23-02-01 fhl

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 3 of 2000
(Grand Court Cause No. 472 of 1998)

BETWEEN:

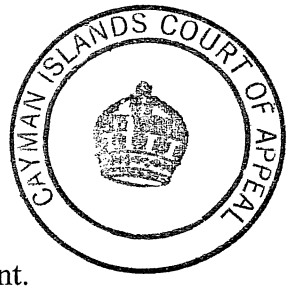
A. DWIGHT PANTON
(In his capacity as personal representative of Robert Selkirk Watler, deceased)

Appellant/Defendant

- and -

ARNO E. HELLNER

Respondent/Plaintiff



BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Hon. Mr. Justice G. Collett, Justice of Appeal
The Hon. Mr. Justice M. Taylor, Justice of Appeal

Pierre Lamontagne Q.C. instructed by O. L. Panton & Co. for the Appellant.
Ramon Alberga Q.C. and Roger Nelson instructed by Nelson & Co. for the Respondent.

February 16th 2001 Delivered February 23rd 2001

JUDGMENT

This is an appeal by the Appellant/Defendant from the judgment of Graham J. in the Grand Court for payment by him in his representative capacity of $413,271.56 Canadian dollars, post-judgment interest and costs to the Respondent/Plaintiff. This amount represented repayment of a loan made by the Respondent to the deceased Robert Selkirk Watler in his lifetime of Canadian $100,000.00 together with accumulated compound interest at 14% per annum with yearly rests.

The Appellant acknowledges that the loan had indeed been made, that no repayment of capital or interest had been made since the deceased died in August, 1989 and that the rate of interest agreed was 14% per annum; but he alleged that there had been no agreement for payment of compound interest at that or any other rate. Accordingly he acknowledged indebtedness of the Estate to the Plaintiff of no more than the principal amount of the loan, Canadian $100,000.00 plus accumulated simple interest at 14% per annum for some 11 years elapsed since the death of the deceased. The difference in dispute at the date of the trial was approximately Canadian $159,000.00.

At the trial only two witnesses gave oral evidence, the Plaintiff himself and an accountant and former administrator of the Deceased's estate, Jeffrey Parker. He gave evidence on the Plaintiff's behalf: no evidence was called on behalf of the Defendant. The learned Judge at the conclusion of the trial delivered an ex tempore Judgment in which he accepted the evidence of the Plaintiff and found him to be a reliable witness. There is no basis for disturbing this finding of primary fact on his part.

Accordingly, the essential point in issue in this appeal is whether or not there was at the trial evidence before the learned Judge upon which he could properly find, as he did, that the terms of the loan agreed between the Plaintiff and the deceased included payment of interest at 14% per annum compounded annually. The Appellant's counsel contends that there was not.

Mr. Hellner's evidence shows that, amongst other occupations, he has been engaged in the business of money-lending on a substantial scale in recent years. Between 1982, when he first met Mr. Watler in Cayman, and 1989 he made a series of loans to the latter to assist him in his real estate business here. The rate of interest varied from 16% down to 14% eventually but the practice adopted was always the same. The deceased wrote out a post-dated cheque for repayment of the capital advanced and gave the Plaintiff further quarterly cheques for the interest due as it accumulated plus a small amount for lender's expenses. If any quarterly payment of interest was late, the deceased tore up the original cheque and wrote out another including an element of compound interest for late payment.

It was Mr. Hellner's evidence that he invariably lent money on compound interest. In cross-examination he indicated that in order to finance his money-lending he was himself borrowing from a bank in Liechtenstein. Since these loans were at compound interest, he could not have loaned money on to others at simple interest, he testified. This appears obvious, if his business was to avoid risk of loss by reason of non-payment.

In 1987 when both the Plaintiff and the deceased were in Canada, the latter sought to obtain a further loan for Canadian $100,000.00 for a year or more from the former. This was the loan in question in these proceedings and the agreed rate of interest was 14% per annum. According to Mr. Hellner's uncontradicted evidence the method of repayment was always the same. In this instance the deceased gave a post-dated cheque for the capital amount, which in fact was 'rolled over' twice, in 1988 and 1989. He also gave

quarterly cheques for Canadian $3,650.00 each, representing $3,500.00 as one quarter's interest at 14% plus $50.00 per month extra for expenses.

If payments were delayed for any reason a further $100.00 per week in respect of the delay was paid by the deceased. There is documentary evidence to show that $300.00 extra was paid on this account in early 1987. All the cheques were honoured on presentation until the deceased's death in August, 1989. Thereafter Mr. Hellner did not press the deceased's Estate for immediate repayment on account of a lack of liquidity in the Estate accounts. He met with the deceased's widow who was formerly the Administratrix and with Mr. Parker who was at that time advising her. Their evidence was that she accepted that the Estate would have to pay "interest upon interest" while the debt remained outstanding. She was not called by the Defendant as a witness to contradict that testimony, a point which was noted by the learned Judge in his judgment.

The strongest point advanced by counsel for the Appellant on the basis of this evidence was that the amount of $100.00 per week, which appears in practice to have been paid whenever the deceased was late with his quarterly payments of interest, bears no mathematical relationship to the rate of 14% compounded annually, which extrapolated would support an additional payment of only $10.00 approximately in case of a single week's delay. Counsel's argument is that this is quite inconsistent and that the inconsistency in the practice adopted on the occasion of the few late payments shows that 14% compounded annually was not an express term of the 1987 agreement.

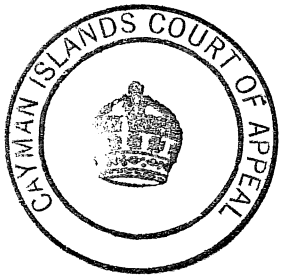
The Respondent's counsel replies that properly considered there is no inconsistency and that the practice of paying $100.00 extra when occasion arose was a convenient one, as between long time business associates and friends, in lieu of the exact amount of interest strictly due under the agreed terms of the loan.

I observe that, in the course of all the numerous loans contracted between the Plaintiff and the deceased, no instance occurred of default or serious delay in making payments as they fell due, until the death of the deceased supervened. No instance, therefore, arose in his lifetime to apply the provision for payment of compound interest at the agreed rate except in the instances during 1987 already mentioned. The fact that on those occasions a differently calculated payment of extra interest was made and received is not, in my judgement a sufficient reason to conclude that no provision at all was made in the contract for payment of compound interest on any basis, a conclusion which would ignore the entire course of former dealing between the parties and indeed go against commercial good sense as well.

Furthermore, if the terms of the agreement for the loan had stipulated for the payment of $100.00 each week during which any quarterly payment of interest should be in arrears, and such a default continued for a period of eleven years, with a total absence of any payment, the amount of the arrears would reach a sum considerately in excess of the amount actually claimed for accumulated interest in the statement of claim or awarded in the Judgment now under appeal.

Upon the basis of the evidence given and received at the trial, therefore, there is every reason to conclude, as did the learned Judge, that on a balance of probabilities the agreed terms of the Canadian loan of 1987 included a stipulation for payment of compound interest at the rate of 14% compounded annually and to reject any different hypothesis.

That being so, I would dismiss this appeal with costs.



Collett, J.A.

Zacca, P.

I agree.

Taylor, J.A.

I agree.