NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW: C.L. F 006/2002

BETWEEN	**STEPHEN FRANKLIN**	**PLAINTIFF**
AND	**DAVID COWAN**	**1ST DEFENDANT**
AND	**MONICA COWAN**	**2ND DEFENDANT**

HEARD: February 18, March 17 and September 30, 2004; January 12 and 26 2005.

Ms. Yvonne Ridguard for Plaintiff; Mr. Patrick Bailey and Ms. Audré Reynolds instructed by Patrick Bailey & Co. for the Defendants; Mr. Garth McBean watching proceedings on behalf of Jamaica National Building Society.

ANDERSON, J.

The application being considered at this time arises from the filing of a writ in the Supreme Court by the claimant, Mr. Stephen Franklin, on February 5, 2002, in which he sought specific performance of an agreement for the sale of land, as well as an order that the defendants reimburse him in respect of monies paid by him to the National Water Commission for water rates for which the defendants were purportedly liable. The defence having been filed in June 2002, the matter came up for case management on February 18, 2004 when it was adjourned part-heard to continue on March 17, 2004. Thereafter, it was further adjourned and continued on September 30, 2004 and January 12 and 26 2005, on which latter date, a decision was handed down in respect of the application for summary judgment. At the time I handed down my decision, I promised to set forth my reasons in writing and this written judgment is in fulfillment of that promise.

A brief word on the dramatis personae will set the stage for these proceedings. Mr. Franklin, the plaintiff, is from all appearances a member of that enterprising group of Jamaicans who left Jamaica by thousands in the years preceding Independence, to seek a better life for themselves and their families in the "Mother Country", England. Their hearts are however forever tethered to the Rock by invisible strings which cannot be

broken, and so many of them seek to find that small piece of Paradise which they can call their own, in full expectation that they will someday retire there, perhaps to live out their natural lives there. The Cowans, on the other hand were a husband and wife team, the husband involved in the construction and development industry, and some interest in real estate. It was no doubt fate which brought them together and there commenced a relationship which has now to be untangled in the context of proceedings in the Supreme Court.

By a Notice of Application for Court Orders dated December 31, 2003 and filed in the Supreme Court on January 2, 2004, the Claimant/Applicant, Mr. Stephen Franklin sought from the Court the following Orders:

1. Judgment be entered for the Plaintiff against the Defendants in terms of the Statement of Claim filed herein pursuant to the provisions of Section 15.2 (b) of the Judicature (Rules of Court) Act, [The Civil Procedure Rules 2002]; alternatively,
2. That the Defendants defence be struck out on the grounds that the defence filed herein disclosed no reasonable ground for defending the claim and/or is frivolous vexatious and/or oppressive and/or otherwise amounts to an abuse of the process of the Court pursuant to the provisions of Section 26.3 (b) and (c) of the Judicature (Rules of Court) Act [The Civil Procedure Rules 2002].

In the Statement of Claim filed on the same day as the writ herein, the Claimant, (then "Plaintiff") claimed to have agreed to purchase a lot (lot # 6) on an approved sub-division plan, from the defendants for the price of Two Million Eight Hundred Thousand Dollars ($2.8 million). The Claimant now claims that he has carried out his side of the bargain by paying the said sum, but that in breach of the March 2, 1995 Sale Agreement, the Defendants have failed to effect completion of the transaction: The Plaintiff asserts that he was in fact put in possession of the said land and by a letter dated 29th May 2000, the Plaintiff gave to the Defendants a notice making time of the essence to complete.

According to the Plaintiff, the Defendants "have failed and/or refused to complete the said agreement."

The Plaintiff also claims that the Defendants should also re-imburse him for the sum of $9,292.00 paid to the National Water Commission (NWC), being sums outstanding to that agency in October 1997, for water supplied to the premises subject of the agreement, and which the Plaintiff had had to pay when the water supply was disconnected by the NWC for the outstanding arrears.

The section of the CPR under which the claimant seeks orders are sections 15.2 (b) and sections 26.3 (b) and (c).

These are set out hereunder –

Section 15.2 The Court may give **summary judgment** on the claim or on a particular issue it if considers that: -

(a)

(b) the defendant has no real prospect of successfully defending the claim or issue.

Section 26.3 (1) In addition to any other powers under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court

(a): -

(b) that the statement of case or the part to be struck out is an abuse of the process of the Court and is likely to obstruct the just disposal of the proceedings;

(a) that the statement of case or part to be struck out discloses no reasonable grounds for bringing or defending a claim.

The claim for Summary Judgment

The Claimant and the Defendant have both filed affidavits in support of their respective positions in relation to this application for summary judgment. In their defence, in

addition to counterclaiming for the allegedly outstanding balance of the purchase price, the Defendants sought to assert that there had been fraud by an employee at the branch of the Jamaica National Building Society in Port Antonio, at which both the Claimant and the Defendants maintained their accounts, and suggested that the alleged fraud could have implications for the claim and the defence. It was because of this that it was agreed that a representative of that company should be called to give evidence.

The allegations by the Claimant

The Claimant, Mr. Cowan, in his affidavit in support of the application for summary judgment (also set out in his statement of claim), alleged that pursuant to the terms of an Agreement for Sale dated March 2 1995, ("the Agreement"), he agreed to purchase and the defendants agreed to sell certain lands amounting to one quarter of an acre, and "being part of the land registered at Volume 1267 Folio 920 of the Register Book of Titles." The land was also described in the Claimant's statement of claim as "the lot numbered 6 on the approved sub-division plan prepared by Dennis Clay Commissioned Land Surveyor, from survey done in June 1995 at the instance of the defendants". This description is confirmed in the Defendants' defence. The purchase price of Two Million Eight Hundred Thousand Dollars ($2,800,000.00) was payable by a deposit of $88,000 on signing, a further deposit of $2,200,000.00 payable on or before the 24th March 1995, with the balance of $512,000.00, "on completion". This is also admitted by the Defendants in their defence. "Completion" was to take place "on payment of all monies payable under this agreement in exchange for Surveyor's Diagram in the name of the purchaser", while possession was to be granted "on payment of the second deposit."

According to the Claimant's affidavit sworn on December 23, 2003 and filed in support of the application for Court Orders on January 2, 2004, it was agreed that the Claimant who is ordinarily resident in the United Kingdom, would send the balance of the purchase price to the 1st Defendant's bank account, Number 80013535 at (the Port Antonio Branch of) the Jamaica National Building Society (JNBS). The Claimant avers and, based upon the affidavit evidence and the evidence of the representative of JNBS, the court accepts, that the account number was the one given him by the 1st Defendant. The Claimant

further states that on the 16th March 1995 he instructed his bankers to credit the said account with the Jamaican Dollar equivalent of Forty-three Thousand Three Hundred and Ninety-five Pounds Sterling (£43, 395.95) which converted to J$2,200,025.10. The building society confirmed by letter dated March 29, 1995 that this had been done. On the 14th June 1995 he gave similar instructions and as a result received confirmation that J$450,000.00 had been credited to the Defendant's said account. Copies of the confirmation letters from JNBS were exhibited to the plaintiff's affidavit.

The Claimant further alleges that on the 25th November 1995, and the 8th February 1996, he paid further sums of One Thousand One Hundred Pounds Sterling (£1,100.00) and Ninety-two Pounds Sterling (£92.00) respectively, to the Defendants' daughter, Heather Cowan, who also resided in England, for and behalf of the Defendants.
He received receipts which were also exhibited to the affidavit and, based on the rate of exchange agreed between the parties, the amounts given to the Defendants' daughter represented J$61,984.00. Indeed, the receipt for the second payment to Heather Cowan was signed by her on behalf of David Cowan and endorsed "final payment". (There is in fact no dispute concerning these latter payments to the daughter which are both admitted in the defence). The claimant says that taken together, all the foregoing sums totaled the full consideration of J$2,800,000.00 due under the agreement.

The Claimant further avers that although pursuant to the terms of the agreement for sale he was entitled to possession after payment of the second installment, it was not until he had made all the payments referred to above that about October 1997 that he was put into possession. He also averred that he paid his share of the costs of the transfer and, in addition, paid the amount of $9,292.00 allegedly owed to the National Water Commission when he took possession in October 1997, a sum he now claims. Notwithstanding the fact that the Claimant has done all that was required of him, the vendor/defendants have failed or refused to complete the agreement by doing the following things: -

(i) Pay the necessary transfer tax, one-half stamp duty, one-half registration fee, one-half cost of title and one half Attorney's cost or other cost to transfer the said lands to me.

(ii) Obtain a certificate of compliance from the Portland Parish Council in respect of the sub-division approval for the lands registered at Volume 1267 Folio 920 of the Register Book of Titles.

(iii) Execute a registrable transfer in respect of the said lands at Snow Hill aforesaid, to me.

(iv) Pay the sum of $9,292.00 paid to National Water Commission on behalf of the Defendants in respect of the said lands sold to me at Snow Hill.

According to the Claimant, in February 2001 he filed a plaint on the Portland Resident Magistrates Court for the same remedies sought in this action. At that time, the Defendants' only response was to challenge the *jurisdiction* of the Resident Magistrate's Court to hear the matter. They raised no challenge to any of the facts then alleged by the Claimant. Further, he says, the Defendants had never at any time before the filing of the plaint in the R.M Court, alleged that they had not received the monies purportedly paid to them through their Account Number 80013535.

The Defendants' Allegations

The Defendants for their part admit most of the Claimant's assertions with respect to the substantive claim, but they asserted the following:

1. They denied that they had received the sums paid through the JNBS (presumably other than the $100,000.00 they admitted to receiving in their defence).
2. They denied that they had an account "#80013535" but claimed they instructed the Claimant that the only account they were aware of was account "#80010335".
3. They pointed to the fact that an employee of the Port Antonio office of the JNBS had been convicted of fraud in relation to some accounts maintained at that Branch and suggested that their account may (*and there is nothing that puts it higher than "may"*), have been fraudulently interfered with by that employee and

that they had considered legal action against JNBS to recover monies they feel may have been taken from their account.

4. The second Defendant averred in her affidavit that the first defendant had been arrested in connection with the fraud of the JNBS employee but the crown had offered "No evidence" against him.
5. She further alleged that the Defendants had themselves considered filing suit against JNBS for monies missing from their account but that they had refrained from pursuing legal action when they had commenced discussions with representatives for the company.

In so far as the Defendants' liability to repay the claimant the sums paid to the NWC is concerned, the 1st Defendant in his affidavit dated 16th day of February 2004, purported to deny that the Claimant was put into possession in October 1997 "or at all". On the other hand, the 2nd Defendant in her affidavit dated 12th January 2005 in opposition to the application, conceded: "When the work (of refurbishing the property, the subject of the sale agreement) was completed, the said agent (of the claimant) was left in possession of the property". The Court accepts the affidavit evidence of the claimant as to the liability of the defendant for the sums paid to the NWC.

It will be apparent that, based upon the defence filed by the Defendants as well as their affidavits opposing the application for summary judgment, they were essentially saying that they had not received the portion of the monies due and allegedly paid into their account at JNBS. This was either because the wrong account was credited, or because of the alleged fraud of the JNBS employee. In particular, the Defendants admit in their defence, the receipt of the deposit and the two payments to the daughter of the Defendants in England. They also say that "in or about June 1995, the Jamaica National Building Society (hereinafter called "JNBS") accepted the equivalent of approximately $100,000.00 *paid in by the plaintiff to the credit of the Defendants' savings account, Port Antonio branch".* I have highlighted these words because of reasons which will become apparent later.

In either event, given the terms of the pleadings, the Defendants do not deny the salient terms of the Sale Agreement in respect of the land in question. In particular, there is no denial that the agreed arrangements in respect of the outstanding payments, were that these were to be paid into the account maintained by the Defendants at JNBS Port Antonio Branch. The existence of such an account as well as any evidence of dealings with it, are therefore of critical importance to any real appreciation of the role played by the account in these transactions.

Given the centrality of the issue of the JNBS account, the parties agreed that it would be useful at this stage of the process, to place before the court in these proceedings, such evidence from JNBS as might be available about any account the Defendants may have operated. As a consequence of that agreement, at the end of the first day of proceedings herein, February 18, 2004, the court granted an order for a witness summons to issue to the appropriate officer of JNBS "to attend and produce the records of the account(s) of David and/or Monica Cowan between 1992 and the 5th of February 2002, including signature cards for the said David and/or Monica Cowan".
As a consequence of this summons, Mr. Joscelyn Campbell, the compliance officer of JNBS was called to give evidence about the account.

In considering the appropriateness of this approach and whether it should be adopted, it is to be noted that since this matter had come before the court for case management, the provisions in Parts 25 through 27 of the Civil Procedure Rules 2002 apply. Pursuant to Part 25, the Court is obliged to further the overriding objective of the Rules by "actively managing cases". By virtue of Rule 25.1 (a), this includes "encouraging the parties to co-operate with each other in the conduct of proceedings". Here, the agreement by the parties to invite the court to hear the evidence from a representative of the JNBS was an example of such "cooperation". Also, by reason of Rule 26 which sets out the court's general powers of management, the court may decide the order in which issues are to be tried 26.1 {2}{f} and may "hold a hearing and receive evidence by telephone or use any other method of direct oral communication" {26.1 (2) (o)} It seems to the court that in the circumstances of this case, the taking of the evidence of Mr. Campbell at this stage

furthered the overriding objective as articulated above, as a determination of this central issue had clear and direct implications for the entire action.

Mr. Campbell produced several records of the company. His evidence was that in his capacity as compliance officer he was responsible for ensuring that the Society complied with all the rules and regulations that affect its operations. He also was responsible for any litigation in which the society might become involved. He stated that the records of the institution indicated that in 1995 at the time of the Agreement, the Cowans maintained one account with the number 80013535. That account had been opened on June 13, 1994 in the names of Monica and David Cowan of Dolphin Bay, Port Antonio. It was opened with a deposit of $131,016.28. The Cowans had also previously maintained a deposit in a Certificate of Deposit with the sum of $1,960,000.00 from August 27, 1994 to November 18, 1994. He also stated that in March 1995, the account 80013535 was credited with $2,200,025.10 which represented the proceeds from the Sterling sum of £43,393.00 sold to JNBS. He confirmed that a letter dated March 29, 1995, had been sent to the Claimant confirming this payment to the account of the Cowans.
A further letter to the Claimant dated June 15, 1995, confirmed that the sum of $450,000.00 had been "credited to the account numbered 80013535 in the name David Cowan". Both of these letters were attached as exhibits to the affidavit of the Claimant. Through this witness, there was tendered into evidence a print-out of the account #80013535 covering the period from June 13, 1994 to September 30 1999, in the names of David and Monica Cowan, which showed an extremely active account. Also tendered into evidence were the signature card for the opening of the aforesaid account (Exhibit 2) and the signature card for the opening of the Certificate of Deposit (Exhibit 3).

Mr. Campbell confirmed that the Cowans had in fact operated another account #80010335, but that account had been closed on June 13, 1994, the day on which the other account had been opened. At the time of closing that account, it contained $726,611.77. He also confirmed that while an employee of the JNBS branch in Port Antonio, (a Ms. Elliot), had been charged and convicted of fraud in relation to funds in accounts maintained at the branch, there was no evidence that this had anything to do

with any account maintained by the Cowans, and it certainly did not involve the account #80013535. In fact, the allegations against the employee, (a Ms. Elliot) involved withdrawals of sums from the Society's account at National Commercial Bank to be sent to the branch, which went missing. There were also allegations involving transfers from the account of one Ricardo Dennis to one of Mr. Cowan's account, and in relation to those transfers, Mr. Cowan himself had been charged with fraud. However, that case had not been proceeded with, as the Crown offered "no evidence". Finally, he denied that there had been any negotiations between JNBS and the Cowan family with respect to their allegation that over $40,000,000.00 was missing from their account. Moreover, he stated that if such discussions had taken place, by virtue of his position at JNBS, he would have certainly been aware of them, by virtue of his position.

I must say that I was impressed by the testimony of Mr. Campbell whom I found to be credible and forthright.

Ms. Ridguard, in her closing, submitted that the evidence was overwhelming that the purchase price had been fully paid and that there was sufficient memorandum in writing and also acts of part performance which are unequivocally referable to the agreement for sale. She says that accordingly, the Claimant has proven his case and is entitled to have his application for summary judgment for specific performance of the agreement granted as he has fulfilled the requirements of Rule 15 of the CPR 2002.

Ms. Reynolds for the Defendants, on the other hand, says that the requirement for the grant of summary judgment had not been fulfilled. She cited ***SWAIN V HILLMAN AND ANOTHER 2001 1 AER 91,*** in support of the proposition that the Defendants have a real as opposed to a fanciful prospect of defending the action. She cited in particular, and adopted, the dictum of Lord Woolf, M.R. in the aforesaid case where he said, in relation to the summary judgment application:

> It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects for success or, as Mr. Bidder QC admits, they direct the court to

> the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.

The learned Master of the Rolls continued:

> It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In so doing, he or she should give effect to the overriding objectives contained in Part 1.

She submitted that the defence and counterclaim provide a real rather than fanciful prospect of being successful as 'it is incontrovertible that there were instances of fraud at the institution to which the claimant alleges he gave instructions to credit the defendants' account'. She goes on to say:

> "It is common ground that the account which the defendants state that they had, # 80010335, was not credited with the funds stated. Rather, another account, which the defendants say they knew nothing of, was credited, as evidenced by the documents kindly presented by Mr. Campbell, the representative of JNBS".

I agree with Ms. Reynolds that the essential fact for determination was whether the defendants had in fact received the funds, a fact which they deny in their defence and to which they claim a right in the counterclaim.

However, in light of the findings of fact which I make below, I am hard pressed to come to any conclusion but that the defence is 'fanciful'.

In looking at the evidence before me, I have formed the view that the affidavit evidence presented on behalf of the Claimant, together with the oral evidence of Mr. Joscelyn Campbell is more believable on a balance of probabilities than the evidence presented by and on behalf of the Defendants. I am satisfied that the documentary evidence presented by Mr. Campbell is credible. I also believe that the court may draw inferences from the fact that the print-out of dealings with and on the very active account #80013535 can only be interpreted to lead to the conclusions, that the defendants did knowingly operate this account. Moreover, given the affidavit evidence of the second defendant as to how her husband dealt with the account, I do not believe that the Defendants could have been unaware of the fact that the Claimant's payments had been placed in their account. I reject that assertion. I also reject the assertion of the Defendants that they were operating

an account # 80010335 at the time of the transaction with the Claimant. Indeed, the Defendants did not produce any evidence to negative the evidence of Mr. Campbell, that the account had been closed in June 1994, and the other account opened on the same day.

It will be recalled that at page 7 above, I had adverted to a paragraph in the Defendants' defence where it was stated that "in or about June 1995, the Jamaica National Building Society (hereinafter called "JNBS") accepted the equivalent of approximately $100,000.00 *paid in by the plaintiff to the credit of the Defendants' savings account, Port Antonio branch".* The evidence of Mr. Joscelyn Campbell is clear and I accept it, that at the time when this payment was acknowledged to have been paid, the Cowans operated ***only one account***, namely, account # 80013535, both their fixed deposit account and the other account, 80010335, having been, on the credible evidence of Campbell, closed. The only reasonable inference to be drawn from these facts is that it must have been to that account that the sum referred to in the defence was paid. This is a crucial fact almost amounting to an admission

For completeness, I state that I also find the following to be established by the evidence.

1. The agreement between the Claimant and the Defendants required that the Claimant pay monies into the latter's account at the JNBS branch in Port Antonio.
2. The account in question into which the Claimant was instructed by the Defendants to pay the monies due, was account #80013535 and not any other account.
3. That this was the only account maintained by the Defendants at JNBS Port Antonio branch at the relevant time.
4. That there was no evidence which, on a balance of probabilities, was capable of showing that any fraud committed by a JNBS employee had been perpetrated on any account maintained by the Cowans.
5. That even if the alleged fraud did involve the account of the Cowans at JNBS, of which there is no direct evidence, the fact that the parties had agreed on this manner of payment, would still have meant that the Claimant had done what

he was required to do by the agreement and would accordingly, only give rise to a right of action against JNBS and not against the Claimant.

6. There is a memorandum in writing sufficient to satisfy the requirements of the Statute of Frauds.

7. There are acts of part performance, the granting of possession since 1997, which are only explainable on the basis that the Defendants accepted the Claimant's right to possession.

Is Summary Judgment available?

It is in light of the above evidence and findings of fact, that the court must decide whether the provisions of Rules 15 and/or 26 of the CPR 2002, have been satisfied. Rule 15.2 (b) adverted to above, permits summary judgment if it can be shown that the Defendant "has no real prospect of successfully defending the claim or issue". In seeking to persuade the court as to the real meaning of this phrase, especially as they are to be applied under the CPR 2002, reference is often made to ***Swain v Hillman and Another***, cited above by Ms. Reynolds for the Defendants. **Swain** was also extensively discussed by Sykes J (Ag., as he then was) in ***SAMUELS v GORDON STEWART AND OTHERS, SUIT NO: C.L. 2001, S – 081***, and we are all indebted to the learned judge for his excellent analysis set out in what, I believe, is one of only a couple of written judgments to date on a summary judgment application under the new CPR, 2002. In ***Swain***, as was pointed out by Sykes, J. (Ag) the attempts at clarifying the essence of the term "real prospect of success" are not "particularly enlightening". In his judgment in this latter case, the learned judge (Sykes) properly cited the "cautionary words" of Judge, L.J. in **Swain**:

> To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require.

Sykes J, also reminded us in his judgment that while Judge, L.J. agreed with Lord Woolf, M.R. in his definition of "real prospect of success", he did add that merely because success was "improbable", did not necessarily mean the prospect was "not real", so as to oblige the court to grant summary judgment. Sykes J. concluded that the meanings of the words "improbable" and "fanciful" were not coterminous when applied to the term "real prospect of success". He opined, *obiter*, that: "If the adjective real, in this context, means

something less than improbable then it cannot take much to satisfy a court that there is a real prospect of success", and that "the threshold to satisfy the test of "real prospect of success" is very, very low". Further that "the criterion for establishing that a case has a real prospect of success is perhaps not far above that required for an injunction, namely a serious triable issue".

While the above analysis is useful in helping to define more precisely, the meaning of the phrase, "real prospect of success" it should be remembered that the learned Master of the Rolls in **Swain** had pointed out in his judgment that at the time of the original decision, the relevant rule (similar to our CPR 15) was supported by a Practice Direction (since amended) which was to the following effect:

> Where a claimant applies for judgment on his claim, the court will give that judgment if (1) the claimant has shown a case which if unanswered would entitle him to that judgment; and (2) the defendant has not shown any reason why the claim should not be dealt with at trial.

In Lord Woolf's view, the judge at first instance seemed to have come to the view, (wrongly in his estimation), that the standard required under the then extant Practice Direction was one of "certainty". That Practice Direction has, in any event, now been amended by deleting the provisions set out above, because it was thought that it seemed to lay down a different standard than the rule itself in suggesting the need for certainty. The Master of the Rolls was however of the view that the judge at first instance had nevertheless come to the right decision. Given that our own CPR is not supported by a similar Practice Direction, we probably get little direct help from the actual decision in Swain, although it does point us in the direction to which we must look. In this regard it should be noted that Paragraph 3 of the U.K. Practice Direction, which is still in force, is to the effect that: "Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order, as described below". In Swain, the judge at first instance had been considering making a conditional order and so he must have been of the view that, however improbable, it was possible that the defence could succeed. It is clear from Swain however, that the court in deciding a summary judgment application, does not have to be "certain" that the case

would fail. However, if the case must fail, then it would mean that summary judgment must be given; that is, there would be "no real prospect of succeeding".

In "***A Practical Approach to Civil Procedure***" by Stewart Sime, Seventh Edition, he states the following proposition:

> On an application for summary judgment by a claimant, the defendant may seek to show a defence with a real prospect of success by setting up one or more of the following:
> (a) a substantive defence, e.g. volenti non fit injuria, frustration, illegality, etc.;
> (b) a point of law destroying the claimant's cause of action;
> (c) a denial of facts supporting the claimant's cause of action;
> (d) further facts answering the claimant's cause of action, e.g. an exclusion clause or that the defendant was an agent rather than a principal.

I adopt the foregoing approach as being appropriate to the situation under our own rules. In the instant case, the defendant has sought to put forward (c) and (d), a denial of facts supporting the claimant's cause of action and further facts answering the claimant's cause of action.

However, given the implausibility of the defendant's assertions as to whether there had been an agreement to pay the purchase price into the particular account # 80013535, any "real prospect of success" for the Defendants' defence and counterclaim, would seem to turn upon whether there was any or any credible evidence of fraud by anyone affecting the operation of their account at the Port Antonio Branch of JNBS, as the defendants sought to suggest. As Sime suggests, summary judgment applications ought not to be mini-trials. However, it is true that "there are occasions when the court has to consider fairly voluminous evidence before it can understand whether there is a real prospect of success". (See for example ***MILES v ITV NETWORKS LTD. (2003) LTL 8/12/2003.***)

In the instant case, although the court did not have to consider "voluminous" evidence, it was invited by both Claimant and Defendants to consider *all the available evidence as to the operation of the accounts maintained by the Defendants*. It is fair to say that both parties accepted that the evidence on the issues of the account of the defendants and the effect of any fraud, if it could be established, would be determinative of the central issue. I should note, *en passant*, that it appears to me that the Court's powers at Case

Management under CPR Rule 26 would be wide enough to allow the court to deal with the issue of the account and fraud as a separate and preliminary issue. Note that Rule 26.1(2) (k), the court may even "exclude an issue from determination if it can do substantive justice between the parties on the other issues and determining it would therefore serve no worthwhile purpose".

I have come to the view that the evidence against the Defendants and in favour of the Claimant's case is so overwhelming on the central issue that there would be no possible likelihood of success. Accordingly, I hold that this means there is "no real prospect of success" on the part of the Defendants. In addition, it is to be noted that ***THREE RIVERS DISTRICT COUNCIL V BANK OF ENGLAND (No. 3) [2003] A.C. 1***, is authority for the proposition that a claim or defence may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other materials on which it is based. In the instant case, the evidence including the documents admitted as exhibits, account cards, print-outs, and so on, leads inescapably to the conclusion that the defence is "fanciful" within the meaning of Swain.

I also wish to make one other observation with respect to this claim for summary judgment. **Sime**, referred to above, observed that the UK provision at CPR 24, (which is similar to our CPR 15), is not explicit in determining who has the burden of proving the lack of a "real prospect of success". Sime cites the case **E.D and F. MAN LIQUID PRODUCTS LTD. v PATEL (2003)** (The Times 18th April 2003) as authority for the proposition that the burden rests upon the applicant to prove that the respondent's case has no real prospect of success. I adopt this view as a correct statement of the law on the issue of the burden of proof, and I hold that the Claimant has discharged the burden of proving that both the defence and counterclaim of the Defendants are fanciful and have no real prospect of succeeding.

I should point out that having come to the conclusion that I have reached on the application for summary judgment under Rule 15, I do not have to consider whether the Claimant is also entitled to succeed under CPR 26 which was an alternative claim.

My ruling accordingly is Judgment for the Claimant on both the claim and the counterclaim, with costs to the Claimant, to be agreed or taxed.