[2018] JMCA App 41

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NOS 158 & 159/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**CITRUS DEVELOPMENT COMPANY LIMITED**	**APPLICANT**
AND	**DEVELOPMENT BANK OF JAMAICA LIMITED**	**RESPONDENT**

Miss Carol Davis and Ms Gillian Mullings instructed by Naylor & Mullings for the applicant

Mrs Tana'ania Small Davis, Mrs Kerri-Ann Allen Morgan and Adam Jones instructed by Livingston Alexander & Levy for the respondent

7, 8, 9 November 2017 and 20 December 2018

PHILLIPS JA

[1] I have read in draft the judgment of my sister Straw JA (Ag). I agree with her reasoning and conclusions and have nothing further to add.

P WILLIAMS JA

[2] I too have read the draft judgment of my sister Straw JA (Ag) and agree with her reasoning and conclusion.

STRAW JA (AG)

[3] In these applications, both filed on 30 August 2017, Citrus Development Company Limited (the defendant in the court below, "CDCL") applied for: (i) a stay of the execution of the judgment of Laing J (the learned judge) made on 28 March 2017, pending the hearing of its appeal; (ii) permission to appeal the said judgment; and (iii) an extension of time within which to file notice of appeal (which ought properly to have been and taken to be a request for an extension of time to file the application to seek permission to appeal).

[4] Laing J had refused to set aside the default judgment, which was entered against CDCL and had further disallowed CDCL's application for its defence which was filed out of time to be regularised.

Background

[5] On 7 April 2016, the Development Bank of Jamaica Limited (being the claimant in the court below, "DBJ") claimed against CDCL the sum of $113,389,035.49 and interest thereon pursuant to a written guarantee dated 8 May 2007. In its particulars of claim, DBJ alleged that CDCL had "guaranteed the payment of Seventy Million Dollars ($70,000,000.00) and any future indebtedness" by Jamaica Citrus Growers Limited which it held with DBJ. DBJ claimed that on 3 April 2007, it had approved a loan ("loan 1") to the Jamaica Citrus Growers Limited in the amount of $70,000,000.00 under a letter of commitment dated 4 April 2007 (as amended by letter dated 23 April 2007), both documents constituting the loan agreement. A second loan in the sum of

$60,000,000.00 was also disbursed pursuant to an agreement dated 2 September 2009 ("loan 2").

[6] DBJ claimed that Jamaica Citrus Growers Limited had defaulted on the repayment of the loans. A demand was made on CDCL pursuant to the terms of the guarantee, by letter dated 4 March 2013, for the sum of $53,389,035.69 which was stated to be the outstanding principal and interest of $28,634,243.30 accrued as at 28 February 2013. CDCL failed to satisfy the demand and as a result, a suit was filed.

[7] On 25 November 2016, default judgment was entered against CDCL on the basis that it had not filed a defence. It was ordered that DBJ recover against CDCL:

> "1. The principal sum of $113,389,035.49;
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> 2. Interest on the principal sum at the contractual rate accrued in the sum of $31,557,175.21 as at 25 November 2016 and continuing thereafter until payment at a daily rate of $27,415.57;
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> 3. Court fees on claim of $2,000.00;
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> 4. Attorney's fixed costs on issue of $10,000.00;
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> 5. Attorney's fixed costs on entering judgment of $14,000.00."

[8] By notice of application filed on 9 December 2016, CDCL applied to set aside the default judgment and sought to regularise its defence filed on 25 November 2016. The learned judge dismissed the application, having rejected CDCL's contention that its proposed defence had a real prospect of success.

[9] On 4 April 2017, CDCL filed a notice of appeal from the judgment of Laing J. On 18 May 2017, DBJ filed a preliminary notice of objection to the notice of appeal, on the basis that permission to appeal was in fact required. Consequently, at a case management conference held on 20 June 2017, a single judge of this court upheld the preliminary objection and struck out the notice of appeal which had been filed.

[10] On 28 April 2017 and 24 May 2017, respectively, CDCL filed in the Supreme Court notices of application for: (i) a stay of the execution of the judgment of Laing J; and (ii) permission to appeal the said judgment. Both applications were heard together on 26 May 2017, by Laing J. Ms Sheron Henry, General Manager for legal services at the DBJ, in her affidavit sworn on 23 October 2017, and filed in opposition to the application for permission to appeal in this court, deposed that the above-mentioned application for permission to appeal in the Supreme Court was withdrawn by CDCL. However, it is noted that in the formal order dated 26 May 2017, the learned judge had refused to grant a stay of execution and had also refused permission to appeal.

[11] Following from that refusal, on 19 June 2017, counsel for CDCL filed another application for leave to appeal in the Supreme Court. At the hearing of that application on 14 July 2017, before Laing J, counsel for CDCL sought orally to vary the application to include a request for an extension of time within which to file the application. The learned judge granted the extension of time within which to make the application but refused permission to appeal.

[12] The applications now before this court for determination. having been filed on 30 August 2017, would have been filed over four weeks outside the period stipulated in rule 1.8(1) of the Court of Appeal Rules (CAR). CDCL would therefore require an extension of time to bring the application for permission to appeal.

[13] The grounds set out in the applications were essentially the same. It was prayed that the applications be granted on the basis that the proposed appeal has a real chance of success. Also, in relation to the application for a stay of execution, CDCL asserted that DBJ, in proceeding to act on the judgment, had obtained a final charging order in respect of land belonging to CDCL. It was averred that the applicant would face ruin and the viability of the Jamaica Citrus Growers Limited would be threatened if the stay was not granted. These factors, counsel, Mrs Carol Davis, submitted, shifted the balancing exercise in favour of a stay being granted.

[14] These were the grounds (as set out in the application for a stay of execution) on which CDCL relied to demonstrate that it had a real chance of success in the appeal:

> "i) The Learned Judge erred in looking at the calculations of the judgment debt and interest thereon which were patently wrong on the face of the Particulars of Claim and later on the face of [Marc] Johnson's Affidavit (officer of the Claimant) dated February 6th 2017 based on provisions of the loan documentation.
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> ii) There are clear and evident errors in the calculations of the Claim on the face of their pleadings and this case begs for an accounting of that [which] was collected and for the true interest to be calculated as per the law.
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> iii) The Learned Judge erred in considering that the guarantee extended to loan 2 in circumstances where the

said loan was granted without notice to the Appellant and in circumstances where at the material time the 1st Loan was already in default.

iv) The Learned Judge erred in that he concluded in his judgment that the modern approach was that 'the normal rules of contractual conclusion apply to written guarantees' but failed to apply the law in respect to [the] true construction of the contract.

v) The Learned Judge erred in that he made a determination as to the proper construction of the contract and as to the intention of the parties with respect to same in circumstances where there was material dispute between the parties as to the true construction of the guarantee and in particular as to whether the 2nd Loan was intended to be covered by guarantee.

vi) The Learned Judge erred in that the 2nd loan agreement dated 2nd December 2009 at paragraph 11.1 the parties specified the specific securities to be taken and did not at any time specify the guarantee mortgage as one of the securities in relation to the 2nd loan.

vii) The Learned Judge erred in that he considered the limitation period for the repayment of the monies to run for a period of 12 years, in circumstances where the period of limitation was 6 years and had expired at the time the Claim herein commenced.

xii) [sic] The Claim herein was not a claim under the mortgage but a claim pursuant to the guarantee, and the Learned Judge erred in concluding that the relevant limitation period was 12 years as for a claim under the mortgage.

iix) [sic] The Learned Judge erred in concluding that the limitation period for loan 1 had not expired. The loan was made in May 2007 and the last payment was made in July 2008, and thereafter no further payments were made. The Claim herein was made in April 2016 at which time the Limitation Period on the loan had expired. The Guarantee provided was for repayment of the sums due on the loan, and in circumstances where the loan was statute barred no sum would have been due pursuant to the guarantee."

[15] In the affidavit in support of the application for permission to appeal sworn on 30 August 2017, Mr John Thompson, the chairman and director of CDCL, averred that a notice of appeal had been filed in this court under the mistaken view that permission to appeal was not required. He stated that that misconception had resulted in the delay in seeking permission to appeal in the court below. The learned judge having refused permission to appeal, Mr Thompson attributed the delay in filing the application for permission to appeal in this court to counsel in the matter proceeding on three weeks' vacation leave outside the island and consequently CDCL having to retain new counsel in the matter. That delay, he stated, was unintentional.

[16] Mr Thompson further deposed (at paragraph 4) that CDCL had been unable to file its defence within time due to issues related to the location of relevant documentation.

[17] In the affidavit sworn by Ms Sharon Henry, she deposed that the proposed appeal was unmeritorious and was being pursued by CDCL in an effort to delay the execution of the judgment, which is a sum in excess of $140,000,000.00. She averred that: there had been a poor record of compliance on the part of CDCL which was evident in its failure to file its defence even after consent had been granted by DBJ for it to do so outside of the prescribed time; CDCL's non-compliance was worsened by its filing the notice of appeal without the requisite permission; Jamaica Citrus Growers Limited did not challenge the validity and enforceability of the loan documentation neither had it disputed its indebtedness to DBJ; and the provisions of the guarantee stipulates that CDCL is liable for payment as primary obligor and surety.

Discussion

[18] The court therefore has to consider whether it should: (i) extend the time to apply for permission to appeal and grant permission to appeal; and if it does, (ii) whether it should grant a stay of execution of the orders of Laing J. If the court refuses to grant an extension of time to apply for permission to appeal and permission to appeal, then it would be otiose for the court to consider any application for a stay of execution. Such an application would be refused, as there would be no appeal pending against the orders of Laing J. The court will therefore treat with the application for extension of time to apply for permission to appeal and permission to appeal firstly.

Extension of time to file application for permission to appeal and application for permission to appeal

[19] If a party seeking permission to appeal has not complied with the time stipulated to file that application, an application for extension of time within which to do so must be made. Rule 1.7(2)(b) of the CAR, gives this court the general power to extend or shorten time even after the time for compliance has passed. Rule 1.8 governs applications for permission to appeal. Rule 1.8(7) requires the applicant to have a real chance of success in order to obtain permission to appeal.

[20] In addressing the issue of whether an extension of time ought to be given, F Williams JA in **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al**[1] at paragraph [56] referred to Panton JA's (as he then was) statement of the approach

[1] [2017] JMCA App 2

to be taken by the court in considering an application for permission to appeal out of time in **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes**[2]:

> "(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable the Court has a discretion to extend time.
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> (3) In exercising its discretion the court will consider-
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> (i) the length of the delay;
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> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;
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> (iv) the degree of prejudice to the other parties if time is extended.
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> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for extension of time, as the overriding principle is that justice has to be done."

[21] However, F Williams JA at paragraph [17] also referred to the guidance of this court by Smith JA in **Evanscourt Estate Company Limited v National Commercial Bank**[3], that if permission to appeal ought not to be given, it would be futile to extend the time within which to apply for permission.

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[2] (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999

[3] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, judgment delivered 26 September 2008

[22] The court will therefore proceed by considering whether the applicant has satisfied the criteria in rule 1.8(7) of the CAR, which requires an applicant to have a real chance of success in its appeal in order to obtain permission to appeal. Bearing in mind that this is not the hearing of the appeal from Laing J's decision, the discussion herein is limited to the extent necessary to demonstrate the reasoning of the court without descending into a mini trial of the issues raised in the proposed appeal (see: **ED & F Man Liquid Products Ltd v Patel**[4] per Potter LJ).

A. *Is there a real chance of success?*

[23] It is firmly accepted that the phrase "real chance of success" is synonymous with the phrase "realistic as opposed to a 'fanciful' prospect of success" as used by Lord Woolf MR in the case of **Swain v Hillman and another**[5] (see: Morrison JA (as he then was) in **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and another**[6] at paragraph [21]; and F Williams JA in **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al** at paragraph [28]).

[24] Laing J's major consideration would have been to determine whether the applicant had a real prospect of successfully defending the claim based on rule 13.3(1) of the Civil Procedure Rules (CPR). In reviewing his decision, this court will consider whether he made any errors in law or misinterpreted the facts in the exercise of his discretion or if the decision was so aberrant that it is deemed "demonstrably wrong"

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[4] [2003] EWCA Civ 472
[5] [2001] 1 All ER 91
[6] [2015] JMCA App 27A

(see: **Hadmor Productions Ltd and others v Hamilton and others**[7] and **The Attorney General of Jamaica v John Mackay**[8]).

[25] In analysing whether CDCL's appeal has a "real prospect of success" focus is placed on the three main issues raised, namely:

(1) whether the claim as to loan 1 was barred by virtue of the Limitation of Actions Act;

(2) whether the guarantee of loan 1 is extended to loan 2; and

(3) whether there is an error in calculations and if so, whether that is a sufficient basis to allow the appeal.

ISSUE (1) - whether the learned judge erred in finding that the claim in relation to loan 1 is not barred by the Limitation of Actions Act

Applicant's submissions

[26] It was the contention of counsel, Mrs Davis, that the learned judge had applied the incorrect limitation period of 12 years (when there had been no effort to enforce the mortgage). The relevant limitation period ought to have been six years in relation to the contract of guarantee and that period would have expired in 2014 prior to the filing of the claim in 2016.

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[7] [1982] 1 All ER 1042
[8] [2012] JMCA App 1

Respondent's submissions

[27] Counsel, Mrs Small Davis, submitted that it was clear that there was an intention to sue on the guarantee and not on the mortgage. Counsel also argued that the guarantee in question is not a simple contract but a writing obligatory which would be governed by section 52 of the Limitation of Actions Act. As such, the issue of limitation would be rendered unmeritorious as the limitation period would be 20 years and not six years. Counsel relied on Halsbury's Laws of England, 4th edition, volume 68, paragraphs 975-977; **International Asset Services Limited v Edgar Watson**[9]; from the authors Phillips and O'Donovan, The Modern Contract of Guarantee, 2nd edition, page 450; and **International Asset Services Ltd v Arnold Foote**[10].

Findings of the learned judge

[28] The learned judge considered section 33 of the Limitation of Actions Act. He accepted the submissions of DBJ that the cause of action accrues from the day the principal debtor defaults on repayment or on demand by the creditor and found that 12 years had not passed since either of these events. He found it unnecessary to consider section 52 of the Limitation of Actions Act to which he had been referred by counsel for DBJ.

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[9] [2014] JMCA Civ 42

[10] (unreported), Supreme Court, Jamaica, Claim No. 2008 HCV 01326, judgment delivered 28 January 2009

Discussion

[29] Section 33 of the Limitation of Actions Act, dealing primarily with mortgages, states that:

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

[30] Section 33 of the above-mentioned Act clearly states that a suit to recover monies secured by a mortgage must be instituted within 12 years of the last payment or within 12 years of acknowledgement by the mortgagor. As to accrual, Halsbury's Laws of England, 2015, volume 49, paragraph 806, which was cited by the learned judge, emphasises that the guarantor will generally not be liable unless the principal debtor is liable.

[31] The claim is clearly brought against the applicant on the basis of the guarantee. In the instant case, Jamaica Citrus Growers Limited made its last payment on loan 1 on 4 July 2008 and made its last payment on loan 2 on 9 January 2011. DBJ sent a demand letter to both Jamaica Citrus Growers Limited and CDCL on 2 June 2010, 13

August 2010, and specifically to CDCL on 4 March 2013, with respect to loan 1. There is nothing before the court to indicate whether Jamaica Citrus Growers Limited or CDCL acknowledged in writing the demand letters from the DBJ.

[32] The issue as to whether the claim is made under the guarantee or the mortgage is significant. The learned judge does not definitively state in his judgment whether he viewed the claim as being under one or the other. But, it is apparent that he accepted that the claim was made under the mortgage as he accepted counsel for the respondent's submissions at paragraph [28] of his judgment in relation to section 33 of the Limitation of Actions Act. However, the limitation period of 12 years would not have applied if there was no claim based on an enforcement of the mortgage.

[33] Section 52 of the Limitation of Actions Act is set out below:

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

[34] This section specifically relates to "all bonds and every other writing obligatory". It stipulates a 20 year limitation period instead of the period of six years that is allowed for simple contracts and debts. This point was apparently raised before the learned judge, however, as stated previously, he determined the issue solely on section 33 of the above Act and found that the claim in relation to loan 1 would not have been statute barred. This aspect of his judgment cannot be successfully challenged however,

if a limitation period that exceeds six years is applicable. The question to be answered is whether the guarantee can be determined to be a "writing obligatory".

[35] In **International Asset Services Limited v Edgar Watson**, Dukharan JA, who delivered the judgment of the court, considered whether credit card agreements were simple contracts or writing obligatories. He endorsed the trial judge's interpretation of "writing obligatory" as a "speciality", that is, contracts executed under deed and excluding simple contracts. Dukharan JA also referred to the definition of "writing obligatory" at paragraph [20] of his judgment:

> "[20] The term 'writing obligatory' is defined in the Dictionary of English Law (1959) by Earl Jowett as 'bonds'. He defines 'bond' among other things, as:
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> > 'a contract under seal to pay a sum of money (a common money bond) or a sealed writing distinctly acknowledging a debt, present or future; and when this is all, the bond is called a single bond'."

He concluded, at paragraphs [21] and [22], that he agreed with the trial judge's view that a "writing obligatory" seemed to refer to something more than a simple contract or an agreement in writing and that a contract not under seal is not a writing obligatory for the purposes of section 52 of the Limitation of Actions Act.

[36] The Osborn's Concise Law Dictionary, 9th edition, defines "guarantee" as:

> "A secondary agreement in which one person (the guarantor) will become liable for the debt of the principal debtor if the principal debtor defaults."

[37] By virtue of section 4 of the Statute of Frauds 1677, a guarantee must be evidenced in writing.[11]

[38] "Speciality" and "bond" are also given in the following definitions[12]:

> Speciality - "A somewhat archaic term used to refer to a contract made by deed (q.v.). A specialty debt is one due under a deed."
>
> Bond - "(1) An instrument of indebtedness issued by companies and governments to secure the repayment of money borrowed by them. (2) A single bond is an instrument made under seal to pay a sum of money or a sealed written acknowledgement of a debt, present or future…"

[39] The Halsbury's Laws of England, volume 68 (2016), provides a list of examples of specialities at page 976. These include: a bond, a deed, a covenant, a statute and also a foreign contract under seal. It also states that "speciality" is often used in the sense of meaning a speciality debt, that is an obligation under a deed securing a debt or a debt due from the Crown or under statute.

[40] In **George Thomas v Allan Arscott**[13], this court also acknowledged that a bond is a speciality. In that case, it was held that the recovery of the proceeds of a judgment was subject to a limitation period of 20 years. Edun JA, at page 597, referred

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[11] "No Action shall be brought . . . whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriages of another person . . . unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

[12] Osborn's Concise Law Dictionary, 9th edition

[13] (1971) 12 JLR 594

to the dictum of Maule J from **Cork & Brandon Rail Co v Goode**[14] where he stated that the bond is "the plainest and simplest kind of speciality".

[41] The guarantee signed by the officers of CDCL was executed under seal. It is a contract given by the guarantor to be liable for the debt of the principal debtor, if the principal debtor defaults. It is not a simple contract in writing. It is in the category of a bond or writing obligatory for the purposes of section 52 of the Limitation of Actions Act. The relevant limitation period would therefore be 20 years and not six years. So while Laing J would have erred in his assessment of the relevant limitation period, this is of no assistance to the applicant in advancing the merits of the appeal. The applicant has therefore no realistic prospect of success in relation to this issue on the appeal.

ISSUE (2) – did the learned judge err in finding that the guarantee applies to loan 2?

Applicant's submissions

[42] Counsel submitted that the money paid to Jamaica Citrus Growers Limited under loan 2 was paid by DBJ acting as agent for the Government of Jamaica and that CDCL neither knew of, nor intended to be, the guarantor of the obligations of loan 2. Further, where the guarantee mortgage was stamped for $70,000,000.00 and that sum was never up-stamped to cover the additional funds advanced by DBJ, the guarantee mortgage could not be considered as a continuing security in relation to loan 2. Counsel contended that these issues should be resolved at a trial.

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[14] [1843-60] All ER Rep 671

[43] Counsel submitted that the learned judge therefore erred in determining that the guarantee extended to loan 2, especially when loan 1 was already in default. She also claimed that while the learned judge used the correct rules of construction, as applied to the interpretation of the words in the guarantee, he failed to consider the matrix of facts which would shed light on the intention of the parties.

[44] Counsel referred the court to the affidavit evidence of Mr Thompson. In support of CDCL's contention, he stated that the demand letters made by DBJ to Jamaica Citrus Growers Limited dated 2 June 2010, 13 August 2010, and 4 March 2013, made no reference to loan 2. They only related to a demand for loan 1, although, the second letter (dated 13 August 2010) would have been sent at a date after loan 2 was alleged to have gone into arrears. It is his opinion that these letters lend credence to CDCL's contention, otherwise DBJ would have also made their demands in relation to both loans.

[45] Counsel relied on various authorities including **Static Control Components (Europe) Ltd v Egan**[15]; **Investors Compensation Scheme Ltd v West Bromwich Building Society and others**[16]; **Boufoy-Bastick v The University of the West**

[15] [2004] 2 Lloyds Rep 429
[16] [1998] 1 All ER 98

Indies (Jamaica)[17]; **Carib Ocho Rios Apartment v Proprietors Strata Plan No 73 and Trevor Carby**[18].

[46] Counsel submitted that when all the factors are taken into consideration, the allegation that loan 2 was guaranteed by the applicant has only recently been put forward as part of the present claim. However, the documentation shows that it was never the intention of the parties that the guarantee should cover loan 2. Counsel contended that it was open to the judge to conclude that the intention of the parties was that loan 2 was not intended to be secured by the guarantor's mortgage.

Respondent's submissions

[47] In relation to the issue as to whether the guarantee applied to loan 2, counsel submitted that the words in the guarantee were clear and demonstrated that it was a continuing guarantee. Counsel submitted that no competing interpretation of the words in the guarantee had been advanced by the CDCL. She also submitted that the obligation of Jamaica Citrus Growers Limited to repay the amount in loan 2 was to DBJ and not to the Government of Jamaica. There was, therefore, no merit in the submission advanced that the applicant was not liable on the guarantee. Counsel referred the court to **Investors Compensation Scheme Ltd v West Bromwich**

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[17] [2015] UKPC 27

[18] [2013] JMCA Civ 33

Building Society and others as well as **Rainy Sky SA v Kookmin Bank**[19]; and **Arnold v Britton and others**.[20]

[48] Additionally counsel submitted that this is a case where the documents are available and there are no facts substantially in dispute. She pointed to the fact that the guarantor's mortgage with the incorporated guarantee and indemnity, was signed and sealed by a director and secretary of CDCL in the presence of Mr Thompson, who was one of the signatories of the second loan agreement on behalf of the principal debtor, along with Mr Kenneth Newman. Counsel submitted therefore that CDCL, through its chairman, would have been well aware of the wording of the guarantee as well as the fact that the principal debtor entered into a second loan agreement. She referred the court also to clause 10.5 of the "Guarantor's Mortgage under the Registration of Titles Act" and submitted that it suggests that the parties contemplated that the respondent would provide additional loans to the principal debtor. It states:

> "10.5 This Mortgage shall be impressed, in the first instance, with stamp duty to cover the principal sum set out in Item 4 of Schedule 1. Notwithstanding the foregoing, the Bank shall be and is hereby authorised without any further consent of the Mortgagor to impress additional stamp duty hereon to cover any principal amount which may be owing by the Mortgagor to the Bank from time to time. Such upstamping shall take effect as if the Mortgagor had issued a new mortgage in the form hereof to the Bank covering the additional principal sum for which this Mortgage is upstamped."

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[19] [2011] 1 WLR 2900
[20] [2015] 2 WLR 1593

Findings of the learned judge

[49] The learned judge found that the normal rules of contractual construction apply to written guarantees. He considered the scope of the "guarantee and indemnity" clause in the contract to find that, albeit there was no "classically formulated continuing security clause", there was nothing to suggest that there was an intention to limit the scope of the guarantee to "a particular facility or transaction and in particular to loan 1 only". Laing J also accepted that, as a matter of construction, the respondent is the lender under loan 2.

Discussion

[50] CDCL's complaint on this point must fail. The guarantee and indemnity clause specifies:

> "2.1 In consideration of the Bank granting or agreeing to grant credit facilities to the Principal Debtor or granting time or other indulgence to the principal Debtor and for other good and valuable consideration (the receipt whereof the Mortgagor hereby irrevocably acknowledges) the Mortgagor hereby unconditionally and irrevocably covenants and guarantees that it will, on demand, pay to the bank the **Secured Obligations**. The foregoing guarantee is given subject to and with the benefit of the provisions set out in **Schedule 3** hereto. If the Mortgagor consists of more than one person, then liability of each in respect of this guarantee shall be joint and several.
>
> 2.2 For the same consideration aforesaid, **the Mortgagor agrees, as primary obligor and not merely as surety, to indemnify the Bank in the event that the whole or any part of the Secured Obligations** is or becomes irrevocable from the Principal Debtor or any other Security Party **or under the guarantee herein for any reason whatsoever**, irrespective of whether any such reason or related fact or circumstance was known or ought

to have been known to the Bank or its officers, employees, agents or professional advisers. The amount of such loss shall be the aggregate amount of the **Secured Obligations** from time to time.

2.3 As a separate and independent stipulation, **the Mortgagor agrees that if the Secured Obligations or any part thereof is not recoverable from the Principal Debtor by reason of any legal limitation, disability or incapacity of the principal Debtor or any other fact or circumstance whether known to the Bank or the Mortgagor or not, such Secured Obligations or part thereof shall nonetheless be charged upon the Mortgaged Premises and recoverable on demand from the Mortgagor as though it had been incurred by the Mortgagor as the sole principal debtor in respect thereof and as though this Mortgage has been created to secure such indebtedness or liability**." (Emphasis supplied)

[51] In the interpretation section/clause (1.1) of the guarantor's mortgage, the term "Secured Obligations" is defined as :

"being the amount referred to in Item C of the First Schedule and means all of the following liabilities of the Principal Debtor or the Mortgagor (whether any such liability shall be the sole liability of the Principal Debtor or the Mortgagor or shall be a joint liability of the Principal Debtor and the Mortgagor or the Principal Debtor or the Mortgagor with any other person, firm or company) namely:

(i) **all present and future indebtedness (in whatever currency incurred) of the Principal Debtor or the Mortgagor to the Bank in respect of any loan, advance or other credit facility**;

(ii) all liabilities in respect of notes or bills discounted or paid or bills accepted for, or at the request of, the Principal Debtor or the Mortgagor or other loans, credits, or advances made to, or for the

accommodation or at the request of, the Principal Debtor or the Mortgagor;

(iii) all other liabilities whatsoever of the Principal Debtor or the Mortgagor to the Bank, present or future, actual or contingent (including liability as surety or guarantor); and

(iv) **all costs, charges and expenses owed to, or incurred directly or indirectly by, the Bank in relation to this Mortgage** or any other Security held by the Bank (in connection with advances or other credit facilities) offered by the Principal Debtor or the Mortgagor or any other Security Party or in relation to the exercise of any of the powers conferred by, or the enforcement of, any such Security or in relation to any such indebtedness or liability on a full and unlimited indemnity basis; together in each of the cases mentioned at sub paragraphs (i), (ii), (iii) and (iv) **with all interest, commissions and bank and discount charges; such interest being completed in each case in the manner agreed in any Related Document or failing that, compounded at monthly rests [sic] and so that interest shall be payable at the same rate and in the same manner as well after as before any judgement, PROVIDED THAT the Secured Obligations shall be determined from time to time by the books of the Bank**." (Emphasis supplied)

[52] Schedule 3 – "Guarantee and Indemnity Provisions" (attached to the Guarantor's Mortgage) specifies the following:

"2. This Guarantee and Indemnity is a **continuing security** and shall remain in full force and effect until all the Secured Obligations have been paid, discharged or satisfied in full notwithstanding the liquidation, administration or other incapacity or any reconstruction, reorganization or change in the constitution of the Principal Debtor, the Mortgagor or any other Security Party or in the name and

> style thereof or any settlement of account or other matter whatsoever, but the Bank may release, in writing, any one or more of the Principal Debtor or other Security Party and notwithstanding any such release this Guarantee and Indemnity shall remain a **continuing security binding on the Mortgagor**, except to the extent of such written release." (Emphasis supplied)

[53] A straightforward reading of those clauses shows that a continuing security is specifically referenced in schedule 3 of the guarantor's mortgage. The definition of secured obligations in clause 1.1 of the interpretation section of the guarantor's mortgage would include loan 2 when taken at its clear and obvious meaning. Loan 1 and loan 2 are secured obligations. CDCL's argument that it was not on notice as to the applicability of the continuing security aspect of loan 1 is without merit. It is clearly a matter they should have known.

[54] However, counsel for the applicant has submitted by reference to the affidavit of Mr Thompson that "the documentation shows that it was not the intention of the parties that the guarantee ... given by the Appellant should cover the second loan". In **Investors Compensation Scheme Ltd v West Bromwich Building Society**, Lord Hoffmann illuminated the principles in analysing the construction or interpretation of contracts such as guarantees. Lord Hoffmann stated:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 ALL ER 352, [1997] 2 WLR 945).

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios* Cia Naviera SA v Salen Rederierna

> AB...[1984] 3 All ER 229…"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must be made to yield to business common-sense."

[55] In determining the meaning of the guarantee, the question must therefore be asked, "…what meaning would it convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract?" as set out in **Static Control Components (Europe) Ltd v Egan**. It also held in **Static Control Components (Europe) Ltd v Egan**, at page 429, that:

> "(1) in principle, all contracts had to be construed in the light of their factual background, that background being ascertained on an objective basis: accordingly, the fact that a document appeared to have a clear meaning on its face of it does not prevent, or indeed excuse, the Court from looking at the background."

[56] While background information between the parties can therefore be admissible to ascertain the true meaning of a contract, it must be ascertained on an objective basis. In these circumstances, is there any basis for the matter to proceed to trial in order that the factual background be considered?

[57] In the instant matter, the terms of the guarantee are clear when read in conjunction with schedule 3 of the guarantee provision. The definition of "secured obligations" speaks to "all present and future indebtedness...in respect of any loan, advance or other credit facility".

[58] CDCL does not point to any further background or history apart from the issues referred to by Mr Thompson. I find merit in Mrs Small Davis' submission that all the information referred to by Mr Thompson was before the learned judge for his consideration.

[59] Mr Thompson would have been aware that loan 2 was given to the principal debtor because of continuing financial difficulties. In fact, at the time the agreement for loan 2 was signed, the principal debtor was already in default in relation to loan 1. Loan 2 describes the lender as DBJ and the borrower as the Jamaica Citrus Growers Limited, the principal debtor. The fact that it is the Government of Jamaica that played an active role in the extension of loan 2, does nothing to reinforce counsel's submission that the applicant had no intention of acting as a guarantor.

[60] The learned judge would have had to consider whether the applicant had a reasonable prospect of success in relation to the applicability of the guarantee to loan 2. Bearing in mind the references in the document referred to above, Mr Thompson's evidence in relation to whether the guarantee applied is subjective at best. He has pointed to no other objective factual circumstances existing between the parties. Since the words in the document contemplated both existing and future debt, the court would only depart from the plain meaning of the document where the meaning of the words results in ambiguity or commercial absurdity.

[61] In **Carib Ocho Rios Apartment v Proprietors Strata Plan No 73 and Trevor Carby** Harris JA at paragraph [26] referred to **Investors Compensation Scheme v West Bromwich Building Society and others** and stated that:

> "the court will only engage in an exercise to investigate the meaning of the words in a document, if in its opinion, it is obvious that something was amiss with the language of the document."

[62] In **Arnold v Britton and others**, a decision of the Supreme Court of England and Wales, Neuberger LJ, at paragraphs 17-23, considered the interpretation of commercial documents and reiterated that the exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader.

[63] In **Kookmin Bank v Rainy Sky SA and others**[21], Sir Simon Tuckey (dissenting in the Court of Appeal, whose dicta was approved by the Supreme Court on appeal) on the point of construction of a bond, stated at paragraphs [18] and [19] that if there are two possible constructions, the court is entitled to reject the one that is unreasonable and, in a commercial context, the one which flouts business common sense. The applicant has not pointed to a competing construction in interpreting the guarantee.

[64] Therefore, I do not believe that any extrinsic material is necessary in these circumstances to shed light on the intention of the parties. The submission on behalf of the applicant would require the court to accept the outside information given by Mr

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[21] [2010] EWCA Civ 582

Thompson. It is essentially akin to a subjective belief and is not contained in the written contract. All the parties to the contractual arrangement, on reading the terms, would be on notice as to the implications, as the wording in the guarantor's mortgage and attachments do not limit the responsibility of the guarantor to a specific loan. However, parties within the confines of the law are free to contract as they deem fit.

[65] The fact that the mortgage was not up-stamped to cover an extended loan beyond the original $70,000,000.00 is of no significance in relation to whether the guarantee applied to loan 2 as the claim is grounded on the guarantee and not on the basis of a mortgage. The absence of any mention of the guarantee in the document relating to loan 2 is also not evidence of any objective fact shared by the parties as the securities listed in clause 11 of loan 2 were those to be provided by the principal debtor to DBJ, not those of the guarantor. These issues do not therefore affect the finding of the learned judge in relation to the defence raised by the applicant.

[66] There is no realistic prospect of success in relation to this ground.

ISSUE (3) – whether the learned judge erred in his treatment of the issue of the calculation error

Applicant's submissions

[67] Counsel, Ms Gillian Mullings, submitted that the learned judge erred in not setting aside the default judgment in the light of erroneous interest calculations which are evident on the pleadings of DBJ when contrasted with the affidavit of Marc Johnson (Account Executive for Credit Services at DBJ), filed on 3 February 2017, based on the provisions of the loan documentation. Further, counsel submitted that the learned judge

erred in not looking into those errors and that an account is necessary to ascertain the correct sums owing.

[68] Counsel made reference to the affidavit of Mr Thompson sworn to on 30 August 2017, in which the specific anomalies were set out at paragraph 25. He stated that the particulars of claim aver that DBJ made demand "By letter dated the 4th of March 2013…under the terms of the guarantee for the sum of $53,389,035.69 being [the] outstanding principal and interest of $28,634,243.30 accrued as at the 28th February 2013." This is in relation to loan1. He deposed however that at paragraph 11 of the said particulars, DBJ pleaded that:

> "… [t]he sums due and payable under the loans … as at the 31st of January 2016 are as follows:
>
> | Principal | Interest |
> |---|---|
> | $53,389,035.69 | **$20,647.821.11 (loan 1)** |
> | $59,999,999.80 | $2,712,098.67 (loan 2)". |
>
> (Emphasis supplied)

[69] He further stated that since DBJ is contending that no payment was made after the demand was issued, a question would arise as to how is it that the interest has been reduced by $8,000,000,00 (loan 1) in the particulars of claim.

[70] Counsel also argued that the date from which default interest was calculated was incorrect. This relates to the disbursement in relation to loan 2. Counsel made reference to the affidavit of Mr Thompson in which he stated that the document reflected that as of December 2009, only $34,870,597.62 was disbursed, that payments

were being made up to and after December 2009, yet December 2009 has been regarded as the date of default. Secondly, interest is being calculated at the rate of 9% (the default rate set out in the loan agreement, instead of 6% - the rate for repayment) from the date the loan was disbursed in September 2009, but the particulars of claim (at paragraph 12) allege that the loan was in default as of December 2009.

[71] Counsel further submitted that the final judgment is in the amount of $113,389,035.49 with interest of $31,557,175.21 (and continuing), but these figures are not supported by the evidence. She cited rule 8.7(3) of the CPR which states that where the claim is for a specified sum of money, the total amount of interest claimed to the date of the claim and the daily rate at which interest will accrue after the claim, ought to be set out. Counsel contended that DBJ has failed to do this.

[72] She referred the court to the loan statement in relation to loan 2 and contended that this document clearly shows that the amount of $30,000,000.00 was disbursed on 11 September 2009 and then interest being added to the account 20 days later in the sum of $143,013.70 on 30 September 2009. She calculated that the interest of 6% on the amount of $30,000,000.00 for 20 days should be $98,630.20. The amount of interest charged instead was 9% and this was done within the context that the entire loan was not disbursed in full until June 2010.

[73] Counsel submitted that the judge erred in not setting aside the default judgment based on these anomalies. At the minimum, an order for variation ought to be made.

Respondent's submissions

[74] Counsel submitted that the issue of the appropriate interest rate (whether 6% or 9%) is concerned only with loan 2 and that CDCL has failed to appreciate the terms of the second loan agreement which provides that (i) interest is payable "immediately following disbursement"; and (ii) the consequence of default in payment of any instalment of the principal is that default interest become payable on the arrears from due date of payment. She referred the court to clauses 6.2 and 6.3 of loan 2.

[75] In examining the said loan statement exhibited to the affidavit of Marc Johnson, counsel submitted that it shows that the first tranche was disbursed on 11 September 2009. The principal debtor missed dates for the repayment due on 30 September and 31 October 2009. DBJ was therefore entitled to charge interest at the default interest rate of 9% from the date of default. The default interest was not charged as against the whole of the principal loan amount but only against the amount of the principal that had been disbursed at that date.

[76] In relation to the discrepancy in the particulars of claim, counsel submitted that there may be an error in the pleading but the loan statements (attached to the affidavit of Marc Johnson) provided the correct amount and date. Counsel stated further that the manner of calculation is consistent with the document attached to Mr Marc Johnson's affidavit and although this was attacked, CDCL has presented no figures to the contrary.

[77] Counsel submitted that the applicant has not established any meritorious argument for setting aside the default judgment on this point. She submitted that in any event, where a judgment has been entered in default and it is proved to have been entered in the wrong amount, the judgment would not be set aside as the court would vary the judgment to the correct amount. She referred the court to **Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v Habib Bank Ltd**[22].

Discussion

[78] Clauses 6.2 and 6.3 of loan 2 are set out below:

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

[79] Clause 6.3 clearly speaks to default interest at 9% being payable in the manner submitted by counsel for DBJ. The normal interest rate would be 6%. The loan account (loan 2) reflects the amount payable as interest at $143,013.70 as of 30 September 2009. However, Ms Mullings recalculation of $98,630.20 is premised on the interest charged at 6% for 20 days from 11 September 2009, the date the loan was disbursed,

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[22] [1999] 1 WLR 42

up until the above date. The agreement speaks to repayment on a monthly basis as reflected in the repayment schedule. This schedule was not disclosed to this court and it is not clear from the material presented whether the first payment would have been due by 30 September 2009. The loan statement indicates that the first payment made after money was disbursed was on 8 December 2009. There was therefore a failure to repay on a monthly basis, as indicated by the agreement, from the date of the disbursement of the loan. CDCL has not challenged this aspect of the evidence. Thus, the calculation of the interest rate at 6% would have been done on an incorrect basis as it would be the default interest that would be applicable. Ms Mullings' submissions in relation to this point are therefore unsubstantiated.

[80] The particulars of claim, at paragraphs 11 and 12, set out the interest rates claimed in relation to both loans, the interest due as at 31 January 2016 and the continuing daily rate of interest. Essentially, the same points were argued before the learned judge and are dealt with at paragraphs [11] to [13] of his judgment. The learned judge found that the rate of interest claimed was properly pleaded pursuant to rule 8.7(3) of the CPR. The learned judge cannot be faulted in his assessment of this issue.

[81] As far as the error on the face of the pleadings is concerned, the figures contained in the loan statements are attached to the affidavit of Marc Johnson. The statement in relation to Loan 1 reflects that the interest as of 31 January 2017 is in the amount of $20,647,821.11. This is the actual amount pleaded at paragraph 11 of the particulars of claim albeit, that figure is pleaded as of 31 January 2016. However, the

loan statement does set out all the relevant figures with the total outstanding. In adding the principal amounts said to be due under both loans, the total is $113,389,035.49. In relation to the interest, the amount is $23,359,919.78. These sums are stated as due as of 31 January 2016. The default judgment issued reflected the principal sum as constituted above and interest accrued in the sum of $31,557,175.21 as at 25 November 2016 and continuing at a daily rate of $27,415.57. Although the figure pleaded in relation to the interest is the same for January 2016 as well as January 2017, an examination of the loan statement (loan 1) appears to provide the explanation. The said statement attached to Mr Marc Johnson's affidavit appears to have been generated on the 31 January 2017. It reflects a closing balance of $53,389,035.69 as principal owing and interest in the sum of $20,647.821.11. Similarly, the loan statement in relation to loan 2, on that same date, reflects a closing balance of $59,999.999.80 as principal owing and interest in the sum of $2,712,098.67. However, the last line item in relation to principal and interest for both loans is dated in 2012. In relation to both loans therefore, there is no indication of any further calculation between 2012 and 2017.

[82] Rule 2.15(b) of the CAR allows this court the power to "affirm, set aside or vary any judgement made or given by the court below" in a civil appeal. If there is evidence of a clear error in calculation, then this would provide a basis for a realistic prospect of success, albeit, on this limited ground. However, CDCL has not submitted any other calculations contrary to what has been set out by the respondent in the above statements. These accord with the sum awarded under the default judgement. While I

accept that there may be no evidence to support the calculation of interest at 9% from disbursement on the 11 September 2009 to 30 September 2009, it is clear that CDCL was in default as the first loan payment was only made on 8 December 2009. This was clearly in breach of the agreement, therefore default payment at the interest rate of 9% was due in any event. CDCL is merely contending that there are miscalculations. There is no evidence to support such a contention. Certainly, it would have been prudent to properly demonstrate the basis for requesting an order for variation in relation to the judgment sum. There is, therefore, no realistic prospect of success in relation to this issue.

Whether a stay of execution ought to be granted?

[83] The now cemented criteria have been plainly stated to require a two step inquiry for any such consideration- [1] whether there is any merit in the appeal and [2] assessing the balance of risk of prejudice to both parties (see: **Sagicor Bank Jamaica Limited (formerly known as RBTT Bank Jamaica Limited) v YP Seaton and Others**[23] and also Morrison JA (as he then was) in **Calvin Green v Wynlee Trading Ltd and Naylor & Turnquest**[24], at paragraph [12]). Having found that CDCL has no "real prospect of success" on appeal, there is no basis for considering whether a stay of execution ought to be granted as the first limb of that enquiry has patently failed.

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[23] [2015] JMCA App 18
[24] [2010] JMCA App 3

Disposition

[84] In the light of the foregoing, I propose that the application to enlarge time within which to seek permission to appeal and for permission to appeal be refused. The application to stay the execution of the orders of Laing J should also be refused and the costs of the applications be to the respondent to be agreed or taxed.

PHILLIPS JA

ORDER

(1) The application for extension of time within which to seek permission to appeal and for permission to appeal is refused.

(2) The application to stay the execution of the orders of Laing J is refused.

(3) The costs of the applications to the respondent to be agreed or taxed.