IN THE SUPREME COURT OF JUDIC ATURE OF JAMAICA

IN CHAMBERS

CLAIM NO. C.L. 199/N-198

BETWEEN	NATIONAL COMMERCIAL BANK	CLAIMANT
A N D	DEXTER CHIN	1ST DEFENDANT
A N D	MONEY TRADERS & INVESTMENTS LIMITED	2ND DEFENDANT
A N D	CONRAD GRAHAM	3RD DEFENDANT

Appearances

Miss H. Phillips Q.C., Mrs. D. Kitson and Miss Y. Christopher instructed by Grant, Stewart Phillips & Company for the Claimant/Respondent.

Mrs. G. Gibson-Henlin, Miss T. Dunn and Miss T. Brown instructed by Nunes, Scholefield, DeLeon and Company for the 1st Defendant/Applicant.

Heard: July 13, 2007 & March 7, 14 & 25, 2008

Williams, J.

By notice of application for Court Orders filed herein on the 5th of October 2006 Dexter Chin the applicant/1st defendant sought four (4) orders; it is the first of the orders that the court is now concerned with. He sought the following against the claimant/respondent The National Commercial Bank (N.C.B.) Limited:-

That summary judgment be entered in favour of the 1st defendant/applicant against the claimant.

The ground on which this order is sought is pursuant to Part 15.2 of the Civil Procedure Rules 2002, that the claimant has no real prospect of succeeding on the claim.

The applicant sets out the following issues to be determined:-

(a) Whether claimant has any real prospect of succeeding on the claim

(b) Whether the claimant's claim is supported by the documentary evidence herein as at May 14, 1997 as alleged-

(i) whether as a matter of fact on the documentary evidence the promissory note was indorsed.

(c) Whether the right to sue or title in the said note passed to the claimant where

(i) the note was not indorsed by the 2nd defendant.

(ii) alternatively at any subsequent indorsement the promissory note had been dishonoured and was overdue for payment and this was known to the claimant.

(iii) the note was not indorsed to the claimant as alleged or at all.

(d) Whether the promissory note is valid or enforceable as against the first defendant in view of the fact:-

(iv) no consideration passed from the 1st defendant to the 2nd defendant in relation to sum secured by the note.

The claimant/respondent submits that they do have a real prospect of succeeding on the claim or issue. They claim to be a holder in due course of the promissory note exhibited in the affidavit of Mrs. Denise Kitson.

It is also submitted that the issues raised by the 1st defendant/applicant are issues of fact to be determined by the hearing of evidence – namely issues as to whether the

claimant knew or ought to have known the note was dishonoured or overdue and whether there was or needed to be notice that consideration did not pass as between the 1st and 2nd defendants for value received.

Both parties acknowledge that this matter has been before various tribunals already. It is also recognized that the tribunals then had to consider whether the claimant had a realistic prospect of success in proceeding as part of its determining whether the matter should be restored.

In 2005, Chief Justice Wolfe heard the initial application to restore and ordered that it was indeed to be restored.

In coming to that decision he held that having carefully examined the defence he was of the view the Claimant has a realistic prospect of success in the proceeding

- per C.L. N-198 of 1999 – **National Commercial Bank v. Dexter Chin, et al** heard April 12, 20 and May 13, 2005. This decision was appealed and Mrs. Justice Harris J.A. (acting) as she then was, found that the Learned Chief Justice finding that the respondent's claim had a realistic prospect of success was correct.

- per Application No. 101 of 2005 Dexter Chin v. National Commercial Bank – heard July 26 and December 13, 2005.

There was also a related matter with issues pertinent to this matter where the 2nd defendant Money Traders Investments Limited sued the 1st defendant and they were awarded summary judgment against him leading to his appeal per SCCA 113/97-

The history of the matter has led the claimant/respondent herein, to assert that the 1st defendant/applicant is well aware that the issue of real prospect of success is identical to that raised in previous fora and has been thoroughly, scrupulously and systemically

litigated upon and determined on at least three separate occasions – to then raise this issue once again is tantamount to abusing the process of the court.

The 1st defendant/ applicant indicate that it is based on documentary evidence and the conduct of the parties in relation to that suit involving the 1st defendant/applicant and the 2nd defendant that the facts now available are clear and a trial would be waste of time and money.

The Law

Swain v. Hillman [2001] 1All ER. .....is generally regarded as the first significant attempt by the courts to define "the real prospect of success" as required in Part 15.2 of CPR 2002.

Lord Woolf M.R as he then was held the word "real" directs the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success.

Our Court of Appeal in **Stewart et al v. Samuels SCCA 2 of 2005** delivered 18.11.05 considered this test necessary in summary judgments.

Mr. Justice Harrison J.A., as he then was stated:-

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

Mr. Justice Panton J.A. as he then was said:-

> In Swain (supra) Lord Woolf MR as he then was concluded that the CPR were not meant to dispense with the need for a trial where there are issues which should be investigated at the trial..... This case and others to which I need not refer are saying that summary judgment ought not to be granted where a party has a real as distinct from a fanciful prospect of success in the matter that is before the court. Where there are genuine issues to be tried, the trial should proceed.

Application of the law to issues raised

The claimant/respondent sues on a promissory note which they say was unconditionally endorsed to it by the 2nd defendant on or about May 14, 1997. The 1st defendant/applicant contends that the note was not endorsed to the claimant's Bank as alleged or at all.

There are two copies of a promissory note exhibited. The first exhibited to the affidavit of Ewart Gilzean, who describes himself as the managing director of the 2nd defendant. This affidavit was part of the papers before the court when the 2nd defendant sued the 1st defendant.

The 2nd note is exhibited to the affidavit of Denise Kitson she being one of the attorneys-at-law having conduct of this case on behalf of the claimant.

The notable difference between the two is that the latter is signed by Conrad Graham over the designation chairman while the former is signed only by Gilzean himself.

The latter is described by the 1st defendant/applicant as being materially altered without his assent or authority and as such is void and invalid as against him.

The claimant/respondent maintain that this note exhibited by Kitson is the one on which they rely as the one they received once it had been endorsed to them.

Importantly if the one exhibited by Gilzean is the actual note to be relied on, clearly the endorsement or purported endorsement would indeed be incomplete.

In any event the 1st defendant/applicant maintain that neither documents comply with the requirements of Section 35 and 107 (1) of the Companies Act 1965. It is submitted that both notes are devoid of a proper indorsement and/or intention to indorse because the indorsee Money Traders is not named in keeping with the requirements of the Companies Act and/or law.

The claimant/respondent points out that the names Money Traders and Investment Limited appear at the heading of the note – both notes. This should be sufficient to satisfy the requirement of having its name mentioned in legible characters on the note in compliance with section 107 1 (c) of the Companies Act.

The 1st defendant/applicant further submits that it is not clear from the examination of the signature of Ewart Gilzeane whether he signs in a representative capacity or whether the words managing director are simply descriptive for the purpose of identity.

Further, it is submitted, no inference of agency or representation can be drawn from this indorsement as it appears. This is so especially since, they claim, no mention is made of Money Traders and Investments therein. They rely on the case of **Arab Bank Ltd. V.**

Ross [1952] 1 All ER 709 where it was held that an endorsement on behalf of a firm with the word company omitted was irregular and incomplete on the face of it.

The claimant/respondent relying on the same case points to the fact that Lord Denning had indicated therein that irrespective of the failure to endorse the note in the name of the firm, the note was not invalidated. Title to the note passed to the endorsee as a holder for value. Lord Denning also asserted that the determination as to whether a promissory note is irregular on its face for uncertainty of capacity of the signatories is a practical question which as a rule is better answered by a banker than a lawyer.

The 1st defendant/applicant in their submission affirm that whether a note has been signed by a person as in the case of directors for a company "for or on behalf of a principal or in a representative character or in his personal capacity" is a matter of construction of the note or indorsement. Indeed this submission is buttressed by pronouncements in Buckley on the Companies Act 13th edition at page 82.

This text in analyzing section 33 of their English Act which is on identical terms with our legislation state:-

> "This section does not require that the making accepting or indorsing shall be expressed to be on behalf of the company. The signature need not purport on the face of the instrument to be on behalf of the company. If on the true construction of the instrument as a whole, the bill or note is the bill or note of the company, the company will be entitled to sue or be liable upon it and not the persons whose signatures appear upon it".

It appears to me that there needs to be a determination of which promissory note ought to be relied on. The claimant/respondent exhibits a note through its attorneys

which on the face of it appears complete and regular. The 1st defendant/applicant's assertions that it has curiously appeared and has a material alteration cannot challenge this note without a hearing of evidence to determine its authenticity.

The caption on the note with the signature by both men in clearly defined and unchallenged capacities ought to be assessed as Denning indicated in **Arab Bank Limited v. Ross (supra)** to decide if it is irregular on its face for uncertainty of capacity of its signatories and if it is valid. Since this is a matter he opined is better answered by a banker, the claimant/respondent can feel well justified in being able to rely on it.

The applicant/1st defendan's submission that Mr. Justice Downer J.A., as he then was, observed that there was no attempt by the bank to produce the promissory note at the application to join the Bank in proceedings brought by Money Traders and Investment Limited against them, does not take away from the fact of the issue now raised by its production. The Bank was not then a party as they now are.

It is perhaps useful here to consider why the Bank was seeking to be joined then. In that proceeding one of the attorneys-at-law for the 1st defendant/applicant had stated inter alia that he "was advised by the then defendant (Chin) and he verily believed that in so far as he is aware the promissory note relied on by the plaintiff [M.T.I.] a true copy of which is exhibited to the affidavit of Ewart Gilzean.....was endorsed to N.C.B and would as far as he is aware have been delivered to N.C.B in the course of various meetings with N.C.B. referred to in the said affidavit of Ewart Gilzean confirming the plaintiff's obligations to N.C.B".

The Learned Judge Mr. Justice Downer J.A., felt compelled to point out.....

"For clarity it should be noted that M.T.I's bank for the transaction with Comway Limited was Island Victoria Bank".

The 4th ground of the notice and grounds of appeal read then:-

4 (iii) The Promissory note has on the face of it been endorsed to N.C.B. Jamaica Limited by plaintiff/respondent and in the absence of any explanation the plaintiff/respondent would have no right to sue under the said note.

It was than that Mr. Goffe Q.C. then appearing for M.T.I indicated he was no longer relying on the promissory note and at this stage sought to amend to add N.C.B as plaintiff announcing that he represented N.C.B.

Mr. Ian Watson in his affidavit for the Bank did indeed indicate being aware of the progress of the case and said "N.C.B. fully expects to receive from Myers, Fletcher and Gordon the net proceeds of any judgment which is given in favour of the plaintiff...".

Clearly the position adopted then on behalf of Mr. Chin accorded with the position held by the claimant/respondent in the matter currently before the court as it relates to endorsement and title. However, he now resiles from the position saying the note was never indorsed to the bank and no title passed to them.

The claimant/respondent retains their position and insist that the deeming position at section 30 of the Bill of Exchange Acts makes then a holder in due course and they take the note free from defects in title.

There is an imputation of certain knowledge to them in relation to the questions of whether the note was dishonoured and overdue, and whether there was consideration passed as between the 1st and 2nd defendant. The response by the claimant/respondent

demonstrates that no such knowledge ought to be imputed without more evidence needs be heard.

On what is presently before the court, the presumption in section 30 of the Bill of Exchange Act cannot be said to be readily rebutted.

The issue raised related to alleged duress, illegality of the transactions between Chin and M.T.I and the Money Lenders Act cannot be resolved in these proceedings.

After careful consideration, I find that to say that the claimant/respondent has no real prospect of success is without merit. They should have their day in court.

Accordingly the order sought by the 1st defendant/applicant is refused.

The matter needs now move to trial with expedition.