[2018]JMCC Comm 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017 CD 00237

BETWEEN	**IAN LEVY**	**1ST CLAIMANT**
AND	**CECELIA LEVY**	**2ND CLAIMANT**
AND	**JULIE ATHERTON**	**1ST DEFENDANT**
AND	**RICHARD ATHERTON**	**2ND DEFENDANT**
AND	**REFRESHING IDEAS LLC**	**3RD DEFENDANT**

IN OPEN COURT

John G. Graham and Ms. Peta-Gaye Manderson instructed by John G. Graham & Company for the Claimant.

Lascine A. Wisdom-Barnett instructed by the Norman Manley Law School Legal Aid Clinic for the Defendants

Heard: January 14, 15, 16 and 23 March 2018

CONTRACT – DISPUTE AS TO NATURE AND VALIDITY OF CONTRACT – CONTRACT REFERRING TO LOAN/EQUITY – WHETHER MONIES ADVANCED WAS FOR A LOAN OR AN EQUITY INVESTMENT – WHETHER THE WRITTEN CONTRACT WAS SO AMBIGUOUS AS TO CALL INTO QUESTION THE CONTRA PROFERENTEM RULE – WHETHER CONTRACT IN BREACH OF THE MONEY LENDING ACT

CONTRACT – SUMS PAID UNDER AN EARLIER AGREEMENT – LATER AGREEMENT SUPERSEDING THE EARLIER AGREEMENT BUT INCORPORATING ITS TERMS – WHETHER CONSIDERATION PAST

EDWARDS, J

Background

[1] Mr Ian Levy and Mrs Cecelia Levy (the claimants),are husband and wife. They are also entrepreneurs. Mr Richard Atherton and Mrs Julia F Riettie-Atherton (the defendants) are also husband and wife. Mrs Atherton is, what I would call, a serial entrepreneur. The couples were more than passing acquaintances, although, how close a friendship existed between, them,surprisingly became a matter of contention in these proceedings.

[2] Mrs Atherton had the refreshing idea to bottle and sell water in environmentally friendly paper containers. To implement this idea she required a degree of capital, greater than that which she or Mr Atherton could procure from their own resources. So entered the claimants into the picture. The claimantswere asked by the defendantsto participate in the venture, which they agreed to do; the extent and nature of their participation seemingly being subject to their gaining further information as to the viability of the venture. In the result, the defendants entered into an agreement with the claimants in which the claimants promised to make sums of money available to the defendants, for the benefit of the company Refreshing Ideas LLC.

[3] Refreshing Ideas LLC (the company) is a limited liability company duly incorporated in the United States of America. Its principal office is located at 1673 Bunting Lane, Weston, Florida 33327 and its sole agent and member/manageris listed as Julia F Riettie-Atherton. The company was registered on the 27 June 2008. The ordinary business of the company included the selling of branded spring water called “h2O”. Mrs Atherton is the owner of the registered trademark “h2O”.

[4] Mrs Atherton waspresented with what appeared to be a lucrative business opportunity by Paramount Studios in the United States, which required capital projected at Two Million United States Dollars (US$2,000,000.00). The marketing requirements to take advantage of this opportunity meant that some capitaloutlay had to be sourced for the company, if it was to meet its financial obligations. As a

result the defendants approached Mr. Levy and invited him to participate in this investment opportunity. Mr Levy took the idea to his wife. Discussions ensued between the defendants and the claimants.Mrs Levy took Mrs Atherton to the United States and introduced her to a friend to whom Mrs Atherton could also make a proposal regarding the venture. The claimants were also informed by the defendants that the company had immediate cash needs and per the defendants' request, the sum of $20,000.00 was transferred to the company's account. This sum was transferred on the 7 February 2011, the same day Mrs Levy and Mrs Atherton went to the United States.Thus, a first sum of US$20,000.00 was advanced to the defendants at their request, as the first instalment under an agreement to advance US$50,000.00 to the account of the company.

[5] For reasons which also became the subject of dispute in these proceedings, the financial proposal made by Mrs Atherton to the persons in the United States to whom she was introduced by Mrs Levy, fell through. Incidentally, Mrs Atherton blames Mrs Levy for that catastrophe.

[6] The claimants, however, decided they were still interested in the venture, despite misgivings regarding its debt structure, but would participate only on certain terms. On the 15 February 2011, the claimants and the defendants signed awritten agreement. The agreement outlined that the sum of US$20,000.00, transferred to the account of the company on Monday 7 February 2011, constituted a loan facility and that this facility was for a period of 120 days from the date of the signing of the agreement. The interest rate was stated to be 10% per annum. There was also an option to convert the sums advanced into equity in the company, at a later date.

[7] This agreement also outlined that the sum of US$30,000.00 was to be transferred to the account of the company on 16 February 2011, and that this sum alsoconstituted a loan facility. This facility, according to the agreement, was for a period of 120 days from the date of the signing of the agreement, at an interest rate of 10% per annum also with the option for it to be converted to equity in the

company. In keeping with the terms of the agreement, this further sums of US$30,000.00was transferredto the account of the company on 16 February 2011.

[8] After further discussions, the claimants and the defendants entered into another written agreement dated 28 February 2011. This agreement was drafted essentially by Mrs Levy. In this agreement it was outlined that the sum of US$700,000.00 would be transferred to the company's account. The agreement set out a schedule for the payments.This sum of US$700,000.00 was to include the sum of US$50,000.00 which was transferred on 7 and 16 February 2011. Also, on the 28 February 2011, the claimants transferred the sum of US$150,000.00 to the account of the company.

[9] A term of this new agreement was that the amount transferred as at 28 February 2011, should be deemed a loan facility at an interest rate at 10% per annum for a period of 120 days from the date of the receipt of funds in the first instance, and that an option existed to convert the amount to equity in the company. This agreement also stated that it superseded all other written agreement between the parties.

[10] On the 28 March 2011, the claimants transferred the sum of US$50,000.00 to the company's account. Therefore, the total sum advanced to the defendants was US$250,000.00.

[11] By letter dated 26 April 2011, the claimants advised the defendants that they would not exercise their option to convert the amounts advanced to equity in the company, but that they had decided to limit the amount to be loaned to US$250,000.00. Between April 2011 and September 2011 the claimants requested that the defendants repay the sum of US$250,000.00 but the defendants requested time to do so. On or about 20 September 2011 the second defendant repaid the sum of US$2,083.33, which represented interest due on the initial sum of US$50,000.00which had been advanced to the defendants.

[12] The true intent and the validity of the agreement dated the 28 February 2011 is now in question, as the claimants contend that all the sums transferred by them to the company's account was a loanto the defendants, with an option to convert, which they declined to exercise. However, it is the defendants' contention that all the sums transferred, amounted to a capital investment by the claimants.

The Claim

[13] The claimants, by way of a claim form and particulars of claim filed on 24 April 2013, initiated a suit against the defendants and the company. The company was never served and effectively was not a party to these proceedings. All references to the defendants, is therefore, a reference to Mrs and Mr Atherton only. The claimants claimed for the return of the sum of US$250,000.00 plus interest of 10% per annum from 28 February 2011, pursuant to a loan contract. In their particulars of claim, the claimants outlined that, through their Attorneys-at-law, by letter dated the 1 February 2013, a formal demand for payment of the sums loaned was made but the defendants failed, neglected and/or refused to settle their debt, despite various promises to do so.

The Defence

[14] On the 27 June 2013, the defendantsfiled a defence to the claim and an ancillary claim. The thrust of their defence was that they did not enter into a loan agreement with the claimants, but that they entered into an equity agreement, by virtue of which the claimants were to acquire equity in the company. The defendants also maintained that the third defendant was not a party to the agreement and therefore was not an appropriate party to the action. The defendants further maintained that the said agreement was drafted by the claimants, and to the extent that there were any ambiguities or questions concerning its construction, pursuant to the contra proferentem rule, the ambiguities ought to be resolved in their favour.

[15] The defendants also averred that, in the alternative, should the agreement be held by the court to constitute a loan agreement, no monies would be owed to the

claimants, as section 8 of the Money Lending Act would apply and the claimants would be in breach of the Act. This section of the Money Lending Act stipulates that no money lending contract is enforceable unless there is a note or memorandum in writing, containing all the terms of the contract, made within seven days of the contract. The defendants deny that any such note or memorandum was made or signed by them or delivered or sent to them and therefore the contract was not enforceable.

[16] The defendants also relied on section 2(1) of the Money Lending Act. They contended that the 10% interest rate charged in the agreement, which concerns a loan in US currency, is not in line with market interest rates and, as such, is excessive, harsh and unconscionable and accordingly should be reopened. This section states, essentially, that where there is evidence that satisfies the court that the interest charged in respect of the sum lent is excessive or that the transaction is harsh or unconscionable, the court may reopen the transaction.

[17] Further and/or in the alternative, the defendants say that the amounts of US$20,000.00 and US$30,000.00 that were paid over to the company on the 7 February 2011 and the 16 February 2011, respectively, were made before the execution of the agreement dated 28 February 2011, and as such were past consideration and were therefore, not valuable consideration for which the claimants could successfully claim.

[18] Finally, the defendants highlighted that it was an expressed term of the agreement that –

> *"…any and all legal proceedings, if any, in relation to this agreement, be transacted through an arbitrator who will determine the place in which such proceeding will take place."*

By virtue of the above, they contend that all legal proceedings arising from the execution of the agreement should be determined via arbitration, and as such, they were of the view that this court had no jurisdiction to entertain or to hear and determine the claimants' claim.

The Ancillary Claim

[19] The defendants, on the same day of the filing of their defence also filed an ancillary claim against the claimants. In that ancillary claim the defendants claimed the following declaration and orders –

> *i. "A declaration that the rate of interest charged in the agreement was excessive, and the transaction were and each of them was harsh and unconscionable.*
>
> *ii. An order that the said transactions be reopened, and that an account may be taken between the parties.*
>
> *iii. An order that in the taking of such account, the Ancillary Claimants may be relieved from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges as the court may adjudge to be reasonable.*
>
> *iv. Such further or other relief as may be just."*

[20] The particulars were listed as follows:

> *(a) "The Ancillary Defendant failed to ensure that the interest rate was in line with market interest rates.*
>
> *(b) The Ancillary Defendants applied an interest rate which was not in-line with market value interest rates.*
>
> *(c) The Ancillary Defendants failed to apply an interest rate which was mindful of the fact that the alleged loan was in United States currency.*
>
> *(d) The Ancillary Defendants attempted to enforce the interest rate when Attachment "A" [the agreement dated 28th February 2011] was an equity agreement and was never meant to be a loan agreement to which interest rates could apply."*

Response to Defence and Ancillary Claim

[21] The claimants in their reply to the defence and ancillary claim, reiterated that the agreement dated 28 of February 2011 was a loan agreement, with an equity option to be taken up at some later date after an assessment of the project. The claimants

aver that they chose not to exercise that option, as per the agreement. They also outlined that although they drafted the agreement, it was done in consultation with, and with the full knowledge of the defendants. They also contended that the loan was needed immediately as the defendants were trying to meet a deadline for the publishing of an advertisement in respect of the company. This advertisement was to be published in a magazine in the United States. The claimants further averred that it was agreed by all the parties that, in light of the immediacy of the need for the loan, and the absence of the defendants' Attorney-at-Law from the jurisdiction, that an interim agreement would be signed to be reviewed at a later date by their Attorney-at-Law. On this basis they rejected the view that the contra proferentem rule applies in these circumstances.

[22] In response to the defendants' reliance on section 8(2) of the Money Laundering Act, the claimants asked the court to consider the said agreement as enforceable under section 8(3). This section reads:

> *"Notwithstanding anything in subsections 1 or 2 any court of competent jurisdiction may, upon application being made and if it considers it equitable to do so, declare the contract to be enforceable in the same manner and the same extent as if the requirements of subsections 1 and 2 had been complied with."*

[23] As regards the defendants' assertion that the interest rate charged was excessive, the claimants averred that the interest rate was arrived at after consultations with all parties herein and their financial institutions. It was highlighted that the base rate for US loans was 10.25% at First Global Bank and 10% at the Bank of Nova Scotia at the time. They also asserted that such loans could only be accessed from these institutions if they were highly collateralized but that the loan from the claimants was not collateralized.

[24] The claimants also asserted that no shares in the company were allotted and/or transferred to them and therefore all the funds transferred must be treated as a loan as per the agreement.

Issues

[25] The issues to be determined by the court, to my mind, are as follows:

i) whether the written agreement signed by the parties was for a loan or an equity investment in the company;

ii) if there was a loan agreement, was the agreement valid and enforceable;and

iii) whether the interest rate of 10% is excessive, harsh and unconscionable.

Submissions

[26] Counsel for the claimant Mr John Graham, pointed to the fact that the clear words of the agreement stated that the monies were to be treated as a loan with an option to convert to equity investment in the company. He cited **Arnold v Britton** [2015] UKSC 36, per Lord Neuberger.

[27] Counsel pointed to the fact that the two written agreements were drafted by the claimants but while accepting, in his words, that they were inelegantly drafted, he argued that there was no ambiguity in the clear words of the agreements. The clear words, he said, showed that the monies advanced constituted a loan, with an option to convert to equity at a particular time. Counsel pointed to the course of dealings between the parties which he said pointed to the fact that the defendants accepted that it was a loan.

[28] Counsel also submitted that the agreement was not governed by the Money Lending Act as the claimants were not in the business of lending money and section 13 of that Act would apply. Counsel pointed to the fact that the prescribedinterest rate for persons not in the business of lending money under the act was 25%. The interest rate charged by the claimants, he pointed out was well below that at 10%.

[29] Counsel for the defendants, Mrs Lascine Wisdom-Barnett submitted that at all times the defendants had treated the arrangement as an investment, as the

expectation was that the exposure of the company's product to the business opportunity with Paramount, would bring about a worthwhile result. Counsel argued that the claimants devoted money to the defendants' company with the expectation of much returns. Counsel further argued that in making this investment, the claimants' assumed the risk of their capital either appreciating or being wholly or partially lost, depending on the performance of the company. Counsel stated that the 20% equity was intended to equate to a share in the profit of the venture, and the quantum of the return on their investment was linked to the company's performance.

[30] Counsel submitted that the agreement of 28 February 2011 was an equity agreement, as it bore all the characteristics of such an agreement. She said the sum of US$250,000.00 was paid by the claimants to the defendants and the parties were proceeding on the basis that this was an investment. Counsel pointed to the evidence of the defendants that the claimants had agreed to provide US$700,000.00 in exchange for 20% equity in the company. According to counsel, the claimant's have not provided proof of payment of any sum but rely instead on email correspondence between the parties. The defendants have on the other hand, counsel pointed out, asserted that they have bank statements which show that initially the sums were stated as being for equity investment and only later was it stated that it was for a loan.

[31] Counsel also argued that the document dated 28 February 2011, was not intended to be the final agreement. She pointed to the defendants' claim that the document was drawn up to give the claimant's some form of assurance, as the company's lawyers were in the United States. It was, she said, expected that the claimant's lawyers would draft a more complete document.

[32] Counsel also argued that even if the document was enforceable, it was unclear and ambiguous because it referred throughout to loan/equity. Counsel cited several cases in support of her arguments. Counsel submitted that the draft agreement was ambiguous as to whether it was a loan or equity agreement and

therefore should be construed contra proferentem the maker. Counsel argued that this is more so, as the signing of the document was not contemporaneous with the events as they occurred, neither with what was stated orally by the parties nor with the instructions of the 1st claimant to the bank.

[33] Counsel also argued that the agreement was a breach of the Money Lending Act and therefore unenforceable and that the interest rate of ten percent was onerous and excessive, harsh and unconscionable.

Discussion and Analysis

Issue 1 – whether the written agreement signed by the parties was for a loan or an equity investment

[34] Although the defendants assert that the sums were an investment in return for equity stake in the company, it is important to note that the undisputed evidence is that no shares were allotted to the claimants and no share agreement or transfer document was ever drawn up in favour of the claimants. It is also important to state at the outset that the defendants are not disputing that the monies claimed by the claimants were received. The only issue between the parties, on that score, is the purpose for which the money was advanced to the defendants.

[35] With that said, I will begin where the parties financial relationship began, that is with the initial agreement for US$50,000.00. According to the evidence of the defendants, the initial US$50,000.00 was an investment. The defendants rely on the fact that they say the wire transfer instruction to Mr Levy's bank refers to the purpose of the transfer as an investment. I have not seen that wire transfer. However, I do not believe that, even if it exists, it can assist in determining the issue one way or the other. The defendants assert nevertheless, that even though this advance of funds to them was an investment, they were compelled to sign a contract that stated it was a loan.

[36] The claimant's evidence however, is that following an approach by Mrs Atherton, where the product and business idea was pitched to them, the claimants sent the first instalment of US$20,000.00 of a US$50,000 loan, at the request of the defendants, as a matter of urgency. The transfer of this initial sum as a matter of urgent need was not disputed. On 15 February 2011, the contract was signed stating that the US$20,000.00 was a loan along with the further US$30,000.00 advanced on the 16 February, with interest rate of 10% for a period of 120 days and with an option to convert the loan amount to a share equity in the company Refreshing Ideas LLC at such date. All the parties signed this agreement.

[37] I will look firstly at this contract which was entered into on the 15 February 2011. The relevant portions of that agreement states, *inter alia*, as follows:

> "BE IT AGREED THE FOLLOWING;
>
> THAT THE SUM OF TWENTY THOUSAND US DOLLARS I.E. (US $20,000.00) TRANSFERRED TO THE ACCOUNT OF REFRESHING IDEAS LLC ON MONDAY, FEBRUARY 7, 2011 CONSTITUTES A LOAN FACILITY. THAT THIS FACILITY BE FOR A PERIOD OF 120 DAYS FROM DATE OF SIGNING OF THIS AGREEMENT, AT AN INTEREST RATE OF 10% PER ANNUM IN THE FIRST INSTANCE, WITH AN OPTION TO BE CONVERTED TO EQUITY IN REFRESHING IDEAS LLC AT SUCH DATE.
>
> THAT A FURTHER THIRTY THOUSAND US DOLLARS I.E. (US$30,000.00) TO BE TRANSFERRED TO THE ACCOUNT OF REFRESHING IDEAS LLC ON WEDNESDAY, FEBRUARY 16, 2011, CONSTITUTES A LOAN FACILITY. THAT THIS FACILITY BE FOR A PERIOD OF 120 DAYS FROM DATE OF SIGNING OF THIS AGREEMENT, AT AN INTEREST RATE OF 10% PER ANNUM IN THE FIRST INSTANCE, WITH AN OPTION TO BE CONVERTED TO EQUITY IN REFRESHING IDEAS LLC. AT SUCH DATE."

[38] It is clear from this agreement that the parties agreed that US$50,000.00 would be advanced to the defendants as a loan at a rate of 10% per annum for 120 days, with an option to convert the sums to equity at the end of the 120 day period.There were other provisions in the agreement for security on the loan, any and all of which the agreement stated, were enforceable to secure payment of the

outstanding loan. The agreement was signed by all the parties on the 15 February 2011. The US$30,000.00 was duly paid out on the 16 February 2011, in accordance with the contract. The parties, therefore, agreed that the claimants would have 120 days to decide whether to convert the funds to an investment in the company.

[39] To my mind there is no ambiguity in this contract. It states exactly what the intention of the parties at the time of the contract was. A loan at a rate of 10% per annum for a period of 120 days from the date of signing, with an option to convert to equity after the 120 days had passed. The agreement was intended to confirm the loan amount which was paid prior to signing and the amount to be paid after the signing. I will say more on this aspect later when I come to deal with the defendant's defence of past consideration in issue 2.

[40] Following a meeting and discussions amongst the parties, this agreement was replaced by an agreement entered into by the parties on the 28 February 2011. That agreement entitled "Agreement on Loan/Equity Condition between Julie & Richard Atherton et al and Ian & Cecelia Levy dated the 28 February 2011" was also signed by all the parties. It is a much longer and more comprehensive agreement than the 15 February 2011 agreement and at paragraph 25 it states that the parties have agreed that "THIS AGREEMENT SUPERCEDES ANY PREVIOUS AGREEMENTS SIGNED BETWEEN JULIE & RICHARD ATHERTON ET AL REFRESHING IDEAS LLC AND IAN AND CECELIA LEVY." The 15 February 2011 contract is, therefore, no longer on the table and was not relied on by the claimants for the return of sums paid out under that contract.

[41] The intention of the parties therefore, was that the 15 February 2011 agreement, which I have already stated was clear and unambiguous, would be replaced by the 28 of February 2011, agreement. This agreement was signed by both the claimants and the defendants and as such, I am guided solely by the terms stated in the 28 February agreement. The defendants, in evidence at trial, acknowledged signing this agreement, but maintained that it was an equity agreement and not a

loan agreement. They maintained also, that in any event, the terms are ambiguous and therefore the contract should be interpreted in their favour.

[42] In that regard, I have considered all the authorities cited by both counsel, but I will refer to only a few in this judgment.The English case of **Arnold v Britton** [2015] UKSC 36, I found instructive. Lord Neuberger speaking in the Supreme Court, made the following observations at paragraph 15-20:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean",…And it does so by focussing on the meaning of the relevant words...in their documentary, factual and commercial context. That meaning has to be assessed in the light of:*
>
> *(i) the natural and ordinary meaning of the clause,*
>
> *(ii) any other relevant provisions of the lease,*
>
> *(iii) the overall purpose of the clause and the lease,*
>
> *(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and*
>
> *(v) commercial common sense, but*
>
> *(vi) disregarding subjective evidence of any party's intentions.*
>
> *[The] reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision.* ***Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract, and, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision... (Emphasis added)***

> *The mere fact that a contractual arrangement, if interpreted according to its language, has worked out badly, or even disastrously, for one of the parties is not reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made…*
>
> *...The purpose of interpretation is to identify what the parties have agreed, not what the court thinks they should have agreed."*

[43] In **NCB Insurance Company Limited v Claudette Gordon-McFarlane** [2014] JMCA 51 Phillips JA at paragraph 45, described as trite law, the principle that in the interpretation of any provision in a contract, words in the contract must be given their plain and ordinary meaning. The plain and ordinary meaning of the words used in the contract can only be displaced if they produce a commercial absurdity. In such an eventuality, the court may resort to the context, background and circumstances surrounding the making of the contract and any other provisions in it. See also **John Thompson and Janet Thompson v Goblin Hill Hotels** [2011] UKPC 8, also cited by Phillips JA.

[44] In Robert Flannigan "*Debt-Equity Distinction"* 26 B.F.L.R 451 Banking and Finance Law Review June 2011, the learned author makes a 'rudimentary distinction' between debt and equity where he stated that:

> *"Classic or prototypical equity investment involves contributing "permanent' capital that is at risk of loss in exchange for rights to participate in the control and residual gain of an undertaking. Classic debt, in contrast, is term capital that is advanced for a fixed return without rights to participate in the control of the undertaking. The elemental difference between these prototypes is that only the equity investment is linked contingently to the performance risk of the venture once past the floor risk of viability. Three main forms of risk participation are involved. First, those who advance equity assume the risk that their capital will appreciate or be wholly or partially lost as a result of the quality of performance. Those who advance debt retain the right to recover their original principal notwithstanding the vagaries of performance or situational stresses affecting the issuer. Secondly, equity contributors assume the risk of contingent returns… for classic debt, interest payments are not contingent on*

> *performance…Thirdly, equity contributors assume some power or ability (through rights of control) to participate in defining the risk associated with the undertaking. Debt providers do not possess positive control powers."*

[45] This distinction (and I am grateful to counsel for citing this article) is important to both sides. If the agreement is an equity agreement, then the defendants do not have to repay the claimants one red cent of the money they advanced, because the claimants would have assumed the risk of loss, having contributed permanent capital in exchange for a stake in the company. If it is a debt agreement, the claimants are entitled to repayment, all else being equal.

[46] To determine which it is, the court must look to the whole document and seek objectively to ascertain what the parties intended. If the words in the contract are clear as to their meaning, then that is the meaning which the court must ascribe to them, as representing what the parties intended. If the agreement admits of any ambiguities, then that ambiguity must be resolved by consideration of the genesis, aims and objectives of the agreement, choosing the meaning which makes the most commercial sense in context of the agreement and the surrounding circumstances. See the case of **Air Jamaica Limited v Worldwide Travel Service Ltd and others** (unreported) Suit No. CL A 004 of 1999 (judgment delivered on the 6 December 1999) per Orr J and the cases judicially referred to therein.

[47] What then did the parties to this contract agree to? In looking at the agreement, in order to ascertain the parties true intention, the starting point is paragraph 1 of the agreement which reads:

> "BE IT AGREED THE FOLLOWING:
>
> THAT THE SUM OF U.S SEVEN HUNDRED THOUSAND DOLLARS I.E. (U.S.$700,000.00) BE TRANSFERRED TO REFRESHING IDEAS LLC. AS A LOAN/EQUITY AS PER SCHEDULE STIPULATED BELOW AND DEPENDENT ON THE CONDITIONS OF SCHEDULED ASSESSMENTS OF REFRESHING IDEAS LLC. AS LISTED BELOW, BEING UNDERTAKEN AND AGREED UPON AS BEING SATISFACTORY BY IAN & CECELIA LEVY

(i) US$20,000	-	FEBRUARY 7, 2011
(ii) US$30,000	-	FEBRUARY 16, 2011
(iii) US$150,000	-	FEBRUARY 28, 2011
(iv) US$50,000	-	MARCH 31, 2011
(v) US$200,000	-	APRIL 29, 2011
(vi) US$250,000	-	MAY 31, 2011"

[48] Paragraph 1, therefore, would indicate to the reasonable man and does indicate to me, that the parties agreed that a total sum of US$700,000.00 would be transferred to the account of Refreshing Ideas LLC over a period, as outlined in the schedule of payments, as a loan or equity, based on certain conditions contained in the agreement. One of the conditions was that the claimants would undertake a scheduled assessment of the company.

[49] Paragraph 2 of the agreement states:

> "THAT ANY PART OF THE ABOVE SUM OF US$700,000 WHICH MAY CONSTITUTE A LOAN, UP TO THE AMOUNT OF $250,000 BE DEEMED FIRST AND PRECEDING ALL OTHER OUTSTANDING LOAN AMOUNTS, SAVE THOSE LISTED IN ITEM #13 TO BE PAID BY REFRESHING IDEAS LLC AND/OR JULIE & RICHARD ATHERTON AS PER LOAN STIPULATIONS LISTED IN THIS AGREEMENT."

[50] Paragraph 2 therefore indicates that of the $700,000 agreed to be loaned, (if the share option is not taken up) the parties agree that the sum of $250,000 is to be repaid to the claimants as first priority before any other obligations of the parties other than those owed to creditors listed at paragraph 13.

[51] Paragraph 3 states:

> *"That the above sum of U.S. Seven Hundred Thousand U.S. (sic)Dollars i.e. ($700,000.00) be deemed representative of a twenty percent i.e. (20%) share in the company Refreshing Ideas LLC., It'sbrand h20 and any and all products and brands thereof."*

This paragraph indicates that the parties agreed and intended that a 20% stake in the company should carry a nominal value of US$700,000 (if the equity option was exercised). When read with the rest of the agreement it is clear that this nominal value only becomes relevant if the claimants opted to treat the money paid over as a capital investment. Paragraph 5 of the agreement speaks to pre-emptive rights to the parties, if the share option was taken up by the claimants. In paragraph 6 it was agreed that as at the date of signing, the company and its trademark remained in the sole ownership of the defendants. In paragraph 12 the parties agreed that at the date of signing the defendants were the only shareholders, with the claimants "holding only an option to take up a 20% shareholding at a later date".

[52] The US$700,000 was, therefore, to be the price of the 20% share in the company only if the option to take up a share holding was exercised by the claimants, at or after the period of the loan had expired.

[53] It seems to me that if the claimants had intended and agreed that the sums were to be treated as an investment, it would hardly make commercial sense to include a clause that dictates that at the date of signing, the defendants had full ownership rights in the company and the trademark,that they were the only shareholders and that the claimants had only an option to take shares at a later date. Especially in light of the fact that the claimants had transferred US$150,000.00 to the defendants as at the date of signing.

[54] The following paragraphs when read with the others, clearly shows the parties intention at the signing of this agreement.

> *"14) That as at Monday, February 28, 2011 the total sum of $200,000.00 would have been transferred to Refreshing Ideas LLC as follows:*
>
> *US$20,000 wired February 7, 2011*
>
> *US$30,000 wired February 16, 2011*
>
> *US$150,000.00 wired February 28, 2011*

And that such amount as at February 28, 2011 be deemed a loan facility at an interest rate of 10% per annum for a period of 120 days from date of receipt of funds in the first instance with an option to be converted to equity in the amount of 5.72% shareholding in Refreshing Ideas LLC at a later date.

15) That an assessment of the viability of refreshing ideas LLC be conducted on March 25th2011, at which time,

(a). Either the outstanding figure of US $200,000 will remain as a loan at 10% interest payable as stipulated above with no further injections of funds

(b) OR the outstanding figure of $200,000 will remain as a loan on the conditions stipulated above, with a further injection of funds with an option to convert to equity.

(c) OR the outstanding figure of US$200,000 be converted to equity at an agreed shareholding of 5.72% of Refreshing Ideas LLC.

16) That subsequent to the equity clause being exercised for the abovementioned U.S. $200,000.00, A further transfer of U.S. $50,000.00 representing 1.43% shares will be made to Refreshing Ideas LLC. On March 31, 2011. The outstanding transferred funds at this date of U.S. $250,000.00 will remain as a loan at 10% interest, each transfer being payable 120 days from date of receipt of funds orbe converted to equity at an agreed shareholding of 7.15% of Refreshing Ideas LLC.

[55] The claimants have consistently maintained that the sums advanced and agreed to be advanced was a loan for a period of 120 days at 10% per annum, with an option to take up a total of 20% shareholding, approximate to the sums transferred, at a later date. It seems to me that a reading of the agreement fully supports their contention.

[56] Paragraphs 17 and 18 of the agreement deal with the payment schedule for the remaining sums to the total of the US$700,000.00. That figure would eventually, depending on what option the claimants exercised, represent either total investment of a 20% stake in the company or total loan, or a combination of both. Security for the loan sums were provided for in paragraphs 20 through to

paragraph 23. It provided for a pledge over the trademark, personal guarantees by the defendants, and a charge over the fixed and floating assets of the company.

[57] It became clear from the evidence at the time the agreement was signed, Mrs Atherton was the only shareholderthat of the companyand that Mr Atherton was not a shareholder, but there is no evidence that suggests that the claimants at this point were being treated as investors by the defendants. If the defendants averments are to be believed, the question that follows is, why did they make no effort to prepare share transfers representative of the nominal value of the investment made by the claimants? There is also no evidence of any share transfers having been prepared for the subsequent sums paid over after the signing of the contract. Certainly no explanation has been given by the defendants as to why this was not done, apart from saying it was to be done.

[58] Although the agreement prepared by Mrs Levy is void of the legalistic stylings of a trained Attorney-at-Law, the terms of the agreement are clear and unambiguous. The intentions of the signatories to the agreement is equally clear. They intended that the sums transferred to the company would stand as a loan for 120 days, with the option for the sums to be converted to equity at such date. This option to convert the sums to equity would only be exercised after an assessment of the viability of the company was carried out to the satisfaction of the claimants. It is clear that the conversion to equity was not mandatory but rather this was dependent on the findings arrived at after the assessment was done. Therefore, if the claimants were unsatisfied with the performance of the company during the period, they were at liberty to stop any further payments to the defendants, and refuse to exercise the option. They also had the option to continue with the loan agreement and inject further sums on the stipulated conditions, still with the option to convert to equity. They could also opt to treat each payment made as an equity investment.

[59] The terms of the contract were very specific. The claimants in fact seemed to have wished to cover every base.On the 28 March 2011, the claimants transferred a

further sum of US$50,000.00. On that date they still had the option per the agreement to treat that sum along with the scheduled payments already made as a loan on the stipulated conditions, with the option to convert to equity at the end of 120 days.

[60] It is clear from a reading of the entire agreement that the claimants intended the loan agreement to be subject to the exercise of an option to be treated as equity investors. Beyond that however, it is clear that they also intended the first US$250,000.00 to remain a loan within the first 120 days of the agreement.

[61] When challenged under cross-examination as to why she signed an agreement stating it was a loan, when she intended to agree to an equity arrangement, Mrs Atherton revealed that prior to signing the agreement, she asked for clarification regarding the use of the word 'loan'. She outlined that the explanation given did not relate to anything that was discussed. However, she failed to state what that explanation was. She recounted that she was told that the document was an interim document to 'protect' the claimants for the $20,000.00 they had already advanced without a written contract, until their Attorney, who was away returned. She further said that this was to 'protect them in case we were hit by a bus'. When questioned as to why she did not ask that the word 'loan' be struck out of the agreement, amended and initialled to reflect her intention, again she reiterated that the document was meant to be an interim document to protect the claimants.

[62] Mrs Atherton also made reference to paragraph 26 of the agreement where it was stated that it was subject to an overriding agreement to be drawn up by an attorney-at-law. She also said she considered the words in the agreement to be irrelevant as she was expecting another contract. In her estimation the contract was a "mere comfort document". Her position was that if the words of the contract were taken alone, the contract would mean what it says. However, she was of the view that it could not be "taken alone" as there were manydiscussions prior to the document and that it was not the only document which showed what was agreed. She maintained that this one document could not negate the other oral agreements and

supporting documentation.Unfortunately, apart from her mere assertions, no such other supporting documents were presented nor evidence given of these other agreements.

[63] In relation to the sums paid 28 February 2016, Mrs Atherton's evidence is that upon printing the bank statement for the company, she noted that when the sum of US$150,000.00 was paid, it was stated as being a loan from Mr Levy. She outlined that she believed that this was so because the funds were sent by Supreme Ventures. She said "it was so worded as the arrangement was with Ian and so for accountingreasons Ian would need to have to regularize the expenditure internally with his company". Despite Mrs Atherton's belief, I do not see how she can possibly give evidence as to why the statement was so worded.

[64] Although the court may not look at the subsequent conduct of the parties to interpret a written contract, none of the subsequent emails tendered into evidence, supported the defendants' contentions. The emails presented by the claimants to this court are instructive, in that they provide further evidence that the defendants – despite their assertions that the sums advanced were an investment – were cognisant that the sums advanced were in fact a loan. These emails highlight several promises by the defendants to repay the claimants. Mr Atherton was the author of an email dated 5 September 2011. In thatemail he expressly stated that:

> *"…We reiterated that we obviously knew that we had to repay the monies and promised to make every effort to do as soon as possible and that we were working hard to secure an investor, to put the company in a stronger financial position to be able to do so.*
>
> *However, unfortunately as stated in previous emails we are not in a position to repay any principle at this time and I said that I would try and pay at least the interest that you had highlighted on your email of 5 August being $2,083.33. We are unable to pay the now requested entire interest as per your email of 26 August for the reasons stated previously and above."*

[65] Interestingly, the claimants also presented a copy of a company cheque, dated 1 August 2011, paid to the claimants' bank Resource and Finance Co. Ltd for the

sum of $2083.33. This cheque appears to be signed by Mr Atherton and it is stated that the listed sum is for “interest payment”. In another email from the defendants, the claimantswere informed of a deal that should be concluded on 30 September 2012 and that they would be receiving Fifty Thousand Dollars from the proceeds. The claimants in one email set out a payment schedule in respect of interest due under the agreement in three tranches. The question that arises from the above is, if the defendants genuinely believed that the sums transferred by the claimants were for investment, why would they engage the claimants on several occasions in discussions promising to repay the loan?

[66] Mr Atherton, during his cross-examination, echoed the same sentiments as Mrs Atherton. When asked why he signed a document that spoke to a loan facility, when his position is that the sums advanced was an investment, his response was that in previous discussions, they always discussed equity, therefore, he trusted the claimants, based on the verbal discussions. When questioned by counsel as to whether it was the verbal discussions that mattered and not the written agreement, Mr Atherton declared that ‘trust’ was what mattered. He also claimed that “they” did not refuse to sign the agreement for a loan because “they” were already involved in the process, and, like Mrs. Atherton, he was of the view that it was just security for the claimants in case they got ‘hit by a bus’. He claimed also, that the signed document was superseded by the verbal agreements.

[67] Cumulatively, the explanations given by the defendants as to why they both signed a document that spoke to a loan agreement instead of an investment as they had previously contemplated, and which was allegedly previously discussed are, interesting, if unbelievable. Mrs Atherton by her own admission told this court that she started her first business at the age of 29, in fact, without prompting she voluntarily told this court that she is now 58 years old. She has owned and operated several retail stores over the course of her adult life. On her evidence, one of her stores lasted 10 years, another lasted 3 years and there was a third which also lasted 10 years. Without making reference to Refreshing Ideas LLC, Mrs Atherton would have been an entrepreneur for, at the very least, 23 years, as such, she

would be sufficiently familiar with running a business and contractual agreements would be a feature of her daily life. Therefore, undoubtedly, she would have, at the very least, a basic understanding of the legal ramifications of a written contract. Further to this, I have had the opportunity to examine Mrs Atherton's demeanour whilst she gave evidence and there is no denying the fact that she is an intelligent person. It is astounding that with the wealth of experience that she ought to possess, she could honestly believe that such a detailed agreement was a mere comfort document and that no reliance would have been placed on it, if in fact there was a verbal agreement that the sums given were for an investment. One would expect that a person with Mrs Atherton's business experience would have, at the very least, insisted that all reference to a loan be removed, even in a 'comfort document'.

[68] Mr Atherton stated that the signed document was superseded by a verbal agreement as to equity arrangements. If this is so, that verbal agreement would have to have been made after the written agreement was signed 28 February. No evidence was led of this verbal agreement, however. Although evidence was given of discussions between the parties prior to the signing of the 28 February agreement, I need only make reference again to paragraph 25 of the agreement which reads:

> *"Be it agreed that this agreement supersedes any previous agreements signed between Julie & Richard Atherton et al Refreshing Ideas LLC and Ian & Cecelia Levy."*

[69] If this agreement supersedes all previous signed agreement, it follows that, it must have been the intentionof the parties to the agreement that it should also supersede all previous verbal agreements. In any event, there was no evidence from the defendants as to when this verbal agreement that they are relying on, was made or its terms.

[70] The evidence, which I accept as true, is that the claimants became concerned about the indebtedness of the company which had not been disclosed to them

prior to the payment of the $20,000.00. Nevertheless, they agreed with the defendants to advance further sums, giving themselves the option of evaluating the business during an agreed period to see if they should lend any further sums or take an equity in the business. This is the explanation given by the claimants for the terms of the agreement of 28 February 2011. This is evidence of the factual background known to the parties at the date of the contract. See **Prenn v Simmonds** [1971] 3 All ER 237 HL at 241, for an explanation of when a court can take account of evidence of the surrounding circumstances or of the genesis and aim of the transaction.

[71] After the contract was signed and further monies were advanced, the evidence is that the defendants became inaccessible to the claimants and the claimant's discovered that false claims about the product had been made by the defendants to them. The claimants then decided not to exercise the option to invest and to limit their loan to $250,000.00. The defendants subsequently agreed to repay the money but failed to do so except for one payment of US$2,083.33 on the account of interest.

[72] I accept that on a true construction of the contract signed on 28 February 2011, it was a loan agreement with an option to convert to equity. I am satisfied from the evidence that this was the intention of all the parties when they signed the agreement and that the terms of the agreement, conforms to those intentions. I accept the evidence of the claimants as witnesses of truth. They both gave their evidence with open candour and a tinge of sadness and regret that it had all come to this. I reject the evidence of the defendants, both of whom struck me as being not entirely forthright with the court, especially in regard to their dealings with the claimants. Take for instance the simple issue of whether Mr Atherton was a shareholder in the company. He claimed in evidence that he was not but it is clear from the evidence that the claimants were led to believe that he was. Mrs Atherton said in evidence that he was an investor though the nature of his investment was not made clear. He also said he was the vice president of the company but could not recall if he was the chief operating officer, although he was signing emails

under that title. Mr Atherton also gave evidence that he was a building and civil engineer but later admitted that he had no formal qualifications in that profession.

[73] I have scrutinized their evidence with great care. Mrs Atherton, though fairly charming, was highly evasive in certain parts of her evidence and Mr Atherton stuck largely to his script. Their denials in the witness box when confronted with and juxtaposed to their signature to a fairly detailed and clear document, coupled with their unacceptable and unbelievable explanations for signing and their later emails to the claimants, certainly to my mind, would brand them as highly unsatisfactory witnesses.

Issue 2-was the agreement enforceable?

(i) Was the agreement unenforceable due to past consideration?

[74] The defendants maintained, in their defence, that the amounts of US$20,000.00 and US$30,000.00 that were paid over to the company on 7 February 2011 and16 February 2011 respectively, at their request, were made before the execution of the agreement dated 28 February 2011, and as such, were for past consideration. They maintainedthat there was therefore no valuable consideration for which the claimants could claim on that contract.

[75] Valuable consideration is a promise made for the price of a promise given or some act or forbearance on the part of the promisee in return for a promise by the promisor to pay. The promisor must tender his promise as the inducement to the promisee to do the act or forbearance or promise, as the case may be. Past consideration is defined as an act done before a contract is made. It is consideration already given or an act already performed before a promise is made. A contract may be oral or it may be in writing or it may be partly oral and partly in writing. It is also possible to have a valid oral contract which is evidenced in writing in which case the contract is in the verbal agreement, not the written text.

[76] The evidence which I have accepted as true in this case, shows however, that an oral request for the urgent payment of the sum of US$20,000.00 was made 7 February 2011. There is very little evidence of the terms under which that sum was advanced at the time it was transferred. However, the evidence from both sides is that it was not a gift. On the claimants' side it was a loan with option to convert to equity later and on the defendants' side it was an investment. Written evidence of the terms, however, appears in the written contract of 15 February 2011 and in the replacement contract of 28 February 2011, which not only evidenced the terms on which that payment was made but also the terms on which additional sums were to be advanced.

[77] In the case of the US$30,000.00, payment was made pursuant to the written agreement of 15 February 2011. Consideration for that contract was fully executed. Confirmation of that contract appears in the contract of the 28 February 2011. Therefore no issue of past consideration arises with regard to the $30,000.00. See **Williams (Nora Veronica) v Persaud (Sedial)** [1968] 12 WIR 261 from the Court of Appeal of Guyana, per Luckhoo C (Ag).

[78] With respect to the US$20,000.00, the monies having been paid over at the request of the defendants (and I reject that they requested it as an investment and accept that it was a request for a loan with option to convert later), the claimants would benefit from the application of the exception to the rule on past consideration. This exception is especially applicable to commercial transactions. The established principle is that if an act is done in the context of business arrangements and it is clearly understood by both sides that the thing requested will be paid for, the past consideration is deemed to be valid. See the discussions by Luckhoo C in **Williams v Persaud** and the case of **Re Casey's Patents** [1892] 1Ch 104. The facts of the latter case are as follows; the defendant Casey managed some patents owned by the plaintiffs. The plaintiffs later signed a document that read:'In consideration of your services*… we hereby agree to give you one-third share of the patents'*. This payment was in return for work Casey had already done. When Casey registered this document on the patent register in order to claim his

1/3 interest in the patents, the plaintiffs applied to have the document expunged from the register. The question to be answered was whether Casey's actions amounted to past consideration, therefore rendering the consideration invalid Bowen LJ opined that the work previously done by Casey at the request of the claimant, amounted to good consideration and that the agreement was therefore enforceable. At page 116 Bowen LJ stated that:

> *"Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered. So that here for past services there is ample justification for the promise to give the third share. Therefore, this is an equitable assignment which cannot be impeached."*

[79] From the words of Bowen LJ, it is clear that, in the context of a business arrangement, where one performs a past service, the implication is that those services will be paid for, unless the circumstances dictate that the service was merely provided out of goodwill. As such, the future promise amounts to an affirmation or admission that it is reasonable to expect that the service that was originally rendered is to be paid for. See also **Lampleigh v Braithwaite**(1615), Hob. 105 where it was held that where the plaintiff had acted at the request of the defendant, there is an implied promise that the defendant would pay. Being an extremely old case this was the language used:

> *"It was agreed that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the Assumpsit, it will bind; for the promise though it follows, yet it is not naked, but couples itself with the suit before."*

See also Chitty on Contracts and Cheshire and Fifoot on The Law of Contract, 11th edition pp. 70 to 73. In **Pao On v Lau Yiu Long** [1980] AC 614 at 629 Lord Scarman in referring to the rule said:

> *"An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated further by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit must have been legally enforceable had it been promised in advance."*

[80] On the authorities, therefore, the oral agreement was incorporated into the written agreement, and the request by the defendants for the urgent payment of the sums which were advanced makes their promise to pay in the subsequent agreement evidence of a positive bargain.

[81] A second limb on which the defendant's arguments would fail, in my view, both in terms of the US$20,000.00 and the later payment of $$US30,000.00, is that even if the payment of the $50,000.00 was past consideration for a fresh promise to pay in the 28 February agreement, the court would still be moved to find that fresh consideration has been given, in that the terms of the new contract provide fresh promises with advantages and benefits conferred on the defendants at the time of signing,over and above that which was given in the earlier contract, and is sufficient consideration for a new promise to pay. So the written contract of 15 February speaks not only to the terms of the agreement regarding the US$20,000.00 but also agreed to the advancement of a further US$30,000.00. The written contract of 28 February 2011 not only confirms the existence of the earlier contract and an implied forbearance not to sue immediately for the earlier sums but agrees to the advancement of further additional sums on the promise to repay on the same terms. This new contract not only superseded the old, but the agreement to advance further sums on those terms is fresh consideration. On the very day the agreement was signed further sums were advanced and accepted. Interest payment on the loan was later made.

[82] In any event, the subsequent written agreement merely confirmed the pre-existing expectation that all sums transferred at the request of the claimant, would have to be returned on terms, if the option to convert to equity was not exercised. The defence of past consideration, therefore, cannot be sustained.

(ii) Is the Money Lending Act applicable?

[83] Counsel for the defendants made reference to section 8(1) of the Money Lending Act which reads:

> *"Subject to section (3), no contract for the repayment by a borrower of money lent to him or to an agent on his behalf after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this section be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be."*

[84] The submission made by counsel in this regard is that no such memorandum was sent to the defendants and that the claimants did not indicate that they didsame, the result of this is that any loan agreement would be unenforceable. However, as outlined by counsel for the claimants, neither the agreement dated 15 February 2011 nor the agreement dated 28 February 2011 are governed by the Moneylending Act. Section 13 (1) (h) and (i) (exemptions) outlines that the Money Lending Act does not apply to:

> *"Any person whose main business is not the lending of money and who lends money solely incidental to the conduct of such business; or*
>
> *Any loan or contract or security for the repayment of money lent at such rate of interest not exceeding such rate per annum as the Minister may by order prescribe."*

[85] As was submitted by their counsel Mr Graham, the claimants are not in the business of lending money; however, to my mind in any event, the agreement of the 28 February 2011 is sufficient note or memorandum in writing of the contract. There is no evidence, however, whether a copy was delivered or sent to the defendants.Counsel also referenced the Moneylending (Prescribed Rates of Interest) Order, 1997, wherein it is outlined that:

> *"For the purposes of paragraph (i) of section 13 of the Act, an interest rate of twenty-five per centum per annum is hereby prescribed."*

The rate of 25% per annum being the rate prescribed by the Minister pursuant to section 13, it is pellucid that the interest rate of 10% per annum charged by the claimants did not exceed the rate ordered by the Minister so as to bring them under the jurisdiction of the Act. See the discussion by Lord Scott of Foscote in the Privy Council decision of *Cornerstone Investment & Finance Company Limited (Jamaica)* [2007] UKPC 49 (16 July 2007) Privy Council Appeal No 23 of 2006, *Estate of Imorette Palmer (deceased) v Cornerstone Investments and Company Limited (Jamaica)* paragraphs 16-22 and 35 -37. I find on the evidence and by virtue of the law, that the Money Lending Act does not apply.

(iii) Is the contra proferentem rule applicable?

[86] The defendants in their defence dated the 27 June 2013 outlined that the subject agreement was drafted by the claimants, and to the extent that there were any ambiguities or questions concerning the construction thereof, the contra proferentem rule should be applied; and that any ambiguities therein ought to be resolved in their favour. Reference was made in the defendants' defence to any "ambiguities or questions concerning the construction thereof" but counsel for the claimants argued that the defendants did not point to any specific ambiguity which raised any concern about the construction of the agreement.

[87] Counsel for the defendants however, did point to the fact that the term loan/equity was usedin the agreement and that this raised an ambiguity. I have already ruled

that the contract was clear with regard to its construction, in that, it was a loan contract with an option to convert to equity and therefore, there was no ambiguity. It is not the function of the court, when it is asked to interpret a document, to search for ambiguities or to use the rules of interpretation to resolve an ambiguity which does not exists. See paragraph 8 of the judgment of Lord Hope of Craighead in the case of **Melanesian Mission Trust Board v Australian Mutual Provident Society** [1996] UKPC 53, a decision from the Court of Appeal of New Zealand. There is nothing specifically raised by the defendants to which this rule is to be applied.

(iv) Was the agreement 'subject to contract' and therefore unenforceable?

[88] Counsel for the defendants had also sought to say that there was no agreement as there was a clause in the contract stating that it was subject to contract. The term counsel for the defendants relies on is in these terms:

> *"26) Be it also agreed that this agreement is subject to an over-riding agreement to be drawn up by an Attorney-at-law under the employ of Ian & Cecelia Levy at the earliest convenience."*

[89] However, counsel for the claimant pointed out that this was not a pleaded defence and therefore should not be raised at this stage. Counsel submitted that, in any event, the clause being relied on by the defendants was not a clause stating subject to contract but simply was an indication that, as the agreement had been drafted by the claimants themselves a more formaldocument would be drafted by their attorney at a later date in the same terms. This is in fact the evidence of the claimants.

[90] It is true that this was not a pleaded defence and it also does not form a part of the ancillary claim. No application was made amend the pleadings. The defendants, therefore, cannot reasonably expect to rely on this averment at this late stage. However, I will take a brief look at the issue as raised by the counsel for the

defendants, as she sought to say it formed part of the defence as to ambiguities in the contract.

[91] Counsel for the defendants, in her written submissions, submitted that the clause meant that the parties had not intended the agreement to be a final agreement. She quoted page 34 of *Cheshire & Fifoot's Law of Contract* (page 38 in the 11th edition) which reads as follows:

> *"A conditional assent to an offer does not constitute acceptance. A man who, though content with the general details of a proposed transaction, feels that he requires expert guidance before committing himself to a binding obligation, often makes his acceptance conditional upon the advice of some third party, such as a solicitor. The result is that neither party is subject to an obligation. A common example of this in everyday life occurs in the case of a purchase or lease of land. Here it is the almost invariable practice to incorporate the terms. After they have been settled, in assigned document which contains some such incantation as "subject to contract" or subject to a formal contract to be drawn up by* ***solicitors' Unless there is cogent evidence of a contrary intention, the courts construe these words so as to postpone the incidence of liability until a formal document has been drafted and signed.*** *As regards enforceability the first document is not worth the paper it is written on. It is merely a proposal to enter into a contract – a transaction which is a legal nullity – and it may be disregarded by either party with impunity. Until the completion of the formal contract both parties enjoy a locus poenitentiae.* ***Winn v Bull*** *(1877" 7 Ch D 29,* ***Chilingworth v Esche*** *[1924] 1Ch 97,* ***Eccles v Bryant and Pollack*** *[1948] Ch 93, [1947] 2 All ER 865. In the case of* ***Branca v Cobarro*** *[1947] KB 854, [1947] 2 All ER 101 the court was presented with a delicate case of construction."* **(Emphasis Added)**

[92] Counsel for the defendants reiterated that the defendants'company lawyers were located in the United States, and that the document was signed to give the claimants some kind of assurance. She outlined that the defendants were of the view that that the claimants could be trusted to have their Attorney prepare a more complete document referring to a share agreement.

[93] The distinction between a final and binding contract and an agreement which is subject to contract has been traversed in several authorities. See **Winn v Bull**

[1877 W. 197] judgment of Jessel M.R. (delivered November 19, 1877). In that case Jessel M.R. cited Lord Westbury in **Chinnock v Marchioness *of Ely*** (1864) 13 W.R. 176, 697; 6 N.R. 1, where he made the distinction between an agreement which is afinal binding agreement, even where the parties declare in it that it is to serve as instructions for a more formal agreement to be prepared and signed by the parties, and an agreement which is subject to a formal contract being prepared. The latter is not binding but the former is. The English Court of Appeal approved that judgment of Lord Westbury in **Rossiter v Miller** (1877) L.R. 5 Ch. D. 648. In **Branca v Cobarro** [1947] KB 854, the English Court of Appeal construed words "provisional agreement until...a fully legalized agreement" as showing that the parties regarded themselves as entering into an agreement which was to last until replaced by a formal document containing the same terms and drawn up by a solicitor. In the **Rugby Group Ltd v Proforce Recruits Ltd** [2005] EWCA 698 Field J had to determine the effect of the term 'subject to contract' in a executed contract. The parties had each performed under the contract. Field J decided that the parties were taken to have entered into an implied binding contract on the terms of the agreement.

[94] The case of **Masters v Cameron** [1954] HCA 72is instructive in this regard. This case from Australia highlighted the fact that expressions such as "subject to contract", "subject to the preparation of a formal contract" and others of similar import, *prima facie* create an overriding condition, so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract of itself. The facts are that, by a document dated 6 December 1951, an agreement was reached for the sale of a farming property. The agreement was made in the form of a memorandum stating that ***'this agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions'***. A deposit of £1750 was also paid in conjunction with this agreement. Prior to signing a formal contract of sale, the purchaser decided against purchasing the property. This refusal raised two significant issues that

were to be decided. Firstly, whether the written agreement constituted a binding contract; ultimately whether or not the purchaser was bound by the agreement. The court was also required to determine which party was entitled to the deposit that had been paid.

[95] At first instance, it was held that the memorandum was a legally binding contract, however, on appeal in the High Court of Australia, the Court found that the document did not constitute a legally binding contract. The High Court stated that in the case of agreements that remain subject to being dealt with by formal contract, the agreement may fall into one of three categories. These categories aim to identify the intention of the parties to be bound by the agreement and the certainty of its terms. As stated by the Court, they are as follows –

> *"Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes.* ***It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.*** *Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and- until they execute a formal contract.*
>
> *In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms 'whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common…*
>
> *… Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and*

*therefore do not have, any binding effect of their own." (**Emphasis added**)*

[96] In the case at bar, paragraph 26 of the agreement dated 28 February 2011 was explained by the claimants, who were lay draftsmen. The 1st claimant said in cross-examination that the lawyer's duty would be merely to put what they had already agreed into more legal terms. This clearly shows that there was an intention to be immediately bound by the terms of this agreement, which would later be set out in a more legal document of the same effect. This is all the more so when one considers that there had been an agreement drafted by the claimants dated 15 February 2011, which was replaced by the 28 February 2011 agreement. Monies were advanced, both on and after the execution of both contracts. It is clear therefore, that the parties did intend to be bound by the contracts they signed. Support for this contention is also to be found in the evidence of the defendants themselves, where they both said that they signed to give the claimants comfort and assurance, in case they got "hit by a bus". This clearly showed the defendants intended to be bound by this contract at the time they signed, even if they were indeed "hit by a bus"; otherwise, there would be little comfort or assurance for the claimants.

[97] Each case has to be considered on its own facts to determine whether, on a proper construction, the words were intended to be a condition of the bargain or whether it was "an expression by the parties of a desire that a more formal contract should be drawn on the same terms which had in fact already been agreed upon". The instant case is distinguishable from the circumstances in **Chillingsworth and another v Esche** [1924] 1 Ch 97 which concerned a contract for sale of land. This case is therefore, a completely different case from those where persons agree in writing that up to a certain point the terms will be the terms of the contract, but that it will be submitted to an attorney with minor terms to be approved or drafted by him, in which case there is no contract, because all the terms were not agreed. In this case all the terms were agreed. It was not an agreement which said 'I agree to give you money on these terms but subject to something else being required

and approved'. It was an agreement where the terms agreed were merely to be "put into form".It is a question of construction on a case by case basis, what the parties intended. In this case it is clear to me that the parties intended to enter into an immediately binding agreement.

[98] I agree with counsel Mr Graham on both limbs of his argument in regard to this clause. This defence was not specifically pleaded and even if it had been or if it could be inferred from the nature of the defence regarding ambiguities, for the reasons stated above, it could not succeed.

[99] The answer therefore, as to whether there was a contract and whether, said contract was enforceable is in the affirmative.

Issue – 3 whether the rate of interest charged, is excessive, harsh and unconscionable

[100] This issue was raised both in the defence and on the ancillary claim. The defendants in their defence and ancillary claim averred that section 2(1) of the Money Lending Act states that where there is evidence which satisfies the court that the interest charged in respect of the sum lent is excessive or that the transaction is unconscionable, the court may reopen the transaction. It was pleaded that the 10% interest rate in the agreement which concerns a loan in US currency is not in line with market interest rates and as such is excessive, harsh and unconscionable and accordingly should be reopened. In response, the claimants averred that the interest rate was arrived at after consultations with all the parties and their financial institutions.

[101] The section gives the court the power, where it is hearing proceedings for the recovery of money lent, *inter alia*, if it is satisfied on evidence that the interest charged is excessive or that the transaction is harsh and unconscionable, to reopen the transaction and adjust the interest rate.

[102] However, as outlined above, the interest rate of 10% per annum is significantly lower than the prescribed rate of 25% outlined in the Moneylending (Prescribed Rates of Interest) Order, 1997. As such a plausible argument could be made that the rate of 10% per annum has not exceeded the sum authorized by the Minister, and as such, it cannot be deemed to be excessive, harsh or unconscionable. He who asserts must prove and the defendants have brought no evidence to support this contention made in their defence and ancillary claim. The evidence of the claimants, which I accept, is that the interest rate was arrived at after consultation with the banks and various stakeholders. It is a rate significantly below the prescribed rate and, as such, I find it is not excessive, harsh or unconscionable.

Should the matter have gone to arbitration?

[103] Although this was an issue raised in the defence, no application to stay proceedings was ever made and no submission was made to the court on the issue, by the defendants. Neither did they defendants raise this as a preliminary issue at the trial. The claimants in their 'Response to Defence and Ancillary Claim of the 1st and 2nd Ancillary Defendants/Claimants filed 17 September 2013 at paragraph XiX averred that:

> *"Save and except that clause 24 states that the executed agreement should be determined via arbitration paragraphs 16 is denied and the 1st and 2nd Ancillary Defendant/Claimants will contend that the 1st and 2nd Ancillary claimants/defendants made numerous unfilled promises to pay and were written to on 1 February 2013 by Attorney-at-law, Philmore H Scott and Associates requesting arbitration to which they agreed verbally to pay the sum but failed to take steps to proceed with arbitration. A copy of the said letter* ***Marked B*** *is exhibited at paragraph 6 of the Particulars of Claim. Further, the 1st and 2nd Ancillary Defendants/Claimants assert that the 1st and 2nd Ancillary Claimants/Defendants having filed a defence has therefore waived the arbitration process and therefore the court has full jurisdiction in respect of the defence and ancillary claim."*

[104] Arbitration can be waived by participation in litigation. It is clear the defendants waived their right to arbitration. Therefore, in case it is necessary for the court to

decide this issue, I hold the court has the jurisdiction to hear and determine this matter.

Disposition and Orders

[105] Based on the evidence in this case, I find for the claimants on the claim and ancillary claim. The court therefore orders that:

a) Judgment is entered for the claimants in the sum of US$250,000.00 with interest at the rate of 10% per annum from 1 March 2011 to 23 March 2018 less the sum of US $2,083.33 paid on the 20 September 2011 and thereafter at the rate of 6% per annum.

b) Costs to the claimants to be agreed or taxed.