COMMISSION OF ENQUIRY INTO THE COLLAPSE OF FINANCIAL INSTITUTIONS IN JAMAICA IN THE 1990s

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Jamaican Redevelopment Foundation Inc.'s

Submissions on Legal Issues

Prepared & Submitted by
Myers, Fletcher & Gordon
Attorneys-at-law for Jamaican Redevelopment Foundation, Inc.

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1. Jurisdiction of the Commission

1.1 The Terms of Reference of the Commission of Enquiry into the Collapse of Financial Institutions in the 1990s (the Commission) took effect on January 12, 2009. It was not until dated May 28, 2009 that Jamaican Redevelopment Foundation, Inc. ("JRF") was formally informed of the Terms of Reference and provided with a copy by the Secretary. This was four days after it was published in the Sunday Gleaner.

1.2 In the Secretary's letter to JRF it was requested to provide the Commission with certain documents and information which, in JRF's opinion, may be of assistance to the Commissioners.

1.3 The paragraphs of the Terms of Reference that affect JRF the most are items (5) and (6) which speak to the sale of non-performing loans to JRF and the treatment of delinquent borrowers and the management, sale and/ or disposal of delinquent borrowers' assets.

1.4 The Commission has been asked to examine the practices of JRF, although JRF is a private corporation incorporated in the United States of America and registered under Part X of the Jamaican Companies Act. JRF does not fall within the categories listed in Section 2 of the Commissions of Enquiry Act for it to be the subject of an enquiry under that Act.

1.5 Although this fact has been brought to the attention of the Secretary to the Commission,[1] neither JRF nor its attorneys have as yet received a response on this issue. At a meeting held on July 1, 2009, then chairman of the Commission, Hon. Boyd Carey unofficially informed JRF and its

[1] See letter from Myers, Fletcher & Gordon ("MFG"), attorneys-at-law for JRF, dated June 8, 2009 addressed to the Secretary of the Commission

attorneys that it was of the view that JRF could be the subject of an enquiry because the enquiry relates to a matter in the public interest and that "sweeps [JRF] in". JRF disagrees with that interpretation. The Commission has the jurisdiction to enquire into bodies described in section 2 of The Commissions of Enquiry Act or into "any matter in which an enquiry would in the opinion of the Governor-General, be for the public welfare". JRF is neither a body that is mentioned in the Act, nor is it a "matter" into which an enquiry can be held. JRF maintains that this Commission lacks the statutory jurisdiction to enquire into its conduct or management.

1.6 In any event, as JRF is directly affected by the Terms of Reference it has voluntarily participated with the Commission's hearings. However, this voluntary participation is not a waiver of JRF's position on the Commission's jurisdiction.

1.7 On June 26, 2009, less than a month after being informed of the Terms of Reference, JRF submitted a statement to assist the Commission. Under cover of letter dated July 3, 2009, Myers, Fletcher & Gordon sent to the Secretary of the Commission copies of all of the documents in its possession that were requested, or alternatively advised it where copies could be accessed. Accompanying that letter was a data drive that contained a complete list of loans sold to IAS by JRF (with balances on date of sale) and a complete list of all loans sold to JRF by Finsac. Mr DePeralto signed in receipt of the letter and its enclosures on July 6, 2009 and by letter dated August 19, 2009, Mr DePeralto wrote to JRF thanking it for the submission and the information provided.

1.8 JRF has therefore been completely cooperative with the Commission and has met all of its timelines.

2. The legal rights in the Non-Performing Loan Portfolio acquired by JRF

2.1 Loans and their underlying security documents are assets, which may be bought and sold like any other asset. Loan agreements, like any other contract, express the contractual obligations that each party to the agreement owes to the other and will provide the circumstances in which another party may step into the shoes of an original contracting party and become entitled to all the rights that its predecessor in title enjoyed.

2.2 By way of an Agreement for Sale and Purchase of Assets, together with a Deed of Assignment dated 30th January 2002, copies of which have been provided to the Commission and entered into evidence, Financial Institutions Services Ltd, Workers Savings & Loan Bank and Refin Trust Limited assigned all right title and interest of the legacy banks in the loans the subject of Exhibit A of the Agreement to JRF.

2.3 Under the Agreement, what was sold to JRF was "*the aggregate amount in respect of principal, interest, insurance premiums, fees, charges, costs, damages, and any other sums of whatever nature owing from time to time by the relevant borrower or any Security Party (eg a Guarantor) to the Seller*". In paragraph 2 of the Deed of Assignemnt, the Seller (Financial Institutions Services Ltd, Workers Savings & Loan Bank and Refin Trust Limited) assigned all of its "rights, title and interest in and to all the Assets described in Exhibit A attached hereto and all interest and other monies (if any) now due and subsequently to become due in respect of such Assets TO HOLD same unto the Purchaser absolutely."

2.4 This Deed of Assignment has been duly registered on the certificates of title to the properties owned (or formerly owned) by the delinquent borrowers who have testified at this Commission.

2.5 JRF therefore has the right to collect what it has acquired, namely, all amounts due under the loans assigned to it by those institutions, which includes principal and interest.

2.6 Numerous challenges to the assignment have been made in the Supreme Court and Court of Appeal. Not one has succeeded. In **Michael Levy v Jamaican Redevelopment Foundation Inc & Kenneth Tomlinson**[2] , Mr Levy argued, unsuccessfully, that JRF was neither an assignee nor a legal successor in title to any sum which Mr Levy owed to Eagle Commercial Bank and Citizens Bank. The Court of Appeal (per Cooke, JA) said that all of Mr Levy's allegations were met by documentary evidence produced on behalf of JRF, which evidence included the Deed of Assignment.

3. Whether JRF is obliged to prepare detailed account histories

3.1 JRF has always been responsive to requests for statements of account from delinquent borrowers. However, this does not mean that JRF is, or has ever been, under any legal obligation to provide these statements of accounts. There is no Jamaican law that requires JRF to prepare detailed statements of loan accounts containing the history of all transactions on the account since the inception of the loan. Assignments operate to transfer the benefits/assets of a contract, not the obligations/liabilities.[3] So even if the banks had a contractual obligation to give debtors account statements, that obligation did not pass to JRF in law on the assignment of the debt. To transfer an obligation, a special type of agreement, called a "novation" is required, and there is none here. The relationship between creditor and debtor is not a fiduciary relationship that brings with it accounting responsibilities. It is an ordinary relationship of debtor and

[2] SCCA 26 of 2008 (unreported)
[3] In fact the agreement is entitled "Agreement for Sale and Purchase of Assets"

creditor.[4] Notwithstanding all of that, the evidence shows several instances of JRF voluntarily providing statements to debtors with the objective of showing the account history and hopefully arriving at reasonable arrangements for servicing of the account and ultimately, settlement.

3.2 There are numerous exhibits which show that JRF (i) wrote to delinquent borrowers to advise them of the status of their accounts, including the amount of principal and interest owed within months of acquiring the accounts; (ii) complied with requests for more detailed statements of account showing how the balances were arrived at, including information prior to the acquisition of the account by JRF; (iii) provided copies of loan and security documentation when requested by borrowers or their attorneys-at-law and (iv) carried out investigations, when requested by borrowers, to confirm the accuracy of accounting information received from Refin Trust Ltd, Financial Institutions Services Ltd or Workers Savings & Loan Bank.

3.3 In some cases where borrowers have complained that they did not receive statements of account, it has been shown that the statements were sent to their attorneys-at-law who (apparently) did not pass on the statements to their clients (see for example the testimony of Anthony Hutchinson) or to the primary debtors who did not pass on the statements to their guarantors (see for example the testimony of Vera Donaldson). Then there are cases where the complainant at this Enquiry testified that he or she did not receive a statement of account but the statement was, on the evidence, demonstrated to be untrue, as for instance, when the evidence of court proceedings adduced by them showed the statement of account as an exhibit.

[4] **National Commercial Bank (Jamaica) Ltd** v **Hew** [2003] UKPC 51

3.4 It is legally incorrect to say that JRF, as the successor of the legacy banks under the loan agreements, has an obligation to prove the amount of the debt before it can demand payment or realise the security pledged. The applicable legal principle is that any entry in a banker's book (defined broadly in case law to include records) is prima facie evidence of the existence of the debt.[5] It is for the person disputing the debt to produce evidence to show that the entry is inaccurate.

3.5 Debts that are secured by mortgages are, for reasons of macro-economic stability, enforceable without the necessity for the creditor to resort to court proceedings. In that regard, the law dictates that a debtor who wishes to temporarily restrain a creditor from exercising its power of sale pending trial must "invariably" pay into Court the amount demanded by the creditor to be due, as a pre-condition of any injunction pending trial.

3.6 The rationale for imposing these conditions was accepted by the Court of Appeal in the case of **SSI (Cayman) Ltd et al** v **International Marbella Club S.A**. In handing down its judgment, the Court of Appeal adopted the following passage:

> "If the debt has not been actually paid, the court will not at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except on terms that an equivalent safeguard is provided to him by means of the plaintiff bringing in an amount sufficient to what is claimed by the mortgagee to be due.
>
> The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of these claim had been completed."

[5] See the Evidence Act, s. 3; Shareif v NCB

3.7 The Court (per Downer, JA) recognized that in competing claims between the owner of the property and the mortgagee, the mortgagee must have priority. Mr Justice Downer went on to say that "such a condition is essential to be just to the mortgagee".

3.8 A significant number of the debts owed to JRF are secured by mortgages. The evidence shows that the debtors who complained to the Commission about JRF all had property mortgaged to JRF. Once JRF acts in compliance with the law it cannot be said to be engaging in unfair treatment of borrowers because the law is presumed to be fair and reasonable.

4. Whether JRF's interest in the Non-Performing Loan Portfolio is affected by any accounting errors made by its predecessors in title

4.1 Errol Campbell gave evidence that in some cases, errors were found in the statements of account that were prepared on certain delinquent borrower's accounts. He testified that where investigations were done and it was shown that errors had been made, those errors were corrected. In cases where these errors were detected before the sale to JRF, then JRF would only have acquired the right to collect the amounts (as corrected) together with interest and fees.

4.2 There is no evidence of the discovery of errors in the statements of account from legacy institutions or FINSAC *after* the date of the sale to JRF. If there were, those errors would not in any way void the sale of the receivable to JRF, as those errors do not present any defect in the legal interest and title that JRF acquired.

4.3 If an error had been found, there would first need to be an examination of the terms of the contract that existed between the legacy bank and the delinquent borrower. In many cases, a borrower is contractually required to challenge errors in a statement of account within a prescribed period of time, usually between 30 and 60 days of receipt of the statement of account. If there was no such challenge, the statement of account may be binding as between borrower and bank, and consequently as between borrower and JRF.

5. JRF's right to collect interest at the rates agreed with its predecessors in title

5.1 JRF has a contractual right, pursuant to the Agreement for Sale and Purchase of Assets and the Deed of Assignment, to collect interest that borrowers agreed to pay to the institutions which granted the loans. In order to ensure that JRF had the same rights that those institutions had, loans acquired by JRF were exempted from the provisions of the Money Lending Act. Much has been made of this exemption, particularly, by counsel representing Milton Baker, Bentley Rose and Michael Levy.

5.2 It is important to be aware of certain key provisions of the Money Lending Act to put these complaints into their proper context.

5.3 Firstly, the Money Lending Act does not apply to loans made to companies.[6] Thus, Ancar Developments Limited, Benros Finance Company Limited, Macro Finance Company Limited and other institutional borrowers ought not to seek to impugn their contractual obligations based on the Money Lending Act. The Money Lending Act was always intended to protect unsophisticated investors, not corporations.

[6] S. 13(1) (f) of the Money Lending Act

5.4 Secondly, the Money Lending Act does not apply to loans where the interest rate is less than or equal to 25% per annum.[7] Further, the Money Lending Act stipulates that a rate of interest that is equal to or less than 40% will not be presumed to be excessive by the Court.[8] Jason Rudd has given evidence that JRF generally seeks to recover interest at the rate of 25%-30% on Jamaican dollar debts. Thus, the argument that delinquent borrowers would be in a better position if JRF had not been exempted from the Money Lending Act is wholly devoid of merit.

5.5 Contrary to the assertions of counsel representing Bentley Rose and Michael Levy, neither the Bank of Jamaica nor the Ministry of Finance has, since liberalization, directly or indirectly regulated interest rates that banks and other financial institutions may charge. Interest rates charged by financial institutions are kept in check by market forces. A borrower is always able to refinance his debt obligations if he believes that he can get a more advantageous interest rate elsewhere. The evidence given at this Enquiry shows that several debtors negotiated a compromise with JRF with the view of having another financial institution pay a lump sum to JRF and thereby take over the loan.[9] It was not JRF's policy to insist that the loan should stay with it in order for the borrower to benefit from a compromised settlement of its debt with JRF.

5.6 It is clear that the borrowers who seek to rely on the provisions of the Money Lending Act are motivated by a desire to escape the repayment of their debts on terms that they voluntarily agreed to. The Supreme Court has ruled that they will not be allowed to do so.[10]

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[7] S. 13(1) (i) of the Money Lending Act; Moneylending (Prescribed Rates of Interest) Order, 1997
[8] S. 3(1) of the Money Lending Act; Moneylending (Prescribed Rates of Interest) Order, 1997
[9] See testimony of Albert Jonas, for example.
[10] **Jamaica Beach Park Limited & Finzi** v **Jamaican Redevelopment Foundation, Inc. & Tomlinson** 2005 HCV 01319

5.7 In the case of Michael Levy, he attempted to use testimony obtained at this Enquiry to advance his challenge in the Supreme Court of the exemptions that affect JRF. The Supreme Court dismissed his claim on October 14, 2011. In so doing, Williams, J. said:

> *"[Michael Levy] had agreed to that rate with the banks from which he had secured the loan and ought to have recognized that any entity which acquired the loan would continue it on the same terms.*
> *The only way J.R.F. could have totally stepped into the shoes of the legacy bank was if they could have secured the same protections liabilities and benefits guaranteed to that bank."*[11]

5.8 Mr Levy's claim was ultimately dismissed by the Supreme Court because of his more than 6 year delay in commencing proceedings.[12] If the Supreme Court has found that a challenge to the exemption in respect of loans acquired by JRF was brought too late in 2008, then this Enquiry ought to accept that position as this Commission has stated that it is bound to accept final (as opposed to interlocutory) decisions of the Supreme Court, Court of Appeal and Privy Council.

6. JRF's compliance with law as it relates to the exercise of its power of sale over delinquent borrower's assets

6.1 There has been no evidence produced at the Enquiry to show that JRF has breached local law as it relates to the sale of the assets of a delinquent borrower.

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[11] **Michael Levy** v **The Attorney General & Jamaican Redevelopment Foundation Inc** 2008 HCV 3638 (Judgment handed down October 6, 2011 – unreported)
[12] See copy of formal judgment attached

6.2 As a matter of policy, valuations prepared within 6 months of the sale of the property are obtained, and JRF commonly obtains a higher sale price than the market value as indicated by the valuation.[13]

6.3 JRF never rushed to sell a delinquent borrower's property although it would have acquired the right to exercise its power of sale over delinquent borrowers' properties immediately upon acquisition of the non-performing loan portfolio. Subject to a term in the mortgage instrument to the contrary, a mortgagor may proceed to exercise its power of sale after giving one month's notice to the borrower that the loan has been in arrears for at least one month.[14] If the mortgage instrument provides for a shorter period of notice, or no notice, then that would be valid.[15] In many cases, JRF would have acquired the non-performing loan after any required notices would have already been sent out. JRF could therefore have lawfully sold these properties immediately and without any reference whatsoever to borrowers, but there is no evidence of them having done so. On the contrary, the evidence shows JRF's re-issuing of statutory notices to have been par for the course.

7. Whether JRF's policies were applied fairly and indiscriminately

7.1 No evidence has emerged which could even suggest that JRF has been influenced by improper considerations in the exercise of its discretion where compromises are concerned. As said by Mr Cobham, "JRF made some very considered compromises". Mr Jonas, too, was complimentary.

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[13] As in the case of Vera Donaldson

[14] Ss. 105 & 106 of the Registration of Titles Act

[15] **Diane Jobson** v **Capital and Credit Merchant Bank Limited and Ronald Taylor** Privy Council Appeal No. 52 of 2006

7.2 These compromises were not afforded to persons based on class, colour or political affiliation but were assessed based on JRF's view of the borrower's willingness and ability to honour his responsibilities. There was no "one size fits all" approach to settlement. Mr Rudd listed several factors that were taken into consideration in JRF's determination of how much of the outstanding debt would be forgiven. These factors included the percentage of the debt that represented accrued interest, the borrower's repayment history from the inception of the loan, their resources, credit-worthiness and attitude towards settlement. These are the factors that continue to influence all settlement decisions, including ongoing negotiations with borrowers who have complained against JRF at this Enquiry. No borrower has been penalized or incentivized for testifying at the Commission whether against or in favour of JRF.

8. The Window of Opportunity voluntarily offered by JRF

8.1 After the purchase of the non-performing loan portfolio, JRF granted a request from the Seller that it would implement a special arrangement for individual debtors with balances of $5M or under whose owner-occupied residences had been used as security for the debt. These accounts represented more than 93% of the portfolio. It was not a term of the sale. It was a request made, to which JRF acceded, notwithstanding that it involved the voluntary surrender of rights it had acquired for value. There was nothing in it for JRF. Its granting of the request was purely altruistic.

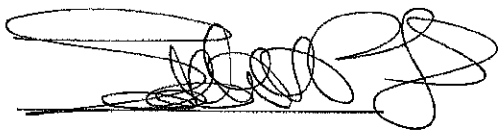
8.2 The terms of this special arrangement were immediately made public by the Government. JRF was never asked to publicize these terms and it did not accept any responsibility so to do. JRF did what was required of it by law, in that it advised delinquent borrowers in writing that it had acquired

their loans and invited them to make contact with JRF as soon as possible to make arrangements for the loans to be serviced. This is consistent with the well-established legal principle that it is a debtor's duty to seek out his creditor and not *vice versa*. Qualifying Borrowers who responded to JRF's letter within the period of the 'Window of Opportunity' would have been advised of the arrangement. Although Mr Rudd wasn't able to give a precise figure, based on how JRF's systems are set up, he testified that at least 88 persons did benefit from the 'Window of Opportunity'.[16] He also testified that other borrowers, who did not qualify for that special program, were nonetheless able to negotiate favourable settlement terms.

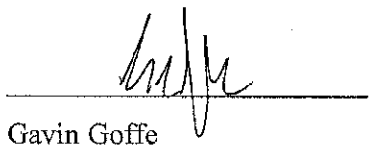
9. CONCLUSION

9.1 JRF acquired over 23,000 non-performing loan accounts. As said by the Hon. Mr Justice Sykes, it assumed the "herculean task of trying to collect debts from defaulting borrowers."[17] Thousands of accounts have been resolved without complaint. At least 88 were settled with a 100% write-off of interest and only 80% of principal being paid. Fewer than 10 borrowers have come forward to complain about JRF. We submit that there could be no basis for any finding of unfair treatment.

October 20, 2011



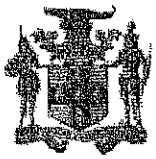
Sandra Minott-Phillips



Gavin Goffe

[16] Transcript of June 21, 2011

[17] See **Jamaica Beach Park Ltd & Finzi** v **Jamaican Redevelopment Foundation, Inc. & Tomlinson**



JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 03638

BETWEEN	**MICHAEL LEVY**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL**	**DEFENDANT**
AND	**JAMAICAN REDEVELOPMENT FOUNDATION, INC.**	**PARTY DIRECTLY AFFECTED**

IN OPEN COURT
BEFORE THE HON MISS JUSTICE P.A. WILLIAMS
THE 5th, 6th, 7th DAYS OF MAY, THE 14th & 15th DAYS OF JUNE, THE 6TH DAY OF JULY, 2010 AND THE 6TH, 11TH & 14th DAYS OF OCTOBER, 2011

UPON THE FIXED DATE CLAIM FORM dated November 25, 2008, and the Party Directly Affected's Application for Court Orders dated December 3, 2009, coming up for hearing on these days and after hearing Mr. Raphael Codlin & Ms. Melissa Cunningham instructed by Raphael Codlin & Co. for the Claimant, Mr. Lackston Robinson and Ms Alicia McIntosh instructed by the Director of State Proceedings for the Defendant and Mrs. Sandra Minott-Phillips & Mr. Gavin Goffe instructed by Myers, Fletcher & Gordon for the Party Directly Affected, Jamaican Redevelopment Foundation, Inc., **IT IS HEREBY ORDERED AND ADJUDGED THAT:-**

1. The Claimant's application by Fixed Date Claim Form for an order of certiorari quashing the orders of the Minister dating from 2001 to 2008 exempting Jamaican Redevelopment Foundation, Inc. from the provisions of the Moneylending Act and for a declaration that the said orders are ultra vires and null and void, and for damages, costs and such further and other relief and the Court sees fit, is dismissed;

2008 HCV 03638

2. No order as to costs;

3. Leave to appeal on the issue of costs granted to the Party Directly Affected;

4. The Attorneys-at-law for the Party Directly Affected are granted permission to prepare, file and serve this Judgment.

BY THE COURT

JUDGE

JUDGEMENT BINDER: 752 **FOLIO:** 386

EXTRACTED BY MYERS, FLETCHER & GORDON, of 21 East Street Kingston, Attorneys-at-law for and on behalf of the Party Directly Affected whose address for service is that of its said Attorneys-at-law per: Mrs Sandra Minott-Phillips(Attorney No. 2626)/Mr Gavin Goffe, (Attorney No. 3805), telephone 922-5860 ext. 2534/2503; fax 922-4811/8781.