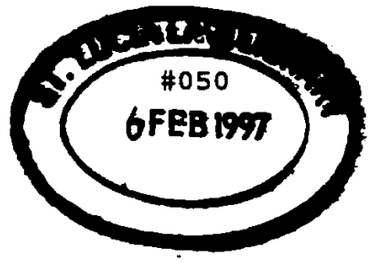

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 87 of 1995

BETWEEN:

ROYAL BANK OF CANADA

Plaintiff

and

1. SEBASTIEN LIONEL
2. BRENDA LIONEL

Defendants

Mrs. B. Fleming for Plaintiff
Mr. M. Michel for Defendants

1996: December 4 and 11.

J U D G M E N T

MATTHEW J. (In Chambers).

On February 1, 1995 the Plaintiff filed a writ of summons indorsed with statement of claim requesting payment of a sum of $12,662.69 being the balance on a promissory note, interest thereon at 12.5% per annum, 10% collection fee and costs. The Defendants were served on the same day but they never entered any appearance. On March 30, 1995 Frederick Phillips swore to an affidavit of service and on April 14, 1995 judgment in default of appearance was entered for the Plaintiff in accordance with the prayer to the statement of claim. On December 21, 1995 the Plaintiff filed a praecipe for writ of execution and instructions to levy.

On April 17, 1996 the Defendants filed an application for Judge's order permitting the filing of an opposition. The application was supported by an affidavit by Charles Hippolyte said to be the duly appointed attorney for the Defendants. On June 25, 1996 Stanley E. Hulse, attorney and manager of the Plaintiff, swore to an affidavit in reply. In his affidavit Hulse alleged that he was advised and

verily believes that the judgment entered for the Plaintiff was for liquidated damages and he referred to the hypothecary obligation which was exhibited to his affidavit which provided for, inter alia, banking and cost charges and expenses which the mortgagee may incur in obtaining repayment of the moneys lent to the Defendants. Incidentally I note the hypothecary obligation only calls for 12 per cent interest.

Learned Counsel for the Defendant submitted that the application was founded on Articles 448(3) and 602 of the Code of Civil Procedure. He stated that there is a cause which affects the validity of the judgment and that cause is that the judgment had been irregularly obtained. Counsel submitted that if there is any unliquidated aspect of the judgment it had to be assessed by the Court. He stated that they do not deny that the sum of $12,662.69 is liquidated; nor do they deny that the interest at 12.5% is liquidated, but their contention is with the 10% collection fee which Counsel contends is not of the nature of a liquidated claim. Counsel simply referred to the Supreme Court Practice 1988 Volume 1 at pages 130 - 132 which he said sets out clearly what the relevant law is on the irregularity of a judgment.

In her reply learned Counsel for the Plaintiff referred to Stanley Hulse's affidavit in reply and especially paragraphs 3 and 4. Counsel also referred to the hypothecary obligation and especially at paragraph e(111) and (iv). Counsel submitted that the mortgage itself empowers the mortgagee to recover all expenses, costs, charges and by inclusion the 10% collection fee which is a normal charge by a solicitor for collection of a debt. Counsel further submitted that the mortgagor by signing the agreement had agreed to pay all the charges and costs incurred by the mortgagee to recover the debt.

In support of her submissions learned Counsel for the Plaintiff referred to the following authorities: The White Book 1995

paragraph 13/1/11; paragraph 6/2/4; paragraph 6/2/8 and to Halsbury's Laws of England, Fourth Edition Reissue Volume 3 paragraph 300 and Volume 37, paragraph 397. Counsel also referred to Rules of the Supreme Court Order 2 Rule 2.

I am not going to look at Mr. Michel's citation which was thrown at me and suggesting that I should go and study the White Book. It is enough to peruse the authorities cited by Mrs. Fleming. Paragraph 300 of Volume 3 referred to above expresses the right of a banker to charges and commission but the paragraph says it is doubtful whether the right can be based on acquiescence in the charges and commissions as disclosed in the bank statement, in view of the doubts cast on the existence of any obligation on the part of the customer to examine his bank statement. This paragraph is not very relevant to my decision. Neither is paragraph 6/2/8 which states that a claim for quantum meruit may be indorsed as a liquidated demand. This is quite understandable. Suppose a carpenter agrees to work for me at $100.00 a day for a week of five days and after the fourth day he falls ill I do not think there could be objection to him entering a liquidated judgment for $800.00.

Paragraph 13/1/11 refers to Order 6 Rule 2 for a definition of a liquidated demand but there is an interesting sentence which states: "Where the claim indorsed on the writ included an item for bank charges and it appeared that the amount claimed was for expenses of noting under Section 57 of the Bills of Exchange Act 1882 it was held to be a liquidated demand." The claim was indorsed on the writ.

Paragraph 6/2/4 defines a liquidated demand as being in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. Paragraph 397 of Volume 37 of Halsbury's Laws of England gives a similar definition and states in addition that a

claim does not cease to be a liquidated demand merely because there is added to it a claim for interest. Also of interest is the last sentence of paragraph 397 which states: "A claim for interest under the Law Reform (Miscellaneous Provisions) Act 1934 need not be pleaded, and in the case of a claim for a debt or liquidated demand the Plaintiff may enter final judgment for the principal sum claimed and interlocutory judgment for interest under that Act to be assessed."

The definition emphasises that a liquidated demand is for a specific sum of money due and payable by the Defendant to the Plaintiff. The 10% collection fee cannot be said to be a specific sum due and payable by the Defendants in this case to the Plaintiff. Learned Counsel for the Plaintiff in the course of her submissions simply included it in the charges. Her exact words were:

> "The mortgage itself empowers the mortgagee to recover all expenses, costs, charges and by inclusion 10 per cent collection fee."

I do not agree that the 10% collection fee is a liquidated sum. Rather it is an unfair imposition on an unwary public. Now costs are not a liquidated demand. The Court must award it and quantify the amount. I am not sure of the justification for a collection fee in addition to the award of costs. I am aware of the practice whereby the agents of landlords, who may be solicitors, collecting the monthly rentals from tenants and being paid a collection fee. Does the solicitor act similarly in a case such as this? There seems to be no collection being made for the house is being put up for sale by public auction.

I am not advocating that the banks should not charge for their services but I say that they cannot unilaterally add on any percentage they feel like on the debts owed to them. After all what will prevent them increasing their collection fee to 15 per

cent from January 1, 1997?

I do not think the provisions of Order 2 Rule 2 are applicable to this case. I therefore grant the order permitting the Defendants to file the opposition to the seizure and sale of the property in question within ten days failing which the execution shall proceed in the normal way. I also award costs in the sum of $500.00 to the Defendants in any event.

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A.N.J. MATTHEW
High Court Judge