[2018] JMCC COMM 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017 CD 00640

BETWEEN	**NATIONAL EXPORT-IMPORT BANK OF JAMAICA LIMITED**	**CLAIMANT**
AND	**KNOCKALVA ENTERPRISES LIMITED**	**1ST DEFENDANT**
AND	**M.K. HOLDINGS LIMITED**	**2ND DEFENDANT**
AND	**PATRICK SMELLIE**	**3RD DEFENDANT**
AND	**HANSEL BECKFORD**	**4TH DEFENDANT**
AND	**STEADMAN KEITH**	**5TH DEFENDANT**

Application for Summary Judgment - No dispute of fact – Whether Guarantor who signed as director of principal borrower privy to change of contract agreement – Whether liable in his capacity as Guarantor – Whether Consumer Protection Act applicable.

Ms. Kashima. Moore instructed by Nigel Jones & Co. for the Claimant

Mr. Glenroy Mellish for the 1st, 2nd, 4th & 5th Defendants

IN CHAMBERS

HEARD: 1st May 2018

COR: BATTS J

[1] This is the Claimant's application for Summary Judgement. The 3rd Defendant has not yet been served with process. The Claimant has elected to proceed against the 1st, 2nd, 4th & 5th Defendants. Having heard submissions, I entered judgment for the Claimant as follows:

(i) Summary Judgment in favour of the Claimant against the 1st, 2nd, 4th & 5th Defendants in the amount of **Fourteen Million, Two Hundred Thousand, Six Hundred and Fifteen Dollars and Forty-Two Cents ($14,200,615.42).**

(ii) Costs to the Claimant to be taxed or agreed.

I promised then to put my reasons in writing. This judgment fulfills that promise.

[2] The Claimant's application for Summary Judgment was supported by two (2) affidavits of Maria Burke, one dated the 28th February 2018 and the other the 19th March 2018. Mr. Mellish, for the Defendants, stated that his clients filed no affidavits as the facts were not disputed. He intended to rely on submissions in law .He indicated that his objection in relation to the promissory note was withdrawn as a stamped note was now filed.

[3] The facts as stated in the affidavits are that on or about the 9th October 2014, a loan evidenced by a Letter of Commitment dated 9th October 2014 was granted to the 1st Defendant. That loan was for Fifteen Million Dollars (J$15,000,000.00). The loan agreement was amended on the 12th November 2014, 22nd January 2015 and 9th February 2015. Each of these changes was endorsed by the 4th & 5th Defendants or either of both of them. Those Defendants had also signed the Letter of Commitment. Both these Defendants also executed a Promissory Note for Fifteen Million Dollars (J$15,000,000.00) to the Claimant. The fifteen million Dollars (J$15,000,000.00) was disbursed as follows:

- $2,590,285.18 on the 5th February 2015
- $11,263,320.26 on the 26th February 2015 and
- $1,146,394.56 on the 25th March 2015.

[4] By a second Letter of Commitment dated the 23rd September 2015, the Defendant agreed to lend a further Four Million Dollars (J$4,000,000.00). This was agreed to and the letter executed by the 4th and 5th Defendants. An amount of Three Million Five Hundred and Fifteen Thousand and Thirteen Dollars and Nineteen Cents (J$3,515,013.19) was disbursed to this facility. The 4th & 5th Defendants also executed a Promissory Note dated 25th September 2015 to secure the second loan.

[5] The 2nd Defendant by way of a guarantor's mortgage guaranteed the 1st Defendant's indebtedness. The 5th Defendant is a Director of the 2nd Defendant. The 3rd Defendant agreed by contract of Guarantee and Indemnity dated 2nd February 2015 to unconditionally guarantee repayment by the 1st Defendant. The 4th Defendant similarly executed an unconditional Guarantee and Indemnity dated 21st January 2015.

[6] Paragraphs 19 and 22 of the affidavit of Maria Burke dated 27th February 2018 assert that the 2nd and 4th Defendants were fully aware of changes made to the Letter of Commitment and indicated approval and acceptance. The 5th Defendant unconditionally guaranteed repayment of the 1st Defendant's debt by a Guarantee and Indemnity dated 2nd February 2015 (paragraph 23 of the same affidavit).

[7] The affidavits also detail the efforts made and costs incurred by the Claimant in seeking to exercise its powers of sale and repayment secured by Bills of Sale. A formal demand for payment was issued to the Defendants on the 28th June 2016.

[8] The affidavit of 13th March 2018 speaks to the matter of service of the claim on the Defendants and in particular the 3rd Defendant. An Acknowledgement of Service has been entered on behalf of the 1st 2nd 4th and 5th named Defendants. The Claimant elected to proceed even though the 3rd Defendant has not been personally served.

[9] The Defendants by way of a Defence, filed on the 28th November 2017, contend that they were not in agreement with the changes that were made to the loan agreements. The evidence however, is that they signed the documentation which are the Bank's Offer Letter dated the 9th October 2014 and the Addendum Letter dated the 12th

November 2014 exhibited as 'MLB 3" and "MLB 4" to the affidavit of Maria Burke dated the 28th February 2018. They contend that they signed as officers of the Defendant companies and as such, the document could not be used against them in their personal capacity as guarantors. Their signatures are affixed to the Letter of Commitment and Promissory Note . It is to be noted , as was decided in the case of **L'Estrange v Graucob [1934] 2 KB 394,that :**

> ***"the clauses of a written contract are binding on the signatories even where a party is unaware of the contract's full content".***

[10] In addition to affixing their signatures to the changes that were made in the Letter of Commitment, the Defendants after they were notified of the changes, agreed to pay all the legal fees that were associated in facilitating the loan outlined in the Affidavit dated February 28, 2018 see exhibit 'MLB 1', paragraph 9 (iv) of the Letter of Commitment dated October 9, 2014.By instrument of Guarantee and Indemnity dated 21st January 2015 and 2nd February 2015, Guarantor's Mortgage January 2015 and the Bill of Sale dated 21st January 2015, the 2nd, 4th and 5th Defendants guaranteed the payment to the Claimant of the amount loaned to the 1st Defendant .

[11] **Geraldine Mary Andrews Q.C. and Richard Miller Q.C** stated in their treatise **Laws of Guarantees 4th Edition** on page 71:

> ***"The signature of a document on behalf of a company by a director may result in his being held personally liable as a surety, either because the document is a sufficient memorandum of an oral agreement with him, or because as a matter of construction of the written agreement he has undertaken personal liability instead of, or as well as, the company."***

They further stated on page 72:

> ***"Consequently a person who is asked to sign a guarantee or similar document on behalf of a company should take care to ensure that the wording precludes the possibility of being held personally liable to the creditor. Of course if a document which has been signed "for and on behalf of" a named company is in the form of a guarantee of the indebtedness of that very same company, the probabilities are that the person who signed it did intend to undertake a personal liability as guarantor. Otherwise the "guarantee" would be meaningless".***

[12] I therefore hold that the , 4th and 5th Defendants, having signed the documentation evidencing the variations, cannot deny knowledge or liability merely because they signed in their capacity as directors of the 1st Defendant.

[13] The 2nd, 4th and 5th Defendants in their Defence at Paragraph 3 (b) alleged also that Clause 4 of the Guarantee and Indemnity is unreasonable and therefore in breach of **Section 39 of the Consumer Protection Act,** which states:

> ***"39. A consumer shall not by reference to any term of a contract be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other person for negligence or breach of contract, except in so far as the term of the contract satisfies the requirements of reasonableness".***

[14] The 2nd, 4th and 5th Defendants reliance on Section 39 is misplaced. The statute addresses the issue of supplying goods and provision of services in order to ensure the protection of life, health and safety of consumers. **Section 2 of the Consumer Protection Act** defines 'consumer' in relation to:

> ***"any goods, means (i) any person who acquires or wishes to acquire goods for his own private use or consumption; and (ii) a commercial undertaking that purchases consumer goods".***

The Act defines 'goods' to **'include all kinds of property other than real property, securities, money or choses in action**'. It is therefore manifest that the Consumer Protection Act has no relevance to the matters in issue before this court. It is not applicable to a commercial transaction with a banking institution. The Defendants are not consumers within the meaning of the Act.

[15] Order 15.2(1) of the Civil Procedure Rules states:

> ***"The court may give summary judgment on the claim or on a particular issue if it considers that – (a) the claimant has no real prospect of succeeding on the claim or the issue; or (b) the defendant has no real prospect of successfully defending the claim or the issue".***

In the case of **Marvalyn Taylor-Wright v Sagicor Bank Jamaica Limited 2016 JMCA Civ 38,** Sykes J, as he then was, applied the principles set out in **Swain v Hillman and Another [2001] 1 ALL ER 90.per** Lord Woolf MR :

> ***"The proper test for whether an action should be struck out under the new rules was whether it had a realistic as opposed to a fanciful prospect of success".***

[16] The Claimant has put before the court credible evidence in support of its claim. The Defendant has put forward no evidence. The Defendants' assertion that the Claimant has failed to prove knowledge or acquiescence with the changes to the loan agreement is unsupported by the evidence. The attempt to rely on the Consumer Protection Act is misplaced.

[17] In the final analysis therefore the Defence has no real prospect of success and in consequence summary judgment was entered.

David Batts
Puisne Judge