NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 114/05

BEFORE: THE HON. MR JUSTICE SMITH, J.A.
THE HON. MR JUSTICE COOKE, J.A.
THE HON. MR JUSTICE MORRISON, J.A.

BETWEEN	WINDSOR COMMERCIAL LAND COMPANY LIMITED	FIRST APPELLANT
AND	SELVYN SMITH	SECOND APPELLANT
AND	WINSTON CREIGHTON	THIRD APPELLANT
AND	CENTURY NATIONAL BANK LIMITED	FIRST RESPONDENT
AND	CENTURY NATIONAL MERCHANT BANK TRUST COMPANY LIMITED	SECOND RESPONDENT
AND	JAMAICA REDEVELOPMENT FOUNDATION, INC.	THIRD RESPONDENT

Miss Carol Davis and Mrs Charmaine Smith-Bonia for the appellants
Mrs Sandra Minott-Phillips and Miss Corinne Henry for the respondents

23, 26, 27 February and 5 June 2009

SMITH, J.A.

I have read the draft judgment of Cooke and Morrison, JJA. I agree with their reasoning and conclusions. There is nothing further I wish to add.

COOKE, J.A.

1. The original monetary claim against the appellants as set out in the particulars of claim in 1993 was for $36,222,252.24. This sum was amended in 2004 to $11,500,344. The amended amount was claimed by the 3rd respondent as the successor in title to the receivables of the 1st and 2nd respondents. This sum was contained in a document dated 17th February 2000, from PriceWaterhouseCoopers, a firm of accountants. This document bore the following heading:

"REPORT
ON THE LOANS
ISSUED TO
WINDSOR COMMERCIAL LAND COMPANY
LIMITED
BY
CENTURY NATIONAL BANK LIMITED
AND
CENTURY NATIONAL MERCHANT BANK AND
TRUST COMPANY LIMITED"

2. How did this report come about? I now reproduce *in extenso* the formal consent order fashioned in the court below made on the 27th October, 1997 presided over by learned Chief Justice: -

> "1. That an account be taken herein by the Accounting firm of Coopers & Lybrand or such other firm of Accountants as may be mutually agreed by the parties and that the said Accountants report what amounts if any are in their opinion due from the Plaintiffs to the Defendants or from the Defendants to the Plaintiffs.

2. That the parties submit to the said Accountants within fourteen days of the date hereof all records, receipts, cheques, vouchers, statements or other documents which they consider relevant to the taking of the said accounts.

3. That the Plaintiffs and the Defendants shall share equally in any advance payments in respect of the cost of the taking of the said accounts, provided that if the said Accountants report that the Plaintiffs are indebted to the Defendants, the Plaintiffs shall reimburse all the cost of the taking of the said accounts, and if the said Accountants report that the Defendant are indebted to the Plaintiffs, the Defendants shall reimburse all the cost of the taking of the said accounts.

4. That the Plaintiffs shall have leave to file their Reply and Defence to Counterclaim within fourteen days of the date hereof.

5. That the Plaintiffs shall pay to the Defendants the costs of this Summons.

6. Liberty to Apply."

In its introduction in the report, PriceWaterHouse stated that:

> "This report presents the results of our review of the accounting records and related financial information provided to us by Century National Bank Limited and the successor organization, Financial Institutions Services Limited and Windsor Commercial Land Company Limited through its attorneys, Delroy Chuck & Co.
>
> The review was undertaken based on the Consent Order of the Supreme Court of

> Jamaica dated 27 October 1977, arising from Suit No. C.L.C. – 363 of 1993."

3. At a case management on the 24th September 2003 it was ordered in para. 1 (a) that:

> "(a) The parties submit to Price Waterhouse Cooper by 22nd of December 2003 all records, receipts, cheques, vouchers, statements or other documents which they consider relevant to the taking of accounts not previously submitted to the said Accountants. The costs of this further reference to the accounts is to be borne in the same manner set out in the Order made on 27th day of October 1997;"

In the pre-trial review on the 18th March 2004, it was ordered by para. 2 that:

> "Written statement of the account submitted by PriceWaterHouseCoopers be admitted into evidence and an expert from that firm being present in court to be available for cross-examination by either party".

The significance of these two orders will be subsequently addressed.

4. In essence there was a claim against the 1st appellant for unpaid loans made to it by the 1st and 2nd respondents. The liability of the 2nd and 3rd appellants was founded on them being guarantors of those loans. Para. 10 of the amended particulars of claim was in these terms:

> "10. Pursuant to the findings of PriceWaterHouseCoopers that the sum of $11,500,344 is due from the Defendants to CNB and CNM&T under the loan agreements being an account rendered

> pursuant to a consent order herein, the Claimant claims that reduced sum as at October 6, 1993 together with interest thereon at such rate and for such period as this honourable Court deems fit."

5. Substantially the defence of the 1st appellant was that the loans have been repaid and any alleged outstanding balance was due to the application of unlawful interest rates – unlawful in that the 1st and 2nd respondents altered the interest rates without first, as was agreed, notifying the appellants. Para. 7 of the amended defence states as follows:-

> "With reference to paragraph 9 (sic) of the claimants' amended Particulars of Claim, the Defendants say that the Consent Order refer (sic) to therein was for an account to be taken in accordance with standard accounting practices and PriceWaterHouseCoopers were unable to take such account or to make any reasonable findings or express any professional opinion or to carry out the mandate of the Consent Order and expressly stated that they "were unable to determine whether all payments and advances made in respect of these accounts have been fully accounted for."

There was a counter claim which sought $6,970,332.44 as being the sum which was overpaid to the 1st and 2nd respondents. I have dealt with the rival positions in the merest outline. This is dictated by the decision to which I have come in respect of the resolution of the appeal. I shall be

likewise equally circumspect as regards the evidence adduced at the trial.

6. At the trial the respondents called a single witness Merlene Patterson. The appellants called four witnesses. They were the 2nd and 3rd appellants who can be regarded as witnesses as to facts; Algernon O'niel, whose evidence went to the general practice in banking and Rohan Crichton a Certified Public Accountant and Chartered Accountant. The last named who was called as an expert witness is the son of the 3rd appellant. In his witness statement, he stated that there was overpayment of $10,573,578.

7. The trial of action lasted three days in May 2004 and on the 23rd September 2005 Campbell J. ordered that:

> "There be judgment for the claimants on the claim of $11,500,344; and on the counterclaim".

There was a consequential order as to the payment of interest. It is this order which is now the subject of appeal.

8. The grounds of appeal were:

> (a) The learned trial Judge erred and/or misdirected himself on the facts in holding that the limitation that was placed on the Accountants ought properly to have been in the contemplation of the parties when the agreement was struck although the parties at the time the consent order was

made did not know and could not have known what their combined efforts to find and collate the relevant documents would produce.

(b) The learned trial Judge erred and/or misdirected himself on the facts in holding that it is clear that the information in the hands of Price Waterhouse Coopers is the only available information a Court at trial would have at its disposal, since the parties were entitled to adduce credible evidence of the transactions and on all relevant issues the credibility of witnesses would have to be assessed and taken into account by the trial Judge.

(c) The learned trial Judge misdirected himself and erred in finding that the mandate for an account to be taken had been fulfilled although the Accountants conceded that they were unable to take an account properly so called.

(d) The learned trial Judge erred and misdirected himself on the facts in finding that the parties had agreed that the accountants would decide the substantive issues between the parties as they had clearly only agreed to the Accountants providing an opinion and not to them making a decision and had left the substantive issues for eventual determination by the Court.

(e) The learned trial Judge misdirected himself and erred on the facts in holding that the parties intended to be bound by the decision of PWC, since the Court Order did not require or authorize the Accountants to make a decision on the substantive issues nor indicate that the parties would be bound by the Accountant's report.

(f) The learned trial Judge erred in law in holding that the Respondents had suffered a detriment by the reduction of their claim, because if nothing was owing there could be no detriment suffered and it is clear that they were not be (sic) in a position to adduce credible evidence in support of their claim.

(g) The learned trial Judge erred in law in holding that the Appellants are estopped from denying that as at October 6, 1993 the balance due to the Respondents was $11,500,344, since the Appellants made no representation or agreement that they would be bound by an opinion provided by the Accountants after conducting a review and which opinion was not a reasonable determination of any amounts due and owed and could not be certified as true or fair and there was no evidence by the Respondents that they relied on any such representation.

(h) The learned trial Judge erred in law and/or misdirected himself on the facts in:

(i) failing to find that the Plaintiffs/ Respondents had failed to prove that the amounts claimed or any amount outstanding;

(ii) failing to find that on the evidence adduced he Defendants/Appellants had proved that all of the outstanding debts had been repaid; and

(iii) failing to find that on the evidence adduced that the Defendants/ Appellants had overpaid the Plaintiffs/Respondents.

(i) The learned trial Judge erred and misdirected himself on the facts in holding that no defect in

> title of the person who negotiated the note was brought to the Court, since an assignee of the loan portfolio and/or the security takes subject to equities and the note was not being negotiated in the ordinary course of business.

The appellants concentrated their energies on grounds 3 (a) – (h). In the assessment of grounds 3 (a) – (g), the critical consideration is the proper construction and effect of the consent order of 27th October 1997. (see para. 2 supra)

9. Before I examine how the learned trial judge construed the consent order it is necessary to advert to the PriceWaterHouse report as he incorporated aspects of this report in his analysis. Under the heading "Scope And Limitations" the report said:

> "We commenced our review on 26 November 1997, but experienced difficulty in our efforts caused by the constant delay of the parties in submitting the documents required of them. To date critical information requested of both parties has not been supplied. To this extent, our scope was restricted and the effectiveness of our work impacted."

Under the heading "Conclusion" the report stated as follows: -

> "As explained earlier in this report, based on the information received, we have determined that four (4) loans were made by the plaintiffs to the defendants. On the same basis also, we have calculated a balance of $11,500,344, as due by the defendants to the plaintiffs under the loan agreements. However, no account has been taken of any balance that may be

> held in current account(s) by the plaintiffs for the defendants, since sufficient information was not available for us to do so.
>
> It appeared that in certain instances, interest charges were made by the plaintiffs to the defendants' accounts based on rates that were not notified to the defendants before the effective date. This resulted in an increase of the defendants' liabilities to the plaintiffs. These charges have been excluded from the computation of the outstanding balances.
>
> The scope of our work was severely restricted by the lack of information required to perform a full analysis of the transactions under the loan agreements between the parties.
>
> Because of the potential impact of the information not provided and the consequent limitation on our scope, we are unable to make a reasonable determination of the amounts due by the defendants to the plaintiffs or the plaintiffs to the defendants, and whether the amount of $11,500,344, calculated from the information provided is a true and fair indebtedness of the defendants to the plaintiffs."

10. The learned trial judge held that: -

> "the parties intended to be bound by the decision of PWC".

Under the heading "the effect of the consent order" the learned trial judge had this to say:

> "The Consent Order that was entered into before the Chief Justice was an attempt

> by the parties to resolve their dispute. The Claimants were of the view that they were owed $36m. The Respondents were claiming an overpayment of $7m. Both parties were ably represented before the Chief Justice. Both parties had a fair arguable case. There was no undue influence exerted by either side. The Plaintiffs have obeyed the Consent Order, by filing their Reply and Defence to the Counter-Claim in the stipulated time. The parties have both performed the directive of the Consent Order, in relation to the payments for taking the accounts. The terms of the agreement could never be regarded as being unfair or unreasonable. I would not expect counsel for the Defendant to enter into an agreement that is unfair and unreasonable to his client. The Claimants had suffered a detriment; their claim had been decreased from the $36m claimed to $11m awarded."

In respect of the limitation expressed by PriceWaterHouseCoopers pertaining to the non-receipt "of critical information" the learned trial judge had this to say:-

> "The limitation that was placed on the accountants ought properly to have been in the contemplation of the parties when the agreement was struck."

Campbell J. concluded his judgment as follows: -

> "I find that the agreement that culminated in the Consent Order before the Chief Justice was fair and reasonable, and was entered into with a view of resolving the dispute between the parties and that the parties had able legal representation. The Defendants are estopped from denying

> that as at October 6th 1993 the balance due from the Defendants to the Claimants was $11,500,344."

11. Ground 3(e) challenges the holding of the learned trial judge that the parties agreed to be bound by the accountant's report. It is impossible to construe the wording of the consent order either explicitly or by necessary implication to say that the parties intended to be bound by the "opinion" of the accountants as to the amounts due from the plaintiffs to the defendants or from the defendants to the plaintiffs. In fact, para. 4 of that order granting leave to the plaintiffs to file their reply and defence to counterclaim 'within fourteen days of the date hereof" is an indication to the contrary. If the "opinion" of the accountants was to be decisive in the resolution of the litigation, then there would have been no need for para. 4. Then there was the order for cross-examination at the pre-trial review, to which I have previously adverted in para. 3 supra. The PriceWaterHouseCoopers report was dated 17th February 2000. So, presumably by the time of the pre-trial review on the 18th March 2004, the parties were in receipt of this report. If there was an agreement to be bound by it, cross-examination would be quite unnecessary.

12. It is my view that the learned trial judge was in error when he held that "the parties intended to be bound by the decision of PWC" and that "the defendants are estopped from denying that as at October 6, 1993

the balance due from the defendants to the claimants was $11,500,344." I am unable to appreciate how the learned trial judge accepted as definitive the figure of $11,500,244 when the report expressed such serious concerns as to its accuracy. At the case management conference on the 24th September 2003, the parties were ordered to submit records receipts etc. to PriceWaterHouseCoopers. This illustrates that even after the accountants' report, efforts were to be made to remedy the deficiency in supplying the relevant information.

13. Almost the entire judgment of Campbell J. was taken up with a discussion pertaining to the construction and effect of the consent order. There was no assessment of the evidence of the witnesses Selvyn Smith and Winston Crichton. There was the expert evidence of PriceWaterHouseCooper and the rival expert evidence of Rohan Crichton. It was incumbent on the learned trial judge to critically analyse the contending positions and to demonstrate in a reasoned manner why he preferred the opinion he chose to accept. In his judgment the learned trial judge did not in even one sentence deal with the evidence tendered by the defendants on their defence and counterclaim. It is therefore my view that thee has not been any proper adjudication in respect of the contending issues between the parties. I would therefore allow the appeal and set aside the award. I would further order that there should be a new trial in the Supreme Court before a different judge. Finally, the

appellants should have their costs of this appeal, as well as in the court below.

MORRISON, J.A.

Introduction

14. This is an appeal from a judgment of Campbell J given on 23 September 2005, in which he gave judgment for the respondents (the claimants in the court below) in the sum of $11,500,344.00, plus interest of $34,398,632.40 and costs.

15. At all material times, the first respondent was a commercial bank and the second respondent was a merchant bank and trust company, both incorporated and operating under the laws of Jamaica. The first appellant was a creditor of the first and second respondents and the second and third appellants were both guarantors of the first appellant's indebtedness to the first respondent. The third respondent is a foreign corporation, registered in Jamaica as such, and is the assignee of the receivables and underlying securities relevant to this action of the first and second respondents. For convenience I will refer to the first and second respondents together as "CNB".

The background

16. In November 1983, CNB filed suit against the appellants claiming the outstanding balances of principal and interest on debts allegedly due from the first appellant and guaranteed by the second and third appellants. The total claim as at that date was for $36,279,170.48, plus interest.

17. By an amended defence and counterclaim filed on 8 July 1996, the appellants challenged the claim on a number of bases and by way of counterclaim pleaded that the sum of $6,970,332.44 had in fact been overpaid by the first appellant to CNB. The appellants also applied for an account to be taken, for repayment of all funds found to be overpaid, a declaration that, in breach of contract, CNB had altered the rates of interest applicable to the loan transactions and other consequential reliefs.

18. CNB failed to file a defence to the counterclaim in time, as a consequence of which the appellants applied by summons to enter judgment on the counterclaim. This summons came on for hearing before Wolfe CJ in chambers on 27 October 1997, when the following order was made by and with the consent of the parties:

> "Upon The Summons Applying For Judgment In Default of Defence To Counter Claim dated the 12 day of September 1997 Coming on

For Hearing And Upon Hearing Miss. Nicole Lambert Instructed by Messrs. Livingston, Alexander & Levy, Attorneys-at-Law For The First And Second Plaintiffs And Dr. Lloyd Barnett and Miss Helen Birch Instructed By Delroy Chuck & Company, Attorneys-at-Law For The First, Second And Third Defendants BY CONSENT IT HEREBY ORDERED AS FOLLOWS: -

1. That an account be taken herein by the Accounting firm of Coopers & Lybrand or such other firm of Accountants as may be mutually agreed by the parties and that the said Accountants report what amounts if any are in their opinion due from the Plaintiffs to the Defendants or from the Defendants to the Plaintiffs.

2. That the parties submit to the said Accountants within fourteen days of the date hereof all records, receipts, cheques, vouchers, statements or other documents which they consider relevant to the taking of the said accounts.

3. That the Plaintiffs and the Defendants shall share equally in any advance payments in respect of the cost of the taking of the said accounts, provided that if the said Accountants report that the Plaintiffs are indebted to the Defendants, the Plaintiffs shall reimburse all the cost of the taking of the said accounts, and if the said Accountants report that the Defendants are indebted to the Plaintiffs, the Defendants shall reimburse all the cost of the taking of the said accounts.

4. That the Plaintiffs shall have leave to file their Reply and Defence to Counterclaim within fourteen days of the date hereof.

5. That the Plaintiffs shall pay to the Defendants the costs of this Summons.

6. Liberty to Apply."

19. The meaning and effect of this order ("the consent order") were to become of central significance in the case. Pursuant to it, CNB filed a reply and defence to counterclaim on 31 October 1997, in which the appellants' claim to an overpayment was disputed and it was stated that accounts had in fact been provided to them. In due course instructions were given to Coopers & Lybrand to carry out the assignment mandated by paragraph 1 of the consent order. The operations of Coopers & Lybrand subsequently devolved to the firm of PriceWaterhouseCoopers ("PWC"), who on 17 February 2000 issued their report ("the PWC report") on the loans made by CNB to the first appellant. I will return to this report below in greater detail, but for the moment it is sufficient to note that, despite reservations as to whether the report was a "true and fair" reflection of the indebtedness of the appellants to CNB, PWC concluded that an amount of $11,500,344.00 was due from the appellants.

20. A case management conference was held on 24 September 2003, when the usual orders were made as to disclosure and inspection of documents, the exchange of witness statements and the like. The pre-trial review was set for 18 March 2004 and the trial for 3 - 6 May 2004. In addition, the following order was made:

> "(a)The parties submit to PriceWaterhouseCoopers by 22nd December 2003 all records, receipts, cheques, vouchers, statements or other documents which they consider relevant to the taking of accounts not previously submitted to the said Accountants. The costs of this further reference to the accounts is to be borne in the same manner set out in the Order made on 27th day of October 1997."

21. At the pre-trial review on 18 March 2004 an order was made for the exchange of witness statements by 31 March 2004 and a further order was also made as follows:

> "Written Statement of the account submitted by PriceWaterhouseCoopers be admitted into evidence and an expert of that firm being present in court to be available for cross-examination by either party".

The witness statements

22. The single witness statement filed on behalf of CNB was that of Ms Merlene Patterson, who had been at one time an assistant manager of CNB and who was in 2004 the loans recovery manager of Dennis Joslin Jamaica, Inc., the entity engaged by the third respondent to recover moneys owing to CNB. It is common ground that Ms Patterson had not herself dealt with the first appellant's account in any detail while she was employed to CNB. However, from her subsequent reconstruction of the account from the files, she calculated the total debt of the appellants to CNB 30 March 2004 (including interest) to be $78,059,547.23.

23. Witness statements were filed on behalf of the appellants by the second and third appellants, as well as by Messrs Humphrey Taylor, Rohan Crichton and Algernon O'Neil, the latter two of whom were put forward as expert witnesses. From his (on the face of it) detailed analysis and review of the PWC report, Mr Crichton, who is the son of the third appellant and a chartered accountant, concluded that the first appellant had in fact overpaid CNB by some $10,573,578.00 in loan repayments. Mr O'Neil, a retired banker of over 25 years experience (not with CNB), spoke to banking procedure generally with respect to "the procurement of loans" and commented on the procedures used by CNB in the instant case with respect to loans made to the appellants.

The trial

24. When the matter finally came on for trial before Campbell J on 3 May 2004, the respondents sought and were given permission to amend their particulars of claim to include the following paragraph:

> "Pursuant to the findings of Price Waterhouse Coopers that the sum of $11,500,344 is due from the Defendants to CNB and CNM&T under the loan agreements being an account rendered pursuant to a consent order herein, the Claimant claims that reduced sum as at October 6, 1993 together with interest thereon at such rate and for such period as this honourable Court deems fit".

25. In keeping with this amended pleading, the total claim was accordingly reduced to $11,500,344.00, with interest and, pursuant to the permission also given to the appellants to amend, the defence was also further amended to add a paragraph in these terms:

> "With reference to paragraph 9 of the Claimants' amended Particulars of Claim, the Defendants say that the Consent Order refer [sic] to therein was for an account to be taken in accordance with standard accounting practices and PriceWaterHouseCoopers were unable to take such account or to make any reasonable findings or express any professional opinion or to carry out the mandate of the Consent Order and expressly stated that they 'were unable to determine whether all payments and advances made in respect of these accounts have been fully accounted for.'"

26. Having amended their particulars of claim as indicated above, the respondents rested their case, as Campbell J put it, "...on the single issue as to the effect of the Consent Order and their contention that the Defendants are estopped from denying the report provided by Coopers and Lybrand...". The appellants on the other hand, contended that they were not bound by the PWC report, which they rejected (again in the judge's words) "as failing to provide any credible basis for the amount claimed". In addition, the appellants maintained their claim that CNB had been overpaid in loan repayments, as well as their claim for damages.

27. All of the persons who had given witness statements were made available for cross-examination, as was Mr Dennis Brown, the PWC partner who had had responsibility for the preparation of the report. As might have been expected, the cross-examination of Mr Brown by counsel for the appellants was extensive and searching.

28. In a considered judgment, Campbell J concluded that the PWC report was binding on the parties, who had agreed, as evidenced by the consent order, that the report would be the means of determining the "substantial question" between them. This is how the judge summarised his thinking on the effect of the matter:

> "The Consent Order that was entered into before the Chief Justice was an attempt by the parties to resolve their dispute. The Claimants were of the view that they were owed $36m. The Respondents were claiming an overpayment of $7m. Both parties were ably represented before the Chief Justice. Both parties had a fair arguable case. There was no undue influence exerted by either side. The Plaintiffs have obeyed the Consent Order, by filing their Reply and Defence to the Counter Claim in the stipulated time. The parties have both performed the directive of the Consent Order, in relation to the payments for taking the accounts. The terms of the agreement could never be regarded as being unfair or unreasonable. I would not expect counsel for the Defendant to enter into an agreement that is unfair and unreasonable to his client. The Claimants had suffered a detriment; their claim had been decreased from the $36m claimed to $11m awarded."

29. Campbell J also found that "the Defendants are estopped from denying that as at October 6, 1993 the balance due from the defendants to the Claimants was $11,599,344".

30. In the result, judgment was entered for the respondents for $11,500,344.00, the amount found due by the PWC report, plus interest at 25% per annum from 7 October 1993 to the date of judgment.

The appeal

31. The appellants filed several grounds of appeal, as follows:

> "(a) The learned trial Judge erred and/or misdirected himself on the facts in holding that the limitation that was placed on the Accountants ought properly to have been in the contemplation of the parties when the agreement was struck although the parties at the time the consent order was made did not know and could not have known what their combined efforts to find and collate the relevant documents would produce.
>
> (b) The learned trial Judge erred and/or misdirected himself on the facts in holding that it is clear that the information in the hands of Price Waterhouse Coopers is the only available information a Court at trial would have at its disposal, since the parties were entitled to adduce credible evidence of the transactions and on all relevant issues the credibility of witnesses would have to be assessed and taken into account by the trial Judge.
>
> (c) The learned trial Judge misdirected himself and erred in finding that the mandate for an account to be taken had been fulfilled although

the Accountants conceded that they were unable to take an account properly so called.

(d) The learned trial Judge erred and misdirected himself on the facts in finding that the parties had agreed that the accountants would decide the substantive issues between the parties as they had clearly only agreed to the Accountants providing an opinion and not to them making a decision and had left the substantive issues for eventual determination by the Court.

(e) The learned trial Judge misdirected himself and erred on the facts in holding that the parties intended to be bound by the decision of PWC, since the Court Order did not require or authorize the Accountants to make a decision on the substantive issues nor indicate that the parties would be bound by the Accountant's report.

(f) The learned trial Judge erred in law in holding that the Respondents had suffered a detriment by the reduction of their claim, because if nothing was owing there could be no detriment suffered and it is clear that they were not be in a position to adduce credible evidence in support of their claim.

(g) The learned trial Judge erred in law in holding that the Appellants are estopped from denying that as at October 6, 1993 the balance due to the Respondents was $11,500,344, since the Appellants made no representation or agreement that they would be bound by an opinion provided by the Accountants after conducting a review and which opinion was not a reasonable determination of any amounts due and owed and could not be certified as true or fair and there was no evidence by the Respondents that they relied on any such representation.

(h) The learned trial Judge erred in law and/or misdirected himself on the facts in:

> (i) failing to find that the Plaintiffs/Respondents had failed to prove that the amounts claimed or any amount was outstanding; (ii) failing to find that on the evidence adduced the
>
> Defendants/Appellants had proved that all of the outstanding debts had been repaid; and
>
> (iii) failing to find that on the evidence adduced that the Defendants/Appellants had overpaid the Plaintiffs/Respondents.
>
> (i) The learned trial Judge erred and misdirected himself on the facts in holding that no defect in title of the person who negotiated the note was brought to the Court, since an assignee of the loan portfolio and/or the security takes subject to equities and the note was not being negotiated in the ordinary course of business."

32. Both parties are agreed that, as Mrs Minott-Phillips for the respondents put it in her written submissions, "... the central issue of this appeal is the effect of the Consent Order dated October 27, 1997". It is perhaps in recognition of this that Miss Davis for the appellants did not pursue her ground (i), which raised a point arising under the Bills of Exchange Act and to which I will make no further reference.

33. Miss Davis submitted that the consent order merely provided for the firm of accountants to take an account and to make a report as to what in their opinion was due from the appellants to the respondents or vice versa. There was no agreement that the parties would accept this

amount as a settlement of the dispute between them. She submitted that the accountants' report was in effect a joint expert's report, which there was good reason to challenge in view of its contents, and that in this case the judge, by treating the report as binding on the parties, had failed to consider the evidence put before him in Mr Creighton's report and had therefore failed to determine the issues raised between the parties. Miss Davis submitted further that Campbell J had misdirected himself in finding that the accountants' mandate for an account to be taken, despite the reservations expressed by the accountants themselves, had been fulfilled and that the report, which was the only evidence on which the respondents relied, could not suffice to satisfy the court on a balance of probabilities that they were entitled to judgment. Finally, on the question of estoppel, Miss Davis submitted that the judge had again fallen into error as the legal requirements of an estoppel were not present in this case.

34. Mrs Minott-Phillips submitted that the evidence showed that the parties had agreed that the purpose of the appointment of the accountants was to assist the court to resolve the proceedings justly, given that there was a dearth of information and that the appellants themselves had asked for an account to be taken. She submitted further that the parties had by implication intended to be bound by the report, pointing out in particular, as an indication of this, the provision in paragraph 3 of the consent order for payment of the costs of the report

by the party found by the accountants to be indebted to the other. But if this court were to find that the report was not intended by the parties to be binding, Mrs Minott-Phillips submitted, then it should be treated as a joint expert's report for the assistance of the court which, when taken with the other evidence in the case, supported the judge's conclusion in favour of the respondents on a balance of probabilities. With regard to the complaint that the judge had failed to consider the expert evidence adduced on behalf of the appellants, Mrs Minott-Phillips submitted that the judge was right to have ignored this evidence, given the fact that the appellants themselves had conceded in their closing submissions at trial that they could not rely on that evidence in the light of the relationship between Mr Crichton and the third appellant. In this regard, Mrs Minott-Phillips helpfully provided us with copies of the closing submissions made by counsel on behalf of both sides at the trial.

The effect of the consent order

35. Campbell J cited with approval the following passage taken from the Supreme Court Practice (1997, Volume 2 at paragraph 4608):

> "Where a consent order embodies an agreement which amounts to a contract between the parties, the Court will only interfere with it on the same grounds as it would with any other contract, and therefore where it appears that the order embodies the conclusion of negotiations between the parties, the Court will give effect to it where one party is in breach,

> and will not vary it, by, e.g. giving extra time to perform its terms. An order by consent, like the contract which it evidences, is to be construed in the light of any admissible evidence of surrounding circumstances, but without direct evidence of the parties' intentions."

36. In reliance on the principle thus stated, the learned judge concluded that "although the consent Order is not a contract, it evidences the agreement of the parties upon which is superimposed the authority of the Court." No one would dissent, I think, from the proposition that a consent order in civil proceedings which gives effect to an agreement between the parties will not be interfered with or disturbed by a court on grounds other than those in which it would interfere with any other contract. ***Elias v Elias*** (No 1) (1987) 51WIR 374, a decision of the Court of Appeal of Trinidad and Tobago referred to by the judge, is a straightforward application of this principle, in a case where the consent order reflected what Gopeesingh JA described (at page 376) as a "clear commitment" on the part of the party against whom enforcement of it was sought.

37. But it is important, as with any ordinary contract, to ascertain precisely what it is that the parties intended to bind themselves to do by agreeing to the consent order. Was it, as the judge found, that "the parties intended to be bound by the decision of PWC", or was it, as the appellants submitted that the report was intended to be no more than

joint expert's report (which was also the appellants' alternative submission), which could, if necessary, be challenged for good cause by either party?

38. In this regard, the actual terms of the consent order are obviously of critical importance. In the first place, what the accountants were required to do was to take an account and to make a report as to what amounts were "in their opinion" due from either party to the other. This language is, in my view, more consistent with the accountants having been asked to provide a report as experts, than with their having been authorised to make a binding award or findings. Indeed, if the accountants' opinion was intended to be binding on both parties, one might also have expected to see some provision made for payment (and enforcement) of whatever sums were found to be due.

39. Secondly, the order grants leave to the plaintiffs to file their reply and defence to counter claim within 14 days, which is in my view equally inconsistent with the appointment of the accountants having been intended to be an agreed mechanism to dispose of the litigation in its entirety. That order is in fact more consistent, it seems to me, with it having been the intention of the parties that the litigation would continue to follow its normal course, though no doubt informed by the anticipated report of the accountants.

40. While I can readily understand Mrs Minott-Phillips' submission as regards the provision for payment of the costs of the report, I cannot treat that provision as decisive in the light of the other terms of the order which clearly point in the direction of the accountants' report having been intended to be a further stage in the litigation and not its terminus. Taken in its context and as a whole, therefore, I am clearly of the view that the intention of the parties in entering consent order was to obtain a joint expert opinion for the assistance of the court when the matter came on for trial.

41. It is, of course, the intention of the parties at the time the consent order was made that is important. However, I am fortified in the view I have come to on the intention of the parties by their conduct subsequent to the making of the order, in particular after delivery of the report to them in March 2000. Thereafter, there is no record of any further step in the litigation until 14 January 2003, when the respondents' attorney-at-law wrote to the Registrar of the Supreme Court requesting that the matter be set down for case management. At the ensuing case management conference on 24 September 2003, an order was made for further submission of additional accounting records to PWC by 22 December 2003 (see paragraph 7 above). Although there is no indication on the record that either of the parties availed themselves of this opportunity, the fact that it was given (presumably with the concurrence of both) is a clear

indication that neither of them regarded the PWC report as having achieved a definitive resolution of the issues between them.

42. But perhaps of greatest significance is the fact that at the pre-trial review on 18 March 2004, a full four years after the PWC report had been issued, an order was made for attendance of Mr Brown at the trial and his cross-examination by the parties. This is another clear indication in my view that the parties did not even at that stage consider themselves bound by the report's conclusion. All of this serves to confirm me in the view that the parties did not intend that the PWC report should have the effect attributed to it by Campbell J, which is to say that it would "decide the substantial question between the parties."

43. The judge obviously based his further conclusion that the appellants were also estopped from denying their indebtedness to CNB in the sum of $11,500,344 (see paragraph 16 above), on the statement in the Supreme Court Practice 1997 (following immediately on the passage cited by the judge and set out at paragraph 22 above) that "A consent order may be pleaded as an estoppel". But, as the authorities cited by the editors in support of this statement demonstrate, this is an estoppel arising from the terms of the consent order itself (***Kinch v Walcott*** [1929] AC 483 and ***Serrao v Noel*** (1885) 15 QBD 549). In other words, a party will be estopped from taking a position contrary to that which he has bound himself by virtue of

the consent order. In the instant case, as I have attempted to demonstrate, the consent order by itself cannot support such an estoppel and there is no other evidence of any representation by the appellants that they would accept as binding the opinion of the accountants. The fact that the second appellant stated in cross-examination that "I considered my company bound by consent Order of the Court" cannot in my view take the respondents' case any higher, since it is still necessary to consider the consent order for its true meaning and effect.

44. I have therefore come to the view that Campbell J fell into error in approaching and deciding the case solely on the basis that the conclusions of the PWC report were intended by the parties to be binding on them.

Can Campbell J's judgment be supported on another basis?

45. Mrs Minott-Phillips nevertheless urged us to say that in the light of the PWC report and the other evidence in the case, the judge was correct in his conclusion that on a balance of probabilities the amount of $11,500,344.00 was due from the appellants to the respondents and that on that basis his judgment ought not be disturbed.

46. I am inclined to doubt that this approach is open to the respondents in the absence of a counter-notice of appeal (pursuant to

Rule 2.3 (3) of the Court of Appeal Rules 2002), but I do not propose to decide the matter on this basis, which was not fully argued before us.

47. In any event, I do nevertheless have two other major difficulties with the suggested approach. The first has to do with what Campbell J himself described as the "inconclusive nature of the report". At the very outset of a section headed "Scope and Limitations", the author of the report complained as follows:

> "We commenced our review on 26 November 1997, but experienced difficulty in our efforts caused by the constant delay of the parties in submitting the documents required of them. To date critical information requested of both parties has not been supplied. To this extent, our scope was restricted and the effectiveness of our work impacted."

48. And in its conclusion, the report concluded as follows:

> "The scope of our work was severely restricted by the lack of information required to perform a full analysis of the transactions under the loan agreements between the parties.
>
> Because of the potential impact of the information not provided and the consequent limitation on our scope, we are unable to make a reasonable determination of the amounts due by the defendants to the plaintiffs or the plaintiffs to the defendants, and whether the amount of $11,500,344, calculated from the information provided is a true and fair indebtedness of the defendants to the plaintiffs"

49. Although Mr Brown maintained in cross-examination that he stood by the accuracy of his findings based on the incomplete material that had been supplied to him by the parties, he agreed that he had been unable to prepare "a complete statement of account". His conclusion therefore mirrored the reservations in the written report:

> "Because of the incompleteness of the information that was supplied to us, we cannot say and we are not saying that this balance is a true and fair balance of the amount due."

50. It seems to me that a conclusion based on the PWC report and Mr Brown's oral evidence in these circumstances cannot be regarded as secure, without the kind of full and careful analysis that Campbell J found it unnecessary to undertake by virtue of his having treated the report as binding on the parties in any event.

51. My second difficulty, which is closely related to the first, is that, in treating the PWC report as he did, Campbell J paid scant regard to the other evidence in the case. It is true that, in a section of his judgment headed "Was the Report inconsistent with Ms Patterson's findings", the judge set out in no great detail some of the matters covered by the report and Ms Patterson's evidence, but in the end he expressed no view one way or the other on the very question he had asked himself. In addition,

neither of the appellants' expert witnesses, Messrs O'Neil and Crichton attracted the judge's attention at all in his judgment.

52. In the case of Mr Crichton, it is again true, as Mrs Minott-Phillips contended, that the appellants had through their counsel in his written closing submissions told the judge that "It is conceded that the Defendants cannot rely on the opinion evidence of Mr. Rohan Crichton, having regard to his relationship with the 3rd defendant". However, the very next submission on behalf of the appellants was that "an examination of [Mr Crichton's] figures, purely as an arithmetical calculation indicates that there has been overpayment of more than $10 million". So that despite the disavowal of any reliance on his opinion, the appellants were nevertheless inviting the court to consider for itself the impact of the numbers set out in Mr Crichton's report on the appellants' overall indebtedness to the respondents. This the judge did not do.

53. I cannot therefore safely conclude, as the respondents invite us to do, that the judge was correct in his conclusion, notwithstanding the penetrating analysis of the evidence by Mrs Minott-Phillips in her submissions. It follows from this, in my view, that the appeal must be allowed.

Conclusion

54. The question that remains is how should the matter be disposed of. Miss Davis submitted that in the light of the inconclusive nature of the PWC report, it was the respondents who had not proved their case and that in these circumstances it is the appellants' counterclaim alone that should be remitted to the Supreme Court for determination. However, in my view, in the light of Campbell J's having failed to adjudicate on all the issues (including the probative value, if any, of the PWC report), there is no alternative to an order that a new trial should take place before another judge of the Supreme Court (see Rule 2.15(b) (d) of the Court of Appeal Rules 2002). The appellants must have the costs of the appeal and of the trial in the Supreme Court, to be agreed or taxed.

ORDER

SMITH, J.A.

Appeal allowed. A new trial is hereby ordered. Such trial is to be conducted before a different judge. The appellants must have the costs of this appeal as well as the costs in the Supreme Court.