JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 42/98

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	DOJAP INVESTMENTS LIMITED	
AND	DONALD PANTON	
AND	JANET PANTON	DEFENDANTS/APPELLANTS
AND	FINANCIAL INSTITUTIONS SERVICES LIMITED	PLAINTIFF/RESPONDENT

R. N. A. Henriques, Q.C. and L. G. S. Broderick,
instructed by L G. S. Broderick & Company, for the appellants

Dennis Goffe, Q.C. and Mrs. Sandra Minott-Phillips,
instructed by Myers, Fletcher & Gordon, for the respondent

April 26, 27, 28, 29, 30 and November 19, 1999

RATTRAY, P:

This matter comes before the Court of Appeal on appeal by the defendants/appellants from the summary judgment of Wolfe, C.J., delivered on April 3, 1998, whereby he ordered that judgment be entered against the defendants/appellants in the sum of US$1.077M or the Jamaican dollar equivalent with costs to the plaintiff/respondent.

The history is as follows: A Writ of Summons was filed in the Supreme Court on June 13, 1997, by the plaintiff/respondent against the defendants/appellants claiming the sum stated above with interest, as a contribution due from the defendants/appellants as co-sureties in respect of money paid by the plaintiff as surety and/or for the use of the defendants. Interest on this sum was also claimed.

On July 16, 1997, appearance was entered on behalf of the defendants. No defence was filed.

On February 4, 1998, the defendants filed a summons to dismiss the action pursuant to section 238 of the Civil Procedure Code. It does not appear that this summons was pursued.

On July 25, 1997, the plaintiff/respondent filed a summons for summary judgment.

On April 3, 1998, the Chief Justice, in a contested hearing, ordered summary judgment in the terms already stated and which judgment is the subject-matter of this appeal.

The appellants maintained that they had a good and arguable defence to the claim of the plaintiff/respondent. The respondent has filed a Respondent's Notice in which it seeks alternatively to uphold the Chief Justice's determination on the basis:

> **(a)** That the transaction between the parties related not to the making of a loan but to subscriptions for ordinary shares of Blaise Trust Company and Merchant Bank Limited, alternatively;

(b) **(i)** even if it related to a loan, the law governing the agreement was that of the Cayman Islands and the Moneylending Act of Jamaica would not apply;
(ii) the provisions of the Bank of Jamaica Act section 22A(3) would not apply since the transaction did not involve a payment of Jamaican dollars;
(iii) the second defendant in any event is precluded from relying on his own wrongdoing to escape the duty to contribute as co-guarantors;

(c) the guarantee is a valid one.

Further, by way of a cross-appeal, the respondent challenges the Chief Justice's determination in not granting interest on the judgment. What are the facts disclosed on the affidavits filed? The affidavit of Patrick Hilton, Managing Director of the plaintiff company alleged:

> **(1)** That Blaise Trust Company and Merchant Bank (BTMB), Consolidated Holdings Limited (Consolidated) and Dojap Investments Limited (Dojap) were owned and controlled by the second and third defendants (the Pantons).
> **(2)** In April 1994 BTMB being in breach of several provisions of the Financial Institutions Act gave a written undertaking to the Bank of Jamaica (BOJ) for strict compliance with certain management and operational guidelines given to them by BOJ. The undertakings were joint and several and signed by the Pantons and the other directors of BTMB.
> **(3)** The financial situation of BTMB deteriorated and in July 1994 Donald Panton undertook to BOJ that BTMB would be re-structured and a new investor found to inject capital of US$1M in BTMB and acquire the control of the Bank and its Board.

Consequently, in July 1994 Donald Panton entered discussions with one James Eroncig, an American businessman who controlled a Company called Continental Petroleum Corporation Limited; a Bahamian Corporation, and West-Euro Equities Limited, a Cayman Corporation. They concluded an agreement whereby:

> **(1)** Continental Petroleum would subscribe US$1M redeemable preference shares with a fixed monthly dividend of US$20,000 in the share capital of West-Euro. This would enable West-Euro to invest the said US$1M in the capital of BTMB.
> **(2)** Continental Petroleum would make a personal loan to Donald Panton of US$300,000 with interest at US$6,000 per month, on a guarantee by the defendants and Consolidated Holdings of the payment to Continental Petroleum of the fixed monthly dividend on its preference shares. On redemption of those shares at the end of one year Continental Petroleum would recover its investment of US$1M. Continental Petroleum and the defendants would further guarantee the repayment by Donald Panton of the interest and principal in respect of the personal loan within one year.
> **(3)** As security Consolidated Holdings would grant Continental Petroleum a mortgage over its premises at Blaise Industrial Park and Dojap would secure its guarantee by granting to Continental Petroleum a charge over certain deposits held by it with Jamaica Money Market Brokers Limited (JMMB Ltd.) and Dehring, Bunting and Golding Limited (DB & G Ltd.).
> **(4)** Control of BTMB would return to the Pantons for a nominal consideration after Continental Petroleum has recouped its investment at the end of one year.

Consequent on these agreements on August 10, 1994, West-Euro introduced US$1M of capital into BTMB as a subscription for a controlling

share holding therein of 16,885,223 ordinary shares. Furthermore, the defendants and Consolidated Holdings, by an executed agreement dated August 10, 1994, jointly and severally guaranteed to Continental Petroleum the several matters listed at (2) on page 4 hereof. They further indemnified Continental Petroleum against loss or diminution in the value of its investment, and Consolidated Holdings further executed and delivered to Continental Petroleum a mortgage over the property at Blaise Industrial Park and the duplicate certificate of the title thereto. Dojap executed a letter of offer charging its deposits with JMMB Limited and DB & G Limited.

Despite these tortuous initiatives, in December 1994 the Minister of Finance assumed temporary management of BTMB and in April 1995 of Consolidated Holdings.

In October 1995 the Supreme Court sanctioned schemes of arrangement between Consolidated Holdings, BTMB, Blaise Building Society and their depositors whereby the assets of the institutions were pooled and transferred to the plaintiff/respondent which then assumed the liabilities of the institutions to the depositors and secured creditors.

On February 8, 1995, Continental Petroleum made written demand on Consolidated Holdings for payment of the entire sum secured under the mortgage, threatening to exercise its power of sale consequent on default in payment of the monthly instalments of dividend on the preference shares

and interest on the personal loan to Donald Panton and consequent also on further stated breaches of the agreements between the parties.

Continental Holdings and the defendants then instituted Suit C. L. C. 069 of 1995 in the Supreme Court against Continental Petroleum et al and obtained interim injunctions restraining the sale of the premises or encashing of the Certificates of Deposits.

On December 9, 1996, the plaintiff/respondent, to whom the mortgaged premises and Consolidated Holdings' liability had passed under the guarantee and mortgage, paid to Continental Petroleum in settlement of the demand and in satisfaction of the liability the sum of US$1,436,000 as a negotiated sum.

The defendants on December 20, 1996, through their attorneys-at-law consented to an order in the Suit whereby Dojap's deposits with JMMB Ltd and/or DB & G Ltd were paid over to Continental Petroleum and/or James Eroncig and/or his nominee in respect of Dojap's guarantee of the personal loan by Continental Petroleum to Donald Panton.

Mr. Hylton alleged in his affidavit that FIS Ltd had paid more than its proportionate share under the joint and several guarantees and consequently a demand for contribution was made on the defendants in the sum of US$1,077,000 being the amount paid by FIS Ltd beyond its proportionate share of the liability. His affidavit was supported by the relevant exhibits.

No defence to the action having been filed the Chief Justice was moved in Chambers by counsel for FIS Ltd for the following relief:

> **1.** Payment of the sum of US$1,077,000 or the Jamaican dollar equivalent at the date of payment or judgment.
> **2.** Interest thereon at such commercial rate as the Honourable Court deems just from December 10, 1996, to date of judgment.
> **3.** Costs to the plaintiff to be agreed or taxed.

The Chief Justice's judgment set out in more summary form the facts which I have above cited. He heard submissions on behalf of both the plaintiff and the defendants. He pointed out that appearance was entered in this matter on July 16, 1997, but "to date no defence has been filed". Furthermore, he stated, "no application has been made to extend the time for the filing of a defence". He further pointed out as follows:

> "The matter came on for hearing on July 31, 1997, and was adjourned at the instance of the defendants to afford them the time to file the affidavit required under section 79.
> The matter again came before the court on January 15, 1998, but no affidavit was filed.
> In fact no application has been filed contesting the summons for summary judgment. There is, however, a summons seeking to strike out the action 'as being frivolous and vexatious and an abuse of the process of the court.'
> Worthy of note is the fact that there has been no affidavit filed stating that the defendants have a good defence to the action."

The Chief Justice cited section 79(1) of the Judicature Civil Procedure Code Law which stipulates:

> "Where the defendant appears to a writ of summons specially endorsed with or accompanied

> by a statement of claim under section 14 of this law the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed (if any liquidated sum is claimed) and stating that in his belief there is no defence to the action except, as to the amount of damages claimed, if any, apply to a judge for liberty to enter judgment for such remedy or relief as upon the statement of the claim the plaintiff may be entitled to. The judge thereupon, unless the defendant satisfies him, that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally may make an order empowering the plaintiff to enter such judgment as may be just having regard to the nature of the remedy or relief claimed."

The Chief Justice stated the question to be resolved in his view as "whether the defendant has satisfied me that he has a good defence to the action on the merits or has disclosed such facts as may be deemed sufficient to entitle him to defend the action generally." He concluded that no evidence had been adduced either by way of affidavit or other viva voce evidence upon which he could so reasonably conclude.

Although no affidavit in rebuttal had been filed, the Chief Justice referred to Supreme Court Practice 1976 at page 137 which states: "that the defendant may show cause by affidavit or otherwise." The Chief Justice did not think the "otherwise" there referred to included counsel's submissions. As he stated, "the words 'or otherwise' are not intended to open wide the door for giving leave to a defendant who has no real defence. The primary obligation remains on the defendants to 'satisfy' the court that

there is a triable issue or question or that there ought to be a trial for some other reason." He concluded that: "on a balance of probabilities the defendants have failed to discharge the obligation which rests upon them." Mr. Goffe, Q.C. for the respondent does not support the Chief Justice's conclusion that it was necessary for the appellants to file an affidavit that there was a good defence to the action when there is in fact no contention on the facts.

The question to be determined is whether in law an arguable defence arises. The absence of an affidavit from the respondent challenging the facts would not, in my view, be fatal to the application for leave to defend in response to the application for summary judgment.

Sheared of all the background, what is being sought by FIS Ltd is to recover from Dojap and the Pantons their share of the guarantees which were met by FIS Ltd in the settlement of Supreme Court Suit C. L. C. 069 of 1995 on the terms stated in the written agreement between Continental Petroleum Products Limited, West-Euro Equities Corporation and Financial Institution Services Limited and to which Dojap and the Pantons were not parties.

Mr. Henriques, Q.C., for the appellants has submitted that the agreement dated August 10, 1994, between Dojap, Consolidated Holdings, the Pantons on the one part and Continental Petroleum of the second part and West-Euro Equities of the third part was not in fact a guarantee

arrangement but was designed to satisfy the Bank of Jamaica that a new investor was found who was injecting US$1M in the bank so that the bank would enjoy the confidence of its depositors and continue its operations. It was in fact a loan masquerading as a capital injection. The court, argues Mr. Henriques, is required to look at the substance and carefully examine the transaction to determine its true nature (***Re George Inglefield, Limited*** [1932] All E.R. Rep. 244 - Romer, L.J., at pages 256-257).

In substance, Mr. Henriques submits that a loan was made to West-Euro for West-Euro to pass on the money to Blaise. The purpose of the scheme was to mislead the Bank of Jamaica into believing that there was some real chance of the Merchant Bank's survival because of the injection of these funds. The whole scheme was a sham.

Mr. Henriques, Q.C., further submits that the plaintiff was under no legal liability to discharge the guarantee. They had not given any guarantees and were not parties to it. There was no evidence of any assignment or novation or any basis on which they could become guarantors. Furthermore, no reference was made to the sureties before FIS Ltd entered into the settlement.

Mr. Goffe, Q.C., has maintained that whatever was done by FIS Ltd under the scheme was sanctioned by the Supreme Court and cannot now be challenged as tainted by lack of authority or illegality. The guarantors' liability to honour the guarantees does not depend upon whether the

principal debtor has been called upon to pay the debt. As a matter of fact and law, each guarantor was himself a principal debtor. The single question for the court to decide, Mr. Goffe, Q.C., maintains is whether having paid under Consolidated's guarantee, FIS Ltd is entitled to claim a contribution from the co-guarantors.

If I have not in my review given the full arguments and the wealth of authorities cited on both sides it is because for this purpose I do not consider it necessary to do so. Have there been issues of law raised which would impel the court to hold that there are triable issues which should be argued and that the justice of the situation would militate against allowing the summary judgment to stand?

I answer this question in the affirmative. I would allow the appeal, set aside the determination of the Chief Justice and further order as follows:

> **1.** That leave is hereby granted for the defendants/appellants to file a defence to the action within thirty days from the date of the delivery of the judgment of the Court of Appeal and to file such other pleadings as are necessary to be filed within the time stated by the rules of the Supreme Court.
>
> **2.** That the appellants be awarded the costs of this appeal.
>
> **3.** That there be a speedy trial of this matter.

Since writing this judgment, I have read with interest the detailed draft judgment of Downer, J.A. in which he concludes as follows:

> "The order of this Court ought to be that the appeal is allowed. The order of the court

> below on the Summons for Summary judgment must be set aside. The decision below which dismissed the Summons to Strike out the Writ and Statement of Claim for want of prosecution was wrong. Alternatively as a matter of law the appellant has succeeded in striking out the Writ of Summons and the Statement of Claim. Costs therefore must go to the appellants both here and below."

It is with regard to the alternative order that I respectfully disagree with Downer, J.A.

The issue before the Court of Appeal was clear. Were there grounds on which the summary judgment ordered by the Chief Justice against the appellants which could be supported on the basis of law and justice and therefore permitted to stand?

Neither Mr. Henriques, Q.C. for the appellants nor Mr. Goffe, Q.C. for the respondent invited the Court to examine and determine the additional issues addressed by Downer, J.A. on which he had based his alternative determination. The Court itself never indicated during the submission any intention of embarking on this exercise.

In these circumstances I find myself unable to agree that the boundaries of our determination should be extended beyond the issue raised by the appellants and in respect of which submissions were made to the Court.

DOWNER, J.A.

This appeal is from a summary judgment of Wolfe, C.J. It involved important points of law which were argued over five days, and more than twelve authorities together with extracts from legal texts were cited. The prayer of the appellants was "For AN ORDER that the said Judgment be set aside and that the Defendants/Appellants be granted leave to file a Defence to the said action and costs of the application to be the Defendants/Appellants in any event". It will be helpful to refer to the status of the parties as by so doing the constitutional and legal issues will be readily understood. The respondent on appeal is Financial Institutions Services Ltd. (FIS Ltd.) who was the plaintiff who obtained summary judgment of over U.S. $1M. in the court below. It is a company set up by the government to administer the assets of Blaise financial institutions and Century National Bank and its sister financial companies. One of the Blaise financial institutions Consolidated Holdings Ltd., a provident society was under the temporary management of the Minister of Finance so as to protect its depositors. Among its assets is a valuable real estate known as Blaise Industrial Park on Constant Spring Road.

F.I.S. Ltd. was granted a loan by the government of $401M with provision for an additional amount - the total allocation not to exceed $1078M. So we are dealing with large sums which will have to be met by taxpayers. The collapse of the Blaise and Century Financial Institutions was the precursor to the more serious problems in the financial sector. To prevent a collapse of the sector the government set up the Financial Institutions Adjustment Company Ltd. It is popularly known as FINSAC. Its purpose was to rescue a number of banks and insurance companies.

If the orthodox pattern was followed the respondent F.I.S. Ltd. was incorporated under the Companies Act pursuant to the Crown Property Vesting Act.

The Certificate of Incorporation was exhibited by the respondent at the request of this Court. However, the Memorandum and Articles of Association were not exhibited. Nor were the annual returns if they were made.

There are two features to note about this later Act. Firstly, the Minister of Finance is accorded a crucial role by provisions of Sec. 6 and 7 of the Act. Secondly, by virtue of Sec. 79 of the Constitution and the Solicitor General's Act the Law Officers of the Crown have an equally important role in the tendering of advice on matters which concerned the respondent. Thirdly, the Accountant General as a corporation sole is generally the dominant shareholder where the orthodox method is followed. Were the Law Officers consulted in this case? As for the Pantons they are a husband and wife team whom we were told were the dominant shareholders in Dojap Investments Ltd.

This is how the Statement of Claim of the respondent, F.I.S. Ltd., reads:

> "1. At all material times Blaise Trust Company & Merchant Bank Limited (hereinafter referred as "BTMB"), Consolidated Holdings Limited (hereinafter referred to as "Consolidated Holdings") and the First Defendant were owned and/or controlled by the Second and Third Defendants.
>
> 2. A Bank of Jamaica inspection had shown BTMB was in breach of several provisions of the Financial Institutions Act and in April, 1994 the Second and Third Defendants gave to the Bank of Jamaica written undertakings to comply strictly with certain management and operational guidelines more particularly set out in a Joint and Several Undertaking signed by the Second and Third Defendants and two other then directors of BTMB.
>
> 3. In July, 1994, the financial situation of BTMB had deteriorated and on the 19th July, 1994, the Second Defendant undertook to the Bank of Jamaica that BTMB would be restructured and a new investor found who would inject capital of US$1,000,000.00 into BTMB and acquire control of the Bank and its Board."

Since BTMB is not a plaintiff but plays a very important part in these proceedings it is necessary to advert to other paragraphs in the Statement of Claim. Paragraph 4 reads:

> "4. In pursuance of the undertaking to the Bank of Jamaica set out at paragraph 3 above, in or about July, 1994, the Second Defendant entered into discussions with James Eroncig, an American businessman who controlled Continental Petroleum Corporation Limited, a Bahamian corporation (hereinafter referred to "Continental Petroleum") and West Euro Equities Limited, a Cayman corporation (hereinafter referred to as "West Euro Equities") and concluded an agreement whereby:
>
> (a) Continental Petroleum would subscribe for US$1,000,000.00 redeemable preference shares with a fixed monthly dividend of US$20,000.00 in the share capital of West Euro to enable West Euro to invest the said US$1,000,000.00 in the capital of BTMB, and
>
> (b) Continental Petroleum would also make a personal loan to the Second Defendant in the sum of US$300,000.00 with interest at US$6,000.00 per month, and
>
> (c) the Defendants and Consolidated Holdings Limited would guarantee the payment to Continental Petroleum of the fixed monthly dividend on its preference shares and that on redemption of its shares at the end of one year it would recover its investment of US$1,000,000.00 and further that they would guarantee the repayment by the Second Defendant of the interest and principal in respect of the personal loan aforesaid within one year, and
>
> (d) Consolidated Holdings would secure its guarantee by granting to Continental Petroleum a mortgage over its premises at Blaise Industrial Park and the First Defendant would secure its guarantee by granting to Continental Petroleum a charge over certain deposits held by it with Jamaica Money Market Brokers Limited and Dehring, Bunting & Golding Limited, and
>
> (e) control of BTMB would return to the Second and Third Defendants for a nominal

> consideration after Continental Petroleum recoups its investment at the end of one year."

Then paragraph 6 reads:

> "6. In December, 1994, the Minister assumed temporary management of BTMB and in or about April, 1995, the Minister likewise assumed temporary management of Consolidated Holdings.
>
> 7. In October, 1995, the Supreme Court sanctioned a scheme of arrangement between Consolidated Holdings, BTMB and Blaise Building Society and their depositors whereby the assets of those institutions were pooled and transferred to the Plaintiff, the Plaintiff assuming the liabilities of those institutions to depositors and secured creditors."[Emphasis supplied]

This assumption of Temporary Management was challenged in a constitutional motion which included a claim that the Minister's action was illegal . See **Donald and Janet Panton v The Minister of Finance et al** SCCA 113/96 delivered on 26th November, 1998. It is now on its way to the Judicial Committee of the Privy Council.

Then paragraphs 15 and 16 of the Statement of Claim continues:

> "15. By letter from its Attorneys dated May 13, 1997, the Plaintiff demanded contribution from the Defendants in the sum of US$1,077,000.00 being the amount paid by the plaintiff beyond its proportionate share of the aforesaid liability. The Defendants have failed to respond to the said demand.
>
> 16. BTMB and West Euro Equities are insolvent.
>
> WHEREFORE the Plaintiff claims:-
>
> (1) The sum of US$1,077,000.00 or the Jamaican dollar equivalent at the date of payment of Judgment
>
> (2) Interest thereon at commercial rates from the 10th December, 1996, to the date of payment or Judgment;

(3) Costs

(4) Further or other relief."

Since Dojap Investments Ltd. is the first defendant one would anticipate some further averment in the Statement of Claim since its status could easily be obtained from the Registrar of Companies. What was the shareholding of the Pantons?

Analysis of the issues in the Court below

To understand the events in the Supreme Court it is necessary to cite the relevant part of the order for Summary judgment:

> "IN CHAMBERS
> BEFORE THE HON. CHIEF JUSTICE
> ON FEBRUARY 9,11,13,23, AND APRIL 3, 1998
>
> UPON THE SUMMONS FOR SUMMARY JUDGMENT dated July 25, 1997, AND UPON HEARING Mr. W. John Vassell, instructed by Messrs. Dunn, Cox, Orrett & Ashenheim, Attorney-at-Law for the Plaintiff, AND UPON HEARING Messrs. RNA Henriques, Q.C. and Lawrence Broderick, instructed by L.G.S. Broderick & Co., Attorneys-at-Law for the Defendants, IT IS HEREBY ADJUDGED:-
>
> 1. That there be Judgment for the Plaintiff against the Defendants in the sum of US$1,077,000.00 or the Jamaican dollar equivalent at the date of Judgment
>
> 2. Costs to the Plaintiff to be agreed or taxed."

The next stage is to examine the reasons which the learned Chief Justice gave as the basis of this order against the Pantons and Dojap. Both the reasons for the decision and the order indicate that the matter was heard on February 9, 11, 13, 23 and that judgment was delivered on April 3, 1998. Mr. Henriques, Q.C., recalls only the 23rd of February as a hearing date but this has no bearing on the reasoning or the order made. In any event we are bound by the record. There was an issue however

which was adverted to in the reasons and since its substance will play an important part on appeal it ought to be demonstrated how it emerged. Here is how Wolfe, C.J. put it:

> "By Writ of Summons dated June 13, 1997, duly endorsed, the plaintiff claimed against the defendants for-
>
> 1. The sum of US$1,077,000.00, or the Jamaican equivalent at the date of payment or Judgment, being contribution from the defendant co-sureties, in respect of money paid by the plaintiff as surety and/or as money paid by the Plaintiff for the use of the defendants
>
> 2. Interest on the said sum of US$1,077,000.00 at commercial rates from the 10th December, 1996, to the date of payment or Judgment.
>
> 3. Costs.
>
> 4. Further or other relief.
>
> The statement of claim was filed in the Registry of the Supreme Court on the same date as the Writ of Summons.
>
> Appearance, on behalf of all the defendants, was entered on the 16th day of July, 1997. To date no defence has been filed.
>
> On July 25, 1997, the plaintiff filed a Summons for Summary Judgment.
>
> On February 4, 1998, the defendants filed a 'summons to dismiss the Action pursuant to section 238 of the Civil Procedure Code'
>
> No argument was advanced in support of the Summons. It follows, therefore, that the Summons must be treated as having been dismissed for want of prosecution." [Emphasis supplied]

The significance of this Summons was adverted to in two further passages of the judgment of the learned Chief Justice. The first reads as follows:

> "In fact no application has been filed contesting the Summons for Summary Judgment. There is, however, a summons filed seeking to strike out the action "as being frivolous and vexatious and an abuse of the process of the Court."

The second states:

> "Before parting with the matter, it is of some significance that the affidavit which was filed in support of the summons to strike out the action does not deny the claim. The basis of the application to strike out is that there is another action filed in which the plaintiff is claiming damages against the defendants. That claim, however, is for damages for breach of fiduciary duties."

Having regard to the reference to this summons it is curious that it formed no part of the record. This Court specifically requested that this summons be exhibited. It reads thus:

> "SUMMONS TO DISMISS ACTION PURSUANT TO S. 238 OF THE CIVIL PROCEDURE CODE
>
> SUIT NO. C.L. F-062 of 1997
>
> IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
>
> IN COMMON LAW
>
> BETWEEN FINANCIAL INSTITUTIONS SERVICES LIMITED PLAINTIFF
>
> AND DOJAP INVESTMENTS LIMITED 1ST DEFENDANT
>
> AND DONALD PANTON 2ND DEFENDANT
>
> AND JANET PANTON 3RD DEFENDANT
>
> LET ALL PARTIES CONCERNED attend a Judge or Master in Chambers at the Supreme Court, Public Building, King Street, Kingston, on Monday the 9th day of February, 1998 on the hearing of an application on behalf of the Defendants, for an Order that:
>
> I. That the Writ of Summons and Statement of Claim be struck out and/or the action be dismissed as being frivolous and vexatious and an abuse of the process of

> the Court, and under the inherent jurisdiction of the Court.
>
> DATED THE 4th DAY OF FEBRUARY, 1998

There was no trace of the affidavit referred to in the judgment below. Further this summons makes no reference to any affidavit to be relied on at the hearing. At this stage it is pertinent to cite the Summons for Summary Judgment since both were before the learned Chief Justice. It reads:

> "LET ALL PARTIES CONCERNED attend before a Judge in Chambers at the Supreme Court, Public Buildings, King Street, Kingston, on Thursday the 31st day of July, 1997 on the hearing of an application by the Plaintiff for final judgment in this action for the following relief mentioned in the Statement of Claim:-
>
> 1. Payment of the sum of US$1,077,000.00 or the Jamaican dollar equivalent at the date of payment or Judgment;
>
> 2. Interest thereon at such commercial rates as the Honourable Court deems just from the 10th December, 1996, to the date of Judgment;
>
> 3. Costs to the Plaintiff to be agreed or taxed
>
> AND TAKE NOTICE that on the hearing of this application the Plaintiff will refer to and rely on the Affidavit of Patrick Hylton sworn to and filed herein."

There is a formal order in respect of the Summons for Summary judgment but none for the Summons to strike out the Writ of Summons and Statement of Claim although there was a decision on both Summonses.

The ratio of the judgment below is to be found in the following passages:

> "The matter came on for hearing on July 31, 1997, and was adjourned at the instance of the defendants to afford them the time to file the affidavit required under section 79.

> The matter again came before the Court on January 15, 1998, but no affidavit was filed.
>
> In fact no application has been filed contesting, the Summons for Summary Judgment. There is, however, a summons filed seeking to strike out the action 'as being frivolous and vexatious and an abuse of the process of the Court'.
>
> Worthy of note is the fact that there has been no affidavit filed stating that the defendants have a good defence to the action'."

Then the learned Chief Justice continues thus:

> "Section 79(1) of the Judicature (Civil Procedure Code) stipulates:
>
> 79(1) Where the defendant appears to a writ of summons specifically endorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed) and stating that in his behalf there is no defence to the action except, as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed" (emphasis mine).

Explaining his reasons for entering summary judgment the learned Chief Justice states:

> "The plaintiff has faithfully observed the provisions of section 79(1). The question to be resolved, in my view, is whether the defendant has satisfied me that he has a good defence to the action on the merits or has disclosed such facts as may be deemed sufficient to entitle him to defend the action generally."

If the defence on the merits is a point of law then it would be open to counsel for the defendants to indicate the points of law which emerge from the Writ of Summons, the Statement of Claims and the affidavit of the plaintiff. If these points of law are capable of determining the outcome of the case, this Court should dispose of the matter on that basis. Where there is a Summons whose prayer is for the Writ of Summons and Statement of Claim to be struck out, the appropriate course as in the instant case where both Summonses were heard together, would be to deal with the points of law raised. Thereafter, either grant the prayer on the summons to strike out or dismiss it, before delivering a decision on the Summons for Summary judgment. **The Jamaica Record Ltd. et al. v. Western Storage Ltd SCCA 37/89** delivered March 5th 1990 contemplates such a procedure. In this case the points of law would be appropriate to both summonses.

Here is how the learned Chief Justice disposed of the submissions of counsel for the appellants:

> "Mr. Henriques, Q.C., in his submissions sought to explain the nature of the transaction contending that the amount claimed was not by way of loan, but was an investment in shares. It would have been so easy for the defendant to have said this in an affidavit considering the number of times this matter has come before the Court.
>
> Paragraph 14/3 - 4/3 of the Supreme Court Practice 1976 at p 137 states that the defendant may show cause by 'affidavit or otherwise'. I do not think 'or otherwise' include counsel's submissions. The words 'or otherwise' are not intended to open wide the door for giving leave to a defendant who has no real defence. The primary obligation remains on the defendant to 'satisfy' the Court that there is a triable issue or question or that there ought to be a trial for some other reason.
>
> On a balance of probabilities the defendants have failed to discharge the obligation which rests upon them."

It is clear from the above reason that the absence of affidavit evidence was crucial to the Chief Justice's decision. It is equally clear that counsel's submission before him were on points of law. These were in the nature of a preliminary objection in point of law although the procedural form was a summons to strike out the Writ of Summons and Statement of Claim. The essence was that in the light of all the affidavit evidence of Patrick Hylton the Managing Director of F.I.S. Ltd. together with the exhibits and the Endorsment and the Statement of Claim the appellants were contending that they had cogent submissions in law which should be adjudicated in their favour. So the issue is whether the appellant was permitted to show that he had "a good defence to the action on the merits" pursuant to section 79(1) of the Code. It should also be noted that the Chief Justice has made it clear that the Summons pursuant to section 238 of the Civil Procedure Code Law was before him. Section 237 was also relevant. He ought to have taken judicial notice of it by virtue of section 21 of the Interpretation Act. Section 237 of the Code reads:

> "237. If, in the opinion of the Court or a Judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim or reply therein, the Court or Judge may thereupon dismiss the action, or make such other order therein as may be just."

The section pursuant to which the Summons was to be heard, reads:

> "Striking out pleadings
>
> 238. The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Since the judgment shows that there was a Summons which sought to strike out the Writ of Summons and Statement of Claim pursuant to section 238 of the Civil Procedure Code Law, then it was clear that there need be no affidavit in circumstances where the issue is that no reasonable cause of action is disclosed. The Chief Justice should have decided whether the point of law raised enabled him to strike out the Writ of Summons and the Statement of Claim by way of summary procedure or as a preliminary point of law. The appellants have assured the Court that there were submissions on a point of law and that the case of **Rolled Steel Products (Holdings) Ltd v British Steel Corporation and Other** [1985] 2 W.L.R. 908 was cited . That case dealt in part with the ultra vires doctrine and the principles would be applicable if F.I.S. Ltd was incorporated pursuant to the Crown Property Vesting Act. The resources to finance the F.I.S. Ltd. came from the Consolidated Fund, so there is a presumption that this Act applies. It is anticipated that if there are further proceedings in this case the Memorandum and Articles of Association will form part of the record. Here is how the appellants complained in grounds 6 and 7 of the Notice of Appeal:

> "6. The learned Chief Justice having heard submission of Counsel on issues of law concerning the Defendants/Appellants Defence to the Plaintiff/Respondent's case having reserved judgment concerning same, erred when he gave judgment for the Plaintiff/respondent, without giving any consideration whatsoever to the points of law raised by Counsel for the Defendants/Appellants and entered Judgment on the basis that as there was no affidavit filed, the Defendants/Appellants failed to discharge the burden of showing there was a good Defence to the claim.
>
> 7. The learned Chief Justice further erred as a matter of law, as if he was of the view that the only way that the Court could consider the issues of law being raised by the Defendants/Appellants was, if there was an affidavit filed in connection therewith, then the Chief Justice should have so indicated to Counsel, who could have then requested an adjournment to file an affidavit, rather

> than permitting Counsel to make submissions in law, then reserving his judgment and then giving a judgment on the basis that as there was no affidavit filed, the Defendants/Appellants had failed to discharge the burden of showing that they had a good and arguable Defence thereby giving no consideration whatsoever to the points of law raised as the Chief Justice failed to deal with same in the written Judgment."

However the learned Chief Justice said in relation to the appellants' Summons to strike out:

> "No argument was advanced in support of the Summons. It follows therefore that the Summons must be treated as having been dismissed for want of prosecution."

We know that the minute of order ought to have been prepared on this aspect of the proceedings, and that a formal order ought to have been drawn up. It ought to have read "Summons dismissed for want of prosecution." So that the substance of the decision in the Court below was that the respondent was awarded an order for summary judgment, while the appellants summons for striking out the Writ and Statement of Claim was dismissed. So I will treat this appeal as if there were two orders on appeal before this Court.

Proceedings in the Court of Appeal

By way of introduction it is pertinent to refer to the modern approach where there are appeals from summary judgments which can be decided on points of law. Mr. Goffe, Q.C. helpfully cited **European Asian Bank AG v Punjab and Sind Bank** [1983] 2 All ER 508 at page 516 where Goff LJ said:

> "But where the appeal raises a question of law, this court may be more ready to interfere. Moreover, at least since **Cow v Casey** [1949] 1 All ER 197, [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under Ord 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of

> Ord 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal (see **Verrall v Great Yarmouth BC**[1980] 1 All ER 839 at 843, 845-846, [1981] 1 QB 202 at 215, 218, per Lord Denning MR and Roskill LJ). The policy of Ord 14 is to prevent delay in cases where there is no defence; and this policy is, if anything, reinforced in a case such as the present, concerned as it is with a claim by a negotiating bank under a letter of credit see (**Bank fur Gemeinwirtschaft v City of London Garages Ltd** [1971] 1 All ER 541 at 547-548, [1971] 1 WLR 149 at 158, per Cairns LJ, a case concerned with a claim on a bill of exchange by a holder in due course."

Since to my mind the learned Chief Justice should have examined the points of law raised by the appellant and ascertained how they related to the Summons for Summary Judgment as well as the Summons to Strike Out which were before him, I will adopt that course to see where it leads.

Turning to the Notice of Appeal it reads:

> "T A K E N O T I C E that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the abovenamed Defendants/Appellants on Appeal from the Judgment herein of the Honourable Mr. Justice Wolfe, Chief Justice, given on the 3rd day of April 1998 whereby it was ordered that Judgment be entered for the Plaintiff/Respondent against the Defendants/Appellants for the sum of ONE MILLION AND SEVENTY-SEVEN THOUSAND UNITED STATES DOLLARS (US$1,077,000.00) with interest thereon and costs to be taxed or agreed."

Surprisingly, the learned Chief Justice awarded no interest as he ruled thus:

> "As to the claim for interest at the commercial rate, no evidence has been adduced before me to show what was the prevailing rate of interest as of the 10th December, 1996, or at anytime. I, therefore, refrain from making any such order."

So that part of the Notice relating to interest is superfluous. In fact there is a Respondent's Notice which challenges the ruling of the Court below on this issue. Paragraph 5 reads:

> "The Respondent will contend by way of cross appeal that the learned Chief Justice erred in declining to award any interest to the Respondent on the amount of the Judgment. The learned Chief Justice should have invited Counsel to address him on the question of interest once he has determined liability in favour of the Plaintiff, as is the usual practice, and, in any event, ought to have, in exercise of the Court's discretion under the Law Reform (Miscellaneous Provisions) Act, awarded interest at such rate as he felt just. The Respondent will seek variation on the Judgment of the learned Chief Justice to include such rate of interest as this Honourable Court deem just."

It is sufficient to say at this stage that the Respondent must succeed on this ground but it may not be necessary to advert to this aspect again. In his summary of his submission Mr. Goffe, Q.C., for the respondent FIS Ltd. wrote:

> "2. The sole question to be decided in the Appellants' appeal is:-
>
> Having paid Continental under the guarantee given by Consolidated to Continental in paragraph 5 (iv) of the Incorporation Agreement (p.27) is the Respondent entitled to a contribution from the Appellants? As there is no dispute as to the relevant facts and documents this is a question of law."

It is convenient to cite the relevant clause of the Incorporation Agreement which reads:

> "iv. The Guarantors agree to pay or cause to be paid to Continental the amount of One Million Three Hundred Thousand Dollars (US$1,300,00.00) on the 12th day of August, 1995 in order to repay the loan to Donald Panton and to redeem the RPShares."

So it is clear that from the respondent's point of view the relevant point of law will determine the outcome of this case. This is the answer to the appellant's prayer which seeks leave to defend and go on to another hearing in the Supreme Court. If the appellants' point of law or any other points of law can dispose of this appeal then the costs of a further hearing in the Supreme Court would be enormous, not to mention judicial time in a jurisdiction where the judiciary at all levels is overburdened with a backlog of cases. The emphasis of both counsel on the Incorporation Agreement was time consuming and may well have misled the learned Chief Justice. The dominant contract was the undated contract which ought to have been in the forefront of counsel's submissions. It is a curious feature of this case that Mr. Henriques, Q.C. made convincing submissions, yet there were scant reference to this undated agreement which was fundamental to his contention.

It is now convenient to turn to Grounds 8 and 9 of the Notice of Appeal. They read:

> "8. The learned Chief Justice erred when he dealt with an erroneous matter, that is, a Summons to strike out the action as being frivolous and vexatious, as same was not argued before him, as the only matter for consideration was the application for Summary Judgment
>
> 9. The Chief Justice failed to appreciate that once it was established that there were issues of law, which warranted serious consideration and affected the validity of the Plaintiff/Respondent's claim, then the Defendants/Appellants were entitled to leave to defend."

Since there is a Respondent's Notice it will be pertinent to cite the relevant grounds corresponding to grounds 8 and 9 in the Notice of Appeal. They are as follows:

> "1. There was, in any event, nothing in the affidavit filed by the Plaintiff in support of the application for summary judgment on which the Defendants/Appellants could rely as furnishing an arguable defence to the Plaintiff's claim. The transaction revealed by the documents involved the subscription for ordinary shares in Blaise Trust Company & Merchant Bank Limited, not the making of a loan to Blaise Trust Company & Merchant Bank Limited.
>
> ...
>
> 3. The fact that an arrangement for a loan rather than equity departed from an undertaking given to the Bank of Jamaica is irrelevant to the issues in this action and could not, in any event, be relied on by the Second Defendant who is precluded from relying on his own wrong-doing to escape the duty to contribute as co-guarantors.
>
> 4. No evidence before the Court supports the other suggested grounds of invalidity of the guarantee."

What it is necessary to grasp at this stage is that both parties, the appellants in their ground 9 and the respondent in its ground 4 raised the legal issue of the validity of the respondent's claim. If the Writ of Summons and the Statement of Claim were invalid in law then there would be no need for leave to defend. The matter ought to be resolved in this court. Here it is pertinent to mention ground 2 of the Respondent's Notice. It reads:

> "2. Even if the transaction amounted to a loan, the Moneylending Act has no application since the governing law of the agreement is that of Cayman Islands and there was no evidence as to whether that jurisdiction has a Moneylending Act (in fact, they have none) or what were its terms. Further, the provisions of ss. 22A (3) of the Bank of Jamaica Act would not apply since the transaction disclosed by the documentation did not involve a payment of Jamaican dollars."

Here an issue of conflict of laws is raised. If it were to be an issue in this case the Cayman Court would have to decide it. As it turns out there is the later undated agreement governed by Jamaican law which is crucial to the outcome of this case.

As regards ground 8 it is clear from the examination of the judgment in the Court below that the learned Chief Justice considered the Summons to Strike Out the Statement of Claim pursuant to Section 238 of the Civil Procedure Code Law on the ground that it disclosed no reasonable cause of action. Therefore as to whether he was right to dismiss this summons for want of prosecution is in issue. Even without this summons the issue of law is whether the FIS. Ltd. was obliged to pay over US$1,436,000.00 to Attorneys-at-Law on behalf of James Eroncig and his Company. It was a live issue raised on the affidavit and exhibits of Patrick Hylton. Here is how the affidavit commenced:

> "I, PATRICK HYLTON, being duly sworn, make oath and say as follows:
>
> 1. That my address is 9 Trinidad Terrace, Kingston 5, in the Parish of Saint Andrew, and I am Managing Director of the Plaintiff, and I am duly authorized by it to make this affidavit and I speak to the following matters from my own knowledge gained in the course of my duties and from the examination of the records and papers of the three Blaise entities during and after Temporary Management by the Minister."

Here it is instructive to notice that Mr. Hylton never mentioned whether the Temporary Management by the Minister was ever confirmed as required by law. I asked Mr. Goffe, Q.C. whether there was such an order in respect of Consolidated Holdings Ltd. This issue was considered in **Donald Panton and Janet Panton v The Minister of Finance and the Attorney General** (unreported) SCCA 113/96 delivered

November 26, 1998 especially at pages 65-79. I should add that the relevant passage was a dissent, but I think it ought to be considered. I still adhere to those views.

It is important to refer to the status of the parties involved in the loan transaction to ascertain whether there was any obligation on F.I.S. Ltd. to pay the Eroncig companies. Firstly, as to Blaise Trust and Merchant Bank it is common ground that the loan was made to this entity although the form it took was redeemable preference shares. Secondly, the loan was made by the combined efforts of a Bahamian and a Caymanian company under the control of James Eroncig. Thirdly, Consolidated Holdings Ltd. one of the guarantors was under the Temporary Management of the Minister of Finance. Also to be considered generally is that F.I.S. Ltd. is a company formed by the Government to administer the assets of the Blaise and Century Financial Institutions. The endorsement on the Writ of Summons is as follows:

"**ENDORSEMENT**

The Plaintiff's claim is against the Defendants for:-

1. the sum of US$1,077,000.00, or the Jamaican Dollar equivalent at the date of payment or Judgment, being contribution from the Defendant co-sureties, in respect of money paid by the Plaintiff as surety and/or as money paid by the Plaintiff for the use of the Defendants.

2. Interest on the said sum of US$1,077,000.00 at commercial rates from the 10th December, 1996, to the date of payment or Judgment.

3. Costs.

4. Further or other relief."

(Emphasis supplied)

The crucial phrase here was, **the Plaintiff as surety**. Because of this crucial phrase there is obligation to examine the evidence cited by the respondent 'surety' as

to how it came to pay over US$1,436.000.00 to Attorneys-at-Law representing James Eroncig. Also if F.I.S. Ltd. was a surety Sec. 4 of the Mercantile Amendment Act would be applicable. By letter dated February 1995 David Parchment wrote this letter to Consolidated Holdings Ltd. It ran as follows:

"DAVID C. PARCHMENT
(Attorney-at-Law)
Apt. 3, Skyline ....Skyline Drive, Kingston 6
February 8, 1995

Consolidated Holdings Limited
53 Knutsford Blvd.
Kingston 5

Dear Sirs:

Re: Mortgage over Warehouse Complex at 69, 73 & 75 Constant Spring Road to Continental Petroleum Products Ltd.

There was a payment of US$26,000.00 due to Continental Petroleum Products Limited on the 12th of January, 1995. Only US$10,000.00 was received. Also a balance outstanding to Continental in the amount of US$20,000.00

The terms of the Agreements under which Continental Petroleum Products Limited subscribed for shares in West Euro Equities Corp. have been breached by the payments, fundamental breaches by way of misrepresentation and finally by the non-payment of the installment due in January, 1995 and the non-delivery of the replacement Certificate of Deposit Promissory Notes representing the collateral security that Continental holds.

I have been instructed to collect the entire amount secured under the mortgage to Continental Petroleum Products Limited which become due under the terms of the mortgage when the breaches occurred. I have registered a legal mortgage on the premises at 69,73 and 75 Constant Spring Road at a cost of J$20,110.00 stamp duty and J$83,213.00 for registration fee, plus a further $60,000.00 Attorney's costs for the process. Consolidated Holdings therefore owes J$813,323.00 to Continental which I hereby demand.

I am demanding the payment by Consolidated Holdings Limited in the amount of US$1,450,000.00 representing the following:

Principal outstanding	US$1,300,000.00
January dividend balance due	US$ 20,000.00
10% Collection fee	US$ 130,000.00
	US$1,480.000.00

Additionally, there is the amount of stamp duty registration fee and Attorney's cost of J$613,323.00 stated above which is also demanded and interest on the dividend payment at the rate of US$657.53 per day from the 12th of January, 1985 until payment.

If these amounts are not paid into my account established for collection at Century National Bank Limited at 14-20 Port Royal Street, Kingston, No. 08-01-06517-4 by the close of banking business on the 17th instant, I shall have no alternative but to commence proceedings to put the premises up for sale immediately.

Yours faithfully,

David Parchment."

The next step is to cite the mortgage in question. It is endorsed thus on the Certificate of Title under the Registration of Titles Act. It reads:

"Mortgage No 839976 registered on the 2nd of December 1994, to CONTINENTAL PETROLEUM PRODUCTS LIMITED at 6 Oakbridge House, West Hill Street, Post Office Box N8195, Nassau, Bahamas to secure One Million Three Hundred Thousand Dollars United States Currency with interest. By this and Eleven others."

Be it noted therefore that by this, the mortgagee Continental Petroleum Products could have exercised its power of sale by virtue of Sections 105 and 106 of the Registration of Titles Act. The basis on which the Supreme Court generally grants an interlocutory injunction to delay the exercise of a power of sale is that the full

amount of the money owing must be paid into Court pending the resolution of the dispute. Even if the realty in issue at Constant Spring Road becomes part of a Scheme of Arrangement then it would still be subject to the mortgage. What is important to note at this stage is that to enforce a power of sale in this instance, proceedings would have to be instituted in Grand Cayman. This important point of private international law was adverted to by both sides although the legal effects were never fully adumbrated in the submissions before this Court.

The crucial document on this aspect of the case was the undated agreement but it is clear that it must have been signed sometime before December 9, 1996. It is probably the most important exhibit in this case. It was not adverted to in the judgment of the Court below. Mr. Henriques, Q.C. did not refer to it directly in this Court or his submissions and grounds of appeal would have been worded differently. Also his alternative prayer would have asked for a decision on the basis that his Summons to strike out the Writ and Statement of Claim ought to have been allowed. Also that the decision below that this Summons was dismissed for want of prosecution was wrong in law. Mr. Goffe, Q.C. did not advert to it either in his oral or written submissions.

The following letter must have taken into account an antecedent agreement to which F.I.S. Ltd. was a party. Here is the letter:

> "December 9, 1996
>
> Messrs, Rattray, Patterson, Rattray
> Attorneys-at-Law
> 15 Caledonia Avenue
> KINGSTON 5
>
> **Attention: Mr. Andre Earle**
> Dear Sirs:
>
> **Re Continental Petroleum Products Limited - Mortgage over premises known as Blaise Industrial**

Park, Kingston 10 owned by Financial Institutions Services Limited (FIS)

We enclose herewith the following drafts representing the amounts due to settle sums owing by FIS as at today's date:-

1. Bank of Nova Scotia draft no. 215048 in the amount of United States One Million Four Hundred and Thirty-six Thousand Dollars (US1,436,000.00) made payable to you; and

2. Citi Merchant Bank Limited draft no. 239262142 in the amount of United States Two Thousand Four Hundred and Twenty-one Dollars (US$2,421.44) made payable to Continental Petroleum Products Limited

Yours faithfully,
DUNN, COX, ORRETT & ASHENHEIM

Per: JANICE A. CAUSWELL (MRS.)"

A subsequent letter by the same Attorneys-at-Law to the appellants in this issue reads:

"May 13, 1997

Mr. Donald Panton
19 -21 Carlton Crescent
Kingston 10

AND

Mrs. Janet Panton
19-21 Carlton Crescent
Kingston 10

AND

Dojap Investments Limited
53 Knutsford Boulevard
Kingston

Dear Sirs:

Re: Continental Petroleum Products Limited

-Investment of US$1,000,000.00 in Blaise Trust Company & Merchant Bank Limited

We act for Financial Institutions Services Limited, to whom all assets and rights of action of Consolidated Holdings Limited passed under Court-approved scheme of arrangement.

The transaction contained in the various agreements between Continental Petroleum Products Limited and West Euro Equities on the one hand and Consolidated Holdings Limited and Blaise Trust Company & Merchant Bank Limited and yourselves on the other, was that Continental Petroleum Products Limited would pay US$1,000,000.00 by way of preference shares with a fixed dividend of 24% per annum into West Euro Equities and West Euro Equities would invest those funds in Blaise Trust Company & Merchant Bank Ltd. in return for 51% of the shares and control of the Board. Consolidated Holdings Ltd. and yourselves executed joint and several guarantees to Continental Petroleum Products Ltd. that the preference dividends of 24% would be paid and that Continental Petroleum Products Ltd. would realize its investment in West Euro Equities at the end of one year. Consolidated Holdings Ltd. executed a mortgage over Blaise Industrial park to secure its guarantee.

As you are aware, in the event that happened, Continental Petroleum Products called on Consolidated Holdings' guarantee and after legal action, Financial Institutions Services Ltd. paid US$1,436,000.00 in settlement of the liability under the guarantees whereby all three of you became discharged.

We hereby make demand on behalf of our client for contribution of $1,077,000.00 being 75% of the amount paid, as co-guarantors of the joint liability which our client satisfied. The legal position is that our client is subrogated to the rights of Continental Petroleum Products Ltd. as against you and is entitled to the contribution we hereby demand.

Unless you confirm to us on or before noon on Friday, the 16th May, 1997, that you are willing to settle our client's claim, we will institute legal proceedings against you without further reference to you.

Yours truly,
DUNN, COX, ORRETT & ASHENHEIM
PER; W. JOHN VASSELL."

It was against this background that the claim in the instant proceedings was made, so this undated agreement was specifically referred to in the affidavit of Patrick Hylton. It reads:

> "11. That on the 9th December, 1996, the Plaintiff to whom the mortgaged premises and Consolidated Holdings' liability to Continental Petroleum under the guarantee and mortgage had passed, paid to Continental Petroleum, in satisfaction of its said liability under the guarantee and Continental Petroleum's demand, in the sum of US$1,436,000.00 being a negotiated figure less than the amount strictly due under the agreements.
>
> Exhibited herewith marked "PH 4" are a copy of the settlement agreement, the cheque in the sum of US$1,436,000.00 and the letter under cover of which the cheque was sent. The shares in BTMB referred to in the settlement agreement are worth nothing as the Company is insolvent."

The failure to deal with this undated agreement (exhibit 'PH 4')in the Court below was probably responsible for the prolonged arguments which lasted over five days. In this Court as well it was never expressly addressed.

The undated agreement must be examined. It reads thus:

> "**THIS AGREEMENT** is made this day of 1996
>
> **BETWEEN CONTINENTAL PETROLEUM PRODUCTS LIMITED**, a company incorporated under the laws of Bahamas (hereinafter referred to as "Continental Petroleum") **AND WEST EURO EQUITIES CORPORATION** , a company incorporated under the laws of the Cayman Islands (hereinafter referred to as "West Euro") and **FINANCIAL INSTITUTIONS SERVICES LIMITED** of 9-11 Trinidad Terrace, Kingston 5, Jamaica (hereinafter referred to as "FIS")"

In referring to the agreements which were relied on in this court the recital continues:

> "WHEREAS Continental Petroleum is registered as mortgagees of 12 lots in Blaise Industrial Park, registered at Volume 1239 Folios 501-512, inclusive of the Register Book of Titles (hereinafter referred to as "the said properties") pursuant to, and upon the terms of, and as a result of, arrangements referred to and described fully in the following agreements namely, Incorporation Agreement dated the 10th day of August, 1994, between Consolidated Holdings Limited and Continental Petroleum and West Euro; Shareholders Agreement dated the 10th day of August, 1994, between Consolidated Holdings Limited, Continental Petroleum, Blaise Trust Company & Merchant Bank Limited and other parties therein referred to; Letter of Offer executed by Consolidated Holdings Limited on the 10th day of August, 1994; Certificate of Acknowledgement dated the 10th day of August, 1994, executed by David Parchment and Instrument of Mortgage over the said properties dated the 10th day of August, 1994, executed by Consolidated Holdings Limited (hereinafter referred to as "the said agreements")."

Then comes the most important recital:

> "AND WHEREAS the said properties were owned at the date of the aforesaid agreements, by Consolidated Holdings Limited but are now owned by FIS pursuant to and upon the terms of a Scheme of Arrangement proposed by the Minister of Finance between Consolidated Holdings Limited and its creditors and sanctioned by the Supreme Court, the terms of which are more fully set out in the said Scheme."

The relevant question to ask is by what means did F.I.S. Ltd. come to "own" the mortgaged property owned by Consolidated Holdings Ltd. It is stated that it is by virtue of the Scheme of Arrangement approved by Cooke,J. in the Supreme Court on the 26th day of October 1995. So we must now turn to the Scheme to see if the property was transferred by the Order of the Supreme Court.

In ascertaining the effect of the Order of the Supreme Court it must be emphasised that the Minister would have had no legal right to go to the Supreme Court for a Scheme of Arrangement before he secured from that Court a Confirmatory Order. So the question is could the Order bind Consolidated Holdings Ltd. if the Minister's Temporary Management was never confirmed? The Order dated 26th October 1995 purporting to bind Consolidated Holdings Ltd. reads:

" IT IS HEREBY ORDERED THAT:

> The Scheme of Arrangement set out in the Schedule to the Petition filed herein be sanctioned by this Honourable Court so as to be binding upon the Company and its Creditors/Depositors.

THERE BE LIBERTY TO APPLY."

Then the caption reads Scheme of Arrangement Between Consolidated Holdings Limited and its General Creditors. The Preliminary in part reads:

" 'Deposit'	means	all sums due and outstanding to the general Creditors in the Company as of Dec. 31, 1994.
'Deposit Liabilities'	means	all sums due and outstanding the depositors in the Company as at December 31, 1994.
'the fixed date'	means	the 10th day of April, 1995 being the date of appointment of the Temporary Manager."

Here we see the initial error in this Scheme. The fixed date ought to be the date when a Confirmatory Order was made by the Court vesting the assets and liabilities in the Minister of Finance.

The Scheme makes provision for Preferential and General Creditors who were defined thus:

" 'Preferential Creditors' means	Creditors of the Company whose claims as at the

Fixed Date would have been preferential under Section 294 of the Companies Act had an order for Winding up of the Company been made on the Fixed Date to the extent to which such debts would have been so preferential or whose claims are for amounts accrued or accruing due by the Company in respect of rent supply of water, electrical energy or telephone service.

'the General Creditors' means all Depositors and other trade Creditors of the Company as at the Fixed Date other than Preferential Creditors with the trade Creditors being persons who supply goods and services to the Company in the normal course of business."

It does not appear that the Eroncig Companies were either Preferential or General Creditors as defined. They were mortgagees and Consolidated Holdings Ltd. was the mortgagor.

Even in the Scheme of Arrangement, Mr. Douglas Leys and Mr. Lackston Robinson Counsel for the Attorney-General refer to the Minister as Temporary Manager. Thus in the Scheme of Arrangement it reads:

> "D. The Minister having assumed Temporary Management of the Company pursuant to paragraph 8 (d) of the Regulations has proposed a Scheme of Arrangement.
>
> E. The Minister as Temporary Manager as well as the Preferential and General Creditors recognize that the BFI's have been operated as a single entity in that the assets of the Company are so intermingled with the assets of the two remaining BFI's that it is just and equitable that the BFI's should be treated as a single undertaking and it is in their overall interests to

> pool the assets of the BFI's in order to accommodate a Scheme of Arrangement and provide an expeditious and equitable conclusion to the existing state of affairs surrounding the three BFI's."

Turning to the Scheme the relevant clauses read:

The Scheme

> "1. Upon this scheme becoming operative the assets of the Society shall be pooled with the assets of the remaining BFI's in order to form one common fund."

Even if the Scheme of Arrangement covered the real estate after a Confirmatory Order then the real estate of Consolidated Holdings Ltd. would still be subject to the Mortgage. The Eroncig Companies could enforce their power of sale in Grand Cayman and register the judgment in the Supreme Court in this jurisdiction. The assets to be pooled would be the surplus if any after sale.

Here are the circumstances which gave birth to F.I.S. Ltd:

> "2. The GOJ shall upon this scheme becoming operative establish a limited liability Company to be known as FIS. The GOJ shall initially make a loan to this Company of a sum not exceeding $401M to cover the projected deficiency in assets. If the deficiency is greater than $401M the GOJ will lend to the Company an additional sum to cover the deficiency provided that the GOJ's total lending shall not exceed $1078. The projected deficiency in assets is based on a payout to the General Creditors of 90 cents in the dollar. The Private Sector may be allowed to participate under the Scheme through equity allocation and by way of loan capital on the same terms and conditions as the GOJ. Private Sector participation would reduce the amount of GOJ's lending."

So we are here dealing with large sums of money and there are stipulations as to how the General Creditors are to be paid. Clearly it was Depositors who were in contemplation of this provision. So paragraph 3 reads:

> "3. The General Creditors shall transfer and assign to FIS and/or its nominee their deposit upon the effective date and the Society in consideration of the assumption by FIS

> of its deposits liabilities transfers to FIS all its assets real and personal. Upon this Scheme being approved by the Court this transfer and assignment shall be deemed to have taken place. A transfer of all the assets and liabilities of any subsidiary of the Society shall upon this scheme being approved to be deemed to have taken place. FIS shall also have the power to appoint and revoke the appointment of any director or other officer of such subsidiary."

This provision, refers to General Creditors, not a mortgagee as the Eroncig companies were. Presumably it was the above paragraph on which FIS. Ltd. and their legal advisors relied to say that they were the owners of the real estate of Consolidated Holdings Ltd. Therefore they entered into the undated agreement with the Eroncig Companies to pay off the mortgage. To my mind there was no legal duty on FIS Ltd. to enter into such an arrangement. By so doing they were volunteers. Did they seek the opinion of the Law Officers of the Crown in making such a payment as they ought to have done pursuant to the Crown Property Vesting Act? Bear in mind if this Act applies the Accountant General would be the dominant shareholder.

Then paragraph 9 reads:

> "9. FIS shall as condition for the loan being advanced by the GOJ grant to the GOJ a first fixed and floating charge on the assets so transferred.
>
> Upon the transfer of the assets aforesaid FIS shall in its absolute discretion vote (any shares) work with develop or otherwise dispose of the assets so as to satisfy its loan obligations to the GOJ. The repayment for the loan to the GOJ by FIS shall be satisfied by the development and or realisation of the assets aforesaid as well as amounts recovered as a result of the legal claims for breaches of fiduciary duties and other responsibilities. Such repayment shall be subject to the payment of all other charges and expenses incurred by the BOJ in the period of temporary management and of all other charges and expenses relating to this scheme and its administration."

To my mind this provision in the Scheme did not transfer the estate of Consolidated to F.I.S. Ltd. so as to enable F.I.S. Ltd. to claim that as from 26th October, 1995 they were by virtue of the court Order owners of the estate of Consolidated Holdings Ltd. They cannot on this basis claim that they were **Plaintiff as surety** as the Endorsement on the Writ reads:

Paragraph 7 of the Statement of Claim which reads:

> "7. In October, 1995, the Supreme Court sanctioned a scheme of arrangement between Consolidated Holdings, BTMB and Blaise Building Society and their depositors whereby the assets of those institutions were pooled and transferred to the Plaintiff, the Plaintiff assuming the liabilities of those institutions to depositors and secured creditors."

cannot be maintained. This averment goes beyond the Order of the Supreme Court.

Returning to the undated Agreement it reads:

> "AND WHEREAS differences have arisen between FIS and Continental Petroleum, as to, inter alia, the amount validly secured by and enforceable under the said mortgages and certain issues have arisen between the parties in Suit No. C.L. C 069 of 1995 in the Supreme Court, and the parties have agreed that the said differences and issues be settled on the terms hereinafter appearing."

This recital is best explained by referring to paragraph 10 of the Affidavit of Patrick Hylton which reads:

> "10. That Consolidated Holdings and the Defendants instituted Suit No. C.L.C. 069 of 1995 in the Supreme Court against Continental Petroleum et al and obtained interim injunctions restraining the sale of the premises or the encashing of the certificates of deposits aforesaid."

Presumably the injunctions were awarded because the Supreme Court judge who made the award realised that any dispute about the exercise of a power of sale as a

result of the Incorporation Agreement of August 10th, 1994 must be adjudicated in the courts in Grand Cayman.

Then continuing, the recital reads as FOLLOWS:

> "AND WHEREAS West Euro, in consideration of FIS agreeing to negotiate a settlement of the said differences with Continental Petroleum, has agreed to transfer its 51% controlling shareholding interest or entitlement in Blaise Trust Company & Merchant Bank Limited to FIS."

Then the undated Agreement continues thus:

> "AND WHEREAS JAMES ERONCIG of 5701 Sunset Drive, Suite 302, Miami, Florida, United States of America, as the beneficial owner of all the shares in Continental Petroleum and West Euro and having procured, consented to and ratified this agreement has agreed to affix his signature thereto and to cause the said Continental Petroleum and West Euro to do likewise and further warrants the authority of DAVID PARCHMENT to sign on behalf of Continental Petroleum and West Euro."

Then comes the effective clause:

> "1. The amount secured in favour of Continental Petroleum by the said mortages, and recoverable from FIS thereunder, is US$1,390,000.00 as at August 31, 1995 inclusive of interest and legal costs.
>
> 2. FIS WILL PAY Continental Petroleum interest in the sum of US$1,390,000.00 or such portions thereof as are outstanding from time to time, at the rate of 12% per annum being U$474.72 per day from September 1, 1996 until the indebtedness is settled in full."

Was this payment made by the Accountant-General approved by the Minister of Finance as required by Sec. 6 of the Crown Property Vesting Act? If there was no approval the action might have been unauthorised. So in addition to being a volunteer at common law it seems that the payment could have been unlawful.

The undated Agreement further states:

> "3. Continental Petroleum will accept payment in Jamaican dollars, the rate of conversion to be the weighted average

rate at which commercial banks sell U.S. dollars on the spot market, at the date of each payment;

4. Continental Petroleum will release to FIS or its Attorneys the duplicate Certificates of Title for the properties together with duly executed but unstamped discharges of mortgages, upon an undertaking from FIS' Attorneys-at-law that upon registration of the discharge of mortgages and return of the duplicate Certificate of Title to them, they will pay to Continental or as Continental shall in writing direct the said sum of US$1,390,000.00 plus interest accrued thereon at 12% from the 1st September, 1996 to the date of payment or if FIS elects to pay in Jamaican dollars pursuant to paragraph 3 above, the Jamaican dollars of the said United States dollar sum calculated as set out in the said paragaraph 3 above."

It was these clauses which the lawyers for F.I. S. Ltd. invoked to pay out the monies to the Attorneys-at-law in Jamaica for Continental Petroleum.

Then clause 5 reads:

"5. Upon payment in full of the sum of US$1,390,000.00 plus interest the parties will release one another from all liability or claims under the aforesaid agreement or at all."

Be it noted that this Agreement was to the benefit of Eroncig. If it had not been made he would have had to go through the Cayman Courts to exercise a power of sale. Mr. Henriques, Q.C. insisted that he would have had a good defence to any action brought pursuant to the Incorporation Agreement. It was a sham he contended and illegal.

Then the undated Agreement stated further:

"6. West Euro will, on demand by FIS, at any time after execution hereof, transfer to FIS its shareholding interest or entitlement in Blaise Trust Company & Merchant Bank Limited and will, in furtherance thereof and at the sole expense of FIS, execute such documents or take such steps as in the opinion of FIS' Attorneys are requisite for the transfer of the said shareholding interest or entitlement to FIS and will, until transfer (such event not to be

unreasonably prolonged) exercise the rights attached to the said shareholding or entitlement as FIS shall from time to time direct, again, all at the sole expense of FIS'

7. Upon execution hereof the Attorneys for the parties hereto will take such steps as are necessary and in their power to terminate the involvement of FIS and Consolidated Holdings Limited in any pending proceedings in the aforesaid Suit.

8. This Agreement is governed by the Laws of Jamaica."

This clause is in marked contrast to the clause in the Incorporation Agreement of August 10, 1994, for which the law was to be that of the Cayman Islands.

If the Supreme Court Order did not bind Continental Holdings Ltd. generally and specifically the mortgage, then it was arguable that amounts paid out to the respondent by FIS Ltd. of US$1,436,000.00 and US$2,421.000.00 directly to the Attorneys-at-Law for Consilidated Petroleum Products were voluntary payments. They could not recover from Dojap and the Pantons who were sureties if the mortgage was insufficient to satisfy the claim. In essence the following paragraphs of the Statement of Claim should be struck out in the light of the above analysis:

> "10. On the 9th December, 1996, the Plaintiff to whom the mortgaged premises and Consolidated Holdings' liability to Continental Petroleum under the guarantee and mortgage had passed, paid to Continental Petroleum, in satisfaction of its said liability under the guarantee and Continental Petroleum's demand, the sum of US$1,436,000.00 being a negotiated figure less than the amount strictly due under the agreements.
>
> 14. The Plaintiff having paid more than its proportionate share under the joint and several guarantee is entitled to contribution from the Defendants as co-guarantors."

How the submissions were developed in this Court

Mr. Henriques Q.C., did not deploy any direct arguments as to why the Summons to Strike Out ought to have succeeded. What he contended was that, the issue raised was a matter of law so he was entitled to leave to defend. Since he accepted the evidence presented by the respondent FIS Ltd. then it is arguable that if the case being made out in law was decisive, in his favour as regards the voluntary payment by F.I.S. Ltd. then the appellants were under no liability to pay the amount claimed on the Summons for Summary judgment.

The argument on which he relied to demonstrate he had an arguable case was based on the Incorporation Agreement dated 10th August, 1994. It was between Dojap and the Pantons on one hand Continental Petroleum Products Ltd and West Euro Equities on the other hand. It had this important clause:

> "b. This Agreement is made under the laws of the Cayman Islands which shall be the governing law and any interpretation of its provisions and any resolution shall be made by the courts of the Cayman Islands in accordance with the provisions of the laws of the Cayman Islands."

Mr. Henriques submitted that in the absence of evidence of Cayman Law then the laws of Jamaica governs the interpretation of the contract. To appreciate the case for the appellants I will attempt to summarise Mr. Henriques' submissions. I have taken the liberty to spell out the implications in his submissions

1. The undertaking by the Pantons with the Bank of Jamaica to strenghten the balance sheet of Blaise Trust and Merchant Bank Co.Ltd. by the injection of new share capital was a sham. In reality it was a loan secured by a mortgage on the real estate of Consolidated Holdings Ltd. to be repaid within a year.

2. The proof that it was a loan was evidenced by the share capital in the form of preference shares. These shares were to be redeemable within a year and the amount of dividends to be paid was so high that no

company could earn that amount of profit from which to pay the dividends.

3. In any action brought against Dojap and the Pantons as sureties they would have a good defence. He ought to have added that such a defence could also be used to demonstrate that in law they were not liable to pay the amount charged by F.I.S. Ltd.

4. No assignment of the mortgage was made to F.I.S. Ltd. They were volunteers and it is for them to explain to the Minister of Finance on what basis they discharged the mortgage on the property of Consolidated Holdings Ltd. Ultimately the Minister will have to give an account to the Auditor-General, and to Parliament through the Public Accounts Committee.

The reality was that, the undated Agreement was one of the dominant features in this case. The other was the Scheme of Arrangement. When these are properly considered, the argument is all one way in favour of the appellants.

Why the appellants ought to succeed either on the basis that:

"(1)the Summons to strike out the Writ of Summons and Statement of Claim ought to have been successful,

or

(2) on the true construction of the undated Agreement and the Scheme of Arrangement, FIS Ltd. acted as a volunteer when they discharged the mortgage on the real estate of Consolidated Holdings Ltd. The payment to discharge may also have been unauthorised.

The major thrust of Mr. Henriques' Q.C. submission was that by paying off the mortgage F.I.S. Ltd. was a volunteer as that payment was not obligatory. Further the appellants as sureties in the earlier Incorporated Agreement of August 10th, 1994 could refuse to make any payment demanded by FIS. There was an important point of private international law involved in these proceedings which must be addressed in order to come to a conclusion in accordance with law.

There is a clause in the Incorporation Agreement of 10th August, 1994 which reads:

> "b. This agreement is made under the laws of the Cayman Islands which shall be the governing law and any interpretation of its provisions and any resolution of issues arising hereunder for resolution shall be made by the courts of the Cayman Islands in accordance with the provisions of the laws of the Cayman Islands."

Then the undated contract which governs these proceedings contains this clause:

> "8. This Agreement is governed by the Laws of Jamaica."

Mr. Henriques stated that in the absence of evidence of Caymanian law, then Jamaican law applies. Mr. Goffe, Q.C. in his submission stated:

> "In any event no illegality has been established. The applicable law was that of Cayman, hence the Moneylending Act does not apply."

It is questionable whether either of those submissions was correct in the circumstances of this case. The authorities suggest that the Incorporation Agreement must be adjudicated on in the Grand Cayman. This was presumably recognised in the Supreme Court where a judge granted an injunction when the Eroncig Companies sought to exercise a power of sale in Jamaica. Here is how it is referred to in these proceedings in the Statement of Claim of the respondents:

> "9. Consolidated Holdings and the Defendants instituted Suit No. C.L. C.069 of 1995 in the Supreme Court against Continental Petroleum et al and obtained interim injunctions restraining the sale of the premises or the encashing of the certificates of deposits aforesaid."

If Jamaican law applied, on the authorities a sale would have been ordered if the amount of US$1,077,000.00 was not paid into court. There does not seem to have been an appeal against that decision. Instead we have the Incorporation contract of 10th August 1994 which was analysed in the first section of this judgment being

replaced by the undated contract. That was the contract relied on in proceedings instituted by the appellants to strike out the Writ of Summons and the Statement of Claim before Wolfe, C.J. My obligation to **Cheshire and North's Private International Law 10th edition** 1979 will be obvious from the following analyses. At page 199 of the text the following passage appears:

> "(1) **Where there is an express choice of the proper law Kahn-Freund (1974), III Hague Recueil 139, 341 et seq.**
>
> It has been recognized since at least 1796 that at the time of making the contract the parties may expressly select the law by which it is to be governed **Gienar v. Meyer (1796), 2 Hy. Bl. 603.** They may declare their common intention by a simple statement that the contract shall be governed by the law of a particular country. **R.v. International Trustee for the Protection of Bondholders A.G., [1939] A.C. 500, at p. 529; Vita Food Products Inc. v. Unus Shipping Co., Ltd., [1939] A.C. 277, at pp 289-290; James Miller & partners, Ltd. v. Whitworth Street estates (Manchester), Ltd., [1970] A.C. 583 at p. 603. Such express choice might be illustrated by, for example, Mackender v. Feldia A.G., [1967] 2 Q.B. 590; [1966] 3 All E.R. 847.Compagnie 'Armement S.A. v. Compagnie Tunis Tenne de Navigation S.A.** [1971] AC 572."

Referring to one of the cases above **Compagnie d' Armement Maritime S.A. v Compagnie Tunisienne de Navigation S.A.** [1971] A.C. 572 Lord Morris stated at 589-580:

> "In **Vita Food Products Inc. v. Unus Shipping Co. Ltd.** [1939] A.C. 277 there was an express clause which provided that the contracts should be governed by English law. Lord Wright pointed out, at pp. 289 and 290, that it was well settled that by English law the proper law of the contract is the law which the parties intended to apply. He said, at p. 290:
>
> > 'But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide

> and legal, and provided there is no reason for avoiding the choice on the ground of public policy'."

Then on the same issue Lord Dilhorne said at p. 593:

> "If clause 28 had said that the ships owned or controlled by the appellants were to be used and had then gone on to say that, in the event of their not being available, the appellants could charter, then I think the ships intended to be used would have been sufficiently identified for clause 13 to operate and, operating, to provide that French law governed the contract.
>
> I think the finding of fact must mean that it was the intention of the parties that this part of clause 28 should be so interpreted and, taking that into account, I have reached the conclusion that giving that meaning to that part of clause 28, the parties to the contract expressly provided that it should be governed by French law."

Then Lord Wilberforce made this statement concerning the proper law and the appropriate tribunal at 594-595:

> "Thus Professor Cheshire in his **Private International Law**, 8th ed. (1970), says that 'for better or for worse English Law is committed to the view that qui elegit judicem elegit jus. An express choice of a tribunal is an implied choice of the proper law.' The editors of **Dicey & Morris, The Conflict of Laws** are more circumspect: ('usually permits the inference' - 8th ed., (1967), p. 705). So, too, Professor Wolff in his **Private International Law,** 2nd ed.(1950), p. 437."

Then His Lordship continues thus at 595:

> "My Lords, I am still of opinion that it is not necessary to embark on citation of authorities in order to establish how the proper law of a contract is to be arrived at. The law has been more than once in recent times stated in this House and if one desires a summary of the main principles the rules in **Dicey & Morris, The Conflict of Laws,** 8th ed., are convenient. For myself I prefer the formulation in the 7th ed. (1958), p. 731, which I find clearer and simpler. In the absence of an express choice of law, rule 127, sub-rule 2, applies, as follows:
>
> > ' Where the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred

> from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract'."

Lord Diplock stated the principle applicable in this case in emphatic terms thus at page 603:

> "English law accords to the parties to a contract a wide liberty to choose both the proper law and the curial law which is to be applicable to it. If the parties exercise that choice as respects either the proper law or the curial law or both, the English courts will give effect to their choice unless it would be contrary to public policy to do so. But it is a liberty to choose - not a compulsion - and if the parties do not exercise it as respects the proper law applicable to their contract the court itself will determine what is the proper law."

It is in the light of these principles that the Incorporation contract must be construed and the plain meaning was that the Cayman Islands was the appropriate jurisdiction and Cayman law the proper law. Here it is useful to cite **National Shipping Corporation v. Arab** [1971] Vol. 2 Lloyd's Rep. p. 363. This is a case where Buckley L.J. said at p. 366:

> "The plaintiffs here are seeking to obtain summary judgment without trial on the basis that there is no defence to the action. The submissions which have been put forward - with great clarity - on behalf of the plaintiffs depend upon the presumption - which is one undoubtedly recognized by our law - that the law of a foreign country is the same as English law except where evidence is adduced to show that it is different. But it does not seem to me that it would be satisfactory that the plaintiffs should obtain summary judgment in a case in which foreign law is clearly involved upon the basis of that presumption."

This was the contention of Mr. Henriques, but it does not apply to the undated contract which is the contract relevant to this case. To reiterate when FIS. Ltd. paid off the mortgage on the basis of this undated contract they were volunteers. They could if they had chosen, by virtue of the Incorporated Agreement have relied on the

concept of subrogation and stepped into the shoes of Continental Petroleum Products Ltd. and sued the sureties in the Cayman Islands. They did not do that. The sureties could have agreed expressly or by implication to the payment F.I.S. Ltd. made. But they did not do that. The sureties challenged the attempt by Eroncig to exercise a power of sale in Jamaica. They instituted constitutional proceedings against the Minister and the Attorney-General and challenged the legality of the Minister's action.

It is arguable that a scheme of arrangement proposed by the Minister of Finance after he had secured a Confirmatory Order could have made provision for the assignment of Minister's rights to FIS. Ltd. He went to the Supreme Court as a Temporary Manager, and appointed Mr. Philmore Ogle of Deloitte Touche Tohmatsu to manage Consolidated Holdings Ltd. An affidavit from the Minister reads:

> "2. On the 10th April 1995 by virtue of the powers vested in me under the Bank of Jamaica (Industrial & Provident Societies) Regulations 1995 I assumed Temporary management of the Respondent. I appointed Mr. Philmore Ogle, Chartered Accountant of the firm of Deloitte Touche Tomatsu to manage the said institution on my behalf.
>
> 3. During the period of Temporary Management the said Philmore Ogle filed a report concerning the operation of the Respondent. The said report has been exhibited in my Affidavit dated the 1st day of June 1995. I am informed by the said Philmore Ogle and do verily believe that the Respondent along with two other related and/or connected institutions namely Blaise Building Society and Blaise Trust Company and Merchant Bank Limited were operated as one entity. Further there was a significant co-mingling of assets with deposits being transferred and re-transferred between the institutions with scant respect for corporate boundaries. Added to this is that Blaise Building Society and the Respondent are insolvent and as far as the Blaise Trust Company and Merchant Bank Limited is concerned its solvency is doubtful as it is difficult if not impossible to determine its insolvency because of the transfer and re-transfer of deposits."

It is clear from the above that the co-mingling of which the Minister spoke was the deposits in the three financial institutions. The mortgage was an encumbrance on the real estate of Consolidated Holdings Ltd. and so beyond the reach of any scheme of arrangement. The Minister continues thus:

> "4. Having regard to this report I have had to consider my options at law i.e. the return of the Respondent to its owners, liquidation and or a scheme of arrangement, re-construction or a compromise under the Regulations. In respect of restoration I have ruled out this option as given the management practices and insolvency of the Respondent as well as the interest of depositors it would be imprudent to return the Respondent to its owners. In respect of liquidation I have already indicated that I would use this option only as a last resort and in the event that I have been unable to successfully propose a scheme of arrangement, a compromise or a reconstruction.
>
> 5. I have now worked out a scheme of arrangement which I hope will be satisfactory to the creditors/Depositors of the Respondent. This scheme will enable them to recover an amount of ninety cents (90¢) in the dollar of such deposits as the same that would have been provable had the company been placed in an insolvent winding-up. This will be paid over a period of 18 months at a rate of interest of 6% per annum effective from the operative date of the Scheme. Payments to be made to the Creditors/Depositors will be advances by the Government of Jamaica. There is now produced and shown to me marked exhibit "OD 1" a draft of the Scheme of Arrangement."

It is because government funds were involved that there is a presumption that the usual course was followed and that F.I.S. Ltd was incorporated by adhering to the provisions of the Crown Property Vesting Act. Continuing the Minister stated:

> "6. This scheme will be proposed at a meeting between the company and its Creditors/Depositors on October 15, 1995 at the Jamaica Conference Centre, Duke Street, Kingston, pursuant to an order given in this Honourable Court by the Honourable Mr. Justice W. James on the 2nd day of August 1995 that the said meeting be convened for the purpose of considering, and if thought fit, approving with or without modification, the scheme of arrangement and that at least 42 days notice be given to the Creditors/Depositors before the

> day appointed for the said meeting. There is now produced and shown to me marked exhibit "OD 2" a copy of the said Order.
>
> 7. In order to successfully propose the said scheme, the period of Temporary Management in respect of the Respondent, needs to be extended as it comes to an end on or about the 28th day of September, 1995. If the period of Temporary management lapses the Respondent will have to be returned to its owners and this will not be in the best interest of its Creditors/Depositors."

It is to be noted that the Minister was aware of the need to secure a "Confirmation Order" so as to vest the assets in him.

I should emphasise that the real estate owned by Consolidated Holdings Ltd was encumbered by a mortgage and Eroncig could enforce a power of sale in Cayman. The Supreme Court Order exhibited in this case could not override the mortgage. Therefore there was no compulsion on FIS Ltd. to pay off the mortgage. Here Scarman L.J. in **Owen v. Tate and another** [1976] 1 Q.B. 402 cited on behalf of the appellants states the principle thus at pages 411-412:

> "In my judgment, the true principle of the matter can be stated very shortly, without reference to volunteers or to the compulsions of the law, and I state it as follows. If without an antecedent request a person assumes an obligation or makes a payment for the benefit of another, the law will, as a general rule, refuse him a right of indemnity. But if he can show that in the particular circumstances of the case there was some necessity for the obligation to be assumed, then the law will grant him a right of reimbursement if in all the circumstances it is just and reasonable to do so. In the present case the evidence is that the plaintiff acted not only behind the backs of the defendants initially, but in the interests of another, and despite their protest. When the moment came for him to honour the obligation thus assumed, the defendants are not to be criticised, in my judgment, for having accepted the benefit of a transaction which they neither wanted nor sought."

Applying these principles to the instant case what do we find:

1. F.I.S. Ltd. knew of the injunction against Eroncig companies where the Supreme Court refused to order a sale. An order for sale could only be made in the Court of Grand Cayman.

2. The Minister went to the Supreme Court with the Scheme of Arrangement as a Temporary manager. In any event the mortgage in issue was beyond the reach of the Order of the Supreme Court.

3. F.I.S. Ltd. entered into the undated contract with Eroncig to pay off the mortgage in return for the title deeds and the share certificates in Blaise Trust and Merchant Bank Ltd.

4. Neither Consolidated Holdings Ltd. Dojap or the Pantons were parties to this undated Contract.

5. F.I.S. Ltd. sought no assignment from Eroncig or his companies. The respondents have averred one of those companies West Euro Equities is insolvent. So Eroncig would be happy with his money being parked in Jamaica.

6. The appellants have contended that the original Incorporated Agreement was a sham. It was designed to mislead the Bank of Jamaica to believe that the Balance Sheet of Blaise Trust & Merchant Bank was being strengthened by the injection of new capital while it was an onerous loan whose validity would have to be determined by the law of the Cayman Islands in the Cayman Courts. They further contend that F.I.S. Ltd. knew all this, yet entered into the undated agreement.

It was on the basis of the above circumstances that the appellants say that they are protected by the principles enunciated by Scarman L.J. See also **Esso Petroleum & Co. Ltd. v Hall Russell & Co. Ltd.** [1989] A.C. 643 at 667 - 668 per Lord Jauncey.

Before closing it is necessary to point out that after entering into the undated contract, the initial letter of May 13, 1997 to the appellants from the lawyers of F.I.S. Ltd. mentioned that the legal position is that their client was subrogated to the rights of

Continental Petroleum Products Ltd. as against Consolidated Holdings Ltd. and was entitled to the contribution they thereby demanded. Such a claim would have had to be decided in the Cayman courts on the basis of the Incorporated Agreement and may be reliance would be placed on **Ghana Commercial Bank v Chandiram** [1960] A.C. 732 at 745.

When subrogation was adverted to, F.I.S. Ltd was precluded from following such a course because the undated contract was already in force. Another point worth noting was that apart from the untenable averment that F.I.S. Ltd. was a surety, the alternative claim that money claimed was "paid by the Plaintiff for the use of the Defendant" was erroneous The money was paid to Eroncig's lawyers in Jamaica in return for the surrender of an unencumbered title and the share certificates in Blaise Trust and Merchant Bank. The appellants have shown that they gave no sanction to such a payment.

Conclusion

To my mind, mistake was not an issue in this case. The appellants have demonstrated that since they supped with foreigners they supped with a long spoon. That spoon stretched to the Cayman Islands. F.I.S. Ltd. paid over US$1M to the astute financier James Eroncig. It is unlikely he would have any further interest in this matter. For all its seeming complexity this is a simple case where F.I.S. Ltd seeks restitution when they paid over the money voluntarily to Eroncig's lawyers in return for share certificates and titles. Restitution is not permitted in our law under such circumstances. Therefore the order of this Court ought to be that the appeal is allowed. The order of the Court below on the Summons for Summary Judgment must be set aside. The decision below which dismissed the Summons to strike out the Writ of Summons and