IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV-00545 OF 2004

BETWEEN	**BARIKI INTERNATIONAL LTD.**	**1ST CLAIMANT**
A N D	**BALTEANO DUFFUS**	**2ND CLAIMANT**
A N D	**JABICO INVESTMENTS LTD.**	**3RD CLAIMANT**
A N D	**JAMAICAN TREAT LIMITED**	**DEFENDANT**

Appearances

Mr. David Henry instructed by Winsome Marsh for the Claimants

Mr. Christopher Kelman instructed by Myers, Fletchers & Gordon for the Defendant.

Heard: September 26 -28 & November 15, 2007

Williams, J.

The Background

Balteano Duffus, the 2nd claimant is a shareholder and director of Bariki International Limited and Jabico Investments Limited the 1st and 3rd claimants.

Carlton Allen is the managing director of Jamaica Treat Limited – the defendant. These two (2) gentlemen entered into contractual arrangements whereby Mr. Duffus' company Bariki International Limited was retained to provide professional financial and management consulting services by Mr. Allen's company Jamaican Treat Limited.

Mr. Allen in his witness statement/evidence-in-chief describes Jamaica Treat Limited as an agro-processing company which processes primarily canned ackees and

occasionally canned calaloo. The factory is located at Bushy Park in St. Catherine and commenced production in about mid August 2003.

He alleges that he was introduced to Mr. Duffus as someone able to provide expertise in getting the factory up and running. He was advised by Mr. Duffus that he could "obtain financing to obtain working capital for the defendant" through loans from either National Commercial Bank or the National Export-Import Bank of Jamaica also known as Ex-Im Bank.

He authorized Mr. Duffus to apply for and obtain these loans and as a result of the engagement of Mr. Duffus the written agreements were signed on January 2, 2002.

The 1st claimant contends that they provided the services pursuant to the contracts but was not paid fully as required by them.

The defendant counters that he has paid what he ought to and further denies that Bariki International Limited provided any professional, financial management consulting services as agreed or at all.

The defendant has counterclaimed saying that the 1st claimant breached the agreement for which damages should be awarded.

The 2nd and 3rd claimants contend that they loaned the defendant various sums which were immediately repayable and despite demands for the repayment, the defendant has failed to do so.

The defendant's response is that he has paid the 1st claimant sums which exceed the amount loaned and thus is entitled to a set-off resulting in his being owed the sum of $254,000.00.

The Law

The relationship between Bariki International Limited and Jamaican Treat Limited it is agreed, is by virtue of two (2) contracts dated January 2, 2002.

It may therefore prove useful at this time to restate one of the basic principles of the law of contract as succinctly put by Justice P.O. Lawrence in **Jacobs v. Batavia and General Trust 1924 1 Ch. 287 at page 295 -**

> "It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly, it has been held that .....parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties".

As the law developed there have been cases in which extrinsic evidence has been held admissible. In one instance while the rule is said to prevent one party from relying on extrinsic evidence as to express terms of the contract, however, where the contract is silent on matters on which a term is usually implied, parol evidence may be given to support or rebut the usual implication.

In this instant case, the defendant urges that to give efficacy to these contracts, terms need to be implied. The case of **The Moorcock [1886-90] All ER** at page 530 is relied on in support of this, and indeed the case is regarded as the leading authority on implied terms.

A restatement of parts the headnote proves useful:-

> "An implied warrant, as distinguished from an express contract or express warranty is founded on the presumed intention of the parties and upon reason. It is the implication which the law draws from what must obviously have been the intention of the parties, an implication which the law draws with the object of giving such efficacy to the transaction as both parties must have intended it should have and preventing such a failure of consideration as cannot have been within the contemplation of either of the parties. The reasonable implication which the law draws must differ according to the circumstances of the various transactions, and in business transactions what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties, not to impose on one side all the perils of the transaction or to emancipate one side from all the burdens, but to make each party promise in law as much as it must have been in the contemplation of both parties he should be responsible for....."

It is generally accepted that in a contract of employment the employee impliedly undertakes that he is reasonably skilled, that he will faithfully serve his employer and not act contrary to his employer's interest, and will use reasonable care and skill in the performance of his duties.

Application of the law to the facts found.

There were two contracts – one dealt primarily with the issue of the sourcing of funds and the other the engaging of the services of the 1st claimant to perform consulting services. It is useful to note that only the latter spoke to a specific time the contract would last.

The first claim by Bariki International arises out of the contract dealing with the sourcing of funds – referred to as the "short form" contract. There is no dispute that funds were sourced in total a loan of $21.8 million from Ex-im bank and a grant of US $50,000.00 from Cariforum Agribusiness Research and Trading Fund [CARTF].

The clause now in contention deals with the matter of payment for services rendered. The clause states:-

> "In consideration for services rendered, client agrees to pay consultant a service fee of 3% of the gross loan. Under the terms of such an agreement client will pay consultant 25% of the total fee in advance of the commencement of the consulting services. The remaining 75% if the fees shall be deemed earned and payable at the time and delivery and acceptance of the loan commitment".

The defendant's argument is that this clause is ambiguous and requires the implication of a term to provide the necessary business efficacy and reasonableness to the transaction. Further it is urged this clause should be construed contra proferentem such that it is to be construed against the party whose favour it was made.

The argument of the 1st claimant is of course that the terms are quite clear and unambiguous. The fee was 3% of the gross loan – this fee was deemed to be earned and payable at the time and delivery and acceptance of the loan commitment.

The defendant urged that the clause should be interpreted so that the fee would be 3% of the loan amount actually received.

The problem arose because only $7 million of the loan committed was actually disbursed. The defendant was unable to service the loan due to the fact that no production commenced at the defendant's factory. He defaulted on the loan and ultimately could not come up with requisite security requirement, and the commitment letter was withdrawn. Mr. Allen for the defendant argues that Mr. Duffus should have been in a position to recognize that the defendant would have been unable to meet the collateral requirements stipulated.

As to the Cariforum Agribusiness Research and Trading Fund [CARTF] agreement, the parties agree that the monies obtained was a grant and not a loan.

Mr. Duffus under cross-examination acknowledges the short-form contract related to loans and not grants.

In his witness statement/evidence-in-chief he said it was agreed between the parties that the claimant would be paid 3% of the funding secured including grants. In his evidence under cross-examination he said that rather than going and drafting up a separate contract for the grant, the spirit of the contract of 2002 [re loans] would be relied on for the grant. Mr. Allen points to the fact that the involvement of BARIKI with this project as service provider was completely separate from his earlier involvement meaning the payment structure as outlined in the short-form contract is not applicable. A separate

agreement, he argued, covered the arrangements pursuant to the Cariforum Agribusiness Research and Trading Fund [CARTF] grant.

Ultimately the parties are bound by the terms of the contract they signed and in this case where the terms, to my mind are indeed clear, they will have to honour those terms.

In relation to the 2nd contract governing the total consultancy – referred to as the long form contract - the 1st claimant urges that they fulfilled their obligations and should be paid accordingly. The defendant counters that the services paid for were never received. He points to the fact that ultimately, no production commenced while he was engaging Mr. Duffus' services.

He agreed that Mr. Duffus wrote to the bank requesting leniency; and also in consultation with him, sought independent legal advice and representations were made from a law firm in relation to the security required for the Ex-Im loan.

There is no dispute that there was equipment bought, with Mr. Duffus's assistance although there is a dispute as to what was actually bought and paid for.

The issue as to the construction of a sanitary facility has one consensus between the two sides – it would have had to be done to conform with certain requirements in order to get certification. Mr. Duffus denies recommending the construction and the evidence of Mr. Allen in this area was confusing such that it cannot be said with certainty what Mr. Duffus is supposed to have recommended.

It is clear that Mr. Allen was anxious to get his business into production. However, it is also clear that Mr. Duffus saw his role as one of raising finances for his client and putting it in a position to re-commence operations. He viewed all items of

expenditure he approved, necessary for the factory to be placed in a condition to facilitate re-commencement of production and operation.

The defendant challenges the care and skill utilized by Mr. Duffus in the exercise of his duty. It is urged that there must be an implied term in the 2nd contract that the first claimant perform its contractual obligations with reasonable care and skill. Suggestions were made to Mr. Duffus that he failed to prove good management technique and that he failed to meet the standard of a reasonable, competent, financial and management consultant.

Mr. Allen's evidence under cross-examination is replete with references to instructions he got from his financial advisor Mr. Duffus. He attested to the fact that he did not write cheques himself as they were written by Mr. Duffus who explained their purpose and asked for his signature. Indeed Mr. Duffus in his evidence said he would have to approve all expenditures. Although Mr. Allen at one point blamed the expenditure on the construction of the sanitary facilities on advice given by Mr. Duffus, he sought to recant from this position at another point. Mr. Duffus was not challenged as to the fact that he visited the factory as was necessary.

Mr. Allen cannot say he did not receive any service from Mr. Duffus – it is the quality he is taking issue with. His displeasure and dissatisfaction seems to stem from the fact the factory was not up and running over the time BARIKI worked for him.

Mr. Duffus answered questions and responded to suggestions as to his ability with confidence bordering on arrogance and condescension. His qualifications were well established. Any specific allegations as to his professional incompetence had not been so pleaded, no evidence could be introduced for first time during the trial. Further there was

no evidence generally as to the standard against which Mr. Duffus's performance could be measured other than the evidence of Mr. Duffus himself. However, the fact that the defendant's business did not take off in the way he wished cannot, without more, be conclusive proof of Mr. Duffus's professional incompetence.

It is noteworthy that although it was suggested to Mr. Duffus that he stopped providing service for Mr. Allen beyond September, the evidence of Mr. Allen did not support this suggestion. The invoice submitted for payment was for $150,000 X 9 – nine months.

The other sums now being sought to be recovered are related to loans Mr. Duffus said he made in order to assist the defendant but did not necessarily come from BARIKI. These sums were loaned in his personal capacity and through his other company JABISCO.

In his evidence Mr. Allen does not deny monies were loaned. In his witness statement/evidence-in-chief he admitted that "$120,000.00, $10,000.00, $170,000.00 and $7500.00 were at various times advanced by the 1st or 2nd claimant."

Under cross-examination he agreed that the 3rd defendant paid $10,000.00 to the law firm Livingston, Alexander and Levy on behalf of Jamaican Treat. He also agreed that they paid $7500.00 to Jamaica Agro Processors Association.

This is against the background that in his defence he denied knowledge of the 3rd claimant.

He did not challenge the fact that the 3rd claimant advanced US $7360.00 on his behalf in relation to the Cariforum Agribusiness Research and Trading Fund [CARTF] grant. He accepts his company did not put in any money whatsoever to facilitate the

obtaining of the grant. He however acknowledges that under the agreement BARIKI would contribute to the arrangement on the basis of discounted fees. His ultimate failure to access the entire grant is blamed on Mr. Duffus's delay in responding to some pertinent query and in the submitting of timely reports.

It is the contention of the defendant that he had paid Mr. Duffus monies sufficient to settle any payments owed. In his evidence-in-chief he speaks of paying $801,500.00 which included what he had estimated to be the sum due for the sourcing of the loan. Under cross-examination he agreed that there is proof of $550,000.00 being paid which had already been credited.

In his submissions, Mr. Kelman made reference to $654,000.00 being paid, this being the figure given in the letter accounting for expenditures by Mr. Duffus as management/financial consultant fees.

As stated above Mr. Allen agreed that only $550,000.00 had in fact been credited.

Mr. Allen's evidence as to the amount he is supposed to have paid is not clear. Mr. Duffus' evidence is far more cogent and finds support in the letters exchanged concerning these payments.

Conclusion

These parties must be bound by the contracts they entered. I am satisfied that BARIKI International Limited fulfilled its obligations under these agreements and accordingly should be paid according to the terms of the said agreements.

The commission on the Ex-Im loan became earned and payable at the time and delivery and acceptance of the loan commitment was 3% of the gross loan.

As regards the Cariforum Agribusiness Research and Trading Fund [CARTF] grant, on the evidence and giving effect to the terms of the contract, the amount claimed which would be a commission on a grant is not covered by the terms and is not recoverable.

The amounts acknowledged by the defendant as having been loaned or advanced to him remains unpaid and is not subject to any counterclaim or set off.

The nature of these contracts and the relationship between the parties is such that the interest rate must be a commercial interest rate and the authority of **British Caribbean Insurance Company v. Delbert Perrier SCCA 114/94** is instructive.

I find that 24% is appropriate; being the average commercial bank lending rate for the relevant period.

There is therefore judgment for the claimants on the claim and counter-claim as follows:-

1st claimant in the amount of $1,366,475.00 with interest at 24% from October 22, 2003 to today's date and $170,000.00 from October 27, 2003 also to today's date.

2nd claimant in the amount of $120,000.00 with interest at 24% from October 27, 2003 to today's date.

3rd claimant in the amount of US $7360.00 and J $17,500.00 with interest 24% from October 27, 2003 to today's date.

Cost to be taxed if not agreed.

The Mareva Injunction that was granted on the 19th of May, 2004 is hereby discharged.