

requested a loan of \$30,000 United States dollars (“USD”) as well as an unspecified Jamaican dollar (“JD”) amount. The Jamaican dollar amount was paid over by way of a manager’s cheque drawn on the National Commercial Bank (“NCB”) dated December 6, 2007 and made payable to Duke Brown. This loan was to be secured by the defendant handing over to the claimant the registration and fitness documents for his 2003 Toyota Land cruiser Prado registered 9611EN. The sums were to be repaid in full in 6 months, neither party set the repayment terms. It was simply agreed between them. The defendant said at the time he received the money that if the loan was not repaid within the six month period then he would transfer his motor vehicle to the claimant. There was no arrangement for the repayment of the Jamaican dollar amount, nor did the claimant ever receive the title for the defendant’s motor vehicle. The defendant then wrote a receipt for the US dollar cash which he handed over to the claimant this became Exhibit A1.

- [3] The witness statement of the claimant filed on April 15, 2016 stood as his evidence in chief. He averred in paragraphs 2 and 3 that in December of 2007, the defendant approached him indicating that:

“...he was experiencing financial difficulties and needed assistance to settle some outstanding debts and to pay arrears on the mortgage account on his home. The defendant advised me that he required the loan for a period of six months and would provide a form of guarantee/security for the said loan by giving me the original motor vehicle registration certificate and certificate of fitness for his 2003 Toyota Land cruiser Prado motor car with a view that he would not part with the said motor car until the loan was repaid.”

- [4] He went on at paragraphs 5 and 6 to say that on December 6, 2007 he loaned the defendant the sum of USD\$28,000.00 in cash and the sum of JD\$2,000,000.00 by way of manager’s cheque drawn on NCB made payable to Duke Brown. The defendant wrote up a receipt for the US dollar amount, signed it and handed it to the claimant. In cross examination the claimant said that the US dollar portion was in cash and though the loan was for USD\$28000 what was actually paid over to the defendant was the sum of USD\$28,409.10. The

claimant explained the additional USD\$409.10 as the sum paid for bank fees and charges in order to purchase the manager's cheque and the penalty he had incurred for breaking the term on certain US dollar denominated instruments from which he would have obtained the funds. He was unable to give specifics as to what portion would have been penalties vis-à-vis fees. This evidence is absent from the witness statement of the claimant for at paragraphs 8 and 9 he averred in respect of the sum paid as follows:

"The total amount which I loaned to the defendant was the sums [sic] of Twenty Eight Thousand United States Dollars (US\$28,000.00) and Two Million Jamaican Dollars (JD\$2,000,000.00). I have made repeated demands of the defendant to repay the said debt and the defendant has refused to repay same."

[5] In cross examination the claimant said that he conversed with the defendant in two separate conversations two weeks apart about the money to be loaned. There was no written document in respect of the loans other than the receipt signed by the defendant for the US dollar amount. It was the defendant who had requested the sum of USD\$30,000 and it was in the second conversation that the claimant had agreed to make the loans. The pair first spoke on the phone regarding the arrangements for payment and within a week, the defendant arrived at the claimant's office to collect the money. There is no evidence in the claimant's witness statement regarding these two meetings or a telephone call with the defendant. The claimant explained this by saying he had not considered the details of arriving at the loan important.

[6] The claimant admitted signing a document which became Exhibit B1, it is the first page of a document identical in form and content to what was later marked as Exhibit B3. His evidence was that it was a club membership agreement form for the LA's Private Club. This membership form required that a USD bank account number be provided, the name of the bank, name of the account holder and a contribution amount among other details. The form purports to certify that there is a "covenant" between the club chairman and club members. Then these words:

"I have read the terms and conditions and I indicate my acceptance of the same by affixing my signature."

Beneath that there is a signature line for the club member, a signature line for a witness, a date line and across from these lines are the words club chairman Orlando Johnson and his signature line.

- [7] Exhibit B1 contained the signature of the claimant. His signature was not on the indicated signature line for a club member but on the face of the document itself near its foot. The claimant admitted to dating and signing the document though not on the line where the club member should have signed. The explanation he gave was that his signature did not signify that he had joined this club. Instead it represented that the defendant would be repaying the loans from the interest earned on his existing investment in LA's Private Club. Again, this is evidence which was not contained in the claimant's witness statement.
- [8] The club membership form promised between 8% and 15% interest depending on the sum deposited. The claimant said that the defendant would take Exhibit B1 to the club which would then wire the defendant's interest payments into his, the claimant's designated account. To this end, the claimant filled in his banking information, signed the form, but not on the designated line, dated it but did not have his signature witnessed. In addition, he gave the defendant a copy of his driver's licence to take to the club. He accepted that the defendant was a member of the club and that he had money investment in it. The claimant did no due diligence in this regard as they were friends. At that time, the defendant was someone he trusted.
- [9] The claimant denied speaking with Mr. Christopher Townsend about any involvement with or joining the club. The claimant denied that the motive behind the claim before the court was one of revenge for not being invited to the opening of the defendant's bar and jerk centre. The claimant denied that there was only one transaction on December 6, 2007, which was the delivery to the defendant of a cheque payable to Duke Brown for JD\$2,000,000.00. He denied that the

purpose of the cheque was to complete an arrangement with Duke Brown to join the club. The claimant also denied that there was no loan to the defendant. The claimant later learnt that Orlando Johnson had fled the jurisdiction when the club members' money could not be repaid. He denied ever meeting Duke Brown or having any conversations with Mr. Townsend about recovering his money after the club failed.

The Defendant's case

- [10] The defendant gave his evidence in chief by way of a witness statement dated April 15, 2016 which was permitted to stand as such. He first met with the claimant at the Half Way Tree court when the claimant stopped him to make enquiries about the club. The claimant asked whether he was getting a return on his investment to which he responded in the affirmative. There was no second meeting. One telephone call was made when the defendant used his cell phone to call the claimant so that Duke Brown could speak with him. That call was not about a loan. The defendant's evidence was that he had no financial difficulties, outstanding debt nor any habit of discussing his financial state with the claimant.
- [11] The defendant in his witness statement at paragraph 6 said that he showed the claimant a statement of his investments and returns from his membership in the club. Thereafter, the claimant asked him to contact Duke Brown who then acted for Orlando Johnson of the club. He and Duke Brown were together when the claimant and Duke Brown spoke on his cell phone. Duke Brown wrote up the receipt for USD\$28,409.10 which was the equivalent of JD\$2,000,000.00. Duke Brown did not sign the receipt but gave it to him for the defendant to sign on his behalf and issue it to the claimant. The defendant took a club membership form from Duke Brown to his meeting with the claimant on December 6, 2007. He gave it to the claimant who completed it and handed over a copy of his driver's licence and only a manager's cheque for JD\$2,000,000.00 in exchange for the receipt (Exhibit A1). He received no cash from the claimant.

- [12] The defendant said he signed and issued the receipt to the claimant. The defendant denied the assertion that this cheque payable to Duke Brown was a loan to him which was to be repaid within 6 months. The defendant had given his vehicle documents to the claimant “to hold” until he was able to show proof that the money had been handed over to Duke Brown. The claimant never returned the vehicle documents as promised, claiming to have lost them, even though the defendant had satisfied him that this money had been lodged with the club. The defendant denied seeking financial assistance from the claimant or offering his vehicle documents to secure a loan or loans. He provided a motive for his being sued by the claimant who was slighted by not being among the invited guests at the opening of the defendant’s bar and jerk centre
- [13] The defendant called Mr. Christopher Townsend, attorney-at-law, whose witness statement dated March 29, 2007 stood as his evidence in chief. Mr Townsend said that having given USD\$27,486.85 to Duke Brown for placement with the club the defendant issued him with a receipt *“representing the amount invested in the club, which receipt reflects that the transaction is a loan.”* In paragraph 8 he referred to other members of the legal fraternity who were members of the club and added that both parties before the court were club members. He was shown his club membership agreement form which became Exhibit B3. He said he had signed it as a club member, the defendant witnessed his signature accepted a copy of his, Townsend’s driver’s licence. Exhibit C4 was a receipt in the defendant’s hand which had been issued to the witness. He recalled an occasion on which he met with Duke Brown and the claimant, when they were both trying to recover their money.
- [14] The evidence in chief of Duke Brown was contained in a witness statement dated September 21, 2017 which stood as his evidence in chief. In it at paragraph 4, he described the system operated by the club in 2007 as follows:

“The club member’s engagement required them completing a club member agreement, a copy of the front page which I see is marked Appendix 1. The prospective member would either complete this

agreement at the office or elsewhere and submit it in person or through a senior employee such as myself, or other authorized person(s), along with the relevant deposit. The deposit would either be in the form of cash or manager's cheque and manager's cheque only, if received by someone on behalf of the business, unless an exception was made. A receipt would be issued for the equivalent in United States dollars, if the deposited sum was in a different currency, calculated as at the date of the deposit and the receipt written as a loan."

[15] Duke Brown's evidence was that in 2007 he was a sales representative for the LA's Private Club. He and the claimant had spoken on the defendant's cell phone in late 2007. The claimant agreed to invest JD\$2,000,000.00 with the club "at either 10% or 15% return on investment per month." Both Exhibits B1 and B3 delineate the interest payable on amounts paid over to the club. For an investment of USD\$28,409.10 the interest would be 10%. To obtain interest of 15% a minimum of USD\$ 500,000 would have had to be invested. Nevertheless, the witness wrote a receipt for USD\$28,409.10 which he said, was the sum of JD\$2,000,000.00 when converted to US dollars. He gave it to the defendant to collect the money from the claimant and to sign and issue that receipt on his behalf.

[16] At paragraph 11 the witness averred that what has been marked Exhibit B1 in this trial is page one of "a whole agreement" which had been completed and returned to him by the defendant. In respect of the incomplete membership form the witness had this to say at paragraph 11 of his witness statement:

"To the best of my knowledge, information and belief this copy must have been made before the signature of a witness and the contribution/deposit amount, was endorsed on the agreement, as I would have ensured that the original agreement was so endorsed before submission to the club. The succeeding pages contained Mr. Thompson's personal information and would be accompanied by a proof of address and a means of identification."

[17] He agreed in cross-examination that he had been in the claimant's presence on a date he could not recall and that they had spoken before. He described Exhibit B3 as a club membership form with a signature line on which the member would sign. A membership form which came to him to without a signature would be

returned to the member for signature confirming agreement with the terms as set out. The general information pages had to be completed to establish a proper relationship with the club. The member would also sign at the foot of each page binding him/her to its terms. A further signature was required on page six of the form which had to be witnessed by a justice of the peace. It would have been difficult to obtain money from the club on an incomplete form. The club would not issue returns without a contribution amount written on the form.

- [18] Duke Brown gave evidence that there were no records that he was aware of that proved the claimant had ever received money from the club. Later on he said that the claimant had received payouts from the club. He knew that a membership form had been sent to the claimant but had never actually seen it filled out. In his witness statement he averred at paragraph 12 that he confirmed receipt of the cheque and the completed agreement by cell phone with Mr. Douglas Thompson and lodged the cheque and form with the club the next day. He also said that there would be challenges with the club making payouts to a member on an incomplete form. When asked how he knew the claimant had received his payouts the witness responded in this way:

“He told me, members would confer with me that they had gotten their payout, based on the conversations we had before on payouts I knew each member including Mr. Thompson got monthly payouts...”

The claimant did not deny receiving payouts from the club.

Submissions

- [19] Mr. Dunkley for the claimant argued in essence that the case at bar turned on the documentary evidence most of which were tendered by the defendant. The claimant would not have been in a position to address these documents prior to the proceedings and would only derive a benefit from any weakness in the defendant's case.

The court was not assisted by Mr. Bishop in respect of closing submissions.

Issues

- [20] 1. What was the nature of the transaction on December 6, 2007?
2. How much money was involved?

Analysis

- [21] Both parties agree that there was a discussion between them at the Half Way Tree court and that there was a telephone call in which money was discussed. The defendant in his witness statement at paragraph 6 said he showed the claimant a statement of his investments and returns. When was this? The defendant gave no date in his evidence for this encounter, however it does provide evidence of a second meeting as given in evidence by the claimant. Thereafter, the defendant's evidence was that the claimant asked him to contact Duke Brown who then acted for Orlando Johnson of the club. When did the defendant receive this request? The defendant also failed to provide this date.
- [22] That the defendant had money with LA's Private Club was an accepted fact on the part of the claimant. If this was so, it does not accord with logic that the defendant having his own reserve of US dollars with the club could not simply have taken the principal sum or part thereof or used the interest which would purportedly be flowing to the claimant, to satisfy his financial difficulties without the need for a loan.
- [23] On the claimant's part, the evidence was that he completed Exhibit B1 without an intention to join the club. This was tantamount to saying here are my banking details jotted down on a slip of paper for then there was no reason to use that club membership form at all. The claimant's explanation was Exhibit B1 constituted instructions to the club and in this way he would receive repayment of the sums loaned. This begs the question how would page one of a six page membership form secure the release of funds from the defendant's account to that of the claimant? This question remained unanswered. The defendant was associated with Duke Brown and this unchallenged. It is evident then, that the

defendant ought to have had discussions with the claimant about the club, its processes, who Duke Brown was and how the wire transfers would work in order for Exhibit B1 to be evidence of a channel for the receipt of repayments. There was no evidence of any such discussions. It is therefore open on the facts to infer that the parties had no such conversation during their meeting on December 6, 2007 or at any time prior, for had this information been given to the claimant by the defendant, it ought to have been pleaded and put in evidence at trial.

[24] In any event, it would seem to be more logical for the defendant to be the one to amend his account particulars to reflect any change to his account into which his interest payments were to be deposited. I am unable to discern how the claimant could have laboured under an expectation that he could cause a change to the defendant's account information by use of a club membership form whether fully completed or incomplete. There was no evidence of how this would be done by the club and it was not put to Duke Brown that Exhibit B1 could have led to a change to the defendant's account which has been suggested. The evidence of the completion of a membership form by the claimant to ensure repayments from the defendant's account with the club and which is not contained in the claimant's witness statement, nor put to Duke Brown is evidence which I have rejected.

[25] It is my view that the documentary evidence failed to establish what the claimant sought to say that it did. There was a cheque receipt from the NCB for the manager's cheque which both sides agree was presented and the receipt admitted as A1 was issued by the defendant. The fact that both existed is not in issue. What is at issue is whether the manager's cheque had been converted by Duke Brown to USD\$28,409.10 when he wrote the receipt or whether the claimant had handed over cash plus finance charges to the defendant as a loan. Was Exhibit A1 written by the defendant or by Duke Brown? Exhibit A1 makes no mention of cash received however, it did contain the words "as a loan."

[26] It is illogical that there would be a payment of JD\$2,000,000.00 to Duke Brown if this was indeed a loan to the defendant who was then and presently in dire

straits. The claimant has asked this court to accept that the defendant's mortgage was in arrears. This would seem to be a matter of some urgency requiring relatively quick action on the part of the defendant. The defendant would also have had to repay the sums borrowed within 6 months. In order to meet this loan repayment schedule it would mean that the defendant's interest payments from the club would have had to be quite significant and in the region of over JD\$650,000.00 per month. This sort of payment would signify a substantial investment with the club on the part of a financially challenged defendant which does not accord with common sense.

[27] On December 6, 2007, the claimant handed to the defendant a manager's cheque made payable to Duke Brown and not to the defendant. Why was the cheque handed over by the claimant made payable to Duke Brown if he was making a loan to the defendant? If this was a loan to the defendant then for what purpose was the cheque made payable to Duke Brown? This cheque, coupled with the membership form are in tandem with the system the club operated as described by Duke Brown and Christopher Townsend.

[28] How did the claimant intend to recover his debt by holding the certificates of registration and fitness for the defendant's motor vehicle? This was never explained. He admitted that he was not given its title. He also made no attempt to have the motor vehicle transferred, wrote no demand letters for repayment and gave no reason for not requesting the title to the vehicle. The claimant was not in a position to cause any purported transfer of the defendant's vehicle. I accept the defendant's evidence that this was because the claimant was only holding the certificates of registration and fitness until his money was placed with the club. There was no intention on the part of either party to have the motor vehicle change hands.

[29] The claimant's driver's licence and Exhibit B1 were said to have been tendered as proof of his identity to the club in light of anti-money laundering laws and to *"justify who he was as it was the defendant's account."* The claimant's evidence

was that he had completed a membership application form, but that he had not joined the club as he had not filled out the contribution amount and his signature had not been placed on the line for club members nor had it been witnessed. These are inconsistent positions. If the form was incomplete and his signature had not been witnessed, how could it verify his identity? If that information was required for dealing with the club, it most certainly would not satisfy the provisions of anti-money laundering laws for his membership form to omit salient personal details. While this explanation may or may not have satisfied the club it could not and does not satisfy the court.

[30] Exhibit B1 was the first page of a multi-page document as seen in Exhibit B3. The absence of the other five pages was not explained by the claimant. The court was able to glean the effect of Exhibit B3 from a witness called by the defendant. It was Christopher Townsend who explained that Exhibit B3 was the entire membership application form he had completed. The defendant said that he had given the claimant a membership form. The claimant has not denied that he filled out such a form. Exhibit B3 contained six pages. It was for the defendant to answer the allegation that the reason the claimant only filled out page 1 was to cause the defendant to update his account details to allow for wire transfers to flow into the claimant's account as he was not joining the club. Did the defendant receive a form comprising 6 pages or a form comprising one page? What was handed over to Duke Brown? The answer is to be found in the evidence of Duke Brown.

[31] In paragraph 11 of the affidavit of Duke Brown, he averred as follows:

"That a copy of the front page of the LA's Private Club Members Agreement, which was allegedly written on and signed by Mr. Douglas Thomson on December 6, 2007 has been produced and shown to me and I exhibit it hereto marked "DB3" for identification. I recall that this page was part of a whole agreement which was completed and returned to me by Nigel Morgan, on behalf of Mr. Douglas Thompson, along the National Commercial Bank Manager's cheque referred to in para 11, on the same day that the cheque was issued. To the best of my knowledge, information and belief this copy must have been made before the signature of a witness and the contribution/deposit amount was endorsed

on the agreement, as I would have ensured that the original agreement was so endorsed before submission to the club.”

[32] It is clear from the evidence of Duke Brown that a completed form and payment had to be made to the club in order to obtain membership. An incomplete form would be returned for completion. In respect of the claimant’s membership form, Duke Brown said that a completed membership form had been returned to him by the defendant on behalf of the claimant. It was also the defendant’s evidence that he had been given a six page form to take to the claimant. The evidence was that the claimant had not signed on the line upon which a club member should sign. He signed within the body of the document. The defendant’s case is that the claimant was a member of the club. It is open on the evidence to find that the claimant had completed all six pages of the membership form, though he had not executed the signature line of the membership form.

[33] The club membership form expressly stated: *“all monetary figures are presented in (US) dollars.”* The sums paid into the club and the interest to be paid out were denoted in US dollars. Exhibit B3 shows a contribution amount paid in by Mr. Townsend in US dollars. The evidence of Duke Brown in paragraph 12 of his witness statement was that he had received the claimant’s manager’s cheque for JD\$2,000,000.00 and the completed agreement on the evening of December 6, 2007. He spoke with the claimant and lodged both cheque and form with the club the next business day. The inference can be drawn that the defendant would have had to have returned both membership form and manager’s cheque to Duke Brown on December 6, 2007. This was evidence which I accept to mean that the claimant intended to join the club.

[34] The club membership form stated that it certified a covenant between club chairman and club member. Nowhere on this six page document does it say that members are making loans to the club. The club describes itself as being in the business of currency trading. A contribution which is just another word for payment is not a loan. The form indicates that “margins” are to be added to the account of a member. Mr. Duke Brown and the defendant nevertheless issued

receipts which said “*as a loan*” on them to club members. This was the understanding Mr. Townsend had when in his witness statement he averred that the transaction with the club was a loan.

[35] The receipts issued to the claimant and to Mr. Townsend are distinct in that the receipt to the claimant, Exhibit A1, is written in both numerals USD\$28,409.10 and words Twenty Eight Thousand Four Hundred and Nine dollars and 10 cents and the words “as a loan.” The receipt to Mr. Townsend, Exhibit C4, contains no words, merely figures. Where there ought to be words appears “JA\$1,924,080.00 beneath that are the words “as a loan” and where there ought to be numerals “\$27486.85 USD then the words “for Duke Brown” Both receipts are inconsistent in respect of how they were completed. The reason that Exhibit C4 is not identical to Exhibit A1 is that different persons completed them as was given in evidence by the defendant and Duke Brown. Exhibit A1 was written up by Duke Brown, signed by the defendant and issued to the claimant. Exhibit C4 was written up, signed by the defendant and issued to Christopher Townsend.

Documentary evidence

[36] Documents which are or have been, in the possession of a party will be admissible against him as original evidence to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate, and are receivable against him as admissions to prove the contents if he has in any way recognized, adopted or acted upon them.¹

[37] The documents presented are items of real evidence, the demeanour of the parties and their witnesses all are relevant to credit and it is for the court to determine the weight to be attached to their evidence.

¹Phipson on Evidence, 12th edn.

[38] On a review of the documentary evidence it would appear that the Exhibit B1 lends credence to the defendant's position that the claimant joined the club and that he signed the document for that very purpose. It is clear evidence of an intention to join the club along with a cheque made payable to a sales representative of that club. Both actions of signing the membership form and presenting the cheque for payment to Duke Brown were done on the same day and at the same time as part of the same transaction. I accept the evidence of the defendant and Duke Brown that a completed form was turned in for membership. Despite Exhibit B1 on its face being an incomplete club membership form, it is more consistent with membership in LA's Private club as opposed to a form purportedly containing instructions to the club to amend or alter the interest payments from the defendant's club account to the claimant's bank account.

If accept the evidence of Duke Brown as to payouts to the claimant and the evidence of Christopher Townsend that the claimant was a member of the club who had discussed with him his financial woes. On a balance of probabilities on the totality of the evidence the claimant was a member of the club.

[39] All the receipts tendered in evidence issued by the defendant say "*as a loan.*" There was no evidence that Mr. Townsend was making a loan to the defendant. In the absence of any evidence to the contrary, these receipts show funds receipted as loans by the club to the persons paying into it. I find that the receipt Exhibit A1 does not show that the claimant made a loan to the defendant in his personal capacity but shows a payment to the club receipted as a loan. In those circumstances, it is difficult to see how the words "*as a loan*" meant that a loan was made to the defendant in light of the viva voce evidence of Mr. Townsend which I accept in its entirety and the documentary evidence presented in the trial which speaks for itself.

[40] As a consequence of the foregoing the following orders are made:

1. Judgment for the defendant
2. Costs to be taxed if not agreed.