JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 65/94

COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	**ZACHARIAH SHARIEF**	**PLAINTIFFF/APPELLANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**DEFENDANT/RESPONDENT**

David Muirhead, Q.0 & Janet Stanbury instructed by Stanbury & Co. for Appellant

Michael Hylton, Q.C. & Patrick McDonald instructed by Myers, Fletcher & Gordon for Respondent

20th, 21st, 22nd, 23rd, 24th April & 27th July, 1998

RATTRAY, P.

On the 13th June, 1994 Patterson, J (as he then was) gave judgment for the defendant National Commercial Bank Jamaica Limited in an action brought in the Supreme Court by the plaintiff Zachariah Sharief claiming inter alia damages for the wrongful and negligent exercise by the defendant as a mortgagee in the exercise of the Powers of Sale under a mortgage. The mortgaged property is 30 Roberta Close, Brooks Level Road, Golden Spring, Saint Andrew, and is registered at Volume 1051 Folio 379 of the Register Book of Titles. The defendant is a commercial bank and the mortgagee of the property. The plaintiff, the owner of the property being in default on the mortgage payments, the defendant exercising Powers of Sale under the mortgage sold the property to a third party at public auction. The statutory notices were sent by registered post to the appellant at 1185 Nostrand Avenue, New York, U.S.A. which was the address of the appellant on the bank's record.

There is no dispute that at the relevant time the plaintiff/appellant was in arrears with his mortgage payments, to the bank. The question before the trial judge for determination was whether the defendant/respondent had acted in conformity with provisions of the Mortgage Deed and the Registration of Titles Act. The Deed recited that:

> "Any demand or notice hereunder may be properly and effectually made given and served on and to the mortgagor if signed by any Director, Manager Acting Manager or Assistant Manager of the Bank or any Attorney-at-law on behalf of the bank and sent by registered post addressed to the Mortgagor at the address stated as 'Mortgagor's Address' in the said Schedule and every such demand or notice sent by post as aforesaid shall be deemed to have been received on the second day following the posting thereof."

The mortgagor's address stated in the deed was 2 Trevennion Road, Kingston 5. The facts however disclose that the mortgagor was resident in the United States of America conducting his business as a restauranteur at 1184 Nostrand Avenue, Brooklyn, N.Y. 11225. The plaintiff/appellant maintains that he received no notice from the bank as is required by Section 105 of the Registration of Titles Act and which is a pre-condition to the exercise of the mortgagor's Powers of Sale under section 106 of that Act.

With respect to the Trevennion Road address on the Mortgage Deed the plaintiff's evidence at the trial was that he did not reside there, but that it was the office address of a friend, and that his wife usually picked up his mail at that address. At the relevant time, it is established in the evidence that his wife was also in the United States of America.

The undisputed facts are that consequent on the mortgage deed dated 21st April, 1987 between the bank and the appellant monies were loaned to the appellant by the bank with the mortgaged premises as security for the loan. The Mortgage

Deed provided inter alia that upon default of payment , which default should have continued for three days:

> "... the bank shall be at liberty to give the Mortgagor notice in writing to repay the moneys hereby secured and if such default shall continue for three days after the service of such notice the statutory powers of sale and of appointing a receiver and all ancillary powers conferred upon the Mortgagee by the Registration of Titles Act may be exercised by the Bank."

Then follows the Notice requirement already cited.

The appellant made payments by Remittance Express from the United States of America directly to the bank, and through his wife when she was in Jamaica. He contended that he got some receipts from the bank which were posted to 1184 Nostrand Avenue.

On the 6th April, 1990 he received a telephone call from a friend in Jamaica who informed him that the property had been sold by auction. He had seen none of the several notices placed in the Daily Gleaner Newspaper informing publicly of the date and place of the intended sale of the property on the 5th April, 1990 by Auction. He denied ever having given his address to the bank as 1185 Nostrand Avenue. In fact there was no such address in existence. He had not received the statutory notices sent out by the bank of its intention to exercise the Power of Sale in the Mortgage.

The respondent Bank maintained that the statutory notice had been sent out to the appellant at the address 1185 Nostrand Avenue, New York which address had been that of the appellant on the records of the bank, that the notice had not been returned to the bank, and the bank was therefore not in breach of any statutory duty.

The learned trial judge found that although the Notice had been sent to 1185 Nostrand Avenue and the appellant did reside at 1184 Nostrand Avenue, there was evidence to establish that he received the notice and consequently gave judgment in favour **of the bank. This is the judgment on appeal before us.**

The grounds of appeal relied upon by Mr. Muirhead, Q.C. for the appellant though exhaustively stated maybe summarised under the following headings:

Error by the learned trial judge in respect to

(a) the effect of sections 105 and 106 of the Registration of Titles Act;

(b) his finding of fact that the appellant received notice of the Bank's intention to sell the property at public auction;

(c) the admissibility of exhibit 9 (the Bank's G18 cards) as prima facie evidence of the matters transactions and accounts received therein;

(d) his findings that the respondent had properly exercised its Powers of Sale under the mortgage.

Re: Sections 105 and 106 of the Registration of Titles Act

Section 105 of the Act permits the mortgagee on the default by the mortgagor for one month or such period stated in the mortgage deed to require the mortgagor in writing to pay the money owing "by giving such notice to him or them or by leaving the same in some conspicuous place on the mortgaged or charged land or by sending the same though the post office by a registered letter directed to the proprietor of the land at his address appearing on the Register Book." The address in the Register Book of Titles is 2 Trevennion Road, Kingston 5.

Section 106 establishes that on default of payment after a month or such period as is stated in the mortgage having passed "the mortgagee ... may sell the land mortgaged or charged."

The evidence of the appellant is that on receiving the information on the day after the auction that the bank had sold his property, he immediately flew to Jamaica. His attempts to reverse the process were unsuccessful. He had not seen the notices

placed in the Daily Gleaner informing of the public auction of the premises. These notices stated the address of the property as Roberta Crescent although the proper address is Roberta Close. At the time the mortgage was entered into his residential address in New York was 1040 Carrot Street, Apartment 4E Brooklyn 11225. He could not recall giving this address to the bank nor indeed any Nostrand Avenue address although his restaurant was situated in Nostrand Avenue. He had sometimes made payments through a Remittance Company.

The appellant's evidence needed to be examined by the trial judge against the evidence produced by the Bank. This evidence was given by two employees at the Bank, Mr. Paul Stewart, the former Assistant Manager of the Bank's New Kingston branch between 1986 and 1989 and who dealt with the appellant when the relevant loan was applied for, and his successor Mr. Kenneth Mitchell, the Branch Manager at National Commercial Bank, New Kingston between 1989-1992.

Mr. Stewart identified exhibit 9, the Bank's G18 cards, which records the loan account of the appellant, as being originated by him, and gave evidence that many of the entries had been made personally by him. Mr. Mitchell gave evidence of the delinquency of the accounts between 1989-1990. He stated:

> "A record of the account is kept on a card known as `G18' - on it is recorded customers name, address, occupation together with lendings, terms of repayment interest rate - principal lent, securities taken, purpose of loan or advance as also record of talks with customer, telephone calls correspondence to or from the customer and state of the account. Any officer of a supervisory rank in the lending department is authorised to write on the card. If a letter is written to the customer, the date is entered on the card and the fact that the letter written. Whenever an entry is made on the card, the card is circulated to all the officers in the loan department who will initial the card to indicate that they have seen it.
>
> There was such a card in respect of plaintiff. I made entries on that card. This card shown me is the `G18' in respect of plaintiff. It covers period November 1986

> and ends 10th April, 1990. I made entry on 20th November 1989 - just one entry. I initialled all the entries on page which commences with date 14th September 1989 and ending 10th April, 1990. I also initialled entries made on 6th March, 1989, 28th March, 1989, 5th June, 1989 14th August, 1989. In respect of item 14th August, 1989, I wrote part there. Initialled entry on 13th December, 1988.
>
> The handwriting on the first page of the card I recognise to be Mr. Paul Stewart - My predecessor in the post then.
>
> Bundle of cards tendered and admitted as Ex. 9."

I have cited the totality of this part of the evidence because Mr. Muirhead, Q.C. has strenuously maintained that despite the absence of objection at the trial the bundle of "G18" cards was not admissible. The appellant's address on the first card is stated in red ink as 1185 Nostrand Avenue, as his foreign address with the "5" struck out and the "4" substituted in black.

Mr. Muirhead, Q.C's., submissions in respect to the "G18" card is a challenge to its admissibility on the ground that the information therein represents hearsay evidence which can only be admitted as failing within the description of banker's books as defined by Section 32 of the Evidence Act. The bundle of cards he maintains cannot be accepted as a "Book". This definition in the section is as follows:

> " 'Banker's books' includes ledgers, day books, cash books, account books and all other books to be used in the ordinary business of the bank;"

Section 33 of the Evidence Act states:

> "Subject to the provisions of this Part, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded."

The Act requires as a foundation for the receipt of this evidence:

> (a) That the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course

> of business and that the book is in the custody and control of the bank.
>
> (b) If a copy, proof that it has been examined with the original and found to be correct.

There is no doubt that the G18 bundle of cards formed part of the records of the bank and that the entries are made in the usual and ordinary course of business of the bank and kept in the custody and control of the bank. Their entries record the relevant transactions, discussions and telephone conversations between customers and client in relation to the specific account.

Although the information is recorded on cards, in my view for the purposes of the Evidence Act these cards constitute a banker's book. As was stated by Caulfield, J in ***Barker vs. Wilson*** [1980] 2 All E.R. 81 at page 82, an appeal referred by way of case stated by Magistrates to the Queen's Bench Division and with regard to microfilm and cheques -

> "The point was taken before the magistrate that microfilm and cheques, if kept by the bank, were not included in the definition of the 'banker's books' which is contained in section 9 of the Banker's Books Evidence Act 1879. The magistrates came to the conclusion (and they put their conclusion in these terms: that they adopted some robust commonsense) that s 9 does include microfilm, which is a modern process of producing bankers records. It is probable that no modern bank in this country now maintains the old-fashioned books which were maintained at the time of the passing of the 1879 Act, and possibly maintained for many years after 1879".

The learned judge continued at page 83:

> "The magistrates in this case made the order in these terms: that the respondent could inspect such books at the bank, to include books containing records, whether photographic or otherwise, of the names of all payees of cheques drawn on the account of the appellant. That was the order made. There is no reference in that order to cheques. Of course until very recently cheques were not retained by a bank but were returned to the customers. It may well be that the cheques in this particular case have been

> returned to the customer, who is the appellant, but that is beside the point. Cheques are not included in the order which has been made by the magistrates. For myself, I would not like, without further argument, to include in this judgment any view whether cheques come within the meaning of the word `book' as used in the definition section of the 1879 Act. But I have no doubt whatsoever that the definition section does include microfilm, if microfilm is used by a bank to record the payment of cheques by photographing the name of the payee and other matters. As far as I can see (and indeed it is a matter of common sense) the microfilm is itself an entry which is maintained by the bank in respect of a customer's account.
>
> Therefore if in this particular case the books which are held by the bank in respect of the appellant's account are really a microfilm process of the transactions which the customer (that is the appellant) has carried out at his bank, then that microfilm itself is within the definition contained in s 9 of the 1879 Act, although it would not be called in ordinary language a book. A bankers' book in ordinary language would be called a book. A book is a word which is used in many contexts. But I have no doubt at all that actual microfilming of actual transactions and actual cheques do come within the definition of 'bankers' books' in s 9."

Lord Justice Bridge, L.J. stated tersely -

> "The Bankers' Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of 'bankers' books' and the phrase 'an entry in a banker's book', it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the Bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm."

The G18 cards which constitute the record of the Bank in respect to the appellant's account were therefore admissible and the learned trial judge was correct in admitting them.

With respect to sections 105 and 106 of the Registration of Titles Act the complaint of the appellant was that he received no notice from the bank to pay the money owing on the mortgaged property and no such notice was given to him by the

method set out in section 105, that is actual notice or imputed notice 'by leaving the same in some conspicuous place on the mortgaged or charged land, or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the Register Book." Consequently, Mr. Muirhead, Q.C., submits that a necessary pre-condition to the exercise of the Power of Sale **by** the Bank had not been met.

Mr. Hylton, Q.C., relies upon the evidence in the G18 cards of the posting of the notification to the appellant at 1185 Nostrand Avenue, New York. Mr. Kenneth Mitchell had given evidence of letters dispatched to the appellant in the ordinary course of business to that very New York address. None of these letters had ever been returned unclaimed. Specifically, the formal demand for payment was given by notices dated 18th September, 1989 and 20th November 1989 addressed to the appellant at 1185 Nostrand Avenue. This was the address of the appellant as written in red on the G18 card at the relevant time. These two letters of demand were sent by registered mail and were never returned.

The witness was shown four remittance notifications from Remittance Express in New York to the Bank between June 21, 1988 and August 23, 1988 which had the appellant's address as 1184 Nostrand Avenue. He was also shown a receipt from the Bank dated 18th March, 1991 which stated the appellant's address as 1184 Nostrand Avenue. When asked to explain how the Bank would have sent this specific receipt to that address, the witness replied:

> "Can't say how bank sent receipt to correct address in 1988. (Ex. 1 - page 13) Looking at Ex. 1 - p. 12 - the Remittance Express advice shows the address of plaintiff as 1184 Nostrand Avenue and so the clerk who prepared the receipt at Ex. 1 p. 13 could have acted on that."

He also pointed out a Remittance Express notification Ex. 5 which had the appellant's address as 1185 Nostrand Avenue. The final letter of demand dated January 12,

1990 from the Attorneys-at-law for the Bank was addressed to Mr. Sharief at 1185 Nostrand Avenue.

By letter dated June 8, 1989 the Bank had informed the appellant addressed to 1185 Nostrand Avenue of the indebtedness of the loan account and warned that "unless some positive steps are taken to repay the loan we regret that we shall be obliged to take the necessary action to recover our debt." The learned trial judge in his judgment referred to this letter as follows:

> "It is important to note that this letter of June 8, 1989, as well as all previous and subsequent correspondence were all addressed to the plaintiff at '1185 Nostrand Avenue, Brooklyn, New York 11225 U.S.A.' The plaintiff contends that there is no such address and that he has never received any correspondence from the defendant addressed to him there."

The learned trial judge returns to this later in his judgment as follows:

> "So I return now to the letter of June 8, 1989 which I referred to as being important. There is an entry on the cards (Ex.9) which refers to this letter and the next entry on the cards is dated 14th August, 1989, and Mr. Mitchell says he saw and initialled it to confirm that he had read it. It reads as follows:
>
> > 'Mr. Sharief called from New York today in response to our letter. He advised that he had given an alleged friend the funds to up-date the loan 2 months ago and he is amazed to know that this was not done. (The word 'lie' is written after this by Mr. Mitchell). He promised to forward funds via T/T by the end of the week to clear the arrears. He will visit Jamaica in October at which time we will discuss the future operation of the account.'
>
> This is an entry made in a banker's book, in the usual and ordinary course of business, and such entry is prima facie evidence of the matters transactions and accounts therein recorded. In my view, a reasonable inference to be drawn from it is that the plaintiff must have received the letter of June 8, although it was addressed to him at 1185 Nostrand Avenue, and that he was prompted by it to make the telephone call. I accept the evidence for the defendant that none of the letters or any other correspondence forwarded to the

> plaintiff was ever returned as undelivered. It is not surprising to me. The plaintiff is a businessman and it is more probable than not that the postman would know him, or at least his business, and since there is no such address as 1185 Nostrand Avenue, the postman would deliver the letter to the plaintiff at his known address. From the evidence, at least eight different letters were posted to the plaintiff between August 1988 and January 1990, some by ordinary mail, others by registered mail, and none was returned to the defendant. I reject the evidence of the plaintiff that he did not receive any of these letters and I find as a fact that that he did receive all the letters sent to him. In particular, I find that on a balance of probabilities, the plaintiff received the registered letter with notice of demand written by the Assistant Manager of the defendant's bank and addressed to him at 1185 Nostrand Avenue on November 20, 1989 and also that posted to him at the same address by Deryck A. N. Russell, Attorney-at-law on January 12, 1990."

Further, the learned trial judge referred to another notation on the G18 cards:

> "14/2/90 'C' called from New York and advised that the address on our files was incorrect and as a result he was not aware of the adverse position on the loan. He was however told that it is incumbent on him to ensure that the loan was being serviced, especially in light of the source of repayment i.e. Mr. Wilson is responsible for payments while he takes care of Mr. Wilson's bills in New York. He has deposited US$1000 and promised to call back on Wednesday with plans for repayment. He was told that the payment made was not enough and a substantial reduction would have to be made to stop us from disposing of the property. (Although by accepting payment we will have to hold off until three months have elapsed). We await call on Wednesday DN 22/2/90. On checking C's track record the impression one gets is that C does not speak the truth. This therefore appears to be another story in the long line of excuses'.
>
> Again, this entry in the banker's book is prima facie evidence which supports a finding of fact that the plaintiff received the notice sent on January 12, 1990. how else would he have known that the address in the defendant's record was incorrect and of the adverse position of the loan? It seems logical

> that it was at this time that the mistake in the foreign address was corrected to read '1184' instead of '1185'. I do not accept his evidence that he did not receive the notice, nor do I believe that his reason for calling the bank in February 1990 was because he had not sent money since November, 1989. As I have said before, I am satisfied that all the letters were delivered at 1184 Nostrand Avenue, although addressed to 1185 Nostrand Avenue."

In my view the important determination is as to whether the appellant had notice of the Bank's demand. The reasoning of the trial judge which brought him to the conclusion that the appellant had such notice cannot be faulted. Had the notification been sent to 2 Trevennion Road, where in fact the appellant does not reside, it is most likely he would not have received it because his wife who collected his bills at that address was in the United States of America. However, he would have In law been deemed to have received it. The evidence relied upon by the trial judge to establish notice to the appellant was not evidence of a "deemed" notice but of an actual notice a question of fact determined on the balance of probabilities, the civil standard of proof. The question to be decided was whether the appellant received the notice or not, whatever address to which the notice had been directed - See ***Stylo Shoes Limited v. Prices Tailors Limited*** [1959] 3 All E.R. 901.

The final complaint by the appellant was that of negligence and breach of duty on the part of the respondent in not taking the reasonable precautions to obtain at the auction the true market value of the premises. The trial judge found as a fact that the respondent acted with prudence in obtaining a valuation of the premises. The evidence does not support the appellant with regard to negligence and breach of duty. The fact that the advertisements described the property at 30 Roberta Crescent instead of 30 Roberta Close does not support a diminution or public interest in the auction where there is no evidence of the existence of a Roberta Crescent. There is absolutely nothing by way of evidence or inference to suggest a manipulation of the auction which resulted in a sale at Five Hundred and Eleven Thousand Dollars

($511.000) on the valuation of a market value of Five Hundred and Fifty Thousand Dollars ($550,000), and forced sale value of Four Hundred and Forty Thousand Dollars ($440.000).

The appeal is therefore dismissed with costs to the respondent.