



[2025] JMSC Civ 106

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008HCV05958

BETWEEN	JOLANES INVESTMENTS LIMITED	CLAIMANT
AND	SAGICOR LIFE JAMAICA LIMITED (Formerly Life of Jamaica Limited)	DEFENDANT

Mr. Garth McBean KC, instructed by Garth McBean & Co for the claimant

Mr Conrad George and Miss Gabrielle Chin instructed by Hart, Muirhead Fatta for the defendant

Heard March 13, 2024, and September 26, 2025

Contract – Whether letters between agent and third party constituted a binding contract – Whether there was acceptance of an offer - Whether essential terms agreed -Ostensible authority

CORAM: JARRETT, J

Introduction

[1] The provenance of this claim lies in a mortgage over property known as Apt D22 Sea Castles, in the parish of St James (the mortgaged property), granted to Jolanes Investment Limited (the claimant) by American Life Insurance Company Limited (ALICO), which was later assigned to Life of Jamaica, now known as Sagicor Life Jamaica Limited, (the defendant). It came to pass that the mortgage

payments fell into arrears. The claimant now contends that in breach of a contract to settle the arrears which it entered into with the defendant's agent, Business Recovery Services Limited (BRSL) around September 2004, the defendant sold the mortgaged property, thereby causing it to suffer loss and damage. The defendant denies that BRSL had any authority to enter the alleged contract on its behalf, denies that any enforceable contract exists against it, and denies that it is liable to the claimant for any loss and damage allegedly suffered.

The claim

- [2]** In its Further Amended Particulars of Claim filed on July 27, 2023, the claimant alleges that it is a company incorporated in Jamaica with registered office at 69 Lady Musgrave Road, Kingston 10. It says it is the registered owner of property known as apartment 22 Sea Castles, in the parish of St. James. By an instrument of mortgage dated April 27, 1991, the claimant granted a mortgage of the mortgaged property to ALICO as security for a loan of \$ 750,000.00. An assignment or transfer of the mortgage made by ALICO to the defendant, was registered on the certificate of title for the mortgaged property on July 6, 1998.
- [3]** It is further alleged that in or around August 2004, a representative of BRSL, acting as agent for the defendant, contacted Mr Lanzie Wedderburn, Managing Director of the claimant and informed him that : a) BRSL was acting as agent for the defendant to recover arrears of payments on the mortgage; b) BRSL on behalf of the defendant was prepared to enter into negotiations with a view to settle the arrears and c), any settlement must involve the settlement of the principal which at the time was \$824, 845.95.
- [4]** It is pleaded that by way of letter dated September 3, 2004, from BRSL to the claimant and the claimant's letter in response to BRSL dated September 30, 2004, an agreement was arrived at between the claimant and the defendant by which the claimant would pay the principal sum of \$824,845.95 in two instalments, and thereafter, negotiations would take place in relation to the interest outstanding. In

BRSL's letter dated September 3, 2004, the offer was that payment on the principal was to be made in two weeks. In the claimant's September 30, 2004, letter, it enclosed two NCB cheques, one dated October 15, 2004, in the sum of \$ 424,845.95, and the other dated November 19, 2004, in the sum of \$400,000.00, and it proposed that payment be on the dates of the cheques.

- [5] A copy of the claimant's September 30, 2004, letter was received by BRSL, signed on its behalf by a P Neilson, and dated October 14, 2004. It is alleged that at all times, BRSL acted as agent for the defendant.
- [6] By letter dated December 7, 2004, the defendant acknowledged that it had received the claimant's letter dated September 30, 2004, ¹ along with the enclosed cheques, but indicated that they did not agree to the application of the amounts paid to the reduction of the principal; and that in accordance with clause 2(b) of the Mortgage Deed, instalments were to be applied first to interest and thereafter to principal. The letter further stated that the claimant's cheques were applied to its account, its current status was a balance of \$762,981.17 on the principal; the account was paid through to November 1, 2004, and that there was a suspense balance of \$ 824.10.
- [7] The claimant pleads further that it relied on the promise made by the defendant through its agent BRSL, that the amounts paid would be applied to principal, and accordingly acted to its detriment by paying the two cheques. The defendant is therefore estopped from breaching its promise.
- [8] The defendant threatened to exercise its power of sale by letters dated March 30, 2007, and July 7, 2007, respectively, and in 2016, it sold the mortgaged property.

¹ Paragraph 12 of the particulars of claim says the letter of September 30, 2004, was received from the defendant, but this is accepted to be a typographical error.

- [9] It is claimed that the defendant's actions led to the claimant incurring expense and suffering loss and damage. The claimant claims special damages of \$839,631.50, damages for breach of contract, interest pursuant to the Law Reform (Miscellaneous Provisions) Act and costs.

The defence

- [10] In its defence filed on March 13, 2024, the defendant says that it engaged BRSL to recover from the claimant arrears of mortgage payments, but it denies that BRSL had the authority to negotiate an agreement with the claimant in which it would be a term of the agreement that the sums paid by the claimant would first be allotted to principal. Reliance is placed on clause 1(b)(ii) of the Mortgage Deed dated April 27, 1991, which provides that the principal and interest are to be paid by equal monthly payments set out in the schedule, and that any partial mortgage payment shall first be applied to outstanding interest and then against the principal.
- [11] The defendant denies that an agreement was concluded between it and the claimant on the terms alleged by the claimant. It also refers to a stamped copy of the claimant's letter dated September 30, 2004, to BRSL, on which is written, on behalf of BRSL by Pamela Neilson, an acknowledgement of receipt of the two cheques, along with the words: "*issue of interest strictly for decision of Life of Jamaica*". The defendant alleges that there was, therefore, no agreement concluded in relation to interest save for what is contained in the Mortgage Deed.
- [12] In the alternative, the defendant pleads that if, which it denies, BRSL's letter of September 3, 2004, was in support of any agreement between itself and the claimant that the sums paid would first be applied to principal, the claimant was given 2 weeks to settle the principal and therefore payment should have been on or before September 17, 2004. The claimant's cheques were however, received by BRSL on October 14, 2004, and they were post dated to October 15, 2004, and November 19, 2004, respectively. The claimant therefore, would be in breach of the alleged agreement.

- [13] The defendant contends further that it was entitled to exercise its power of sale as the claimant was in arrears on the mortgage in the sum of \$1,897,101.12 as of January 30, 2009; and even on the claimant's claim, had the monies paid been applied to principal, there would still remain unpaid interest due and owing. It is denied that the defendant is liable to the claimant as alleged or at all.

The evidence

The claimant

- [14] The sole witness for the claimant was Mr Lanzie Wedderburn (Mr Wedderburn). His witness statement dated January 9, 2023, and filed on January 11, 2023, stood as his evidence in chief. He is the claimant's Managing Director. Most of his witness statement is an almost mirror image of the Further Amended Particulars of claim which I summarised earlier. It is therefore unnecessary to reproduce here, what is contained there.
- [15] Mr Wedderburn also states in his witness statement that in response to a letter written on behalf of the claimant by Nunes Scholefield Deleon & Co, the defendant stated, among other things, in a letter dated September 2007, that the moneys paid by the claimant in 2004, were applied to interest.
- [16] According to Mr Wedderburn, the defendant sent the claimant a Statement of Account dated January 19, 2009. In or about September 2009, in response to that Statement of Account, the claimant sent to the defendant a Schedule, prepared by George Wilson an Accountant, which showed that interest of \$117,704.68 was due to the defendant for the period up to December 1, 2004. Accompanying this Schedule, was a manager's cheque in that amount. However, by letter dated October 5, 2010, from Hart Muirhead Fatta, the manager's cheque was returned to the claimant's attorneys-at-law, advising that the defendant was not prepared to accept it.

- [17] On July 30, 2011, the claimant received from the defendant, a notice dated July 10, 2011, which stated its intention to apply to the Registrar of Titles for an order for foreclosure. Subsequently, the defendant sold the mortgaged property and has not provided an accounting to the claimant.² All the claimant owes the defendant is \$117, 704.68 which is interest up to December 1, 2004, but the defendant has wrongfully refused to accept this sum.
- [18] Mr Wedderburn said on cross examination that the claimant's initial objectives during its interactions with BRSL in 2004, was to bring the loan in good standing, but the claimant's proposal to do so was rejected by the defendant as they insisted that the full principal must first be paid before any negotiated settlement. He said the defendant's rejection of that proposal led to a "forced new objective" which was to pay the principal sum, stop the interest from running and arrange for the timely settlement of any accrued interest. According to him, the defendant did not want the loan to be brought into good standing, what they wanted was the full payment of the principal first, and then an arrangement for interest. He said the amount the claimant was to pay in interest would be agreed upon at some time in the future as it would involve some recalculations. His expectation was that once the principal was accepted and the cheques cleared, the interest would be calculated, and a timely settlement arrived at. When he was asked whether he was hoping by his letter, for a reduction or renegotiation or rescheduling of the interest payment, Mr Wedderburn said his expectation was that the interest would be calculated, because he had previously expressed concern about the way interest was being calculated and that the claimant was being overcharged. Pressed by Mr George whether his answer was a "yes", Mr Wedderburn said "Yes is the answer to your question". He further admitted that he understood that BRSL had no authority to renegotiate or reschedule interest.

² In **Jolanes Investments Limited v Sagicor Life Jamaica Limited [2023] JSMC 127**, I determined that the claimant was not entitled to an accounting. I granted permission to amend the particulars of claim, hence the absence from the Further Amended Particulars of Claim, of any allegation in relation to an accounting from the defendant.

- [19]** When asked whether BRSL gave him the impression in their September 3, 2004, letter that they had the authority to reschedule interest, Mr Wedderburn said: “no”, and that BRSL mentioned in their letter that once the principal was paid then the interest amount would be arranged by Life of Jamaica. He said he understood BRSL’s authority did not extend to the renegotiation or rescheduling of interest. He admitted that the sum of \$ 824,845.95 paid to the defendant was money owed by the claimant.

The defendant

- [20]** Mrs Grace Royal Bassaragh (Mrs Bassaragh) was the defendant’s sole witness. Her witness statement dated November 29, 2022, and filed on November 30, 2022, stood as her evidence in chief. She is the Assistant Vice President Legal Services for the defendant, and she says she is personally familiar with the circumstances surrounding the claim.
- [21]** According to Mrs Bassaragh, by transfer registered on July 6, 1998, the defendant took an assignment of the ALICO mortgage granted to the claimant. Both the mortgage and the transfer of mortgage were registered on the certificate of title for the mortgaged property. She says that clause 1(b)(ii) of the Mortgage Deed provides that partial monthly payments made by the claimant would be first applied against outstanding interest and then against principal. BRSL was engaged in or about 2004, by the defendant to recover the outstanding arrears owed by the claimant on the mortgage, but it had no authority to vary the terms of the mortgage loan as set out in the Mortgage Deed. She says BRSL was engaged solely to collect the amounts due and owed by the claimant and did not have the authority to negotiate how funds received would be appropriated to either principal or interest.
- [22]** She says there never was an agreement between the claimant and the defendant to vary or contradict the Mortgage Deed. On December 7, 2004, the claimant was written to by the defendant advising that the defendant did not agree to the

application of the moneys paid to principal. According to Mrs Bassaragh, by notices dated March 30, 2007, and July 3, 2007, respectively, the defendant informed the claimant of its intention to take steps preparatory to the exercise of its power of sale. The mortgaged property was advertised for sale by public auction three times. On the first two occasions there were no bidders, and on the third occasion, the highest bid of USD\$72,000.00 was below the reserve price. The defendant subsequently foreclosed on the mortgaged property and sold it by private treaty on August 9, 2016.

[23] Mrs Bassaragh admitted in cross examination that the quotation in the defendant's letter dated December 7, 2004, is not from clause 2(b) of the Mortgage Deed although the letter says that it is. She agreed that the amount paid by the claimant was not applied to principal, and said that BRSL's letter of September 3, 2004, which referred to an arrangement to pay principal first, came to the attention of the defendant who indicated immediately that the payment would not be applied that way. According to her, the fact that BRSL's letter was copied to Mrs Jacqueline Donaldson, Mortgage Administrator for the defendant, does not mean that the contents of the letter were agreed to by the defendant.

Analysis and discussion

[24] The issues in this claim are these: -

- a) Whether BRSL's letter dated September 3, 2004, and the claimant's letter dated September 30, 2004, constitute a contract binding on the defendant.
- b) If the answer to the above is yes, is the defendant in breach of that contract.
- c) If the defendant is in breach of contract, what damages if any, are the claimant entitled to receive.

Whether BRSL's letter dated September 3, 2004, and the claimant's letter dated September 30, 2004, constitute a contract binding on the defendant.

[25] The analysis of this issue will involve considering the sub-issue, whether BRSL had the authority from the defendant to conclude a contract with the claimant in the terms alleged by the claimant. The claimant submits that BRSL had the apparent or ostensible authority to negotiate and agree with the claimant to apply the moneys paid first to principal, evidenced by BRSL's letter dated September 3, 2004, and the claimant's letter of September 30, 2004. The claimant submits further that the fact that BRSL's letter was copied to a mortgage administrator of the defendant, entitled the claimant to believe that BRSL had the aforementioned authority. Furthermore, the submission goes, the two cheques paid by the claimant totalling \$ 824,845.95 were accepted by the defendant. On the other hand, the defendant argues that BRSL had no such authority, it did not hold out BRSL as having any such authority and the "offer/acceptance" made by BRSL was without its knowledge. In any event, argues the defendant, BRSL clarified in its note on the claimant's letter of September 30, 2004, that it was unable to enter into the alleged agreement on behalf of the defendant.

[26] Both parties have relied on the well-known decision of **Freeman & Lockyer (a Firm) v Buckhurst Park Properties (Mangal) Ltd and Another [1964] 2 QB 480**, for an explanation of apparent or ostensible authority. The following dicta of Diplock LJ at page 503 of the judgment was cited by the claimant: -

"‘An apparent’ or ‘ostensible’ authority [...] is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority so as to render the principal liable to perform any obligations imposed upon him by such contract."

[27] It is important to set out BRSL's September 3, 2004, letter in full. I do so below: -

"September 3, 2004

Mr Lanzie Wedderburn
Managing Director
Jolanes Investment Limited
P.O. Box 1021
Mandeville
Manchester

Dear Mr Wedderburn

Re: Mortgage Arrears – Life of Jamaica

Apt D22 Sea Castle Resort, Rose Hall, St. James

This will confirm telephone discussion (Wedderburn/Millwood) advising that your proposal to settle the captioned indebtedness was not approved by Life of Jamaica.

You have therefore requested, and we have agreed, that a period of two (2) weeks be given to settle principal amount of \$824,845.95 (from proceeds of sale of two motor vehicles) after which a payment plan for the outstanding interest will be put in place. We trust that this arrangement will hold good.

Kindly sign and return the attached copy of this letter signifying your acceptance and agreement with the forgoing.

Truly yours

Pamela Neilson

Asset Recovery Manager

PN/apm.

Copy: Mrs. Jacqueline Donaldson

Mortgage Administrator- LOJ"

[28] In its response dated September 30, 2004, Mr Wedderburn, writing for the claimant refers to BRSL's letter and says it was late in reaching due to hurricane Ivan. He goes on to say this: -

"We have accepted the proposal to settle the principal sum as outlined in your letter, however, due to substantial damage to my principal residence resulting from the passage of the hurricane, I am making payment in two installments as follows:

October 15, 2004- \$424,845.95 (NCB cheque numbered 026738)

November 19, 2004 -\$400,000.00 (NCB cheque numbered 026738)

We are making these payments with the understanding that as soon as the second cheque clears the banking system Life of Jamaica will review the accrued interest charge with a view to adjusting it and agreeing to the timely settlement of same.

Please sign the attached copy of this letter indicating receipt of the cheques and that the outlined terms are in keeping with our understanding".

[29] It is on a copy of this letter that Pamela Neilson for BRSL acknowledged receipt of the cheques and writes the words referred to earlier, which are that: *"Issue of interest strictly for decision by Life of Jamaica."*

[30] Before getting into the question of whether BRSL had the authority to negotiate and make the agreement alleged by the claimant, and assuming for the time being, that BRSL had the requisite authority to do so; it seems to me that the claimant's letter does not accept BRSL's proposal, but instead, makes its own proposal to settle. Not only does the claimant's September 30, 2004, letter offer to pay by postdated cheques beyond the two-week period for payment of the principal proposed by BRSL, but it also proposed, that the accrued interest charged be

reviewed with a view to adjusting it and an agreement reached to its timely settlement. BRSL's letter said nothing about reviewing and adjusting the accrued interest charged by the defendant. It spoke to putting in place a payment plan to pay the outstanding interest. It therefore cannot be said that the offer to settle in BRSL's letter was accepted by the claimant, because the claimant's letter in response had terms at variance with the offer in BRSL's letter and was, in essence, a counteroffer. It is a trite observation, and no authorities need be cited for this, that two critical elements of a valid contract are an offer and an acceptance. If there is a counteroffer, no contract has been concluded.

[31] Not only does Mr Wedderburn in his letter ask that BRSL sign a copy of his letter signifying receipt of the cheques and that the terms he outlines are in keeping with "our understanding",³ but BRSL in its note written on the letter acknowledging receipt of the cheques, makes it very clear that issues of interest fall strictly for the defendant to decide. This reinforces my view that there was indeed no agreement concluded. The issue of interest was clearly considered by the claimant and the defendant as an essential term for the conclusion of an agreement to settle the outstanding mortgage arrears which the claimant had. This is evident from the parties' evidence, both oral and documentary.

[32] The defendant relies on the judgment of Carr J in **Paul Pinnock v Albert Fredrick Moo [2023] JMSC Civ 217**, in which the learned judge cited the following dicta from Clarke LJ in **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG UK (production) [2010] 3 All ER 1 at para 45 :-**

'The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a

³ Which in my view is a reference to the claimant's understanding, because in the preceding paragraph Mr Wedderburn says: "We are making these payments with the understanding" that as soon as the second cheque clears the defendant will review and adjust the accrued interest charge.

consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded, or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.'

- [33]** I endorse and gratefully adopt this statement of the law and find that even if BRSL had the authority to negotiate and contact, as alleged by the claimant, its letter of September 3, 2004, and the claimant's letter of September 30, 2004, do not constitute a contract concluded between the claimant and the defendant. Having so found, it is not strictly necessary to determine whether BRSL had the ostensible authority to negotiate and make the agreement alleged by the claimant, but I will.
- [34]** It is noteworthy that in the defendant's letter of December 7, 2004, from Mrs Jacqui Donaldson, she refers to the claimant's September 30, 2004, letter and acknowledges receipt of the claimant's cheques, but does not say that BRSL did not have the authority to write its letter dated September 3, 2004. She merely says that the defendant has not agreed to the application of the moneys paid to the reduction of principal. She refers to clause 2(b) of the Mortgage Deed and advised that the sums paid have been applied to the claimant's account. The evidence is that the defendant applied the moneys paid to interest and relied in doing so on the provisions of the Mortgage Deed.

[35] I find Mrs Bassaragh's letter of December 3, 2007⁴, to Mr John Givans (the attorney-at-law then representing the claimant) , to be very instructive.⁵ In his letter dated November 20, 2007, Mr Givan's refers to correspondence between the defendant and the claimant's attorneys-at-law, and says : " We have not seen in your letters any reference to the action of your agent Business Recovery Services Limited and in particular to the contents of their letter to our client dated September 3, 2004". Like Mrs Jacqueline Donaldson before her, Mrs Bassaragh in her response, does not deny that BRSL had the authority to write the September 3, 2004, letter, instead this is what she says:

"Reference is made to your letter of 20th ultimo and the penultimate paragraph of letter dated September 3, 2004, from Business Recovery Services Limited (BRSL). You will note that BRSL extended a two (2) week period to your client for payment of the principal sum.

This period commenced on September 3, 2004, and would have expired on September 17, 2004. The payment was not received until September 30, 2004, and hence Life of Jamaica Limited (LOJ) reverted to its original position as outlined in our December 7, 2004, letter".

[36] In my view, the reasonable inference to be drawn from this letter is that BRSL either had the authority to write the letter dated September 3, 2004, or this letter and its contents were later ratified by the defendant. This is so because Mrs Bassaragh in her letter, not only refers to BRSL's letter, but she acknowledges that by that letter, a two week period was given to the claimant to pay the principal sum, the payment was made late and as a result, the defendant took the position stated in Mrs Donaldson's letter of December 7, 2004, which is, to revert to the provisions of the Mortgage Deed and to apply the payment received first to interest. I see no

⁴ An agreed document and part of the evidence - exhibit 1(36)

⁵ Mrs Bassaragh was at the time Miss Grace Royal

other way that Mrs Bassaragh's December 3, 2007, can be interpreted. It is surprising that this letter was neither referred to, nor submitted on, by either party. It bears observing as well, that this letter contradicts that aspect of the defence in which it is pleaded that BRSL had no authority to negotiate an agreement with the claimant, in which it would be a term of the agreement that the sums paid would first be applied to principal.

[37] BRSL's note must be interpreted within the context of the claimant's September 30, 2004, letter. As I understand this note, BRSL was saying, in response to the claimant's statement that : *"We are making these payments with the understanding that as soon as the second cheque clears the banking system Life of Jamaica will review the accrued interest charge with a view of adjusting it and agreeing to the timely settlement of same."*, that the issue of reviewing interest and making adjustments to it, was strictly for the defendant to decide. As already seen, in its letter, BRSL spoke only to the putting in place of a payment plan to pay the interest that was outstanding. In cross examination, Mr Wedderburn admitted that the expectation of the claimant, as reflected in its September 30, 2004, letter, was that there would be a reduction, or renegotiation or rescheduling of the interest. It seems to me, from the evidence, that BRSL clearly had no such authority (whether actual or ostensible), a fact admitted to by Mr Wedderburn in cross examination. So, while it seems to me that BRSL had the authority to write its September 3, 2004, letter, it had no authority to agree to what the claimant proposed in its letter of September 30, 2004.

[38] Before leaving this issue, I must address the fact of the acceptance by the defendant of the cheques paid by the claimant and its appropriation of those moneys to interest. In its submissions, the claimant observes that the defendant relies on clause 2(b) of the Mortgage Deed to apply the moneys paid to interest, when in fact no such clause exists. The observation was also made that clause 1(c) allows the borrower to pay the whole principal or the remaining balance. The defendant's reference to clause 2(b) of the Mortgage Deed as the basis to support its application of the moneys paid by the claimant to interest is obviously wrong.

Clause 2(b) gives the defendant the right to enter and view the mortgaged property once in each year, at the cost of the claimant, to ascertain its state of repairs, upkeep and improvements. Clause 3(b) however provides that at any time of payment; the defendant shall have the right to appropriate all money's paid by the claimant to the defendant as it may deem expedient. By this clause the defendant was clearly entitled to apply the moneys paid by the claimant, first to interest.

[39] Given my findings in this claim, the two remaining issues are now clearly otiose and will not be considered.

Conclusion

[40] In the result I find that BRSL's letter of September 3, 2004, and the claimant's letter of September 30, 2004, did not constitute a contract binding on the defendant as the latter contained terms at variance with the former. There was clearly no agreement on an essential term, which was the payment of interest.

[41] I also find that BRSL had the authority to write the letter dated September 3, 2004, and even if it did not have such authority at the time of writing, the defendant later ratified that letter. I find, however, that BRSL did not have the authority to negotiate and agree with the claimant for principal to be paid first **and** thereafter there would be a reduction or renegotiation or rescheduling of interest.

Orders

[42] I therefore make the following orders:

- a) The claim is dismissed.
- b) Costs to the defendant to be agreed or taxed.

A Jarrett
Puisne Judge