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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 70/94

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE DOWNER JA
THE HON MR JUSTICE PATTERSON JA (AG)

BETWEEN	LANE PETTIGREW KARP (A FIRM)	PLAINTIFF/ APPELLANT
AND	CLIFTON YAP ARCHITECTS (A FIRM)	DEFENDANT/ RESPONDENT

R B Manderson-Jones for appellant

Michael Hylton for respondent

January 23 & March 21 1995

CAREY JA

The issue which is raised on this appeal involves a point of procedure whether certain statements made by the respondent (the defendant in the action) in an affidavit in rebuttal of a summons for summary judgment and contained in an answer to further and better particulars amount to admissions as would entitle the appellant (the plaintiff) to enter judgment pursuant to section 307 of the Civil Procedure Code. That provision is in this wise:

> "307. Any party may, at any stage of a cause or matter where admissions of facts have been made, either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may, upon such application, make such order or give such judgment as the Court or a Judge may think just."

To appreciate the point, I must, I fear, set out in some detail, the relevant pleadings.

The statement of claim (so far as material) pleaded as follows:

> 1. The Plaintiff is and was at all material times an international firm of architects and interior designers with its principal office situated at Miami Beach, Florida, United States of America.
>
> 2. The Defendant is and was at all material times a firm of architects established in Jamaica having its office at Manor Centre, Constant Spring Road in the parish of St Andrew and a member of the Jamaican Institute of Architects.
>
> 3. The Plaintiff is the author of an architectural schematic design and concept for a tourism, hotel and resort project contained in a report prepared in August, 1991, entitled 'The Village Braco' and is the owner of the copyright therein.
>
> ...
>
> 6. By an agreement partly oral and partly in writing made between the Plaintiff and the Defendant in or about August, 1991, the Plaintiff in the said report entitled 'The Village of Braco' introduced the Defendant to the developers by indicating that the Plaintiff has an association with the Defendant for all joint venture projects in Jamaica. It was further agreed with the Defendant that if the Defendant was to be engaged by the developers as architect for the resort project, the Defendant would thereupon formally engage the Plaintiff as an overseas consultant on the project.
>
> 7. In or about October, 1991 the Defendant firm was engaged as local Architects for the resort project and pursuant to the agreement between the Plaintiff and the Defendant the Defendant thereupon formally engaged the Plaintiff as an overseas consultant on the project.
>
> 8. It was a term of the agreement between the Defendant and the Plaintiff for the Plaintiff's engagement as an overseas consultant on the project that the Plaintiff would undertake seventy per cent (70%) of the project diversity work and that in addition to payment therefor the Plaintiff would also be paid fifty per cent (50%) of the total architectural and design fees.
>
> ...
>
> 13. In breach of the said agreement the Defendant has also refused to pay the Plaintiff's invoice of

US$113,157.39 for outstanding professional fees (in part) and to pay any part of the architectural and design fee.

16. As a consequence of the Defendant's breaches of contract and infringement of copyright aforesaid the Plaintiff has suffered loss and damage.

PARTICULARS OF SPECIAL DAMAGES

1. Invoice for outstanding fee =US$113,157.32

2. Brokerage commission =J$5,4000,000.00

3. 50% Total Architectural and design fee (Estimated) =US$ Amount to be determined on discovery

J$5,400,000.00 +US$ to be determined

AND THE PLAINTIFF CLAIMS:

5. Recovery of the sum of US$113,157.39."

I can now turn to the defence which insofar as the relevant paragraphs in the statement of claim are concerned, pleaded as follows:

1. Paragraph 1 and 2 of the Statement of Claim are admitted.

2. No admission is made as to paragraph 3 of the Statement of Claim in so far as authorship of the Report is concerned and in relation to the ownership of the copyright therein, the Defendant denies that the Plaintiff has any copyright in the land use concept.

5. Save that the Defendant does not admit that there was the Report or alleged that it was introduced to the developers thereby having an association with the Plaintiff for all joint venture projects in Jamaica paragraph 6 of the Statement of Claim is admitted.

6. Save that the Defendant denies that the Plaintiff was formally engaged as an overseas consultant on the project paragraph 7 of the Statement of Claim is admitted.

> 7. Paragraph 8 of the Statement of Claim is denied and the Defendant says that its agreement with the Plaintiff was that the work load would be shared equally and the fees would be shared in like proportion.
>
> ...
>
> 12. The Defendant denies paragraph 13 of the Statement of Claim and says that it has always been ready and willing to recommend the Plaintiff's fees for payment as and when the Plaintiff's said fees had been substantiated and the Defendant further says that it has on numerous occasions requested the Plaintiff to substantiate its said fees and to date the Plaintiff has refused and/or failed and/or neglected to substantiate the same.
>
> ...
>
> 15. Paragraph 16 of the Statement of Claim and the particulars of Special damages pleaded thereat are denied."

The defence subsequently supplied further and better particulars of its defence as requested by the appellant as appears below. With respect to paragraph 7 of the defence, question (e):

> "(e) What amount of fees are due to the Plaintiff in respect of this work load?

The answer was stated thus:

> "(e) Up to the point of termination JA$4,438,724.40 had become payable to the Plaintiff to which a total of JA$3,046,445.61 had been paid over a period of a year leaving a balance outstanding of JA$1,392,278.70."

With respect to paragraph 12 of the defence, the questions were:

> "(a) Who is responsible for payment of the plaintiff's fees?
>
> (b) From whom are the Plaintiff's fees due?"

The answers were:

"(a) The Defendant

(b) The client."

The appellant's legal advisers took the view that the statement contained in the answer to the further and better particulars at (e) in relation to paragraph 7 of the defence which is set out above amounted to an admission. On that footing therefore, the appellant applied for summary judgment under sections 79 and 81 of the Judicature (Civil Procedure Code) Law and for judgment by admission pursuant to section 307 of the Code. Karl Harrison J (Ag) by an order dated 27th June 1994, dismissed the summons on the ground that there was no clear and unequivocal admission on the part of the respondent.

For my part I am altogether unclear how there could have been any application for summary judgment under section 79 of the Civil Procedure Code familiarly known to those of my generation as Order 14 procedure which is a procedure in respect to claims for liquidated sums where there is no defence to the action in the plaintiff's belief. In this case, the claim was for "damages for breach of contract" that is, an unliquidated sum and a defence had at all events been filed. There was also an attempt to enter judgment in accordance with section 81 of the Civil Procedure Code, but in my view, the conditions prescribed to enable that provision to be invoked were entirely absent. It is therein ordained as follows:

> "81. If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms (if any) as to suspending execution, or the payment of the amount levied or any part thereof into Court by the Bailiff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be

> allowed to defend as to the residue of the Plaintiff's claim."

By no stretch of the imagination could it be said that the defence set up applied to a part only of the appellant's claim. The respondent traversed or pleaded to every paragraph of the statement of claim. As to the conditionality of admission, I propose to deal with that aspect of the matter hereafter. It is enough at this stage to say that no part of the claim was admitted. Howsoever that might be, those methods of entering judgment on the appellant's behalf were not pursued and therefore I need say no more about them.

The argument by Mr Manderson-Jones before us proceeded on the basis that the defendant's admission was contained in the answer (e) given to a question raised by the appellant in a request for further and better particulars, and also a statement made by the respondent to the same effect in an affidavit in rebuttal of the appellant's affidavit supporting the so-called summons for summary judgment. There is one comment which it is necessary to make regarding the statement contained in the respondent's affidavit in rebuttal of the appellant's affidavit supporting the summons for summary judgment. This affidavit really forms no part of the pleadings on which reliance can be placed to prove an admission as will allow judgment by admission to be entered. The statement contained therein would have been made at a time after the application for judgment by admissions was made.

To deal then with Mr Manderson-Jones' submissions, it appears to me that the entire argument is based on a misconception. The particulars which were being sought related to paragraph 7 in the defence which had denied the appellant's allegation of fact in paragraph 8 of the statement of claim. Paragraph 7 in the

defence contained an express denial of paragraph 8 of the statement of claim. The further and better particulars sought with respect to that paragraph 7 of the defence could scarcely be transformed into any admission of paragraph 8 of the statement of claim. To simplify the matter, paragraph 8 of the statement of claim sets out the appellant's understanding of a term of the agreement but the defence's pleading to that allegation was a denial and an averment by the respondents to his understanding of the relevant term. The answer supplied that an amount was due to the plaintiff did not and could not (in the face of an express denial) admit liability for any claim to a payment for fees. Indeed, the averment as to liability for payment was contained in paragraph 13 of the statement of claim which I must repeat:

> "13. In breach of the said agreement the Defendant has also refused to pay the Plaintiff's invoice of US$113,157.39 for outstanding professional fees (in part) and to pay any part of the architectural and design fee"

Paragraph 12 of the defence was in this form:

> "12. The Defendant <u>denies</u> paragraph 13 of the Statement of Claim and says that it has always been ready and willing to recommend the Plaintiff's fees for payment as and when the Plaintiff's said fees had been substantiated and the Defendant further says that it has on numerous occasions requested the Plaintiff to substantiate its said fees and to date the Plaintiff has refused and/or failed and/or neglected to substantiate the same."[Emphasis supplied]

In this case to enable the appellant to move for judgment by admission, the respondent would have had to admit the allegations contained in the appellant's pleadings, that is, in paragraph 8 of the statement of claim or had failed to traverse the allegations therein. As can be seen, that was not the position: the respondent expressly denied the appellant's allegations.

The learned judge did not approach the matter quite in this way. He took the view that the admission identified by Mr Manderson-Jones was not clear and unequivocal. He expressed himself thus (p.67):

> "... the admission which is being sought to be acted upon must be clear and unequivocal. It would seem to me and I so hold that the allegation that the defendant is ready and willing and able to pay must be read subject to the proviso that the Plaintiff substantiates his claim and the allegation that there is an independent contractual relationship between the plaintiff and the client. In my view, this is not an admission regarding personal liability to pay. It is further my view that it is a qualified admission and does not fall within the ambit of sections 81 and 307 of the Civil Procedure Code for a judgment on admissions."

He also stated that there were triable issues which should be determined at trial.

With all respect to the judge, if the appellant's pleading are read as a whole, I do not really think that there is any need to consider the question whether the statement by the respondent that a specific sum was payable could be considered a clear or an equivocal admission of liability. It did not, in my judgment, legitimately arise for consideration.

Insofar as it can be deduced from Mr Manderson-Jones' submissions that he was contending that there was somehow an admission by inference, I would not dissent to the response of Mr Hylton that there was no clear admission. In this regard, he referred us to **Technistudy Ltd v Kelland** [1976] 2 All ER 632 where it was held that a court is not entitled to enter judgment by admission where there is no clear admission of any kind either in the pleadings or in the correspondence.

Accordingly, although my approach differs from that of the judge, I would, for my part, dismiss the appeal and affirm the order of the learned judge. The respondent is entitled to his costs to be taxed if not agreed.

DOWNER J A

The straightforward issue to be decided on this appeal is whether Karl Harrison J (Ag) was correct in deciding that the appellant Karp was disentitled to a judgment on admissions as he claims. It is helpful to set out section 307 of the Civil Procedure Code as it governs the issue. Section 307 of the Code reads:

> "Judgment on admissions
>
> 307. Any party may, at any stage of a cause or matter where admissions of facts have been made either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may, upon such application, make such order or give judgment as the Court or a Judge may think just."

To appreciate why it is economical and helpful to confine this appeal to the prayer for a judgment on admission, it is pertinent to refer to the two relevant orders sought in this court:

> "For an Order to be granted in the following terms:
>
> 1. Judgment for the Plaintiff pursuant to Section 307 of the Judicature (Civil Procedure Code) Law for the sum of $1,317,497.90 with interest thereon at the rate of 20% per annum from 29 November, 1993, to the date of payment;
>
> 2. The remainder of the Plaintiff's claim to proceed to trial;"

Does Section 307 of the Code avail the appellant?

Initially it is necessary to advert to the specific averment in the statement of claim. It reads originally:

> "13. In breach of the said agreement the Defendant has also refused to pay the Plaintiff's invoice of US$113,157.39 for outstanding professional fees (in part) and to pay any part of the architectural and design fee."

By amendment the figure $1,1392,278.79 was substituted for US$113,157.39. This is how the respondent answered :

> "12. The Defendant denies paragraph 13 of the Statement of Claim and says that it has always been ready and willing to recommend the Plaintiff's fees for payment as and when the Plaintiff's said fees had been substantiated and the Defendant further says that it has on numerous occasions requested the Plaintiff to substantiate its said fees and to date the Plaintiff has refused and/or failed and/or neglected to substantiate the same."

In view of this emphatic denial, it is questionable if it is necessary to make any further enquiry as to the merits of this appeal. Yet Mr Manderson-Jones invited us to examine the further and better particulars which he had sought.

It is therefore helpful to examine the material part of that aspect of the pleading as they reveal the quality of the particulars which the appellant Karp claims as admissions to his claim. The narrative from the extracts is as follows:

> **"REQUEST**
>
> 3(c) What are the total fees payable in respect of the work load?
>
> **ANSWER**
>
> (e) Up to the point of termination JA$4,438,724.40 had become payable to the Plaintiff to which a total of JA$3,046,445.61 had been paid over a period of a year

leaving a balance outstanding of JA$1,392,278.79."

Then the further request runs thus:

" 5(e) Specify precisely the manner in which the Plaintiff is to substantiate his fee.

This answer is important and should be carefully noted:

"ANSWERS

(e) (i) The Plaintiff is to supply the check set of blue prints of its work which was submitted to the Defendant but was subsequently removed by the Plaintiff without the Defendant's consent before the same could be checked and presented to the client for approval.

(ii) The Plaintiff is to supply to the Defendant invoices and receipts for all advances made to it.

(iii) There was no agreement for time charges and the Plaintiff's statement includes significant amounts for time charges. As such, there is no basis for substantiating these time charges as the basis for charging the client for architectural fees was a percentage fee basis of which the Plaintiff was to get 50% of the architectural fees.

(iv) The reimbursable expenses need to be substantiated and justified by way of a discussion with the client and the Defendant."

The Law

In **Technistudy Ltd v Kelland** [1976] 3 All ER 632 at p. 634 Lord Denning MR said:

"...The contractors seek judgments on admissions. I cannot see any clear admission that any specific sum is due which could be ascertained. The

> issues are so wide open that it seems to me that there should be no judgment on admissions;"

Then Roskill LJ said on the same page:

> " It seems to me, with great respect to him, that he made the wrong order. The reason why his order is wrong is that there is no clear admission of any kind, either in the pleadings or in the correspondence, which entitled him to make the order that he did under RSC Ord 27, r 3. As the cases show an order should only be made under that rule if it is plain that there are either clear express, or clear implied admissions. I can see no clear express admissions; I can see no clear implied admissions."

In the earlier judgment of **Ellis v Allen** [1911-13] All E R Rep 908 or [1914] 1Ch 904, Sargant J said at 909 of the All E R Rep:

> "...the object of the rule was to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed... In my judgment it applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed."

The record does not show any correspondence before or after the writ of summons which are admissions. So the defence and further and better particulars are the relevant facts. There were no admissions there within the intendment of section 307 of the Code. Instead, there are issues to be resolved by the trial court as to whether the appellant must satisfy certain conditions pursuant to the relevant contract before he is entitled to payment. It is really a very short point and the appeal ought to be dismissed and the order below affirmed. The respondent Yap must have his costs which is to be taxed if not agreed.

PATTERSON, J.A. (Ag.):

The appellant is an international firm of architects and interior designers, and the respondent is a local firm of architects. Both firms were engaged as architects for a resort development project known as "The Village of Braco". But before the project was completed, the employment of the appellant was terminated. The appellant issued a writ claiming "damages for breach of contract and infringement of copyright in respect of architectural services and work done" for and at the request of the respondent in connection with the project and also for "an account, a declaration and an injunction in connection therewith."

The appellant filed its statement of claim after the respondent appeared to the writ and the respondent filed a defence in due course. The respondent also filed further and better particulars at the request of the appellant, and that seems to have prompted the appellant to apply by summons dated the 24th February, 1994, supported by an affidavit of even date, for "Final Judgment ... pursuant to sections 307, 79 and 81 of the Judicature (Civil Procedure Code) Law, for the amounts of $4,438,724.40 and US$113,157.39 with interest." Karl Harrison, J. (Ag.), by order on the 27th June, 1994, dismissed the summons on the ground that there was no "clear and unequivocal" admission which would entitle the appellant to a judgment pursuant to sections 81 and 307 of the Civil Procedure Code, and he further held that "on the state of the pleadings there are triable issues and they ought to be determined by trial."

Before us, counsel for the appellant contends that the appellant is entitled to a judgment on admissions pursuant to section 307 of the Judicature (Civil Procedure Code) Law for the sum of $1,317,497.90 with interest. That section provides:

> "307. Any party may, at any stage of a cause or matter where admissions of facts have been made, either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may, upon such application, make such order or give such judgment as the Court or a Judge may think just."

The appellant says that the admissions of fact which entitles it to a judgment are contained firstly, in the respondent's answer to the appellant's request for further and better particulars, secondly, in two affidavits of the respondent sworn on the 1st March, 1994, and 22nd March, 1994, and filed in response to the appellant's affidavit in support of the summons for judgment, and lastly, in the affidavit of Stephen Shelton, the respondent's attorney-at-law, sworn on the 22nd March, 1994.

It is necessary to set out the details of the relevant pleadings leading up to the filing of the summons for judgment which form the ground for the summons, as well as the relevant sections of the affidavits on which the appellant relies. Paragraph 8 of the Statement of Claim reads:

> "8. It was a term of the agreement between the Defendant and the Plaintiff for the Plaintiff's engagement as an overseas consultant on the project that the Plaintiff would undertake seventy per cent (70%) of the project diversity work and that in addition to payment therefor the Plaintiff would also be paid fifty per cent (50%) of the total architectural and design fees."

The defence to this is in these terms:

> "7. Paragraph 8 of the Statement of Claim is denied and the Defendant says that its agreement with the Plaintiff was that the work load would be shared equally and the fees would be shared in like proportion."

That seems to have prompted the following request for further and better particulars:

> **"As regards Paragraph 7 of the Defence:**
>
> 3(e) What amount of fees are due to the Plaintiff in respect of this work load?"
>
> **'ANSWER**
>
> Up to the point of termination JA$4,438,724.40 had become payable to the Plaintiff to which a total of JA$3,046,445.61 had been paid over a period of a year leaving a balance outstanding of JA$1,392,278.70'."

The relevant sections of the affidavits which the appellant seeks to rely on are these:

> "(1) Affidavit of Clifton Yap sworn to on 1.3.94 - Paragraph 5:
>
> 'Paragraphs 10 and 11 of the said Affidavit are absolutely untrue and to date the Plaintiff has been paid the sum of $3,121,223.50

"towards its fees and all that remains outstanding to the Plaintiff is the sum of $1,317,497.90 which the defendant is ready willing and able to pay provided the Plaintiff does the following in accordance with my numerous requests:

(a) Provides the Defendant with invoices to cover the amounts which have been advanced to date;

(b) Provides the defendant with an indemnity for the income tax which the Defendant is required to withhold from the payments which were made to the Plaintiff and pay over to the Commissioner of Income Tax;

(c) Submit copies of the drawings to substantiate and justify the payment of the fee.'

(2) Affidavit of Clifton Yap sworn to on 1.3.94 - Paragraph 10(b) -

'whenever the Plaintiff provides the documents requested by the defendant and set out in paragraph 4 hereof the Defendant is obliged to immediately pay over to the Plaintiff the sum of $1,317,487.90.'

(3) Supplemental Affidavit of Clifton Yap sworn to 22.3.94 - Paragraph 2:

'That I wish to refer to my Affidavit sworn to on March 1, 1994 and I wish to state that after further research in the matter I have discovered that the actual amount which has been paid to the Plaintiff to date is JA$3,046,445.61 and not JA$3,121,223.50 as previously stated. There is therefore a balance outstanding to the Plaintiff of $1,392,278.79 which is payable once the Plaintiff supplies the documents set out in

> "paragraph 5(a) to ((c) of my aforesaid Affidavit.'
>
> (4) Supplemental Affidavit of Stephen Shelton sworn to 22.3.94 - Paragraph 2 -
>
> 'That I wish to refer to my Affidavit sworn to herein on the 2nd March, 1994, and I would like to amend the figures in paragraph 3 thereof in that I am informed by Mr. Clifton Yap, principal of the Defendant and verily believe that the total amount which has been paid to the Plaintiff is $3,046,455.61 and that the balance which is outstanding is JA$1,392,278.79 which is payable on condition that certain documents are supplied to the Defendant by the Plaintiff'."

It is of some significance that the appellant seeks to rely on affidavits filed in riposte subsequent to the summons for judgment, which was amended to substitute the figure of $1,392,278.79 in lieu of $4,438,724.40 where it appears.

Counsel for the respondent submits that this appeal ought to be dismissed for two reasons. Firstly, he says there is no admission by the respondent within the meaning of section 307 of the Judicature (Civil Procedure Code) Law, and, secondly, there is no clear admission that any sum is payable by the respondent.

It seems quite clear that the provisions of section 307 may only be invoked where there is no dispute as to the facts admitted. In **Ellis v. Allen** [1914] 1 Ch. 904, a case which turned on the construction of provisions in pari materia with section 307, Sargant, J. said:

> "...it applies wherever there is a clear admission of facts of which it is impossible for the party making it to succeed."

It is undoubtedly true that clear admissions may be made in pleadings, in letters, in affidavits "or otherwise", and that any such admission may properly form the basis for an application for judgment by admission. But I am not sure that the appellant's application was originally directed to a judgment by admission. The interlocutory summons for judgment is based on the pleadings and the evidence in support of the application is contained in an affidavit sworn by Lane Pettigrew, a partner in the appellant's firm. The relevant section of the Summons, which is intituled "Summons for Summary Judgment", and is dated 24th February, 1994, reads in part as follows:

> "11. ...application on behalf of the Plaintiff that it be at liberty to sign Final Judgment in this action against the above-named Defendant CLIFTON YAP ARCHITECTS (A FIRM) pursuant to Sections 307, 79 and 81 of the Judicature (Civil Procedure Code) Law for the amounts of $4,438,724.40 and US$113,157.39 with interest at such rate and for such period as the Court thinks fit and costs.
>
> AND TAKE NOTICE that at the hearing of this Summons the Plaintiff shall refer to the Affidavit of Lane Pettigrew in support of this summons and filed herein."

The affidavit of Lane Pettigrew in support of the summons is of even date and is intituled "Affidavit in Support of Summons for Summary Judgment". The relevant paragraphs are these:

> "7. In or about June, 1993, the Defendant terminated the Plaintiff's employment.
>
> 8. Up to the point of termination, the total architectural fees payable on the Defendant's

"calculation were JA$8,877,448.80 made up as follows:

1) Schematic Design & Design Development	= $ 8,889,570.00
2) Additional Fees for S.D. & D.D. due to inclusion of additional village buildings	= $ 957,977.00
3) Construction document stage	= $ 9,691,606.00
CFW'D	$19,539,153.00
BFW'D	= $19,539,153.00
Architect fees = 4.1/9 of $19,539,153.00	= $ 8,901,169.70
Less payments to special consultants in Historic preservation (Arch. Pat Green)	= $ 23,720.90
Total Architect fees to be shared	= $ 8,877,448.80

9. Of the sum of JA$8,877,448.80 which the Defendant claims represents total architectural fees payable up to the point of termination of the Plaintiff's contract JA$4,438,724.40, was due to the Plaintiff.

10. Although the Defendant has paid itself its share of JA$4,438,724.40 it has not paid to the Plaintiff the Plaintiff's share of JA$4,438,724.40.

11. There is therefore due and owing to the Plaintiff from the Defendant the sum of JA$4,438,724.40 by the Defendant's own admission.

> "12. Furthermore, there is also an additional amount of US$113,157.39 due and owing from the Defendant to the Plaintiff for work done and for which the Defendant was given an invoice but which the Defendant has failed to pay.
>
> 13. At the date of the Writ herein the Defendant was, therefore, justly and truly indebted to the Plaintiff in at least the sums of JA$4,438,724.40 and US$113,157.39.
>
> ...
>
> 17. In the premises, I verily believe that the Defence filed herein is not a bona fide defence and that the Defendant has no genuine defence to this action and does not intend to defend it."

It seems quite clear, both from the summons and the affidavit in support, that the original thrust of the appellant's application was for summary judgment in terms of section 79 of the Judicature (Civil Procedure Code) Law. Although the summons makes reference to section 307, the only mention of an admission is in paragraph 11 of the appellant's own affidavit, and the judgment sought was for the sum of $4,438,724.40 and US$113,157.39.

The respondent filed affidavits in retort to the appellant's application, which clearly prompted the appellant to switch horses in midstream. When the matter came on for hearing the appellant abandoned the application for summary judgment, and consequently the evidence in the affidavit in support of the summons lost much of its importance. Instead, counsel argued for judgment on admission, placing great reliance on the affidavit filed by the respondent in

opposition to the application for summary judgment, and he has maintained that posture before us.

It seems to me that logic and good sense dictate that the evidence which is necessary to ground an application for judgment pursuant to section 307, must exist before the summons is filed. The affidavit in support of the summons must clearly state the admission on which the applicant intends to rely. It is true that the judge who hears a matter inter partes must necessarily consider all the evidence put before him, but the plaintiff in such a case must at least make out a prima facie case to support the relief prayed. The evidence adduced by the defendant in a normal case will then be examined to decide the effect it has on the plaintiff's evidence and any inferences to be drawn from such evidence.

In the instant case, it is plain that the evidence contained in the affidavit of the appellant did not support an application for summary judgment, and since counsel did not pursue that application, I need not say more. I will assume, however, that the summons is sufficient to satisfy an application pursuant to section 307, and examine the evidence in support in that light. As I have already pointed out, the affidavits on which the appellant seeks to rely in support of the application for judgment by admission cannot by themselves avail the appellant. It is not sufficient for the appellant to make assertions and then seek to rely on what he says are admissions in the respondent's affidavit in reply to form the basis for his application and to legitimize his case. It is, therefore, necessary to examine the pleadings to ascertain whether there are clear admissions of facts which would

entitle the appellant to a judgment. Counsel for the appellant placed reliance on the request for further and better particulars and the answer thereto, which I have referred to earlier, but it is best that I re-visit the pleadings to put the matter in its true perspective. The appellant's averment at paragraph 8 of his statement of claim (supra) was denied as stated in paragraph 7 of the defence (supra). The request for further and better particulars, based on this denial in the defence, and the answer thereto, reads:

> "**REQUEST**
>
> 3. **As regards Paragraph 7 of the Defence:**
>
> (a) Specify the nature and type of the work load to be shared equally as alleged.
>
> (b) Has the work involved been completed?
>
> (c) What are the total fees payable in respect of the work load?
>
> (d) On what basis are the fees payable computed?
>
> (e) What amount of fees are due to the Plaintiff in respect of this work load?
>
> (f) Has the Defendant been paid in respect of the work load and, if so, state the amount that the Defendant has been paid and the date of payment.
>
> (g) State whether the amount, if any, which the Defendant has been paid represents the full amount due to the Defendant and, if not, state the full amount of fees payable to the Defendant.

"(h) State the total architectural and design fee payable in connection with the Braco project.

(i) Was the alleged agreement between the Defendant and the Plaintiff that the work load would be shared equally and that the fees would be shared in like proportion expressed in writing or was it oral?

ANSWER

3. (a) Initially, the arrangement was that the Plaintiff would do the Design and Working Drawings of the Central Facilities and the Sports Complex and the Defendant would do the Design and Working Drawings of the Room Blocks, the Service Buildings, the Beach / Bar and the Main Entrance. However, the supervision aspect of the work was not discussed or clarified.

(b) At the point of termination of the Plaintiff's services, there was no evidence that the Plaintiff's portion of the work had been completed. The Defendant has completed its work.

(c) Up to the point of termination, the total architectural fees payable were JA$8,877,448.80 made up as follows:

1) Schematic Design & Design Development	= $ 8,889,570.00
2)Additional fees for S.D. & D.D. due to inclusion of additional village buildings	= $ 957,977.00
3) Construction document stage	= $ 9,691,606.00
	$19,539,153.00

"Architect fees = 4.1/9 of
$19,539,153.00 = $ 8,901,169.70

Less payments to special
consultants in Historic
preservation (Arch.
Pat Green) = $ 23,720.95

Total Architect fees to be
shared = $ 8,877,448.80

(d) As per the contract between the Defendant and Jamaica Venture Fund Limited dated October 8, `1991 a copy of which was supplied to the Defendant.

(e) Up to the point of termination JA$4,438,724.40 had become payable to the Plaintiff to which a total of JA$3,046,445.61 had been paid over a period of a year leaving a balance outstanding of JA$1,392,278.70.

(f) Yes, up to the point of termination JA$4,438,724.40 was paid to the Defendant.

(g) Yes, the above amount represented the full amount which was due to the Defendant up to the point that the Plaintiff's services was terminated, but the Defendant has done a considerable amount of additional work since the termination of the Plaintiff's services for which some further fees have been paid.

(h) This particular cannot be supplied because the fees are based upon a percentage of construction costs from time to time.

(i) Oral."

The appellant averred further, at paragraph 10 of the statement of claim, that:

> "10. Further, it was an essential term of the agreement express and implied that so long as the Defendant was engaged as architect on the project it would retain the professional services of the Plaintiff as consultant on the project and that neither the Plaintiff, on the one hand, nor the Defendant on the other would terminate their own contracts or that of the other without the prior consent of the other, their relationship being that of an association in a professional joint venture."

The respondent traversed this averment in the following manner:

> "9. Paragraph 10 of the Statement of Claim is denied and the Defendant says that any professional on the project could be terminated by or on behalf of the Client/Developer without any other professional necessarily having to be terminated in that each professional has an independent contractual relationship with the Client/Developer."

The appellant did not make any request for further and better particulars in this regard.

Paragraph 12 of the statement of claim reads:

> "12. In breach of the said agreement the Defendant terminated the employment of the Plaintiff as an overseas consultant on the project and did so without any notice or cause and without the consent of the Plaintiff."

The defence to this averment is:

> "11. Paragraph 12 of the statement of claim is denied and the Defendant says that the Plaintiff's employment was terminated for non-performance on the instructions of the Client/Developer."

To this, the appellant requested further and better particulars, and the requests and answers follow:

> "**REQUEST**
>
> 4. **As regards Paragraph 11 of the Defence:**
>
> (a) By whom was the Plaintiff employed?
>
> (b) What were the terms of employment and were they contained in writing; if so, specify the nature of the document in which they were contained and the names of the signatories thereto.
>
> (c) When, by whom and in what manner was the Plaintiff's employment terminated?
>
> (d) In what ways specifically and what tasks did the Plaintiff fail to perform?
>
> (e) State the name of the 'Client/Developer'.
>
> (f) Specify the instructions of the Client/Developer and state when, by whom and to whom they were given?
>
> **ANSWER**
>
> (a) By the Defendant at the request of the client.
>
> (b) The terms of employment were oral and were the terms set out in 3(a) hereof.
>
> (c) On June 2, 1993, by the Defendant by letter.
>
> (d) These particulars have already been supplied to the Plaintiff by way of the attachment to the Defendant's letter of termination dated June 2, 1992.

> "(e) Jamaica Venture Fund Limited.
>
> (f) These written Particulars were already supplied to the Plaintiff by way of the attachment to the Defendant's letter of termination as aforesaid and the client orally requested the Defendant to terminate the Plaintiff's employment."

It seems quite clear from the above mentioned pleadings that the respondent is resisting the appellant's claim for damages for breach of contract and all the other related claims. In particular, there is a clear denial of a contractual relationship between the parties that would render the respondent personally liable for any fees or other amounts that may be due and owing to the appellant. The respondent has not abandoned that posture in the affidavits filed in response. In my judgment, the appellant has failed to prove an entitlement to judgment on admission, and accordingly, the appeal should be dismissed.

Counsel for the appellant made comments on the learned judge's ruling that "on the state of the pleadings, there are triable issues and they ought to be determined by trial." By these words, I understand the learned judge to be saying that, given the state of the pleadings, he is not prepared to exercise his discretion in favour of the appellant and, therefore, the matter should stand for trial. This ruling is, however, otiose in light of his earlier finding. Nevertheless, it should be remembered that the power of the court under the provisions of section 307 is discretionary, and this court would not interfere with the exercise of a judge's discretion unless satisfied that he was wrong in principle or where the justice of the

case is against the order made. No reason has been proffered to justify my interference.

For these reasons, I would dismiss the appeal, affirm the order of the learned judge and award the costs of this appeal to the respondent.