ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.9 OF 2002

BETWEEN:

CHARLES JOSEPH

Appellant

and

ANTIGUA COMMERCIAL BANK

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]

Appearances:

The Appellant in person
Mr. Justin Simon for the Respondent

2003: July 1;
September 16.

JUDGMENT

[1] REDHEAD, J.A.: This appellant was a customer of the respondent bank. In 1985 the appellant secured a loan from the respondent in the sum of $66,000.00 with interest at 16 per cent per annum payable by 48 installments of $1871.60 per month. The Judge accepted the evidence that the loan was for $ 66,000.00 and was secured by a charge on the property, a fixed deposit of $8000.00 and a promissory note. The appellant at his trial insisted that the loan was for $58,000.00. The learned trial Judge then made a finding that the loan was in fact for $66,000.00.

[2] The appellant fell on hard times and there is no dispute that he defaulted on his payments. This was the beginning of his woes.

[3] On 11th November 1992 the appellant was advised by the respondent that his account was debited with the sum of $8203.00 being fees paid to a lawyer in relation to a proposed auction sale of his property. That sale never took place.

[4] The appellant visited the premises of the bank and attempted to get the Bank to remove this debit. The bank refused. The appellant as a result threatened to stop payments on his loans if the charge was not removed. The appellant subsequently stopped the payments on his loan.

[5] In April 1997 the appellant received a letter from the respondent's solicitor stating that on 19th July 1998 he received a loan in the sum of $49,783.84 and that he was in arrears in the sum of $112,963.05. The letter was making a demand for payment of that sum from him.

[6] The learned trial Judge in her judgment said that it was admitted by the respondent in its defence and also established by the evidence that this as well as the first debit were mistakes by the respondent.

[7] Yet the appellant had numerous discussions with the employees of the respondent to have these matters rectified but to no avail. As the learned trial Judge said, Mr. Colin Maynard, a senior employee of the Bank, in a very frank answer in cross-examination said he believed the bank would not have admitted this if legal action had not been taken by the appellant.

[8] On 21st September 1999 the appellant began proceedings against the respondent.

[9] In his writ he claimed against the Bank damages for negligence in that the Bank failed as chargee to insure the property against loss. As a result the property was destroyed by Hurricane Luis.

[10] The appellant based this claim on clause 1sub paragraph 5 of the variation of charge which reads in part as follows:

> "if the chargor shall fail to perform any of his obligations under this clause the Bank may insure and keep insured all or any of the said buildings and all such payments shall be repaid by the chargor on demand and such payments shall bear interest at the rate from time payable in respect of the principal sum and shall be an additional charge on the security"

[11] The learned trial Judge rejected this claim holding that the bank was not under an obligation to insure the property. She interpreted the above clause as giving the bank an option or permission to insure.

[12] The appellant also claimed damages against the bank for libel in that, by advertising his property for sale, the respondent's allegation about his indebtedness to it was false.

[13] The learned trial Judge in rejecting this aspect of his claim said that the appellant admitted that the loan was delinquent. Under the Registered Land Act Cap. 374 section 72 the Bank had the power to sell the property once the appellant did not comply with the notice to pay off, even though the amount stated in the notice was not correct. The only publication was the advertisement for sale which did not refer to the amount owing by the appellant.

[14] The learned trial Judge concluded that the facts stated in the advertisement were true and were in no way defamatory of the appellant.

[15] The learned trial Judge found that the bank was in breach of contract.

(1) In debiting the appellant account with $8203.00 for fees which were not properly incurred

(2) In deliberately increasing the interest rates to 18% per annum from the date it relegated his loan in July 1988

(3) In failing to give him interest on his fixed deposit when the proceeds were applied to the loan in July 1988

[16] The learned trial Judge then awarded the appellant the sum of $10,000.00 for breach of contract.

[17] The appellant is dissatisfied with this award and has appealed to this court.

[18] The appellant filed 13 grounds of appeal. Most of which are based on issues of fact. The appellant was unrepresented consequently I set out hereunder all the grounds of appeal so as to avoid the charge of not treating his case seriously because he is unrepresented. The grounds of appeal are as follows:-

(a) The Court erred when the Judge in paragraph 13 of the judgment relied on the Application

(b) The Judge ought to have held that the note exhibited in DMI is not a promissory note since it does not contain one of the features which is a standard requirement of a promissory note which is the precise “time to pay” and therefore does not constitute an agreement.

(c) The Judge ought to have held that on the disbursement form HBI only $58,000.00 can be accounted for in the columns, which the Defendants claim to be $66,000.

(d) The Judge ought to have held that neither, the fixed deposit receipt or any other document provided conclusive proof that the deposit truly belonged to the Appellant.

(e) The Judge ought to have held that there is no evidence documentary or otherwise to verify that the Appellant received $8,000.00 cash.

(f) The Judge ought to have held that even if all the signatures compared looked similar, none of the documents exhibited or any of the oral testimony was conclusive proof of oral testimony was conclusive proof of an agreement between the Appellant and the Defendant as to a loan of $66,000.00

(g) The court erred when in paragraph 5 of the judgment it states:-

> " It was admitted in the defence and also established by the evidence that this as well as the first debit were mistakes on the bank's part."
>
> The appellant claim's that nowhere in the defence or established by evidence in reference to paragraph 4 of the Statement of Claim was an admission to a mistake.

(h) "The Court erred when in paragraph 11 of the judgment it states that the bank cannot act by itself. The Statement suggests that the Appellant refers to the bank as an inanimate object but the Appellant's definition of the bank was clearly spelt out in the first paragraph of the Statement of Claim, which reads:-

> "The Defendant are bankers carrying on business at their branch situated at the corner of Thames and St. Mary's Streets in the Island of Antigua."

The appellant insists that the reference to the words: Defendant, Defendants, Banks, Bankers and those with the banker's authority is defined as the Bank. Therefore the bank can and did act. In paragraph 3 of the Appellant's closing arguments filed on the 29th April, 2002 the appellant did offer a motive for fraud.

(i) The court erred when it did not address and determine fraud as stated in paragraph 5 of the Statement of Claim. Failure to do so has deprived the

appellant of potential damages under this head in his case. In paragraph 17 and 19 of the Judgment the Court defines the act as a breach of contract with entitlement to nominal damages and treated it as such. The Appellant clearly states in the Statement of Claim:-

> " The Defendant on the 6th November, 1992 unlawfully and fraudulently debited the Plaintiff's loan account with enforcement charges."

(j) In paragraph 16 of the Judgment, the court held that the bank had an option but no legal obligations to insure the building charge with the security of the loan. The appellant disagrees. The Court's decision is based on the Interpretation Act 224 Section 43 reads:-

> "In an enactment the expression "shall" shall be construed as imperative and the expression "may" is permissive and empowering."

The appellant claims that Act 224 Section 43 should not apply since it sets out a standard blanket approach to the words shall and may further, section 43 raises serious questions when "may" is defined as permissive and empowering and at the same time suggest that it is optional.

(k) In paragraph 16 of the judgment, the court held the view that the appellant was served with a "Notice to pay off debt". The appellant claimed he was not served, but even if the appellant was served as suggested with the "Notice to pay off debt" exhibited DM2, it is not the Appellant's debt. The loan is yet to be identified.

(l) The appellant claims that the bank does not have the right to put property on auction for monies fraudulently debited to the account.

(m) The Charge and Variation of charge documents CJ13 was not signed by the appellant in the presence of the defendants lawyer

[19] There was not even a proper basis for the challenge of the finding of facts by the learned trial Judge. Under ground 3 (a) the appellant makes the allegation that the Judge erred in relying on the application form in determining the amount of money borrowed. I make allowances that the appellant was not represented and is a lay person. However there could be nothing wrong or any complaint made against the learned trial Judge in her approach at determining whether the appellant in fact had borrowed $66,000.00 by examining the promissory note documents.

[20] The appellant under paragraph 4 of his statement of claim alleged that the respondent's claim that the appellant on 19th July received a loan in the amount of $49.783.84. He also alleged under that same paragraph that the respondent had increased the principal sum of his loan and increased the interest from 16% to 18%.

[21] In paragraph 7 of the defence it is stated:

> "The defendant admits that it wrongfully increased the interest rate on the said loan from 16% to 18% per annum as of July 19th 1988 when the said loan was relegated to "Solicitors account"

[22] When the learned trial Judge wrote in paragraph 5 of the judgment

> "the claimant received another letter from the bank which stated that he had obtained a loan on or about 19th July, 1998 for $49 783.84 and claiming arrears of $112,903.05. It was admitted and interest rate was increased from 16% to 18% per annum."
>
> There was at least a partial admission by the respondent

[23] The issue for determination by this court is having regard to the learned trial Judge's findings, was the award of damages adequate?

[24] Before I embark on this issue I should indicate that I am in total agreement with the learned trial Judge in rejecting the appellant's other claims namely-

defamation and damages for loss of his property for failure of the respondent to insure it. I also support her reasoning in rejecting the claims.

[25] The appellant also alleged fraud in his statement of claim. On appeal the appellant argued that the respondent in debiting his account with charges which he was not liable for and in putting his property up for sale acted fraudulently. It was as a result of his delinquent loan which resulted in the aborted sale and the unfortunate debit to his account with $8203.00. The appellant could not establish fraud on the basis of his pleading and the evidence he led in support.

[26] I now examine the conduct of the respondent's employees, as detailed by the learned trial Judge, in order to determine the measure of damages which should be awarded to the appellant.

[27] The respondent had debited the appellant's account with $8203.00 for fees which was not properly earned and despite the appellant going to the bank and asking that the debit be removed the bank refused to budge.

[28] The learned Judge also found that the respondent increased the interest rate on appellant's loan from 16% to 18%. Why deliberately? I find this disturbing.

[29] The learned Judge also made this comment:

> " The Bank knew or ought to have known that such an increase was unlawful. It was a deliberate and an unlawful increase yet the Bank persisted despite the claimant's complaints.'

[30] Is this comment justified? If it is, then again it is disturbing.

[31] Finally the Judge found that there was a failure to give the appellant interest on his fixed deposit when the proceeds were applied to the loan in July 1988.

[32] The learned trial Judge accepted the appellant's evidence that his ability to obtain loan facilities from other banks was affected somewhat by the bank's breach of contract and its failure to address his complaints in a timely and proper manner.

[33] The respondent in its defence stated that it had offered to and will recalculate the appellant's indebtedness on the basis of the 16 per cent per annum interest as from July 19, 1998 and will reverse the entry in respect of the entry charges and any interest thereon.

[34] Mr. Simon has given this court the assurance that has been done. He also admitted before us that the bank was not as forthright to the appellant as it should have been.

[35] In light of the foregoing, what measure of damages should be awarded to the appellant? Any award must in my view have an element of guesstimate. The appellant is asking for an award of punitive or exemplary damages. In my judgment having regard to the facts of this case he cannot be awarded damages under any of those heads.

[36] In my judgment I am of the view that a sum of $50,00.00 will meet the justice of this case.

[37] The appeal is therefore allowed in part and the award of $10,000.00 is set aside. The sum of $50,000 is substituted.

[38] Costs to the appellant calculated at $9333.33

Albert Redhead
Justice of Appeal

I concur

Adrian Saunders
Justice of Appeal

I concur

Ephraim Georges
Justice of Appeal [Ag.]