JAMAICA

IN THE COURT OF APPEAL

APPLICATION NOS COA2019APP00080 AND COA2019APP00099

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN STOPLIGHT WHOLESALE COMPANY LIMITED APPLICANT

AND DERRIMON TRADING COMPANY LIMITED RESPONDENT

Aon Stewart instructed by Knight, Junor & Samuels for the applicant

Alexander Williams and Miss Topazia Brown instructed by Alexander Williams & Company for the respondent

28, 29, 31 May 2019 and 6 March 2020

F WILLIAMS JA

[1] I have read in draft the judgment of my learned sister, Straw JA. I agree that it was for the reasons outlined by her that I joined in making the orders set out in paragraph [3] of this judgment; and I have nothing to add.

STRAW JA

[2] The applicant, Stoplight Wholesale Company Limited ('Stoplight'), pursued two applications before this court. The first (Application No COA2019APP00080) was filed on 12 April 2019 and was an application for leave to appeal the decision of Laing J,

refusing to set aside a default judgment. The second application (Application No COA2019APP00099) was filed on 10 May 2019 and sought a stay of execution of judgment pending the determination of the first application.

[3] On 31 May 2019, the court made the following orders in respect of both applications:

(1) Application No COA2019APP00080 – application for leave to appeal

"1) The applicant's application for leave to appeal is refused; and

2) Costs to the respondent to be agreed or taxed."

(2) Application No COA2019APP00099 – application for stay of execution

"1) The applicant's application for stay of execution is refused; and

2) No order as to costs."

Following our decision, we indicated that we would put our reasons in writing. This judgment is a fulfilment of that promise.

Background

[4] Stoplight and the respondent, Derrimon Trading Company Limited ('Derrimon'), are both trading companies which enjoy a business relationship and engage in the selling of goods to each other.

[5] In the year 2017, Derrimon brought a claim against Stoplight for the sum of $19,219,004.00 being the balance due for goods which were delivered. Derrimon claimed that despite its demand, Stoplight failed to pay the said sum. Pursuant to rule 8.9(3) of the Civil Procedure Rules ('CPR') Derrimon annexed to the claim form and

particulars of claim a transaction report as at 31 October 2017, described as the customer opening balance ('COB'), as well as the invoices referred to in the report. The transaction report reflects transactions from 13 December 2012 to 1 October 2017 between Derrimon and Stoplight and indicates that a total of $19,219,004.00 is owing to Derrimon. The invoices have various dates between 2012 and 2014.

[6] It is not disputed that Stoplight was served on 23 November 2017. It was pointed out by counsel for Stoplight that the claim form and particulars of claim (which constituted a single document) did not bear the Supreme Court's stamp which indicates the date of filing. Nonetheless, Stoplight filed an acknowledgement of service on 5 December 2017 in which it

(i) admitted receipt of the claim form, but not the particulars of claim;

(ii) stated its intention to defend the claim; and

(iii) indicated that it intended to dispute the jurisdiction of the court.

[7] On 4 January 2018, Stoplight filed a notice of application for court orders in which it sought the striking out of Derrimon's statement of case. The affidavit in support of this application was filed 16 February 2018. It is unclear whether these documents were served on Derrimon, and if so, when. What is readily apparent is that, in the period between the filing of Stoplight's notice of application and the affidavit in

support, Derrimon took steps to obtain default judgment which was dated 5 January 2018 and entered on 11 January 2018.

[8] On 30 January 2019, a notice of application to set aside the default judgment was filed by Stoplight. An affidavit in support of the application, sworn to by Nieoker Junor, attorney-at-law, was filed on the same day. There is also an affidavit sworn to by the Managing Director of Stoplight, Mr Junior Wilson, filed on 19 June 2018, which is said to be in support of an application to set aside the judgment filed on 8 May 2018. However, this notice of application filed on 8 May 2018 was not placed before this court, but it is referred to in the grounds on which Stoplight relies.

[9] In any event, the order of Laing J (the subject of this application) only refers to the application filed on 30 January 2019 and there is no indication that this application was an amended application. This court was not provided with the learned judge's reasons or any notes of proceedings which may or may not have addressed this seeming irregularity.

The application for leave to appeal

[10] It may be useful to set out precisely what orders were being sought, together with the grounds that were relied on by the applicant.

> "The Applicant, **STOPLIGHT WHOLESALE COMPANY LIMITED**, a body corporate with its registered offices situated at 36 – 40 Manchester Avenue, May Pen PO in the Parish of Clarendon seeks the following order(s):
>
> 1) The Applicant is granted leave to appeal the decision of Mr. Justice Kissock Laing dated 2 April 2019 in

refusing to set aside the Default Judgment entered in Judgment Binder No. 770 Folio 309.

2) Costs to be costs in the appeal;

3) Such further or other relief as the Honourable Court deems just.

The ground(s) on which the Applicant is seeking the order(s) is/are as follows:

(a) The Respondent/Claimant filed a single document title [sic] Claim and Particulars of Claim against the Applicant/Defendant on or about 20 November 2017 for goods sold and delivered.

(b) The Applicant on or about the 8 May 2018 filed an Urgent Notice of Application for Court Orders seeking to set aside the Judgement entered by the Deputy Registrar on or about the 11 January 2018.

(c) The Application was heard by the Court on the 2 April 2019 whereupon Mr. Justice K. Laing refused to set aside the Default Judgment entered against the Applicant.

(d) The Applicant's Attorneys-at-Law orally applied for permission to appeal the Learned Judges ruling and was refused.

(e) The Learned Judge failed to sufficiently consider the Applicant's evidence before the Court.

(f) The Learned Judge erred as a matter of fact and or law in finding that the Applicant/Defendant proposed statement of case did not disclose a case with a reasonable prospect of success.

(g) The Learned Judge erred as a matter of fact and or law in exercising his discretion not to set aside the Default [sic] that the Applicant/Defendant did not have a case with a reasonable prospect of success."

Submissions on behalf of the applicant

[11] Counsel for Stoplight, Mr Stewart, submitted that its case had a reasonable prospect of success and that the learned judge erred in refusing to set aside the default judgment.

[12] In respect of the first contention, counsel referred to rule 1.8(7) of the Court of Appeal Rules, 2002 ('CAR') which provides that permission to appeal in civil cases will only be given "if the court or the court below considers than an appeal will have a real chance of success". He also cited the case of **Donovan Foote v Capital and Credit Merchant Bank** [2012] JMCA App 14, wherein the words "real chance of success" were interpreted. The dictum of Sinclair-Haynes JA from **Denry Cummings v Heart Institute of the Caribbean Limited** [2017] JMCA Civ 34 was also referred to in support of the relevant considerations in determining whether this court should interfere with the exercise of the judge's discretion.

[13] It was contended that the learned judge was demonstrably wrong in refusing to set aside the default judgment, as Stoplight had a complete defence with a reasonable prospect of success. Counsel submitted that this was demonstrated by the report of Ms Olivene Swaby, chartered accountant, which was exhibited to the affidavit of Mr Junior Wilson. This report stated that the actual payments made in December 2012, and for the years 2013 and 2014, far exceeded the invoice balance as per Derrimon's COB report. Counsel contended that at the time of the application, Stoplight's statement of case had information supporting what was being challenged, albeit not set out in the actual defence.

[14] Counsel referred to the fact that Ms Swaby's report was challenged by Derrimon's Credit Manager, Ms Carol Wilson, who asserted that the information presented in the said report was "inaccurate, misleading and untrue as it does not create a wholesome picture of all invoices presented to Stoplight Wholesale". However, counsel submitted that Ms Wilson had not established any credentials as an expert witness but sought to impugn the process by which the chartered accountant came to her findings. He stated also that there were competing positions between the two parties and the court could not embark on a mini-trial to decide whether there was an outstanding balance. Further, it would be a matter for trial for both parties to properly assess the amount.

[15] Counsel contended, therefore, that the learned judge was incorrect to state that Ms Swaby's report was inconclusive. He contended that there was a defence with merit and that the figures in the report made it clear the amount of the overpayment. He stated that the issue of methodology was to be explained at the trial and that the documents were in the possession of Derrimon so it would not be difficult to indicate the excess. He stated that the court would also have to consider the issue of the barter system that existed between both parties and whether the amount that was being claimed was actually paid.

[16] Reference was made to the pre-CPR case of **C Braxton Moncure v Doris Cahusac Delisser** (1997) 34 JLR 423 wherein it was held that "the court will not allow a default judgment to stand if there is a genuine desire of the defendant to contest the claim supported by the existence of some material upon which that defence can be

founded". Counsel submitted that where there is no cross-examination on an issue joined between the parties on the affidavit evidence, it is difficult for the learned judge to have been in a proper position to assess the respective credibility of the parties. In support of this contention, he cited the case of **Chin v Chin** [2001] UKPC 7. He complained that it was unfair for a court to make an adverse finding solely on the strength of affidavit evidence.

[17] Counsel submitted also that the learned judge misunderstood the evidence before him and inferred that particular facts did not exist which in fact did exist. This was demonstrated in the learned judge's finding that the report of the accountant, Ms Swaby, was inconclusive as it did not state how much Stoplight had overpaid. He also found that because Stoplight did not counterclaim for the overpayment, this was indicative of the weakness of its case.

[18] With regard to the application for stay of execution, counsel's submissions may be summarised as follows: (i) Stoplight would be financially ruined if Derrimon was allowed to realise the judgment, as the money contained in Stoplight's account was used to operate its business on a daily basis; (ii) considerable injustice and prejudice would arise with respect to Stoplight as it maintained that it had paid in excess of what was owed to Derrimon, and if the judgment is realised there would be the risk of double compensation; and (iii) Derrimon would in no way be prejudiced by the grant of a stay as it has continued to operate without the sums claimed.

Submissions on behalf of the respondent

[19] Counsel for Derrimon, Mr Williams, submitted that Stoplight's prospect of success must be real and tangible, not notional. He stated that Mr Stewart is basically saying that "if we go through the report, there may be an overpayment". He submitted further that since Stoplight's defence was that it did not owe any monies and that there was an overpayment, its failure to show the said overpayment was a failure to show its defence. Counsel also made reference to rule 1.8(9) of the CAR (which is now rule 1.8(7)) as well as to the cases of **Donovan Foote** and **Denry Cummings**.

[20] Mr Williams submitted that there was no suggestion by counsel for Stoplight that the learned judge misled himself on the applicable law or relevant rules. He stated that Stoplight's contention was that it had overpaid its debt due to Derrimon. Counsel sought to demonstrate, however, that there was no evidence before the learned judge that the debt was paid, much less an overpayment.

[21] Counsel also referred to the affidavit of Mr Junior Wilson, filed on 19 June 2018 in support of the application to set aside the default judgment, in particular paragraphs 13 and 14, where he stated:

> "13) The [defendant] will contend that the Defendant has paid in excess of the amount claimed as being outstanding in the claim herein.
>
> 14) The Defendant will say that the Claimant supplied rice to [the] Defendant while the Defendant supplied flour to the Claimant, and its subsidiaries Sampars Cash and Carry as also Derrimon Cold Storage. The Defendant will also contend that during the period for which the Cla[i]mant had claimed for amounts outstanding, the Defendant made payments to

> the Claimant and its subsidiaries by cheque deposits, cash sent via Guardsman Limited and set off amounts owing for flour, cake mix, cornmeal and cereal sales to the Claimant and its subsidiaries against amounts owing for rice sales to the Defendant."

[22] It was noted by counsel that Mr Wilson did not actually state that Stoplight paid the invoices which are the subject matter of the claim, nor were receipts produced that matched the invoices. Since payments made were not tied to the invoices, counsel submitted that the said payments may well have been for other invoices which were not being claimed. He also questioned why payments in any period would be made in excess, and suggested that it was more likely that the payments would have been for debts carried forward or related to other invoices for which there was no claim.

[23] Counsel then referred to the accountant's report of Ms Swaby which was exhibited to Mr Wilson's affidavit. He submitted that the said report did not purport to show that the invoices which form the subject matter of the claim were actually paid, nor did it purport to show that all debts owed to Derrimon were paid. He stated that the COB set out a list starting from 13 December 2012 to 1 October 2017 and that the total sum owing was $19,219,004. He submitted, further, that all the invoices were attached to the claim form and particulars as annex 2 and that Ms Swaby's report failed to fully reconcile any of its outstanding payments from 2012 to 2014 and ignored the annexures to the claim form and particulars of claim. Counsel also pointed to the fact that the report was limited to the period 8 September 2014 to 1 October 2017, while there were invoices being claimed for as far back as 13 December 2012 and the alleged overpayment was not stated.

[24] In essence, the report was described as "misleading" by counsel, insofar as it left out some of Stoplight's outstanding invoices and insofar as it gave the inference that no payments were applied against the invoices or that there was an overpayment. He also stated that there were no barter payments (made by Derrimon) attached to the report in relation to rice and flour and that invoices actually existed for these. It was his contention that an arithmetical figure as to what was paid and what was owing could be arrived at and Stoplight did not disclose any invoices on which it is claiming it paid. Counsel referred to page three of Ms Swaby's report, where she stated that she could not arrive at a conclusion and that an opening balance was needed. He pointed out also that she made certain recommendations for the years 2014 and 2015, and that there is no computation or schedule provided with a comparison of how a particular payment matched a particular invoice. He indicated that, while she could calculate the bank deposits made by Stoplight, she could not say what the payments were for. It is for this reason that counsel contended that the accounting report is inconclusive.

[25] In this regard, counsel also referred to the affidavit of Ms Carol Wilson filed on 18 July 2018 in response to Stoplight's notice of application to set aside default judgment. He contended that Ms Wilson's affidavit completely negated the details presented in Stoplight's draft defence and also challenged the accuracy of Ms Swaby's report. Counsel submitted that Stoplight had made no response to this affidavit and this was a crucial fact pointing to the lack of substance in the defence. As such, he contended Stoplight's application to set aside the default judgment was doomed to fail. Reference was made to the case of **ED & F Man Liquid Products Ltd v Patel and**

another [2003] All ER (D) 75 in support of the contention that the learned judge was not required to embark on a mini-trial but only to assess the evidence before him in determining whether there was a reasonable prospect of success.

[26] In the circumstances, it was submitted that the learned judge could not be said to have been plainly wrong.

Discussion and analysis

The application for leave to appeal

[27] I agree with both counsel that the appropriate starting point for the determination of this application was rule 1.8(7) of the CAR which provides that:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers than an appeal will have a real chance of success."

[28] In relation to this rule[1] (before amendments were made to the rules) Morrison JA (as he then was) stated, at paragraph [40] of **Donovan Foote v Capital and Credit Merchant Bank**:

> "This court has on more than one occasion accepted that the words 'a real chance of success' are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in ***Swain v Hillman*** (at page 92), 'there is a 'realistic', as opposed to a 'fanciful' prospect of success'. Although in that case Lord Woolf MR was speaking in the context of an application for summary judgment, in respect of which rule 15.2 of the CPR requires the applicant to show that there is 'no real prospect' of success on either the claim or the defence, this formulation has been held by this court to be equally applicable to rule

[1] formerly rule 1.8(9)

1.8(9) (see, for instance, ***William Clarke v Gwenetta Clarke*** [2012] JMCA App 2, paras [26]-[27])."

[29] The decision to grant or refuse an application to set aside a regularly entered default judgment is within the discretion of a judge. This exercise is guided by the criteria set out in rule 13.3 of the CPR, which provides:

> "13.3 (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.
>
> (3) …"

[30] It is quite settled that in matters of this nature, this court must defer to the judge's exercise of a discretion and must not interfere with it merely on the ground that the members of this court would have exercised the discretion differently. As such, this court will only set aside the exercise of a discretion by a judge where it was (i) based on a misunderstanding of the law or evidence; or (ii) based on an inference which can be shown to be demonstrably wrong; or (iii) is so aberrant that no judge regardful of his duty to act judicially, could have reached it (see **Hadmor Productions Ltd and others v Hamilton and another** [1982] 1 All ER 1042, 1046 and **The Attorney**

General of Jamaica v John Mackay [2012] JMCA App 1 at paragraphs [19] and [20]).

[31] It is apparent from both counsel's submissions that the learned judge's decision was based on his finding that Stoplight did not have a real prospect of successfully defending the claim. For the reasons which will be discussed presently, I was unable to conclude that the learned judge could be faulted for arriving at such a conclusion.

[32] Firstly, Stoplight would have had to support its application to set aside the default judgment by evidence on affidavit, sometimes referred to as an affidavit of merit (see: dicta of Morrison JA (as he then was) at paragraph [47] of **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2; and at paragraph [23] of **The Attorney General of Jamaica v John Mackay**). This is what is required by rule 13.4(2) of the CPR. This is separate from the requirement to exhibit a draft of the proposed defence, which is required by rule 13.4(3). The point being made is that these applications are routinely determined by reference to affidavit evidence and annexed documentation. At this stage the court is merely assessing whether there is a "prima facie defence" based on the evidence produced by the applicant (per Lord Atkin at page 480 of **Evans v Bartlam** [1937] AC 473; cited by Morrison JA in **B & J Equipment Rental Limited v Joseph Nanco** at paragraph [47]). This court was, therefore, unable to see how any unfairness would have been caused to Stoplight by the making of findings, adverse or otherwise, solely on the strength of affidavit evidence, as Mr Stewart submitted.

[33] Derrimon's claim form and particulars of claim had two annexures. Annex 1, described as "Transaction Report as at 31 October 2017" which was entitled Customer Opening Balance (COB), lists transactions (including invoices, payments, credit memos and general journal notations) dated between 13 December 2012 and 1 October 2017. The amount noted as outstanding by Stoplight at the final posting is the sum of $19,219,004.03. Annex 2 consisted of copies of relevant invoices dated from 13 December 2012 to 25 November 2014. The affidavit of Carol Wilson, filed on 18 July 2018, stated at paragraph 8 that the amount owed by Stoplight is an **accumulation** of all **unpaid sums** on invoices from 2012 to 2014.

[34] Paragraphs 13 and 14 of the affidavit of Mr Junior Wilson (set out at paragraph [21] herein) are essentially mirrored in paragraphs 1 and 2 of the draft defence which consisted of three paragraphs. It is to be noted that there is no dispute in either document between the parties that the goods, itemised in the invoices contained in annex 2, were delivered by Derrimon to Stoplight. Instead, Stoplight asserted that it overpaid Derrimon for these goods and that these payments were made to Derrimon and its subsidiaries (which are not named) by cheque deposits, cash (sent by a security company) and set off. Regarding the set-off, it was alleged that Stoplight supplied various goods (flour, cake mix, cornmeal and cereal) to Derrimon and its subsidiaries and that this should have been set off against the amounts it owed Derrimon for rice.

[35] As mentioned previously, in the affidavit of Mr Junior Wilson, as well as the draft defence, Stoplight relied on a report dated 12 June 2018 with appendices which were prepared by Ms Olivene Swaby, a chartered accountant. What is noticeably absent from

both the said affidavit of Mr Wilson and the draft defence are any sums or figures specifically relating to payments (whether by cash, cheque or in the form of goods supplied) for the goods supplied to it by Derrimon. In particular, there is no corroboration provided by Stoplight to suggest that the relevant invoices were actually paid in full or in part. One would have thought that this could easily be achieved by proper accounting and cross-referencing of payments made by them. Also, the amount which Stoplight claims it overpaid Derrimon is simply not stated in the affidavit or draft defence. Further, the affidavit of Ms Carol Wilson in response to the affidavit of Mr Junior Wilson challenged the integrity of the report of Ms Swaby in several regards. Ms Wilson claims that the information in appendix 2 of Ms Swaby's report is inconsistent with accounting records maintained by Derrimon. In particular, these inconsistencies are set out at paragraphs 6 to 8 of her affidavit:

> "6. However the information in Appendix 2 is inconsistent with the accounting records maintained by Derrimon Trading Company Limited. The total purchases amount is grossly understated and inaccurate. Our records show that for the month of December 2012, there were more than thirty (30) invoices for purchases made, supplied and delivered to Stoplight Wholesale Company Limited as shown in the invoices attached to the Claimant's Particulars of Claim. Our records also show that the invoice total for December 2012 is $38,636,583.24. I exhibit hereto marked exhibit '**CW3**' for identity, a copy of our invoice records for the period December 2012.
>
> 7. This means that the three (3) invoices referenced in Appendix 2 by Ms. Olivene Swaby represent **outstanding invoices for December 2012** and not the total invoices for that month. I exhibit hereto marked exhibit '**CW4**' for identity, a copy of our accounting statement for the period December 2012 which shows that the $2,908,400 referred to in the Report of Ms. Olivene Swaby represents what was still

> outstanding after the payments were made on the more than thirty (30) invoices for that period.
>
> 8. It is also misleading and untrue to suggest that no payments were applied against the invoices or that there was some sort of overpayment. Our accounting system does a detailed matching and application of invoices with payments. Our policy and practice is to apply payments to specific invoices even where full payments are not made for the invoice amount. The amount owed by the Defendant Company is an accumulation of **all unpaid sums** on invoices from 2012-2014. I exhibit hereto marked exhibit '**CW 5**' for identity, copies of the accounting statements as well as matching customer quick reports which provide details on all purchases made, payments received, the running balance and all outstanding amounts from 2012-2014. The copies of the said invoices were previously attached to the Claimant's Particulars of Claim."

[36] Ms Wilson also stated at paragraph 9 of her affidavit that Stoplight "has never fully reconciled any of its outstanding payments". She indicated that the records of Derrimon illustrate that Stoplight has had a rolling balance even when it supplied Derrimon and its subsidiaries with flour; that there are verifiable records on Derrimon's accounting system which shows that the amount of $19,219,004 is a legitimate sum. Finally, she asserted that she had sent frequent emails to Stoplight in relation to the running balance and this (the running balance) was never challenged. She had also met with Mr Junior Wilson to discuss the balance owed.

[37] Mr Williams is correct that Stoplight did not respond to this affidavit or sought to challenge the information stated there. It stands to reason, also, that if Stoplight had overpaid Derrimon, it would have been in a position to quantify by how much, and perhaps institute a counter-claim as the learned judge seems to have suggested.

Though not determinative, I did agree with the learned judge that this was indicative of the weakness of its case.

[38] When one turns to the report of Ms Swaby (which is titled "Report on the analysis of Derrimon Trading Company Limited's Customer Open Balance Report for Spot Light [sic] Trading Company Limited vs. payments made to Derrimon Trading Company Limited for the period September 8, 2014 to October 1, 2017") there are findings made in relation to December 2012, and for the years 2013 as well as 2014. In relation to 2012, it stated that "actual payments made in December 2012 far exceeded the invoice balance as per Derrimon's Customer Open Balance Report (COBR)". However, the invoices analysed were only three in number and the total amount was $2,908,400.00. While Ms Swaby referred to three invoices, Ms Wilson referred the court to a document (exhibited as CW3) which sets out over 30 invoices totalling $38,636,583.24. In fact, Ms Swaby also stated that actual invoices from Stoplight were not seen or presented. Similar statements were also made in respect of the years 2013 and 2014 by Ms Swaby. The following figures of $279,728,445.60 and $229,999,594.00 were provided which were said to represent summary payments for the years 2013 and 2014, respectively by Stoplight.

[39] In relation to the year 2013, there is a recommendation by Ms Swaby that Derrimon provide details of Stoplight's opening payables balance at January 2013, as well as provide details of sales to Stoplight for the entire year of 2013. This recommendation by Ms Swaby is similar for the year 2014. Again one would have thought that if Stoplight had been seriously challenging the amount of money claimed

by Derrimon, as set out in the COB, this would have been more clearly demonstrated by way of its own recordkeeping or at least, by an attempt to match payments against invoices for the relevant period. Mr Stewart's submission that the methodology of Ms Swaby should be allowed to be explained at a trial, therefore, lacked merit. It would have been necessary for Ms Swaby, in her report, to refer to documentation in the form of payments as it related to actual invoices, as the basis on which the methodology could be analysed.

[40] Ms Swaby also presented, in her report, a summary in appendix 2 of cash payments, cheque payments and details of flour sales identified as made to Derrimon for December 2012. This amounted to a total of $18,797,005.00. For the years 2013 and 2014, these totals were not presented by way of a summary. Based on various appended documents it appears, however, that the cash payments for those years totalled $108,816,625.00 and $71,606,969.00, respectively. The cheque payments and flour sales for 2013, though listed, were not totalled. For 2014, the cheque payments totalled $47,189,551.00 and, for what appears to be flour, cereal and cornmeal sales, a total of $111,203,075.00 was provided.

[41] However, these payments and sales are not cross-referenced to specific invoices so as to suggest that the accounting records of Derrimon are unreliable. In particular, there is nothing to dispute Ms Wilson's evidence that the sum owed by Stoplight is an accumulation of all unpaid sums during the relevant period. In relation to the year 2015, Ms Swaby stated that "payments and journal entries to record payments on Stoplights account were identified on Derrimon's report but records to substantiate

same have not yet been provided by Stoplight". There appears to have been no effort by Stoplight to retrieve and provide same to Ms Swaby.

[42] Having assessed the various affidavits with annexures and appendices, I found myself in agreement with the submissions of Mr Williams that Ms Swaby's report was inconclusive. The assertions made by Ms Wilson at paragraphs 6 to 8 of her affidavit, set out above at paragraph [35], have not been challenged with any specificity by Stoplight. Herein lies the distinction with the Privy Council decision of **Chin v Chin** relied on by Mr Stewart. In that case, both affiants had given contradictory evidence on a critical issue related to the ownership of a company. Lord Scott of Foscote, on behalf of the Board, stated at paragraph 11 that the trial judge was not in a position to make a finding as there was no cross-examination of the deponents on that critical issue, namely the joint ownership of the company. In the case at bar, the learned judge would have had evidence before him replete with invoices and a transaction report from Derrimon in order to arrive at the conclusion that he did. Ms Swaby's expert report provided no challenge to that conclusion.

[43] Mr Williams is therefore on solid ground as far as he submitted that a judge cannot be asked by an applicant to cull from documents a possible defence or, to use his words, "a notional defence". There must be, as stated by counsel, some material in existence upon which the defence can be founded (see the case of **C Braxton Moncure v Doris Cahusac Delisser** per Rattray P). In the circumstances, I saw no basis for interfering with the exercise of discretion by the learned judge as it could not

be concluded that he erred in his conclusion that there was no real prospect of successfully defending the claim.

[44] The application for leave to appeal was, therefore, refused.

The application for a stay of execution

[45] Having found that the learned judge did not err in finding that Stoplight failed to demonstrate that it had a real prospect of successfully defending the claim and, having refused the application for leave to appeal, the grant of a stay of execution would be entirely inappropriate. Consequently, that application was also refused with the orders made as set out at paragraph [3] of the judgment.

EDWARDS JA

[46] I have read in draft the reasons for judgment of my sister Straw JA and agree with her reasoning and conclusion.