IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

IN CHAMBERS

SUIT NO. C.L.F. 062/1997

BETWEEN	FINANCIAL INSTITUTIONS SERVICES LIMITED	PLAINTIFF
AND	DOJAP INVESTMENTS LTD.	FIRST DEFENDANT
AND	DONALD PANTON	SECOND DEFENDANT
AND	JANET PANTON	THIRD DEFENDANT

John Vassell instructed by Dunn, Cox, Orrett and Ashenheim for the Plaintiff
R. Henriques, Q.C. and Lawrence Broderick for the Defendants

Heard: February 9, 11, 13, 23 & April 3, 1998.

CORAM: WOLFE, C.J.

By Writ of Summons dated June 13, 1997, duly endorsed, the plaintiff claimed against the defendants for -

1. The sum of US$1,077,000.00, or the Jamaican equivalent at the date of payment or Judgment, being contribution from the defendant co-sureties, in respect of money paid by the plaintiff as surety and/or as money paid by the Plaintiff for the use of the defendants.
2. Interest on the said sum of US$1,077,000.00 at commercial rates from the 10th December, 1996, to the date of payment or Judgment.

3. Costs.

4. Further or other relief.

The statement of claim was filed in the Registry of the Supreme Court on the same date as the Writ of Summons.

Appearance, on behalf of all the defendants, was entered on the 16th day of July, 1997. To date no defence has been filed.

On July 25, 1997, the plaintiff filed a Summons for Summary Judgment.

On February 4, 1998, the defendants filed a "summons to dismiss the Action pursuant to section 238 of the Civil Procedure Code".

No argument was advanced in support of the Summons. It follows, therefore, that the Summons must be treated as having been dismissed for want of prosecution.

It is necessary to set out the basis of the plaintiff's claim.

Blaise Trust Company & Merchant Bank Limited (hereinafter referred to as 'BTMB') and Consolidated Holdings Limited (hereinafter referred to as "Consolidated Holdings") and the first defendant were owned and/or controlled by the second and third defendants.

A Bank of Jamaica inspection revealed that BTMB was in breach of several provisions of the Financial Institutions Act. In April 1994, the second and third defendants gave to the Bank of Jamaica written undertakings to comply strictly with certain management and operational guidelines set out in a

Joint and Several Undertaking which both the second and third defendants signed.

The situation worsened and in July 1994, the second defendant gave an undertaking to the Bank of Jamaica that BTMB would be restructured and a new investor found who would inject capital of US$1,000,000.00 into BTMB and acquire control of the Bank and its Board.

The second defendant, in keeping with the undertaking, entered into discussions with one James Eroncig, an American businessman who controlled Continental Petroleum Corporation Limited, a Bahamian Corporation, and West Euro Equities Limited a Cayman Corporation. The discussions gave birth to the undermentioned agreement.

(a) Continental Petroleum would subscribe for US$1,000,000.00 redeemable preference shares with a fixed monthly dividend of US$20,000.00 in the share capital of West Euro to enable West Euro to invest the said US$1,000,000.00 in the capital of "BTMB".

(b) Continental Petroleum would lend to the second defendant US$300,000.00 with interest at US$6,000.00 per month.

(c) The defendants and Consolidated Holdings Limited would guarantee the payment to Continental Petroleum of the fixed monthly dividend on its preference share and that on redemption of its shares at the end of the year it would

recover its investment of US$1,000,000.00 and further that they would guarantee the repayment by the second defendant of the interest and principal in respect of the personal loan within one year.

(d) The guarantee by Consolidated Holdings was to be secured by granting to Continental Petroleum a mortgage over its premises at Blaise Industrial Park and the first defendant would secure its guarantee by granting to Continental Petroleum a charge over certain deposits held by it with Jamaica Money Market Brokers Limited and Dehring, Bunting & Golding Limited.

(e) Control of BTMB would return to the Second and Third Defendants for a nominal consideration after Continental Petroleum recovered its investment at the end of one year.

In keeping with the agreement mentioned herein West Euro introduced US$1,000,000.00 capital into BTMB in subscription for a controlling shareholding of 16,885,233 ordinary shares. The defendants and Consolidated Holdings executed an Incorporation Agreement dated August 10, 1994, jointly and severally guaranteeing to Continental Petroleum the matters set out in paragraph (c) above and indemnifying it against loss or diminution in value of its investment. Consolidated Holdings as security for its guarantee executed

and delivered to Continental Petroleum a mortgage over its said property. The First Defendant executed a Letter of Offer charging its deposits.

In December 1994, the Ministry of Finance assumed temporary management of Consolidated Holdings. In October 1995 the Supreme Court sanctioned a scheme of arrangement between Consolidated Holdings, BTMB and Blaise Building Society and their depositors whereby the assets of the abovenamed institutions were pooled and transferred to the plaintiff who assumed the liabilities of the said institutions to depositors and secured creditors.

In February 1995, Continental Petroleum made a demand in writing on Consolidated Holdings requiring payment of the entire amount secured under the mortgage referred to herein. Continental Petroleum threatened to exercise its power of sale on the basis that the agreement arrived at between the different players had been breached. There was no response to the demand and Consolidated Holdings and the defendants commenced proceedings against Continental Petroleum and obtained interim injunctions restraining the sale of the premises or the encashing of the certificates of deposits.

In 1996, the plaintiff, to whom the mortgaged premises and Consolidated Holdings' liability to Continental Petroleum under the guarantee and mortgage had passed, paid to Continental Petroleum, in satisfaction of its liability under the guarantee and Continental Petroleum's demand, the sum of US$1,436,000.00.

On December 20, 1996, Attorneys-at-Law for the defendants consented to an Order in the said suit whereby the first defendant's deposits with Jamaica Money Market Brokers Ltd. and/or Dehring, Bunting & Golding Ltd. were to be paid over to Continental Petroleum and/or James Eroncig and/or his nominee in respect of the first defendant's guarantee of the personal loan by Continental Petroleum to the second defendant.

The second and third defendants made no payments under the joint and several guarantee, or otherwise, to Continental Petroleum. The first defendant made no payment other than that paid under the Consent Order.

In May 1997 the plaintiff demanded from the defendants the sum of US$1,077,000.00 being the amount paid by the plaintiff in excess of its proportionate share of the defendant's liability. To date the defendants have not paid.

The plaintiff contends that having paid more than its proportionate share under the joint and several guarantee it is entitled to contribution from the defendants as co-guarantors.

BTMB and West Euro Equities are both insolvent.

Appearance was entered in this matter on July 16, 1997. To date no defence has been filed. No application has been made to extend the time for filing of a defence.

The matter came on for hearing on July 31, 1997, and was adjourned at the instance of the defendants to afford them the time to file the affidavit required under section 79.

The matter again came before the Court on January 15, 1998, but no affidavit was filed.

In fact no application has been filed contesting the Summons for Summary Judgment. There is, however, a summons filed seeking to strike out the action "as being frivolous and vexatious and an abuse of the process of the Court".

Worthy of note is the fact that there has been no affidavit filed stating that the defendants have a good defence to the action.

Section 79(1) of the Judicature (Civil Procedure Code) stipulates:

> "Where the defendant appears to a writ of summons specially endorsed 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 behalf 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" (emphasis mine).

The plaintiff has faithfully observed the provisions of section 79(1). The question to be resolved, in my view, is whether the defendant has satisfied me that he has a good defence to the action on the merits or has disclosed such facts as may be deemed sufficient to entitle him to defend the action generally.

No evidence has been adduced before me whether by way of affidavit or *viva voce* evidence upon which I could reasonably so conclude.

Mr. Henriques, Q.C., in his submissions sought to explain the nature of the transaction contending that the amount claimed was not by way of loan, but was an investment in shares. It would have been so easy for the defendant to have said this in an affidavit considering the number of times this matter has come before the Court.

Paragraph 14/3 - 4/3 of the Supreme Court Practice 1976 at p 137 states that the defendant may show cause by "affidavit or otherwise". I do not think "or otherwise" includes counsel's submissions. The words "or otherwise" are not intended to open wide the door for giving leave to a defendant who has no réal defence. The primary obligation remains on the defendant to "satisfy" the Court that there is a triable issue or question or that there ought to be a trial for some other reason.

On a balance of probabilities the defendants have failed to discharge the obligation which rests upon them.

Before parting with the matter, it is of some significance that the affidavit which was filed in support of the summons to strike out the action does not

deny the claim. The basis of the application to strike out is that there is another action filed in which the plaintiff is claiming damages against the defendants. That claim, however, is for damages for breach of fiduciary duties.

In the light of the foregoing the Court Orders that Judgment be entered for the Plaintiff accordingly.

As to the claim for interest at the commercial rate, no evidence has been adduced before me to show what was the prevailing rate of interest as of the 10th December, 1996 or at anytime. I, therefore, refrain from making any such order.

Costs to the plaintiff to be taxed if not agreed.

Lensley H. Wolfe, O.J.
Chief Justice.