Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 1993/C363

BETWEEN	CENTURY NATIONAL BANK LIMITED	CLAIMANT
AND	CENTURY NATIONAL MERCHANT BANK AND TRUST COMPANY LIMITED	2ND CLAIMANT
AND	JAMAICA REDEVELOPMENT FOUNDATION, INC. [Added by Order of Campbell, J on the 3rd May 2004]	3RD CLAIMANT
AND	WINDSOR COMMERCIAL LAND COMPANY LIMITED	1ST DEFENDANT
AND	SELVYN SMITH	2ND DEFENDANT
AND	WINSTON G. CRICHTON	3RD DEFENDANT

Mrs. Sandra Minott-Phillips, Christopher Kelman, instructed by Myers, Fletcher and Gordon for the Claimants.

Dr. Lloyd Barnett, Keith Bishop and Ms. Helen Birch Instructed by Delroy Chuck and Co. for the Defendants.

Heard on the 3rd, 4th, 5th May 2004 and 23rd September 2005

Campbell J.

CONSENT ORDER

On the 27th October 1997, four years after the commencement of this action, the parties appeared before the Chief Justice in Chambers, on an application for

judgment in default of defence to the Defendants' counter-claim. It was agreed that an accounting be taken by the firm of Coopers and Lybrand, and the Accountants report what amount if any is in their opinion due from the Plaintiffs to the Defendants or from the Defendants to the Plaintiffs.

Before this Court, the Defendants submitted that they are not bound by this "expert's report" and reject it as failing to provide any credible basis for the amount claimed. The Defendants raised several other issues, which they contend ought to be determined at trial.

The Claimants rests their case 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 (now Price Waterhouse Coopers and Lybrand).

Background.

In November 1993, when the Claimants, Century National Bank (the Bank) and Century National Merchant Bank and Trust Co. Ltd. (the Trust) instituted action in this matter, the financial landscape had undergone dramatic changes from what had obtained in the preceding decade. The Statement of Claim filed by the Bank and the Trust provides a snapshot of that landscape.

The Bank alleged, inter alia;

(2) The First Defendant was at all material times a customer of the Plaintiffs. The First Defendant received loans from the Plaintiff and the said loans were secured by Promissory Notes dated February 3, 1993, September 27, 1990 and May 31, 1989 signed by the First Defendant.

(3) The said loans were further secured by mortgage dated March 22, 1988. The Plaintiffs will rely on the said mortgage and the said Promissory Notes for full term and effect.

(4) The said Mortgage permits the Plaintiffs to charge such interest from time to time as the Plaintiff deems fit.

(5) The First Defendant has failed and/or neglected to repay the said loans and the First Defendant is now indebted to the Plaintiff as follows.

Particulars

First Plaintiff

Principal balance – Claim No. 2601006295	-	$5,582,798.43
Interest as at October 6, 1993	-	1,896,011.99
Late Charges		49,648.70
		$7,528,459.12
Principal balance - Claim No. 2601006303		5,582,798.43
Interest as at October 6, 1993		1,686,011.99
Late Charges		49,648.70
		$7,528,459.12

Second Plaintiff

Principal Balance	6,150,000.00
Interest to October 6, 1993	14,826,252.24
Late Charges	246,000.00
	21,222,252.24
Total due	-$36,222,252.24

The Statement of Claim further alleged that the Second and Third Defendants agreed to guarantee "the First Defendant indebtedness" for the consideration that the Plaintiffs continued to deal with the First Defendant in the way of its business as a bank.

On the 6th April 1995, the Defendants filed a Summons to set aside Judgment entered in default of defence. In the draft defence exhibited to the affidavit in support, of the summons the Defendants contended, inter alia;

(2) With reference to paragraph 4 of the said Statement of Claim the Defendants say that it was an express and/or implied term of the said mortgage and the loan agreement made between the Plaintiffs and the First Defendant that the Plaintiff would prior to altering the interest rates, notify the Defendants of its intention to do so, but the Plaintiffs in breach of the said term purported to alter the interest rates on several occasions and to charge compound interest.

(3) The Defendants denied paragraph 5 of the said Statement of Claim and further say that;

(a) It was agreed and understood that the loan would be repaid from the proceeds of sale of the apartments in the scheme, which was the subject of the loan transaction. The Defendants will at the trial of this action refer to the Plaintiffs' letter dated June 27, 1988 relating to the terms of the loan.

(b) The total amount advanced by the Plaintiffs to the First Defendant totalled $5.7m; and

(c) In accord with the loan agreement approximately $10m has been paid to the Plaintiffs on the loan account but the Plaintiff by reason of its unlawful alteration of the interest rates has continued to claim further amounts.

(4) The Defendants have repeatedly requested the Plaintiff to provide a proper statement of account in support of the amounts claimed by it but the Plaintiff in breach of the implied term of the said Agreement that the Plaintiff as its bankers would provide such accounts, has failed and/or refused to do so.

The Defendant counterclaimed for an account of all amounts that were paid to the Plaintiffs and all such amounts charged by the Plaintiffs. They also sought a declaration that the alteration of the interest rates was unlawful.

On the 8th July 1996, the Defendants amended their defence and counter-claimed, that instead of $10m being paid, the sum of $7M was overpaid. They sought orders that such overpayment should be refunded.

The Claimants having failed to file a Defence to the amended defence and counterclaim, the Defendants applied by summons to enter judgment. The Defendants also applied for an account to be taken, and repayment of all funds

found to be over-paid. They sought a declaration that in breach of contract the Claimants altered the interest rate, and an injunction to prevent the Plaintiff from enforcing the promissory notes or guarantees.

When this summons came before the Chief Justice, Dr. Lloyd Barnett and Ms. Helen Birch for the Defendants and the legal representatives of the Claimants were present and consented to the following Orders:

(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 Counter Claim within fourteen days of the date hereof.

It was the Defendants application for the account to be taken. The Defendants had complained as early as April 1995 of the dearth of accounting material. It was against that background that the application was made.

On 18th March 2004, at the pre-trial review, it was ordered that statement of the Witness be exchanged by March 31, 2004, and that the written statement of the account submitted by Price Waterhouse Coopers, be admitted into evidence and that an expert of that firm being present in Court to be available for cross-examination by either party.

The Claimants pre-trial Review Memorandum contended, as they did at this trial, that by virtue of the Consent Order, the Defendants are estopped from denying an indebtedness of at least $11,500,344.00.

The Defendants' submissions

The Defendants submitted, firstly, "that PWC did not take an account and merely conducted a review and so were unable to verify all the payments or advances. It was contended that the terms of the order was of critical importance. It required "that an account be taken" after which the accountants were to report their "opinion." It was pointed out that nowhere in the report was it stated that an audit was conducted or accounts was taken. Secondly, the unavailability of the records and statements of the bank would cause the Bank's claim to fail because

financial institutions must keep proper records and cannot benefit from their failure to do so. Thirdly, PWC conclusions are unacceptable because they are unable to say whether they are fair, true and reasonable.

The Agreement of the Parties

Although the Consent Order is not a contract, it evidences the agreement of the parties upon which is superimposed the authority of the Court.

In the Supreme Court Practice (1997) Vol. 2, para. 4608 states:

> "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 light of any admissible evidence of surrounding circumstances, but without direct evidence of the parties 'intention.'"

(a) "**An account be taken**"

Mr. Dennis Brown testified that the best was done with the documentation with which he was presented. His bona fides, professional qualifications and experience are unquestioned. He asserts that using the material that was presented, he would seek corroboration from the other party. This he claims would be by way "of correspondence or by way of some documentation." This is demonstrated in PWC's opinion in respect of the Loan 1, because he had no corroboration, (as

defined by him) of the disbursement of the remainder of the first loan of $3m, he was only prepared to acknowledge the Defendants drawing-down the first tranche. However, both Selvyn Smith and Winston Crichton have acknowledged receipt of the remainder of the $3m. Brown testifies of this Loan that 'no evidence that full $3m was disbursed.' Crichton, in his written statement at paragraph 10, says, "In the interim, the 1st Claimant advanced the balance of the $3,000,000.00 loan so that as a result, at the end of June 1988, the principal of the loan made by the 1st Claimant to the 1st Defendant stood at $3,000,000.00.

"Parties submit all records receipts etc. to the Accountants."

Orders on the Consent Order and at Case Management had required the parties to submit all relevant records, receipts, cheques, statements, etc. Brown admits that because of the incompleteness of the record he is unable to say that it is a true and fair balance of the amount due. Brown's evidence is that "it is the best that could be done given the documentation received."

The limitation that was placed on the Accountants ought properly to have been in the contemplation of the parties when the agreement was struck. The consent order ought to be construed in light of the circumstances of the inability of both parties (and the Bank and Trust, in particular) to provide all the necessary documentation. The Claimants had been under the temporary management of the

Ministry of Finance, from April 1998, the Claimants summons for extension of time in which to file records, statements or other documents stated in his affidavit in support;

(2) That the Plaintiffs were taken over by the Minister of Finance on October 22, 1997.

(3) That consequent on the Minister's action, the Plaintiffs were closed to the public and almost the entire staff was terminated.

(4) That since October 22, 1997, Financial Institutions Services Ltd. has taken over the management of the Plaintiffs and the staff was reduced even further

(5) That consequent on the matters set out herein, it was difficult to locate the documents required for submission to Coopers and Lybrand.

(6) That prior to the Minister's action, the Plaintiffs' records were in some disorder and were not easily located.

(7) That notwithstanding the difficulties, the Plaintiffs have in fact located some documents which were forwarded to Coopers and Lybrand.

(8) That I believe that there is much more documents in the Plaintiffs' archives.

(9) That the Plaintiffs have allocated two persons specifically to conduct a search since February 16, 1998.

The inability of the Bank and the Trust, to produce "proper statement of account" did not arise in the weeks following the consent order, but had been the source of complaint years before the Consent Order was entered. (See para.4 of Defendants' Defence.)

The unavailability of documentation had resulted in the Defendants themselves having to amend their defence due to the late receipt of documents from their own accountants.

The Claimants' submission on this point is that, there is no evidence on which either side or the Court could be in any better position than PWC to determine the extent of the indebtedness between the contending parties. The Consent Order was likely made, because it was recognized that there would be difficulties occasioned by the less than perfect record keeping on both sides. Counsel argued that Cooke J. (as he then was) accepted KPMG Peat Marwick report in not dissimilar circumstances. In, **Gifford Morrel and Anor. v Workers Savings and Loan Bank - Suit No. C.L. 1996/M105,** where Cooke J, after referring to a letter from Counsel for the Defendant that described the record-keeping of both parties "as being less than perfect," at page 7 said;

> The description of "less than perfect record-keeping" is quite euphemistic.
>
> And at page 28;
>
> A report by KPMG was produced. In its covering letter to the report KPMG stated;
>
> "Generally we found that many of the source documents were unavailable for our examination. We performed such alternate procedures as we considered necessary in the circumstances in an attempt to verify the transactions. However, we are unable

> to verify satisfactory all transactions of the relevant bank accounts and therefore, the result of our investigations is not conclusive."

Despite the inconclusive nature of the Report and that one of the parties (as here) contested it, nonetheless, the Court, accepted the accounting in the Report

The parlous state of the record keeping would have been in the minds of the parties when the Consent Order was agreed. Is the Consent Order to be avoided because of this limitation? If the records of the transactions between the parties were of the requisite standard, this dispute is unlikely to have arisen. It is clear that the information in the hands of Price Waterhouse Coopers is the available information a Court at trial would have at its disposal. It is clear that the accountants felt that the mandate was fulfilled, that mandate was for "an account to be taken." They had meetings with the parties to clarify various issues and concerns. The limitations that restricted the scope and ability of the accountants are limitations that the parties were aware of before they consented to the appointment of the accountants. The bona fides and expertise of PWC, and Dennis Brown, in particular were unchallenged. No contest was taken with his statement that "this report represents the best I could do with what I have been presented." I hold that the accountants properly construed their mandate and fulfilled that mandate.

Was the Report inconsistent with Ms. Patterson's findings.

The Court was however invited to reject the report on the ground that it did not provide a credible basis for the amount claimed. That complaint, according to Dr. Barnett, arose because of discrepancies between the evidence of Dennis Brown, and that of Mrs. Patterson, who stated that she saw evidence of only three loans, whereas PWC stated they saw four loans.

In respect Loan 1- the evidence of Selvyn Smith and Winston Crichton supports the Bank's contention that the promissory note of 2nd November 1987 (ex. 5b) was the first draw down of the loan of $3m, and that the entire loan amount was disbursed at the end of June 1988. However, PWC, because the information was not forthcoming and they were unable to corroborate the information, concluded, "There is no evidence that Windsor Commercial exercised this option."

I accept that what is reported by Mr. Brown as Loan 2 had what he described as "an immaterial residual balance of $885," this did not appear as an existing debt on the report of Mrs. Patterson.

Loan 3, according to Mrs. Patterson, the parties are agreed that the date of disbursement of the sum of $7m is the 1st June 1989, the promissory note dated 31st May 1989 for $7,000,000 represents the pre-condition for disbursement of this loan. This eventually incorporated in one consolidated loan of the outstanding

principal and interest amounting to $11,165,396.86. This was split into two accounts of $5,582,798.43.

Mr Brown opines that the sum of $3,830,770 was disbursed from Loan 4 and was applied to reduce the indebtedness under Loan 3.

The effect of the Consent Order

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 ***Elias v Elias (1997) 51 WIR 374*** the parties, after negotiations, had entered in a consent agreement to settle the action by the Appellant purchasing the

shares that had been bequeathed to him at a fair valuation in accordance with the articles of association. A Consent Order was agreed, which had appended to it, the Appellant's undertaking. Despite the Order, the Appellant purchased the shares at a price fixed by the will. The Respondent applied for specific performance of the agreement. The Court ordered specific performance and the Appellant appealed. The Court of Appeal in Trinidad and Tobago referred to ***Binder v Alachouzos (1972) 2 All ER 189***. Where the English Court of Appeal recognized two competing considerations. Firstly, the challenge raised to the legality of the agreement, the Defendant contending that they were unlawful money lending transactions. Secondly, the enforcement by the Court of compromises between lender and borrower. Lord Denning at page 192 said;

> ".....it is important that the courts should enforce compromise which are agreed in good faith...if the court is satisfied that the terms are fair and reasonable, then the compromise should be held binding. Otherwise, there could never be a compromise of such an action. Every case would have to go to court for final determination and decision. That cannot be right."

There were suggestions in the instant case that the agreement on which the Consent Order was based was unfair and unreasonable. In ***Elias v Elias*** (supra), there was no such suggestion. It is clear that whether a party had legal representation is an important factor in determining the fairness and reasonableness of the agreement in relation to him. Gopeesingh, JA stated at page 381;

> "In the instant matter there was no suggestion by the appellant that the terms of the agreement were unfair or unreasonable. Indeed, the **appellant had** been **represented by able and competent attorneys at law when the agreement was arrived at**. In the circumstances, therefore, since the respondent has performed his part of the agreement by entering the consent order in action 2572 of 1985 and his position is now irreversible, in my view it would be only reasonable to order specific performance of the agreement in question especially since his remedy at law for damages suffered by him would be nominal. The appellant should not be permitted to attempt to re-open the agreement at trial." (Emphasis mine.)

In Binder's case, Lord Denning, in remarking on the effect of parties to a consent agreement, acting on competent legal advise, said; at page 192 letter H:

> "In my judgment, a bona fide agreement of compromise such as we have in the present case (where the dispute is whether the plaintiff is a moneylender or not) is binding. It cannot be re-opened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was a fair arguable case for each. The agreement they reached was fair and reasonable."

..and Roskill LJ. at page 193 at letter j;

> Whilst it has always been the policy of the courts not to allow the Moneylenders Act to be evaded, it has always been the policy of the court to encourage compromises and to enforce compromises when they are made. The position is clearly stated, if I might respectfully say so, in ***British Russian Gazette and Trade Outlook Ltd. v Associated Newspapers Ltd***., in judgement of Greer LJ, where the learned Lord Justice said;
>
> > "I therefore feel that we are now entitled to decide the question on principle, and I think at the present stage of the development of the law we ought to decide that an

> agreement for good consideration, whether it be an agreement to settle an existing claim or any other kind of agreement; is enforceable at law by action if it be an agreement for valuable consideration, and such valuable consideration may consist of the promise of the party."

...and at letter d;

> "...it seems to be clear that the court should encourage and when appropriate enforce any bona fide compromise arrived at, especially one arrived at under legal advice."

The Defendants submitted that PWC, ***were merely appointed*** as Court experts but even if they were assessors their "award" would not be binding. As they did not carry out the mandate of the Court Order. They relied on ***Hutcheson & Co. Eaton (1884) 13Q.B.D. 864***, where the parties had entered into a contract that "any dispute arising on this contract is to be settled by arbitrators. The Defendants signed the contract adding "brokers" after their names. After the signing the names of their principals were added. At arbitral hearings to determine the liability of the Defendants. The arbitrators found that the Defendants were not liable because a custom existed that upon naming his principal he ceased to be personally liable. At the trial of the matter, a jury found that no such custom existed. The Court held that the Defendants were personally liable on the contract, and that the finding of the arbitrators had not relieved the Defendant from liability inasmuch as the arbitrators had exceeded their jurisdiction. The arbitrators had not examined any facts in the case, but having decided concluded the existence of the

custom, upon that alone decided that the defendant as not liable. They were deemed to have declined jurisdiction. Brett M.R. said at page 867;

> "....It seems to me that what, they have decide they have decided without jurisdiction, and they having declined to exercise the only jurisdiction which they had, the award cannot be supported on any ground, and that it is a mere nullity as between the plaintiffs and the defendants in this case. It is not a case where an arbitrator has assumed to decide something within his jurisdiction, and where he is alleged to have decided it wrongly. It is not a case where an arbitrator has assumed to decide something within his jurisdiction and is alleged to have misconduct himself with reference to it. I apprehend that in such cases as those, the award would be binding, and if the plaintiffs objects to the award on either of those grounds, they must have moved to set it aside and they could not dispute its validity when relied upon as a defence to an action." (Emphasis mine.)

In the instant case, PWC did not decline to exercise jurisdiction neither did they decide anything without jurisdiction so to do. PWC did give an opinion on the amounts that were due and by whom. In ***Hutcheson***, the Court found that the arbitrators have not dealt with the contract as contained in the paper on which it was written, but they have dealt with another matter, and that other matter was not "a dispute arising out of the contract but was really a dispute as to what was the contract." The arbitrators in ***Hutcheson*** only decided a matter which they had no authority to decide, whilst omitting to determine the issue they were mandated to determine.

Counsel also referred the Court to ***Owners of S.S Austrilla v Owners of Cargo of S.S Nautilus (1927) A.C. 145***, a case dealing with nautical assessors. The position of the assessors are quite different from the role of the PWC. In this case, PWC's appointment was mutually agreed by the parties and their expertise remains unquestioned. On the other hand, the assessors "occupy the same position as do skilled witness. ***Odgers on Pleadings and Practice, The Eighteenth Edition, page 268*** states;

> Assessors are professional or scientific persons who assist the judge with their special knowledge most frequently seen in the Admiralty Court in cases of collision between two vessels. They function as expert witnesses, their functions were described by Lord President Cooper in ***Davie v Edinburgh Magistrates 1953 S.C 34;***
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> 'Their duty is to furnish he Judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge to form their own independent judgement by the application of these criteria to the facts proved in evidence.'

Here the parties intended to be bound by the decision of PWC.

In the ***Owners of S. Austrilla case***, the assessors in the Court of Appeal had differed from the assessors below, Viscount Dunedin said, after commenting that the sharp divergence of opinion among skilled assessors had more than once given the Judges cause for comment at page 149,

> "So that, speaking for myself, except for the purposes of explanation, I shall always ask an assessor as little as

> possible...we have found not only in this case but in several cases...that the different assessors are at variance is much more of a hindrance than an assistance"

The parties in the instant case had agreed for the parties to decide the substantial question between the parties.

Holder in due course

The Defendants argue that the Third Claimant cannot be regarded as a holder in due course having obtained the promissory note by virtue of a vesting order that post-dated the action in which the enforceability was challenged and refers the Court to section 29 of The Bills of Exchange Act. No ***defect in the title*** of the person who negotiated the note was brought to this Court. S. 30 of The Bills of Exchange Act provides, inter alia, every holder of a bill is prima facie deemed to be a holder in due course, but if in an action on the bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected by fraud, duress, or force or fear, or illegality, the burden of proof is shifted.... No such proof or admission was received in evidence. The Third Claimant was substituted to reflect the current ownership of the receivables. The receivables have passed from the Bank and the Trust to Jamaica Redevelopment Foundation. It is clear that the receivables are vested in the Third Claimant, also clear is that there were issues involving Jamaica Redevelopment Foundation Inc. The Third Claimant was added to enable the Court to resolve all the matters in dispute. Counsel for the Claimants

was, naturally reluctant to withdraw the First and Second Claimants, when the application was made. The Court ordered the addition of the Third Claimant pursuant to Rule 19.3. I find for the Claimants on the Claim and on the Counterclaim.

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. The rate of 25% per annum to be applied to the sum of $11,500,344 from 7th October to today's date. Costs of the action and one-half cost of obtaining the Report from Price Waterhouse Coppers to the Claimant.