of those documents as I consider necessary to explain this, my decision.

[8] The Application to strike out the Defendant’s Statement of case is made pursuant to the Civil Procedure Rules (CPR) Rule 26.3 (1) (a) and (c). The Claimant contends firstly, that the Defence and Counter claim disclose no reasonable ground for Defence or counterclaim. Secondly that the Counterclaim breached Rule 18.2 of the CPR.

[9] The Application for Summary Judgment is made pursuant to CPR rule 15.2 (a) and (b). The test, and the burden is on the applicant in this regard, is whether the Defendant has no real prospect of succeeding on his counterclaim or defence. He will have no prospect of success if the Defence and Counterclaim disclose no reasonable ground of defence or cause of action respectively; either because it is unknown to law, or is vague, inchoate or ill-founded, see ***Sebol***

Limited and Selective Homes v Ken Tomlinson unreported SCCA 115/2007 judgment 12th December 2008. Whereas the evidence is considered on the application for summary judgment, only the statements of case are reviewed on the application to strike out.

[10] I agree with the Claimant and hold that the Defence and counterclaim disclose no arguable case and have no real prospect of success. In the first place the Defendant in Para 8 of his Defence and Counterclaim admits he stopped making payments on the loan. The reasons advanced for doing so (because Claimant failed to issue a promissory note, failed to address issues raised in certain letters and because there were withdrawals from his client's trust account) are not answers to a claim for repayment of sums loaned. He does not deny borrowing the sums alleged. On the contrary, the Defendant has admitted that he stopped repaying the loan

[11] The first reason alleged i.e. issuance of a promissory note, is irrelevant. If the Claimant has advanced sums without first having the Defendant sign an I.O.U. (which is what a promissory note is) it means they may here evidential difficulties. They also may not have the 'protection' of the Bills of Exchange Act. It does not make a loan any less a loan. The issues raised in 'certain letters' are so vague a pleading as to be disregarded, but in any event I treat with them at Paras 24 and 25 below when considering the Summary Judgment application. Suffice it to say they too do not disclose a reason not to repay sums borrowed. The third reason advanced is equally incomprehensible. If, as alleged, the bank wrongfully or unlawfully withdrew monthly repayments from a trust account without authorisation, then it means the Defendants debt to them was reduced accordingly. This is a benefit to the Defendant. Once the error comes to the Defendant's attention he, to my mind, has a duty to point it out to the Claimant and to transfer funds from the account from which those debits were to be raised and place them into or to the credit of the trust account. Alternatively, the Claimant ought to re-credit the Trust account and debit the accounts from which the amounts ought to have been withdrawn. There is no loss on either side

provided the Claimant has his own personal funds sufficient within the bank. Interest will run on either side and is likely in any event to be higher on the loan account. There is no allegation of any peculiar or special loss in consequence of the withdrawal from the trust account. It is not asserted for example that any cheque was dishonoured or embarrassment caused to the Defendant in consequence of the alleged wrongful withdrawal.

[12] The entire counterclaim is premised on this wrongful withdrawal. For the reasons stated, I would also strike out the counterclaim. The Claimant also seeks to have the Counterclaim struck out because it was not separately stamped. I would, if it had been necessary, have allowed the counterclaim to stand upon an undertaking by the Defendant to correct that administrative oversight.

[13] The Defence in its first paragraph alleges that the amount loaned was $6,533,861.00 and not $7,100,000.00. It does not however challenge the balance that is allegedly due. The Defence is that the letter of commitment of 24th September 2009 superseded that of the 22 December 2008 which was therefore no longer effective. It is further alleged that the letter of commitment dated 24th September 2009 was unenforceable and void because no promissory note had been signed. During his submissions the Defendant was unable to answer, to my satisfaction, the question whether it was his position that in those circumstances the loan had disappeared. An allegation that a promissory note was not signed is not a Defence to a claim for repayment of sums borrowed,

[14] For the reasons stated above, I strike out the Defence and Counterclaim as disclosing no arguable defence or counterclaim.

[15] The application for Summary Judgment will call for a consideration of the evidence filed. I go on to consider this in the event some other court disagrees with my conclusion on the application to strike out.

[16] The Claimant's case is supported by the affidavits of Damian Fletcher filed on the 18th June 2014 and Pauline Philips filed on the 30th June 2015. Documentation

is attached to support their assertions. **Exhibit DF1** is a letter of commitment dated 22nd December 2008. It clearly states that the loan was amortised and totalled $7,100,000.00. The purpose was debt consolidation and expenses. It was repayable monthly at $195,086 per month over 60 months. That document was signed by the Defendant on the 23rd December, 2008.

[17] By a handwritten note dated the 9th December 2008 [Exhibit DFC3] the Defendant instructed the Claimant to debit two accounts (one of which was his Client trust account #232188324) with a total of $1,550,000, convert same to United States dollars and place on Fixed deposit "to secure a loan." The Defendant gave written authorisation dated 18th October 2007 [Exhibit DF4], generally, for the Claimant to hold or apply any credit balances towards satisfaction of his indebtedness.

[18] By letter dated 15th July 2009 [Exhibit DF6] addressed to the Defendant, chartered accountants Owen Orgill and Co. stated in part:

> "the reconciliation of both loan accounts did not disclosed (sic) any major discrepancies. The current account #232188324 (Client trust account) had a withdrawal by the bank of $1,200,000 on December 22nd 2008 to account #237197445.
>
> It was noticeable that the bank made all loan principal and interest repayments, except once in September 2008 ($127,516.20), from the Client Trust Account and not the Administered Account."
>
> And later,
>
> "We recommend that designated client account be opened and maintained at National Commercial Bank Jamaica Ltd. or another commercial bank. The account should only be used to maintain (sic) client business the Bank of Nova Scotia has such facility. A the Bank of Nova Scotia Ltd. withdrawals can only be made on your instructions, regardless of what is owed to the bank by you personally."

It is to be noted that the Defendant described Owen Orgill and Co. as accountants "retained" by him. [See Paragraph 6 of the Amended Defence and Counterclaim filed on the 20th March 2015]

[19] A letter of commitment, dated 24th September 2009 [Exhibit DF7] is signed and accepted by the Defendant. That document is for an amortised loan of $6,833,861.00 the purpose is described as "continuation of existing facility and "to assist with personal expenses." It too was repayable at $195,086.40 per month. The document ends as follows:

> "if you accept this offer, please sign and return to us attached copy of this letter. Unless we receive your response by 2009 October 24th this commitment will lapse and the facility will not be available to you."

The letter was signed by the defendant indicating acceptance on the 15th October 2009.

[20] At paragraph 23 of his affidavit Mr. Damian Fletcher states,

> "In DF7 reference is made to the First Agreement as a continuation of existing facility. No further loans were granted to the Defendant. The sum of $6,833,861.00 was not loaned to the Defendant under the Second Agreement as contended in paragraph 1 of his Defence. Furthermore no sums were disbursed under this Second Agreement. The Defendant simply received an overdraft facility."

[21] The Defendant's affidavit filed on the 21 January 2016 states at paragraph 4:

> "That a limited loan contractual relationship exist between [the Defendant] and the Claimant under the 2008 "Terminated/refinanced loan agreement," but none under the 2009, "Defective Loan Agreement: and whatever contractual loan Defendant had with Claimant ended prior to or on September 24th 2009, and so did Defendant's indebtedness to the Claimant."

Importantly the Defendant does not anywhere in his affidavit deny that money was borrowed, nor does he say that the loan was repaid. He however repeatedly denies owing any money.

[22] At paragraph 12 of the affidavit and somewhat curiously the Defendant says:

> "That the Claimant's nominal loans to the Defendant amounts to $13,533,861.00 $7,100.0000 under the terminated refinance letter of commitment dated 2nd December 2008 and $6,537,861.00 under the defective letter of Commitment dated 24 September 2009."

[23] In paragraph 15 of his Affidavit the Defendant states,

> "15. That the Claimant sought to justify another of its misdeeds, claiming by letter dated March 4th 2013 from Claimant's attorneys at law that they have adjusted the amount of their claim from $4,010,154.17 to $1,984,559.26 which has been applied to Defendant's indebtedness, which now settles Defendant's loan in full."

[24] That a letter is attached to his Defence and counterclaim to which paragraph 15 of his affidavit referred. That letter dated 16 December 2009 acknowledges receipt of a letter dated 15 July 2009 from Owen, Orgill and Company. It asserts to the Defendant,

> "You had instructed us to use account #232188324 as your operative account hence the reason the loan payments were taken from that account. It should be noted that the account was in debit in September 2008 when the loan payment was due and we were advised to take the payment of $127,516.20 from account #232188316.

And later,

> "We concur with your accountant that the Claimant's trust account should only be used to maintain Client's business. We therefore ask that you instruct us in writing to change the operative account, to facilitate the loan payments from #232188324 to #232188316."

[25] Perusal of several letters written by the Defendant to the Claimant and attached to his Defence and Counterclaim reveals no relevant allegation of fact. The letters generally repeat unsubstantiated accusations and makes irrelevant allegations. So for example:

(a) Letter dated 29 April 2011:

> "We still await a reply to our letter of February 8 2011 copy of which is enclosed.
>
> The writer is still at a loss as to what is NCB's position in relation to the US Fixed Deposits securing both the Amortized loan facility at account no. 231051627 and the overdraft facility at current account NO. 232188324 notwithstanding NCB's diversionary tactics.
>
> NCB has been threatening the writer with legal action for more than a year and a constant demand to deposit substantial funds in current account No. 232188324 a position the writer opposed, continues to oppose for good reason and can substantiate his opposition
>
> The writer reiterates that NCB provides details of transactions and proper documentation of the appropriate accounts (amortised loans and overdraft facilities)" underlying NCB demand to position the writer to determine the appropriateness of NCB's demand and take the necessary action to resolve the matter.
>
> Clearly the matter is heading somewhere else."

(b) Letter dated 19th January, 2011

> "We refer to your letter dated January 11th 2011 threatening legal action against the writer within ten days from the date of your aforesaid letter because of the writer's alleged indebtedness to NCB in the sum of $1,533,660,89 in relation to an Amortized Loan facility at Cross Roads Branch at account No. 231051627 and $295,220.49 in relation to current account No. 232188324 at Cross Roads Branch and write to advise the writer has not been provided appropriate documentation to determine whether or not the writer is indebtedness to NCB for any of aforesaid sums or whether its NCB that has an indebtedness to the writer

notwithstanding the Fixed Deposits (securing the amortized loan facility) and overdraft facility at current account No. 232188324.

The writer now provides in relation to his position, documents as follows:

1. Letter from HLM & Co. to NCB dated December 15th 2009.

2. Letter from Owen Orgill & Co. to HLM & Co. with attached detailed analysis.

3. Letter from HLM & Co. to Owen Orgill & Co. dated July 6th 2009.

4. Letter from HLM & Co. to Owen Orgill & Co. dated 17th June 2009

5. Letter from HLM & Co. to Owen Orgill & Co. dated April 14 th 2009.

6. Letter from HLM & Co. to NCB dated February 10th 2009.

The writer does not agree with the detailed analysis of Owen Orgill & Co., which fails to provide a detailed analysis of the transactions in Amortised loan and at current account No. 232188324 the appropriate accounts underlying NCB demand.

The writer now again request that NCB provide detail of transactions and proper documentation of the appropriate accounts underlying NCB demand so that the writer will be in a position to determine the appropriateness of NCB's demand and take the necessary action to resolve the matter."

[26] It is apparent from the correspondence, referenced in a general way in the Defendant's defence and in his Affidavit opposing the application, that there is no arguable defence to the claim. Indeed the Defendant has taken issue with his accountant's confirmation, after reconciliation, that there was a balance due and owing. The Defendant does not deny borrowing the funds; nor does he assert that he has repaid the same. He complains about debits from an incorrect account (which served to reduce the loan balance), but nowhere asserts that he

had fully repaid the loan. There is no credible counterclaim or any evidence of damage or loss that may be relied on to set off any sum due and owing.

[27] When the claim was filed on the 18th October 2013 the balance claimed was $4,010,145.17. However when the claim was amended on the 4th March 2014 it reflected the fact that on or about the 14th February 2014 the Claimant applied the sum of $1,984,559.26 (which stood to the Defendant's credit in account #232188316) towards his indebtedness on loan account #231051627. This liquated the loan account. The Claimant therefore in its Amended Claim sought only a Declaration that it was entitled to respectively apply US$76,800.00 and J$1,984,559.26 from the Defendant's Fixed Deposit accounts and account #231051627 to loan account #231051627.

[28] In his written submissions the Defendant relies on the authorities of ***Delfosse v Alvin Wiggall Suit CL2000/D055*** unreported judgment 31/7/01 and ***Capital & Credit Merchant Bank Ltd. v. Lindo 2010 CD 00026*** Unreported Judgment of the 10 December 2010. He alleged a parallel situation in his case because:

> "The Defendant in instant case stopped making payment on the loan when the Claimant failed to correct the irregularities of the non delivery of the promissory note and the use of Defendant's client's trust account as the operative account. The Claimant, its servant or agents visited Defendant at his office to resolve Promissory Note issue in relation to the letter dated September 24th 2009 ... but Claimant's only demand is for Defendant to deposit substantial sums in current account No. 232188324 (Defendant's client trust account) to be deducted by Claimant to service loan without addressing in any way issues raised by the Defendant."

The Defendant fails to realise that in the Delfosse case that Defendant alleged that there was no agreement between himself and the Claimant for a loan and there was no consideration for the promissory note signed by him. The Claimant had filed no response to these allegations. It is not surprising that the court found triable issues. Similarly in the Capital and Credit Merchant Bank case the

Defendant contended that the bank had increased the interest rate payable on the loan less than 6 months after the loan was granted and that both herself and the bank subsequently agreed to a voluntary termination of the facility. There was evidence that the motor vehicle in question was returned to the bank on the 15th January 2009 for it to be returned to KIA Motors. It was alleged that in breach of the agreement the bank treated the vehicle as being repossessed and hence it was not sold for the best price reasonably obtainable in the market. Again it is not surprising that the court found a triable issue.

[29] In the case at bar the Defendant has not challenged the fact of the loan nor that it remains unpaid. Accountants retained by him have confirmed the accuracy of the Claimant's statement of account. The suggestion that the failure to obtain a promissory note makes the loan granted ineffective or fraudulent or otherwise unenforceable is unsupported by authority and is with respect absurd. If money loaned has not been repaid it remains due and owing. The Defendant's other contention is that funds were deducted from a Trust account to service the loan. If true, and if the sums are to be reverted, it means that the balance due from the Defendant to the Claimant will increase along with any interest charges. It will mean that the loan, to the extent of the wrongful deductions, will not have been serviced. There is no evidence of loss to the Defendant or his Client consequent on the deductions alleged. There is therefore no credible claim to a set off. There is in any event unchallenged documentary evidence that the Defendant instructed that funds from the Trust account were to be combined with other funds to purchase currency of the United States, all of which was then to be held on Fixed Deposit. There is documentary evidence that the Claimant was authorised to apply balances on Fixed Deposits to secure the loan account.

[30] In the circumstances and on the evidence I would also have entered summary Judgment for the Claimant on the claim and the counterclaim.

[31] I think I have said enough to demonstrate why to allow this matter to go to trial would be an unwise use of the resources of the court. The Defendant on the material before me cannot succeed. I therefore declare and Order as follows:

1. The Defence and Counterclaim are struck out as disclosing no Defence and no arguable claim.

2. The counterclaim is dismissed as having no real prospect of success and as being frivolous, vexatious and an abuse of the court's process.

3. There is Summary Judgment for the Claimant against the Defendant.

4. It is Declared that the Defendant at all material times was entitled to apply US$76,800.00 and J$1, 984.599.26 from Defendant's Fixed Deposit Accounts and account #231051627 to loan account #231051627

5. Costs to the Claimant to be taxed if no agreed.

[32] Finally, it should be noted that in the course of submissions I indicated to the Defendant that there were aspects of the matter which if explored may be of interest to the Disciplinary Committee of the General Legal Council. The Defendant did not heed my caution. Having considered the evidence, and in particular documentation emanating from the Defendant; it is a matter of concern that an officer of this court appears to have instructed a financial institution to (a) withdraw funds from his client's trust account (b) combine those funds with other funds to purchase United States currency (c) place the combined funds on Fixed Deposit and (d) use the Fixed Deposit to secure a loan or loans. It is also a matter for further concern that an officer of this court should seek to avoid lawful obligations by resorting to rather irrelevant technicalities. I have therefore directed that the Registrar of the Supreme Court forward a copy of this Judgment

to the Chairman of the General Legal Council so that he may conduct such investigations and take such steps, as he may consider appropriate.

David Batts
Puisne Judge

Permission to appeal granted if refused, 5th February, 2016-02-05

David Batts
Puisne Judge