[2017] JMCC COMM 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISON

CLAIM NO. 2016CD00094

BETWEEN DEVELOPMENT BANK OF JAMAICA LIMITED CLAIMANT

AND CITRUS DEVELOPMENT COMPANY LIMITED DEFENDANT

IN CHAMBERS

Mrs. Tana'Ania Small-Davis, Mr. Allan Jones and Mrs. Kerry Ann Allen-Morgan instructed by Livingston Alexander Levy for Claimant.

Ms. Gillian Mullings and Ms. Leslie Lue Yen instructed by Naylor and Mullings for the Defendant.

Heard: 6th and 22nd February 2017.

CIVIL PROCEDURE- Application to set aside default judgment regularly obtained- principles to be applied.

LAING, J

[1] The Defendant by notice of application filed on the 9th December 2016 sought *inter alia*, orders that the judgment in default of defence filed on the 25th of November 2015 be set aside and that the defence filed out of time on 25th November 2016 be regularised.

[2] On the first day that the application came on for hearing, Mrs. Small-Davis for the Claimant took a preliminary point relating to the issue of whether there was sufficient evidence that Mr. John Thompson Attorney-a- law was in fact a director of the Defendant as he had asserted in his affidavit in support of the Notice of Application. Counsel also questioned whether Mr. Thompson had the capacity and or authority to properly carry out such acts such as instructing Counsel in the application or signing the certificate of truth contained in the defence.

[3] The Opportunity was given to the Defendant to provide supporting evidence of Mr. Thompson's status. On the resumed hearing, the Court was not provided with documentary evidence contained in resolutions or in minutes of a meeting of the board of directors of the Defendant which reflects the date of appointment of Mr Thompson. However the Court was provided with minutes of a board meeting which reflected his appointment as the Chairman of the Board. The Court found on the evidence before it including the evidence of Mr Thompson and the evidence of Kenneth Newman an acknowledged director, that Mr Thompson was a director at the material time for purposes of the claim and for this application.

The Claim

[4] The Claimant is a company incorporated under the laws of Jamaica and has as a part of its mandate the provision of financing for the productive sector.

[5] On or about 3rd April 2007 the Claimant agreed to lend Jamaica Citrus Growers Limited ("the Principal Debtor") the sum of Seventy Million Dollars ("Loan 1")by an instrument in writing dated 8th May 2007 between the Claimant and the Defendant ("the Guarantor's Mortgage"). The Guarantors Mortgage also contains guarantee and indemnity provisions included as Schedule 3, which are also referred to herein individually as "the Guarantee" and "the Indemnity" respectively.

[6] By an agreement in writing dated 2nd September 2009 the Claimant made a further loan to the Principal Debtor of the principal sum of Sixty Million Dollars ($60,000,000.00) ("Loan 2").

[7] The Principal Debtor defaulted on the payment of the two loans and the Claimant appointed a Receiver over the business and assets of the Principal Debtor. In exercise of his powers the Receiver sold the business and assets of the Principal Debtor with most of the proceeds being applied to the debt of the Principal Debtor to RBTT Bank Jamaica Limited, which had a priority lien. The Defendant having failed to repay the debt of the Principal Debtor, this claim was filed and judgment in default of defence entered.

Setting Aside a Judgment in Default – The Civil Procedure Rules

[8] The Civil Procedure Rules ("CPR") rule 13.3 provides as follows:

> *"(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.*
>
> *(2) In considering whether to set aside or vary judgment under this rule, the court must consider whether the defendant has:*
>
> *(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*
>
> *(b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be.*
>
> *(3) Where the rule gives the court power to set aside a judgment, the court may instead vary it.*

The Jamaican courts have considered the application of this rule on many occasions and in the case of **Merlene Murray-Brown v Dunstan Harper and Winston Harper (2010) JMCA App 1** a judgment of the Court of Appeal, Phillips JA confirmed that the focus of the Court in the exercise of its discretion to set aside a default judgment under CPR 13.3 is to assess whether the defendant has a real prospect of successfully defending the claim, however the court must also

have regard to the matters set out in CPR 13.3(2)(a) and (b). There has been no debate between Counsel as to the correctness of this approach, nor has there been any disputing of the principle that in an application under CPR 13.3, the defendant bears the burden of satisfying the court on a balance of probabilities that there is a good reason why a regularly obtained judgment should be set aside.

[9] Our courts have also repeatedly approved and adopted the statement of Lord Woolf MR in **Swain v Hillman [2001] 1 All ER 91 at 92 J** that;

> *"The words "No real prospect of succeeding" do not need any 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 a fanciful prospect of success."*

Was the judgment irregular? -The pleading point

[10] Counsel for the Defendant conceded that although the default judgment was entered on the same day that the defence was filed, there is no evidence to suggest that the defence was filed before the judgment was entered and as a consequence there is no reasonable basis for the argument that there was some irregularity in this regard.

[11] Counsel for the Defendant sought to rely on CPR 8.7(3) which provides as follows:

> *8.7(3) A claimant who is seeking interest must-*
>
> *(a) say so in the claim form, and*
>
> *(b) include in the claim form or particulars of claim, details of –*
>
> *(i) the basis of the entitlement;*
>
> *(ii) the rate;*
>
> *(iii) the date from which it is claimed;*
>
> *(iv) where the claim is for a specified sum of money,*

- *The total amount of interest claimed to the date of the claim; and*
- *The daily rate at which interest will accrue after the date of the claim*

Counsel had submitted in writing that this rule has not been complied with and that the claim was therefore irregular. However Counsel subsequently conceded that there was not any merit in that submission since the particulars of claim clearly sets out the required details in respect of the interest that is being claimed.

[12] It was instead submitted that the claim was irregular in respect of the calculation of the appropriate interest and that this is evident in relation to Loan 2 where the date of default on the loan and accordingly the date from which the default interest calculation begun was stated to be 1st December 2009. It was argued that the particulars of claim stated that loan was disbursed in tranches to the principal debtor on dates between 11th September 2009 and the 9th June 2010 and it was not open to the Claimant to charge interest on the full loan amount or to charge interest at the rate of nine percent (9%) per annum which is the default interest rate.

[13] Counsel for the Claimant in response referred to clauses 6.2 and 6.3 of the Loan Agreement which provides as follows:

> *6.2 Interest shall be paid on the Loan by the Borrower, in arrears, on a monthly basis immediately following disbursement in accordance with the repayment schedule attached hereto as Appendix ii.*
>
> *6.3 In the event that any instalment of the principal is not paid in accordance with the repayment schedule, default interest shall become payable on such arrears of the principal as the case may be, from the due date for payment until payment is made at a rate of 9 percent (9%) per annum.*

Counsel argued that based on the evidence of Marlon Murdoch in his affidavit filed 20th February 2017, although the first tranche of Loan 2 was disbursed on 11th September 2009, the first payment was 8th December 2009, and this supports the pleading in the particulars of claim that the date of default was 1st December 2009.

Challenge to the Guarantor's Mortgage

The Perpetuities point

[14] The Defendant asserts that the Guarantee is unenforceable on a number of bases. The first argument presented may be described for convenience as "the perpetuities point" and is expressed in the defence as follows:

> *"aa) The said Guarantor's mortgage has no date for the repayment of the principal amount or interest and purports to be of perpetual and indefinite duration. The provisions of the said mortgage are therefore contrary to law particularly the rule against perpetuities and at variance with the terms of the commitment letter issues by the Claimant on April 4, 2007 providing for a loan over the duration of one (1) year only."*

[15] In written submissions Counsel for the Defendant argued as follows:

> *"...The documents also purport to be of perpetual effect in that the Claimants (sic) aver that both the liability on the first loan as well as all future indebtedness of the principal debtor are covered by terms of the mortgage by guarantee. The Claimant purports that even if sums are being advanced to this very date these sums are due under the terms of the mortgage by guarantee. By parity of reasoning* ***this mortgage could never be redeemed as it would always be open to advance future sums to the principal debtor at its sole discretion and continue to hold the same for all eternity.*** *This is an obvious fetter on the equity of redemption and is null and void...." (emphasis as supplied by counsel)*

[16] In response on this issue, Counsel for the Claimant submitted that the rule against perpetuities is not applicable to mortgages and provided support for this position by way of **Halsbury's Laws of England 2013 Volume 80 para 126**:

> *"126. Inapplicability of rule to mortgages.*
>
> *Where an estate or interest is invalidated by the rule against perpetuities, a mortgage, charge or other security upon that estate or*

> *interest is nugatory as a security. Where, however, an estate or interest is validly created, the rule has no application to the estate interests or rights of an ordinary mortgagor and mortgagee, charger and charge, or persons deriving title under them in respect of the estate or interest so validly created, or to the exercise of the powers conferred by the security. A proviso for redemption at any time is not invalid under the rule."*

[17] Counsel for the Claimant also relied the House of Lords Decision in **Knightsbridge Estate Trust Limited v Byrne and Others [1940] 2 All ER 401** in particular at page 408 where Viscount Maugham opined as follows:

> *The contention that the rule against perpetuities applies to the mortgage has not been very strongly urged by counsel for the appellant, who candidly admitted that he raised the point because the reason often given for exempting mortgages from the rule against perpetuities was that a condition in a mortgage precluding redemption for over 21 years would be void in equity. Both Luxmoore J and the Court of Appeal pointed out that the rule has never been applied to mortgages, and they declined to depart from the established view that mortgages were not within the rule. In my opinion, they were justified in taking that course. I will only add that since the Law of property Act 1925, came into force, it seems to be more difficult than ever to invoke the rule in the case of mortgages. Where, as in the present case, there is a mortgage term for 3000 years, with a statutory provision for cesser of the mortgage term on discharge of the money secured by the mortgage, it would seem difficult of consider the case being within the rule. In saying this, I do not wish to throw any doubt upon the view that mortgages before 1926 were an exception to the rule.*

[18] I accept the accuracy and applicability of authorities submitted on behalf of the Claimant and consequently I do not find that there is any merit in the Defendant's submissions on this point.

<u>The Stamp Duty Point</u>

[19] Following on the perpetuities point, Counsel for the Defendant submitted that:

> *"...the provision of an indefinite guarantee and indemnity of contractual obligations offends not only against the rule against perpetuities but also the Stamp Duty Act..."*

Counsel relied primarily on sections 36 of the **Stamp Duty Act** which provide as follows:

> *36. No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof.*

Section 38 of the **Stamp Duty Act** is also relevant and provides as follows:

> *Any instrument made, executed, taken, or acknowledged out of this island, and liable to duty shall not be received or admitted in any court, or be entered on record in any office within this island, until the same shall have been first duly stamped.*

Counsel submitted that the mortgage was stamped to cover Loan 1 only and there is no evidence to indicate that it was up stamped to cover Loan 2. Counsel therefore submitted that as a consequence of the failure to up stamp, the Claimant is not entitled to rely on the terms of the Guarantor's Mortgage as a guarantee or indemnity. In oral submissions Counsel developed the point in a slightly more nuanced manner and indicated that in addition the Guarantor's Mortgage was not stamped or under seal but if it were a deed it was not registered pursuant to the **Records of Deeds and Patents Act**. As a consequence of this omission, Counsel submitted that the Guarantee and Indemnity provisions are of no effect.

[20] Notwithstanding these submissions, it appears to the Court that the Guarantee and Indemnity constitute a deed since the document in which they are contained is signed and under the seal of both parties, (and evidently delivered). Section 6 of the **Record of Deeds, Wills and Letters Patent Act** provides as follows:

> *"6. All and every deed or deeds which shall be made or executed within this island for any lands, tenements, or hereditaments whatsoever shall be duly proved or acknowledged, and recorded, within ninety days after the date or dates of such deed or deeds, otherwise to stand void and of no effect against other purchasers or mortgagees Bona fide for valuable consideration of the said lands, tenements or hereditaments, who shall duly prove and record their deeds within the time prescribed by this Act from the dates of their respective deeds."*

[21] On the stamp duty issue Counsel for the Claimant made a number of points. Firstly Counsel argued that there was no effort in this claim to enforce the Mortgage and that is the only document to which up stamping could apply.

Counsel submitted that, in any event, pursuant to section 10.5 of the Guarantor's Mortgage it can be up stamped at anytime. Section 10.5 of the Guarantor's Mortgage provides as follows:

> *"This Mortgage shall be impressed, in the first instance, with stamp duty to cover the principal sum set out in Item 4 of Schedule 1. Notwithstanding the foregoing, the Bank shall be and is hereby authorised without any further consent of the Mortgagor to impress additional stamp duty hereon to cover any principal amount which may be owing by the Mortgagor to the Bank from time to time. Such up stamping shall take effect as if the Mortgagor had issued a new mortgage in the form hereof to the Bank covering the additional principal sum for which this Mortgage is up stamped."*

[22] As it relate to the **Record of Deeds, Wills and Letters Patent Act**, the point was well made by Counsel for the Claimant that section 6 of that act upon which Counsel for the Defendant places reliance is primarily concerned with the issue of priority as between competing interests by purchasers and/or mortgagees and does not affect the validity of the Guarantee and Indemnity provisions.

[23] I am in total agreement with this submission and with the opinion of Jackson-Haisley, J (Ag.) in **McFarlane v Ferguson [2017] JMSC Civ. 21** where in analysing section 6 of the **Record of Deeds, Wills and Letters Patent Act** (albeit in the context of a dispute stemming from the sale of land by a vendor to two separate persons), and after reviewing a number of authorities on the point the learned judge concluded as follows:

> *"The effect of section 6 is that a subsequent disposition of the same property once registered will rank in priority to the unregistered disposition even though the later may be first in time. Therefore if the deed is not recorded within 90 days it is not binding on the world, but is only valid on the parties to the agreement. If the deed is recorded outside of the 90 days it is valid against the world except against anyone who can show better title."*

[24] On both the up stamping and the **Record of Deeds, Wills and Letters Patent Act** points, I accept the submissions of Counsel for the Claimant.

The Limitation Point

[25] An additional plank on which Counsel for the Defendant relied in support of the unenforceability of the Guarantee may for convenience be referred to as "the limitation point" and the averment in the defence in support of this position is as follows:

> *bb) The Claimant in its Particulars of Claim has sought repayment of a debt by enforcement of the provisions of the aforesaid guarantee. Any claim seeking repayment of principal debtor's obligation under the said guarantee included/annexed to the Guarantor's Mortgage is defeated by the Limitations of Actions Act as the time for the exercise of the rights of the Claimant to sue the Defendant in respect of said guarantee has expired by effluxion of time;*

Counsel submitted that Loan 1 provided that it was due and payable within a period of one year and that the date of repayment passed more than 6 years ago without any action.

[26] Counsel for the Claimant submitted that the limitation period in cases dealing with money secured by mortgages and charges in respect of land is twelve years and relied on section 33 of **the Limitation of Action Act** which states:

> *" Section 33:*
>
> *No action or suit or other proceedings shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to received the small shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon, shall have been in paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such case action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given."*

[27] Counsel also referred to **Halsbury's Laws of England 2015, Volume 49 para 806** which provides that:

> *" The creditor's cause of action accrues, and time begins to run against him and in favour of the guarantor, when the guarantor becomes liable to make payment under the guarantee. When that liability accrues depends upon the terms of the guarantee. The secondary nature of a contract of guarantee means that guarantor will generally not be liable unless the principle debtor is liable. However, the terms of the guarantee often prescribe conditions in addition to the liability of the principal debtor which must be satisfied before the guarantor also becomes liable."*

[28] It was argued on behalf of the Claimant that the cause of action accrues from the day the principal debtor defaults on the payment or on demand by the creditor and since twelve years have not run since either of these events, then there can be no reliance by the Defendant on the limitation point. I am satisfied that these submissions on behalf of the Claimant are correct.

[29] Counsel for the Claimant also sought to rely on section 52 of the **Limitation Act** which provides as follows:

> *All bonds and every other writing obligatory whatsoever, whereon no payment has been made or action brought within the space of twenty years from the time they respectively became or shall become due, or from the last payment thereon, shall be null and void to all intents, constructions and purposes whatsoever...".*

The case of **International Asset Services Ltd. v Arnold Foote Claim No. 2008 HCV 01326 delivered 28 January 2008** was commended to the Court but I did not find it to be if any assistance given its particular facts . However having regard to my acceptance of Counsel for the Claimant's submissions in respect of section 33 of **the Limitation Act**. I did not find it also necessary to consider the applicability of section 52 of the said act.

Was the guarantee in respect of Loan 2?

[30] An alternative position averred in the defence and counterclaim, is that the Guarantor's Mortgage referred only to Loan1 and this point was expressed as follows:

> *" In the event that the limitation of actions period and the law against perpetuities allows for the prosecution of this action herein, the Defendant avers that the Guarantor's Mortgage related only and specifically to funds advanced under the April 4, 2007 agreement and the said guarantor's mortgage did not cover of operate as a guarantee of any other loan agreements entered into by the claimant either on its own behalf or as an agent with the said JCG."*

[31] In **The Modern Contract of Guarantee** by James O'Donovan and John Phillips Sweet and Maxwell 2003, a Guarantee is defined in essence as ..."*a binding promise of one person to be answerable for the present or future debt or obligations of another if that other defaults*".

[32] It is settled law that a guarantee may be specific to a particular transaction or may guarantee a series of future transactions entered into between the principal and the lender. Although historically there has been some inconsistency by the courts in the construction of guarantees it is now widely accepted that the modern approach is that the normal rules of contractual construction apply to written guarantees. It has been observed in **Egan v Static Control Components (Europe) Ltd [2004] 2 Lloyds Rep 429** that the Court will ask:

> *"...what meaning would it convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract."*

[33] It therefore goes without saying that careful consideration needs to given in framing the clause which defines the scope of the guarantee. In **The Modern Contract of Guarantee** (supra) at para 5-23 in referring to the drafting of a guarantee in terms which reflect that it is clearly a guarantee the authors express the following view:

> *" The Guarantee will relate to "all moneys which are now or may from time to time be owing or remain unpaid" by the principal to the creditor, and there may also be a specific reference to the guarantee being a continuing security."*

[34] In this case it is perhaps prudent to set out the appropriate clauses in their entirety. They provide as follows:

> *GUARANTEE AND INDEMNITY*
>
> *"2.1 In consideration of the Bank granting or agreeing to grant credit facilities to the Principal Debtor or granting time or other indulgence to the Principal Debtor and for other good and valuable consideration (the receipt whereof the Mortgage hereby irrevocably covenants and Guarantees that it will, on demand, pay to the Bank the Secured Obligations. The foregoing guarantee is given subject to and with the benefit of the provisions set out in Schedule 3 hereto. If the Mortgage consists of more than one person, then the liability of each in respect of this guarantee shall be joint and several.*
>
> *2.2 For the same consideration aforesaid, the Mortgagor agrees, as primary obligor and not merely as surety, to indemnify the Bank in the event that the whole or any part of the Secured Obligations is or becomes irrecoverable from the Principal Debtor or any other Security Party or under the guarantee herein for any reason whatsoever, irrespective of whether any such reason or related fact or circumstance was known or ought to have been known to the Bank or its officers, employees, agents or professional advisers. The amount of such loss shall be the aggregate amount of the Secured Obligations from time to time.*
>
> *2.3 As a separate and independent stipulation, the Mortgagor agrees that if the Secured Obligations or any part thereof is not recoverable from the Principal Debtor by reason of any legal limitation, disability or incapacity of the Principal Debtor or any other fact or circumstance whether known to the Bank or the Mortgagor or not, such Secured Obligations or part thereof shall nonetheless be charged upon the Mortgaged Premises and recoverable on demand from the Mortgagor as though it had been incurred by the Mortgagor as the sole principal debtor in respect thereof and as though this Mortgage has been created to secure such indebtedness or liability."*

[35] "Secured Obligations" is defined in the interpretation section of the Guarantor's Mortgage as:

> *"being the amount referred to in Item C of the First Schedule and means all of the following liabilities of the Principal Debtor or the Mortgagor (whether such liability shall be the sole liability of the Principal Debtor or the Mortgagor or shall be a joint liability of the Principal Debtor and the*

> *Mortgagor or the Principal Debtor or the Mortgagor with any other person, firm or company) namely: (i) all present and future indebtedness (in whatever currency incurred) of the Principal Debtor or the Mortgagor to the Bank in respect of any loan, advance or credit facility: (ii) all liabilities in respect of notes or bills discounted or paid or bills accepted for or at the request of the Principal Debtor or the Mortgagor or other loans, credits or advances made to, or for the accommodation or at the request of, the Principal Debtor or the Mortgagor; (iii) all other liabilities whatsoever of the Principal Debtor or the Mortgagor to the Bank, present or future, actual or contingent (including liability as surety or guarantor); and (iv) all costs charges and expenses owned to, or incurred directly or indirectly by the Bank (in connection with advances or the other credit facilities) offered by the Principal Debtor or the Mortgagor or any other credit facilities) offered by the Principal Debtor or the Mortgagor or any other Security Party or in relation to the exercise of the powers conferred by, or the enforcement of any such Security or in relation to any such indebtedness or liability on a full unlimited indemnity basis; together in each of the cases mentioned at sub-paragraph (i), (ii), (iii) and (iv) with all interest commissions and bank and discount charges; such interest being completed in each case in the manner agreed in any Related Document or failing that compounded at monthly rests and so that interest shall be payable at the same rate and in the same manner as well after as before any judgment, PROVIDED THAT the Secured Obligations shall be determined from time to time from the books of the Bank".*

[36] The reference to "*the amount referred to in item C of the first schedule*" (which is seventy million dollars ($70,000,000.00) being the amount of Loan 1), is not absolutely restricted to that sum, but is qualified and indeed expanded by the subsequent words of the clause which include:

> *"...(i) all present and future indebtedness (in whatever currency incurred) of the Principal Debtor or the Mortgagor to the bank in respect of any loan, advance or other facility ..."*

It is duly noted that the Guarantee does not have a classically formulated "continuing security clause", for example the clause considered in the case of **National Westminster Bank plc v Hardman [1988] FLR** 302 which provided as follows:

> *This guarantee shall be a continuing security and shall remain in force notwithstanding any disability or the death of the guarantor until determined by three months notice in writing from the guarantor of the personal representative of the guarantor..."*

However, although there is no expressly worded continuing security clause identified and entitled as such, as a matter of pure construction, there is nothing to suggest that there was any intention to limit the scope of the Guarantee to a particular facility or transaction and in particular to Loan 1 only. Having reviewed the Guarantors Mortgage, I have concluded that the continuing nature of the obligations as expressed therein does extend to Loan 2 and that the argument that it does not so extend, has no real prospect of success.

The Privity Point

[37] Although not expressed in these terms in the defence, Counsel for the Claimant also submitted that there was no privity of contract as between the Claimant and the Defendant or the Jamaica Citrus Growers Limited in respect of Loan 2. It was argued that Loan Agreement dated 2nd September 2008 for Loan 2 is between the Government of Jamaica and the Jamaica Citrus Growers Limited. It was submitted that the Loan 2 agreement establishes that the Claimant is a "mere agent" only, in that it provides as follows:

> *"acting for and on behalf of the GOVERNMENT OF JAMAICA ("GOJ") (hereinafter referred to as "the Lender") and JAMAICA CITRUS GROWERS LIMITED...".*

It was further submitted that the Government of Jamaica has not made a written demand for Loan 2 and as a consequence Loan 2 is not properly before the Court since no cause of action has arisen in respect of it.

[38] In response to these submissions Counsel for the Claimant countered that in the Loan 2 agreement, the Claimant is the named the "Lender" and throughout the agreement the obligations refer to involvement of the Lender, for example in clause 8 there is the obligation of the Principal Debtor to the Lender, which is accepted by the Defendant to be the Claimant. Furthermore, there was no earlier suggestion by the Defendant in its course of dealing with the Claimant that this means the Government of Jamaica. Counsel argued that the loan agreement does not support a finding that the Claimant is a "mere agent" and the fact that

the Claimant may be used by the Government of Jamaica as a vehicle to disburse funds and to provide financing to various entities, is in keeping with the Claimant's objects and mandate but does not prevent it from contracting as a party in its own right.

[39] I accept that as a matter of construction the Claimant is a proper party and is the "*Lender*" in respect of Loan 2. As a consequence of this finding, I reject the submission on this point that Loan 2 is not properly before the Court since no cause of action has arisen as it relates to that loan.

[40] As to the submission that there was no demand made in respect of Loan 2, Counsel for the Claimant submitted that the need for a demand before a creditor can take steps to enforce the debt is dependent on the construction of the security documentation and the nature of the obligation imposed on the Guarantor. It was argued that when one examines the Guarantee and Indemnity incorporated in to the Guarantor's Mortgage it is clear that the Defendant is also liable as a primary obligor and not only as a surety. Counsel relied on the English Court of Appeal case of **M.S. Fashions Ltd. v B.C.C.I. 1993 Ch 425 at 247 letter B** where Dillon L.J. accepted as correct and in accordance with many authorities, the Defendants concession that that the liabilities of the principal debtors were at all times presently enforceable even if the indebtedness was described in the relevant documents as "repayable on demand".

[41] In this case, under Clause 2.2 of the Guarantor's Mortgage the Defendant agreed "*as primary obligor and not merely as surety, to indemnify the Bank in the event that the whole or any part of the Secured Obligations is or becomes irrecoverable from the Principal Debtor or any other Security Party.*…." In my view the obligations of the Defendant in respect of Loan 2 are also as principal obligor and were at all times enforceable by the filing of a claim even in the absence of a specific demand.

The Receivers Conduct

[42] A portion of the Defence is directed to the conduct of Mr. Dennis L. Boothe. It is averred that he was appointed as an interim financial controller of the Principal Debtor and it was through him that the Claimant took control of the assets of the Principal Debtor but that the Claimant negligently and/or recklessly failed to provide any account of the transactions entered into and the receivables collected by Mr Boothe. It is also averred in the Defence and repeated in paragraph 13 of the Affidavit of Mr John Thompson in support of the application, that under the stewardship of Mr Bothe, the Principal Debtor:

> *"...failed and/or refused to honour arrangement s made with citrus farmers and Pepsico resulting in the loss of valuable contracts, goodwill and collection of receivables, resulting in substantial damage to [the Principal Debtor's] business interests."*

Neither in written submissions nor in oral submissions at the hearing were the allegations in respect of Mr. Boothe pursued with any cogency or vigour, instead the submissions of Counsel for the Defendant concentrated on the conduct of the Receiver. These complaints, in essence, allege that the Receiver acted negligently and/or recklessly in the performance of his duties by *inter alia* not obtaining the best price for the assets of the Principal Debtor, and that the Receiver did not provide a sufficient account.

[43] Counsel for the Defendant submitted that it is a long established principle that even where the mortgagee appointed the Receiver the terms of the agreement may make the Receiver the agent of the mortgagor and the mortgagor had to bring any action in respect of an allegation of negligence or failure to account against the Receiver. The Court was referred to Clause 7.1 of the Mortgage which provides that "*A Receiver and/or Manager appointed by the Bank shall be the Mortgagor and the Mortgagor shall be solely responsible for his acts or defaults or the acts or defaults of his servants or agents*...". The Court was not presented with any authority which suggested that this principle recognised in early cases such as **Jeffery's v Dickson (1866) LR 1 Ch App 183** is not

applicable to the facts before the Court. I therefore find that any claim or counterclaim against the Claimant in respect of the alleged negligence or other conduct of the receiver does not have a real prospect of success.

[44] Tied closely to the complaint in respect of the Receiver's conduct was the submission on behalf of the Defendant that it has a good defence of a set-off as against the claimant or a valid counterclaim. Following from the Court's finding in the preceding paragraph it appears clear that any claim which the Defendant may have against the Receiver cannot ground a counterclaim as against the Claimant. If the default judgment is not set aside this will not affect the ability of the Defendant to file separate claims against the Receiver or anyone else against whom the Defendant has a sustainable complaint.

The need for the court to not conduct a mini trial

[45] Both Counsel reminded the Court of the guidance offered by Lord Justice Potter in **ED & F Man Liquid Products Ltd V Patel and Anor [2003] EWCA Civ 472** which was an appeal against the refusal of the trial judge to set aside a judgment in default of acknowledgment of service. In considering the English CPR 13.3 and CPR 24.2 at paragraph 10 Lord Justice Potter commented as follows:

> *It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party 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 contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save cost and delay of trying an issue the outcome of which is inevitable; see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p467 and Three Rivers DC v Bank of England (No.3) {2001] IKHL/16,[2001 2 All ER 513 per Lord Hope of Craighead at paragraph [95]*

[46] In this case there were no "*significant differences between the parties so far as factual issues are concerned*". The issues joined between the parties had to do with issues of the law relating to mortgages, guarantees and indemnities and the construction to be placed on transactional documents. As a consequence of there being no factual issues for resolution, I was equally well placed to consider the appropriate legal issues as I, or any other Judge would have been on the trial of the claim.

[47] The hearing was fixed for a full day and the parties provided written submissions and authorities to the Court before the hearing for pre-reading. Counsel were each given adequate time to fully develop their written submissions and to expand them if they thought necessary without any inhibiting time restraint and full advantage was taken of that opportunity. It would not in my view be a reasonably accurate complaint to say that this Court conducted a mini-trial in performing its analysis of the issues. The Court had before it all the evidence and submissions necessary to determine the questions of law that fell for determination and certainly took the opportunity to "grasp the nettle" (or the more culturally relevant cow itch plant) and decide those issues. It would in my view be a glorious waste of judicial time and would not be in keeping with the overriding objective for these same issues to be again ventilated in the context of a trial, only to have the same inescapable conclusions reached.

[48] Counsel for the Defendant submitted that the application to set aside having lasted one day suggests that there are issues which are in need of determination at trial and which require the judgment to be set aside. I disagree. In this case the Court is of the view that although the Defendant has made a number of submissions on various matters of law, when analysed against the existing authority they are without merit and not applicable to the pleaded facts and evidence before the Court. I repeat for emphasis that although the Defendant is required to file evidence to persuade the Court that his defence has a real prospect of success, the issues in dispute in this case were primarily in relation to matters of law.

Conclusion

[49] For the reasons expressed herein, the Court finds that on a balance of probabilities the Defendant does not have a reasonable prospect of success on its defence. The Court makes this finding notwithstanding the fact that, in the Defendant's favour, it has where necessary, taken a very generous view of the Defendants case and has to some extent considered the Defence using the broader, expanded construction as presented by Counsel for the Defendant in her oral presentation. Having so found it is largely academic exercise for me to consider CRR 13.3 (2), but were I to do so I would have found that the Defendant has applied to the Court as soon as is reasonably practicable after finding out that the Judgment has been entered. I would also have found that the Defendant has given a good explanation for its failure to file the Defence within the time given Mr Thompson's explanation of the difficulties he had in providing full instructions to Counsel and I would so conclude notwithstanding the submissions of Counsel for the Claimant that given his involvement in the loan process he ought not to have had a difficulty in this regard.

[50] In the premises the application fails and Court makes the following orders:

1. The Notice of Application for court orders filed 9th December 2016 is refused.

2. Costs of the application to the Claimant to be taxed if not agreed.