JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 38/2002

BEFORE: THE HON. MR. JUSTICE HARRISON, P
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	**YVETTE REID**	**1ST APPELLANT**
	MAVIS HENRY	**2ND APPELLANT**
AND	**JAMAICA AGRICULTURAL DEVELOPMENT FOUNDATION**	**RESPONDENT**

Mrs. Marvalyn Taylor Wright instructed by Taylor-Wright & Co., for appellants

Davis Batts & Miss Daniella Gentles instructed by Livingston, Alexander & Levy for respondent

25th, 26th, 27th, 28th April; 10th July & 20th December, 2006

HARRISON, P.

This is an appeal from the judgment of Ellis, J on 14th February 2002 giving judgment for the respondent against the appellants for the payment of a loan balance in the sum of $1,814,669.23 with interest at 20% from 8th July 1999 to 14th February 2002 and costs to be agreed or taxed.

On 10th July 2006 we dismissed this appeal and delivered our oral judgment. These are our written reasons.

The appellants contended that they are not obliged to repay the loan because they were wrongly induced by the respondent to enter into fish farming by the negligent mis-statements of the respondent at an investment seminar and by a fish farming project document issued by the respondent. As a result they suffered damages and loss.

The relevant facts as revealed from the record are, that, in "...late 1991" the 1st appellant Yvette Reid took the decision to go into fish farming after she looked at the Bunting Farm at Hill Run, in "1991 late 1991". She was invited to do so.

She had met previously with Ian Maxwell, technical service director of JADF when she went to his office to seek funding to go into the business of chicken rearing. He suggested that she "look into" fish farming.

The 1st appellant took the decision to purchase the Bunting Farm – she had her own resources to purchase the farm and invest in the farm with JADF financial assistance. She returned to see Maxwell at The Jamaica Aquacultural Development Foundation ("JADF") for a loan to assist in the purchase of the farm in late 1991 to 1992.

In March 1992 the 1st appellant commenced negotiations with Mutual Security Bank to establish her credit worthiness – with a view to purchasing the

said fish farm at Hill Run. In a letter from Mutual Security Bank dated 26th March 1992, to JADF, the writer said:

> "... Re: Yvette Reid
>
> We have been requested by the captioned client to advise you as follows:
> Ms. Yvette Reid commenced banking relations with us in July 1986 by way of a current account which have been operated in a satisfactory manner.
>
> She has availed herself of our credit facilities and payments have been made as arranged. We consider her trustworthy and a reliable individual who would not commit herself beyond her capacity to fulfill, and recommend her to your services."

In February to March 1992, Rohan Miller, venture capital officer JADF, interviewed the 1st appellant in respect of her application for a loan.

On 23rd June 1992 John Carberry of Aquaculture Jamaica Limited wrote a letter "To whom it may concern" –

> "Over the past year, Aquaculture Jamaica Limited has embarked on a programme of Contract Fish Farming. Currently, Mr. Donnovan Bunting, owner of St. John's Fish Farm, of Hill Run, St. Catherine, is operating his farm under the contract since December 1991.
>
> Mrs. Yvetter Reid has expressed her interest in purchasing Mr. Bunting's farm and a desire to maintain the contract with Aquaculture Jamaica Limited. Should Mrs. Reid be successful in obtaining the farm, Aquaculture Jamaica Ltd. would be willing to maintain the contract, providing the guidelines governing the operation of the farm are maintained."

On 14th July 1992 a pre-investment workshop/seminar hosted by the respondent was attended by 1st appellant. Maxwell presented a paper "Aquaculture as an investment opportunity."

In October, 1992 Rohan Miller – JADF's officer, prepared a project document, which was given to the 1st appellant as a guide for the project.

On 16th October 1992 David DeLisser and Associates Ltd, real estate agents and valuators, issued an appraisal report in respect of the farm at Hill Run, St. Catherine, on the instructions of the 1st appellant.

On 16th October 1992 the appellants entered into an agreement with the respondent -

(a) for sale of the fish farm at Hill Run with vendor Phillip Bunting
(b) for the sale of chattels including "24,360 kilos fish (by estimation only.)"

In November 1992, the project document prepared by Rohan Miller was presented to the Board of the respondent at a board meeting.

On 25th January 1993 the appellants entered into a loan agreement with the respondent and received a loan of $2,300,000.00 to assist in the purchase of the said farm and equipment for fresh water fish production.

The project document had advised that in order to make the production viable, the ponds should have been stocked according to a specific schedule, a number of aerators were required, experienced workers should be retained and the fish when harvested should be sold in the ratio of 50% on the pond side

and 50% to Jamaica Broilers. The appellants failed to follow the advice contained in the project document.

The appellants defaulted in their repayment of the loan and as a consequence, the respondent sued for the balance owing.

Ellis, J. found in favour of the respondent resulting in this appeal.

The grounds of appeal are:

1. The Learned Trial Judge erred as a matter of law when he found that the Respondent, in the circumstances of this case was not negligent in the advice it gave to the Appellants in relation to the operation of the fish farm.

2. The Learned Trial Judge erred in fact and law when he found that the project document prepared by the Respondent contained no negligent mis-statement and did not induce the first Appellant to enter into fish farming.

3. The Learned Trial Judge erred as a matter of law when he found that the first Appellant's loss in her fish farming operation was not consequential on any negligent/false statement/inaccurate technical information, contained in the project document prepared by the Respondent.

4. The Learned Trial Judge erred as a matter of law and fact when he found that there was an agreement between the Appellants and the Respondent for the capitalization of loans and interest and further failed to address the Respondent's claim for an account.

5. The findings of fact by the Learned Trial Judge are unreasonable and inconsistent with the evidence tendered at trial.

6. The Learned Trial Judge erred as a matter of law when he failed to have regard to the pre-investment workshop on Aquaculture as a factor that induced the first Appellant to enter into fish farming.

7. The learned Trial Judge erred as a matter of law when he failed to consider whether the first Appellant was negligently induced into entering and concluding the loan agreement with the Respondent."

Mrs. Taylor Wright for the appellant argued that the respondent held itself out to the appellants as having expertise in the area of fish farming and agribusiness financing and prepared project documents and gave such documents, containing negligent misstatement and misrepresentations and advice to the appellants. The respondent well knew that it was a high risk project and that the appellants were inexperienced. The appellants were induced by the respondent to take up the loan well-knowing that the project would fail, which it did and that the appellants would be unable to service the loan. The sale arrangement of the fish of 50% to Jamaica Aquaculture Ltd and 50% through pond bank sales, in order to obtain a viable price on sale as stated by the respondent, was false. The appellants were obliged to purchase fingerlings from and to sell 100% of the fish harvested to Jamaica Aquaculture Ltd, as contract farmers. This arose by the principle of novation.

The appellants expended "... equity ... more than $2,502,000.00" which they lost due to the respondent's negligence.

The sale agreement was dependent on the loan agreement and both must be read and construed along with the project document. There was no agreement as to capitalization of interest. The new loan thereby arising was never the subject of agreement between the parties; its terms were uncertain and therefore are enforceable. The appeal should be allowed.

Mr. Batts for the respondent submitted that the learned trial judge was correct to find that the statements in the project documents were accurate and not negligent. Rodney, the director of the Aquaculture branch of the Ministry of Agriculture in giving expert evidence stated that the project document did not differ from Dr. Fred Hanley's book "guide to Telapia farming" in respect of the key operating perameters. A shared contract of 50% /50% was possible and not unusual. The first appellant agreed that she did not follow the project document in the operation of the farm in respect of the mode of marketing or good husbandry. The project failed because, instead of selling 50% to Jamaica Aquaculture and 50% on the pond side where better prices are available, she chose to sell 100% of the fish to Jamaica Aquaculture. Neither the pre-investment workshop on 14th July 1992 nor the project document completed in October 1992, could have induced the appellants to enter into fish farming, because from late 1991/92 the first appellant had decided to buy the Bunting fish farm which was then a successfully run farm.

The learned trial Judge was correct to find that the loss to the appellant was not caused by any negligent statements in the project document, but

instead it was the fault of the appellants, by not acting as directed by the project document. It was a term of the loan agreement dated 25th January 1993 and also as contained in a letter dated 2nd December 1992 from the respondent to the appellants and signed by them, that the loan would be capitalized. The learned trial judge was therefore entitled to find this point in favour of the respondent. The appeal should be dismissed.

In our view the the learned trial judge was correct to find that the appellants were not induced by the respondent to enter into fish farming. The appellants had taken the decision from as far back as "late 1991" to purchase the fish farm of Bunting at Hill Run. That decision was prior to the workshop/seminar which was held in July 1992 and prior to the project document, prepared for the respondent's board, in October 1992.

The respondent was not negligent in the advice it gave to the appellants. The recommendation, in the project document that the appellants sell 50% of the harvested fish to Aquaculture and 50% as pond bank sales, was not followed by the appellants. If they had, they would have had a higher sale price from the pond bank sales to supplement the lower price from the sale to Aquaculture.

The sale of 100% fish by the appellants to Aquaculture, at an expected lower price than the pond bank sales, was an early contributory factor to the appellants' loss. There were other factors.

The appellants had no contractual obligation as they claimed to sell the harvested fish to Aquaculture. The appellants had bought and paid for the fish "24,300 kilos" from Bunting. Bunting was liable to Aquaculture on his contract with them; the appellants were not. No principle of novation arose, as claimed by the appellants.

The appellants were not obliged to take fingerlings from Aquaculture. The 1st appellant was aware of this. She expressed her intention to purchase fingerlings elsewhere.

No principle of novation existed to make the appellants contractually bound to take fingerlings from Aquaculture. Bunting had a contract with Aquaculture previously, independent of the appellants. Bunting and the appellants and Aquaculture were never parties to any contract, together, in order to give rise to the principle of novation. The authors of Law of Contract by Cheshire Fifoot & Furmston's, 11th edition (1986) defining novation, at page 509, said:

> "Novation, therefore, is the only method by which the original obligator can be effectively replaced by another. A, B and C must make a new contract by which in consideration of A releasing B from his obligation, C agrees that he will assume responsibility for its performance."

Novation can only arise if all three consent and agree to the release of the original debtor. See also, Chitty on Contract, 27th edition (1994), paragraph 19-050, where it was said, of novation:

> "There is no doubt that with the consent of both contracting parties all contracts of any kind may be transferred, and the term 'novation' has been introduced from Roman law to describe this species of transfer. Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained in this necessity for consent lies the most important difference between novation and assignment.

The first appellant failed to retain qualified and experienced staff which she was advised to do.

In addition, the absence of the provision of the several aerators, as recommended in the project document, only one aerator was being used by the appellants, made the ponds less functionally viable.

There was a distinct agreement between the parties for the capitalization of the loan interest as evidenced both by the letter of 2nd December 1992 and the loan agreement dated 25th January 1993.

Accordingly for the above reasons, the learned trial judge was correct in his findings, on the evidence that the respondent was not negligent and therefore not liable for the losses incurred by the appellants. The appellants were the authors of their own failure.

The appeal is dismissed with costs to the respondent to be agreed or taxed.

SMITH, J.A.

I agree.

McCALLA, J. A.

I agree.

HARRISON, P.

ORDER

The appeal is dismissed with costs to the respondent to be agreed or taxed