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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1998/C341

BETWEEN	CITIZENS BANK LIMITED	PLAINTIFF
AND	LLOYD STANBURY	1ST DEFENDANT
AND	JANET STANBURY	2ND DEFENDANT

Mr. D. Goffe Q. C instructed by Myers Fletcher and Gordon for Plaintiff.

Mrs. Denise Kitson instructed by Stanbury and Co. for Defendants.

Heard: June 13, 14, 15 September 21,2000.

HARRISON J

This is an application for summary judgment. The statement of claim alleges that the defendants are indebted to the plaintiff for various sums of money and are in breach of the terms of the loans. The defendants entered appearance on the 13th October 1998 and filed their Defence on the 20th January 1999. A Reply to the Defence was filed on the 19th March 1999 and the application for summary judgment filed on the 4th June 1999.

The defendants have set up a defence based on a contract of variation. They have contended that there are triable issues in the pleadings and have exhibited a proposed amended defence and counterclaim.

The Law

Section 79(1) of the Judicature Civil Procedure Code Law stipulates:

> " Where the defendant appears to a writ of summons specially endorsed with or accompanied by a statement of claim under section 14 of the law the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts

verifying the cause of action and the amount claimed(if any liquidated sum is claimed) and stating that in his belief there is no defence to the action except, as to the amount of damages claimed, if any, apply to a judge for liberty to enter judgment for such remedy or relief as upon the statement of the claim the plaintiff may be entitled to. The judge thereupon, unless the defendant satisfies him, that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally may make an order empowering the plaintiff to enter such judgment as may be just having regard to the nature of the remedy or relief claimed."

The defendant is therefore obliged to satisfy the Judge that he has a good defence on the merits or disclose facts that will entitle him to defend the action. Of course, a defendant may also show cause by a preliminary or technical objection. The 1967 Supreme Court Practice states at Order 14 r 4(1) :

"A defendant may show cause against an application under Rule 1 by affidavit or otherwise to the satisfaction of the Court"

There is no corresponding provision however, in the Civil Procedure Code. In **Dojap Investments Limited and Others v Financial Institutions Services Limited SCCA** 42/98 (unreported) delivered on the 19th November 1999, Rattray P said that where the question to be determined is whether in law an arguable defence arises, the absence of an affidavit from the respondent challenging the facts would not be fatal to the application for leave to defend in response to the application for summary judgment". The inference could be drawn therefore, that a defendant is required to swear to and file an affidavit when he seeks to rely upon facts.

The learned authors of the Supreme Court Practice (supra) have stated:

"...although a defendant may show cause by "affidavit or otherwise" "it is anticipated that in practice the Masters will generally require an affidavit from the defendant before they feel "satisfied" that the defendant is entitled to leave to defend save in exceptional or obvious cases e.g in a small claim...The use of the term "or otherwise" is not intended to open wide the door for giving leave to a defendant who has no real defence; the primary obligation remains on the defendant to satisfy the Court that there is a triable issue or question or that there ought to be a trial for some other reason."

Where the defendant files an affidavit it must condescend upon particulars, and should as far as possible deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on as supporting it. It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part. A mere general denial that the defendant is indebted will not suffice. See **Wallingford v Mutual Society** (1880) 5 App. Cas. per Lord Blackburn at page 704. Sufficient facts and particulars must be given to show that there is a bona fide defence.

The following propositions have also been stated in decided authorities:

1. Summary judgment should not be given where there is a bona fide defence i.e an issue or question in dispute that ought to be tried.
2. On a application for summary judgment disputes of fact should not be decided, serious questions should not be determined in a summary manner and issues should not be tried.
3. A defendant seeking to resist summary judgment should state clearly and concisely what his defence is and what facts are relied upon as supporting it.
4. The affidavit sworn to may contain statements of information and with the sources and grounds thereof.
5. Where a cross-claim is un-connected with the plaintiff's claim then judgment should be entered for the plaintiff. See **Rotherham v Priest** (1879) 41 LT 558 C.A.
6. If the cross-claim is linked to the plaintiff's claim, the counterclaim must be plausible and connected to the plaintiff's claim.
7. If a set-off is a defence to the plaintiff's claim, where the value of the claim is at least equal to the value of the claim, then the defendant should be granted unconditional leave to defend.

8 If the set-off is not worth as much as the claim unconditional leave to defend in the sum of the set-off can be granted with judgment for the balance. See **Axal Johnson Petroleum AB v MG Mineral Group AG** [1992] 1 WLR 270 C.A.

<u>Is there a fair or reasonable probability of the defendants having a real or bona fide defence</u>?
The answer to this question lies in the affidavit evidence and the pleadings filed in the matter.

There are a number of cases that have laid down guidelines with respect to how affidavit evidence should be treated in an application for summary judgment. I shall refer to a few. In **Banque de Paris et des Pays Bas (Suisse) S.A v Costa de Naray** [1984] 1 Lloyd's Re. 21 Ackner L.J said at page 23:

> "It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend, the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence."

In **Bhogal v Punjab National Bank** [1988] 2 All E.R 296 at 303, Bingham L.J puts the matter this way:

> "But the correctness of factual assertions such as these cannot be decided on an application for summary judgment unless the assertions are shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence."

In **Day v RAC Services Ltd** [1999] 1 WLR 2150 Ward L.J said:

> "I agree, however, that the arguable case must carry some degree of conviction but judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set aside against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it…."

What is the affidavit evidence placed before me? Deryck Rose, Credit Manager for the Plaintiff has deposed inter alia:

> "2. I hereby verify the facts contained in the Statement of Claim filed herein. The amount loaned by the Plaintiff to the Defendants was secured by an Instrument of Mortgage

numbered 937922 and dated the 10th day of June 1996. Exhibited hereto marked "DR" for identity is a copy of the said instrument of Mortgage.

3. Since the issue of the said Writ of Summons and Statement of Claim the Defendants have failed to pay any sums to the Plaintiff to settle or reduce the sums due and I confirm that the sums set out in the Minute of Judgment exhibited hereto are correct.

4. I verily believe that there is no Defence to the Statement of Claim filed in this action.

5. Accordingly, I humbly ask that an Order be made in terms of the Summons filed herewith."

Mr. Goffe Q.C submitted that the mortgage deed which is exhibited and marked "DR" in the affidavit of Deryck Rose (supra) is excellent evidence which shows that on its date the defendants have acknowledged that they owe the plaintiff the sum of J$11,632,000.00 with interest. He submitted that the plaintiff would therefore be entitled without more to summary judgment for this part of the claim less any payments that the defendants may have made to reduce the balance. He argued that the question would really be, how much is owed? He further argued that accounts could be taken by the Registrar of the Supreme Court in order to ascertain the amount due.

He also submitted that there is no bona fide defence and has asked the court to examine the contemporaneous letters between the parties. He further submitted that these letters have provided a basis to conclude that there is no arguable defence and summary judgment should be granted.

The defendants have denied the plaintiff's claim and contend that the pleadings have disclosed triable issues. They have sworn to an affidavit on the 20th October 1999 stating inter alia:

"2. That our defence clearly denies that the plaintiffs are entitled to the claim set out in the statement of claim and sets up a defence based inter alia on a contract of variation.

3. That the defence is not frivolous or vexatious or without substance and clearly joins issue with the claim and we respectfully ask that the matter be heard on the merits of the case.

4. That we exhibit hereto marked "A" for identification, a proposed Amended Defence including a Counterclaim and we hereby ask this Honourable Court to dismiss the Summons for summary judgment and to treat the same as a Summons for Directions including in the order for direction the attached proposed amendments to the Defence."

They also rely on an affidavit dated 28th October 1999. It states:

"2. That we make reference to our Affidavit dated the 20th day of October and filed herein and now state that we wish to further amend the Proposed Amended Defence attached to our said Affidavit filed herein.

3.That we exhibit hereto marked "B" for identification the Further Proposed Amended Defence and Counterclaim and the material facts of which we aver are true and raise triable issues and we again hereby ask this Honourable Court to dismiss the Summons for Summary Judgment and to treat the same a summons for direction including in the order for direction the attached proposed amendments to the Defence".

Mrs. Kitson argued that the proposed amended defence shows where the parties had agreed that payment of the loans were to be deferred. She submitted that the plaintiff's delay in producing the titles resulted in the property being put up for sale in a depressed market thereby causing the defendants to suffer foreseeable loss. She also submitted that damages arising from the counterclaim could set off the claim at trial. Claims in respect of injury to reputation and for an account to be taken were set out in the proposed document. She said that there was disparity in the figures relating to the outstanding sums of money and submitted that the figures in the statement of claim, the minute of judgment and the statement of account(exhibited) were all different. It was patently clear therefore, that a proper accounting was required.

As regards the Reply to the Defence she submitted that vital issues were joined between the parties.

It is abundantly clear from the evidence that the parties are not ad idem on the alleged outstanding sums of money. The defendants have questioned the substance and accuracy of these sums. They further contend that there is no breach of contract as pleaded because of a variation of the contract agreed to by both parties that the loan was to be settled out of liquidation of the security located at

16A Worthington Terrace, Kingston 5.The facts also reveal that the plaintiff had permitted the use of the duplicate certificate of title towards this end, hence the proposed amended defence and counterclaim deal with the inordinate delay in its release and consequential damages which the defendants allege they have sustained.

The pleadings in the Reply reveal that the plaintiff has denied that the written loan agreement between the parties was varied orally or otherwise, as alleged or otherwise. The plaintiff admitted however, that it had consented to the release of the Duplicate Certificate of Title, that the title was splintered and the new titles returned to the plaintiff. The Plaintiff denied however, that this was pursuant to the alleged or any variation of the loan contract.

The affidavits upon which the defendants rely are very terse. The defendants' affidavit of the 20th October 1999 has simply stated that their defence denies the plaintiff's claim and that it sets up a defence of variation of contract. The affidavit asserts as well that the defence is not frivolous or vexatious or without substance and that it clearly joins issue with the claim. The affidavit of the 28th October 1999 refers to the earlier affidavit and then states:

> "3. That we exhibit hereto marked "B" for identification the Further Proposed Amended Defence and Counterclaim <u>and the material facts of which we aver are true and raise triable issues</u> and we again hereby ask this Honourable Court to dismiss the Summons for Summary Judgment and to treat the same a summons for direction including in the order for direction the attached proposed amendments to the Defence". (emphasis supplied)

The defendants are therefore placing reliance upon the facts set out in the proposed amended defence and counterclaim. It is without a doubt that the document cannot be treated as a pleading since it has not been filed in the Registry of the Supreme Court. The question to answer is, can the defendants in the absence of an affidavit rely upon the contents of the document in order to show that there is merit in the defence? Mrs. Kitson was of the view that they could. She submitted that the affidavit of the 28th October 1999 incorporates the contents of the proposed amended defence when the defendants deposed in that affidavit that the material facts averred in the proposed amended defence and counterclaim are true and raise triable issues.

Mr. Goffe submitted however, that where a defendant sets out in his pleadings that facts are different from those alleged earlier he should state this in an affidavit. He argued that the

defendants ought to have sworn to an affidavit setting out the material facts rather than seeking to rely upon a document that has not been filed.

It is my considered view, that there is merit in the submissions of Mr. Goffe Q.C. Where a defendant files an affidavit in these proceedings that defendant must state clearly and concisely what the defence is and what facts are relied on as supporting it. The defendant cannot in my view circumvent the need for an affidavit by simply stating that the facts in the proposed document are true and raises triable issues. The proposed amendments are not minor ones hence, the defendants ought to depose to these new facts in an affidavit. I hold therefore that the defendants cannot incorporate the material facts set out in the proposed amended defence and counterclaim in their affidavit of the 28th October 1999.

I am satisfied that in this case there is no bona fide triable issue. The matter does not rest on the mere statement of the defendants in their affidavits. I have seen a number of letters that had passed between the parties. It is necessary to extract them in this judgment having regards to the nature of the application. They are set out below:

1.Letter from Stanbury and Co. of the 25th March 1996 and part of exhibit "DR 1"which states inter alia :

> "25th March 1996
> Mrs. Antoinette Reid-Walcott
> Citizens Bank Limited
> 17 Dominica Drive
> Kingston 5.
>
> Dear Mrs Reid-Walcott
>
> Re: Lloyd/Janet Stanbury – Foreign Exchange loan and Stanbury and Company Office Account.
> "...
> Regrettably we must now inform you that the joint venture and refinancing arrangement involving our Company Sandosa Limited has fallen through. In these circumstances we have not been able to access the funds anticipated to allow us to settle in full the foreign exchange loan and to remove the overdraft on the office account.
>
> We have now been forced to embark on an office relocation exercise which will permit us to dispose of 16a Worthington Terrace with a view to settling all our liabilities to the Bank. To this end we are proceeding to secure alternative office facilities and additionally we have recently commenced the procedure necessary to obtain strata titles for each of the two existing storeys of the building at 16a Worthington Terrace in an effort to facilitate the disposal of the property in parts if necessary to expedite the entire process.

In light of the foregoing, we are therefore now asking that you grant us the following:

1. An extension of the terms of our letter of February 1, 1996 for An additional six(6) months to allow for completion of the selling exercise.

2. A conversion of the Office Account overdraft balance to a demand loan for the same six(6) months period.

3. Both loans to be serviced by way of interest payments monthly until fulkl settlement as proposed..

Thanks for your usual kind cooperation.

Sgd. Janet-Kaye Stanbury (Mrs.)

2. The plaintiff responded in a letter of the 29th March 1996 which states inter alia:

"Meeting of March 27, 1996
Reference is made to our captioned meeting, and as discussed, I wish to confirm the following:

1. Current Account #1107-010597 in the name of Stanbury & Company – Client Account and Current Account # 1107-010600 in the name of Sandosa Limited will be converted from regular chequing accounts to our Club Class Chequing Accounts effective immediately.
2. No further increase in exposure will occur on current accounts.
3. Lodgements to cover all overdraft balances to be made by April 4, 1996 to current account in the name of Stanbury & Company Limited and Janet &/or Lloyd Stanbury. Accounts are expected to operate in credit once cleared.
4. Recommendation will be submitted to Citizens Bank's credit committee to convert overdraft facility on Current Account #1107-010740 to Demand Loan, with interest payments monthly and principal repayable at maturity, Six (6) Months from conversion date. We will advise you of the outcome of our request accordingly.

We are in the process of upstamping our security and anticipate receiving your cheque for $305,460.00 to cover the costs....

Sgd. Antoinette Reid- Walcott (Mrs.)
Branch Manager.

3. There is a letter of the 21st June 1996 from the defendants to the Plaintiff Bank where the defendants have acknowledged the debts and have stated that they are trying to sell the property in order to liquidate the debt. The letter states as follows:

"Dear Mrs Reid –Walcott

Re: Loan Account

We refer to previous meetings and correspondence in this matter culminating in meeting on Tuesday June 18, 1996 at your offices when Mrs. Camile Facey and Mrs Camile Meikle-Gooden along with your goodself and the writer were in attendance.

This will confirm that we now wish to have an official approval with regards to the above loans as follows:

1. The foreign exchange loan to be settled by or before December 31, 1996 with payments of interest only to continue until that date,. We propose to bring the interest account current by June 30, 1996 and we note that you have failed to credit us for one (1) month's interest which was paid on this account.
2. A conversion of the overdraft balance on the office account to a demand loan with payments of interest and principal deferred to the 31st December, 1996 at which time the account to be settled in full. We are also again requesting that the interest account be revisited so that any adjustments possible can be put in place by December 31, 1996.

We are unable to commit to a payment of interest only in respect of this account having regard to other commitments for the office and the foreign exchange loan to be serviced.

We make reference to ours dated March 25, 1996 and in particular to the third paragraph thereof (copy enclosed for quick reference). We confirm that the application has been filed with the KSAC and we have been promised an early approval of the two strata titles. We also confirm that current efforts are being made regarding the sale of the property as indicated in our meeting.

The selling price is $26,000,000 for the entire property or $13,500,000 -$15,000,000 for each of the two strata lots and there is definitely more interest in the lots as opposed to the whole. The six(6) months being requested should cover the completion of the title exercise and the sale of the lots.

Please let us hear from you regarding all the matters herein.

Sgd. Janet-Kaye Stanbury.

4. The defendants wrote a letter dated 5th January 1997 to the plaintiff. The letter states as follows:

"Re Loans Stanbury and Co/J & L Stanbury

We write regarding the above accounts and at this time wish to make the following comments:

"1. As you are aware we have been unable to secure the sale of the premises due to the state of the market during 1996.

We have however been able after much effort to obtain the approval to subdivide the premises at 16a Worthington Terrace and a copy of same is enclosed at this time.

We have experienced unforeseen setbacks in our collections and earnings for 1996 due to certain personal misfortune as well as the state of the economy. To this end we have taken steps to ensure that in 1997 we will in fact increase our foreign exchange income.

We have no plans to go out of business at this time and with diversification and some further consideration from Citizens Bank we aim at settling these accounts as soon as possible.

Hereunder is the proposal which we have been forced to resort to making at this time:

a. That we be allowed the months of January and February to bring the arrears on the foreign exchange accounts up to date.
b. That if the accounts are not settled in full by the end of March we begin to pay the full amounts of principal and interest on the foreign accounts until same is settled.
c. That the full amount of the Jamaican dollar demand loan be settled by March from proceeds of a separate loan which we are negotiating. We Are requesting that provided we supply you with a letter from a financial institution regarding this loan being processed that you will waive the interest on this amount until settled.,

In the meantime we await your instructions as to whether you would loan us the title for Worthington Terrace to strata the titles or whether we should forward the application and approval to your legal department. We are quite confident that with the separate Titles in hand we will in fact be able to settle the foreign exchange loan by realising the security.

We are indeed grateful for your continued patience in these matters and wish to assure you that we are giving them our utmost priority and attention.

We look forward to your early response.

Sgd. Janet-Kaye Stanbury

I do agree with Mr. Goffe Q.C that the pleadings do not reveal a bona fide defence. The contemporaneous letters referred to above, have also provided a basis for me to conclude that there is no arguable defence in this matter.

The delay issue

The defendants raised the issue of delay. The writ was filed on the 13th October 1998. The defendants entered appearance and filed their defence on the 20th January 1999.The summons for summary judgment was not filed until June 4th 1999.Mrs. Kitson submitted that a bona fide application for summary judgment ought to have been made between January and February. She relied on the case of **McLardy v Slateum** (1890) QBD 504 on the question of delay. Mr. Goffe argued however, that the defendants could have waived the delay. He said they had engaged the plaintiff on issues of merit right up to the hearing of the summons.

The case of McLardy (supra) proposes that if an application for summary judgment is made after the delivery of the defence, the plaintiff must show circumstances that justify the delay. In **Brinks Ltd v Abu – Saleh** (Ch.D) [1995] 1 WLR 1479 Jacobs J was most critical however,of the decision. He stated that Pollock B. had given no reason for saying that the plaintiff must show circumstances to justify the delay. He said: "Whilst that may well have been apposite in the 1890s, when trials were quicker and cheaper and I suspect Order 14 was more restricted in its use, I do not think it appropriate today...."

It is my considered view that the delay complained of in the instant matter does not affect the plaintiff's application for summary judgment.

The Order

Looking at the whole situation I conclude that there shall be summary judgment in favour of the plaintiff as set out below:

1.

a. Against both defendants jointly and severally, for:
   (i) the sum of $17,729.684.73 and interest at $10,649.28 per day from May 15, 1999.
   (ii) The sum of $93,783.89 and interest at $85.88 per day from May 15, 1999.

b. Against the 1st Defendant for:
   (i) the sum of US$460,406.20 and interest at US$0.46 per day from May 15, 1999.
   (ii) The sum of US$1,002.31 and interest at US$0.46 per day from May 15, 1999.
   (iii) The sum of $1,923.73 and interest at $2.13 per day from May 15, 1999
   (iv) The sum of US$17,177.18 and interest at US$7.80 per day from May 15, 1999.
   (v) The sum of $37,721.34 and interest at $41.76 per day from May 15, 1999.
   (vi) The sum of $24,828.18 and interest at $27.61 per day from May 15, 1999.

c. Against the 2nd Defendant for:
   (i) the sum of $689,031.19 and interest at $630.98 per day from May 15, 1999.
   (ii) The sum of US$19,392.67 and interest at US$8.81 per day from May 15, 1999.
   (iii) The sum of $88,842.00 and interest at $98.35 per day from May 15, 1999.

d. Against both defendants for
   (i) Costs to be taxed if not agreed.

2.An account is to be taken by the Registrar of the Supreme Court in order to determine what sums have been paid on the respective loans by the defendants.

3. Certificate for Counsel granted

4. Leave to appeal granted.

5. Stay of Execution granted for a period of six (6) weeks.