[2019] JMCC Comm 10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISON

CLAIM NO. 2017CD00222

BETWEEN	**BLONDEL CHUE**	**CLAIMANT**
AND	**MELAN INVESTMENT COMPANY LIMITED**	**1ST DEFENDANT**
AND	**SANDRA CHUNG (Executrix of the Estate of Melvin Chung, Deceased)**	**2ND DEFENDANT**

Ms Tavia Dunn and Ms Gabrielle Warren instructed by Nunes, Scholefied, DeLeon & Co., Attorneys-at-Law for the Claimant

Mr Patrick Thompson, Ms Shanece Fletcher and Ms Bridgette Townsend instructed by Patrick D Thompson & Co Attorneys-at-Law for the Defendant

Heard: 25th March and 4th April 2019

Contract – Novation- Whether there was consent of the parties

LAING, J

Background

[1] The 1st Defendant, Melan Investment Company Limited, is a limited liability company duly incorporated under the laws of Jamaica ("the Company") and was at all material times engaged in the business of investments.

[2] The 2nd Defendant, Sandra Chung, was the wife of and is the Executrix of the Estate of Melvin Chung, deceased. Melvin Chung, deceased, was the Managing Director and a shareholder of the Company. There were also three other directors namely Lloyd Chung the father of Melvin Chung, as well as Mark Chung and Lloyd Chung, brothers of Melvin Chung, deceased.

[3] The Claimant invested various sums with the Company and received a return on her investments. This claim concerns the Claimant's investment numbered 22226, for which she received a deposit certificate, and which the Company confirmed to the Claimant by letter dated 21st March 2011 as having a principal balance in the sum of $12,000,000.00. Interest was payable at the rate of 14% per annum and was payable monthly on the 19th of each month.

[4] On 5th January 2013 Melvin Chung died and by letter dated 9th January 2013, the 1st Defendant advised the Claimant of Mr Chung's death and sought to reassure her that Mrs Sandra Chung, his wife was now leading the operation and had taken full control, as well as the responsibilities and duties of the deceased Melvin Chung.

[5] By letter dated 19th August 2014 the Claimant was advised by the Company that her principal sum with the Company stood at $12,000,000.00 and that interest was payable at the rate of 10% per annum payable on the 19th of each month. The Claimant received her monthly interest payments as per the agreement with the 1st Defendant until August 2015 when the payments ceased. The Claimant consulted the 2nd Defendant and subsequently received a letter addressed to her dated 15th September 2015 from the law firm of Hart Muirhead & Fatta ("the 15th September Letter"), which the Claimant says she understood to mean that steps would be taken by the 2nd Defendant, in her capacity as executrix of the estate of Melvin Chung, to pay the Claimant the sums due and owing to her by virtue of her investment with the 1st Defendant. The meaning of the 15th September Letter will be explored in greater detail in the body of this judgment.

The Claim

[6] The Claimant has not received the principal sum of $12,000,000.00 or the interest accruing thereon since 19th September 2015 and has claimed against the Defendants jointly and severally to recover these sums. The Claim Form and

Particulars of Claim were filed on 10th April 2017, and at the Case Management Conference on 5th July 2018, the Company not having filed a defence, Batts J granted permission to the Claimant to apply for judgment in default against it, "*if so advised*". On 10th October 2018, judgment in default of defence was entered for the Claimant against the Company for the payment of $15,510,483.15.

The Claim against the 2nd Defendant

[7] Mr Thompson, Counsel for the Defendants anticipated that the trial would have involved the Claimant attempting to lift the corporate veil of the 1st Defendant in order to expose the 2nd Defendant to liability and Counsel provided the Court with preliminary skeleton submissions on that point. However, the Claim against the 2nd Defendant was founded and pursued entirely on the theory that the principle of novation is applicable to the facts. Novation is defined in Halsbury's Laws of England/Contract, Volume 22 (2012)/8 at paragraph 598 as follows::

> *Novation occurs where one contract is substituted with another, either between the same parties or different parties, the consideration usually being the discharge of the old contract. However, where the 'new' contract modifies the old contract between the same parties, this has come to be termed a variation; and the expression 'novation' has more recently tended to be used rather for the situation where the acts to be performed under the old contract remain the same, but are to be performed by different parties. Hence, novation requires a subsequent binding contract4 and the consent of all parties. Where the new party takes over liabilities formerly resting on one of the original parties, it is a question of construction whether he takes them over with or without benefit of time which has run under the statutory rules of limitation. (footnotes omitted)*

[8] In developing the Client's case, Ms Dunn, Counsel for the Claimant first sought to establish that the 2nd Defendant was the Managing Director of the Company after the death of Melvin Chung. Counsel challenged the 2nd Defendant's assertion in her evidence that she was not and was never a director or employee of the Company, by referring the 2nd Defendant to a number documents which disclosed Sandra Chung signed as Managing Director of the Company. The 2nd Defendant

agreed with Counsel that she ought not to sign documents for a company for which she was neither a director or employee.

[9] The Claimant's reliance on the legal doctrine of novation is founded largely on the facts contained in paragraphs 13 to 15 of the 2nd Defendant's witness statement which provide as follows:

> *"13. Sometime in 2015 I was asked by Ms. Blodell Chue, [sic] the Claimant to pay her money she was owed by Melan Investment Company Limited. I advised my father-in-law of these requests being made of me and he advised and lead me to believe that he would settle these request.*
>
> *14. I retained the services of Hart Muirhead Fatta, Attorneys-at-Law to assist with obtaining the Grant of Probate on Melvin's Estate and I advised by Attorneys-at-Law of the requests being made.*
>
> *15. By letter dated 15th September, 2015 my Attorneys-at-Law wrote to Ms Chue indicating **inter alia** that as soon as they obtained the Grant of Probate they would advise her and at that time all claims would be dealt with."*

[10] Ms Dunn submitted that the facts contained in these paragraphs are to be juxtaposed against the contents of the 15th September 2019 Letter, referred to earlier. I set out the contents of that letter hereunder as follows:

> *"Dear Madam:*
>
> *Re: Estate Melvin Chung, dec'd*
>
> *We are the Attorneys-at-law for Sandra Chung, the Sole Executrix named under the Last Will And Testament of her late husband, Melvin Chung and have been instructed to obtain the Grant of Probate on her behalf.*
>
> *We have been advised by Mrs. Chung that you have been requesting payment from her for investment you had with the late Melvin Chung.*
>
> *Please be advised that we have not yet received the Grant of Probate and the Estate have not been settled.*
>
> *Accordingly, we request details of the indebtedness, the amount paid to date and the balance outstanding.*
>
> *As soon as we obtain the Grant of Probate we will advise you and at that time all claims will be dealt with.*

We await hearing from you."

[11] It is common ground between the parties that novation may be effected both formally and informally. It was also agreed that consent to novation may be inferred from the acts and conduct of the parties without express words, in the absence of rebutting circumstances. Ms Dunn referred to the settled principle of contract law that interpreting contracts involves ascertaining the parties objective intention, rather than their subjective intention and relied on the words of Lord Hoffman in **Investors Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 All ER 98 where in speaking of interpretation he stated that it:

> *"is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*

[12] Ms Dunn also relied on the case of **Rouse v Bradford Banking Company** [1894] 2 Ch. 32 and the statement of Lidley, L.J. as follows:

> *"The question whether a creditor of two or more persons has released one of them and converted the others into his sole debtors by what is called novation is a question of intention, and an intention to look to them for payment, especially when requested to do so by their co-debtor, is quite consistent with an intention to look to them as a mere matter of convenience without releasing him. To succeed on this round, whit the Plaintiff has to prove is conduct inconsistent with this liability, from which conduct an agreement to release him may be inferred."*

[13] It is against this backdrop that Ms Dunn has submitted that the Court adopts the following view of the facts. Firstly, that the evidence suggests that the Claimant was making a claim against the Company. Secondly, that the 2nd Defendant's interjection in paragraph 14 of her witness statement, that she retained a law firm to assist with obtaining the Grant of Probate of Melvin Chung's estate and that she advised the Attorneys of the requests being made, could only be of relevance if his estate was going to accept the liability of the Company to the Claimant. This is because this was not a debt of the estate. Accordingly, it would have had no place in the settling of the estate and the Attorneys would not have needed to be advised

of it unless it was intended by the 2nd Defendant to communicate to the Attorneys that the estate was in fact accepting and treating the debt as a liability of the estate.

[14] Thirdly, Ms Dunn asked the Court to find that, the 15th September Letter is evidence of the 2nd Defendant's agreement to the novation and the final paragraph which reads " *As soon as we obtain the Grant of Probate we will advise you and at that time all claims will be dealt with*" is to be construed as an acceptance of the claim as a valid claim, and confirmation that the estate was liable for the entire sum (albeit that the estate might not be able to pay the entire sum having regard to the amount of resources to which it may have access).

Did the 2nd Defendant consent to the novation?

[15] It is my view that the Court must be extremely cautious in adopting the approach suggested by Ms Dunn in trying to infer what the 2nd Defendant's instructions were to her Attorneys which formed the basis of the 15th September 2015 Letter. One reason for this is that the paragraph which reads, "*We have been advised by Mrs Chung that you have been requesting payment from her for investments you had with the late Melvin Chung"* is not supported by the evidence. Neither the 2nd Defendant's chronology of the events recorded up to paragraph 14 of her witness statement, nor the documentary evidence discloses any assertion by the Claimant that she had made such investments with Melvin Chung. It is an uncontrovertable fact that the investments by the Claimant were with the 1st Defendant. This therefore raises the question of how or why did this factually inaccurate statement come to form a part of the letter. If the portion of the letter which immediately follows this statement is premised on this statement being factually accutate, then it makes it difficult for the Court to be satisfied that the remainder of the letter is an accurate reflection of the 2nd Defendants instructions to Counsel. More importantly, this factual inaccuracy casts doubt on whether one can reasonably infer that the 2nd Defendant's instructions were that the estate was expressing its unqualified intention to accept as the liability of the Company towards the Claimant, as the liability of the estate.

[16] Mr Thompson submitted that the 15th September Letter is in the standard form that is to be expected by any estate Attorney responding to a claim. Ms Dunn has objected to his characterisation of the letter as a "standard form letter", and submitted that, this type of evidence should properly be forthcoming from duly qualified Counsel as expert evidence, rather than from Mr Thompson at the bar in his closing submissions. I accept Ms Dunn's submission on this point and reject Mr Thompson's characterisation of the letter as a standard form letter.

[17] When I simply interpret the letter in its entirety using appropriate rules of construction as commended by Ms Dunn, I am unable to accord the meaning to the letter that Ms Dunn urges the Court to accept. This is because I find that the letter on its true construction does no more than to ask the Claimant to submit the details of her claim to the estate for consideration.

[18] It is my considered opinion that the words: "*at that time all claims will be dealt with*", cannot reasonably be construed as an unqualified undertaking by the Attorneys on behalf of the estate, to accept the liability of the Company to the Claimant. This is especially so when juxtaposed against the preceding paragraph which requests details of the amount of the claim. Mr Thompson submitted that the estate accepting the liability of the company would serve to diminish the value of the estate and therefore the Court should lean against any construction of the 15th September Letter which suggest that the Attorney was advising that his be done. I find that there is some merit in these submissions.

[19] However, the issue of the legal basis on which the 2nd Defendant could have accept the 1st Defendants liability on behalf of the estate having regard to whether there are beneficiaries which may be prejudiced is one which I cannot properly consider because there is insufficient evidence before the Court. But, putting that issue to the side, I do not think I need expert evidence to conclude that it would be unusual for an Attorney representing an estate to allow that estate to give, (though the attorney), an unqualified acceptance of a claim in respect of which the amount is not even stated or confirmed. I am also of the view that this is a consideration

that I can properly take into consideration in interpreting the letter. It is of course not a determining or even a significant factor, but it is one factor which, when considered in the round, along with what I find to be the ordinary meaning of the words used, has caused me to reject the interpretation of the letter that has been suggested by Ms Dunn. I therefore find on a balance of probabilities that the 2nd Defendant did not consent to a novation.

Did the Company consent to the Novation?

[20] Ms Dunn submitted that Sandra Chung as Managing Director of the Company had knowledge of the claim against the Company. In her capacity as intended Executrix of the estate of Melvin Chung she used her knowledge of the claim acquired in her capacity as Managing Director to give instruction to the Attorneys which amounted to consent to the novation of the claim. Counsel submitted that since Sandra Chung was aware of the consent of the estate which she gave on behalf of the estate in her capacity of intended Executrix, in her capacity as Managing Director it is implicit that she also gave the 1st Defendant's consent to the novation. This theory posited by Ms Dunn which, involves Sandra Chung utilizing (and arguably misusing in breach of confidentiality and trust) the knowledge acquired by her in her two unrelated and distinct capacities, bears a high degree of technicality but moreso, artificiality. Nevertheless, as I hope to demonstrate below, the facts as found by the Court do not support the application of this theory to the Claimant's benefit.

[21] There is no evidence before me that the 2nd Defendant is a duly appointed Director of the 1st Defendant. She asserted in her evidence that she was not and is not.

She accepted during Ms Dunn's cross examination of her that if her conduct amounts to having held herself out as a director then she did hold herself out. There is no issue raised as to the invalidity of the correspondence she issued purportedly as director and or Managing Director on the basis that she held neither post. The 1st Defendant has not raised any issue as to her non-appointment and

the Claimant has been content to have treated her as a Director of the 1st Defendant since it is arguable that she had apparent authority in respect of some acts.

[22] The authority to manage the affairs of a company is vested in its board of directors and that board will sometimes delegate authority for particular matters to specific directors or officers. This delegation of authority can be express or implied. The authority can be implied in appropriate cases from a person's positon as a director. In the case of **Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal), Ltd and Another** [1964] 1 All ER 630 at page 645 H Diplock, LJ stated that:

> *"…The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, viz., by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter contracts on behalf of the corporation into contacts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do normally enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business."*

[23] As it relates to the Company giving its consent to the novation, to my mind the issue is raised as to whether the legal rules which attribute the acts of an agent to the company in a transactional context would apply to the legal test in this case where the Court is tasked with making a finding of fact as to whether the Company consented to a novation. However, this issue is purely academic because, even assuming for the sake of analysis that Sandra Chung as representative of the 1st Defendant does have the authority to consent to the novation on behalf of the Company, I find that there is insufficient evidence from which the Court can infer that she did give such consent which can be attributed to the Company. It must at all times be borne in mind that "…*in order to effect a novation, not only must there*

*be consent to the substitution of some new obligation for the original one, there must also be intention to effect a novation"(see H*alsburys supra).

[24] In the first place, there is insufficient evidence on which I can find that the 2nd Defendant expressed an intention for the estate to accept the 1st Defendants liability to the Claimant. This being the case, and consequent on this finding of the absence of such an intention, is my conclusion that the 2nd Defendant did not give instructions to the estate's Attorneys that the estate would be accepting the liability of the 1st Defendant. Accordingly, there is no knowledge of an intention to effect novation which Sandra Chung *qua* representative of the 1st Defendant could have acquired from Sandra Chung *qua* intended executrix of the estate so as to give consent to it on behalf of the 1st Defendant.

[25] In any event, I find that there is insufficient evidence from which the Court could infer that Sandra Chung in her capacity as representative of the 1st Defendant was in fact consenting or purporting to consent on its behalf, since the only evidence on which the Claimant places reliance is the fact that she was aware of this intention to novate. In my view there would have to be "*something more*" than this knowledge which could be capable of demonstrating the 1st Defendant's consent to novation for such consent to be found by the Court to be effective. In this case there is nothing else. I therefore conclude that the 1st Defendant did not consent to the novation.

Did the Claimant consent to the Novation?

[26] Mr Thompson, with laser-like focus, asked very few question during his cross examination of the Claimant and ended that joust with the Claimant's admission that she has not discharged the 2nd Defendant from the debt it owes to her. It was this fact which formed the main pillar of the defence. Mr Thompson submitted that the claim and the entry of judgment against the 1st Defendant was further evidence that the Claimant had not discharged the 1st Defendant of its liability and that this was fatal to a claim asserting novation.

[27] The Claim form declares the claim to be against the defendants "*jointly and severally*". Ms Dunn submitted that his was a case which could properly be made in the alternative. In **Balgobin v South West Regional Health Authority and another** [2013] 1 AC 582, an appeal to the Privy Council from the Republic of Trinidad and Tobago, the Court made the following observations:

> ***21*** *It appears, therefore, that where a claim against more than one defendant cannot be pursued either because the factual basis of the suit against one is incompatible with the factual foundation necessary to establish liability against the other or the legal bases of both claims cannot be consistently advanced, an election to pursue one basis of claim will preclude reliance on the other. By contrast, where there is no joint contract or relationship of principal and agent and the obligations are several, a judgment in an action against one is no bar to an action against another: Isaacs & Sons v Salbstein [1916] 2 KB 139, 152, per Swinfen Eady LJ. Furthermore, as Lush J, sitting in the Divisional Court in that case, said, at p 143, there is no foundation for the contention that because A obtains a judgment against B (who in fact was never a party to the contract at all) he cannot afterwards obtain judgment on that contract against C, who was the real contracting party.*

At page 593 the Court continued:

> *While it would not be correct to suggest that obtaining a default judgment can never amount to an unequivocal election, the circumstance that such a judgment will almost certainly be obtained without any consideration of the merits is inescapably relevant to that question. In Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993, it was held that a default judgment, although capable of giving rise to an estoppel, must always be scrutinised with great care in order to determine the "bare essence" of what was the import of the judgment. Viscount Radcliffe said, at p 1010:*
>
> > *"a default judgment is capable of giving rise to an estoppel per rem judicatam. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked upon as only another form of a judgment by consent (see In re South American & Mexican Co [1895] 1 Ch 37) and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave*

> *danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default."*

[28] Although raised in a tangential manner by Mr Thompson, the issue as to whether there has been an election by the Claimant was not pleaded in the Defendant's Defence and was not a prominent issue during the trial. Accordingly, I do not find it necessary to decide whether the entry of the judgment in default against the 1st Defendant amounted to an election to unequivocally pursue the claim against the 1st Defendant only or whether the judgment in default against the 1st Defendant operates as a bar to this court finding of liability against the second defendant.

[29] Nevertheless, I am satisfied on the fact of this case, having particular regard to the evidence of the Claimant herself that she did not release the 1st Defendant from its liability. The applicable law is expressed in Halsburys (supra) is as follows:

> *"Since novation involves a new contract, it is essential that the consent of all parties be obtained[1], and in this necessity for consent lies the essential difference between* ***novation*** *and assignment.* ***It follows that, to novate a debt, the creditor has to agree to release the original debtor and replace him with a new one****." (emphasis supplied)*

In the absence of agreement of the creditor to release the 1st Defendant from its liability to her there could have been no novation and accordingly the Claim must fail as a matter of law.

Conclusion and disposition

[30] For the reasons expressed herein I find that there has not been the consent of the Claimant, the first Defendant and the 2nd Defendant as required by law in order for there to be a valid novation and as a consequence, the claim fails. Accordingly I make the following orders:

1. Judgment is awarded in favour of the 2nd Defendant against the Claimant.

2. Costs of the Claim are awarded to the 2nd Defendants to be taxed if not agreed.