[2018] JMCC Comm 43

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

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2016 CD 00225**

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|---|---|---|
| **BETWEEN** | **ALLIANCE FINANCE LIMITED** | **CLAIMANT** |
| **AND** | **CAPITAL SOLUTIONS LIMITED** | **1ST DEFENDANT** |
| **AND** | **MARK ANDERSON JONES** | **2ND DEFENDANT** |

**IN CHAMBERS**

**Conrad George and Andre` Sheckleford instructed by Hart Muirhead Fatta for the Claimant**

**Christopher Dunkley instructed by Ballentyne Beswick & Company for the 1st Defendant**

**HEARD: 10 July and 20 December 2018**

**CIVIL PRACTICE AND PROCEDURE – APPLICATION FOR SUMMARY JUDGMENT – DEBT OWED BY ONE PARTY TO ANOTHER – ATTEMPT BY DEBTOR TO ASSIGN DEBT – ASSIGNMENT INEFFECTIVE – DECLARATION OF TRUST-TRUSTEE REFUSING TO BRING CLAIM AGAINST HIS DEBTORS – BENEFICIARY OF THE TRUST BRINGING CLAIM AGAINST THIRD PARTY DEBTOR – WHETHER THERE EXIST ANY BASIS FOR SUMMARY JUDGMENT – CIVIL PROCEDURE RULES 2002, PART 15, RULE 15.2**

**EDWARDS, J**

**Background to this application**

**[1]** This is an application for summary judgment. It is brought by the claimant Alliance Finance Limited (Alliance) which filed claim against Capital Solutions Limited

(CapSol) seeking to recover sums, Alliance claims, is due to it under a trust. Alliance says this trust was declared in its favour by Mr Mark Jones (Mr Jones), a former director and shareholder of CapSol. Alliance also claims that Mr Jones borrowed several sums of money from it and failed to repay. Alliance further claims that CapSol holds monies on trust for Mr Jones, partly from sums it received in a judgment against an entity known as Black Brothers Limited, which CapSol sued on behalf of its investor clients, as well as other funds. Alliance sued Mr Jones in a separate claim 2016 CD 00225 and had judgment on admission entered against Mr Jones for sums amounting to US$182,153.73 and J$24,000.00.

**[2]** Alliance claimed to have lent to Mr Jones sums on 29 July 2014, 16 September 2014 and 26 September 2014, on the basis (according to Mr Peter Chin a director of Alliance) that Mr Jones was entitled to monies to his credit due to him from CapSol out of the Black Brothers Limited judgment sums. Those loans to Mr Jones, it claims, were evidenced by three promissory notes for US$600,000.00, US$150,000.00 and US$330,000.00, at an interest rate of 9.5%. Together with interest, Alliance claims to be owed over US$1,200,000.00 by Mr Jones, with interest accruing at a daily rate.

**[3]** No monies were repaid to Alliance by Mr Jones, however, instead Mr Jones attempted to assign to Alliance, the debt, he says, is owed to him by CapSol. That attempt at an assignment failed and Alliance has determined that Mr Jones, in his affidavit before this court, has now made a declaration of trust in its favour. Alliance's claim against CapSol is to recover those sums, it says, CapSol holds on behalf of Mr Jones, and to which, by virtue of this trust, it is now beneficially entitled. The claim brought by Alliance has been amended on several occasions and is now as formulated in its Re-Re-Amended Claim and Re-Re-Amended Particulars of Claim both filed 16 January 2017. The Re-Re-Amended Claim seeks the following:

1) "An order directing the 1st defendant to pay directly to the Claimant One Million Two Hundred Thousand United State(s) Dollars (US$1,200,000);

2) Restitution; alternatively

3) A declaration that the 2nd Defendant holds on trust for the Claimant the right to recover from the 1st Defendant the sum of US$713,000 and the sum of US$600,000, alternatively a chose in action in the said sums;

4) An order tracing in the hands of the 1st Defendant the said sums the subject of the trust obligation of the 2nd Defendant;

5) Any further or other relief as this Honourable Court should deem just;

6) Costs.

**[4]** CapSol has denied the claim and has refused to pay. Instead it filed a counterclaim seeking judgment and damages in its favour based on allegations of collusion and conspiracy between Alliance and Mr Jones, against CapSol.

**[5]** Alliance has now brought this application for summary judgment on the claim against CapSol and on the counterclaim brought by CapSol. Although Mr Jones is a named party in the suit, he is now an involuntary guest at a penal institution in the United States, and took no active part in these proceedings.

**[6]** Other than the fact that both Alliance and CapSol are both licensed financial institutions which had previously been engaged in an independent sub agency agreement for the provision of bill payment and remittance services, there is no financial relationship between them. The only basis for the claim filed by Alliance against CapSol, is the monies it alleged is due to Mr Jones from CapSol and which sums, Alliance further alleges, it is now the beneficiary of by virtue of the trust declared in its favour by Mr Jones.

**[7]** The full background as to how it came to be that Alliance is now suing CapSol for a debt owed to Alliance by Mr Jones, can be found in the judgment of this court in **Alliance v Capital Solutions** [2018] JMCC. Stated briefly, Alliance contends that Mr Jones owes it money and that CapSol currently has in its possession, monies which it is holding on behalf of Mr Jones. It avers that this money came to be in CapSol's possession on the basis that Mr Jones lent a company, Black Brothers Limited, and its principal Kenneth Black, the sum of US$400,000.00 on 15 March

2007 and US$230,000.00 on 29 March 2007. These monies, it is alleged, were transferred to CapSol by Mr Jones and CapSol, in turn, provided the money to Black Brothers Limited on terms set out in the promissory notes.

**[8]** The loans to Black Brothers Limited were not repaid and Alliance alleged that, on the advice of Mr. Christopher Dunkley, Mr Jones agreed for his loans to Black Brothers Limited to be included in a claim that was brought by CapSol against Black Brothers to recover sums due to its investor clients, who had also lent money to Black Brothers Limited. CapSol's claim against Black Brothers Limited was eventually determined by way of a consent order, dated 23 November 2011, wherein Black Brothers Limited and its principal Kenneth Black (who guaranteed the loans), agreed to pay the sum of US$4,000,000.00, with interest in full and final settlement of the claim. According to Robert Chin, another director of Alliance, the Black Brothers proceedings included claims for sums in the amount of US$660,914.41; and US$28,864.24, which it is averred, were the amounts then due on the loans made by Mr Jones to Black Brothers Limited. On 6 February 2015, by way of enforcement of the judgment debt, Black Brothers Limited and Kenneth Black, by consent order, agreed to sell properties located in Manchester, the proceed of which was to be used to settle the judgment debt owed to CapSol.

**[9]** CapSol, having been successful in its suit against Black Brothers Limited, is now in possession of the funds secured from that judgment. Alliance claims that Mr Jones is entitled to a share of those funds and that CapSol has pledged to Mr Jones the sum US$1,200,000.00. It also claims that Mr Jones has declared a trust of those sums, in its favour, to which it is now entitled. CapSol denies this claim but Alliance is averring that it has evidence in proof of that fact.

**[10]** In CapSol's Draft Defence and Counterclaim to Alliance's Re-Re-Amended Claim and Re-Re-Amended Particulars of Claim, it denied that it had ever received money from Mr Jones by way of a transfer of funds or otherwise. In respect of monies lent to Black Brothers Limited, it also denied that CapSol made any claim against Black Brothers Limited on behalf of Mr Jones. CapSol also contends that

it made several requests for information, seeking to ascertain all evidence in Alliance's possession, with regard to the claimed disbursement of loans to Mr Jones, however, it claims not to have received the requested information, to date. It pointed out further, that Mr Jones did not declare any financial obligation to Alliance, as he was obligated to do to the financial regulators, The Financial Service Commission (FSC). It also describes as fraudulent, the copy document which Alliance relies on as a "pledge" by CapSol of sums owed to Mr Jones and claims the document is unknown to the principals, directors, officers, management or staff of CapSol.

**[11]** In its counterclaim filed in this matter, CapSol avers that there is a conspiracy between Alliance and Mr Jones, intended to lay "specious" claims against CapSol and to cover Mr Jones' indebtedness to Alliance, which was deliberately undisclosed by both parties, in breach of Mr Jones 'fiduciary" obligations to CapSol and Alliance's obligation to give notice of the alleged assignment of interest by Mr Jones. CapSol further contends that allegations raised in the claim, as well as Alliance's tortuous interference in its contractual relations and its attempts to frustrate the sale of lands – the subject of the court's judgment – has caused it to suffer loss and damages as a licensed financial institution.

**The Application**

**[12]** In its amended notice of application for summary judgment, Alliance contends that CapSol has no reasonable prospect of successfully defending the claim brought against it and that it has no reasonable prospect of success on its counterclaim. Alliance grounds this assertion in the documentary evidence that it has placed before this court, namely;

a) The promissory notes which, it said, evidences a transaction between Mr Jones and Black Brothers Limited;

b) the details of the proceedings in the Black Brothers' claim which it says included sums referred to in the promissory notes above;

c) an alleged admission in writing (dated 9 April 2015) signed by Mrs Vanceta Ramsay on behalf of Mr Jones stating that CapSol owes Mr Jones US$1,200,000.00;

d) the admission in writing supplied by the said Mrs Vanceta Ramsay to Mr Jones admitting that CapSol owed Mr Jones US$129,676.87 and US$583,000.00, respectively;

e) the fact that Mr Jones has confirmed that he has declared himself a trustee for Alliance of all such sums and has submitted to judgment in favour of Alliance to this effect.

**[13]** Alliance contends that CapSol cannot overcome the impact of the documentary evidence and that its objections to the documents was a contrivance which could not successfully counter what the documents state. Alliance further contends that, although CapSol maintains that Mr Jones was merely an equity partner, the documents proves otherwise.

**[14]** The promissory notes on which Alliance relies are dated March 15 and March 28, 2007, in the sums of US$460,000.00 and US$230,000.00, respectively. They both have Black Brothers Limited as the promisor and CapSol as the promisee, and neither makes any reference to Mr Jones. However, Alliance alleges that they were both sent to Mr Jones with a memorandum from Mrs Vennecia Scott – the Vice President of Strategic Planning of CapSol – stating that, "We enclose the following documents regarding Black Brothers Ltd.'s outstanding debt for your adoption…"

**[15]** The Black Brothers proceedings in HCV 04075 of 2008/2014 CD 0031, is alleged to have included two separate amounts of $US$660,914.41 and US$28, 864.24 which Alliance claims were the amounts, then due, on the loans made by Mr Jones to Black Brothers.

**[16]** The letter allegedly signed by Mrs Vanceta Ramsay is a copy, the whereabouts of the original being undisclosed or unknown and has been declared a forgery by CapSol. Although Alliance has declared it to be a "pledge" from CapSol, it is merely a letter addressed "To Whom It May Concern" and confirms that Mr Jones is a client of CapSol since 2008 and that he has investment funds totalling

approximately US$1,200,000 which will become available to him upon liquidation of a judgment order to CapSol. It also encourages any courtesies to extend to Mr Jones.

**[17]** The admission referred to at (d) above is a list of client payables on which Mr Jones name appears with figures against his name, to wit, USD$129,676.87 and USD$583,000.00/BB notes. BB notes is said to be a reference to Black Brothers notes.

**[18]** CapSol has strenuously opposed the grant of summary judgment in Alliance's favour, on the basis, *inter alia*, that it holds no funds on behalf of Mr Jones and that Alliance has not been transparent in its dealings with Mr Jones, evidenced by what it says, is its failure to grant the Request for Information which would assist this court in determining whether a loan existed between Mr Jones and Alliance.

**The applicant's submissions**

**[19]** The submissions by counsel Mr George, on behalf of Alliance, may be summarised as follows:

1. Alliance's claim against CapSol arises from its right to bring a derivative action as a beneficiary of a trust, (in this case Alliance) the trustee being unable or unwilling to bring the action himself (in this case Mr Jones).

2. Alliance relies on the principle of law that a party to a contract can declare himself/herself as trustee of his/her entitlements under a contract. This assertion is supported by the principles enunciated in **Vandepitte v Preferred Accident Insurance Corporation of New York** [1933] AC 70.

3. Alliance's claim demonstrates that Mr Jones is entitled to monies from CapSol, this is evidenced by the affidavit of Mr Peter Chin – a director of Alliance - filed on 29 August 2016, the affidavit of Andrea Walters-Isaacs filed on 26 October 2016 and the affidavit of Mr Jones dated 1st December 2016.

4. Alliance's claim demonstrates that monies are owed from Mr Jones to Alliance. This is evidenced by the affidavit of Mr Peter Chin filed 29 August 2016, and its claim also demonstrates that

Mr Jones has declared a trust in favour of Alliance and in his capacity as trustee he has failed to take action against CapSol.

5. Mr Jones' entitlement is established by way of the following documentations –

    a. Promissory notes between CapSol and Black Brothers Limited, supported by a memorandum from Ms Vennecia Scott – the Vice President of Strategic Planning of CapSol – to Mr Jones which states the following, "We enclose the following documents regarding Black Brothers Inc. Ltd.'s outstanding debt for your adoption…"

    b. A list generated by Mrs Vanceta Ramsey headed client payables and has Mr Jones listed in the amount of US$129,676.87 and US$583,000.00, with the notation "Mark Jones/BB notes" beside the latter figure.

    c. A letter dated 9 April 2015 on Capital Solutions Letter head acknowledging a debt of US$1,200,000.00 from Capital Solutions to Mr Jones from the Black Brothers claim.

6. A party to a contract can declare himself as trustee of his entitlements under a contract. An *inter vivos* trust regarding personalty does not require writing or other formalities and that the relevant consideration is whether, it is more likely than not, that there was an intention to create a trust; furthermore, an entitlement under a contract is a chose in action capable of forming trust property.

7. Mr Jones, in his Affidavit evidence, has stated his intention to create a trust in relation to his entitlements to monies due to him from CapSol, confirming that he has parted with all beneficial interest in favour of Alliance.

**The respondent's submissions**

**[20]** The submissions by Mr Dunkley on behalf of CapSol, may be summarized as follows:

1. Summary judgment ought only to be granted in clear cases where it is patent that there is no real prospect of success in either the bringing or defending of a claim. The test of a good arguable case

is lower than the test for a real prospect of success; citing the case of **Swain v Hillman** [2001] 1 All ER 92.

2. Alliance is still enmeshed in trying to establish that it has at least a good arguable case of a legal proprietary right enforceable in law or equity in relation to funds it claim is being held by CapSol on Mr Jones' behalf.

3. In its instant application, Alliance is still relying on the same material which failed to secure either of its *inter partes* application for a mareva injunction before this court as well as its subsequent applications before the Court of Appeal.

4. As per the summary judgment application on the counterclaim, the affidavit of Mr Robert Chin filed 7 October 2016 admits that Alliance was fully aware that Mr Jones withheld disclosure of the indebtedness from CapSol and its regulators.

5. Both Messrs Peter and Robert Chin deponed to affidavits asserting that Mr Jones was in default of their alleged loan arrangement and that he assigned his interest to CapSol. The claimant has revealed its knowledge that it was a mandatory requirement for Mr Jones to inform the regulators in his renewal application for his *fit and proper status,* that his loan facility was in default and the consequences of that failure to so disclose.

6. They both also deponed to Alliance's knowledge of a letter dated 9 April 2015 purporting to be a pledge of funds by CapSol to Mr Jones. That they were assured by an unnamed attorney from whom they received this copy letter, that the original of the said letter had been misplaced, but yet no effort has been made to contact the financial institution supposedly holding its borrower's funds or to reaffirm those holdings at its institution or to have the institution reissue a replacement of the misplaced document. Alliance's inaction speaks volumes to the bona fides of its dealings with Mr Jones with regard to the document, especially in circumstances where no evidence has been brought by either of them, to discharge the assertion of fraud against CapSol.

7. The affidavit of Mr Robert Chin dated 7 October 2016, on which Alliance relies, evidences the fact that it conspired with Mr Jones to obtain several items of CapSol's proprietary information and confidential information of its clients, which was thereafter deliberately, wilfully and recklessly disclosed in these public proceedings, even though it was known that these public proceedings would amount to a breach of the fiduciary duties of

the confidentiality owed by CapSol and Mr Jones to their clients, in keeping with their licences from its regulators.

8. Alliance has failed to answer the several Requests for Information brought by CapSol, as such it is questionable whether Alliance loaned any money to Mr Jones.

9. CapSol by way of a default judgment was successful in its Ancillary Claim against Mr Jones, as such, by virtue of the special provisions of rule 18.11 (2) of the Civil Procedure Rules, Mr. Jones is deemed to have admitted to all particulars of conspiracy, as was averred to in the claim.

**The issues to be determined by the court**

**[21]** The main issues to be resolved by this court may be stated as follows:-

1. Whether the evidence presented to this court proves, indisputably, that CapSol holds funds for the benefit of Mark Jones;

2. whether the evidence presented to this court proves, indisputably, that Mark Jones has declared a trust in favour of Alliance;

3. whether Alliance is entitled by law to recover any funds owed to it by Mark Jones by way of a derivative action against CapSol; if so

4. whether CapSol has any real prospect of successfully defending such a claim; and

5. whether CapSol has any real prospect of success on its counterclaim?

**[22]** If issues 1, 2 and 3 above are answered in the affirmative, then in the final analysis, this is a case that is amenable to summary judgment and Alliance would be entitled to the orders sought, subject only to whether CapSol has a defence with a real prospect of success. If issue 5 is answered in the affirmative, then there is no basis for granting Alliance's application for summary judgment on CapSol's counterclaim. The contrary also holds true, that is, if issue 1, 2 and 3 are answered in the negative, then this is a matter that must proceed to trial.

**The applicable test governing the grant of an order for summary judgment**

**[23]** Rule 15.2 of the Civil Procedure Rules 2002, as amended (the CPR), sets out the basis on which an order for summary judgment may be granted. This rule reads as follows –

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

**[24]** The dicta of Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91 has often times been cited as the authoritative statement when defining the expression "real prospect of success". At page 92 of his judgment he opined that –

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

**[25]** An equally instructive case is that of **International Finance Corp v Utexafrica Sprl** [2001] All ER (D) 101 (May). In that case his Lordship Moore-Bick considered the test for setting aside a default judgment which is equally applicable to the grant of a summary judgment. It was highlighted at paragraph 8 that –

> *"…to say that a case has a realistic prospect of success carries the suggestion that it is something better than merely arguable…"*
>
> *"…the expression 'realistic prospect of success'…means a case which carries a degree of conviction."*

**[26]** It should also be noted that when considering an application for summary judgment, the court must not embark on a mini trial. At page 95 of **Swain v Hillman** Lord Woolfe MR made the following observations –

*"Useful though the power is… it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial… it … does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."*

**[27]** In **Lyle v Lyle** Claim No. HCV 02246/2004, unreported, (judgment delivered May 10, 2005), Sinclair-Haynes J (as she then was) emphasized that summary judgment is inappropriate where there are important disputes of fact, and that accordingly on an application for summary judgment the claimant must satisfy the court of the following –

*(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.*

*(b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.*

*(c) There must be no real prospect of oral evidence affecting the court's assessment of the facts.*

(See **S v Gloucestershire County Council and L v Tower Hamlets London Borough Council** (2000) The Independent 24th March (CA).

**[28]** In **Eugenie Chin Lyn et al v Ludlow Reynolds** [2012] JMSC Civ 98 in assessing the principles to be applied on an application for summary judgment, Fraser J made the following comments at paragraphs 26 and 27 respectively-

*"26. …Cases involving complex issues of law and disputed facts are likely to be inappropriate for summary judgment (Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1). There are however occasions where, without embarking on a mini-trial, the court may have to consider evidence of some volume before it can be determined whether or not there is a real prospect of success (Miles v ITV Networks Ltd [2003] EWHC 3134(Ch), (Transcript)). In considering whether or not a case has a reasonable prospect of success the court should also consider whether the case may be supplemented or supported by evidence at trial (Royal Brompton Hospital NHS Trust v Hammond and others [2001] EWCA Civ 550).*

*27. The principles outlined in the previous paragraph were approved and applied by Kangaloo JA in Western United Credit Union Co-operative Society Ltd v Corrine Ammon (TT Civ App 103/2006) when he considered the English case of Toprise Fashion Ltd v Nik Nak Clothing [2009] EWHC 1333 which relied on Federal Republic of Nigeria v Santolina Investment Corp [2007] 437 CH. In the Federal Republic of Nigeria case it was stated that:*

*(iii) In reaching its conclusion the court must not conduct a mini trial…*

*(iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents…*

*(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence which can reasonably be expected to be available at trial…"*

**Discussion and analysis**

**Issue 1 – Whether the evidence presented to this court proves indisputably that CapSol holds funds for the benefit of Mark Jones**

**[29]** Alliance claims that CapSol owes money to Mr Jones, CapSol has refuted that claim and is also quite sceptical of Alliance's claim that it lent Mr Jones any money. Counsel for Alliance, Mr George, in his written submissions, in a bid to persuade this court of Mr Jones' entitlement in respect of monies being held by CapSol, commended three documents to this court. The first of those documents were promissory notes between CapSol and Black Brothers Limited. These were attached to a letter dated 29 April 2010 from Mrs Vennecia Scott, CapSol's Vice President of Strategic Planning. This letter was addressed to Mr Jones and stated that the promissory notes attached were for Mr Jones' adoption.

**[30]** The second document was a list generated by the Chief Executive Officer of CapSol, Mrs Vanceta Ramsey headed 'Clients Payables'. This list contained references to two amounts which Alliance claims is monies being admitted as due to Mr Jones by CapSol, in the amount of US$129,676.87 and US$583,000.00. The

notation “BB notes” was written beside the latter figure and as said earlier, there is evidence that “BB notes” means “Black Brothers Notes”.

**[31]** The third document is a letter dated 9 April 2015 on CapSol’s letterhead. This letter is supposedly written by Mrs Vanceta Ramsey and is captioned “To Whom It May Concern”. It states that Mr Jones has investment funds totalling approximately US$1,200,000.00 which becomes available to him upon the liquidation of a judgment order issued by the Courts of Jamaica in 2011 to CapSol. The letter went on to further state that the judgment is now being liquidated under a Court Order dated February 2015 for the sale of lands to settle the debt owed to CapSol.

**[32]** Mrs Vanceta Ramsay, in her affidavit filed 1 November 2016, sought to explain the true nature of the promissory notes which were attached to Mrs Vennecia Scott’s letter dated 29 April 2010. She stated that in 2009 CapSol got valuable liquidity support from Mr Jones in the amount of US$600,000.00, for an equity stake in the company and that the regulators protracted in declaring Mr Jones a fit and proper person – which was a pre-requisite to becoming a shareholder of a regulated entity. Mrs Vanceta Ramsay stated that for this reason, Mr Jones requested that CapSol proffer to him the Black Brothers promissory notes, as a partial security for his equity investment in 2009, until he was eligible to hold shares. It is Mrs Vanceta Ramsay’s evidence that CapSol acceded to this request and that Mr Jones was thereafter, approved in September of 2011. If this is true, it would mean (apparently) that the debt secured by the promissory notes would have been extinguished after Mr Jones became an official shareholder in CapSol. However, according to counsel for Alliance and on the affidavit of Mr Peter Chin, Mr Jones only received a 25% shareholding in CapSol as opposed to an agreed 85%, therefore some of the remaining sums from the US$600,000.00, they say, must be debt.

**[33]** Alliance, on the one hand, is saying that Mr Jones invested in Black Brothers Limited, thereby rendering him a beneficiary of CapSol’s successful claim against Black Brothers Limited. On the other hand, CapSol is contending that it did not

invest in Black Brothers Limited on behalf of Mr Jones. It claims that the promissory notes which do not mention Mr Jones in their recitals but which were attached to the letter signed by Mrs Vennecia Scott for Mr Jones' adoption, were merely part of a temporary scheme to provide security for Mr Jones' equity investment in CapSol, pending the Financial Service Commission declaring him eligible to be a shareholder. After his approval as a fit and proper person for equity in CapSol, Mrs Vanceta Ramsay claims CapSol negotiated with Mr Jones and settled on his investment being worth a 25 % stake in CapSol, with a USD$100,000.00 "clawback". Mr Jones and Alliance categorical denies this to be true.

**[34]** CapSol is categorically denying that Mr Jones is entitled to a portion of the judgment sums it obtained from Black Brothers Limited and, therefore, neither the promissory notes nor the letter from Mrs Vennecia Scott, indisputably proves Mr Jones alleged entitlement. CapSol maintains that the intention behind this letter must be tested at trial.

**[35]** Both parties have provided unrelated reasons for Mrs Vennecia Scott's letter dated 29 April 2010. This fact has to be considered against the undisputed fact that the promissory notes do not make any reference to Mr Jones, therefore, this evidence taken at the highest point, is insufficient for this court to definitively conclude that these promissory notes evidenced a loan to Black Brothers Limited by Mr Jones. Taken together, with the different explanations given by both sides, it does not prove indisputably the entitlement claimed by Mr Jones and CapSol. The evidence is such that it must be tested at trial by way of the vehicle of cross examination.

**[36]** With regard to the list generated by Mrs Vanceta Ramsey headed "Client Payables", Mr Dunkley, in his oral submissions, asserted that Alliance's assertion that the sums appearing adjacent to Mr Jones' name was evidence of an acknowledgment by CapSol that they held funds on Mr Jones' behalf, is an incorrect assertion. Counsel relied on the explanation provided by Mrs Vanceta Ramsay, in her affidavit filed 1 November 2016. At paragraphs 12 to 14 Mrs Ramsay says the following –

*''12. …I will only say that the spreadsheet was prepared by management to assist in our board's deliberations in anticipation of the proceeds of the Black Brother's Judgment.*

*13. The 2nd Defendant's notation on the spreadsheet was at his request, to liquidate his equity from the recovery of the judgment, because equity interests otherwise rank last in any distribution of a company's assets.*

*14. Although the 2nd Defendant was never a Client participant in the Black Brothers facility, the 1st Defendant was able to accommodate his request based on an additional award of US$550,000.00 to the 1st Defendant by Batts J. in 2015, by consent, as liquidated damages."*

**[37]** Truthfully, I am not entirely sure that this explanation makes much sense. Although CapSol maintains that Mr Jones was seeking to exit the company, I am not entirely sure this was a legitimate way to do so. It sounds to me as if Mr Jones and CapSol, if Mrs Vanceta Ramsay is to be believed, were in an agreement to defraud creditors by placing an equity investor higher in the priority rankings than he legally is entitled to be. I am entirely sure that this is not a scheme that could ever have the sanction of the courts. Not surprisingly, counsel for Alliance viewed this explanation with more than a jaundiced eye. Counsel for Alliance took the view that it was extraordinary for a financial institution to create such a "sham" to protect an equity investor. Counsel was also of the view that CapSol could not rely on its claim of a "sham" arrangement to discredit a document created by a financial institution.

**[38]** However, these averments by both parties are insufficient for this court to declare that Mr Jones' has a prima facie entitlement to a portion of the proceeds from the Black Brothers Limited's judgment sum. I also take into account the fact that Mr Jones was never listed with the FSC, by CapSol, as a creditor for that amount and that Mr Jones himself did not list Alliance as a creditor in his sworn declaration to the FSC. Mrs Ramsay also claimed that the USD$550,000.00 was never paid by Black Brothers Limited so the scheme with Mr Jones was never carried through.

**[39]** With respect to the copy letter dated 9 April 2015, on CapSol's letterhead, Mr Dunkley submitted that this letter is fraudulent. As stated earlier above, Alliance claims that it is a "pledge" of the judgment sums in the amount of USD$1,200,000.00 from CapSol to Mr Jones. Counsel made much of the fact that despite CapSol's assertions of fraud, Alliance has not made any attempt to negative these assertions, neither have they taken any steps to present an original copy of the letter.

**[40]** This document is a copy and there is no evidence as to the whereabouts of the original. In any event, interestingly, the sums in this letter does not match the sums in the list marked "BB notes". Mrs Vanceta Ramsay, in her affidavit evidence denies that she wrote or signed this letter and claims she had never seen it before Alliance presented the copy of it.

**[41]** Of equal concern to me also, at this stage, is the fact that the figures put out by Alliance in the evidence does not match with its claim of monies held in trust, which is USD$1,313,000.00. The figure to which it claimed entitlement in its caveat lodged in 2016 against the title of the property in the Black Brothers claim was USD$750,000.00. Its original loan to Mr Jones, based on the three promissory notes, was just over USD$1,000,000.00. The two separate sums which Alliance said formed part of the proceedings in the Black Brothers claim and which were due to Mr Jones (USD$660,914.41 and USD$28,864.24), does not match the sums in the client payables from CapSol (USD$583,000.00 marked BB notes plus, a separate sum of USD$129,676.87); which in turn does not match the sum in the promissory notes from Black Brothers Limited (USD$460,000.00 and USD$ 23,000.00), nor the sum in the "To Whom It May Concern" 'pledge' letter of USD$1,200,000.00.

**[42]** Alliance's claim seems to be largely based on the sums in the letter of 'pledge' of USD$1,200,000.00, (thus its claim to be entitled to be paid directly by CapSol, that precise figure) which seem to have no actual factual support. At its highest, from the evidence, the Black Brothers judgment sums which would be due to Mr Jones,

if Alliance's assertions to that effect is accepted, is a little less than USD$713,000.00. There is no evidence of where the remainder, to make up the total of USD$1,200,000.00 would have been derived from. It would be mere speculation to say, as Alliance seems to be asking this court to say, that it comes from the USD$600,000.00 transferred to CapSol as an equity investment. In any event, Mr Jones, in his second affidavit filed 5 December 2016, asserts that his equity investment was converted to a 25% share in CapSol, when it revalued the company and effectively diluted the shares, so that instead of the USD$600,000.00 buying him an 85% share, it only bought him a 20% share, negotiated to 25%. No debt therefore, arises out of that sum, contrary to Alliance's speculation in that regard. It is difficult to see at this stage, therefore, how Alliance can be successful in its claim for a declaration of trust of USD$600,000.00.

**[43]** CapSol has indicated that its account listing to the FSC reflect USD$29,676.87 and USD$10,000.00 held on behalf of Mr Jones. These, Mr Jones claims, are his personal account balances and a short term loan to CapSol to settle some of its urgent invoices, respectively.

**[44]** Having perused the above documents, they have failed to satisfy the conditions outlined by Sinclair-Haynes J (as she then was) in **Lyle v Lyle.** All the substantial facts relevant to the claim by Alliance was not placed before the court and the facts as presented do not sufficiently lay an indisputable foundation. The documents as presented raises issues of credibility that requires the court to embark on a trial of the issues. There are several disputes as to facts which cannot be determined on documentary evidence only, which makes this claim unsuitable for summary judgment.

**[45]** The answer to issue one is therefore in the negative.

**Issue 2 – Whether the evidence presented to this court proves, indisputably, that Mark Jones has declared a trust in favour of Alliance**

**[46]** Counsel for Alliance submitted that an inter vivos trust regarding personalty does not require writing or other formalities. The relevant consideration is whether it is

more likely than not that there was an intention to create a trust. Counsel for Alliance said that Mr Jones was asked to declare himself a trustee of Alliance after the attempt at an assignment failed. It was stated that Mr Jones then declared a trust, in his affidavit, in favour of Alliance, in relation to his entitlements from Black Brothers Limited and all his entitlements from CapSol. Two affidavits were presented to this court which Alliance claimed provided evidence of the alleged trust that was declared by Mr Jones in its favour. These were the affidavit of Mr Jones, dated 1 December 2016 and filed 5 December 2016 and that of Attorney-at-Law Mrs. Andrea Walters-Isaacs, filed and dated 26 October 2016.

**[47]** Mr. Jones states the following at paragraph 5 to 7 of his Affidavit –

> *"5. I owed Alliance US$1.2 million.* ***I wished to pay it back, and offered to do so by giving to them my entitlement to receive from Capital Solutions a portion of the proceeds of the Claim [of] against Black Brothers. I agreed to assign my rights to them****. I did this as part of a free and open negotiation, and was fully knowledgeable of, and satisfied with the outcome.*
>
> *6. Alliance's lawyer drafted the document, and believing it to be an effective assignment, putting into effect our agreement. I signed it.*
>
> *7.* ***Having signed the document, I have understood the reality to be that I had parted with all my right to receive monies from Capital Solutions from the proceeds of sale of lots in Mandeville by Black Brothers, referred to in these proceedings. I further understood that the funds, when available, would pass directly from capital solutions to Alliance, through Attorneys, as agreed between the two parties. I would not be a party to this transaction in any way, having assigned to Alliance all rights or monies due to me from Capital Solutions until my Alliance liability is extinguished".*** *(Emphasis mine)*

**[48]** Mrs. Andrea Walters-Isaacs in her affidavit deposed that she was Mr Jones' Attorney. She states the following at paragraphs 2 (a) to 2(c) –

> *"(a) When he (Mark Anderson Jones) signed the Agreement with Alliance Finance Limited…his clear understanding was that he was giving to Alliance Finance Limited…all his right to receive monies from Capital Solutions…from*

*the proceeds of sale of lots in Mandeville by Black Brothers Limited, referred to in these proceedings.*

*(b) He understood that from that time onwards he held on trust for Alliance all choses in action, rights or monies due to Mark Jones from Capsol, until his liability to Alliance had been extinguished.*

*(c) For the avoidance of doubt, Mark Jones has asked me to confirm that he holds no beneficial interest in the monies due to him from Capsol – he has given all such interest to Alliance."*

**[49]** It is important to highlight that, in his oral submissions, Counsel appearing for Alliance outlined that Alliance previously relied on an assignment drafted by Alliance's in house counsel but though it was clear that Mr Jones' intention was to part with the money in favour of Alliance, the document which was drafted intending to effect an assignment, was ineffective. As a result, Mr Jones was asked to declare himself trustee of the money, and this, counsel stated, Mr Jones had done by way of his affidavit. Counsel further stated, that Mr Jones was asked to bring proceedings against CapSol for the money but that he refused to do so because of the circumstances of his incarceration in the United States. Counsel stated that it was on this basis that reliance was placed on the equitable principle that entitles a *cestui que trust* to bring a derivative action against a defendant.

**[50]** Given counsel's admission that the assignment that was being relied on was ineffective, resulting in Mr Jones' and Mrs Walters-Isaacs's making these affidavits, the question that becomes pertinent is whether the failure of the assignment would also result in the alleged trust failing? It is settled law, as was established in **Milroy v Lord** [1862] 4 De GF, that the owner of the chose in action may declare that he holds it in trust for another. However, in **Antrobus v Smith** [1805] 12 Ves 39, it was declared that an attempted assignment by transfer which fails as a transfer, cannot be treated as a declaration of trust. In this regard, there appears to be a ground on which the alleged trust created by Mr Jones, in so far as any attempt is made to rely on the failed assignment to ground the trust, may

fail and this would also relinquish any grounds on which Alliance may bring a derivative action.

**[51]** Special note must be made of counsel's submission that an *inter vivos* trust regarding personalty does not require writing or other formalities, the relevant consideration being whether, it is more likely than not, that there was an intention to create a trust. This is indeed true, however, the specific facts of a case must be taken into consideration. The ownership of the funds, which are the subject matter of the claim are heavily disputed and the very affidavit which Mr Jones has prepared seems to echo remnants of the failed assignment, rather than a separate declaration of a trust. Mr Jones speaks of his agreement to assign over his rights to his entitlements from CapSol and that he signed a document to that effect. He goes on to speak of his understanding of what his signing of the assignment document meant. He does not seem, to me at least, to have made any independent declaration of trust, outside of what he maintains he intended to do under the assignment. If one accepts the principle that a failed assignment cannot constitute a declaration of trust, then there would be no declaration of trust in favour of Alliance.

**[52]** In any event, there is a disparity between what Alliance is claiming that Mr Jones declared in trust and what he did in fact speak to in his affidavit. The affidavit clearly speaks to entitlement to funds from the Black Brothers judgment, it speaks to no other entitlement. Yet Alliance seems to be claiming that a trust had been created in its favour for all sums due to Mr Jones from CapSol. Alliance however, has failed to specifically identify what other sums Mr Jones is claiming is due to him from CapSol. The only other sum is that which was mentioned in the questioned "pledged' letter but Mr Jones made no mention of this in his affidavit of 'trust'. It seems to me therefore, that the question of whether a trust has been created and over what entitlement is very much in dispute and is best determined at a trial of all the issues.

**[53]** The answer to issue 2 is also in the negative.

**Issue 3 – Is the claimant entitled by law to recover any funds owed to it by the 2nd defendant by way of a derivative action against the 1st defendant?**

**[54]** A corollary to the question of whether there is a trust, is the question whether Alliance can bring a derivative action based on a trust. A derivative action is an exception to the general rule that the only person entitled to enforce a cause of action is the person recognized at law as being entitled to do so. In a derivative action someone other than the owner of the right of action is entitled or permitted by the court to pursue the cause of action, on behalf of the owner, standing in his shoes. The typical claimant in a derivative action is a beneficiary of a trust or estate, a shareholder in a company, individual partner in a partnership, member of a trade union or, where there is an insolvency situation, a creditor. A typical cause of action to be pursued by way of derivative action is a breach of fiduciary duty by an office holder of the entity, which the claimant is interested in or a tracing claim, but it can apply to an ordinary claim against a third party, which for some reason the entity cannot or has refused to pursue. Based on the aforementioned, it is pellucid that a derivative action is an example of a court of equity providing a remedy in order to prevent injustice.

**[55]** It has long been the practice that in cases relating to companies, a shareholder, is entitled to take action in respect of wrong doings committed against the company, this is the principle as was laid down in the case of **Foss v Harbottle** [1843] 2 Hare 461. However, as was outlined by Master of the Rolls Sir George Jessel in **Russell v Wakefield Water Works Company** [1875] LR 20 Eq 474.

> *"This is not a universal rule; that is, it is a rule subject to exceptions, and exceptions depend very much on the necessity of the case; that is the necessity for the court doing justice."*

**[56]** Like companies, the general rule in relation to partnerships and personal representatives is that it is for the partners or the personal representative of the deceased to take any action on behalf of the partnership but as averred above in the true spirit of equity, it is now the court's practice to allow partners or the

beneficiaries of trusts and estates to take action, in exceptional circumstances. It must be highlighted that in **William Brandt's Sons v Dunlop Rubber Co** [1905] AC 454, a case which considered the course that must be taken where, although the legal owner of a debt is not before the court, the facts are such that it is clear that a beneficiary has a vested interest in the chose in action. In that case Lord took the view that no action should be dismissed for want of parties.

**[57]** In that case the equitable assignee of a debt was permitted to enforce the debt and obtain a judgment, even though the legal owner of the debt was not before the court. In **Kapoor v National Westminster Bank Plc** [2011] EWCA Civ 1083, Etherton LJ in assessing several cases that dealt with this debate, re-affirmed Lord Macnagten's position in **William Brandt's Sons v Dunlop Rubber Co**, and at paragraph 30 he stated the following –

> *"The law does not, in my judgment, require a different conclusion. The current state of the authorities, binding on this court, is that an equitable assignee of debt is entitled in its own right and name to bring proceedings for the debt. The equitable assignee will usually be required to join the assignor to the proceedings in order to ensure that the debtor is not exposed to double recovery, but that is a purely procedural requirement and can be dispensed with by the Court. By contrast, the assignor cannot bring proceedings to recover the assigned debt in the assignor's own name for the assignor's own account. The assignor can sue as trustee for the assignee if the assignee agrees, and, in that event the claim must disclose the assignor's representative capacity. In any other case, the assignor must join the assignee, not because of a mere procedural rule but as a matter of substantive law in view of the insufficiency of the assignor's title. These points emerge clearly from the following authorities."*

**[58]** At paragraph 40 he went on to say –

> *"In terms of principle, I do not share the doubts and misgivings expressed by Mr Smith and the academic commentators whose opinions support his argument. There is no good reason of policy or principle for the courts to refuse to recognise the title of the undisputed equitable assignee of part of a debt, and every good reason for the courts to refuse to recognise the bare legal title of the assignor, except where the assignor is a trustee for the assignee and*

*expressly suing as such or the assignee joins in the proceedings. As the Court of Appeal in Three Rivers said, that approach is entirely consistent with section 49 of the Senior Courts Act 1981."*

**[59]** The discourse above, shows that a derivative action is reminiscent of a situation where someone who does not have a legal vested interest in the cause of action wants to bring the proceedings. It was also established that this type of action would only be maintained in exceptional circumstances. Traditional cases dating back to the 18th century listed insolvency and collusion as examples of these exceptional circumstances. As it relates to insolvency there are now other remedies, namely, appointment of a receiver. The practice is now that if another remedy is available, this will be a factor against permitting a derivative action. However, collusion remain a plausible ground for bringing a derivative action.

**[60]** In **Hayim v Citibank** [1987] AC 730 Lord Templeman at 748 F made the following remarks –

*"A beneficiary had no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate."*

**[61]** It is also a settled principle of law that a mere refusal by a trustee to sue does not generally entitle a beneficiary to sue in his own name. This principle was examined in the case of **Sharpe v San Paulo Rly Co** [1873] LR 8 Ch App 597. The facts of which are as follows, an engineer of a railway company prepared a specification of the works on a proposed railway, and certain contractors fixed prices to the several items in the specification, and offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day at a sum equal to the sum total above mentioned. If the contractors failed to proceed with the works the company might take possession and proceed with them; in which case a valuation should be made by the engineer or, if either party required it, by arbitration.

**[62]** The contract contained provisions making the certificate of the engineer conclusive between the parties; and it was provided that all accounts relating to the contract should be submitted to and settled by the engineer, and that his certificate for the ultimate balance should be final and conclusive. It was further provided that all questions, except such as were to be determined by the engineer, were to be referred to arbitration. The railway was completed and the engineer gave his final certificate as to the balance due to the contractor. The contractors had assigned their interest in the contract to trustees on trust for their creditors and for themselves, in certain proportions. The contractors filed a bill against the company, making claims on several grounds including that the trustee would not sue. Sir W.M. James, LJ in assessing a *Cestui Que Trust's* right to sue, said the following at page 610 –

> *"…that a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the cestui que trust was to file his bill against the trustee for the execution of the trust, or for the realization of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action, or the proper suit in this Court. That view I still adhere to, and I say it would be monstrous to hold that wherever there is a fund payable to trustees for the purpose of distribution amongst a great number of persons, every one of those persons could file a separate bill in equity, merely on the allegation that the trustees would not sue."*

**[63]** In relation to companies, the law is clear that there is no automatic right to bring a derivative action. The complainant must first seek leave to commence the action. Section 2012 of Jamaica's Companies Act read as follows –

> *"212. – (1) Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the Court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party."*

**[64]** There is no statutory authority that speaks to claims that are bought by the beneficiary to a trust, neither does the CPR provide any guidance in this regard. However, if it is that the normal practice is that even in cases where the derivative action is being brought by a beneficiary to a trust, the court's permission must be sought by way of an application, then, in this regard, Alliance would lack the *locus standi* to bring this claim.

**[65]** However, if the reverse is true and Alliance did not need to have the court's permission, Alliance will only succeed on its derivative action if it is able to prove that its claim has been brought in line with well-established principles. CapSol should have the opportunity at trial, to challenge Alliance's claim to a right to bring such an action.

**[66]** It is not possible at this stage, to determine issue 3, positively in the applicants favour, therefore, that issue must be determined, after full argument, at trial.

**Issue 4 – Whether CapSol has any real prospect of successfully defending such a claim**

**[67]** Mr Dunkley submitted that CapSol had sent several requests for information concerning the antecedents of the loan between Alliance and Mr Jones, however, to date none of them has been answered. This, Mr Dunkley says, has resulted in CapSol questioning whether Alliance really lent any sums to Mr Jones. This inaction by Alliance is but another shortcoming in this claim that precludes this court from making any summary determination in this case. This information must be placed before the court for full consideration along with the rest of the documentation. Based on the state of Alliance's claim against CapSol, it cannot be said that CapSol has no prospect of successfully defending the claim.

**Issue 5 – Whether CapSol has any real prospect of success on its counterclaim**

**[68]** Consideration has been given to the grounds as stated by Mr Sheckleford in his affidavit in support of this application for summary judgment on the counterclaim. Counsel raised the issue of whether the allegations of conspiracy and other

tortious claims were sufficiently particularised. Counsel also pointed to the fact that the necessary elements of the torts were not made out and in some cases not pleaded at all. Counsel also maintained that the draft defence and the counterclaim made claims which were not known to law and in some cases carried no pleadings to support such claims. Counsel concluded that as they stood, the averments showed no cause of action and no entitlement to damages from Alliance.

**[69]** Be that as it may, even if this were so, at this stage it is not necessarily fatal, as CapSol could always apply to amend its pleadings. Given the many shortcomings and failures that have been sighted in the evidence, as presented by Alliance, and the fact that CapSol has secured a default judgment against Mr Jones in this counterclaim, it cannot be said that CapSol has no real prospect of success in its counterclaim against Alliance.

**Disposition**

**[70]** The application for summary judgment on the claim and counterclaim brought by Alliance Finance Limited is denied, with costs to Capital Solutions Limited, to be taxed if not agreed.