JMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2009 HCV 3034

BETWEEN	**PETER KRYGGER**	**1st CLAIMANT**
A N D	**GARRIE DON**	**2nd CLAIMANT**
A N D	**BRADLEY JOHNS**	**3rd CLAIMANT**
A N D	**F1 INVESTMENTS INC.**	**1st DEFENDANT**
A N D	**STEVE PALMER**	**2nd DEFENDANT**
A N D	**PAUL ATKINSON**	**3rd DEFENDANT**
A N D	**CHRISTOPHER KELLY**	**4th DEFENDANT**
A N D	**PATRICE PALMER**	**5th DEFENDANT**

IN CHAMBERS

Appearances

Hon. Mr. M. Hylton O.J., Q.C., Mrs. N. Foster-Pusey and Mr. K.O. Powell for the claimants.

Mr. P. Beswick and Mr. F. Jobson for the 1st, 2nd 4th and 5th defendants.

Matter previously discontinued against the 3rd defendant.

2nd, 4th and 5th defendants attended but were excused from the proceedings.

Heard: May 19 & 20 and November 26, 2010.

P.A. Williams, J.

1. There are four applications before the court so the one first in time which could possible resolve the matter was the first proceeded with.

This was an application for summary judgment by the claimant under CPR 15.2 wherein the claimants argued that the defendants had no real prospect to succeeding on the claim and ask therefore that summary judgment be entered in their favour.

2. The claimants are representative parties appointed by the court on June 15, 2009 to represent eight-three investors who invested various sums with the 1st defendant which they allege was at all material times under the management control and direction of the other defendants. They are claiming the return of the sum of US$8,145,441.20 being monies invested with the 1st defendant and which have not been returned despite demand. They also seek interest on these monies at a commercial rate.

The law

This application for summary judgment is under CPR 15.2 which provides inter alia:-

> "The court may give summary judgment on the claim or a particular issue if it considers that.....the defendant has no real prospect of successfully defending the claim or the issue'.

4. The English authority of **Three Rivers District Council v. Bank of England (2001) 2 All ER 513** and **Swain v. Hillman [2001} 1 All ER 91** remain the leading authorities pronouncing in this area of the law.

The dictum of Lord Wolfe MR in **Swain v. Hillman and another** [supra] provides the useful point to commence consideration in matters of this nature. At page 91 he said

> "....the court now has a very salutary power, both to be exercised in a claimant's favour or where appropriate, in a defendant's

favour. It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success....they direct the court to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."

5. At page 93, he went on to state:

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objective contained in Part 1. It saves expense, it achieves expedition, it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally that it is in the interests of justice."

He cautioned at page 94 that these powers under Part 24 which is similar to CPR 15 .2.....

"It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial."

6. Judge L.J at page 95 followed up on this cautionary note in stating:-

"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".

7. In the submissions on behalf of the claimant, Mr. Hylton referred to a decision from our courts namely **Dave Blair v. Hugh Hyman 2005 HCV 2297** unreported delivered May 16, 2008 where Mr. Justice Brooks quoted with approval **Potter L.J** in **E.D & F Man Liquid Products Ltd. V. Patel and Anor. [2003] EWCA Civ. 472**

In referring to the English rules 13.3 and 24.2 (equivalent to our15.2) Potter L.J stated:

> "It is certainly the case that under both rules where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v. Hillman..... However that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertion may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable.

8. **The claim**

The claimants brought this action for damages for breach of contract, damages for deceit and/or fraud alternatively damages for negligence, damages for conversion, restitution for or by reason of unjust enrichment, an order that the defendants account for the sum received by them or any of them from the investors; interest and cost.

They rely only on two (2) of these causes in their assertion that the defendants have no real prospect of successfully defending the claim namely for breach of contract and in negligence.

9. The issue identified by the claimants for the court to resolve in this application are:-

(i) whether the 1st defendant was under the control, management and direction of the 2nd, 4th and 5th defendants.

(ii) whether the 1st defendant received funds from the claimants who invested those funds with it for the sole purpose of foreign exchange trading.

(iii) whether the claimants are entitled to the return of their funds invested with the defendants and whether the defendants have failed or refused to return those funds.

The submissions

For the claimants

10. Mr. Hylton in making the submissions for the claimant considered the relevant facts of the case simple and not disputed.

Between May 07 and July 08 the claimants invested various sums of money with the 1st defendant for the purpose of foreign exchange trading on terms that the funds would be repaid on demand. It is not disputed that despite demands, the claimants' funds have not been returned. These facts constitute a breach of contract.

11. In the defence stated by the 1st defendant there was admission that the terms of the agreement between the claimant and itself indicated that the funds invested would be used for the agreed purpose of trading on the foreign exchange market; that the funds

invested would be returned on demand and that the 1st defendant would maintain the usual and proper books of accounts.

Further it was stated that "the 1st defendant had not been able to repay the said funds to its investors".

12. In their defences, the remaining defendants all made similar admissions as relates to the 1st defendant. They argued that the money was invested with the 1st defendant, a separate and legal entity, they maintain as between themselves and the claimants there is no contract.

13. The response to this assertion by Mr. Hylton was that the company was merely an alter ego of the persons who actually controlled it.

The case of **Donovan Crawford et al v. Financial Institutions Ltd**. SCCA No. 64 and 68 of 1999 delivered July 31, 2001 was cited as demonstrative of how in particular circumstances the court can refuse to regard a company as a separate legal entity.

The Privy Council's decision in the matter had found that there had been "ample material on which to conclude that Regardless was a creature of [the controlling director] a device and a sham; a mask which he holds before his face in attempt to avoid recognition by the eye of equity."

PCA No. 34 of 2004 delivered 2nd November, 2005.

14. In the instant case, it was submitted that the 1st defendant was only a vehicle and a device through which the other defendants carried out their investment business. It is noted that both the 2nd and 4th defendants admitted that the 1st defendant was under their control, management and direction in their defences.

The 5th defendant denied this and stated instead that she was an employee of the 1st defendant at all material times.

Mr. Hylton opined therefore that the 1st defendant conceded it was the alter ego of the 2nd, 3rd and 4th defendants.

15. It was further pointed out that although the 1st defendant was incorporated in Panama, the evidence indicated that all decisions on its behalf had been made by the remaining defendants and all communication was through them.

In none of the correspondence and other documents was there communication with or reference to any of the persons listed as officers in the Panamanian company registry. It was further pointed out that there had been another vehicle used by the defendants at one point that is F1 Holding Company Ltd. – a Jamaican company with Steve Palmer and Christopher Kelly as the sole shareholder and they and Patrice Palmer as directors.

This company held an account at the National Commercial Bank in Jamaica and some of the investors with the 1st defendant were directed to transfer money to that account.

In a law suit filed in the United States involving the 1st defendant, it gives it address as c/o F1 Holding Company Limited.

17. This suit is also referred to for the way in which the 2nd and 5th defendants referred to funds invested with the 1st defendant. The 2nd defendant described it as "my funds" or "my money" and the 5th defendant described it as "my husband's funds" or "Steve's funds".

This, Mr. Hylton submitted are classic indicia of an alter ego situation.

18. In those proceedings it was noted that the 2nd defendant made it clear that it was he and not the company's nominal directors who made decisions on behalf of the 1st defendant.

The 5th defendant is said to have made it clear that she spoke for and could make decisions on behalf of the 1st defendant in discussions and e-mail correspondence with the 1st claimant.

The 4th defendant is said to have done the said things with one of the investors – Nicholas Wiltshire.

19. Other material for asserting that the 1st defendant was a sham was found, by Mr. Hylton, in a report of an investigation commissioned by the defendants and prepared by Peter Abalia.

Firstly it revealed that the defendants had used other entities in pursuing their foreign exchange trading business interest – the 1st defendant had an account with Olint in the name Candlelight Collections which was a company owned by the 2nd and 4th defendants.

Secondly the 2nd defendant did not take a salary from the 1st defendant but "took a small amount of money needed for personal expenses". This fact it was submitted showed that there was no distinction between the personal funds of the defendants and the funds of the 1st defendants.

20. It was concluded on this point that "in all the circumstances the court has more than sufficient material before it to show that the 1st defendant was under the control, management and direction of the 2nd, 4th and 5th defendants and that it was a device and vehicle for the activities being carried out by them.

21. Anticipating the defendants possible argument that they may be able to lead contrary evidence at trial, it was submitted that the court must consider and rule on the application on the basis of the evidence before it.

The Privy Council decision of **Commissioner of Police v. Bermuda Broadcasting Co. Ltd**. PCA No. 48 of 2007 delivered January 23, 2008 was referred to as demonstrating that Court's application of this principle.

Further support for this proposition was submitted to be found in the Court of Appeal decision in **Gordon Stewart, Andrew Reid and Bay Roc Limited v. Merrick (Herman) Samuels SCCA No. 2/2005** delivered November 18, 2005 (unreported).

23. The second ground argued in support of this application was that the defendants have no reasonable prospect of successfully defending a claim of negligence against them.

It was submitted "that by accepting funds from the claimants on the basis that those funds were to be used for foreign currency trading on the basis of offering a professional service, the defendants owed the claimants a duty of care".

The three criteria for determining the existence of this duty as a matter of law as set out in Bullen and Leake and Jacob's Precedents of Pleadings 16th edition, Volume 2, 2008 at paragraph 77- 03 was referred to.

The three to be satisfied are foreseeability of damage, proximity and a consideration of what is fair, just and reasonable.

24. It was submitted that all three criteria are present in the instant matter and is expressed as follows:-

"The loss of the investors funds was obviously reasonably foreseeable in circumstances where the defendant engage in offering to accept funds for foreign exchange trading. The proximity of the relationship between the claimants and the defendants may be defined in the context of the accepted responsibility by the defendants in managing or directly trading the funds invested by the claimants. In all the circumstance, it is fair, just and reasonable that the court to conclude that defendants owed a duty of care to the claimants and the funds invested by the claimants".

25. It was opined that the defendants breached their duty of care in specific ways:-

a) They failed to keep any or any proper records or books of accounts. None had been provided on request. The forensic audit commissioned by the defendants noted that "F1 Investments and F1 Holdings have never prepared a financial statement and their records are not set up in general accounting methods."

b) They transferred some of the claimants funds to Olint Corp. Ltd/Olint TCI and Ingrid Loiten/May Daisy without taking any or any sufficient steps to secure their return.

No evidence was given of the due care and effort the defendants alleged was undertaken to secure the return of the claimants' funds.

US $5 million of the investors funds was transferred to another entity which did not appear to have been for foreign exchange trading.

26. The forensic audit they commissioned, revealed that the defendants failed to take, sufficient care in handling investors' funds – they used monies received from new investors to pay encashment requests.

It was opined that this may have been the reason the defendants were unable to return funds invested in 2008.

27. Having recognized that there may appear to be an appearance of inconsistency in the claims for breach of contract and for negligence, the House of Lords decision in **Henderson v. Merrett 1994 3 All ER 506** was referred to. The leading judgment of Lord Goff at pages 531-532 was cited in support of the submission that in the circumstances the claimants were entitled to pursue concurrent remedies in contract and negligence.

28. Having advanced the principal arguments on behalf of the claimants, the submission went then to address other issues which was recognized as being raised by the defendants in their affidavit evidence.

29. On the issue of how much money was owed; it was noted that the defendants while admitting to the existence of the agreements for monies to be accepted from the claimants for the purpose of foreign exchange trading, they did not admit to the amount being claimed US $8,145,441.20.

However it was noted that the Final Report of Investigation reflected that the claimants were owed at least US $8,140.659.95. This report was referred to as "the defendant own report".

30. It was again noted that the defendants in their separate defences admit that the claimants are entitled to the return of their funds and that the 1st defendant has not been able to repay the said funds to its investors.

The allegations of the defendants that the funds invested by the claimants were "misappropriated by at least two (2) of the traders" was described as incorrect. Documents filed in the proceedings in Florida against Loiten/May Daisy showed that the sums sued for by the 1st and 2nd defendants was due to them as at December 30, 2007 whereas the majority of the claimants funds were invested in 2008.

31. Against this background, it was submitted that the monies invested in 2008 should be now available. The reason given for failure to pay being incorrect as indicated in the argument outlined in the preceding paragraph, the submission was that it was therefore clear that the monies invested had been converted and used for purposes other than what was agreed.

It was noted that in that Final Report the 2nd claimant is said to have agreed that what he was doing "is commonly called a Pyramid"

32. It was opined that the defendants failed to recognize that even if the funds they received had been misappropriated by traders they had used in their operation, it did not provide them with a defence to their breaching of the terms of the agreement with the claimants.

33. It was noted that the 2nd defendant in one of his affidavits had said that the defendants commissioned a forensic audit by a retired investigator of the United States Internal Revenue Service who has concluded in his report that the defendants did not convert any of the funds in their possession.

Mr. Hylton stressed that this report however does not ultimately help the defendants.

Indeed it was submitted that "when one compares the findings of the report commissioned by the defendants and prepared on their behalf and the contents of pleadings filed in Florida with the substance of the defences filed, the genuineness of the Defences is clearly suspect."

34. Two aspects of the report are given as examples of the divergence between it and the Defences filed. The first is the denial in the defence of operating a "Ponzi" scheme whereas in the report the 2nd defendant is admitting to doing so. Secondly the defendants deny using the claimants funds to repay the investments of others whereas in the report the 2nd defendant admits that this was done.

35. The final substantive submission that was made on behalf of the claimants was on the point of jurisdiction.

It was noted that defendants had filed an affidavit in what appeared to be an attempt to challenge the jurisdiction of the court to grant summary judgment against the 1st defendant.

36. It is to be noted that the agreement between the claimants and the 1st defendant provide that it is:-

> "governed by the laws of Panama and the customer consents to the exclusive jurisdiction of the Panamanian courts in all matters regarding it except to the extent that the company invokes the jurisdiction of the courts of any country".

37. The affidavit filed seemingly to address this issue was that of Ricardo Cambra La Duke.

It was pointed out that this affidavit suffers from serious procedural and substantive deficiencies. It does not comply with the requirements under section 6 of the Probate and Deeds Act relating to a notary public.

Further it purports to give evidence of foreign law in circumstance where the procedure under CPR 31.2 has not been complied with.

38. Further, it is submitted that under the CPR any application to contest the court's jurisdiction has to be made within the period for filing a defence. At CPR 9.6 (5) it is stated "A defendant who

(a) files an acknowledgement of service

(b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim

39. It is argued that since the 1st defendant has not only failed to make an application under CPR 9.6 and has filed a defence to the claim and applied for security for cost in its defence of the claim, any submission at this stage to contest the court's jurisdiction should be viewed as not only an attempt to circumvent the clear provisions of the CPR and also an abuse of the process of the court.

40. It was further submitted that the other defendants are not being sued as shareholders or directors of the 1st defendant but as the alter ego of the 1st defendant.

In the alternative, it was submitted that even if the claim against the other defendants could be construed as claims against them in their capacity as shareholders,

they are not parties to the agreements and cannot avail themselves of the jurisdiction clause.

41. Addressing a suggestion in the affidavit of Mr. Duke that summary judgment could not be applied to this claim, it was submitted that summary judgment is a procedural step in proceedings and is not a question of substantive law to which the jurisdiction clause applies.

For the defendants

42. Mr. Paul Beswick in response urged the court to firstly have an overview of the actual pleadings claim and defence. He then proceeded to address on specific paragraphs of the various statements of case.

43. He began by pointing to the claim form itself and noted that the claim was against the defendants jointly and severally, hence the terms of the contract was applicable to all.

44. He turned to the particulars of claim and commenced by considering the assertion that the 1st defendant was merely the "alter ego" of the other defendants who controlled it. He submitted that there was no principle of law that individuals who directed a company would become "alter ego" of that company or that the company is a sham.

The first defendant was set up to do business it was in fact doing, that is trading in foreign exchange on various platforms.

45. He attacked the claimants assertion that the defendants represented to the general public including the investors that they were in the business of foreign currency trading. He pointed to the close relationship between the parties – they were related through the aviation industry – pilots and their families; not members of the general public but all people who know each other.

46. It was not being challenged that it was an express or alternatively implied term of the agreements between the defendants and the investors that:

a) the funds invested would be used for the agreed purpose of trading on the foreign exchange market

b) the funds invested would be returned on demand

c) the defendants would maintain the usual and proper books of accounts, and would account to the investors for their funds when reasonably requested to do so.

Mr. Beswick indicated that there was no real complaint with this statement, the question however remained whether there was in fact any breach.

47. He opined that there was not a scintilla of evidence before the court that the investors funds were used for anything other than for which it was invested, i.e. the claimants cannot prove that the funds were fraudulently converted and the court was being asked to infer that there was conversion.

48. He opined further that the failure to repay gave rise to a question of law as to whether this was in fact a breach.

He submitted that when they invested the claimants had been in acceptance of a risk and therefore if they didn't get pay, this did not necessarily mean that they could sue and get judgment.

49. The issue of the failure to keep any or any proper or sufficient books of account was described as the making of a general statement which was not sufficient. It was submitted that there was no rule of law requiring the defendants keep the books to any

standard – the books and accounts were sufficient for the purpose for which they were kept.

50. Mr. Beswick went on to consider the claimants assertion that their funds had been obtained by the defendants by way of fraudulent misrepresentations and commented that the particulars listed required proof to a particular degree not before the court at this time.

His review and analysis of the particulars are however not considered relevant at this time as the claimants were not relying on that cause of action in their application for summary judgment.

The claimants had relied on their belief that the defendants had no reasonable prospect of successfully defending a claim of negligence against them.

51. In addressing the specifics of what the claimants had referred to as proof that the defendants had breached their duty to take care in the management of their funds, Mr. Beswick highlighted sections of the affidavits which he said provided evidence that investors were advised that investments were to be done through third parties.

There second defendant exhibited a page from a website which expressly stated that "F1 Investments Inc. does not trade funds directly. The funds are traded by Investment Clubs, Forex Traders, Brokers or Fund Managers".

52. It was also noted that the claimants had been made aware of the level of risk of their investments.

The claimants, therefore had no entitlement to get back the full amount of their monies.

53. Mr. Beswick then turned to considering specific assertions in an affidavit of the 1st claimant. He challenged the conclusion arrived at in the assertion that funds received

from the investors had been transferred to Ingrid Loiten/May Daisy and were thus tied up in the Florida litigation was a false representation. The claimants had noted that the majority of their funds had been transferred in 2008 whereas the transfer referred to was prior to December 2007.

54. He argued that the usage of words by 2nd and 5th defendants referring to the funds as personal funds was not a sufficient basis for saying the funds was not being held by a separate legal entity F1 Investments Inc. or F1 Holdings Limited. It was a question not only in fact but in law which was not addressed in a grant of summary judgment.

55. The fact that the claimants thought that all decisions on behalf of the 1st defendant were made by other defendants does not mean that they are in fact alter ego of the company and therefore vicariously liable.

Again, Mr. Beswick stressed that only evidence presented at a trial would enable the court to make a decision and then apply the relevant law to arrive at a conclusion.

56. Mr. Beswick then turned to the defence of the first defendant which it was noted contained assertions similar and even identical to some contained in the defences of the other defendants.

The main thrust of his argument when considering the defence was that the assertions raised meant that there was a question as to whose version of the evidence a court would prefer which could not be settled at this stage.

57. In considering the defences of the 2nd and 4th defendants the similar form was duly noted and the same opinion was ultimately arrived at – evidence had to be presented for the court's determination.

The 5th defendant's position was noted to be different as she asserted she was an employee of the 1st defendant and nothing more. It had been noted that the 2nd and 4th defendants said they were shareholders of the 1st defendant.

58. Mr. Beswick asked the court to consider the actual agreement between the parties. In particular and of primary importance was the clause which stated that the contract was to be governed by the Laws of Panama. This clause it was urged cannot be got around by way of procedure. In determining what falls from the contract to be considered outside of the laws of Panama needs a trial to examine. The issue of jurisdiction it is urged is still live and can still be argued.

59. Mr. Beswick having reviewed the documents before the court then turned to consider relevant principles and authorities.

The first area addressed was on the question of whether the defendants had been negligent.

The starting point of the argument was that a standard of care must be established in order to proceed in a case of negligence, i.e. there must be established what is the standard of care for the particular activity being practiced.

It was urged that the defendants were not holding themselves out as bankers or traditional investors but as high risk traders, a fact which had been indicated to the claimants.

Further it was argued a bald assertion that the defendants had breached their duty of care in the manner in which they managed the claimants funds was not sufficient. There was no evidence as to what the standard required in matters such as this was and thus the court was being asked to infer a breach of standards unknown.

The case of **Shakoor v. Situ [2000] Vol. 4 All ER 193** was referred.

60. Mr. Beswick took issue with Mr. Hylton's reliance on the "Crawford case" in seeking to establish that the 1st defendant was a "sham" or a "device" or a "vehicle" through which the defendants carried out their investment business. The legal principle extracted from that case Mr. Beswick found not to be appropriate.

The company in that case was not set up as a trading company as F1- the 1st defendant was in the instant case.

On the question of the company being an alter ego of the persons who control it, Mr. Beswick submitted that being an alter ego required more than directing but there must be some deceitful purpose or improper motive.

61. In concluding on this aspect Mr. Beswick submitted that at the end of the day the court must consider what the result would be if the case went to trial on the evidence as it exists now.

The defendants are not obliged to provide detailed evidence at this time which would be expensive to produce and to say that they must have volumes of evidence to address the application here would be unreasonable.

62. The words of Mr. Justice Evan J. Brown (Ag.) in **Jamaica Redevelopment Foundation v. Premier Food Jamaica Limited and G. Anthony Lee** was referred to as being indicative of the proper approach for matters such as this. At page 6 paragraph 15 of the unreported decision **HCV 02739/2005** delivered on the 21st October 2009 he said:-

> ".....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 shape or form the inert dry bones would assume once clothed with testimonial sinew".

63. In ending his oral submissions Mr. Beswick revisited the issue of jurisdiction as had been presented in his written skeleton arguments for the defendants.

He strongly argued that the claimant cannot get summary judgment since the claim itself must be in compliance with Panamanian law – the very substratum of the claim does not exist.

64. He recognized that the affidavit of Ricardo Cambra La Duke may not conform with the requirement of the Probate of Deeds Act which he described as a lapse on procedure. However it was argued that the court was still entitled to consider the document and give it such weight as it think is deserved.

65. In urging the need for the court to consider the law of Panama as being the one to be used in determining any issue arising under this contract, the following authorities were relied on:-

Armar Shipping Co. Ltd. V. Caisse Algerienn d'Assurance et de Reassurance the Armar [1981] 1 All ER 498.

Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd. and Ors. [2004] 4 All ER 1071.

66. Finally Mr. Beswick referred to our Court of Appeal decision in **Quick Signs Limited v. EZ Cash Loans Services Ltd. et al SCCA 58/09** delivered 2nd July 2009. A comment by the President Panton at page 4 at paragraph 6 provided more support for the argument that summary judgment ought not to be granted in a case such as this.

In that case one investor in what appeared to be an investment scheme had sought an injunction which was found to be requiring the making of an order which would give the investor "full sway and say over what happens with the assets". This was seen by President Panton as the investor "attempting to steal a march on other individuals who may be in the same position that it is in, in that they have contributed to the scheme and so would be entitled to returns."

The learned judge was held to have been right in the exercise of his discretion in not granting an injunction.

67. It should be noted here that in response Mr. Hylton pointed out that the case of Quick Sign [supra] is not applicable given the basic fact that the application there was for an injunction which was discretionary whereas the application here was not. The court is being asked to determine whether the defendant has any real prospect of succeeding on its defence and if the claimant ought to receive judgment.

The decision

68. Although the relevant law applicable in this case was reviewed above, I am moved to consider the words of Mr. Justice Evan J. Brown (Ag.) in **Jamaica Redevelopment Foundation v. Premiere Food Jamaica Ltd**. [supra] as a useful backdrop against which to determine this application. At pages 5-6 paragraph 13-14 after reminding that the burden of proof rests on the claimant to prove that the defendants have no real prospect of successfully defending the claim, he continued:-

> "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 courts assessment of the facts must not be susceptible to a robust challenge by viva voce evidence (Commonwealth Caribbean Civil Procedures Third Edition page 64).

69. The issue as to the Courts jurisdiction to deal with this matter must be considered, given the strenuous submission made by Mr. Beswick in this regard.

I am satisfied that the court would have to be guided by the provisions of the Civil Procedure Code as urged by Mr. Hylton.

The provisions of CPR 9.6 (5); as appears above, having not been complied with by the defendant means that they have submitted to the jurisdiction of this court.

I find support for arriving at this conclusion from the judgment of Mrs. Justice N.E. McIntosh, J (as she then was) in **William Potopsingh and Athlene Brown v Nicroja Limited and Nicholas Grant Claim No. 3224 of 2009** delivered October 20, 2009.

70. It should be noted that in seeking to strengthen their argument that the issue which they have raised gives rise to an inevitable conclusion that the defendants have no real prospect of succeeding on the claim, Mr. Hylton had shared with the court the decision of Mr. Justice Sykes when an application was made by these claimants against these defendants for a freezing order. Mr. Justice Sykes was considering after an inter parties hearing whether a without notice freezing order should be continued until trial. His decision was delivered on January 22, 2010.

71. It was noted at page 6 paragraph 22 that the defendants admitted the following:-

(a) F1 Investments and the claimants entered into a contract whereby F1 Investments would manage funds given to it.

(b) F1 Investments and/or the 2nd to the 5th defendants did receive money from the investors.

(c) the monies received were for the purpose of foreign exchange trading.

(d) the monies have not been returned

72. It is of course to be remembered that the requirements for what is necessary to be established to obtain a freezing order differs from what is required for a summary judgment. The claimant in the former must establish that he has a good arguable case whereas in the latter there must be no real prospect of the other party being successful.

In the matter before Mr. Justice Sykes, the defendants had not yet filed a defence or any affidavit and most of what they said came from counsel's submission.

For the purpose of the application now before the court, the defendants having filed their defence, also filed an affidavit of the 2nd defendant in response to the claimant's application for summary judgment.

73. It is undisputed however that certain things found to be admitted by Mr. Justice Sykes, remain unchanged. Significantly the claimants invested monies with the defendants for the sole purpose of foreign exchange trading. The funds have not been returned despite demand.

These two basic facts to my mind supports the contention that there was a breach of contract.

74. In their defence, the defendants seek to avoid liability by trying to sufficiently distance themselves from the 1st defendant. The 2nd defendant and 4th defendants

admitted that the 1st defendant was under their control, management and direction at all material times.

This admission to my mind supports the claimant's assertion that the 1st defendant was a device through which the other defendants were seeking to advance their business.

I find the 5th defendant has made a bald assertion that she was an employee of the 1st defendant. At this point there is nothing before the court to suggest the capacity in which she was employed not the terms of her employment. She does however state that she ensured that the 1st defendant met the standards required under its license and that proper records and book of accounts were kept using software developed by a company recognized in the industry as being capable to the extent she was required as an employee so to do.

75. It is true however that more would be anticipated from the evidence ultimately presented at trial. The 5th defendant however would be hard pressed to explain the evidence in the documents filed in the Florida proceedings where she repeatedly describe the Funds invested with the 1st defendant as "my husband's funds" or "Steve's funds"

76. It is also note that in her discussions and correspondence with the 1st claimant, the 5th defendant did not dispute the assertion that she spoke for and could make decisions on behalf or the company.

77. On the evidence before the court at this time, I am satisfied that F1 Investments was indeed a devise and cannot be viewed as a separate legal entity. The 2nd, 4th and 5th defendants cannot therefore successfully contend that there was no contract between themselves and the claimants.

78. Following on this finding and given the admission by these defendant that the 1st defendant received the Investors funds for the sole purpose of foreign exchange trading and that it has not been able to repay the said funds to its investors, these are admissions that can be visited on the 2nd, 4th and 5th defendants themselves.

79. Given the admissions of having received the monies/funds and having failed to repay as was agreed in the contract, the defendants offer as an explanation for their failure/inability to honour the contract the fact that having transferred it to others, the funds had been misappropriated.

This explanation cannot be regarded as providing them with a defence to their breaching the terms of the agreement between themselves and the claimants.

80. The claimants assertion that the defendants have no reasonable prospect of successfully defending a claim of negligence against them is rooted firstly in their breaching in their duty of care in the manner in which they managed the claimants funds. Secondly the claimant points to the transferring of the claimants funds without taking any or any sufficient steps to secure their return.

81. The response by Mr. Beswick is not without some merit. What was the standard of care required? Certainly it cannot be equated with that of a bank or other such institution. This fact however leaves unanswered the assertion by the claimants that there was a failure to keep any or any proper records or books of accounts. There has been no books or records exhibited or referred to in the defence of any of the defendants or in the affidavit of the 2nd defendant.

82. Given that it may well be said that such documentation may be available at trial, it must be recognized that given the reliance the claimant was placing on its absence in this

application; there ought to be evidence before the court at this stage to determine the chances of success the defendant would have in defending this aspect.

83. The defendants agree that they transferred some of the claimants funds to other investment clubs and/or Forex traders. This was noted as being expressly stated in the business practices on the website of the defendants.

It is observed however that as part of the mission statement the following was stated:-

> "We will also ensure that our clients' accounts are not only accurate and accessible at all times but also that their funds are safe and secure".

There is nothing indicated in the documents filed by the defendants as to how they would have sought to achieve this promise. Once again there are bald assertions which, on what is presently before the court, has no factual foundation.

84. In the circumstances as urged by the claimants and based in the authorities, I am satisfied that summary judgment should be granted to the claimants.

85. On the question of the appropriate interest to be awarded, Mr. Hylton submitted that the claim seeks interest pursuant to the provisions of the Law Reform (Miscellaneous Provisions) Act in particular Section 3.

He referred to the decision by our Court of Appeal in **BCIC v. Perrier 1996 53 WIR 342** in which the section was considered with Carey J.A. delivering the leading judgment.

He indicated that the average weighted foreign currency loan rate for September 2009 was 8.81% and for January 2010 (the latest rate available) it was 9.37%. The average of these rates is 9.09%.

86. In response, Mr. Beswick indicated he had no difficulty with the principle pronounced in the Perrier case [supra].

The issue for him however, is as to the date interest should be applied, if the claimants are successful.

Mr. Hylton had submitted that interest should be awarded at the rate of 9.09% per annum from September 1, 2009 to the date of judgment.

It was countered that given the state of the evidence as to when the demand was made that date could not be considered accurate.

It was suggested that the date of this claim might well be the most appropriate date.

87. **The order**

1. The claimants are granted summary judgment in the terms of the particulars of claim in the sum of US $8,145,441.20 with interest at 9.09% from June 7, 2009 to today's date.

2. Cost to the claimants to be taxed if not agreed.