[2012] JMSC Civil 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO: C. L - N 082 of 1999

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**1ST CLAIMANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC.**	**2ND CLAIMANT**
AND	**SCOTIA BANK JAMAICA TRUST AND MERCHANT BANK LTD.**	**DEFENDANT**

Whether person, by signing letter purporting to "confirm his agreement" to terms of letter allegedly giving undertaking, is to be considered as having given undertaking; whether unilateral contract may be effected in such manner; whether consideration supplied or whether privity of contract established; whether circumstances of particular relationship may give rise to duty of care; whether representation of present fact intended to be acted upon and which is acted upon by another party may amount to a warranty and give rise to liability in damages; expert evidence under the CPR.

Appearances: Mr. Charles Piper, instructed by Charles Piper & Co, for the Claimants; Dr. Lloyd Barnett, Mr. David Batts and Ms. Daniella Gentles instructed by Livingston Alexander and Levy, for the Defendant.

CORAM: ANDERSON J;

Heard: February 15, 16 and 25, 2010, March 29 2010 and January 13, 2012.

1) From the claim number in the heading of this page, it will be apparent that this suit has been extant for over eleven (11) years, having been filed in 1999. What is perhaps equally of interest is the fact that the circumstances giving rise to the action took place way back in 1994 during a period of traumatic upheaval in the financial sector in Jamaica, a period which has spawned numerous lawsuits involving financial institutions. It is also worth noting that although this matter is now being finally tried as a substantive matter for the first time, it has already developed some history and has been the subject of

two (2) written rulings by the Court of Appeal; one in relation to an appeal against a refusal of an application by the First Claimant here for Summary Judgment, that appeal heard on October 23 to 27 and December 20, 2006 and the other a preliminary objection to the hearing of the appeal, heard February 1,2 and 3 and April 7, 2006. Both the preliminary objection and the substantive appeal against the refusal of the summary judgment application failed. There has also been an appeal involving at least some of these same parties in Supreme Court Civil Appeal No: 37 of 2005, a decision handed down by the Court of Appeal on July 27, 2007. I refer briefly to that decision below.

The Background Facts

2) The basic facts which have given rise to these proceedings are summarized very effectively and succinctly by his Lordship Paul Harrison, then the learned President of the Court of Appeal in SCCA 80/04. There his lordship said:

> 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 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. Jeffery Cobham, Managing Director, National Commercial Bank, 32 Trafalgar Road, signed by Henry Fullerton, "Executive Chairman of Caldon Finance Group Ltd., " the appellant was directed:

> "Dear Jeff,
>
> Enclosed is a copy letter signed by Mr. 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 forwards … 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 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 agreement 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, (as he then was), on 23rd July 2004".

[3] That dismissal was upheld by the Court of Appeal. Before that appeal was determined, the Court of Appeal also ruled against an application by the Defendant to prevent the claimants from appealing the judgment of Dukharan J.

[4] In order to determine the issues in the case, it will be useful to start with the pleadings and then to turn to the submissions by the parties. According to their statement of claim, the Claimants' action is ostensibly limited to two causes of action, namely:

(1) damages for breach of an undertaking contained in correspondence between the First Claimant, the Defendant and Caldon Finance Group Ltd.; and
(2) negligence in delivering the proceeds of the sale of the shares to PHJ despite having received the stock units on the alleged

undertaking and or neglecting or failing to take any steps or adequate steps to ensure that the proceeds of sale did not come into the hands or under the control of PHJ or CFG when the Defendant knew or ought to have known that the Claimant would suffer loss and damage by reason thereof.

[5] On the other hand, the Defence denies that there was any agreement between the First Claimant and the Defendant or that there was any breach of any such agreement or undertaking. It also denied that it had been negligent in any way and asserted that it had acted as Registrar and Transfer Agent and had acted pursuant to the changed instructions it had received from CFG.

The Issues

[6] The First Claimant's submissions have suggested that the issues are as follows:

(i) Whether there is a contract between the First Claimant arising from the correspondence referred to at items 4, 6, 7 and 10 above;

(ii) If so, what are the terms of the contract;

(iii) If there is a contract has it been -

a) breached; and/or

b) performed negligently

(iv) What are the consequences in the event of a finding that there has been a breach of the contract or that it has been negligently performed; and

(v) Costs.

[7] Counsel for the Claimants submits that a contract was created because the Defendant accepted the offer contained in the letter of May 27, 1994 and that in fact such acceptance had taken place. The First Claimant

cited the case of **In re Imperial Land Company of Marseilles (Harris' Case)** Law Rep. 7 Ch. 587. Claimants' counsel also cited **Alexander Brogden and others v The Directors of the Metropolitan Railway Company** 2 App. Cas. 666 as authority for the principle set out in the head note, that-

> "Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either.

[8] Mr. Piper for the Claimants further referred the court to the well-known case of **Carlill v Carbolic Smoke Ball Company** [1893] 1 Q.B. 256 in support of the first Claimant's submission that a contract had been created by the Defendant's representative signing as "approved" the letter from the first Claimant as to how the shares in question were to be disposed of. Counsel further cited the case of **Daulia Ltd. v Four Millbank Nominees Ltd and Another** [1978] 2 W.L.R. 621 to the effect that a unilateral contract may arise from the conduct of the parties. In that case it was held that a contract had arisen but was unenforceable because, in the absence of part performance, there was no sufficient memorandum in writing to satisfy the provision of section 40 of the United Kingdom Law of Property Act 1925.

[9] The Claimants submitted that based upon the principles articulated in the authorities, it had demonstrated that a contract had been created between the first Claimant and the Defendant and that by not sending the proceeds to the First Claimant as it should have done pursuant to the terms of the contract, the Defendant was in breach.

[10] Alternatively, the Claimants submitted that based upon the evidence of the Defendant's chief executive officer, Mr. Page, the defendant had breached a duty of care to the first Claimant and was liable in negligence for that breach which had resulted in the first Claimant suffering losses and incurring damages for which it was entitled to compensation.

[11] The defendant on the other hand denies that a contract was ever created between itself and the first Claimant and accordingly says that there has been no breach of contract. In that regard, it relies upon the evidence of its expert, Victor Mouttet, who opined that not only was there no contract but that there was no "undertaking" given upon which the First Claimant could rely.

[12] Equally, it denied that there was any breach of a duty of care so as to make the defendant liable in negligence. Indeed, the Defendant relied upon the case of **Marfani & Co Ltd v Midland Bank Limited** [1968] 2 All ER 573, which was authority for the proposition that the duty of care of a banker to the true owner of a cheque does not arise until the cheque is delivered to him (the bank) by the customer.

The Evidence

[13] The evidence is that the sale of the 31,000,000 and 69,515,972 stock units to ADM Milling Co. Ltd was completed at some point between May 30, 1997 and July 9, 1997. The said stock units were sold by the Defendant for US$14,861,992.98 and a cheque for US$14,861,992.98 bearing date July 10, 1997 was delivered to CFG's bearer on that date. Meanwhile, by a letter dated July 9, 1997 from CFG to the Defendant's General Manager, the latter was advised that: "With respect to PHJ Limited, our bearer will collect the relevant cheques and

deliver same to Life of Jamaica and National Commercial Bank respectively."

[14] The cheque in question was, indeed, delivered to the bearer from PHJ instead of being sent to NCB for the attention of Mr. Cobham. It was deposited in an account opened by PHJ at NCB's Knutsford Boulevard Branch in two separate amounts of US$7,430,996.49. It was specially cleared and the proceeds deposited to the first Claimant's Wall Street, New York account. The proceeds of the cheque were then dissipated over the following days leaving the account with a balance of US$52,505.24 by July 31, 1997.

[15] Mr. Piper, for the Claimants, submitted that the evidence as given by the Defendant's General Manager Mr. Page could be summarized in the following terms:

- The letter from Henry Fullerton dated May 27, 1997, required him to send the proceeds of sale of the shares to the first Claimant at the specified address for the attention of Mr. Jeffery Cobham.
- He did not send the proceeds of sale of the shares to the First Claimant for the attention of Mr. Jeffery Cobham as he had agreed to do.
- It was Mr. Page's understanding that the sale proceeds were to be sent as set out in the said letter at page 2 of Exhibit 1.
- He did not personally handle the transaction and left it to the Defendant's treasury department to do so.
- His understanding from the letters from the First Claimant sending the Shares to the Defendant was that the amount indicated therein was to be sent to the First Claimant together with any increase in value.
- He was satisfied that the cheque representing the proceeds of sale of the shares had not been delivered to Mr. Cobham.

[16] Further it was submitted that the substance of the witness of the Defendant's witness Mr. Mouttet was that no contract between the Defendant and the First Claimant came into existence because the letters under which the share certificates were delivered to the Defendant, to the extent that they purported to be sent on an undertaking, did not give rise to the existence of an undertaking because they were not accepted *in writing* by the Defendant. (Emphasis mine) For this reason, the words "against your undertaking to forward the amount of … representing sale proceeds of the enclosed stock units" should be ignored and were properly ignored by the Defendant in the case of each letter.

The Expert witness's evidence

[17] Before leaving this question of evidence, it is important that I make some critical observations about the expert evidence of the Defendant's witness, Mr. Mouttet, which is central to the defence. Mr. Mouttet was designated by the court to provide expert evidence in the instant matter. Expert evidence is dealt with under Part 32 of the Civil Procedure Rules, 2002, as amended. By Part 32.3 the Rule imposes on an expert, an over-riding duty to the court a) to help the court impartially on matters relevant to his or her expertise, and b) makes it clear that the duty to the court over-rides any obligation to the person by whom he or she is instructed or paid. I wish to point out in particular Rule 32.4 which is in the following terms:

1) Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert witness uninfluenced as to form or content by the demands of the litigation.
2) An expert must provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within the expert witness's expertise.
3) An expert witness must state the facts or assumptions upon which his or her opinion is based. The expert witness must not omit to

consider material facts which could detract from his or her concluded view.

4) An expert witness must state if a material fact or issue falls outside his or her expertise.
5) Where the opinion of the expert is not properly researched, then this must be stated with an indication that the opinion is no more than a provisional one
6) Where an expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, then the qualification must be stated in the report..
7) ………………

[18] **Whitehouse v Jordan** [1981**]**, a case from the United Kingdom, demonstrated the need, per Lord Wilberforce at page 256, for the expert report to be "uninfluenced as to form or content by the exigencies of the litigation".

As noted elsewhere in this judgment, a court is not obliged to accept the opinion of the expert. See **Fuller v Strum** [2002] 2 All ER 87). The key question to be determined in deciding what weight is to be given to the expert's report is whether the expert's opinion is "independent of the parties and the pressures of litigation". In this regard it is to be noted that some of the questions contained in the brief seeking the opinion of Mr. Mouttet, appear to be matters which are essentially within the purview of the judge to determine. For example, the expert was asked to respond to the following questions:

> "Is it customary practice between bankers to send documents of title to each other on the implied undertaking of the receiving bank to deliver to the sending bank the sums required without the need for formal acceptance of the undertaking by the receiving bank?"

The expert's answer was in the following terms:

> "My opinion is premised upon the assumption that the issue relates specifically to the share certificates sent by the 1st Appellant/Applicant to Respondent *against the alleged*

> *undertaking* of the Respondent to remit the proceeds of sale of the shares to NCB. (Emphasis mine)
> The customary practice between bankers is that the letter from the 1st Appellant/ Applicant enclosing the share certificates and requesting the sale proceeds would be countersigned by the shareholder PHJ and the 1st Appellant/Applicant would request written confirmation of the undertaking from the Respondent signed by a person in authority (*depending on the policy of the bank*) that it was prepared to pay the proceeds over to the 1st Appellant/Applicant". (Emphasis Mine).

[19] It is not stated in his evidence that what the questioner characterizes as an "implied undertaking" is the same as the "alleged undertaking" of the expert.

> Question: Is it the customary practice to treat the letters of May 28, 1997 and May 30, 1997 from the 1st Appellant/Applicant to the Respondent as binding undertakings from the Respondent?

[20] In the course of his answer, the expert refers to the First Claimant's letter of May 28 1997 in which the stock units were sent to the Defendant. The answer stated that the letter "should have been countersigned by the shareholder PHJ" Secondly, the wording of the letter suggests that some undertaking , *oral or written*, was given by the Respondent prior to the issue of the letter and the letter should have provided details of the undertaking". (Again, emphasis mine) It is apparent that the witness recognizes that there could have been a valid "oral" undertaking given and his reservation seems to be *that the terms were not quoted in the letter*.

[21] It is not clear why the expert would conclude that quoting the "undertaking" in the letter sending the shares would have made a difference to the legal status of any given undertaking, "implied" or "alleged".

[22] The third question was:

> "What is the customary practice among banks as regards undertakings and what acts are necessary for a sufficient undertaking to be established?"

The question seems not to recognize that whether, and if so to what extent, certain acts may amount to the giving of a valid undertaking, is a matter of law. Moreover, the factual bases upon which such may be established may be infinite. The expert says that the only obligation which the Defendant had was "to return the share certificates to PHJ in the event the sale fell through". At the same time it should be noted that, in the previous answer the expert said that while the additional information concerning any undertaking should have been supplied to the Defendant, it would not have made any difference to the rights of the First Claimant as the Defendant, in its capacity as Registrar and Transfer Agent, could not in law be expected to recognize any interest other than that of PHJ, the legal owner of the stock units.

It is, in my view, of critical importance that the answer does not tell us why the Registrar who, on the Defendant's case was obliged deliver the sale proceeds to the legal owner of the stock, (PHJ), was subsequently obliged to agree to vary the terms of delivery set out in the letter to the Defendant, dated May 27, 1997 and signed by Mr. Henry Fullerton, the Executive Chairman of CFG and MCS, on the basis of different instructions contained in a letter dated July 8, 1997 and signed by Miss. Greta Bogues an "authorized signature" of Caldon Finance Group Limited, which company was ***NOT*** the beneficial owner of the stock units.

[23] I have set out the above in fair detail because in my view, it raises questions as to the weight which ought to be attached to the expert's opinion in general, and in particular, on whether valid undertakings have arisen based upon the exchanges which have been identified in the course of the evidence. I should note that I do not accept the expert's opinion that no undertaking had arisen in the circumstances shown in the exchange of letters. But I am equally concerned that nowhere in the expert's report does he testify that the duties as Registrar which he says

obliged the Defendant to act in a certain way are the same as those of "banks" with which he is conversant, or if not, how they differ. In the context of the requirements of the CPR as to the admissibility of, and weight to be attached to the evidence of expert witnesses, I was also concerned by his answer to a question from the First Claimant's counsel in the following terms: "Do you agree that the letter at page 2 (that is the letter from PHJ to the Defendant) was a direction from PHJ to the Defendant to pay the proceeds from the share offer to NCB for the attention of Mr. Jeffrey Cobham?" His answer was: "I do not agree. In my view the letter was deficient". Later, under cross examination, he agreed that the letter did in fact mean that the Defendant had confirmed its agreement to the terms of the letter but he said it was deficient because the First Claimant "should have countersigned it".

[23A] The following exchanges between counsel for the First Claimant and the expert witness, I also found to be disturbing.

> Question: Do you agree that a series of communications when taken together can constitute an undertaking?
> Answer: Yes, possibly.
> Question: Am I not correct that at times a number of documents taken together can be construed as an undertaking?
> Answer: Not in a transaction of this size.
> Question: Are you saying that the size of a transaction may determine whether a number of documents taken together can become an undertaking?
> Answer: Yes
> Question: Explain how the size of the transaction can affect whether the documents amount to an undertaking.
> Answer: This is governed by the basic rules and the discretion of the financial institutions concerned.

Given his evidence to the effect that size matters in determining whether a set of documents taken together may amount to an undertaking, and since size is relative, the Court ought to expect that it would be assisted in determining what would be an appropriate size in relation to the documents under

consideration. Perhaps, more to the point is the expert's own concession that he has never worked in this jurisdiction. In such circumstances it is difficult to see how any evidence he may proffer as to the appropriateness of the documentation to any particular size transaction can be of any assistance to the court.

Defendant's submissions

[24] The Defendant submits that since the First Claimant's claim is based in contract and it is relying on certain correspondence as proof of this contract, if the correspondence does not amount to a contract the claim must fail. In the instant case, it was submitted that the Defendant acted as transfer agent of PHJ from whom it took instructions and to whom it presented the proceeds of sale. As agents for PHJ, the Defendant was bound to follow the instructions of PHJ and any variation of those instructions, as it was responsible solely to PHJ since the money was being held by the Defendant qua agent and not stakeholder. See, for example, **Fairlie v Fenton and Another** [1870] 5 EXCH 169 and **Ellis v Goulton and Another** [1893] 1 QB 350 and **Montgomerie and others v United Kingdom Mutual Steam Ship Association Ltd**. [1891] 1 QB 370. The Defendant was well "within its rights" to act on the variation of the May 27, 1997 instructions given by PHJ in it subsequent letter of July 1997.

[25] It was the burden of this submission that the letter from PHJ to the Defendant dated May 27, 1997, had nothing to do with the First Claimant. It was, in that regard, *res inter alios acta* and, accordingly, this could not amount to an offer from the First Claimant capable of being accepted by the Defendant, let alone provide the basis of a contract between the two parties. The Defendant's submission pointed out that the letter of May 28, 1998 from the First Claimant to the Defendant "stated that the Claimant was forwarding the stock units "at the request" of CFG and not that the

First Claimant was acting as equitable owner or chargee of the stock units. It erroneously added that it was being done "against your undertaking to forward" the proceeds of sale. As pointed out the Defendant had not given an undertaking to the First Claimant but to PHJ pursuant to its status as the latter's agent. Significantly, neither of the two letters said that BNS should **pay** the amount to the First Claimant. It was submitted that the evidence was that it was the practice for the proceeds of the sale of stock units to be paid over to the owner of the stock.

[26] It was also submitted that the letter of May 28, 1997, (Exhibit 5) "assumed that an undertaking existed and did not require the Defendant to make a reciprocal promise to forward or pay the proceeds to the First Claimant". In fact, the letter ended with a requirement for a copy of the letter to be signed and returned in acknowledgement of the "receipt of the Certificates" not by way of agreeing to give an undertaking. There is no evidence that such a signed copy was returned as requested. In essence, If there was a contract at all it was between PHJ and the Defendant and the Claimant was not party to that contract. No privity existed between the Claimant and the Defendant".

[27] In this respect, *en passant*, it should be noted that, whatever the wording of the letters, in SCCA 37 of 2005, **PHJ Limited (Appellant) v NCB Jamaica Limited and Others (Respondents)**, Cooke J.A. with whom Harrison J.A. and Dukharan J.A. (Ag) agreed, held that there had been an equitable assignment of the proceeds of the sale of the 31, 000,000 stock units which was the second block of stock units in issue in favour of the appellant there (First Claimant here).

[28] The Defendant further submits that in relation to the letter of May 30, 1997 (Page 6 of the Agreed Bundle of Documents) the only condition suggested therein was that if the shares were not sold they would be returned. Since

the shares were in fact sold it was submitted that this did not even give rise to an expectation that the share certificates would be returned to the Claimant.

[29] It was further submitted that a party cannot be considered to have entered into a contract because of his silence (See **Felthouse v Bindley** (1862) 11 CBNS 869; **The Leonidas D** [1985] 2 All E.R. 796(805). In any event, the letters which constitute Exhibits 1, 2 and 3 do not indicate that any contract came into being between the First Claimant and the Defendant and the evidence of the Defendant's expert witness is that in banking terms, the words used in the correspondence do not rise to the level of a proper undertaking which could bind the parties.

[30] In the alternative, the Defendant asked the Court to find that if there were in fact a legally enforceable undertaking, that undertaking was fully satisfied and discharged when the proceeds of the sale of the stock units came into the possession of the Claimant bank when it was deposited into an account at its corporate branch office., even if it were not delivered to "Mr. Jeffrey Cobham". The First Claimant had not only got the proceeds of the sale in its possession but had facilitated dealings with those proceeds and cannot now be heard to say that there was a breach of any undertaking. In fact it was the Defendant's submission that based upon the evidence of the expert, the lodgment of the cheque in PHJ's account in the First Claimant's bank would have been a sufficient discharge of any undertaking according to customary banking practice. It should be noted that both Mr. Giddarie (then senior assistant general manager at the Head Office of the First Claimant) and Mr. Badresingh, another senior officer of the First Claimant, said they were unaware that the sale proceeds had been deposited in a newly-opened account at the Knutsford Boulevard branch rather than being sent to the head office for the attention of Mr. Jeffrey Cobham. I also accept the evidence of both witnesses that they

had made enquiries between the time of the handing over of the stock units to the Defendant in May 1997 to July 1997 about the proceeds of the sale but were not given definite answers.

[31] The First Claimant has also claimed in negligence for the "negligent performance" of the contract in the undertaking. The Defendants submit that as submitted above, there was no contract as there had been no valid undertaking. The second particular of negligence cited in the particulars of claim related to the failure of the Defendant to prevent the monies falling into the hands of PHJ or CFG when it knew or ought to have known that the shares were being held to secure loans and/or advances made by the First Claimant to those companies. However, the Defendant submitted that it had no previous knowledge of the stock units being held by the First Claimant as security for any such loans or advances. In any event, the Defendant was obliged as agent of PHJ and/or CFG to deliver the proceeds of the sale of the shares to its principal and could not legally have delivered those proceeds to the First Claimant, PHJ being the legal owner of the shares and CFG being the company on whose behalf it held those shares. I pause to note the irony in this submission. It is interesting that the Defendant here submitted that essentially it was CFG who beneficially owned the shares which is why it would have accepted instructions from Mr. Henry Fullerton, the executive chairman of CFG whereas elsewhere it was at pains to point out that under the Companies Act, the Registrar is not obliged to and does not recognize any trusts in relation to the shares on the register. In any case, the fact that the First Claimant suffered loss is not of itself a basis for a finding that a duty of care existed.

[32] It was the further submission of the Defendant that the standard of the duty of care owed in any particular set of circumstances is objectively determined. However, where one is considering the standard of care applicable in a particular area of business, the standard of the duty is

determined by the prevailing standard of care in that field. It was submitted that the Claimants had "led no evidence to establish that the Defendant did not act in accordance with the standards of Bankers in the particular field. On the other hand, the Defendant has adduced evidence that it acted in accordance with normal banking practice and more emphatically did not act in any way which did not accord with standard banking practice". Reference is then made to the Expert Report of Mr. Mouttet, para. 8, Response to Issue #2. Defendant's counsel also cited **Marfani and Company Limited v Midland Bank Ltd** [1968] 2 All E.R. 573, per Diplock, L.J.(as he then was). I shall comment later on the dicta of the learned judge which has been cited to the Court.

[33] The Defendant further submitted that even if there had been a duty and a breach, such breach was not the proximate cause of the loss. Such loss been caused by the First Claimant's own negligence as there were several things the First Claimant, as equitable mortgagee, could have done to avoid the loss including insisting that the cheque be drawn in its name and preventing PHJ from getting access to its funds once it had been deposited in the account. In this regard the Defendant cited Palmer's Company Law 24th Edition Volume 1 paragraphs 40 – 41. In fact the Defendant submitted that the first Claimant was fully aware of the impending sale, the identity of the purchaser and the amount of the purchase price and could have taken the necessary steps to obtain payment of the cheque to itself and not requested merely its delivery. It also pointed to the oral evidence of the expert, Mr. Mouttet, and suggested that he had given some clear indications as to the type of simple and practical procedure which the First Claimant should have adhered to in protection of their interests, such as asking for the instructions to the Defendant to be irrevocable in the absence of its consent and countersigning the instructions. In furtherance of the submission that it was the First Claimant's negligence that was the proximate cause of the

loss, the Defendant submitted that it was the 1st Claimant which caused the funds to be withdrawn and therefore the loss to them was due to their own failing. In determining the cause of a loss for the purpose of legal liability, one takes a common sense approach to decide what is the real substantial, direct or effective cause of the loss; that is, the legally operative cause. See Galoo **Ltd v Bright Grahame Murray** [1994] 1 WLR 1360A at 1375A, **Wright v Lodge** [1993] 4 ALLER 299 at 307f and **Stapley v Gypsum Mines Ltd.** [1953] AC 663. (See for example Lord Reid at page 681in **Stapley v Gypsum Mines Ltd** and Lord Asquith of Bishopsgate in the same case at pages 687-688).

[34] The Defendant also points to the fact that the First Claimant had given access to PHJ to the funds upon it being deposited to an account at the Knutsford Boulevard Branch of the First Claimant. There was an inexplicable lack of urgency on the part of the First Claimant in pursuing its claim on the proceeds of the sale of the shares of which it was aware from the time it was effected. It was noted that interestingly, although Mr. Cobham had been at the centre of the transactions he had not been called as a witness by the First Claimant. Messrs Badresingh and Giddarie who had been called for the First Claimant did not appear to treat the matter with the urgency that one would have expected.

[35] Finally, the Defendant submitted that the only expert evidence on banking practice had been led by the Defendant and that evidence should be accepted. In conclusion it was submitted that the Court should accept the evidence of Mr. Mouttet and in particular his evidence that a Registrar and Transfer agent need only take instructions from the owner of the shares and is not obliged to enquire into the existence of beneficial or unregistered interests.

Court's Discussion

[36] Notwithstanding the foregoing analysis of the evidence and the detailed submissions of both parties, it is my view that the issue which this court has to decide is whether a contract came into being between the First Claimant and the Defendant, and if there was, was there a breach of such a contract, or was there negligent performance of the contract by one of the parties thereto, or does liability arise on the evidence adduced independently of the foregoing?

[37] In this regard, it will be recalled that the second particular of negligence pleaded by the First Claimant was to the effect *that Defendant neglected or failed to take any or any adequate steps to ensure that the proceeds of sale did not come into the hands or under the control of PHJ or CFG when the Defendant knew or ought to have known that the Claimant would suffer loss and damage as a result.* (Emphasis mine) I shall return to this later.

[38] It is trite law that in order to come into existence there needs to be an offer capable of being accepted; an acceptance and consideration. Both parties agree on this. Where the difference arises is in whether what was done amounted to a contract. Mr. Piper for the First Claimant, as noted above, based his claim upon the concept of a unilateral contract for he does not pretend that there was ad idem arising from direct discussions between the parties.

Unilateral Contract.

[39] Does the evidence support a finding that a unilateral contract has been effected? A unilateral contract is one in which only one party makes an express promise, or undertakes a performance without first securing a reciprocal agreement from the other party. In such a contract, one party, known as the offeror, makes a promise in exchange for an act (or abstention from acting) by another party, known as the offeree. If the

offeree acts on the offeror's promise, the offeror is legally obligated to fulfill the contract, but an offeree cannot be forced to act (or not act), because no return promise has been made to the offeror. After an offeree has performed, only one enforceable promise exists, that of the offeror. Thus in **Bowerman and Another v Association of British Travel Agents Ltd.** Times Law Reports November 21, 1995 decided in the English Court of Appeal, the claimant was to take part in a school skiing trip. The first operator was a member of the defendant association, and ceased trading through insolvency. It was held that the ABTA notice displayed in the travel agent's offices created a contract between ABTA and the client. The advert 'ABTA arranges re-imbursement' constituted a unilateral offer to contract in this context. The notice would be seen to create legal relations, and satisfied the criterion in **Carlill**. The promises covered ABTA tour operators against any failure of ABTA travel agents who had taken money from the public and not passed it on to the tour operator.

[40] The question is whether the circumstances outlined in the evidence in this case are sufficient to fulfil the criteria to give rise to such a contract. It would seem to me that the requirement for the offeror to make a "payment" in respect of certain performance, once it is completed or to be incapable of withdrawal of the offer once performance has commenced, is not met. In passing, I should observe that while the "Expert Witness" Mr. Mouttet opined that no contract had arisen and that there was no valid undertaking, the court is not obliged to accept his opinion as those are questions of law upon which the Court must make its own determination. If the finding of the court is that no contract has been entered into, then it must follow that there can be no "negligent performance" of the contract.

[41] But I would venture to argue that this is not necessarily determinative of the question here. The question may well be asked: "What is the effect, if any, of the letters of May 27, 1997 and those of May 28 and May 30,

1997?". It will be recalled that the first letter sent by PHJ on May 27, 1997 had requested that the Defendant "sign and return (the letter) as confirmation of your agreement". It will be further recalled that the said letter was, on the evidence I accept, signed by the Defendant's General Manager, Mr. Randolph "Jack" Page. Based upon the evidence of the letter which was sent on the same day to Mr. Jeffrey Cobham at the First Claimant, it is a clear inference which the court would be entitled to draw that the letter referred to in the letter to Mr. Cobham was a copy of the earlier referenced letter. In any case, the First Claimant's witness, Mr. Chester Giddarie, in his evidence confirmed that he had received on its behalf a copy of the signed letter. I am also prepared to hold that the "agreement" which was "confirmed" by the signature, was that the Defendant had agreed "to forward the proceeds" of the sale of the 69,515,972 stock units, to the First Claimant.

[42] On May 28, 1997 the relevant stock units were delivered to the Defendant by the First Claimant on terms in relation to which the following may be regarded as significant by the parties:

> "<u>At the request of (CFG)</u> … (NCB) ….<u>hereby forwards (69,515,972) stock units</u> in Jamaica Flour Mills, <u>against your undertaking to forward the amount of … (US$8,858,350.80) representing sale proceeds of the enclosed stock units.</u>" (Emphasis supplied)

[43] I would also hold that the Defendant knew or ought to have known, by virtue of the terms of this letter, that the First Claimant had been made aware of the said signed letter and its terms. Indeed, it would seem to me that it is possible to find that the "confirmation of your agreement" which was subsequently conveyed to the First Claimant and which was acted upon by the First Claimant was in the nature of a "warranty". In that regard, I would be prepared to find that in business and legal transactions, a warranty is an assurance by one party to the other party that specific

facts or conditions are true or will happen. The other party is permitted to rely on that assurance and seek some type of remedy if it is not true or followed. In the instant case, if the assurance given by the First Defendant was untrue or was not followed and the First Claimant who, in reliance upon the assurance released the stock units to the Defendant, suffered loss, this would amount to a breach of warranty for which damages should be recoverable. It is also clear that a breach of warranty does not require that a valid contract had been entered into. Thus, for example, a breach of warranty of authority could give rise to a claim in damages although no proper contract had been effect.

[44] It is worth noting that on May 29, 1997, the First Claimant requested the other block of 31 million stock units which had been held by Jamaica Citizens Bank (JCB) on much the same undertaking as were offered by the First Claimant including its undertaking to pay to JCB the amount of $54,858,500.00 and on May 30, 1997, forwarded these to the Defendant. It is a matter of record of which this court may take notice that in relation to the proceeds of the sale of the 31 million units for which the First Claimant did pay JCB, the Court of Appeal in **PHJ Limited (In Liquidation) Appellant, v National Commercial Bank Jamaica Limited 1st Respondent, Jamaica Redevelopment Limited 2nd Respondent, Scotiabank Jamaica Trust and Merchant Bank Jamaica Limited3rd Respondent and ADM Milling Co. Ltd. 4th Respondent**, SCCA 37 of 2005 held that the First Claimant herein was an equitable assignee of those proceeds of sale.

[45] I wish to return to the question of the First Claimant's pleading of its second particular of negligence. In response to this pleading, the Defendant in its submissions had articulated two responses: firstly, it was that the Defendant did not know that the stock units in question were pledged to the First Claimant or of any equitable interest held by the First

Claimant, and secondly, that the Defendant was legally obliged to act on the instructions of the Caldon Group. "It could not be expected to serve two masters. The Defendant's duty of care was owed to PHJ in particular and the Caldon Group as a whole on behalf of which PHJ held the legal title to the shares". These submissions raise some interesting questions.

[46] In terms of the evidence led before me, the assertion that the Defendant's duty of care was owed to PHJ in particular and "the Caldon Group as a whole *on behalf of which PHJ held legal title to the shares*" is only supported by the statements or inferences to be drawn from the various letters in exhibit. The submission implicitly recognizes the relatedness of PHJ and Caldon Group in the context of the stock being held by a third party. In these circumstances where I have held that the Defendant had knowledge that its "confirmation of the agreement" had been passed on the First Claimant (See the letter from the First Claimant to the Defendant dated May 28, 1997 in which the stock units were enclosed), it seems to me that a duty of care had arisen by virtue of the warranty that the proceeds would be sent to the First Claimant, a warranty upon which the First Claimant relied.

[47] The mere existence of a duty does not of course mean that there is liability unless there is shown to be a breach of that duty. It is the Defendant's submission that even if there was a duty here, the First Claimant had failed to show that the Defendant had acted in breach of that duty. It was submitted: "The standard of reasonable care is determined objectively and in a particular area of business is determined by the prevailing standard of care in that field. The claimants have led no evidence to establish that the Defendant did not act in accordance with the standards of Bankers in the particular field. On the other hand, the Defendant has adduced evidence that it acted in accordance with normal banking practice and more emphatically did not act in any way which did not accord with standard

banking practice”. The difficulty with this submission is that the despite his voluminous expert report, the expert makes no claim that the duty of a “Registrar and Transfer Agent” which is what the Defendant was is coterminous with that of a bank.

[48] The question therefore is whether the duty which exists by virtue of the close relationship between the Defendant and the First Claimant and the warranty I have found to be implicit in the letter signed by Mr. Jack Page, has been breached. I have found dicta by Diplock L.J. (as he then was) in the authority of **Marfani** cited by the Defendant’s counsel to be quite instructive. There his lordship had stated:

> “The duty of care owed by the banker to the true owner of the cheque does not arise until the cheque is delivered to him by his customer. It is then, and then only, that any duty to make inquiries can arise. *Any antecedent inquiries that he has made are relevant only in so far as they have already brought to his knowledge facts which a careful banker ought to ascertain about his customers before accepting for collection the cheque which is the subject-matter of the action, and so have relieved him of any need to ascertain them again when the cheque which is the subject-matter of the action is delivered to him.*
> *What the court has to do is to look at all the circumstances at the time of the acts complained of, and to ask itself: were those circumstances such as would cause a reasonable banker, possessed of such information about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque?”* (Emphasis Mine)

[49] It seems to me that the learned judge was making it clear that while in general a banker’s duty of care to the true owner of a cheque only arises after he receives the cheque in question, “antecedent enquiries” are relevant to the extent that they have brought to his attention”*facts which a careful banker ought to ascertain about his customers before accepting for collection the cheque….*” (Emphasis mine) So the need to make further enquiries is a function of the extent to which other facts of which the banker is aware, or ought reasonably to be aware, make it reasonable to

make further checks. In his lordship's view, the court has to look at "*all the circumstances at the time the acts complained of" and ask itself the question whether those circumstances are such as would cause a reasonable banker to suspect that his customer was not the true owner of the cheque".* (Emphasis Mine) In my view, given the letters of May 27, 28 and 30, 1997 which came to the attention of Mr. Page were clearly enough to put the Defendant on notice to make further enquiries. This it failed to do. I accept the submission of the claimants' counsel that the nature of the relationship which existed between the First Claimant and the Defendant based upon the letters which have been admitted into evidence clearly brings the circumstances within the neighbor principle exemplified in the rule laid down in **Donoghue v Stevenson** [1932] 1 A.C. 532 per Lord Atkin at page 580, so as to give rise to a duty:

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[50] I accept that the evidence by the Defendant's then General Manager, Mr. Page, already cited above was indeed to the following effect:

- He knew that the letter of May 27 1997 from PHJ required him to send the proceeds of sale of the shares to the First Claimant at the specified address for the attention of Mr. Jeffery Cobham.
- He did not send the proceeds of sale of the shares to the First Claimant for the attention of Mr. Jeffery Cobham as he had agreed to do in the letter at page 2 of Exhibit 1.
- It was his understanding that the sale proceeds were to be sent as set out in the aforesaid letter.
- He did not personally handle the transaction and left it to the Defendant's treasury department to do so.
- His understanding from the letters from the First Claimant sending the Shares to the Defendant was that the amount indicated therein was to be sent to the First Claimant together with any increase in value.
- He was satisfied that the cheque representing the proceeds of sale of the shares had not been delivered to Mr. Cobham.

I also must consider Mr. Page's own evidence that this was the first occasion on which he had had to deal with the sale of stock units. In that context and based on that and the other evidence I have accepted, including my findings of fact that,

- the Defendant had, by signing the letter of May 27, 1997 from Henry Fullerton, Executive Chairman of CFG and MCS to the Defendant, "confirmed its agreement" to the *terms set out in that letter*; and was aware that that signed confirmation had been, or would be, relayed to the First Claimant; (Emphasis mine)
- in reliance upon that warranty by the Defendant, the First Claimant proceeded to release the stock units to the Defendant;
- the effect of what I have characterized as a warranty, was that the Defendant undertook to "forward" the proceeds of the shares to be sent to it by the First Claimant to the First Claimant at its Trafalgar Road address for the attention of Mr. Jeffery Cobham;
- by so signing the letter which it knew or ought reasonably to have known would be acted upon by the First Claimant, there was thereby created a relationship which gave rise to a duty to take care that the proceeds were delivered in the manner to which it had agreed;
- on the clear evidence of Mr. Page, the Defendant failed to take any steps to ensure that it complied with its own agreement to "forward" the proceeds of the shares to the First Claimant at the address and

for the attention of the designated person and thus it breached its duty; and

- ❖ the First Claimant has suffered loss and damage,

I believe that it is open to the Court and I so find that there was indeed, a duty owed by the Defendant and that the Defendant breached that duty. I also find that it was the breach of that duty which led to the loss suffered by the First Claimant and accordingly I find for the First Claimant.

[51] In the circumstances I make the following awards:

A. Judgment for the Claimants on the Claim in the sum of US$14,861,992.98.

B. Interest on the judgment debt at the rate of 4% from July 10, 1997 to the date of payment;

C. Costs to the Claimants, to be taxed if not agreed.

ROY K ANDERSON
PUISNE JUDGE
January 13, 2012