THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-02564

Between

CLICO INVESTMENT BANK LIMITED

(In Compulsory Liquidation)

also known as

CLICO INVESTMENT BANK LIMITED ISLAMIC BANKING SERVICES, IBS

Claimant

And

HASSAL ENTERPRISES LIMITED

Defendant

Appearances:

Claimant: Nadine S. Ratiram instructed by Keilah Granger

Defendants: Frederick A. Gilkes instructed by Yuri JR Saunders

Before The Honourable Mr. Justice Devindra Rampersad

Date of Delivery: December 7, 2018

JUDGMENT

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Introduction

1. This claim was initiated on 18 July 2014 for the repayment of monies disbursed to the defendant between the period 6 May 2005 to 4 January 2007 in the sum of $4,262,782.54. The disbursements were made pursuant to an Interim Joint Venture Agreement dated 14 June 2005 ("**the JVA**"). Reliance was placed on a letter of acknowledgment written by the defendant's Managing Director to the claimant in support of the claim.

2. There was no issue that the sum was disbursed[1] but the defendant defended the claim on the basis that (i) it was statute barred and (ii) the moneys were repaid. By its reply the claimant asserted that the matter was filed within the limitation period as the disbursements made between 6 May 2005 to 4 January 2007 were recorded on a running account basis as part of a cumulative singular debt and so the relevant period to start time running would be 20 July 2010 – the date of the letter of acknowledgement.

3. The case therefore turned primarily on whether there was a running account so as to preserve the claim. There was also the issue as to whether the sum had been repaid in the event that the court allowed the claim to proceed.

4. Ultimately the court found that the disbursements to the defendant by the claimant were done on a running account. The last disbursement was dated 4 January 2007 and the claim in relation to the total amount owing would have been statute barred on 4 January 2011 were it not for the acknowledgment executed on 20 July 2010. The court found the

[1] There was no suggestion on the defence that the figure claimed by the claimant was not received by the defendant so attempts to raise that as an issue in the submissions was not consistent with the pleadings

acknowledgment to be valid and as such it operated to extend the limitation period for recovery of the debt to 20 July 2014. The claim was initiated within that period and the defendant did not put forward cogent evidence to prove that the moneys were repaid.

5. Accordingly, judgment will be entered for the claimant.

Background

6. According to the JVA, also referred to as the Murabaha and Musharaka facility, the parties entered into the agreement with the intention of "… *combining their relevant expertise to purchase new and used motor vehicles and to resell the same to prospective purchasers such that the profit realized from this venture would be divided proportionally between the parties*."

7. The JVA outlined the responsibilities of both parties and stipulated that the defendant was responsible for sourcing, licensing and selling the vehicles. The defendant was responsible for all operations from the shipment to the sale of the vehicle and according to clause 1.11, was required to receive payment for the vehicle on behalf of the claimant and remit same to the claimant upon instruction by the Fund Manager. The claimant was responsible for:

> *"2. Responsibilities of the Bank*
>
> *2.1 The Bank shall be responsible for and agrees to:*
>
> *2.1.1 Give all relevant approvals required under this agreement within a reasonable time of being requested to so give;*
>
> *2.1.2 Finance the purchase of such vehicle inventories upon such terms and conditions as it shall see fit;*

2.1.3 ***Compile all the invoices supplied by the Dealer*** *[the defendant]* ***for the purchase of such inventory such that the purchase price of each said vehicle could be clearly ascertained****;*

2.1.4 Remit to the Dealer such sum as shall represent a share as determined by the IBS Fund Manager of the difference between the sums expended for the purchase of such vehicles inclusive of attendant costs and the sum for which the said vehicle has been sold for within a reasonable time from the receipt of such funds; "

8. In this court's respectful view, the JVA contemplated that the proceeds of sale of vehicles would have been paid to the claimant and that the claimant, after deducting the sums put out to acquire the vehicles, would then have remitted to the defendant such sums, as the claimant determined, represented the defendant's share of the profit made on such sales. The profit share ratio appeared to have been 80% in favor of the defendant and 20% in favor of the claimant.[2]

9. Pursuant to the JVA and in support of the claim, the claimant submitted a bundle of documents to support disbursements made to the defendant totaling $4,361,665.83. The majority of the disbursements took place between the period 6 May 2005 to 28 March 2006 with the exception of the sum of $174,669.00 which was disbursed on 4 January 2007. The claim was initiated on 18 July 2014, some seven years after the last alleged disbursement.

10. Section 3(1) of the Limitation of Certain Actions Act Chap. 7:09 (the Act),[3] limits a claim for recovery of a debt to a period of four years. Pursuant to

[2] See Internal Memorandum from the claimant to the defendant dated 28 October 2005 and included in the bundle annexed as "C.I.B.1."

[3] 3. (1) The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say: (a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort

section 12(2) of the Act,[4] the right of action accrues from the date of acknowledgment of debt, if there is one. It is thus possible for the limitation period to extend beyond four years from the date the debt was incurred once there is an acknowledgment of the debt[5] during the validity of the debt. In such an instance, the limitation period would run for four years after the date of the acknowledgment if the debt itself has not become statute barred.

11. The claimant submitted what purported to be a letter acknowledging the debt dated 20 July 2010, displaying the defendant's letterhead, signed by the defendant's Managing Director and addressed to the claimant. By that letter, the defendant acknowledged the outstanding debt of $4,262,782.54 and assured repayment of the sum by 31 December 2011.

12. The defendant filed its defence on 14 July 2015 and averred that the claimant's claim to recover sums disbursed during the period 6 May 2005 to 28 March 2006 would have been barred by 29 March 2010. The defendant challenged the validity of the letter acknowledging the debt but in any event pleaded that it could not have rejuvenated a claim for the sums disbursed during the period 6 May 2005 to 28 March 2006. This is because that claim would have been barred by 29 March 2010 and an acknowledgment dated 20 July 2010 could not operate to revive a claim that was barred.[6] The defendant rationalized that only the claim for the sum of TT$174,669.00, disbursed on 4 January 2007, could be rejuvenated

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[4] 12 (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim ……and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or payment

[5] An acknowledgment shall be in writing and signed by the person making the acknowledgment – see section 13(a) of the Act

[6] See section 12(4) of the Act

by any purported acknowledgment. It was however asserted that the acknowledgment did not include that disbursement and a claim for same would have been barred by 5 January 2011.

13. The defendant also denied that it failed to repay the sum claimed or that it remain due and owing. Instead, the defendant asserted that during the period 2004-2008 it paid the sum of TT$4,924,228.41 to the claimant. In that regard reliance was placed on the defendant's company ledger and First Citizens Bank Statements to prove same.

14. By its reply the claimant contended that the disbursements made by the claimant to the defendant under the JVA from 6 May 2005 to 4 January 2007 were part of a cumulative singular debt owed to the claimant on a running account basis. In this way the relative limitation period was calculated to be 4 January, 2011.[7] The alleged acknowledgment was executed before that date and as such it was asserted that the same extended the limitation period to 20 July 2014.

Murabaha and Musharaka Facilities

15. These concepts were not addressed by either parties at the trial and, in reviewing the matter for decision, the court reached out to the parties for assistance on these terms.

16. To assist the court gain a primary appreciation for the terms, the court perused the following websites, which were drawn to the attention of the parties by way of email:

[7] Four years from the last disbursement made on 4 January 2007 in the sum of TT$174,669.00

16.1. https://www.researchgate.net/publication/277013914_Mudaraba_musharaka_murabaha_-_new_terms_to_bank_on

16.2. https://www.westga.edu/~bquest/2004/musharaka.htm

16.3. https://www.investopedia.com/terms/m/musharakah.asp

17. In response the parties forwarded an agreed position acknowledging that these concepts were not considered in the context of Islamic financing and confirming that the JVA did not anticipate interest payments of any kind on the disbursements to the defendant. No further submissions were offered and the parties did not indicate any objection to the information represented on the said websites. In addition, the court perused other learning on the topic[8].

18. These facilities refer to Islamic finance methods/joint venture arrangements based on elements of Sharia, that is, the law of Islam. Sharia-compliant investments are structured on the exchange of ownership in tangible assets or services, with money acting simply as the payment mechanism to effect the transfer. The taking or receiving of interest (Riba) is strictly prohibited.

19. A Murabaha in an Islamic Finance context is a partnership whereby one party contributes services and another party capital. A Musharaka is an investment partnership in which profit-sharing terms are agreed in advance and losses are attributable to the sum invested, similar to a joint venture agreement.

[8] Principles extracted from the combined learning of: UK Regulatory Materials Summaries "*What the UK can offer the Islamic finance market"* LNB News 28/10/2014 96; Real Estate Finance: Law, Regulation & Practice > Glossary; Journal of International Banking & Financial Law > 2010 Volume 25 > Issue 6 > Articles > Part 2: Islami; Journal of International Banking & Financial Law > 2011 Volume 26 > Issue 7 > Articles > Murabaha: a new era – (2011) 7 JIBFL 425c finance techniques: the Sunni schools' differing approaches – (2010) 6 JIBFL 368

Issues for the court's resolution

20. There appears to have been no disputing that (i) the claim carries a limitation period of 4 years from the time the right to bring the action accrued; (ii) the time the right to bring the action accrued may be referenced from the date of an acknowledgment but the same cannot revive a claim that was already statute barred; or (iii) the right to bring an action on a running account accrues from the date of the last disbursement.

21. The determination of whether the claim was statute barred thus turned on resolving the dispute as to whether there were singular debts owed to the claimant or a cumulative debt on a running account. That would thus determine when time ought to start running to resolve the issue of whether the claim was statute barred.

22. Bearing in mind that the last disbursement took place in 2007, another important consideration would be whether the claimant could rely on the impugned letter dated 20 July 2010 as an acknowledgment of the debt to extend the limitation period.

23. It is the claimant who must prove the existence of a running account and the acknowledgment of the debt to extend the limitation period. However, the defendant accepted that the sum claimed was disbursed to him and as such, if the claimant can be considered to have proven (i) that the sums were disbursed and (ii) that the claim is not statute barred; it would be for the defendant to prove, as per his defence, that he has repaid the sum claimed.[9]

[9] In line with the usual burden placed on persons in receipt of monies which carried with it and obligation to repay and adopted in the case of ***WH Smith Travel Holdings Ltd v Twentieth Century Fox Home Entertainment Ltd*** [2015] EWCA Civ 1188 where the burden was placed on the party in

Resolution of the Issues

24. There were only two witnesses giving evidence in this matter. That evidence came from Ms. Yvette Peters, Project Manager of the Deposit Insurance Corporation, the court appointed liquidator of the claimant company, and Mr. Salim Baksh, the defendant's Managing Director. Ms. Peters gave evidence that she had no personal knowledge of the events surrounding the claim but that her purpose in giving the witness statement was to produce documents and records that she considered to be relevant to the claim.

Singular debts or running account?

25. Transactions between two parties may be recorded in a running account in a great variety of relationships but it is a characteristic of them all that the parties have expressly or impliedly agreed that the monetary outcome of each transaction shall not be settled separately.[10] A running account between traders is merely another name for an active account running from day to day as opposed to an account where further debits are not contemplated. The essential feature of a running account is that it predicates a continuing relationship of debtor and creditor with an expectation that further debits and credits will be recorded. Ordinarily, a payment, although often matching an earlier debit, is credited against the balance owing in the account. Thus, a running account is contrasted with an account where the expectation is that the next entry will be a credit

receipt of a sum which had been, at least at one time, due and payable, to prove that it was no longer owed in circumstances where it was claimed that the sum had been properly off-set

[10] ibid at para 34

entry that will close the account by recording the payment of the debt or by transferring the debt to the Bad or Doubtful Debt account.[11]

26. Both parties cited the case of ***Ishrack Daniel t/a Daniel's Grocery & Liquor Store v Trinidad and Tobago Defence Force & Anor*** CV2014-00217 wherein Gobin J cited with approval the New Zealand case of ***Timberworld Ltd v Levin (as liquidators of Northside Construction Ltd (in liq)*** [2015] NZCCLR which outlined the following requirements of a running account:

> *"[34] The key features of a running account, drawn from the Australian case law, may be summarised as follows:*
>
> ***(a) A payment is part of a running account where there is a business purpose common to both parties which so connects a payment to subsequent debits as to make it impossible, in a business sense, to pause at any payment and treat it as independent of what follows.***
>
> ***(b) The amount owing to a creditor is likely to fluctuate over time, increasing and decreasing depending on the payment made and the goods or services provided.***
>
> *(c) The effect of a payment depends on whether it is paid (i) simply to discharge a debt then owing to the creditor (including the permanent reduction of the balance of an account that is then owing) or (**ii) as part of a wider transaction which, if carried out to its intended conclusion, would include further dealings giving rise to further amounts owing at the time of payment.***
>
> ***(d) A payment is part of a transaction that includes subsequent dealings even though it may reduce the amount of debt owing at the time of the payment, where it can be shown it is inextricably linked to further credits, and has the predominant purpose of inducing the provision of further supply and it is impossible to treat the immediate effect of the payment as the only effect.***

[11] Ibid at para 35 Lord Justice Kitchin there quoting dicta from the case of ***Airservices Australia v Ferrier and Anor*** (1996) 185 CLR 483

> *(e) The manner or form of keeping account of credits and debits does not determine the effect of the payments. Rather, whether the payments are in fact part of a transaction with an effect distinct from the mere reduction of debt owing to the creditor by the debtor company, drives whether the series of transactions constitute a running account.* ***The courts are concerned with the 'business purpose', the 'business character' and the 'ultimate effect' of the payments, in an objective sense."*** *[Emphasis added]*

27. In the case of ***Timberworld v Levin*** the court was there considering specific legislative provisions relative to New Zealand but the learning is helpful for its definition of a running account which was described as being akin to a series of transactions which are an integral part of a continuous business relationship between the parties.

28. The claimant alleged that it was the practice of the parties under the JVA to regard and treat all sums due to the claimant as a cumulative singular debt arising out of a series of continuous transactions. In particular, it was asserted that the claimant never issued any or any individual invoices or demands based on a single disbursement, neither did the claimant by its conduct refer to any individual sum owing. The defendant denied this assertion and instead gave evidence that:

> *"8. Under the JVA, the Defendant had no account or facility with the Claimant upon which it could directly draw funds. There was no agreement on a credit limit and each transaction was considered on an individual basis. Funds were released once the Claimant was satisfied with the particular transaction and following the sale of each vehicle, the claimant was repaid the sum that it put out to acquire the vehicle and the profit on the transaction was split evenly between the parties."*[12]

29. In support of its assertion, the claimant suggested that the court must look to the record to assist in the determination of whether there was a

[12] See para 8 of the witness statement of Mr. Baksh filed on 4 July 2017

continuing business relationship[13] to support the existence of a running account which is usually characterized, as identified in ***Ishrack Daniel v TTDF*** and ***WH Smith Travel Holdings Limited*** by:

29.1. A consolidated record which reflected what the balance was at any point in time;

29.2. An express or implied agreement between the parties that the monetary outcome of each transaction shall not be settled separately*;*

29.3. Continuous dealings not intended to terminate with one contract; and

29.4. Outstanding items uniting to form one entire demand.

30. In considering those factors, attention was drawn to the following:

30.1. The Statement of Account referred to in paragraph 45 of the witness statement of Yvette Peter and annexed as ”Y.P.39” is a consolidated record of the defendant’s Musharaka Portfolio;

30.2. There were six (6) factors that prove that there was an implied term between the parties that each disbursement would not be settled separately namely:-

30.2.1. ***The terms of the JVA*** - Clause 1.11 does not provide for the defendant to remit monies relative to each disbursement that may have been made by the claimant. Instead, the remittance by the defendant to the claimant was to be made upon the instruction of the IBS Fund Manager and after the defendant had received payment for the vehicles. Thus, there may

[13] ***Airservices Australia*** cited in ***WH Smith Travel Holdings Limited*** at page 10

have been more than one disbursement by the claimant, relative to one inventory, yet the JVA provided for the remittance of monies by the defendant to the claimant at the tail end of the transaction, that is, after receipt of each payment and not after each disbursement.

30.2.2. ***No individual invoices were issued*** - No demand was made for repayment of singular sums disbursed. Ms. Peters gave evidence that nowhere in the claimant's files/records did she see any individual demand(s) for any singular sum(s) disbursed to and/or for and/or on behalf the defendant. Mr. Baksh's evidence is that at no time during the joint venture relationship did the claimant ever issue demands for payment neither did the claimant require that sums disbursed be settled at a certain time. Further, the claimant never withheld further disbursements until monies were received from previous transactions. Despite lulls in business, the claimant never demanded any repayment nor did they transfer the debt to a bad debt account.

30.2.3. ***Under the JVA, the defendant signed no loan agreements or Promissory Notes***;

30.2.4. ***The Statement of Account*** as at 31 January 2009, which gives particulars of Disbursements and Purchases made for and/or on behalf of the defendant and states the Overall Total Musharaka Portfolio as $4,262,782.55 which recorded the receipts retained by the claimant for the sale of vehicles by the defendant. These receipts

were not credited to any individual disbursement but was applied to the cumulative sum to reduce the overall cumulative singular debt owed by the defendant.

30.2.5. ***Letters confirming a cumulative singular sum owed*** - Ms. Peters annexed to her witness statement Y.P.38 – letter dated 25 March 2009 from the claimant to the defendant which made reference to "*Outstanding Balance on CIB-IBS MVP Joint Venture Account in the name of Hassal Enterprises Limited*" and requested that the defendant's Managing Director affix his signature and endorse the company's stamp in confirmation of the balance due on the JVA, that being $4,262,782.54. The letter was signed by Salim Baksh and stamped by the defendant in confirmation of the balance of $4,262,782.54.

Annexed as Y.P.37 was letter dated 20 July 2010 from Salim Baksh to the claimant proposing a schedule for the repayment of the Murabaha & Musharaka facilities and quoting the sum of $4,262,782.54 as being the sum owed to the claimant; and

30.2.6. ***No profit share was paid on each disbursement***

30.3. The defendant's evidence suggests that the parties were continuously transacting and that there was continuous accounting in so much as Mr. Baskh agreed that vehicles were being purchased and sold on a continuous basis with a reconciliation being done to track the total disbursements against the income.

31. As relates the learning from the case of ***Timberworld v Levin***,[14] the claimant's attorney noted that the evidence of Mr. Baksh revealed that:

31.1. The defendant's payments were not for the purpose of discharging a debt, but for the ultimate purpose of realizing profits. Mr. Baksh gave evidence that the relationship of the parties was an agreement for the financing of the vehicles; was different from a normal conventional finance arrangement as it was not a credit facility/loan but a joint partnership for mutual profit; a continuous transaction with the profit share being the overriding factor.

31.2. Each payment was not meant to terminate the transaction but to induce further dealings as Mr. Baksh gave evidence that vehicles were continuously being bought and sold on a continuous, albeit cyclical, basis. The evidence in that regard from Mr. Baksh was that approximately 200-300 vehicles were purchased via the JVA.

31.3. There was no stipulated time for repayment during the relationship, neither were disbursements withheld until payments were made. The evidence is that disbursements were made based on invoices submitted and projections by the defendant. Disbursements would have increased the fund and the amount owing. Whenever payments were remitted, they would have been credited to the account and reduced the balance. At times, the full sums disbursed would not have been received because of a shortfall in projections or Mr. Baksh may not have received the full sums. Due to the continuous nature of the transactions, further

[14] That a running account is characterised by: payments forming part of a business purpose common to both parties which are not to simply discharge a debt; payments forming part of a wider transaction and inextricably linked to further credits; a fluctuation in the amount owing to the creditor

disbursements would have been made, which would again increase the fund.

32. Despite these submissions it was stressed by the defendant that the arrangement between the parties was a joint venture agreement and not a loan agreement. Capital was advanced to finance the venture and the returns on the venture were split between the parties. As such it was contended that the JVA was not a credit facility and lacked the critical features of the existence of a running account which were identified by Professor Goode in his treatise, *Goode: Consumer Law and Practice*, section IC, para 25.22.[15]

33. Particularly, the defendant's attorney noted that there was no direct evidence of the arrangement between parties being a running account as Ms. Peters could give no firsthand, or any evidence for that matter, that the parties had agreed to the account being a running account or any evidence of any such course of dealings.

Analysis

34. The uncontested evidence is that the JVA was the single agreement that governed the relationship of the parties with no amendments having been made as provided for by the agreement. The JVA did not make provisions for the calculation of the profit sharing ratio but the defendant accepted, at paragraph 2 of his defence, that it was governed by the Internal Memorandum from the claimant to the defendant dated 28 October 2005 and included in the bundle annexed as "C.I.B.1.". The defendant's evidence in that regard was inconsistent as his witness statement went on to assert that the ratio was 70/30 at paragraphs 6 and 7 and then 50/50 at

[15] As cited in the case of ***Goshawk Dedicated (No 2) Ltd v Governor and Company of the Bank of Scotland*** [2005] EWHC 2906 (Ch)

paragraph 8. In any event, nothing turned on the profit sharing ratio between the parties but the court noted the inconsistency in the defendant's pleaded case and his evidence.

35. When one looks at the JVA it is clear that the parties did not contemplate the individual repayment of each disbursement but instead the repayment of the cost expended on the purchase of each vehicle. That payment ought to have been coupled with a share of the profit made on each vehicle and not on each disbursement. For that reason the claimant was required to "*compile all the invoices supplied by the defendant for the purchase of such inventory such that the purchase price of each said vehicle could be clearly ascertained*."

36. There could have been no stipulated time for repayment as there was uncertainty in relation to the sale of the vehicles and it was for that reason that the settlement of previously disbursed sums was not a requirement for the joint venture to continue. Rather, the funds being received by the claimant was applied to the outstanding sum owed by the defendant. To have been able to calculate the profit share to which the claimant was entitled there must have been clear records of the costs spent on each vehicle.

37. Each disbursement then was not meant to be settled separately but remittance was based on how much was expended on each vehicle. However, the accounting records presented reflected a cumulative record that showed that the monies received were not credited to any particular disbursement, nor the amount expended per vehicle, but rather was applied to reduce the cumulative debt. In that regard it was noted that the payments received for vehicles were applied generally to the debt, and not specifically to each vehicle, and no remittance was made to the defendant for its share of the profit.

38. The description of the transactions as cycles connotes that the disbursements and remittances were part of a series. Vehicles were continuously being purchased and sold, therefore disbursements were being made on a continuous basis.

39. Each payment was not separate from the transactions that followed, but due to the continuous nature of the JVA, the payments were inextricably linked to further submissions of inventories and further disbursements. Even Mr. Baksh described the relationship as being part of a process.

40. Respectfully, when the court considered the evidence before it the court could not agree with the defendant's submission that the claimant failed to adduce any evidence of a practice of treating the total disbursements as a single transaction. Even though Ms. Peters could not have given any interpretation to the documents she tendered, the evidence in this matter consisted of those documents, the JVA which was an agreed document, and the evidence of the defendant's managing director both in chief and that elicited under cross examination. There is no corroborated evidence of the debt being treated on an individual/separate basis coming from the defendant other than to say, "*The claimant would, in due course, issue funds to purchase that vehicle and when the vehicle was sold, the profit would again be split on a 70%-30% basis between the claimant and the defendant, with the claimant recovering the sum which it had put out to acquire the vehicle."* The defendant however failed to say how that sum would be recovered by the claimant. Further, that explanation cannot be supported in light of the outstanding figure and the defendant's own admission on the letters cited above that the figure outstanding as at the dates of the letters were part of a whole rather than a series of parts.

41. Further, the court's understanding of a running account would suggest that the relationship does not need to be strictly speaking a credit facility.

Instead, in this case, the financial arrangement between the parties was regulated by Islamic banking in a manner which denoted a nontraditional banker/client relationship and more of a business venture with the claimant providing the finance and the defendant providing the know-how. In this case, the defendant was charged with the responsibility of collecting payments on the claimant's behalf when vehicles were sold and remitting it to the claimant to cover disbursements made on the defendant's instruction. There was no evidence to suggest that the vehicles were not sold so, obviously, the purchase monies for these vehicles were collected and retained by the defendant until payment.

42. The court therefore comes to the conclusion that it is more probable than not that the account between the claimant and the defendant was a running account as part of a going business arrangement and concern. All of the circumstances militates against a series of individual loans or transactions as postulated by the defendant. Consequently, the court so holds.

Is the claim statute barred/Validity of letter dated 20 July 2010

43. The last recorded date of a disbursement was 4 January, 2007. The court having found that there existed a running account between the parties, the cause of action would then have accrued as of that date and expired 4 January 2011 pursuant to section 3 of the Act. However, section 12 of the Act provides that the cause of action is to be taken to have accrued from the date of an acknowledgement. Section 13 of the Act goes on to provided that an acknowledgment (i) shall be in writing (ii) signed by the person making the acknowledgment; (iii) may be made by the agent of the person by whom it is required to be made; and (iv) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose debt the payment is made.

44. There are two letters in which the defendant purportedly acknowledges the exact debt claimed by the claimant although reliance is only placed by the claimant on that dated 20 July 2010.

45. The first was dated 25 March 2009. It was not disputed that it was prepared by the claimant. The defendant's evidence in that regard is as follows:

> *"12. Sometime in 2009, one of the Claimant's officers, Mr. Ian Phillip, telephoned me and asked me to sign a letter pledging to repay the Claimant the amount of $4,262,782.54. Mr. Phillip indicated that he needed me to sign such a document as the Claimant had no records of its own.*
>
> *13. I questioned the figure stated to be owed but Mr. Phillip said that he was constrained by time as the Company was being taken over by the Central Bank of Trinidad and Tobago and he could not provide documents to support the figure. Given my relationship with Mr. Phillip, I signed the letter and faxed it to him thinking at some point, a true account of the figure which the Defendant owed to the Claimant would be developed by the two parties after reference to their respective accounts."*

46. As relates the evidence at paragraph 13, a discrepancy was noted in that he stated that he signed and faxed the letter to Mr. Phillip, but under cross examination he stated that he met with Mr. Ian Phillip and signed the letter in his office. Notwithstanding that, Mr. Baksh's further evidence upon being cross examined is that he had no further conversation with Mr. Phillip after signing the 25 March 2009 letter concerning reconciling the accounts and no steps were taken to reconcile the accounts.

47. The second letter, and that relied on by the claimant, was dated 20 July 2010 and unlike the first letter it was prepared by the defendant, carried its letter head and was signed by its obvious, and uncontroverted, agent,

Mr. Baksh. His evidence in that regard is found at paragraphs 14 and 15 of his witness statement:

> *"14. A year later in 2010, after the Central Bank took over the operations of the Claimant I was invited to a meeting with three representatives of the Central Bank. A Mr. Roland Yorke and two others whose named I cannot now recall were present. At the meeting I indicated that the Central Bank was trying to "clean up" the records of the Claimant.*
>
> *15. Mr. Yorke presented me with a spreadsheet of figures which totaled the same figure which I had previously stated were owed to the Claimant in the letter of 2009. I again indicated that the $4,262,782.54 figure was not correct and had to be verified on both sides. When I asked for records which showed what I had paid so far under the JVA Mr. Yorke said that the Central Bank had no records. Mr. Yorke told me to put forward a proposal of how I was going to pay that money back and I sent a copy of a letter to the Claimant stating the Defendant's intention to repay the $4,262,782.54 figure together with another figure which I had been told by Mr. Yorke that the Defendant also owed. I had expected that there would be a follow up meeting between the parties from their respective records. No such meeting, however, ever took place."*

48. The defendant did not dispute that the acknowledgment relied on by the claimant met the statutory requirements.[16] Rather Mr. Baksh admitted to sending the letter of acknowledgment but challenged the amount that was stated. According to Mr. Baksh, he informed both Mr. Phillip and Mr. Yorke that the figure quoted was not correct. Implicit in that submission, the court notes, is an admission that there was an outstanding amount owed.

[16] Or even other common law requirements such as an admission as to the specific amount owed (see ***PCA/Interplan Group (J-V) Limited v Urban Development Corporation of Trinidad and Tobago Limited*** CV00766 of 2005 TT2007 HC 60)

49. An acknowledgment which has been obtained by undue influence is of no effect and cannot be relied on by the creditor.[17] The burden of proving an allegation of undue influence/misrepresentation/fraud rests upon the person who claims to have been wronged.[18]

Analysis

50. Mr. Baksh evidence is that he had records in his possession to prove that the defendant made payments to the claimant in excess of what was indicated as being owed. However, despite that assertion there were no follow-up meetings with Mr. Phillip or Mr. Yorke to rectify what Mr. Baksh says was an error or any attempt made to pass those documents onto those persons. The court admits that it finds that rather peculiar.

51. When the court considers that:

    51.1. The figure claimed, which is no trivial sum, was quoted and accepted on two separate occasions by the defendant;

    51.2. There is no evidence of the defendant's principal disputing the sum as he never took any steps to reconcile the accounts at the time he signed the letter dated 25 March 2009 nor produced to the personnel he mentioned his ledger as evidence to support his claim of repayment;

    51.3. The letter of 20 July 2010 went so far as to give a breakdown of the sources of payment (being four in total) which to the court's mind would have had to be actively, purposefully and positively

[17] See Halsbury's Laws of England Fourth Ed. Vol. 28 para 1084

[18] ***Royal Bank of Scotland plc v. Etridge*** (No.2); Halsbury's (Supra) Vol.31, para.841; ***Moonan v Moonan*** (1963) 7 WIR 420

considered by the defendant in line with the outstanding amount owed to ensure that the sum could be fully covered;

51.4. There is no evidence of a reservation being made in relation to the amount to the effect that it was being queried even on the document prepared by the defendant and neither Mr. Phillip nor Mr. Yorke was called upon to corroborate the defendant's evidence,

51.5. There is no cogent evidence of what was in fact owed;

51.6. There is no evidence of any threats or coercion; and

51.7. There was no evidence of a special relationship with Mr. Phillip and especially not Mr. Yorke so as to infer any faith/trust in them by the defendant;

the court accepted the submissions of the claimant that:

"it is difficult to imagine that a reasonable, prudent businessman would sign a letter admitting liability for a particular sum, when he knows that the said sum is not owed, and especially in a situation where he claims to have documents to prove that the said sum is not owed. Further, it is difficult to accept that after signing a letter admitting liability for the sum, and disputing the sum, that he would write letter explicitly acknowledging the said sum is owed, in spite of purportedly having evidence to the contrary."

52. From his evidence Mr. Baksh knew that Central Bank was in control of the claimant. It was a meeting of serious consequence between a creditor and a debtor to discuss repayment. Taking the gravity of this situation in mind, along with what has already been discussed and the substantial quantum acknowledged, the court is convinced that Mr. Baksh, acting on behalf of the defendant, knew what he was doing and deliberately and consciously,

without any improper coercion or influence, signed the two letters acknowledging the debt and quantum thereof. The acknowledgment signed by Mr. Baksh on behalf of the defendant was therefore valid.

Has the defendant proven that the sum claimed was repaid

53. Having asserted that there sums advanced were paid, the evidential burden of proving that lay with the defendant. The defendant accepted that the sum was disbursed in its pleading at paragraph 2 of its defence. Coupled with that admission and the court's finding that the acknowledgment of 20 July 2010 was valid, the burden then shifted to the defendant to prove that the sum was repaid.

54. There was no positive assertion pleaded that the defendant repaid the outstanding sum in a lump sum but merely that an amount of $4,924,228.41 was repaid over the period 2004-2008. However, the defendant's evidence failed to prove this.

55. Immediately it was noted that the JVA is dated 14 June 2005, and so it was accepted that all of the payments referred to between the period 2004-2008 could not have related to those made to the claimant pursuant to the JVA.

56. In support of the defendant's case reliance was placed on its ledger and bank statements which the court could not rely on for the following reasons:

    56.1. As accepted by Mr. Baksh, the ledger recorded payments to the claimant made prior to the JVA;

    56.2. The ledger recorded alleged payments made to third parties and there is no evidence that the claimant was the beneficiary. No nexus was established. There were sums recorded as payments made by the defendant for freight, purchase of cars from

"Starbright" or to suppliers in Japan, and to "Ryan". Mr. Baksh's evidence in that regard was recorded as follows:

> *"The terms of the joint venture is that they would remit payments on our behalf. Some of the things that you pointed out, the descriptions doesn't necessarily. The descriptions may be what CIB would have done with the money. Remember the joint venture arrangement was a fluid thing. Some of them have no explanations, so what she would have written up here would be. I really can't speak to the specifics, but in my estimation the information there whether its for freight, whether its for Starbright, whether its for Ryan, at the end of the day it was a payment for CIB. So if we paid 100,000 to CIB and they use it to pay for another shipment. Remember it's a cyclical thing its not one off transactions, its continuous transactions."*

There is no evidential basis for an assertion that the monies paid to third parties was for the benefit of the claimant when the JVA and the evidence before the court is that the claimant provided the funds for the purchase of the vehicles under the business arrangement. It may have been made for the claimant with the understanding that it represented a debt owed to the claimant once the claimant disbursed the corresponding sum pursuant to its obligations under the JVA. Mr. Baksh's evidence in that regard was that:

> *"6. Under the initial arrangement, and subsequently under the JVA, whenever the Defendant wished to order stock. A request for funds would be sent to the Claimant, supported by the foreign supplier's invoice. The claimant would, in due course transmit the fund to the suppliers to secure the filling of the order.*
>
> *7. When a vehicle was ordered by a customer, which was not in stock, and which therefore had to be brought in, the*

Defendant would secure an invoice from the supplier for the cost of the vehicle and provide that invoice to the Claimant when requesting funds. The Claimant would, in due course, issue funds to purchase that vehicle…"

56.3. The ledger is not supported or corroborated by any credible evidence in circumstances where Mr. Baksh could not positively give evidence of "*the specifics"* of the payments or what was meant by the notes which followed them. Importantly, the maker of the ledger was not present to verify its truth or accuracy nor to resolve questions and conflicts arising thereon;

56.4. Mr. Baksh indicated that he looked at the ledger for the purpose of reconciling with the statement but as he admitted to the court, there is nothing on the ledger which said it was reconciled and that process was not detailed nor evidenced before the court.;

56.5. The bank statements recorded withdrawals and deposits with no indication of the purpose for the withdrawals.

57. What had to be done was that the defendant had to bridge the gap between the financial records set out in the bank statements and the information recorded in the ledger with sufficient cogency to allow the court to come to a finding on a balance of probabilities. This was not done.

Conclusion

58. The court thus therefore concludes, on a balance of probabilities after considering the evidence and the submissions on both sides, that:

58.1. The sum of $4,262,782.54 was disbursed to the defendant during the period 6 May 2005 to 4 January 2007.

58.2. The dealings between the parties were not meant to terminate with one contract, but meant to be a series of transactions under the Joint Venture Agreement, as opposed to one off transactions requiring separate agreements. It was a continuing business arrangement under a Murabaha/ Musharaka and was not meant to be a series of one-off transactions. The sums were thus disbursed on a running account so that the right to bring the action accrued on 4 January 2007.

58.3. The letter dated 20 July 2010 is a valid acknowledgment of the debt in accordance with the Act. By the same, the time to bring this action was extended to 20 July 2014.

58.4. The claim was initiated on 18 July 2014 and so fell within the statutory period for bringing the claim.

58.5. The defendant has not been able to prove that the sums disbursed were repaid.

58.6. The claimant is thus entitled to succeed on the claim.

Order

59. Consequently, there shall be judgment for the claimant against the defendant.

60. The defendant shall pay to the claimant the sum of TT$4,262,782.54.

61. There will be no order for interest. The parties agreed that the Murabaha/Musharaka facility did not contemplate interest payments of any kind on the disbursements.

62. The defendant will pay to the claimant the prescribed costs of the action quantified by the court to be $215,569.56.

63. By consent there will be a stay of execution until the 7 January 2019.

/s/ D. Rampersad J.

Assisted by Charlene Williams
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Attorney at Law