JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 76/2005

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	**EARL LEVY**	**1ST APPELLANT**
AND	**TRIDENT VILLAS & HOTELS LIMITED**	**2ND APPELLANT**
AND	**KEN'S SALES & MARKETING LIMITED**	**RESPONDENT**

Conrad George & Miss Teresha Bowen instructed by Hart Muirhead Fatta for appellants

Miss Carol Davis and Miss Gillian Mullings for Respondent

29th, 30th June 2006 & 13th, July 2007

HARRISON, P.

This is an appeal against the judgment of Miss Gloria Smith, J. on 1st June 2005 entering summary judgment against the appellants on the ground that they had no real prospect of successfully defending the action. The order reads:

> "1. Judgment for the Claimant in the sum of $28,500,000.00 with interest at 30% per annum from 7th January 1998 to 1st June 2005.
>
> 2. Costs to the Claimant to be taxed if not agreed."

The respondent company Ken's Sales and Marketing Ltd ("Ken's Sales") supplied goods and materials to the first appellant ("Earl Levy") over a period of time pursuant to the latter's orders. Consequently, a sum of money was due and owing to Ken's Sales.

An agreement in writing was signed on 7th January 1998 by Ken's Sales and Earl Levy. It reads:

> "THIS AGREEMENT is made the 7th day of January 1998 BETWEEN KEN'S SALES & MARKETING LIMITED, a company incorporated under the laws of Jamaica and having its registered offices at Dunrobin Plaza, 30 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew, (Hereafter called 'the Plaintiff') of the ONE PART AND EARL LEVY whose address for the purposes of this Agreement is in care of his Attorneys-at-law, Hart Muirhead Fatta of 30 Knutsford Boulevard, Kingston 5 in the parish of Saint Andrew, (hereinafter called 'the Defendant' of the OTHER PART.
>
> WHEREAS the Plaintiff has a claim against the Defendant in an amount of $98,500,000.00. The Defendant acknowledges that he owes a debt amounting to $70,000,000.00 to the Plaintiff and that suit has been commenced by the Plaintiff for the recovery of the said claim; the parties hereby agree to a settlement of the matter in the following terms:
>
> 1. The payment of $14,000,000.00 before the 9th January, 1998 as to which time shall be of the essence and the failure of which shall amount to a termination of this Agreement.
>
> 2. The payment of $56,000,000.00 on or before the 31st December 1998 failing which interest accrues thereafter at a rate of thirty percent (30%) per annum, and in addition, the Plaintiff shall have the option of proceeding to obtain judgment against the Defendant after giving to the Defendant not less than 30 days written notice of his intention so to do.

3. The Plaintiff acknowledges that the Defendant has a claim against Half Moon Bay Limited and from that claim or settlement the Defendant will pay a sum of up to $28,500,000.00, after deducting the sum of $14,000,000.00 plus interest and reasonable attorneys costs incurred by the Defendant in the action with the Plaintiff and with Half Moon Bay Limited. The said sum of $28,500,000.00 or part thereof shall be paid within seven working days after receipt from Half Moon Bay Limited.

4. That the Defendant will keep the Plaintiff informed on the negotiations towards settlement or claim with Half Moon Bay Limited and provide the Plaintiff with a written copy of the settlement or judgment. The Defendant shall give written authority to Half Moon Bay Limited to pay over to the Plaintiff a sum of up to $28,500,000.00 from the settlement. Failure by the Defendant to give such irrevocable authority shall be deemed a breach of Agreement, and the Plaintiff shall have the right to request payment direct from Half Moon Bay Limited and the Defendant hereby indemnifies Half Moon Bay Limited from any claim in respect of such payment.

5. In consideration of the aforesaid settlement, the Plaintiff hereby agrees to stay all proceedings in Suit No. CLK 062 of 1996 and to take no further action therein until after the 31st day of January 1999, provided the Defendant complies with the terms of Clause 1 hereof and gives to Half Moon Bay Limited the authority referred to in Clause 4 hereof."

This agreement disclosed the schedule of payment of various sums by Earl Levy to Ken's Sales to settle the outstanding debt.

A second agreement dated 1st September 1999 was signed by Earl Levy, in his own right and Earl Levy "... on behalf of Trident Villas Hotels Limited ("Trident"). It reads:

"AGREEMENT

AGREEMENT BETWEEN EARL ANTHONY LEVY
AND TRIDENT VILLAS AND HOTEL LIMITED

AND

KENNETH BIERSAY AND KEN'S SALES &
MARKETING LIMITED

RE: PROPOSED SALES OF 17.76 ACRES OWNED BY EARL ANTHONY LEVY AND TRIENT VILLAS AND HOTEL LIMITED, AS DESCRIBED ON PAGE 2 OF THE C.D. ALEXANDER REALTY LIMITED APPRAISAL REPORT, AS PER COPY ATTACHED.

This is to confirm that I, Earl Anthony Levy, hereby promise to pay Ken's Sales & Marketing Limited the amount owing to the said Ken's Sales & Marketing Limited as per agreement dated January 7, 1998 from the proceeds of the sale of the property described above.

Singed: Earl Anthony Levy — Witness: M Powell
Date: 1/9/99

Singed on behalf of
Trident Villas & Hotel
Limited:
Earl Anthony Levy — Witness: M Powell
Date: 1/9/99

Agreement
Dated 1 Sept 99"

Attached to this agreement was an appraisal of seven (7) parcels of land by CD Alexander & Company Realty Limited. Six (6) of the parcels of land were owned by Earl Levy and the seventh (Vol. 1012 Folio 543) parcel was owned by the

second appellant. This second agreement referred specifically to the agreement dated 7th January 1998 and "the amount owing" thereon.

The sum of $14,000,000.00 only, pursuant to the agreement dated 7th January 1998 seems to have been paid.

On 16th March 2001 Ken's Sales filed suit (C.L. K9/2001) against Earl Levy for non-payment of $56,000,000.00 and interest accrued. This payment should have been made in accordance with the first agreement on or before 31st December 1998. Judgment was entered therein on 24th July 2002 for the respondent in default of defence.

The respondent Ken's Sales filed Suit No. HCV 1978/2004 against both appellants for the sum of $28,500,000.00 and interest, based on the said agreements. Smith, J., entered summary judgment for the respondent. This appeal resulted.

The grounds of appeal are:

> "i The Learned Judge erred in holding that the Defendants have no real prospect of successfully defending this action;
>
> ii. The Learned Judge erred in holding that non-receipt by the First Defendant of the sum of $28.5 million from Half Moon Bay Limited would not absolve the First Defendant of the obligation to pay the Claimant.
>
> iii. The Learned Judge erred in holding that the wording of the Agreement dated September 1, 1999 gave rise to an obligation on the part of the Second Defendant to sell property and apply the proceeds in the manner contemplated by the said Agreement."

Smith, J said at page 37 of the record:

> "I concluded that the $28.5 million the subject of this claim is clearly due and owing to the Claimant. The fact that Mr. Levy did not receive this amount from Half Moon Bay Limited would not in my view absolve him of the obligation to pay the Claimant.
>
> (ii) I find that this sum of $28.5 million does not form a part of the sum sued for in Suit C.L. K009/2001."

and at page 38:

> "(iv) Based on the terms of the two agreement when taken together and especially clauses 3 and 4 of the Agreement of January 7, 1998 and the 2nd Agreement dated September 1, 1999 I find that the Defendants have no real prospect of successfully defending this action."

Mr. George for the appellants argued that they "... have a real prospect of defending this claim" therefore the matter should have gone on for trial. The learned judge erred in finding that the said sum of $28,500,000.00 was due and owing because the said sum was already the subject of proceedings in Suit C.L. K009/2001 in the Supreme Court, in which the respondent obtained judgment in default of defence. These proceedings for the payment of the said sum was both an abuse of process or res judicata, and therefore for either reason ought to have been struck out.

Miss Davis for the respondent submitted that the sum of $28,500,000.00 was not included in the claim in Suit C.L. K009/2001 and that on a proper construction of the agreement dated 7th January 1998, the appellant Levy agreed to pay the respondent the said $28,500,000.00 from monies expected from Half Moon Hotel. The appeal should be dismissed and the judgment of Smith, J., should be affirmed.

Summary judgment is a process employed without going to trial, in circumstances where the claimant contends that the defendant has no real prospect of successfully defending the claim. This saves time, expense and costs. Rule 15.2 reads inter alia:

> "15.2 The court may give summary judgment on the claim or on a particular issue it if considers that –
>
> ...
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue."

On that basis Smith, J., entered judgment in the instant case. In the oft-quoted case of ***Swain v Hillman*** [2001] 1 All E R 91, the Court of Appeal (UK) in propounding the test to be applied when considering an application by a claimant for summary judgment, held that the "prospect of success" must in fact be "real" as opposed to "fanciful". In the case of ***Stewart et al v Samuels*** (unreported) SCCA No. 2/2005 dated 18th November 2005 referring to the term "real prospect of success", and relying on ***Swain v Hillman***, supra, it was said at page 6:

> "The prime test being 'no real prospect of success' requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence, it must be a 'real prospect' not a 'fanciful' one – ***Swain v Hillman*** (supra). The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party."

In the instant case, the agreement dated 7th January 1998, recited Ken's Sales' claim for $98,5000,000.00 and the appellant Earl Levy's acknowledgment

"... that he owes a debt amounting to $70,000,000.00". The agreement thereafter continues in:

(a) paragraph 1 – payment of $14,000,000.00 before the 9th January 1998 and

(b) paragraph 2 – payment of $56,000,000.00 on or before 31st December 1998

"... failing which interest accrues thereafter at ...thirty percent (30%)..."

(c) paragraph 3 – Ken Sales acknowledges that Earl Levy has a claim against Half Moon Bay Limited and "from that claim or settlement the Defendant will pay a sum of up to $28,500,000.00 after deducting the sum of $14,000,000.00 ... The said sum of $28,500,000.00 shall be paid within seven working days after receipt from Half Moon Bay Limited."

Paragraphs 1 and 2 deal specifically with the agreed payment of $14,000,000.00 and $56,000,000.00 by Earl Levy on 9th January 1978 and 31st December 1998 respectively, and refers also to both the sanction of 30% interest and the option of Ken's Sales to proceed to judgment, if a breach is committed in respect of the payment of $56,000.000.00.

The recital in paragraph 3 that, "the Defendant will pay up to $28,500,000.00 "... within seven working days after receipt from Half Moon Bay Limited," is a distinctly different payment method from paragraphs 1 and 2, in that it provides for:

(a) No definitive payment dates, (for example 9th January 1978 and 31st December 1998 as in paragraphs 1 and 2) and

(b) Payment from a specific source, that is, the fund due to Earl Levy from Half Moon Bay Limited.

The said payment of $28,500,000.00 has no relevance to the payment of $56,000,000.00 in paragraph 2. Neither is it a component part of $56,000,000.00. Paragraph 4 of the said agreement, was probably seen by the learned judge as conclusive of the fact, that the sum of $28,500,00.00 was not a part of the $56,000,000.00, contained in Suit CL K009/2001, in that it, also recites, its peculiarly specific method of enforcement. The paragraph provides that:

(a) Earl Levy shall keep Ken's Sales informed of the negotiation with Half Moon Bay Limited and send to Ken's Sales a copy of any settlement.

(b) Earl Levy shall give to Half Moon Bay written authority and pay to Ken's Sales "up to $28,500,000.00" from the settlement and in default

(c) Ken's Sales had the right to request payment directly from Half Moon Bay Limited which is indemnified by Earl Levy.

The intention of the parties to an agreement must be ascertained from the document signed by the parties. In Halsbury's Laws of England, 3rd edition, Volume II, the means of ascertainment of intention of parties was discussed. It was said, in paragraph 629:

> "The intention must be gathered from the written instrument. The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention."

Clearly, the agreement of 7th January 1998 was intended by the parties to provide for the payment of the entire debt claimed by Ken's Sales, namely $98,500,000.00, by the payment of $14,000,000.00, $56,000,000.00 and

$28,500,000.00. That is so, despite the fact that Earl Levy, initially, admitted owing only $70,000,000.00 of the said debt. The significance of the phrase "up to $28,500,000.00", which was repeated both in paragraphs 3 and 4 of the agreement, is meant by Earl Levy to limit the payments to Ken's Sales to a sum not exceeding $28,500,000.00, from the amount due from Half Moon Bay Hotel. That would ensure that Ken's Sales received $98,500,000.00 in total and no more.

In my view, Smith, J., was correct to find that the sum of $28,500,000.00 did not form a part of the sum sued for in Suit C.L. K009/2001. Neither does res judicata or issue estoppel arise, as contended for by the appellants. Consequently, the appellants had no real prospect of successfully defending the action. There is no merit in ground i, which accordingly fails.

Ground ii complains that the learned judge was in error to find that the non-receipt of the $28,500,000.00 by Ken's Sales from Half Moon Bay Limited did not absolve Earl Levy of his obligation to pay Ken's Sales the said sum. Smith, J found, at page 37 of the record:

> "I concluded that the $28.5 million the subject of this claim is clearly due and still owing to the claimant. The fact that Mr. Levy did not receive this amount from Half Moon Bay Limited would not in my view absolve him of the obligation to pay the Claimant."

By this agreement dated 7th January 1998, Earl Levy would pay to Ken's Sales the sum of $28,500,000.00 from "that claim or settlement" which Earl Levy had with Half Moon Bay Limited. It also provided that Earl Levy would, advise Ken's Sales of discussions with Half Moon Bay Limited, give the latter written

authority to pay the sum to Ken's Sales and in default Ken's Sales would have the right "to request payment direct from Half Moon Bay Limited."

The learned judge no doubt held the view that these terms in the said agreement were primarily for Earl Levy's convenience and created no binding obligation between Ken's Sales and Half Moon Bay Limited.

Half Moon Bay Limited was not a party to the agreement of 7th January 1998. Neither was there any assignment to Ken's Sales of the debt due from Half Moon Bay Limited to Earl Levy. No principle of novation arose between Ken's Sales and Earl Levy.

The appellants' contention that the agreement dated 7th January 1998 was a "settlement agreement" is without merit. Properly construed, the agreement is unambiguous and expresses the intention of the parties. Furthermore, it could not have "settled" the debt between the parties, if as contended by the appellants, it was an agreement to pay $70,000,000.00 in settlement of a debt of $98,500,000.00. I agree with counsel for the respondent that such an agreement to pay a lesser sum, in satisfaction of a greater is no satisfaction of the debt due – (see ***Foakes v Beer*** [1884] 9 A.C. 605 following ***Pinnel's*** case [1602] 5 Co. Rep. 117a.)

Earl Levy was still contractually obliged to pay to Ken's Sales the said sum, on its non-receipt from Half Moon Bay Limited. This ground also fails.

Ground iii complains that the learned judge was in error to hold that the wording of the agreement dated 1st September 1999 created an obligation on the

second appellant ("Trident") to sell property and apply the proceeds in accordance with the said agreement.

Smith, J., in respect of the agreement of September 1999 at page 38 of the record, said:

> "... this document was signed by Mr. Earl Levy in his personal capacity as well as on behalf of Trident Villas & Hotel Limited. There was no denial that Mr. Levy was the Managing Director and a majority shareholder of the Corporate Defendant Company. It is the view of the Court that as Managing Director Mr. Levy was authorized to act its behalf. The caption of the 2nd agreement, together with the signing of the document by both Defendants demonstrated the clear and undeniable intention of the parties. I therefore concluded that the corporate Defendant was in fact a party to the Agreement."

Counsel for the appellants argued that the agreement of September 1999 was not binding on Trident because it is not a deed nor was any consideration given.

The learned judge correctly found that the said agreement recited Trident in its heading, twice, and was signed both by Levy in his personal capacity and on behalf of Trident. Trident, as a corporate entity, is estopped from denying that it authorized the signing of the agreement by its managing director Earl Levy and that it was a willing party to the said agreement. The agreement specifically refers to "the account owing ... as per agreement dated January 7, 1998" and Earl Anthony Levy's "promise to pay." In this latter agreement Ken's Sales had agreed to a forbearance to continue proceedings (in suit CLK 062/96) against Earl Levy while the latter complies with clauses 1 and 4 thereof.

Trident therefore, with full knowledge, signed both as a party to the September agreement and in the nature of an indemnifier, and was accordingly obliged to sell the property in satisfaction of the debt owing. I agree with Smith, J., that the appellant Trident was a party to the agreement. This ground also fails.

In all the circumstances the appeal ought to be dismissed with costs to the respondent to be agreed or taxed.

SMITH, J.A.

I have read in draft the judgment of Harrison, P. I agree with the reasons and conclusions therein and have nothing further to add.

McCALLA, J.A.

I too agree with the reasons and conclusions of Harrison, P., and have nothing to add.

HARRISON, P.

ORDER

The appeal is dismissed with costs to the respondent to be agreed or taxed.