SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 2001/1012

BETWEEN:

RUFINA JEREMIE
PATRICK JEREMIE

Claimants

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LTD.,
Formerly CIBC (Caribbean) Ltd

Defendant

Consolidated with

FIRST CARIBBEAN INTERNATIONAL BANK (B'DS) LTD
Formerly CIBC (Caribbean)Ltd

V

Mohammed Francis Jeremie
Patrick Jeremie
Rufina Jeremie

Appearances:
Mr. David Moyston for Rufina and Patrick Jeremie
Mr. Kenneth Monplaisir, Q. C. for Bank

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2005: OCTOBER 17
DECEMBER 14

……..

DECISION

MASON J:

[1] This is a consolidated action.

It was begun in 2001 by a claim filed by husband and wife Patrick and Rufina Jeremie for the improbation of a hypothecary obligation which they claimed was effected through the negligence of the Bank.

[2] This claim was subsequently amended to add the Notary as the second Defendant and to include a claim for the rectification of the Land Register; for indemnity and contribution for loss suffered and for costs.

[3] By Order of the Master, leave was granted to the second Defendant to make an ancillary claim.

[4] An Order for consolidation was given because the Bank in 2004 filed an action against the Jeremies and their son Mohammed claiming sums due on the abovementioned hypothecary obligation.

[5] Just before the trial began and for reasons not disclosed to the Court , the action against the second Defendant in the first action and his ancillary claim were discontinued.

FACTS

[6] In 1999 Mr. and Mrs. Jeremie together with their son Mohammed, borrowed a sum of money from the St. Lucia Cooperative Bank to purchase land on which the family dwelling house stands at La Ressource in the quarter of Vieux Fort.

[7] That loan was secured by the Deed of Sale to the property.

[8] The loan was serviced by Mr. and Mrs. Jeremie until one day Mr. Jeremie goes to the Bank to make an installment payment on the loan and is informed that the loan had been paid off. He immediately returns home to inform his wife.

[9] When the son comes to visit, (he was not living with his parents at the time), they question him and are told that he had paid off that loan and taken another with the Defendant Bank. They discover from him that in order to secure the new loan, a mortgage was executed over their property using the Deed of Sale to the said property.

[10] The son admits to signing the mortgage on their behalf. They feel cheated and go to the Bank to enquire about the details of the loan and mortgage.

[11] Initially they are rebuffed by the staff of the Bank who claim that the negotiations between the son and the Bank were confidential.

[12] It was only through their insistence and apprising the Bank that they were part owners of the property which had been used to secure the loan and in fact that they had not signed the mortgage deed that they were given a hearing by the Bank.

[13] It was subsequently discovered that the son had infact, together with persons passing themselves off as his parents, Mr. and Mrs. Jeremie, signed the mortgage document in the presence of a Notary.

[14] The son after making a few payments on the loan had "disappeared" with the money. The loan fell into arrears and the Bank brings, its action against the Jeremies and their son.

Issues

[15] The issues to be determined are:

1) whether the Bank was negligent in not ensuring that the persons signing the hypothecary obligation were in fact the Jeremies and
2) whether the hypothecary obligation can be seen to be a valid subsisting document thereby binding the Jeremies even though the document is proved to be a forgery.

Submissions

[16] Counsel for the bank contends that there is no duty owed to the Jeremies by the Bank that it is the responsibility of the Notary to ensure that the document is properly authenticated and that the Notary is not an agent of the Bank.

[17] Counsel makes reference to the procedure for the execution of a loan, that procedure is as follows:

a) The customer makes a request for the loan.

b) He brings in requested documents;

c) The loan request is sent to Barbados for approval

d) After approval is obtained the bank sends a letter to the solicitor's office requesting that document be prepared for the Hypothecary obligation

e) The customer and surety sign the documents in front of the solicitor;

f) The solicitor registers the Hypothecary Obligation and then sends it to the bank. Sometimes the solicitor may send an undertaking that the documents are being processed and therefore the bank should proceed to disburse the funds. In the case where a guarantee form has to be signed before funds are disbursed the form may be signed by the guarantors before the bank receives the final documents from the solicitors.

[18] Counsel states that it is not the responsibility of the Bank to ensure that persons to whom the Bank is lending the money (that is the borrower) seek advice and further that the lawyer to whom the borrower goes is the borrower's lawyer and not the Bank's.

[19] He contends that since the Jeremies are saying that they never signed, the original document should have been produced to determine whether the signatures are theirs. The Court therefore is powerless to determine whether or not the parties signed.

[20] Counsel is submitting that even if the Court is of the opinion that the Jeremies did not in fact sign the document, the Court cannot improbate it since the son, Mohammed, is a co-owner of the property and by Article 909 of the Criminal Code a hypothec is indivisible and binds in entirety all the immovables subject to it and every portion of them"..

[21] As a consequence, the mortgage is binding on Mohammed as a co-owner and as such binding on the parents, Mr. and Mrs. Jeremie. Because it is indivisible, the Court cannot remove the names from the Land Register as prayed.

[22] Counsel further contends that the parties benefited by the son paying off the loan from the first Bank and so have to bear the responsibility for the new loan.

[23] Counsel for the Jeremies is of the view that the issue to be decided is whether or not the Jeremies signed the document because if they did not, it does not subsist and is therefore not prima facie evidence of the hypothecary obligation.

[24] Counsel contends that the Bank in its letter of instruction to the lawyer makes reference to the offer of a loan to the son Mohammed only and does not mention the parents. This therefore is evidence that at no time were the parents ever involved with the process.

[25] The contents of the letter are here reproduced:

January 19, 2000

Mr. Mark Maragh,
C/O Monplasir & Co.,
Chambers,
Castries

Dear Sir

Re: Hypothecary Obligation for Mohammed Jeremie

We have agreed to provide the subject with credit facilities and as security we are to be provided with a First Registered Hypothecary Obligation stamped for $97,000, over a residential property at La Ressource, Vieux Fort, registered as Block 1219, Parcel # 209. Interest is to be levied at 11.5% reducing balance per annum.

Please ensure that the charge in our favour provides valid and enforceable security at any one time and continuing from time to time and sums up to the amount borrowed. Also prepare an up to date Certificate of Existing Claims and provide us with written evidence that all taxes with regards to the property mentioned have been paid.

All charges incurred in the preparation of these documents are for the account of the Customer.

The documents should be presented to the bank's attorney, Mr. Kenneth Monplaisir Q. C. for vetting.

Yours truly,

Dixon A. Phillips
Personal Banking Representative – Vieux Fort

c.c. Kenneth Monplaisir
Chambers, Castries

[26] Counsel continues that this position is corroborated by:

1) the evidence of Dixon Philips, loans officer with the Bank, who in both his witness statements and evidence in Court stated that he never saw or spoke to the parents with regard to the loan and
2) the evidence of the parents themselves who, when they discovered what their son had done, immediately approached the Bank and were refused any information regarding the loan because according to the Bank, that was information confidential to the son

[27] Counsel cited Article 1139 of the Civil Code which provides, inter alia, that "a notarial instrument other than a will is authentic if signed by all the parties, though executed before only one Notary". The parents were never before any notary to sign any document.

[28] Counsel also referred to the St. Lucian case of John Bertram Goddard V Laurent John (1971) 1WIR decided by the Privy Council confirming the Court of Appeal's decision that where a document is not properly signed before a Notary, then that document is not an authentic writing.

[29] Counsel further contends that the hypothecary obligation could not even exist as a private writing under Article 1153 of the Civil Code.

[30] The Article provides "A writing which is not authentic by reason of any defect of form, or of the incompetency of the Officer, has effect as a private writing, if it have been signed by all the parties……..

[31] At no time did the Jeremies present themselves to the Notary and sign the hypothecary obligation and so the document is totally invalid.

[32] Counsel seeks to counter the argument of Counsel for the Bank regarding the production of the document by stating that the document could not be produced by the Jeremies for the reason that they had never seen it and that in any event it was still in the possession of the notary who at the time of signing was attached to the firm of Counsel for the Bank and when he left the firm, he could not find it.

[33] Counsel concludes that what in effect is existence between the parties is an unsecured debt by the son to the Bank based on an agreement solely between the two and in which the parents played no part.

[34] The question whether the Bank owed a duty of care to the parents could perhaps be approached by first answering the question whether the parents were customers of the Bank.

[35] It should be noted that the Bank in its action against the Jeremies referred to them as customers of the Bank.

[36] Halsbury Laws 17th edition volume 3 at page defines a customer of a Bank as someone who is in such relationship with the Bank that the relationship of Banker and customer exists even though at this stage the customer has no account.

[37] Thus on the face of it the Jeremies could be said to be customers of the Bank.

[38] If they are customers of the Bank, the Bank must exercise due care and skill in the business of Banking.

[39] In the case, Woods V Martins Bank Ltd (1959) 1QB 55 (which was approved by the House of Lords in the seminal case of negligence. Hedley Byrne & Co Ltd., V Heller and Partners Ltd (1964) AC 465 Salmon L J p. 70 said "In my judgment the limits of a Banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact……the law in these circumstances imposes an obligation on him to advise with reasonable care and skill".

[40] In the instant case in the procedure for the execution of a loan by the Bank (set out earlier) at paragraph 18 the Bank indicates that it does not owe the Jeremies any duty of care, because they are concerned only with the procedure as set out but the rest is up to the Lawyer.

[41] However all this is academic because everything relies on the question of the validity of the document purported to have been signed by the Jeremies.

[42] If the Court is of the opinion that the document is not valid by reason of its being a forgery then the duty of care by the Bank to the Jeremies is totally irrelevant because no duty can exist where nothing is in existence.

[43] It should be said that the Court accepts the Jeremies as witnesses of truth: that they never signed the notarial document, the hypothecary obligation.

[44] This is premised on the actions of the staff of the Bank when the Jeremies confront them with regard to the loan taken out by their son: as soon as the Jeremies state that they had not signed the hypothecary obligation, they are sent to the Notary who admits that he had never seen them before.

[45] The Court having accepted this should the question posed by Counsel for the Bank be a factor in determining the liability of the Jeremies? That having reaped the benefit of a fully paid loan, that they should be allowed to avoid the contract which was subsequently made, albeit that it was made through fraud.

[46] It is quite evident from their behaviour that the Jeremies could not have been in favour of their son taking out a second loan and mortgage on the property. They were content to continue making their payments on the first loan. According to their evidence, their house needed no repairs, they had no need of more money.

[47] It is trite law that fraud operates to vitiate a contract but by Article 927 of the Civil Code, fraud is never presumed, it must be proved.

[49] The original hypothecary document was never produced to the Court despite an Order of the Court for full disclosure. It has been stated that the Notary displaced it when he was

changing 'offices. The certified copy seen by the court does not bear the signatures of the parties.

[49] One of the unfortunate facets of this case is the unexplained discontinuance of the case by and against the Notary. That case would most likely have put beyond doubt the allegation of fraud.

[50] Counsel for the Bank argued that for there to be iimprobation under Part IV of the Code of Civil Procedure, the original document must be produced.

[51] However in the case of Ullyses et al Vs Anthony et al St. Lucia High Court (Civil) No. 84 of 1977 it was held per Mathew J: "There is nothing in the Code of Civil Procedure which states that documents to be improbated must be produced, although the provision with respect to incidental improbation in particular Article 180 would seem to indicate the usefulness of the court having the document before it would improbate.

[52] Further it is a principle of law that extrinsic evidence, that is, evidence of matters outside the document will always be admitted to defeat a deed on the ground of fraud.

[53] I do not think the Jeremies should be penalized for action not within their control - the production of the original document and especially when a copy cannot suffice - and in any event as stated before, the court accepts as truth their statement that they were not the makers of the deed.

[54] It was submitted on behalf of the Jeremies that neither Article 1139 (relating to authentic writings) nor Article 1153 (relating to private writings) could be construed to authenticate the hypothecary obligation because of the requirement that the document must have been "signed by all parties".

[55] Article 1139 reads " A notarial instrument other than a will is authentic if signed by all the parties, though executed before only one notary".

[56] Article 1153 reads " A writing which is not authentic by reason of any defect of form, or of the incompetency of the officer, has effect as a private writing, if it have been signed by all the parties, except in the case mentioned in article 831.

[57] Since the document because of its being a forgery cannot be found to have been signed by all parties it must be declared null and void".

[58] In the cited Court of Appeal/Privy Council Case John Bertram Goddard Vs Laurent John (supra) and, I quote from the judgment of Louisy J at page 510: " The issue between the appellant and respondent is whether or not the document was signed by the appellant. The document having been shown to be false would if this had been prayed for by the appellant in his defence, have been set aside; but it is clear that the court, even though it does not formally set it aside, cannot give it any authenticity nor found any judgment upon it.

[59] The Court in that case could not found any judgment upon a document which had been proved to be false.

[60] This court now adopts that finding as its own.

[61] See also the case of Fung Kai Sun Vs Chan Fai Hing (1951) AC 489, the facts of which are very similar to ours:

[62] The manager of certain real property belonging to the respondents fraudulently mortgaged it by means of forged mortgages to the appellant. There had been no contractual or other relationship between the respondents and the appellants and the former after they because aware of the forgery and that the forger had disappeared had for their own purposes, delayed for about three weeks before informing the appellant of the forgery.

[63] The respondents sought and were granted a declaration that the mortgages were null and void and should be set aside.

[64] The issue of estopped was raised and determined in that case, while it was not raised in ours, it might be helpful to make a statement on it.

[65] The learning from Halsbury is thus: The doctrine that a forgery cannot be ratified is probably of general application. A man be estopped by conduct from denying his signature or held to have adopted the forged instrument. Where on being aware of the

forgery of his signature, a man must disclose the forgery to the bank. If he fails to do so within reasonable time, he is estopped from denying its validity.

[66] In our instant case, as soon as the Jeremies became aware of the forgery, they went around to the Bank and informed them of it.

[67] The finding of this court therefore is that the hypothecary obligation purported to have been signed by the Jeremies is null and void because of its having been forged.

ORDER

1) That the Hypothecary Obligation registered at the Land Registry of St. Lucia on 28th day of June, 2000 as Instrument No.3000/2000 be and is hereby improbated..
2) That there be rectification of the Land Register number 1219 b209 by deleting the said hypothecary obligation from the incumbrances Section
3) That costs be awarded to Mr. and Mrs. Jeremie

SANDRA MASON Q. C.

High Court Judge