IN THE HIGH COURT OF SIERRA LEONE

COMMERCIAL AND ADMIRALTY DIVISION

FAST TRACK COMMERCIAL COURT

Case No: MISC.APP 023/15

THE MATTER BETWEEN:

SIERRA LEONE COMMERCIAL BANK LTD -PLAINTIFF

AND

SAHID KOROMA

T/A MARIKA ENTERPRISE -DEFENDANT

LAMBERT & PARTNERS -COUNSEL FOR THE PLAINTIFF

JENKINS-JOHNSTON & CO -COUNSEL FOR THE DEFENDANT

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA JA

JUDGEMENT DELIVERED ON THE 8TH JULY, 2016

The Plaintiff applied to this Court by Originating Summons dated 13th November, 2015 for the following Orders:-

1. That the Defendant do immediately pay all monies due to the Plaintiff under the respective covenants in a Deed of Mortgage dated the 24th day of May, 2003 and duly registered as No. 41 at page 70 in Volume 75, a Deed of Further Mortgage dated the 28th day of December, 2004 and duly registered as No. 3/2004 at Page 78 in Volume 76 and Further Mortgage dated the 7th day of November, 2008 and duly registered as No. 184/2008 at Page 41 in Volume 80 all in the Record Books of Mortgages kept in at the Registrar-General's Office in Freetown for the repayment of the principal sum totaling Le5,528,814,785/22 (Five billion five hundred and twenty-right million eight hundred and fourteen thousand seven hundred and eighty-five Leones twenty-two cents) as at 5th November,2015 and payment in the meantime of interest at the rate of 25% per annum.
2. Or in the alternative an Order that the said Mortgage may be enforced by sale.
3. Further to Order 2 above delivery of possession of the mortgaged property situate at 18 Garrison Street, Freetown by the Defendant to the Plaintiff.
4. Any further or other relief that may be necessary in this action.
5. That cost of this Application be provided for.

1. The Application was supported by the affidavit of Alpha Amadu Bah sworn to on the 13th day of November, 2015 together with the Exhibits attached thereto. The relevant portions of the said affidavit were as follows:

a) That by a Deed of Mortgage dated the 24th day of May, 2004, the Defendant Mortgaged his property at 18 Garrison Street, Freetown to the Plaintiff for a consideration of the grant of overdraft facilities in the sum of Le1,700,000.00 – Exhibit AAB1

b) That by a further Mortgage made the 28th December, 2004 the Plaintiff at the request of the Defendant increased the facility by a further sum of Le300,000,000.00 making a total of Le2,000,000,000.00.

c) That by a further Mortgage made on the 7th November, 2008, the Plaintiff at the request of the Defendant increased the Borrower's banking and overdraft facility by a further sum of Le500,0000,000.00 making a total of Le2,500,000,00. All of these facilities, were securitized by the Defendant's property lying, situate and being at 18 Garrison Street, Freetown

d) That the Mortgage Deeds contained the following provisions which are material to the present proceedings to wit:

   i. That the Defendant will pay on demand or without demand the principal sum and interest thereon

   ii. That the Defendant conveyed the said property at 1 Garrison Street, Freetown to the Plaintiff to hold the

same in fee simple subject to a provision for redemption on the payment of all due debts.

iii. That the demand for payment may be made by the Plaintiff or any person authorized by the Plaintiff.

iv. That the power of sale is conferred on the Plaintiff as if section 20 of the Conveyancy and Law of Property Act, 1881 has been omitted from and the said power is only exercisable after due demand has been made.

v. That the interest rates on the said overdraft are fixed as the bank may determine from time to time.

2. The deponent deposed that the Defendant defaulted in his repayment of his overdraft. Acting on the instructions of the Plaintiffs, their solicitors demanded repayment of the sum owed to the Plaintiff by letters dated the 23rd June, 2009, and 24th June, 2009 respectively – **Exhibits "AAB 4 and AAB 5".** Even after Exhibits "AAB4" and AAB5" respectively, the Defendant did not still liquidated his indebtedness which as at November 5th, 2015 stood at Le 5, 528,814,785.22.

3. The Plaintiff by a Notice of Motion to the Defendant dated 25th September, 2015 formally demanded payment of the Mortgage Debt and gave notice of intention to sell mortgaged property in default of payment. No repayment was made but the Defendant remained in possession of the Mortgaged property as Mortgagor and was in default of the principal sum and interest.

On the 25th November, 2015, the Firm of J. B. Jenkins-Johnston & Co entered appearance to the Writ of Summons on behalf of the Defendant herein. No affidavit in opposition was filed and after the breakdown of negotiations, Counsel for the Plaintiff moved his application on the 24th May, 2016. This followed applications for adjournment by Counsel for the Defendant to either respond to the said Originating Summons or make repayments. These were not done as a result thereof; the file was withdrawn for Judgement.

THE PARTIES

There is no doubt that the relationship between the Plaintiff and the Defendant is one of Banker and Customer. The word "Customer" is not defined in the Bill of Exchange Act, 1882. At one time it was thought that a person became a customer only when banking services were habitually performed for him by the Bank. The mere opening of an account by the bank in the customer's name was considered inadequate for this purpose. This view was questioned in LACAVE & CO –v- CREDIT LYONNAIS (1897)1 Q B 148 at 154 and discarded in LADBROKE & CO –v- TODD (1914) 30 TLR 433. In the latter case, a rogue who stole a cheque opened with the Defendant bank an account under the name of the ostensible payee of the instrument. The cheque was cleared and the rogue withdrew the funds. As a defence to the drawers action for conversion of the instrument the bank relied on Section 82 of the Bills of Exchange Act, 1882. It was objected that Section 82 was inapplicable, as the mere opening of the account did not constitute the rogue a customer. BAILHACHE J. held that

the rogue had become a customer when the bank agreed to open the account. It is thus clear that a person becomes a customer of a bank when he opens an account with it.

In the instant case, the Defendant became a customer of the bank when he opened an account with the Plaintiff. The fact that a bank agrees to open an account in a person's name signifies that the bank consents to entering into regular business relationship with him for example granting him loans, overdraft facilities etc. this is so even when the account is overdrawn. It was in pursuant of this bank-customer relationship that the Plaintiff extended overdraft facilities to the Defendant.

THE OVERDRAFT

The Plaintiff granted overdraft facilities to the Defendant to the tune of Le 2, 5000,000.00. The said facilities were granted between May, 2004 and November, 2008.

What is an overdraft facility? In an overdraft facility, the bank authorizes the customer to draw cheques on his account, or make withdrawals or payments from the account by other authorized means up to a ceiling which may not be exceeded at any one time. As the amounts are paid to the credit of the account, the available credit increases. As cheques are drawn by the customer and paid by the Bank, or funds are transferred out of the account by other authorized means, the balance decreases. As a matter of practice, the bank informs the customer at the time of granting the overdraft if not only the ceiling but also the period for which the

overdraft is available. To protect its interest, the bank usually adds a specific proviso to the effect that the overdraft is repayable at call.

SECURITY

The overdraft facility was securitized by a Mortgage over the Defendant's property at 18 Garrison Street, Freetown. I have already referred to the terms of the Mortgage Deeds. It is important to note that by the said mortgage Deeds, the Defendant conveyed the property to the Plaintiff in fee simple subject to the provision for redemption on the payment of all sums due.

THE PRINCIPAL SUM

The Defendant has not denied that the principal sum of Le 2, 5000, 000.000.00 is due and owing.

INTEREST

The principal governing the charging interest on overdraft is that when the accrued interest is debited to the customer's account, it is capitalized. It becomes part of the outstanding balance for future calculations. The bank thus earns compound interest on the account overdrawn although this aspect is eliminated if the customer forthwith pays to the credit of his account an amount equal to the interest charged.

There have been attempts to question the bank's right to add the half yearly (or yearly) interest to the outstanding balance, and to charge interest for the next six months (or one year) on a balance comprising the

capitalized interest. The validity of the practice was recognized by the Judicial Committee of the Privy Council in EX PARTE BEVAN (1803) 9 VES 22 and affirmed by the House of Lords in YOURELL –v- HIBERNIAN BANK Ltd(1918) AC 372. It was there held that this method of charging was legitimate as between banker and customer despite the compound interest involved. Their Lordships regarded the debt accrued on the basis of the interest charge as accrued on the day it was debited. Until recently, the accepted view was that the bank's right to charge compound interest applied only in the context of a current account. Support for this conclusion was largely based on DEUTCHE BANK UND DISCONTO GESELLCHAFT –v- BANQUE DES MARCHANDS DE MOSCOU. This view was rejected by the House of Lords in NATIONAL BANK OF GREECE S-A –v- PINIOS SHIPPING CO. (NO1) (1990) 1 AC 637. Relying on PATON –v- TRC (1938) AC 341 and declining to adopt the reasoning in the DEUTCHE BANK CASE, Lord Goff of Chiverly held that the usage prevailed generally as "*between bankers and customers who borrow from them and do not pay interest as it accrues*". His Lordship said "*if it is equitable that a banker should be entitled to capitalize interest at, for example, yearly or half-year rates because his customer has failed to pay interest on the due date, there appears to be no basis in justice or logic for terminating that right simply because the bank has demanded payment of the sum outstanding in the customer's account.*"

From the authorities cited, I hold that the bank was entitled to charge compound interest on the overdraft.

In the instant, the payment of interest was agreed by the parties though it is often said that award of interest is discretionary, here the parties are contractually bound by an agreed interest rate. I shall therefore hold that that Court cannot interfere with a freely negotiated and agreed term of contract, in the absence of a vitiating factor. The principal Mortgage Deed provides that "*The mortgagor will in the meantime pay to the Bank so long as any money shall be owing on the security hereof interest at current Banker's rate or such rate as the Bank may determine is the appropriate prevailing rate of interest to be calculated on the balance owing from day to day.*" It is provided in the said Mortgage Deed that if any such interest or interest's payable on arrears of interest capitalized under this present clause shall remain unpaid after the day on which the same ought to have been paid, the same shall be added for all purposes on the general balance of accounts here secured and shall henceforth bear interest payable at the rate and in the days aforesaid and all the terms and provisions of this mortgage and rules of law or equity in relation to interest on the balance or other accounts shall apply equally to interest on such arrears.

I have perused the affidavit in support and note that the Plaintiff did not exhibit the statement of accounts to ascertain the interest rate charged. In the Notice requiring payment of mortgage money and Intention to sell mortgaged property in default of payment, the Plaintiff demanded the sum of Le 5,521,814,785/00 as principal and interest as at 25th September, 2015. In the Originating Summons, the Plaintiff is claiming the sum of Le 5, 528,814, 785/22 as at 5th November, 2015 and interest at the rate of 25

percent per annum. There is confusion here but after perusing the relevant documents herein, I hold the view that the sum of Le 5,528,814,785/22 consist of both the principal sum and interest thereon. I however believe that the bank has a responsibility to clearly state the rate of interest agreed on.

As I stated earlier, the Plaintiff has proved its claim to principal sum and interest thereon. I am however constrained to grant a further interest of 25 percent on the accrued interest as claimed in the Originating Summons as it would be unconscionable. As interest should not be punitive, I will award interest on the said accrued interest at the rate of 5 percent per annum from the 5th November, 2015 to date of Judgement.

Having held that the Plaintiff has proved the liability of the Defendant for both the principal owing and interest thereon, I will however not order an immediate sale of the mortgaged property. The Defendant shall be given the opportunity to redeem the mortgage through the exercise of their equity of redemption. This is because their legal right to redeem had been lost by failing to repay the loan on the due date. If the Defendant fails to exercise his equity of redemption, then the Plaintiff will be entitled to foreclose. This will make the Plaintiff the owner in law and equity of the mortgaged property.

DECISION

In the circumstances therefore, after due consideration of the affidavit evidence and submission of Counsel, Judgement is entered on behalf of the Plaintiff herein on the following terms:

1. The Defendant is liable to the Plaintiff for the repayment of the sum of Le 5,528,814,785/22
2. Interest on the said sum of Le 5,528,814,785/22 at 5 percent per annum from the 5th November, 2015 to date of Judgement.
3. That the said sum of Le 5,528,814,785/22 be paid in six (6) monthly instalments commencing on the 1st August, 2016.
4. In the event of default of one (1) instalment, the entire sum of Le 5,528,814,785/22 with interest thereon as at 3 above shall immediately become due and owing.
5. In the event of default as stipulated in paragraphs 2-4 supra the Defendant yields up possession of the mortgaged property to the Plaintiff and the Mortgaged Deeds dated 24th May, 2004, 28th December, 2004 and 7th day of November, 2008 respectively be foreclosed for sale. Should the proceeds thereof be insufficient to liquidate the sum due and owing the Plaintiff herein, that the Defendant personally pay the outstanding sum due.
6. Costs to be taxed if not agreed.

Hon. Mr. Justice Sengu M. Koroma JA