[2026] JMCC Comm 37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2024 CD00024

BETWEEN	**VM INVESTMENTS LIMITED**	**CLAIMANT**
AND	**AHL (SPV) LIMITED**	**1ST DEFENDANT**
AND	**KEVIN FRITH**	**2ND DEFENDANT/ ANCILLARY CLAIMANT**
AND	**KINTYRE HOLDINGS LIMITED**	**3RD DEFENDANT/ 1ST ANCILLARY DEFENDANT**
AND	**TYRONE WILSON**	**2ND ANCILLARY DEFENDANT**

IN CHAMBERS

Appearances: Mrs Symone Mayhew KC & Ms Shereece McLeod instructed by Mayhew Law for the Claimant

Mrs Denise Kitson KC & Ms Anna-Kay Brown instructed by Grant, Stewart, Phillips & Co for the 1st & 2nd Defendants

Mrs Kaysian Kennedy Sherman instructed by TWP Attorneys-at-Law for the 3rd Defendant

Heard: February 16 & October 30, 2026

Civil Procedure Rules – Summary Judgment – Whether disbursement of loan proceeds authorised – Banker's Duties to its Customers – Default Judgment – Civil Procedure Rules, R. 12.1(2), 12.5, 12.10(1)(b), 15.2(b), 15.6(1), 18.8(2), 18.11(2), 18.11(4), 1.1, 1.2 and 26.1.

BROWN BECKFORD J

(1) APPLICATION FOR SUMMARY JUDGMENT

BACKGROUND

[1] VM Investments Limited, hereinafter referred to as "**VM Investments**", is an investment and finance company duly incorporated under the laws of Jamaica. VM Investments extended credit facilities to the 1st Defendant, AHL (SPV) Limited, hereinafter referred to as "**AHL**". The 2nd Defendant, Kevin Frith, a Director of AHL, personally guaranteed the loan, and the 3rd Defendant, Kintyre Holdings Limited, hereinafter referred to as "**Kintyre**", provided a corporate guarantee. Summary Judgment has been granted to the Claimant against the 3rd Defendant.

[2] The terms of the credit facility were outlined in a Commitment Letter dated December 15, 2022. Credit facilities were extended up to One Hundred and Fifty-Five Million Jamaican Dollars (**$155,000,000**), commencing on December 29, 2022, and expiring on December 31, 2025. The facility provided for interest at the rate of 14.25% per annum on the sums disbursed and for an increase in the rate. A default on interest payments constituted a default event entitling VM Investments to demand repayment of all outstanding sums.

[3] AHL agreed to the terms of the loan set out in the Commitment Letter by the signature of its authorised signatory on December 15, 2022. The 2nd Defendant executed his guarantee on the same date, and the 3rd Defendant followed suit on December 28, 2022. AHL also executed a Promissory Note through Kevin Frith on December 28, 2022.

[4] The parties knew and understood that the proceeds of the credit facility/loan were intended to fund iCreate Limited's purchase of a majority shareholding in Visual Vibe Limited, being approached by representatives of AHL and Tyrone Wilson, representing the 3rd Defendant, for the same. It was intended that iCreate would launch a rights issue of shares to repay this credit facility.

[5] The Commitment Letter contained conditions precedent to disbursement that included the provision of executed Shareholders' Loan Agreements for Kintyre Holdings Limited's margin loan of One Hundred Million Jamaican Dollars **($100,000,000**) and AHL's margin loan of One Hundred and Fifty-Five Million Jamaican Dollars (**$155,000,000**). The Shareholders' Loan Agreements were to explicitly state that margin loans taken by both companies to participate in the acquisition of Visual Vibe Limited would be liquidated from the Rights Issue being done by iCreate Limited.

[6] The sum of One Hundred and Fifty-Five Million Jamaican Dollars (**$155,000,000**) was duly deposited into the account of VM Wealth on December 29, 2022.

[7] The 1st Defendant failed to pay the interest as required by the Commitment Letter, resulting in a letter to the borrower and guarantors, from the Claimant, advising of the breach of the terms of the credit facility and demanding the full pay-out of the facility immediately. As at December 31, 2023, the Defendants had failed to repay the outstanding loan in the amount of One Hundred and Fifty-Five Million Jamaican Dollars (**$155,000,000**) together with interest due. Consequently, the Claimant brought this claim against the Defendants for:

> *18. …*
>
> *a. The principal sum of $155,000,000 and interest accrued to December 31, 2023 for $25,057,824.07 and continuing at the rate of 15.5% per annum or $73,587.94 per day;*
>
> *b. Court Fees and Attorney's Costs.*
>
> *c. Such further and other relief as this Honourable Court deems fit*

[8] The 1st and 2nd Defendants contend that by the terms of the credit facility, the net proceeds should be deposited into an interest-bearing bank account in the name of the Claimant's associate company VM Wealth Management Limited, which they authorised. The further contention of the 1st and 2nd Defendants is that the proceeds of the credit facility were not authorised by them to be disbursed from that account and that, in making payments to 3rd parties, VM Investments was in breach of the fiduciary duty and/or duty of care owed to the 1st and 2nd Defendants.

[9] The application for Summary Judgment is based on the Claimant's position that the 1st and 2nd Defendants do not have a realistic prospect of successfully rebutting the premise of the Claim, which is a claim for monies. A loan was made to the 1st Defendant and guaranteed by the 2nd and 3rd Defendants, and the Defendants who were responsible for repayment of the loan were in default according to the terms of the agreement.

CLAIMANT'S SUBMISSIONS IN SUPPORT OF APPLICATION FOR SUMMARY JUDGMENT

[10] Mrs Mayhew King's Counsel, on behalf of the Claimant submitted that summary judgment should be entered against the 1st and 2nd Defendants pursuant to **Rule 15.2(b)** of the **Supreme Court Civil Procedure Rules 2002 ("CPR"),** as they had no real prospect of successfully defending the claim. Counsel relied on **Ocean Chimo Ltd. v Royal Bank (Jamaica) Ltd. (RBC) et al** [2015] JMCC Comm 22, at paragraph 52, for the principles governing summary judgment. In particular, once an applicant had demonstrated grounds for concluding that the respondent's case had no reasonable prospect of success, the respondent was required to show a case which was more than merely arguable and carried a realistic, rather than fanciful, prospect of success. The test is to be applied having regard to the overriding objective. Although caution was required where material factual conflicts required resolution, a clear-cut point of law or construction could be determined even where it appeared complex or required full argument.

[11] Counsel also relied on **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12, particularly paragraphs 16 and 17, concerning the utility of summary judgment where a trial was unnecessary. She submitted that factual disputes warranted a trial only where their resolution would affect the Claimant's entitlement to the relief sought. She further relied on the Privy Council's statement that, where a defence, even if established, would still leave the claimant entitled to the relief claimed, there would be no need for a trial.

[12] Counsel contended that the loan documents and supporting evidence established the Claimant's entitlement to recover the outstanding principal and interest. The margin loan had been advanced to the 1st Defendant in December 2022 upon the terms of the

Commitment Letter dated December 15, 2022, which the 1st Defendant had accepted. The facility was secured, inter alia, by the 2nd Defendant's personal guarantee and the 3rd Defendant's corporate guarantee. The 2nd Defendant had also executed a Promissory Note on behalf of the 1st Defendant acknowledging the loan and the obligation to repay it. Counsel maintained that the loan had been disbursed in accordance with its terms, but the principal and interest remained unpaid despite demands. Summary judgment had already been entered against the 3rd Defendant.

[13] In answer to the allegation that the Claimant had breached a fiduciary duty by disbursing the loan proceeds without express authorisation, Counsel relied on **Bristol and West Building Society v Mothew (t/a Stapley & Co)** [1996] 4 All ER 698. She submitted that a fiduciary relationship arose where a person undertook to act for or on behalf of another in circumstances giving rise to trust and confidence, with loyalty being its distinguishing obligation. The relationship between a lender and its customer was not ordinarily fiduciary. Counsel pointed the Court to **JMMB Merchant Bank Ltd v Winston Finzi and Mahoe Bay Company Ltd** [2014] JMCCCD 10 ('**JMMB Merchant Bank Ltd**') where Sykes J, as he then was, explained that the creditor's interests were antagonistic to those of the debtor and that the lender need not advise upon the wisdom of the proposed transaction.

[14] Although the Claimant was not a bank in the strict sense, Counsel submitted that those principles applied equally to other institutions engaged in lending. She relied on **Western Cement Company Limited v National Investment Bank of Jamaica Limited et al** [2023] JMCA Civ 14 ('**Western Cement**'), in which the Court of Appeal rejected the contention that the National Investment Bank of Jamaica owed a fiduciary duty to its borrower. Counsel maintained that the 1st and 2nd Defendants had pleaded no special circumstances capable of creating such a relationship. There was no allegation that the Claimant had undertaken to advise, manage or act on their behalf beyond advancing the loan upon the agreed contractual terms.

[15] As to negligence, Counsel submitted that any duties arising in the commercial lending relationship were primarily contractual and that the Defendants' allegations were

unsupported by facts. She maintained that the parties' discussions, agreements and transaction documents, considered together, authorised the application of the loan proceeds towards the acquisition of Visual Vibe. The contemplated shareholder loan agreements, which provided for lending to iCreate, were a condition precedent to the facility under paragraph 6.1(e) of the Commitment Letter. The Shareholder Agreement between the 1st Defendant and iCreate Limited further confirmed that purpose.

[16] Counsel further submitted that the net proceeds had been disbursed on December 30, 2022, to Hart Muirhead Fatta, the Attorneys-at-Law representing the vendors of the shares in Visual Vibe. She contended that the instruction to pay the loan proceeds to VM Wealth Management was an interim measure pending disbursement to the vendors. Accordingly, the allegation that the proceeds had been disbursed contrary to instructions was without merit.

[17] Alternatively, Counsel argued that, even if a breach of duty were established, it would not extinguish the borrower's or guarantors' contractual obligations to repay the loan. She submitted that the appropriate remedy for any such breach lay in damages rather than as a defence to the debt claim. Having established disbursement in accordance with the loan arrangements and default in repayment, Counsel maintained that no trial is necessary and seeks summary judgment against the 1st and 2nd Defendants with costs.

1ST AND 2ND DEFENDANTS' SUBMISSIONS OPPOSING SUMMARY JUDGMENT

[18] Mrs Kitson King's Counsel, for the 1st and 2nd Defendants, submitted that the application should be refused because the defence and affidavit evidence disclosed material factual disputes requiring a trial. Counsel relied on **Bennett & Anor v Donaldson & Anor.** (unreported), Court of Appeal, Jamaica, SCCA No. 78 of 2009 (Procedural Appeal), judgment delivered 6 October 2009; and **United General Insurance Company Limited v Marilyn Hamilton** (unreported), Court of Appeal, Judgment in SCCA No. 88 of 2008 delivered 15 May 2009., **Swain v Hillman** [2001] 1 All ER 91 and **Merrick Samuels v Gordon Stewart et al.** (unreported), Supreme Court, Jamaica, Claim No. 2001/S-081, judgment delivered 23 December 2004. She maintained that the Defendants

had a real prospect of defending the claim and that determining the disputed evidence summarily would entail an impermissible mini-trial.

[19] Counsel contended that the transaction was governed by the Commitment Letter dated December 15, 2022, the Promissory Note dated December 28, 2022, and the Indicative Term Sheet dated December 12, 2022. The Letter dated December 15, 2022, expressly directed that the net proceeds, after deduction of the Fifteen Million Jamaican Dollars (**$15,000,000**) retention and facility costs, be deposited into the designated interest-bearing account in the name of VM Wealth Management Limited. Neither Defendant had authorised payment to Hart Muirhead Fatta or any other third party. Counsel argued that the Claimant could not vary those written instructions by relying on a purported understanding without the Defendants' express written agreement.

[20] Counsel further submitted that the Claimant knew that the proposed transfer of the shareholding in the 1st Defendant to the 2nd Defendant had not occurred and that the arrangements for acquiring Visual Vibe remained incomplete. It was an express term of the credit facility that repayment would be derived from the proposed iCreate rights issue, which could not proceed because of regulatory breaches. Nevertheless, the Claimant had disbursed the funds without ensuring compliance with the mandate or that the rights issue could be implemented. Counsel also maintained that the entire proceeds had not reached the Vendor and that the Claimant had failed to identify all recipients despite repeated requests.

[21] Relying on **Philipp v Barclays Bank UK PLC** [2023] UKSC 25, Counsel submitted that a financial institution was bound to comply with its customer's mandate and, unless otherwise agreed, could not debit the customer's account for an unauthorised payment. She distinguished that decision on the basis that the customers there had unequivocally authorised the payments, whereas authorisation was directly disputed here. Whether the Claimant had complied with the mandate, breached its contractual duties or duty of care, and caused the resulting loss therefore required determination at trial. Counsel maintained that the Claimant's own breaches had caused the loss for which it sought

recovery and that the Defendants were therefore not liable for the principal and interest claimed.

[22] Counsel relied on **Hamblin v World First Ltd** [2020] EWHC 2383 (Comm) in support of her submission that duties to comply with customers' mandates and exercise reasonable care and skill were not confined to banks in the strict sense but could extend to other financial institutions, including the Claimant. She accordingly submitted that the factual disputes and consequential legal issues afforded the 1st and 2nd Defendants a real prospect of successfully defending the claim and sought refusal of the application with costs.

LAW

[23] It is provided by **Rule 15.2(b)** of the **Supreme Court of Jamaica Civil Procedure Rules, 2002 ("CPR")**, that the court may grant summary judgment where the defendant has no real prospect of successfully defending the claim. The court's powers where an application for summary judgment is made are set out in **CPR Rule 15.6(1)**:

> *On hearing an application for summary judgment the court may-*
>
> *a) Give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*
>
> *b) Strike out or dismiss the claim in whole or in part;*
>
> *c) Dismiss the application;*
>
> *d) Make a conditional order; or*
>
> *e) Make such other order as may seem fit.*

[24] As pointed out in the submissions, **Swain v Hillman,** the case most often relied on in these applications, explains that a "real prospect of success" means a realistic, rather than fanciful, prospect. Also often referred to is the statement of Lord Hobhouse in **Three Rivers District Council v Governor and Company of the Bank of England** (No. 3) [2001] UKHL 16 (**'Three Rivers'**) at paragraph 158 in respect of how a judge should approach the question of the prospect of success as follows:

> *The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, i.e one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly.*

[25] Lord Hope in **Three Rivers** cautions that complex cases requiring a mini-trial on the documents without the benefit of discovery or oral evidence are generally not fit for summary judgment. He stated at paragraph 95:

> *…In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case, the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in Swain's case [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.*

[26] Further guidance is given by P Harrison JA in **Gordon Stewart et al. v Merrick Samuels** SCCA No. 2/2005 at page 94 on the judge's consideration of the question:

> *The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a real prospect, not a "fanciful one". The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning.*

[27] These cases make it clear that the summary judgment procedure is intended to quickly dispose of cases where there is no realistic prospect of success. The court is to determine the merits from the statements of case and documents, but must be careful not to engage in a mini-trial. The procedure is generally inappropriate where there are

substantial disputes of fact. But where, however, extant disputes do not affect the claimant's entitlement to judgment, summary judgment may be granted.

[28] The onus of proof rests upon the respondent to establish that he does have a defence with a realistic prospect of success, once the applicant credibly asserts that there is no real prospect of successfully defending the claim. The scope of the burden was clarified in **Somerset Enterprises Limited and Anor v National Export Import Bank** [2021] JMCA Civ 12 **("Somerset")**, where Brooks P, in reviewing several authorities, posited:

> *[25] The party that seeks the summary judgment must assert that the respondent's case has no real prospect of success. If that party asserts that belief, on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable". In order to successfully resist the other party's assertion, the respondent must prove that its case has "a 'realistic' as opposed to a 'fanciful' prospect of success" (see paragraphs [14] and [15] of* ***ASE Metals NV v Exclusive Holiday of Elegance Limited*** *[2013] JMCA Civ 37).* ***In determining whether there is any real prospect of succeeding, the judge should not conduct a mini-trial.***

ISSUES

[29] The questions raised in this Claim are as follows:

1. Was there a contract for the extension of credit facilities/were the terms of the contract agreed?

2. Were the funds disbursed in keeping with the terms of the contract?

3. Were the funds repaid on the agreed terms/are the sums due and owing?

4. Are the 1st and 2nd Defendants liable to repay the sums?

DISCUSSION

[30] There is no dispute around the 1st and 3rd questions. The sum disbursed under the credit facility was in fact a loan as described in the Guarantee. The background set out above is the agreed position from the pleadings.

[31] The relevant parts of the Commitment Letter as regards the second question are as follows:

> ***6.2 Conditions Subsequent To Disbursement***
>
> a. *Within thirty (30) days of loan disbursement, client is to provide additional security(ies) in the form of cash, repos, equities, or bonds to reduce the concentration risk. The J$15M part loan proceeds being withheld will be released upon satisfaction of this condition.*

[32] Save for this clause, there are no terms of the contract governing the method of disbursement. Contrary to the assertions on behalf of the 1st and 2nd Defendants, no term in the Commitment Letter stated that the net proceeds of the credit facility were to be deposited into the interest-bearing bank account number 351171960 at the National Commercial Bank in the name of the Claimant's associated company VM Wealth Management Limited. There is no mention of such an account in the Commitment Letter. However, a letter of the same date, under the hand of Kevin Frith and bearing the seal of AHL, directed VM Wealth Management Limited to prepare a margin loan facility in the amount of One Hundred and Fifty-Five Million Jamaican Dollars (**$155,000,000**) and that the net proceeds of One Hundred and Thirty-Five Million Eight Hundred and Ninety-Eight Thousand and Sixty-Five Dollars (**$135,898,065**) be placed in NCB Account number 351171960 in the name of VM Wealth Management Limited. There is no realistic prospect of success that the 1st and 2nd Defendants' version of these facts could be accepted. I will return to the import of this letter.

[33] There is no dispute around these events. The difference between the parties emerged due to subsequent events. At paragraph 11 of the Affidavit of Rezworth Burchenson in support of Application for Summary Judgment filed September 18, 2025, he states: *"In accordance with the credit facility, various transaction documents and the discussions between the representatives of the parties, on December or around December 30, 2022 the net loan proceeds in the sum of $135,898,065.00 was disbursed to Hart Muirhead Fatta the Attorneys-at-Law representing the Vendors of the shares in Visual Vibe."* It is noted that the various transaction documents exhibited were the

Commitment Letter, Promissory Note, and letter re the depositing of the loan proceeds, none of which spoke to how the funds were to be disbursed from that account.

[34] AHL and Kevin Frith contend at paragraph 12 of the Affidavit of Kevin Frith in Opposition, filed October 6, 2025, that "neither the first defendant nor I authorised any other payment from the proceeds of the credit facility, whether in writing or other ways to any other person including Hart Muirhead Fatta Attorneys-at-Law", and further contend in paragraph 13 that the Claimant owed to the 1st and 2nd Defendants a fiduciary duty and a duty of care to disburse the proceeds of the credit facility only upon the explicit instructions of the 1st and 2nd Defendants. The argument was that VM Investments failed to conform to the specific agreed instruction for payment, and that there are serious issues to be tried surrounding this question. The premise of this submission is that further instructions were required to be given.

[35] The response by VM Investments is that the purpose of the margin loan was for iCreate to acquire the shares of Visual Vibe. There was no dispute as to this purpose and the Shareholder Agreements, which were required as a precondition to the disbursement of the loan, were in fact executed. A copy of the Shareholder Agreement between AHL and iCreate was exhibited. VM Investments therefore contended that no further instructions were required from AHL or Kevin Frith since the funds were no longer in their names but were transferred to the account of VM Wealth for administrative reasons, to be furthered by the payment for the shares. There is no evidence that AHL gave VM Investments any contrary instructions.

[36] Before proceeding any further, it is necessary to revisit the law as it pertains to the financial institution's duties towards its customer. The Claimant's reliance on **JMMB Merchant Bank Ltd** and **Western Cement** sufficiently elucidates the relevant principles that a bank or financial institution does not ordinarily owe a fiduciary duty to its customer. While it has no obligation to advise, where it undertakes to give advice, it must exercise reasonable care and skill in giving the advice.

[37] The very recent case of **Keith Rose & Colleen Rose v First Caribbean International Bank (Jamaica) Limited** [2026] JMCA Civ 36 makes it clear that while

there is no presumption of a duty of care, same may arise in certain circumstances. Dunbar-Green JA stated:

> *[116] The legal principles governing the negligence issue are not in dispute. A bank owes a duty to exercise reasonable skill and care in carrying out its customer's instructions. Thus, in Barclays Bank plc v Quincecare Ltd and another, Steyn J held that it is an implied term of the banker-customer relationship that a bank will observe reasonable skill and care in and about executing its customer's orders. Likewise, Ubacol Investments Ltd v Royal Bank recognises that the contractual and debtor-creditor relationship between a bank and its customer may provide the requisite proximity for a duty of care to arise. The latter case further recognises, however, that the content of that duty depends upon the relationship and circumstances.*

[38] The ultimate question is whether VM Investments carried out AHL's mandate or its instructions. Paragraph 10 of the Particulars of Claim indicates that the sum of One Hundred and Fifty-Five Million Jamaican Dollars (**$155,000,000**) was disbursed pursuant to the credit facility on December 29, 2022. This allocation is denied in the defence of the 1st and 2nd Defendants. They state at paragraph 11 of the Defence that it was a term of the credit facility that the net proceeds of the credit facility would be deposited into an interest-bearing bank account number 351171960 established at the National Commercial Bank in the name of the Claimant's associated company VM Wealth Management Limited. As stated before, no such term exists. It is clear, though, that the sums were so deposited; hence the letter addressed to VM Wealth Management Limited. The dispute arises as to the disbursement from that account.

[39] It is now appropriate to revisit the referenced letter as to its terms and effect. It must be first noted that the letter is not directed to VM Investments but to VM Wealth Management Limited, said to be an associated company. The letter directs VM Wealth Management firstly to prepare a margin loan facility in accordance with the terms and conditions, which included that the collateral would be ordinary shares in iCreate Limited.

[40] Paragraph 12 of the Defence makes it clear that the full Fifteen Million Jamaican Dollars (**$15,000,000**) was paid to VM Wealth because the letter addressed to Yannick Hutchinson spoke to net proceeds after deduction of a retention of Fifteen Million Jamaican Dollars (**$15,000,000**) and costs of the facility. It is also clear the letter was referencing the sums from the margin loan facility that was being extended by VM Investments. It is the same loan amount, the same security for credit facilities being ordinary shares in iCreate, the same tenure, and the same rate of interest. This letter properly establishes AHL's instructions for the disbursement of the loan by VM Investments to VM Wealth Management Limited. Further, no demur was made to this transaction.

[41] The 1st and 2nd Defendants contend that the letter only authorised the deductions and no other payment, and that any such payment required their explicit instructions. They contend further that the payments made by VM Wealth Management Limited were at the behest of VM Investments and that they are associated companies.

[42] Despite the principle of each company being a separate legal entity, they are inextricably linked in this transaction. Rezworth Burchenson is the CEO of both Companies. He exhibited to his affidavit a letter of March 24, 2023, in which he writes to AHL on behalf of both companies with respect to an increase in interest rates. Counsel for the 1st and 2nd Defendants was invited by the Court to indicate why disbursement from the VM Wealth Management Limited account was a matter for which VM Investments was responsible. Counsel contended that this was a matter for trial as the issue was not straightforward.

[43] It is trite law that a subsidiary company is a distinct legal entity from the parent company. The same applies to companies in a group. This was the posture of the English Court of Appeal in **Adams v Cape Industries plc** [1990] Ch. 433, a case in which the question for determination was whether a company was domiciled in the jurisdiction by

the presence of its subsidiary. The English Court of Appeal stated the law quite clearly. The court said:[1]

> *There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities:" The Albazero [1977] A.C. 774, 807 per Roskill L.J.*

[44] It went further to note:[2]

> *[T]he court is not free to disregard the principle of Salomon v A. Salomon & Co. Ltd. [1897] A.C. 22 merely because it considers that justice so requires. Our law, for better or worse, recognises that the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.*

[45] The court further pointed out that there is no presumption that the subsidiary is the agent of the parent company, nor that it is the alter ego of the parent company. The corporate veil of a subsidiary company can only be pierced where the company was formed with the intention of carrying out some wrongdoing, as was stated in **Prest v Petrodel Resources Limited and others** [2013] UKSC 34 **('Prest')**.

[46] In **Prest**, the question on appeal was whether the court had the power to order the transfer of several properties owned by companies that were wholly owned or controlled by a husband to his wife as matrimonial property. Lord Sumption noted that *"[t]heir separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them."* **Prest** was considered by the Court of Appeal in **International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461** [2013] JMCA Civ 45. Morrison JA (as he then was) stated:[3]

> *It is therefore clear that a company generally falls to be treated as an independent person, separate and distinct from its shareholders, capable of*

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[1] [1990] Ch. 433, pg 532 para D
[2] Ibid. pg 536 para G
[3] [2013] JMCA Civ 45, para 63

> *holding land and other property, entering into contracts and incurring debts and other liabilities in its own name.* ***In the context of groups of companies, each company is also a distinct entity and a subsidiary does not fall to be regarded as an agent of the parent by reason only of the fact that the parent is its controlling shareholder. In this regard, it is generally irrelevant that the parent and the subsidiaries share or have common directors or other officers****. [Emphasis mine]*

[47] In respect to piercing the corporate veil, Morrison JA, in considering **Prest**, opined:[4]

> *Although the court confirmed that there is a limited category of cases in which it might be appropriate to pierce the corporate veil, it squarely located the jurisdiction to do so within the context of cases of abuse of a company's separate legal personality "for the purpose of some relevant wrongdoing" – per Lord Sumption at para [27].*

[48] The pleadings do not suggest, nor do the affidavits, that there was any abuse by VM Investments or VM Wealth Management Limited of their separate legal personalities, which would cause this Court to lift the corporate veil of the Claimant company.

[49] The question then becomes whether further instructions were required to be given to VM Investments at the time the funds were paid to Hart Muirhead Fatta. The short answer is no. VM Wealth was said to be the arranger of the rights issue. It is understandable that the funds were directed there. It is uncontested that the funds were intended to be paid for the shares in Visual Vibe. Mr Burchenson swears that they were disbursed for that purpose on December 30, 2022. AHL and Kevin Frith, while contending that only some of the sums were so disbursed from VM Wealth Management Limited, do not dispute that a portion was paid to Hart Muirhead Fatta representing the vendors of the shares in Visual Vibe.

[50] As a reminder, Mr Burchenson states that the disbursement of the loan proceeds to Hart Muirhead Fatta, the Attorneys-at-Law for the vendors of the shares of Visual Vibe, was in accordance with not only documents but discussions between the representatives

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[4] Ibid. para 65

of the parties. It is the details of those discussions which are called into issue by the 1st and 2nd Defendants. But these are matters between VM Wealth Management Limited and the Defendants. The alleged breach of fiduciary duty of care relates to this transaction, a transaction for which the Claimant has no responsibility.

[51] Questions 2 and 4 are therefore answered in the affirmative. The loan was disbursed in keeping with the instructions given. The subsequent failure of the rights issue in about February to March 2023 would have no bearing on the actions of VM Investments on December 29, 2022. The 1st and 2nd Defendants are liable to repay the loan and interest as provided for in the Letter of Commitment and Guarantee. No issue was taken as to the amount claimed. For this reason, the Claimant is entitled to Summary Judgment in its favour.

ORDERS

I. Claimant's application for Summary Judgment granted.

II. Judgment given in favour of the Claimant against the 1st and 2nd Defendants in the amount of $226,146,224.03 plus interest at the rate of 15.5% from July 1, 2025 to the date of judgment.

III. Costs of the Claim to be the Claimant's on an indemnity basis.

IV. Leave to Appeal refused.

V. Claimant's Attorney-at-Law to prepare, file and serve Formal Order.

(2) APPLICATION FOR DEFAULT JUDGMENT

[52] By Notice of Application for Court Orders filed December 22, 2025, the 2nd Defendant/Ancillary Claimant made an Application for Judgment in Default of Defence against the 3rd Defendant/1st Ancillary Defendant and 2nd Ancillary Defendant.

[53] The 2nd Defendant/Ancillary Claimant filed an Ancillary Claim on May 31, 2024, against the 3rd Defendant/1st Ancillary Defendant and Tyrone Wilson 2nd Ancillary

Defendant, seeking the costs of the claim and such contribution and/or indemnity against the Claimant's claim as may be just pursuant to the **Law Reform (Tortfeasors) Act**, on the grounds and with Particulars of Loss and Damage as follows:

1. *This Claim has been brought by the Claimant against the 1st, 2nd and 3rd Defendants in accordance with Claim Form and Particulars of Claim served with this Ancillary Claim Form. Copies of the 2nd Defendant's/Ancillary Claimant's Particulars of Claim (being the 2nd Defendant's Defence to the Claim) and all other statements of case that have been filed in these proceedings are also served with this Ancillary Claim Form.*

2. *The 2nd Defendant/Ancillary Claimant claims against the 1st and 2nd Ancillary Defendants both of Apt C 108, Plantation Springs Red Hills Post Office in the parish of Saint Andrew the costs of the claim together with such contribution and or indemnity against the Claimant's claim herein as may be just pursuant to the Law Reform (Tort Feasors) Act on the grounds that:*

    (a) *On April 3, 2023, the Ancillary Claimant obtained from the 1st and 2nd Ancillary Defendants a Guarantee and Indemnity in relation to the credit facility, the subject of the main proceedings. The Ancillary Claimant will at the trial refer to and rely on the said Guarantee and Indemnity.*

    (b) *The Ancillary Claimant is therefore entitled in addition and or in the alternative to its Defence in the main proceedings, to enforce the said Guarantee and Indemnity against the 1st and 2nd Ancillary Defendants by way of an Ancillary Claim.*

(c) *In breach of your obligations under the said Guarantee and Indemnity, you have failed to honour the same by paying to the Claimant the sums due under the said credit facility.*

(d) *Your breach has caused the 2nd Defendant/Ancillary Claimant herein loss and damage.*

(e) *You are therefore liable for the loss and injury caused to the reputation and business of the Ancillary Claimant*

PARTICULARS OF LOSS AND DAMAGE

i. *Inability to obtain funding for a pending Ideas Execution agreement.*

ii. *Lost business opportunity for the implementation of a branding agreement to carry out branding projects in the Caribbean.*

iii. *Overseas travel to meet with persons in the diaspora to mitigate the negative effect of the litigation resulting from the Ancillary Defendants' failure to honour the terms of the Guarantee and Indemnity.*

iv. *Public relations consultants' expenses.*

v. *Legal Expenses*

3. *The 2nd Defendant/Ancillary Claimant will also ask the Court to determine the following matters not only as between the Claimant and the 1st and*

2nd Defendants, but also between the 2nd Defendant/Ancillary Claimant and you:

(a) whether you owed a duty in contract in the circumstances

(b) whether you breached this duty; and

(c) whether and to what extent the 2nd Defendant/Ancillary Claimant's losses resulted from your breach of contract.

4. *If you wish to dispute the Claimant's claim against the Defendants or the 2nd Defendant/ Ancillary Claimant's claim against you, you must-*

(a) send or deliver a completed form of Acknowledgement of Service to the registry so that it is received by them within 14 days of service of the Ancillary Claim upon you; and

(b) send or deliver a Defence to this claim to the court so that it is received by them within 42 days of the day on which this claim was served on you. Rule 18.8(2). You must also serve a copy of your Defence on the 2nd Defendant's/Ancillary Claimant's Attorney-at-Law whose address will be given below.

5. *If you do not file a Defence, you will –*

(a) be deemed to have admitted the 2nd Defendant's/Ancillary Claimant's claim against you, and

(b) be bound by any judgment or decision in the main proceeding in so far as it is relevant to any claim made against you and judgment may be entered against you.

[54] The Ancillary Claim was served on the Ancillary Defendants on June 3, 2024. The Ancillary Defendants filed an Acknowledgement of Service of the Ancillary Claim on June

7, 2024. The Ancillary Defendants, having failed to file a Defence, a Request for Default Judgment was made on December 9, 2024. To date, no Defence has been filed.

ANCILLARY CLAIMANT'S/2ND DEFENDANT'S SUBMISSIONS IN SUPPORT OF DEFAULT JUDGMENT

[55] King's Counsel Mrs Kitson, on behalf of the Ancillary Claimant, submitted that permission should be granted to enter default judgment against the Ancillary Defendants, Kintyre Holdings Limited and Tyrone Wilson. The Ancillary Claim Form, filed on May 31, 2024, sought contribution or indemnity and damages arising from a signed Guarantee and Indemnity concerning the credit facility. The Ancillary Defendants were served on June 3, 2024, and filed an Acknowledgment of Service on June 7, 2024, without contesting jurisdiction. However, neither had filed a Defence or sought an extension of time.

[56] Counsel submitted that the 42-day period prescribed by **Rule 18.8(2)** expired on July 15, 2024. Pursuant to **Rule 18.11(2),** the Ancillary Defendants were therefore deemed to admit the Ancillary Claim and were bound by any judgment or decision in the main proceedings insofar as it was relevant to that claim.

[57] Counsel acknowledged that no default judgment had been entered against the Ancillary Claimant in the main proceedings and that the Ancillary Claim sought relief beyond contribution or indemnity. Relying on **Rules 18.11(4), 1.1, 1.2** and **26.1**, Counsel submitted that the Court retained a discretion to grant permission and dispense with procedural requirements where just, particularly given the prolonged and unexplained default. The claim sought substantive relief capable of standing independently and could therefore be treated, in substance, as an ordinary claim under **Parts 8, 10** and **12**. Counsel maintained that requirements analogous to **Rule 12.6** had been satisfied.

[58] Reliance was placed on **Naetyn Development Company Limited v Kirk Holbrook** [2017] JMCC Comm 11 ('**Naetyn**'), in support of the submission that default judgment was administrative in nature and did not require consideration of the merits where no Defence or extension application had been filed. Applying **Rule 12.10(1)(b)** by

analogy, Counsel submitted that judgment could be entered for an amount to be determined by the Court, as in **Naetyn.** In asking the court to grant permission and enter default judgment, Counsel relied on **Rule 26.1(3)** which outlines that where the court makes an order it can make such order subject to conditions or specify the consequences of failure to comply and **Rule 26.1(4)** which states the conditions the court may impose.

[59] **Rule 12.1(2)** of the **CPR** provides for a claimant to obtain default judgment where a defendant has failed to file a defence in accordance with **Part 10**. The conditions to be satisfied are set out at **Rule 12.5** below:

> *The registry must enter judgment at the request of the claimant against a defendant for failure to defend if –*
>
> *(a) the claimant proves service of the claim form and particulars of claim on that defendant;*
>
> *(b) or an acknowledgment of service has been filed by the defendant against whom judgment is sought; and*
>
> *(c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;*
>
> *(d) that defendant has not –*
>
> *(i) filed a defence within time to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6));*
>
> *(ii) where the only claim is for a specified sum of money, filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or*
>
> *(iii) satisfied the claim on which the claimant seeks judgment; and*
>
> *(e) there is no pending application for an extension of time to file the defence.*

[60] The conditions have all been met. The only question for the court is whether the Ancillary Claimant is entitled to Judgment on the pleadings. I accept the exposition on the relevant law as posited by Simmons J (as she then was) in **Naetyn**, relied on by the Ancillary Claimant. The 1st and 2nd Defendants in their Defence state that on April 3, 2023, Kevin Frith, the 2nd Defendant, now also Ancillary Claimant, obtained a guarantee and indemnity in relation to the credit facility in question from the 3rd Defendant Kintyre Holdings Limited and Tyrone Wilson. The 2nd Defendant/Ancillary Claimant seeks to enforce this indemnity by way of the Ancillary Claim. In those premises, the Orders below are being made.

ORDERS

I. Time is abridged for the making of this application.

II. Judgment in Default of Defence granted to the 2nd Defendant/Ancillary Claimant Kevin Frith against the 3rd Defendant/1st Ancillary Defendant Kintyre Holdings Limited and 2nd Ancillary Defendant Tyrone Wilson, with damages to be assessed following the determination of the Claim.

III. Costs to be costs of the claim.

IV. The Ancillary Claimant's Attorney-at-Law to prepare, file and serve order.

CASE MANAGEMENT CONFERENCE

ORDERS

I. Pre-Trial Review Conference is fixed for February 26, 2027 at 11:00 a.m. via video conference for one hour.

II. List of Documents to be filed and served on or before December 9, 2026.

III. Ancillary Claimant's Witness Statements to be filed and served on or before January 13, 2027.

IV. The Ancillary Defendants are at liberty to file and serve Witness Statements within 14 days of service of the Ancillary Claimant's Witness Statements.

V. Liberty to Apply.

VI. Costs to be costs in the Ancillary Claim.

VII. Ancillary Claimant's Attorneys-at-Law are to prepare, file and serve this order.