



[2014] JMCC Comm. 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013CD00047

BETWEEN LAURISTON STEWART CLAIMANT
AND NATIONAL COMMERCIAL BANK JAMAICA LIMITED DEFENDANT

Mr. Ransford Braham QC and Ms Nerine Small for claimant/respondent

Ms. Malica Wong and instructed by Myers Fletcher and Gordon for the defendant/applicant

Summary judgment application

Heard: 10 and 12 December 2013 and 15 January 2014

SINCLAIR- HAYNES J

[1] This is an application by the defendant, National Commercial Bank (NCB) for an order that the claimant's claim be struck out or the defendant be granted Summary Judgment against the claimant. The defendant seeks the aforesaid reliefs on the following grounds:

- (a) the claimant has failed to particularize any cause of action against the defendant;
- (b) the statement of case is an abuse of the process of the court and discloses no reasonable ground for bringing the claim ; and
- (c) the claimant has no real prospect of succeeding on the claim.

The claim

[2] The claimant, Lauriston Stewart, has instituted proceedings against the defendant in which he claims, *inter alia*, the following:

- (a) An account of the proceeds of a deposit made by the claimant in a commercial paper account with the defendant in the sum of ten million dollars (\$10,000,000.00) in 1993;

- (b) Damages for conversion;
- (c) The sum of ten million dollars (\$10,000,000.00) being moneys had and received by the defendant being deposit in an account with the defendant plus interest thereon at the commercial rate per annum from 1993 to the date of judgment or sooner payment;
- (d) Alternatively, damages for breach of trust;
- (e) Alternatively, damages for breach of contract of deposit of the said ten million dollars (\$10,000,000.00) together with interest at the contractual rate.

[3] He asserts that he was the General Manager of Investment and Merchant Banking (MSB) up to the year 1996. Sometime between the years 1995-1996, the assets and liabilities of MSB were assigned to the defendant. He (claimant) continued in the employ of the defendant. The claimant was subsequently forced to resign as the defendant had accused him of breaching his contract by indulging in arbitrage transaction.

[4] According to him, shortly before his dismissal, the defendant took possession of his personal files which contained all his personal documents, which included his financial dealings with MSB. The defendant to date has not returned them. He claims that the files contain his record of a deposit for the sum of ten million dollars (\$10,000,000.00) in a Commercial Paper account at MSB. The said deposit was made in the year 1993. On the 2nd April 2013, he demanded payment of the amount due to him on the Commercial Paper but the defendant has failed to make any payment.

Background to the defendant's position

[5] Whilst in the employ of the defendant, the claimant was the recipient of several loans. Upon his forced resignation, he was unable to service the loans. The claimant acknowledged the debt and made arrangement for payment of same. On the 23rd March 2010, the defendant sued the claimant and obtained judgment against him in the sum of fourteen million two hundred fifty-one thousand six hundred eight dollars and sixteen cents (\$14,251,608.16) inclusive of interest. The claimant defended the debt

sum without any mention of a deposit of ten million dollars (\$10,000,000.00). The bank has searched its record and has found no record of the alleged deposit.

[6] Ms. Wong, the defendant's attorney, contends that the claimant has no reasonable ground for bringing the action. She relies on Rule 26.3(c) which empowers the court to strike out a statement of claim or part of a statement of claim which fails to disclose a reasonable ground for bringing the claim. She further relies on Rule 26.3(b) which enables the court to strike out a statement of case or any part of a statement of case which amounts to an abuse of the process of the court.

[7] In the alternative, she argues that the claimant's claim has no real prospect of succeeding because it is manifest that the assertions by the claimant regarding the said deposit have no real substance. His actions prior to the filing of the suit are inconsistent with his claim of having the said account. In his defence to the bank's claim, he made no mention of the said deposit. At all material times he acknowledged the debt without mention of the deposit. Further the bank has no record of his claim that the said sum was deposited.

[8] She relies on the unreported cases of **Robertson v Toyojam & Haughton** HCV 2311 which was delivered on the 16th September 2008, **Andrew Keane v Vendryes** HCV 02917 which was delivered on the 3rd September 2009 and the UK Court of Appeal case of **ED&F Man Liquid Products v Patel** [2003] All ER (D) 75 for the proposition that Summary Judgment is appropriate in circumstances where factual assertions are contradicted by contemporaneous documents. Further, she contends that the claimant's claim is statute barred.

Claimant's evidence regarding the \$10 million

[9] Mr. Stewart contends that the defendant's assertion that it is unaware of the said deposit is false and deceitful. It is his evidence that while he was employed to the defendant, he was the owner of ninety-eight percent (98%) of the shares in Citi Car Sales & Rentals Limited. Citi Car Sales & Rentals Limited was the owner of property situate at 271/2 Half Way Tree Road. The sum of ten million dollars (\$10,000,000.00) was assigned to the bank as security for a loan to Citi Car Sales & Rental.

[10] The property was sold and the net proceeds of the sale was nine million five hundred thousand dollars (\$9,500,000.00). The said sum was placed on Commercial Paper with the defendant. The deposit was made in his name. The sum of nine million five hundred thousand dollars (\$9,500,000.00) had increased to ten million dollars (\$10,000,000.00) by the time he was separated from the defendant. The amount which Citi Cars Sales & Rentals owed the bank at the date of his forced resignation was two million dollars (\$2,000,000.00).

[11] He asserts that the defendant was at all material times aware of the claimant's said deposit. It is his evidence that at the time the defendant alleged that he was engaged in arbitrage, it also alleged that the said sum was obtained by way of arbitrage. The defendant investigated the source of the said sum and the investigations exonerated him.

[12] Mr. Stewart avers that by way of letter dated 15 February 1996, he requested an account of his loan balances from the defendant, but it failed to provide same. He did not think that it was necessary to include the issue of the Commercial Paper deposit as he felt it would have been included in the statement upon request. Further, he never felt it was necessary to request the said ten million dollars (\$10,000,000.00) because it was being used as security for all his loans and that of his companies. It is also his evidence that the ten million dollars (\$10,000,000.00) exceeded the loan amounts and he would have been entitled to a substantial refund upon the payment of the loans.

[13] He was supported by Mr. Dunstan who was the manager the mortgage department at MSB from the year 1991 to 1993. His evidence is that in or about the year 1993, a letter of undertaking from the claimant's attorney concerning Mr. Stewart's property at 271/2 Half Way Tree Road came to the mortgage department. A mortgage was registered on the property in MSB's favour. The title to the property was held by MSB as a result. It is his evidence that Mr. Stewart invested about nine million dollars (\$9,000,000.00) on Commercial Paper.

[14] Mr. Stewart was also supported by Ms. Salome Graham, who was a former mortgage officer of the defendant. It is her evidence that Mr. Stewart was her immediate

supervisor. Her position was made redundant in the year 1997. In the 1990's, one of her duties was to invest client's monies in Commercial Paper at the bank.

[15] She knew that Mr. Stewart was the owner of Citi Car Sales and Rentals and that property at 27 ½ Half Way Tree Road was owned by the said company. She was also aware that the property was sold in the 1990's and the proceeds of the sale were invested in Commercial Paper at the defendant bank. It is her evidence that the defendant alleged that the source of the funds of the Commercial Paper was arbitrage and not a legitimate investment. The defendant was very hostile towards him. His employment was terminated because of the allegation.

[16] It is also her evidence that in the year 1996, she was requested to investigate the source of the funds of the Commercial Paper by the Bank Inspectors, internal and external auditors which included Price Waterhouse Coopers and the Bank of Jamaica. Her investigations revealed that the source of the funds which were placed on Commercial Paper in the claimant's name was from the proceeds of sale of the property situate at 27 1/2 Half Way Tree Road. A letter from the claimant's attorneys at law, Zaide, Saunders and Reid with a cheque for the sum of nine million dollars (\$9,000,000.00), which was the proceeds of the sale of the said property, was shown to her. The said correspondence which contained the cheque was shown to all the auditors.

The Law

[17] The court, pursuant to Rule 15.2, of the Civil Procedure Rules can dispose of matters summarily. Part 15.2 states:

“The court may give summary judgment on the claim or on a particular issue if it considers that –

(a) The claimant has no real prospect of succeeding on the claim or the issue; or

(b) The defendant has no real prospect of successfully defending the claim or the issue.”

[18] Lord Woolfe in **Swain v Hillman** [2001] 1 All ER 91 at 92, said:

"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success ... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[19] Lord Woolfe was of the opinion that if the issues of fact between the parties were significantly different as to require a hearing in order to unearth the truth, the matter is not an appropriate one for summary disposal. The court is however at liberty to dispose of a claim which factual assertions lack substance.

Is this an appropriate case for summary judgment?

[20] Examination of the conduct of the claimant regarding the ten million dollars (\$10,000,000.00) is illuminating in determining this issue. The defendant had obtained judgment against the claimant on the 23 March 2010 to recover sums which were owed to it in respect of loans facilities which were granted to Mr. Stewart. In that case the defendant (NCB), in an Amended Writ of Summons and Statement of Claim filed on the 11 June 2003, listed the loans as follows:

Computer Loan

<i>Principal</i>	\$ 27,999.00
<i>Interest</i>	<u>\$ 95,470.00</u>
	<u>\$123,469.00</u>

Ordinary Loan

<i>Principal</i>	\$ 314,390.00
<i>Interest</i>	<u>\$ 961,840.00</u>
	<u>\$ 1,276,230.00</u>

Car Loan

<i>Principal</i>	\$ 523,344.00
<i>Interest</i>	<u>\$2,544,720.00</u>
	<u>\$3,068,064.00</u>

Car Loan

<i>Principal</i>	\$ 523,344.00
<i>Interest</i>	<u>\$2,514,063.00</u>
	<u>\$3,335,323.00</u>

- (i) *The sums of \$1,276,230.00, \$3,068,064.00, \$3,335,323.00 and \$123,469.00.*
- (ii) *Interest on the sums of \$27,999.00, \$314,390.00, \$523,344.00 at the rate of 22% per annum and \$821,260.00 at the rate of 12% per annum from the 11th day of October 2001 to the date of payment or Judgment.*
- (iii) *Costs to be agreed or taxed.”*

[21] Mr. Stewart's defence to NCB's then claim was filed on the 23 June 2003; there was no mention of the ten million dollars (\$10,000,000.00) which he claims the defendant held on Commercial Paper for him. It is his evidence that the said sum secured his loans and exceeded the loan amounts which were at the time smaller than the deposit.

[22] It is significant that on 15 February 1996, by way of letter, the claimant wrote to the defendant, instructing it to use his pension contributions to liquidate his mortgage loan. Instructions were given as to what was to be done with the balance of his pension contribution, outstanding profit share and retroactive motor vehicle allowance. He wrote:

“RE: STAFF LOANS – L. H. STEWART

I refer to our recent telephone conversations and hereby confirm that the refund of my pension contributions is to be used to liquidate my mortgage loan.

The Certificate of Title and Discharge of Mortgage should be sent to:

*Mrs. Jennifer Messado
Jennifer Messado & Company
Attorneys-at-Law
6 Dominica Drive
Kingston 5*

I am asking that any balance remaining from my pension contribution along with outstanding profit share and retroactive motor vehicle allowance to be sent to me in care of Nevalco Consultants Limited, 19 Norwood Avenue, Kingston 5.

In relation to my motor vehicle and other staff loans, if any, both Messrs. Jeff Cobham and Dunbar McFarlane advised me that reasonable time would be allowed for me to liquidate these loans. It is my understanding that these loans will continue at the current rates until repayment in the time allowed. I am requesting twelve (12) months to pay off these loans including staff overdraft facility at Duke Street branch.

I have already made arrangements for my credit card balance. The outstanding amount for profit share, motor vehicle allowance and balance of pension contribution is very urgent and would appreciate your cheque on Monday, February 19, 1996. Please provide me with outstanding balances for my staff loans.

I will be meeting with MSB Knutsford Boulevard next week to review and hopefully renegotiate facilities for my companies, with this in mind, I would like to know whether or not the Bank objects to my continuing as a regular customer, if not, kindly indicate to them in writing during the course of the week.

Kind regards,"

On 15 April 1996, he wrote to the deputy Managing Director of the defendant.

"I acknowledge receipt of your letter dated February 29, 1996 by way of a copy faxed to me on March 28, 1996 by Mrs. I. S. 'Sam' Rennals after I had enquired about a response to my letter of February 15, 1996.

In your first paragraph, you mentioned that Mr. McFarlane and yourself offered to assist me with finalizing arrangements for repayment of my liabilities with the Bank. Frankly, I did not remember and I hope you can understand based on the circumstances at the time. No disrespect was intended.

In my letter of February 15, 1996 I requested twelve months to repay my staff facilities and you have offered until July 31, 1996 with existing rates and monthly payments. I am requesting that you extend the time to September 30, 1996 and also allow me to keep interest current with the periodic lump sum payments with full payout by September 30, 1996. My reason for such a request is that for the first time in twenty-four years, I am without a fixed monthly income and agreeing to a fixed payment is a

prescription for delinquency. Repayment will most likely be through disposal of assets or obtaining a loan.

I must, however, express my disappointment with the Bank asking me to make alternate banking arrangements for my personal and company accounts. I have worked with the Bank for half of my life, leaving after twenty-four years without any form of compensation and now to be told by the NCB Group that I am not even wanted as a regular customer. I now recall that in our meeting, Mr. McFarlane commented that "it is difficult to transfer accounts to other banks these days as other banks do not seem to want to take over accounts from us"; yet I received a letter dated March 12, 1996 from Mutual Security Bank Knutsford Boulevard Branch, giving me one or two months to move my account.

Having worked in the banking system for so long, I dare say that I understand banking arrangements and banker/customer relationships and believe that I have the ability to conduct my account as a regular customer.

I look forward to an early response."

On the 18 April 1996 the bank's Deputy Managing Director responded thus:

"Dear Mr. Stewart,

Thank you for your letter of 15th April, 1996. We had sent our letter of 29th February, 1996 to you by registered mail and are unable to explain why you did not receive it.

In view of the one month delay before you received a faxed copy, we are happy to accede to your request that we continue to extend staff facilities at the current rates to you until September 30, 1996. We would prefer if you kept to the existing repayment arrangements until you repay, in full, by 30th September, 1996 latest. If we are to consider the arrangement you propose whereby interest only is paid and periodic lump sums are credited to reduce the principal, we would need to receive from you a proposed schedule for such payments.

We have again given consideration to your request that your banking facilities remain with the Group and we have again concluded at this would be almost certain to result in further unpleasantness. We will repeat our reasons. When you left the employment of MSB there were some uninformed elements who took to the media with an entirely apocryphal story of victimization. In today's difficult economic climate a successful

banking relationship is built on mutual trust of customer and banker. Picture if you will, the dilemma of an NCB Group banker who has to say no to a request from you or who has to return cheque. Under ordinary circumstances the decision would not be considered by anyone to be based on anything but a banker's informed judgment; the case of your account it is very possible that the cries of victimization would be renewed with the same degree of accuracy as in the first case. We are not able to, nor would have any wish to explain details of the circumstances under which you left in order to combat such accusation.

All in all, the situation would have the ongoing potential for unpleasantness, and we consider it in your best interest and those of the organization if we do not bank you. We are prepared to extend the deadline for you to make other arrangements to 30th June, 1996."

[23] In spite of the claimant's entreaties to the defendant to allow him to continue as its customer and the defendant's outright refusal to do so, he made no mention of the Commercial Paper in any of his correspondences. Instead, he outlined to the defendant's managing director, his dire financial straits. In a letter dated 15 September 2002, he wrote:

"Good day to you, I write in regard to the captioned accounts that are indebted to your bank. Since leaving your employment on February 1st, 1996, my fortunes have turned dramatically for the worse. I have lost everything including my family structure. I have lost all my businesses, real estate holdings and other assets.

Most recently, my brother had to pay your bank \$430,000.00 to release my car and based on the arrangements I had to transfer it.

With no business or assets and a daughter in college, I still have to depend on my brother for assistance for basic things. I do not see any possibility of me paying my debts to the bank under the present situation and ask that you consider relieving me of this burden."

[24] It is indeed peculiar that Mr. Stewart allowed himself to suffer such unnecessary hardship while the bank held ten million dollars (\$10,000,000.00) for him. It is even more startling that even at that point he does not request payment of the same or that the sum be used to liquidate his debts.

[25] On the 29 March 2001, he wrote to the bank's Deputy Chairman expressing his impecuniosity. Again, he makes no mention of the ten million dollars (\$10,000,000.00). So severe was the hardship he was experiencing that he had become dependent on his brother's subsistence. In the face of a dismal future, he apparently ignored the fact that the bank was holding ten million dollars (\$10,000,000.00) on Commercial Paper for him and instead sought its mercy. That letter states:

"Re: Liabilities in the name of Lauriston Stewart

I refer to previous correspondence on the subject ending with your letter dated March 27th, 2001 which was received today.

My letter dated September 15th, 2000, Statement of Affairs and Income and Expense dated October 18th, 2000 are true and accurate. In fact, the situation becomes worse as time goes by. My salary is only \$47,700.00 per month and the assistance received from my brother over the last four (4) years is no longer there as he is having his own difficulties.

Trying to exist at the basic level is a tremendous challenge and sometimes it seems that I am losing the fight.

I do not have the resources to make even a partial payment at this time. While I am trying to be hopeful and optimistic, it does not look good."

Is there need for a trial to resolve the issues of fact?

[26] The English Court of Appeal decision of **ED&F Man Liquid Products Ltd v Patel & ANR** [2002] All ER (D) 75 (Apr) Potter LJ Lord Justice Potter said:

*" It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in **Swain v Hillman [2001] 1 ALL ER 91** at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Volume 1 p.467 and **Three***

Rivers DC v Bank of England (No.3) [2001] UKHL/16, [2001] 2 ALL ER 513 per Lord Hope of Craighead at paragraph [95].

[27] In the instant case, without the need to embark on a mini trial or otherwise, it is palpable that the claimant's claim lacks substance. His behaviour over twelve years contradicts his assertion that the \$10 million was held by the bank as surety/guarantee for his loans. Indeed it contradicts his belated assertion that he had ten million dollars (\$10,000,000.00) on Commercial Paper with the defendant. From the year 1996, when the first demand was made on him, through to when judgment was entered against him, there was not a scintilla of resistance to claim on the basis that the bank held ten million dollars (\$10,000,000.00) for him.

[28] Lord Wolfe in **Swain & Hillman** (2001) 1 All ER 91 enunciated:

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In so doing he or she gives effect to the overriding objectives contained in Part 1. It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add, generally that it is in the interest of justice."

[29] The claimant's claim has no real prospect of succeeding. In the circumstances:

1. summary judgment to the defendant on the claimant's claim;
2. cost for the day pursuant to the CPR to the defendant; and
3. leave to appeal granted to the defendant/applicant.

