IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. HCV 00553/2004

BETWEEN	VICTOR LOWE	CLAIMANT
A N D	NATIONAL INVESTMENT BANK OF JAMAICA	DEFENDANT

Mr. Christopher Dunkley and Miss Marina Sakhno instructed by Cowan Dunkley & Cowan.

Mr. Charles Piper instructed by Piper & Samuda for the Defendant

Heard: 4th and 6th May, 2004, 6th and 15th July, 2004 and 21st September, 2004

McDonald, J (Ag.)

In this matter there are 2 notices before the Court. The first is filed on behalf of the Claimant, Victor Lowe seeking the following:-

1. A Declaration under section 17.1(b) that the said hypothecated funds do not form security for the loan extended by the Defendant to Pathway's Technologies Limited "(Pathways") of which the Claimant is the Executive Chairman under the Loan Agreement dated November 12,2001.

2. A declaration under 17.1(b) that the Claimant has no personal liability to the Defendant for any obligations of Pathways.
3. An order under section 17..1(c)(k) that the Defendant, National Investment Bank of Jamaica Limited, its servants and/or agents, be restrained until further order of this Court from calling on and liquidating the sum of ($59,000,000.00) currently on deposit with Dehring, Bunting and Golding Limited of 7 Holborn Road, Kingston 10 which sum was hypothecated to them on or about August 18, 2003 by the Claimants.

The second notice is one filed by the Defendant seeking the following orders:-

1. The case be struck out under the Court's inherent process as being frivolous and vexatious and an abuse of the process of the Court.
2. Alternatively, that the action be dealt with summarily under Part 27(2)(8) of the Civil Procedure Rules, 2002 and the claim be dismissed.
3. The Costs of the proceedings be the Defendants.
4. There be such further or other relief as may be just.

This action was commenced by way of Fixed Date Claim form filed on March 16, 2004 in which the Claimant claims –

1. The said sum of US$4,576,556.00 representing the Claimants direct

Investment in Pathways lost as a result of the Defendant's wrongful withholding of the release of the hypothecated funds and the prior facility of United States $1,000,000.00

2. A Declaration that the said hypothecated funds do not form security for the loan facility extended by the Defendant to Pathway Technologies Limited ("Pathway') of which the Claimant is the Executive Chairman pursuant to the Loan Agreement dated November 12, 2001.
3. A Declaration that the Claimant has no personal liability to the Defendant for any obligations of Pathway.
4. An injunction compelling the Defendant to release the sum of $59,000,000.00 on account with Dehring, Bunting and Golding Limited hypothecated to the Defendant's benefit by the Claimant.

I propose to deal firstly with the Defendant's Notice of Application for Court orders. The grounds on which the Defendant is seeking the order are as follows:-

(a) The claim is not one which is authorized by Part 8.1(4) as being capable of being commenced by Fixed Date Claim Form.

(b) Alternatively, if the action is one which is authorized by Part 8 1(4) of the Rules, the determinant issue in the proceedings is the meaning and effect of the documents Exhibits RJ2 to the

affidavit of Mr. Rex James sworn to and filed on April 13, 2004 and Exhibit VL 12 to the Affidavit of Mr. Victor Lowe sworn to and filed on the 11th March 2004.

(c) If, as the Defendant contends, the document Exhibits RJ-2 to Mr. James said Affidavit and VL 12 to Mr. Lowe's said Affidavit, constitute a pledge of the Claimant's funds as a continuing security for the repayment of the debt of his company, Pathway Technologies Limited, to the Defendant, the Claimant is not entitled to any of the relief claimed in the Fixed Date Claim Form in the absence of evidence that the debt has been repaid or written cancellation of the hypothecated agreement has been received by the Claimant or Dehring, Bunting & Golding, from the Defendant.

(d) The evidence fails to reveal that there has been any cancellation of the hypothecation agreement by the Defendant or that the debt of Pathway Technologies Limited has been repaid or discharged.

(e). Unless the Claimant can demonstrate that the hypothecation agreement has been cancelled or that Pathway Technologies Limited has paid its debt to the Defendant and is entitled to a discharge in respect of its liabilities, there is no basis in fact or in law for the commencement or continuation of the proceedings by

the Claimant and, for this and the foregoing reasons, the action ought properly to be dismissed either for the reason that it is frivolous or vexatious and is an abuse of the Court's process for the reasons that in the exercise of the summary powers of the Court, it cannot properly be maintained.

(f) The overriding objection would be best served by the granting of the application than by refusing same.

In response to (a) of the grounds stated above Mr. Dunkley submitted that "questions of fact hopefully will not be too substantial" and this would involve the Court in an examination of the original loan document and variation document with attendant correspondence. I understand him to be saying that 8(1) (4) (d) Civil Procedure Rules 2002 is applicable. This section states that a fixed date claim form must be used where the claimant seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact.

Mr. Piper opined that the action is not authorized by Part 8.1.4 of the Civil Procedure Rules. However even if it is not, the Court is mindful that the Fixed Date Claim Form would be capable of being converted to a Claim Form and the applicant's affidavit to a Statement of Case under Rule 26.9.3 of the CPR. The dicta of Lord Templeman in the Privy Council Case of Herbert Wellesley Eldemire v Arthur Eldemire PC Appeal 33 of 1989 provides the Court with some guidance in this respect.

I will proceed to hear the matter on the basis that the Claimant has brought it under Rule 8.1.4. of CPR 2002, in addition I am of the opinion that the action is one which is properly sustainable under Part 8 (1) 4 (d) of the CPR 2002.

In order for the Court to determine whether the case ought to be struck out under its inherent powers as being frivolous and vexatious and an abuse of process of the Court or be dealt with summarily and dismissed under Part 27 (2) 8 of CPR the Court will have to examine the affidavits and exhibits filed in particular Exhibit RJ 1 and 2 to the Affidavit of Mr. Rex James filed on 13/4/04 – i.e. the loan agreement and copy letter dated 14th August, 2003 from NIBJ to Mr. Lowe and Exhibits VC 12 to the affidavit of Mr. Lowe filed 11/3/04 i.e. letter dated 12-9-03 and the Hypothecation of Specified Security Agreement for their meaning and effect.

The Loan Agreement – Exhibit RJ 1

The Claimant Victor Lowe, Executive Chairman of Pathway Technologies Limited was one of the signatories to the loan agreement on behalf of the said Company and the Defendant for the sum of J$153 million.

A pre-condition for the grant of the loan was set out in clause 10(1x) of the loan agreement which states:-

> "Evidence of one million five hundred thousand United States dollars (US$1.5m) placed in a Jamaican Bank account hypothecated to NIBJ. US $1 million to be placed

> prior to disbursement and US$500,000 within 120 days of NIBJ's payment or last letter of Credit to BNS. NIBJ is to authorize all drawdowns"

Mr. Dunkley submitted that the drawdown provision in Clause 10 (1x) of the loan agreement can only be interpreted as referring to the drawdown of the hypothecated funds because the disbursement of the loan funds is otherwise specifically covered by clause 6 of the Agreement titled "Disbursement" Section 6 reads:-

> "Disbursement of the loan shall be made in tranches in accordance with the disbursement schedule agreed by the parties hereto."

He opined that the funds were clearly intended to be hypothecated to the joint venture between the parties to the Loan Agreement and to be accessed by way of drawdown by the parties in furtherance of that joint venture and at no time did the loan agreement contemplate these funds as representing a continuing security to the loan.

Mr. Piper on the other hand was adamant that on no stretch of the imagination could drawdown in this context be referable to drawdown under any instrument other than the Letter of Credit.

He submitted that the hypothecation of US 1 million means that the moneys are being pledged to NIBJ as a security for the loan to Pathway Technologies Limited which could be liquidated by NIBJ in the event of default by Pathway Technologies Limited.

He referred the Court to several definitions of "hypothecation" and submitted that the intrinsic nature of hypothecated funds is that by its very nature hypothecation constitutes a pledge of the said funds as a security. I am in full agreement with this definition and understanding of hypothecation.

Mr. Piper submitted that there can be no drawdowns under a fund put up as security. Drawdowns are made where a bank has the benefit of a Letter of Credit and a party is entitled to draw on that Letter of Credit and the Bank is authorized by NIBJ to effect the drawdowns.

He averred that there was no right to the drawdowns to the hypothecated funds and the agreement between the parties does not reflect that any such right be vested in Mr. Lowe or Pathway.

Clause 5 of the Loan Agreement dated 12th November, 2001 deals with security and documentation and reads:-

> "Repayment of the loan and all other monies payable pursuant thereto shall be secured and evidenced by way of the undermentioned securities:-
>
> i) This loan agreement
> ii) Promissory Note
> iii) Registered first Debenture over the fixed and floating assets of the Company to be stamped to cover one hundred and fifty three million Jamaican dollars (J$153,000,000.00) with power to upstamp the Debenture to cover the amount of the loan outstanding from time to time without need for further approval of the Company."

Mr. Dunkley averred that the hypothecated funds do not from a part of the security for the loan. He referred the Court to paragraph 10 of Mr. Lowe's affidavit where he states that he verily believes the debenture was the entire security for the loan.

Mr. Piper stated that he understood Mr. Dunkley's submission to be that because words or provisions relating to hypothecation were not included under that sub-title it does not form part of the security for the loan as being untenable.

He submitted that Clause 5 deals with security documentation which were to be executed by Pathway as part of the securities provided for under the loan agreement. Hypothecation is a different form from those that arise under Clause 5.

He stated that hypothecation is not limited to the parties to the Agreement, so that in order to procure the loan someone other than Pathway could have used their funds for the purpose of the pledge which is exactly what has been done.

He said that absolutely nothing turns on Clause 5 of the Agreement against the background that in Clause 10 of the Agreement, special provision was made for a different form of security.

The Claimant alleges in his affidavit that it was orally agreed between himself and Mr. Rex James President of NIBJ during various meetings and

discussions leading up to the Term Letter that the hypothecated funds would be released by NIBJ pari pasu upon his injection into Pathway of working capital. Further that he has invested upwards of Four million Five Hundred and Seventy Six Thousand Five Hundred and Fifty-six United States Dollars (US$4,576,556.00) in the Company and thereby Pathway met all the necessary and/or implied requirements of the Loan Agreement. In addition, the hypothecated funds were his personal funds and he is personally not in breach of any obligation to the Defendant, having signed no personal guarantee or otherwise.

Alleged dispute of facts arise as Mr. James in his affidavit denies that he agreed that the hypothecated funds would be released by NIBJ pari pasu upon Mr. Lowe injecting working capital into Pathway.

In my opinion if this were so, that would amount to a variation of clause 10(x) which provided for "the authorized issued and paid up capital of Pathway Technologies to reflect the amount of Three million Two Hundred and Seventy-seven Thousand United States Dollars (US$3,277,000.00) initially and an additional Five Hundred Thousand United States Dollars ($500,000.00) to be issued and paid up prior to the commencement of call center two (2).

On the question of the effect that an oral agreement would have on varying 10(x), the court is directed to Clause 17 of the Loan Agreement which reads inter alia:-

Waiver and Remedies: -

The right of the parties hereunder:

(a) may be exercised as often as necessary;

(b) are cumulative and not exclusive of its rights under the general law; and

(c) may be waived only in writing specifically.

It is trite law that an oral agreement cannot override a written Agreement. Further an oral agreement would be inconsistent with Clauses 17 and 18 of the Loan Agreement. Clause 18 reads:-

> "Any term or condition of this Agreement may be amended or varied with the agreement of the parties hereto in writing"

I agree with Mr. Piper's submission that the parties cannot be bound to any alleged agreement or variation of the Agreement unless that original agreement or variation has been made in writing specifically. Nothing in writing has been shown to the Court by the Claimant which varies the original agreement. My understanding of the Loan Agreement is that it provides for non-viva voce evidence, any variation must be put in writing.

Agreement dated 14th August 2003 (Exhibit RJ-2 to Mr. James affidavit)

This letter from NIBJ to Mr. Lowe and signed by Mr. Lowe on 10/9/03 agrees inter alia, to the conversion of the hypothecated sum of US$1 million to Jamaican dollars and authorizes Dehring Bunting and Golding Ltd, in the following terms, among others to:-

> "Invest the sum of J$59 million on terms to be approved by NIBJ. This said amount will be hypothecated to NIBJ as a continuing security for facilities provided to Pathway Technologies by NIBJ until the said facilities are repaid in full." (Emphasis mine)

Paragraph 22 of Mr. Lowe's affidavit makes it clear that it was at Mr. Lowe's request and for his benefit that the hypothecated funds were converted from US to Jamaican dollars.

Further paragraph 23 of the said affidavit also puts it beyond doubt that he accepted that this new arrangement was a variation of the hypothecation initially put in place pursuant to the Loan Agreement dated November 12, 2001. Here he is saying "this new arrangement was practically a replacement to the prior arrangement entered pursuant to the Loan Agreement dated November 12, 2001.

Mr. Piper submitted that letter dated 8th August 2004 – Exhibit VL 11 to Mr. Lowe's affidavit does not contain the preamble set out in letter dated 14th August 2003 – Exhibit RJ 2 to Mr. James' affidavit, but that it is obvious

that Mr. Lowe by accepting and agreeing to those words "continuing security" knew and accepted that the initial hypothecation of the funds was a security for the loan. It is against that background that he would sign a subsequent document which indicates that it is to be a continuing security.

Mr. Piper also referred the Court to letter dated 7th May 2001 – Exhibit VL 2 to Mr. Lowe's affidavit where by this letter hypothecating the funds, it was confirmed that "only claims received from you (i.e. NIBJ) in writing shall be honoured and it further confirmed that "this hypothecation will remain in force until written cancellation has been received from NIBJ'.

Mr. Dunkley submitted that at trial the Court would have to consider whether the actions of NIBJ and the response of the Claimant represented a varying of the original agreement or a duress, and determine as well whether the subsequent Agreement of August 14, 2003 takes priority over the Agreement of November 12, 2001.

He asked the Court to find, that after almost 18 months of unsuccessful efforts to access the funds, the Claimants request for a change of currency of the hypothecated funds to access a much more favourable interest income (which was to be applied towards debt servicing of the loans with the Defendant and D B & G for funds borrowed by the Claimant to satisfy a further cash injection requirement) was an act of loss mitigation.

Hence, the conditions imposed upon this conversion by the Defendant, including that designating the hypothecated Jamaican funds as a "continuing security" as set out in the letter of August 14, 2003, though ostensibly agreed upon by the Claimant, ought to be subjected to judicial scrutiny at the trial of this matter.

VL 11

The Court takes cognizance of exhibit VL 12 which states inter alia:

> "should we wish to change the instrument in which our client's funds are invested in, we will seek NIBJ's written approval of the replacement instrument prior to disposing of the DBJ security (such approval not to be unreasonably withheld or delayed by NIBJ. In that case, in the event that NIBJ gives such approval, the replacement security will stand hypothecated to NIBJ in the amounts specified above (save that the timing of payments by us to NIBJ will correspond to the timing of payments of the cash flows received by us under the replacement security) and subject to the above stated conditions."

Conclusion

The Claimant seeks to recover damages in the sum of US$4,576,556.00 representing the Claimant's direct investment in Pathway lost as a result of the Defendant's wrongful withholding of the release of the hypothecated funds. In order to establish whether the Claimant has the right to the relief being sought, the Court must ask itself whether there was an agreement for the release of the hypothecated funds which was allegedly

breached by the Defendant in any manner which entitles the Claimant to initiate or advance this claim.

On examination of the Loan Agreement I have found that the hypothecated funds form part of the security for the loan.

I also find that this original Loan Agreement has been varied as provided for in RJ 2 of Mr. James' affidavit.

I find that the negotiations culminated in the Claimant's agreement with the Defendant resulting in this Agreement of 14/8/03 whereby the hypothecated funds would be converted to Jamaican dollars and J$59,000,000.00 thereof would be hypothecated to NIBJ as a continuing security for facilities provided to Pathway Technologies by NIBJ until the said facilities are repaid in full. This condition has never been fulfilled. There has been no allegation of beach of the agreement evidenced by the letter dated 14/8/03. There has been no agreement for the release of the hypothecated funds.

I therefore find that the claim being advanced is based on assertions of both fact and law which are unsustainable.

Against this background the overriding objectives of the CPR 2002 dictates that the case be dismissed and I so exercise my powers under Part 27.2(8) of CPR to deal with the matter summarily and dismiss same with costs of the proceedings to the Defendants.

In the circumstances the Claimant's Notice of Application for court orders filed on 31/3/04 stands dismissed.

Leave to appeal, if necessary.

Three week stay of execution granted.