IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISISON

CLAIM NO. 2010 CD 00026

BETWEEN	CAPITAL & CREDIT MERCHANT BANK LIMITED	CLAIMANT
A N D	SUZETTE LINDO	DEFENDANT

Carissa Messado and Faith Hall for Claimant/Applicant instructed by Henlin Gibson Henlin.

Melissa Cunningham for Defendant/Respondent instructed by Raphael Codlin and Company.

Heard: December 2nd, and 10th, 2010.

Cor: Rattray J.:-

1. Suzette Lindo was a customer of Capital and Credit Merchant Bank Limited (the Bank). On the 7th November, 2008 she entered into a loan agreement with the Bank to borrow the sum of **$1,576,000.00**, the terms and condition of which were contained in a loan facility letter dated the 6th November, 2008. The purpose of the loan was to purchase a 2007 KIA motor vehicle. The loan was repayable at a variable interest rate of twenty one percent (21%) per annum over a seventy two (72) month period, with the monthly payment being **$39,614.33.** Security for the said

loan included, inter alia, a Promissory Note executed by the borrower, as well as a Bill of sale over the said motor vehicle.

2. It is the Bank's case that within two (2) months of the loan agreement, Ms. Lindo was in default of her agreed monthly payments, leading them to issue a Notice of Default letter dated January 5, 2009. That letter gave the borrower seven (7) days to pay the arrears, failing which the KIA motor vehicle would be repossessed. The Bank contended that the motor vehicle was in fact repossessed on the 15th January, 2009, and subsequently sold on the 31st July, 2009, for the sum of **$900,000.00**. Those proceeds however were not sufficient to pay off the sum outstanding on Ms. Lindo's account. Despite a letter of demand being sent to Ms. Lindo on the 12th February, 2010, with respect to the balance due to the Bank, she failed to settle her indebtedness. Legal proceedings were then filed against the borrower on the 12th May, 2010, claiming the sum of **$1,159,320.56**, being principal and interest on the said loan as at the 11th March, 2010, together with interest continuing at the rate of twenty eight percent (28%) per annum.

3. A Defence and Counterclaim was filed on behalf of Ms. Lindo on the 19th August, 2010. In it she contended that less than six (6) weeks after signing the loan agreement, the Bank increased the interest rate on the

loan to twenty five percent (25%) per annum. Being unable to afford the increased monthly payment, she wrote to the Bank by letter dated 12th January, 2009, indicating her intention to terminate the loan. Ms. Lindo had a meeting with the Bank's representative, Mrs. Dian McLean on the 15th January, 2009, and advised her of her position as indicated in her letter. At that time, Mrs. McLean, on behalf of the Bank, agreed to enter a voluntary separation agreement, whereby the Bank would take the vehicle, turn it over to KIA Motors the following day to be sold and would thereafter advise her of the balance, if any, outstanding on the loan to be paid by her to liquidate same. Exhibited to those pleadings was a copy of a motor vehicle checklist given to Ms. Lindo by Mrs. McLean showing that the motor vehicle was left with the Bank on the 15th January, 2009. At the top of that document, Mrs. McLean had written the contact number of the mechanic at KIA Motors, who it was agreed would collect the vehicle the following day and take it to KIA Motors.

4. In breach of that agreement, the Bank did not hand the motor vehicle over to KIA Motors, but instead treated same as having been repossessed. Ms. Lindo alleged in her Defence that it was not until October, 2009, that she was advised that the vehicle had been sold for **$900,000.00** in July, 2009. She further alleged that at the time of the voluntary separation

agreement, the applicable rate of interest was twenty five percent (25%). She contended that had the Bank turned the vehicle over to KIA Motors to be sold as had been agreed, and had it been sold for the best price that could have been reasonably obtained at that time, the loan amount, or a larger percentage would have been liquidated by the proceeds of sale.

5. By way of Counterclaim, Ms. Lindo sought damages for breach of the voluntary separation agreement, damages for breaches of the implied terms of the loan agreement that the vehicle would be sold for the best possible price that could be reasonably obtained and that she would be advised of the sale within a reasonable time. She also sought an Order that the amount of damages found due to her be set off against the amount, if any, found owed to the Bank.

6 Shortly after the receipt of the Defence and Counterclaim, the Bank, by Notice of Application for Court Orders filed on the 30th September, 2010, applied for Summary Judgment to be entered in its favour against Ms. Lindo in the sum of **$1,159,320.56**, together with interest on the sum of **$725,030.60** at the rate of twenty eight percent (28%) per annum, as well as Summary Judgment on the Defendant's Counterclaim. In the alternative, the Bank sought the leave of the Court to file its Reply and

Defence to Counterclaim within twenty-one (21) days of the Order of the Court.

7. Two affidavits in support of the Bank's application for Summary Judgment were sworn to by Olive Callender, the Debt Recovery Manager of Claimant company. Apart from giving evidence of the narrative already outlined in this Judgment, Ms. Callender asserted that there was neither a verbal nor written voluntary separation agreement as alleged by Ms. Lindo, whereby the vehicle would be turned over to KIA Motors for sale and the proceeds paid over to the Bank. Nor was there any evidence of such an agreement. She further asserted that there was no discussion of the said vehicle being taken to KIA Motors for sale. Ms. Callender went on to state that the Bank received only two offers over the six (6) month period for the sale of the motor vehicle. It accepted the highest offer of **$900,000**.00 being the best price that could have been reasonably obtained.

8. In her second affidavit, Ms. Callender maintained that there was no voluntary separation agreement as alleged by Suzette Lindo and referred to correspondence dated 14th January, 2009, addressed to the borrower advising of the Bank's intention to repossess the motor vehicle. The following day, the motor vehicle was dropped off at the Bank's New

Kingston branch by Ms. Lindo and a checklist prepared to show the condition of the vehicle. Ms. Callender referred to numbers on the checklist and indicated that she had been advised by Mrs. McLean, that it was Ms. Lindo who asked that calls be made on her behalf to those numbers, which had nothing to do with KIA Motors disposing of the motor vehicle.

9 Ms. Callender further maintained that on the 16th January, 2009, the vehicle was taken to Cars R Us, where the Bank's repossessed vehicles were stored. It was advertised by that company in the Sunday Gleaner on a regular basis, with no interest being shown. Only two offers were received over the six (6) month period, the lower one being for **$650,000.00** which was rejected. The bank therefore accepted the best offer received of **$900,000.00** and sold the vehicle on the 31st July 2009. By letter dated the 25th September, 2009, Ms. Lindo was advised of the sale of the vehicle and the amount of the loan which remained outstanding. No response was ever received or any payment made by Ms. Lindo, despite a letter of demand being sent dated February 12, 2010.

10. The Defendant in two affidavits filed opposing the Applications for Summary Judgment, repeated to a large extent what was alleged in her

Defence and Counterclaim. She reiterated that at the meeting with the Bank's representative Mrs. McLean on 15th January 2009, it was Mrs. McLean who suggested entering the voluntary separation agreement. It was Mrs. McLean who represented that she had the Bank's authority to do so and Ms. Lindo stated that she relied on that representation. She went on to state that in her presence Mrs. McLean contacted a representative of KIA Motors by telephone, who agreed to collect the vehicle from the bank the following day and to sell same and pay the proceeds over to the Bank. She was later advised by the representative of KIA Motors that when the mechanic went for motor vehicle, the Bank refused to hand it over as agreed. Ms. Lindo also denied being aware of any correspondence from the bank indicating its intention to reprocess the motor vehicle. Finally, she stated that she was not aware of any advertisement placed in the newspapers as alleged, and noted that the Bank has failed to exhibit any documents in proof of that allegation.

11. The sole affidavit filed by an individual who was not a party to this action was deponed to by a Mr. Dwight Moore, a Director of KIA Motors. In that affidavit, he stated that on the 15th January, 2010, he received a telephone call from a Mrs. Dian McLean of Capital and Credit Merchant Bank, in which she enquired whether he would be prepared to

sell a motor vehicle that KIA Motors had previously sold to Suzette Lindo. He indicated that he would be prepared to do so and it was agreed that one of KIA Motors' mechanics would collect the vehicle the following day from the Bank and that his company would seek to sell same from its lot. On the following day, however, the mechanic he sent advised him that the bank refused to hand over the said vehicle, and he subsequently notified Ms. Lindo of what had occurred.

12. The Applications for Summary Judgment in this matter are made pursuant to Rule 15.2 of the Civil Procedure Rules (CPR) which reads:

> *15.2 "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*
> *(b) the defendant has no real prospect of successfully defending the claim.…"*

Both these subsections are of relevance in the matter before the Court as the Bank is contending that Ms. Lindo, as the Defendant in this suit, has no real prospect of successfully defending the claim brought by the Bank against her. Similarly, it is being argued that as a Claimant with respect to her Counterclaim against the Bank, she has no real prospect of succeeding on that Counterclaim.

13. An application for Summary Judgment, if successful brings a litigant's legal excursion to an abrupt end, without him having his day in Court and

without him or his witnesses being exposed to cross-examination. It also denies him the right to cross-examine the other party or that party's witnesses. Such an Order is not lightly made. However, where the circumstances are appropriate, as in a case where the matter is not fit for trial at all or where it is clear as a matter of law that even if a party proves all the facts alleged, he will still not be entitled to the remedy he seeks, the Court will not hesitate to grant an Order for Summary Judgment.

14. In the well known case of **Swain v Hillman** 2001 1 All ER 91, Lord Woolf MR encouraged Judges to make use of the powers contained in Part 24 of the English Rules, which is the equivalent of our Rule 15. He suggested by granting an Order for Summary Judgment in appropriate cases, the Judge gives effect of the overriding objective of the Rules. He went on to state-

> *"It saves expense; it achieves expedition; it avoids the court's resources being used upon cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know as soon a possible."*

In that same case, the learned law Lord considered the power of the Court to grant Summary Judgment under the equivalent of our Rule 15 and stated:

> *'It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the Court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success"*

15. A cautionary note was raised by Judge LJ in that case where he opined:-

> *"To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion in the court to give summary judgment against a claimant, but limited to those cases where, on the evidence, the claimant has no real prospect of succeeding.*
> *This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the Court concludes that success is improbable."*

The circumstances of each case clearly must be carefully examined by Court to determine whether on the evidence before it, the Order sought ought to be granted.

16. In the unreported Jamaican case of **Allan Lyle v Vernon Lyle** Claim NO. HCV-02246 of 2004**,** decided on the 10th May, 2005, the learned trial Judge at page 8 of her Judgment stated;-

> *"An application for summary judgment is however, inappropriate where there are important disputes of facts. On application for summary judgment the applicant must satisfy the court of the following*:

1. *All substantial facts relevant to the claimant's case which are reasonably capable of being before the court must be before the court.*
2. *Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.*
3. *There must be no real prospect of oral evidence affecting the court's assessment of the facts."*

17. Counsel Mrs. Carrisa Messado submitted that all three (3) arguments outlined above have been satisfied and supported by undisputed documentary evidence. She further submitted that there is no real prospect of oral evidence affecting the Court's assessment of the facts. As such, she urged the Court to grant the Bank's Application for Summary Judgment on its Claim and on the Defendant's Counterclaim.

18 A finding of this Court to the contrary was forcefully urged by Counsel for Suzette Lindo, Ms. Melissa Cunningham. She argued that her client disputed the Bank's claim in this matter on two grounds, firstly, on the basis that the documentary agreement which allowed for the repossession and sale of the motor vehicle would have been varied or superseded by the voluntary separation agreement, which now specified the manner in which the vehicle was to have been sold. It is alleged that this new agreement was breached by the Bank. Secondly, the Defendant asserted that the motor vehicle was not sold at the best price that could reasonably have been obtained, in light of the recent valuation report dated 29th

October, 2008, which showed a forced sale value of **$1,353,200.00**. The argument being advanced on behalf of Ms. Lindo is that had the best price been obtained for the motor vehicle, the debt would either have been extinguished or substantially reduced. A further complaint raised by Counsel Ms. Cunningham is that although the Bank sold the motor vehicle in July 2009, her client was not notified until October 2009, by which time further interest had been added to the debt.

19. Ms. Cunningham further contended that there were a number of disputes as to facts in the present case, which would have to be resolved by the Court before determining the remedy to which a successful party would be entitled. Some of these disputes involved the question of-

    (a) whether a voluntary separation agreement was entered into between parties,
    (b) whether or not the motor vehicle was sold for the best price that could be obtained.

She maintained that were this matter to go the trial, oral evidence to be called on behalf of the Defendant would have an impact on the Court's assessment of the facts. Counsel therefore argued that the nature of the issues raised in her client's Defence and Counterclaim were such that they ought not to be dealt with summarily based on conflicting affidavit evidence.

20. The claim of the Bank in this matter is based primarily if not solely on documentary evidence. That case is squarely met by the Defendant's allegation that parties entered an oral voluntary separation agreement, which varied or superseded their previous agreement. There is the affidavit evidence of Dwight Moore which seems to suggest that the parties did in fact have discussions in that regard. The function of this Court is not to carry out a mini trial on conflicting affidavit evidence. Having carefully considered the submissions of Counsel in this matter, I am not satisfied that Ms. Lindo has no real prospect of successfully defending the claim brought by the Bank herein. An issue of pivotal importance is whether or not the parties entered into a subsequent agreement. This touches and concerns both the Defence and Counterclaim filed by the Defendant. If follows therefore that this Court is not prepared to grant an Order that Ms. Lindo has no real prospect of succeeding on her Counterclaim.

21. There ought to be a trial of this matter to fully ventilate the issue of whether a subsequent agreement was entered by the parties and if so, the terms thereof and its effect on their previous contract. The Claim brought by the Bank is also challenged as to whether it has breached implied terms of its contact with Ms. Lindo, in relation to steps taken to

sell the motor vehicle and for the obtaining of the best possible price. These are matters for the trial Judge.

22. I therefore order the following:-

(i) The Application of the Claimant for Summary Judgment on its Claim against the Defendant and for Summary Judgment on the Defendant's Counterclaim is dismissed.

(ii) Permission granted to the Claimant to file and serve its Reply and Defence to Counterclaim on or before the 7th January, 2011 by 3pm.

(iii) Costs of this application to the Defendant to be taxed if not agreed.