



[2017] JMCC Comm. 10

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE COMMERCIAL DIVISION**

CLAIM NO. 2011 CD 00080

BETWEEN JMMB MERCHANT BANK LIMITED CLAIMANT
(Formerly, CAPITAL & CREDIT
MERCHANT BANK LIMITED)

AND BRUCE JAMES 1ST DEFENDANT

EDNA JAMES 2ND DEFENDANT

CLAIM. NO. 2011 CD 00086

BETWEEN JMMB MERCHANT BANK LIMITED CLAIMANT
(Formerly, CAPITAL & CREDIT
MERCHANT BANK LIMITED)

AND BRUCE JAMES 1ST DEFENDANT

EDNA JAMES 2ND DEFENDANT

**Applications to set aside Default Judgments and Judgments on Admission-
Defendant unrepresented when admission filed - Guarantee – Whether set off
possible of a pending claim- Whether notice to guarantor served-Whether
interest clause a penalty- whether defence has real prospect of success.**

Ms. Shanique Scott instructed by Hylton Powell for the Claimant

**Mr. Nigel Jones and Ms. Kacey-Ann Nelson instructed by Nigel Jones and Co. for
the 1st Defendant**

Heard: 8th and 21st March, 2017 and 6th April, 2017

IN CHAMBERS

BATTS J,

[1] These actions are not consolidated. They however concern the same parties and similar facts and circumstances. The two applications before me were conveniently heard at the same time. They are brought by the 1st Defendant to set aside default judgments entered against him in each claim. Both claims concern the alleged failure of the 1st and 2nd Defendants to honour their guarantee of loans. The loans were made by the Claimant to Jaaz Import and Export Company Limited. The Particulars of Claim allege that the 1st Defendant is a director of that company. The relationship if any of the 2nd Defendant to Jaaz Import and Export Company Limited is not disclosed, save to say that she is also a guarantor of the loans. Default judgments were entered in Claim No. 2011 CD 00080 (hereinafter referred to as the 1st Claim) arising from a guarantee dated 12th July, 2010; and, Claim No. 2011 CD 00083 (hereinafter referred to as the 2nd Claim) arising from a guarantee dated 30th April, 2011.

CLAIM NO. 2011 CD 00080 – The First Claim

[2] The Claimant by way of Claim Form filed on the 17th November, 2011 claimed the sum of US\$503,157.61 (United States Dollars) and J\$344,039.55 (Jamaican Dollars) which it said was due and owing from the Defendants. The 1st Defendant filed an Acknowledgement of Service and a Defence in person admitting liability in the amount of US\$403,157.61 United States Dollars plus interest. The 1st Defendant's Defence filed on the 27th January, 2012 states;

"I dispute the claim on the following grounds

- 1. The defendants are in agreement with all the stipulations in the claim save and except paragraph 7 of the Particulars of Claim on the grounds that the Claimant having seized equipment valued at US \$110,000 has not applied the sum to the account.*

2. *Further the Defendants admit to owing the principal sum of US\$ 403, 157.61 together with interest hereon based on paragraph 1 above.”*

A default judgment was entered against the 1st Defendant in the amount of US \$532,944.57 after an ex parte hearing in chambers before Mangatal J on the 25th June, 2013.

[3] The Claimant sought to enforce its judgment in June 2015 by exercising its power of sale under a mortgage in relation to property owned by the Defendants. The Claimant also obtained a provisional charging Order over shares owned by the 1st Defendant. The Claimant says that the sale of that property has not extinguished the debt owed to it. The 1st Defendant contends that the premises were sold at an undervalue. These assertions are made in support of the application, although that issue is the subject of separate legal proceedings brought by the 1st Defendant against the Claimant.

[4] The 1st Defendant retained attorneys and filed an application to set aside the default judgment and discharge the provisional charging order. The application was filed on the 27th September, 2016 and was later amended on the 24th November, 2016. In the amended application the 1st Defendant sought orders for:

1. The default judgment entered against it to be set aside;
2. The provisional charging order to be discharged;
3. A stay of execution of the Judgment entered in favour of the Claimant until the application to set aside is heard; and,
4. Costs

The grounds on which the 1st Defendant relied as stated in his amended application are that;

- a. *The 1st Defendant has a real prospect of successfully defending the claim;*
- b. *The 1st Defendant will be greatly prejudiced if the stay is not ordered and the judgment is executed by the Claimant as the 1st*

Defendant has a good explanation for failure to file his Defence within the prescribed time;

- c. The 1st Defendant has applied as soon as reasonably practicable after finding out that judgment has been entered against him;*
- d. The 1st Defendant will be ruined without the stay;*
- e. There is merit in the 1st Defendants' application to set aside;*
- f. The Claimant will not be prejudiced by the application because its judgment continues to accrue interest;*
- g. The overriding objective of the Civil Procedure Rules, 2002, is best served it [sic] the Default Judgment is set aside;*
- h. The interest of justice is best served if the default judgment is set aside."*

[5] The facts and issues for determination in the 1st Claim are similar to those of the 2nd Claim. I find it convenient at this point to detail the 2nd Claim.

CLAIM. NO. 2011 CD 00086 – The Second Claim

[6] The Claimant by way of Claim Form filed on the 2nd December, 2011 claimed the sum of J\$170,475,128.72 (Jamaican Dollars) which it said was due and owing by the Defendants. The 1st Defendant filed an Acknowledgement of Service and Defence in person admitting liability. His defence filed on the 22nd January, 2012 bears close resemblance to his defence in the earlier claim. His defence stated;

"I dispute the claim on the following grounds-

- 1. The Defendants admit to all the stipulations contained in the claim save and except paragraph 16 of the Particulars of Claim dated 2nd day of December, 2011 on the grounds that the Claimant having seized equipment valued at US\$110,000 as (sic) not appropriated same to the loan account prior to the date of filing the claim."*

[7] On the 16th March, 2012 Judgement on Admission was entered against the 1st Defendant in the sum of \$174,906,460.80. Shortly thereafter, on the 20th March, 2012 a Default Judgment was entered against the 1st Defendant for payment of

the sum of \$6,493,999.53. The Claimant has sought to enforce these judgments in the same manner as in the 1st Claim. It exercised its power of sale under a mortgage in relation to the same property and also obtained a provisional charging order over shares owned by the 1st Defendant.

[8] The events of the second Claim follow a similar thread to the first. It was after the Claimant had taken steps to enforce its judgment that the 1st Defendant retained attorneys and filed this application. By way of an Amended Notice of Application for Court Orders filed on 24th November, 2016 the 1st Defendant sought orders for:

1. The default judgement to be set aside;
2. The admission made by the 1st Defendant in his Defence be withdrawn and the judgment entered thereon be set aside;
3. The provisional charging order to be discharged;
4. The execution of the judgment entered in the Claimant's favour to be stayed until the Application to set aside is heard;
5. Costs to the 1st Defendant; and
6. Such further and/ or other relief as this Honourable Court deems fit.

The grounds on which the 1st Defendant made his Application are that;

- a. *"The 1st Defendant has a real prospect of successfully defending the claim;*
- b. *The 1st Defendant will be greatly prejudiced if the stay is not ordered and the judgment is executed by the Claimant as the 1st Defendant has a good explanation for failure to file his Defence within the prescribed time;*
- c. *The 1st Defendant has applied as soon as reasonably practicable;*

- d. *The 1st Defendant's application to withdraw the admission in his Defence filed on January 27, 2012 is being made in good faith;*
- e. *The balance of prejudice rests with the granting of the application to withdraw the 1st Defendant's admission;*
- f. *The 1st Defendant is not the author of the prejudice he now suffers;*
- g. *The 1st Defendant will be ruined without the stay;*
- h. *There is merit in the 1st Defendant's Application to set aside;*
- i. *The Claimant will not be prejudiced by the Application because its judgement continues to accrue interest;*
- j. *The overriding objectives of the Civil Procedure Rules, 2002 is best served it (sic) the Default Judgement is set aside; and*
- k. *The public interest in the administration of justice is best served if the Default Judgment and Judgment on Admission are set aside."*

Applications to Set Aside Judgments – The Affidavits

[9] The 1st Defendant's applications were supported by the following affidavits;

First Claim:

1. Affidavit of Bruce James filed 27th September, 2016
2. Supplemental Affidavit of Bruce James filed 11th November, 2016
3. Further Supplemental Affidavit of Bruce James in support of Notice of Application for Court Orders and in opposition to Application for formal order filed 5th December, 2016
4. Affidavit of Kacey-Ann Nelson filed 2nd November, 2016

The Claimant responded with the following Affidavits:

5. Affidavit of Deryck Rose filed 4th November, 2016

6. Further Affidavit of Deryck Rose filed 7 March, 2017

In the Second Claim:

1. Affidavit of Bruce James filed 27th September, 2016
2. Supplemental Affidavit of Bruce James filed 11th November, 2016
3. Further Supplemental Affidavit of Bruce James filed 5th December, 2016

The Claimant responded with the following Affidavits:

4. Affidavit of Deryck Rose filed 4th November, 2016
5. Further Affidavit of Deryck Rose filed 7th March, 2017

The Pertinent Rules

[10] The Civil Procedure Rules, in Part 13, detail the circumstances in which the court must set aside a default judgment as well as circumstances in which the granting of an order to set aside lies within the discretion of the Court.

Rule 13.2 states;

“(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because-

(a) In the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;

(b) In the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or

(c) The whole of the claim was satisfied before judgment was entered.

(2) The court may set aside judgment under this rule on or without an application.”

Rule 13.3 states;

“(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

- a. Applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*
- b. Given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.”*

Counsel withdraws

[11] I should indicate that on 8th March, 2017 when these applications came on for hearing Ms. Kacy Ann Nelson, counsel for the 1st Defendant, indicated that an application had been filed to remove her firm’s name from the record. I declined to hear the application as it was not listed before me. Counsel applied for an adjournment to a date so that that application might be heard. This I refused. I considered the fact that the applications to set aside were in a state of readiness. I also considered the prior history of adjournments. In my view, it was not in the interests of justice to allow counsel to remove their name at this stage or to grant an adjournment for that purpose. The Claimant had been prevented from pursuing recovery, and the Defendant had been awaiting the hearing of his applications to set aside, for some time. An adjournment would be in neither party’s interest at this stage.

[12] Counsel remained for the first day of the hearing and was to respond to submissions made by counsel for the Claimant on 21st March, 2017. The 1st Defendant indicated he would take steps to pay to his attorneys the outstanding fees. On 21st March, 2017 counsel for the 1st Defendant did not appear. The 1st Defendant was present and indicated that no counsel would be appearing on his

behalf. This was the position communicated to him by his attorneys on record. They have, it appears, acted in disregard of the Court's ruling and left their client without legal representation. I allowed the 1st Defendant to respond to the submissions of counsel for the Claimant as best he could.

The 1st Claim

[13] I will consider each application to set aside separately. The 1st Defendant in his affidavit filed on the 27th September, 2016 says that the default judgment was irregularly entered. His affidavit states;

"10. I was advised by my Attorneys-at-Law, Nigel Jones and Company, and do verily believe that the Default Judgment obtained by the Claimant was irregularly entered. This is because at the time of filing my Defence only 41 clear days had passed since I was served with the Claim Form and Particulars of Claim and therefore I was still within the time prescribed for filing said Defence that is, 42 clear days. In addition, there is no affidavit of service filed in respect of the Claim Form and Particulars of Claim and therefore, there is no evidence to dispute that I was served on December 14, 2011."

[14] Mr Deryck Rose Recovery Portfolio Manager disagrees with this position. In his Affidavit filed 4th November, 2016 he stated ;

"16. Paragraph 10 is denied and that I was advised and verily believe that the Default Judgment obtained by the Claimant in the circumstances, was not irregularly entered. Further by the 1st Defendant's own admission in his Acknowledgement of Service of Claim Form which he filed on December 23, 2011 he admitted to receiving the Claim Form and Particulars of Claim on December 14, 2011. Attached hereto and marked "DR-1" and "DR-2" respectively for ease of identification is the Acknowledgement of Service of Claim Form and Defence."

[15] Both parties agree on 14th December, 2011 as the date of service. The 1st Defendant filed his defence on the 27th January, 2012 .That makes a total of 45 days .Even therefore allowing for the fact that our rules require 42 "clear " days, **Rule 3.2(2)** ,the defence was one day out of time. I respectfully disagree that the default judgment was entered irregularly.

- [16] The 1st Defendant went on to aver in his said Affidavit, in the alternative, that he applied to the Court to set aside the judgment as soon as was reasonably practicable after realising that the judgment was entered. He pointed out that he sought legal representation in order to have the judgment set aside and the Claim dealt with. He stated that he sought the assistance of three separate attorneys prior to engaging his present attorneys. He said one attorney informed him that he had a conflict of interest and consequently could not take his matter any further. Another indicated that he was unable to take the matter any further. The 1st Defendant says that on or about the 1^{4th} September, 2016 he retained Nigel Jones and Company to act on his behalf.
- [17] The Claimant submitted that the 1st Defendant has not provided any evidence of when he first became aware of the judgment. That indeed appears to be so. In the course of the hearing, however the 1st Defendant did say that he became aware of the judgment in 2016. This was in response to the submissions of Counsel for the Claimant. Having regard to the 1st Defendant's precarious circumstances, of being left without Counsel, I accept the averment even though it was not made on affidavit. I therefore accept that the 1st Defendant acted within a reasonable time. The circumstances suggest that he may be speaking the truth given that it was not until the 25th day of August 2016 that the Notice of Hearing to make provisional charging order final was served, see (affidavit of service filed 21st September 2016). Service being effected pursuant to an order for substituted service.
- [18] However, the issue as to whether the application was made within a reasonable time is not dispositive of the application. The primary consideration, in an application such as this, is the assessment of the merits of the defence, see **Merlene Murray-Brown v Dunstan Harper et al [2010]JMCA App 1 (unrpted 1st February 2010)** per Phillips JA at paragraph 23 of her judgment.

[19] The 1st Defendant in his affidavit filed on the 27th September, 2016 urged that he had a reasonable prospect of defending the Claim. The relevant sections of his affidavit are ;

“ 11.... I honestly believe that I have a reasonable prospect of successfully defending this Claim because the Claimant has sold Property at an undervalue and as such there are no monies owing to the Claimant. I have therefore instructed my Attorneys-at-law, Nigel Jones and Company, to file a Claim Form and Particulars of Claim on the basis of breach of duty by the Claimant to act in good faith and negligence. This Claim was filed on September 26, 2016 and served on said date.

12. In addition, there is an Application for Provisional Charging Orders and Affidavit in Support which were filed on May 13, 2016. Nowhere in this Application has the Claimant indicated to the Court that the Property was sold in June 2015 and neither has the Claimant applied the proceeds of sale towards the debt it alleges is owed.

13. I have been advised by my Attorneys-at-law and do verily believe that there has been non-disclosure in respect of the sale of the property and this has serious implications for the provisional charging order that was granted to the Claimant on June 6th, 2016. This Provisional Charging Order has caused me to be severely prejudiced.

14. Further the Defendant has not accounted for the proceeds from the sale of the property and continues to claim the alleged original debt of USD\$532,944.57 plus interest at 3 percent per annum. Consequently, the Claimant has caused my 200 ordinary shares in a company of which I am one of the Directors, Forever Green Farms Limited, to be charged.

[20] Deryck Rose in his Affidavit filed on the 4th November, 2016 states that the Claimant sold the property on the open market and at market value under powers of sale but that there is still a significant debt owing to the Claimant. He said further that the proceeds from the sale of the property have been applied to the loans but were inadvertently not updated and applied on the judgment debt. The affiant also says that, when the monies received after exercising the powers of sale are deducted, the sum owing on the judgment by the Defendants is

US\$110,901.06. Mr. Rose denied that there was non-disclosure and indicated that the information was provided to the 1st Defendant's then attorney-at-law in the form of a letter outlining the exercise of the power of sale and how the proceeds were applied.

[21] Counsel for the Claimant submitted that, as the 1st Defendant has not yet received a judgment that he could utilize to set off the debt owing, his contention that there are no sums owing must fail. In the course of submissions the Defendant's Counsel indicated that the 1st Defendant's claim against the bank had been filed and was awaiting a date for case management.

[22] The learned authors of **Halsbury's Laws of England** Volume 12 (2015), paragraph 400 state:

"The right conferred by the Statutes of Set-off was a right to set off mutual debts arising from transactions of a different nature which were due and payable and could be ascertained with certainty at the time of pleading. Thus no legal set-off could exist against a claim which sounded in unliquidated or uncertain damages..."

I accept this as a correct statement of the law. Counsel for the Claimant submitted that the learned authors of **Paget's Law of Banking 13th edition** at page 838 expressed the view that an unliquidated cross claim (even where capable of being employed by way of set-off when quantified) can only be utilized by the guarantor where the principal debtor is a party to the proceedings. I agree with Counsel for the Claimant that one cannot "set off" an unascertained amount. The Defendant's attorneys, for reasons best known to themselves, filed a separate claim. They have not applied to consolidate that Claim with these. In any event that claim, until and unless a judgment is obtained in their favour represents, only a hope or maybe an expectation. There is nothing that can now be set off to liquidate this judgment.

[23] I must say however that it would not be in the interest of justice to enable the Claimant to enforce a judgment in this matter against the 1st Defendant while he

has a pending claim that significantly overlaps in facts and issues. It was indicated to the Court that the Claim by the 1st Defendant has not yet come up for case management. It would seem just and equitable for there to be a determination on these related issues before further enforcement proceeds in the Claim now before me.

- [24] The Court has at times assisted litigants in circumstances where their attorneys have failed to do so. In the case of **Merlene Murray – Brown v Dunstan Harper & Winsome Harper (paragraph 18 above)** the Court of Appeal, applying **Law v St Margaret’s Insurance Ltd (2001) LTL 18/1/2001**, expressed the view that the court must in some cases step in to protect the litigant when his attorneys have failed him. The Court decided that inadvertence on the part of an Attorney-at-law may be considered a good explanation for failing to file a defence within the stipulated time. Per Phillips, JA at paragraph 30 of her judgment :

“The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended.”

“We never like a litigant to suffer by the mistake of his lawyers,” this was the statement of Denning LJ in **Salter Rex & Co v Ghosh [1971] 2 AllER 865** applied by Morrison JA in **Jamaica Public Service Company Ltd v Rose Marie Samuels [2010] JMCA App 23 (unreported 26th November 2010)** at **paragraph 30**. It is arguable that the Defendant’s counsel erred tactically by failing to apply for consolidation of these claims with the other one. Such an error would further support my view that to allow enforcement, prior to a resolution of the question whether there has been a culpable sale at an undervalue, would be unjust.

[25] In a Further Supplemental Affidavit dated 5th December, 2016 the 1st Defendant stated that he had a reasonable prospect of defending the Claim as the guarantee by which the judgment was obtained is unenforceable, null and void and has no effect. This he submits is because it discloses a past consideration. The 1st Defendant says that the letter creating the loan facility stated,

“This offer will remain available for acceptance up until June 30, 2010”

He stated that the guarantee in respect of the loan was signed on 12th July, 2010. The loan facility letter was accepted on the 15th July, 2010. The 1st Defendant asserts that when he signed the Guarantee the date was not inserted and that it is the Claimant who inserted the date after the expiration of the time to accept.

[26] Counsel for the Claimant submitted that good consideration was provided as the loan facility and Guarantee are part of one transaction. She submitted further that it was unchallenged evidence that part of the loan proceeds were disbursed on the same day that the Guarantee was provided and the balance disbursed at a later date. Counsel relied on the definition of past consideration by the learned authors of **Halsbury’s Laws of England** Volume 22 (2012)/ 4ed, paragraph 320. The authors state:

“A so-called ‘past consideration’, that is something made by the promisee before the promise was made, may constitute a motive for the promise, but it is not valuable consideration. However, the courts do not take a strict chronological view, so that, provided the promises are part of one transaction, it does not matter in what order they were given.”

The learned authors of **Paget’s Law of Banking 14th edition [18.7]** hold a similar view:

*“Wholly past consideration – in particular the existing indebtedness or overdraft of the principal debtor – is not sufficient, nor is merely keeping the customer’s overdrawn account open. Where the consideration is expressed in terms that are ambiguous as to whether it is past or future, extrinsic evidence is admissible to show that it is good consideration. **Where the consideration is the***

creditor's agreement to the principal debt and the principal debt pre-dates the guarantee, the court is not bound to apply a strictly chronological test in determining whether the consideration is past. If the making of the guarantee is part and parcel of the same transaction also involving the making of the principal debt, then the exact order in which these events occur is not decisive" (emphasis added)

[27] I do not believe that on this issue the 1st Defendant has a reasonable prospect of successfully defending the Claim. I find that there exists good consideration in the contract between the parties. Indeed when one reads the letter of intent it clearly references the security. The loan would not be granted without the guarantee and vice versa. The 1st Defendant signed both documents .

[28] The 1st Defendant says further that the interest being charged is excessive, harsh, unconscionable and unjust. The 1st Defendant says that some fees have no description of charges or breakdown. Counsel for the Claimant submitted that the authorities indicate that the court will not at common law intervene in circumstances of an alleged unconscionable contract. I agree. In **Cavendish Square Holding BV v Talal El Makdessi and Parking Eye Limited v Beavis [2015] UKSC 67**, the Supreme Court of England restated the penalty rule in the law of contract. The court was however careful to underline the distinction between relief from the unconscionable consequence of a breach and review of the terms of a contract for unconscionability. As per Lords Neuberger and Sumption, who co-authored the leading judgment, (at paragraph 13):

"There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligation, not the primary obligations themselves."

[29] If I am wrong, and the contractual term for the payment of interest is subject to review, I am satisfied it will not, in this case, be considered a penalty. The modern test is stated cogently by Lord Hodge in the **Cavendish Square case (para 28 above)** at paragraph 255,

“I therefore conclude that the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party’s interest in the performance of the contract.”

[30] The 1st Defendant says that the bank has in effect charged him double interest as it consolidated a previously issued loan, with interest, into a larger loan facility on which it charged interest. There is no evidence as to the usual corporate rates in the market, or as to interest rates normally charged or as to the usual practice of financial institutions. There is nothing on the face of the evidence to suggest that the interest charged is unconscionable. I am of the view that the 1st Defendant does not have a real prospect of success in arguing that the terms of the guarantee are not commercially justifiable given the risk undertaken by the Claimant in granting the loan facility.

[31] The 1st Defendant argued also that the Claimant has breached the expressed term of the Guarantee that a demand must be first made in writing and served personally or by way of registered post. The 1st Defendant said that it did not receive the demand for payment whether personally or by registered post, and that there is nothing to suggest that the demand was in fact sent to him, he denies that a demand was made to him in writing for the sums outstanding.

[32] Deryck Rose has in his Further Affidavit filed on 7th March, 2017 asserted the contrary. His evidence is that the Claimant served the required demand on the Defendants by sending it by registered mail to the address provided in the Guarantee. To buttress her submission that the letter was served Counsel relied

on section 52(1) of the **Interpretation Act** which provides that a document is deemed to be served by properly addressing and posting the document unless the contrary is proved. This section relates however to requirements of service under enactments of parliament. Before me is a contractual document. The parties have agreed the methods of service, one being by registered post. I hold that service is effective, for the purpose of the agreement, once the agreed method is used. It would be odd indeed if a party to such an agreement could stymie the other party by an assertion that he had not received a document which had been served in the manner mutually agreed. There is no reasonable prospect of the Defendant succeeding on this ground.

[33] The Claimant submits that the 1st Defendant's admission cannot be withdrawn. The 1st Defendant says it can and ought to be withdrawn as he did not have legal advice at the time. My brother, the Honourable Mr Justice Sykes, recently examined the circumstances in which a court will allow withdrawal of an admission, see **Continental Baking et al v Super Plus Food Stores Limited et al [2015] JMSC Civ 169**. In so doing Sykes J adopted the analysis of Brooke VP in **Sowerby v Charlton [2005] AllER (D) 343 @ para 35** :

"[35] Finally, the unreported judgment of Sumner J in Braybrook v Basildon & Thurrock University NHS Trust (7 October 2004) appears to us to offer valuable guidance (at para 45) on the way in which a court should exercise its discretion when determining whether or not to permit the withdrawal of an admission that was made after an action was commenced. After referring to a number of earlier cases he said: "45. From these cases and the CPR I draw the following principles. 1. In exercising its discretion the court will consider all the circumstances of the case and seek to give effect to the overriding objective. 2. Amongst the matters to be considered will be: (a) the reasons and justification for the application which must be made in good faith; (b) the balance of prejudice to the parties; (c) whether any party has been the author of any prejudice they may suffer; (d) the prospects of success of any issue arising from the withdrawal of an admission; (e) the public interest, in avoiding where possible satellite litigation,

disproportionate use of court resources and the impact of any strategic manoeuvring. 3. The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing." [36] Above all, the exercise of any discretion will always depend on the facts of the particular case before the court. The words "will consider all the circumstances of the case" have particular resonance in this context"

I have decided that in this case the 1st Defendant has no real prospect of success on the merits of the matter. He is a businessman who, in all probability gave thought or ought to have given thought, before filing his admission. He is the author knowingly of any prejudice he now suffers in consequence.. I will not, in all the circumstances of this case, allow the Defence on admission to be withdrawn.

The 2nd Claim

[34] The issues and events that arise on the second Claim in relation to the application before me overlap significantly with those of the first. My analysis of the issues that have arisen on the 1st Claim are therefore instructive on the determination of the latter Claim.

[35] In considering whether the Court's discretion should be exercised in favour of the 1st Defendant, on his application to set aside default judgment, it will be useful to begin by considering his evidence. The 1st Defendant filed a Further Supplemental Affidavit on 5th December, 2016 the content of which I set out in detail given that his lawyer abandoned him:

"4. I was advised by my Attorneys-at-law, Nigel Jones and Company, and do verily believe that this Honourable Court has the discretion to set aside Default Judgment for a Specific Amount obtained by the Claimant on the basis that I have a real prospect of successfully defending the claim and that I have a good explanation for failure to file a Defence within the prescribed time period.

Further and in any event, my Defence was filed personally and it was done only one day outside the prescribed time.

5. In or around 2007 approximately JMD\$ 80,000,000.00 was borrowed from the Claimant by myself and Mr. Labeeb Azan, the directors of Jaaz Import and Export Company. As at early 2010 we had repaid approximately JMD\$40,000,000.00 of the principal amount borrowed however, the loan by that time attracted considerable interest. The Claimant then restructured the original loan balance of JMD\$ 40,000,000 applied the interest that had already accrued to it and thereafter created a subsequent loan facility which it referred to as "Refinancing of loan facilities totalling J\$132,846,632.33". The Claimant then charged interest on this refinanced/ restructured loan.

6. I was advised by my Attorney-at-Law, Nigel Jones and Company and do verily believe that the loan agreement as detailed in the Commitment Letter dated May 18, 2010 is illegal in so far as it (sic) indirectly provides for compound interest. The agreement is therefore unenforceable, null and void.

7. In addition, this initial loan that was taken out in or around 2007 attracted interest at a lower rate than the 20% charged after restructuring; accordingly, the rate of interest or amount of interest charged increased by reason of the default in payment by the principal and/ or the guarantors (including me) and consequently, I have been advised by my Attorneys-at-Law and do verily believe that the loan agreement is illegal.

8. Importantly, it was an express term and/ or condition of the Guarantee signed by me that the Claimant should serve me with a demand made in writing for payment of outstanding amounts owed by Jaaz Import and Export Company Limited. The Claimant further agreed that such demand shall be deemed to have been effectually made when an envelope containing such demand is sent to my respective stated address or such other address (as directed by me in writing) is either personally delivered or sent by registered post.

9. I did not receive the demand for payment whether personally or by registered post and there is nothing to suggest that the demand was in fact sent to me. I therefore deny that a demand was made to me in writing for the monies that were outstanding. I was advised by my Attorneys-at-Law, Nigel Jones and Company, and verily believe that this express clause of the Guarantee is to be construed strictly against the Claimant and the Claimant's breach of the

clause avails me of any and all liabilities under the Guarantee. The 1st Defendant attached thereto his proposed Defence.

10. In respect of my admission, I filed my Defence personally without the assistance of counsel and I was therefore unaware of the proper procedure as well as my rights concerning the allegations made. This was primarily because I had never been served with court documents before therefore although I did not agree with the interest rate and what appeared to me as a double charge of interest I honestly believed it was something I needed to discuss directly with the Claimant by visiting its head office.

11. Further, it was not until I engaged my now Attorneys-at-Law, Nigel Jones and Company, that I was informed by them and do verily believe that having not been served with the Demand letter pursuant to the loan agreement I am entitled to ask this Honourable Court to set aside the judgement on Admission as well as the Default Judgment on the basis that the Claimant breached the terms of the agreement by not serving the requisite demand letter.

12. Having regard to paragraph 10 and 11 above, my admission to all the stipulations contained in the claim was therefore an honest mistake because I was in a hurry to file the documents having not initially understood at the time I was served how time sensitive the documents were and this affected my ability to properly read and understood the seriousness of the entire court process and the need for my Defence to fully encapsulate the basis of my denial of specific allegations made.

13. Further, there are other equipment which I did not mention in the Defence but which the Claimant had seized and also not applied the proceeds to the alleged debt. I did not include these because as explained at paragraph 10, I honestly believed it was an issue that could be rectified by going directly to the Claimant bank's head office and the Defence was hurriedly prepared.

14. Importantly, I honestly believe that the Claimant's Application should be denied because the Claimant has sold the Property at an undervalue and as such there are no monies owing to the Claimant. My Attorneys-at-Law, Nigel Jones and Company, has filed a Claim Form and Particulars of Claim on the basis of breach of duty by the Claimant to act in good faith and negligence. This Claim was filed on September 26, 2016 and served on said date. The relevant claim number being 2016CD00309.

[36] As I stated earlier the 1st Defendant does not have a real prospect of successfully arguing that the demand was not effectively served. My view is the same with regard to the suggestion that the guarantee discloses a past consideration. With regard to the 1st Defendant's assertion, that "double" and/or compound interest was charged, he has not provided the Court with evidence or authority to suggest that this is unconscionable or not in accordance with practice in the industry .In any event the contractual provisions, being primary obligations, are incapable of being declared penal. The analysis at paragraphs 28 and 30 above is equally apt.

Summary and Conclusion

[37] The 1st Defendant has not in either application demonstrated a defence with a real prospect of success. There is not in my view any basis to set aside judgment or to give permission to withdraw consent to judgment. I find, given the state of the law and the facts stated on affidavit, that in filing an admission the 1st Defendant was doing nothing more or less than he might reasonably have done even had he received legal advice on the merits.

[38] The words of Moor-Bick J in **International Finance Corporation v Ute Africa Sprl [2001] All ER (D)** are appropriate, he opined that (para8):

"A person who holds a regular judgment even a default judgment has something of value and in order to avoid injustice, he should not be deprived of it without good reason."

[39] The 1st Defendant's claim relating to the alleged undervalue of the property sold by the Claimant is Claim No. 2016 CD 0039. For the reasons stated in paragraph 23 above the execution of judgment in the Claims now before me will be stayed pending the determination of that matter. The court can make orders of its own volition particularly where, as in this case, the litigant is unrepresented. **Rule 42.13** states;

" A judgment debtor may apply to the court to stay the execution or other relief on the grounds of-

(a) Matters which have occurred since the date of the judgment or order; or

(b) Facts which arose too late to be put before the court at trial, and the court thinks just to grant such relief, upon terms, as it thinks just.”

[40] I therefore make the following orders;

CLAIM NO. 2011 CD 00080

1. The 1st Defendant's Application is dismissed.
2. Costs to the Claimant to be agreed or taxed
3. Execution of judgment stayed until the determination of Claim No. 2016 CD 0039 or further Order of the Court.
4. Application for charging order to be made final is to be listed for hearing at the same time and before the same Judge hearing the Case Management Conference in Claim No. 2016 CD 0039

CLAIM NO. 2011 CD 00086

1. The 1st Defendant's Application is dismissed.
2. Costs to the Claimant to be agreed or taxed
3. Execution of judgment stayed until the determination of Claim No. 2016 CD 0039 or further Order of the Court.
4. Application for charging order to be made final is to be listed for hearing at the same time and before the same Judge hearing the Case Management Conference in Claim No. 2016 CD 0039.

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David Batts
Puisne Judge