JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 80/04

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**1st CLAIMANT/ APPELLANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC.**	**2nd CLAIMANT/ APPELLANT**
AND	**SCOTIABANK JAMAICA TRUST AND MERCHANT BANK LIMITED**	**DEFENDANT/ RESPONDENT**

Mrs. Georgia Gibson-Henlin & Ms. Tavia Dunn instructed by Nunes, Scholefield, DeLeon & Co for the Appellants

Dr. Lloyd Barnett & Daniella Gentles instructed by Livingston Alexander & Levy for Respondent

23rd, 24th, 25th, 26, 27th October & 20th December 2006

HARRISON, P.

This is an appeal from the decision of Dukharan, J on 23rd July 2004 dismissing an application for summary judgment. Permission to appeal was granted. We completed hearing the arguments on 27th October 2006 and gave our oral judgment herein. These are our written reasons therefor.

The facts are that National Commercial Bank ("the appellant") had advanced funds to the Caldon Finance Group Ltd ("CFG") and held 69,515,972 stock units in the Jamaica Flour Mills (JFM) as security for such advances. The said stock units were owned by PHJ Ltd, a subsidiary of CFG. In order to reduce CFG's indebtedness to the appellant, PHJ decided to sell the said stock units to ADM Milling and apply the proceeds of such sale for that purpose.

By a letter dated 27th May 1997 to Scotiabank Jamaica Trust & Merchant Bank Ltd ("the respondent") for "Attention Mr. Jack Page," Henry Fullerton, signing as "Director" of PHJ Ltd informed the respondent that:

> "National Commercial Bank will send you a certificate for Sixty Nine Million, Five Hundred and Fifteen Thousand, Nine Hundred and Seventy-Two (69,515,972) stock of units in Jamaica Flour Mills.
>
> Please forward proceeds from the offer to:
>
> National Commercial Bank
> 32 Trafalgar Road
> Kingston 10
>
> Attention: Mr. Jeffery Cobham
>
> We ask that you sign and return the enclosed copy letter as confirmation of your agreement." (Emphasis added)

A signature appears on the said letter above a stamp "Scotiabank Jamaica Trust & Merchant Bank Ltd 27th May 1997" which purports to be that of Jack Page, indicative of the fact that the respondent received the letter.

By letter also dated 27th May 1997 to Mr. Jeffrey Cobham, Managing Director, National Commercial Bank, 32 Trafalgar Road, signed by Henry

Fullerton, "Executive Chairman of Caldon Finance Group Ld.," the appellant was directed:

> "Dear Jeff,
>
> Enclosed is a copy letter signed by M. Jack Page of SCOTIABANK JAMAICA ... which speaks for itself. Please deliver the Share Certificate for ...(69,515,972) stock units in Jamaica Flour Mills which you are holding on the basis of the undertaking given by Scotiabank...
>
> My bearer will collect the Certificate for delivery to Scotiabank ...
>
> N.B. Please sign and return this copy in acknowledgement of receipt..."

By letter dated 28th May 1997, the appellant sent to the respondent the said certificate representing 69,515,972 stock units. The letter reads, inter alia:

> "At the request of CFG Ltd, NCB hereby forward ... 69,515,972 stock units in JFM against your undertaking to forward the amount of ... in ($US8,858,350.00) ... sale proceeds. Kindly acknowledge receipt ... by signing and returning the attached copy of this letter."

The respondent did not sign as requested.

By letter dated 30th May 1997 from the appellant to the respondent "Attention Mr. Jack Page," certain stock units were provided to the respondent. It reads:

> "At the request of Caldon Finance Group Limited, National Commercial Bank ... hereby forward ... (31,000,000) stock units in Jamaica Flour Mills, against your undertaking to forward the amount of ... ($US3,950,299.00) representing sale proceeds of the enclosed stock units. ...

> Kindly acknowledge receipt ... by signing and returning the attached copy of this letter.
>
> In the event that the sale of these shares does not materialize, the said Certificates are to be returned to us." (Emphasis added).

The appellant, by letter dated 29th May 1997, had requested Citizens Merchant Bank to release to them the 31,000,000 stock units "to facilitate the transaction" of an agreement for sale of the said shares by Caldon to ADM Milling. The appellant undertook to pay to Citizens the sum of $54,854,500 plus interest, being Caldon's indebtedness to Citizens Bank, from the sale proceeds or in default of sale to return the stock units.

Citizens Bank, by letter dated 30th May 1997 had released the said stock units to the appellant "... in respect of the sale ... and for no other purpose."

By letter dated 9th July 1997 from CFG Ltd to Jack Page, Scotiabank, which reads:

> "Further to our telephone conversation, we now formally request that you deliver the cheques for the sale of JFM shares for the following to our bearer Mr. Ivan Dixon ...
>
> With regards to PHJ Ltd, our bearer will also collect the relevant cheques and deliver same to ... National Commercial Bank ..."

CFG was thereby seeking to take delivery of all the proceeds of sale.

The sale had materialized. However, the respondent sent the proceeds of sale to PHJ Ltd and not to the appellant as agreed. PHJ Ltd opened an account at NCB, Knutsford Boulevard on 9th July 1997, but withdrew the said funds on the same day.

By letter dated 29th October 1998 from the appellant to the respondent, the appellant referred to "Scotiabank's undertakings to pay to NCB the sale proceeds" of the said shares and requested the immediate payment of US$13,285,895.63, the calculated sale price of the stock units.

The respondent denied that it was liable to the appellant.

The appellant issued its writ and statement of claim claiming damages for breach of undertaking.

By its defence filed on 27th July 1999 the respondent admitted receiving instructions by letter dated 27th May 1997 from PHJ to pay to the appellant the proceeds of sale of the said shares but maintained that those instructions were changed by CFG by letter dated 9th July 1997. The respondent stated that it received the stock units from PHJ and CFG, that it acted as Registrar and transfer agent and denied that there was any undertaking or arrangement between the respondent and the appellant. When the cheque was lodged in the appellant bank in PHJ's account, at Knutsford Boulevard, the appellant had full control over it.

The appellant's application for summary judgment on the ground that there was no defence to its claim, was dismissed by Dukharan, J, on 23rd July 2004.

A court is empowered to grant summary judgment in circumstances where the claimant maintains that the defendant "has no real prospect of successfully defending the claim" – Rule 15.2(b) of the Civil Procedure Rules 2002. In ***Swain***

v Hillman [2001] 1 All E R 91, Lord Woolf, M.R. distinguished "real prospect of success" by maintaining that it means "... not fanciful prospect...".

In circumstances where the case for the claimant is based on issues of law involving the construction of documents, and issues of fact do not arise, a court could decide the issues of law without going to a trial and enter summary judgment in favour of the claimant if the circumstances permit – ***Boden et al v. Hussey*** [1985] 1 Lloyd's Rep. 423.

Mrs. Gibson-Henlin for the appellant argued before us that the judge in the Court below was in error in dismissing the application for summary judgment. The case for the appellant involved issues of law based on the construction of five letters, the correspondence involving the said stock units. The direction and notice to the respondent constituted an assignment of the proceeds of sale of the stock units. No particular words needed to have been used. The transaction must be viewed in the context of its commercial purpose, namely, that the parties are banking institutions which would be well aware of the tenor of the documents. The respondent would know that the appellant would not have parted with the shares except on reliance on the undertaking given by the respondent to forward to the appellant the proceeds of sale.

There was a clear assignment in law, Mrs. Gibson-Henlin argued. The letters of 27th May 1997 may be construed as an assignment of the proceeds of sale to the appellant. PHJ the assignor notified the respondent as the fund holder, to send the proceeds to the appellant, the assignee. There was a legal assignment of the 69,515,972 shares in accordance with 549(f) of the Judicature

(Supreme Court) Act. In the case of the 31,000,000 shares, the written direction was an assignment of the proceeds of sale. In both cases the respondent paid out to the assignor at its peril. The defence is fanciful. Having admitted receiving the share certificates the respondent was bound by the terms of the undertaking it gave.

Dr. Barnett argued that the appellant sued initially for breach of undertaking and could not properly expand its claim to include negligence and the existence of an assignment. The pleadings fail to reveal that the respondent had notice of any interest of the appellant in the shares. The letters of 28th May and 30th May 1997 did not constitute an assignment. There was no transfer of shares to the appellant. The shares were to be held by way of charge and the arrangement was conditional on the expected sale of the shares. There was no valid assignment and on that ground the respondent had a good and arguable defence. The appellant cannot rely on an undertaking by the respondent who did not sign the letters. The undertaking being contractual, no contract existed between the parties, seeing that no acceptance of an undertaking was given by the respondent. The respondent acted as Registrar and agent for the owner of the shares and was entitled to pay the proceeds to PHJ. The cheque, having been lodged in the appellant's bank, the latter had control over the funds and ought therefore not to hold the respondent responsible. There are issues of fact and law to be tried. Summary judgment ought not to be entered.

Rule 15(2)(b) of the Civil Procedure Rules, 2002 empowers a court to grant summary judgment on the claim, in circumstances where the defence "has

no real prospect of successfully defending the claim." This means that the defence must not be fanciful. ***Swain v Hillman*** (supra).

Where the case for the claimant is based on the construction of documents, that is, a matter of law, a court could decide that issue without going to a trial ***Boden et al v Hussey*** (supra).

Where an assignment is alleged, as arising from the construction of correspondence, no specific words are required to have been used. A court may look at the substance of the transaction, the conduct and intention of the parties and the documents concerning the parties, to determine if an assignment did in fact exist.

An assignment is the transfer of the legal right to a debt or other chose or thing in action, together with the legal remedies attached thereto, including the right to sue in one's own name – Halsbury's Law of England, 4th Edition, Volume 6, paragraph 13.

A legal assignment is effected if three conditions are fulfilled: (1) it must be absolute and not by way of charge (2) it must be in writing, and (3) express notice in writing must be given to the debtor or trustee, generally, the fund holder. Section 49(4) of the Judicature (Supreme Court) Act describes the absolute assignment as:

> "...effectual in law (subject to all equities which would have been entitled to priorities ...) ... to pass and transfer the legal right to such debt or thing in action from the date of ... notice."

An assignment which does not satisfy the statutory requirements may be an equitable one.

In ***Curran v Newpark Cinemas Ltd et al*** [1951] 1 All ER 26, it was held by the Court of Appeal that a direction and authority from judgment debtors to pay to the bank monies due to the judgment debtor was not an assignment to the bank, but merely a direction to the garnishees to pay. There was no proof of agreement or notice to the bank by the judgment debtor. However, the Court held that there was evidence to support that there might have been an assignment and therefore the Court should order the bank "to appear and state the nature and particulars of its claim to the debt."

In ***Harding v Harding et al*** [1886] 17 QBD 442, a residuary legatee, wrote on a statement of account sent to him by executors and trustees under a will, "I hereby instruct the trustees in power to pay to my daughter Laura Harding the balance shown in the above statement ..." He sent the document to his daughter who gave to the trustees notice of it in writing. It was held to be a valid assignment.

In ***William Brandt's Sons & Co v Dunlop Rubber Co Ltd*** [1905] AC 454, notice by a bank to buyers, that merchants, "had made over to the bank the right to receive the purchase money" in respect of goods sold to such buyers by the merchants, and the signing of an undertaking by the buyers to remit such moneys to the bank – was a valid equitable assignment and a right in the bank to receive the moneys.

In the instant case, the letter of 27th May 1997 to the respondent directed the respondent:

> "Please forward proceeds from the offer to National Commercial Bank..."

The second letter of 27th May 1997 to the appellant requested that it –

> "... deliver the share certificate for ...(69,515,972) stock units ... which you are holding ... My bearer will collect [it] for delivery to Scotiabank ..."

The letters of 28th May 1997 and 30th May 1997 from the appellant sending 69,515,972 stock units and 31,000,000 stock units to the respondent "At the request of CFG ... against your undertaking to forward the ...sale proceeds of the ...stock units..." make no reference to any transfer of such stock units to the respondent nor any interest therein to the respondent.

The letter of 30th May 1997 does direct the respondent that, if the 31,000,000 shares were not sold "the said Certificates are to be returned to us."

A direction to "...forward the proceeds ...to...X", is not synonymous with "...pay the monies to ...X". It may be that in normal banking practice and the custom of the financial institutions, the direction in the letter of 27th May 1997 to the respondent, "Please forward the proceeds from the offer to NCB..." amounts to a direction to pay. However, only evidence of that fact to a court may settle that interpretation.

Although the memorandum of deposit exhibited in respect of the 69,515,972 stock units owned by PHJ and held by the appellant, as security for the advances to CFG reads:

> "In consideration of NCB...affording us banking facilities. We have deposited with and/or <u>transferred into the name of the Bank</u> ... the specified shares ..." (Emphasis added)

there was no transfer in fact of such shares to the appellant.

Although no specific words or the word "assignment" are necessary to be used to evidence an assignment, there must be clear and specific evidence from the document, the relevant conduct and the dealings between the parties that an assignment was in fact created.

Dukharan, J was correct to find that:

> "... it is questionable that there was any assignment to the Claimants."

In our view, the question to be determined is whether the relevant letters are mere directions that the shares be forwarded to the respondent for the purpose of completing a sale transaction or are properly construed as an assignment. There is no clear evidence of a transfer of shares to the respondent to evidence an assignment.

An undertaking is a contract between the parties, giving and receiving it. There is no clear evidence of such reciprocity of conduct between the respondent and the appellant. In agreement with Dr. Barnett, we think that the view that this is an unilateral imposition is worthy of consideration.

In August 1998, the respondent, then aware that the appellant had not signed the documents in 1997, as evidence of the undertaking sought, was then requesting the appellant to do so.

No clear evidence of an assignment is evident on the relevant correspondence. A court could not justifiable hold that the respondent has no real prospect of successfully defending the claim. A factual examination of the

correspondence, any known custom of the trade and the conduct of the parties would all have to be considered, in order to resolve the issues.

Dukharan, J was correct when he dismissed the application for summary judgment.

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

COOKE, J.A.

I agree.

HARRIS, J.A.

I agree.

HARRISON, P.

ORDER

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