IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G 119 of 2016

BETWEEN

FINANCIAL INTEGRATED SERVICES LTD

Plaintiff

AND

LOVINE WILSON-BARRETT

Defendant

IN OPEN COURT

Appearances:	**Mr. H. Delroy Murray of Murray & Westerborg, Attorneys for the Plaintiff** **Mrs Lovine Wilson-Barrett, in person**
Before:	**Hon. Mrs. Justice Margaret Ramsay-Hale**
Heard:	**6 May 2021 and 23 June 2021**
Judgment Delivered:	**26 April 2022**

HEADNOTE

Action for debt due - Plea of non *est factum* - Mistake - Burden of proof - Proof that reasonable care exercised - Failure to exercise reasonable care not giving rise to estoppel - whether fundamental difference in nature of document

JUDGMENT

Introduction

1. The Plaintiff, Financial Integrated Services Ltd. ("FIS"), is a company engaged in the business of making personal loans to members of the community who are unable to qualify for loans from other financial lending agencies in the Cayman Islands. At the relevant time, it operated out of premises commonly known as 196 Shedden Road in George Town, Grand Cayman of which it was the lessor.

2. The Defendant, Mrs. Lovine Wilson-Barrett ("Mrs. Barrett"), also known as Charmaine, is a small business owner who operated a hairdressing salon known as Charmaine's Beauty and Barber Hair Studio from commercial space at 196 Shedden Road which she sub-let from FIS.

3. Pursuant to a tenancy agreement made with FIS in 2010, Mrs. Barrett, agreed to pay the sum of $1,500 per month as and for rent. It is agreed that Mrs. Barrett was in persistent arrears of rent and utility payments over the relevant period.

4. A decision was taken by FIS in 2012 to evict Mrs. Barrett because of the arrears. In response to Mrs. Barrett-Wilson's entreaties, however, FIS wrote off a portion of the sums owed and converted the remainder of the arrears of rent and unpaid utilities, into a loan.

5. The agreement made between FIS and Mrs. Barrett was reduced to writing on or about 1 March 2012 and documented using FIS's standard ***Promissory Note and Loan Agreement***. The agreement provided that the sum of $7,503.18, which was the sum outstanding for arrears of rent and unpaid utilities, would be repaid over a period of 60 months at the rate of $500 per month, with interest of 10 per cent per annum (the "First Agreement"). The agreement was signed by Mrs. Barrett.

6. Unsurprisingly, Mrs. Barrett failed to make the payments as required under the First Agreement. As she said in her evidence she could not pay her rent, much less make loan payments on top of that. Surprisingly, notwithstanding Ms. Barrett's failure to repay the loan, her continued failure to pay her rent and utility charges and the delivery of a second eviction notice, FIS agreed to enter into a Second Agreement with her in October 2014 (the "Second Agreement"). The loan made by FIS to Mrs. Barrett in the Second Agreement was in the sum of $22,500 with interest at the rate of 12.5% per annum, to be repaid at the rate of $500 per month for a period which was not to exceed 60 months. This agreement was also signed by Mrs. Barrett.

The Claim

7. No monies were paid under the agreement and, on 4 May 2016, FIS made a formal demand that Mrs. Barrett repay the outstanding principal plus interest within 14 days. The monies were not

paid and on 1 July 2016, FIS filed a Writ of Summons claiming the sum of $28,081.06 being the outstanding principal at 4 May 2016 with interest on that sum at the rate of 12.5 % per annum.

The Defence

8. Mrs. Barrett accepts that she was in arrears of rent and utilities for the commercial premises she had leased from FIS. It is her case, however, that she had not applied for a loan from FIS but had made an arrangement with FIS under which she would pay $125 per week towards the outstanding arrears. She contends that the First and Second Agreements were essentially payment plans for the monies owed under the lease and asserts that she did not know and had not understood that interest was reserved on the sums due and owing under either the First or the Second Agreement.

9. Although the pleaded averment in her Defence, that *"the reason for the said loan to fall into arrears was due to payments been (sic) made and [she] saw no reflection of the said principal being reduced",* amounts, on one view, to an admission that FIS had converted the sums due to them under the lease as a loan, it was clear in the her pre-trial exchanges with the Court that Mrs. Barrett's position was that she had not applied to FIS for a loan and was unaware that the payment plan she had made with FIS was in fact an agreement under which FIS loaned her the sum due to them to be repaid with interest. The Court, therefore, treated her defence to the claim as a plea of *non est factum* and the matter proceeded on that basis.

The Law

10. The general rule of law is that a party of full age and understanding is bound by his signature to a document whether he reads it or understands it or not.

11. A plea of *non est factum* - it is not my deed - is a defence which may be available to someone who has been misled into signing a document which is fundamentally different from what he or she intended to execute or sign. Where the defence is established, the person who has signed the document may be able to escape the effect of the signature by arguing that the agreement is void for mistake.

12. The modern boundaries of the doctrine of *non est factum* are found in the case of *Saunders v Anglia Building Society* [1970] UKHL 5, where the House of Lords restated the principles governing the availability of the defence. As summarised by the learned editors of **Halsbury's** Vol. 22 (2019) at 4-85, the case establishes the following propositions :

(i) the plea can only rarely be established by a person of full age and capacity; and, although it is not confined to blind or illiterate persons, any extension in the scope of the plea will be kept within narrow limits;

(ii) the burden of establishing the plea falls on the signatory seeking to disown the document; and he must show that, in signing the document, he acted with reasonable care;

(iii) Carelessness which would preclude him from pleading *non est factum* is based on the principle that no person can take advantage of his own wrong, and is not an instance of negligence operating by way of estoppel;

(iv) For the plea to succeed, it is essential to show that there is as regards the transaction a radical or fundamental distinction between what the person seeking to set up the plea actually signed and what he thought he was signing.

The Evidence

13. Ms. Karen Diaz, the Operations Manager for FIS exhibited the First and Second Promissory Note and Loan Agreements as well as the record of payments made by Mrs. Barrett over the relevant period.

14. In her *viva voce* testimony, she explained that a decision had been taken to evict Mrs. Barrett because of the arrears but, in response to Mrs. Barrett's entreaties, FIS entered into the First Agreement with Mrs. Barrett who signed the document in her presence and in the presence of Melissa Ebanks. She couldn't recall if Mrs. Barrett had asked any questions about the document or if she explained it to her, but she believed she had done so because, as she said, in her *viva voce* testimony,

*"I know because that is my moral obligation to discuss the terms of the agreement when they sign it. I would have pointed out whatever is in **bold.** I would have shown her those terms agreed upon."*

15. She later said under cross-examination that she had told Mrs. Barrett that she would be charged interest of 10%.

16. Though not present when the Second Agreement was made, Ms Diaz's evidence was that FIS's records reflect that, in October 2014, the loans were consolidated. At that time, Mrs. Barrett was behind on both the loan and rent payment and then General Manager, Mr. Andre Iton wrote off a portion of the debt due and rounded it down to $22,500.

17. Ms. Diaz said she spoke to Mrs. Barrett several times between 2015 and 2016 about the outstanding debt before the matter was referred to the lawyers and Mrs. Barrett's response had been, much like today's, that she did not have the money to pay the monies outstanding, that she had not known FIS had made her a loan but rather made an agreement with her to pay *"the back rent".*

18. Ms. Diaz explained to the Court that FIS had had to borrow the money to pay the rent Mrs. Barrett owed to FIS in order for FIS to pay the landlord to whom FIS was liable under their lease and had incurred interest on those borrowings which they sought to recover from Mrs. Barrett. No monies were paid out to Mrs. Barrett as would have been under a conventional loan; rather, the monies were paid to her indirectly by settling of her outstanding arrears.

19. Ms Diaz said that the proposal would have been explained to Mrs. Barrett and the documentation would not have been prepared unless Mrs. Barrett had agreed to the terms.

20. Mr. Iton, who made the 2014 agreement with Mrs. Barrett on behalf of FIS, stated that at all times in his discussions with Mrs. Barrett she was told that she was being given a loan by FIS in respect of her indebtedness to them.

21. In his *viva voce* testimony, he rehearsed the facts which are not in issue, that Mrs. Barrett operated a hairdressing salon on the premises and was consistently late on her rent. It was a pattern and the unpaid rent had accumulated over a protracted period.

22. In an effort to help her keep her small business going, FIS offered to put the arrears on a loan so she could pay them in a *"more timely manner"* and continue to pay her current rent. She did neither and it became necessary to make a second loan to her. In making the second loan, FIS waived a portion of the unpaid interest which had accrued on the 2012 loan. According to Mr. Iton:

> *"What we had was accumulated unpaid rent over a protracted period that we attempted to work with her by converting it to a lump sum loan which she could pay piecemeal while she continued to pay her rent for the ongoing business."*

23. Given the lapse of time, Mr. Iton was unable to remember exactly what was said, but it was his evidence that it was standard operating procedure to explain the terms of a loan to a borrower.

24. Cross-examined by Mrs. Barrett, he scoffed at the idea that the agreement they had made was for her to pay the arrears of rent without interest, noting that the document she signed stated at the top *"Promissory Note and Loan Agreement"* and recalled that he had a discussion with her, before the 2014 loan was made, in which he said that FIS would waive the interest on the 2012 loan.

25. Mrs. Barrett, in putting her case to Mr. Iton, suggested that she was *"panicking"* at the time she signed the document, that she had signed without going through the details of the agreement, that she thought she was agreeing to pay the arrears of rent and not taking a loan and that she would not have signed the agreement had she understood that interest was payable.

26. Mr. Iton remarked that the whole issue of whether Mrs. Barrett had agreed to pay interest was just a *"diversion"* given that she had not paid any of the principal. In response to her suggestion that he had assured her that she was only paying the outstanding rent, he said that that if you owe money that you haven't paid, it is a debt and how you restructure the repayment of that debt is a matter to be agreed and that FIS had agreed with her to allow her to pay her debt at an agreed rate of interest instead of going to Court to seek judgment against her for the sum outstanding.

27. Asked by Mrs. Barrett if he had explained all of that to her, Mr Iton replied,

"You signed that you would pay $500 per month over 16 months."

28. He rejected the suggestion that because of his *"more professional standard"* - by which I take Mrs. Barrett to mean to mean his greater understanding of financial matters - *"he put [her] in a position where [she] had to sign the document."*

29. Ms Melisa Rankine was the last witness for FIS. It was her evidence that she had signed the Promissory Note and Loan Agreement made on 15 October 2014 on behalf of the Company in the presence of the Mrs. Barrett and that it was the usual practice to go through the terms of the agreement with the customer when the document is signed.

30. In her evidence, Mrs. Barrett said that during the period when she was renting the premises from FIS, she was under a lot of financial stress. Her then husband had a stroke and her mother fell ill with cancer and ultimately passed away. She was going through a lot of stress financially and *"paying the rent to Mr. Iton had become a real strain."* She said she would speak to him sometimes and explain her situation to him because he was someone she could talk to and that she told him that she was not making enough to pay the rent.

31. She said she had heard nothing from FIS about the arrears for about 6 years until she was served with the Writ, during which period she had been under extreme stress. Her daughter was diagnosed with leukemia and she too was unwell being both diabetic and hypertensive and taking medications for both which caused her to suffer certain side effects. I understood this to be her explanation for not addressing the monies owed to FIS before the matter was taken to Court.

32. She accepted that she owed arrears of rent but insisted that she did not owe any interest because she *"didn't take out any loan."* Consistent with her opening remarks and her cross-examination, Mrs. Barrett said at the time the agreements were made she was really stressed because FIS was going to evict her and that she had not realized that the debt she owed to FIS was being repackaged as a loan.

33. Under cross-examination, she maintained her position that Mr. Iton did not tell her that the arrears were being converted to a loan and that Ms Diaz did not explain the 2012 document to

her. She said that at the time she signed the agreement, she was in a situation where she was vulnerable and that she did not read the document because she had no reason to doubt Mr. Iton who had not told her that interest would be payable on the arrears.

34. She accepted that in 2014, when she received a further notice of eviction, she went to Mr. Iton who again offered to work with her on the outstanding rent. She denied the suggestion that Mr. Iton offered to waive any interest accrued on the first agreement, asserting that no interest had been payable. She said she signed that document too without reading it and that she did not know she was borrowing money and agreeing to pay interest on that sum.

35. Mr. Murray's final question in cross-examination, whether Mrs. Barrett could think of any other document of a legal nature which she had signed without reading it, prompted the following exchange:

Mrs. Barrett: "I cannot answer that question"
Mr. Murray: "You cannot answer that question?"
Mrs. Barrett: "I cannot understand what you are saying."
Mr. Murray: "Have you signed other legal documents, a mortgage, a car loan, any legal document. Have you signed other legal documents?"
Mrs. Barrett: "I am talking about this one, sir."
Mr. Murray: "I am asking you if you have signed other legal documents…"
Mrs. Barrett: "I am talking about this one. I did not know…"
Mr. Murray: "Ma'am. Answer my question."
Mrs. Barrett: "I did not know. I don't know what you are talking about. I can't remember anything."
Mr. Murray: "Ms. Charmaine, please….
Mrs. Barrett: "I don't remember what you are talking about. I did not sign this… I did not sign this knowing I was signing a loan and interest."
Mr. Murray: "You are not in the habit of signing a legal document without reading it?"
Mrs. Barrett: "Not in a habit...?"
Mr. Murray: "…of signing a document without reading it."
Mrs. Barrett: "I don't really have issues like that so I don't understand."
Mr. Murray: "Do you have a mortgage?"
Mrs. Barrett: "Sir, I just explained…"
Mr. Murray: "Do you have a mortgage?"
Mrs. Barrett: "I am talking about this. I did not …"

36. The question was repeated by the Court and Mrs. Barrett acknowledged that that she did indeed have a mortgage, "*made some 20 odd years ago*" which she had not signed without first reading it. She was then asked by Mr. Murray if she had ever entered into a written lease agreement, to which her response was,

> *"I don't know where you are going?"*

37. After another intervention by the Court, Mrs. Barrett answered that she had read her current lease with Paramount out of whose premises she now operates her salon.

38. She insisted, however, that

> *"I didn't read this document because Mr. Iton never tell me it was a loan and I was quite happy with the fact that he was allowing me to pay the rent over time."*

Findings of Fact and Application of the Facts to the Law

39. The primary issue of fact for resolution is whether Mrs. Barrett was aware of the provision in the agreement made with FIS for interest to be paid on the accumulated arrears to be paid over a period of 60 months.

40. It is impossible to accept that Mrs. Barrett did not know that FIS was agreeing to convert her arrears to a loan or that interest would be payable on the amount to which she was indebted to them. As Mr. Iton said the document is headed as follows:

> *"THIS PROMISSORY NOTE AND LOAN AGREEMENT made the 1st day of March 2012*
> ***BETWEEN*** ***Lovine Wilson-Barrett***
> ***PO Box 2897***
> ***Grand Cayman KY1-1112***
> *(hereinafter referred to as "the undersigned")*
>
> ***AND*** ***FINANCIAL INTEGRATED SERVICES LTD.***
> ***PO Box 321818 SMB***
> ***Grand Cayman***
> *(hereinafter referred to as "the Finance Company")"*

and a little further down, again in bold:

"THE UNDERSIGNED PROMISES TO PAY TO THE FINANCE COMPANY ON DEMAND THE RENEGOTIATED LOAN AMOUNT plus interest accrued on the Loan as set forth below"

and at clause 2

"2. Interest shall be charged on the outstanding daily balance of the loan at a rate of ***12.5%*** *…"*

with the rate in bold as set out above.

41. The only way Mrs. Barrett would have failed to be aware that the document she was signing obliged her to pay interest on the sums she owed to FIS is if she had signed it without even so much as glancing at it, as the essential terms are highlighted in bold and clear in their meaning.

42. Her evasive responses to Mr. Murray's question, whether she had ever signed other legal documents without reading them, undermined her credibility and give the lie to her evidence that she had not read the document and was unaware of the provision that interest of 12.5% was payable on the sums she owed. I am satisfied and find that she was aware that the arrangement made with FIS for the payment of the debt due to them was subject to interest. Mrs. Barrett signed the agreement thus signifying her consent to its terms and she is bound by it.

43. Even if it were to be believed that Mrs. Barrett had not read the document, the plea of *non est factum* would not be available to her. It is only available where the person seeking to rely on it has acted with reasonable care. As Lord Reid said in *Saunders*' case,

"The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document."

44. On her own case, she would have been exceedingly careless in a signing the document without knowing what it was and the law does not permit her to rely on her own wrong to avoid her obligations to pay the interest reserved in the agreement she signed.

45. Mrs. Barrett's defence was somewhat of a moving target as she sought to make the case that she was the victim of undue influence on the part of Mr. Iton saying, as she did, that she was *"in a situation"* where she *"vulnerable*" - by which I understand her to mean under threat of

eviction while under severe financial stress because her family members were all ill and needed her support - and had been put, by Mr. Iton, "*in a position where she had to sign the document."*

46. The evidence does not support a finding of undue influence. Mrs. Barrett was not vulnerable in any relevant sense. She was not ignorant of business or illiterate or otherwise unable to understand the language of the bargain made. She is an established business woman, a property owner pursuant to a mortgage agreement. This was a simple commercial agreement, the language of which would be readily understood by anyone who took the time to read it.

47. Mr. Iton did not exert any pressure on Mrs. Barrett to sign the agreement, as she alleged. She fell into arrears of rent and, on both occasions when the threat of eviction reared its head, it was she who approached Mr. Iton who she found, as she said in her evidence, "*quite sympathetic*" to her position. Instead of evicting her or making demand for full payment of the arrears, he agreed to work with her and converted her indebtedness to a loan which she could pay over time thus allowing her to continue to operate her business, on the promise that she would continue to pay her rent. He did so only to find that his sympathy had been misplaced.

48. Mrs. Barrett signed the agreement thus signifying her consent to its terms and she is bound by it.

ORDER

49. Judgment is entered for the Plaintiff in the sum of $28,081.06 with the contractual rate of interest of 12.5 % on that sum from May 2016 to the date of judgment and post-judgment interest at the same rate until the debt is paid. The Plaintiff shall pay the Defendant's costs, to be taxed if not agreed.

DATED 26TH DAY OF APRIL, 2022

Hon Mrs. Justice Ramsay-Hale
Judge of the Grand Court