JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 113/97

THE HON. MR. JUSTICE FORTE, J. A.
THE Hon. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	DEXTER CHIN	DEFENDANT/ APPELLANT
	MONEY TRADERS & INVESTMENT LTD.	PLAINTIFF/ RESPONDENT

David Henry for the Appellant instructed by
Donovan Jackson of Nunes Schofield DeLeon and Co.

Dennis Goffe Q.C. and Sandra Minott-Phillips for the
Respondent instructed by Myers Fletcher and Gordon

16,17,19,20, 23, and 24th February, and March 24, 1998

FORTE, J.A.

I have read in draft the reasons given by Downer, J.A. for allowing this appeal. I agree with them and have nothing useful to add.

DOWNER, JA

To appreciate the reasons for the prolonged hearings in this appeal it is necessary to advert in the first instance to the order made by Ellis J, on 19th June, 1997. At that time a Mareva injunction was granted to restrain the appellant Dexter Chin from removing his assets from the jurisdiction. The other relevant proceedings were before McIntosh J, on 8th October, 1997. The learned judge without hearing from

Dexter Chin awarded summary judgment to the respondent Money Traders and Investment Ltd. ("MTI") in the sum of $56,271,915 with interest from May 19,1997 to October 8, 1997. Dexter Chin was aggrieved by that order and has appealed for redress.

The proceedings before Ellis J.

Dexter Chin is an astute margin gatherer. He operates a company called Camway Trading Ltd. and it seems the transactions which gave rise to this dispute arose in part because Camway's cheques which were used to settle accounts were not honoured. Chin purchased U.S. Dollars from (MTI) for his clients who imported from the U.S.A.

Here is how one of Chin's Attorneys-at-Law describes the system:

> "7. That I am advised and verily believe that the transactions surrounding this matter involved the Plaintiff issuing US Dollar cheques to customers of Camway Trading Limited who were purchasing US Dollars, Camway Trading Limited would thereafter pay the Plaintiff the value of these cheques at agreed rates of exchange from its Trafalgar Commercial Bank Account (TCB). These cheques would be paid for by cheques drawn by Camway Trading Limited from its account after Camway Trading Limited has been paid by the recipient or their agent an amount to cover the Jamaica Dollar equivalent which would include a margin for profit."

M.T.I. was a company licensed by the Securities Commission. There is no information in the affidavit evidence as to the scope of their licence. We were told that as a result of the events in this case their licence was suspended.

The relevance of this is that in the usual course it is the Bank of Jamaica which licenses trading in foreign currency and the taking of deposits. In an application for summary judgment one would have anticipated that this information would have been

forthcoming from Ewart Gilzean. He is a chartered accountant and stated in his affidavit:

> "2. I am the Managing Director of Money Traders & Investment Limited (hereinafter referred to as 'MTI') and am duly authorized to make this affidavit on its behalf. The matters deposed to herein are within my personal knowledge or are in accordance with information I have received in the course of my duties. Insofar as the matters deposed to are within my personal knowledge they are true and insofar as they are in accordance with information I have received they are true to the best of my knowledge, information and belief.
>
> 3. In the course of MTI's business which includes foreign currency trading MTI entered into a business relationship with Dexter Chin over the last 18 months to 2 years in which it sold to him United States of America (US) dollars."

Suffice it to say that as a result of dealings between Dexter Chin, Camway Trading Ltd. and MTI the allegations by Gilzean were that Chin was indebted to MTI in excess of $36 million. It was in those circumstances that MTI obtained a Mareva injunction against Chin and he was ordered by the court below to file an Affidavit Of Assets. Further he was debarred from removing those assets from Jamaica. When the order was made Chin had repaired to Miami and MTI then sought summary judgment for the debt they claimed Chin owed.

The proceedings before McIntosh, J.

The order appealed from so far as material reads:

> **" IT IS THIS DAY ADJUDGED THAT THE PLAINTIFF RECOVER AGAINST THE DEFENDANT:**
>
> 1. The sum of $56,271,915 with interest at 75% from May 19, 1997 to October 8, 1997.
>
> 2. Costs to be agreed or taxed (Certificate for counsel granted)."

At this hearing Chin sought an extension of time to file a Defence, but this was refused by the learned judge. That order made in part reads as follows:

> "... IT IS HEREBY ORDERED THAT:-
>
> 1. The Court will not hear the Summons for Extension of Time to file Defence.
>
> 2. Leave to Appeal granted."

With regard to this unprecedented order the learned judge gave the following brief reasons:

> " All Affidavits filed on behalf of the Defendant in opposition to the Plaintiffs application for Summary Judgment will not be received in evidence and submissions by the Counsel for the Defendant will not be heard on behalf of the Defendant in opposition to the Summons for Summary Judgment."

For the record it should be noted that an Affidavit of Assets was filed on October 15, seven days after the orders made by the learned judge on October 8,1997. It was stated thus in the written outline submissions on behalf of Dexter Chin:

> 7" In the instant case even if a contempt could have been established and it is contended there is no contempt, it would clearly have been highly technical in nature and was not, as was the case in Hadkinson's case relevant to the applications being made. The Defendant/Appellant ought properly to have permitted an opportunity to remove the impediment, which was done, having regard to the courts ruling, by the filing of an Affidavit of Assets on the 15th October, 1997 within 7 days of the hearing on the 8th October, 1997. The Learned Judge in Chambers failed to consider other options which could have removed any perceived impediment including ordering the examination of the Defendant/Appellant or the filing of the said Affidavit within a limited time."

It must be noted that it does not appear that Chin was offered the opportunity at the hearing to explain why the Affidavit of Assets was not filed.

The right to be heard is one of the fundamental procedures in our legal system and it is enshrined in Section 20 (2) of our Constitution. Mr. Goffe for MTI however sought to limit that right in circumstances where Chin had not obeyed the order of the court to file an Affidavit of Assets. **Hadkinson v. Hadkinson** [1952] 2 All ER 567 was relied on for that bold submission. The principle in that case however, reconciles the right to be heard with the obligation to obey the order of the court. Here is how Romer, L.J. approached the matter. At page 569:

> " It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. **Lord Cottenham, L.C.**, said in **Chuck v. Cremer** (1846) (1 Coop. temp. Cott. 342):
>
> > 'A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it . . . It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.'
>
> Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in

> contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt. It is the second of these consequences which is of immediate relevance to this appeal."

Be it noted that the appellant mother in **Hadkinson** had taken her child out of the jurisdiction in disobedience of a court order. So the learned Lord Justice did the reconciliation thus at p. 572-573.

> " I understand that, in fact, the child has already been, or that it will have been within a few days, returned within the jurisdiction, and, if so, the mother will then be able to have this appeal heard and determined on its merits. In these circumstances it will not, perhaps, be necessary to make a formal order now on the preliminary objection, but such an order, if made, would have been to the following effect:
>
> 'It appearing that the appellant is in continuing contempt of court by retaining the infant outside the jurisdiction of the court. Let the appeal stand over generally with liberty to the appellant to apply to restore after the infant has been returned within the jurisdiction.' "

Then Denning, L.J. as he then was, reconciles the two principles thus at p.575:

> " In this regard I would like to refer to what **Sir George Jessell**, MR., said (46 L.J.Ch. 383) in a similar connection in **Re Clements & Costa Rica Republic v. Erlanger** (1877) 46 L.J. Ch. 375.
>
> > 'I have myself had on many occasions to consider this jurisdiction, and I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.'
>
> Applying this principle, I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his

> disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed. "

Turning to the instant case McIntosh, J. did not attempt to give any weight to Chin's right to be heard. Had he done so he would have given Chin time in which to file the Affidavit of Assets and hear the matter after it was filed or he could have heard the matter on condition that counsel give an undertaking that the Affidavit of Assets would be filed within seven days. Consequently, the orders of the court refusing Chin a hearing and the further order acceding to MTI's prayer for summary judgment must be set aside.

The proceedings before this court on the issue of the summary judgment

Having regard to the analysis above it will be seen that the issue of whether Chin had a triable issue was never adjudicated on in the court below. We could have remitted the matter to be heard on this issue or we could determine it and by so doing save the parties expense and shorten the proceedings in the interest of justice. We decided to follow the latter course.

Mr. David Henry in his excellent submissions for Chin cited two authorities which elucidated the principles which ought to guide our discretions in this matter. In **Jones v Stone** [1894] A.C. 122 at p. 124 Lord Halsbury said:

> " The Chief Justice of the Supreme Court, who dissented from the order of the Court giving the plaintiff liberty to sign judgment, remarked in his judgment that the case seemed to him to be 'eminently one which required the fullest investigation before a jury, as the conduct of the plaintiff in his dealings with the defendant

> in connection with the land in question was of a most suspicious character.' Whether that is so or not, it is abundantly clear to their Lordships that there are very serious questions of fact in debate which never ought to have been determined in a summary manner under Order XIV. The proceeding established by that order is a peculiar proceeding intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay."

The other authority is **Jacobs v Booth's Distillery Company Vol. LXXXV The Law Times** p. 262. There Lord James of Hereford said:

> " My Lords: I only wish to make it very clear that in giving judgment in accordance with that which has been proposed by the Lord Chancellor, there is no expression of opinion upon the merits of this case. The view which I think ought to be taken of Order XIV is that the tribunal to which the application is made should simply determine, 'Is there a triable issue to go before a jury or a court?' It is not for that tribunal to enter into the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order, 'You have no defence. You could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact.' We are not expressing any opinion whatever upon the merits of the case."

Perhaps it is pertinent to cite Section 79 of the Civil Procedure Code on which M.T.I. relies. It reads:

> " **Judgment on writ specially indorsed under S.14, notwithstanding appearance.* # 1**
>
> 79. (1) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the

> statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

It is now appropriate to advert to MTI's Statement of Claim. It reads:

> "1. The Plaintiff is a company duly incorporated in the island of Jamaica.
>
> 2. The Defendant is a businessman."

In view of the application for summary judgment it is surprising that the Statement of Claim did not disclose whether the plaintiff was authorised to carry out the transaction which gave rise to the dispute.

Then the Statement of Claim continues in part thus:

> 3. "On or about May 14, 1997, the Defendant, for value received, executed a promissory note in favour of the Plaintiff in the principal sum of J$63,359,165 (hereinafter called "the Principal Sum").
>
> 4. Under the terms of the promissory note:
>
> a) interest on the Principal Sum, if paid when due, is payable at a fixed rate of 75% per annum, is to be calculated on the basis of the actual number of days elapsed divided by 365, and shall be deemed to accrue as from May 6, 1997.
>
> b) The Principal sum is payable by the Defendant to the Plaintiff on demand.
>
> 5. The Plaintiff has demanded repayment of the Principal Sum from the Defendant.
>
> 6. The Defendant has repaid part of the Principal Sum leaving a balance due of $56,271,915 as at May 19, 1997"

The proposed Defence and Counter Claim in response to this section reads:

1. "No admission is made as regards paragraph 1 of the Statement of Claim.

2. Paragraph 2 of the Statement of Claim is admitted.

3. As regards paragraph 3 of the Statement of Claim the Defendant avers that there was no consideration to support the alleged Promissory Note and same is unenforceable against the Defendant..

4. In the premises the alleged Promissory Note is unenforceable void and of no legal effect.

5. In the further premises the Defendant will aver that any payment alleged in respect of the said Promissory Note was not a payment on behalf of the Defendant but a payment to partially discharge the legal obligation of Camway Trading Limited."

Serious issues of law are raised on these pleadings concerning the status of the plaintiff, the legality of the promissory note as a negotiable instrument as to whether the plaintiff can sue Chin on it, and who ought to be the proper defendants. Chin claims that the proper defendant to the action is Camway Trading Ltd. So much so that M.T.I. cited **Amalgamated Investment & Property Co. Ltd.**(in liquidation) **vs Texas Commerce International Bank Ltd** [1981] 3 All E.R. 577 to bolster its claim that Chin was estopped from taking such a stance. But such a stance requires pleadings and assessment of evidence at a trial. It is not appropriate to claim for summary judgment in such circumstances.

Then to demonstrate that there were crucial issues of fact to be determined at a trial the rival versions as to the transaction on April 30th will be cited. Ewart Gilzean for M.T.I. states:

> "8 Mr. Dexter Chin drew, on his account with TCB, two cheques payable to MTI totalling J$34,000,000 and, on the morning of April 30, 1997, instructed MTI to place those cheques on deposit for one day.

9. On the afternoon of April 30, 1997, after MTI had lodged the two cheques given to it by Mr. Chin, he returned to MTI's office and requested a refund of the J$34,000,000 which he had deposited that morning. He asked that the money be paid to him in three separate cheques and that was done.

10. In the events which happened TCB did not honour the two cheques for J$34,000,000 drawn on Mr. Dexter Chin's account with them in favour of MTI, a fact which MTI did not discover until after its own account had been cleared of the three cheques totalling $34,000,000 which it had drawn based on Mr. Chin's deposit of the same amount."

Here is how Dexter Chin explains this curious transaction:

"10. In relation to the matters raised at paragraphs 9 and 10 of Gilzean's Affidavit, that transaction is not a foreign exchange transaction and occurred in the following manner. Camway Trading Limited was requested by the Plaintiff/Respondent to advance the sum of $34,000,000.00 for a short period for the Plaintiff/Respondent to meet certain financial obligations as at the 30th April, 1997 which was the end of one month. Based on the request, two cheques totalling $34,000,000.00 payable to the Plaintiff/respondent were provided to the Plaintiff/Respondent from Camway Trading Limited's TCB account and these cheques were lodged to the Plaintiff/Respondent's account. The arrangement was that the Plaintiff/Respondent would immediately provide a refund the following day by way of three cheques which would be lodged to Camway Trading Limited's account to clear the amount for which they had drawn a cheque the previous day. Unfortunately Camway Trading Limited's cheques which were first provided to the Plaintiff/Respondent were dishonoured as a result of the fact that cheques which had been lodged to its account were dishonoured or had been held awaiting clearance while the Plaintiff's/Respondent's cheques which had previously been lodged to Camway Trading Limited's account were cleared. This transaction arose from an arrangement between Camway Trading Limited and the Plaintiff/Respondent in the first place and did not involve the sale of foreign exchange. I did not receive any personal value or consideration in this transaction. The original cheques drawn to the Plaintiff/Respondent were from Camway Trading Limited's account and not as is

> being suggested my own account. They are exhibited among other Camway Trading Limited cheques as exhibit "DC5" to my 15th September, 1997 Affidavit."

One of the puzzling features of this case was that the three cheques delivered to Dexter Chin were not exhibited. When a query was raised Mr. Goffe brought them to court. On the other hand the two cheques allegedly delivered by Chin from Camway's Account which were not honoured do not appear to have been exhibited. There is a cheque for $4,203,748.000.00 dated April 30, 1997, from Camway Trading Ltd.but the endorsement by Island Victoria Bank suggests that it was honoured. Again the question may be posed as to why M.T.I. returned the deposit in cheques made out to Chin, since the deposit was made by Chin with two cheques drawn by Camway Ltd. albeit signed by Chin. It must be enphasised that this court has not seen the cheques returned to M.T.I. or the relevant cheques dated April 30th which were not honoured by Island Victoria Bank. There can be no doubt that important issues of law and fact of which this is an example must be resolved at a trial in open court.

The amendments sought before this court

Because of the effective response anticipated, Mr. Goffe for MTI who relied on a Respondent's notice in this court sought and was granted an amendment to the Statement of Claim. So far as their prayer to the Statement of Claim goes it reads:

> " AND THE PLAINTIFF CLAIMS:
>
> 1. The sum of $56,271,915;
>
> 2. Interest on the said sum at the rate of 75% per annum from May 19, 1997 to the date of payment or judgment."

Then the amendment pursuant to a Notice of Motion dated 13th February, 1997, reads:

> "3. And further in the alternative the plaintiff claims, A

> debt of $56,271,915 a debt together with interest at the rate of 75% per annum from May 19, 1997, to October 8, 1997."

This amendment was sought because one of the Attorneys-at-Law for Chin Mr. Donovan Jackson in a supplemental affidavit on behalf of Chin stated:

> "3 I am also advised by the Defendant and verily believe that insofar as he is aware the Promissory Note relied on by the Plaintiff a true copy of which is exhibited to the Affidavit of Ewart Gilzean sworn to on the 19th day of June as exhibit "EG3" was endorsed to National Commercial Bank Jamaica Limited (NCB) and would as far as he is aware have been delivered to National Commercial Bank Limited in the course of various meetings with NCB referred to in the said Affidavit of Ewart Gilzean confirming the Plaintiff's obligations to NCB."

For clarity it should be noted that MTI's Bank for the transactions with Camway Ltd. was Island Victoria Bank.

Additionally, ground 4 (iii) of the Notice and Grounds of Appeal reads:

> "4(iii) The Promissory Note has on the face of it been endorsed to National Commercial Bank Jamaica Limited by the Plaintiff/Respondent and in the absence of any explanation the Plaintiff/Respondent would have no right to sue under the said Promissory Note."

In fact during the course of his submission Mr. Goffe, Q.C. stated that he was no longer relying on the Promissory Note in these proceedings. Mr. Henry for Chin responded that the Promissory Note was in evidence and it was arguable in law on the facts that the promissory note was a settlement for the alleged debt. It was against that background that Mr. Goffe, Q.C. sought another amendment to add National Commercial Bank (NCB) as a plaintiff and announced that he represented N.C.B.

Ian Watson in an affidavit on behalf of N.C.B. stated:

> "5. Since that time Mr. Graham (The chairman of MTI) has kept me informed of the progress of the case and I am aware that the Court of Appeal is presently re-hearing

> the Summons for Summary Judgment filed by the Plaintiff. NCB fully expects to receive from Myers, Fletcher & Gordon the net proceeds of any judgment which is given in favour of the Plaintiff, i.e. after deduction of Myers, Fletcher & Gordon's fees."

The Notice of Motion reads in part:

> "... on an application by Counsel for the Respondent **FOR AN ORDER THAT:**
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> 1. National Commercial Bank Jamaica Limited be added as the Second Plaintiff in the suit (CL 1997/M-184) subject of this Appeal on the ground that it is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the matter pursuant to sections 100 & 101 of the Judicature (Civil Procedure Code) Act;
>
> 2. The Plaintiffs be allowed to make such consequential changes to its Writ of Summons and Statement of Claim as are set out in the proposed Amended Writ of Summons and Statement of Claim exhibited to the affidavit of Sandra Minott-Phillips filed herein."

Mr. Henry aptly responded that when he demonstrated that he had an arguable case on MTI's claim Mr. Goffe presented a new case. There was merit in that submission. It was not a question as to whether this court was empowered to join N.C.B. but whether it was in the interest of justice to do so at this stage. For it would be appropriate for N.C.B. to ask that MTI be a defendant also. Here was a reputable commercial bank taking a promissory note from a client allegedly indebted to it. As to whether the Bank holds the promissory note in due course or has endorsed it and delivered to some one else, could not be determined on the evidence in this case. Significantly, there was no attempt by the Bank to produce the promissory note at this application. So we refused to entertain the amendment sought.

Conclusion

In addition to the triable issues adverted to above, there were other issues raised concerning the application of the Moneylending Act, the rate of interest charged, the status of the accounts between the two parties, the application of the Stamp Duty Act and the relevant sections of the Bills of Exchange Act dealing with promissory notes. The Appellant Chin made out a convincing case that he should have his day in court. So at the end of the hearing we set aside the Orders in the Court below and gave him leave to file a defence within fourteen days, with liberty for either side to apply in the Court below for any necessary amendments. Further we ordered costs to the appellant Chin, both here and below.

Harrison, J.A.

I have read the reasons given by Downer, J.A. and I agree with them.