IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L 1995/B228; 1995/B253; 1997/F053; 1995/B129; 1995/B258
[CONSOLIDATED PURSUANT TO ORDER DATED NOVEMBER 5, 1999]

BETWEEN	**FINANCIAL INSTITUTIONS SERVICES LTD**	**PLAINTIFF**

(Substituted for Blaise Trust Company and Merchant Bank Limited and Consolidated Holdings Limited pursuant to Order dated 20th day of February, 1997 and for Blaise Building Society pursuant to Order dated 8th day of January 1998)

AND	**DONALD PANTON**	**1st DEFENDANT**
AND	**JANET PANTON**	**2ND DEFENDANT**
AND	**JEFFREY PANTON**	**3RD DEFENDANT**
AND	**WINSTON DWYER**	**4TH DEFENDANT**
AND	**ORRETT HUTCHINSON**	**5TH DEFENDANT**
AND	**RAYMOND CLOUGH**	**6TH DEFENDANT**
AND	**RAYMOND GARCIA**	**7TH DEFENDANT**
AND	**EDWIN DOUGLAS**	**8TH DEFENDANT**
AND	**UNIJAM LIMITED**	**9TH DEFENDANT**
AND	**DOJAP INVESTMENTS LIMITED**	**10TH DEFENDANT**
AND	**DJNJ INVESTMENTS LIMITED**	**11TH DEFENDANT**

Mr. Michael Hylton Q.C and Miss Hilary Reid instructed by Myers Fletcher and Gordon for Plaintiff.

Mr. Walter Scott and Miss K. Stanley instructed by Chancellor & Co.for the 1st and 2nd Defendants.

IN CHAMBERS

Heard: May 15, June 23, 2000

HARRISON J

This is an application by the plaintiff to strike out paragraphs 120 – 134 inclusive of the Defence and Counterclaim of the 1st and 2nd Defendants on the grounds that:

1. No reasonable cause of action is disclosed by them;

2. Those paragraphs are frivolous and vexatious; and

3. The claim as contained in those paragraphs is an abuse of the process of the Court.

The application is supported by an affidavit by Carina Cockburn sworn to on the 13th March 2000. She is an officer of the Plaintiff Company and states that she is fully authorized to make the affidavit on its behalf. She has exhibited copies of the Schemes of Arrangement in relation to Blaise Merchant Bank and Trust Company, Blaise Building Society and Consolidated Holdings Limited (hereinafter referred to as the BFIs). She continues in this affidavit and states as follows:

> "4. The assets of these three entities which were transferred to the Plaintiff pursuant to the said schemes included:
>
> (a) Debts owed by more than 160 persons in respect of mortgages, instalment loans, demand loans and credit cards.
> (b) Approximately 15 pieces of real estate, one of which, the Navy Island property, is a substantial resort property comprising over 60 acres and 62 certificates of title.
> (c) Furniture, motor vehicles and other chattels and equipment.
>
> 5. The plaintiff assumed more than 4,000 files in respect of depositors and 60 correspondence files and consequently now has several thousand filed relating to its attempts to develop or dispose of these assets."

Paragraphs 120 –132 of the Counterclaim are set out hereunder:

> "120. By orders of the Supreme Court of Judicature of Jamaica made on the 26th day of October, 1995 the Supreme Court of Judicature of Jamaica sanctioned Schemes of Arrangements in respect of the Merchant Bank, the Building Society and Consolidated Holdings respectively. The 1st and 2nd Defendants will at the trial hereof refer to use and rely on the said Orders and the said Scheme of Arrangements for their full terms and legal effects.

121. Pursuant to the said Scheme of Arrangements all of the assets real and personal of the Merchant Bank, the Building Society and Consolidated Holdings were transferred and assigned to the Plaintiff.

122. It was an express term of the said Scheme of Arrangements that the Plaintiff should develop or otherwise dispose of the assets acquired from the Merchant Bank, the Building Society and Consolidated Holdings so as to satisfy its loan obligations to the Government of Jamaica.

123. It was also an express term of the said Scheme of Arrangements that any surplus which resulted after the development and disposal of the said assets and the payment of all outgoings, should be distributed.

124. The 1st and 2nd Defendants aver and say that it is an implied term of the said Scheme of Arrangements that the Plaintiff develops and /or disposes of the assets within a reasonable time.

125. The 1st and 2nd defendants aver and say that 3 to 5 years is a reasonable time.

126. In breach of the said implied term and condition the Plaintiff has failed and/or neglected and/or refused to develop and/or dispose of the assets within a reasonable time in consequence of which the assets of the Merchant Bank have been compromised and have suffered from a diminution in value to the prejudice of the 1st and 2nd Defendants as shareholders of the Merchant Bank and as persons who would have a valid claim to any surplus which may remain after the said development and/or disposal of the said assets and the payment of all valued debts and liabilities of the Merchant Bank.

127. The 1st and 2nd Defendants aver and say that by letter dated December 18, 1994 the Minister of Finance appointed Mr. Philmore Ogle Chartered Accountant to manage the Merchant Bank on behalf of the Minister from that date until further notice.

128. The 1st and 2nd Defendants further aver and say that the said Mr. Philmore Ogle produced a confidential report dated February 8, 1995 on inter alia the operations of the Merchant Bank.

129. The 1st and 2nd Defendants aver and say that as a part of his said report the said Mr. Philmore Ogle reported that as of December 31, 1994 the Merchant Bank had total assets of $486.7 Million and a total liability of $322.3 Million.

130. The 1st and 2nd Defendants aver and say that it was an implied term and condition of the said Scheme of Arrangements that the Plaintiff owes a duty of care and skill to the Merchant Bank, its shareholders, the potential beneficiaries of the surplus, the taxpayers of the country and others to manage and/or husband the assets of the Merchant Bank and prevent dissipation and to ensure that they are

developed and/or disposed in such a matter (sic) in order to achieve the greates yield.

131. The 1st and 2nd Defendants also aver and say that the Plaintiff its servants and/or agents owed the Merchant Bank, its shareholders and potential beneficiaries of any surplus the following fiduciary duties:

PARTICULARS

(a) To act with reasonable skill and diligence.

(b) To act bona fide in the interest of the Merchant Bank, its shareholders, potential beneficiaries of any surplus and the tax payers of Jamaica and not to exercise its powers and/or authority for any collateral purpose.

(c) Not to make a benefit and/or profit for itself, its servants and/or agents to the prejudice of the interest of the Merchant Bank, the shareholders of the Merchant Bank, the potential beneficiaries of any surplus and the taxpayers.

132. In breach of its duties of care and skill and/or its fiduciary duties and/or negligently the Plaintiff its servants and/or agents have managed the assets of the Merchant Bank in such a manner that it has resulted in loss and damage to the Merchant Bank, its shareholders, the potential beneficiary of any surplus and the taxpayers of Jamaica.

PARTICULARS

(a) Failing to sell and/or dispose of assets of the Merchant Bank in a timely manner.

(b) Failing to develop and/or dispose the assets of the Merchant Bank in such a manner as to achieve the greatest yield.

© Selling some of the assets of the Merchant Bank at an undervalue.

(d) Failing to protect the assets of the Merchant Bank by paying exorbitant and/or extravagant salaries and benefits to the senior management of the Plaintiff.

Background to the application and submissions

The suit against the 1st and 2nd Defendants has been consolidated with various suits involving claims by the BFIs for breaches of fiduciary duties, fraud, negligence, breach of contract and several other claims.

On April 10, 1995 temporary management of the BFIs was assumed by the Minister of Finance but pursuant to the Scheme of Arrangements sanctioned by the Supreme Court on October 26, 1995, all the assets of the Institutions were transferred to the Plaintiff. The Plaintiff has now been substituted for the three original plaintiffs.

The Scheme of Arrangement in respect of the Merchant Bank was sanctioned by order of the Supreme Court on the 26th October,1995. It provides inter alia, that the upon the Scheme becoming operative the assets of the Merchant Bank shall be pooled with the assets of the remaining BFIs in order to form one common fund. It sets out at paragraphs 9-11 how the surplus if any remaining should be distributed. They provide as follows:

> "9. FIS shall as condition for the loan being advanced by the GOJ grant to the GOJ a first fixed and floating charge on the assets so transferred. Upon the transfer of the assets of the assets aforesaid, FIS shall in absolute discretion vote (any shares) work with develop or otherwise dispose of the assets so as to satisfy its loan obligations to the GOJ. The repayment for the loan to the GOJ by FIS shall be satisfied by the development and/or realisation of the assets aforesaid as well as amounts recovered as a result of the legal claims for breaches of fiduciary duties and other responsibilities.
>
> 10. After the satisfaction of the loan and charges mentioned in paragraph 9 the General Creditors will be allowed to participate in any surplus arising in the following manner:
>
> > (i) the General Creditors, if the surplus is sufficient will be refunded the remaining ten percent (10%) of the balances of their deposits as at December 31, 1994. If the surplus is insufficient the General Creditors shall be repaid on a pro rata basis the balances of their deposit as at December 31, 1994.
>
> Should any surplus remain after the above distribution, the distribution of such surplus shall be determined by the Minister of Finance and Planning in such manner as he deems fit".

Mr. Hylton submitted that the Pantons had not sought to impugn the Scheme itself or to appeal from that order, and that once the Scheme is sanctioned by the Court, it became statutory though ordinarily founded in contract. He submitted further that the terms of the Scheme therefore are the governing factor and that the Scheme having transferred the assets of the BFIs to FIS for valuable consideration, there can be no obligation on FIS to dispose of them otherwise than as the Scheme itself states, that is, in satisfaction of the loan from the Government of Jamaica. Thereafter, if any surplus remains, it goes to the General creditors, and thereafter as the Ministry of Finance determines. He submitted that the shareholders have no interest in the assets of the Merchant Bank and cannot question the Scheme, or the manner in which it is carried out and they are not entitled to trace the assets to the transferee company FIS.

Mr. Scott argued that the issues raised in paragraphs 120 – 134 of the Counterclaim are as follows:

"1. (a) Does the Plaintiff at Common Law owe a duty of care in the management and disposition of whatever assets have come into its possession pursuant to the Schemes of Arrangements.

(b) If it does, is the duty of care owed to the depositors in these institutions, shareholders in these institutions the Government of Jamaica, in particular and the taxpayers in general.

© If it does owe such a duty of care can it be liable to any or all of these parties for breaches of its duty of care.

2. Does the First and Second defendants have the locus standi to maintain the counterclaim as set out in paragraphs 120 to 134 (inclusive)

3. (a) Is the plaintiff in a fiduciary position as against:
(i) The depositors in the Blaise Financial Institutions
(ii) The shareholders of the Blaise Financial Institutions
(iii) The Government of Jamaica

(b) If it is in a fiduciary position as respect to these persons can it be liable for breach of its fiduciary duties.

4. (a) Is the plaintiff a constructive trustee of the assets under its care by virtue of the Scheme of Arrangement for:
(i) The depositors of Blaise Financial entities
(ii) The shareholders in the Blaise Financial entities
(iii) The Government of Jamaica

(b) If it is, can it be liable to any or all of these persons for breach of its duties as trustee.

He submitted that the answers to all of the aforementioned questions are in the affirmative. He has further submitted that these are all arguable matters involving very serious and complex legal issues which will have to be resolved during the trial process. For example, he says that a trial court would be required to review the evidence at trial and determine and pronounce as to whether the relationship between the parties was sufficiently proximate or direct so as to give rise to a duty of care. Furthermore, he submitted that the plaintiff cannot seek to strike out paragraphs 120, 121, 122, 123 and 137 of the Counterclaim which it has admitted, and paragraphs 128 and 129 which it has not admitted. With respect to paragraphs 130 and 132 of the counterclaim, he said that they dealt with in the main the issues of the duty of care allegedly owed by the plaintiff to the First and Second defendants. Finally he said that the averment of breach of duty of care and/or negligence always raises a triable issue and even if it was not one of the usual categories it will be a task for the trial judge to determine whether to apply the general rules and principles of negligence to prove circumstances and facts creating the duty of care.

Analysis of the law and submissions

Is there a reasonable cause of action disclosed on the pleadings? Counsel for the Plaintiff submitted that paragraphs 120-134 of the Defence and Counterclaim does not disclose any reasonable causes of action and should be struck out.

Now, sections 191 and 238 respectively of the Judicature (Civil Procedure Code) Law deal with the striking out of pleadings and they state as follows:

> " 191. The Court or a Judge may, at any stage of the proceedings, order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client."

> "238. The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

In Drummond Jackson v British Medical Association (1970) 1 All E.R 1094 it has been held that :

> " The summary power to strike out a pleading for failure to disclose a reasonable cause of action was one which should be exercised only in plain and obvious cases where the alleged cause of action on consideration only on the plain allegations of the pleading was certain to fail."

The question then, according to Mr. Hylton Q.C is whether the counterclaim of the Pantons disclose a claim which has any chance of success. He submitted that the claims in the offending paragraphs were obviously unsustainable and have no chance of succeeding.

The Defence and Counterclaim has alleged that the Plaintiff had breached an implied term of the Scheme that the property of the BFIs should be disposed of within a reasonable time and that 3 to 5 years is a reasonable time. They claimed that the Plaintiff has failed and/or neglected and/or refused to develop and/or dispose of the assets within a reasonable time in consequence of which the assets of the Merchant Bank have been compromised and have suffered from a diminution in value to the prejudice of the 1st and 2nd Defendants as shareholders of the Merchant Bank and as persons who would have a valid claim to any surplus which may remain after the said development and/or disposal of the said assets and the payment of all valued debts and liabilities of the Merchant Bank. It was also their contention that they had suffered loss as a result of that breach.

The defendants claim inter alia, that Mr. Philmore Ogle Chartered Accountant who was appointed to manage the Merchant Bank on behalf of the Minister of Finance (that is, before the Scheme of Arrangement was ordered) had reported that as of December 31, 1994 the Merchant Bank had total assets of $486.7 Million and a total liability of $322.3 Million. The indications are, that at that date the Merchant Bank would have been solvent.

Paragraph E of the Scheme of Arrangement states however:

> "The Preferential and General Creditors recognized that the BFI's have been operated as a single entity in that the assets of the Society are so intermingled with the assets of the remaining BFIs that it is just and equitable that the BFI's should be treated as a single undertaking and it is their overall interests to pool the assets of the BFI's in order to accommodate a Scheme of Arrangement and provide an expeditious and equitable conclusion to the existing state of affairs surrounding the three BFI's."

Furthermore, paragraph 1 of the Scheme provides:

> "The assets of the Company shall be pooled with the assets of the remaining BFI's in order to form one common fund."

I agree therefore, with Mr. Hylton's submission that the effect of the provisions of the Scheme, make it irrelevant that the Merchant Bank may have been solvent by itself and that what matters is that the BFI's as a group were insolvent.

What is the legal effect of the Scheme of Arrangement? Section 192 of the Companies Act provides inter alia that:

> "...the compromise or arrangement shall, if sanctioned by the court be binding on all the creditors or the class of creditors or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company..."

Does it mean then, that the jurisdiction of section 192 (supra) can be exercised without regard to the wishes of shareholders or a class of creditors who have no real interest in the assets of the company? Mr. Hylton submitted that "even assuming that there was an implied duty to dispose of the assets within a reasonable time, and that the Plaintiff has breached this duty, this duty cannot be said to be owed to the Pantons since they are not persons with an interest in the assets of the BFI's. Any claim by the Pantons to have suffered loss as a result of such breach, we would submit, is obviously unsustainable". He submitted further that paragraphs 3 and 8 of the Scheme provide:

> "3. The General Creditors shall transfer and assign to FIS and/or its nominees their deposits upon the effective date...upon this scheme being approved by the Court this transfer and assignment shall be deemed to have taken place.

> 8. As a further condition for the payout aforesaid the General Creditors agree to assign and transfer any residual right, claim and interest contingent, inchoate or otherwise against or in the Company or against any person or entity for any liability to the General Creditors whether arising from breach of duty, breach of trust or otherwise to FIS. Upon this Scheme being approved by the Court the said transfer shall be deemed to have taken place."

I also agree with the submission made by Mr. Hylton that all rights of the General Creditors have been transferred to the Plaintiff and therefore even if the Pantons were General Creditors they would not be entitled to share in any surplus. In the circumstances, since the 1st and 2nd Defendants are not entitled to the surplus or having any interest in the assets of the BFI's, Mr. Hylton is correct when he submits that the Plaintiff owed them no fiduciary duties.

Mr. Scott had submitted that the Plaintiff cannot strike out paragraphs that it has either "admitted" or "not admitted". He pointed out that the Plaintiff had admitted paragraphs 120, 121, 122, 123 and 137 and that it had not admitted paragraphs 128 and 129 of the Counterclaim. Now, paragraph 120 speaks of the Order of the Supreme Court which was made on the 26th day of October, 1995 sanctioning the Scheme of Arrangement. Paragraph 121 alleges that pursuant to the said Scheme all of the assets of the BFI's were transferred to the Plaintiff. Paragraph 122 speaks of the express term of the Scheme to develop or otherwise dispose of the assets acquired from the BFI's so as to satisfy the loan obligations to the Government of Jamaica. Paragraph 123 alleges that it was also an express term of the Scheme that any surplus which resulted after the development and disposal of the assets and payment of all outgoings, should be disbursed.

Now paragraph 137 of the Counterclaim alleges that certain sums of money were paid by the 1st Defendant to various third parties for and on behalf of the Merchant Bank during 1994. Upon examining paragraph 137 however, of the Reply to the Defence and Counterclaim, it is observed where the plaintiff made no admission to that paragraph as well as paragraph 138 and has put the Defendants to strict proof thereof.

I hold in the circumstances, that the admissions in the abovementioned paragraphs as well as those paragraphs that are not admitted, would not affect the application to strike out pleadings which are included in those paragraphs.

Are paragraphs 120 – 134 of the Defence and Counterclaim frivolous and vexatious and abuse of the process of the Court? Halsbury's Laws of England 4th Edition states as follows at paragraph 434:

> "An abuse of the process of the Court arises where it's process is used not in good faith and for proper purposes but as a means of vexation or oppression of or for ulterior purposes or more simply where the process is misused."

I was referred to the case of Wenlock v Moloney and Others [1965] 2 All E.R 871 by Mr. Hylton. In that case, Millett J at first instance, had pointed out that even if an application may pass the test of disclosing a reasonable cause of action, if the "claim has no foundation in fact and is not made in good faith with a genuine belief in its merits, but has been manufactured to provide a vehicle for a further public denunciation, it is an abuse of the process of the court and will be struck out". Mr. Hylton submitted that the BFI's as a whole were insolvent and the plaintiff was entitled to treat the assets as a pooled fund and not separate from the Merchant Bank. Further, "since the Scheme made no provision for the return of any surplus to the shareholders, none was due to them and no duty in this regard was assumed by the Plaintiff or owed to the Pantons". He has also submitted that the claims by the 1st and 2nd Defendants, "particularly those relating to salaries, selling at an undervalue and breaches of duties, are not based on any genuine belief in their merits, but have been put forward in the hope of embarrassing the Plaintiff and distracting the Court from the substantive claims in the action". He contends that this would delay the fair trial of the action. I do agree with this submission and further hold that paragraphs 120 – 134 are indeed frivolous and vexatious and an abuse of the process of the Court.

Conclusion

It is therefore my considered view that paragraphs 120 – 134 of the Defence and Counterclaim have no chance of success and the alleged cause of action is certain to fail. I also hold that the claims set out in those paragraphs are frivolous and vexatious and are only intended to embarrass the Plaintiff and to delay the fair trial of this matter.

IT IS HEREBY ORDERED:

1. That paragraphs 120 – 134 of the Defence and Counterclaim be struck out as disclosing no reasonable cause of action against the Plaintiff.

2. That the 1st and 2nd Defendants do pay the costs of this application which is to be taxed if not agreed.

3. Certificate for two (2) Counsels granted

4. Leave to appeal granted.