IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. C.L. 2002/A-O36

IN COMMON LAW

BETWEEN	AUBURN COURT LIMITED	1ST PLAINTIFF
AND	DELBERT PERRIER	2ND PLAINTIFF
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	1ST DEFENDANT
AND	RBTT JAMAICA LIMITED	2ND DEFENDANT
AND	FINSAC LIMITED	3RD DEFENDANT
AND	REFIN TRUST LIMITED	4TH DEFENDANT

HEARD ON April 23, June 24 and 25, October 7, 8, 2003 and March 10, 2004

Mr. Raphael Codlin and Mr. Rudolph Francis instructed by Rowe, McDonald & Co. for the Plaintiffs; Mrs. Sandra Minott-Phillips instructed by Myers, Fletcher & Gordon for the 1st, 3rd and 4th Defendants/Applicants; Mr. Charles Piper instructed by Piper & Samuda for the 2nd Defendant.

ANDERSON, J

There were at these hearings, three (3) summonses before the Court. The first to be heard and the one which is the subject of this judgment, is an application by way of summons made on behalf of the 1st, 3rd and 4th defendants and is:

"An application on the part of the 1st, 3rd and 4th Defendants for **AN ORDER THAT:**

1. The action be dismissed as against the 1st, 3rd and 4th Defendants:

   (a) as disclosing no cause of action; and/or

   (b) as being frivolous and vexatious and an abuse of the process of the court on the grounds that:

      i) the debt subject of the action is no longer the property of the 1st or 4th Defendants; and,

ii) the debt subject of the action has never been the property of the 3rd Defendant;

iii) a similar action (Suit No. C.L. 2000/A-O50) brought by the plaintiffs in respect of the said debt against, *inter alia*, the 1st and 3rd Defendants was discontinued on the 21st day of September, 2000;
iv) the Plaintiffs are vexatious litigants;

2. Such further or other relief as this Honourable court deems fit;

3. Costs of this application and the action generally to the 1st, 3rd and 4th Defendants".

HISTORY

The matter presently before this Court represents but one chapter in a long history of events, dating back to a loan made in or around 1984 to the First Plaintiff by a bank, then known as the Jamaica Citizens Bank, ("JCB"). The present second defendant herein ("RBTT"), is the institution that emerged from the merger of several banks including the JCB. That loan had been the subject of an action by the bank against the first-named plaintiff herein, (Suit No: C.L. J 576 of 1985) and the bank had in 1985, obtained a default judgement against the then defendant in the sum of four million, nine hundred and twenty-nine thousand, seven hundred and ten dollars and sixty-six cents ($4,929,710.66). So far as we can tell, that judgment has never been appealed. Indeed, the sum in the default judgment was disputed by the defendant and they brought an action against JCB seeking certain remedies including an account and declarations in respect of the said judgment. That action by the 1st-named Plaintiff against the bank (Suit No. CL 1991/A-019) was heard by the Court on November 21,23,24, & 25, 1994 and judgment was delivered on April 18, 1997.

The orders/declarations sought in the 1991 suit were as follows:

a) that an account be taken between them and that the defendants account to the plaintiff for the sums of money paid to them by the plaintiff, Jihije Limited and Delbert Perrier in relation to a judgment debt in Suit C.L. J576/1985 for the sum of $4,929,710.66;

b) A declaration that the unpaid balance of the mortgage loans secured by registration mortgage No. 424336 and mortgage No. 436171 registered at Volume 955 Folios 565 & 566 of the Register Book of Titles merged into the judgment debt in Suit C.L. J576/1985 entered on either the 15th or the 24th January 1986.

c) A declaration that the unpaid balance of the mortgage loan (the existence of which is not admitted) secured by the registration of mortgage No. 363566 on certificate of title registered at Volume 1108 Folio 908 of the Register Book of Titles merged in the judgment debt of Suit No. C.L. J576/1985 entered on either the 15th or the 24th January 1986.

His Lordship, Wesley James, J. had this to say:

> "I do not think it is necessary for me to determine the issues dealing with registration and stamping of mortgages. These issues although addressed by Counsel for the Plaintiff did not arise on the pleadings for my determination. The fact is there is a judgment obtained 15th January 1986.
>
> Judgment
>
> 1) An account of all monies received by the Defendant or any person on its behalf from 17/2/84 to 15/1/86 and of the manner in which the said sums have been applied by the defendant.
> 2) To account and establish what balances are due as of 15/1/86 on (a) the mortgage loans 424336 and 136171 and (b) on the Demand Promissory Note.
> 3) To calculate the amount of interest on the amount found to be due as of 15/1/86 on the mortgage loans at the covenanted rate of interest and to calculate the interest on the Demand Promissory Note at the rate of 6% per annum.
> 4) That all account and calculations be made to the Registrar of the Supreme Court within six (6) weeks of the Order".

On July 4, 1991 before Theobalds J., at an application for an Interlocutory Injunction by the Plaintiff (Auburn), in the 1991 suit, the plaintiff consented to an Order in the following terms:

1) That the Plaintiff/Applicant do pay to the Defendant/Respondent the sum of Four Million seven Hundred and Eighty-Five Thousand, Five Hundred and Eighty-six Dollars and Forty-Four Cents ($4,785,586.44) on or before the expiration of the said period of four (4) weeks.

2) That upon the receipt of the sum of money referred to in the foregoing paragraph of this Order the Defendant /Respondent do hold the sum of three million and eighty-five thousand five hundred and ninety-six dollars and forty-four cents ($3,085,596.44) of this amount in an escrow interest-bearing account in the joint names of the parties herein pending completion of this action, accrued interest to be paid to the successful party.
3) That the balance of One Million Seven Hundred Thousand Dollars ($1,700,000.00) is to be kept by the defendant/respondent and credited in respect of the sum of money which the defendant/respondent claims is due to them from the Plaintiff.
4) That upon payment of the sum mentioned in paragraph (-) above, the defendant/respondent shall release all securities which it now holds in respect of the said sum of money which the defendant/respondent claims is due, and discharge all the garnishee orders which it obtained in the suit No. C.L. 1985/ J-576.

On May 3, 2000, the first and second plaintiffs commenced another action, (this time by way of Originating Summons) against the first defendant; the Financial Sector Adjustment Company Limited and Union Bank, the predecessor of the 2nd Defendant herein, Suit No. C.L. A050/2000, and on May 10, 2000they secured an *ex parte* injunction before Theobalds J. that: "the defendants by their servants and/or agents be restrained from selling the plaintiffs premises or in any way interfering with the plaintiff's quiet possession of the said premises for a period of eight (8) days from the date hereof in relation to the premises set out and described at paragraph 2 of the affidavit of Delbert Perrier sworn on the 10th day of May 2000". That action was the subject of a summons to strike out action as against the second and third defendants in that suit. That suit was wholly discontinued by a Notice of Discontinuance filed in this Court on September 21, 2000.

For completeness, I should point out that at a hearing before me on October 21, 2001 for the extension of an ex parte interim injunction granted on September 26, 2001, in relation to suit C.L. 1991 A-019, I refused the application on the grounds, *inter alia*, that that suit had been determined by the judgment of James J., and that there was no basis for the joinder of Refin Trust Limited, (the fourth defendant herein), nor the Financial Sector Adjustment Company Limited. Neither of these two (2) defendants had been parties in the suit decided by James J., but had been added as defendants pursuant to an Order on an

ex parte application for an injunction to postpone the sale of properties, on September 26, 2001.

In summary therefore, this history has involved:

a) A default judgment for $4,929,710.66 which has not been appealed but was the subject of a second action;
b) A second suit challenging the amount and the make-up of the default judgment;
c) A consent order at a hearing for an interlocutory injunction, pursuant to which $4,785,586.44 was to be paid to JCB, partly beneficially and partly to be held in escrow. There is no evidence that this apportionment took place.
d) A judgment in the second suit that ordered an accounting which apparently has not been done;
e) The filing of a third suit which was subsequently the subject of a Notice of Discontinuance.
f) The filing of a fourth suit (the third by the Plaintiff) which has precipitated the application to strike out.

I do agree with the view expressed in the submissions for the 1st, 3rd and 4th defendants that: **"The payment and mortgages referred to (in the 1991 action) were at the heart of that action. They are also at the heart of this action".** That this is the case, (at the very least in practical, if not legal terms), is confirmed by the following paragraphs of the Amended Statement of Claim in the instant matter.

> The repayment of the loan for which the Secondnamed Defendant obtained the default summary judgment was secured by
>
> 1. Mortgage No. 424336 endorsed on the Certificates of Title for premises No. 47-49 Trinidad Terrace, Kingston 5, in the parish of Saint Andrew, registered at Volume 955 Folio 565 and 566 of the Register Book of Titles.
> 2. Mortgage No. 410707 endorsed on three (3) Certificates of Title for premises No. 2 Musgrave Avenue, Kingston 5, in the parish of Saint Andrew, registered at:
>   a. Volume 459 Folio 78, now Volume 1294 Folio 828
>   b. Volume 1168 Folio 322, now Volume 1276 Folio 783
>   c. Volume 1168 Folio 323, now Volume 1294 Folio 827 all registered in the name of the Firstnamed Plaintiff, as registered Proprietor.

3. The continued retention by the Secondnamed Defendant of the Duplicate Certificate of Title for premises No. 3 Padua Avenue, Kingston 20, in the parish of Saint Andrew, registered at Volume 965 Folio 108 of the Register Book of Titles, in the name of the Secondnamed Plaintiff as Proprietor, which the Secondnamed Defendant already had in its possession because of an earlier transaction between the parties.

After the Second-named Defendant obtained the default summary judgment on or about the 15th day of January, 1986, it took out sale of land proceedings to enforce the judgment. The Registrar of the Supreme Court held two enquiries. The first was held on the 21st day of October, 1987, and the second was held on the 8th day of December 1987.

Premises No. 2 Musgrave Avenue, Kingston 5, aforesaid, then registered at

(a) Volume 459 Folio 78
(b) Volume 1168 Folio 322, and
(c) Volume 1168 Folio 323

was not one of the First-named Plaintiff's properties for which the Second-named Defendant obtained an order for sale under the Sale of Land proceedings pursuant to the default summary judgment of the 15th day of January 1986.

The Second-named Defendant however, having obtained the order for sale of the First Plaintiff's other real properties named in the order, wrongfully sold premises No. 2 Musgrave Avenue, aforesaid under Powers of Sale contained in Mortgage No. 410707 by private treaty without a Court Order, for the sum of Eight Hundred Thousand Dollars ($800,000.00), a price grossly below its then current market value.

The Secondnamed Plaintiff on behalf of the Firstnamed Plaintiff, Jeheji Limited and himself disputed the amount for which the default summary judgment was obtained, and on the 4th day of February 1991, the Firstnamed Plaintiff brought an action in the Supreme Court of Judicature of Jamaica against the Secondnamed Defendant therein on behalf of itself, in Suit No. C.L. 1991/A-019 for the orders and remedies as set out in the Statement of Claim.

The said Second named Defendant (then JCB), defended the action, and at the hearing of an application by the Firstnamed Plaintiff for an Interlocutory Injunction on the 4th day of July 1991, so far as is relevant to these proceedings commencing at paragraph three (3) therein, consented to an Order, *inter alia*:

(3) That the Plaintiff/Applicant do pay to the Defendant the sum of Four Million, Seven Hundred and Eighty Five Thousand, Five Hundred and Eighty Six Dollars and Forty Four Cents ($4,785,586.44) on or before the expiration of the said period of four (4) weeks."

(4) That upon receipt of the sum of money referred to in the foregoing paragraph three (3) of this order the Defendant/Respondent do hold the sum of Three Million and Eighty Five Thousand, Five Hundred and Ninety Six Dollars and Forty Four Cents ($3,085,596.44) of this amount in an escrow interest bearing account in the joint names of the parties herein pending completion of this action, accrued interest to be paid to the successful party.

(5) That the balance of One Million, Seven Hundred Thousand Dollars ($1,700,000.00) is to be kept by the Defendant/Respondent and credited in respect of the sum of money which the defendant/Respondent claims is due to them the Plaintiff.

(6) That upon payment of the sum mentioned in paragraph three (3) above the Defendant/Respondent shall release all securities which it now holds in respect of the said sum of money which the Defendant/Respondent claims is due, and discharge all the garnishee orders which it obtained in Suit No. C.L. 1985/J-576.

It was as a consequence of this latter consent order that the Plaintiffs herein negotiated a loan with the National Commercial Bank Limited, ("NCB") the first named defendant herein. It is common ground that NCB, in a letter to JCB dated August 16, 1991, and signed by its manager, A.S.O. Shirley, paid over to the JCB the sum detailed in the consent order, in exchange for the Plaintiff's Certificates of Title registered at Volume 955 Folio 565 and 566, and Volume 965 Folio108.

The relevant actual terms of that letter are instructive and are accordingly set out hereunder:

Auburn Court Limited v Jamaica Citizens Bank Limited Suit C.L.A –019 of 1991

We refer to previous discussions and correspondence with respect to the above and now enclose our cheque in the amount of $4,785,586.44, being the sum payable by Auburn Court Limited pursuant to paragraph 3 of the Formal Order made by the Supreme Court on 4th July 1991.

This payment is made by us, on your bank's irrevocable undertakings:

1) To forthwith forward to us, all items of security held by you with respect to any and all accounts in the name of Auburn Court Limited, Jehije Limited and Delbert Perrier freed from all charges and liens in your bank's favour, and
2) To hold to our order, any and all sums that may become refundable/payable (including interest) to Auburn Court Limited, pursuant to the said Supreme Court action C.L. A –019 of 1991.

> Kindly acknowledge receipt hereof, and indicate your acceptance of the undertakings herein set out, by signing and returning the attached copy of this letter.

The plaintiffs herein quite inexplicably allege in paragraph 14 of their amended statement of claim, that NCB only "disbursed the sum of One Million Seven Hundred Thousand Dollars ($1,700,000.00)". I must say, for the record, that there is no evidence to support this assertion. In fact, it is inconsistent with the averments of the said 2nd named plaintiff herein in his affidavit of December 23, 2002, where he said at paragraph 19:

> That neither Auburn Court Limited nor myself had any further transaction with the First named Defendant's bank from the time in 1991, *when they sent the sum of $4,785,386.44 to Jamaica Citizens Bank Limited on the 16th day of August, 1991*.....(Emphasis Mine).

Indeed, paragraph 14 of the Plaintiffs' said Amended Statement of Claim recited that the Plaintiffs had "negotiated a loan" from NCB in order to be able to pay JCB the money referred to in paragraph 13 (3) of the said Amended Statement of Claim ($4,785,586.44). As further stated at paragraph 17 of the Amended Statement of Claim, JCB received the sum of $4,785,586.44 from NCB and released the relevant duplicate certificates of title to NCB. It appears that the assertion in the statement of claim is based upon a view that since the consent order provided for the payment of $1,700,000.00 beneficially to JCB, but required that JCB hold the sum of $3,085,596.44 in escrow, that somehow, the proceeds of the NCB loan, admittedly paid over to JCB, was only a "disbursement" to the extent of the lesser sum. This is a complete misconception, which I find difficult to comprehend. It is even more difficult to escape the charge that the plaintiff is being completely disingenuous when the Second Plaintiff in a supplementary affidavit dated December 23, 2002, at paragraph 12 thereof, states:

> That the First defendant's manager, Mr. A.S.O. Shirley approved the loan to Auburn Court Limited, but only disbursed the sum of $1,700,000.00 to Jamaica Citizens Bank. A copy of the letter from the first Defendant's Manager to the Manager of Jamaica Citizens Bank Limited is now produced and shown to me and marked with the letters "D.R.P.-3".

The fact is that the letter in question gives no support to the essential assertion in this affidavit, *as the only figure mentioned in the said letter is the $4,785,586.44, which the writer says he is sending to JCB*. How this letter can be cited as support for the assertion is beyond me.

SUBMISSIONS FOR DEFENDANTS

Mrs. Minott-Phillips for the Applicants submitted that, "the application on behalf of the 1st, 3rd and 4th Defendants is brought under section 238 of the Judicature (Civil Procedure Code) Act ("J.C.P.C.") and under the inherent jurisdiction of the Court as set out in Vol. 1 of the 1997 Supreme Court Practice"(See Order 18/19/1). Section 238 of the J.C.P.C. provides as follows:

> The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in the case the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Order 18 rule 19 of the Supreme Court Practice to which reference is made, provides as follows:

1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

   a. it discloses no reasonable cause of action or defence, as the case may be; or
   b. it is scandalous, frivolous or vexatious; or
   c. it may prejudice, embarrass or delay the fair trial of the action; or
   d. it is otherwise an abuse of the process of the Court;

   and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

2) No evidence shall be admissible on an application under paragraph (1)(a).

3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

It was submitted on behalf of the 1st, 3rd and 4th Defendants, that each of these defendants was entitled to succeed on either or both wings of the rule as set out in section 238 of the J.C.P.C. as expanded and explained by Order 18 Rule 19 of the Supreme Court Practice,

1997. According to submissions by Mrs. Minott-Philips, the action should be dismissed as against the First Defendant as no cause of action is disclosed against that Defendant. (See ground 1(a) of the summons). She referred to the amended Statement of Claim paragraph 14 in which the plaintiff acknowledged that it had borrowed Four Million Seven Hundred and Eighty-Six Thousand, Three Hundred and Eighty-Six Dollars Forty-Four Cents ($4,786,386.44) in order to satisfy the obligation imposed on it by the judgment of the court in the earlier matter in 1986. There is clear evidence including the affidavit of Mr. Perrier that NCB did send its cheque to JCB to cover this amount in return for JCB sending to it, *all the securities* which it held on behalf of the plaintiffs herein. As I indicate elsewhere, I accept this part of the evidence and I have already commented upon the inconsistencies within the plaintiff's own case as to its assertion that NCB only paid 1.7 million dollars. I reject that assertion. She also submitted that the pleadings reveal no reasonable cause of action against either the 3rd or 4th Defendant as the evidence clearly indicates that neither of those defendants is the holder of any debt or any security which is the property of the plaintiffs or either of them. The affidavit evidence of Lana Smith and Valerie Alexander shows that the debt had been transferred from NCB to Refin Trust Ltd., and thereafter to Jamaica Redevelopment Foundation.

Mrs. Minott-Phillips submitted, however, that even in the event the Court was of the view that a reasonable cause of action was disclosed in the amended Statement of Claim, the action still ought to be dismissed as against the First Defendant, as being frivolous or vexatious or an abuse of the process of the court for the reasons stated in paragraph 1 (b) (i), (iii) & (iv) of the summons. It was further submitted that the application on behalf of the 3rd Defendant was made under paragraphs 1 (b) (ii) & (iv), 2 (if necessary) and 3 of the summons, while the application on behalf of the 4th Defendant was made under paragraphs 1 (b) (i), (iii) & (iv), 2 (if necessary) and 3 of the summons.

In relation to the Fourth defendant, it was submitted that the action should also be dismissed on the grounds that it was frivolous, vexatious or otherwise an abuse of the process of the Court. This, it was submitted, was on the basis that the debt, the subject of this action, was no longer the property of the Fourth Defendant, as it had been

subsequently and properly assigned to Jamaica Redevelopment Foundation Inc.; or, secondly, because a similar action brought against the First and Third Defendants in respect of the said debt (See Suit C.L. A – 050 of 2000) was discontinued by the plaintiff; or, thirdly, because the plaintiffs are vexatious litigants.

It was also submitted by Mrs. Minott-Phillips for the applicants that the principle of *res judicata* also applied here to effectively bar the plaintiffs' claim. It was her submission that the principle applied not only where the parties were identical in both the previous and subsequent actions, but even where they were not. In this regard she cited the case of ***Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd. and Anor. [1975] A.C. page 581***, a decision of the Privy Council. That case was cited as authority for the proposition that where a matter could have been pleaded in the previous case, and was not so pleaded without any reasonable excuse then a litigant would not be allowed to have that matter litigated in a subsequent action. The *locus classicus* on the subject of *res judicata* is the judgment of ***Wigram V.C in Henderson v Henderson [1843-1860] All E.R. page 378 at page 381,*** where the learned Vice Chancellor said:

> "Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have, some negligence, inadvertence, or even accident, omitted part of their case. (My emphasis) The plea of *res judicata* applies, except in special cases not only the points upon which the court was actually requires by the parties to form an opinion and pronounce a judgment, but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at that time".

The Court in the *Yat Tung* case proceeded to make the following observations *(per the judgment of Lord Kilbrandon at page 590)*:

> "The shutting out of a 'subject of litigation' a power which no court should exercise but after a scrupulous examination of all the circumstances, is limited to where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the

> non-application of the rule. For example if it had been re-suggested that when the counter claim in number 969 came to answered Mr. Lye was unaware and could not reasonable have been expected to be aware of the circumstances attending the sale to Choi Kee, it may be that the present plea against would not have been maintainable but no such averment has been made."

In the case of ***Greenhalgh v Mallard [1947] 2 All E.R. 255,*** the court sought to expand upon, the meaning the phrase used by the Vice Chancellor in *Henderson and Henderson* with respect to the phrase, "every point which properly belongs to the subject of litigation". Somervell L. J. said

> "I think that on the authorities to which I will refer, it would be accurate to say that *res judicata* for this purpose is not confined to the issues that the court is actually to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

While it would appear that if it is found that res judicata applies, this fact would be a final bar to the plaintiff pursuing this action, Mrs. Minott-Phillips also submitted that there was another reason to uphold the application to strike out the action as being frivolous and vexatious. She submitted that where, as in this case, the issue raised in the instant proceedings is identical to the issue raised in previous proceedings, then the court has an inherent jurisdiction to stay the action. In support of this she cited ***Stephenson v Garnett [1898] 1Q.B.D.677***. There A.L. Smith L.J. stated:

> In my opinion, the learned judge at chambers ought to have exercised the inherent jurisdiction which he undoubtedly possesses of staying the action on the ground that it is frivolous and vexatious and an abuse of the process of the Court. I do not rest my decision upon the ground that the matter is res judicata, for I do not think that it can be said that it is. I put my decision on the ground that the identical question raised in this action was raised before the county court judge upon an application for an order to tax the costs of the action in the county court, and was heard and determined by him.

Similarly in the same case, Chitty L.J. said:

> I am of the same opinion. I do not rest my judgment on the ground that the question is res judicata in the strict sense of that term. The jurisdiction which we are now exercising is the inherent jurisdiction of the Court to

> prevent frivolous and vexatious litigation which the Court considers to be a mere abuse of its process.

In light of this authority, she submitted that on the pleadings and the affidavits filed in the instant suit, it was clear that they raised issues previously raised in the earlier proceedings, and that this action should accordingly be struck out on the basis of being frivolous and vexatious.

I should observe that in the application to strike out, the applicants make certain assertions in paragraphs 1(b)(i), (ii) and (iii) about defendants not having property in the debt or mortgage securities, as well as the similarity of previous actions with the present, as providing the factual substratum to support that the applications on their behalf should be acceded to. Even assuming that there was some evidence to support those assertions, the court must still satisfy itself that those things indeed, rise to a level to satisfy the legal criteria for being, "frivolous, vexatious or an abuse of the process of the court." It was submitted for the Applicants that the commencement of the instant suit was another attempt by the first-named Plaintiff to re-litigate matters first dealt with in the case filed by JCB against it in 1984 (Suit C.L. 1985/J-576); then again the subject of the First-named Plaintiff's suit in 1991 (Suit No C.L. 1991 A-019), which had been heard and a decision given in 1997 and thirdly, the case it filed in 2000, (Suit C.L.2000/A-050) which it had subsequently discontinued. The essential facts and the links seeming to connect all the actions, are the loan by JCB, the default judgment of the court in relation to that matter, the order for payment of $4,754,585.44 in the injunction application in 1991 and the 1997 order for an accounting in relation to the relative positions of the parties under the 1986 default judgment. The suit filed in 2000 was in relation to the same issues. She cited ***E.T. Mailen Ltd. v Robertson, [1974] I.C.R. 72,*** cited with approval in ***Ashmore v British Coal Corporation [1990] 2 All E.R. 981***, where it was held that "frivolous and vexatious" includes proceedings which are an abuse of the Court's process.

It was her further submission that the plaintiff in this suit now sought to raise, for the first time, an allegation of fraud which it would need to prove in order to succeed, in the absence of any evidence that it had repaid the loan, (or at least so much of it that it was

not disputing), in respect of which NCB, and not any other party, had registered the mortgages. Fraud on the part of the mortgagee (NCB), would be the only basis upon which the plaintiff could resist the right of the mortgagee to have the mortgage amount (or at any rate, so much as was not in dispute) paid into court. ***[See Inglis and Anor v Commonwealth Trading Bank of Australia, [1971-72] Vol 123 CLR 161;*** See also the decision of the Jamaican Court of Appeal relying on that case; ***SSI (Cayman) et al v International Marbella Club S.A. SCCA 57/86 ("Marbella"***) and see also the judgment of Wolfe C.J. in ***Ciboney Group et al v Neuson Ltd and Ors., Suit No: C.L. 073 of 1998***. In any event allegation of fraud insofar as they relate to Padua Avenue, is inconsistent with the amended statement of claim which acknowledged that the NCB loan to pay off the JCB judgment was in fact registered as a mortgage on Padua Avenue. Indeed paragraph 8.3 of the amended statement of claim states that: "The repayment of the loan for which the second-named defendant obtained the default summary judgment was secured by:

> The continued retention by the second-named defendant of the Duplicate Certificate of Title for premises No.3 Padua Avenue registered at volume 965 Folio 108 of the Register Book of Titles in the name of the second plaintiff as proprietor which the second-named defendant already had in its possession because of an earlier transaction between the parties".

Paragraph 16 of the said amended statement of claim quoted from the letter from the Manager of the NCB branch which requested that JCB "forward to us all items of security held by you with respect to any and all accounts in the names of Auburn Court, Jehije Limited and Delbert Perrier, free from all charges and liens in your bank's favour". (My emphasis) She said that paragraph 17 of the said document is also instructive as it is in the following terms:

> The second-named plaintiff having received the sum of $4,785,586.44 from the first-named defendant, released the plaintiff's Duplicate Certificate of Title registered at Volume 955 Folios 565 and 566 and Volume 965 Folio 108 to the first-named defendant.

It was pointed out that the certificate of title is specifically acknowledged to have been in the possession of the second-named defendant "because of an earlier transaction", and the transfer of the relevant certificates having been accomplished as part of the loan from NCB. This clearly is inconsistent with any claim of fraud on the part of the first-named

defendant. There is no evidence that the loan has been repaid by the plaintiff to NCB. She said that this "allegation" of fraud was a sham and on its face was completely unsustainable and the Court should accordingly reject it.

SUBMISSIONS FOR PLAINTIFFS

Mr. Codlin made a number of submissions in opposition to those made by Mrs. Minott-Phillips. He stated that none of the bases on which the applicants purported to rely was sufficient to ground a successful application to strike out. In particular as they related to the issue of res judicata, he submitted that the preponderance of the matters raised in this suit, were matters which arose after July 1991 when suit C.L. A019 of 1991, was initiated by the plaintiff. This was in the context of the observation by Mrs. Minott-Phillips that four (4) suits had been filed by or against the plaintiffs in relation to the "same matters". He further submitted that it was only those matters that could have been pleaded in that case, C.L. A-019 of 1991, or the earlier 1985 case, that could now be the subject to the principle of res judicata. The matters complained of in the instant case, arose after July 1991; ergo, they could not provide the basis for a plea of res judicata. He rejected the view, in any event, that the four suits were of the same nature and complexion. For example, he indicated that in 1991 the dispute was over a sum of less than five million dollars, ($5,000,000.00) and Mr. Justice Theobalds had made an appropriate order on an application for an injunction. He also submitted that there was no evidence that the sum advanced by the first defendant ($4,786,386.44) to which reference is made in this suit, was other than the sum which had been ordered in the 1991 case. With particular reference to the suit C.L.A – 050 of 2000 which had been discontinued, he said that the discontinuance was consensual and effected after discussions between the parties, and only on the basis it had been wrongly started by originating summons rather than by a writ. That was his reasoning as to why the matter was discontinued.

It was also Mr. Codlin's further submission that the filing of an unconditional Entry of Appearance extinguished the defendant's right to apply to strike out the writ or the relevant pleadings. Since an "unconditional appearance" had in fact been entered and

response pleadings filed, then pursuant to Section 678 and 679 of the J.C.P.C., it was now too late to make the application to strike which the defendants were now seeking to make. Those sections are in the following terms:

> 678
> Non-compliance with any of the provisions of this law shall not render the proceedings void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms as the Court shall think fit.
>
> 679
> No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowing of the irregularity.

As part of this submission, he suggested that the provisions in the rules allowed a party who had received a pleading and who was seeking to make the case that that pleading disclosed no reasonable cause of action or defence, for that party to enter a conditional appearance and make an application to strike out the writ or statement of case. It was his view that, issue having now been joined, the defendants could not make an application on the basis that the pleading disclosed no cause of action. Mr. Codlin did not at all make clear to me how the sections cited assist the plaintiffs to resist the application, as they are not directed at the issues raised in the applications; that is whether the action was frivolous or vexatious. In a comment which I find instructive, as part of this submission, he said it would be shown that orders made by Theobalds J., in the action in respect of which James J. had given a written judgment, (Suit C.L.A-019 – 1991, had not been complied with.

Thirdly, Mr. Codlin submitted that what should inform the exercise of the court's undoubted discretion in this area, is its mandate pursuant under Rule 1 of the Civil Procedure Rules of 2002, to "act justly". Litigants should not use "devious and unfair means" (my emphasis) to invoke the court's discretion in an unfair exercise. Litigants with genuine complaints have a right to have their matter before the court properly adjudicated. He also submitted that based upon the demands now being made of the plaintiffs, the first defendant was now asserting that the original debt of around Five

Million Dollars ($5,000,000.00), as represented by the mortgages which had been registered originally, had now ballooned to over Two Hundred and Fourteen Million Dollars ($214,000.00) and this made it a different case the earlier one in which the claim was for around Five Million Dollars. ($5,000,000.00) He further submitted that in relation to ground 1(b) (i) and (ii) of the applicant's summons, (that the debt at the subject of this action was no longer property of the either First or Fourth defendants) that that fact was not to be regarded as a ground for dismissing the suit, unless it was being suggested that the only claim against them both, is that the debt is the property of one or other of them. However, that was not what is being alleged. He said that it did not matter where the debt presently resided. The gravamen of the plaintiffs' action was whether there had been "a wrongful act" committed by either party while the securities were in their possession. It is not clear what are the "wrongful acts" alluded to, either from the submissions or from the pleadings. I note that no authority was cited for this proposition, and I have to say, with the greatest of respect, that I do not know of it having any foundation in law.

With respect to the submission that the third defendant and the fourth defendant were separate legal persons and that, in fact, FINSAC had never held the securities in question, he pointed to a letter of demand from Mr. Kissock Laing dated the 18th day of April 2000, at page 162 of the plaintiffs bundle, and written on a FINSAC letterhead but which clearly was signed as coming from Refin Trust Ltd. The letter states: "I act on behalf of Refin Trust Limited a wholly-owned subsidiary of FINSAC Limited, Assignees of your debt at National Commercial Bank Jamaica Limited". He pointed to the use of the word "assignees" in the letter and suggested that it must mean both Refin and FINSAC. He submitted that the applicants could not now be heard to say, in light of this letter, that FINSAC had not been an "assignee" of the debt. I do not agree that this letter by it self could have any important consideration unless it can be shown that the two companies were the same, and there is no evidence that they are. In fact the letter itself refers to one being the subsidiary of the other. I hold that this is not an "admission" upon which the plaintiff may rely.

Mr. Codlin purported to call in aid Section 307 of the J.C.P.C., dealing with judgment on admissions.

> 307
> Any party may at any stage of a cause or matter where admissions of fact have been made, either on pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or Judge may, upon such application, make such order or give such judgment as the Court or Judge may think just.

He said that wherever a party to litigation has made an admission whether in the pleadings or otherwise, the other side could take advantage of that admission. He submitted that the Kissock Laing letter 'purportedly on behalf of Refin Trust Limited, but on the FINSAC letterhead, was such an admission and that it was therefore now too late for FINSAC, as a party to this litigation to now to be heard to say, that they ought not to be a party. In truth and in fact however, if FINSAC ought not to be in the litigation at all, it is difficult to see why they should be bound by the provisions of Section 307 of the J.C.P.C.

It was also submitted that where are pleadings upon which issue had been joined by defendants who have not entered a conditional affair, those issues which have been so joined, must go to trial and cannot be subject of an application to dismiss. Again, no authority was presented for the submission. He said that section 61 of the J.C.P.C. suggested that if a party is served with a writ or pleadings which discloses no cause action, the proper thing to do would be to file a motion or strike out the writ of summons or the pleadings or the service thereof, on the ground that the pleadings disclose no cause of action because for example, it is frivolous or vexatious, However, the party must act "promptly" to deal with the matter. He says that this has not been done in this case and accordingly the defendants cannot be allowed now to strike the action. I am unable to agree that this is the effect of section 61 of the J.C.P.C.

Mr. Codlin also refers to order 18, rule 19 paragraphs 12 to 14 of the Supreme Court Practice, previously cited by Mrs. Minott-Phillips and to the cases referred therein. He said that these showed that in order for the litigants to be successful on a plea that the

pleadings are vexatious or show no cause of action or are an abuse of process, the pleadings must show this, i.e. you must assume that if everything in the pleadings is true, the litigant would still lose if the matter went to trial at that time it would be in order to strike. He then proceeded to say that he had identified more than twenty live issues in the pleadings and he proceeded to list those issues. If there are live issues which the court should consider then the matter ought to go to trial. It was these "live issues", that comprised the pith and substance of his submission that the application to strike out must fail.

Without seeking to downplay the significance of the submissions in relation to twenty issues, I have to say with respect, that I do not believe that they are important in relation to what the court has to decide upon the application before me. In this connection it seems to me that whether there is one issue or twenty, if that submission is correct then it ought not to matter as to the number of such issues. I will however look at some of these to see whether are of any relevance.

One of the issues which Mr. Codlin says is still a live issue is at what rate of interest was the first defendant allowed to charge in relation to the amount advanced to the Jamaica Citizens Bank. He submits that in 1992, the bank had stamped the securities in relation to a debt of Five Million Dollars ($5,000,000.00) and that shortly thereafter up-stamped to Fifty Million Dollars ($50,000,000.00). He also said that the plaintiffs were now being told that their indebtedness had burgeoned to over Two Hundred Million Dollars. It is at not all clear to me how this has any consequences for the application which is before me. Mr. Codlin also made the following submission without giving any authority. He said that where a customer owes a debt to a bank to that bank, and a demand is made for repayment, the relationship of customer and banker ceases and that of creditor/debtor begins. He said that when that happened, the effect is to prevent the banker from levying interest at the rate payable during the relationship of banker/customer and it can only now recover such rate of interest as it could show would allow it not to suffer a loss. Again, it is not clear to me why this has anything to do with an application to strike out an action or pleadings.

Mr. Codlin summarized his submissions as follows:

1. There are allegations against each and every party sued and those allegations are in law, the subject of a dispute and ought to be submitted for judicial determination.
2. None of the parties sued can say that is was not in any way or other directly involved in the entire process in circumstances which make it a party to that process.
3. In order for the truth to be known as regards conflicting allegations raised on the pleadings, each party is required to submit by evidence, its side of the story for judicial determination.
4. A party cannot enter an unconditional appearance and file a defence and, in effect, agree to go to judicial determination and then say case before it must be dismissed because it discloses no reasonable cause of action. He submitted that order 2, rule 2 of the Supreme Court practice and Section 678 and 679 of the J.C.P.C. make it clear that if one saying there is no case against one based on the pleadings, then he should enter a conditional appearance and apply to have the matter dismissed. Having filed a defence it is now too late to make that application. Mr. Codlin then referred to Section 100 of the J.C.P.C. and cited as authority, ***Lilliput Ltd. v Liguanea Club, Ex Parte Vincent [1968] 11 J.L.R. 156***, *in* relation to the question of joinder of the parties. That section deals with misjoinder and non-joinder of parties. It gives the court a power to strike out a party who is improperly joined in a suit and to order the joiner of a party whose presence is necessary for the determination of the issues in the matter to be joined as a party to the action. It does not however, deal with the question of whether pleadings may be struck out or dismissed against a party *only* if there has been a conditional appearance to the suit filed. The relevant part of the section is as follows:

> 100
> No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties; and the Court may, in every cause or matter, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

> The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.
> It is in my view not a relevant consideration here.

5. He submitted that where one party is suing another, he must show that the one being sued is a necessary party to the proceeding and must show by pleadings that there are serious issues to be tried as raised by those pleadings. This is why, he submitted, if a party is maintaining that he ought not to be sued, he ought not to join issue on those pleadings which have been served.

Finally, he submitted that the application should be dismissed as he had shown that all the parties were necessary and that there were issues to be tried and that the matter could not be adequately adjudicated upon without the presence of any or all the parties now in this suit.

In her response to the authorities raised by Mr. Codlin, Mrs. Minott-Phillips rejected the view that there was any necessity for a conditional appearance to have been entered. Under the terms of the J.C.P.C., a conditional appearance was only necessary where an unconditional appearance would have waived some defect. Such defects would have included service outside of the limitation period, or expiry of the date for service outside of the jurisdiction, in which case the plaintiff would have suffered some prejudice by entering an unconditional appearance, because he would have waived the defect. She made the point, to which I have referred above, that Section 100 of the J.C.P.C. dealt with joinder of parties and is not relevant to theses proceedings. She also rejected the submissions that the filing of the defence now precluded the applicants from making the application on the basis that they have joined issued with the plaintiffs. It is clear that if the defendants had failed to file a defence, the plaintiff would have been entitled to move for judgment in default of defence.

She submitted that the first and fourth defendants were mere successors or assignees of the debt which had initially arisen out of a loan by the JCB to the plaintiff. Further, that that issue had already been adjudicated upon in 1985 and further adjudicated in 1997. The plaintiffs, she said, can't have greater recourse against the successors to that debt than they had against the original lender. Any legal complaint which the plaintiff has against NCB or the fourth defendant and which they would have had against the Jamaica Citizens Bank, but which were not raised in the previous proceedings, cannot now be raised since they were *res judicata,* and she again referred to the Yat Tung. She also said that even if the letter from Mr. Kissock Laing on the FINSAC letterhead was written on behalf of Refin Trust spoke of "assignees", it was clear from an examination of the duplicate certificates of title that were in evidence, that FINSAC had never been a party to any such assignment. The assignment had taken place from JCB to NCB to Refin Trust to Recon Trust and now latterly to the Jamaica Redevelopment Foundation Inc. She said the question was not whether there were allegations against a party but whether there was a factual or legal basis which needed to be tried.

Mr. Piper who represented RBTT, the second defendant, referred to CPR Section 26.3 (1) (b) (o). This part of the rule provides as follows:

"In addition to any other powers under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court

(a).....

(b).....

(c)..... that the statement or part be struck out discloses no reasonable grounds for bringing or defending a claim, or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of part 8 or 10.

He adopted the submissions of Mrs. Minott-Phillips with respect to the striking out on the grounds that the action was frivolous, vexatious or an abuse of the purpose of the court. In particular, I understood him to adopt the submissions that as against the second

defendant this issue was res judicata. He submitted finally that if in reviewing the authorities on the facts presented the court is of the view that the whole or any part of any claim against the second defendant ought properly to be struck out, then the court may do so under rule 26 of the Civil Procedure Rules 2002.

FINDINGS AND RULINGS

In looking at the applications for each of the Defendants for whom relief is being sought, the court must consider three issues, though a positive finding on any one would dispose of the matter.

1. Do the pleadings reveal "no reasonable cause of action" or defence?
2. Even if the answer to question 1 above is negative, are the pleadings frivolous, vexatious or an abuse of the process of the court?
3. Ought the court to exercise its inherent jurisdiction to strike the pleading or the action?

These are the matters to be considered here.

I accept the view expressed in the 1997 Supreme Court Practice Order (18/19/1) that: "There are two jurisdictions pursuant to which the Court may impose sanctions for breaches of the rules of pleading". The first is under the provisions of the rule, (and in our case, section 238 of the J.C.P.C.), and secondly, under its inherent jurisdiction. Applications are often made, as in this case, under both jurisdictions. (***SEE VINSON V THE PRIOR FIBRES CONSOLIDATED LTD. [1906] W.N. 209***)

It is trite law that where the only ground of an application to strike out an action or pleadings is that it discloses no reasonable cause of action or defence, no evidence is admissible. (See **Attorney General of Duchy of Lancaster v L. & N.W. Railway [1892] 3 Ch. 278**; and **Republic of Peru v Peruvian Guanco Co; [1887] 36 Ch.D. 489 at page 498**). Similarly, where the only ground on which a statement of claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is equally inadmissible (See **Wenlock v Moloney [1965] 1W.L.R.**

1238; [1965] 2 All E.R. 871). Do the pleadings of the plaintiff reveal a reasonable cause of action against the defendants or any of them?

I have made the following findings of fact which will inform my rulings below in respect of each defendant.

A. The First defendant made a loan to the plaintiff Auburn in order to satisfy its judgment obligations to the predecessor of the second-named defendant. The loan was secured by the registration of mortgages on various properties.

B. There is no evidence of repayment to the First-named defendant or the successors to the loan and securities.

C. The allegation of fraud in respect of the First defendant is completely unsustainable, and in the absence of fraud the mortgagor must pay the mortgage debt or so much of it as is not disputed. (See Marbella). The letter from NCB's manager, Mr. A.S.O Shirley, to JCB, gives a complete explanation of how the mortgages came to be registered on the plaintiff's (i.e. including the second plaintiff) properties, since JCB was obliged to send all securities held by either of these two plaintiffs.

D. In any case, the plaintiff would have to give particulars of the fraud alleged. There are no particulars that support the bare allegation that registration of the mortgages was obtained by fraud.

E. The reliefs sought against the first-named Defendant in paragraph 32 (1) to (7) are not available to the plaintiffs herein.

F. The claim in paragraph (8) for an order for the return of money paid to the second-named Defendant by NCB can only properly be made after the accounting ordered in suit C.L.A - 019 of 1991, and not in this suit.

G. The claim in paragraph (9) of the Statement of Claim against the second-named Defendant for wrongful disposition and sale of property has no place in this suit. It could properly only be, and should have been raised in C.L.A - 019 of 1991. This claim is not sustainable here.

H. In light of E above, the reliefs sought against the second-named Defendant in paragraph 32 (8) and (9), have no place in this suit.

I. The third-named Defendant has never been a holder of any security for the Plaintiffs or any of them. There is absolutely no nexus between the third Defendant and the Plaintiffs.

J. Without more, the Third-named Defendant must be dismissed from this suit. (See below).

K. The fourth-named Defendant is no longer the holder of the debt or the mortgage securities, having assigned.

L. The assignments are valid assignments.

M. The injunctions sought at sub-paragraphs (11) and (12) of paragraph 32 of the statement of claim are, in essence, the same as sought in the application before me, and which I refused on October 21, 2001.

These findings suggest that the statement of claim discloses no reasonable cause of action, and as will be apparent below, that is where the reasoning leads.

With respect to the second limb of the application, that the action is frivolous, vexatious or an abuse of the courts process, it is settled that the court is able to look at evidence and indeed must do so. In this regard, I accept the submissions of counsel for the Applicants, as to the bases upon which this application may be pursued. What amounts to "frivolous, vexatious or an abuse of the court's process", has been the subject of consideration by the courts. In ***E.T. Mailen Ltd. v Robertson, [1974] I.C.R. 72,*** cited with approval in ***Ashmore v British Coal Corporation [1990] 2 All E.R. 981***, it was held that "frivolous and vexatious" includes proceedings which are an abuse of the Court's process. In the latter case, the Court of Appeal in the United Kingdom held that: "It could be an abuse of process to seek to re-litigate the same issue in the absence of such fresh evidence as would entirely change the aspect of the case" (My emphasis). In the Ashmore case, counsel sought to argue that in the absence of res judicata, issue estoppel or agreement, a litigant had an absolute right to have a claim litigated. The Court disagreed:

In his judgment, Stuart-Smith L.J. had this to say:

> Counsel for the Appellant submits that the tribunal did err in law. He submits that unless she is estopped by res judicata, issue estoppel or agreement to be bound by the findings in the *Thomas* case, and it is common ground that she is not, the appellant has an absolute right to have

her claim litigated. He argues that because the appellant is not estopped for any of those reasons, her claim cannot be frivolous, vexatious or an abuse of process. I do not agree. A litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material. In ***Hunter v Chief Constable of West Midlands [1981] 3 All ER 727 at 729, [1982] AC 529 at 536 Lord Diplock,*** with whose speech the rest of the House agreed, said:

> 'My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedures in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'

In that case the House of Lords held that it was an abuse of process to bring a civil action which involved re-litigating matters which had been decided against the plaintiffs in a criminal court. Lord Diplock said: ([1981] 3 All ER 727 at 733, [1982] AC 529 at 541):

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

I agree with the reasoning and the dicta of the both learned Lord Justice and Lord Diplock, and would agree that there seems to be here, an attempt to re-litigate substantially, issues long since settled. That view would seem to be correct, at least to the extent that it raises issues which could be construed as a "collateral attack" on previous decisions of this court. In this regard, I accept the submission of Mrs. Minott-Phillips that this action is frivolous and vexatious and an abuse of the process of the Court at least

in relation to three of the defendants. I also accept that on the facts as found by me, the plea of res judicata may well be available, but even if it is not, it is correct to say that the case raises issues which could have been raised in previous suits. As suggested by counsel for the plaintiffs, it seems to me that there is here, some attempt to re-litigate at least some of the issues in this case and there is an absence of any fresh evidence such as would justify the court taking a fresh look at those issues, within the meaning of the authorities. This is an abuse of process. By the same token, I do not accept the essential basis of the Plaintiffs' submissions; that the existence of live issues between the parties is a basis upon which to resist an application to strike on the basis that an action is an abuse of the process of the Court.

What are the implications for the various defendants herein for the foregoing?

THE THIRD DEFENDANT

Let me start by addressing the issue of the Third Defendant, FINSAC Limited. Absolutely no evidence has been led that that entity has ever been the holder of any security connected with any aspect of this suit. The copies of the certificates of title in evidence, evince no information which, in any way, links that entity to the plaintiffs herein, and FINSAC must accordingly be dismissed as a defendant. The remedies sought against the Third Defendant are a declaration that an assignment of a debt by NCB to the Third Defendant was "fraudulent and not a valid assignment"; injunctions restraining the said Third Defendant from exercising any powers of sale under certain mortgages. There is absolutely no evidence of any assignment to the Third Defendant nor is there any evidence that the said Third Defendant has ever been the proprietor of any mortgage in respect of any real property of the Plaintiffs or either of them. Ergo, they can have no power of sale in respect of which they should be restrained. Indeed, there is no sustainable allegation in the pleadings of the Plaintiffs which are directed to the Third Defendant in any way. The Third Defendant's application to strike out the action against it is accordingly granted, with costs against the Plaintiffs, on the basis that it is frivolous, vexatious or otherwise an abuse of the process of the Court. I might add, that had I thought it necessary, I would have been prepared to hold that the statement of claim should be dismissed as showing "no reasonable cause of action" against the Third

Defendant. Costs to the third-named Defendant against the Plaintiffs to be agreed or taxed.

In this regard, I accept the view of the White Book that not every statement of claim which does not disclose a reasonable cause of action needs be struck out for that reason. If it may be amended to save it, this can be allowed. However, where no conceivable amendment could save it, then it should be dismissed. In the case of the Third Defendant, I can see no amendment being able to ground any action against it. (***See Hubbuck v Wilkinson, [1899] 1 Q.B. 86***)

THE FOURTH DEFENDANT

With respect to the Fourth named Defendant, Refin Trust Limited, the evidence before me also indicates that the debt which was the subject of the mortgages in issue, was assigned to Jamaica Redevelopment Foundation Inc. on January 30, 2002. There is no evidence that Refin Trust Limited did anything improper in relation to the Plaintiffs or either of them. Even on the Plaintiffs' case, there is no actionable wrong committed by the Fourth named Defendant for which any action would lie. The Plaintiffs do not allege that Refin is holding any mortgage, or duplicate certificate of title for which demand has been made and refused. Nor is there any allegation of an agency relationship between Refin and its assignee. It seems to me that the action against the Fourth named Defendant must also be dismissed as disclosing no reasonable cause of action and also as being frivolous and an abuse of the process of the Court. I would also award costs of this application to the fourth-named Defendant against the Plaintiffs, to be agreed or taxed.

THE SECOND DEFENDANT

In so far as that loan by JCB is concerned, that matter has been determined subject only to the carrying out of any orders which were made by James J. at the time of that hearing. That order was the order of James J. unless that order is changed by the Court of Appeal, it seems to me that is not open to this Court to make another order in respect of the same matter. It seems clear that neither the order of Theobalds J. for the establishment of an escrow account in the joint names of the parties, nor that of James J. for an accounting

has ever been carried out. The question may be phrased in this way: "Would it be possible to make an order against the second defendant *in this case* in relation to the loan made in 1984 by the JCB"? I would respectfully suggest that this would not be possible on the pleadings before the court. This is because there is already in place an order made in respect of that defendant. Indeed, Mr. Codlin in his submissions conceded that the order of James J. had not been carried out, and this perhaps highlights his difficulty in seeking to pursue another suit against the Second Defendant. It seems to me that with respect to this defendant, the plaintiffs are clearly faced with the plea of res judicata, and the second-defendant must succeed in its application.

It is also true that there was an agreement as between NCB and JCB for JCB to hold any funds found due to the Plaintiffs on any accounting, together with interest to NCB's account. This has not been done either. But that agreement is not one to which the plaintiffs are privy. If the plaintiffs seek to pursue the accounting, or the failure of JCB to carry out the orders of the court, then they must pursue it in the suit in which the orders were made, that is, C.L. A –019 of 1991. There is no allegation at all in this suit which grounds any action either in contract or in tort against the second-named defendant. If I am correct in that, then it seems that the second defendant must be dismissed from this suit and are entitled to have it dismissed as disclosing no reasonable cause of action, and/or because it is frivolous or vexatious or an abuse of the process of the Court. The second-named Defendant is also entitled to its costs to be agreed or taxed.

THE FIRST DEFENDANT

What ought the court to decide in relation to this defendant? I think it is important to set out what I understand the position to be in both legal and practical terms. I have already dealt with the question of the second, third and fourth defendants and I have indicated that as far those defendants are concerned, the matter is stuck out as against them. The question is now whether the same remedy should be made available to the first defendant.

In a practical sense the NCB came into the history of this by virtue of its decision to lend to the plaintiff a sum of money to satisfy the judgment debt which had arisen by virtue of

the action filed by JCB in 1985 in respect of the loan made in 1984. As a practical matter therefore, NCB may be may be seen as taking over that loan. As a matter of law however, it seems to me that the *fons et origio* of NCB's involvement in this history, is *its* decision to lend the plaintiff the funds referred to in the letter of Mr. Jack Shirley, the Manager of NCB. In other words, it would not have mattered whether that loan was to satisfy the debt obligation to JCB or for some other purposes. That is where NCB's involvement commenced. It was a loan to the plaintiffs and it was secured by the securities transferred from JCB, and by virtue of which mortgages were registered in NCB's favour, first for Five Million and then up-stamped to Fifty Million Dollars some time later. It is that debt which the plaintiffs are saying is now over two hundred and fourteen million dollars. If my interpretation as set out above is correct, then it seems that both the applicant and the plaintiffs are somewhat mistaken in treating as the staring point, the loan from JCB.

Much of the statement of claim dealing with the history of the relationship between JCB and Auburn/Perrier, and the prior orders made have nothing to do with NCB at all. The plaintiff's difficulty as it emerges from what their counsel have said, is the extent of the increase of its indebtedness to a sum in excess of Two Hundred and Fourteen Million Dollars ($214,000,000.00). That would appear to be a matter which may be the subject of legitimate questioning. However, in the circumstances of this case, that may not be questioned here. The challenge is to the rights of the mortgagee to enforce its security. The law in relation to the enforcement of a mortgage security is long settled. I must accordingly dismiss the action as against the first-named Defendant as well as against the others as being frivolous or vexatious or an abuse of the process of the Court.

Costs against the Plaintiffs to be agreed or taxed.