



[2021] JMCC COMM. 2

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. 2017CD00230**

<b>BETWEEN</b>	<b>COK SODALITY CO-OPERATIVE CREDIT UNION</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>NEVILLE PERALTO</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>KARLA CHIN-PERALTO</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>WP SERVICES LIMITED</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN OPEN COURT**

Mrs Georgia Gibson-Henlin and Ms Nicola Richards instructed by Henlin Gibson Henlin, Attorneys-at-Law for the Claimant

Mr Rudolph Muir initially, replaced by Mr Kent Gammon, instructed by Kent Gammon & Associates, Attorneys-at-Law for the Defendants

**Contract – Assessment of damages - Loan agreement – Whether quantum of debt claimed is incorrect due to misapplication of funds and/or incorrect interest rate being applied**

Heard: 21<sup>st</sup> November and 9<sup>th</sup> December 2020, 11<sup>th</sup> and 14<sup>th</sup> January 2021

**LAING J**

**The Claim**

[1] The Claimant is a duly registered co-operative society under the laws of Jamaica. By its Claim Form and Particulars of Claim filed 19<sup>th</sup> April 2017, it claimed that the Defendants were indebted to it in the sum of \$42,285,759.81.

- [2] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were married at the material time and the 1<sup>st</sup> Defendant is a director of the 3<sup>rd</sup> Defendant
- [3] The Claimant averred that on or about 9<sup>th</sup> March 2012 the 1<sup>st</sup> Defendant entered into a loan facility agreement with the Claimant in the sum of \$33,500,000 (“the Elmwood Loan”). This sum was loaned by the Claimant at the rate of 9.75% per annum and the Claimant also claims legal and other costs, charges, and expenses as a result of the Elmwood Loan.
- [4] The Claimant only lends money to its members and whereas the 1<sup>st</sup> Defendant was a member, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not. However, the Elmwood Loan was secured by a guarantors mortgage duly signed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 14<sup>th</sup> March 2012 over all that parcel of land registered at Volume 1456 Folio 504 and being property located at 10 Elmwood Close being the land known as Allerdyce, part of number 65 Shortwood Road in the parish of St. Andrew (“the Elmwood Property”). This Mortgage related bearing number 1752185 was registered on 19<sup>th</sup> March 2012 (the “Elmwood Mortgage”).
- [5] The 1<sup>st</sup> Defendant defaulted on the Elmwood Loan and the Claimant issued notices to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants dated 19<sup>th</sup> January 2017 demanding that they make good their obligations under the guarantee by paying all amounts due and owing as per the said guarantee. The Defendants failed to settle their indebtedness and the claim herein was filed on 19 April 2017 (“the Claim”).
- [6] The 1<sup>st</sup> Defendant admitted liability for the obligation created by the Elmwood Loan but challenged the accuracy of the sum claimed by the Claimant. It was also averred in the Defence that the 2<sup>nd</sup> Defendant is not a Guarantor of the Loan made by the Claimant. Paragraph 4 of the Defence is material and states:

*The Defendants say that on the 19<sup>th</sup> day of March 2012 the Claimant registered a mortgage (#1752185) against the property of the Defendants registered at Volume 1456 Folio 504 of the Register Book of Titles in the amount of \$37 million on. This sum differed from the principle of the loan mentioned in paragraph 5 of the Particulars of Claim by the amount of \$3.5*

*million. The amount of \$3.5 million is therefore unaccounted for and mortgage amount registered is also in error by the said sum of \$3.5 million.*

The Defence continues at paragraph 6 as follows:

*The Defendants say that the difference between the amount of the mortgage registered and the loan amount approved (see paragraph 5) properly represents the recovery by the Claimant of the bridging loan approved by the claimant on December 15, 2011 and secured by a mortgage registered against property owned by the First Defendant's mother Yvette Madden at 23 Harwood Drive, Kingston 20 in the parish of St. Andrew.*

*(reproduced without bold highlights).*

It was also asserted in the Defence that the penalty of \$1,213,580.00 is harsh and onerous.

- [7] On the 9<sup>th</sup> May 2018 it was ordered by Edwards J (as she then was), that judgment on admission be entered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. On 5<sup>th</sup> November 2019, the assessment of damages in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the trial in respect of the liability of the 3<sup>rd</sup> Defendant were both fixed for 21<sup>st</sup> November 2019. On 21<sup>st</sup> November 2019, the Court granted the Claimant's application filed 20<sup>th</sup> November 2019, that judgment on admission be entered against the 3<sup>rd</sup> Defendant on the basis of admissions in the Defence filed on the 27<sup>th</sup> December 2017 and the contents of paragraph 26 of the witness statement of Winston Butler dated 12<sup>th</sup> November 2019 and filed 18<sup>th</sup> November 2019.

### **The Defence's version of the transaction**

- [8] The Defendants assert that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were desirous of purchasing the Elmwood Property which was being sold for \$34,000,000.00 as well as associated chattels which were being sold for \$4,000,000.00 The 1<sup>st</sup> and 2<sup>nd</sup> Defendant also needed the ten percent deposit required for the purchase of this property. The Claimant agreed to lend the 1<sup>st</sup> Defendant the sum of \$3,500,000.00 which was secured by a mortgage over real property owned by Yvette Madden, the mother of the 1<sup>st</sup> Defendant (referred to herein for descriptive convenience only without ascribing any finding as "the Bridging Loan"). This property is located at 23

Harwood Drive, Washington Gardens, Kingston 20 (“the Harwood Property”). The 1<sup>st</sup> Defendant states that that he was required to make a deposit of \$170,500,00 by way of shares in the Claimant in order to be eligible for this Bridging Loan and that this deposit would also serve as additional security.

- [9] The Defendants assert that this Bridging Loan was supposed to have been only a short term loan and that it was understood by the Defendants, the Claimant and Yvette Madden, that the Bridging Loan would have been recovered by the Claimant from the disbursement on the mortgage in respect of the Elmwood Property, but this was never done by the Claimant. As a precondition for the Elmwood Mortgage, the 1<sup>st</sup> Defendant was required to make a deposit of \$1,000,000.00 of his shares in the Claimant.
- [10] The Defendants aver that whereas the Claimant only disbursed \$33,500,000.00 in respect of the Elmwood Property it improperly registered the Elmwood Mortgage in the sum of \$37,000,000.00. They also allege that the Claimant assert that the Claimant did not deduct the amount of the Bridging Loan as agreed and in fact the Claimant has initiated a separate claim in respect of the Bridging Loan. Accordingly, it is being submitted by the Defendants that the sum of \$3,500,000.00 would be unaccounted for if the Claimant did not recover in full the amount of the Bridging Loan on 19<sup>th</sup> March 2012 when the Elmwood Loan was disbursed.

### **The Claimant’s version of the transaction**

- [11] The evidence of Ms. Dianne Bolton, the Manager of Credit Administration in the Claimant credit union, was that based on her recollection the price of the Elmwood Property was \$39,000,000.00. She stated that the Elmwood Loan was granted in the sum of \$33,500,000.00 which represented the balance of the purchase price of the property because the Claimant had initially granted a separate loan in the sum of \$3,500,000.00 which represented an initial deposit on the Elmwood Property. She further explained that both loans were connected to the same transaction and the financing that the Claimant provided was towards the

acquisition of the property together with the chattels. There was an equity injection of \$1,000,000.00 required of the 1<sup>st</sup> and 2<sup>nd</sup> Second Defendants, plus an additional million dollars which took the price up to \$39,000,000.00.

**[12]** Mr Muir suggested that the price of the Elmwood Property was \$34,000,000.00. He confronted Ms. Bolton with a copy of the duplicate Certificate of Title in respect of the Elmwood Property and in particular, the entry in respect of the transfer of the property by Transfer No.1752184 registered on 19 March 2012 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for a Consideration of \$34,000,000.00. Ms. Bolton explained that she was not sure if she was in a position to agree with the suggestion put to her that the Elmwood Property was in fact purchased for \$34,000,000.00, however she asserted that the Claimant was approached to do a transaction which was to purchase the Elmwood Property along with the chattels, the total of which was for \$39,000,000.00. She further explained that matters relating to the security documentation for the transaction were not handled by her and therefore she could not speak to that process.

**[13]** Ms Bolton was adamant that the Claimant did not recover the proceeds of the Bridging Loan from the Elmwood Loan because that was not the agreement between the Claimant and the 1<sup>st</sup> Defendant. She further explained that had the Claimant recovered the Bridging the Loan from the Elmwood Loan that would have resulted in a shortfall in the transaction for the purchase of the property. In response to a question from the Court, she confirmed that this is because if this was done only \$30 million would have been disbursed as the balance of the purchase price.

### **Analysis**

**[14]** I find that in this Claim, the Defendants have not been prejudiced in the calculation of their liability by the fact that the 1<sup>st</sup> Defendant had two loans. Although the issue of a possible misapplication of payments was raised tangentially by Mr Muir during the cross examination of Ms Bolton, it was not pursued and there was no specific

suggestion to her that this actually occurred. I accept the evidence of Ms. Bolton that if a member makes a payment and gives no instructions as to how the payment should be apportioned, the payment will firstly be applied to the account with the highest level of delinquency that is, the account having the most number of days in which the account is "past due" (and not the account which is delinquent in the highest amount). If there are specific instructions the Claimant will endeavor to fulfil the member's instructions and may sometimes offer guidance as to the method of allocation which would be in the member's best interest.

- [15] I feel obliged to comment on the fact that the Claimant has opted to bring two separate claims in respect of the Bridging Loan and the Elmwood Loan. It would have been a much more efficient use of judicial time to have the two claims heard together or consolidated.
- [16] The Claimant through its counsel Mrs. Gibson-Henlin QC has adroitly deployed a version of the Claimant's case which is grounded in simplicity. Mrs Gibson-Henlin has submitted that this Court ought not to be concerned with the Bridging Loan because that is the subject of separate proceedings. Learned Queen's Counsel has urged the Court to isolate the Elmwood Loan and to approach this assessment of damages purely as an arithmetic exercise. However, I am of the view that such a clinical approach is difficult to achieve having regard to the cross examination conducted by Mr Muir which has raised the role of the Bridging Loan and consequently the necessity arises for the Court to resolve the issue of whether there is \$3,500,000.00 which is unaccounted for. In order to perform this analysis, the Court is required to consider, if only briefly, the relationship and the extent of the link between the Bridging Loan and the Elmwood Loan.
- [17] I do not think it is necessary for me to resolve the issue of whether the purchase price of the Elmwood Property was \$39,000,000.00 (which included chattels valued at \$4,000,000.00) as Ms. Bolton asserted, or \$34,000,000.00 (with their being a separate agreement for the purchase of chattels valued at \$4,000,000.00) as contended by the 1<sup>st</sup> Defendant. I will note purely as an observation that the

price stated as consideration on a certificate of title is not conclusive of the actual purchase price. Parties who are so inclined, are able to structure the transaction for purchase and sale of property to include a component of the purchase price as chattels. The price of the chattels would not be reflected in the consideration disclosed on the certificate of title, and as a consequence would be exempt from the usual transfer tax and stamp duty requirements. For the avoidance of doubt, I wish to make it abundantly clear that I am not making a finding that this is what took place in this case. A finding on this issue is not necessary for this assessment and is best left undetermined.

**[18]** It is uncontested that the Bridging Loan and the Elmwood Loan were disbursed to the 1<sup>st</sup> Defendant. I accept the evidence of Ms. Bolton that the Bridging Loan was not recouped from the Elmwood Loan because there was no agreement between the parties that this should have been done. I do not accept the suggestion by the Defendants that the agreement between the parties was for a mortgage in respect of the Elmwood Property in the amount of \$37,000,000.00 from which the Bridging Loan should have been deducted. Ms. Bolton was the Credit Administration Manager in March 2012 and was well placed to understand the underlying circumstances surrounding the granting of the Bridging Loan and the Elmwood Loan. I find this to be so notwithstanding the fact that she was unable to give evidence as to the structure of the security documents and in particular, speak to the legal or commercial basis for the Elmwood Mortgage being for the sum of \$37,000,000.00. I therefore find that there is no sum of \$3,500,000.00 which is unaccounted for. The recovery of the amount due pursuant to the Bridging Loan is the subject of a separate claim and there is no issue joined between the parties in respect of the existence of that claim for that sum.

**[19]** Mr Gammon has submitted that another factor which led to the incorrect calculation of the arrears due which is the subject of the Claim herein, was the combining of the Bridging Loan and the Elmwood Loan and the application of an incorrect interest rate of 16 percent per annum to this consolidated loan. He argued that the correct interest rate applicable to the Elmwood Loan was 9.75 percent per annum.

Mrs. Gibson-Henlin QC objected to this submission that an incorrect interest rate was charged in respect of the Elmwood Loan because she observed that the accuracy of the interest rate of 9 percent per annum was not the subject of dispute nor was it challenged on the pleadings in this Claim. I am not in agreement with Mrs. Gibson-Henlin that the Court should not consider this issue. If there is cogent evidence that a rate other than the contractually agreed 9.75 percent was charged, then I would be required to factor that in my assessment of the calculation of the amount being claimed, even if it was not an issue joined on the pleadings. However, I have not found any evidence to support the assertion that there was the improper application of 16 percent per annum interest rate to the Elmwood Loan.

**[20]** It should be noted that the Claimant has exhibited a Member Activity Report in respect of the Elmwood loan which has outlined all the transactions relative to the loan since its inception to 22<sup>nd</sup> October 2019. This provides a useful platform from which one can begin to deduce the methodology employed by the Claimant in arriving at the sum being claimed. There has not been a viable challenge to the methodology utilised save an except that the Defendants are asserting that some of the inputs in the form of payments made on behalf the 1<sup>st</sup> Defendant are missing and accordingly, not accurately represented. I accept the Member Activity Report as an accurate document. The calculations disclosed therein are premised on an interest rate of 9.75 percent which demonstrates that the submissions of Mr Gammon as to the erroneous application of an interest rate is misconceived.

**[21]** The Claimant claims that the principal amount owed at the time of filing the Claim on 19<sup>th</sup> April 2017 was the sum of \$32,714,657.62. The charges and interest were in the sum of \$9,571,102.19 resulting in a total amount claimed of \$42,285,759.81. A significant feature of the claim is based on the Claimant's assertion that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only paid \$9,356,806.19 by way of repayment on the Elmwood Loan. Exhibited in the bundle of agreed documents was the claimant's payment details in respect of the Elmwood Loan which itemized all the payments made by the 1<sup>st</sup> Defendant and which amounted to \$9,356,806.19. At page 7 of his witness



statement, it appears to me that the 1<sup>st</sup> Defendant accepts the payment details and this figure as representing his total payments in respect of the Elmwood Loan, (although in re-examination his counsel sought to have him invite the inference that he was simply repeating the Claimant's claim). Despite this admission, during the assessment of damages the 1<sup>st</sup> Defendant sought to challenge the Claimant's account of the total payments received. He explained however, that he was finding it difficult to locate his receipts checks and other documents which were evidence of the sums of money actually paid in respect of the Elmwood Loan because of the hasty manner in which he was required to leave his residence. His evidence during cross-examination was that other persons had also made payments in respect of the Elmwood Loan and in particular, Monsignor Michael Lewis made substantial payments on his behalf, although the Claimant said he was unaware of the exact amount of these payments.

**[22]** Dr. Winston Butler is the brother of the 1<sup>st</sup> Defendant and the brother-in-law of the 2<sup>nd</sup> Defendant. He is a director of the 3<sup>rd</sup> Defendant and gave evidence. He also served on the board of directors of the Claimant between 2012 and 2014, and during this period Monsignor Michael Lewis also served on the board. Dr. Butler asserted that he did not receive the demand notice in respect of the Elmwood Loan but I accept that the notice was sent to the 3<sup>rd</sup> Defendant at 23 Harwood Drive, Washington Gardens, at which address he admitted the 3<sup>rd</sup> Defendant receives its mail. He testified that he was asked and did make payments on behalf of the Peraltos and believed that he received receipts for these payments. He also said that he was aware of a payment made by Monsignor Michael Lewis in relation to the loan, which was made by cheque. Dr. Butler asserted that he also made a payment of \$1,000,000.00 in respect of the loan (presumably the Elmwood Loan) which was from his personal account for his son's school fees. He also asserted that the payment details exhibited by the Claimant could be inaccurate because there may have been other sums injected which have not been accounted for.

**[23]** Having regard to the evidence of Dr. Butler the Court part-heard the assessment and adjourned it to permit the 3<sup>rd</sup> Defendant to file directly relevant documents

relating to deposits made by the 3<sup>rd</sup> Defendant. Dr. Butler filed a supplemental witness statement to which he attached email correspondence between himself and Mrs Mighty a representative of the Claimant in which he stated that:

*"In summary, a total of J\$3,357,875 shall be paid into COK to cover the J\$1,182,875 transaction fees and the \$2,175,000 injection to the Parameters COK share account.*

*Furthermore, as per prior discussion and agreement, the Parallel letters hereby commit to making an additional \$1,000,000 injection into their COK share account, on or before the disbursement of the proceeds committed under the LOU to the vendors attorney."*

However, Dr. Butler did not exhibit any evidence of payments made in respect of the Elmwood Loan which were not reflected in the claimant's Payment Details which it exhibited.

- [24] It is therefore the finding of this Court, that Claimant's Payment Details accurately reflects the sum total of the payments made by or on behalf of the 1<sup>st</sup> Defendant and the sum of \$9,356,806.19 accurately represents these payments.

### **The penalties**

- [25] The evidence of Ms. Bolton was that where a loan is not non-performing, in other words, not delinquent, the normal allocation is for payments to be applied firstly to interest, then next to principal, then to shares. Where an account becomes non-performing as was the case with this particular loan and where provision has been made against the account, payments that are made will be applied to debt recovery charges first and thereafter principal, penalty interest and then interest in that order. She admitted that the monthly repayment on the loan was \$303,000 and explained that she could not say specifically when the Elmwood Loan was classified as non-performing, but the Claimant's procedures provided that after three months of consecutive delinquency or three months of non-payment of the full instalment, a loan is classified non-performing. She confirmed that the Elmwood Loan was eventually classified as non-performing.

- [26] Ms. Bolton explained that default interest will be applied before an account becomes classified as non-performing and the default interest rate will be activated once there are missed payments or where the account is considered “past due” (in the sense that the due date is past and so too has any grace period). She noted however that the classification of the loan as non-performing does not result in the interest rate on the original loan being increased and that default interest is the same thing as penalties. Therefore, as it relates to the default interest of \$1,213,580.05 that represents the accumulated default interest over the period of the loan.
- [27] The default interest rate was contractually agreed. I am frequently amazed at how ignorant many borrowers appear to be of the practical consequences of the application of a default interest in the ballooning of their liability and I appreciate the strong reaction by the 1<sup>st</sup> Defendant having seen the effect it has had on the Elmwood Loan. Nevertheless, I have not been presented with any legal or equitable basis on which I can properly find that the sum claimed resulting from the application of the default interest rate is harsh and should not be permitted.

### **The sale of the Elmwood Property**

- [28] Mr. Gammon made extensive submissions criticizing the manner in which the Claimant exercised its power of sale as Mortgagee. He submitted that the Defendants had obtained a valuation report in respect of the Elmwood Property which disclosed a market value of between \$56,000,000.00 and \$59,000,000.00, and a forced sale value of \$46,000,000.00. Despite this, the property was sold for \$39,000,000.00 in 2018. He argued that there is no evidence that the Claimant took all reasonable steps to obtain the best price especially in circumstances where this was a sale by private treaty. Counsel relied on the cases of **Moses Dreckett v Rapid Vulcanizing Company Limited** (1988) 25 JLR 130 and **Foote (Donovan) v JMMB Merchant Bank Limited** (formerly) **Capital and Credit Merchant Bank Limited** 2008 HCV3328, decisions of the Court of Appeal and the Supreme Court respectively, in which the classic test in **Cuckbrick Brick**

**Company Limited and Another v Mutual Finance Limited** [1971] Ch 949 was approved.

[29] Mrs. Gibson-Henlin QC submitted that the Defendants had not sufficiently raised in their defence a challenge to the manner in which the Claimant had exercised its power of sale or asserted that the Claimant had been negligent. Learned Queen's Counsel posited that if the Defendants sought to raise breach of duty and/or negligence, this should have been expressly pleaded and the negligence would have had to have been particularized. Furthermore, there would have had to have been a finding on that issue which would have been a necessary precondition to an assessment of damages against a bank on the basis of breach of duty or negligence. I find that there is considerable force in these submissions and I accept them. This Court cannot within the context of this assessment, properly consider the issue of whether there was a breach of duty by the Claimant in the exercise of its power of sale. This is an issue which ought to have been raised and properly pleaded in the statement of case especially since this is usually an issue requiring the detailed assessment of evidence as to value and the steps taken by the bank in attempting to obtain the best price for the property.

[30] The Elmwood Property was sold for the sum of \$39,000,000.00. The claimant has exhibited a final vendors statement of account prepared by Alton E Morgan & Co the Attorneys-at-Law who handled the sale of the property and which states the sale price and the net proceeds of sale in the amount of \$33,401,312.50. The statement discloses the usual deductions such as the 5% transfer tax and half cost of the 0.5 percent registration fee. The accuracy of this document has not been challenged. The Claimant has also exhibited a detailed Statement of Account, which contains the net proceeds of sale of \$33,401,312.50 but which also lists the total external costs that were incurred by the Claimant in connection with the sale and purchase of the property in the sum of \$393,064.84. These costs included for example, payment of property taxes in the sum of \$188,046.50 and the payment of property insurance in the amount of \$74,268.75. In addition to these expenses the Statement of Account also lists a number of other payments associated with

auction attempts totalling \$381,098.10 which include for example three auction fee invoices two valuation fees.

**[31]** The amount of the various deductions and the calculation by the Claimant as contained in the Statement of Account has not been challenged by the Defendants.

**[32]** The amount remaining after all the fees were deducted from the sale of the Elmwood Property amounted to \$32,627,149.56 which was applied to the Elmwood Loan as a payment. After this payment, the balance to be paid by the member as reflected in the Statement of Account was a total of \$12,469,656.51 which was comprised of principal in the amount of \$87,508.06; interest in the sum of \$11,168,568.40 and penalty in the sum of \$1,213,580.05.

**[33]** The Claimant has also exhibited a Statement of Account to Close as at 1<sup>st</sup> November 2019 which shows the indebtedness of the Defendants to be \$12,490,578.99 as at 5<sup>th</sup> November 2019. On a balance of probabilities, I accept the Claimant's calculations presented to the court in the statements of account to which reference has been made, to be accurate. Furthermore, the Claimant asserts that interest accrues at the daily rate of \$23.38 and as at 11<sup>th</sup> January 2021 the amount outstanding is \$12, 534, 659.94. This figure if updated to 14<sup>th</sup> January 2021 the date of judgment on the assessment amounts to \$12,534,730.08 and the Court assesses damages in this sum.

**[34]** In the premises I make the following order:

1. Damages having been assessed in the amount of \$12,534,730.08 Judgment is awarded in favor of the Claimant against the Defendants in the said sum of \$12,534,730.08 plus statutory interest at the rate of 6 percent per annum from today's date 14<sup>th</sup> January 2021 until the judgment is satisfied.
2. Costs of the assessment of damages are awarded to the Claimant to be taxed if not agreed.