JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 111/2006

BEFORE:	**THE HON. MR. JUSTICE COOKE, J.A.** **THE HON. MRS. JUSTICE McCALLA, J.A.** **THE HON. MRS. JUSTICE HARRIS, J.A.**

BETWEEN	**SUGAR COMPANY OF JAMAICA LIMITED**	**APPELLANT**
AND	**NEW YARMOUTH LIMITED**	**1ST RESPONDENT**
AND	**J WRAY & NEPHEW GROUP LIMITED**	**2ND RESPONDENT**

Mr. Patrick Foster, Deputy Solicitor General and Jerome Spencer instructed by Director of State Proceedings for the Appellant.

Mr. Conrad George and Miss Charlene Atkinson, instructed by Hart, Muirhead and Fatta for the Respondents.

May 15, 29, 30 and November 9, 2007

COOKE, J.A.

1. On the 30th November, 2006 the Supreme Court ordered inter alia that:

> "Summary judgment is entered against the Defendant and [sic] on the Claim and the Counter-Claim in the amount of Eighty Six Million Five Hundred and Ninety One Thousand and Fifty Three Dollars and Twenty Six Cents ($86,591,053.26) with interest at 6% from the 13th October 2004."

The appellant now challenges the correctness of that order.

2. It is of critical importance to appreciate at the very outset that the claim of each respondent was founded on separate and independent agreements. It is therefore necessary to subject to scrutiny the basis upon which each claim was launched and the response by the appellant to each such claim.

3. I will first address the claim of the 2nd respondent. It is a claim for $16,638,924.00 as at 30th April, 2002. On the 8th March, 1994 there was an agreement between the appellant and Booker Tate Limited and the 2nd respondent that the latter two named entities would provide management services for the business of the former (the Management Agreement). The duration of this Management Agreement was for ten years and, as payment, the appellant was to pay a management fee of US$2,000,000.00 in respect of each financial year. On the 26th August, 1998 there was signed a 'Heads of Agreement'. Under this agreement, for the purposes of this discussion, it is only necessary to state that the Management Agreement of the 30th April, 1994 was by mutual consent to be terminated "no later than August 31, 1998". There was to be "the waiver of all and any management fees due" as of August 31, 1998. Paragraph 9 of the Heads of Agreement is of no little significance. It is now reproduced.

> "That in consideration of the matters set out herein, the GOJ shall procure that:
>
> (a) on August 26, 1998, payment is made to each of WN and BOOKER of fifty percent (50%) of

> amounts due to each of them up to August 31, 1998, in respect of personnel services provided (not including management services pursuant to any Management Agreements), and,
>
> (b) the remaining fifty percent (50%) to each of them, to be paid by February 28, 1999, to be evidenced by Promissory Notes;
>
> PROVIDED that the said amounts due are verified to the reasonable satisfaction of the GOJ."

"GOJ" represents the Government of Jamaica "WN" represents the 2nd respondent and "Booker" stands for Booker Tate Limited.

4. The claim of the 2nd respondent is as to "personnel services" mentioned in paragraph 9(a). This is how the 2nd respondent pleaded its cause in paragraph 6 of the amended Particulars of Claim.

> "By an agreement dated 26th August 1998 between the shareholders of the Defendant including the 2nd Claimant and the Government of Jamaica ('the Heads of Agreement"), the 2nd Claimant compromised its entitlement to Management Fees under the Management Agreement, in return for the Government of Jamaica's Defendant's undertaking to procure payment in respect of personnel services provided (not including management services pursuant to any Management Agreements) all other charges that were due thereunder. The Defendant's obligation to make reimbursement under the Management Agreement subsisted, as did the Defendants liability to pay G.C.T. on Management Fees already charged under the Management Agreement, and liability on the part of the Defendant to pay such G.C.T. has been admitted by the Defendant in writing."

5. The response by the appellant to that averment was in its amended defence and counter claim stated as follows:

> "9. Paragraph 6 of the Amended Particulars of Claim is denied and the Defendant will say that it is not a party to the Heads of Agreement and such undertaking as was provided for therein was made by GOJ in the following terms:
>
> 9. That in consideration of the matters set out herein, the GOJ (Government of Jamaica) shall procure that:
>
> a) On August 26, 1998 payment is made to each of WN and BOOKER of fifty percent (50%) of amounts due to each of them up to August 31, 1998, in respect of personnel services provided (not including management services pursuant to any Management Agreements); and
>
> b) the remaining fifty percent (50%), to each of them, to be paid by February 28, 1999, to be evidenced by Promissory Notes.
>
> PROVIDED that the said amounts due are verified to the reasonable satisfaction of the GOJ.
>
> 10. ...
>
> a) ....
>
> b) ....
>
> 10. Pursuant to the said Heads of Agreement, the Defendant was therefore under no obligation to pay any charges and denies that it admitted in writing, or at all, that it would pay General Consumption Tax (GCT) on Management Fees

already incurred. Further, if there was such an admission, which is denied, the Defendant will say that its admission was of no effect as it was not a party to the said Heads of Agreement as in the circumstances the admission would have been made by mistake.

11. Such amounts as the Second Claimant might have been due for Management Fee and GCT as at August 31, 1998 were waived in accordance with Clause 3 of the Heads of Agreement."

6. At this stage it would be convenient to set out the relevant section of the Civil Procedure Rules, 2002 which is directly relevant.

"**Grounds for summary judgment**

15.2 The court may give summary judgment on the claim or on a particular issue if it considers that–

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue."

7. Regrettably, the learned trial judge has not given any reasons for coming to the view that the appellant had no real prospect of successfully defending the claim of the 2nd respondent. This was no fanciful defence. The issues raised by the defence should be determined at a trial. The appellant's stance is that it was under no legal obligation to pay the amount claimed by the 2nd respondent. The responsibility of payment for personnel services, if any existed would be that of

the Government of Jamaica in accordance with paragraph 9 of the Heads of Agreement. (See para. 3 supra.)

8. I now turn to the claim of the 1st respondent. It was for the amount of $48,879,747.00 as at 30th April, 2002. This claim has, as its basis, an agreement made between the 1st respondent and the appellant, dated the 8th March, 1994. The relevant terms of that agreement are now set out.

> "NOW IT IS HEREBY AGREED by and between the parties as follows:-
>
> 1. NYL agrees to close the NYL Factory and to cease sugar manufacturing operations on the 31st day of December, 1993 and not to re-open same except with the written consent of SCJ so long as the Monymusk Factory processes the sugar cane grown on the said lands.
>
> 2. In consideration therefor SCJ agrees –
>
>   (a) To pay the sum of ONE HUNDRED AND TWENTY MILLION DOLLARS ($120,000,000.00) to NYL on the 31st day of December, 1993. The parties agree that this sum shall be paid free of all charges, taxes and deductions whatsoever it being the intent of the parties that the sum shall be a net payment to NYL. SCJ further agrees to pay interest monthly at the latest Government of Jamaica Treasury Bill rate plus four per cent (4%) per annum on the said ONE HUNDRED AND TWENTY MILLION DOLLARS ($120,000,000.00) or any part thereof that is not paid from the due date to the date of payment.

(b) To keep the Monymusk Factory in operation and take delivery at the Monymusk Factory and purchase from NYL for a period of ten (10) years and subject to the regulations normally applying to the purchase of cane by factories all the sugar cane crop produced on the said lands at the prevailing price paid to sugar cane farmers from time to time.

(c) To pay to NYL and to such extent as may be necessary its cane farmers (being the cane farmers who supplied sugar cane to the NYL Factory during the 1993 crop season) within seven (7) days of the delivery of the sugar cane a sum to be agreed being additional costs to NYL and its cane farmers of transporting cane to the Monymusk Factory gate rather than the NYL Factory gate (hereinafter called "Transportation Cost"). The sum for Transportation Cost is subject to review by the parties hereto before the commencement of the reaping of the annual sugar cane crop. SCJ reserves the right to transport the sugar cane from the NYL Factory gate to the Monymusk Factory gate at its own expense and in such event no Transportation Cost shall be paid.

(d) ...

3. For a period of ten (10) years from the date hereof NYL agrees to continue to cultivate sugar cane on the said lands, other than the land known as "Sheckles" subject to the said lands remaining suitable for cane cultivation and SCJ shall purchase such cane in accordance with clause 2(b) above."

Para. 13 of the amended particulars of claim reads –

> "The Defendant has failed to pay transportation costs (including cane road repairs) amounting to J$34,053,673 as at 30th April 2002, cane cart repairs amounting to $7,029,369 as at 30th April 2002, and molasses transportation cost of J$6,450,960, and the 1st Claimant claims these amounts, together with interest thereon."

In its amended defence there is this response.

> 18. The Defendant denies paragraph 13 of the Amended Particulars of Claim. In answer thereto, the Defendant will say that all transportation costs contemplated by the agreement of March 8, 1994, that is, the additional cost of transporting cane to Moneymusk instead of New Yarmouth, formed part of the cost of cane purchased by the Defendant from the First Claimant. The Defendant will say that as all cane purchased by the Defendant from the First Claimant was duly paid for, the Defendant is not indebted to the First Claimant in respect of transportation costs under the agreement of March 8, 1994. Additionally, the Defendant will say that the agreement of March 8, 1994 made no provision for payment to the First Claimant in respect of cane road repairs or cane cart repairs by the Defendant.
>
> 19. In further answer to paragraph 13 of the Amended Particulars of Claim, the Defendant will say that if, which is not admitted, it owes the First Claimant transportation costs as claimed, the claim is statute barred and at the trial of this claim the Defendant will rely on the Limitation of Actions Act, 1881.
>
> 20. Save that it is admitted that the Second Claimant set out its claim against the Defendant in a letter dated December 5, 2001, the Defendant denies paragraph 14 of

Amended Particulars of Claim. The Defendant will say that the notation by the Defendant's then Chairman, Ambassador Derrick Heaven, on the letter dated December 5, 2001 was not an admission/acknowledgment of indebtedness of the Defendant. Furthermore the Defendant's then Chairman, Ambassador Derrick Heaven did not have the authority to make such an admission/acknowledgment of indebtedness on behalf of the Defendant. Further, even if Ambassador Heaven had such authority, which is expressly denied, that admission/acknowledgment of indebtedness did not create a contract and was subject to account verification and to any sums owed by to the Defendant by the Second Claimant.

21. Further and in the alternative the Defendant says if the said letter created a contract it is unenforceable as Ambassador Heaven would have entered into it on behalf of the Defendant by mistake as he thought the said sums were owed when they were not."

9. Reliance on the Limitation of Actions Act has not been pursued in this Court – although not abandoned. It may well be that the appellant considered that there was some difficulty in maintaining this stance, in view of the letter dated 5th December, 2001 from the 2nd respondent which was signed by Ambassador Derrick Heaven on behalf of the appellant. (This letter will be subsequently set out). For now I will only say that, the signature of Heaven may be construed as an acknowledgment of a debt, thus making time run afresh as of that date.

10. I do not think it is arguable that Heaven did not have any authority to make an "admission/acknowledgment on behalf of the defendant". The agreement between the appellant and the respondent was clearly independent of the Management Agreement. Consequently the Heads of Agreement did not touch or concern that agreement. Therefore, in its defence there is an erroneous reliance by the appellant on the Heads of Agreement as regards the agreement between it and the 1st respondent.

11. The appellant contends that the agreement between the parties made no provision for payment to the 1st respondent for payment in respect of road repairs or cane cart repairs. These repairs formed a part of the basis as part of the claim of the 1st respondent. It is certainly clear that a perusal of the agreement does not reveal any obligation of the appellant to pay for any such repairs. Accordingly, this is an issue which merits exploration.

12. I will now address the letter of December 5, 2001. It is this document that the respondents heavily rely on to affix the appellant with liability. As far as they were concerned this document demonstrated an admission of liability in respect of their respective claims. Here is the letter.

"December 5, 2001

Ambassador Derick Heaven
The Sugar Company of Jamaica Limited
Bernard Lodge
St. Catherine

Dear Ambassador,

SUBJECT: AMOUNTS OWED TO J. WRAY & NEPHEW LIMITED AND NEW YARMOUTH LIMITED

I am writing to set out our understanding of the position regarding the indebtedness of The Sugar Company of Jamaica Limited ("SCJ") to J. Wray & Nephew Limited ("JWN") and New Yarmouth Limited ("NY") and of the proposals you have made to deal with the matter.

The amounts are owing under a contract between us and under other commercial arrangements. According to our records, the total owing, including interest, is some $78m. According to your records, SCJ owes some $68m.

In meetings between us and Mr. Richard Powell of JWN, we have discussed the position. In our first meeting, you stated that SCJ admitted owing around $68m and that there was no legal issue surrounding this, and offered an immediate cash payment of $40m in full and final settlement. I indicated that I did not think this would be acceptable. In a subsequent meeting, I stated that we would be prepared to accept a settlement of $68m, with $40m payable immediately in cash and the balance payable over an agreed period. Interest would accrue but would be waived if timely payments were made. You stated that you would have to refer the matter to your board of directors.

You subsequently telephoned me to tell me that the board had rejected the proposal, and had stated that they would not make any payment unless we agreed to send all cane from New Yarmouth Estate to SCJ's Monymusk Estate.

Please sign the duplicate of this letter and return it to me, to confirm that it reflects the situation regarding the amounts owed by SCJ.

Yours sincerely,
J. WRAY & NEPHEW LIMITED
AGRI DIVISION

ROBERT L. HENRIQUES
MANAGING DIRECTOR

I hereby acknowledge the foregoing. *Rather than the last paragraph of the first page as is I would order that it was suggested as well some compensation for the loss of Cane.*

....

On behalf of the Sugar Company of Jamaica Limited"
(The words following "I hereby acknowledge the foregoing" were handwritten.)

13. Firstly, I wish to note that this letter makes no distinction between the Management Agreement which culminated in the Heads of Agreement and the other agreement between the appellant and the 1st respondent. Secondly there was a lack of specificity as to how much was owed to each entity – and the basis for such debt. Thirdly there is the imprecise statement that "SCJ (the Sugar Company of Jamaica Limited) owing around 68m". Fourthly, it may be that the admission was subject to "compensation for the loss of cane". (See handwritten addition). The highest that the respondents can put it is that there is material in respect of this document which can ground their assertion that there is an admission of some debt. Before the learned trial judge could make any award in an application for summary judgment the appellant must adduce evidence to substantiate the amount claimed. Perhaps, this document may be seen as part of a negotiating process, hence, the lack of specificity.

14. There does not seen to be any harmony in the amount of money claimed by the respondents. The Amended Claim form filed on October 6, 2006 sought the sum of $78,991,787.00. In the Amended Particulars of Claim filed on that same date the 1st respondent claimed $48,879,747 as at 30th April, 2002 and as of that same date the 2nd respondent claimed $16,638,924. Together both were claiming $65,518,871. In the Amended Claim form the figure of $78,991,787.00 when reduced by $10,000.00 for court fees and attorneys fixed costs is $78,981,787.00. This represents quite a difference, but this is not all. In the Amended Particulars of Claim paragraph 13 reads:

> "The 1st Claimant, the Defendant has failed to pay transportation costs (including cane road repairs) amounting to J$34,053,673 as at 30th April 2002, cane cart repairs amounting to $7,029,369 as at 30th April 2002, and molasses transportation cost of J$6,450,960, and the 1st Claimant claims these amounts, together with interest thereon."

These sums add up to $46,534,002.00 which is quite different from $48,879,747.00. Then quite inexplicably the learned trial judge made an award of $86,591,053.26. This sum is far in excess of the amount claimed – as to which there is obvious uncertainty. Further, there is no distinction in this award as to what each respondent was to be paid. Where did the learned trial judge get his award figure from? It was from paragraph 16 of the Amended Particulars of Claim which reads:

> "Further or alternatively, the Defendant has on other occasions admitted the amount of the debt. By letter dated 14th January 2000 the defendant wrote to KPMG Peat Marwick, auditors of the Claimants, and

> confirmed that "..... at the request of J. Wray and Nephew Limited we confirm our liability at 30th September 1999 to the following companies
>
> (a) J. Wray & Nephew Limited – $10,587,983.86
>
> (b) New Yarmouth Limited – $46,778,245.68
>
> (c) Lascelles Henriques Superannuation et al $29,224,823.72
>
> (d) Total $86,591,053.26"

Thus the learned trial judge was in error in making the award of $86,591,053.26, Lascelles Henriques Superannuation et al was not a party to the action. The figures presented by the respondents were in disarray.

15. The appellant, as stated earlier, filed a counterclaim. The amount claimed was for $386,293,740.79. It was sought to set off this amount against "any sum which maybe found due" to the 1st respondent". The appellant's counterclaim is based on what it says is a breach of para. 2 (b) of the agreement between the appellant and the 1st respondent. (See para 8 supra). In essence the appellant asserts that the 2nd respondent did not send to the appellant "all the sugar cane crop produced on the said lands at the prevailing price ... from time to time". This breach the appellant said resulted in the loss claimed. The central issue can only be resolved on a proper construction of the agreement between the parties. At the time of hearing no defence to the counterclaim had been filed. This may not appear to be all that surprising as the record reveals that although the Amended Defence and Counterclaim was dated the 1st December 2004 it was not

filed until the 29th November 2006, which was the day before the hearing. Despite the fact that there was no defence filed to the counterclaim the respondents proceeded with their application. The submission, in this court, and I presume in the court below was that it was impossible to even consider the construction proffered by the appellant. It has earlier been lamented that the learned trial judge gave no reasons for his decision. He apparently must have come to the view that the counterclaim had no real prospect of succeeding at a trial on that issue. I do not agree. Was it a term of the agreement between the parties that the 1st respondent was obligated to send the totality of its sugar cane crop to the appellant? This is a serious issue to be determined and if resolved in the appellant's favour, it would be then for evidence to be adduced to prove the particulars of loss as set out in the table provided by the appellant in its counterclaim.

16. For the reasons given I would allow this appeal. As discussed above there are several issues which demand legal exploration. This was not a case which should be subject to summary disposal. Finally, I would award costs to the appellant both here and in the court below.

McCALLA, J.A.:

I agree.

HARRIS, J.A.

In this appeal the appellant challenges a decision of McIntosh D, J. of November 30, 2006 granting summary judgment to the respondents.

The appellant is a company duly incorporated under the laws of Jamaica and was at all material times engaged in the business of growing sugarcane, processing sugar and manufacturing other byproducts of sugarcane. The respondents are likewise companies duly incorporated under Jamaican law and were involved in operations similar to those of the appellant. The appellant was a participant in a joint venture enterprise between the Government of Jamaica and the 2nd respondent. This joint venture subsisted until September 30, 1998 when the Government of Jamaica assumed full control and ownership of the appellant.

On October 13, 2004, the respondents commenced action against the appellant claiming the sum of $78,981,787.00 together with interest for damages for breach of contract, or alternatively for breach of compromise. This claim was with reference to allegations by the respondents touching the appellant's failure to pay sums due to the respondents under separate agreements between the appellant and each respondent.

A defence and counterclaim was filed by the appellant. In its counterclaim, the appellant claimed the sum of $386,293,740.79 for breach of contract with respect to the failure of the 1st respondent to deliver sugar cane,

cultivated on the 1st respondent's land, to a factory operated by the appellant. A set-off was also claimed by the appellant.

On October 6, 2006, the respondents filed an application for summary judgment. On November 30, 2006, this application was heard and the learned trial judge made the following order:-

> "1. Summary judgment is entered against the Defendant and [sic] on the Claim and the Counter-Claim in the amount of Eighty Six Million Five Hundred and Ninety One Thousand and Fifty Three Dollars and Twenty Six Cents ($86,591,053.26) with interest at 6% from the 13th October, 2004.
>
> 2. Costs to the Claimants to be taxed if not agreed."

The learned trial judge gave no reasons for his decision. This regrettable omission, however, does not prevent this Court from embarking on a re-hearing of the matter as Rule 1.1 (b) of the Court of Appeal Rules 2002 permits the Court so to do.

The following are the grounds of appeal filed:-

> "(a) The Learned Judge erred in hearing the application for summary judgment without the Claimants having complied with Rule 15.4(4) of the Civil Procedure Rules, 2002.
>
> (b) The Learned Judge erred in entering summary judgment without reviewing all the statements of case in the claim.
>
> (c) The Learned Judge erred in granting the order for summary judgment on the claim in

circumstances where the Defendant had real prospects of successfully defending the Claim in view of the issues raised in the original Defence and the Amended Defence.

(d) The Learned Judge erred in granting the order for summary judgment on the Counterclaim in circumstances where the Defendant had real prospects of success on the Counterclaim in view of the unchallenged allegations raised in the original Counterclaim and the Amended Counterclaim."

Grounds (a) and (b) were abandoned.

Rule 15.2 (a) and (b) of the Civil Procedure Rules 2002 empowers the Court to enter summary judgment in circumstances where a claimant has no real prospect of succeeding on a claim, or, where a defendant has no real prospect of successfully defending a claim. The rule reads:

"The court may give summary judgment on the claim or on a particular issue if it considers that –

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue."

A party can only successfully invoke this rule where it can be established that the other party has no reasonable prospect of success at trial. To succeed under this rule it must be shown that the other party does not have a realistic, as opposed to a fanciful, prospect of succeeding. See **Swain v. Hillman** [2001] 1

All ER 91; **ED & F Man Liquid Products Ltd. v. Patel and Another** [2003] EWCA Civ. 472.

The critical issue in this case is whether the pleadings disclose that the appellant has real prospect of successfully defending the claim and pursuing the counter-claim.

Consideration will first be given to ground C.

In the Particulars of Claim the 2nd respondent's claim is first pleaded followed by that of the 1st respondent. I will address the issues in accordance with the order in which the claims have been pleaded.

The 2nd respondent's claim is to recover the sum of $16,638,924.00 for the payment of personnel fees.

On March 8, 1994 the appellant entered into an agreement (Management Agreement) with the 2nd respondent and Booker Tate Limited. The critical terms of the agreement stipulated the following:

(a) The 2nd respondent and Booker Tate Limited would provide management services to the appellant for a period of ten (10) years commencing January 1, 1994. These services included the provision of General Managers for Bernard Lodge, Monymusk and Frome Estates, together with suitable and qualified support managers.

(b) The 2nd respondent and Booker Tate would provide specialists on assignment, a labour

force and a chief operating officer for the appellant.

(c) That the appellant in consideration of provision of the services, would pay the 2nd respondent and Booker Tate Limited the sum of Two Million United States Dollars (US$2,000,000.00) for each financial year during the life of the agreement.

(d) The appellant would reimburse the respondent and Booker Tate for salaries, emoluments and various costs attendant to the employment of personnel.

On August 26, 1998 an agreement, the Heads of Agreement, was brokered between the appellant's shareholders, including the 2nd respondent, and the Government of Jamaica. The Government of Jamaica subsequently purchased the appellant's entire share capital. The important areas of the agreement, for the purpose of this appeal, are found in clauses 2, 3, 4 and 9 which read as follows:

"2. All Management Agreements currently existing between SCJ, MIL, WN and BOOKER shall be terminated by mutual agreement of all the parties thereto, no later than August 31, 1998.

3. That MIL, WN and BOOKER hereby agrees to the waiver of all and any management fees due to any or all of them as of the said August 31, 1998.

4. That all contracts in respect of the provision of personnel by WN and BOOKER to SCJ shall be terminated and new contracts entered into on mutually acceptable terms with effect from September 01, 1998.

5. ...

6. ...

7. ...

8. ...

9. That in consideration of the matters set out herein, the GOJ shall procure that:

   (a) On August 26, 1998, payment is made to each of WN and BOOKER of fifty percent ($50%) of amounts due to each of them up to August 31, 1998, in respect of personnel services provided (not including management services pursuant to any Management Agreements); and

   (b) the remaining fifty percent (50%) to each of them, to be paid by February 28, 1999, to be evidenced by Promissory Notes:

   PROVIDED that the said amounts due are verified to the reasonable satisfaction of the GOJ.

It is now necessary to turn to the pleadings. Paragraphs 5, 6, 7, 8, and 9 of the amended Particulars of Claim read as follows:

"5. The 2nd Claimant and Booker Tate duly performed all their obligations under the Management Agreement and in breach of contract the Defendant failed to pay sums due thereunder, namely, the Management Fee and the reimbursement of the emoluments of members of staff provided to the Defendant.

6. By an agreement dated 26th August 1998 between the shareholders of the Defendant including the 2nd Claimant and the Government of Jamaica ('the Heads of Agreement"), the 2nd

Claimant compromised its entitlement to Management Fees under the Management Agreement, in return for the Government of Jamaica's undertaking to procure payment in respect of personnel services provided (not including management services pursuant to any Management Agreements). The Defendant's obligation to make reimbursement under the Management Agreement subsisted, as did the Defendants liability to pay G.C.T. on Management Fees already charged under the Management Agreement, and liability on the part of the Defendant to pay such G.C.T. has been admitted by the Defendant in writing.

7. In breach of contract, the Defendant has failed to pay to the Claimants the G.C.T. due on the said Management Fees, which as at 30th September 1996 amounted to J$5,382,516.00 in principal together with interest as at 30th September 2001 amount to $9,485,126.00 and the 2nd Claimant claims the sum of these figures amounting to $14,867,642.00 together with any further penalty and/or interest subsequently to have accrued.

8. Further, the 2nd Claimant claims an indemnity from the Defendant in respect of all G.C.T., interest and penalties payable on the Management Fees under the Management Agreement, which G.C.T. the Defendant was liable to pay under the terms of the said Management Agreement to the 2nd Claimant.

9. In further breach of contract, the Defendant has failed to reimburse the 2nd Claimant for the emoluments paid to the members of staff provided to the Defendant, such emoluments that should have been but were not reimbursed amounted to $17,606,109, in respect of Bernard Lodge, and $12,689,611, in respect of Monymusk, as at 30th April 2002."

In response to these averments, the appellant in paragraphs 7, 8, 9, 10, 11, 12 and 13 of its amended defence stated:—

"7. Paragraph 5 of the Amended Particulars of Claim is denied and the Defendant will say that it reimbursed to the Second Claimant all emoluments due to members of staff who were provided to the Defendant.

8. The Defendant denies that any management fees are due to the Second Claimant. As Clauses 2, 3, and 4 of the Heads of Agreement provide as follows:

   2. All Management Agreements currently existing between SCJ MIL, WN and BOOKER shall be terminated by mutual agreement of all the parties thereto no later that [sic] August 31, 1998.

   3. That MIL, WN and BOOKER agrees to the waiver of all and any management fees due to any or all of them as of the said August 31, 1998.

   4. That all contracts in respect of the provision of personnel by WN and BOOKER to SCJ shall be terminated and new contacts [sic] entered into on mutually acceptable terms with effect from September 1, 1998.

9. Paragraph 6 of the Amended Particulars of Claim is denied and the Defendant will say that it is not a party to the Heads of Agreement and such undertaking as was provided for therein was made by GOJ in the following terms:

   9. That in consideration of the matters set out herein, the GOJ (Government of Jamaica) shall procure that:

a) On August 26, 1998 payment is made to each of WN and BOOKER of fifty percent (50%) of amounts due to each of them up to August 31, 1998, in respect of personnel services provided (not including management services pursuant to any Management Agreement); and

b) the remaining fifty percent (50%), to each of them, to be paid by February 28, 1999, to be evidenced by Promissory Notes.

PROVIDED that the said amounts due are verified to the reasonable satisfaction of the GOJ.

10. ...

10. Pursuant to the said Heads of Agreement, the Defendant was therefore under no obligation to pay any charges and denies that it admitted in writing, or at all, that it would pay General Consumption Tax (GCT) on Management Fees already incurred. <u>Further, if there was such an admission, which is denied, the Defendant will say that its admission was of no effect as it was not a party to the said Heads of Agreement as in the circumstances the admission would have been made by mistake</u>.

11. Such amounts as the Second Claimant might have been due for Management Fee and GCT as at August 31, 1998 were waived in accordance with Clause 3 of the Heads of Agreement.

12. Paragraphs 7 and 8 of the <u>Amended Particulars of Claim</u> are denied and the Defendant will say that the Second Claimant is not entitled to be indemnified by the Defendant in respect of GCT, interest or penalties payable in respect of

> Management Fees, or at all. In any event, if the Second Claimant is entitled to an indemnity, which is denied, the responsibility to indemnify the Second Claimant is that of the GOJ by virtue of Heads of Agreement.
>
> 13. The Defendant denies that there are any emoluments due to the Second Claimant by the Defendant, as set out in paragraph 9 of the Amended Particulars of Claim or at all. If, which is not admitted, any such emoluments are due to the Second Claimant they are subject to Clause 9 of the aforesaid Heads of Agreement and are the responsibility of GOJ."

The 2nd respondent contended that the outstanding Management Fees, the indemnity in respect of the General Consumption Tax and penalty payable on Management Fees which were compromised on the ground that the Government of Jamaica would honour payments, were still due. In refuting this allegation, the appellant asserted that the outstanding sums claimed had been paid but if these sums had not been paid, payment would be the obligation of the Government of Jamaica under the Heads of Government Agreement.

It is clear that the claim of the 2nd respondent had been traversed by the appellant. Thus, issue had been joined between the parties. It follows therefore that resolution of the issue can only be achieved by a trial. Therefore, the question as to whether the amount claimed had been paid or whether the appellant should pay must be determined at a trial.

The foregoing not withstanding, the 2nd respondent sought to rely on a letter dated December 5, 2001, from the Managing Director of the 2nd

respondent to Ambassador Derrick Heaven, Chairman of the appellant as containing an admission of the appellant's indebtedness. The letter is set out hereunder:

"December 5, 2001

Ambassador Derick Heaven
The Sugar Company of Jamaica Limited
Bernard Lodge
St. Catherine

Dear Ambassador,

SUBJECT: AMOUNTS OWED TO J. WRAY & NEPHEW LIMITED AND NEW YARMOUTH LIMITED

I am writing to set out our understanding of the position regarding the indebtedness of The Sugar Company of Jamaica Limited ("SCJ") to J. Wray & Nephew Limited ("JWN") and New Yarmouth Limited ("NY") and of the proposals you have made to deal with the matter.

The amounts are owing under a contract between us and under other commercial arrangements. According to our records, the total owing, including interest, is some $78m. According to your records, SCJ owes some $68m.

In meetings between us and Mr. Richard Powell of JWN, we have discussed the position. In our first meeting, you stated that SCJ admitted owing around $68m and that there was no legal issue surrounding this, and offered an immediate cash payment of $40m in full and final settlement. I indicated that I did not think this would be acceptable. In a subsequent meeting, I stated that we would be prepared to accept a settlement of $68m, with $40m payable immediately in cash and the balance payable over an agreed period. Interest would accrue but would be waived if timely payments were made. You stated

> that you would have to refer the matter to your board of directors.
>
> You subsequently telephoned me to tell me that the board had rejected the proposal, and had stated that they would not make any payment unless we agreed to send all cane from New Yarmouth Estate to SCJ's Monymusk Estate.
>
> Please sign the duplicate of this letter and return it to me, to confirm that it reflects the situation regarding the amounts owed by SCJ.
>
> Yours sincerely,
> J. WRAY & NEPHEW LIMITED
> AGRI DIVISION
>
> ROBERT L. HENRIQUES
> MANAGING DIRECTOR
>
> I hereby acknowledge the foregoing. *Rather than the last paragraph of the first page as is I would order that it was suggested as well some compensation for the loss of Cane.*
>
> *..............(Sgd.)................................*
> On behalf of the Sugar Company of Jamaica Limited"
> (The words 'Rather ... Cane' were handwritten.)

The letter emanates from J. Wray and Nephew Limited and not the 2nd respondent J. Wray and Nephew Group Ltd. (emphasis mine), a different entity from J. Wray and Nephew Ltd. There is nothing in this letter to show that the indebtedness to which the writer alludes was with respect to a debt created by the appellant in favour of the 2nd respondent.

It cannot be ignored however, that the 2nd respondent is a subsidiary of J. Wray and Nephew Ltd. This notwithstanding, if the 2nd respondent was one of the appellant's creditors to which the letter relates, this should have been expressly stated.

Assuming that the letter was intended to have included the 2nd respondent as one of the appellant's creditors, the 3rd and 4th paragraphs thereof seem to illustrate that any admission as to the appellant's indebtedness or the settlement of an indebtedness would be conditional on the approval of the appellant's Board of Directors. Initially, such condition was in terms that all the cane from New Yarmouth Estate would be sent to the appellant's Monymusk Estate. In acknowledging the receipt of the letter, the signatory thereto Ambassador Heaven, stated that it was suggested, (presumably by the Board of Directors,) that there should be some compensation for the loss of cane in substitution for the proposal that the cane be sent to Monymusk. Any admission made would be subject to the new proposal.

Further, even if it could be said that there was an admission of an indebtedness by the appellant, the letter discloses that the amount acknowledged is approximately $68,000,000.00. This is clearly an estimated amount, an imprecise sum. It is also of significance that the letter is silent as to what proportion of the $68,000,000.00 was to be allotted to each creditor. In all the circumstances, could it be said that the contents of the letter revealed an

admission of the appellant's indebtedness in the sum of $68,000,000.00? It appears to me that the letter would only tend to show that there may be some amount due and owing by the appellant.

A further issue raised relates to the question as to whether Ambassador Heaven was empowered to make an admission of indebtedness to the respondents.

It was Mr. Foster's contention that Ambassador Heaven was not clothed with the authority to admit that a debt was due and owing by the appellant. Mr. George contended however, that as Chairman of the Board of the appellant's company, he is presumed to have been authorized to act on the company's behalf.

It may be that the letter of December 5, 2001 points to an admission of the appellant's indebtedness, however, it appears that any admission could be subject to the approval of its Board of Directors. The fact that Ambassador Heaven, in acknowledgement of the letter did not deny the debt but appended a condition, (presumably on the Board's advice) in lieu of that which had been originally proposed, could present some difficulty in the appellant proving that any admission of the debt had been unauthorized.

I will now consider the claim of the 1st respondent against the appellant. The 1st respondent sought to recover the sum of $48,879,749.00 as due and owing from the appellant as of April 30, 2002.

The 1st respondent is the proprietor of approximately 4,900 acres of land cultivated in sugar canes. It also owns and operates a factory situated on these lands. The appellant operates a sugar factory.

On March 8, 1994 the 1st respondent and the appellant entered into an agreement. The following is the clause of the agreement which is relevant to the determination of the appeal:

> "Whereas:-
>
> ...
>
> "(6) NYL at the request of and in consideration inter alia of the payment of ONE HUNDRED AND TWENTY MILLION DOLLARS ($120,000,000.00) by SCJ has agreed to cease cane milling and sugar manufacturing operations and to close the NYL Factory on the terms and considerations hereinafter contained.
>
> ... as follows:—
>
> 1. NYL agrees to close the NYL Factory and to cease sugar manufacturing operations on the 31st day of December, 1993 and not to re-open same except with the written consent of SCJ so long as the Monymusk Factory processes the sugar cane grown on the said lands.
>
> 2. In consideration therefore SCJ agrees –

(a) To pay the sum of ONE HUNDRED AND TWENTY MILLION DOLLARS ($120,000,000.00) to NYL on the 31st day of December, 1993. The parties agree that this sum shall be paid free of all charges, taxes and deductions whatsoever it being the intent of the parties that the sum shall be a net payment to NYL. SCJ further agrees to pay interest monthly at the latest Government of Jamaica Treasury Bill rate plus four per cent (4%) per annum on the said ONE HUNDRED AND TWENTY MILLION DOLLARS ($120,000,000.00) or any part thereof that is not paid from the due date to the date of payment.

(b) To keep the Monymusk Factory in operation and take delivery at the Monymusk Factory and purchase from NYL for a period of ten (10) years and subject to the regulations normally applying to the purchase of cane by factories all the sugar cane crop produced on the said lands at the prevailing price paid to sugar cane farmers from time to time.

(c) To pay to NYL and to such extent as may be necessary its cane farmers (being the cane farmers who supplied sugar cane to the NYL Factory during the 1993 crop season) within seven (7) days of the delivery of the sugar cane a sum to be agreed being additional costs to NYL and its cane farmers of transporting cane to the Monymusk Factory gate rather than the NYL Factory gate (hereinafter called "Transportation Cost"). The sum for Transportation Cost is subject to review

by the parties hereto before the commencement of the reaping of the annual sugar cane crop. SCJ reserves the right to transport the sugar cane from the NYL Factory gate to the Monymusk Factory gate at its own expense and in such event no Transportation Cost shall be paid.

(d) ...

3. For a period of ten (10) years from the date hereof NYL agrees to continue to cultivate sugar cane on the said lands, other than the land known as "Sheckles" subject to the said lands remaining suitable for cane cultivation and SCJ shall purchase such cane in accordance with clause 2(b) above."

In paragraph 13 of the amended particulars of claim, the 1st respondent states:

> "The Defendant has failed to pay transportation costs (including cane road repairs) amounting to J$34,053,673 as at 30th April 2002, cane cart repairs amounting to $7,029,369 as at 30th April 2002, and molasses transportation cost of J$6,450,960, and the 1st Claimant claims these amounts, together with interest thereon."

The appellant, in paragraphs 18, 19, and 20 of the amended defence, in answer to the claim states:

> "18. The Defendant denies paragraph 13 of the Amended Particulars of Claim. In answer thereto, the Defendant will say that all transportation costs contemplated by the agreement of March 8, 1994, that is, the additional cost of transporting cane to Moneymusk instead of New Yarmouth, formed part of the cost of cane purchased by the

Defendant from the First Claimant. The Defendant will say that as all cane purchased by the Defendant from the First Claimant was duly paid for, the Defendant is not indebted to the First Claimant in respect of transportation costs under the agreement of March 8, 1994. Additionally, the Defendant will say that the agreement of March 8, 1994 made no provision for payment to the First Claimant in respect of cane road repairs or cane cart repairs by the Defendant.

19. In further answer to paragraph 13 of the Amended Particulars of Claim, the Defendant will say that if, which is not admitted, it owes the First Claimant transportation costs as claimed, the claim is statute barred and at the trial of this claim the Defendant will rely on the Limitation of Actions Act, 1881.

20. Save that it is admitted that the Second Claimant set out its claim against the Defendant in a letter dated December 5, 2001, the Defendant denies paragraph 14 of Amended Particulars of Claim. The Defendant will say that the notation by the Defendant's then Chairman, Ambassador Derrick Heaven, on the letter dated December 5, 2001 was not an admission/acknowledgment of indebtedness of the Defendant. Furthermore the Defendant's then Chairman, Ambassador Derrick Heaven did not have the authority to make such an admission/acknowledgment of indebtedness on behalf of the Defendant. Further, even if Ambassador Heaven had such authority, which is expressly denied, that admission/acknowledgment of indebtedness did not create a contract and was subject to account verification and to any sums owed by to the Defendant by the Second Claimant."

It was agreed between the 1st respondent and the appellant, that the 1st respondent would close its factory and cease manufacturing sugar cane in return for the following:

(a) payment of $120,000,000.00

(b) compensation for additional costs of transporting cane to Monymusk factory

(c) payment for transportation of molasses by the 1st respondent to Monymusk.

The 1st respondent's contention is that the appellant failed to pay the transportation costs (inclusive of cane road repairs) cane cart repairs and cost of transporting molasses, despite their agreements.

The appellant in response denied any indebtedness to the 1st respondent for the costs claimed and averred that these costs were incorporated in costs paid for the purchase of sugar cane by the appellant. These competing claims undoubtedly raises triable issues.

A further complaint of the 1st respondent is that a sum of $280,000.00 is owed by the appellant under written and oral contracts made between the parties for the supply of water. In its amended defence, the appellant admitted that the agreement exists but averred that there was no agreement on the applicable rate and that the amount payable is subject to reconciliation pursuant to arrangement between the parties. This clearly shows that the arrangements made by the parties as to the rate of payment and the question of the

reconciliation of accounts are matters disputed and ought to be resolved at a trial.

At this juncture, it is of worth to mention that the agreement of March 8, 1994 between these parties makes no reference to the appellant's liability for the cost of repairs to cane roads and cane carts.

The pleadings show a discrepancy as to the total sum claimed by the respondents as stated in the amended claim form and the particulars of claim. The claim form recites that a sum of $78,981,787.00 is due and owing by the appellant. However, in the particulars of claim two separate amounts have been claimed as the total sum due, $78,981,787.00 and $65,518,871.00.

No application was made to regularize the error. Judgment was entered for the sum of $86,591,053.26 notwithstanding the error. The judgment sum far exceeds such sum which ought to have been claimed, whether the correct debt stands at $78,981,787.00 or $65,518,871.00.

The 1st respondent also sought to place reliance on the letter of December 5, 2001. As earlier indicated, it would be for the court to construe this letter in determining whether it amounted to an acknowledgement of debt by the appellant.

A further issue arising relates to an alternative claim of the respondents in which they sought to rely on a letter dated November 14, 2000 from the

appellant's General Manager to K.PMG Peat Marwick. J. Wray and Nephew's auditors stating that "at the request of J. Wray and Nephew Limited. We confirm our liability at September 30, 1999 to the following companies:

(a)	J.Wray & Nephew Ltd.	-	10,587,983.86
(b)	New Yarmouth Ltd.	-	46,778,245.68
(c)	Lascelles Henriques Superannuation Fund et al	-	29,224,823.72
	Total	-	**86,591,053.26**"

It is to be observed that New Yarmouth Ltd., the 1st respondent is the only respondent mentioned in the letter, as, the 2nd respondent had not been included. It is also of importance to state that Lascelles Henriques Superannuation Fund was never a party to these proceedings.

It appears to me that the learned judge was erroneously influenced by this letter when making the award of $86,591,053.26.

It was also an averment of the appellant that the claims were statute barred for the reason that the action commenced outside the period of limitation.

The agreements on which the claims were founded were made on March 8, 1994. This action commenced on October 13, 2004. The time limited for commencing action by both respondents would have expired on March 7, 2000, notwithstanding the Heads of Agreement of August 26, 1998 to which the 2nd respondent was a party. The question as to whether the claims were statute barred would remain subordinate to the determination of the issue relating to the acknowledgment of the debt.

I now turn to ground 3 (d) which relates to the counterclaim. Before giving consideration to this ground it is necessary to state that the amended defence and counterclaim was dated December 1, 2004 but was filed on November 29, 2006. The date recorded on this pleading is an obvious error, as, the record shows that the amended claim and particulars of claim were filed on October 6, 2006 and would have been served subsequent to the filing. The amended defence and counterclaim would therefore have been prepared sometime after October 6, 2006.

The counterclaim is for $386,293,740.79 to be set off against any sum due to the respondents. This counterclaim is founded on an alleged breach of clause 2 (b) of the contract between the appellant and the 1st respondent which reads:

> "To keep the Monymusk Factory in operation and take delivery at the Monymusk Factory and purchase from NYL for a period of ten (10) years and subject to the regulations normally applying to the purchase of cane by factories all the sugar cane crop produced on the said lands at the prevailing price paid to sugar cane farmers from time to time."

In paragraphs 30 & 31 of the counterclaim the appellant pleads as follows:

> "30. Further, the Defendant agreed with the First Claimant and it was a term of the said agreement inter alia that the Defendant would:

(b) ... keep the Monymusk Factory in operation and take delivery at the Monymusk Factory and purchase from NYL [the First Claimant] for a period of ten (10) years and subject to the regulation normally applying to the purchase of cane by factories all the sugar cane crop produced on the said lands at the prevailing price paid to sugar cane farmers from time to time.

31. In breach of the said agreement, the First Claimant failed and/or neglected to deliver all the sugar cane cultivated on the said lands to the Monymusk Factory, as required under the said agreement for the years 2000 to 2004 inclusive, as a result of which the Defendant has suffered, and continues to suffer, loss and damage."

No defence was filed to the counterclaim. The respondents not having traversed the claim set forth in paragraphs 30 & 31 of the counterclaim, it would have been open to the appellant to apply for summary judgment on the counterclaim upon proof that it suffered loss due to the respondent's failure to transmit to Monymusk factory the entire sugar cane production, "at the prevailing price paid to sugar cane farmers from time to time." However, the issues of facts raised on the respondents' claims and on the counterclaim would have to be tried simultaneously in light of the appellant's claiming a set off, which, essentially is a defence to the claims.

The learned judge had erred in awarding judgment on the claim and counterclaim. I would allow the appeal and set aside the order of the learned

judge with costs of this court and the court below to the appellant to be agreed or taxed.

COOKE, J.A.:

ORDER

The appeal is allowed. The order made on the 30th November, 2006 is set aside. The costs here and in the Court below are awarded to the appellant to be agreed or taxed.