Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. HCV 3381 OF 2006

BETWEEN	LEYMON FLLOYD STRACHAN	CLAIMANT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC.	DEFENDANT

IN CHAMBERS

Barrington Frankson and Howard Taylor for the claimant

Sandra Minott Phillips and Corrine Henry instructed by Myers Fletcher and Gordon for the defendant

October 10 and 16, 2007

PENALTY, CONSIDERATION, PERFORMANCE OF EXISTING OBLIGATION, RULE IN PINNEL'S CASE, RULES 25.1 (b) and (c), 26.1 (2) (k) and 27.2 (7) and (8) of the CIVIL PROCEDURE RULES

SYKES J.

1. Some years ago Mr. Strachan borrowed money from National Commercial Bank. The debt is now in the hands of Jamaican Redevelopment Foundation Incorporated ("JRF"). No issue is taken on the assignment of the debt to JRF. JRF is an efficient debt collector. JRF has an iron fist covered with a velvet glove. It enforces agreements that it makes with debtors. It may agree to accept a lower amount in satisfaction of the original debt but the conditions are stringent. JRF does not accept or tolerate excuses. It is not afraid to litigate to enforce its rights. Some might even say that JRF relishes and thrives on a legal challenge. This case is about one of those agreements. Mr. Strachan has taken up the challenge of trying to establish that two clauses in the agreement between him and JRF impose a penalty. JRF contends otherwise.

2. Mr. Strachan is in debt to the tune of some US$12,733,853.00. One adds to this interest and costs and regardless of the rate of interest, the sum owed is indeed significant. This figure was the agreed debt when he signed a document headed *Agreement to Restructure Existing Debt*. The other signatory is JRF. By this agreement JRF agreed to accept a much lesser sum (US$1,248,000.00) provided that Mr. Strachan adhered to the stringent conditions. In the agreement this lesser sum is called the restructured debt.

3. By his own admission, Mr. Strachan accepts that he was unable to make the payments in accordance with the terms of the agreement. JRF and Mr. Strachan amended the agreement by letter dated September 26, 2005. This sum was revised upward to US$2,000,000.00. The letter evidencing this revised figure is dated September 26, 2005, and reads:

> *Pursuant to our last meeting regarding the matter at caption, we advise that approval has been had to amend the terms and conditions of the Agreement to Restructure as follows:*
>
> **(a)** *Restructured debt at US$2,000,000.00 less payments made since November 17, 2004, with interest accruing thereon at 12% from November 17, 2004 to September 30, 2005 (sic)*
>
> **(b)** *The balance outstanding as at September 30, 2005 will be capitalized and interest accruing thereon at 12% (sic)*
>
> **(c)** *Monthly payments of J$1,000,000.00 converted at the prevailing exchange rate, commencing October 1, 2005. Lump sum payment of J$5,000,000.00 to be made in December 2005 (sic)*
>
> **(d)** *All remaining balance becomes due to full settlement no later than June 30, 2006 (sic)*

Based on the foregoing, we look forward to receiving your first promised payment by ***October 3, 2005*** (emphasis in original)
In acknowledgment and your (sic) agreeing to the foregoing kindly sign and return to us the attached copy of this writing no later than ***October 3, 2005*** (emphasis in original)

4. This agreement was signed by JRF and Mr. Strachan. The signature has a date. The date in numerals. The date is either October or November 22, 2005. The figure representing the month may be either "10" or "11". It does not matter which it is. What is important is that Mr. Strachan signed the letter and returned it thereby indicating acceptance of the proposed amendment.

5. This variation of the agreement was possible under clause 17 of the restructured agreement which provides that the agreement cannot be modified or amended except by an instrument in writing signed by both parties.

6. It was necessary to set out the letter above because Mr. Strachan at paragraph 11 in his affidavit dated September 26, 2006 made the startling assertion, that the September 26, 2005, was sent to him "arbitrarily purporting to amend the restructured agreement". Mr. Strachan omitted to mention the small but important fact that he signed the letter agreeing the variation.

7. It appears that Mr. Strachan is still behind in his payments and has difficulty meeting the conditions of the amended agreement. JRF has apparently threatened to sell the security for the loans. This prompted a payment of US$150,000.00 sometime in 2006. This, in turn, elicited a response from JRF by way of letter dated April 25, 2006. JRF does not indulge in unnecessary pleasantries. Mr. Strachan was told in quite blunt fashion that while JRF accepted his latest payment that fact must not be taken as an indication that JRF is relaxing its position or weakening its resolve to collect what is owed to it. He was told that if the full amount is not paid by June 30, 2006, JRF will exercise all remedies open to it. The full amount referred to in that letter was US$2,308,675.66. This letter has the signatures of JRF and Mr. Strachan.

8. Mr. Strachan in an effort to lighten his burden has raised the issue of whether two clauses in the restructuring debt agreement impose a penalty. The relevant clauses that are being challenged are clauses 13 and 14. Clause 13 reads in the relevant parts:

> *In the event of a breach or default of any representations, warranties or obligations under this Agreement (sic), including those set forth on the Schedule hereto which includes the failure to make any payments required by Item 8 (sic) of the Schedule hereto by the Borrower (sic) or the Guarantor, and this breach continues for a period of thirty (30) days (except for breached under Clauses (sic) 10, 11 (2) and 11 (3) hereof as to which there shall be no cure period and such breach shall be immediately deemed a default hereunder); provided, however, that such thirty (30) day grace period shall only be applicable two (2) times during any twelve month period following the date hereof, and if a breach or default (the "third default") occurs during any such twelve (12) month period and if during such twelve (12) month period Borrower has committed a breach or default as described herein two (2) previous times, no thirty (30) day cure period shall apply to such third Default (sic) or any subsequent default or breach occurring during such twelve (12) month period will constitute a default and JRF reserves the right to (i) enforce all terms, provisions and conditions of the Security; and (ii) exercise and pursue all of the rights, remedies and powers under the Security; and (iii) sue to recover the entire amount of the unpaid Original Debt (sic) plus fees and interest at a rate of thirty percent (30%) on Jamaican Dollar facilities or twenty percent (20%) on United States Dollar facilities, whichever is applicable, from the effective date stipulated in Clause 3 (2) subject to the Maximum Interest Rate (sic) defined below. JRF may elect to sue the Borrower and the*

Guarantor to recover the Original Debt less any installments pursuant to the provisions of Clause 3 (1) hereof and to employ any or all available remedies to recover the Original Debt. The "Maximum Interest Rate" shall mean ...

9. Clause 14 reads in the relevant parts:

This agreement shall remain in force until either the Original Debt or Restructured Debt is liquidated and JRF release and forever discharges both the Borrower and the Guarantor form their respective obligations or any claim which JRF may have against the Borrower and the Guarantor in respect of the Original Debt and Restructured Debt and JRF shall not release, waive, forever discharge or compromise the Original Debt until the terms of this Agreement have been fully performed and the Original Debt or Restructured Debt, as applicable, is fully paid. Any release or discharge given by JRF is expressly conditioned upon ...

10. Clause 13 is long but it does not require much to appreciate that it establishes the events that give rise to JRF enforcing the original debt. The failure to pay the restructured debt on the conditions set out in the agreement is a trigger event that activates clause 13. If there is a failure to pay in accordance with the agreed terms there is a thirty day period during which the debtor can make the payment without the trigger being activated. The debtor is allowed two such breaches in any twelve month period. A third breach in any twelve month period gives JRF the right to enforce the original debt.

11. Clause 14 makes it clear that until the original debt or the restructured debt is paid off in accordance with the agreed terms the agreement remains on foot.

12. Mr. Strachan launched his strike against JRF by way of fixed date claim form in which he asked for the following relief:

(a) a declaration that Clauses 13 and 14 or portions thereof in the agreement to restructure existing debt dated the 11th day of March 2004 made between the claimant and the defendant be struck out, as the said clauses or portions thereof are penalty clauses and not a genuine pre-estimate of any loss suffered or likely to be suffered by the defendant.

(b) an order that the defendant pays into court and/or into an interest bearing account in the joint names of the attorneys at law for both the claimant and the defendant the sum of US$932,055.00 until the determination of the claim herein.

(c) an injunction restraining the defendant from removing from the jurisdiction the said sum of US$932,055.00 which is presently in the hands of the defendant.

(d) an order that the defendant provides the claimant with an account of all funds due and owing to the claimant.

13. JRF responded with what has proven to be the mortal strike. It asked by notice of application for court orders dated March 28, 2007:

1. that the claim be dismissed.

2. that it be adjudged as follows:

(a) judgment for the defendants on the claim;

(b) costs of the claim to be paid by the claimant to the defendant, to be taxed if not agreed.

14. JRF sought this order of the following grounds:

(a) The issues raised by the claim, namely, whether clauses 13 and 14 of the agreement to restructure existing debt dated March 11, 2004 are penalty clauses, is a question of construction of the agreement that may be determined at

the first hearing without the need for further hearing or trial.

(b) There is no real prospect of the claim succeeding, as properly construed the clauses are not and could not be penalty clauses.

The submissions

15. Mr. Frankson arrives at his conclusion that the clauses impose a penalty by this route. He submitted that Mr. Strachan provided consideration for this agreement and therefore the rule in Pinnel's case has no application. He relies on the dictum of the Lord Chancellor in ***Foakes v Beer*** (1883 - 1884) L.R. 9 App. Cas. 905.

16. Mr. Frankson added that if the restructured agreement is a contract supported by consideration then the clauses that revive the original debt are penalty clauses because they permit JRF to impose a figure that is much greater than the restructured debt. According to Mr. Frankson, the greatest loss to JRF under the new contract if Mr. Strachan failed to perform under the contract would be the restructured debt. Therefore, says Mr. Frankson, any imposition of the original debt by necessary conclusion must be a penalty because the original debt is so large in comparison to the restructured debt that it cannot be said that the original debt represents a genuine pre-estimate of any loss. In order that the full impact of Mr. Frankson's submissions can be appreciated, I shall put it the figures. The original debt is US$12,733,853.00. The restructured debt was US$1,248,000.00 which was revised, by agreement between the parties, to US$2,000,000.00 on September 26, 2005. I need not say anymore.

17. Mrs. Minott Phillips submitted that there can be no question of a penalty arising because all that has happened is that the debtor has agreed to pay a lesser sum subject to specified conditions and should he fail to meet these conditions, the original debt becomes payable. She relies on ***Dunlop Pneumatic Tube Company Limited v. New Garage and Motor Company, Limited*** [1915] A.C. 79. She also cited a

decision of the Supreme Court by McDonald Bishop J. (Ag) in the unreported decision of ***Patvad Holdings v Jamaican Redevelopment Foundation Inc*** Claim No. 2006 HCV 1337 (delivered March 9, 2007). Finally she submitted, based on the authority of ***Phillip Hong Kong Ltd v Attorney General of Hong Kong*** [1993] 1 H.K.L.R. 269, that the courts should exercise self restraint and must not be too ready to interfere with contracts entered into by parties who know their best interest. In ***Phillip Hong Kong*** the Judicial Committee of the Privy Council advised Her Majesty, through Lord Woolf, that: *The application of the principle giving the court a penalty jurisdiction has always been recognised by the courts as subject to constraints and the courts have always avoided claiming that they have any general jurisdiction to rewrite the contracts that parties have made.*

18. It is convenient to deal with one of the authorities cited by Mrs. Minott Phillips. I believe that reliance on ***Patvad*** is misplaced. The issue before the court in that case was whether an interim injunction should be granted to bar JRF from enforcing its security held under a mortgage. There was mention of whether the failure by ***Patvad*** to adhere to the terms of the agreement and whether such failure activated the clause which operated as a trigger to make the original debt payable amounted to a penalty. Ultimately, her Ladyship did not resolve the issue because she concluded that in the circumstances of that case, there was no serious issue to be tried because the mortgagee's power of sale had properly arisen. Added to that, McDonald Bishop J. (Ag) concluded that damages would be adequate. Any issue of whether the relevant clause imposed a penalty had become academic and could not affect the power of sale.

Performance of existing duty and the rule in Pinnel's case

19. At the root of Mrs. Minott Phillips' submission is the undoubted proposition that payment of a lesser sum is not satisfaction of the whole. There is a connected proposition which is this: unless there is consideration moving from the debtor to the creditor, the agreement is not a contract and therefore is unenforceable by the debtor. This is said to be the outcome of the rule in Pinnel's case - a rule that has many critics but has not been statutorily reversed in Jamaica or by judicial decision. Since Pinnel's case was decided in 1602 before

Jamaica became an English colony, under the rules of relating to the reception of law, that case and its understanding, or more accurately, its misunderstanding, was received as part of the law of Jamaica and remains as such. Its continued application has been reaffirmed by the Court of Appeal of Jamaica.

20. The rule received the reluctant approval of the House of Lords in ***Foakes v Beer*** (1883 - 1884) L.R. 9 App. Cas. 905. The facts were that Mrs. Beer obtained judgment against Dr. Foakes for the sum of £2077 17s. 2d. for debt and £13 1s. 10d. for costs. Mrs. Beer subsequently entered into an agreement with Dr. Foakes in the following terms: "*Whereas the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in Her Majesty's High Court of Justice, Exchequer Division, for the sum of £2090 19s. And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500, the receipt whereof she doth hereby acknowledge in part satisfaction of the said judgment debt of £2090 19s., and on condition of his paying to her or her executors, administrators, assigns or nominee the sum of £150 on the 1st day of July and the 1st day of January or within one calendar month after each of the said days respectively in every year until the whole of the said sum of £2090 19s. shall have been fully paid and satisfied, the first of such payments to be made on the 1st day of July next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators or assigns, will not take any proceedings whatever on the said judgment.*"

21. The dispute arose because Mrs. Beer sued for the interest after Dr. Foakes had paid £2077 17s. 2d. He resisted by saying that the agreement did not mention interest. The House held, on the interpretation point, that the agreement meant that Mrs. Beer was simply giving Dr. Foakes time to pay but not as relinquishing any right to enforce the judgment for all that was legally due. The House held that Dr. Foakes was under an existing duty to pay all sums lawfully due

on the judgment which included interest and in the absence of consideration coming from Dr. Foakes, the agreement was not enforceable by him.

22. No lesser authority that Lord Blackburn in ***Foakes v Beer*** who not only criticized the rule but demonstrated that (a) the rule now called the rule in Pinnel's case was not the ratio of the case but an obiter dictum (see page 617); (b) it was the great authority of Sir Edward Coke that elevated this dictum to an authoritative rule of law when Sir Edward cited the case as authority for this proposition "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. ... If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction" (see page 615, where Lord Blackburn quotes directly from Sir Edward); (c) for the next 115 years after Pinnel's case the obiter dictum was not actually made the basis of any decision in the House of Lords (see page 619). Lord Blackburn did not shrink from concluding that Sir Edward Coke was in error because of Lord Blackburn's "*conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so*" (see page 622).

23. Lord Blackburn's criticism of ***Pinnel's case*** is on good ground. The history of the case as indicated in 77 E.R. 237 is that ***Pinnel's case*** was not applied by the House of Lords until ***Foakes v Beer***. Further the English Reports highlight the fact that Mr. Cole, the defendant in ***Pinnel's case***, failed because he omitted to plead, as he ought to have, that the lesser was accepted by the claimant in full satisfaction. What he did was to plead that he paid part of the debt. Clearly, as a matter of strict analysis the case is no authority for what was attributed to it by Sir Edward Coke.

24. Lord Selborne L.C. in ***Foakes*** did not feel comfortable with overruling a case that had been understood, for over 280 years, as establishing a particular legal principle. The Lord Chancellor did not disagree with Lord Blackburn's analysis and conclusion. None of the other Law Lords suggested that on the point of Pinnel's case Lord Blackburn was an erring legal historian.

25. In concluding on the facts before him Lord Selborne said at page 611:

> *No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not (in my opinion) be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the £500, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction, so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction ad interim, conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.*

26. Applying that to this case, Mrs. Minott Phillips, as I understand her, is saying Mr. Strachan still owes the original debt. Therefore he is under an antecedent obligation to pay that debt. Until there is complete satisfaction in conformity with the terms of the accord, Mr. Strachan's instalments cannot constitute consideration for the

agreement. I understand Mrs. Minott Phillips to be also saying that there is no consideration coming from Mr. Strachan to support the agreement while payments remained outstanding.

27. Within this passage from the Lord Chancellor can be found another important principle. Had Dr. Foakes provided consideration, that is to say, agreed to perform some act which he was not under a pre-existing obligation to do, that act might constitute sufficient consideration to sustain Mrs. Beer's forbearance. Payment of the instalments alone cannot have that effect.

28. The law as stated in ***Foakes*** has been applied consistently in the last century (see ***D. & C. Builders Ltd. v. Rees*** [1966] 2 Q.B. 617; ***In re Selectmove Ltd.*** [1994] 1 W.L.R. 474). There is one case which has applied Lord Blackburn's suggestion that the performance of an existing duty may confer a real benefit on the other party. That case is Williams ***v. Roffey Bros. & Nicholls (Contractors) Ltd.*** [1991] Q.B. 1. In that case, the claimants were contracted to build a set of flats for a sum of money which turned out to be too low for them to complete the flats and make a reasonable profit. The defendants promised to pay more money if the flats were completed on time. The claimants continued working but stopped because the defendants had not made the promised payments. The defendants argued that there was no consideration for the promised payments because the claimants were not doing anything more than doing what they were contractually bound to do under the contract. The court held, without citing ***Foakes***, that a benefit was conferred on the claimants and so there was adequate consideration. ***Williams*** is out of step with the law as laid down by ***Foakes*** and the omission to cite ***Foakes*** significantly undermines its authority.

29. Regardless of the historical error of Sir Edward Coke, in Jamaica, ***Pinnel's case*** and ***Foakes*** have been accepted as good law (see ***Adams v R. Hanna and Sons*** (1967) 11 W.I.R. 245; ***Jamaica Telephone Co. Ltd v Robinson*** (1970) 16 W.I.R. 174). The Court in both cases affirmed that the principle in ***Hughes v Metropolitan Railway*** (1876 - 77) L.R. 2 App. Cas. 439 (H.L.) applies to Jamaica.

Was there consideration?

30. What is consideration? The expression has long outgrown its original connotation in the law which was the reason for doing a particular act. In the modern law of contract consideration is the act or promise by one party and accepted by the other as the price of that other's promise (see *Cheshire, Fifoot & Furmston's,* ***Law of Contract***, (15th), 104).

31. When one examines the agreement in this particular case, one sees that in addition to agreeing to pay on time, Mr. Strachan agreed to discontinue an appeal he had in the Court of Appeal, an act that was not part of an antecedent obligation. JRF also agreed to discontinue a claim against Mr. Strachan in this court. It would seem to me that Mr. Strachan has provided consideration in exchange for the promise of JRF to enter into the agreement. The law is not concerned with the adequacy of consideration; just its sufficiency. It is up to the parties to agree on what is important to them and what they are prepared to give or do in order to secure the promise from the other party. It is not the court's business to question the wisdom or otherwise of the agreement struck. The only concern in law is whether the legal requirements of a contract have been met. In my view, they have been met in this case.

32. However, having concluded that Mr. Strachan provided consideration for the agreement it does not necessarily follow that Mr. Strachan has escaped his current predicament. The question is what did he "purchase" with his consideration? I hope to show from an examination of the contract, there is no evidence that JRF agreed that giving up the appeal by itself would amount to satisfaction of the debt. What Mr. Strachan purchased with his consideration was the new contract which set out the terms on which the debt would be paid off. This new contract now regulates the management of the debt.

33. Before one can conclude that clauses 13 and 14 impose a penalty one has to look at the contract as a whole, that is to say, interpret the agreement between the parties. This indeed was the approach of the court in ***Dunlop Pneumatic Tyre Company Ltd.***

34. It should be pointed out as well that when a court grants relief from a clause construed as imposing a penalty the court is exercising an extraordinary power. The purpose of this power is to grant relief from unconscionable bargains. It is not to rewrite agreements or save a contracting party from an improvident agreement.

35. If I may be permitted to cite the joint judgment of Wilson and Toohey JJ. in ***Esanda Finance Corporation Ltd v Plessnig*** 166 C.L.R. 131, 139 - 140, where they approved a passage from an earlier decision of the High Court and then cited a decision from the Supreme Court of Canada:

> *Earlier in their reasons their Honours [referring to Mason and Wilson JJ. in AMEV-UDC Finance Ltd. v. Austin 162 C.L.R. 170, 193] ... they said:*
>
> > *"In both these decisions, in conformity with the doctrine's historic antecedents, the concept is that an agreed sum is a penalty if it is 'extravagant, exorbitant or unconscionable': Clydebank; Dunlop. This concept has been eroded by more recent decisions which, in the interests of greater certainty, have struck down provisions for the payment of an agreed sum merely because it may be greater than the amount of damages which could possibly be awarded for the breach of contract in respect of which the agreed sum is to be paid: see Cooden Engineering Co. Ltd. v. Stanford. These decisions are more consistent with an underlying policy of restricting the parties, in case of breach of contract, to the recovery of an amount of damages no greater than that for which the law provides. However, there is much to be said for the view that the courts should return to the Clydebank and Dunlop concept, thereby allowing parties to a contract greater latitude in determining what their rights and*

liabilities will be, so that an agreed sum is only characterized as a penalty if it is out of all proportion to damage likely to be suffered as a result of breach: see Robophone Facilities Ltd. v. Blank; U.K. Law Commission, pars. 33, 42-44."

A similar view was expressed in Elsley v. J. G. Collins Insurance Agencies Ltd., where Dickson J., in delivering the judgment of the Supreme Court of Canada, said:

"It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression."

36. Thus ***Dunlop, Esanda*** along with ***Phillips Hong Kong***, emphasizes the view that parties are free to contract as they see fit and courts are to restrain themselves and not intervene merely because a bargain is hard. The ***Esanda*** case was not calling for more judicial intervention but less - much less. There is no suggestion of oppression or duress in the case before me. Thus for Mr. Strachan to receive the benefit of equity's intervention he must show that on a proper construction of the contract (it can now be properly called that because there was consideration) the clauses do indeed impose a penalty. It is now time to look at the whole contract.

The examination of the contract

37. The contract begins with the recital that the debtor and the original assignee (then Refin Trust Company) agreed that the original debt of US$12,733,853.

38. Turning now to the operative parts of the contract. Clause 1 states that all amounts under the original debt are due and owing in full and interest, costs, fees and expenses continue to accrue in

accordance with the terms of the security and JRF's rights under the security. It also states that JRF has the immediate right to enforce all of its rights and remedies under the security and sue for recovery of the original debt. Clause 1 concludes with statement that the debtor and guarantor "agree that the amount of indebtedness comprising the original debt, including accrued interest and fees, set forth on (sic) Item 4 (sic) of the Schedule (sic) hereto is accurate and correct".

39. Now comes the important clause 2 which reads in full:

> *Provided, however, that for long as no breach or default of any obligation under this Agreement (sic) by the Borrower or Guarantor (sic) occurs and continues beyond any applicable grace period set forth in clause 13 herof (sic), JRF will not enforce the Security and will forbear from taking steps by Court (sic) proceedings or otherwise to recover the original debt. JRF has agreed, conditioned on the Borrower and Guarantor's fulfillment of all and strict compliance with every term, provision and condition of this Agreement, to restructure the Original Debt (sic) as specified herein at the request of the Borrower and the Guarantor.*

40. The equally important clause 3 (1) needs to be stated in full:

> *JRF, the Borrower, and the Guarantor have agreed to* ***conditionally*** *compromise the Original Debt in the principal amount set out in Item 7 (sic) of the Schedule (sic) hereto (hereinafter referred to as the "Restructured Debt") subject to: (i) strict compliance with all terms of this Agreement; and (ii) the Borrower and/or Guarantor making payments in the amounts and the manner set out in Item 8 (sic) of the Schedule (sic) hereto* (my emphasis)

41. Clause 3 (2) speaks to the effective date of the agreement which was November 18, 2002. Clause 3 (3) allows the debtor to repay any obligation designated in United States currency to be paid in Jamaican currency at the exchange rate on the date of payment.

42. Clause 5 is the late payment clause, that is to say, it imposes a late charge and the expense involved in handling the late payment.

43. There are other provisions making provision for the debtor to have adequate insurance for the security (clause 10).

44. Although the agreement makes reference to a guarantor there is none in this case. This agreement seems to be a standard form contract that is adjusted to meet the particular case.

45. Clause 12 reads:

> *This agreement constitutes the legal, valid and binding obligation of the Borrowers and the Guarantor in accordance with the terms hereof. The execution or performance of this Agreement shall not invalidate or otherwise cause the discharge of any guarantee of the Original Debt or Restructured Debt, regardless of whether such guarantee is set forth herein or whether the terms of such guarantee are stated incorrectly herein*

46. Under item 8 of the schedule the debtor was obliged to pay

> **(a)** US$10,000.00 (Ten Thousand Dollars) upon confirmation of approval by JRF (made 17th November 2002).
>
> **(b)** 23 equal consecutive monthly payments f U.S. 10,000.00 (sic) each. This first payment shall become due on the 17th day of December 2002 and on the 17th day of each and every month thereafter.

(c) A final payment of all unpaid principal, accrued interest and fees shall be paid no later than 17th day of November 2004.

47. Item 12 of the schedule has some additional terms:

(a) The payment of US$10,000 upon confirmation of approval by JRF (Made November 17, 2002) as per item 8 (a) above.

(b) In the event that on the 17th day of November 2004 the entire principal amount of restructured debt of US$1,248,000.00 [replaced on September 26, 2005 with US$2,000,000.00] is not paid, PROVIDING THAT (sic) a minimum payment of 50% of the principal amount of the Restructured Debt (sic) or US$624,000.00 has been repaid, JRF will allow a further period not exceeding 12 months to settle the remaining balance which must not exceed US$624,000.00.

(c) If at the expiration of the additional 12 months extension in (2) above, the entire amount of the debt is not repaid, PROVIDING THAT (sic) the remaining balance does not exceed the some of US$312,000.00 JRF will allow a

further period of 12 months to settle the remaining balance inclusive of any outstanding interest accrued thereon.

(d) The entire sum of the principal amount of the restructured debt of US$1,248,000 [replaced as indicated] along with all accrued interest must be settled within a maximum of 48 months, that is, by no later than the 17th day of November 2006.

(e) If the entire Restructured Debt is not repaid by the 17th of November, 2004 (sic) and JRF has agreed to extend the term of repayment as hereunder interest will accrue and be payable monthly at the rate of 12& per annum calculated on the reducing balance of the remaining Restructured Debt from the 17th November 2004 and will continue to accrue until the date of final settlement of the agreed debt.

(f) Notwithstanding any extensions of time granted the Borrower must at all time make monthly instalments of US$10,000.00 towards the repayment of the restructured debt and failure by the Borrower to pay any installment thereof

will constitute an event of default under Paragraph 13 of this Agreement.

(g) Failure by the borrower to repay a minimum of 50% of the Restructured Debt amount (i.e. the sum of US$624,000.00) on or before the 17th November 2004 shall constitute an event of default under Paragraph 13 of this Agreement.

(h) In consideration of the premises herein JRF will advise its Attorneys-at-Law to discontinue the counter-claim filed by the Original Assignee in Suit No. C.L. 1994/S 415 and the Borrower will discontinue Appeal S.C.C.A No. 99 of 2001. The parties agree that each will bear its own costs in respect of the counterclaim (sic) and appeal.

48. When the entire contract is examined it is obvious that JRF did not at any time indicate that it would unconditionally relinquish its claim to the original debt. JRF never said that giving up the appeal by itself would be sufficient satisfaction. It was prepared to accept a lesser under the new contract on the terms specified. The new contract which replaced the one under which the debt was contracted expressly retained the original debt. The new contract expressly stated that JRF had the right to enforce the security to recover the original debt. It was agreed that a lower sum was acceptable provided that Mr. Strachan kept to the terms and conditions. There is no evidence that JRF agreed that Mr. Strachan's withdrawal of his appeal was to be accepted as consideration for JRF giving up the residue of the debt without more.

49. A debt cannot be discharged unless the whole debit is paid or the creditor by accord and satisfaction agreed to take something else in discharge of the liability. The parties are free to set the terms of the accord and satisfaction. This is what happened here. Mr. Strachan and JRF agreed clear and unambiguous terms for the accord and satisfaction of the original debt. The plain truth is that Mr. Strachan failed to perform the terms of the accord so there is no satisfaction.

50. On a proper analysis, this contract does not fall to be considered under the rubric of penalties at all. Clauses 13 and 14 do not purport to be and there is nothing in the agreement indicating that the parties were agreeing on any sum payable representing a genuine pre-estimate of loss. What the parties were regulating was how Mr. Strachan would repay his debt. The terms required payments to be made on time and in a specified sum as well as discontinuing the appeal. At all times the original debt was there. It would not be a correct use of language to describe this arrangement as pre-estimate of damage. There is no basis for equity to intervene and save Mr. Strachan from what he now considers to be a harsh contract. He got what he contracted for - time to pay and a staying of enforcement of the original debt provided he kept up his end of the bargain - no more, no less.

51. Even if I am wrong and there is no new contract between JRF and Mr. Strachan because what I have identified as consideration is not consideration, the position would be that JRF would be forbearing from exercising its rights under the agreement without consideration. This would be a ***Foakes v Beer*** situation. Therefore, the agreement would be unenforceable at the instance of Mr. Strachan and so he could not possibly raise an issue of a penalty. To raise the issue of a penalty presupposes an otherwise enforceable contract between the parties. If there is no contract, one may ask, how would Mr. Strachan be protected if he were performing in accordance with the agreed terms? The answer is this: if Mr. Strachan had been performing in strict compliance with the agreement and JRF sought to resile from its agreed position equity would intervene and restrain JRF. Equity

would intervene on the basis identified in ***Hughes v. Metropolitan Railway Co.***(1876 - 77) L.R. 2 App. Cas. 439 (H.L.) as explained by the Court of Appeal in ***Adams*** and ***Jamaica Telephone Company*** that is to say, Mr. Strachan would have been led to believe that JRF would not insist on its strict legal rights provided he acted in accordance with the terms of what was agreed. That is not the case here and so there is no equitable principle that come to Mr. Strachan's assistance. For equity to assist Mr. Strachan he would have needed to have performed his end of the bargain.

52. Were I to accede to Mr. Frankson's submission, I would be putting at risk any attempt by a creditor to compromise a debt. It would create uncertainty which cannot be beneficial to either debtor or creditor. Creditors and debtors need to know that when bargains are struck, the courts will not interfere except on the clearest of legal bases. To do otherwise would mean that the courts would be rewriting contracts arrived at by parties who know their affairs better than any judge could possibly hope to know.

53. If Mr. Frankson is correct then it would mean that once the parties have made a contract to accept a reduced debt payment subject to strict conditions which must be met, then any recovery of the original debt must necessarily be a penalty because the original debt will always be greater than the reduced debt. If I were to uphold Mr. Frankson's submissions which creditor would compromise a debt? Finally, the procedural issue.

The procedural point

54. Having dealt with the substantive issue the question remains of how the court is going to dispose of the matter. It was brought to my attention that under rule 15.3 of the Civil Procedure Rules ("CPR") the court is precluded from giving summary judgment in any proceeding commenced by fixed date claim form. However, rule 26.1 (2) (j) permits the court to dismiss or give judgment on a claim after a decision on a preliminary issue. Rule 27.2 (2) gives the court at the first hearing all powers of a case management conference in addition to any other powers the court may have at first hearing. Rule 27.2 (8) empowers the court to treat the first hearing as the trial of the claim

if the claim is not defended or the court considers that the claim can be dealt with summarily. The procedural issue arose because this hearing is the first hearing. The previous first hearing scheduled for April 17, 2007, was adjourned to October 10, 2007.

55. It would seem to me that in keeping with the duty of the courts to identify the issues at an early stage and deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others (as per rule 25.1 (b) and (c)), there can be no objection to the court exercising its powers under rule 26.1 (2) (j) or under rule 27.2 (8). In my oral judgment I have said that I would be acting under rule 26.1 (2) (k) and dismiss the claim after deciding the preliminary issue of whether clauses 13 and 14 impose a penalty. On reflection, that would not be quite accurate since that is not a preliminary issue but the claim itself. The better view appears to be that I should act under rule 27.2 (8) and deal with the claim summarily. The issue raised by Mr. Strachan is purely one of construction of the agreement and can be dealt with summarily. This is what I have done. The claim is dismissed. I have given judgment on the notice of application for court orders filed by JRF.

Conclusion

56. Mr. Strachan's claim is dismissed in its entirety. Mr. Strachan has asked for an account of all funds due and owing to the claimant as part of his relief. Mr. Strachan must know what he has paid. If Mr. Strachan has failed to meet the terms of the accord, then he must know that the original debt becomes payable. There is no evidence that he has overpaid.

57. Let me commend the professionalism of all counsel in this matter. The history of the matter has been recounted when I dealt with the procedural point. Happily, both sides had filed their affidavits and were prepared to deal with matter on the merits. This is in keeping with the overriding objective, namely, to deal with matters speedily but fairly with all parties having an opportunity to be heard.