

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 17/2009

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE HIBBERT JA (Ag)**

**BETWEEN ELEGERO COMPANY LIMITED APPELLANT
A N D ANTHONY PERKINS RESPONDENT**

Mrs Rosemary Neale-Irving for the appellant

The respondent neither present nor represented

28 July 2011 and 30 March 2012

HIBBERT JA (Ag)

[1] On 28 July 2011 we dismissed the appeal and made no order as to costs. As promised, we now put our reasons in writing.

[2] The appellant brought an action against the respondent on 20 August 2008 to recover the sum of \$70,125.00 as the amount due on a loan. This amount, it was claimed, became due as a result of the default by the respondent in meeting his payment obligations under a loan agreement entered into between the parties on 13 June 2008.

[3] The respondent was served with a copy of the summons to which was attached a copy of the plaint note and particulars of claim. He however, failed to attend court and the appellant sought to have judgment entered in default. This attempt, however, failed as the learned Resident Magistrate found as follows:

“(1) That there is no written contract -

(1a) [Because] the lender does not sign as party to the contract. Rather the lender’s signature appears only as a witness to the borrower’s signature.

(2) An oral contract in the general clauses outlined in the document was assumed on the basis of the borrower’s signature and the fact that the loan money passed as consideration.

(3) It appears from the terms of the contract as outlined in these clauses, that the 5% late fee only becomes chargeable in the event that the Power of Sale which is attached to the security is exercised (Clause 4 (v).)

(4) The second paragraph of the second clause numbered 4 in the purported contract clearly states in part that:

‘The period of the loan expires on the 13th day of July 2009 and all the liability of the borrower shall cease if all payments are paid on the 13th day of July 2009....’ ”

[4] The appellant’s challenge to these findings, by way of appeal, was supported by one ground of appeal which stated:

“That the verdict is unreasonable and cannot be supported having regard to the evidence.”

[5] Before this court, Mrs Neale-Irving submitted that the learned Resident Magistrate erred in finding that the cause of action would not arise until the term of the loan had expired. She submitted that the payments by monthly instalments was a material term of the contract, and its breach by the respondent entitled the appellant to treat the contract as discharged, and to sue for damages. She further submitted that the learned Resident Magistrate erred in holding that penalties would only be attached to outstanding payments once the power of sale under the mortgage is exercised.

[6] It is, we believe, necessary to set out the terms of the agreement, the interpretation of which has triggered this appeal. The agreement states:

"LOAN AGREEMENT

This Legal Charge is made on the 13th day of June 2008 between ELEGERO COMPANY LIMITED of 45 Duke Street in the City and parish of Kingston CPO. TRN **001-814-630** hereinafter called "the Lender" and **MARK PERKINS** of 24 Andrews Pen Lane, Kingston 6 in the parish of Saint Andrew TRN 107-174-669 hereafter called "the Borrower".

The Borrower is seized of the property ("the Mortgaged Property") described in the schedule subject to the incumbrances notified thereunder.

That in consideration of the sum of **\$50,000.00** (the Principal sum) this day lent and advanced to the Borrower by the Lender (the receipt whereof is hereby acknowledged by the Borrower) with interest secured as appears below.

The Borrower covenants as follows:

1. To repay the Principal Sum of \$4,167.00 in twelve (12) monthly instalments commencing on the 13th day of

July 2008. Also a further payment of \$12,000.00 being interest at **24%** per annum payable at \$1,000.00 per month making a total of principal and interest of **\$5,167.00** per month for 12 months.

2. To deposit forthwith with the Lender the security mentioned in the Schedule as collateral for the loan until repayment of the loan with interest as aforesaid. As equitable owner to charge the Mortgage Property described in the Schedule with payment to the Lender of the Principal Sum, interest and all money payable by the Borrower under this deed.

3. To repay regularly and punctually all taxes and assessments now or hereafter to be imposed.

4. Section 106 of the Law of Property Act, but shall not apply to this deed and the statutory and other powers of sale and appointing a receiver shall arise on the date of this deed and shall become exercisable by the Lender without notice to the Borrower immediately on the happening of any one or more of the following events:-

- i) If the Lender demands payment of any money secured by this deed and repayable on demand, and it is not paid immediately.
- ii) If any payment of any money secured by this deed payable in any other manner or interest payable under it is not paid on the due date whether demanded or not.
- iii) If the Borrower dies or commits any act of bankruptcy or makes a composition with his creditors or becomes of unsound mind or otherwise incapable of managing his affairs.
- iv) If the Borrower makes default in observing or fulfilling any of his obligations under this deed.
- v) If any of the said instalments, principal or any part of the interest payable under this Deed is in arrear after

it has become payable, then it shall attract a penalty of **5%** calculated on a monthly rate.

5. And to better secure payments in [the] name aforesaid of the Principal Sum, interest and other payments intended to be hereby secured. The Borrower doth hereby Mortgage to the Lender all the Borrower's estate and interest and all the estate and interest which the Borrower is entitled or able to transfer and dispose of in all that parcel of land described in the Schedule hereto.

The period of the loan expires on the 13th day of July 2009 and all the liability of the Borrower shall cease if all payments are paid on the 13th day of July 2009 and the deposited security not then realized shall forthwith be returned to the Borrower by the Lender.

SCHEDULE

ALL THAT parcel of land part of **ANDREWS PEN** called **WATTLE PEN** in the parish of **SAINT ANDREW** containing by survey Eighteen Thousand One Hundred Square Feet and Thirty-one Hundredths of a square foot of the shape and dimensions and butting as appears by the plan thereunto annexed registered at Volume 1028 Folio 587.

PRINCIPAL SUM: \$50,000.00
INTEREST RATE: 24%
PERIODICAL PAYMENTS: 12 monthly payments of **\$5,167.00**
DATE OF FIRST PAYMENT: July 13th 2008
TERM: 12 Months

SIGNED BY THE BORROWER

The said **MARK PERKINS** *M Perkins*
.....
MARK PERKINS

in the presence of

.....
ROSEMARY NEALE-IRVING (Director)
ELEGERO COMPANY LIMITED

Sworn to at *45 Duke Street*
Kingston

This *13th* day of June 2008

In the presence of

Maria Bobb
Justice of the Peace for the parish of ..."

[7] Having examined this agreement, we do not believe that the signature above "Rosemary Neale Irving (Director) Elegero Company Limited" was placed there for the purpose of witnessing the signature of the respondent. This, however, is of no real moment as the learned Resident Magistrate held that there was indeed an agreement in the same terms as those contained in the written document.

[8] The real issue in this case is whether or not the full amount of the loan plus interest was due and payable at the time of the commencement of the suit. Clause 4 of the agreement sought to make provisions for the appellant (the lender) to exercise its powers of sale or the appointment of a receiver (iv) "if the borrower makes default in observing or fulfilling any of his obligations under this deed". We note the reference to the Law of Property Act and assume that what was intended was a reference to the Registration of Titles Act. We believe that the opening portion of paragraph 4 can, at best, be described as vague.

[9] The only provision in the agreement which specifically address the consequences of late monthly payments is to be found in clause 4 (v) which merely imposes a penalty. We believe that this provision is totally misplaced as it seems to bear no relationship to the remainder of that clause and is not in any way governed by it.

[10] The final paragraph of what should be numbered Clause 5 is of significance and bears repeating. It states in part:

“The period of the loan expires on the 13th day of July 2009 and all the liability of the Borrower shall cease if all payments are paid on the 13th day of July 2009 ...”

In the absence of an express provision in the agreement making the full amount of the loan, together with interest and penalties, due and payable on the default of a monthly payment, the full amount would become due and payable on 13 July 2009.

[11] Bearing in mind that the amount claimed was for an amount due under a loan, we therefore, agreed with the learned Resident Magistrate that the suit was brought prematurely and accordingly dismissed the appeal.

