THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S304 of 2018

Claim No. CV 2015-00796

Between

WAYNE LUM YOUNG

Appellant

And

ZORENA KHAN-ALEXANDER

Respondent

Panel:

A. Yorke-Soo Hon, J.A.

M. Dean-Armorer, J.A.

M. Holdip, J.A.

Appearances:

Mr. Navindra Ramnanan appeared on behalf of the Appellant

Mr. Samuel Saunders appeared on behalf of the Respondent

Date of Delivery: April 23, 2024.

I have read the judgment of A. Yorke-Soo Hon, J.A. I agree and I have nothing further to add.

.....

M. Dean-Armorer, J.A

Justice of Appeal

I have read the judgment of A. Yorke-Soo Hon, J.A. I agree and I have nothing further to add.

.....

M. Holdip, J.A

Justice of Appeal

JUDGMENT

Delivered by: A. Yorke-Soo Hon, J.A.

Introduction

1. This is an appeal against the order of Justice Joan Charles dated July 31, 2018, in which the Court dismissed the Appellant's claim for damages as a result of the Respondent's breach of agreement.

Case for the Appellant

2. On September 14, 2007, the Appellant, a licenced moneylender, pursuant to the **Moneylenders Act, Chapter 84:04** loaned to the Respondent $2,000,000.00 secured by a promissory note in which $2,120,000.00 was repayable. A copy of this note was made available to the Respondent.

3. The Respondent did not meet the complete payment and a set-off arrangement was entered taking into account payments made. This involved the Appellant receiving phones and payment of phone bills by the Respondent.

4. The Respondent continued to fail to make substantial payments on her debt and on July 2, 2014, the Appellant exercised leniency and the parties agreed that the remaining balance was $1,650,000.00. On even date, the Respondent paid $150,000.00 thereby leaving a balance of $1,500,000.00. She later made three payments of $10,000.00, but failed and/or refused to make any further payments.

5. The Appellant denied receiving jewellery from the Respondent as part of payment of the loan. He also denied any affiliation with an individual named Akeem.

6. Alternatively, the Appellant claimed that the Respondent was unjustly enriched by the sum of $1,470,000.00 which she received from him and which she has not repaid.

Case for the Respondent

7. The Respondent denied that she borrowed the sum of $2,000,000.00 from the Appellant on September 14, 2007, and also denied signing a promissory note to that effect. She instead borrowed the sum of $200,000.00 from him and signed a promissory note for that sum on even date. She requested a copy of this promissory note from the Appellant, but he refused to give it to her. She stated that the promissory note referred to by the Appellant does not bear a licence number to verify that the Appellant was a moneylender. Also, the note was signed by his son Mc Neish Lum Young (deceased), who was not a licenced moneylender. She said that the sum she borrowed was lent to her via Republic Bank cheque dated September 14, 2007 on the instructions of Mc Neish and not the Appellant. She indicated that there were no obligations for her to pay any sums to the Appellant.

8. The Respondent testified that the Appellant and Mc Neish asked her to sign a blank sheet of paper at the bottom left side and was told that if she did not, the money

would not be loaned to her. She was desperate for the money and signed the blank sheet. She acknowledged that the signature appearing on the promissory note for $2,120,000.00 belonged to her, but stated that that sum was typed onto the blank sheet after she signed.

9. Around November 2007, the Respondent informed the Appellant of the difficulties that she had in repaying the loan and he accepted the Respondent's jewellery valued at $100,000.00 as part payment. They then entered into a verbal agreement that the debt would be paid through the Respondent's Digicel store by paying phone bills and issuing new cell phones to the Appellant and Mc Neish which amounted to $125,794.96. She also indicated that $240,000.00 was paid to the Appellant via twelve monthly instalments of $20,000.00 between September 2007 and August 2008. These were made in cash and the Appellant never gave her a receipt despite her request for same. On June 11, 2014, a person who identified himself as Akeem threatened her and her family. On June 12, 2014, she visited the Appellant's home with a relative to discuss the situation. Bruce Lum Young, son of the Appellant indicated that they had paid $200,000.00 to Akeem to recover the debt and that she was required to repay that sum. In her witness statement, she referred to this sum as $150,000.00. She agreed that having received threats to her life and those of her family, she decided to pay the sum of $150,000.00.

10. On July 2, 2024, she visited the Appellant's home and produced two Royal Bank of Canada cheques totalling the sum of $150,000.00. The Appellant and Bruce began threatening her to sign an agreement for the sum of $1,500,000.00 or she would not be allowed to leave. She signed the agreement in fear for her life and made three monthly instalments of $10,000.00. Thereafter, she ceased paying.

11. On November 1, 2014, as a result of threats made to her and her family the Respondent visited the Marabella Police Station and made a report. On November 4, 2014, her attorney sent a written request to the Appellant requesting documents pertaining to the debt owed. In reply, on November 20, 2014, the Appellant's attorney responded by denying the request and stating that the Respondent had waived her

rights to any documents when she signed the promissory note on July 2, 2014. The Appellant later filed a claim and upon the Respondent filing an appearance, threats were made to her via text messages sent to her cellular phone threatening her life and those of her family if the repayment of money was not made. An attempt was made to burn down her home and an envelope with some ten small brass cylindrical objects resembling ammunitions were found on her premises.

The Trial Judge's Decision

12. The trial judge found the Appellant to be entirely unreliable and lacking in creditworthiness due to several discrepancies and inconsistencies in his evidence. He departed from his pleaded case in several material particulars including with respect to the correct sum owed and that the 2007 loan was not one loan but rather three loans. Also, there were inconsistencies with respect to the interest due. He also acknowledged that the 2007 promissory note was varied to permit the Respondent to make contributions to the loan by issuing him phones and paying his phone bills, that he had waived over $3,000,00.00 of debt and that she owed $5,720,000.00, though he did not plead these. Additionally, not pleaded was his evidence that the Respondent promised to liquidate the debt through the sale of land which she owned. Though relying on the document dated July 2, 2015, he admitted that it did not contain all the terms which the parties agreed upon. Furthermore, the trial judge found that the Appellant breached the **Moneylenders Act**. She also found that the Appellant's admission of dishonest bookkeeping strengthened her findings that he was untruthful and unreliable. The trial judge held that the Appellant had failed to prove his case on a balance of probabilities and made the following order:

> *(1) that the appellant's claim is dismissed.*
> *(2) the appellant to pay the respondent prescribed costs on the sum of $1,470,000.00*

On the Counterclaim:

(1) a Declaration that the loan made by the appellant to the respondent is unenforceable by reason of breach of the Money Lender's Act.

(2) The respondent did not satisfy the court on a balance of probability that she offset the loan by giving to the appellant over $100,000.00 worth of jewellery.

(3) That an overpayment of $395,794.96 is made to the appellant.

(4) The respondent to pay to the appellant costs in the sum of $14,000.00.

The Appellant's Submissions

13. Counsel for the Appellant, Mr. Ramnanan submitted that the trial judge's decision was plainly wrong and the sole issue that fell for determination was whether the agreement of July 2, 2014, was executed under circumstances of duress. He contended that it was not. He submitted that the 2014 agreement was an account stated between the parties which created a new debt and referred to **Bishund Chand v Seth Girdhari Lal & Anor**[1] in support that the 2014 agreement created a new cause of action. He added that all matters concerning the original 2007 promissory note were subsumed, merged and extinguished into the 2014 agreement and it was impermissible for the court to enquire into it. It was further impermissible for the Respondent to have raised any issues of duress as the 2014 agreement constituted an acknowledgement and /or admission by the Respondent of sums due under the original loan.

14. Counsel further submitted that the trial judge erred by making findings of fact on the issue of duress since those findings were not based on the evidence and the judge failed to take into account relevant issues to a finding of duress.

[1] [1934] UKPC 28.

The Respondent's Submissions

15. Counsel for the Respondent, Mr. Saunders contended that the Appellant's counsel wrongly misidentified the real issues for this court's consideration. He argued that the judge properly evaluated all the evidence placed before her and concluded that the Appellant had failed to prove his case. He submitted that the trial judge's decision could not be shown to be plainly wrong, see **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd**[2] and **Bahamasair Ltd v Messier Dowty Inc**[3]**.**

Law, Analysis and Conclusion

16. It is trite that to be successful in this appeal the appellant must establish that the trial judge was plainly wrong in that her decision was one in which no reasonable judge could have reached, or her decision cannot reasonably be explained or justified. In **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd,** Lord Hodge commented on the role of an appeal court at paragraph 12 as follows:

> *"[12]…It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". … it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: Choo Kok Beng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168–169."*

[2] [2014] UKPC 21.
[3] [2018] UKPC 25.

17. In **Bahamasair Ltd v Messier Dowty Inc**, the Lord Kerr in delivering the judgment of the Board summarised at paragraph 36, the basic principles upon which the appellate court may act. These are as follows:

> *"[36]. The basic principles on which the Board will act in this area can be summarised thus:*
>
> *1. "… [A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere …" - Central Bank of Ecuador v Conticorp SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5.*
>
> *2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - Anderson v City of Bessemer, cited by Lord Reed in para 3 of McGraddie.*
>
> *3. The principles of restraint "do not mean that the appellate court is never justified, indeed required, to intervene." The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities." Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of Central Bank of Ecuador".*

18. The central issue in this case centred around the credibility of the Appellant and whether the trial judge erred in arriving at the conclusions at which she did. We are unable to find any mistake in the trial judge's evaluation of the evidence that was sufficiently material to undermine her conclusions. The trial judge's findings were not

shown to have beeen plainly wrong and therefore this court is reluctant to interfere. Our reasons are outlined below.

The **Moneylenders Act**

19. The **Moneylenders Act** govern the operations of licenced moneylenders and stipulates mandatory steps that must be taken by the moneylender in order for an agreement to be enforceable against the borrower. In this case, it was for the Appellant to establish on a balance of probabilities that there was a valid agreement between himself and the Respondent and a memorandum on a specific date. That memorandum must be in writing, signed by the borrower before the issuance of the loan and a copy must be delivered to the borrower within 7 days. That memorandum must also contain all the terms of the contract as set out in the **Moneylenders Act under section 11** which provides that:

> ***"11. (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender licensed under this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent in respect of any such contract is enforceable, unless a note or memorandum in writing of the contract is made and signed personally by the borrower, and unless a copy of the note or memorandum is delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security is enforceable if it is proved that the note or memorandum was not signed by the borrower before the money was lent or before the security was given, as the case may be.***
>
> ***(2) The note or memorandum shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent per annum, or the rate per cent per annum, represented by the interest charged as calculated in accordance with the Schedule*****."* [emphasis added]**

20. In the instant matter, there is no dispute that an agreement was entered into on September 14, 2007. However, there is a dispute as to the sum loaned to the Respondent. The Respondent contends that she signed a promissory note for the sum of $200,000.00 which she received by cheque on behalf of Mc Neish Lum Young, but never received a copy of this promissory note. It is the Appellant's case that $2,000,000.00 was loaned with an interest at a rate of 2% per month payable by December 14, 2007. The interest accruing from the date of the loan until prepayment was 2% per month.

21. The Appellant submitted that he was a licenced moneylender under the **Moneylenders Act**. There was no evidence that Mc Neish was a licenced moneylender. The Appellant, however, in his witness statement stated that Mc Neish was a business associate of his and worked for him. He therefore was an agent of his. The funds which were loaned during the Appellant's business were taken from a joint account in the names of Mc Neish and the Appellant and the Appellant was the primary holder. The September 2007 promissory note relied upon by the Appellant did not contain his signature, but that of Mc Neish as a witness. It stated that the loan ought to be paid to the Appellant.

22. The **Moneylenders Act** further stipulates that moneylenders must issue receipts to the borrowers and keep a book with a record of these transactions. **Section 18** states:

> *"18. (1) Every moneylender licensed under this Act shall give a receipt for every payment made to him on account of a loan or of interest thereon. Every such receipt shall be given immediately the payment is made.*
>
> *(2) Every moneylender licensed under this Act shall keep a book in which he shall enter in connection with every loan made by him—*
>
> *(a) the date on which the loan was made;*
>
> *(b) the amount of the principal;*
>
> *(c) the rate of interest;*

(d) all sums received in respect of the loan, with the respective dates of payment.

(3) The entries in the said book shall be made forthwith on the making of the loan or the receipt of sums paid in respect of the loan, as the case may be.

(4) Any moneylender licensed under this Act who fails or neglects to keep the book required by this section, or to make the necessary entries in such book, or to produce such book when required to do so by any Court, or to give a receipt required by this section, is for each offence liable to a fine of one thousand dollars"

23. In this case, the Appellant was in breach of the **Moneylenders Act** as he did not have a book containing entries of the transactions conducted with the Respondent. He gave evidence that the book was lost, but there was nothing which suggested that he took any steps to reconstitute it. He later acknowledged that he was guilty of not keeping proper records, though he was required to do so under the **Moneylenders Act**.[4] He then indicated that while records are supposed to be kept in a book, he did not keep a record because of the large amount of cash or maybe for the tax purposes. He described every businessman as having two books, one to show the government and one to keep for themselves. In describing why he did not record an earlier large sum loaned to the Respondent, he said "*Maybe that is why, maybe that is why I didn't record that big transaction."* Thereafter, with respect to the 2007 debt, he indicated, "*The only…the record I had was in the promissory note for the $2million. I thought that was sufficient."*[5]

Inconsistencies in the Appellant's case

24. The trial judge has a duty to test evidence against the pleaded case as a fact finding device. This exercise must generally be approached by a consideration of the inherent

[4] Transcript of trial dated November 17, 2016 at page 15 line 13 - 31
[5] Transcript of trial dated November 17, 2016 at page 15 lines 32-33.

probabilities of the different versions along with all the evidence in the case. In the case of **Alice Mohammed v Jeffrey Bacchus**[6], the court considered that the fact that the claimant's pleaded case was significantly different to what was admitted in cross-examination assisted the court in finding that the claimant was an unreliable witness and her version of events was not accepted. Although **Alice Mohammed** was in relation to a running down action, the dicta of Sharma, J.A bears application to this case. Sharma JA stated as follows at pages 4 -5:

> ***"… I should just like to add a few words of my own to say that in matters of the kind, the fact finding exercise is generally approached by the judge, by looking at the inherent probabilities of the various versions in order to assist him, together with all the viva voce evidence, in the case. But there is one compelling factor which is of tremendous help in the fact-finding exercise, and it is most acutely demonstrated in cases which are commonly called 'running down actions' - that is, facts pleaded are quite different from the evidence adduced….***
>
> ***The trial judge in my view, was entitled in these circumstances not to rely on the appellant as a witness of truth. He was also entitled to conclude, if the evidence was truthful, why did they not find their way in the pleadings. In my view this was a perfectly valid approach by the trial judge to assist him together with other matters to determine the matter on a balance of probabilities.***
>
> ***In point of fact, I find it a valuable approach, which other judges may adopt when assessing questions of fact, particularly in running down action"*** [emphasis added]

25. The Appellant's pleadings in his statement of case were materially inconsistent with either the particulars in his witness statement, amended defence to counterclaim or his evidence on oath at trial. There were marked discrepancies with respect to how

[6] C.A.CIV.106/2001.

the money was loaned, the amount owed, the amount paid on the loan and the interest payable. These are set out below.

i. 2007 Loan

26. In the Appellant's statement of case, he did not plead that the loan was consolidated with earlier loans given to the Respondent. Also, he did not plead that he did not pay the Respondent all of the loan on the date on which the promissory note was signed or that he loaned monies to the Respondent on a date subsequent to the signing of the note. In his witness statement as well as at trial, he stated that the September 2007 loan was a consolidation of earlier loans made to the Rrespondent and of additional sums required by her. He indicated that the loan payments were made in the form of cheque and cash.

ii. Sum owed

27. In the Appellant's claim form he stated that he loaned the Appellant $2,000,000.00 in September 2007 and there was no acknowledgement that she paid any money on the loan. He said that they revisited the loan on July 2, 2014 whereby they agreed and fixed the sum owing as $1,500,000.00 He said after this, payments were made and the sum was reduced to $1,470,000.00

28. In the Appellant's statement of case, at paragraphs 4 and 5 he said that on July 2, 2014, the Respondent visited him to settle the debt and after discussions they arrived at an agreed debt of $1,650,000.00. This is inconsistent with the agreed and fixed sum owed mentioned in his claim form. At paragraph 6 of his statement of case, the Appellant stated that on said date, the Respondent paid $150,000.00 and the parties signed a memorandum agreeing that the remaining sum of $1,500,000.00 to be paid by November 3, 2014. At paragraph 7 he stated thereafter the Respondent made three equal monthly instalments of $10,000.00 thereby reducing the debt to $1,470,000.00.

29. In his amended defence to the counterclaim, he said that the Respondent actually visited him on June 12, 2014 to settle the debt and not July 2, 2014. At the meeting, the accounts were settled and the Respondent agreed to make payments. She returned on July 2, 2014, and made some payments in cheque form amounting to $150,000.00. She thereafter made three monthly payments of $10,000.00

30. At trial on he indicated that by June 2014 she owed him $2,000,000.00 in principal and $3,720,000.00 in interest for the 7 years, a total of $5,720,000.00 based on the terms of the 2007 promissory note.

iii. Sums paid on debt

31. The Appellant never pleaded that the Respondent had paid him $125,794.96 in phones and phone bills to offset part of the 2007 debt. In his amended defence to counterclaim he stated that he did not accept responsibility for all the bills exhibited by the Respondent. However, at trial during cross-examination he accepted that she paid $125,794.96 for phones and bills.

iv. Forgiveness of part of the loan

32. In the Appellant's claim form and statement of case he did not mention that he forgave the Respondent some $3,000,000.00 in relation to her debt. However, in his amended defence to counterclaim, he indicated that he exercised leniency but did not state the sum. It was only at trial that he indicated that he waived some $3,000,000.00 in debt.

v. Variation of promissory note

33. The Appellant did not plead that there was a variation of the promissory note to allow the Respondent to repay the debt by giving him phones and paying phone bills. This was only mentioned in his defence to the counterclaim, witness statement and at trial.

34. The Appellant also did not plead that the Respondent told him that she had 100 acres of land to sell and when she sold the land that she would pay him what was due. This was only revealed during the trial.

vi. 2014 Agreement did not contain all terms agreed upon

35. For the first time, the Appellant during cross-examination indicated that the July 2014 agreement did not contain all the terms upon which the parties agreed on, namely that the interest which was excluded by mistake. This omission was never contained in his pleading or witness statement.

36. We agree with the learned trial judge that the Appellant failed to prove his case on a balance of probabilities. He did not establish that there was an agreement between the parties for a loan of $2,000,000.00 He has presented a shifting case, plagued with several inconsistencies between what was pleaded and his witness statement and his evidence on oath during cross-examination. These inconsistencies were not on minor issues but went to the core of his case and affected his credibility. His credibility was further undermined when he as a licenced moneylender, although aware of his obligations to keep a book containing a record of all loans, admitted to failing to comply with his obligations under the **Moneylenders Act**. He held the unacceptable view that promissory notes were sufficient. He also admitted to dishonest bookkeeping practices, that is he may not have entered large transactions to avoid taxes.

37. We are of the view, that having regard to the above, the trial judge was not plainly wrong in finding that the Appellant was untruthful and lacked credibility and that he did not therefore prove his case on a balance of probabilities. In the circumstances, we find no merit in this appeal.

DISPOSITION

38. The appeal is dismissed. The Appellant is to pay to the Respondent two-thirds of the costs in the court below.

_____

A. Yorke- Soo Hon, J.A.