[2020] JMCA Civ 62

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 30/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**JULIE ATHERTON**	**1ST APPELLANT**
AND	**RICHARD ATHERTON**	**2ND APPELLANT**
AND	**IAN LEVY**	**1ST RESPONDENT**
AND	**CECELIA LEVY**	**2ND RESPONDENT**

Miss Nancy Anderson instructed by Lascine A Wisdom-Barnett for the appellants

John Graham QC and Ms Peta-Gaye Manderson instructed by John G Graham and Company for the respondents

18, 19 November and 3 December 2020

BROOKS JA

[1] The attempts by Mrs Julie Atherton and Mr Richard Atherton (the Athertons) to avoid repaying Mr Ian Levy and Mrs Cecelia Levy (the Levys), money that the Athertons and their company borrowed from the Levys, are unworthy of the efforts that counsel on both sides, the court below and this court, have been obliged to invest in the resulting litigation.

[2] The Athertons, in February 2011, had an urgent need for cash in order for their company to capitalise on a business project. They approached the Levys, who agreed to provide financing. The documentation shows that the Levys advanced, in tranches, a total of US$250,000.00 to the company, as part of a proposed total of US$700,000.00. The Levys contend that the advances were by way of a loan to the company with an option to convert that loan into equity in the company. The Athertons agreed to repay the monies if the Levys did not exercise the option.

[3] Two agreements were signed by the parties in respect of the monies advanced by the Levys. The second document (the last agreement) signed by the parties, stated that it superseded all previous agreements. Both agreements were drafted by Mrs Levy, who is not an attorney-at-law.

[4] By letter dated 26 April 2011, the Levys told the Athertons that they had decided:

a. not to exercise the option to invest in the company;

b. to treat the monies advanced as a loan; and

c. not to advance any further sums.

They also requested the repayment of the money loaned.

[5] The Athertons initially agreed to repay the monies, but indicated an inability to do so at that time. Eventually, the Athertons paid US$2,083.33 towards the interest that had accrued up to a certain point. Thereafter they made no payments and, after an unmet letter of demand, the Levys filed a claim in the Supreme Court for the return of

the money together with the accrued interest thereon. They named the Athertons and the company, Refreshing Ideas LLC (the company), as defendants to the claim. The company, however, was not served with the claim form.

[6] The Athertons sought to defend the claim on a number of bases:

a. the company was not a proper party to the proceedings;
b. the monies were an investment in the company and was not a loan;
c. the last agreement is ambiguous as to whether it is a loan or an investment and since it was drafted by the Levys, the ambiguity must be construed against them;
d. US$50,000.00 of the money was paid before the last agreement and, therefore, is unrecoverable because it constitutes "past consideration";
e. if the advances constituted a loan, the last agreement is unenforceable because it is in breach of the Moneylending Act, as:
    i. the Levys did not provide the Athertons with a copy of the last agreement, as is required by that Act; and

ii. the interest rate of 10% per annum charged on the loan is "excessive harsh and unconscionable" and that the transaction ought to be reopened by the court.

[7] The defence also raised a jurisdiction point, indicating that the last agreement required any dispute to be referred to arbitration. This point, however, was not pursued on appeal. It is, therefore, not a relevant consideration and is mentioned only for completeness.

[8] The Athertons also filed an ancillary claim in which they sought, in the event that the court found that the agreement was for a loan:

a. a declaration that the interest rate charged is excessive;
b. an order reopening the transaction and for the taking of an account; and
c. an order relieving them from the payment of any sums deemed excessive.

In the ancillary claim, the Athertons again asserted that, since the Levys had drafted the agreements, any ambiguities in those documents should be construed against the Levys.

[9] The Levys' defence to that ancillary claim is that the rate of interest, which was agreed, was selected after consultation with the Athertons and two financial institutions

in Jamaica in respect of loans in United States currency. There was no need, they asserted, to reopen the transaction.

[10] In oral evidence at the trial, the Levys testified that the discussions between the parties were always on the basis that the monies advanced constituted a loan with an option to purchase equity in the company. The Athertons, on the other hand, insisted that the mutual understanding was always that the monies were to be an investment in the company.

[11] Edwards J, as she then was, in a comprehensive judgment, considered the evidence and dealt with each of those proposed defences in turn. She found that:

a. the last agreement clearly shows that the monies were provided as a loan with an option to convert it to an investment, and the parties treated it that way up to the time of the Athertons' initial promises to repay;

b. the last agreement is unambiguous and there is no need to invoke the principle of interpreting it against the drafter;

c. the transactions were such that the advance payments were made on the basis of promises to pay and so did not constitute "past consideration" when the last agreement was drafted, and in any event the promise to pay

made in that document constituted fresh consideration for all the payments;

d. the loan is enforceable and it is not in breach of the Moneylending Act:
    i. the Levys are not in the business of moneylending and so that Act did not apply to them; and
    ii. the interest rate of 10% per annum is below the rate that is presumed to be usurious and is neither harsh nor unconscionable;
e. the "subject to contract" defence was not pleaded and is therefore unarguable, but in any event it would fail as:
    i. the term "subject to contract", in the context, did not prevent the last agreement from coming into force; and
    ii. the parties acted on it and intended to be bound by it, and in particular, the Levys performed their part of the bargain by advancing the monies.

[12] Importantly, the learned judge found that, to the extent that the parties disagreed in their oral evidence, especially on the issue of whether the transaction was a loan or an investment, not only did the documentary evidence support the Levys, but they were credible, genuine witnesses of truth. On the other hand, she rejected the evidence of the Athertons. She found that, among other things, they were "not entirely forthright with the court" (paragraph [72] of the judgment).

The appeal

[13] The Athertons have lodged this entirely unmeritorious appeal. They have filed a number of grounds of appeal, on the basis of which, they say, the learned judge's decision ought to be set aside. The grounds of appeal, set out in their amended notice of appeal, state:

> "1. The learned trial judge erred in finding that the Company, Refreshing Ideas LLC was not a party to the agreement dated February 28, 2011 when numerous references are made to it throughout the agreement and it is signed by the [Athertons] on behalf of and as principals of the said company and therefore any sum due to the [Levys] is to be paid by the said Company.
>
> 2. The learned trial [judge] erred when she applied the rates of interest for loans in Jamaican dollars to rates of interest for loans in a foreign currency - US$ - without any evidence of the market interest rates in the U.S. and therefore the said interest rate set out in the Agreements dated February 15 and 28, 2011 (exhibits 2 and 1) was harsh and excessive.
>
> 3. The agreement dated February 15, 2011 was a loan to Refreshing Ideas LLC and not to the [Athertons] and therefore the learned trial judge erred in finding that the agreement of February 28, 2011 superceed [sic] this agreement and enforcing the February 15th

agreement as consideration for the latter agreement of February 28th.

4. The Learned Trial Judge erred in allowing the [Levys] to enforce the agreement set out in the document dated February 28, 2011 as:

   a) The Document was enforceable [sic] as it was not stamped in accordance with the Stamp Duty Act;

   b) The Document could not be relied on as an exhibit as it was inadmissible as it was not stamped, and

   c) The [Athertons] were not parties to the Document on their own but as principals in the company, Refreshing Ideas LLC and therefore not personally liable.

   d) The Levys were in breach of the Agreement as they had not fulfilled their obligations in the document, particularly with respect (1) instructing their attorney to draw up an agreement (para 26) and (2) to payment of the sums agreed.

5. The Learned Trial Judge erred in finding that the Levys could recover sums under an agreement they breached.

6. The Learned Trial Judge erred in failing to apply the contra proferenten [sic] rule to the ambiguities in the Agreement of February 28th with respect, inter alia, with

   (a) In paragraph 1 – the use of 'loan/equity';

   (b) In paragraph 2 – listing of loans owed by Refreshing Ideas LLC and adding 'and/or' the [Athertons];

   (c) In paragraph 15 – the options set out in this paragraph all concern the liability of Refreshing Ideas LLC and not the [Athertons];

(d) In paragraphs 16, 17 and 18 – the referral to 'That subsequent to the Equity Clause' was not clarified by the Trial Judge;

(e) That although paragraph 23 states all security provisions were to be enforceable, there was no evidence of any (para 20) pledge of the trademark; (para 21) personal guarantee and (para 22) guarantee of the fixed or floating assets of Refreshing Ideas LLC..

7. The Learned Trial Judge erred in holding that the February 28th agreement was enforceable although para 26 stated that it was 'subject' to an overriding agreement to be drawn up by the Levys' attorney." (Underlining removed)

[14] The grounds of appeal will be considered in the context of the issues that they raise.

The absence of the company from the litigation (grounds of appeal 1, 3c, 4c and 6c)

[15] These grounds epitomise the insincerity and futility of this appeal. In them, the Athertons complain, in part, that the learned judge ought to have found that the company ought to have been made a party to the litigation, as the cash advances were made to the company and not to them personally.

[16] The company is not a named party to this appeal. It was named as the third defendant to the claim, but was never served. Importantly, however, the Athertons' defence to the claim contained an express statement that the company was not an appropriate party. Paragraph 3 of the defence states, in part:

"The [Athertons] deny paragraph 3 of the Particulars of Claim and will say that the [company] is a United States registered

> company which has no presence in Jamaica as it has never traded in Jamaica, has never conducted business in Jamaica and has no assets in Jamaica and further, is not a signatory to the said document signed by the [Athertons], **and as such is not an appropriate party to this action**. [The Athertons] also state that the [said document] is not a loan agreement but an equity agreement by virtue of which the [Levys] were investing in the [company]…." (Emphasis supplied)

[17] The learned judge, appropriately, merely noted, at paragraph [13] of her judgment, that the company had not been served and was not a party to the proceedings. She made no error in this regard. The nub of the dispute between the Levys and the Athertons, before her, was whether the monies constituted a loan or a purchase of equity in the company. She did not, as the ground suggests, find that the company was not a party to the last agreement.

[18] In respect of the learned judge's finding that the last agreement superseded the previous one, it only need be said that the finding is an acknowledgment of the agreement between the parties. The last agreement is entirely in upper case letters and, where it is necessary to quote it, will be reproduced as such. Paragraph 25 of the document states:

> "BE IT AGREED THAT THIS AGREEMENT SUPERCEDES [sic] ANY PREVIOUS AGREEMENTS SIGNED BETWEEN JULIE & RICHARD ATHERTON ET AL REFRESHING IDEAS LLC. AND IAN & CELIA LEVY"

[19] Over and over again, the document speaks to the Levys as having an option to convert the loan into equity.

[20] In relation to the Athertons' assertion that it is the company that is to be bound, two extracts from the last agreement demonstrate the Athertons' intention to be bound by, and liable under it, at the time that they signed it. The heading states:

> "AGREEMENT ON LOAN/EQUITY CONDITIONS BETWEEN
> JULIE & RICHARD ATHERTON ET AL
> AND
> IAN AND CECELIA LEVY
>
> AN AGREEMENT IS HEREBY ENTERED INTO BETWEEN JULIE AND RICHARD ATHERTON, PRINCIPALS OF REFRESHING IDEAS LLC OF 318 INDIAN TRACE, SUITE 340. WESTON FL. 33326 U.S.A. AND REFRESHING IDEAS LLC."

[21] Paragraph 2 states:

> "THAT ANY PART OF THE ABOVE SUM OF US$700,000 WHICH MAY CONSTITUTE A LOAN, UP TO THE AMOUNT OF UA$250,000 BE DEEMED FIRST AND PRECEEDING ALL OTHER OUTSTANDING LOAN AMOUNTS, SAVE THOSE LISTED IN ITEM #13 **TO BE PAID BY REFRESHING IDEAS LLC AND/OR JULIE & RICHARD ATHERTON AS PER LOAN STIPULATIONS LISTED IN THIS AGREEMENT**" (Emphasis supplied)

"Item #13" refers to a clause in the last agreement that stipulates the company's pre-existing debts.

[22] These grounds utterly fail.

The rate of interest charged on the loan (ground 2)

[23] In this ground, the Athertons complain that, considering that the loan was in United States currency, the learned judge erred in finding that the interest rate of 10% per annum was not harsh or excessive. They argue that the regulation under the Moneylending Act, which stipulates that a higher rate of interest (25%) must be

exceeded before a presumption of usury could apply, is restricted to loans in Jamaican dollars.

[24] The learned judge, at paragraph [102] of her judgment, acknowledged the provisions of the Moneylending (Prescribed Rates of Interest) Order 1997 which stipulates the rate of 25% per annum. She indicated that the evidence from the Levys was that that rate was settled after consulting with banks and various stakeholders. She found that, in the absence of the Athertons demonstrating that the rate was excessive, harsh or unconscionable, it could and should be applied.

[25] The learned judge erred in stating that there was evidence of the rate being settled after consultation. The Levys, in their response and defence to the ancillary claim, stated at paragraph (xvi) that the "interest rate was arrived at after consultations with all the parties herein and their financial institutions". The document indicates that there were attachments "which state that the base rate for US loans was 10.25% at First Global and 10% at Bank of Nova Scotia". The Levys, however, did not actually give evidence in respect of these matters. At best, it may only be said that there was no contradiction of those aspects of their statement of case. The learned judge's lapse, however, is not fatal. The principle that she stipulated, that is, that the Athertons should have demonstrated that the Moneylending (Prescribed Rates of Interest) Order 1997 did not apply to foreign currency loans, is valid.

[26] In this court, learned counsel for the Athertons, Miss Anderson, was also unable to supply any authority to support the Athertons' contention either in principle, as to the

restriction to the Moneylending (Prescribed Rates of Interest) Order 1997, or any evidence as to rates existing for loans in United States currency. The Athertons have, therefore, still not demonstrated that the rate of 10% per annum is harsh or unconscionable.

[27] It is to be noted, however, that the Minister's order, in respect of the rate of interest on judgment debt, prescribes different rates for debts in Jamaican currency from those in foreign currency (see the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006). It may be inferred, therefore, that where it is intended that different rates should apply, it will be so specified.

[28] There is no merit in this ground of appeal.

The enforceability of the last agreement (ground 4a and b)

[29] This aspect of the judgment will deal with two facets of this ground of appeal. The first concerns the admission into evidence of the last agreement, despite the fact that it was not stamped. The second concerns the enforceability of the last agreement given the fact that it was not stamped.

[30] The Athertons rely on the provisions of section 36 of the Stamp Duty Act (SDA) and this court's decision in **Garth Dyche v Juliet Richards and Another** [2014] JMCA Civ 23 in support of the assertion that the learned judge erred in admitting the document into evidence and allowing it to be enforced.

[31] The Athertons have correctly cited section 36 of the SDA, which stipulates that:

> "No instrument, not duly stamped according to law, shall be admitted in evidence as valid and effectual in any court or proceeding for the enforcement thereof."

It is also correct that the last agreement is, by virtue of the second schedule to the SDA, subject to stamp duty and would be subject to section 36 of the SDA. As will be demonstrated below, it is the court's obligation to ensure that the provisions of section 36 are complied with.

[32] The absence of stamping, however, was not an issue before the learned judge. The document was admitted into evidence by consent and was actually placed before her when defence counsel cross-examined Mr Levy on it. Defence counsel also cross-examined Mrs Levy on it, and counsel for the Levys cross-examined Mrs Atherton on it. All this was done without any mention of the need for stamping. It is understandable in those circumstances that the learned judge was not alerted to the requirements of section 36 of the SDA and failed to require compliance with the section.

[33] The Athertons' reliance on **Garth Dyche v Juliet Richards** is, however, misplaced. Firstly, the last agreement is not a promissory note, as was the subject of **Garth Dyche v Juliet Richards**. A promissory note would become unenforceable, if it were not stamped within seven days of being executed, and can only be used for the specific purposes outlined in section 50 of the SDA. That does not apply to documents such as the last agreement. The last agreement may still be stamped, although it would be subject to penalties for late stamping.

[34] It is also to be noted that the document in **Garth Dyche v Juliet Richards** was still used for other purposes by the court, despite the absence of stamping as a promissory note within the stipulated time (it bore evidence of later stamping). The court, at paragraph [57] indicated that the improperly stamped document in that case, could be used as corroborative of evidence of an agreement. The court said, in part, at paragraph [57]:

> "…The document is capable of providing corroborative evidence of his contention that he loaned money to the deceased and that the amount that was owed represents the monies that he deducted from the deceased's accounts, which are reflected on the promissory note. That is an entirely different matter from saying that the document comprises the agreement between the parties."

[35] The stamping deficiency is, therefore, not fatal to the Levy's case or to the learned judge's decision. The last agreement is corroborative of the agreement between the Levys and the Athertons. This court will not, however, ignore the breach of section 36. The last agreement must be stamped at the Levys' expense, as they are seeking to enforce it.

[36] Sections 43 and 44 of the SDA stipulate the procedure to be followed in ensuring that the provisions of section 36 are satisfied. Section 43 states:

> "Upon the tender in evidence of any instrument, other than inland and foreign bills of exchange and promissory notes, coastwise receipts, and bills of lading, it shall be the duty of the officer of the court, before reading such instrument, to call the attention of the Judge to any omission or insufficiency of the stamp; and the instrument if unstamped, or insufficiently stamped, shall not be received in evidence until the whole, or (as the case may be) the deficiency of the stamp duty, to be determined by the Judge, and the penalty

> required by this Act, together with an additional penalty of five hundred dollars, shall have been paid."

Section 44 allows the payment to be made to the court to allow the proceedings to be continued.

[37] Despite the fact that the omission to stamp the document, has just been brought to the court's attention, the Registrar of this court has been asked to arrange for the payment of the stamp duty, in accordance with sections 43 and 44 of the SDA.

[38] These grounds also fail.

The failure of the Levys to perform certain aspects of the last agreement (grounds 4d and 5)

[39] The Athertons contend that the Levys breached the last agreement because they did not:

a. have their attorneys-at-law draft a formal document;

and

b. pay over the additional sums agreed.

[40] This is yet another indication of the Athertons' desperate attempts to avoid their obligations. These issues were not raised in the Athertons' defence as being breaches of contract. They did not raise them, as such, before the learned judge and the ancillary claim did not rely on them.

[41] In any event, the Levys chose not to exercise the option to invest in the company and therefore were not obliged to pay over any further sums. That aspect will

be discussed in analysing ground 6. The aspect of the further document will be formal analysed in assessing ground 7.

The interpretation of the last agreement (ground 6)

[42] The Athertons complain that the learned judge erred in finding that the last agreement was not ambiguous on the critical issue of whether the transaction was one for a loan or for equity. They contend that the several references to loan/equity, and other aspects of the document, evidence that ambiguity. In the circumstances, they contend, the document ought to be interpreted against the Levys, and in favour of their position. This is especially so, they assert, because the parties had intended their agreement to be properly formulated by an attorney-at-law.

[43] The learned judge was correct in her finding that the document indicated that the transaction was a loan with an option to convert it to an equity investment. Paragraph 2 of the last agreement has already been quoted. It speaks to a loan up to an amount of US$250,000.00. Other paragraphs support the learned judge's finding in this regard. Paragraphs 5, 12, and 14 speak to the factor of the Levys acquiring an option to secure a share in the company. Paragraph 5 states:

> "THAT UPON THE SHARE OPTION BEING TAKEN UP BY IAN & CECELIA LEVY, ALL SHARES HELD BY JULIE & RICHARD ATHERTON AND IAN & CECELIA LEVY BE FIRST OFFERED TO EACH OTHER AS PRIORITY BEFORE BEING OFFERED TO ANY AND ALL OTHER PARTIES[.]"

Paragraph 12 states:

> "THAT AT THE SIGNING OF THIS AGREEMENT, THE ONLY SHAREHOLDERS OF THE COMPANY REFERESHING IDEAS LLC. ARE RICHARD & JULIE ATHERTON WITH IAN & CECLIA

LEVY HOLDING AN OPTION TO TAKE UP A 20% SHAREHOLDING AT A LATER DATE[.]"

Paragraph 14 states:

> "THAT AS AT MONDAY, FEBRUARY 28, 2011 THE TOTAL SUM OF US$200,000.00 WOULD HAVE BEEN TRANSFERRED TO REFRESHING IDEAS LLC. AS FOLLOWS:
>
> US$20,000 WIRED FEBRUARY 7, 2011
> US$30,000 WIRED FEBRUARY 16, 2011
> US$150,000 WIRED FEBRUARY 28, 2011
>
> **AND THAT SUCH AMOUNT AS AT FEBRUARY 28, 2011 BE DEEMED A LOAN FACILITY AT AN INTEREST RATE OF 10% PER ANNUM FOR A PERIOD OF 120 DAYS FROM DATE OF RECEIPT OF FUNDS IN THE FIRST INSTANCE WITH AN OPTION TO BE CONVERTED TO EQUITY** IN THE AMOUNT OF 5.72% SHAREHOLDING IN REFRESHING IDEAS LLC. AT A LATER DATE[.]" (Emphasis supplied)

Paragraph 14 could not be clearer as to the intentions of the parties.

[44] Paragraphs 15 through 18 set out the options that were open to the Levys on 25 March 2011, after they had had an opportunity to assess the company. Only paragraphs 15 and 16 need be quoted for this point. Paragraph 15 states:

> "THAT AN ASSESSMENT OF THE VIABIITY OF REFRESHING IDEAS LLC. BE CONDUCTED AT MARCH 25TH 2011, AT WHICH TIME, (A) EITHER THE OUTSTANDING FIGURE OF U.S.$200,000.00 WILL REMAIN AS A LOAN AT 10% INTEREST PAYABLE AS STIPULATED ABOVE WITH NO FURTHER INJECTION OF FUNDS[;]
>
> (B) OR THE OUTSTANDING FIGURE OF U.S.$200,000 WILL REMAIN AS A LOAN ON THE CONDITIONS STIPULATED ABOVE, WITH A FURTHER INJECTION OF FUNDS WITH AN OPTION TO CONVERT TO EQUITY[;]
>
> (C) OR THE OUTSTANDING FIGURE OF U.S.$200,000 BE CONVERTED TO EQUITY AT AN AGREED SHAREHOLDING OF 5.72% OF REFRESHING IDEAS LLC." (Underlining as in original)

Paragraph 16 states:

> "THAT SUBSEQUENT TO THE EQUITY CLAUSE BEING EXERCISED FOR THE ABOVEMENTIONED U.S.$200,000.00, A FURTHER TRANSFER OF U.S.$50,000.00 REPRESENTING 1.43% SHARES WILL BE MADE TO REFRESHING IDEAS LLC. ON MARCH 31, 2011. **THE OUTSTANDING TRANSFERRED FUNDS AT THIS DATE OF U.S.$250,000.00 WILL REMAIN AS A LOAN AT 10% INTEREST, EACH TRANSFER BEING PAYABLE 120 DAYS FROM DATE OF RECEIPT OF FUNDS <u>OR</u> BE CONVERTED TO EQUITY AT AN AGREED SHAREHOLDING OF 7.15% OF REFRESHING IDEAS LLC**." (Underlining as in original, emphasis supplied)

[45] Admittedly, paragraph 16 is not happily worded but the emphasised portion is clear, and the learned judge found that the parties subsequently acted in accordance with the position that the sum was a loan. She relied on e-mail correspondence from Mr Atherton explaining the Athertons' efforts to repay the sums and their projections as to when that would come to fruition.

[46] By email dated 25 August 2011, Mr Atherton responded to Mr Levy's email dated 22 August 2011, within the body of Mr Levy's 22 August 2011 email. Mr Atherton stated that a promise that they had made to repay US$50,000.00 in August, could not be fulfilled because, the funds should have come from Mrs Atherton's father. He, however, as Mr Atherton explained, "is not in a position right at the moment to be able to do this". Mr Atherton went on to say that the time for repayment was short and cash flow did not allow a repayment at that time. He asserted that they were looking for an investor but reminded the Levys that "the promise we made was to pay you as soon as possible and you continue to be our priority".

[47] On 5 September 2011, Mr Atherton sent an email to the Levys with a similar tone. It states, in part:

> "You keep mentioning that we promised to repay the first tranche by the end of August, but we could never have promised that this would happen by that date if at the time of our meetings we didn't have an investor on board or had any other means of repayment. We reiterated that we obviously knew that we had to repay the monies and promised to make every effort to do so as soon as possible and that we were working hard to secure an investor, to put the company in a stronger financial position to be able to do so.
>
> However, unfortunately as stated in previous emails we are not in a position to repay any principle [sic] at this time and I said I would try and pay at least the interest that you had highlighted on your email of 5th August being $2,083.33. We are unable to pay the now requested entire interest as per your email of 26th August for the reasons stated previously and above.
>
> …" (Underlining as in original)

[48] The Athertons paid the sum of $2,083.33 as interest, which the Levys received by cheque on or about 20 September 2011.

[49] By the time November 2012 had arrived, the Athertons were still promising to pay and explaining the delay in payment. In an email dated 16 November 2012, Mr Atherton said:

> "Re the $50,000, that was a commitment made & payable from the proceeds of the land sale & this has not changed & will be honoured as soon as funds are in hand. The only thing that has changed was that the purchaser requested an extension to the closing date.
>
> …"

[50] Based on all the above, the learned judge was correct in stating that the document was clear and mutually understood by the parties.

The stipulation that the last agreement was subject to an overriding agreement to be drawn up by the Levys' attorney-at-law (ground 7)

[51] This ground turns on the contents of paragraph 26 of the last agreement, which states:

> "BE IT ALSO AGREED THAT THIS AGREEMENT IS SUBJECT TO AN OVER-RIDING AGREEMENT TO BE DRAWN UP BY AN ATTORNEY-AT-LAW UNDER THE EMPLOY OF IAN AND CECELIA LEVY AT THE EARLIEST CONVENIENCE [.]"

[52] The learned judge accepted as valid, a submission by counsel for the Levys, that that was not a part of the Athertons' pleaded defence, and could not, therefore, properly be raised by defence counsel, during the course of submissions. The learned judge, nonetheless, went on to explain why she thought that defence counsel's submission would fail, if it could have been properly advanced.

[53] The Athertons contend that the learned judge erred in that regard. They argue that the last agreement is not a legally binding document because:

a. the parties did not intend the document to be the final terms of their agreement as the Athertons considered it an equity agreement; and

b. there was to be an over-riding agreement drafted by an attorney.

[54] Miss Anderson argued that the learned judge's reliance on **Masters v Cameron** [1954] HCA 72 for support of her position was misplaced.

[55] The learned judge is correct on both bases that she used for rejecting the Athertons' position on this issue. On the first basis, it is plain that the Athertons' statement of defence did not assert that the last agreement was invalid because of clause 26.

[56] On the second basis, the learned judge was not incorrect to rely on the learning in **Masters v Cameron**. In that case the Australian High Court set out, what it viewed as the three alternative interpretations open to a court in considering a "subject to contract" clause. The court stated at paragraph 9:

> "Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."

[57] The court found that in the first two cases, the parties had intended to be legally bound. In respect of the third case, the court said at paragraph 11:

> "Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own: Governor & c. of the Poor of Kingston-upon-Hull v. Petch [1854] EngR 995; (1854) 10 Exch 610 (156 ER 583). The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document, as in Summergreene v. Parker [1950] HCA 13; (1950) 80 CLR 304 or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed."

[58] A similar, but more detailed, reasoning was used by the United Kingdom Supreme Court in **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG** [2010] UKSC 14; [2010] 3 All ER 1. In that case, the parties signed a letter of intent, which was said to be subject to detailed terms to be finalised, but work, nonetheless, commenced on the basis of that which had been agreed. When relations broke down and litigation ensued, one of the parties denied, for the first time, in the Court of Appeal, the existence of a contract. The Supreme Court, in rejecting that contention, set out the principles that are applicable in such situations. It said at paragraph [45]:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. **It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.** Even if certain terms of economic or other significance to the parties have not been finalised, an

> objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement." (Emphasis supplied)

[59] The court adopted a tabular form of those principles. It set them out at paragraph [49]:

> "In his judgment in the Court of Appeal in [**Pagnan SpA v Feed Products Ltd** [1987] 2 Lloyd's Rep 601] Lloyd LJ (with whom O'Connor and Stocker LJJ agreed) summarised the relevant principles in this way (at 619):
>
> > '(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole …
> >
> > (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.
> >
> > (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed …
> >
> > (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled …
> >
> > (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
> >
> > (6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the

> statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge [at 611], 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'.'
>
> The same principles apply where, as here, one is considering whether a contract was concluded in correspondence as well as by oral communications and conduct."

[60] In applying those principles to this case, it is plain that, despite clause 26 of the last agreement, these parties relied on that document and intended to be bound by it. The Levys advanced monies in reliance of it, and the Athertons not only accepted the monies, but accepted that the document would be binding. Mrs Atherton said at paragraph 21 of her witness statement that "[t]he Levy's [sic] assured us that it was just something in the interim until we could have a final document prepared by their [a]ttorneys as it was intended that there would have been a further document transferring shares". Mr Atherton, at paragraph 7, of his witness statement said, in part:

> "We signed a document the Levys presented to give the Levy's [sic] some assurance but this was done after the initial sums had been disbursed…."

[61] Mr Atherton's email correspondence also belie this belated attempt to deny the contract.

[62] This ground also fails.

Conclusion

[63] The appeal must fail for all the reasons set out above. The attorneys-at-law for the Levys were ordered to consult with the Registrar of this court to have the payment made in respect of the stamping of the last agreement, and they have complied.

[64] It should also be said that a judge of the Supreme Court ordered a stay of execution proceedings pending the outcome of the appeal. That stay must be set aside.

SINCLAIR-HAYNES JA

[65] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

FOSTER-PUSEY JA

[66] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion.

BROOKS JA

ORDER

1. The appeal is dismissed.

2. The judgment and orders of the Supreme Court handed down herein on 23 March 2018 are affirmed.

3. The stay of proceedings granted in the court below is set aside.

4. Costs of the appeal to the respondents to be agreed or taxed.