IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 02739/2005

BETWEEN	**Jamaica Redevelopment Foundation**	**Claimant**
AND	**Premier Food Jamaica Limited**	**1st Defendant**
AND	**G. Anthony Levy**	**2nd Defendant**

Mrs. Sandra Minott-Phillips and Miss Kyann Lee instructed by Myers, Fletcher and Gordon for the Claimant

Mr. Paul Beswick instructed by Clough, Long and Co. for the Defendants

Summary Judgment – summary judgment will not be granted where what is placed before the court is the inert dry bones of the case, waiting to be called to life by the breath of oral testimony. For only the prophet would be seized with the prescience to know what form the inert dry bones would assume once clothed with testimonial sinew.

IN CHAMBERS

Heard: 21st September, 2009; 8th and 21st October, 2009

CORAM: Evan J. Brown, J (Ag.)

(1) In this application for summary judgment the Claimant avers that on or about 15th June, 1995 a US$80,000 loan was extended to the 1st Defendant by the now defunct Island Victoria Bank (IVB) at a rate of interest of 15% per annum. Further, that J$8,833 190.00 at an interest of 30% per annum was also lent to the 1st Defendant.

(2) It is the Claimant's averment that the 2nd Defendant executed an Instrument of Guarantee dated 10th January, 1997, giving an "unlimited guarantee and undertaking to repay the lender, all principal, interest and other monies, at any time payable by the 1st Defendant, due on account from or by the 1st Defendant to the lender."

(3) By vesting order granted by the Minister of Finance and Planning, effective 23rd April, 1999, the assets and liabilities of IVB became vested in Citizens Bank. Subsequently, by two successive Deeds of Assignment, the loans contracted by the 1st Defendant were sold to the Claimant, a corporation incorporated in the United States of America, with a local office.

(4) In the affidavit of Janet Farrow, Chief Executive Officer of the Claimant, the Defendants' indebtedness was asserted to be US $79,265.74 and J$31,111,023.92, as at 14th July, 2008. Those figures she swore were computed at the respective interest rates set out above. In the said affidavit she stated her belief that the Defendants have no real prospect of successfully defending the claim or succeeding on the Ancillary Claim.

(5) All the parties were *ad idem* in so far as the fact of the receipt of the United States dollar loan is concerned. However, issue was joined on the question of their continued indebtedness to the Claimant. That the Jamaican dollar loan was also issued to the 1st Defendant was hotly denied. The 2nd Defendant also disputes the extent of the guarantee allegedly given.

(6) The Claimant sough to demonstrate that its assertion of a Jamaican dollar loan is not a vacuous one by placing reliance on Island Victoria Investment and Finance Ltd. letter dated 19th November, 1997, to the 1st Defendant.

That letter speaks unambiguously to a J$8,833,190.00 loan to the 1st Defendant at an interest rate of 30% per annum. This commitment letter was signed by the 2nd Defendant and sealed by the 1st Defendant.

(7) The Claimant also contended that the Defendants made an admission to its claim. That admission the Claimant said is contained in a letter under the hand of the 2nd Defendant to Joslin Jamaica Limited dated 20th February, 2003. In that letter, the 2nd Defendant, on behalf of the 1st Defendant, gave directions for the application of three cheques to three named accounts. Those account numbers are identical to the account numbers of the Claimant's statement of accounts.

(8) The letter of the 19th November, 1997, on the question of security for the Jamaican dollar loan lists, *inter alia*, the "unlimited guarantee of G. Anthony Levy." Now, the guarantee referred to in The Claimants Statement of Case dated 1st January, 1997 does not reveal that phrase regardless of how microscopic the scrutiny it is subjected to. The latter document is headed "Mortgage Under the Registration of Titles Act" and sub-headed, in parenthesis, "To support Guarantor's Foreign Currency Liability." In its penultimate paragraph on page one it reads:

"And whereas it has been agreed between the parties hereto that the mortgagor would guarantee to the Bank the payment by the party described in the said schedule as The Borrower of all money's now or at anytime. Hereafter owing by the Borrower to the Bank on any account whatsoever, together with interest thereon and all usual and accustomed bank charges the

Mortgagor's Liability under such Guarantee being limited however to such sum (if any) as is stated in the said Schedule as Limit of Mortgagor's Liability..."

(9) In the Schedule at item #7 **"Limit of Mortgagor's Liability",** the following appears, "Fifty Thousand United States Dollars (US$50,000.00) and Two Hundred Thousand Jamaican Dollars (J$200,000.00)." The 2nd Defendant denied that the guarantee dated 10th January, 1997 was given for both the US dollar and Jamaican dollar loans. The 2nd Defendant contended that the guarantee was given in respect of the United States dollar loan only.

(10) The Defendants' contention of satisfaction of the United States dollar loan is dichotomous. First, it rested on conduct attributed to Joslin Jamaica Inc. the Claimant's predecessor. The 1st Defendant alleged that with the acquiescence of Joslin Jamaica Incorporated, it transferred its business and assets to International Chicken &Seafood Limited (IC & S). That transfer was subject to the interests of IVB under mortgage debentures. Thereafter, the Defendant said, negotiations concerning the liquidation of the 1st Defendants indebtedness took place between Dennis Joslin and Edward Muschette Snr, one of the directors of IC & S.

(11) However, in answer to an inquiry from Joslin Jamaica Incorporated, the 2nd Defendant, writing as Managing Director of the 1st Defendant, said the 1st Defendant entered into an agreement with IC & S in which it licensed IC & S to operate its four restaurants. That letter of the 20th January, 2003, also said the equipment and licenses continued to be in the name of the 1st Defendant. Further that the equipment being maintained by IC & S remained

the property of the 1st Defendant and "subject to the debentures in your favour." This arrangement, it appears, was struck to circumvent a competition clause in the franchise agreement between the 1st Defendant and AFC Enterprises Limited to operate the Popeye's Restaurant in Jamaica.

(12) Secondly, the Defendants asserted that the Claimant become a mortgagee in possession and should be made to account for the assets of the 1st Defendant. Those assets, the Defendants declared, "far exceeded whatever indebtedness the 1st Defendant may have had to IVB." That situation came about, according to the pleadings, when Joslin Jamaica Inc. took possession of the equipment and furniture of three of the restaurants which had been closed. Although it has been disclosed that those items were in fact reduced to the custody and control of Joslin Jamaica Inc, nothing has been said of their final disposition.

(13) In the Ancillary Claim the contention is that the Claimant is an accounting party and obliged to account in respect of the 1st Defendants indebtedness. As a corollary of that proposition, orders are therein sought compelling the Claimant to provide an account from the 1st June, 1995 to the present. That account should encompass all loans or advances made by IVB or the Claimant and appropriately particularized.

THE LAW

(14) The court is empowered to decide a claim without a trial, that is, give summary judgement, by virtue of Part 15 of the Supreme Court of Jamaica Civil Procedure Rules 2002. Rule 15.2 (b) lays down the standard for entering summary judgement. Summary judgement may be entered for the

claimant if the court "considers that the defendant has no real prospect of successfully defending the claim." Although it may be a *chose` juge`e*, a reminder is not without advantage, that the burden of proof rests on the claimant to prove that the Defendants have no real prospect of successfully defending the claim. In other words, *affirmanti non neganti incumbit probatio.*

(14) To discharge this burden, the claimant must, in saltatorial fashion, clear three hurdles. First, the claimant must satisfy the court, that all substantial facts material to its case, which are reasonable capable of being before the court, are before it. Secondly, those facts must be either indubitable or reasonable unassailable. Thirdly, the court's assessment of the facts must not be susceptible to a robust challenge by *viva voce* evidence. (Commonwealth Caribbean Civil Procedures Third Edition p.64)

(15) To give it succinct expression, summary judgement will not be granted where what is placed before the court is the inert dry bones of the case, waiting to be called to life by the breath of oral testimony. For only the prophet would be seized with the prescience to know what shape or form the inert dry bones would assume once clothed with testimonial sinew. So then, it is small wonder that the genotype of the typical successful summary judgement application is the straightforward debt action where there is evidently no defence.

(16) This claim falls within the genre of debt action. However, in respect of the loan which was admitted, the Defendants contended that it was fully liquidated and the other loan was out rightly denied. The Defendants, by this

denial of the facts supporting the Claimant's cause of action, sought to establish a defence with a real prospect of success. And if the issue turns on who to believe that denial would sound the death knell of the application. So then, is there any evidence to give this denial a different complexion?

RATIOCINATION

(17) The substratum of the Claimant's application is the letter of 20th February, 2003. Understandable it was the cynosure of the hearing. The Claimant's Attorney-at -law submitted that the letter evidenced an admission from both Defendants in respect of the entire claim. She submitted that the 2nd Defendant acknowledged the debt in this letter.

(18) Quite the contrary, was the rejoinder from counsel for the Defendants. On their behalf learned counsel advanced that the 'admission' is not one that satisfies the requirements of CPR r.14.1 (2) for three reasons. First, the 2nd Defendant wrote the letter in his capacity as the Attorney-at-law for the 1st Defendant and not that of a party. Secondly, 'the letter contained no terms or words' demonstrative of an authority to bind the client to an admission. Thirdly, the letter was 'nothing more than a response to instructions and not a binding admission of any sort on any defendant.' However, counsel conceded that the letter at best was an admission only against the 1st Defendant.

(19) But that is the nub of the matter. The instructions given by the 1st Defendant concerned the discharge of its loan obligations. Those instructions, logically, must have flowed from the premise of an acknowledgement of the debts. The 2nd Defendant, on behalf of the 1st Defendant said this in his letter to

Joslin Ja. Ltd, "we direct that the cheque for US$ 15,000 be applied on account of your loan #10309857 which would leave a balance on the principal of US $813 on that loan. However, that account number is the number of a US $50,000 loan issued on 27th October, 1995. A note on the statement further describes this loan as 'Part of 2nd US $80,000 loan commitment.' The Claimant's statement of account shows where those instructions were carried out but leaving a balance of considerable more than the 1st Defendant acknowledged.

(20) On behalf of the 1st Defendant, Joslin Ja. Ltd was next directed to apply "the cheque for US $30,500.00 ... on account of the principal of your loan #10309867 which would then leave a balance on the principal of US $28,237.00 on that loan." The Claimant's statement of account of identical number revealed the carrying out of those instructions. The only difference was again the anticipated balance.

(21) Finally, Joslin Ja. Ltd was instructed that "the cheque for J $2,545.35 should be applied against the principal in respect of loan # 10309626." This account number is identical to that in the Claimant's Jamaican dollar account.

(22) This disaggregation of the 1st Defendant's instructions, juxtaposed with the Claimant's statement of accounts presents something of an irreconcilable conflict with the Claimant's statement of case. Whereas the statement of case speaks to one US $80,000 loan, the statements of accounts advert to two US$ accounts: #10309867 and #10309857. The latter account showed a balance of US $ 4,530.38 as at 1st January, 2008. The former account had a balance of US $74,735.37 as at 1st January, 2008. The sum of these two

balances gives the amount alleged to be the debt owing in the affidavit of Janet Farrow.

(23) The United States dollar loan bearing account #10309867 was disbursed on 15th August, 1996. This statement of account is headed "Originally IVB US $120,000 Loan# 202010-004." As was said before both sides agreed the US $80,000 loan was paid out on the 15th June, 1995. The last entry in this statement of account that of 6th November, 2002, is 'CLOSE ACCOUNT' with a zero balance. This statement of account is numbered 10205836 and sub-headed, 'Originally IVB US $80,000 Loan# 202010-001.'

(24) While it is obvious that the 1st Defendant enjoyed more than one contemporaneous United States dollar loan facility, the Claimant hasn't articulated the Defendants' indebtedness with the specificity susceptible of the clarity to make it straightforward. If, as it appears to have been, that accounts were consolidated or old accounts subsued in new ones that must be said, especially in light of the defence.

(25) The defence in relation to the Jamaican dollar component of the claim is a bald denial. One which is amply refuted by the 2nd Defendant's letter of 20th February, 2003. Indeed, this is fortified by the commitment letter of 19th November, 1997. That however is not the end of the matter. The quality of the relationship between the parties affects this aspect of the claim as well.

(26) The unwieldy part of the claim is that which concerns the United States dollar debt. The position in respect of the subsistence of the loan disbursed on 15th June, 1995 and the extent of the 2nd Defendant's guarantee is by no

means clothed with certainty. This the court cannot disregard. The state of the United States dollar claim impacts directly on the Jamaican dollar claim. That is, while the Claimant asserts that the guarantee given by the 2nd. Defendant was unlimited, the instrument of mortgage on its face limits the 2nd Defendant's liability to the United States dollar debt.

(27) So, although the 1st. Defendant has admitted the Jamaican dollar debt, the question of the extent of the 2nd. Defendant's guarantee remains unresolved. Short of a trial of the claim, further affidavit evidence would be needed to clarify or falsify that fact. In respect of the 2nd Defendant, *viz-a-viz* the guarantee, the dry bones of the claim are in need of life-giving breath.

(28) It was submitted, with some force, that the interest rates were excessive. In this vein, counsel for the Defendants submitted that the Defendants were entitled to the protection of the Moneylending Act. That submission can be disposed of in this way. Both interest rates fall below the forty percent threshold under that Act and, in any event, the rates complained of are no more than appear in the original loan documents, agreements into which the Defendants voluntarily entered.

(29) Finally, was the Claimant a mortgagee in possession? If that answer is in the affirmative, the Defendants argued that summary judgment should be denied. That submission was predicated upon the view that the value of the stock exceeded any outstanding debt that existed at the time. The means of divination by which the value was arrived at remains shrouded in impenetrable fog. Nothing was placed before the court to suggest that a valuation was ever done. As a matter law, personal chattels assigned as

security under a bill of sale may be seized or taken possession of in well defined circumstances, (Fisher and Lightwood's Law of Mortgage 11th ed. P.142). None of the adumbrated circumstances are here relevant as the items were handed over to the Claimant/mortgagee. Having assumed possession the Claimant became a mortgagee in possession. And, being a mortgagee in possession is liable to account on wilful default basis. How the chattels were dealt with remains a secret shut up within the bosom of the Claimant. So, it may be that the Claimant should be made to account but how does that operate to extinguish the debt of the Defendants?

(30) The court accepts the submission of learned counsel for the Claimant on the point as an accurate statement of the law. That is, a creditor is free to exercise any of several securities that he holds or not to realise any and sue on the debt instead. Therefore, whatever the value of the chattels, the Claimant's right to sue is not abridged by the fact of being in possession. *Ergo,* since being in possession does not extinguish the debt, leaving the right to sue unaffected, summary judgment could not be denied on this basis.

(31) A not too dissimilar contention was the Defendants' right to an account. That was premised on the assumption that the Claimant and Defendants are accounting parties. The sobriquet, accounting parties, presupposes a bond of trust and confidence. Whether or not the relationship existed was the focus of disparate submissions. That relationship may be proved or presumed, according to their Lordships in **National Commercial Bank (Jamaica) Limited v. Raymond Hew et al PC Appeal #65/2002 dated 30th June 2003.** The relationship of banker-customer is not one in which it is presumed. It must be proved. Against the background of a staunch denial that one loan was ever extended and that the admitted loan was liquidated, juxtaposed with the unsatisfactory state of the accounts put before the court,

the Defendants should not be denied the opportunity to establish the nature of the relationship between the parties.

(32) The upshot of the foregoing ratiocination demonstrates that this is a case which falls under the rubric of inert dry bones awaiting the quickening breath of additional evidence. Accordingly, the application for summary judgement is dismissed.