EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2015/0860

BETWEEN:

SAGICOR FINANCE INC
Formerly THE MUTUAL FINANCE INC

Claimant

and

GLENIS REMI

Defendant

CLAIM NO. SLUHCV 2015/0906

BETWEEN:

SAGICOR FINANCE INC
Formerly THE MUTUAL FINANCE INC

Claimant

and

YASON ALBERTON

Defendant

Before:
Ms. Agnes Actie — Master

Appearances:
M. Anwar Brice Brice for the Claimant
Mr. Horace Fraser for the Defendant

2016: December 14

JUDGMENT

[1] **ACTIE M.:** These two claims are not consolidated but they raise common issues in two applications filed by the claimant. The claimant contends that the defence

filed by the respective defendants does not have any realistic prospect of success and should be struck out and summary judgment entered in its favour. A short background of the facts will put the applications before this court into perspective.

Background Facts

[2] The claimant granted loans to each of the defendants for the purchase motor vehicles. The loans were secured by promissory notes and mortgage Bills of Sale. The defendants defaulted in payment of the loans. The claimant in exercising its powers under the Bill of Sale seized and sold the vehicles. One of two vehicles under the Bill of Sale, in the case of **Yason Alberton**, was involved in an accident and was a complete write off. The claimant received compensation from the insurance company and also received the salvage value of the damaged car. The proceeds of sale and the compensation paid by the insurance company did not clear off the full amounts due and owing by the defendants under the respective Bill of Sale and promissory note. As a result the claimant filed a statement of case against the defendants respectively for the sums due and owing together with interest.

[3] The defendants each filed a defence admitting the loan facility to purchase the vehicles but both contend that the claimant is not entitle to maintain the claim against them.

The defence of Yason Alberton

[4] Alberton admits the loan facility to purchase two vehicles. He admits that one of the vehicles was involved in an accident and the claimant received compensation under the policy of insurance in respect of the said vehicle together with the proceeds of the salvage value of the car. He avers that the other vehicle was repossessed and sold by the claimant.

[5] Alberton contends the loan agreement in respect of the damaged vehicle was frustrated at law and therefore the payment of interest ceased at that date of the

destruction. He further contends that the settlement sum received by the claimant together with the salvage value of the wreck from the insurance company constituted the total of the claimant's bargain under the agreement. He contends r that the claimant is seeking to unjustly enrich itself by claiming interest on the loan facility beyond the date on which the vehicle perished.

Reply to defence

[6] The claimant in reply states that the vehicles merely comprised the security for the loan but did not form the basis of the loan agreement. The claimant states that the destruction and sale of the vehicle(s) did not release Mr. Alberton from his obligations under the loan agreement as interest accrued on the unpaid balance of the loan. The claimant avers that the sale and insurance proceeds were applied to the loan but the full principal balance together with interest have not been satisfied in accordance with the loan agreement.

Defence of Glenis Remi

[7] Glenis Remi contends that the claimant repossessed the vehicle and was under a duty to sell the vehicle for its true market value. Remi further contends that the interest applying to the loan ought to have been discontinued upon the vehicle being repossessed and it is unconscionable for the claimant to continue applying interest after the seizure and sale.

[8] Remi states that the Bill of Sale is not a mortgage and if it is shown that a balance is due, which is not admitted, it will attract interest in accordance with **Article 1009 A of the Civil Code** and not at the interest rate of 10 % as claimed by the claimant

Reply to the Defence

[9] The claimant avers that the defendant is under an obligation to repay the outstanding loan balance together with the interest. The claimant states that the accrued interest was completely unaffected by the claimant's exercise of its rights under the loan agreement to repossess and sell the vehicle upon the default of

payment by the defendant. The claimant avers that the outstanding amount together with interest under the loan became due and payable based on the fundamental principles of contract law.

[10] The claimant applied for summary judgment against the defendants. The defendants in return both filed an application to strike out the claims. The claimant's applications for striking out and summary judgment were filed on 19th April 2016 first in time to the defendants' application filed on 13th June 2016. The court will accordingly determine the claimant's application in priority to the defendants' application.

Application to strike out and summary Judgment

[11] The claimant in its applications to strike out the defence and for summary judgment contends that the defendants have no reasonable grounds for defending the claims. The claimant contends that there is no compelling reason why the matter should proceed to trial and summary judgment should be entered in its favour pursuant to CPR 15.2.

[12] The claimant contends that the defendants defaulted on their payments obligations under the respective Bill of Sale and Promissory Note and as a result the vehicles were seized and sold in an effort to clear the outstanding debts. The claimant avers that the proceeds of sale together with salvage value of one of the two vehicles of **Yason Alberton** were insufficient for the repayment of the outstanding balances owing on the debts.

[13] The defendants in response state that the nature of the loan agreements is premised on the defendants' ability to have the possession, use and enjoyment of the vehicles. The defendants aver that the agreements ended when the claimant exercised its right of seizure and sale of the vehicles and when it accepted the proceeds of the insurance settlement and salvage value of the other vehicle in **(Yason Alberton)** case.

[14] The defendants' contend that they no longer have possession, use and enjoyment of the vehicles but are being asked to pay the principal and interest on loans from which they do not benefit. The defendants contend that the borrower cannot be required by law to pay for something he does not have or enjoy.

Law and Analysis

[15] CPR 15.2 grants the court the discretion to give summary judgment on a claim or on a particular issue if it considers that the:-

(a) Claimant has no real prospect of succeeding on the claim or the issue or

(b) Defendant has no real prospect of successfully defending the claim or the issue

[16] CPR 26.3(1) states that the court may strike out a statement of case or part of a statement of case if it appears; (a) that there has been a failure to comply with a rule, practice direction, order or direction given by the court in proceedings or (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending the claim.

[17] 'The Court of Appeal in **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**[1] states that summary judgment should only be granted by a court in cases where it is clear that a claim or **(defence**) on its face obviously cannot be sustained or is in some other way an abuse of the process of the court. Pereira C.J then George-Creque JA, at paragraph 21 stated:

> "[21] The principle distilled from these authorities by which a court must be guided may be stated thus: Summary Judgement should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in Swain v Hillman is that the claim or the defence has no "real" (i.e. realistic as opposed to a

[1] HCVAP2009/008 delivered on 11th January 2011.

fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment."

[18] The rule granting the court jurisdiction to enter summary judgment is designed to deal with cases which are not fit for trial. It is a discretionary power which the court must exercise when properly assessing the prospects of success of the relevant party. The court is not to conduct a mini trial in order to establish whether a summary disposal was appropriate[2]. However, that does not mean that the court has to accept without analysis everything said by a party in its statements before the court**.** An analysis of the nature and scope of a Bill of Sale is required to put the case and the applications into perspective.

The nature of the Bill of Sale

[19] The text **Bullen and Leake and Jacobs** defines a Bill of Sale as "a document transferring a proprietary interest in personal chattels from one individual (the "grantor") to another (the "grantee"), without possession being delivered to the grantee". The Bill of Sale is "a form of legal mortgage of chattels". The **Black's Law Dictionary** defines a Bill of Sale as "an instrument for the conveyance of title to personal property, absolutely or by way of security".

[20] A Bill of Sale is governed by the **Bill of Sale Act**[3] of the Revised Laws of Saint Lucia. A Bill of Sale is made or given by way of security for the payment of money. Where there is a breach of the agreement, Section 10(a) of the **Bill of Sale Act** empowers the grantee to seize chattels assigned under the Bill of Sale. The section reads as follows:

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[2] Swain v Hillman [2001] 1 All ER 91, CA

[3] **CAP 13.06** of The Revised Laws of Saint Lucia

> "Personal chattels assigned under a bill of sale made or given by way of security for the payment of money is not liable to be seized or taken possession of by the grantee for any other than the following causes-
>
> (a) if the grantor makes default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in a bill of sale to which this section applies and necessary for maintaining the security;"

[21] Under the Bill of Sale, the chattels in this case (the vehicles), did not change hands and the defendants were able to continue to use the vehicles, but the claimant as lender and 'owner', has personal rights of seizure. On default on repayments, the claimant who is the owner can take possession of the chattels (vehicles), sell them and still pursue the defendants for any shortfall on the loan agreement. The claimant/lender/owner retains the right to recover from the defendants until the total amounts inclusive of interest have been paid.

[22] It is not unusual for interest charges on a Bill of Sale to be significantly higher than those offered under other forms of conditional sale and in the event of default it may increase the defendants' indebtedness to the claimant. The security may be insufficient to cover the principal sum, interest and costs due under the mortgage Bill of Sale. The defendant in such circumstances will become liable to an amount in excess of the contractual sum stipulated in the Bill of Sale.

[23] The defendants' argument that the proceeds of the sale and/or the destruction of the vehicle put an end to the loan agreement is without merit. I am of the view that the defendants' liability did not end with seizure and sale of the vehicles. Bills of Sale loans are sometimes made without reference to the value of the underlying security or its likely depreciation. It is common knowledge that vehicles depreciate over time. The vehicles as the security may well not have been sufficient to cover the outstanding balance. The amount due and owing may increase particularly under circumstances where the customer becomes liable for interest and other late charges and expenses incurred in the repossession and sale of the vehicles.

These charges may be in excess of the value of the vehicles at the time of seizure and sale. The defendants will still remain liable for any shortfall after the sale of the vehicles. The claimant in such instances has the right to pursue the defendants for any shortfall in the debt after the seizure and sale of the vehicles.

[24] Counsel for the defendants in his legal submissions states that the transaction in relation to **Yason Albertson** became unconscionable within the meaning of .Section 2 of the **Money Lending Act**[4]. Section 2 of the Act provides for the reopening of transactions of moneylenders. The claimant states that the claimant is seeking interest on the loan facility beyond the date the vehicle perished.

[25] Section 2 of the **Money Lending Act** gives the court jurisdiction to intervene in an agreement where interest is harsh and unconscionable. The purpose of this provision is to guard against unjust enrichment. According to **Halsbury's Laws of England Edition volume 27 page 30 Para 80**;

> "where a money lender contravenes the provisions of the **Money Lenders Act**, the transaction is unlawful and any contract which forms part of it is void and confers no rights".

[26] As stated before the act of seizure and sale does not put an end to the claimant's right to seek to recover the insufficiency of the security or the shortfall of the proceeds of sale. The option is always open to the lender to pursue the defendants for any shortfall and interest under the loan agreement. It would be unconscionable to reopen the entire transaction at this point to dispute the terms of the agreement under the **Money Lending Act**.

[27] I am of the view that the defendants are estopped at this late stage from challenging the agreement. The claimant is merely seeking to recover the insufficiency or shortfalls of the money due and owing under the loan agreements.

[4] Cap 12.10 of the Revised Laws of St Lucia

The defendants conceded the loan transactions but argue that loans terminated when the claimant exercised its right of seizure and sale under the Bill of Sale Act. This argument is fallacious as it may well be that the security was insufficient to cover the amount of principal, interest and costs due under the loan agreements.

[28] However, I find merit in the defendants' assertions that the claimant did not particularize the amounts claimed but merely stated global amounts purportedly representing outstanding amounts together with interest due and owning under the loan agreements. I am of the view that an itemization of the amounts would have been better appreciated by both the defendants and the court to justify the amounts claimed. This in my view can be achieved in an assessment of damages rather engaging the court limited resources in a full trial on this narrow point. The assessment of damages would give the defendants an opportunity to challenge any of the disputed sums and interest claimed by the claimant as due and owing.

[29] The court has an express discretion under Rule 26.2 whether or not to strike out a statement of case. Striking out is a draconian step which should only be applied sparingly in limited, plain and obvious cases where there is no point in having a trial. The court in **Bank of Bermuda Limited v Pentium**[5] court held that a judge should not allow a matter to proceed to trial where the defendant has not produced nothing to persuade the court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant.

[30] I am of the view that the defendants have not convinced the court that there is any prospect of successfully defending the claims against them. Accordingly taking all the facts and circumstances into consideration I will order that the defence filed by the respective defendants be struck out and summary judgment be entered in favor of the claimant for an amount to be decided by the court on assessment of damages. The assessment of damages will give the defendants an

[5] BVI HCVAP 2003/0014

opportunity to participate in the determination of the amount due and owing upon the evidence provided by the claimant to prove the sums claimed.

[31] For completeness I will now deal with the claimant's application further or in the alternative ground to strike out the defence in **Yason Alberton** for failure of a Certificate of Truth. The claimant contends that the Certificate of Truth which purports to verify the defence is not signed by the defendant or his legal practitioner as required by CPR 3.13 and should accordingly be struck out.

[32] The short response to the claimant's contention is that a statement of case will not automatically fail for the failure of a Certificate of Truth as required by CPR 3.13. The failure of a Certificate of Truth is a procedural defect which could be rectified under Part 26.8 of the CPR 2000. The failure of a Certificate of Truth ought not to void the statement of case as a whole. In **Parry Husbands v Cable & Wireless**[6] Hariprashad J. as she then was states:

> "A court is unlikely to strike out a party's case if the Certificate of Truth is missing. The failure to include the Certificate of Truth could be rectified by the court making an order that unless Mr. Husbands take the required step by a specified date, his statement of case will be struck out."

[33] This argument is merely academic at this point as I have already ruled in favor of the claimant's applications for summary judgment and striking out the defence as having no realistic success of defending the claim. Also my ruling will now render the defendants' applications to strike out the claimant's statement of claim irrelevant.

ORDER

[34] In summary it is ordered and directed as follows:

(1) The claimant's applications to strike out the defendants' defence and for summary judgment are granted as prayed.

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[6] SLUHCV2002/1193

(2) Summary judgment is granted to the claimant for an amount to be decided by the court on assessment of damages.

(3) Costs on the applications to the claimant in the sum of $750 respectively against the defendants.

(4) Unless the parties agree on quantum within 21 days of today's date, the claimant shall file and serve affidavits/witness statements with submissions and authorities in support of the assessment of damages on or before 21st January 2017; The defendants shall file and serve affidavits/witness statements, submissions and authorities in reply on or before the 21st February 2017 .

(5) The matters shall be listed on the 1st March 2017 for report or the assessment of damages.

Agnes Actie
Master