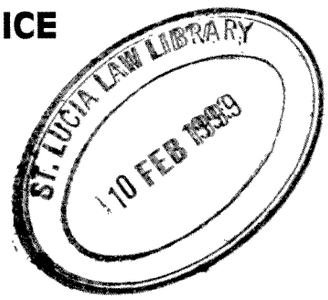
trespass, damages,

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1997



SUIT NO: 136 of 1993

Between:

NICHOLSON DICKSON
MURIEL DICKSON

PLAINTIFF

AND

BARCLAYS BANK PLC

DEFENDANT

Appearances:

Mr. Dexter Theodore for the Plaintiff

Mr. Anthony McNamara for the Defendant

1997: NOVEMBER 17, 18, 20
DECEMBER 19

JUDGEMENT

FARARA J.

The Pleadings

By Writ of Summons indorsed with Statement of Claim issued 12th November, 1993 the Plaintiffs, who are estranged husband and wife, claims against the Defendant bank general damages for trespass to and conversion of their immovable properties, interest and costs.

During his closing arguments Learned Counsel for the Plaintiffs, although not abandoning the claim in trespass, quite rightly urged the count to focus on the claim in conversion.

The properties said to have been converted are (1) a portion of land in the Quarter of Vieux-Fort owned in community by the Plaintiff registered as Block 1025B Parcel 26 and (2) a portion of land in the town of Vieux-Fort (New Dock Road) owned solely by the Second Plaintiff registered as Block 1217C Parcel 499.

The Plaintiffs' pleaded case is that the Defendant, having in 1982 radiated a 1978 Hypothecary Obligation given by the Second Plaintiff in favour of the Defendant mortgaging her sole property, Parcel 499, to secure a loan of $6,920.00 and, a 1980 Hypothecary Obligation given by the Plaintiffs mortgaging their joint property Parcel 26, proceeded to sue the Plaintiffs claiming against them both an alleged balance of $6,547.42 on the 1980 Hypothec and against the First Plaintiff for a balance of $5,866.00 on a vehicle loan and a further sum of $1,466.11. Further, the Defendant having obtained default judgments against both Plaintiffs, qua defendants, in January 1983 executed these judgments by seizing both properties, including a building on the Second Plaintiff's land in the town of Vieux-Fort (Parcel 499) which were then sold to Lyndell and Eula Walker by judicial sale and the Plaintiffs were required, by written notice of the Sheriff of the High Court of Justice, to deliver-up possession of their properties on or before 15th June, 1992.

On 6th June, 1992 the said Lyndell Walker with servants or agents wrongfully entered the home of the Plaintiffs on Parcel 499 causing damage thereto in an unsuccessful attempt to evict them therefrom, thereby causing them to suffer "ridicule and odium from curious on-lookers and neighbours".

The Defence, although admitting the radiation of both the 1978 and 1980 Hypothecs, pleads that the Defendant will seek to impugned the Deed of Radiation at the trial of the action, and asserts that at the time of the radiation the Plaintiffs were indebted to the Defendant and continue to be so indebted, in the sum of $50,808.66, which indebtedness was acknowledged verbally by the Plaintiffs to the Defendant to the extent that they are estopped from denying the existence of the said debt. Further, the default judgments, as judicial hypothecs, attached to all the immovable property of the Plaintiffs, giving the

Defendant the right to sell the said properties by judicial sale in satisfaction of the judgments.

The Defendants also pleaded a set-off at paragraph 9 of the Defence -

> *"If, which is denied, the Plaintiffs are entitled to any damages as claimed, the Defendant further states that the Plaintiffs received the sum of $11,878.87 from the proceeds of the judicial sale, which sum must be set-off against any damages which the Plaintiffs claim to be entitled to."*

Let me say at this juncture that absolutely no evidence, documentary or otherwise, has been given or produced in this matter to establish the allegation that the Plaintiffs received $11,878.87 or any sum whatsoever from the judicial sales of their properties, and so the plea of set-off is wholly unsubstantiated and fails.

The Defendant, by way of counterclaim, seeks judgment for the sum of $50,808.66 "being the balance of the debt arising described in paragraph 7" of the statement of claim, that is the alleged balance of the judgment debt from the default judgments obtained in the previous suit brought by the Defendant in 1982.

I will deal with the validity of this counterclaim later in the judgment.

In their Reply and Defence to Counterclaim, the Plaintiffs assert that the solicitor was instructed by the Defendant to radiate both Hypothecs; deny that they received from the Defendant the letter dated 25th May, 1982 and while admitting making visits to the Defendant and their solicitors, asserts that the purpose of those visits were to protest the Notice of seizure of their properties received by them and not to treat with the Defendant for a loan to settle their indebtedness to the Defendant.

The Plaintiffs also plead that the default judgments, although not set aside, were and remain irregular in that they were

separate judgments for the same amounts of $13,879.53 against each Plaintiff, although the claim, which included the Second Plaintiff, was for $6,547.42.

The Plaintiffs also deny owing the Defendant the sum of $50,808.66 or any sum.

The Plaintiffs' then solicitor, by letter dated and filed 6th May, 1993 requested of the Defendant certain particulars of its Counterclaim, which were supplied by letter dated 17th May, 1993 from the Defendant's Solicitors. This is a rather unconventional method of requesting and receiving particulars or further and better particulars of a party's claim.

The Defendant's Solicitors letter clearly states that the alleged debt of $50,808.66 arose from three separate loan transactions, namely, a farm establishment loan, vehicular loan and furniture loan, the balance of which as of 17th August, 1982 were $6,547.42, $5,886.00 and $1,466.11 respectively.

It was also specifically stated in that letter that the 1980 Hypothec was "a primary security for the farm establishment loan and the furniture loan and as collateral for the car loan."

I will address these loans separately later in the judgment.

This letter also revealed, and it was bourne out by the evidence, that the Second Plaintiff had obtained other loans from the Defendant.

A Joinder of Issue was filed by the Plaintiffs on 15th July, 1993 as was a Request for Hearing on 16th September, 1993.

The Facts

In large measure the facts essential for the court's determination of the legal issues involved in this case are matters of public record and are, in essence, not in dispute.

On 13th June, 1978 the Second Plaintiff executed in favour of the Defendant a Hypothecary Obligation (the 1978 Hypothec) mortgaging her land at New Dock Road in the town of Vieux-Fort to secure a loan of $6,920.00 with interest thereon at the rate of 7 percent per annum discounted, repayable by monthly installments of $186.00 over a period of four (4) years.

The purpose of this loan was for the building of a house on the said land which became the home of the Plaintiffs.

The First Plaintiff acted as Surety for the said loan. **Exhibit ND 1**.

It is accepted and beyond dispute that the 1978 loan was repaid in full by the First Plaintiff by October, 1982.

On 24th June, 1980 both Plaintiffs executed in favour of the Defendant a Hypothecary Obligation (1980 Hypothec) mortgaging their immovable property in community situate in the Quarter of Vieux-Fort comprising 4 acres, 3 roads and 26 perches of undeveloped agricultural land, to secure a loan facility of up to the amount of $8,000.00 with interest thereon at a rate of 10 percentum per annum repayable on demand. This was a farm or agricultural loan for the First Plaintiff to develop the said land. However, both Plaintiffs were contractually obligated for the repayment of the said demand loan. **Exhibit ND 2**.

It is the testimony of Carlton Glasgow, the Deputy Country Manager and Senior Corporate Manager in St. Lucia of the Defendant bank, that advances of up to $6,000.00 were made by the Defendant to the First Plaintiff under the 1980 Hypothec, for the purposes of developing the land mortgaged as security therefor.

By Clause 2 of the 1980 Hypothec the Plaintiffs covenanted as mortgagors -

> *"to pay or repay to the mortgagee on demand all such sums of money now or hereafter owing by the mortgagors to the mortgagee by virtue of these presents and all other*

money in respect of which the mortgagors become indebted to the mortgagee (such sums being hereafter called "debts and liabilities") and including without prejudice to the generality of the foregoing all monies advanced by the mortgagors either by way of overdraft or otherwise all debts owing by the mortgagors to the mortgagee whatever the nature of such debts may be whether direct or indirect absolute or contingent or otherwise and howsoever the same may be incurred whether alone or jointly with others as principal or surety .... and such "debts and liabilities" to include charges for interest ...."

And by Clause 3 of the 1980 Hypothec, the Plaintiffs jointly and severally covenanted with the Defendant, to pay interest on the said "debts and liabilities" at the rate of 10 percent per annum. The limit of the said "debts and liabilities" was expressly stated to be $8,000.00.

There is no provision in the 1980 Hypothec permitting the Defendant qua mortgagee, in circumstances of default by the mortgagors, to unilaterally increase, charge or demand a rate of interest higher than 10 percent per annum.

After the 1980 Hypothec, the Defendant made a loan to the First Plaintiff for the purchase by him of a motor vehicle ("the vehicle loan") secured by a bill of sale over the said motor vehicle. The exact amount of this loan is unclear, as neither the bill of sale or any other loan documents were put in evidence and Mr. Glasgow in cross-examination was uncertain as to the principal sum, stating initially $14,000.00 and then agreeing that $8,000.00 could well be correct.

What is clear from Mr. Glasgow's testimony, and I accept as a fact, is that the Second Plaintiff was not a party to or surety for the vehicle loan or the bill of sale and she was in no way responsible for or obligated to repay that loan, which responsibility and obligation rested solely with her husband the First Plaintiff.

Also, on a date uncertain but at sometime after the 1980 Hypothec, the First Plaintiff borrowed from the Defendant the sum of $2,000.00 to enable him to manufacture furniture to sell to the company "Courts".

It is clear from the evidence of the Second Plaintiff and Mr. Glasgow, and I so accept, that the Second Plaintiff was not involved in the process by which this sum of $2,000.00 was made available to the First Plaintiff or she was not called in or required to sign any bank documentation relating thereto. On this aspect the cross-examination of Mr. Glasgow is of some significance -

> *"There is nothing in our records to show that Mrs. Dickson was part of the furniture loan. The farm loan [1980 Hypothec] was for $8,000.00. Only $6,000.00 was disbursed. So when Mr. Dickson approached the bank for a $2,000.00 loan for the furniture there was no problem as there was room for an additional $2,000.00 ....I did not see anything in the records to the effect that Mrs. Dickson was contacted about the $2,000.00 furniture loan .... The amount of $2,000.00 would not have been disbursed at the same rate as the farm loan. It would have been disbursed at a higher rate maybe 1 percent but I cannot say".*

And in answer to the Court Mr. Glasgow testified -

> *"Mrs. Dickson did not have the obligation to repay the $2,000.00 loaned to Mr. Dickson for furniture".*

This evidence is to me most alarming because, as we shall see, a judgment in default of defence was entered against the Second Plaintiff in Suit 355 of 1982 for a liquidated sum, which includes the outstanding balance on both the furniture and vehicle loans, neither of which she played any part in obtaining and was not legally or contractually obligated to repay.

On 25th May, 1982 Miss A. F. Simmons, Manager of the Defendant bank by letter (**Exhibit CG1**) to Mr. Cyril Landers, the Plaintiffs Solicitor and Notary Royal who had certified the signatures of the parties to both the 1978 and 1980 Hypothecs, referring to the 1978 Hypothec only, stated -

"We certify that we no longer have any interest in the above mortgage, and it may be radiated."

The legal effect of this letter **CG1** and what evidential value the Court is to put on it, will be addressed when I come to deal with the legal issues and submissions in this case.

I continue with the factual chronology and my findings.

On 15th October, 1982 some 5 months after the letter **CG1**, Messrs Peter A. Weatherhead and Anthony G. Phillips, the then manager and assistant manager respectively of the Defendant bank, executed a Deed of Radiation of the 1978 and 1980 Hypothec "IN FAVOUR OF MURIEL DIXON" (**Exhibit ND3**).

Contrary to what has been stated by both Counsel in this matter and pleaded in paragraph 6 of the Statement of Claim and, to some extent, at paragraph 12 of the Defence, the Deed of Radiation registered in Volume 135a Number 137897 relates to the indebtedness or obligations of the Second Plaintiff only, it does not extend to the First Plaintiff. This is patently obvious on the face of the Deed if Radiation itself.

I therefore hold that the Deed of Radiation **Exhibit ND3** does not expressly or by impli-cation extend to the obligations of the First Plaintiff under the 1980 Hypothec and does not operate as a release or discharge of his obligations, thereunder, but only to the obligation of the Second Plaintiff. The evidence-in-chief of the First Plaintiff is that the Deed of Radiation was requested "in so far as my wife was concerned".

It means therefore that the First Plaintiff remained indebted to the Defendant and obligated to repay any balance owed on the loan secured by the 1980 Hypothec.

Indeed, this is consistent with the uncontroverted evidence that the 1980 borrowing was really for the benefit of the First Plaintiff, to whom both the Defendant and the Second Plaintiff looked to principally to repay the said loan. I would add that during that period the Defendant made other personal loans to

the Second Plaintiff who, it is agreed, fully discharged her obligations thereunder.

I do not accept the testimony of the First Plaintiff that the 1980 loan had been paid off when the Deed of Radiation was executed in 1982. It is interesting that no where in his examination in chief does he so assert. It is only in cross-examination where he first states - *"I paid off the second mortgage"*.

Having also testified that he had documentary proof of his payment of the 1980 mortgage, he was unable to produce it but ended up relying on the Deed of Radiation as his only proof that he paid of the debt. As I have observed the Deed of Radiation does not mention him and does not extend to extinguish his obligations under the 1980 Hypothec.

Later in cross-examination, the First Plaintiff not only admitted that balances were owed on the vehicle and furniture loans, but admitted that he treated with the Defendant making proposals for his son "Luc" to pay-off or take-over the judgment debt in Suit 355 of 1982. Also, in re-examination, having reiterated that he went to the Defendant with his son Luc and proposed that he sell the land in the country to payoff "the debt I owe the bank", he then stated-

> *"When I say the debt I mean the money I had taken to develop the land".*

It is common ground that the said money is the 1980 farm loan secured by the 1980 Hypothec and the said land is the property owned in community in the Quarter of Vieux-Fort Block 1025B Parcel 26.

I accept the testimony of both Mr. Richard Gomez and Mr. Carlton Glasgow, that the 1980 farm loan had not been paid in full and was in arrears. I find as a fact that after October 1982 the obligation to pay the arrears was that of the First Plaintiff solely, to whom the Deed of Radiation did not extend.

I also find as a fact that the vehicle loan, made to the First Plaintiff, was also in arrears and after sale of the vehicle a balance was owing thereon by the First Plaintiff.

An amount was also outstanding on the furniture loan taken out by the First Plaintiff.

On 12th November, 1982 the Defendant issued a Writ of Summons in Suit 355 of 1982 (**Exhibit ND4**) against both Plaintiffs as defendants.

In paragraph 3 of the Statement of Claim it is pleaded -

> *"The Defendants Nicholson Dickson and 2. Muriel Dickson are jointly and severally liable to the bank for the balance of a loan at present $6,547.42 secured by a Hypothecary Obligation by them in favour of the Plaintiff registered on 4th July, 1980 in Vol. 133a No. 128909".*

This pleading was factually and legally correct only as to Mr. Dickson, the First Plaintiff, not as to Mrs. Dickson the Second Plaintiff, who had been released and discharged by the Deed of Radiation of any obligations under the 1980 Hypothec.

Paragraph 4 of the Statement of Claim in Suit 355 of 1982 correctly asserts that Mr. Dickson "is further indebted to the Plaintiff for a vehicle loan presently $5,666.00 and a further loan [furniture loan] presently $1,466.11".

The claim for interest at the rate of 16 percent per annum was, on the documentary evidence, wholly unjustified. The rate of interest on the 1980 mortgage (ND2) was 10 percent per annum.

Mr. Glasgow testified in cross-examination that where a borrower fails to meet the terms of his loan it, at some stage, becomes classified by the bank as a "bad debt" and thereby attracts a higher rate of interest, reflecting the "increased risk"; and the bank records relating to the 1980 loan indicate that at some point, the loan having been classified as a bad debt, the rate of interest was hiked from 10 to 16 percent per annum.

That may be the policy of the Defendant bank and may well be in accord with usual banking and commercial practices. However, it is wholly unauthorized by the 1980 Hypothec and, no other loan documentation has been produced to the Court authorising the unilateral hiking by the Defendant of the interest rate on the 1980 loan.

This notwithstanding, Mr. Dickson, having not entered an appearance in Suit 355 of 1982, judgment in default of appearance was entered against him on 17th January, 1993 for $13,879.53 (the aggregate balances of the 1980 mortgage, vehicle and furniture loans) and interest thereon at 16 percent per annum from 17th August, 1982 until payment, and $60.00 costs. (**Exhibit ND5**).

A judgment in default of defence in identical terms was also entered on 17th January, 1993 in Suit 355 of 1982 against Mrs. Dickson. (**Exhibit CG2**). In my view this was clearly unjustified as, firstly, Mrs. Dickson was not at the time indebted to the bank in respect of the 1980 Hypothec or the vehicle loan or the furniture loan, for the reasons previously given. Secondly, no claim was made in the Writ against her in respect of balances on the vehicle or furniture loans, to which she was not a party or surety, and a judgment against her for those sums totalling $7,332.11 was patently bad and irregular. There began, in my view, a grave injustice to the Second Plaintiff.

No steps were taken then, and none have not been taken since, by either Plaintiff to set aside or appeal the default judgments entered against them in Suit 355 of 1982 or to set aside any steps taken thereunder to enforce the said judgments.

The bank, having obtained both default judgments, issued on 4th January, 1981 a Writ of Ferri Facias against both Plaintiffs for the joint and several judgment debt of $13,879.53 with interest thereon at 16 percent per annum. (**Exhibit ND6**).

Both Plaintiffs admitted having discussions with and making proposals to officers of the Defendant bank, after entry of the default judgments, regarding the payment of the judgment

debt. In particular, the First Plaintiff testified that he proposed to the Defendant that his son Luc be given a loan to pay-off the debt and take over the 4 acres of land, and, also, a proposal that Luc would pay $15,000.00 towards the judgment debt and make arrangements to pay the balance. These proposals did not meet with the Defendant's approval.

I accept the evidence of the Second Plaintiff that after the judgments and Writ of Execution, in an attempt to save her property at New Dock Road in Vieux-Fort Parcel 499, she proposed to the Defendant that she obtain a loan to pay-off the judgment debt.

I also accept as true the evidence given by both witnesses for the Defendant, Mr. Richard Gomez and Mr. Carlton Glasgow, as substantiated by the contemporaneous notes made by them at the time, **Exhibit CG3**, regarding the meetings with either Plaintiffs, viz, by Mr. Gomez on 16th November, 1983 (Mrs. Dickson), and by Mr. Glasgow on 6th November, 1986 (Mr. Dickson), 21 April, 1987 (Mr. Dickson) and 29th April, 1987 (Mrs. Dickson), where proposals were made for the payment of the judgment debt in Suit 355 of 1982.

On 6th June, 1991 some 8 years after the entry of the default judgments and 3 1/2 years after issuance of the writ of fi. fa., both properties, comprising the Second Plaintiffs property at New Dock Road and the farm land in the Quarter of Vieux-Fort, were sold by judicial sale of the Sheriff, to Lyndell Alvan Walker and Eula Frances Walker, for some $32,000.00 (**Exhibit ND7**).

By that Sheriff's Notice, (**ND7**) issued 9th April 1992 some 10 months after the actual sale, the First Plaintiff (who admitted receiving the Notice) was required to deliver-up possession of the said properties by 15h June, 1992.

According to the Second Plaintiff, Mr. Walker, having purchased the properties, arranged for the relocation of the tenant of the New Dock Road property.

On 6th June, 1992 Mr. Walker with workmen attempted to evict the Plaintiffs from the New Dock Road property, causing in the process damage thereto. This was done in the presence of both Plaintiffs and the brother of the Second Plaintiff.

There is absolutely no evidence that Mr. Walker and his workmen were, on 6th June, 1992, acting as the servants or agents of the Defendant or in any way under the authority or directives of the Defendant. Both Plaintiffs admitted that no officer or other persons of or representing the Defendant was present at or during the attempted eviction and destruction of parts of the house at New Dock Road, and I so find. In fact, all the evidence points to Mr. Walker, having purchased the property, taking steps as purchaser to obtain possession of that which was now owned by his wife and himself, albeit before expiry of the notice period.

The Plaintiffs did not vacate the property at New Dock Road until 1993.

I therefore reject the Plaintiffs' claim for damages for trespass against the Defendant as being wholly unsubstantiated and without merit.

The First Plaintiff obtained in 1993 two valuations, one from Hadrian Monrose (**Exhibit ND8**) of the property at New Dock Road (building $150,000.00 and land $35,000.00 - total $185,000.00) and another by Patrick John of the 4.25 acres of land at Woodlands in the Quarter of Vieux-Fort ($26,000.00). By then both properties had been sold to Mr. and Mrs. Walker for approximately $32,000.00.

And so, this chronology indicates that the Second Plaintiff who, by virtue of the Deed of Radiation no longer was obligated under the 1980 Hypothec for repayment of that mortgage, and who did not take out or participate as co-signatory or surety or otherwise in the vehicle loan and furniture loan, and, who therefore, ought not to have been a party to Suit 355 of 1982 and, indeed, had a good defence to the claim against her therein which related only to the 1980 Hypothec, had a

judgment entered against her, by the Defendant, for the aggregate balances of all three loans, which judgment then attached to her property at New Dock Road and her interest in the 4.25 acres of land, with the end result that her house and land were sold, apparently for well below market value. As a woman of modest means who had diligently and faithfully met her financial obligations for several loans she had from the Defendant bank, lost her home for which she had worked hard and saved to build.

I have no hesitation in saying that a grave injustice has been metted out to the Second Plaintiff where, in essence, advantage has been taken of her ignorance of these matters and lack of legal representation.

If ever there was a case which cries out for the Court to intervene on behalf of and to protect a litigant this is such a case. But is the Court, at this stage, able to come to her assistance, whether in equity or otherwise?

The Legal Issues

Effect of Radiation of 1980 Hypothec

Article 1966 (4) of the Civil Code provides for the extinction of hytpothecs "by the express or tacit remission" .

Article 1908 defines a hypothec as "a real right, and is a charge upon immovables specially pledged by it for the fulfillment of an obligation".

I hold, for the reasons given earlier in this judgment, that there was an express remission of the 1980 Hypothec in so far as the obligations thereof in relation to the Second Plaintiff is concerned, and there has been no remission of the obligations of the First Plaintiff thereunder and certainly not his obligation to repay any outstanding balance on the 1980 mortgage.

Error or Mistake

Learned Counsel for the Defendant, relying on Article 925 of the Civil Code, submitted that the proven intention of the

Defendant to be gleamed from the bank manager's letter to the Plaintiffs' Solicitor, Cyril Landers, (**Exhibit CG1**) was to radiate only the 1978 Hypothec and that by error or mistake the 1980 Hypothec was radiated as well.

Counsel submitted that a hypothec creates an obligation and is a contract within the meaning of Article 917 and 1908 of the Civil Code; that error or mistake is a ground for nullifying mortgages (hypothecs), [see Article 926 Civil Code]; and that the radiation is part of the obligation arising under the mortgage or hypothec whereby, upon payment of the debt, the mortgagee is obligated to radiate the mortgage and release the security from the incumbrance thereof.

Mr. McNamara also submitted that the release must conform with the intention of the parties and the intention of the Defendant was for only the 1978 mortgage to be released. See **Halsbury Laws of England 4th Ed. Vol. 9 para. 594 and Vol. 12 para. 1513.**

He further submitted, on this aspect that there was mutual mistake affecting the parties in the radiation of both mortgages, mistake on the part of the Plaintiffs and their solicitor on one hand and mistake on the part of the Defendant by executing the radiation for both mortgages. **Halsbury Laws of England 4th Ed. Vol. 32 para. 6** where it is stated, inter alia,

> *"Mistake may be a ground for refusing specific performance of a contract where the terms of the contract do not express the intention of the parties. Whether the mistake is made by both parties or by the defendant only is a question of fact .... Where the error is that of the defendant but was contributed to by the plaintiff, the plaintiff cannot enforce the contract".*

In my view, we are not here concerned with specific performance of a contract but with the effect of the Deed of Radiation. The legal effect of that document is to extinguish the obligations under the 1978 and 1980 Hypothecs in so far as the Second Plaintiff is concerned. There is no question of its "performance" to be considered, only its legal effect as a validly

executed deed of radiation . Contrary to the submission of Counsel for the Defendant, it is not fundamentally different in nature, character or effect from that which the parties intended to sign, **Halsbury Laws 4th Ed. Vol 32 para 10**.

In fact, in my view, it is exactly what the Defendant intended to sign in favour of the Second Plaintiff and I so find. I therefore hold that the plea of *non est factum* does not apply to the Deed of Radiation, **Exhibit ND3**, as there was no mistake as to the nature, character or effect of the document and the Defendant has not established any mistake or error.

Learned Counsel for the Defendant, relying on the doctrine of estoppel, submitted, on the issue of mistake or error, that the intention of the parties was to radiate only the 1978 Hypothec as bourne out by the letter, **Exhibit CG1**, and the Plaintiffs received something, that is a release of the 1980 Hypothec, which was not the intention of the parties, and they ought to, as it were, give back what they received, they must give value for it by payment of the balance under an the 1980 Hypothec. On this aspect Counsel cited.
Halsbury Laws of England 4th Ed. Vol. 12 para. 1502,
Norwich Union Fire Insurance Society v. W.M.H. Price Ltd. (1934) AC 455 Per Lord Wright at 461-462.
Frederick E. Rose (London) Ltd. v. William H. Pim JWR and Co. Ltd. (1953) 2 QB 450 per Singleton L.J. at 457-458 and Article 979 of the Civil Code.

Having regard to my conclusions regarding lack mistake or error, the doctrine of estoppel does not apply at all as the Deed of Radiation, **ND3**, accurately reflects the intention of the Defendant bank.

Further, in light of my conclusions on this aspect, I do not consider it necessary for me to deal with the extensive and interesting submissions of Learned Counsel for the Plaintiffs, regarding whether oral testimony can be given to contradict the terms of a valid written instrument, the Deed of Radiation; what is the legal effect of the letter of instructions from the Defendant to the Plaintiffs' Solicitor (**CG1**); and the application

of the doctrine of estoppel to prevent this Defendant, in the absence of improbation of the Deed of Radiation, from suggesting or claiming that the 1980 mortgage had not been paid. Counsel cited extensively from the Articles 1164, 1142, 1138, 1966 (4), 1966 (5), 1127 and 1164 of the Civil Code of Procedure.

Suffice it to be said, that no mistake or error having been established and no steps having been taken by the Defendant to improbate the Deed of Radiation , it stands as a valid document in favour of the Second Plaintiff, in so far as the extinguishment of her obligations to repay the 1980 mortgage was concerned, and the Defendant would have been estopped from claiming from her any balance in relation to the said 1980 mortgage.

It had no legal effect whatsoever so far as the First Plaintiff was concerned, who remained obligated to pay the balance of the 1980 mortgage and fully liable therefor. No estoppel arose or could have arisen by virtue of the Deed of Radiation in relation to the First Plaintiff's obligations and liabilities under the 1980 Hypothec.

Again, in light of my conclusions on this aspect regarding the absence of any mistake or error, it is not necessary for me to address the submissions of Mr. Theodore regarding the sufficiency of proof of mistake or error, the intention of the parties in relation to the radiation of the Hypotecs, and in-equality of bargaining power.

Promissory Estoppel

Learned Counsel for the Defendant submitted that, having regard to the conduct of the Plaintiffs in negotiating with the Defendant, after the execution of the Deed of Radiation, for the payment of the balance of the debt on the 1980 mortgage and the acknowledgement of the debt, they are estopped from denying the existence of the debt. In support of this proposition he relied on -

Halsbury Laws of England 4th Ed. Vol. 16 paras. 1501,1505 and 1514.

Hughes v. Metropolitan Rail Co. (1877) 2 AC 439 or (1874-1880) AER Rep. 187.

Combe v. Combe (1951) 2 KB 215 per Denning LJ at 219 where he referred to the principle stated in the High Trees case, as reformulated in Hughes v. Metropolitan Railway case thus -

> *"The principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties".*

The doctrine of promissory estoppel is framed by the authors of **Halsbury Laws 4th Ed. Vol. 16 at para. 1514** in this way:

> *"When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made to him, but he must accept their legal relations subject to the qualification which he himself has so introduced".*

This doctrine, which is still expanding, is predicted on the basis, inter alia, that the other party has altered his position.

In my judgment, the doctrine of promissory or equitable estoppel has no application to the instant matter in so far as the obligation of the Plaintiffs to pay the balance of the 1980 mortgage after execution and registration of the Deed of Radiation is concerned.

The Second Plaintiff has no further legal or contractual obligation concerning repayment of the 1980 mortgage after the Deed of Radiation was executed by the Defendant in her favour. It was by act of the Defendant that her obligations in relation thereto were estinquished. Her subsequent dealings with the Defendant was to save the New Dock Road property from judicial sale. The Defendant knew or ought to have known

that she had no further obligations or indebtedness to them concerning repayment of the 1980 mortgage. The Defendant wrongly pursued her for the debt where none existed in so far as the Second Plaintiff was concerned. Her dealings with them, post Deed of Radiation did not cause the bank to alter its position to its detriment.

In fact, the Defendant pursued her for the debt to the extent of selling her property in enforcement of a judgment for a debt she did not owe, to her detriment. It is the Second Plaintiff who has suffered the detriment and injustice, not the Defendant.

On this aspect, I accept the submissions of Learned Counsel for the Plaintiff as a complete answer to any reliance by the Defendant on the doctrines of estoppel in pais and promissory or equitable estoppel, in so far as the Second Plaintiff is concerned, and I hold that these equitable doctrines, even if available under the laws of St. Lucia, have no application to the position of the Second Plaintiff so as to make her liable or obligated to pay any balance outstanding under the 1980 Hypothec.

As far as the First Plaintiff is concerned, having found that the Deed of Radiation did not apply to him and therefore his obligation under the 1980 Hypothec to pay the balance on the 1980 mortgage continued, the First Plaintiffs actions, post Deed of Radiation, in making proposals to the Defendant for payment of the outstanding balance either by sale of land or by part payment of and assumption of liability for payment of the balance by his son Luc, were confirmatory of the fact that the 1980 mortgage had not been paid in full by him or at all and he knew or ought to have known that the Defendant had not in any way released him from his obligations therefor.

Any testimony by the First Plaintiff to the effect that he paid the 1980 mortgage in full I do not accept as truthful and is, accordingly, totally rejected.

Estoppel by Record - Legal Effect of Default Judgments

The judgments in default of appearance and defence entered against the First and Second Plaintiffs respectively on 17th January, 1993 have not been set aside or appealed against and, as such, stand as final judgments against both Plaintiffs for the judgment debt in Suit 355 of 1982. Unless and until they are set aside, upon application made for that purpose, they must be obeyed.
Isaacs v. Robertson (1984) 3 AER 140 (P.C.)

Indeed the causes of action in the Statement of Claim in Suit 355 of 1982 have become merged in the judgments and ceased to exist in law. **Halsted v. Attorney General Civil Appeal No. 10** of 1993 (Antigua). Per Sir Vincent Floissac CJ at pages 14 to 15 and **Privy Council Appeal No. 53 of 1996** Per Lord Clyde at page 3.

A judgment obtained in default of appearance or pleading is a final judgment, notwithstanding that it was obtained not as a result of judicial decision after a trial or contest on the merits of the issues. **Halsbury Laws of England 4th Ed. Vol. 16 para. 1520**. However, its efficacy in relation to the plea of res judicata is somewhat strictly limited and a defendant will not be barred from setting-up in a subsequent action, defenses or issues which were not "necessarily and with complete precision" decided by the previous default judgment. **Halsbury Laws 4th Ed. Vol. 16 paras. 1520 and 1533.**

A default judgment, while it does create an estoppel by record, that doctrine will only apply in respect of matters which were directly decided by the default judgment, such as liability for a liquidated sum claimed and the subject of the judgment, but may be of limited application to declarations as to the construction of documents were no argument thereon had been heard. **New Brunswick Railway Co. v. British and French Trust Corporation Ltd.** (1938) 4 AER 747 at 748 B (H.L.).

Learned Counsel for the Plaintiffs submitted, quite rightly, that the legal effect of the Deed of Radiation having not been raised

or argued in Suit 355 of 1982, it is not an issue necessarily or which can be said with precision to have been decided by the default judgments, therefore, it is not res judicata and it is open to the Court in the instant action to pronounce upon that issue.

However, in my judgment, the default judgments being judgments of record of a court of competent jurisdiction which have not been set aside, varied or appealed against, are final judgments determinant of the issue to which they relate or necessarily relate, that is, the issue of liability of the Plaintiffs as defendants in Suit 355 of 1982 for the liquidated sum of $13,879.53 and interest thereon at 16 percent per annum for 17th August, 1982 until payment.

Those judgments stand unchallenged by either Plaintiff even if they are based on a wrong principle or invalid claim. Unless and until they are set aside or varied, the liability of either Plaintiff for the liquidated sum and interest remains as a judgment debt which can only be extinguished by payment or satisfaction or compromise.

I must in law come to this inescapable conclusion, and I confess that I do so with great reluctance because of the obvious and grave injustice to the Second Plaintiff, which I have already addressed at some length earlier in the judgment.

It is therefore with reluctance and with my hands tied so to speak that I hold that the doctrine of estoppel by record applies to the default judgments entered against both Plaintiffs and they are estopped in the present action from denying or asserting that they or either of them are not indebted to the Defendant for the principal sum and interest to which default but final judgments relate, less any amounts realized by execution process taken under those default judgments.

Interest

I have already expressed by views on the Defendant's claim as plaintiff in Suit 355 of 1982 for the "hiked" rate of 16 percent, which, in the absence of other documentary evidence, is wholly

unjustified and without any legal or contractual basis.

However, as that claim was not defended the default judgments, which include interest at 16 percent per annum, are final and conclusive of that issue.

This notwithstanding, the Defendant bank has again fallen into grave error as regards the calculation of interest, this time judgment interest, and a further injustice has been thereby perpetrated on the Plaintiffs. The Defendant has compounded the interest payable under the judgment. This error was patently obvious to the court as the principal judgment sum was $13,879.53, the Plaintiffs properties realized from the evidence some $32,000.00 in a sale some 8 years later, and the Defendant has counterclaimed in this action for a balance under those judgments of $50,808.66. The fact that judgment interest was being compounded by the bank was confirmed by Mr. Carlton Glasgow in his testimony.

It is well settled, that judgment interest is to be calculated as simple interest unless the contrary is expressly stated in the judgment as, for example, where there was some contractual basis for it.

I have not done the calculations but counsel for the Defendant, who conceded that the 16 percent rate in the default judgments is simple interest, asserts that some small balance still exists.

Conversion

The Plaintiffs, although pleading trespass and conversion, relies principally on the latter cause of action. I have already given my findings on and dismissed any claim for damages for trespass to property.

Regarding the Plaintiffs' claim for damages for conversion, Learned Counsel for the Plaintiffs submitted that they were deprived of their properties as a result of an indirect but not remote consequence of the actions of the Defendant in causing

execution of the judgments in Suit 355 of 1982 to be put in train against the Plaintiffs, the end result of which was a judicial sale of both properties.

This does not smack of conversion, where a person wrongfully and without justification takes property of another converting it to his own use. Here, the default judgments obtained, formed the legal basis for the judicial sales by process of execution as provided by rules of court, which are steps available to any judgment creditor who has a final judgment. The Defendant, as judgment creditor in Suit 355 of 1982, simply availed themselves of what remedies or avenues the law has provided to all judgment creditors to enforce their judgment and realize the judgment debt.

Learned Counsel also argued with passion for the court to come to the aid of the Second Plaintiff who has suffered a grave injustice in loosing her property at New Dock Road in respect of debts which she did not owe to the Defendant. As Counsel put it, "the court should do what is right and just".

Of course the court must do justice "according to law". Regrettably, I can find no basis in law or equity which can be envoked to right the grave wrong done to the Second Plaintiff. If there was some such legal basis or principle I would, without hesitation, envoke it in aid of this poor lady.

Accordingly, and for the reasons stated above I dismiss the Plaintiffs claim in conversion.

Counterclaim

The Defendant's counterclaim is without merit. Firstly, it is based on erroneous calculations of judgment interest using the "compound interest" method. Secondly, and most importantly, it is based on final judgments derived in another suit before the High Court of Justice in St. Lucia.

The court has already pronounced on that claim and given judgment. The court cannot give a second judgment essentially

for the same matter. Those claims giving rise to the judgments were merged in the judgments and legally no longer exist, *transit in rem judicatam*.

Those judgments cannot be a new cause of action as, for example, where steps are taken to enforce a foreign judgment by means of proceedings brought in St. Lucia using the foreign judgment as a cause of action.

I accordingly dismiss the counterclaim as an abuse of the process of the court.

Conclusions

(1) The Plaintiffs' claims are dismissed and judgment thereon entered for the Defendant.

(2) Having regard to the views I have already expressed concerning the Deed of Radiation and the default judgments, particularly as they relate to the Second Plaintiff, in my view the justice of the case demands, and I exercise my discretion, and make no order as to costs.

Before moving on, I feel compelled to appeal to the Defendant, an international banking institution, to find some way on an exgratia and humanitarian basis, in assisting the Second Plaintiff, who has suffered a grave injustice at the hands of the Defendant resulting in her loosing her property at New Dock Road. The fact that she was not indebted to the bank when she was sued in 1982 ought to have been realized by the officers of the bank, even after the default judgment was entered against her and she visited with the officers in a desperate but futile attempt to save her house. I can, regrettably, do no more.

GERARD ST. C. FARARA, Q.C.
HIGH COURT JUDGE (ACTING)