[2020] JMSC Civ. 98

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 02695

BETWEEN	**RICHMOND FARMS LIMITED**	**1ST CLAIMANT**
AND	**MARK BROOKS**	**2ND CLAIMANT**
AND	**GEORGINA COOKE HOLLAND**	**DEFENDANT**

IN CHAMBERS

Mr. Maurice Manning Q.C and Mr. Mark-Paul Cowan instructed by Nunes, Scholefield, DeLeon & Co for the claimants

Dr. Lloyd Barnett with Mr. Weiden Daley and Mr. Oshane Vaccianna instructed by Hart Muirhead Fatta for the defendant.

March 11, May 1 and 15, 2020

SUMMARY JUDGMENT – APPLICATION –CIVIL PROCEDURE RULE 15.2 – CONTRACT LAW – BREACH OF CONTRACT – DEMAND LOAN AGREEMENTS – WHETHER PROMMISSORY NOTES – INTENTION TO CREATE LEGAL RELATIONS – WHETHER CLAIM STATUTE BARRED – UNDUE INFLUENCE – BANK OF JAMAICA ACT SECTION 22A (2) – MONEY LENDING ACT SECTIONS 8(1) & (2), 2&3 – STAMP DUTY ACT SECTION 35&36

HENRY MCKENZIE, J

[1] The 1st claimant, Richmond Farms Limited is a limited liability company duly incorporated under the Laws of Jamaica with registered office at Windy Manor, Stanmore, Malvern in the parish of St. Elizabeth. The 2nd claimant, Mark Brooks, is a businessman and one of the duly appointed directors and shareholders of the 1st claimant.

[2] The defendant Georgina Cooke Holland, and the 2nd claimant were involved in a romantic relationship at the material time relevant to this claim.

[3] This is an application for summary judgment by the claimants. This application is made by way of a Notice of Application for Court Orders filed on March 4, 2015, which is supported by several affidavits of the 2nd claimant. The defendant has responded with several affidavits, outlining her defence.

[4] The claim is for monies owing to the claimants together with interest, pursuant to various contractual arrangements made between the claimants as lenders and the defendant as borrower. The 1st claimant seeks the repayment of US$105,000.00 as the principal balance outstanding plus interest, while the 2nd claimant seeks the repayment of the principal balance of US$54,000.00 plus interest.

[5] By way of the Particulars of Claim filed on May 2, 2013, the claimants contend that by virtue of demand loan agreements executed by the parties, the defendant borrowed sums from the 1st and 2nd claimants which were payable upon demand with interest at the rate paid by National Commercial Bank on United States Dollar Savings Account. For the 1st claimant, the sums loaned spanned the period between June 29, 2004 and April 5, 2007 and for the 2nd claimant, the sums claimed were loaned on November 8, 2006 and February 20, 2007.

[6] The 2nd claimant alleged that all of the loans were made upon request by the defendant, for assistance in attending her daughter's university graduation, in covering her expenses associated with financial relief proceedings in England and for repairing the Batts Hill property in England, which she acquired as a result of the financial relief proceedings. In fact, the 2nd claimant indicated that of the amounts outstanding on the

loans, the sum of US$114,000.00 was loaned to the defendant after the end of the financial relief proceedings in July 2006.

[7] It is common ground, that the sums were advanced to the defendant whilst the 2nd claimant and the defendant were in a romantic relationship. However, the 2nd claimant contends, that there was an understanding that despite the existence of this relationship, the monies advanced to the defendant were loans, evidenced by the demand loan agreements executed by both of them and intending to have full legal effect. In fact, the claimants provided evidence of this intention through various acknowledgments by the defendant of the loans in emails and written letter correspondence to the 2nd claimant and in one instance to his mother, Pauline. Also, by bank transfers made by the defendant to the claimants repaying other demand loans, together with interest at the rate of 6% per annum, on August 7, 2007 and December 13, 2007.

[8] The 2nd claimant further stated in the supporting affidavits, that the discussions with the defendant led him to believe that she would have repaid the loans from the sale of the Batts Hill property, but then he was later advised by her, that she was going to sell a house in Upton, Ocho Rios to repay the loans. However, the 2nd claimant alleged further, when it became apparent to him that the defendant would not repay the loans, he instructed his Attorney-at-Law to demand repayment, which was done by way of a letter dated October 26, 2012.

[9] In her defence, the defendant maintained that neither claimant has ever made a loan to her in a commercial sense. She alleged that the monies were contributions offered by the 2nd claimant (directly or indirectly through the 1st claimant) by virtue of their romantic relationship, to fund legal fees in the financial relief proceedings against her former husband. She contended that this was nothing strange as throughout the subsistence of the relationship, she was financially dependent on the 2nd claimant, he having the task of maintaining her. She stated that the 2nd claimant also bought her numerous gifts throughout the relationship. The defendant further alleged, that the contributions were made with the understanding that she and the 2nd claimant would get married after the financial relief litigation had been resolved. She indicated there was no intention on the

part of either of them for the monies that are in dispute to be the basis of any legal claim and further, that there was no promise to repay at any specified time or at all.

[10] In relation to the alleged demand loan notes, she admitted signing the documents but stated that she signed at a time when she was stressed, depressed and in an emotionally and psychologically weak and vulnerable condition from the financial relief litigation, as seen by her having suffered a stroke and collapsing in the court room during the proceedings. She also contended, that being in a relationship that was not just a romantic one, but one where the parties lived together as husband and wife with mutual trust and confidence, this provided a means for the 2nd claimant to influence her into signing the documents. She alleged that the 2nd claimant informed her that the purported demand loan notes were only for the purpose of recording the 2nd claimant's contribution to the expenses associated with the litigation, in case costs were ordered in her favour at the financial relief proceedings. However, the "demand notes" were not taken into consideration during the proceedings as the court ruled that they were not true obligations because of their source and the circumstances. She quoted a passage from the judgment of the court where the learned judge said: *"I cannot see Mr. Brooks insisting on the loans being repaid until such time as the wife feels able to do so. They are truly soft loans".*

[11] The defendant further argued, that there was never any discussion between herself and the 2nd claimant about her selling the Batts Hill property before or during the financial relief proceedings and she denied any money advanced by the claimants being used to repair or otherwise being used in relation to the property. She stated that when the financial relief proceedings came to an end, there were substantial legal fees left to be paid and more were incoming. This was what the sums received from the 2nd claimant after the proceedings were substantially used towards.

[12] She also stated that the 2nd claimant only sought repayment of the funds "contributed" after their relationship ended, Further, that although she had repaid him in 2007, before the relationship came to an end for some of the funds she had received from him, she did this out of an appreciation for his assistance, but not because there was any debt owed that she was legally obligated to pay.

THE APPLICATION FOR SUMMARY JUDGMENT

Submissions

[13] The overall thrust of the claimants' submissions is that the defendant's defence has no realistic prospect of success. Mr. Manning Q.C. relied on the test in ***Swain v Hillman*** *[2001] 1 All ER 91* and ***ED & F Man Liquid Products Ltd v Patel*** *2003 EWCA Civ. 472* in coming to this conclusion. He argued that the claim before the court is simply one for monies owing, but the defendant is seeking to avoid her debts by attempting to over complicate a simple issue with defences or contentions that are wholly unsustainable. He pointed out, that there is uncontradicted evidence that the defendant received monies from the claimants in the amount they are claiming. Further, that these monies were characterized by the defendant as loans in numerous correspondence and that there was acknowledgment that she remained indebted to the claimants. He also contended, that the admissions made by the defendant and contemporaneous documents, make it clear that there is no real substance to the defendant's factual assertions and summary judgment ought to be entered in the claimants' favour.

[14] Dr. Barnett, however, took the opposite position. He asserted that the claim is not amenable to determination on a summary basis, without a trial. He submitted that not only are there strong arguable defences, but also that there are many conflicting pieces of evidence that require careful and full cross examination of the witnesses. He further submitted, that issues as to the credibility of witnesses, admissibility of documents, and the numerous legal contentions which arise, make this case one that needs to be ventilated at a trial. As to the legal contentions, he argued that:

i. The entire claim was statute barred and must fail as the claim was commenced on 2nd May 2013, over 6 years since the last purported demand loan was made in February 2007. Dr. Barnett argued that it is well-

established law, that for demand loans the statute of limitation runs as of the date of advancement of the funds and not from the date of the demand.

ii. They was no intention to create legal relations as the parties were in a romantic relationship, living together as husband and wife. It was under such circumstances the monies were given as a gift or contribution to the defendant in continuing the financial relief proceedings. The claimants only demanded repayment after the relationship broke down.

iii. The defendant's signature was procured by undue influence. He argued that the defendant at the time of making the signature was suffering from some form of disability which the claimants took advantage of and as such the purported transactions would be intrinsically inequitable and unconscionable and ought to be set aside in equity.

iv. The purported transaction was void and unenforceable as it was in breach of the Money Lending Act in that as, in keeping with section

v. 8(1), it was not signed by the borrower before the money was lent and that no copy was delivered to the borrower within seven days of the making of the contract. In addition, in breach of section 8(2) the purported demand loan notes failed to show the date on which each of the alleged loans was made and also in breach of sections 2 and 3 the interest charged was excessive and the transaction by its terms and the circumstances of the parties, were otherwise harsh and unconscionable.

vi. The purported promissory notes were in breach of s36 of the Stamp Duty Act, having not been stamped and as such are not valid and could not be admitted into evidence. He further submitted, that the documents were not able to be presently stamped by virtue of section 35 of the Act, which stipulates that the purported promissory notes may not be stamped by the Commissioner as seven days have elapsed since the execution of the

notes. Further, the claimants cannot now seek to enforce the purported notes, being aware of the breach.

vii. Finally, he submitted, that the sums received by the defendant, if they were in fact loans, would be in breach of section 22A (2) of the Bank of Jamaica Act**,** since in making the alleged loans, the claimants would have been carrying on the business of lending foreign currency without being an authorised dealer and as such, the alleged loan contract would be unenforceable.

[15] Mr. Manning in response to the defendant's legal contentions, took the position that the defendant's submissions showed a clear dichotomy. First, it was submitted that the monies received were not loans but gifts or contributions and on the other hand, they were in fact loans but were in breach of numerous statutory regulations. Mr. Manning found this contradiction to be confusing but argued, nevertheless, that they were indeed fanciful and have no real prospect of success.

[16] In relation to the claim under the Limitation of Actions Act**,** the claimants' position was that the claim was not statute barred. Mr. Manning submitted that with the acknowledgment of the debt made by the defendant in the numerous correspondence to either the 2nd claimant or his mother, Pauline, time begins to run afresh from such acknowledgement. He relied on ***Gartman v Hargitay*** *SCCA 116/2005.* As to the acknowledgment in the correspondence dated May 2009, the action was brought almost 4 years to the month since that acknowledgement. There was correspondence to the 2nd claimant's mother dated July 2009, where the defendant not only admitted to owing money, but expressed her intended course of action in selling her parents' home to repay the debt. Acknowledgment even came by email later in March 2011 which was a little over 2 years before the action was brought.

[17] Mr. Manning further submitted, that in respect of the acknowledgment of the debt, it does not matter that the defendant did not specify the amount owing, so long as it can

be ascertained by extraneous evidence, which the demand loan notes provided. See: ***Dungate v Dungate*** *[1965] 1 WLR 1477*.

[18] On the issue of the breach of the Bank of Jamaica Act**,** Mr. Manning submitted that the Act was inapplicable as the claimants were not in the business of lending foreign currency. He argued that the fact that the 2nd claimant through the 1st claimant gave his romantic partner assistance in the form of loans, does not mean he was in the business of lending foreign currency in breach of the statute. He found support for his position in the case of ***Ken Sales & Marketing Ltd v Earl Levy & others*** *SCCA No. 131/2008.* He asked the court adopt the position taken in that case and come to the conclusion that the lending of money to your romantic partner and to no one else, does not constitute a business for the purposes of the Act.

[19] Mr. Manning also argued that the Money Lending Act is inapplicable to this case. He argued that the circumstances of this case fall squarely within the exemptions laid down in section 13(1)(h) and/or (i) of the Act so as to exempt them from its application.

[20] As it relates to the interest charged on the loan Mr. Manning rejected the contention that interest charged was harsh and unconscionable. He pointed out that the interest agreed under each agreement is the savings rate interest for the particular year and not the lending rate interest, which is below the 25% interest rate ceiling stipulated.

[21] Mr. Manning, however, argued that if the assertions were accepted that the loan was in breach of the Bank of Jamaica Act and the Money Lending Act, illegality will not bar recovery under a loan agreement. He found support from Lord Millet at para 43 in ***NCB v Hew*** *[2003] UKPC 5*. Where he opined:

> *"But where the transaction is one of loan the position is very different. It would not be just simply to set aside the loan; this would leave the borrower unjustly enriched. The proper course is to set aside the*

contract of loan and require the borrower to account for the moneys received with interest at a rate fixed by the court."

[22] In relation to the Stamp Duty Act**,** Mr. Manning highlighted that the defendant's argument was founded on the documents being promissory notes which they were not. He stated that what is pleaded is contracts between the parties for the lending of money as evidenced by the demand loan agreements and not a promissory notes and therefore no stamping is required.

[23] In the event the court finds that the demand loan, notes were in fact promissory notes, Mr. Manning invited the court to adopt the position expressed by Phillips JA in the Court of Appeal decision of **Dyce v Richards and Banbury** [2014] JMCA Civ. 23 at paragraphs 57 and 58 where Justice Phillips posited that they can be used as corroborative evidence of a contention that money was lent and that a particular amount was owed. That a promissory note can be used in court for purposes other than its enforcement.

[24] On the issue of undue influence, Mr. Manning contended that it was not just the question of influence, but also the use of the influence by the influencer to illegitimately gain something or deprive the complaining party of something of value. In the present case the claimants indicated that there was no unjustifiable gain by them, nor was there any compelling of the defendant to do some act that would be to her detriment. In fact, Mr. Manning pointed out that it was solely the defendant who benefitted from this agreement as she not only received monies to complete the financial litigation, but also because of its completion, she was able to obtain a financial benefit and also secure real estate. He indicated further, that she also received monies from the claimants to repair the Batts Hill property. He indicated that she was never disadvantaged and as such the defendant was not unduly influenced.

[25] Finally, in response to the contentions that there was no intention to create legal relations, Mr. Manning submitted that what was intended between the parties can be gleaned from correspondence between them. He states that this documentary evidence

show that there was in fact a binding commitment with an intention to create legal relations. He submitted that defendant's case of the monies being a gift was concocted and patently false.

ANALYSIS

[26] The criterion for deciding whether a matter should be resolved by way of summary judgment as opposed to a trial, is laid down in CPR Rule 15.2. It states:

> *"The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *(a) The claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) The defendant has no real prospect of successfully defending the claim or the issue.*

[27] The objective of this rule, is to confer upon the court, the power to dispose summarily of claims and defences which have "no real prospect" of succeeding. In **Swain v Hillman and another** (supra) at page 92 Lord Woolf MR pointed out:

> *The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success … they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success"*

[28] The court in utilizing its powers under this rule, should have regard to the overriding objective of the CPR as set out in CPR Part I, that is, to deal justly, expeditiously and fairly with cases. This is to save time and expense and to avoid the allocation of the court's resources in unnecessary trials. Where there is no real prospect of success either way, then the case should be disposed of summarily.

[29] In a summary judgment application, the overall burden of proof rests on the applicant/claimant to show that the respondent's case has no real prospect of success. Despite this, the respondent/defendant still has an evidential burden to prove that in fact he/she has a case which is better than merely arguable.

[30] It is a well-established principle that in a summary judgment hearing, the court is not required to embark on a mini trial of the issues. However, as pointed out in the case of **ED & F Man Liquid Products Ltd v Patel and Another** (supra) at page 3. Para. 10,

> *"… that does not mean that the court has to accept without analysis everything said by a party in his statement before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents"*

[31] Where the court is of the view however, that reasonable grounds exist for believing a fuller investigation would add to or alter the evidence, caution must be exercised in granting summary judgment or in deciding the matter summarily. The pertinent question in deciding such an application is whether there is material which demonstrates that there are issues to be investigated at trial. *See:* ***Fiesta Jamaica Limited v The National Water Commission [2010] JMCA Civ. 4***

[32] It stands to reason therefore, that the court is required to assess the relative strength of both cases, in a summary judgment application. This of course may involve the examination of documents exhibited.

[33] In the instant case, at first glance, one would think the court is only required to deal with the simple issue of recovery of monies allegedly loaned under demand loan agreements, and to assess whether in fact the parties had intended to create a legally binding contract, despite their romantic relationship and whether the monies were received as a gift. However, it is obvious that this case took a turn to include several other legal issues. The defendant raised defences under numerous statutory legislations, namely the Limitation of Actions Act, the Money Lending Act, the Bank of Jamaica Act

and the Stamp Duty Act. She also raised the defence of undue influence. Under each of these legal issues, numerous sub-issues have arisen for consideration. In determining whether these issues can be decided without the need for trial, I will look at each contention individually.

Intention to Create Legal Relations: gift vs. Loan

[34] The claimants' case is that there was a binding contract between the parties for the lending of monies which can be proved through demand loan agreements signed by both parties. The defendant, however, says that the monies were a gift from a romantic partner in her time of need.

[35] It is no longer the law that romantic partners cannot enter into an agreement which was intended to have legal consequences. There is a presumption against an intention of creating any legal relations when arrangements are made between persons who are closely related, but this is a presumption of fact, which like any other, can be rebutted.

[36] In the instant case, it is common ground that the parties were in an intimate relationship when the disputed sums were given to the defendant. Though the law will be in favour of there being no binding legal relations, the court still has to consider whether the claimants' case has rebutted the presumption that these monies were a gift to a romantic partner in need of assistance, as against being given under demand loan agreements, with the expectation to be repaid upon demand.

[37] I will start off by examining the documents that stand at the centre of the controversy between the parties, the purported demand loan agreements. These documents show the parties to the agreements being the 1st claimant, the 2nd claimant and the defendant. Further, the documents indicate the sums that were borrowed on each occasion, how the interest rate applicable to the loan is determined and also that the loan was to be repaid on a demand being made. The documents further show that the 2nd claimant and defendant had signed their names as having agreed to the terms of the

agreement and that the defendant received the monies in full on each occasion. The dates the documents were made are also indicated, as well as the signature of a witness.

[38] The defendant has not denied the authenticity of these documents, but explained their purpose solely as documentary proof in the cost deliberations in the financial relief proceedings. I must however take into account the fact that sums were also advanced to her by the claimants after the financial relief proceedings came to an end. It is agreed between the parties that the proceedings ended in July 2006 and that monies were advanced thereafter. I have noted that the parties followed the same course of drafting and signing demand loan agreements for sums advanced after the financial relief proceedings came to an end. Given the defendant's explanation for the loan agreements, what then is the rationale behind similar loan agreements being adopted for the monies given after the financial relief proceedings? The defendant has provided no explanation for this. Worthy of note as well, are the documents relied on by the claimants evidencing the repayment of some of the demand loans by the defendant in 2007. The defendant's explanation is that she paid these sums to the 2nd claimant out of an appreciation for his assistance and not because there was any debt owed to him. This explanation however, defies logic and is lacking in substance.

[39] Reference must also be made to a number of correspondence between the 2nd claimant and the defendant, where the defendant admitted that she owed monies to the claimants and accepted having an obligation to repay the monies. In an email dated March 30, 2011 to the 2nd claimant, the defendant wrote:

> *"In reply to your recent email regarding the loans which I took out with you in order to pay for the court proceedings during my divorce; I will very shortly be putting Upton on the market with Coldwell banker at a much reduced figure & once a sale has gone through I will be in contact"*

Also, of note is the defendant's correspondence to the 2nd claimant's mother, where acknowledgment of the defendant's indebtedness to the 2nd claimant's and an obligation to repay him were evident. In the letter dated July 2, 2009 to the 2nd claimant's mother, the defendant wrote:

> *"I owe Mark money that was used to fight the court case in London, so I'm in the process of selling my parents' home to repay my debt as soon as I can."*

Further, in a letter dated May 4, 2009 to the 2nd claimant, the defendant had this to say:

> *"Don't worry to contact me again unless it is via email to organise all this or repay my loan."*

[40] The defendant has not denied any of these correspondence. From all indications they would have been written at a time when litigation was not contemplated. The facts therefore support a conclusion that the monies were given to the defendant as loans with the intention to create legal relations between the parties and not advanced as a gift, out of love, affection and consideration for the financial struggles the defendant was going through at the time. The defendant's argument that the monies were given to her as gifts is untenable in the face of her acknowledgment of the debts, the repayment of some of the loans with interest and the contemporaneous documents exhibited, which serve to undermine her case. The factual underpinnings of this defence is as such that time should not be spent exploring them further at a trial.

[41] The defendant has further relied on the description of the loans as "soft loans" by the High Court in England, in support of her argument and imputed that from the judge's description of the loans as "soft loans" this meant there was no binding agreement between the parties and therefore no obligation to repay. I, however, agree with Mr. Manning that the court did not take the view that there was no obligation to repay. What I understand from the court's reasoning, is that it is unlikely that the claimants would insist on repayment until the defendant was able to do so, because of the intimate relationship between the defendant and the 2nd claimant, but that the sums were still in fact loans albeit informal loans.

[42] Accordingly, the presumption of an arrangement inspired by love has been rebutted. The defendant has no realistic prospect of succeeding under this head. There was obviously an intention on the part of both parties to be bound by the agreements.

The Limitation of Actions Act

[43] The defendant is contending, that the entire claim is statute barred and therefore must fail. Some pertinent questions that must be considered in relation to this, are when does time begin to run in a claim under a demand loan agreement and secondly, if acknowledgment of the loan allows time to start afresh, despite a claim being statute barred. Also, whether there was sufficient acknowledgement of the debt by the defendant. If the court determines that there was acknowledgement by the defendant, the court must also consider when the acknowledgment of debt was made, so as to determine when time begins to run afresh.

[44] There is no doubt that the six (6) years limitation period for bringing a suit applies to demand loan contractual agreements. The authorities submitted by the defendant all seem to indicate, that time begins to run on a demand loan agreement from the date of the demand loan and not the date of the advancement of the monies. With that said, in this case, this means that the time within which an action could be brought for each demand loan would have elapsed. The earliest loan was made on June 29, 2004 and the latest was on February 20, 2007. Therefore, the latest date for the bringing of an action would have been February 20, 2013, however, the claim was not brought until May 2, 2013, outside of the limitation period.

[45] However, this is not an absolute bar against the bringing of an action. If there is an acknowledgment by the debtor of the debt, then time will begin to run again from the acknowledgment. In **Ricco Gartmann v Hargitay** (supra) Cooke J.A. at page 6 para. 7 said:

> *"However, the Limitation Act does not provide for an absolute bar against the initiation of a suit after the expiring of 6 years from the date when the cause of action for a debt arose. If there is acknowledgment by the debtor, time begins to run afresh from such acknowledgement."*

[46] The earliest evidence of an acknowledgment by the defendant was made on May 4, 2009 in a letter to the 2nd claimant signed by her. For ease of reference I will again state the content of this letter. It states:

> *"Don't worry to contact me again unless it is via email to organize all this or repay my loan."*

[47] Further, the defendant in a letter dated July 2, 2009 to the 2nd claimant's mother, indicated:

> *"I owe Mark money that was used to fight the court case in London, so I'm in the process of selling my parents' home to repay my debt as soon as I can."*

[48] The defendant subsequently acknowledged the debt in an email correspondence to the 2nd claimant on March 30, 2011 when she said:

> *"In reply to your recent email regarding the loans which I took out with you in order to pay for the court proceedings during my divorce; I will vary shortly be putting Upton on the market with Coldwell Bankers at a much reduced figure and once a sale has gone through I will be in contact".*

[49] As earlier alluded to, the defendant has not denied these correspondence. All these correspondence were signed by her and she offered no explanation for them. These correspondence are a clear and unequivocal acknowledgement of the defendant's indebtedness to the claimants. It is improbable that any other interpretations could be adopted.

[50] I agree with Mr. Manning that it does not matter that the acknowledgment was made to a third party, and that what is important is that the defendant acknowledged her indebtedness.

[51] The defendant did not specify the amount of the debt in any of the correspondence. However, this may not be necessary as she has acknowledged a general indebtedness and the amount of the debt can be ascertained from extraneous evidence. (See **Dungate v Dungate** (supra) at page 1487.

[52] If one calculates from the date of any of these acknowledgments, the claim would have been made well within the limitation period, the claim having been filed on May 2, 2013. There is no need for a trial of this issue, as it can be disposed of summarily.

The Stamp Duty Act

[53] The issue raised by the defendant to be considered is whether the documents were promissory notes required to be stamped so as to be admitted in evidence and be enforced, or as proposed by the claimants' contracts for the lending of money. The formalities of a contract are well known to be offer, acceptance, consideration and intention to create legal relations. A promissory note, however, is an unconditional promise, made by one person to another and signed by the maker, engaging to pay a sum certain in money. ***See: Bills of Exchange Act, section 83(1)***. It is not a contract and so does not require the formalities of a contract.

[54] There is no unconditional promise here solely on the part of the defendant, but instead a mutual agreement by both parties for the claimants to lend monies in exchange for repayment on demand with interest by the defendant. It has already been established that there was an intention by both parties to create legal relations. There is also no doubt that there is consideration. Though there is a dispute as to who made the initial offer, there is no doubt that an offer was made by one of parties and that acceptance was consequently given, resulting in the defendant obtaining the necessary monies to use for the financial relief litigation and for other uses. There was in fact a contract between the parties for the lending of money. The details that were agreed to in the demand loan agreements showed as much that it was intended to be accepted as a contract. There is, therefore, no stamping required.

[55] In any event if the documents are considered promissory notes, as argued by the claimants, they can still be used for purposes other than enforcement. They can be used as corroborative evidence of a loan agreement entered between the parties and the terms and conditions under which such agreement was entered. (See **Garth Dyche v Juliet Richards & Michael Banbury** (supra) per Phillps J.A. at paragraph 57 & 58

The Bank of Jamaica Act

[56] Dr. Barnett has argued, that even if the sums claimed by the claimants were loans, which the defendant is disputing, they would have been made in breach of Section 22(A)(2) of the Bank of Jamaica Act. Section 22A (2) of the Bank of Jamaica Act provides:

> *"No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorized dealer."*

[57] It is common ground that the monies advanced to the defendant by the claimants were in US currency and that the claimants were not authorized dealers within the meaning of Section 22A (2) of the Act.

[58] The sustainability of the defence under the Bank of Jamaica Act however, depends on whether the claimants were in the business of lending foreign currency. Dr. Barnett argued, that the numerous alleged demand loan agreements exhibited by the claimants show a pattern of a business of lending foreign currency without the necessary authorization. On the evidence presented by the claimants, several loans were made to the defendant of varying sums over a period of years. What is obvious on the evidence however, is that loans were made only to the defendant with whom the claimant was romantically involved, and no one else.

[59] Notably, what is prohibited by Section 22A (2) of the Act, is not the lending of foreign currency generally, but being involved in the business of lending foreign currency without being an authorized dealer. Without more, the lending of US dollars to the defendant on a number of occasions over a period of years, cannot place the claimants under the umbrella of being involved in the business of lending foreign currency. There is no evidence before the court for me to agree with any description of the claimants' business as being one of lending foreign currency.

[60] The evidence before me does not indicate that the claimants were pursuing the lending of foreign currency as an occupation, nor were they offering a service to the public in general, or on a commercial basis, or conducting their affairs in such a way that

connotes that they were carrying on the business of lending foreign currency. There is no documentary evidence which shows that the nature of the 1st claimant's business was the lending of foreign currency. There is also no evidence to even remotely suggest, that foreign currency was loaned to anyone else, other than the defendant, with whom the 2nd claimant shared a romantic relationship and to whom the money was loaned for a specific purpose.

[61] In **Ken's Sales and Marketing v. Earl Levy and others** [2010] JMCA CIV. 8 at p. 35-40, the Court of Appeal had to consider whether three loans made over a period of 8 years for substantial sums in US dollars, amounted to a breach of section 22A (2) and (3) of the Bank of Jamaica Act. It was submitted before the Court, inter alia, that the loans were made as a special arrangement based on friendship and that the carrying on of a business had an element of continuity. In the circumstances of that case, the Court of Appeal found that the learned Judge in the court below, was correct in finding that the 3rd respondent was not involved in the business of money lending.

[62] Similarly, in the circumstances of this case, the evidence does not support the assertion, that the claimants were in the business of lending foreign currency. The defendant's argument in this regard is also unsustainable and can be summarily dismissed.

The Money Lending Act

[63] In relation to the Money Lending Act, the defendant also raised points that are without merit. The defendant argued that the loan agreements were unenforceable as the claimants were in breach of sections 8(1), 8(2) and sections 2 and 3 of the Act. Section 8(1) stipulates that no contract or security shall be enforceable if it is proved that the note or memorandum in writing of the contract was not signed by the borrower before the money was lent and unless a copy was sent to the borrower within seven days of the making of the contract. Section 8(2) stipulates that the note or memorandum shall contain

all the terms of the contract, and shall show the date on which the loan was made, the amount of the principal on the loan, and the interest charged in terms of rate per centum per annum. Section 2 provides that if the interest rate charged on a sum lent is excessive or that the transaction is harsh or unconscionable, the court may re-open the transaction. Section 3 prescribes that if it is found that the interest charged exceeds the prescribed rate per annum, then unless the contrary is proved, the court shall presume that the interest charged is excessive and that the transaction is harsh and unconscionable.

[64] I cannot agree with the arguments proferred by the defendant in relation to the Act. What must be underscored is the fact that this Act provides exceptions to its application for certain categories of transactions, persons and institutions. Section 13(1)(h) exempts any person whose main business is not the lending of money and who lends money solely incidental to the conduct of such business. Section 13 (1)(i) prescribes that the Act shall not apply to any loan or contract or security for the repayment of money lent at a rate of interest not exceeding the rate per annum, as the Minister may by order prescribe.

[65] I had already decided that there is no evidence that the claimants were in the business of lending foreign currency. Neither is there any evidence that the claimants' main business was the lending of money and so these transactions fall within the exemptions under section 13(1)(h) of the Act. The transactions also fall within the exemption at Section 13 (1)(i). The interest rate ceiling pursuant to section 3 of the Money Lending (prescribed Rates of Interest) Order 1997 is set at 25% per annum. The claimants' loan agreements stipulated an interest rate that was in line with the United States Dollar savings interest rate for the Bank of Nova Scotia and the National Commercial Bank. The BOJ's Schedule of Commercial Banks Foreign Currency Weighted Time Deposit Interest Rates submitted before this court for the required period, shows an average rate of 6% per annum. This is below the 25% threshold and thus in line with the acceptable interest rates. It cannot be said therefore that the interest rate charged was excessive. The Money Lending Act is therefore not applicable in the circumstances of this case.

Nevertheless, as indicated by the claimants, it is clear that where any breaches under the Bank of Jamaica Act and the Money Lending Act is concerned, illegality, will not prevent recovery under a loan agreement. In **National Commercial Bank v. Hew** (supra) Lord Millet stated that where the transaction is a loan, as distinct from a guarantee, *"It would not be just simply to set aside the loan; this would leave the borrower unjustly enriched. The proper course, he opined, is to "set aside the contract of the loan and require the borrower to account for the moneys received with interest at a rate fixed by the court."*

Undue Influence

[66] There is no doubt that the relationship between the parties could have fostered an environment where the 2nd claimant could wield influence over the defendant. They were romantic partners who lived together as husband and wife. Their relationship also had a dynamic where the 2nd claimant was the breadwinner of the relationship. He had his own business. The defendant, on the other hand, was dependent on the 2nd claimant. The defendant admitted to the 2nd claimant maintaining her and buying her gifts. She was also during the currency of their relationship, going through a financial battle with her ex-husband. One could say, without more, that this was a relationship capable of giving rise to undue influence.

[67] In considering the question of undue influence however, the focus should not only be on the existence of the relationship capable of giving rise to the influence, but moreso on the misuse and abuse of the influence. Equity will not intervene unless the second limb has been proved. Its main aim is to save vulnerable individuals from being victimized by other people, or from transactions that are manifestly disadvantageous, where the influencer will obtain an unfair advantage from the vulnerable individual.

[68] The case of **Watts v Watts and another** [2013JMCC Comm.15 and **Samuels v Gordon Stewart and others**, Supreme Court Claim No.2001/S-081 relied by the defendant are clearly distinguishable on the facts from this case. In **Watts v Watts**, the

daughter was able to procure her father's signature to a Power of Attorney and transferred a majority shareholding interest in a company he owned to herself. The court found that Miss Watts, had undue influence over Mr. Watts and that Mr. Watts did not have the requisite mental capacity to make rational important decisions.

[69] In **Samuels v Stewart**, the claimant who was severely injured on his job and who was barely literate, was allegedly befriended by the defendant, who had the claimant sign a Release and Deed of Settlement, which substantially minimized the value of his entitlement under the claim. The court concluded, that the claimant had raised a strong arguable case of undue influence.

[70] One can say that the defendant in this case was an individual who was endowed with sufficient intelligence and the mental capacity to be able to make her own decisions and conduct her own affairs and to understand exactly what she was doing. There is no evidence to the contrary.

[71] There is no evidence before the court to indicate that the claimants used any power over her to cause her to do anything to her detriment or unfairly exploited her. There is also no evidence that the transactions in question were manifestly disadvantageous to the defendant. The defendant was the only party who obtained a benefit from the transactions in question. The defendant with the monies from the loan was able to complete her financial relief proceedings, where she obtained not only real estate but also a financial benefit. There is no evidence that the claimants would have obtained a benefit, except maybe the repayment of their monies with interest, which strictly speaking was not a benefit but an entitlement. There was no transferring of any of the assets she received from the proceedings to the claimants. There was no unconscionable act on the part of the claimants that calls for the court's intervention to protect the defendant from repaying her debt. There is no evidence that she was victimized. The fact that she collapsed in court and had a stroke and was going through stress and anxiety in the financial relief proceedings, did not make her vulnerable and open to victimization by the claimants.

[72] The evidence provided falls woefully short of the requirements necessary to enable a claim for undue influence. The defendant has no real prospect of succeeding with this defence. This defence is at best fanciful.

CONCLUSION

[73] In all the circumstances, and having considered all the defences raised by the defendant, the defendant has failed to show that she has a real prospect of successfully defending the claim. The claimants are entitled to the relief sought. I therefore make the following orders:

Orders

1. Summary Judgment is entered in favour of the 1st Claimant on its claim for the sum of One Hundred and Five Thousand United States Dollars (US$105,000.00), together with interest thereon at the rate of six percent (6%) per annum from October 26, 2012 to May 15, 2020

2. Summary Judgment is entered in favour of the 2nd Claimant on his claim for the sum of Fifty-Four Thousand United States Dollars (US$54,000.00) together with interest thereon at the rate of six percent (6%) per annum from October 26, 2012 to May 15, 2020.

3. Costs to the 1st and 2nd claimants, to be taxed if not agreed.

4. Interim injunction granted on March 12, 2015 is further extended until further orders of this court, or the Court of Appeal.

5. Leave to appeal is granted.

6. Stay of enforcement of summary judgment is granted for twenty-eight (28) days from the date hereof.

7. Claimants' Attorneys-at-Law are to prepare, file and serve orders herein.

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G. Henry-McKenzie
Puisne Judge