IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2008 HCV 05233

IN CHAMBERS

BETWEEN	FITZROY HENRY	CLAIMANT
AND	GEORGE DAVE RANGLIN	1ST DEFENDANT
AND	NIPO-LINE LIMITED	2ND DEFENDANT
AND	NIPO-LINE AUTO IMPORTS LIMITED	3RD DEFENDANT
AND	ANDREW RANGLIN	4TH DEFENDANT

Jacqueline Cummings instructed by Archer Cummings for the Claimant

Nigel Jones, Jason Jones and Zavia Mayne instructed by Nigel Jones and Company for the 1st, 2nd, 3rd, and 4th Defendants.

Contract – ostensible loan contract – whether enforceable – public policy – award of costs.

The court finds it more than a little unpalatable to adjudicate upon a document the product of the devil's draftsman. The veneer of moneylending jargon which clads the agreements is as efficacious as Adam's fig leaf.

The enforcement of these contracts would be the inexorable, if unwitting, legitimization of what was *prima facie* an AIS. The pernicious socio-economic consequences to the public of so doing are incalculable. The peace, order and good governance of the state must be of fundamental concern to the state and the public as a whole. These principles and standards are not promoted by a scheme, the probable consequence of which is injury to the public.

Heard : 19th and 20th May, 2010 and 30th July, 2010

CORAM : E.J. BROWN, J. (Ag)

1). The Claimant, Mr. Fitzroy Henry, seeks the recovery of Fifty One Million, Nine Hundred and Thirty Three Thousand, One Hundred and

Eight Dollars ($51,933,108.00), together with interest thereon, from the defendants either jointly or severally. After much rumination, the court has been impelled to the view to declare the agreements which form the substratum of the claim unenforceable. The reasons for so doing are set out hereunder.

2). For ease of reference, the first of the four agreements is set out in full below. The amounts are identical save for a few details, ***viz*** the principal and rate per centum in clause one and the date and signatories in the execution section.

AGREEMENT

"This agreement is made between **Fitzroy Henry of 1 Shortridge Crescent, Kgn 6** in the parish of St. Andrew (hereinafter called the Lender) of the first part and **George Dave Ranglin of Nipo-line Auto Imports Ltd, 39 Hagley Pk Rd. Kgn 10** in the parish of St. Andrew (hereinafter called the borrower) of the second part witnesseth as follows:

1. In consideration of the sum of **Two million JAD ($2,000,000.00 JAD)** which is this day lent to the Borrower for a period of three (3) months or ninety days (90) The borrower agrees to repay the said principal sum after ninety days and pay the monthly interest of up to **12%**
2. The monthly gains from this account will be paid within the first seven (7) working days of the ensuing month.
3. The services provided pursuant to this agreement carries a high degree of risk in the event of a loss, it is understood that eighty

percent (80%) of the principal is guaranteed by the Borrower and any other loss suffered will be borne exclusively by **the Lender**.

4. A monthly statement will be sent each month by email to **henryfit@cfni.paho.org**
5. Funds may be withdrawn at any time after the initial three months, but the Investor is required to give seven (7) days notice for any interest that may be required from the account.
6. **Fitzroy Henry** hereby appoints **Edgar Henry** as his beneficiary in the case of his death.
7. In the event that George Ranglin is unable to perform his obligations under this contract, Mr. Andrew Ranglin of 7320 NW 56TH ST, Miami FL 33166, Phone number (954) 261-7659 will act to fulfill all the requirements of this contract.
8. The Borrower may at the end of the loan period apply to renew the loan for another three (3) months or ninety (90) days as the situation demands. If the contracted sum is required at the end of the loan period, the Lender is to give thirty (30) days notice to the Borrower."

CLAIMANT'S SUBMISSIONS

3). **"Was there any risk that has occurred that the Defendants have proved that has affected the Claimant's investment herein?**

An interesting thing that has occurred since the hearing of the evidence of this action herein that we ask this Honourable Court to take judicial notice of, is that every other day the Financial Services Commission has

placed an advertisement in both the daily newspapers listing out all the unregistered financial investment entities in Jamaica.

4). "They have listed "Nipo Farms/Nipon Farms/Nipoline/George Dave Ranglin and Carl Ranglin" as one such entity and they go on to list "Vision Increase SA Corp/Yvonne Coke" and another entity and then "MayDaisy E Partner Plan Club/Ingrid Loiten" as still another such entity.

5). "This we submit is further proof that the First Defendant was operating as a separate entity and investment entity from "Vision Increase Sa Corp" with whom he claimed to have invested the Claimant's money and also "MayDaisy" with whom he claimed also had some of the Claimant's money.

6). "This court can take judicial notice that most of these investments entities failed not because they were unregistered but because they failed to practice as they said they were.

7). "It is no secret that some of these entities were nothing more than "ponzi schemes" masquerading as foreign exchange traders. It is also no secret that some of these entities were all married at some point in time with "David Smith" or "Olint Corp" and although they initially started out trading in foreign exchange it was discovered they had not traded the preceding two years prior to its closure firstly by the Jamaican authorities here and then by the British Authorities in the Turks and Caicos.

8). "The allegation of money laundering and lack of trading activities would make these entities not participating as they should and hence anything they claim they lost was not a genuine loss of their customer's investment but due to there own ultra vires and/or unlawful activities and the customer should not bear any loss of their money as it was not within their contemplation.

9). "A party should not benefit from their own illegal activity. The case of **Spector v Ageda [1971] 3 All ER 417** is authority for this proposition. We ask this Honourable Court to hold as a fact that no risk has occurred that would invoke this provision of the agreements herein.

10). "**Is the Money Lending Act applicable herein and how is it applicable?**

We submit that the money Lending Act will be applicable only to deny the Claimant from receiving the agreed rate of interest in the contracts with the First Defendant.

11). "Although the defendants have all pleaded the Money Lending Act they have failed to state what section of the Act they relied on in this assertion. The Defendants have all also not produced any evidence to prove that any of these contracts were void for illegality, or that the interest rates in each contract were harsh, unconscionable, and otherwise oppressive under the Money Lending Act.

12). "Section 3 of the Money Lending Act states:-

"Where, in any proceeding in respect of any money lent after the commencement of this Act or in respect of any agreement or security

made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the prescribed rate per annum, the court shall, unless the contrary is proved, presume for the purposes of section 2 that the interest charged is excessive and that the transaction in harsh and unconscionable, but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding the prescribed rate per annum, is excessive."

13.) "There is also no evidence produced by the Defendants that the rate of interest charged was excessive as the contract has proved that it was not regular loans but investment contracts.

14). "The Trinidadian case of **South Western Atlantic Investment Trust Co Ltd v Millette (No 2) (1992) 41 WIR 26** states as follows:-
"The charging of interest at a rate exceeding that permitted by section 12(1) of the Moneylenders' Act does not render the contract void or unenforceable."

15). "Also the Jamaica case of **United Dominions Corporation (Jamaica) Ltd v Michael Mitri Shcucair (1968) WIR 510** the Privy Council held only part of a mortgage contract unenforceable by reason of non-compliance with parts of the Moneylending Law but upheld that remaining unchanged portion to be enforceable.

16). "Hence it is our submission that none of the provisions of the Money Lending Act has been proved to have been breached by the Defendants

and even if any provision was in breach it did not nullify the entire contracts but merely the offending parts.

17). "The mischief that existed that led to the creation of the money lending legislation is to protect members of the public from unscrupulous lenders of money that are not licensed as a financial institutions, and these unscrupulous lenders seek to take advantage of persons in need.

18). "These transaction although set out in the agreements as loan contracts we already know from the evidence of the parties were investments made by the Claimant with the First Defendant in trading in foreign exchange and not simple loans that he was seeking to collect. This does not fall within the contemplation of the Moneylending Act of Jamaica.

19). "To copy a quote from in **Iraqi Ministry of Defence v Acrepey Shipping Co SA [1980] 1 All ER 480** where it was a statement made by Goff J at page 487 where he said:

"A reputable businessman who has received a loan from another person is likely to regard it as dishonourable, if not dishonest, not to repay that loan even if the enforcement of the loan is technically illegal by virtue of the Moneylenders' Act."

"Consequently we submit that none of the provisions of the Moneylending Act are applicable herein."

DEFENDANTS' SUBMISSIONS

21). "The **Money Lending Act sections (2(1), 3 and 9)** which respectively treat loans made by a money lender above the prescribed rate as

presumptively excessive, harsh and unconscionable and, allow the court to treat such contracts for the repayment of monies to be unenforceable.

22). "Under the **Money Lending Act (s. 3)** there is a presumption that contracts which provide for interest above the prescribed rate are harsh and unconscionable and that the interest is excessive. The latest rate is 25% pursuant to the **Moneylending (Prescribed Rates of Interest) Order, 1997**. The interest rates provided for in the relevant contracts far exceed 40%. The upshot will be that there is a presumption that the contract itself will be void because it is illegal.

23). "The **Money Lending Act (s. 9)** also entertains a presumption that a contract which provides either directly or indirectly for the compounding of interest is also illegal. It is quite clear from the Statements provided that the interest was compounded.

24). "The most recent application of these provisions of the Act is to be found in **Estate of Imorette Palmer (deceased) v. Cornerstone Investments & Finance Company Ltd (Jamaica)**. Importantly the Privy Council looked at the circumstances in which the court will exercise its discression to give relief under the Act. At paragraph 36 the court stated:

"The relieving discretionary power conferred on the court by [section 8(3)] is, obviously, particularly apt to cater for accidental inaccuracies in the statement of the amount of money lent, the rate of interest or the date of the transaction, or of inaccuracies in any of the matters required... to be included in... note or memorandum. In the present

case, however, the failure to comply with the requirements of section 8 (2) is substantial. There was a very substantial overstatement of the amount of money actually lent... an consequently, and enormous understatement of the true interest rate, almost 240 per cent..."

25). "At paragraph 42 the court made it clear that their position would have been the same if the matter fell to be decided under section 2(2) of the Act. It was stated:

"Their Lordships, in agreement with Downer JA, conclude that this is not a case in which it would be equitable to restore the liability of the ladies under their guarantee and mortgage and therefore conclude that it would not be equitable to exercise the section 8(3) power to declare the transaction between Mr. Salter and Cornerstone to be enforced. For the same reason their Lordship would, had it been necessary to do so, have exercised the power under section 2(2) of the Act to set aside the guarantee and the mortgage."

26). "In the present case what we have is a lender who took a great risk in investing in one of the high risk, high yielding investment arrangements whereby funds were invested on trading platforms, with the risk of monies being lost almost overnight. The Claimant, notwithstanding borrowed substantial amounts, allegedly partly for the purpose, and in any event invested amounts of monies, knowing of the risks. The 3rd Defendant has shown where the funds have been lost by the traders. It would be inequitable to ask the Defendant to repay the sums or any amount at all. This is a transaction which ought to be set aside as being

harsh and unconscionable. **Section 2(1) of the Moneylending Act** expressly empowers the court to do this. It states:

"Where proceedings are taken in any court by any person for the recovery of any money lent either before or after the commencement of this Act, .. and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, the court may reopen the transaction,... and if any such excess has been paid or allowed in account, by the debtor, may order the creditor to repay it, and shall set aside, either wholly or in part, or revise, or alter any security given, or agreement made in respect of money lent,...""

REASONING

27). While the agreements on their face masquerade as loan contracts, they are bargains for the trading of funds in the foreign exchange market through what has been euphemistically called alternative investment scheme (AIS). So, who were the parties? All the agreements declare themselves to be between Fitzroy Henry and George Dave Ranglin of Nipo-line Auto Imports Limited. However, first, all except the first agreement bear, in addition to the signatures of the gentlemen, the seal of Nipo-line Limited, over the signature of George Dave Ranglin. Secondly, the cheques representing the consideration were all written to Nipo-line Limited. Thirdly, Mr. Henry in his witness statement said the first defendant requested all lenders to submit proof of the source of their "funds loaned to him and NIPOLINE," (emphasis added). Finally, under cross examination Mr. Henry said in his view he was contracting with the 1st, 2nd and 4th defendants.

28). Attention is now turned to the subject-matter of the agreements. The preamble describes Mr. Henry as the lender and George Dave Ranglin as the borrower. Clauses 1, 3 and 4 refer to obligations of lender and borrower. Clause 5, however, mentions the "investor" being required to give seven (7) days notice to withdraw interest.

29). Secondly, while the preamble and clauses 1 and 8 convey the impression of a loan agreement, clause 3 warns of "a high degree of risk" and spells out apportionment of loss. Clause 8 gives the borrower a right to apply for a ninety (90) day renewal "as the situation demands," and requires the lender to give thirty days notice "if the contracted sum is required at the end of the loan period." So if the sum is not required it is rolled over.

30). Both the background of these agreements and the parties subsequent conduct make it transparently clear they were in the business of foreign exchange trading and not moneylending. A fact frankly admitted by learned counsel for the claimant. While Mr. Henry first said in his witness statement that he was introduced to George Dave Ranglin "with a view to maximizing returns on loan," his next utterance revealed the true nature of the beast. This is how he expresses it:

> At all material times I was interested in investing monies in foreign exchange trading and I was introduced to the first Defendant as an individual who trades in foreign exchange and would trade money for me.

31). So, while the agreement for the most part is couched in the language of a loan, it is clearly for foreign exchange trading. The document seeks

to pass itself off as a fish but to the eyes of the wary is patently fowl. The court is therefore in sympathy with the submission of learned counsel for the claimant that the Money Lending Act does not apply.

32). In seeking to maintain this claim, Mr. Henry quite incredibly persisted in the unconvincing assertion that he did not know Mr. George Dave Ranglin was trading his funds through other players, for want of a more forensic nomenclature. It is widely known that that is the ***modus operandi*** of these AIS. Mr. Henry had himself "invested" in two such AIS before his encounter with George Dave Ranglin: an unnamed scheme in Jersey, UK, and Cash Plus, Jamaica [more appropriately Crash Plus, as that was its inevitable end].

33). Indeed, when Mr. Henry says in his witness statement that he was introduced to "George Dave Ranglin....with a view to maximizing returns on loan," the court understood him to be saying he was seeking an AIS to take advantage of the supernormal returns generated by the unsustainably high interest rates. So, far from being a neophyte, Mr. Henry was quite the virtuoso. Neither is Mr. Henry any intellectual dwarf, being a director of an international organization. Against this background, it would be incongruous to accept his counsel's submission that Mr. Henry had scales over his eyes.

34). What we have then is an educated and experienced man executing a contract with an AIS trader which is far more a reflection of smoke and mirror than a commercial contract. The contract and conduct of the parties are as contorted as snakes in a pit. George Dave Ranglin says

Mr. Henry was asked to make the cheques payable to Nipo Line Limited (NLL) because the contract was between NLL and Mr. Henry. At the same time Mr. Anglin admits that nowhere in the objects of NLL was it stated that NLL was a foreign exchange trader while Mr. Anglin had been collecting money from the public for foreign exchange trading since 2007. He never volunteered that he had the legal capacity to do so, neither was he asked. However, other evidence in the case suggest Mr. Anglin was little more than a glorified middleman, since what he did was to place the funds with other "traders". Ergo, the inescapable conclusion is that he was not a registered trader with the Financial Services Commission (FSC). This finding is fortified by the submission of learned counsel for the claimant concerning publications by the FSC.

35). The question that screams for an answer is why would an obviously sophisticated man such as Mr. Henry and an apparently savvy businessman such as the 1st Defendant, have entered into this kind of arrangement? Mr. Anglin contended that the contract was not expressed to be between Mr. Henry and NLL, as he intended, for want of legal advice. But a shrewd man knows when he doesn't know and to diligently seek the advice to fill the interstices in his stock of knowledge. The opposite is the dilemma of the fool and that Mr. Anglin is not.

36). Could it be that the agreements were so drawn in a vain attempt to avoid challenge by the regulators concerning the true nature of the bargain? Surely, it may have been thought that describing Ranglin as a

borrower avoided a charge that he was providing financial services to the public without the requisite licence. Whatever the reason or reasons for their surreptitiousness, the court finds it more than a little unpalatable to adjudicate upon a document the product of the devil's draftsman. The veneer of moneylending jargon which clads the agreements is as efficacious as Adam's fig leaf.

37). What are the likely consequences of a court enforcing such an agreement? Recent history is replete with examples of the collapse of these schemes. Anecdotes aside, it is notorious that their collapse has had a deleterious impact upon the local economy. Many are the persons reputed to have either been catapulted over, or stand teetering on the razor edge of personal financial ruin.

38). If the court were to countenance contracts such as these, it would become impossible to dissuade a gullible populace from believing there is a civil remedy in the face of ineluctable failure. This would be the antithesis of the efforts of the state to encourage judicious investments. Wholesale participation in such schemes could sooner lead to social unrest when they fail.

39). That would be the very anathema to the peace, order and good governance of the state. The enforcement of these contracts would be the inexorable, if unwitting, legitimization of what was ***prima facie*** an AIS. The pernicious socio-economic consequences to the public of so doing are incalculable. The peace, order and good governance of the state must be of fundamental concern to the state and the public as a

whole. These principles and standards are not promoted by a scheme, the probable consequence of which is injury to the public. From time immemorial the courts have held that a party does not have a right to enforce the performance of an agreement founded on a consideration that is inimical to the public interest. In other words, ***ex turpi causa non oritur actio.***

40). Having decided in the manner aforesaid, and bearing in mind the losses suffered by the claimant, the order in respect of costs which meets the justice of the case is no order as to costs.