

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 1444/2004

BETWEEN	PROPERTY MANAGEMENT DEVELOPMENT AND SERVICES LIMITED	CLAIMANT
AND	FINSAC LIMITED	1 ST DEFENDANT
AND	REFIN TRUST LIMITED	2 ND DEFENDANT
AND	JAMAICA REDEVELOPMENT FOUNDATION, INC	3 RD DEFENDANT/ ANCILLARY CLAIMANT
AND	GERALD A WRIGHT	1 ST ANCILLARY DEFENDANT
AND	JOHN A. WRIGHT	2 ND ANCILLARY DEFENDANT
AND	ROGER F.G. WRIGHT	3 RD ANCILLARY DEFENDANT

Mr. Lancelot Cowan instructed by Lancelot Cowan and Associates,
Attorneys-at-law for the Claimant 1st and 2nd Ancillary Defendants.
Mr. Charles Piper and Miss Kanika Y. Tomlinson instructed by Charles
Piper & Company for the 3rd Defendant/Ancillary Claimant.

***Debt Mortgage - Endorsement of debt on Certificate of Title - Money
Lending Act***

Heard: on 11th March, 2009

Coram: MORRISON, J (Ag.)

Background

The action at bar commenced by way of Fixed Date Claim Form filed on 21st June, 2001. Substantively, the Claimant challenges the validity of some three mortgages registered on certificate of title belonging to it in favour of the National Development Bank (NDB). Coincidentally, the Claimant sought accounts in respect of all those mortgages as between the parties (the Claimant and the NDB) as well as orders setting aside the endorsements of the said mortgages and their delivery up to the Claimant free from all encumbrances. Further, the Claimant importuned the Court to pronounce some (3) three declarations that loans of different tranches, US\$200,000.00, US\$50,000.00, and the overdraft facility of \$500,000.00 were never disbursed to the Claimant.

Finally, the Claimant asks for damages for breach of contract and/or negligence and/or breach of fiduciary duty.

By way of defence and counter-claim the material defendant defied the above by reference to a number of particulars. They are set out in extenso as to bring into relief the foci of their import.

In January 1993 the Claimant made an application for a demand loan of \$3,000,000.00. Pursuant to this application, the Claimant executed an agreement for the, "Operation of Account," whereby it authorized IVB to charge any of the Claimant's accounts for the payments due on the said loans as well as any expense incurred by IVB in connection with the operation of the Account.

Secondly, the Defendants rely on a Promissory Note dated January 1993 whereby the Claimant promised to pay to IVB the sum of US\$100,000.00 for value received with interest thereon at specified rates payable on specified dates in default of which the whole balance would fall due to be paid.

A third transaction between the Claimant and IVB then fruited. In January 1993 the latter offered the former the sum of US\$100,000.00 by way of a letter of Commitment for a period of twelve (12) months at a specified rate of interest which interest would be payable on a monthly basis, the principal being repayable at its maturity.

In addition to the above, the Claimant would grant to IVB a mortgage over its property in consequence of which Directors of the Claimant signed a Letter of Commitment spawned by the said transaction.

Thereupon, a number of other transactions followed through its directors. In April 1993 the Claimant issued an Instrument of Unlimited Guarantee in favour of IVB undertaking to pay to IVB all debts and interest thereon, however configured, that remained unpaid by it to IVB.

On the same date, by way of a Deed of Mortgage, the Claimant conveyed its estate and interest in the said property for the repayment of the sum of US\$100,000.00 as a continuing security for its present and future liability to IVB at a specified rate of interest, which interest was compounded.

In this scenario, IVB caused the Claimant's registered title to reflect the mortgage numbered 766632 to be recorded thereon the 8th June 1993.

More was to come. The Claimant thickened its indebtedness to IVB by requesting from the latter in May 1993 an increase in its overdraft facility in respect of the very first deal mentioned earlier. It had now swelled to an additional \$2,000,000.00.

Following the trail of the May 1993 arrangement, the Claimant, in July 1993, sought and received more funds enabling it to restructure its loan portfolio, that is, the demand loan of \$US100,000.00, the overdraft line of \$500,000.00 and finally a Guarantee Loan of \$250,000.00.

In respect of all the above the Defendant asserts that, "all rates of interest thereunder were agreed to be variable at the discretion of IVB." In consequence, the Claimant granted a mortgage to IVB over the said property which mortgage was duly registered and numbered 806850 on the 15th April 1994.

In November 1993 IVB yet again increased the Claimant's overdraft facility upon its request. This facility reflected a movement in the amount from \$500,000.00 to \$700,000.00 at an agreed specified rate of interest.

At the behest of the Claimant, IVB made an application to NDB on behalf of the Claimant for US dollar financing which loan was granted with its attendant rate of interest. As between IVB and NDB, the former was permitted by the latter to on-lend the sum of US\$200,000.00 to the Claimant. This facility was similarly subject to its specific rate of interest.

The Claimant gave its benediction to the arrangement by way of a letter to IVB dated 25/1/1993. In direct response thereto IVB through letter dated

1/3/1994 advised the Claimant of the terms and apprised the Claimant of the terms and conditions by which IVB would on lend to it the said sum of US\$200,000.00. This the Claimant accepted.

In total four (4) mortgages were generated by the Claimant in favour of IVB. These are numbered 766632 for US\$100,000.00; 806851 for US\$100,000.00; 835996 for US\$50,000.00 and 806850 for JA. \$3,800,000.00. All the suppliants averment are supported by annexures.

As a rejoinder and in specifically countermanding the Defendant's Claim and counter claim the Claimant filed its defence thereto on 17/11/2005. By their defence the Claimant challenged the rates of interest; that IVB guaranteed payments to their creditors; that the letter of commitment was invalid as it was signed by unauthorized persons who were not directors of the Claimant; that the Unlimited Guarantee was similarly impugned because of a lack of authorization by the signatories and for want of them being directors of the Claimant. A third strand to the objection was now added to the above two in that, "there are changes made to this document (Unlimited Guarantee) that were not initialled by the Claimant or its duly appointed representatives."

Without descending to more particulars, the Defendant's case in seriatim was traversed by the Claimant.

The Claimant's case was either a robust and sound defence or else it was an abject denial.

At this juncture, it surpasses being merely noteworthy so as to be paramount, what the records reflect.

In consequence of Case Management Orders of September 19, 2006, being made in respect of the execution of all guarantees and, after trial in Chambers by Pusey, J, the Judgment of the Court reads thus, inter alia:

1. The Claimant and the First and Second Ancillary Defendants concede that the Instrument of Unlimited Guarantee dated April 29, 1996 is valid and enforceable.
2. Judgment for the Third Defendant/Ancillary Claimant against the First and Second Ancillary Defendants on the ancillary claim with the amount of liability to be determined at the trial of this matter.

Thus, winnowed of the issue of the Unlimited Guarantee the issues which separated the parties are in respect of; what loans were taken by the Claimant and whether the said loans or any of them have been repaid; what effect does the purported repayment have on the registered mortgages and, if the loans were not in fact repaid, what sums are outstanding?

Finally, is the Claimant's assertion that the Mortgages are null and void, sustainable?

Findings of Fact

Of the witnesses who testified in this claim Mr. Gerald Wight did so on behalf of the Claimant while Ms Janet Farrow, Chief Executive Officer of the third Defendant did so on the latter's behalf.

In addition to these two witnesses referred to the above, the remaining evidence in this case comes from an agreed Bundle of documents. The Bundle comprised of two volumes numbering 1 - 120 and 121-275 respectively.

I find as a fact, contrary to the assertions of Mr. Wight, that he was not the sole director of the Claimant company. It is manifest from the Claimant's Articles of Association that this is not so. The Articles, namely, article 5, 8(F)(2), 8 (F)(3), 8(G) and (13) all refer to more than one director by the use of the word "Directors". In fact Mr. Wight admitted in cross-examination that, at the time of the procurement of the loans from IVB, other Directors had been appointed by the Company. Tellingly, prior to the Company's receipt of the loans, Mr. Wight told IVB the names of the Directors and instructed them as to which of the Directors would be signatories in respect of the Company's account.

Mr. Wight's contention that his sole directorship of the Company should have been rectified by IVB altering the Articles of Association in order to incorporate the other directors, and that it was never done is spurious, inasmuch as it is unsupported. I fail to see any proof that IVB undertook the role of being the Company's attorney-at-law in that regard. That being so, if that was even contemplated by the company then the latter had an obligation to do so in their own behalf. Plainly, this assertion has no resonance and is refused.

It is overwhelmingly manifest as to the Company's borrowing from IVB. It cannot be repudiated that loans given to the Company were secured by mortgages in respect of premises registered at Volume 975 Folio 173 of the Register Book of Titles. Mr. Wight's claim that these loans were repaid is untenable. Not one jot or tittle of documentary evidence was offered in proof.

His declaration that one of the loans was repaid by funds borrowed from NDB is immitigably impotent so as to be without documentary support.

Mr. Gerald Wight's other allegations that the mortgage document was signed in blank by him and, that the interest rates in respect of the mortgage were unliterally and illegally altered, are again without foundation and bespeaks a lack of credibility on his part.

Not unsurprisingly, when Mr. Wight was confronted in cross-examination a plethora of admissions trundled forth. Not only did the Company take the several loans from IVB but the Company also has an overdraft with the said bank.

The instrument of Mortgage located at item 22 of the Bundle was executed by two of the Company's directors as security for the loans. In this said document the rate of interest is specified as 13½% per annum at a monthly compound: This aforesaid document permitted increases in the rate of interest as well as it specified that the mortgage was a continuing security for, not only present but, future debts to IVB; further, that NDB would make loans available to IVB who would in turn on-lend to the Company at an interest rate beyond the 11% per annum interest charge of NDB so that in the event that the Company failed to service this loan then IVB had to do so by paying NDB.

As to the loan sum of \$2,000,000.00, already adverted to, this remained unpaid by the company as the sale of 94 Old Hope Road did not eventuate thereby putting the Company in further debt.

I find that the Third Defendant/Ancillary Claimant, through Ms Farrow whose evidence was unexceptionable, showed unequivocally that they had acquired by assignment the debt and the securities given in respect thereof by the Claimant from IVB. As such, the Mortgages as are endorsed on the Certificate of Title registered at Volume 975 Folio 173 are unassailable.

I adopt and embrace Mr. Piper's closing submissions, "that in the absence of payment by the Claimant of its debt to IVB there can be no statement of account showing that the loans have been repaid and there can be no discharge of the mortgage with respect thereto."

Also, with respect to the variations in rates of interest, it is incontestably clear that it is provided for in the Instrument of Mortgage at Clause (a)(i).

Paragraphs 19 through to paragraph 25 of the Third Defendant's/Ancillary Claimant's written submissions are irrefragable and as such on a balance of probabilities the claim by the Claimant has failed for want of proof. That is to say, there is no evidence that the mortgages held by the Third Defendant/Ancillary Claimant are null and void; that the loans were not obtained by the Claimant from IVB; that the repayment of the loans to IVB were made.

In the end, and on a balance of probabilities, judgment is hereby entered in favour of the Third Defendant/Ancillary Claimant against the Claimant on the claim in the sum of US\$492,746.61 and JA\$6,663,616.29 with interest on the US amount at 15% per annum and at 30% per annum on the amount in Jamaican dollars. Also, judgment is entered for the Third Defendant/Ancillary

Claimant against the First and Second Ancillary Defendants, guarantors of the Claimant's liability, in the sum of US\$492,746.61 and JA\$6,663,616.29 with interest at the same rate of prescription as is above stated.

The Third Defendant/Ancillary Claimant is awarded the costs of trial for one day one senior counsel and a junior counsel. Such costs are to be agreed if not then to be taxed.