IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM. NO. 2007/HCV 1803

BETWEEN	**DEVELOPMENT OPTIONS LTD.**	**CLAIMANT**
A N D	**GENERAL BUSINESS SERVICES LTD.**	**DEFENDANT**

Mr. Hugh Wilson instructed by Wilson Franklyn Barnes for the Claimant.

Mr. Leon Green and Althea Anderson instructed by Green and Moodie for the Defendant.

Contract-loan agreement-whether relationship one of debtor and creditor or principal and agent-deemed intention of the parties-lost documents-whether contract enforceable-doctrine of frustration-unconscionable contract.

Heard: 7 and 8th June, 2010 and June 10, 2011

EDWARDS J (Ag.)

BACKGROUND

1. This is a claim for outstanding balances of principal and interest due and owing on a loan contract. The claimant, Development Options Limited (DO Limited), is a limited liability company incorporated under the Companies Act of Jamaica. It operated and managed the Government of Jamaica's (GOJ) Microfinance Programme (Micro FIN). As such, it acted as wholesale agent for the GOJ for the purpose of lending funds to Micro Finance Organizations (MFOs). The GOJ provided the claimant with funds and permitted it to lend such funds to the MFOs. The MFO's would, in turn, on-lend the said funds to small business operators, herein-after referred to as sub-borrowers.
2. One aspect of the claimant's duty to the GOJ was to identify suitable personnel, agencies or companies to qualify as MFOs. The idea was to develope an island-wide network of organizations and individuals with the technical capability to grant micro-loans to small business operators.

3. The defendant, General Business Services (GBS), applied to participate in this programme. At that time it carried on the business of providing support to small and medium sized enterprises by assisting them with company formation, registration, business plans and general accounting and tax compliance services.
4. In furtherance of its mandate, the claimant approved and designated the defendant as an MFO. They subsequently entered into a formal written agreement, called the Participation Agreement (PA), where DO Limited agreed to lend and GBS agreed to borrow funds for the expressed purpose of on-lending to sub-borrowers.
5. The claimant now avers that between April 27, 2000 and January 3, 2002, pursuant to this agreement, it lent the defendant a total sum of $19,614,769.00. The PA was executed and monies were forwarded to the defendant and on-lent to sub-borrowers. The defendant on-lent the funds to the sub-borrowers at an interest rate higher than that at which it acquired the funds.
6. The defendant begun repayments to the claimant; a total of $11,706,425.79 inclusive of interest was said to have been repaid. Subsequently, the repayments stopped. The present claim is for an outstanding balance of $9,977,786. 86, with interest thereon at 11% per annum. There is also a claim for a balance of $32,645.76 on a loan sum of $69,769.00 with interest at 23% per annum.
7. The defendant is denying liability on the basis that:

    a. It was not a borrower from the claimant but was merely its agent for on-lending to the sub-borrowers.
    b. The debt due is owed by the sub-borrowers and not GBS.
    c. The claimant varied the terms of the contract by removing debt collections from its control.
    d. Natural disasters affected the ability of sub-borrowers to repay and service the loans.

e. The interest rate of 11% was onerous and affected its ability to repay the loans.

8. The defendant also claimed by way of counter claim an account of:

   i. Amounts approved and disbursed to small business operators.
   ii. Interest which has accrued on such amounts.
   iii. Principal amounts paid by small business operators.
   iv. Interest paid.
   v. Whether under the agreement the defendant is entitled to receive any payment from the claimant and if so how much.

ISSUES

9. The following issues fall to be determined;

   1. Whether the agreement between the claimant DO Limited and the defendant GBS was a Loan Contract or an Agency Contract.
   2. If it was a Loan Contract was the contract subsequently frustrated? If not;
   3. Is there any other relief available to the defendant?

10. There was an issue raised by the defendant for the first time at the trial. It did not form part of the pleadings. This was by way of a submission complaining that the bringing of this claim was an abuse of process, as there was a previous claim filed by the claimant, regarding the same substantive issues, which had not yet been prosecuted.

11. The defendant's attorney, Mr. Green, submitted that the present claim was an abuse of process as the first claim was the same as the second. Citing **Allen v Alfred McAlPhine and Sons Ltd.** (1968) 2 QB 229 and **Paul Collins v Air Jamaica Ltd**. Suit No. CL1995/C203, he argued that the identical claim subsisted and was still pending. However, the claimant's attorney, Mr. Wilson, indicated that there was indeed a previous action filed prior to the new Civil

Procedure Rules in 2002; but the claimant having failed to apply for a Case Management Conference under the new rules, the claim was automatically struck out. In support of his argument he cited **Norman McNaughty et al v Clifton Wright** SCCA No. 20/2005 delivered May 25, 2005. That case looked at the meaning and application of Rule 73.3 (7). Based on that, he said, there was no abuse of process in re-filing the claim within the relevant limitation period.

12. Ms. Joan Jonas, the sole witness for the claimant, gave evidence that the first claim had been abandoned; the submission is that it was automatically struck out under the CPR 2002. In either event nothing would prevent the claimant from filing a new claim within the relevant limitation period. There was no abuse of process and I will say nothing further on this aspect of the submissions.

13. The resolution of the substantive issues in this case must be found in the true construction of the agreement signed by the parties in this claim. Both sides agreed to certain correspondence between them as well as a loan report, all of which were admitted into evidence. Also admitted into evidence were the PA, the application by GBS to be an MFO and what is said to be an on-lend agreement.

THE PARTICIPATION AGREEMENT

14. The contractual terms and conditions governing the agreement between the claimant and the defendant are to be found in the PA. It also refers to a Promissory Note and a Letter of Commitment as forming an integral part of the agreement. Only the PA was presented to the court. The other two documents, according to the claimant, could not be located. The defendant denied knowledge of their existence.

15. The claim is that this was a loan contract. The defendant countered that it was a contract of agency at most and in the event that it was, indeed, a loan contract, it had been frustrated. It is trite that calling an agreement a loan contract does not necessarily make it so, if the intrinsic terms and conditions under which it was granted showed it to be some other type of contract.

Therefore, the terms of the agreement between the parties which governed their activities, are relevant to defining its status. So before embarking on the construction of the agreement, it might be convenient to set out, what I consider to be, the relevant provisions.

Terms of the Agreement

16. The agreement was made on March 27, 2000 between GBS Limited and DO Limited. In the preamble to the said agreement GBS is referred to as the "Borrower". Paragraph 1 of the recital is very instructive. It provides;

> **WHEREAS**:
>
> The "BORROWER" is desirous of applying to DO Limited for funds to on-lend to micro entrepreneurs (hereinafter called SUB-BORROWERS) under a micro-enterprise revolving credit programme known as Micro FIN. The purpose of Micro Fin is to provide micro entrepreneurs with increased access to credit.

17. In paragraph 2, DO Limited agreed to provide such funds to the borrower for the above stated purpose, under the terms and conditions appearing in the agreement. The agreement purports to have been made pursuant to or in contemplation of other agreements. The two which are relevant to these proceedings are a Letter of Commitment and a Promissory Note to be executed by the borrower.

18. It may be useful to set out the main terms contained in the body of the agreement. These were as follows:

> NOW THIS AGREEMENT WITNESSETH as follows:
>
> 1. Upon application by the Borrower, DO Limited will review and without any obligation on its part so to do approve financing to the Borrower for on-lending to a SUB-BORROWER to such extent and on such terms and conditions as DO Limited may from time to time stipulate (hereinafter referred to as the "On-Lending Agreement").
> 2. Funds approved by DO Limited shall be disbursed to and repaid in accordance with the terms and conditions stipulated in this Participation Agreement and the Letter of Commitment as accepted by the Borrower. The terms of the Letter of Commitment shall constitute an integral part of the Agreement.
> 3. Funds disbursed shall bear interest at the rate prevailing at the date of approval (hereinafter called "the effective Rate") unless otherwise varied by DO Limited.

4. DO Limited reserves the right to vary the rate of interest payable from time to time by notice in writing.

19. Clause 5 of the Agreement carried certain covenants. I will only set out those that I consider to be relevant to these proceedings.

5. The Borrower **HEREBY COVENANTS** with DO Limited:

(i) That under the laws of Jamaica with powers to execute and deliver this Participation Agreement, the Letter of Commitment and Promissory Note to which it expressed to be a party and to exercise its rights and perform obligations hereunder and all corporate or other action required, if applicable to authorize the execution of this Participation Agreement by it and the performance by it of its obligations hereunder has been duly taken:

(ii) This Participation Agreement contains legally, valid binding and enforceable obligations of DO Limited.
(iii)
(iv)
(vi)
(vii) To pay to DO Limited at 2 Holborn Road, Kingston 5 or such other place as DO Limited may direct, all principal sums disbursed in pursuance of this Agreement and so long as such principal sums or any part thereof shall remain unpaid to pay to DO Limited interest on the balance of the said principal sums as hereinbefore provided.
(viii) That if any payment of interest or any part thereof shall remain unpaid after the date covenanted for such payment, the borrower shall pay interest on such unpaid interest at a rate of two and one-half percent (2 ½ %) per annum above the Effective Rate or such other rate of interest as DO Limited may from time to time notify in writing.
(ix)
(x)
(xi)
(xii) That there shall be no recourse to DO Limited for any losses as a result of default by the sub-borrowers in respect of the terms and conditions of the loan agreements between the Borrower and its SUB-BORROWERS.
(xiii)
(xiv)
(xv) It will stipulate in the On-lending Agreement between itself and the Sub-Borrower that DO Limited, the Contracting Authority and/or its agents shall have the right to visit and inspect the Sub-Borrower's projects.
(Xvi) It will permit DO Limited and/or a duly authorize (sic) representative of the Contracting Authority access to the premises of

> the Borrower for the purpose of installing computer hardware, software and providing technical assistance in accordance with the relevant provisions set out in Appendix C and will facilitate them in so doing.

20. In clause 6 sub-clause (ii), GBS undertook and or warranted to sign and deliver a Promissory Note to DO Limited, representing its obligation as Borrower to repay loans advanced with interest. In clause 7, the securities for the loan were expressed in the agreement to be the PA under seal, the loan application which was subject to the approval of DOL (sic) (DO Limited), the Promissory Note executed by the Borrower under seal, the Letter of Commitment to be executed by the Borrower and DOL (DO Limited), under seal.
21. By clause 9, the Borrower agreed that DO Limited had the right to suspend access to funds and to require it, forthwith, to repay to DO Limited the full amount of funds outstanding at any time, upon the occurrence of certain listed events. Events which could result in suspension included, inter alia; default in payments by the Borrower, any breach of performance or observance of the agreement, where the Borrower's loan applications contained any false or untrue statements or information of a material nature or if the Borrower enters into a compromise agreement with its creditors.
22. Clause10 provides as follows:

> "The Borrower shall, (notwithstanding any enquiry made by or information furnished by the DO Limited in respect of the credit of the SUB-BORROWER) remain always liable as a principal debtor to DO Limited for the due repayment of any monies granted by DO Limited to the Borrower pursuant to this PARTICIPATION AGREEMENT".

23. That is the general outline of the PA under which the parties operated. The relevant facts leading to the claim are not in dispute. At the close of the evidence both sides made oral and written submissions complete with authorities to which I have given due regard.

THE ARGUMENTS

24. Mr. Wilson, on behalf of the claimant, submitted that the PA is the principal legal instrument, the terms of which the court must construe according to its commercial purpose and the dealings of the parties. He argued that the agreement envisaged two separate legal contractual relationships. The first was the contractual relationship between the claimant and the defendant and the second, was the contractual relationship between the defendant and the sub-borrowers.

25. He pointed out that, a contract for a loan of money is a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise, expressed or implied, to repay that sum on demand or at a fixed or determined future time or by installment, with or without interest. He noted that such a contract carried consideration; it is a loan of monies in consideration of a promise to repay on demand. He cited the case of **Coghlan and another v SH Locke (Australia) Ltd.** (1988) LRC 492. In that case, which concerned a contract of guarantee, it was held that the actual advance of money in response to a request made contemporaneously with or prior to the document of guarantee, could constitute a good consideration for the guarantors promise to pay.

26. Mr. Green, on behalf of the defendant, submitted that there was no consideration in this contract, so that it could not be a loan contract. He cited **Dunlop Pneumatic Tyre Company Limited** v **Selfridge & Company Ltd.** (1915) AC 847. In that case, the House of Lords reiterated certain fundamental principles in the English law of contract. Firstly, that only a person who is a party to a contract can sue on it. Secondly, if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request. Thirdly, that a principal not named in the contract might sue on it if the promisee really contracted as his agent. But in order to entitle him to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it; per Viscount Haldane

at p 853. But counsel for the defendant failed to address the fact that the PA was made under seal, in any event.

27. Counsel further argued that there was no certainty of terms; furthermore, the Letter of Commitment and Promissory Note were not tendered to the court. He pointed out that the first duty of the court in a case for breach of contract was to identify the terms of the contract. It was the duty of the party seeking to enforce the contract to place all the relevant terms before the court. He noted that the PA made reference to several documents as containing terms which affect the agreement between the parties but these documents were not tendered to the court.

28. He also pointed out that apart from the Letter of Commitment and Promissory Note, neither of which were presented to the Court, reference was also made to several other documents such as; the ON-Lending Agreement; the Extended MEP Agreement; the Extension and Novation Agreement; the Permission to Lend Agreement; The Micro FIN Credit Programme and Deed of Assignment. The court, he said, is not in a position to determine all the terms of the contract in the absence of these documents.

29. He also argued that the terms of the PA were vague and imprecise. Citing the case of **Hillas & Co v Arcos** (1932) 38 COM Cas 23 (HL)**,** he prayed in aid the principle that if the terms of an agreement are so vague and indefinite that it could not be ascertained with reasonable certainty what the intentions of the parties were, there is no contract enforceable at law.

30. As examples of the vagueness of the agreement he referred the court to passages in the agreement starting firstly with paragraph 3 of the recital which stated that "this Participation Agreement is made pursuant to or contemplated in the following agreements". It then goes on to refer to several other agreements. He also referred the court to clause 5, sub- clause (i) of the PA where the borrower covenanted with DO Limited that:

> Under the laws of Jamaica with powers to execute and Commitment and the Promissory Note to which it expressed to be a party and to exercise its rights and perform its obligations hereunder and all corporate or other action deliver this Participation Agreement the Letter

of required, if applicable, to authorize the execution of this Participation Agreement by it and the Performance by it of its obligations hereunder has been duly taken.

31. That clause, he said, was incomprehensible. I am not sure I agree with counsel for the defendant on this point. The language is indeed archaic and obscure but its meaning is not. In plain terms the borrower covenants to sign and deliver the PA, the Letter of Commitment and the Promissory Note which it has agreed to be a party to, in the manner required by the Laws of Jamaica. It also covenants to exercise its rights and perform its obligations under the agreement and carry out any other action which would authorize the execution of the PA and ensure it is able, under the Laws of Jamaica, to perform its obligations under it.

32. Mr. Wilson however, argued that the principles to be applied to the construction of the PA, were those summarized in the case of **Don King Promotions v Warren** (1998) 2 ADR 608. He asked the court to look at the commercial intent of the agreement and not what the defendant thought it meant. In **Don King Promotions,** Lightman J said;

> **"The essential task of construction is to deduce, if this is possible, from the two agreements construed against their commercial background, the commercial purpose which the businessmen and entities who are parties to them must as a matter of business commonsense have intended to achieve by entering into them; and if such intent can fairly be deduced and if this is necessary to effectuate that intent, the court may require what may appear to be errors or inadequacies in choice of language to yield to that intention and be understood as saying what (in light of that purpose) that language must reasonably be understood to have been intended to mean."**

33. The case of **Summit Investment Inc v British Steel Corporation** (1987) Vol. 1 Lloyds Rep. 230 was also cited by him. This was a Charter Party and the facts are irrelevant but the principle of construction outlined in the judgment is helpful. In **Summit Investment Inc**., the judgment was given by Sir John Donaldson M.R. who stated that;

> **"In seeking to divine the deemed intentions of the parties- their actual intentions are happily irrelevant, since, were it otherwise, many, and perhaps most, disputes upon points of construction would be resolved by holding that the parties were not ad idem- the Court has to place itself in thought in the same factual matrix as that in which the parties were and, so positioned, is justified in assuming that both parties intended by their words to further the commercial purpose of the charter party and, in particular, the specific aspect of that purpose dealt with by the words under consideration.."**

34. Mr. Wilson also cited the case of **Investors Compensation Scheme Ltd. v West Bromwich Building Society** (1998) 1 WLR 896 HL, where the head notes reads;

> **"That in construing contractual documents the aim was to find the meaning which the document would convey to a reasonable person having all the background knowledge reasonable available to the parties, including anything which would have affected the way a reasonable man would have understood it, but excluding previous negotiations and declarations of subjective intent; that the meaning which a document would convey to a reasonable man was what the parties using its words against the relevant background would reasonably have been supposed to mean and included the possibility of ambiguity and even misuse of words or syntax; that the court was not obliged to ascribe to the parties an intention which plainly they could not have had…"**

35. The attorney suggested that one of the questions which arise in this case is what meaning the PA would convey to a reasonable person having all the background knowledge available to the parties at the time of the contract, excluding their previous negotiations and evidence of subjective intent or subjective state of mind. He argued that the court should consider what the factual matrix available to the parties was at the time the defendant borrowed the funds from the claimant. He argued that against the background of the factual matrix in this case, the only sensible construction that could be placed on the PA is that it was a loan contract. That contract, he said, embodied the terms and conditions by which the claimant agreed to lend and the defendant agreed to borrow funds which it would on-lend to sub-borrowers. He argued

that the PA created a debtor creditor relationship between the parties. Such a contract, he said, is characterized by an obligation to repay.

36. He further submitted that for the defendant to argue that the sub-borrowers were the ones who owed the claimant was to do violence to the language of the agreement. He argued that such an interpretation was disingenuous, dishonest, deceptive and misleading. There was no agreement, express or implied, between the sub-borrowers and the claimant nor was there any privity of contract between them. He pointed out that when the sub-borrowers defaulted on their payment the defendant's response was to submit a repayment schedule to the claimant, this he argued was an acknowledgment of its liability.

Ascertaining the Intentions of the Parties

37. I bear these submissions and the applicable principles of law in mind and accept that contracts between commercial men must be construed in light of their underlying commercial purpose and business commonsense.

38. I will now examine the relevant paragraphs in the PA. Implicit in the submissions on both sides is the recognition that the preamble, the recital and clauses 5, 9 and 10 are the most vital to the agreement. Both the preamble and the recital refer to the defendant as the borrower. Clause 10 holds the borrower always liable, as the principal debtor, to DO Limited for the repayment of monies granted under the agreement. Clause 5 denies the borrower any recourse to DO Limited in case of default by the sub-borrowers and clause 9 holds the borrower liable to suspension and repayment of all outstanding sums.

39. In **Luxor (Eastbourne), Ltd v Cooper** (1941) AC at p.130 Lord Wright in referring to the construction of contracts said:

> **"The decision as to each (i.e. the construction of an agreement) must depend on the consideration of the parties contract read in the light of the material circumstances of the parties in view of which the contract is made."**

40. This approach commends itself to me. Looking at the recital to the agreement and its various clauses and sub-clauses, it is not difficult to consider the material circumstances of the parties in view of which the agreement was made. In that regard therefore, in construing the agreement, the more useful approach, in my view, is to place oneself in the position of an MFO in entering into this agreement. The purpose of the agreement was to indicate to the MFO its obligations, liabilities and rights under the agreement. The language used is not altogether technical. It speaks of a borrower and of approval of financing. It speaks of on-lending agreements and sub-borrowers. The MFO would read the preamble which indicates the parties, that is, GBS hereinafter called the borrower of the one part and DO Limited of the other part.
41. The MFO would then notice that clause 1 of the recital informs it of the purpose of the funds. It states that the borrower is desirous of applying for funds to on-lend to sub-borrowers under the Micro Finn programme. It would notice that clause 2 indicates that there are terms and conditions attached to the provision of the funds. It would see that the agreement speaks to other agreements and it would be well within its rights to believe that those are not relevant to it, as it is not a party to any of them.
42. It would then go to the body of the agreement. Again, the MFO would notice that clause 1 speaks to an application by the borrower, approval of the financing by DO Limited to the borrower for on-lending to sub-borrowers on terms and conditions stipulated by DO Limited; those terms and conditions of the loans to sub-borrowers being the on-lending agreement. The MFO would also notice that funds are to be disbursed to it at the prevailing interest rate with the right reserved to vary the rate.
43. It would clearly see the stipulations as to how the on-lend agreement is to be operated and the default provisions. Most importantly of all, it would become clear that under clause 5 (xii), if having loaned the money to the sub-borrowers they default on the repayment, then there would be no recourse to DO Limited for the loss.

44. Our MFO would see that it has certain obligations to undertake under the agreement and that certain security would have to be provided before the funds are distributed. It would take note that under clause 9, the loan was subject to suspension and recall of the full amount of the funds, if certain events occurred. Clause 10 would then surely give our MFO pause. Under that clause, the borrower, which our MFO would understand refers to it, by virtue of the preamble and recital, is made liable as the principal debtor. It would certainly query the meaning of those words and conclude that it could only mean that he is liable to repay the loan as a debt to DO Limited. There could be no other meaning.

45. In the end our MFO would conclude that this was an agreement where it would be required to on-lend funds to sub-borrowers with money financed by DO Limited, which it was liable to repay at an agreed interest rate.

46. Is there any particular reason why this court should not give this PA the same meaning as this hypothetical MFO; that is, is there any reason why the court should depart from the plain meaning of the PA?

47. Lord Hoffman, in **Investors Compensation Scheme Ltd v West Bromwich B.S.W**., expounded on the modern approach to the construction of contractual documents. These were summarized at page 912 as follows;

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way

we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

48. In my view, to borrow the words of Mr. Wilson, the PA envisaged several different contracts between several different parties. These were; the agreement between the parties now before the court; that between the borrower and sub-borrowers; the agreement between the claimant and the GOJ and the agreement between the claimant and Eagle Merchant Bank. We need not concern ourselves here with the latter two.

49. Applying the principles outlined in the cases, I see no reason to depart from the plain language of the agreement. I find no ambiguity in the wording of this agreement. The PA is exactly what it says it is, that is, an agreement by the borrower to participate in a loan scheme. It has to be construed according to its underlying purpose, which was to be an umbrella agreement governing the loan financing between the claimant and the defendant.

50. Mr. Wilson is correct as to the definition of the nature of a loan contract. A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise expressed

or implied to repay that sum on demand or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest: Vide **Chitty On Contracts, 26th Edition, Volume 2. p. 3574**.

51. The transaction takes effect according to the intention of the parties no matter how it is classified. The burden of proof is on the defendant who receives the money to say it was not a loan. See **Chitty on Contracts Volume 1, pp 71-75.**

52. A loan of money generally creates debt, so if this was found to be a loan contract between the parties then the defendant would be liable to the extent of any outstanding balances on the loan together with interest thereon. However, the PA does not refer to any loan sum, it does not indicate the commencement date of the loan and it makes no reference to the period of the loan or how the loan is to be repaid. The reasonable man on reading the PA would realize that on signing it, he would be agreeing to participate in a loan scheme on terms and conditions contained therein and terms and conditions contained in other documents referred therein. The PA itself refers to four other documents which are integral to the agreement. This takes me now to two of those documents which are not before the court.

The Absence of the Promissory Note

53. The sole witness for the claimant made reference to a Letter of Commitment signed by Bent Kristensen, on behalf of the defendant, in which it agreed to the PA and committed to making repayments on a quarterly basis at the agreed interest rate. Reference was also made to a Promissory Note purportedly signed by the said Bent Kristensen on behalf of the defendant, agreeing to pay a particular amount over a certain period of time, with interest. Neither document was presented to the court, as it was claimed that they could not be located. If these documents indeed existed they would have formed part of the security for the loan to the defendant, according to the terms of the PA.

54. Mr. kristensen's evidence was that along with the PA, he signed other documents but he could not recall what those were. He claimed not to recall a

commitment letter. He also did not recall signing a document agreeing to make repayments quarterly. He denied the existence of a promissory note.

55. The task of the court is to discover the deemed intention of the parties both from the terms of the agreement, the course of dealing between the parties and the circumstances which surround and follow it. It is sometimes difficult to determine whether the language used in a particular document purporting to be an agreement between parties, should be interpreted to mean that the parties have come to a fully complete agreement. Sometimes the circumstances may raise a question as to whether the preparation of a further document is a condition precedent to the creation of a contract or whether it is incidental to the performance of an already binding obligation between the parties. This question was considered in **Hillas & CO Ltd v Arcos Ltd**., which head note reads:

> Hillas & Co had agreed to buy from Arcos Ltd. 22,000 standards of softwood goods of fair specification over the season 1930. The written agreement contained an option to buy 100,000 standards in 1931, but without particulars as to the kind or size of timber or the manner of shipment. No difficulties arose on the original purchase for 1930, but, when the buyers sought to exercise the option for 1931, the sellers took the point that the failure to define these various particulars showed that the clause was not intended to bind either party, but merely to provide a basis for future agreement.

56. It was held by the House of Lords that, in interpreting the language used in light of the course of dealings between the parties, it showed a sufficient intention to be bound. In this case, counsel for the defendant is of the view that the agreement cannot be construed in the absence of the Promissory Note and is therefore, unenforceable. Whilst the logic o this argument is sound, in light of applicable legal principles, it cannot be sustained.

57. A claimant may rely on two or more document to prove its case but the rule is that one document should specifically refer to the other, otherwise the agreement is unenforceable. In the instant case the PA specifically refers to a Promissory Note and Letter of Commitment. The court is mindful that the repayment of a loan may be secured by the giving of security in various forms

one of which is the deposit of a bill of exchange or promissory note. A bill of exchange or promissory note may itself be prima facie evidence of a loan having been made.

58. The Promissory Note is the makers' unconditional promise in writing to pay a certain sum on a fixed date. It is a negotiable instrument and is transferable by simple delivery. It can be made payable to bearer on demand and is as good as cash. It is different from an IOU which is only evidence of the existence of a debt. The Promissory Note may itself be an independent agreement or form part of a complete agreement to be found in one or more documents.

59. The problem facing the claimant in this case is that the two documents referred to in the PA as integral to the agreement, are not before the court. It has sought to give parol evidence of their existence and purported content. The defendant has denied their existence. Is the court unable to ascertain the intention of the parties because of the absence of these documents referred to in the PA and incorporated therein? The answer to that lies in the principles of and the Courts' current approach to the best evidence rule.

60. Previously, the general rule was that the contents of a document must be proved by primary evidence in the form of the document itself, an attested copy or on an admission by the party against whom the contents are to be proved. If the contents are admitted it may not be necessary to produce it. Oral testimony cannot generally prove the content of a document as reliably as the document itself and will be inadmissible. Oral evidence is generally only admissible as to the existence of the document itself but not as to its contents. However, the contents of lost documents can be proved by secondary evidence, including oral evidence, in certain circumstances. Such oral evidence can be given by a person who has seen the document and can swear to its content. But before such evidence may be received, satisfactory evidence must be given of its previous existence, its loss or destruction and that a diligent and exhaustive search was made to locate it. See **Read v Price** (1909) 2 K.B. 724 CA. and **Barber v Rowe** (1948) 2 All ER 1050.

61. The general rule was revisited more recently by the English Court of Appeal in the case of **Masquerade Music Limited v Springsteen (Bruce)** Case 15 CAEW, delivered April 10, 2001. In that case, which dealt with a lost assignment of music rights, the Court of Appeal placed a gloss on the best evidence rule, most particularly on its application to lost documents. The court took into consideration the cases cited above, as well as **R v Wayte** (1983) 76 Cr. App. R. 110, judgment of Bedlam J. In **Wayte,** it was the opinion of the court that the best evidence rule should now be confined to cases where it could be shown that the party had the original and could produce it but did not. The approach taken by Bedlam J was to ask whether the document existed and whether it could be produced without difficulty. If it could not be produced then secondary evidence including parole evidence was admissible in proof thereof.

62. The Court of Appeal in **Springsteen** went even further and noted that there was a parallel development in the law between the gradual erosion of the hearsay rule in civil proceedings and its eventual abolition effected by the Civil Evidence Act 1995 and the decline of the best evidence rule. Lord Parker, in his judgment, held that the best evidence rule, in its earlier formulation was not an absolute rule but depended on what the urgency and justice of the case warranted. He expressed that the more modern approach is to trust judges to give proper weight to evidence which is not the best evidence. By that approach, secondary evidence would carry no weight as to content unless the person seeking to rely on it accounted for it to the satisfaction of the court. The question of the admissibility of secondary evidence as to contents of a lost document is now a question of weighing all the evidence; the standard of proof being on a balance of probability. According to Lord Justice Parker, the best evidence rule as it was previously applied, in England at least, has finally expired. In my view, that approach to the old common law rule, notwithstanding the absence of any parallel development in the Evidence Act in this jurisdiction, is highly persuasive.

63. In this case there was evidence given of the existence of the documents and the fact that they could no longer be located after a reasonable and exhaustive search. The evidence is that the promissory note contained a promise by the defendant to repay the loan over a certain period of time, with interest. This is in keeping with the covenant in clause 6 (ii) of the agreement.

64. The PA was signed by the defendant and that agreement refers to the Promissory Note. I do not agree that the failure to produce it in court must result in the failure of the claimant's case. In my view it was incidental to the performance of an otherwise binding contract.

65. It is the evidence of Bent Kristensen that he signed other documents other than the PA but he is unable to say what those were. The signing of the Promissory Note was expressly made part of the agreement. The agreement was executed and the parties conducted themselves accordingly, that is, the defendant submitted applications for loans and the claimant began to disburse funds accordingly. The defendant on-lent those funds to sub-borrowers who repaid on a weekly basis. The defendant, thereafter, undisputedly, had begun repayment to the claimant on a quarterly basis, with interest.

66. The oral evidence is that the Promissory Note required to be signed by the PA would simply be the "borrower's" promise to repay the loan granted under the PA at certain times. In this case it was not itself prima facie evidence of the loan but was meant to be a security for the loan. I find on a balance of probabilities that the promissory note did exist and was executed by the defendant and that it contained a promise by the defendant to repay monies advanced to it, over a certain period of time. The undisputed evidence is that the repayments were in actuality being made on a quarterly basis with interest.

The Absence of the Letter of Commitment

67. I also hold that the absence of the letter of commitment does not affect the enforceability of the agreement for the reasons given above. Often the parties to a contract will require and rely on a letter of commitment by one or both of

them to abide by the terms or some term of the contract. However, the letter of commitment does not in and of itself amount to a contract. It merely indicates one of two things; firstly that the parties are prepared to do business with each other or secondly; that the parties or one of them are committed in good faith to acting in accordance with the concluded contract entered into by the parties. I accept the evidence of the claimant and find on a balance of probabilities that the defendant did in fact sign a letter of commitment, committing to repay the loan on a quarterly basis with interest at the agreed rate.

THE ISSUE OF AGENCY

68. Mr. Green submitted that despite its designation as a "Borrower" the defendant was a mere conduit to facilitate the loans. He said that the relationship created by the PA between the claimant and the defendant was more akin to principal and agent rather than one of lender and borrower. He also argued that the defendant had no independent control, discretionary or otherwise, over the disbursement of the funds given to it by the claimant and he was to receive no compensation for performing his obligations. It would therefore, he said, be unreasonable and without legal basis to require him to pay.

69. In denying that the PA could be construed as an agency agreement, Mr. Wilson argued that there was no express term for the funds to be lent on behalf of the claimant nor were there any words from which the inference could be drawn that this was to be so. He also submitted that it was irrelevant and immaterial that the defendant may have taken the view that it was acting as an agent of the claimant company. He noted that whereas an agency relationship arose either by express language or by implication, if the parties had intended to create an agency relationship it would have been expressly stipulated in the agreement. He cautioned that it was not the subjective intention of the defendant that was material in determining the parties' agreement but their real and expressed intention as may be deduced from the document.

70. The relationship of principal and agent is created by an express or implied agreement, which may, but need not be contractual; by the ratification of the agent's acts by the principal; and by operation of law in the case of agency by necessity and certain other situations. See **Chitty On Contract Volume 1, 31-019**. An agency may be created by formal words but where it is not so created, the court must look to the substance rather than the form of the agreement. Therefore, a retailer who describes himself as an agent for a manufacturer is in fact more likely to be a purchaser from the manufacturer for resale to the customer: **Chitty para. 31-020**. There may be an agency relationship even where the parties by their agreement say it is not so.

71. I agree with the submissions of Mr. Wilson on this issue. Nowhere in the agreement is the word agency used. Neither are any of the usual words generally associated with a relationship of agency. In the absence of these expressed words in the contract can the court apply a purposive interpretation of the contract in order to find a contract of agency?

72. In looking at the plain meaning of the words such an interpretation does not seem to be available. There is no ambiguity in the wording of the agreement which could result in a choice between the two possible interpretations. I have searched the clauses in the PA and its terms and conditions but can find no clause or sub-clause which could lend itself to an inference that the parties had in fact contracted as principal and agent rather than as lender and borrower.

73. It is true that the claimant reserved to itself certain regulatory acts under the PA. It reviewed and approved the financing to the Borrower for on-lending to a sub-borrower. So that, according to the evidence, after the sub-borrowers are identified and approved by the defendant, the applications are sent to the claimant, who would then review and determine whether to approve the financing or not. The wording of Clause 1 is very precise. It does not state that the claimant would approve the loan to the sub-borrower; instead it states "approve financing to the borrower for on-lending to a sub-borrower". In my view this is a clear indication that each was meant to be a separate

transaction. Another regulatory framework is to be found in Clause 5 Sub-clause (xi) which states as one of the covenants:

> "To co-operate with DO Limited in the development and implementation of systems and procedures which DO limited deems necessary for the efficient management of the Borrower's operation;"

74. In clause 5 sub-clause (xv) the borrower covenanted to stipulate in the On-lending agreement that DO Limited, the Contracting Authority and/or its agents have the right to visit and inspect the sub-borrowers projects. Sub-clause (xvi) also permits DO Limited or the Contracting Authority access to the Borrowers premises in order to install computer hardware, software and the provision of technical assistance.
75. As part of the agreement, the claimant reserved, the right, effectively, to stipulate to the defendant what provisions were to be included in the on-lending agreement: See Clause 6 sub-clause (iv). Can any of these provisions be relied on as an incident of agency? My answer to that is a definitive no. These clauses, in my view, simply provide the necessary regulatory framework to ensure that the claimant would be able to recover the funds loaned by them.
76. What is the legal and commercial consequence of one interpretation over the other? If the defendant was an agent of the claimant, then the implication of the submission by its attorney is that, the outstanding balances owed by the sub-borrowers would be owed directly to the claimant and not to the defendant. Consequently, the defendant would not owe the claimant one red cent. On the other hand, if this is a straightforward loan agreement, the outstanding balances from the sub-borrowers would be owed directly to the defendant. It would in turn be indebted to the claimant for the principal sum on the outstanding balances loaned to it, plus interest.
77. The conclusion I have come to therefore, is that there are no words in the agreement which could possibly lead to an interpretation that this was a contract of agency. There is also nothing from which the court could imply such a relationship. There is no difficulty in finding that the PA was an

agreement to participate in a loan scheme. I also have no difficulty in finding on the evidence on both sides that pursuant to the PA the defendant GBS did borrow funds from the claimant DO Limited.

78. I hold the view that looking at the words used in describing the terms and obligations under the agreement, it may reasonably lead to the conclusion that this was a master contract. A series of dealings for loans was to take place under this master contract, with DO Limited as the lender and GBS as the borrower. It showed an agreement for the claimant DO Limited to lend and the defendant GBS to Borrower monies with certain stipulations. I find that the defendant did execute a Promissory Note and Letter of Commitment as part of the securitization of the loan. The loan applications submitted by the defendant formed an integral part of the agreement.

79. I have therefore concluded that the defendant entered into an agreement to participate in a loan scheme as borrower. The clear language of the PA so stipulates. I also find that this contract is enforceable.

THE EVIDENCE

80. If there is any doubt remaining as to the effect of this agreement entered into by the parties, such doubts may be rendered nugatory by a quick examination of the evidence given by the parties as to their course of dealing following the implementation of the agreement. Although such evidence cannot be used to contradict the clear meaning of the agreement, or to put it another way, it cannot be used to interpret the contract retrospectively, it can be used to show clear evidence as to the intention of the parties, their course of dealing after it and assist in interpreting its terms.

81. Ms. Joan Jonas, Credit Manager, gave evidence on behalf of the claimant. She had been working at the company since 2002. She was responsible for the management of funds on behalf of the company. The evidence for the defendant was given by Bent Jacob Kristensen, who is the Managing Director and Consultant to GBS.

82. I accept as a fact from the evidence of both sides that the funds were partly a grant from the Government of the Netherlands and partly from the GOJ. The

funds were earmarked for micro businesses and would constitute a revolving loan scheme. The defendant company had been earmarked as a MFO to on-lend these funds to small businesses. This is not disputed.

83. The evidence was that the defendant had been incorporated since 1986 and offered various commercial services to small, medium and micro businesses in Portland and surrounding areas. The company is still in existence. I accept therefore, that the PA was a commercial contract entered into by commercial minded entities.

84. Following an application by the defendant company to participate in the programme, Bent Kristensen, as its representative, was trained by the claimant company and the defendant was thereafter accredited as an MFO. Mr. Kristensen informed the court that, as a result of the accreditation, the defendant was allowed to lend money, which was provided by the claimant, to small businesses in Portland. I find this to be an important admission.

85. Ms. Jonas noted that the funds were provided to the defendant for the sole purpose of on-lending to sub-borrowers. She said that based on the structure of the programme, the claimant would provide the loan to the defendant at an agreed interest rate and it would in turn lend to borrowers at a higher interest rate. She also agreed that the defendant could charge a further 1% interest rate or more over and above the rate charged to it. I accept that the defendant was advised to charge a higher interest rate to the sub-borrowers.

86. The evidence, which is undisputed, is that the interest rate charged to the defendant was 11% on the reducing balance. The defendant could then charge sub-borrowers any percentage higher. The defendant's profit would be the difference between the interest rate charged to him and that which it charged to the sub-borrowers. The PA did not provide for compensation to the Borrower.

87. In cross-examination, Ms. Jonas said that the defendant would identify the sub-borrowers, approve the loan to them and then submit the loan application to the claimant for review and disbursement of the required amount. Based on the loan applications, the claimant would approve the financing of the loan.

She denied that the claimant had to approve all the sub-borrowers identified by the defendant before the loan was disbursed.

88. The evidence of Mr. Kristensen, on the other hand, is that after signing the agreement, the defendant began submitting applications from sub-borrowers; the claimant disbursed cheques to the defendant's account only after it approved and accepted the loan application of the sub-borrowers submitted to it through and by the defendant. His further evidence was that the claimant issued cheques in the name of the defendant which was then lodged into a designated account. This account was at the CIBC bank (as it then was), Port Antonio branch. The defendant would then draw cheques to each sub-borrower in the amount approved by the claimant. He said all loans made to sub-borrowers were dealt with in this manner.

89. However, the evidence of Ms. Jonas was that the claimant had no direct contact with sub-borrowers; neither did it have any direct documentation from the sub-borrowers. She said the defendant presented a list along with accompanying documentation detailing information about each sub-borrower already approved by it.

90. It is to be recalled that clause 1 of the PA provided for the review of the applications presented by the Borrower before approval is given for the financing for on-lending. In clause 6 sub-clause (i) the Borrower warranted and /or undertook to submit written loan applications to DO Limited together with any other information or documentation. The application and documentation should be such as to satisfy DO Limited that the sub-borrower is entitled to the loan amount.

91. In his evidence, Mr. Kristensen made certain admissions. He admitted that the defendant borrowed $19,545,000.00 from the claimant to on-lend to sub-borrowers. He agreed that cheques from the claimant were paid to the defendant by lodging the sums to its account. It was from this account that cheques were disbursed to the sub-borrowers.

92. On the vexed issue of collateral for the loans granted to sub-borrowers, Ms. Jonas' evidence was that collateral was required from them for only half the

amount of the loan. The sub-borrower's character was sufficient to secure the other half of the loan. Ms. Jonas agreed that the claimant knew there was some risk attached to this kind of character based loan; but she noted that, according to the loan agreement, the defendant was to bear the risk.

93. Clause 5, sub-clause (x) of the PA, was shown to Mr. Kristensen. It speaks to the conduct of the business of the Borrower in accordance with sound administrative, financial and credit practices. He admitted that the defendant had not secured the loans with collateral. He said the claimant was not interested in collateral. He said normally one would expect to secure a loan of $80,000.00 but that this loan scheme was exceptional. The loans were also not guaranteed. He however, insisted that the business was conducted with sound credit practices. As a matter of evidence it is not disputed that some of the funds loaned to the defendant had been repaid but the loan was in arrears. Ms. Jonas admitted that there were reports from the defendant of difficulties in collecting the arrears from the sub-borrowers.

94. Clause 7 (SECURITIES), sub-clause (v) (sic) (which should actually be (iv)) of the PA, which referred to the Letter of Commitment was shown to Mr. Kristensen but he could not recall if the rate of interest to be charged was contained in the Letter of Commitment. He maintained that no Letter of Commitment or Promissory Note was signed by him.

95. He could not recall being told that he would not receive any money under the loan agreement unless those documents were signed. He agreed he received the loans. He said he recalled signing a document to the effect that the money received was to be loaned only to sub-borrowers in Portland. He said that that was the P A. However, nowhere in the PA is this stipulation to be found.

96. He said there had been no agreement as to how often the money was to be repaid. He said repayments were only made when the claimant asked for it from the particular batch of sub-borrowers. He denied repayments were to be made quarterly. He did, however, admit that the repayments were made on a quarterly basis.

97. He told the court that he had not obtained legal advice regarding the PA. He admitted that he had read it but claimed he was not sure he understood its terms and conditions. In his witness statement he maintained that it was his understanding that the defendant would act on behalf of the claimant to identify the borrowers and collect the necessary documentation. He stated that the claimant did not make it clear that the defendant would be the borrower and that it would then on-lend to sub-borrowers. He also stated that it was not made clear to him that the defendant would be principally liable if the sub-borrowers defaulted on their payments.

98. He agreed that, according to Clause10 of the PA, the defendant remained liable to the claimant as the principal borrower. He said that although he now understood that the risk of the loan was on the defendant's shoulder, he had not understood it at the time.

99. In her witness statement, Ms. Jonas indicated that the defendant had refused to pay the amount due and owing. She said the basis for the refusal was that it was no longer a viable enterprise, as the clients were no longer repaying the loans. She went on to indicate however, that the defendant refused to collect the loan re-payments from them. She accused the defendant of mismanaging the funds which were loaned to it.

100. She referred to an audit conducted by the claimant into the financial affairs of the defendant company which revealed several serious weaknesses in the conduct of the loan scheme. Her further evidence was that at some point the claimant attempted to assist the defendant to recover monies owing to it from sub-borrowers. The evidence was that following the claimant's intervention, 144 of the total 177 clients as at March 31st 2001, responded to demand letters sent to them. Of that amount, 98 started repayments and 52 made arrangements to pay.

101. It is this intervention that the defendant complained amounts to a variation of the contract. However, it is to borne in mind that one part of the terms of the PA, was a reservation to the claimant of the right to visit and inspect the

sub-borrowers project and to provide technical support to them. This intervention is to be viewed in that light.

102. Mr. Kristensen admitted that sums were collected by the auditors and placed into the defendant's account but he could not say how much. He denied that between April and May 2001 the auditors were able to collect a sum of $912,000. He was also unaware whether in May a total of 93 clients came into the office and paid a total of $382,000. According to Ms. Jonas, notwithstanding the claimant's intervention, the defendant continued to mismanage the funds, the consequence of which was that it was unable to service the loan.

103. However, Mr. Kristensen denied that the defendant owed the claimant the sums claimed or any money at all. He asserted that the money was lent to specific persons and not to him. He said the defendant had no right to the money. He, however, agreed that the terms of the agreement referred to the defendant as the Borrower.

104. Exhibit 1f, the GBS Loan Report prepared by Ms. Jonas, was shown to Mr. kristensen. It contained ten (10) loan applications. In it he identified a Micro Fin loan application from a sub-borrower. He admitted that the credit institution named in the application form was the defendant. However, he declared that the form was generated by the claimant and not the defendant. He, however, confirmed that the application for the loan was between the defendant and the sub-borrower who was the loan applicant.

105. He agreed that the defendant submitted several loan applications to the claimant and that he was the one who approved them. He said the defendant submitted over 100 applications. He was unable to confirm or deny that there were 34 such applications submitted in batches of 10.

106. He agreed also, that the loan report showed a repayment schedule on a quarterly basis. He stated that he was expected to make the payment as per the schedule, if all went well.

107. In that same report the statement on interest charges was also shown to Mr. Kristensen. He agreed the interest payments were shown on a quarterly

basis. He admitted that the sub-borrowers made payments to the defendant on a weekly basis and that it, in turn, would make repayments to the claimant on a quarterly basis. The sub-borrowers were charged 1% per week on the outstanding balance. In his witness statement he said it was his understanding that the loans would be repaid weekly at an interest rate of 11% per annum for the claimant and an additional 1% per week interest for the defendant. He said this was at the instructions of the claimant. He denied that the instruction was to charge interest at a rate at which it could make a profit and repay the loan. He first said that it made a profit by charging 1% per week; but later said that the profit which had been projected had not materialized.

108. The evidence was that about six months after the implementation of the programme, the defendant realized that some of the sub-borrowers were defaulting on their repayments within the time period specified by the claimant for the repayments. It is important to note here that no time period is specified in the PA; so this begs the question as to where or in what document could this time period have been specified bearing in mind the defendant's denial of the existence of a promissory note and a letter of commitment.

109. His evidence was that some of the sub-borrowers reported that they were experiencing difficulties repaying the loans as their businesses were not profitable while others cited reasons such as a hurricane which had destroyed crops and businesses. In cross-examination he said 60-65 clients defaulted out of 100-165, especially in 2000-2002, as there were hurricanes and floods in the area. He agreed that the figure could be as high as 267 from 2000-2002. He said some sub-borrowers had repaid in full which amounted to about 70. The defendant was suspended by the claimant in 2002.

110. He gave evidence of the efforts that were made by the company to collect on the debts. He said he personally wrote letters to the defaulters and caused attorneys to issue letters of demand. He said some of the borrowers could not be found at the addresses given, some had migrated from the area or gone abroad. He said they were all poor people below the poverty level. He said

two of his staff who knew the clients and where they were located were fired by him at the suggestion of the claimant. He denied that this was as a result of them defrauding the Micro Fin Programme.

111. The level of arrears led to several letters passing between the parties. Exhibit 1e was a letter dated January 19, 2001 to Maureen Webber, President of Development Options Limited, from the defendant, under the signature of Mr. Kristensen who wrote:

> **Re: Micro FIN**
>
> I am in receipt of your letter dated 2001 January 11, with original received on 2001 January 17 and Fax copy received 2001 January 12.
>
> All relevant persons at General Business Services Ltd./General Financial Services (GBS/GFS) in the Micro FIN programme, including myself, realize with concern also the high level of arrears in payments by our sub-borrowers as the picture of our portfolio appear from the statistical reports with the arrears report in particular.
>
> We certainly agree that it is a matter of urgency to bring the arrears down to an acceptable level and to enforce effective procedures of collection. I wish to assure you that that we shall apply all our resources-human, financial and professional-to ensure that Development Options is not exposed to financial liability related to the Micro FIN programme as implemented by GBS/GFS and myself in the parish of Portland.
>
> Our analysis of the status of the programme as it appears statistically by various reports and by review of details of individual loan accounts, considering the cultural and practical conditions of the area is that the portfolio is sound, viable and manageable for ultimate profitable returns for DO and GBS/GFS….
>
> I have met with Andre Lyn, Senior Business Development Consultant at DO (Friday, 2001 January 12) on the matter of arrears and consequent suspension of lending to us and we have agreed to put mechanisms in place to keep arrears level within relevant levels. We have also had telephone conversations on the subject. A feature of our valuation of the portfolio is a classification of all current loans (example enclosed)….
>
> We shall at this time appeal the decision made by you to suspend us and perhaps allow for disbursement of a selected few (6) of the

applications we sent to you on 2001 January 8. A few of these sub-borrowers are A1 clients and have already been disbursed by us and they have already made their first weekly payment to us. Kindly consider my request and I shall provide the names, etc upon your approval.

112. In his evidence before the court he said that he spent up to fifteen hours per day in the office monitoring the project and spent a significant amount of time trying to collect on outstanding sums. Again, on February 5, 2001, Mr. Kristensen wrote to Ms. Maureen Webber, stating inter alia:

> With reference to REF. 2, page 2 last paragraph and page 3, we wish to assure you that our intensified arrears collection drive is giving good result and that the arrears report, etc for the month of January 2001 shall show substantial improvement.
>
> Kindly advise us on the following matters:
>
> 1. Should GBS Ltd., represented by the undersigned, accept the invitation to be present at the MP's FACE TO FACE meeting, prepared to answer questions from the public relevant to the Micro Fin programme in Portland?
> 2. If the answer is in the affirmative, would we be able to announce that a downsized lending activity, with more stringent and tighter qualifications criteria will be implemented now and that the programme will continue?
>
> For Practical purpose and clarification, GBS Ltd. wishes to cancel and withdraw from the system all of the reimbursement applications submitted to DO Limited on 2001 January 08, totaling $1,480,000.00.
>
> With your approval however, we again appeal for reimbursement of five applications for clients classified as A1, amounting to $500,000.00, three (3) of which have already been disbursed by us and who are paying back on perfect schedule.

113. Mr. Kristensen explained that the purpose of that letter was that it had reached a point where arrears exceeded 2% of loan amount and the ultimatum came that if that did not change, the loan facility would stop. This also shows that the defendant was making loans to borrowers, financed other

than by the claimant, for which it sought refinancing (reimbursement) by the claimant.

114. On June 22, 2001 Mr. Kristensen again wrote to the claimant stating:

> With reference to above letter and discussions and meeting on matters related to subject above, I wish to provide the following information and present a proposal.
>
> Our collection target for the period June-November 2001 (6 months) as reflected in our cash flow is $5, 800,000.00…
> Records available to me show that the following payments are due to DO Ltd. on June 30, 2001.
>
> | **Principal** | **Interest** | **Amount Due** |
> |---|---|---|
> | $3,870,309.69 | $775,698.79 | $4,646,008.48 |
>
> Cash available at June 30, 2001 will total approximately $2,646,008.48, all of which will be paid to you on June 29, 2001. The cash flow projection shows a shortfall in meeting this payment on time and I am asking you kindly to review the payment schedule for the purpose of extending the time for payment to include two payments each, not later than end of July and end of August 2001, approximately $1, 000,000.00 each.
>
> I sincerely hope that my proposal shall be accepted by you and please be assured that the total repayment to DO Ltd. shall be made before or on the original in the schedule.

115. One year later the situation seemed to have shown very little improvement, resulting in this letter to the defendant from the claimant, dated January 15, 2002:

> **Re: Micro Fin**
>
> In 2001 June, General Business Services Ltd. (GBS) experienced difficulties in meeting its loan repayments. You submitted a proposed repayment schedule which **DO Ltd**. reviewed and revised. Under the terms of the new repayment schedule agreed upon, you were given a 16-month loan term resulting in payments of $757,083.91inclusive of principal and interest. The first payment due and payable on 2001 July 31 was paid on 2001 August 26,

signaling problems in GBS making its loan payment. Your record of payments for the period 2001 August-December under the captioned clearly indicates that you are unable to meet the monthly payments of $757,083.91.

We are mindful of the problems you continue to experience and so after careful review and in consultation with you, **DO Ltd.** is offering a 69-month loan term resulting in monthly payments of $199,573.98 inclusive of principal and interest. The first payment is due 2002 January 31. Refer to the attached payment schedule.

Any default in the loan payment will result in the immediate calling of the loan.

116. On January 29, 2002, Bent J Kristensen wrote to Maureen Webber. In that letter it was stated inter alia:

SUBJECT; Micro FIN LOAN REPAYMENT

"I also acknowledge meeting at DO Ltd**.** offices on 2002 January 4 where our loan and indebtedness to you was discussed in details with your Ms Joan Jonas. Our discussion was on the potential cash flow of GBS Ltd. in total and I did mention a possible inflow of approximately $150,000.00 from Micro Fin loan repayments and approximately $50,000.00 from GBS surplus on accounting services, etc."

Consequently, Ms. Jonas prepared a loan data sheet on payment table on that assumption resulting in a $199, 573, 98 monthly payments for a period of 69 months.

One of my ideas on the projected Micro Fin collection was the purchasing of a small pre-used Toyota car (Starlet) from a car rental client of ours that would enable me to travel on a daily schedule to on-site visits to my Micro FIN loan debtors in the Rio Grande Valley (Moore Town, Comfort Castle, etc.) as well as from Hectors River in the east to Buff Bay in the west. This personal face-face contact with the borrowers would result in more collection of loan payments. It is of great disadvantage that we at the moment do not own a car for theses (sic) visits.

We greatly appreciate DO Ltd.'s offer of 69 months loan terms with payment of $199, 573. 98 but until we are able to travel into the various areas of the borrowers we may not see an immediate increase in the collections.

117. This letter seems to be a response to the suggested repayment schedule offered by the claimant. However, he still maintained that, in his view, despite the tone of the correspondence it was not the defendant who owed the claimant.

118. No where in any of this correspondence did the defendant deny he was the borrower or that he owed the money. The language of the letters is clear and requires no interpretation. Equally, no where in this correspondence did he indicate that the arrears were as a result of hurricanes or other natural disasters.

119. He admitted that loan agreements were done with the clients. He said the defendant did loan agreements with its sub-borrowers using the same forms prepared by the claimant. He admitted that he may have been instructed to prepare loan agreements for the sub-borrowers but he could not now recall clearly.

120. Clause 8 headed, Terms and Conditions For On-Lending to Sub-Borrowers, was brought to his attention. He agreed that the on-lend agreement had to have certain conditions. He however, disagreed that it was part of the training that sub-borrowers must give a promissory note for the loan. He denied that it was a part of the training that it should be contained in the on-lending agreement. He was unable to recall the features of the exact document for securing the loans to the sub-borrowers. He said however, that the sub-borrowers signed the loan application and repayment schedule.

121. He agreed that the defendant borrowed $19,545,000.00 from the claimant from 2000-2002 for on-lend to sub-borrowers but denied that it owed any money. He agreed that it was the defendant who had agreements with the sub-borrowers and not the claimant. He disclaimed that he was now denying that GBS was the borrower because it did not wish to repay. He pointed out that the defendant had collected over eleven million dollars ($11,000,000.00) and sent it to the claimant.

122. The evidence presented, to my mind, showed that what is in the agreement is what was in fact implemented. The actual performance of the

contract was effected by the presentment of loan applications by the defendant and the forwarding of the sums by the claimant, into the bank account of the defendant.

123. Monies were therefore, lent to the defendant at an interest rate of 11%, on presentation of loan agreements from sub-borrowers and it, in turn, on lent the monies to sub-borrowers at 12%. The sub-borrowers repaid weekly to the defendant who in turn repaid the claimant quarterly. The extra 1% interest weekly was the defendant's profit on the venture.

124. Mr. Kristensen, having admitted that funds were provided to the defendant for on-lend to sub-borrowers and that the said sum amounted to $19, 545,000.00, such an admission is proof against the defendant.

125. I accept that there is no documentary proof of the total individual loans made from all the loan applications submitted by the defendant. However, there is no dispute as to the total of the amount received by the defendant from 2000-2002, based on financing provided by the claimant, on the presentation of loan applications to it by the defendant. Repayments were being made by the defendant on the loan and I find that to be admission by conduct that the loan sum was owed.

126. I will reiterate that whilst the conduct of the parties is not admissible as to the construction of the agreement, their conduct is admissible to show what the terms of the contract meant; what their intentions were, known to each other, or to raise an estoppel. In this case the conduct of the parties was directly in keeping with the terms of the PA and their intentions at the time of entering into the agreement.

WAS THE CONTRACT FRUSTRATED?

127. Mr. Green argued that even if the court were to find that the PA was enforceable as a loan contract, the defendant was discharged from his obligations under it, on the grounds of frustration. He submitted that the contract had become frustrated as the sub-borrowers were unable to repay. One of the reasons for their inability was as a result of natural disasters. The defendant was unable to collect and therefore was unable to pay back. In

support of this contention he cited **Davis v Fareham UDC** (1956) 2 All ER 145.

128. To this Mr. Wilson replied that the defendant was not excused from performing its contract because of an act of God. There was no provision in the contract for force majeure. The contract was not frustrated. Economic hardship cannot constitute a frustrating event. He relied on the case of **Glahe International Expo AG. v ACS Computer Pte Ltd**. (2000) 3 LRC 275. That was a contract for sale with a force majeure clause. The contract became unprofitable to perform and it fell to the courts to say whether the force majeure clause applied or whether the contract was frustrated at common law. The House of Lords held that none of the economic circumstances being relied on by Glahe came within the force majeure clause and that economic changes made the contract more expensive and costly but did not prevent Glahe from performing it. The case also recognized that the doctrine of frustration operated on a completely different level from a force majeure clause.

129. In the instant case the parties were free to make some agreement or arrangement which permitted one party not to perform or to perform in a different way. However, no evidence was produced of any such arrangement. This contract carried no force majeure clause, so the question falls to be determined whether the contract was frustrated by some supervening event under the common law doctrine of frustration. Whereas a force majeure clause anticipates the happening of a foreseeable event, the doctrine of frustration concerns the treatment of contractual obligations in the event of unforeseen circumstances occurring.

130. A contract may be considered frustrated when there is a supervening event (not caused by the default of either party), which is not expressly provided for in the contract, the consequence of which, is that, the nature of one party's or both parties' obligation under the contract is so fundamentally or radically altered, that the contract can no longer be said to be the same as that which had been entered into by them. Further, upon the happening of

such an unforeseen event and the changes it brings to the nature of the contractual obligations of the parties, it would be unjust to hold them or any one of them to its literal stipulations. The law in such a case will declare the contract to have been frustrated.

131. Frustration does not occur merely because the contract becomes more expensive or onerous. Disappointed expectations do not lead to frustrated contracts. In **Davis Contractors Ltd. v Fareham UDC** (1956) 2 All ER 145 at 160, Lord Radcliffe stated the principle thus:

> **"Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."**

132. It is not the law that where there is an unexpected turn of events which renders the contract more onerous than the parties had contemplated, that is by itself, a ground for relieving one party of his obligation under the contract. The sub-borrowers were selected by the defendant. The defendant had its operation in Portland. The sub-borrowers were all from Portland. The risk of lending unsecured loans to persons in Portland for projects which were at the risk of the elements must have been within the contemplation of the defendant when the selection was made. The claimant did not select sub-borrowers; it was the defendant which assumed the risk of the venture.

133. It is of general proposition that frustration operates to bring the contract to an end and relieve the parties of their obligation under it; therefore a court should not lightly declare a contract frustrated. Bingham L.J. in **J. Lauritzen A.S. v Wijsmuller B.V. (The Super Servant Two)** (1990) 1 Lloyd's Rep. 1, set out five general propositions describing the essence of the doctrine of frustration. He noted that the propositions were established by the highest authority and were not open to question. In summary the propositions describe the evolution of the doctrine which was formulated to mitigate the rigour of the common law's insistence on literal performance of the contract. It

brings the contract to an end forthwith and automatically; It should not be due to any act or at the election of the party seeking to rely on it and must result from some outside event or extraneous change of situation and It must take place without blame or fault on the part of the party seeking to rely on it.

134. The loss in crops to bad weather would be a loss in profitability and an increase in burden on some of the sub-borrowers but it is not sufficient in law to frustrate the loan contract between the claimant and the defendant. The obligation to repay the loan remains.

135. In fact, clause 5 sub-clause (xii) appears to anticipate such an event by stipulating that the borrower could have no recourse to DO Limited for any default in the loan by the sub-borrowers.

WAS THE BARGAIN UNCONSCIONABLE?

136. Mr. Green also put forward the proposition that there was no element of bargain in the arrangement between the parties as contained in the PA. He emphasized that, to the extent that clause 9 in particular or any other provision of the PA, imposed upon the defendant the obligation to repay balances due on loans made to sub-borrowers, where the sub-borrower, through no fault of the defendant, failed to pay, such an obligation was gratuitous and consequently, unenforceable.

137. The argument that the agreement shows a lack of bargain is rooted in a well established area of law where equity will intervene to provide relief if the bargain is found to be harsh and unconscionable. It is less clear when and under what circumstances equity will interfere with the freedom to contract. The authorities show a decided reluctance in the courts to interfere with the freedom of contract between commercial minded persons. It must be shown that one party engaged in unconscionable conduct or engaged in an unconscious use of power. That party must have behaved in a morally reprehensible manner which affects his conscience. If there has been no equitable fraud, victimization, taking advantage of, overreaching or other unconscionable conduct, relief will not be granted.

138. In **Hart v O'Connor** (1985) AC 1000 Lord Bingham said that there must be procedural fairness, as well as contractual imbalance. The kind of contractual imbalance which is so extreme as to raise a presumption of procedural unfairness, undue influence or victimization. See also **Boustany v Piggot** (1993) 42 WIR 175, PC.

139. Equity will also give relief to a person who, without independent advice, enters into a contract upon terms unfair because of his own needs or desires or ignorance or infirmity; coupled with undue influence or pressures brought to bear on him by or for the benefit of the other.

140. There is no evidence that any of the above applies to this defendant or to the PA. The defendant was an existing commercial enterprise in the business of making money and there is evidence, undisputed, that as regards the conduct of the programme under the PA, there had been some training involved. There is no evidence that the interest rate of 11% was onerous. There is evidence that the defendant had projected to make a profit of 1% per week on the loans to the sub-borrower. There was therefore, no lack of bargain.

THE LOAN BALANCES

141. The final issue is whether the claimant has made out its case against the defendant for a balance of $9,977,786.86 and $32,645.76 respectively.

142. I will first deal with the claim that there was a loan in the amount of $69,769.00 which now has an outstanding balance of $32,645.76. This appears in the claimant's particulars of claim but nothing has been heard of it since. No evidence was given regarding when, where and how this loan was made. Ms. Jonas does not address it all in her evidence. The only other reference to it is in the defendant's defence where it is averred that computers and software were sold to it at a cost of $69,769.00. This has not been refuted by the claimant. The claimant has failed to prove that there was a loan for $69,769.00 with an outstanding balance of $32,645.76, with interest at 23%.

143. The claimant also averred that from June 6, 2000 to January 3, 2002 it loaned the defendant $19,545,000.00. It claimed that from June 29, 2000 to May 2, 2002 the defendant repaid $9,567,213.14 plus interest for a total of $11,647,369.02. The claim is for a balance of $9,977,786.86 plus interest at 11% as at December 31, 2006, to April 5, 2007, totaling $12, 887,502.36 and continuing at a daily rate to judgment.

144. However, the defendant has admitted that it borrowed $19,545,000.00 which it disbursed to the small business operators. It also admitted to having repaid $9,567,213.00. There is therefore no dispute as to the sum loaned and the loan balance. The dispute has been and continued to the end to be, who is liable to repay the balance outstanding on the monies loaned. In my view, on the evidence, the defendant is liable to repay the balance outstanding as claimed.

THE COUNTER CLAIM

145. The defendant fails on the counter claim for an account as all matters requested there under is within the defendant's own knowledge. There is also no provision for payment to the defendant under the agreement. The defendant's sole compensation was to come by way of profits from the weekly interest charged on the loans to the sub-borrowers. It has failed to show any cause of action arising on this counter claim.

ORDERS

(1) Judgment for the claimant against the defendant on the claim. The defendant to pay the sum of $9,977,786.86 plus interest at 11% per annum from December 31, 2006 to April 5, 2007 and continuing at a daily rate of $ 8034.19 to June 10, 2011.

(2) The Counter Claim fails.

(3) Cost to the claimant Development Options Limited to be agreed or taxed.