[2016] JMCA App 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 31/2014

MOTION NO 11/2016

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN SAGICOR BANK JAMAICA LIMITED APPLICANT

(formerly known as RBC Royal Bank (Jamaica) Ltd formerly known as RBTT Bank Jamaica Ltd)

AND MARVALYN TAYLOR-WRIGHT RESPONDENT

Mrs Sandra Minott-Phillips QC and Ms Rachel McLarty instructed by Myers, Fletcher & Gordon for the applicant

Ransford Braham QC and Anwar Wright instructed by Taylor-Wright & Co for the respondent

18 October and 20 December 2016

MCDONALD-BISHOP JA

[1] This is a notice of motion brought by Sagicor Bank Jamaica Limited ("the bank") for conditional leave to appeal to Her Majesty in Council from the decision and order of the court, delivered on 1 July 2016, in favour of the respondent.

[2] The motion is brought pursuant to section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, and section 110(2)(a) of the Constitution of Jamaica ("the Constitution"). The bank has submitted two grounds in support of the motion. They are as follows:

> "1. The question involved in the appeal is a decision in a civil proceeding that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
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> 2. Section 110(2)(a) of the Constitution of Jamaica provides that an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal where, in its opinion, the question involved in the appeal falls within ground 1 above."

[3] The notice of motion is supported by affidavits of Andrew Foreman, sworn to on 15 July 2016, and of Rachel McLarty, sworn to on 10 and 18 October 2016.

[4] The respondent strongly opposes the motion, and relies on her affidavit sworn to on 21 July 2016. She contends that the proposed appeal to Her Majesty in Council entails no question of great general or public importance or otherwise, and the motion should therefore be refused.

[5] The primary issue which arises on this application, therefore, is whether the criterion of "great general or public importance or otherwise" has been established by the bank, for conditional leave to be granted for an appeal to Her Majesty in Council.

The factual background

[6] The claim brought by the bank against the respondent in the Supreme Court has its genesis in an agreement between the bank and the respondent entered into in or around July 2007, by which the bank loaned to the respondent the sum of $21,760,000.00 with interest. The bank contended that in pursuance of the agreement, the respondent had signed a promissory note on 27 July 2007 ("the 27 July promissory note") which was witnessed by one, Roosevelt Gillett-Chambers, manager at the Duke Street branch of the bank.

[7] The respondent, in her amended defence, admitted to having signed a promissory note for a loan in the sum of $21,760,000.00 plus interest from the bank, but contends that it was done on 20 July 2007 ("the 20 July promissory note") and not on 27 July as contended by the bank. She further asserted that the 20 July promissory note was witnessed by Mr Wilton South of the Mandeville branch of the bank. She also stated that in addition to the 20 July promissory note, she signed an offer letter as well as provided residential property, situated at Wireless Station Road, Stony Hill in the parish of Saint Andrew, and commercial property, situated at Duke Street in the parish of Kingston, as security for the money advanced to her.

[8] The respondent's contention therefore was that she had not signed, issued or delivered to the bank the 27 July promissory note on which it was relying to enforce the loan agreement. She alleged that that promissory note was forged. She also contended that she owes no liability under the 20 July promissory note since it was incomplete as it did not contain any agreed interest rate and that the loan had been disbursed on 27

July 2007, which was not contemporaneous with the date of the signing of the 20 July promissory note on. In effect, the respondent denied the validity of the two promissory notes as proper bases on which the bank could enforce the loan agreement.

The Supreme Court proceedings

[9] On 8 March 2011, the bank commenced proceedings against the respondent to recover the money allegedly owed on the loan plus interest, amounting to $31,662,395.26, as well as for money owed on credit cards with interest, fees, costs and expenses to the date of payment. The respondent subsequently paid all claims except for the money the bank alleged was owed on the loan.

[10] On 8 May 2012, the bank filed a notice of application for summary judgment with respect to the unpaid loan by the respondent, for the sum of $31,650,395.26. The basis of the application for summary judgment was that the respondent had no real prospect of successfully defending the claim, she having admitted to borrowing monies from the bank as well as executing a genuine promissory note (the 20 July promissory note) in favour of the bank in the sum of $21,760,000.00 plus interest.

[11] The application was heard and granted by Sykes J, who, in applying the principles set out in **Swain v Hillman** [2001] 2 ALL ER 91 and **ED&F Man Liquid Products Ltd v Patel & Anr** [2003] EWCA Civ 472, found that the promissory note was not essential to the bank's claim for payment. He stated:

> "So I am not making any pronouncement now as to whether or not there was forgery, or no forgery, because that is not my function here. But let us go on the favourable

> assumption to the [respondent] that there was some kind of forgery or some kind of irregularity. In the circumstances of this case, as pleaded by both parties, and as the contest has developed, the documentation in relation to which the dispute has arisen, namely the promissory note exhibited by the bank, is not an essential part of the bank's claim or, put another way, the bank can still establish its claim without that document. And, in light of the fact that there is really no denial that the loan was made, and there is no assertion by the [respondent] that all the monies have been paid back, what you have now is a problem of arithmetic."

[12] The respondent appealed against that decision. The appeal was allowed and the matter was remitted to the Supreme Court to be heard by a different judge. Phillips JA, with whom the other members of the court agreed, dealt exhaustively with the grounds of appeal and, at paragraphs [78] and [79] of the judgment, she provided a useful synopsis of the court's overall conclusion in disposing of the appeal in these terms:

> "[78] Without hearing all the evidence and on the pleadings as existed, it is evident that the learned judge's approach in granting an order for summary judgment and his assessment of the respondent's prospects of success was palpably wrong.
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> [79] The issues surrounding whether the appellant signed the 27 July promissory note and whether it was forged or was ratified require investigation and cannot be a basis for summary judgment. The learned judge placed reliance on documents outside the respondent's particulars of claim and reply without regard to the applicable law on bills of exchange and without an amendment to the particulars of claim. In those circumstances, the learned judge was wrong in the exercise of his discretion to grant summary judgment and so it ought to be set aside with costs to the [respondent]. The issues which arise on the disputed facts in this case must be subject to a trial."

The legal and factual bases for the motion

[13] By way of reminder, the relevant provision of the Constitution, which is engaged in the consideration of this motion, is section 110(2)(a), which provides:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases –
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> > (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings;..."

[14] The bank's contention that conditional leave should be granted rests on the two planks provided for in the section: Firstly, that the question to be asked of Her Majesty in Council is of great general or public importance and, secondly, that the phrase "or otherwise" in the section is used disjunctively, so that, leave may be granted in situations where the decision ought "otherwise" to be submitted to Her Majesty in Council, particularly, in situations where the overriding objective of the Civil Procedure Rules 2002 ("the CPR") makes it necessary for conditional leave to be granted.

[15] The affidavit of Andrew Foreman succinctly sets out the issues identified by the bank as being of great general or public importance or otherwise, for conditional leave to be granted. The relevant portions from paragraphs 7-12 read:

> "7. By its Notice of Motion Sagicor seeks leave to appeal the decision of the Court of Appeal to [H]er Majesty in Council pursuant to sections 110(2)(a) of the Constitution of Jamaica

and in accordance with section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council, 1962.

8. Sagicor is advised by its attorneys-at-law on Record and verily believes that its proposed appeal raises an issue of great general or public importance to a commercial bank's ability to effectively engage in banking business namely, that commercial banks must be allowed to utilize the legal procedure of summary judgment to recover from delinquent debtors overdue, acknowledged and undisputed borrowings.

9. The orderly functioning of the commercial banking sector in any market economy is regarded by Sagicor as being of critical general and public importance and the ability of commercial banks to effectively engage in banking business is an essential part of that. Timely and speedy debt recovery is critical to the process.

10. It is Sagicor's experience that among the things essential for the effective engagement in banking business is the preservation of a creditor's right to summarily recover overdue and outstanding debts from persons who admit receipt of value for a bill of exchange, or of their indebtedness otherwise.

11. Sagicor is informed by its attorneys-at-law on Record and verily believes that in the instant case where:

> a. [The respondent], an attorney-at-law, testified that she borrowed the sum of $21,760,000 plus interest from the bank;
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> b. [The respondent] did not deny owing the money to the bank;
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> c. Sagicor's calculation of the balance due from [the respondent] was not challenged in the summary judgment proceedings; and
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> d. [The respondent's] receipt of value for the promissory note was never in issue;

the Court of Appeal erred in ordering the parties to proceed to trial (with all the attendant expense and

> extended timeline that involves). Accordingly Sagicor's attorneys-at-law on Record are of the opinion that the Court of Appeal's decision is not in keeping with the overriding objective of Jamaica's Civil Procedure Rules to enable the court to deal with cases justly and, accordingly, ought to be submitted to Her Majesty in Council for consideration by Their Lordships' Board.
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> 12. Sagicor therefore humbly prays for an Order in terms of its Motion for Conditional Leave to appeal to Her Majesty in Council filed herein."

Whether the question is one of 'great general or public importance'

[16] The question which the bank wishes to be submitted to Her Majesty in Council for consideration, and which is said to be of great general and public importance, was not specifically stated in the form of a question in the affidavit of Andrew Foreman. As can be seen at paragraph 8 of the affidavit, he merely raised the issue that the bank is saying is of importance for consideration. The issue, according to Mr Foreman, is one that relates to "a commercial bank's ability to effectively engage in banking business, namely, that commercial banks must be allowed to utilize the legal procedure of summary judgment to recover from delinquent debtors overdue, acknowledged and undisputed borrowings". The absence of a question in the affidavit has not escaped the criticism of Mr Braham QC, on behalf of the respondent, and the attention of this court. This defect will be addressed later.

[17] It is sufficient to note for present purposes, that it was during the course of oral submissions by Mrs Minott-Phillips QC, on behalf of the applicant, that the proposed question was formulated for the benefit of the court. She framed it this way:

> "In what circumstances must commercial banks be allowed to utilize the legal procedure of summary judgment to recover from delinquent debtors, overdue, acknowledged and undisputed borrowings."

The bank's submissions

[18] The bank has filed comprehensive, and I must say, intellectually stimulating, submissions in support of its motion. All those submissions have been considered but for the sake of brevity, only some prominent aspects that are immediately relevant to the specific question under consideration will be outlined. They are as follows:

a) The question that is proposed to be put for consideration before Her Majesty in Council is of importance as the decision of this court "has the potential to substantially impair a creditor's ability to obtain summary judgment on an action for recovery of debt in circumstances where the debtor's receipt of consideration for the instrument binding him (in this instance a bill of exchange securing a demand loan of $21,760,000 [sic] with interest) is not a live issue".

b) Section 30 of the Bills of Exchange Act ("the Act") provides that a debtor who has signed a bill of exchange is *prima facie* deemed to have received value. Accordingly, although the respondent contends that the bill of exchange that is affixed to the bank's particulars of claim is forged, she has admitted in her defence that she had borrowed the sum of $21,760,000.00 with interest from

the bank and has made payments on the loan. She has also affixed to her defence, a bill of exchange which she admits to having signed and which she acknowledges to be genuine. This bill of exchange is for the "very indebtedness" which is the subject of the bank's application for summary judgment. For these reasons, she is *prima facie* deemed to have received value and as such, the bank ought to be allowed to utilize the legal procedure of summary judgment.

c) Where a party's claim is for debt recovery, in which evidence of the debt includes a bill of exchange, "the burden of proving receipt of value, where fraud, duress, force and fear or illegality is either admitted or proved (neither of which applies here), shifts to the holder until he proves that subsequent to the forgery value has in good faith been given for the bill". Additionally, if the court is of the view that the burden of proof had shifted to the bank to prove receipt of value, that burden would have been eliminated in the light of the respondent having pleaded in her defence her intention to rely on a genuine bill of exchange evidencing the debt and her receipt of value.

d) In the alternative, even if the burden had shifted and the bank was required to prove receipt of value, the respondent in her affidavit has admitted to owing the debt, irrespective of the

allegation of forgery. Therefore, the court is to accept that once it has been established that value has been received for the bill of exchange, a debtor should not be able to take issue with it. The burden of proof is only shifted to the bank to establish that the respondent had received value and this could not be in issue given that the respondent has admitted receiving the value. In light of these circumstances, the court has misapplied sections 24 and 30 of the Act.

e) The respondent, by producing in evidence what she says is a genuine bill of exchange in virtually identical terms to that produced by the bank, and which acknowledges her receipt of value, is precluded in law from setting up want of authority regarding the signing of the bill of exchange produced by the bank. The court's direction of the trial of that issue amounts to another misapplication of section 24 of the Act "that has dire consequences for the quick resolution of debts".

f) The court's decision has resulted in a lower court now being bound to refuse summary judgment applications against a debtor who questions the legitimacy of his signature on an instrument used by the creditor as evidence of his indebtedness and order that the matter proceeds to trial, irrespective of whether receipt of value is in issue. The instrument, in any particular case, need not be a bill

of exchange. See as an example, in which the decision of this court has since been followed, the case of **Barbican Heights Limited v Seafood & Thing International Limited** [2016] JMSC Civ 142, the judgment of Master Jackson-Haisley (Ag) (as she then was).

[19] In support of her arguments, Mrs Minott-Phillips maintained that the South African case of **Patrick Thabang Kgotlagomang v Petrus Johannes Joubert** (A203/2013) [2014] ZAFSHC 143 (4 September 2014) is also instructive. She pointed, in particular, to the dictum of Rampai, AJP at paragraphs [39] and [40] that:

> "[39] It is very easy to deny one's signature. If such simple denials, unexplained defences, and vague suspicions were to be glorified as triable issues or *bona fide* defences – then the commercial world would be absolutely paralysed with catastrophic economic repercussions. The courts would not cope with the resultant endless tide of commercial litigation. We have to adjudicate disputes responsibly lest we open floodgates for undeserving litigants. That, in my view, would sound the death knell for the efficacy of the sifting procedure designed to afford a deserving plaintiff inexpensive and speedy relief against an undeserving defendant.
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> [40] A trial court has of course a discretion to refuse summary judgment and to afford a defendant an opportunity of having his day in court. However, such a discretion always has to be judiciously and not arbitrarily exercised. Where, as in this appeal, the defence is not only materially deficient, but also substantially lacks *bona fides*, no legitimate ground exists for generously exercising the residual discretion the court has in favour of the defendant *in casu* the appellant. On the facts I am satisfied that the respondent's case, as pleaded, was substantively unanswerable. He was, accordingly entitled to have summary judgment granted in his favour... The purpose of

> the rule is to accelerate the progress of our civil justice system and not to retard it for flimsy reasons."

The respondent's submissions

[20] The respondent also made equally comprehensive and intellectually stimulating submissions, in opposing the motion, which have also been duly considered. However, in the interest of expediency, only the core aspects of those submissions will be outlined. They are as follows:

a) No clear question of law has been posited by the applicant that satisfies the requirement for leave. The contention of the bank does not raise any question, which can be regarded as one subject to serious debate. The question is "misconceived" for the following reasons:

> "(i) at no stage in the proceedings, leading up to the judgment of this court has the applicant been prevented from utilizing the legal procedure of summary judgment.
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> (ii) This contention is untenable since, it was the applicant's very utilization of that legal procedure which resulted in:-
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> (a) a summary judgment in its favour;
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> (b) an appeal from the said summary judgment and;
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> (c) the judgment of this honourable Court from which the applicant now seeks leave to appeal to Her Majesty [i]n Council.

(iii) the rules applicable to the summary judgment procedure apply in equal and uniform treatment to all litigants, whether the parties are commercial banks, or ordinary citizens.

(iv) the applicable principles do not vest in a commercial bank any special privileges or right to utilize the legal procedure of summary judgment in any way which is different from its utilization by other persons, so that it becomes mandatory and/or automatic that by using the summary judgment procedure it will be guaranteed the relief claimed."

b) The question is not referenced as a question which has arisen from the judgment from which the appeal is to be brought to Her Majesty in Council and it is not one of great general or public importance, which would require the opinion of the Privy Council.

c) The effective use of the summary judgment procedure is an issue which has been "well traversed" in legal authorities and the principles are, by now, well-settled. See such authorities as **Swain v Hillman**; **Three Rivers District Council and Others v Governor and Company of The Bank of England** (No3) [2001] 2 ALL ER 513; **ED & F Man Liquid Products Ltd v Patel & Anr**; and **Margie Geddes v Messrs McDonald Millingen** [2010] JMCA Civ 2**.**

d) The principle applied by this court in coming to its decision is settled, and that is, that summary judgment ought not to be granted once there are issues raised on which the defendant has a chance of succeeding. Therefore, leave to raise this proposed question before

Her Majesty in Council, ought not to be granted simply to see if the Privy Council will agree with the decision.

e) There is a distinct probability that the promissory note being relied on by the applicant is a forgery and so any judgment obtained by the bank in reliance on it would not be "clean". The alleged forgery must be investigated and this must be done by means of a trial. This is necessary because "there has been no serious challenge by [the bank] to that issue," and the evidence of the forensic examiner who confirmed the forgery was not challenged. In **The Royal Bank of Scotland PLC v Highland Financial Partners LP and others** [2013] EWCA Civ 328, the court held that a liability judgment obtained by fraud, through the deliberate and dishonest misstatement of facts, should be set aside and it is unlikely that a court would grant summary judgment in a case with "murky factual background". Even though the facts of that case differ from the facts of the case at bar, that case underscores the importance of the integrity of the summary judgment process in dealing with matters justly, the requirement for untainted evidence and the court's readiness to set aside a judgment obtained by a commercial bank where fraud was an operative cause. For the court to ensure that proceedings and resultant judgment obtained by the bank are clean, the alleged forgery must be investigated at a trial of the issues.

f) Before a borrower can be fixed with liability to repay a debt, the debt must be lawfully due and as the respondent has asserted that she is not liable on the promissory note on which the bank is relying because it is a forgery and that she bears no other contractual liability to the bank, the matter is not fit to be disposed of summarily.

g) Sections 23 and 24 of the Act prohibit liability on a promissory note that has not been signed by the maker as well as its enforcement where it bears a forged signature. This has rendered the bill of exchange "wholly inoperative".

h) The bank's reliance on the Act, particularly, within this context, where an allegation of fraud is raised by the debtor, requires that the issue is properly ventilated at a trial. Section 30 of the Act provides the basis on which the several factual issues requiring ventilation may be done at a trial. Reliance is placed on the dictum of Phillips JA at paragraphs [76] and [77] of the judgment that:

> "[76] The appellant contended that since the claim was based on the 27 July promissory note and no amendment was sought to the particulars of claim which enabled the respondent to rely on the 20 July promissory note, the commitment letter and the instruments of mortgage, reliance could not be placed on them to assess the respondent's prospects of success on the claim. However, the appellant had contended that, even where an amendment was sought and obtained, she still had valid defences to the claim since no single document encompassed the terms and conditions of the loan, and the covenant to pay was contained in the forged

> promissory note only and in any event it was her contention that the letter of commitment and the mortgage instruments were all tainted by the fraudulent promissory note.
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> [77] Mr Braham submitted that the defence of *ex turpi causa non oritur actio* would also have been available to the appellant and cited the case **Simpson v Bloss** which states that where a claim is so mixed with the illegal transaction, and could not be established without going into proof of that transaction, that claim could not be enforced in law. The appellant also contended that she had a valid defence to the 20 July promissory note since it was incomplete and the money had not been issued to her under it. Mr Braham also argued that there is uncertainty as to the amount that the appellant actually owed on the loan since the sum claimed included interest and fees which she had not agreed to pay. These are all defences to the claim recognised in law, and which may impact the respondent's prospects of success on the claim."

i) The issues specified by Phillips JA are of such importance to the ultimate determination of the matter and so, even if the matter was to be submitted to Her Majesty in Council, it would still have to be remitted to the Supreme Court of Jamaica to be tried.

j) There can be nothing worthy of debate before the Privy Council on the matter of the proper role of summary judgment procedures when the respondent's clear position is that she did not sign, issue or deliver to the bank a promissory note on which the bank has brought its claim and that the said note is a forgery.

k) This court in its judgment has thoroughly reviewed the principles relevant to forgery, fraud and bills of exchange and no legal

challenges to the decision are discernible from the notice of motion and evidence placed before this court.

l) The decision of the court that the issues raised ought to be ventilated at a trial is in accordance with the rules applicable to the summary judgment procedure, which had, in fact, been utilized by the applicant.

Analysis and finding

[21] The motion will ultimately be determined based on the interpretation of section 110(2)(a) of the Constitution, which clearly establishes that leave to appeal to Her Majesty in Council under that section is not to be granted as of right and so the criterion for leave set out in the section must be satisfied. This has been made absolutely clear, time and time again, by this court.

[22] In **Viralee Bailey-Latibeaudiere v The Minister of Finance and Planning and the Public Service and others** [2015] JMCA App 7, Phillips JA, in outlining the requirements that are to be met for leave to be granted, helpfully stated:

> "[34] The question as to the true and proper interpretation to be given to section 110(2)(a) of the Constitution, has also been the subject of review in this court. In **Georgette Scott v The General Legal Council** SCCA No 118/2008, Motion No 15/2009, delivered 18 December 2009, I set out, on behalf of the court, at page 9 three steps that ought to be used in construing this section namely:
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> > '… Firstly, there must be the identification of the question(s) involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.

> Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue(s) which require(s) debate before Her Majesty in Council. Thirdly, it is for the applicant to persuade the Court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general of public importance.'
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> It is clear therefore that before granting leave the court must be satisfied that the proposed appeal raises questions which arise from the decision of the Court of Appeal, are determinative of the substantive issues, on the merits of the appeal, and are by their nature of great general or public importance to justify being considered by Her Majesty in Council."

[23] The decisions of the court on what is to be construed as a question which raises issues of great general or public importance have been clear and consistent. The consistency of this court in examining the approach to be taken in considering whether the question is of great general or public importance was again demonstrated in the recent decision of the court in **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27, where Morrison P, speaking on behalf of the court, reiterated at paragraph [33]:

> "[33] ...in order to be considered one of great general or public importance, the question involved must, firstly, be one that is subject to serious debate. But it is not enough for it to give rise to a difficult question of law: it must be an important question of law. Further, the question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations; and is of general importance to some aspect of the practice, procedure or administration of the law and public interest..."

[24] I would, again, endorse the view expressed by Morrison P (as I did in **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings**) that the question must raise an issue that is subject to serious debate, and most importantly, must be one that goes beyond the rights of a particular litigant, in that, it must be one that may set guidelines and bind others.

[25] Before I proceed to examine the merit of the proposed question, I find it necessary to point out that I am compelled to accept the submissions made on behalf of the respondent that the bank had not raised any clear question for submission to Her Majesty in Council in its notice of motion or supporting affidavit. Mr Braham's observation that no clear question of law had been posited by the bank is therefore true. The formulation of the question during the course of oral submissions, as was done in this case, may not be the most appropriate way to proceed and the proper approach would seem to be to include the specific question in the notice of motion and the affidavit. However, as was noted in **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings**, there is no rule of law or procedure brought to the attention of the court that would render the absence of the question in the notice of motion or affidavit fatal to the motion. So, despite Mr Braham's criticism, I see nothing in law to prevent the hearing of the motion on the basis of the question formulated by learned Queen's Counsel.

[26] That having been said, it should be noted that it is observed that there are two distinct but interrelated components to the question posed by the bank: (a) it refers specifically to two groups of litigants, that being, commercial banks (creditors) and

their debtors; and (b) it is asking for clarification as to when the commercial banks (creditors) may use summary judgment procedures "to recover from delinquent debtors overdue, acknowledged and undisputed borrowings".

[27] Having considered the question against the background of the law and the peculiar circumstances of the case, while bearing in mind the helpful submissions of counsel on both sides, I form the view that the respondent is correct in her observation that the question proposed is one that does not give rise to any issue worthy of serious debate to warrant the consideration of Her Majesty in Council. The law as to the procedure to be adopted and the principles to be applied on an application for summary judgment are clear and well-settled on strong authority. One of the fundamental principles applicable to such applications is that where a case raises issues that require investigation, and on which the party against whom the application for summary judgment is brought has a 'realistic' as opposed to a 'fanciful' prospect of success, trial should not be dispensed with.

[28] Phillips JA, in addressing the issues that were before the court for consideration, reiterated the established principles in this way at paragraph [43]:

> "The principles stated in **Swain v Hillman** and **ED & F Man Liquid Products Ltd v Patel**, have been cited with approval in a number of cases before this court such as **National Commercial Bank Jamaica Ltd and another v Toushane Green** [2014] JMCA Civ 19, **Tikal Limited and others v Amalgamated (Distributors) Limited**[2015] JMCA App 11 and **Island Car Rentals Ltd (Montego Bay) v Headley Lindo** [2015] JMCA App 2. From a reading of these cases, it is evident that to succeed on an application for summary judgment, the prospects of

> success must be 'realistic' as opposed to 'fanciful' and in making an order on this assessment, regard must be had to the overriding objective, and the interests of justice. However, if there are serious issues which require investigation, these ought to be determined in a trial and not on a summary judgment application."

[29] This is an accurate and unchallenged statement of the applicable law, which is universal in its application to all litigants. There is, therefore, no separate regime or distinct rules of court for the treatment of summary judgment applications brought by commercial banks (creditors) against their debtors.

[30] The issue also arises as to whether, as Mrs Minott-Phillips submitted, the debt is "acknowledged and undisputed" and so there is no issue for ventilation at a trial. Sykes J had indicated that he would not have delved into whether there was a forgery, or some form of irregularity, as alleged by the respondent, as that was not his duty. He maintained that, there being no real denial that the loan was made, and no assertion by the respondent that she has paid back the loan, the only thing that the court was required to consider was a "problem of arithmetic". At the end of the hearing before him, the issue of the alleged forgery, which raises the question of the enforceability of the 27 July promissory note being relied on by the bank would have been unresolved.

[31] Against that background, it is difficult to counter Phillips JA's view that the issue of the alleged forgery of the 27 July promissory note raises triable issues which cannot be disposed of summarily. Also, while the respondent has admitted receiving the loan, she has denied any liability to the bank because she also challenges the enforceability of the 20 July promissory note, which she said she had signed, as well as the interest

payments being demanded by the bank. In the end, the debt is, on the face of it,not acknowledged and undisputed by the respondent, as the bank is contending.

[32] Similarly, Mrs Minott-Phillips' argument that the decision of the court has now made it impossible for commercial entities to utilise the legal procedure of summary judgment as the lower court is compelled to refuse summary judgment applications against debtors who question the legitimacy of their signature on an instrument used by a creditor as evidence of their indebtedness, is not borne out as a valid consideration for the grant of leave. The decision of this court, in remitting the case for trial of the issues, has merely reaffirmed the long-standing and well-entrenched principle of law that summary judgment should not be allowed in cases where serious or material issues have arisen that require investigation at a trial. This ruling of the court, as the respondent contends, is in accordance with the law applicable to summary judgment applications. The decision has laid down no rule or principle of law, hitherto unknown, concerning the grant or refusal of summary judgment that requires the scrutiny of Her Majesty in Council.

[33] It is my considered view, therefore, that when the decision of this court is considered against the background of the issues raised in the case, and the submissions of counsel on both sides, the proposed question does not raise any issue of great general or public importance in keeping with section 110(2)(a) of the Constitution. Accordingly, the contention of the bank that conditional leave to appeal to Her Majesty in Council should be granted on this basis is rejected.

Whether the question ought 'otherwise' to be submitted to Her Majesty in Council

[34] Mrs Minott-Phillips submitted, in the alternative, that in examining section 110(2)(a) of the Constitution the "or" that comes before "otherwise" is used disjunctively so that leave may be granted where the decision ought "otherwise" to be submitted to Her Majesty in Council**.** Learned Queen's Counsel, in support of her contention, referred the court to the following dictum of Wolfe JA (as he then was) in **Emanuel Olasemo v Barnett Limited** (1995) 32 JLR 470, at page 476:

> "Is the question involved in this appeal one of great general or public importance *or otherwise?* The matter of a contract between private citizens cannot be regarded as one of great general or public importance. **If the applicant is to bring himself within the ambit of this subsection he must therefore do so under the rubric 'or otherwise'. Clearly the addition of the phrase 'or otherwise' was included by the legislature to enlarge the discretion of the Court to include matters which are not necessarily of great general or public importance, but which in the opinion of the Court may require some definitive statement of the law from the highest Judicial Authority of the land. The phrase 'or otherwise' does not per se refer to interlocutory matters. 'Or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to Their Lordships Board for guidance on the law**."(Emphasis added)

[35] Learned Queen's Counsel's contention is that in the instant case, the decision of the court does not conform with the overriding objective of the CPR, which requires matters to be dealt with justly and so on that basis, the matter should be submitted under the "or otherwise" provision of the section. According to the submissions, "the resultant ordering of non-summary trial of actions that ought to be determined summarily has already begun and will increase the workload of an already

overburdened Supreme Court". The lengthening of the time it will now take to determine debt recovery actions in cases, where want of authority is raised as an issue although receipt of value is not, cannot amount to dealing justly with a case as that phrase is defined in the overriding objective of the CPR. See CPR, rule 1.1(1) and (2)(b), (c), (d) and (e).

[36] In advancing this line of argument, learned Queen's Counsel also placed strong reliance on the affidavits of Rachel McLarty, which exhibited to them two newspaper articles, both of which speak, among other things, to the backlog of cases in our courts and the resultant long delays in the determination of cases.

Analysis and finding

[37] It is accepted that a question arising from the decision of the court may be submitted to Her Majesty in Council under the rubric "or otherwise", if in the opinion of the court, guidance in the law is required on the particular issue. Therefore, the rubric "or otherwise" used in the section does enlarge the category of cases, which may be referred to Her Majesty in Council under section 110(2)(a) of the Constitution, beyond those which involve a question of great general or public importance.

[38] Having given due consideration to the vociferous arguments presented by Mrs Minott-Phillips in relation to this limb of the provision, against the background of the decision of the court in respect of which the proposed appeal is to be brought, I find it difficult to accept that there is anything in the decision of the court that has managed to raise any issue that has or will have any profound implication for the application of

the overriding objective of the CPR in cases of this nature. The court, in coming to its decision to remit the matter for trial, explicitly indicated its appreciation of the application of the overriding objective to summary judgment applications. By way of reminder this is what Philips JA stated in that connection at paragraph [43]:

> "[43] ...It is evident that to succeed on an application for summary judgment, the prospects of success must be 'realistic' as opposed to 'fanciful' **and in making an order on this assessment, regard must be had to the overriding objective, and the interests of justice."** (Emphasis added)

[39] It is clear from the above extract of the judgment that the applicability of Part 1.1 of the CPR to summary judgment applications in the Supreme Court is under no threat or is any danger by virtue of the decision of the court. In my opinion, there is no matter of law pertaining to the applicability of the overriding objective of the CPR that has arisen from the decision of this court that would require the guidance of Her Majesty in Council.

[40] I conclude that there is nothing in all the circumstances to bring the bank within the rubric of 'or otherwise' so that conditional leave may be granted on this alternative basis as contended on behalf of the bank.

Conclusion

[41] In the final analysis, the bank has not shown that the question proposed to be submitted to Her Majesty in Council is one that arose from the decision of this court and which is of great general or public importance or otherwise. Accordingly, the criterion

laid down under section 110(2)(a) of the Constitution for conditional leave to be granted is not satisfied by the bank. The motion must, inevitably, be denied with costs.

SINCLAIR-HAYNES JA

[42] I have read, in draft, the judgment of my sister, McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing useful to add.

F WILLIAMS JA

[43] I too have read, in draft, the judgment of my sister, McDonald-Bishop JA and agree with her reasoning and conclusion. I have nothing to add.

MCDONALD-BISHOP JA

ORDER

The motion for conditional leave to appeal to Her Majesty in Council, filed on 15 July 2016, is refused with costs to the respondent to be agreed or taxed.