THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 560 OF2001

BETWEEN:

CARIBBEAN BANKING CORPORATION LIMITED

Claimant

V

FRANCIS MICHAEL

Defendant

Appearances:

Mr. P. Joseph for the Claimant
Mr. P.R. Campbell Q.C. and Mr. M. Peters for the Defendant

2007: December 11;
2008: March 4;
April 2;
May 16.

JUDGMENT

[1] **MATTHEW J. (Ag.):** On December 20, 2001 the Claimant filed a claim form requesting the following relief:

(1) The sum of $10,147.00 outstanding on the principal of a loan granted on November 23, 2001;

(2) Interest at the rate of 9 per cent per annum on the said loan of $8,377.91 as at December 17, 2001 and continuing at the daily rate of $2.50 per day;

(3) Late fees of $900 as at December 2001 on the said loan and continuing at the monthly rate of $20.00 per month until payment;

(4) Costs.

PLEADINGS

[2] In its accompanying statement of claim the Claimant alleged that the Defendant owes the sum of $10,147.00 being the amount due and owing by the Defendant to the Claimant on the principal of the said loan, plus interest of $8,377.91 at the rate of 9 per cent as at December 17, 2001 and continuing until payment at the daily rate of $2.50.

[3] The Claimant alleged that the Defendant had been in default in his payments on the said loan since April 1998 and therefore also owes the Claimant late fees of $900 as at December 2001 and continuing at the monthly rate of $20.00 until payment.

[4] On June 10, 2003 the Defendant filed a defence and counterclaim. In the defence the Defendant stated that a mortgage bill of sale was executed by him on November 23, 1995 in respect of a passenger van registered as HA 610 to secure repayment of the principal sum of $40,000.

[5] The Defendant admitted that he fell into arrears in relation to the Bill of Sale but could not state the exact month or date when he fell into arrears. The Defendant stated that there was not reserved in the said Bill of Sale any power in the Claimant to sue for any shortfall in the event of the vehicle being seized and sold by the Claimant and in the absence of the specific reservation of such a power the Claimant cannot maintain the present action.

[6] The Defendant stated that on January 27, 1996 the Claimant repossessed the vehicle in exercise of the power of seizure conferred upon the Claimant under clauses 7 and 8 of the said Bill of Sale, and the Claimant sold the vehicle on February 3, 1999.

[7] The Defendant asserted that the seizure of the vehicle constituted the exhaustion of the only remedy conferred upon the Claimant under the terms of the said Bill of Sale, and that there was no residual or implied remedy in the nature of an action for shortfall between the amount owing on the date of the seizure and the amount realized from the eventual sale of the vehicle.

[8] In his counterclaim the Defendant stated that:

(1) The Defendant asserts that proper accounts should be taken so as to ensure that there is no element of compound interest in the amounts claimed in the statement of claim;

(2) The Defendant challenges the contractual basis and the imposition of the purported late fee;

(3) The Defendant challenges the calculation of the purported interest;

And that the Court should make consequential orders.

[9] In November 2007 the Claimant filed a reply and defence to the counterclaim in which it joined issue with the Defendant's defence except where the Defendant indicated admissions.

[10] The Claimant denied that the seizure of the vehicle constituted the only remedy available and it was at liberty to sue for the balance left owing.

[11] The Claimant asserted that proper accounts have always been kept with respect to the Defendant's loan agreement and the making of an order for accounts and inquiries should be disallowed.

WITNESS STATEMENTS

[12] A witness statement was filed on November 21, 2007 by Arnold Dalrymple, the Recoveries Officer at the Claimant Bank and one was filed by the Defendant on June 29, 2007.

[13] Dalrymple stated that he had been employed by the Claimant Bank for the past 30 years and had conduct of all matters regarding customers of the Bank who had defaulted on loan agreements.

[14] He said the Defendant was issued the loan based on terms including repayment by way of monthly installments of $1,383.00 at the rate of 8 per cent per annum.

[15] He said the Defendant's vehicle HA 610 was used as security for the loan and at the date of the grant of the loan, the vehicle, a minibus, was valued at $49,000.00.

[16] He stated that the Defendant defaulted on his monthly installments in 1996 and the Bank seized the vehicle on January 27, 1996 when it was valued at $12,000.00.

[17] He said pending the sale of the vehicle storage fees of $1,432.25 were incurred. The vehicle was sold for $12,000. The balance then due on the principal was $10,147.00; interest of $8,377.91; and late fees of $900.00.

[18] In his witness statement the Defendant asserted that in the absence of a specific reservation of power to sue for any shortfall the Claimant could not maintain the action.

[19] He said he did not maintain accounts pertaining to his transaction with the Claimant and he was in no position to state what were the true amounts owing to the Claimant on the date of the seizure of the vehicle; and what part of that balance was attributable to principal and what part was attributable to interest.

[20] It appears to the Court that the Defendant should at least request copies of the accounts relating to his transaction before he requests the Court to make orders in respect of things he could easily obtain upon request.

[21] The Defendant asserted that the Claimant was accountable for the diminution on the value of the vehicle during the year which elapsed between seizure and sale and during which the said vehicle remained in the exclusive custody of the Claimant.

[22] The Defendant stated that between January 30, 2004 and February 4, 2004 the Claimant wrongfully seized the sum of $10,000 from his account, allegedly in satisfaction of its claim against him in these proceedings.

NOTES OF EVIDENCE

[23] Suit 560 of 2001 was first called for hearing on December 11, 2007. Counsel and clients were present. Whatever might have been stated in the witness statements the Court was told by both Counsel that "the central legal issue is whether the Bank can claim if there is a shortfall from the Bill of Sale. Facts are not in dispute."

[24] The Court proposed a hearing date for submissions on March 3, 2008 but in the meantime the Parties should file and exchange their submissions not later than February 26, 2008.

[25] The Defendant filed his submissions on February 26, 2008 and the Claimant filed its submissions late February 28, 2008. On on March 4, 2008 both sides requested time to file other submissions skeleton arguments in reply to each other's earlier submissions. The joint request was granted and the time limit set for these further submission was March 18, 2008. The matter was further adjourned to April 2, 2008.

[26] The Claimant filed what he called a reply to the Defendant's earlier submission late again on March 27, 2008. The Defendant's Queen's Counsel, as he usually does, had again filed on March 17, 2008 within the limit set. The Parties appeared on April 2, 2008 to my surprise hoping to have a judgment delivered. The matter was reserved.

SUBMISSIONS OF COUNSEL

[27] Learned Counsel for the Claimant submitted that the loan contract is part of the Bill of Sale. He referred to the printed words in the Bill of Sale which states that the borrower "doth hereby assign unto the Bank and its assigns all and singular the several chattels and things specifically described in the schedule hereto (hereinafter called the property) by way of security for the payment of the sum of forty thousand dollars."

[28] Reference was made to Clause 6 of the Bill of Sale which states "that all amounts paid by the Bank and charged to the Borrower hereunder shall be payable by the Borrower on demand at the aforementioned branch of the Bank."

[29] Counsel submitted that there was a contract for money lent between the Parties. He stated that the Bill of Sale refers to the terms of a loan issued to the Defendant and it recites the actual contractual obligations and specifically binds the Defendant to pay all amounts paid by the Bank and charged to the Borrower.

[30] Counsel submitted that it is clear that the covenant to pay such money exists as a contract separate and apart from the covenant relating to the security following the authority of ***Davies v Rees***.

[31] Counsel further submitted that it would be inequitable when one considered, that realistically, the chattel, due to external factors, such as market forces, devaluation and other issues, may leave the borrower totally unable to enforce contracts for monies lent by virtue of a bill of sale.

[32] Counsel submitted that the Courts have had to determine the intention of the parties regarding any loan granted by way of security.

[33] In support of his submissions Counsel cited the following authorities:
Davies v Rees (1886) 17 QBD 408;
Barclays Bank Ltd v Beck 1952 QB 47;
Lloyds Bank Ltd v Margolis 1954 1 All E.R. 734;
Yates v Ashton 1834 4 QB 183
Chitty on Contracts 27th Edition, Volume 2, paragraph 36-218, page 614.

[34] Learned Queens Counsel for the Defendant submitted that the rights and obligations of the Parties to the Bill of Sale fall to be determined exclusively within the four corners of the document which created the Bill of Sale.

[35] In respect of the legal principles Counsel referred to the case of ***Massey- Harris v Lowe*** (1905) 1WLR 213 (Canada) and ***Sharp v McHenry*** 1887 38 Ch. D 427. Counsel submitted that every bill of sale must show, on the face of it, the true agreement between the parties, and must not depend for its real effect upon some other instrument.

[36] Counsel submitted that for the Claimant to be able to sue the bill of sale had to contain a provision such as was found in ***Halifax v Grant*** 2002 4 All E.R. 544; or ***Gordon Grant and Co v Boos*** 1926 AC 781.

[37] In the former case there was a provision which reads as follows:

> "If on realization of its security by the society the net proceeds shall prove insufficient to discharge the redemption money, then the borrower will immediately pay the amount of the deficiency with interest until payment."

[38] Counsel reiterated that the absence of any such personal covenant, or of any covenant of any description, from the Bill of Sale in the instant case should be regarded as being decisive of the central issue of law presently before the Court.

[39] Counsel in conclusion referred to the case of ***Wilson v First County Trust Ltd*** (2003) UKHL 40, a United Kingdom House of Lords case on the United Kingdom Consumer Credit Act, 1974. What the case decided in brief is that where an agreement between the defendant pawnbroker and the Claimant borrower, referred to as a regulated agreement, was not properly executed, the agreement was altogether enforceable.

[40] The submissions in reply by the Claimant simply rebutted the authorities cited by the Defendant and the Defendant's supplemental skeleton arguments besides rebutting the authorities of the Claimant, cited a passage from the 29th edition of ***Chitty on Contracts*** to which reference will be made below, as well as the legislative intent of the Bills of Sale Act as expressed in ***The Manchester, Sheffield, and Lincolnshire Railway Co v The North Central Wagon Company*** 1888 13 A.C. 554; and **James Charlesworth v James Mills** 1892 A.C. 231 at pages 235-236.

CONCLUSIONS

[41] I have read with interest all or most of the cases cited by Counsel but cannot say I was particularly assisted by them or any of them. Some of the cases cited general principles of law dealing with different subject matters from what is before me, that is, different branches of the law; in others what was cited were incidental observations in the cases and not really what the cases decided; and yet in others the authorities cited by one Party could easily assist the submissions of the other Party.

[42] There is no dispute that Bill of Sale No. 1064 of 1995 is a valid instrument and that was accepted by learned Counsel for the Defendant.

[43] Clause 6 of the Bill of Sale reads –

> "And the Borrower doth agree with the Bank as follows:
> That all amounts paid by the Bank and charged to the Borrower hereunder shall be payable by the Borrower on demand at the aforementioned Branch of the Bank."

That is an agreement, in my judgment, within the four corners of the document which created the Bill of Sale. It is not here the situation contemplated in ***Sharp v McHenry***.

[44] Money was lent to the Defendant to purchase a vehicle to be used as a passenger minibus. He defaulted in making the agreed monthly payments and there arose financial consequences. The Bank had to sell the vehicle to recoup some of the loss. The money received was deducted from his loan account but it proved insufficient and so he became liable for the balance.

[45] It is interesting to note that the procedure followed by the Claimant was that which took place in some of the cases, even those cited by learned Counsel for the Defendant. In ***Halifax v Grant*** the three conjoined appeals related to the time limit for the claimant to sue for the shortfall after the mortgaged property was sold.

[46] In ***Gordon Grant and Company v Boos*** the headnote reads:

> "A mortgagee who has obtained an order for sale, and, bidding with the leave of the Court, has purchased the mortgaged property, is not precluded from suing the mortgagor upon his personal covenant in the mortgage for the difference between the sum due under the mortgage and that realized by the sale. It is not material that he has resold the property at a profit."

[47] In my judgment there need not be a specific clause as was described earlier in the case of ***Halifax v Grant***. What the Society did was to put in a clause ex abundantia cautela. It does not follow that unless there is such a clause the Claimant cannot recover the shortfall.

[48] I agree with the law as contained at paragraph 36-218 of the Chapter on Credit and Security in the Second Volume of ***Chitty on Contracts*** 27th Edition:

> **Secured Loans**: A loan may, and in practice commonly will, be secured in one of a number of different ways. But the existence of security does not mean that the lender is bound to look only to the security for repayment of the debt. Prima facie the borrower's personal obligation remains unaffected by the security, and the lender may either disregard the security and sue the borrower on the loan, or he may realize the security, and if it proves insufficient, sue for the balance.....It is also possible that the lender may agree to look only to the security for repayment, thereby leaving the borrower free of any personal obligation, so that the borrower will not be liable even if the security is insufficient: whether this is so in any particular case depends on the intention of the parties and the construction of any written agreement between them. But in the absence of special circumstances a court is unlikely to infer that the borrower is under no personal liability. Indeed, even in the absence of an express promise to repay the loan, a personal liability may be inferred despite the existence of some security."

[49] Learned Queen's Counsel for the Defendant in reply to the passage cited above referred to a passage from the 29th Edition of ***Chitty on Contracts*** which states –

> "The 1882 Bills of Sale Act (U.K.) has been interpreted with great strictness, and the technicality of this branch of the law is notorious. While a substantial number of security bills are in fact registered each year, the Act has severely inhibited the use of chattel mortgages as security for credit transactions."

[50] In my judgment the passage from the 29th Edition of ***Chitty*** is no answer to the passage cited earlier. Both passages cited in the last two paragraphs of this judgment are found respectively in the 28th Edition of ***Chitty*** at paragraphs 38-239 and 38-274.

[51] Learned Counsel for the Defendant recognizes the drastic results that would emanate from the acceptance of his submission and in order to mitigate this he cited the case of ***Wilson v First County Trust Ltd***, a case which, as I indicated earlier, dealt with the specific provisions of the Consumer Credit Act 1974. I am not persuaded that the Bills of Sale Act (SVG) and the Consumer Credit Act 1974 (U.K.) are kindred laws.

[52] The long banking practice has gone one for so many years that it ought not to be disturbed except upon clear legal authority. Learned Counsel for the Claimant has rightly commented upon the inequity that would result if banks were not able to recover the shortfalls in such transactions.

[53] In this case the chattel which was mortgaged is a passenger minibus, a rapidly diminishing asset, used on the sometimes very bad roads in the country, due to excessive work, lack of proper maintenance, no proper shelter. Should a debtor be allowed to misuse such a chattel and after one year return it to the Bank and simply tell the Bank, take back your vehicle and sell it for what you can get. I do no owe you anything further.

[54] In my judgment the Claimant is entitled to recover the amounts claimed in his claim form and statement of claim and costs in the sum of $5,000. I do so order. I also dismiss the Defendant's counterclaim.

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Albert N.J. Matthew
HIGH COURT JUDGE (Ag.)