JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 114/05

MOTION NO. 8/09

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.

BETWEEN	**CENTURY NATIONAL BANK LIMITED**	**1ST APPLICANT**
	CENTURY NATIONAL MERCHANT BANK AND TRUST LIMITED	**2ND APPLICANT**
	JAMAICA REDEVELOPMENT FOUNDATION INC.	**3RD APPLICANT**
AND	**WINDSOR COMMERCIAL LAND CO. LTD.**	**1ST RESPONDENT**
	SELVYN SMITH	**2ND RESPONDENT**
	WINSTON G. CRICHTON	**3RD RESPONDENT**

Mrs. Sandra Minott-Phillips and Ms. Ky-Ann Lee, instructed by Myers Fletcher and Gordon for the applicants

Ms. Carol Davis and Mrs. Charmaine Smith-Bonia for the respondents

September 28; October 2 and 9, 2009

PANTON, P.

1. On June 5, 2009, this Court ordered as follows in this matter:

> "Appeal allowed. A new trial is hereby ordered. Such trial is to be conducted before a different

> judge. The appellants must have the costs of this appeal as well as the costs in the Supreme Court."

There seems to be a misunderstanding in relation to the order for costs in the Supreme Court, and that will be clarified shortly by the panel that made the order.

2. The applicants herein, recognizing that the matter is interlocutory in nature, are seeking leave to appeal to Her Majesty in Council on the basis that there are questions which by reason of their "great general or public importance or otherwise" ought to be submitted to Her Majesty in Council.

3. In written and oral submissions, the applicants say that the matters are procedural in nature but the interpretation of the procedural rules is such that it would have a draconian effect. They say further that the ordering of a new trial in an old case "amounts to a special circumstance which would render guidance from the Privy Council useful to the local Courts".

4. The suit involves the recovery of sums loaned by the applicants to the first respondent and guaranteed by the second and third respondents. The suit was filed in 1983, that is, twenty-six years ago. The amended defence was filed in 1996, that is, thirteen years after the filing of the suit. In 1997, a consent order was made for an account to be taken by a named firm of accountants, and leave was granted then to file a reply and defence to counter-claim.

5. The report of the accountants was issued in 2000, and a case management conference held on September 24, 2003, where orders were made for disclosure, inspection, and exchange of witness statements, among other things. The pre-trial review was set for March 18, 2004, and the trial fixed for May 3 to 6, 2004. At the said case management conference, a further order was made for the parties to submit by December 22, 2003, "all records, receipts, cheques, vouchers, statements or other documents which they consider relevant to the taking of accounts not previously submitted to the said Accountants". One would have thought that this submission of documents would have been done already, in keeping with the 1997 order, considering that the report was made three years after the order. At the pre-trial review on March 18, 2004, an order was made for the exchange of witness statements by March 31, 2004.

6. At the conclusion of the trial, Campbell, J. held that the report of the accountants was binding on the parties. He regarded the consent order as an attempt by the parties to resolve their dispute; that they had both performed the directive of the consent order as regards payment for taking the accounts, and that the terms of the agreement could not be regarded as unfair or unreasonable. The defendants, he said, were estopped from denying that the balance due from them to the claimants was $11,599,344.00.

7. This Court, in giving its judgment after hearing the appeal, pointed to the fact that the accountants had reported that "critical information requested of

both parties had not been supplied" and that they were "unable to make a reasonable determination of the amounts due by the defendants to the plaintiffs or the plaintiffs to the defendants and whether the amount of $11,599,344.00 calculated from the information provided is a true and fair indebtedness of the defendants to the plaintiffs".

8. In the light of that evidence, and the fact that the learned judge had not adjudicated on the other evidence in the case, this Court ordered a new trial before a different judge. Given the obvious dragging of feet by both sides to this dispute in the Court below (the amended defence being filed 13 years after the filing of the suit), it is passing strange that the applicants are now seeking leave to find out whether the age of the case amounts to "a special circumstance".

9. The "important" questions raised by the applicants now are:

> "a. Whether a trial court ought properly to be faulted in holding parties to litigation to a method agreed upon between them and sanctioned by the court (in the form of a consent order) directed to resolving at trial an issue in their contractual dispute.
> b. Can a court trying a civil case properly be faulted for proceeding in accordance with an express concession made by litigants at trial through their counsel?"

10. In respect of "a" (above), it is a question of fact whether there was a proper consent. The learned judge held that there was, but this Court in its judgment has pointed to aspects of the accountants' report and other evidence

in the case as well as the conduct of the parties, matters to which the learned judge had not turned his mind. The trial process was deficient in this regard. So far as "b", the concession, was concerned, it was not entirely clear what was the extent or the effect of the so-called "concession". It related only to one witness, and one aspect of the case. There were other points for adjudication.

11. In the circumstances, there does not appear to be any matter of great general or public importance that requires guidance from Her Majesty in Council. The matter requires a determination that only a trial in the Supreme Court can bring about. For these reasons, we refused the application and ordered that the costs of this application are to be the respondents' herein, such costs to be agreed or taxed.

12. It is regrettable that this matter has been on the Court's list for so many years. The evidence suggests that the blame for this is to be laid squarely at the feet of the parties. Looking at the dates of filing of the pleadings, the impression is given that neither side was anxious for a trial. The rules of civil practice then allowed for such indulgence. The new Civil Procedure Rules 2002 do not. The new Rules have shown that civil matters need not be protracted for decades. So, hopefully, there will be no case such as this in the future.