THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2005/0497

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED
(formerly CIBC Caribbean Limited)

Claimant

and

LAUREL THOMAS-EGAN

Defendant

Appearances:
Mrs. Eleanor Solomon, of Clarke & Clarke for the Claimant
Mr. Hugh Marshall and Mrs. Cherissa Thomas, of Marshall & Co for the 1st Defendant

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2007: September 24
2008: February 15
……

JUDGMENT

[1] **Harris J**: The Claimant are Bankers carrying on business at their branch at High Street, St. John's and claimed against the Defendants Laurel Thomas-Egan and Noel Egan of St. John's Antigua. The claim is for the *sum of $66,877.72 being the balance due on money lent to the Defendants by the Claimants, together with legal fees, interest and costs.*

[2] The statement of Claim endorsed on the Claim Form is made up of five (5) brief paragraphs and for purpose of this case it is important that it be set out here in this Judgment:

"Statement of Claim"

1. The Claimant are bankers carrying on business at their branch at High Street, St. John's.

2. The Defendants are and at all material times have been customer of the Claimant at the said branch.

3. On 3rd July 1998 Defendants executed a Bill of Sale in favour of the Claimants to secure a loan of $77,850.00 granted to the Defendants by the Claimants.

4. Since the payment of $500.00 on the 14th May 2004 the defendants have failed and or neglected to make any further payments.

5. As at 26th September 2005, the Defendants are indebted to the Claimants in the sum of $60,120.65 being the balance due inclusive of interest.

[3] Filed together with the Claim Form amongst other documents is the document entitled CIBC CARIBBEAN LIMITED COMMERCE BANK PLAN LOAN, BILL OF SALE (the "Bill of Sale") made the 3rd day of July 1998 between Noel Egan, Laurel Thomas-Egan as grantors and CIBC Caribbean Limited on the other part.

[4] By Notice of Discontinuance dated the 5th day of March 2007 and filed on the 6th March 2007 the Claimants wholly discontinued their claim against the 2nd named Defendant, Noel Egan. This was done after the filing of the witness statements.

[5] The matter had proceeded substantially in accordance with the CPR 2000 with the filing and serving of (i) Defence and Counterclaim of the Second Defendant (ii) Defence, of the first-named Defendant (iii) Reply and Defence to Counterclaim (iv) Pre -Trial memorandum of both Defendants and the Claimant. The parties filed their Lists of Documents in accordance with an Order for Standard disclosure. Witness Statements were filed by the Claimant, 1st named and 2nd named Defendants.

[6] Various applications were made in this matter including an application for substituted service and a Request for Judgment in Default against both Defendants. The claim form was filed in October of 2005 and the last Pre -Trial memorandum was filed in November of 2006.

[7] The matter was first fixed for Trial on the 31st January 2007 and ultimately and tried on the 24th day of September, 2007.

[8] At the trial the Claimant gave evidence and was cross-examined and subsequently closed its case. The 1st named Defendant, through her counsel, opted to make a no-case submission and to stand by counsel's submission[1], declining therefore to lead any evidence in Defence of the Claim were she not to succeed on her submission.

The Submission

[9] The 1st named Defendant (the "defendant") submitted that she did execute a Bill of Sale. However, that the Claimant, under CPR 2000 Part 8.7 (1) (3), failed to set out its case by not alleging the loan agreement out of which the Claimant alleges the Bill of Sale arose. She submits that the Claimant's case be struck out on that ground. For convenience the said CPR 2000 rule is set out below:

> **Claimant's duty to set out case**
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> **8.7 (1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.**
>
> **(2) The statement must be as short as practicable.**
>
> **(3) The claim form or the statement of claim must identify or have annexed thereto a copy of any document which the claimant considers is necessary to his or her case.**
>
> **(4) If the claimant seeks recovery of any property, the claimant's estimate of the value of that property must be stated.**
>
> **(5) The statement of claim must include a certificate of truth in accordance with rule 3.12.**

[10] Further, counsel for the Defendant submits that a "debt does not and cannot arise from a Bill of Sale"[2]. The terms of the bill of sale he submits, relate solely to the custody of the chattel and in any event, the terms of this bill of sale are not even properly pleaded in the statement of case far less in the statement of claim. The upshot of the submission is that the Statement of Claim does not disclose a reasonable cause of Action. The loan is not adequately pleaded (nor is the bill of sale for that matter), the terms and conditions of the loan are not set out and the details of the breach not canvassed in the statement of case.

[1] See notes of evidence for text of the court's directions on this point and counsel's undertakings thereto.
[2] See para. 1, 2, 3 of the Defence of the 1st named Defendant filed on the 23/2/06 for full text of the Defence. The Defence alleges the very *defect* in the pleadings referred to in the no case submission.

[11] The Claimant argues however, that the terms of the loan agreement are at least set out in the Bill of Sale which forms part of the evidence in the matter. Further, that the grantee of a bill of sale has all the rights and remedies of any other mortgagee of goods[1].

[12] Counsel for the Claimant submits further, that the claim form clearly sets out that the Defendants have failed and/or neglected to make their payments and that reading the claim form in its entirety, it is clear that the Defendant's failed to live up to their covenant to pay in accordance with the Bill of Sale. Finally, submits the Claimant, the Claim form does set out the cause of action and does not violate the CPR 2000 as to what is to be contained in the Statement of Claim.

LAW

[13] Blackstone's Civil Practice 2003 at para. 59.28 says that a "… *defendant may make a submission of no case to answer*" and, that this is made "… *on the basis that on the evidence adduced by the Claimant the claim cannot succeed*." The point being taken by the Defendant in this matter is really one on the pleadings as opposed to the evidence, although the two come perilously close at times. However, the question is whether the evidence lead does support the claim against the Defendant. If the claim is not known to the law, then the evidence in support would not establish a claim or indeed could not create a new claim/cause of Action not already pleaded.

[14] I do not believe that there is any dispute that a party must adequately[2] plead its case and that issues between the parties are established by way of the pleadings[3]. "*The pleader makes allegations of facts in his pleadings. Those alleged facts are the case for the party*[4] *...The 'pleadings should make clear the general nature of the case,' in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleadings must contain the particulars necessary to*

[1] Counsel for the Claimant refers to Halsbury's Laws 4th edit. at para 767
[2] See Lord Woolf in Mc Philemy v Times Newspapers Ltd [1999] 3 All ER 775
[3] See Three Rivers District Council and others v Bank of England (No.3) [2001] 2 All ER 513
[4] Barrow J.A at para. 43 in, Eastern Caribbean Flour Mills Limited and Ormiston Ken Boyea; Eastern Caribbean Flour Mills Limited and Hudson Williams CIVIL APPEAL No.12 of 2006

serve that purpose. But there is no longer a need for extensive pleadings , which I understand mean pleading with an extensive amount of particulars, because witness statements are intended to serve the requirements of providing details or particulars of the pleaders' case."

[15] In the ***Flour Mills*** case Barrow J.A. at para. 44 went on to point out *that witness statements may now be used to supply details or particulars that under the former practice, were required to be contained in pleadings.* So in this case I will, shortly, look to the pleadings together with the witness statements oral testimony and documentary evidence to see if the particulars contained therein could properly regarded as particulars of allegations already made in the pleadings, mindful always, that the allegation must have been already made in the pleadings[1].

[16] The Halsbury's Law of England Vol. 4 (1), 4th edit 2002 Reissue at para. 601 describes the nature of a bill of sale: "A bill of sale may be described as an "instrument in writing whereby one person transfer to another the property he has in goods and chattels, or as a document given with respect to the transfer of goods or chattels, used in cases where possession is not intended to be given." The transfer is for the purpose of creating a security, subject to a provision for redemption on repayment of the money secured. The bill of sale does not create the indebtedness. Equally important, for purposes of the submission before the court, is maintaining the distinction between the pleadings and the evidence. The pleadings do not set out the loan agreement and do not disclose a cause of Action on that 'loan agreement'. The Bill of Sale forms part of the evidence and to the extent that the essential terms of the agreement are endorsed on it, cannot create a cause of Action. The evidence, documentary or oral testimony, cannot enlarge the pleadings to the point of creating a cause of action that was not originally pleaded/disclosed.

[17] In any event the essential terms of the agreement are endorsed on the bill of sale as a statutory requirement in relation to "such defeasance". S.8 (1) (c) of the Bill of Sale Act of

[1] In this case the relevant pleadings are (i) Statement of claim and (ii) Claimant's Reply and Defence to counterclaim of the second defendant. Pp 25-28 of trial bundle "A". see also para. 4 on 'Discontinuance'.

Antigua and Barbuda requires that; "If the Bill of Sale is made or given subject to any defeasance or condition…" and that such defeasance or condition is not contained in the body of the bill of sale the registration of the bill of sale "shall be void." This endorsement of the agreement/defeasance on the bill of sale is merely to put one on notice.

[18] The Claimant will not be permitted to pursue a case at trial, a secondary case if you will, **"***...that is not fully reflected in the way that party's case was previously put in its statement of case. A judge is not permitted to give judgment on the basis of a claim that is not included in the statements of case*[1]***."***

PRE-TRIAL MEMORANDUM

[19] The pre-trial memorandum of the first defendant is a little confusing in that under the heading "FACTUAL BASIS" it appears to acknowledge the existence of the loan secured by a bill of sale and the default on the loan. Then it concludes by saying: "*The Claimant commenced the Action for the balance of monies lent to the Defendants by the Claimant'."*

[20] The pre-trial memorandum does not end there. The very first point under the heading "ISSUES" is *"1) What is the cause of action pleaded?"* This is consistent with the Defence as pleaded. Paras. 2 and paras. 3 of the 1st defendant's Defence are as follows: *"2 . The claimant has not alleged a loan agreement nor produced such."* And *"3. That a debt does not and cannot arise from a bill of sale."*

[21] The Claimant's pre-trial memorandum makes several references to the existence of the loan, default on the loan and much about the repossession and auction of the vehicle, the subject of the loan. The 1st issue to be determined at trial, identified by the Claimant in this document reads as follows: "Are the defendants indebted to the claimants?" (See: '2.a"). Nothing necessarily turns on this, save that it does suggest that the claimant is directing itself to the 'debt' and presumably proof of it and ought to have responded to the *pleadings point* taken in the 1st Defendants defence.

[1] Blackstone's Civil Practice, 2003 at para. 31.7

THE EVIDENCE

[22] Paragraph 3 of the statement of claim contains the only reference to a loan and is set out above in para. 2 of this Judgment. The breach of this loan is not expressly pleaded anywhere in the statement of claim. In the *"Reply"*, the claimant pleads: *"On the 27th of October 2000, the first named defendant informed the claimant that the second named defendant would service the loan. No payments were made and the loan fell into arrears again*". In relation to the adequacy of the pleadings are these two references sufficient to satisfy the rule 8 of the CPR 2000 bearing in mind also, the *overriding objectives*? Does it disclose the terms of the loan agreement, the circumstances that the agreement provides as amounting to a breach, the conditions under which the Defendant becomes liable, the conditions under which the Claimant can seek to recover from the Defendant and so on?

[23] The witness for the Claimant, one Glendina Jacobs, credit counselor for the Claimant had this to say in her witness statement at para. 4: *"The defendants executed a Bill of Sale in favour of the claimants on 3rd July, 1998. The amount secured was $77,850.00 over a new vehicle. The vehicle is particularly described in..."* And in para 5, she (1st Defendant) "*...also informed the claimants that the loan account would be in arrears."* In para. 6 the witness testifies that: *"The vehicle was repossessed by the claimants on 23rd Decenber, 1999 for arrears on loan payments and for non payment of insurance*." Several other references to the arrears and updating same, appear in her evidence in chief.

[24] In *amplification* of para 12 and 15 of her witness statement at trial, Glendina Jacobs provides further details of the loan agreement between the Claimant and Defendants. In cross examination further reference is made, in so far as is relevant, to the loan agreement culminating in her indicating that she had a copy of the loan agreement but is unable to say if it was made available to the defendant (pursuant to standard or other disclosure requirements).

[25] The evidence that would have fleshed out an allegation in pleadings so as to make clear the general nature of the case would have been the evidence in chief/witness statement

and not the oral testimony in *amplification* or in cross-examination or re-examination at trial.

[26] Taking the Claimant's statement of case together with the witness statement and the oral testimony one does, at the end of it all, arguably, get a sense (and only a sense really) of the case that the Defendant has to answer (and perhaps even more so taking a look at the pre-trial memorandum although this does not form part of the statement of case[1]). But surely, after oral testimony at trial, is too late to put a Defendant on notice of the case for the claimant.

[27] I accept that a cause of action on the loan agreement is not disclosed on the pleadings sufficient to be buttressed and given life by the witness statement and/or the disclosed bill of sale[2] document. I accept also that the bill of sale does not create a cause of action for which the claimant claims[3]. I find that the basis of the evidence adduced by the claimant the claim cannot succeed. I note further that the claimant had notice of the Defendant's point on the *pleadings* and could have taken steps to amend its claim at an earlier date to regularize its pleadings.

[28] In the circumstances, I uphold the no case submission of the Defendant and dismiss the case for the Claimant against the 1st named Defendant.

[29] I need make the point here that the overriding objectives[4] which both counsel are obliged to pursue should have led the Defendant to have taken this point at the Case Management level or in any event prior to Trial[5]. This is a pleading issue not an issue on the evidence[6]. The point taken in the submission was, however, clearly raised in the Defence of the 1st named Defendant. The Claimant had the opportunity to apply to amend but failed to do so

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[1] The relevance of the Pre-Trial memorandum is to show that both parties were aware of the issue here raised, prior to trial.
2 The bill of sale is referred to as #16 on the "Claimants List of Documents" filed and dated June 23 2006.
[3] See para. 1 above for details of what is claimed.
[4] CPR 2000 Part 1.3
[5] See para. 20 , 26 and 27 above.
[6] In any event only the evidence in the filed and served witness statement to the extent it buttressed allegations in the pleadings would be relevant to the issue.

before trial and has made no application here at trial. The point raised in the no-case submission is one to be taken by the Defendant however, and, in my view, should have been taken at the appropriate time prior to trial. This failure by the Defendant to comply with the civil procedure rules and to be guided by its overriding objectives and frankly speaking, its failure to apply a healthy dose of good sense in this regard, will have cost implications for the Defendant, she having put the parties through an unnecessary trial , albeit an abridged one.

ORDER

[30] **IT IS HEREBY ORDERED** that:

1. The no case submission of the 1st named Defendant is upheld.

2. The claim against the 1st named Defendant Laurel Thomas-Egan is dismissed with costs to the Defendant and that judgment be entered for Laurel Thomas-Egan.

3. That the value of the claim is noted as $66,877.72 as pleaded.

4. That costs paid to the Defendant by the Claimant be 50% of the prescribed costs on the prescribed cost scale or, as otherwise agreed between the parties within 28 days of this Order.

DAVID C. HARRIS
Judge
The High
Court of Justice
Antigua and Barbuda