Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

HCV 01319 of 2005

IN THE MATTER OF SECTION 10 OF THE MONEY LENDING ACT

AND

IN THE MATTER OF THE COMPANIES ACT

AND

IN THE MATTER OF CERTAIN QUESTIONS CONCERNING TWO DEBENTURE AGREEMENTS BETWEEN JAMAICA BEACH PARK LIMITED AND MUTUAL SECURITY BANK LIMITED DATED JANUARY 10, 1994 AND SEPTEMBER 2, 1996

BETWEEN	**JAMAICA BEACH PARK LIMITED (In Receivership)**	**FIRST CLAIMANT**
AND	**WINSTON FINZI**	**SECOND CLAIMANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**FIRST DEFENDANT**
AND	**KENNETH TOMLINSON**	**SECOND DEFENDANT**

IN CHAMBERS

Mr. Abe Dabdoub and Mr. Oswald James instructed by Oswald James and Company for both claimants

Mr. Maurice Manning instructed by Nunes, Scholefield, Deleon and Company for the first defendant

Mr. Conrad George instructed by Hart, Muirhead and Fatta for the second defendant

June 8, 11 and 17, 2005

APPLICATION TO DISMISS CLAIM UNDER RULE 26.3(1) (b) and (c) OF THE CIVIL PROCEDURE RULES, SECTIONS 10 AND 14 OF THE MONEY LENDING ACT

SYKES J

1. Jamaica Redevelopment Foundation Incorporated (JRF) has acquired debts that were held by many financial institutions in Jamaica. JRF has undertaken the Herculean task of trying to collect debts from defaulting borrowers. This case is one of its attempts to enforce a power of sale it

has in respect of mortgages it acquired that used to be held by Mutual Security Bank (MSB) and National Commercial Bank of Jamaica (NCB). MSB no longer exits. It was a victim of the financial disaster of the 1990s.

2. The other parties to this action are Mr. Winston Finzi, managing director and principal shareholder in Jamaica Beach Park (JBP). Mr. Finzi and JBP have put up fierce resistance to JRF's efforts to sell the mortgaged property. Kenneth Tomlinson is the receiver appointed by JRF. The next few paragraphs explain the background to this action.

3. JBP is the registered proprietor of land known as Mahoe Bay, St. James. It is registered at volume 1255 Folio 157 of the register book of titles. JBP mortgaged the property to MSB in 1994. This mortgage (no. 900669) was registered on February 9, 1994. The limit of this mortgage was US$2,000,000. JBP issued a second mortgage over the same property. It was registered on November 26, 1996. The mortgage amount was US$258,400. The terms of the mortgage, contained in debentures, permit the mortgagee to appoint a receiver if certain events occur, for example, failure to service the debts. JRF acquired these mortgages. It is not clear when JRF acquired the mortgages. There is a dispute over the amount owed but that apart, it is agreed that JBP is still indebted under the mortgages. JRF appointed Kenneth Tomlinson as the receiver on February 7, 2005, in the exercise of its power to do so conferred by the debentures.

4. JBP has challenged the validity of the appointment of the receiver. This challenge is predicated upon the proposition that JRF cannot enforce its security because JRF has not complied with section 10 of the Money Lending Act (MLA). JBP sought interim relief on an ex parte application on May 24, 2005. I granted an interim injunction restraining JRF from

exercising its power of sale and also restraining the receiver from exercising his powers. I set the matter down for further consideration on May 30, 2005. On May 30, 2005, both defendants were represented. In an effort to settle the matter without litigation, the interim injunction was extended to June 3 and from June 3 to June 8, 2005. The parties have been unable to resolve their differences and so a hearing of JRF's notice of application for court orders, as amended, commenced on June 8, 2005. In that notice, JRF seeks an order striking out the claim against it on the bases that (a) it disclosed no reasonable cause of action and (b) the application is an abuse of process. This is a root and branch attack on the interim injunction. If the defendants succeed then the injunction against JRF must be dissolved. Something cannot come out of nothing. Also, because of the way in which the claim against Kenneth Tomlinson is put, if JRF succeeds then the case against Mr. Tomlinson necessarily goes. The case against Mr. Tomlinson is that his appointment is invalid because JRF did not comply with section 10 of the MLA.

5. The basic proposition of JRF is that the action against it is precluded by orders issued by the Minister of Finance in the exercise of his powers under section 14(1) of the MLA. These orders, JRF submits, exempts the loans in question from the MLA. JBP contends that the orders are defective in that they do not comply with section 14(1) of the MLA.

The Minister's orders and their meaning

6. JBP submitted that section 10 of the MLA requires the lender, on reasonable demand in writing, to supply to the borrower a statement signed by the lender or his agent giving the following information:

a. the date of the loan, principal and rate of interest;

b. amount already paid and date of payment;
c. amount due that is unpaid and date on which the amount became due and interest on the unpaid sum;
d. amount outstanding that is not yet due and date on which it becomes due.

7. What I have just stated is a summary of the four paragraphs under section 10(1) of the MLA.

8. JRF's response is blunt. There is a number of orders before me that the Minister of Finance made for the years 2003, 2004 intituled *The Money Lending (Exemption) (Jamaica Redevelopment Foundation Inc.) Order,* followed by the particular year. Other than the year of the order, and the date the order is to come into operation, the terms of the orders are identical, except that paragraph two in the 2003 order repeats the word *contract* twice. That is clearly a typographical error and does not affect the meaning of the document. The material paragraph is paragraph 2 which I set out below:

Loans or contracts entered into or security given for repayment thereof, being loans ***made*** *or* ***acquired*** *by Jamaican Redevelopment Foundation Inc. or contracts entered into thereby or security given thereto (respectively) within one (1) year from and including that date, are hereby declared to be exempt from the provisions of the Money Lending Act.* (my emphasis)

9. Faced with this apparently clearly worded document, Mr. Dabdoub took a deep breath before launching his mission impossible: to establish that the order did not do what it purported to do. Mr. Dabdoub sought to say

that paragraph two did not apply to JBP's loans for two reasons. First, the Minister exceeded his powers under section 14(1) of the Act by exempting an institution from the legislation. The Minister, he submitted, could not do this because section 13 already stated the institutions that are exempt from the Act. On further reflection, Mr. Dabdoub muted this submission and put forward his second reason. He said that the section confers upon the Minister, if it is in the public interest so to do, to declare exempt from the provisions of the Act:

a. any loan or contract or security for the repayment of a loan specified in the order; or
b. any loan made, any contract entered into, or any security for the repayment of a loan given by any person specified in the order.

10. I have paraphrased the provisions of section 14(1) but when one examines the legislation and the orders, it is obvious that the draftsman adhered as closely as possible to the statutory wording with appropriate modifications to identify the loans to which the exemption relates. Section 14 (1) gives the minister power to exempt in two ways. He can exempt the loan or he can exempt a person. The orders in question are directed at exempting loans and not persons. The language of the orders tries to be as inclusive as possible while at the same time identifying the loans with sufficient specificity that are covered by the orders. The orders speak to two types of loans: loans made and loans acquired. The loan in the instant case falls within the category of loan acquired.

11. With the best will in the world, I am unable to see why Mr. Dabdoub says that the wording of paragraph two is inadequate to accomplish its goal. Learned counsel said that the order should have said something like

all loans by Mutual Security Bank or *all loans made to Jamaica Beach Park Limited* or identify the loans by date, borrower and lender.

12. I concluded that the purpose of specifying the loans or persons in the order is to inform interested persons that a specified loan or person is outside of section 10 of the Act. The practical effect of the exemption is that it removes the section-10 formalities with consequential reduction of costs and time if and when the holder of the loan seeks to recover the sums outstanding. The real question is whether the language of the order sufficiently identifies the loans to which it refers and not whether the order could be better drafted. To say that the draftsman could have been more specific is not the same thing as saying that what he has said is not specific enough.

13. Having read the paragraph and listened to the submissions on both sides, I conclude that paragraph two of the orders clearly identifies the loans. In this case, it is not disputed that the loans made by MSB to JBP have been acquired by JRF. No one was misled or confused or unable to identify the loans to which the order refers.

14. In light of my conclusion, it necessarily follows that a claim based on section 10 of the MLA is bound to fail. It is my view that where a case is destined to fail then the court would not be managing the case properly if it is allowed to go forward. It would be consuming resources that could be expended more profitably. In ***Harris v Bolt Burdon*** [2000] C.P. Rep 70 Sedley LJ held that because the claimant's case was bound to fail it would be unfair to allow it to go on.

15. Mr. Dabdoub next argued that there was no evidence showing when JRF acquired these loans. This argument was not seriously pressed. It is common ground that JRF is now the holder of the debentures. JRF

therefore succeeds on this limb of their application. This is sufficient to decide the case. The injunction against JRF can be discharged on this basis. The issue of abuse of process was fully argued and I now deal with that question.

16. Before addressing the abuse of process issue, I should state that submissions were made to me concerning alleged breaches of sections 105 and 106 of the Registration of Titles Act. However, the claim form does not ask for any relief based upon these provisions and so I need not concern myself with them.

Is this claim an abuse of process?

17. It is virtually impossible to adjudicate upon abuse of process claims without recounting the history of the matter. This case is no exception.

Claim number HCV 1858/2003 (the 2003 action)

18. This was the first claim launched in the trilogy of actions involving at least Winston Finzi and JBF on the one hand and JRF on the other. In this claim Winston Finzi, JBP and Avalon Investments Ltd were the claimants. The defendants were Dennis Joslin Jamaica Inc, JRF, National Development Bank of Jamaica Limited and National Commercial Bank of Jamaica Limited.

19. By a notice of application for court orders, the claimants applied for an injunction before Brooks J on October 9, 2003, who granted the injunction restraining the defendants from selling the property. The affidavit in support alleged that Dennis Joslin Jamaica Inc and JRF had advertised, on October 9, 2003, that they intended to sell the mortgaged property in exercise of the power sale.

20. The notice of application for court orders was followed by a fixed date claim form dated October 14, 2003. The claim form alleged that

a. any claim for interest under the mortgage is statute barred because the claim to interest is based on simple contract and such interest cannot be claimed after the expiration of six (6) years from the date the interest became due;
b. no debt is owing under the first mortgage in respect of which land registered at volume 1255 folio 157 was mortgaged;
c. US$300,000 was the maximum disbursed under the first mortgage (no number 800669) that had an upper limit of US$2,000,000;
d. there were material alterations in the surety agreement of Mr. Finzi. These alterations were done without his knowledge and consent and consequently he was discharged from his guarantee;

21. There are other allegations that are not material. At an inter partes hearing before McCalla J on October 16, 2003, the injunction granted by Brooks J was extended to November 13, 2003 or until further order of the court. On October 15, one day before McCalla J conducted the inter partes hearing, the claimants filed an application for court orders asking that the order of Brooks J be further extended. This notice of application not only repeated the grounds stated in the claim form but included a new ground namely, that no notice of default as is prescribed by section 106 of the RTA was given or served on JBF or Mr. Finzi as guarantor. The claim form was not amended to include this new ground.

22. On November 25, 2003, JRF and Dennis Joslin Jamaica Inc. filed a defence. An examination of the file shows that a notice of discontinuance was filed on February 17, 2004 by the claimants.

23. What is it that led to the matter being discontinued? In the current matter before me there is some evidence that allows me to piece together the sequence of events that may shed some light on why the claimants discontinued their action.

24. There is a document headed **Memorandum of Understanding** dated October 14, 2003 signed by Mr. Finzi and a representative of Dennis Joslin Jamaica Inc. Mr. Finzi's signature was witnessed by an attorney. In that document there is a caption that reads **Re: A/C – Indebtedness of Winston Finzi/Jamaica Beach Park/Universal Holding Limited/Unity Farms.** The document has two paragraphs, the first of which states:

We hereby agree that any and all discussion to be undertaken in relation to the proposal for settlement of the captioned Accounts are for negotiating purposes only and that any communication whether written or oral made pursuant to same is subject to the approval of the relevant Credit Committee and is not binding unless and until approved by the Committee and until such an Agreement is executed by Jamaican Redevelopment Foundation Inc (JRF).

25. The second paragraph is not relevant for present purposes. It is to be noted that this document is dated October 14, 2003, two days before the inter partes hearing before McCalla J. This indicates that negotiations were going on while action was being taken in court.

26. Sometime between October 14, 2003 and December 5, 2003, JBP and Mr. Finzi received a document headed *AGREEMENT TO RESTRUCTURE EXISTING DEBT* which set out terms of restructuring the outstanding debt. This document was signed by Mr. Finzi on behalf of JBP and returned to JRF. Apparently this document was returned accompanied by a letter from JBP's counsel. I also infer, from further communication, that this document was not executed under the seal of JBP. It appears that the letter suggested that the document executed by JBP was the final agreement between the parties.

27. Dennis Joslin Jamaica Inc sought to correct JBP's impression. The company wrote a letter dated December 5, 2003. This December 5 letter stated that it enclosed the restructured agreement and a power of attorney; both for execution. In other words the document executed by JBP before the December 5 letter and returned to JRF was not the final agreement. The letter again repeats that unless and until the agreement is executed by JRF neither Dennis Joslin Jamaica Inc nor JRF will be bound by any discussions. The letter also stated that on execution of the documents accompanying the December 5 letter JRF and Dennis Joslin Jamaica would be prepared to withdraw the properties from auction set for December 8, 2003, without prejudice to their right to reschedule the said auction. The letter significantly ends with these words *Kindly confirm your acknowledgment and acceptance of the terms and conditions of this Agreement by signing and returning the attached copy letter.* The letter exhibited has the signatures of Mr. Finzi and his counsel. The signatures appear under words that say they acknowledge and agree the terms and conditions therein.

28. It is hard to imagine clearer language. The memorandum of October 14 and the letter of December 14 bore the signature of Mr. Finzi and his counsel acknowledging that they understood that Dennis Joslin Jamaica Inc. and JRF would not be bound by any agreement unless and until the relevant committees agreed and the document was executed by JRF. JRF never executed the agreement that accompanied the December 5 letter.

29. In light of the clearly stipulated conditions precedent for a binding agreement it is startling that JBP and Mr. Finzi could contend that the document that accompanied the December 5 letter, after it was executed by them and returned, somehow could be transform into a binding agreement because of some unspecified conduct of JRF and Dennis Joslin Jamaica Inc. The submission has a drowning man quality about it. I say unspecified because neither the claim form nor the affidavit in support the claim identifies with any clarity the nature of the conduct relied on in support of this supposed estoppel. The best that can be said is that by some not-yet-revealed thought process JBP and Mr. Finzi, concluded that notwithstanding that the twice-stated condition precedent for a binding contract to come into existence, a contract had in fact been concluded and on that understanding the action was discontinued. I now turn to suit HCV 0369/2004.

Claim number HCV 0369/2004 (the 2004 action)

30. The claimants in this action were Winston Finzi and JBP. The defendants were Dennis Joslin Jamaica Inc. and JRF. The claimant filed the action on February 24, 2004, a mere seven days after HCV 1858/2003 was discontinued. The claimants applied for an interim injunction to prevent the sale of property registered at volume 1255 folio

157. It was advertised in the *Daily Gleaner* of February 19, 2004. Campbell J granted the injunction for a period of fourteen (14) days. The claim form in this matter alleged that JBP, Mr. Finzi and JRF had, after negotiations, arrived at a settlement. The claimants failed to disclose to Campbell J that there were two written documents signed by Mr. Finzi and witnessed by counsel that stated clearly and unambiguously that there would be no agreement unless the relevant committees of Dennis Joslin Jamaica Inc agreed and the document was executed by JRF. This non-disclosure eventually led to the injunction being dissolved.

31. On March 10, 2004, the interim injunction was extended to March 29, 2004. Cole-Smith J extended the interim injunction to April 8. On April 8, the injunction was extended to April 16. On April 16 an inter partes hearing commenced before Cole-Smith J that continued on April 22, then to April 28, then May 12, then June 29 on which date the injunction was dissolved on the basis of a material none disclosure on the part of the claimants. Her Ladyship not only dismissed the application for the injunction but she ordered that HCV 0369/2004 be stayed. She dismissed the defendants' application to strike out parts of the particulars of claim and the affidavit of Mr. Finzi. Leave to appeal was granted. The learned judge expressed serious doubts about the allegation that a contract came into existence by the conduct JRF and/or Dennis Joslin Jamaica Inc.

32. It is difficult to believe that JBP and Mr. Finzi forgot to inform Campbell and Cole-Smith JJ about the letter of December 5 and the memorandum of understanding dated October 14, 2003.

33. Panton J.A. granted a stay of execution on August 4, 2004. The Court of Appeal dissolved the order of Panton J.A. on May 2, 2005.

34. The receiver who was appointed on February 7, 2005 by JRF discontinued the appeal on April 25, 2005. The receiver also discontinued claim number HCV 369/2004 . Here endeth the life of claim HCV 369/2004. I now go on to the 2005 action.

Claim number HCV 1319/2005 (the 2005 action)

35. I stated earlier in this judgment the relevant facts of this claim. As noted earlier, the claim form makes the case against JRF exclusively on section 10 of the MLA. There is no reliance in the claim form on any alleged breach of section 105 and 106 of the RTA.

The conduct of the claimants

36. The affidavit in support of the claim form, in the 2005 action, sworn by Mr. Finzi has an interesting paragraph. At paragraph eight (8) he states that payment, including interest payments were made by JBP on a monthly basis from the United States dollar account held at MSB. This is in relation to the first mortgage.

37. The different accounts coming from JBP about this first mortgage is disturbing. In the 2003 case JBP told Brooks J that, and I quote from the notice of application for court orders filed October 8, 2003:

The ground on which the applicant is seeking the order is as follows: The mortgage loan is paid in full and any sum being claimed by the Defendants (sic) or either of them is in respect of money that was disbursed without the knowledge, consent or authority of the Applicant (sic).

38. The claimants asserted that everything was paid off and no more than US$300,000 was disbursed. The affidavit of Mr. Oswald James, counsel for JBP filed in support of the application puts the matter very strongly.

Counsel swore: *However, our clients have maintained steadfastly that there is no money owing and have asked for, among other things, proof of the debt, copies of security agreements and an accounting.*

39. So strong was the assertion that no monies were owing that claim HCV 1858/2003 has the claimant seeking this declaration at paragraph 22: *The Claimants (sic) further seeks (sic) a declaration that they are under no liability to pay to the First and/or Second Defendants (sic) any part of any sum representing unpaid balance of the loans in regard to a first mortgage over land situated at Lot 3 Mahoe Bay in the parish of St. James, comprised in Certificate of Title registered at Volume 1255 Folio 157 in the Register Book of Titles.*

40. By the time of the 2004 suit, the claimants not only admitted that they received US$935,979.78 under the first mortgage but had resiled from saying that the mortgage was paid off. The claimants did not say that any principal was paid. However, by the time we get to 2005, the revised disbursed figure remains the same but he is now suggesting that he paid both principal and interest.

41. I note as well that there is no allegation in the 2004 and 2005 suits that the first or second mortgage has been fully paid. I also note that in the 2003 claim JBP failed to mention that it also had a second mortgage of US$258,400. JBP has never asserted that it has paid any principal or interest on the second mortgage since the money was disbursed.

42. These omissions were serious breaches of the duty of full disclosure imposed on an applicant in an ex parte application. At the time of the application before Brooks J, JBP and Mr. Finzi could hardly have forgotten to instruct their counsel that there was a second mortgage of US$258,400 that was borrowed in 1996. This was on the same property.

It is unlikely they would have forgotten that JBP has also received JA$100,000 in further loans also in 1996. Brooks J was presented with a misleading picture of the indebtedness of JBP when he granted the injunction. There is no evidence that these grave omissions were rectified at any stage during the life of HCV 1858/2003. Cole-Smith J was misled about the true state of negotiations between the claimants and JRF. It is difficult to characterise these non-disclosures as innocent. The onerous duty on an ex parte applicant was stated by the Court of Appeal in ***Jamculture Ltd. v Black River Upper Morass Ltd*** (1989) 26 J.L.R. 244 (per Wright J.A. 250 D - 251 E).

43. Mr. Manning submitted that when one examines all three claims nothing is being alleged in the 2005 claim that has not been alleged in the previous two suits. I believe however that Mr. Manning overstated the case when he said that the previous suits raised questions that were **already decided**. An examination of the facts shows that the 2003 claim was discontinued by the claimant. The matter never went to trial and neither was there any determination of any of the issues by any court. The application for an injunction could hardly be described as a determination of the issues. There is no evidence that any judge dismissed or gave judgment on the claim after the determination on a preliminary issue under rule 26.1(2)(i) of the Civil Procedure Rules. What is said about the 2003 claim applies equally to the 2004 claim.

44. Mr. Manning relied on ***Remmington and others v Scoles*** [1895-1899] All ER Rep 1095. In that case the defendant produced a defence that merely denied or refused to admit the claimant's statement of claim. On a motion to strike out the defence as vexatious and frivolous the claimant was permitted to take the extraordinary step of adducing

evidence that the defendant, in previous proceedings, had admitted many of the facts of the statement of claim which he now denied. The defence was struck out on the basis of it being an abuse of process. The decision of Romer J (as he was at the time) was upheld by the Court of Appeal. Mr. Manning relied on dictum from Romer J found at 1098 A-B where the learned judge said that in this case the defendant merely wanted to delay the claimant.

45. It is important to refer to the judgment of Lindley LJ in the Court of Appeal. His Lordship indicated that what Romer J did was quite unusual. He said that a court in the normal course of things would not try to determine whether the defence is true or false (see page 1098 H-I). The Lord Justice continued by saying that the defence was a sham. It was this finding that made the defence an abuse of process. The other members of the Court of Appeal regarded the case as "exceptional" (per Lopes LJ at 1099 B) and "very exceptional" (per Rigby LJ at page 1099 G). Given these pronouncements it is not an appropriate case to draw too many conclusions of general application. The only principle it is safe to take from the case is that the court has an inherent power to prevent abuse of its process. It was on this basis that Romer J acted.

46. In the case before me, the claimant is not saying, anymore, that he does not owe any money under the first mortgage. The issue is quantum. He is saying the JRF cannot act unless and until they comply with section 10 of the MLA. From the history of the litigation and the relevant court records this appears to be the first time that any decision has been made by any court on the merits of the claim.

47. The case of ***Attorney General v Blake*** (unreported, delivered February 16, 2000 Divisional Court, Queen's Bench Division of the High

Court) is more helpful. The Lord Chief Justice was considering an application by the Attorney General under section 42(1)(a) and (b) of the Supreme Court Act of 1981. The section allowed the court to make orders preventing vexatious litigants continuing from bringing or continuing their cases without the leave of the court. The vice aimed at was the bringing of a number of cases in circumstances where previous litigation has been unsuccessful. If I understand Mr. Manning's submission, what he is saying is that the three claims amount to persistent and habitual litigation, and that this amounts to an abuse of process.

48. If the abuse is based upon habitual litigation I believe that the Lord Chief Justice has captured the essence of this conduct when he said at paragraph 22 of his judgment that the hallmark of persistent and habitual litigious activity is the claimant repeatedly suing the same party in reliance on essentially the same cause of action with minor variations ***after it has been ruled upon***, the effect of which is to impose the burden of defending claim after claim. The key phrase to me is ***after it has been ruled upon.*** As I have said none of the issues in dispute between the parties has been ruled upon. None of the cases has gone beyond applications for interim injunctions, so to that extent no court before now has determined the validity of the claims. I therefore conclude that this current claim should not be struck out as an abuse of process. I am far from saying that a party can repeatedly bring cases based upon the same facts. What I am saying is that the court should be slow to turn away a litigant, even if he is annoying, without at least letting him know whether his cause of action has merit.

Is there another basis upon which the injunction may be dissolved against the first defendant?

49. An injunction is an equitable remedy. This means that JBF is not entitled to the remedy as of right. Even if the claimants had a good cause of action, I would be slow to extend the injunction having regard to the history less than frank disclosure on at least two previous occasions when the jurisdiction of this court was invoked. It would be wrong to give litigants the impression that truth telling is unimportant. On this basis, the injunction against both defendants would be discharged had I concluded that there was a reasonable cause of action.

The claim against the second defendant

50. In light of my conclusion in respect of the case against JRF, I have to consider the claim against Kenneth Tomlinson. Even though he has not applied to have the case against him struck out, it is my view that I am under an obligation to consider the case against him. The case against Kenneth Tomlinson is tied to success against JRF.

51. The source of my power to consider the case against Kenneth Tomlinson is found in rules 25.1 and 26.2(1). Under rule 25.1 the court *must further the overriding objective by actively managing cases.* This clearly indicates that the court is to be proactive and not necessarily wait on the parties to make any appropriate application. Rule 25.1 (b) states that active management of cases may include identifying the issues at an early stage. This means that if a court, after hearing submissions on a particular application, comes to a particular decision that has implications for the rest of the case the court, in my view, is fulfilling its duty to *actively manage* cases by raising the issue with the parties and give them

an opportunity to make such submissions as they see fit. This view is supported by rule 26.2(1), which permits the court to exercise its powers of its own initiative. Further support is provided by rule 26.2(2) that provides that where the court proposes to make an order on its own initiative it must give any party likely to be affected a reasonable opportunity to make such representations. Rule 26.2 (4) says that if the court intends to act on its own initiative then it must give the parties seven days notice of the date, time and place of hearing.

52. The rule is directed at the principle of natural justice. It is seeking to give any person who may be affected, negatively or positively, an opportunity to be heard. The purpose is to allow the parties to bring to the attention of the judge, matters of law or fact or other relevant considerations that the judge may not have considered or if the judge thought about it, he may not have done so in the manner the parties have. For example, the rule could not apply to situations where the parties are before a judge who is dealing with an application or a case management. In such circumstances, the judge and the parties can deal with the matter so long as the party has had a reasonable opportunity to present his arguments. To interpret the rule in any other way could produce the ridiculous position where a judge has a matter before him on case management and proposes to exercise his initiative to make an order and even if the parties agree with the proposed decision or order the judge would have to say, "Even though you agree, the registrar must give you seven days notice so I cannot make the order now."

53. In the case before me, after my decision in respect of the effect of the Minister's order was delivered I invited the claimants' attorneys to address me on whether in light of my decision the claim against Kenneth

Tomlinson was sustainable. Mr. Dabdoub gave this cryptic response, "Only if you changed your mind about your first decision." I took that to mean that he agreed that claim against Kenneth Tomlinson would fall if the case against JRF fell.

54. In making this decision to strike out the claim against Kenneth Tomlinson I pray in aid the ***Harris*** case (supra) and say that it would be unfair to allow a claim to continue when it is bound to fail.

55. I should, however, point out that in addition to his cryptic response Mr. Dabdoub mentioned that part of the claim that stated that JRF could not claim interest beyond six years. I indicated to Mr. Dabdoub that section 33 of the Limitation Act did not apply here because JRF was not enforcing its security by any action or suit. The question of limitation would only arise if JRF were taking court action (for that is what action or suit means in this context) to enforce their security. Additionally, I cannot recall a limitation statute being used to ground a cause of action.

56.I have concluded that since the case against JRF is not sustainable in law, the case against Kenneth Tomlinson is not sustainable as well. It necessarily follows that the injunction against Kenneth Tomlinson is dissolved and the claim against him be struck out on the basis that it discloses no reasonable grounds for bringing the claim.

Conclusion

57. There is no reasonable cause of action against JRF based upon the alleged breach of section 10 of the MLA because the orders made by the Minister of Finance, in the exercise of his powers under section 14(1) of the MLA exempted the loans in question from the provision of the MLA.

58. Since the claim based upon an alleged breach of section 10 of the MLA is bound to fail, the case against Kenneth Tomlinson is also bound to fail because the case against him required a successful case against JRF. In other words, in the context of this case, Kenneth Tomlinson's liability is derivative and not primary.

59. In the special circumstances of this case, I would not classify the conduct of the claimants as an abuse of process. The 2003 action was discontinued in a context where the claimants might have thought that they had arrived at a settlement with JRF. The 2004 claim did not get to the point of adjudication on the merits. A litigant should not be summarily dismissed from the court unless there is good and compelling reason to do so. Even annoying litigants have a right to have their matters heard.

60. Looking at the conduct of the claimants in the round, this is not a case in which I would have exercised my discretion in favour of extending the injunction.

61. The claim against both defendants is struck out on the basis that it discloses no reasonable ground for bringing the claim. The injunction is dissolved. Costs to the defendants to be agreed or taxed. Leave to appeal granted.