

The defendant was a garment manufacturer under the name 'Softees Limited' and a former customer of 'Cloth World.'

The claimant and the defendant once shared an intimate and sexual relationship. He was much older than her. She was a widow. He was a married man and denied that he told her he was separated from his wife and was looking for someone to make life with.

He asserted that there was an oral contract between the parties that in consideration of the loan of \$3,000,000.00, the defendant would execute a mortgage deed on her land situated at Lot 435 Perseus Close, Smokey Vale in the parish of St. Andrew.

The money was paid to her in two parts. He said "*the first cheque I gave her was a RBTT cheque number 5012496 dated 27th May 2004 for two million dollars.*" He continued "*I loaned her a further one million dollars in July 2004.*"

The claimant said he instructed his Attorney at Law to prepare the requisite mortgage deed but she refused to sign it when it was sent to her.

Paragraphs 3 to 7 of the Particulars of Claim reads:

"The claimant agreed to lend the defendant \$2,000,000.00 in May of 2004 and a further \$1,000,000.00 in July of 2004"

It was an expressed term of the contract that the defendant would pay the claimant interest at the rate of 20% per annum.

Further, it was also a term of the contract that the defendant would surrender her title to the claimant for her property located at Lot 435 Perseus Close, Smokey Vale, Saint Andrew, Volume 1095, Folio 195 and a mortgage registered on the said property by the claimant as security for the loan.

The claimant further alleged the defendant surrendered her registered title to him and made eight (8) interest payments up to the 29th April 2005.

The defendant in the Defence and Counterclaim denied the allegations as set out in the Particulars of Claim that she was in breach of any contract or contractual relationship with the claimant. She maintained that the money was a gift from him to be used to purchase a restaurant and bar known as the Fashion Café. She also submitted that there was no intention to create a legal relationship.

It was her contention that towards the end of 2003 they had entered into an intimate relationship and he had agreed to assist her financially. Her husband had died earlier at her hands and she was experiencing emotional and financial hardship.

In February 2004 she discussed with him, her desire to acquire the restaurant and bar business called 'Fashion Café', situated at 38A Trafalgar Road that was up for sale for \$2,000,000.00. He later agreed to assist her to acquire the business.

As a result on the 27th May 2004 he gave her the cheque in the sum of \$2,000,000.00 out of which she used \$1,500,000.00 towards the purchase of the said business. On the 1st July 2004 he gave the second cheque in the sum of \$1,000,000.00 to purchase stock for the business.

She further claimed that at the time of purchase the claimant said he did not want to be involved in the business. He later changed his mind and they incorporated a company known as 'Cashville Fashion Café Limited'. They were the sole shareholders and directors and operated the business jointly until it was closed in December 2004.

The claimant denied that he had given her the money to purchase the café. It was intended for her business, Softee Limited. He described how he carried out his investigations to determine whether or not this was a good investment opportunity before he agreed to lend her the two million dollars.

He then loaned her the additional one million dollars as "I was told by her that as a matter of urgency she needed the money as she needed to pay for some materials, and she was being evicted from the business place." This piece of evidence must be contrasted with his affidavit evidence to the Registrar of Titles which appeared to be contradictory. He said then "*that she further advised me that she had committed herself to a business venture, and that there existed a shortfall of one million Jamaican dollars.*" Clearly one of these statements could not be true.

The claimant had maintained that he was not aware of the acquisition of the café and only discovered this by chance. In his witness statement (examination in chief) he said at paragraph 19:

"Sometime after I received a call from Pings Fabrics stating that the goods have not been paid for. I was surprised as I had given the defendant the funds to repay the loan. I went to the defendant and demanded where the funds have gone. It was then that I learnt that she had acquired "Fashion Café."

He had to pay Pings the \$500,000.00 in order to maintain his good relationship with them. In order to secure this payment on her behalf he became a shareholder of the Fashion Café. They executed the Articles of Association and the Memorandum of Association of Cashville on the 27th July 2004.

The claimant also maintained that he did not know that the claimant had used the loan to acquire the Fashion Café contrary to the agreement that it was for Softee Limited until after April 25, 2005.

At paragraphs 27-28 he said:

“In fact it was only later on when the defendant stopped paying me that I discovered that she had used the money I loaned her to purchase the Fashion Café. She concealed this from me. I would have never loaned her the money to invest in this business for I find restaurants very bad investments.”

When I pressed her about the source of funds for the acquisition of the business she initially told me that she had a friendly relationship with both the vendors and the landlord, which later proved to be untrue. By this time I was thoroughly annoyed with the situation and had realized that I had made a mistake in lending her the money.

I demanded my money back. She made several unfulfilled promises to repay the loan and settle the matter. After a long period and no repayment I decided to have my Attorney at law write her a demand letter. This was served personally on her by Mr. Sherriah. I waited at her gate and pointed her out to the Bailiff myself.”

The claimant did not resile from his position that he was unaware of the acquisition of the café. In cross examination he emphasized this when he said that he became aware that the defendant had purchased the Fashion Café sometime after she should have bought raw material to satisfy the business according to the original plan and the large amount of material was not going in and I started getting curious.

What however was not clear was when it was that he knew that the defendant had used his money and purchased the café. In one instance he gave the impression that he found out in July

2004, i.e. the same month he gave her the one million dollars and also executed the company documents to secure his five hundred thousand dollars. In the other instance it would have been after April 2005 when he said she had stopped paying him or made the last payment. These two statements were contradictory and inconsistent.

The claimant asserted that he later instructed his Attorney to make a demand on her for the loan. He had two letters of demand served the defendant and retained a copy.

I received a copy of the letter of demand.

The first demand letter reads:

December 6, 2005

*Ms. Veda Miller
1 Upper Sandrington Avenue
Kingston*

Dear Ms. Miller,

Re: Outstanding loan from Carlton Williams

Be advised that I represent Mr. Carlton Williams of 3 Norbrook Way, Kingston 10, in the parish of St. Andrew. My client instructs that on or about the 1st June 2004, you requested a loan of three million dollars (\$3,000,000.00). It was agreed that you would repay the loan in full no later than the 1st June 2005. It was further a term of the agreement that you would repay interest calculated at the rate of twenty percent (20%) per annum on the principal sum commencing on the 30th day of June 2004 and thereafter each month until the date of repayment.

I am further instructed that to date you have made no payments. Because of your breach of the agreement I am now demanding that the full sum be repaid on before the 31st day of January 2006. There is also an additional cost of ten thousand dollars (\$10,000.00) for legal fees incurred.

It is therefore imperative that you comply, failing which I am instructed to institute legal proceedings to recover the debt without reference to you.

Yours faithfully,

Carl A. McDonald
Attorney-at-Law

A second letter of demand dated February 17, 2006 was sent to the defendant giving her until the 31st March 2006 to repay the debt.

A perusal of the letters of demand revealed that it was at variance with the claimant's evidence in two material respects. Firstly the loan was a period of two years and not one year.

However in his affidavit to the Registrar of Titles to support an application for a caveat he said *"that it was a further term of the agreement that she would sell the property registered at volume 1095 folio 195 at the end of 2004 and repay the debt in full in which event I would then discharge the mortgage."* This was another contradiction on his part.

Secondly, the letter stated that the defendant had made no payments contrary to the Particulars of Claim and the evidence. Paragraph 9 of the Particulars of Claim reads:

"The defendant made eight interest payments in total and has subsequently stopped paying altogether since the 29th April 2005."

The letters of demand were not in accordance with the claimant's evidence and were based on the instructions he gave to his Attorney. Surely, If the letters did not conform to the instructions, he ought to have had him corrected them. They were hand delivered to the defendant in the claimant's presence. He also had a copy. However these assertions were never corrected. This was a factor the court must take into account in determining the claimant's credibility particularly in light of the defendant's defence.

The claimant also alleged that it was a term of the oral agreement that the loan was to be secured by a mortgage on her property. He asserted that she delivered the certificate of title to him in pursuant to this agreement. He then obtained a valuation from Allison Pitter & Co. to satisfy himself that the security was adequate. Thus, the only reason he was in possession of the defendant's duplicate certificate of title was to register his mortgage and not only to note her husband's death.

He later discovered that the defendant dishonestly made a lost title application to the Registrar of Titles when she knew that he had the title. As a result he lodged a caveat against newly issued duplicate certificate of title.

The defendant admitted that she made the application after the claimant told her that he did not have her title.

The defendant denied the claimant's claim that there was an agreement to register a mortgage against her property. She alleged that he offered to assist her to note her husband's death on the title. Consequently she gave him the title, her husband's death certificate, valuation report and her marriage certificate.

She also denied the suggestion that the valuation was commissioned by the claimant's Attorney-at-Law on his behalf. This she said was done by her.

In the claimant's affidavit in support of an application for registering a caveat sworn to on the 27th June 2006 he asserted at paragraph 13 "*that in keeping with the agreement to register the mortgage against land registered at volume 1095 folio 195 she showed me a valuation which was done on volume 1095 folio 195 by Allison Pitter & Company as recent as March 30, 2004*

where the open market value of the property was \$3,000,000.00 to \$3,500,000.00 I exhibit a copy marked C.W.V." This statement was inconsistent with his evidence and the suggestions made to the defendant that it was his Attorney that had the valuation done. This clearly supported the defendant's account that she had commissioned the valuation and not the claimant or his Attorney at Law.

The claimant further said that after he had given her the money, his attorney prepared the mortgage document. He later instructed his Attorney-at-Law to send it to her. This letter reads:

November 29, 2004

*Ms Veda Miller
23 Stars Way,
Hughenden,
Kingston 20.*

Dear Madam,

Re: Estate Boswell Beckford and Mortgage

Please find enclosed amended instrument of mortgage, revenue affidavit, application to note death and affidavit. Kindly sign the aforementioned documents in the presence of a Justice of the Peace and return same as soon as possible.

Yours faithfully,

*Carl A. McDonald
Attorney at Law*

He complained that although she received the document she refused to execute it. Instead she returned it for it to be done over. She later asked him not to proceed with the mortgage as she wanted to repay him in full. This was reason why the mortgage was not registered on the certificate of title.

The defendant on the other hand claimed that during their intimate relationship the claimant never made any demand on her to sign any mortgage. The issue of a mortgage and repayment of the money came after they were separated. She denied receiving the letter from Mr. McDonald.

The claimant admitted that he had a few adulterous sexual encounters with the defendant after he loaned her an additional \$500,000.00 to pay Pings Fabric. He said:

“By this time her overtures to me, which were previously observed, now intensified and resulted in some covert sexual encounters which were few and short. I never gave the defendant the \$3,000,000.00 or any money whatsoever as a gift. We were never in a relationship. She is misguided. She conjured this story because she has refused to repay the loan.”

The claimant also denied that they were business partner in Fashion Café or the re-named entity Cashville Fashion Café Limited notwithstanding that he was a shareholder and a director in the company. He had 350 shares and the defendant 650. The Articles of Association and the Memorandum of Association were executed by them on the 27th July 2004. He said the only reason he became a shareholder was to secure the \$500,000.00 he paid Ping s Fabric on her behalf.

He and the defendant also executed a credit card merchant agreement with the National Commercial Bank on the 22nd September 2004 for the said company. He was merely assisting her to get the credit card machine as she needed a second signature for the approval of the application.

The defendant denied his assertions and insisted that he knew of the acquisition of the business. She said at first that he did not want to be involved in it. He later changed his mind. He started to tell everybody that it was his place.

In December 2004 the place was closed by the landlord for renovation and lease terminated. As a result with the claimant's assistance she unsuccessfully sought an injunction against the landlord.

In the instant case the claimant had lodged a caveat against the defendant's land to protect his interest as she refused to execute the mortgage prepared by his Attorney. He alleged in his declaration that the defendant was in breach of an oral agreement as the time fixed for the repayment of the loan expired.

The parties did not execute a contract at the time he handed over his cheques. He was relying on her goodwill and honour. There was no memorandum or note as required by the Statute of Frauds. This act stipulates that no action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing, and signed by the party to be charged or by some other person there unto by him lawfully authorized.

The thrust of the claimant's was based on the doctrine of part performance as he was claiming an equitable mortgage. He loaned her the money on the condition that it was to be secured by a registered mortgage and the registered title was deposited with him. The loan and the mortgage were indivisible.

In Steadman v Steadman [1974] 3 WLR 56 the House of Lord held that the alleged acts of part performance had to be considered in their surrounding circumstances and, if they pointed on a balance of probabilities to some contract between the parties and either show the nature of or were consistent with the oral agreement then there was sufficient part performance.

Per Lord Reid at page 61: "*You must not first look at the oral contract and then see whether the alleged acts of part performance are consistent with it. You must first look at the alleged acts of part performance to see whether they prove that there must have been a contract and it is only if they do so prove that you can bring in the oral contract.*"

Thus, the claimant must show on a preponderance of probabilities part performance by him of the contract on which he relied before a court can properly proceed to consider his oral evidence of the existence of that contract.

The acts on which he relied on as constituting part performance were these: (1) in March 2004 he commissioned a valuation to negotiate the mortgage with the defendant; (2) on the 27th May 2004 he gave her a cheque in the sum of \$2,000,000.00; (3) on the 1st July 2004 he gave her a cheque in the sum of \$1,000,000.00; (4) the payment of interest; (5) the letter dated November 29, 2004 from his Attorney at Law with the instrument of mortgage to be executed; (6) the letters of demand; (7) the retention of the duplicate certificate of title; and (8) the lodging of the caveat.

The evidence clearly showed that on the 27th May 2004 he gave her the first cheque for \$2,000,000.00 which she deposited to her current account. The following day she paid \$1,500,000.00 towards the purchase of Fashion Café and gave \$265,506.00 to the claimant.

On the 1st July 2004 he gave her the second cheque for \$1,000,000.00 and she in return gave him a cheque dated 29/6/04 in the sum of \$240,000.00. These two cheques were deposited to his bank account on the 7/6/04 and the 5/7/04 respectively. These clearly could not have been interest payments. He gave no explanation for the defendant's generous action in giving him \$505,506.00 from the purported loan which was to be injected into the financially starved 'Softes Limited.' I found the claimant's action quite odd.

The defendant on the other hand explained that the \$505,506.00 she paid him was for the liquor he had purchased from Matt Armstrong as they took stock in preparation of the club' opening.

The defendant made a number of payments by cheques to the claimant. She denied that these were payments in keeping with the terms of the oral loan agreement as asserted by the claimant. She said it was reimbursement for liquor he had purchased for the business. In her witness statement she said:

“I commenced operations of the business on the 1st of June 2004. On the 1st July 2004 I received another cheque from the claimant, drawn on the First Caribbean Bank Jamaica Limited in the amount of One Million Dollars (\$1,000,000.00) to purchase stock for the business. It was agreed between the claimant and me that he would purchase all the alcohol for the business as he had a friend who operated a liquor store and that I should reimburse him for same out of the One Million Dollars (\$1,000,000.00) given to me on the 1st of July 2004. As a result, throughout the life of the business I wrote eight cheques to the claimant totalling Eight Hundred and One Thousand, Five Hundred and Six Dollars (\$801,506.00). I also paid two (2) months security deposit, totalling One Hundred and Fifty Four Thousand Dollars (\$154,000.00), for the rental of the premises on which the business was situated out of the One Million Dollars (\$1,000,000.00) I received on the 1st of July 2004.”

It was the claimant's evidence that the interest was to be calculated at 20% per annum i.e. \$50,000.00 per month until the loan was repaid. However the cheques paid to him by the defendant were not in keeping with the stipulated amount as he asserted.

By his account the interest for the first month would be calculated on the principal of \$2,000,000.00 and thereafter on \$3,000,000.00 until the loan was repaid. The first payment should be approximately \$34,000.00 and thereafter \$50,000.00 monthly. Interestingly, I found no cheque that showed the defendant paid to the claimant any sum calculated at 20% as claimed by him. Instead seven cheques each in the sum of \$40,000.00 and the eighth for \$16,000.00 payable to the claimant were exhibited.

There was no evidence that he ever complained that the defendant was not paying less than the agreed interest. Likewise there was no claim for arrears of interest notwithstanding that she only made 8 payments totalling \$216,000.00. This was another factor against the claimant.

The claimant relied on the letter from his Attorney to the defendant enclosing the purported mortgage as an act of part performance. In *Steadman v Steadman* Viscount Dilhorne said:

“One does not send to a person a document for execution which transfers title to property unless there has been some prior agreement with regard thereto. While an oral statement made by a party or his Solicitor will not ordinarily be an act of part performance, in this case the making of the statement to the magistrates was an essential part in the performance of the contract. Without it, and the magistrates' co-operation, the agreement would not have been implemented. It follows that, in my view, all these acts suffice in law to constitute part performance. I do not think that Mr. Morland's contention that the sending of the transfer for execution was an act preparatory to the performance of the contract and not in performance of it, is well founded. It is well established that preparatory acts such as instructing a solicitor to prepare a lease or conveyance do not constitute sufficient part performance... ..But here it went beyond the mere preparation. In the absence of conditions it was the respondent's duty to send the transfer for execution by the appellant... .., the transfer was thus sent in discharge of an obligation that rested on the respondent by virtue of the contract.”

The claimant blamed the defendant for the failure to have the mortgage registered on the title. He had instructed his Attorney to prepare the appropriate document from as early as May 2004. This was very important to him to ensure that he recover his money by selling the land if she defaulted.

It was not sent to her to be executed until November 2004 i.e. five months after the loan. He did not take it to her himself although he knew that she could be found at Cashville Fashion Café. He instructed his Attorney to deliver it. There was no independent evidence to support it and was relying on conversations with the defendant. This was detrimental to the claimant's case.

On the 27th July 2004 the parties executed the company documents for the registration of 'Cashville Fashion Cafe' to protect \$500,000.00 he said he paid to 'Pings' on her behalf.

On the 22nd September 2004 at the defendant's request the parties executed the NCB merchant agreement to enable her to get a credit card machine for the business. He was always willing to assist the defendant He did all of this for the defendant's benefit yet he made no demand that she execute a mortgage that would secure his money and which was long outstanding. A copy of the unsigned document was not exhibited in court.

Mr. Williams was not candid with the court. His oral testimony consistently contradicted his previous statements and cast serious doubts on the veracity of his case and his credibility. The onus was on him to establish on a balance of probability that parties had a contract and he failed to do so.

He had alleged that the defendant would repay the \$3,000,000.00 at the end of two years. However his previous statements showed two different periods.

It was also a fundamental term of the contract that the defendant had agreed to pay him interest at the rate of 20% monthly. He asserted that she made 8 payments as agreed. However these payments were less than the agreed sum. In addition there were two payments amounting to \$505,600 that was not accounted for by him. The defendant on the other hand explained that these sums were re-imbursments for the liquor he had purchased for the business.

The evidence clearly showed that it was the claimant's money that the defendant used to purchase the Fashion Café. He however denied that he it was done with his knowledge and consent. He said he only discovered this sometime later when he confronted the defendant about

not paying for the goods credited from Pings. One must therefore conclude that this occurred in July 2004 as the documents appointing him a director and shareholder were executed on the 27th July 2004. He again contradicted himself by saying that he only discovered she had used the money after she had stopped paying him.

On the other hand the defendant's version was consistent and was corroborated in some instances by the claimant's previous statements. I found her to be credible and reliable witness. She denied that she gave her title to the claimant as a part of the negotiation for the mortgage. She also denied that it was the defendant who had commissioned the valuation report. The claimant's previous statement that she showed him a valuation as recent as March 30, 2004 confirmed this.

I therefore accepted her evidence that she and not the claimant had her land valued. She later gave the duplicate Certificate of Title along with her marriage certificate, her husband's death certificate and the valuation to note death and not to register a mortgage.

I accepted her evidence that the defendant was her partner and he purchased the liquor from Matt. The payments to the defendant were actual re-imbursments for the liquor he purchased for the business.

I rejected the claimant's account that he loaned the defendant \$3,000,000.00 to invest in Softee Limited and the defendant used it to acquire the Fashion Café without his knowledge.

It is my finding that as a consequence of the claimant's dalliance with the defendant he willingly provided the money for the acquisition of the café to assist her.

The claimant's claim is therefore dismissed and judgment entered for the defendant on the claim and counter claim. The caveat lodged on the defendant's duplicate certificate of title registered at

Volume 1401 Folio 464 to be removed and the registered duplicate certificate of title registered at Volume 1095 Folio 195 in his possession to be surrendered to the Register of Title.

Cost to the defendant to be agreed or taxed.