[2017] JMSC Civ 214

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 04283

BETWEEN	**NATIONAL EXPORT – IMPORT BANK OF JAMAICA LIMITED**	**CLAIMANT**
AND	**YONO INDUSTRIES LIMITED**	**1ST DEFENDANT**
AND	**ANDRE JONES**	**2ND DEFENDANT**
AND	**ANDRE PRINCE**	**3RD DEFENDANT**

IN CHAMBERS

Kashina Moore, instructed by Nigel Jones and Company, Attorney-at-law for the Claimant

Sherry-Ann McGregor and Mark Paul Cowan, instructed by Nunes, Scholefield, DeLeon, Attorneys-at-law for the 3rd Defendant

HEARD: September 22, 2016 and October 6, 2017

COMMITMENT LETTERS SETTING OUT TERMS OF LOAN AGREEMENTS BETWEEN THE CLAIMANT AND THE 1ST DEFENDANT – 3RD DEFENDANT'S GUARANTEE AGREEMENT WITH THE CLAIMANT – WHETHER SUMMARY JUDGMENT SHOULD BE AWARDED TO THE CLAIMANT – WHETHER THE 3RD DEFENDANT'S DEFENCE IS ONE WHICH HAS A REALISTIC PROSPECT OF SUCCESS – VARIATION OF INITIAL LOAN AGREEMENT – CIRCUMSTANCES IN WHICH GUARANTOR WILL BE DISCHARGED FROM GUARANTEE AGREEMENT – WHETHER GUARANTEE AGREEMENT WAS A CONTINUING SECURITY – WHETHER GUARANTEE AGREEMENT IS APPLICABLE AS BETWEEN THE CLAIMANT AND THE 3RD DEFENDANT

ANDERSON, K.J

THE BACKGROUND

[1] Summary Judgment – In the present context, the claimant's application can only properly be granted in circumstances wherein the 3rd defendants defence has no realistic prospect of success. **Rule 15. 2 (b) of the Civil Procedure Rules (CPR)** applies. See: **ASE Metals NV v Exclusive Holiday of Elegance Ltd.** – [2013] JMCA Civ 37; and **ED & F Man Liquid Products Ltd., v Patel and anor.** – [2003] EWCA Civ 427 and **Swain v Hillman** – [2001] 2 ALL ER 91.

[2] Only one affidavit could properly provide any useful assistance to this court, upon the hearing of the claimant's application for summary judgment to be entered against the 3rd defendant, in respect of this claim. That would be the affidavit of Maria Burke in support of claimant's notice of application. That affidavit was filed on February 24, 2016.

[3] This court had, during the course of the hearing of the application, disallowed the claimant from relying on the affidavit of Charles Lewis, which was filed on September 15, 2016 and served on September 16, 2017. Same was disallowed, because it was short-served, bearing in mind that the application was heard on September 22, 2016.

[4] On the other hand, the affidavit evidence deponed to by Michelle Campbell, which the 3rd defendant had intended to rely on and which had been appended as an exhibit to Ms. Campbell's affidavit, was not, prior to the hearing of the claimant's application for summary judgment, filed as a separate affidavit. That affidavit of Ms. Campbell has been of no useful assistance to this court, for present purposes, for the reasons as set out below.

[5] **Rule 15.5 (2) of the CPR** provides that a respondent who wishes to rely on evidence must file affidavit evidence and serve copies on the applicant and any other respondent to the application, '*not less than seven (7) days before the summary judgment hearing.'*

[6] Objection was made to the 3rd defendant's reliance on that affidavit, but that objection was grounded upon the alleged failure to comply with **section 22 of the Judicature (Supreme Court) Act** and not the short-service of same.

[7] I am of the view though, that whilst this court can extend time or lessen time for compliance with any timeline set by a rule of court and whilst this court can do so, of its own motion, pursuant to its discretionary powers under **rule 26.2 of the CPR**, this court can only properly do so, if, prior thereto, any party likely to be affected by this court acting on its own initiative in making such an order, has been given a reasonable opportunity to make representations. See **rule 26.2 of the CPR** in that regard. With there not having been any such opportunity given, this court cannot and will not act on its own initiative and allow the affidavit of Michelle Campbell, which the 3rd defendant has sought to rely on, to stand and be relied on, notwithstanding that same was not even filed, one clear day in advance of the hearing of the claimant's application for summary judgment, much less seven (7) clear days, as our rules of court require.

[8] In any event, even if I am wrong in having adopted that approach, I accept the submission of the claimant's counsel, as made during the hearing which I presided over, that the affidavit of the 3rd defendant, as appended to the affidavit of Michelle Campbell, cannot properly be taken cognizance of, in this court, since the witnessing of same in Virginia, USA, which is where the 3rd defendant lived at the time when he deponed to that affidavit before a notary public in that US state, needed to have also had appended to it, a certificate under the seal of an appropriate person having the power of verification, that the signature or seal of that notary public is valid and specifying that said notary public had the authority to administer an oath, in Virginia, as and when he purportedly administered that oath to the deponent, who is the 3rd defendant. **Section 22 (4) of the (Supreme Court) Act**, requires that to be done, in order for said affidavit, to be valid and thus, properly capable of being taken cognizance of, in a court of law, in Jamaica.

[9] As it is the claimant who has filed the application for summary judgment, the burden of proof rests on the claimant, to establish that the defendant has no real prospect of successfully defending the claim. See: **Island Car Rentals Ltd. v Headley Lindo** – [2015] JMCA App 2.

[10] The grounds of the claimant's application for summary judgment, as pertain to the 3rd defendant, are as follows:

(i) The 1st defendant obtained several loans from the claimant which are contained in various commitment letters.

(ii) The 2nd and 3rd defendants executed a guarantee in relation to the loans issued by the claimant to the 1st defendant and is therefore liable for the 1st defendant's indebtedness.

(iii) The 3rd defendant has no realistic prospect of successfully defending the claim.

To my mind, those three (3) grounds are to be considered collectively, rather than separately.

[11] What then, is the claimant's case against the 3rd defendant and what is the nature of the 3rd defendant's defence to that claim? We will begin first, with a review of the claimant's case, which has been helpfully set out by Attorney Maria Burke in her affidavit which was deponed to, on February 24, 2016, in her then capacity, as the claimant's legal counsel and which was filed on said date. Paragraphs 3-21 of that affidavit, summarize the nature of the claimant's case. The highlighted portions are as were highlighted in those paragraphs. Those paragraphs are quoted, immediately below.

'3) The claimant's claim against the defendants is to recover the principal sum of ***Forty-Two Million Three Hundred and Seventy-Nine Thousand Four Hundred and Seventy-Eight Dollars and Thirty-Six Cents (J&42,379,478.36)*** *plus interest being monies due and owing by the defendants to the claimant.*

4) The claimant's records reveal that the claimant approved a loan of ***Twenty-Five Million Jamaican Dollars (J$25,000,000.00)*** *("the first loan*

*facility") to the 1st defendant for the purchase and installation of equipment and working capital. The 1st defendant agreed to repay the sum with interest. This agreement was reduced to writing and the terms set out in a letter dated October 6, 2008. A copy of the First Commitment Letter is exhibited hereto as **"MLB-1"**.*

5) *The claimant's records further reveal that the claimant by agreement, in writing dated February 6, 2012 (hereinafter the "Second Commitment Letter") agreed to extend a further loan to the 1st defendant in the amount of **Sixteen Million Jamaican Dollars (J$16,000,000.00)** ("the second loan facility") and the 1st defendant agreed to repay the sum with interest. A copy of the Second Commitment Letter is exhibited hereto as **"MLB-2"**.*

6) *In performance of the agreements made between the claimant and the defendants, the claimant disbursed on diverse days a combined total of **J$41,000,000.00** in relation to the first and second loan facility. I exhibit hereto a Statement showing the disbursements made and interest payable as **"MLB-3"** for identity.*

7) *The 1st defendant failed to, in compliance with the First and Second Commitment letters, keep the insurance policy current. As a result of the 1st defendant's breach of the terms of the Commitment Letters, the claimant was forced to disburse money to an Insurance Broker in order to keep the Fire and Allied Peril Insurance policy current and to ensure that the claimant's interest in the serialized industrial equipment was protected. The claimant, disbursed the sum of **J$2,007,707.26** on or about July 9, 2013 and he sum of **J$2,007,707.26** or about July 14, 2014 to keep current the said Insurance policy.*

8) *The principal balance of the sum disbursed to settle the insurance premium paid on or about July 9, 2013 as at the date of the claim is **J$1,626,774.18**. No payment has been made in relation to the sum disbursed to settle the insurance premium paid on or about July 14, 2014 and accordingly, the entire principal amount of **J$2,007,707.26** that was paid remains outstanding.*

9) *The claimant claims interest on the sum of **J$1,626,774.18** at the rate of 12% per annum and interest on the sum of **J$2,007,707.26** at the rate of the 18% per annum as permitted by the Commitment Letters.*

10) *The 1st defendant duly executed and delivered two (2) Promissory Notes to the claimant, signed by the 2nd defendants on its behalf. Copies of which are attached hereto as **"MLB-4"** and **"MLB-5"**.*

11) *The 1st defendant through its Directors, the 2nd and 3rd defendants promised to repay the sum of **J$25,000,000.00** on the following terms:*

a) *Repayment of the principal sum shall be in forty-two (42) equal consecutive monthly installments on the last business day of each month (the "Due Date"), the first of which shall be paid on 30 June 2009 and the last of which shall be paid on 30 November 2012 (the "Final Date").*

b) *If any amount of principal or interest shall be unpaid after the Due Date or the Final Date the Borrower shall pay to the Lender post maturity interest thereon at the rate of* ***NINETEEN PER CENTUM*** *(19%) per annum calculated from the Due Date until the date of payment.*

12) *The 2nd and 3rd defendants as Directors of the 1st Defendant signed a Promissory Note to repay the sum of J$16,000,000.00. The relevant terms of the Promissory Note are as follows:*

a) *To pay interest thereon at a rate of ten and half per centum (10.5%) per annum from the date of disbursement until the due date (90 days from disbursement date) and thereafter at the rate of Twenty per centum (20%) until the date of the actual payment.*

13) *The 1st defendant executed a Bill of Sale dated November 3, 2008 in furtherance of the First Commitment Letter. The claimant, as expressly provided for by the Second Commitment Letter, upstamped the Bill of Sale on or about August 7, 2014 at a cost of* ***$J562,500.00****. A copy of the Bill of Sale is annexed hereto as* ***"MLB-6"****.*

14) *By the expressed terms of the First and Second Commitment Letter the claimant is permitted to recover the costs of upstamping the Bill of Sale from the defendants. The claimant further claims interest on the sum of* ***J$562,500.00*** *at the rate of 12% per annum being the interest rate payable on unpaid principal as set out in the First Commitment Letter.*

15) *By Guarantee in writing ("Jointly and Several Guarantee and Indemnity") dated 3rd November, 2008, the 2nd and 3rd defendants guaranteed all liabilities of the 1st defendant to the claimant. A copy of the Guarantee and Indemnity is attached hereto as* ***"MLB-7"****.*

16) *By the terms of said Guarantee and Indemnity the 2nd and 3rd defendants unconditionally and irrevocably guaranteed payment to the claimant of the sum specified in the First Commitment Letter (as may be amended or renewed from time to time) all the guaranteed obligations including payment of interest at the rate set out therein, both before and after judgment.*

17) *The 2nd and 3rd defendants by the terms of the said Guarantee and Indemnity guaranteed the payment of future loan to the 1st defendant. The Guarantee and Indemnity expressly provides that:*

a) *The term Guaranteed obligations means all principal, interest, fees, commissions, expenses (including legal costs and expenses on a full indemnity basis), damages and other moneys from time to time owing by the Borrower to the Bank under or in connection with the Commitment Letter and/or any other banking facility granted by the Bank to the Borrower.*

18) *The defendants have failed to make payments in accordance with the terms of the First and Second Commitment Letters and the defendants' indebtedness to the claimant to September 4, 2014 stands at* ***Sixty-Five Million Five Hundred and Ninety-Three Thousand Eighty-Five Dollars and Eleven Cents (J$65,593,085.11)*** *inclusive of interest to that date.*

19) *That the Bank has calculated the interest owed to the claimant on the principal sums claimed to February 4, 2016 and the defendants owe the claimant the following amounts:*

1) *On the principal sum of* ***J$1,626,774.18*** *interest in the amount of* ***J$466,588.09*** *being interest at a per diem rate of $$534.83.*

2) *On the principal sum of* ***J$25,136,597.16*** *interest in the amount of* ***J$13,111,260.07*** *being interest at a per diem rate* ***J$12,396.13****.*

3) *On the principal sum of* ***J$15,616,107.02*** *interest in the amount of* ***J$8,206,452.67*** *being interest at a per diem rate of* ***J$8,556.77****.*

4) *On the principal sum of* ***J$2,007,707.26*** *interest in the amount of* ***J$564,358.26*** *being interest at a per diem rate of* ***J$990.10****.*

5) *On the principal balance of J$562,500.00 interest in the amount of* ***J$100,972.60*** *being interest at a per diem rate* ***J$184.93****.*

20) *That the sum owed to the claimant as at February 4, 2016 is* ***Seventy-Seven Million Three Hundred Thousand Two Hundred and Thirty-Seven Dollars and Ninety-Four Cents (J$77,300,237.94)****. Attached hereto as* ***"MLB-8"*** *is a copy of a Statement of Account.*

21) *Despite a formal demand made by the claimant and a demand made by its Attorneys-at-Law, the defendants have failed to pay the sums owed to the claimant. Attached as* ***"MLB-9"*** *are copies of the demand letters dated May 7, 2014.'*

[12] In order to know what the 3rd defendant's response to the claim against him is, regard must be had to the 3rd defendant's defence, which was filed on November 5, 2015 and certified as true, to the best of his knowledge, information and belief, by the 3rd defendant. Paragraphs 2-6 of that defence, set out the most salient aspects of the 3rd defendant's defence, for present purposes. The highlighted portions are as were highlighted in those paragraphs. Those paragraphs are quoted, immediately below.

> '*2) This defendant admits the contents of the commitment letters dated October 6, 2008 and February 6, 2012 under which loan facilities in the amounts of* ***J$25,000,000.00*** *and* ***J$16,000,000.00****, respectively, were granted to the 1st defendant.*
>
> *3. This defendant also admits the contents of the Promissory Notes, one of which is undated, and the other which is dated February 21, 2012, which were executed on behalf of the 1st defendant.*
>
> *4. Save and except that this defendant admits that he executed a Joint and Several Guarantee and Indemnity dated 3rd November 2008, paragraph 20 of the Particulars of Claim is not admitted as this defendant denies liability to settle the 1st defendant's indebtedness under the said Guarantee and Indemnity for the following reasons:-*
>
> *i. At the time of the execution of the Joint and Several Guarantee and Indemnity dated 3 November 2008, the 1st defendant was indebted to the claimant in respect of the sum of* ***J$25,000,000.00****, plus interest at the rate of 12% per annum and was referable to the principal contract as set out in the commitment letter dated 6 October 2008.*
>
> *ii. The inclusion of the second loan in the amount of* ***J$16,000,000.00****, plus interest at the rate of 10.5% per annum to the 1st defendant, as set out in the second commitment letter dated 6 February 2012, under the Joint and Several Guarantee dated 3 November 2008 amounted to a substantial variation in the guarantee and indemnity provided by this defendant.*
>
> *iii. The Guarantee does not state that the 1st defendant "guaranteed all liabilities of the 1st defendant to the claimant", as alleged. The said Guarantee specifically referred to the loan facility granted on 6 October 2008 by stating that the 2nd and 3rd defendants "jointly and severally unconditionally and irrevocably guarantee payment to the Bank on the date and in the manner set forth in the Commitment Letter dated 6*

October 2008 (as may be amended or renewed from time to time) ... of all the guaranteed obligations ... including interest thereon (both before and after judgment) at the rate and upon the terms set out in the Commitment Letter ...".

5. *This defendant does not admit the interpretation of the quoted portion of the Guarantee as set out in paragraph 22 of the Particulars of Claim, and will say that the said clause is not to be interpreted to mean that the Guarantee extended to include the loan facility granted by the claimant to the 1st defendant on 6 February 2012.*

6. *In the premises, this defendant's guarantee of the loan by the claimant to the defendant has been discharged.'*

The parties' submissions and the analysis

[13] Having carefully considered the exact terms of the most important portions of the claimant's and 3rd defendant's statements of case, it is obvious that the claimant's case against the 3rd defendant rests primarily on the commitment letters dated October 6, 2008 and February 6, 2012, under which loan facilities in the amounts of J$25,000,000.00 and J$16,000,000.00, respectively, were granted by the claimant to the 1st defendant and on the joint and several guarantee and indemnity, dated November 3, 2008, which was admittedly executed by the 3rd defendant.

[14] It is the interpretation of that guarantee agreement, which will be crucial for the purposes of this claimant's ultimate resolution of this claim, as between the claimant and the 3rd defendant. Both parties' counsel are united in that understanding.

[15] According to the 3rd defendant's counsel at the hearing of the summary judgment application – Mr. Cowan, who then appeared alone, holding for Mrs. McGregor who was then unavoidably absent; where there is an issue as to whether there is an existing debt, that should not be resolved on a summary judgment application. He relied on the case – **Credit Merchant Bank Ltd. v Isaac Gordon** – [2011] JMCA Civ 43.

[16] Having reviewed that case though, I was unable to find any such broad, general principle, stated therein. What is clear from a review of that case is that, in that case, what our Court of Appeal was there concerned with, was an appeal from a refusal by a Judge of this court, to award summary judgment to the claimant, arising from an alleged unpaid debt owed by the defendant to the claimant. It was, therefore, the claimant that appealed that refusal. Hibbert, J.A who wrote the Court of Appeal's judgment, with which the other members of that appellate court's judicial panel in that case, were in agreement, opined that, '*in order for the learned Judge to determine what was owed by the respondent, he would have to conduct a trial of all the unresolved issues in the case.'* (paragraph 25)

[17] That conclusion of Hibbert J.A with which the other members of the judicial panel in that case, agreed, should not, to my mind, be taken as the broad proposition as stated by the 3rd defendant's counsel, in response to the claimant's summary judgment application, which is now under consideration by this court.

[18] I am strengthened in that view of mine, by a ruling of this court upon a summary judgment application in respect of a disputed sum then claimed to have been owed by the defendant/ancillary claimant, to the claimant. That ruling was given in favour of the claimant, such that summary judgment was awarded in their favour, against the defendant/ancillary claimant, in respect of a disputed sum owed. See: **Cable and Wireless Jamaica Ltd. (T/A LIME), Alliance Investment Management Ltd. and Reliant Enterprise Communication Ltd.** – [2012] JMSC ADM 1.

[19] I do recognize though, that in the event that this court is minded not to, award summary judgment in the claimant's favour, as against the 3rd defendant, it would mean that this court, is presently of the view, that the claimant's claim against the 3rd defendant, ought to proceed to trial and be adjudicated on and determined at that stage, rather than at this interlocutory stage. As such, it would not be prudent for this court to set out its own interpretation of the guarantee agreement between the relevant parties, since, if this matter were to be, for present

purposes, resolved in the 3rd defendant's favour, whether here, or even possibly, perhaps, in a higher court hereafter, the proper interpretation to be placed on that guarantee agreement will ultimately be central to the resolution of this claim. The ultimate resolution should not be significantly impacted upon, by this court, at this interlocutory stage.

[20] What I will, therefore, confine these reasons for judgment to expressing upon, in respect of the interpretation of the guarantee agreement, therefore, is whether or not the 3rd defendant's interpretation of same, has any realistic prospect of success. If it does, then the claimant's claim against the 3rd defendant's should be resolved following upon a trial of this claim. That though, will not mean and ought not to be understood as meaning that the 3rd defendant's defence, ultimately, will succeed at trial. That possible consequence is to be distinguished from any conclusion that may be made by this court, at this interlocutory stage, that the 3rd defendant's defence has a realistic prospect of success.

[21] A realistic prospect of success ought never to be equated with expected, actual success. The word 'prospect', in the context of **rule 15.2 of the CPR** means, 'a possibility', based on that which this court knows, concerning this claim, at this time. The word 'real' which qualifies the word, 'prospect' as used in **rule 15.2 of the CPR** means realistic, as opposed to fanciful.

[22] As was correctly stated by Popplewell J. in the case – **Barclays Bank Plc. v Landgraf** – [2014] EWHC 503 (Comm), at paragraph 26 –

> *'(7) on the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had a proper opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's*

> *case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction:* ***ICJ Chemicals and Polymers Ltd. v TTE Training Ltd.*** *– [2007] EWCA Civ 725.'*

[23] As regards the claimant's application for summary judgment, it has been borne in mind by this court at all times, that the burden of proof rests on the claimant in this case, to establish that there are grounds for their contention that the 3rd defendant has no real prospect of successfully defending this claim. That is though, the overall burden of proof. Once though, the claimant has produced credible evidence to support their present application, a burden is then cast upon the 3rd defendant, to show that his defence has a real prospect of success. In that regard, see: **Island Car Rentals Ltd. (Montego Bay) v Headley Lindo** – (*op. cit.),* esp. at paragraph 22, per Brooks JA.

[24] The claimant has, to my mind, produced credible evidence in support of their application for summary judgment. That evidence has been provided by attorney Maria Burke, who deponed to an affidavit in support of the claimant's said application and who was, at the time when she deponed to that affidavit, the claimant's in-house legal counsel. That affidavit was filed on February 24, 2016.

[25] Accordingly, the burden has shifted to the 3rd defendant, to show that there exists credible evidence to show that his defence is one which has a realistic prospect of success. The 3rd defendant has, to a great extent, sought to do that, by relying on some of the evidence also being relied on, by the claimant.

[26] In that respect, the 3rd defendant is relying on the guarantee agreement dated November 3, 2008 and the extended or further loan facility contained in the February 6, 2012, letter of commitment.

[27] The 3rd defendant has contended that the extended or further loan facility contained in the February 6, 2012, letter of commitment, constituted a material variation of the underlying contractual relationship between the claimant and the 1st defendant.

[28] According to the 3rd defendant, a trial should be held to resolve the disputed issues in this claim, because, the 3rd defendant has a reasonably arguable case that he did not consent to the variation of the underlying contractual relationship between the claimant and the 1st defendant and that as such, the nature and degree of the said variation is not authorized by, or within the purview of the existing terms of the joint and several guarantee and indemnity, dated November 3, 2008.

[29] In the text – Law of Guarantees [1992], authored by Geraldine Andrews and Richard Millet, at pages 216 –219, the following is stated – 'Any material variation in the terms of the principal contract (i.e between the creditor and the principal) will discharge the surety. This is known as the rule in **Holme v Brunskill**. The facts of the case were that the creditor let a farm with sheep on it to the principal, the surety guaranteeing the redelivery of the flock in good condition at the end of the term. During the course of the term the agreement was varied between the creditor and the principal whereby the principal surrendered one of the fields up to the creditor in return for a reduction in rent of £10, without the knowledge or assent of the surety. The Court of Appeal held (Brett LJ dissenting) that even though the variation made no substantial difference to the tenancy agreement, the surety was discharged from liability. Cotton LJ said (at 505):

> *'The true rule in my opinion is that if there is any agreement between the principals with reference to the contract guaranteed,*

the surety ought to be consulted, and if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, or that it cannot otherwise be beneficial to the surety, the surety may not be discharged; yet that if it is not self – evident that the alteration is insubstantial, or one which cannot be prejudicial to the surety, the court... will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alternation, and that if he has not so consented he will be discharged.

Therefore in general terms the surety is entitled to require that his position shall not be altered by any agreement between the creditor and the principal from that in which he stood at the time of his contract.

A variation of the principal contract is material for the purposes of the rule in ***Holme v Brunskill*** *where it is not necessarily beneficial to the surety or otherwise prejudices him, and where any lack of prejudice or benefit is not evident without enquiry. If the benefit or lack of prejudice is not self-evident, then the court will not embark on an enquiry as to whether the variation was indeed beneficial to the surety or otherwise unprejudicial. Accordingly, the question of whether a variation is material is answered objectively, without reference to what the parties thought. A surety may be discharged, therefore, if the variation is potentially prejudicial when made, even though it ultimately has little effect on the surety's risk. Accordingly, whenever a creditor seeks a variation in the terms of his contract with the principal without the knowledge or consent of the surety, he does so at his own risk, and unless benefit or lack of prejudice to the surety is obvious, or there is obviously no possibility of prejudice, the surety will entitled to be discharged. It is a matter for the surety as to whether he wishes to continue to be bound by the guarantee in the circumstances of the variation of the principal contract, and if the creditor wishes to avoid the risk that the surety will seek to avoid liability under the guarantee, he should obtain the surety's prior consent to the variation.*

A variation is material so as to entitle a surety to a full discharge however, only if it is an act by the creditor which affects the risk of default by the principal, and consequently, the risk of the surety

being called upon to honour the guarantee. Such a variation alters the basis on which the surety agreed to become liable under the guarantee, and not to release the surety in those circumstances would be to allow the creditor and the principal to impose a new bargain upon the surety. In those circumstances, the surety cannot necessarily be compensated by a reduction in the creditor's right to recover against him. This type of variation must be contrasted with a variation which merely affects the amount of the surety's ultimate liability, but which leaves the risk of default by the principal unchanged; this variation will not be material...

Further, variations which are authorised by the surety or expressly contemplated by the principal contract will not discharge the surety, and nor will those authorised within the guarantee. Plainly, where the surety plays a part in the variation transaction, he will not be discharged, for example where he prepares his own documents, or where he allows the creditor to think that he has consented. However, the surety is not bound to enquire as to whether a variation is to take place, nor is he bound to warn the creditor against carrying it out because of some prejudice he may suffer.'

[30] All in all, the rule in **Holme v Brunskill,** can be understood as being of broad application and while there are a few exceptions to that rule, since none of those exceptions are applicable, based on the particular facts of this particular case, I will not refer to them, in these reasons. The citation for **Holme v Brunskill** is: [1878] 3 QBD 495.

[31] The 3rd defendant relies heavily on the rule in **Holme v Brunskill** (*op. cit.)* in support of his contention that summary judgment ought not to be granted.

[32] What is in dispute between the parties to this claim, is the interpretation of the guarantee agreement which the claimant and the 2nd and 3rd defendants entered into, on November 3, 2008.

[33] For the purposes of the claimant's summary judgment application, if the 3rd defendant's interpretation of that agreement is one which has a realistic prospect of success, then this matter must go to trial. The alternative or contrary, would

also lead to an alternative consequence, that being that this court should resolve this matter on the claimant's summary judgment application and award judgment to the claimant, at this interlocutory stage of the proceedings.

[34] The guarantee agreement is a contractual document. As such, the following dicta which is derived from paragraph 27 of the judgment of Popplewell J., as was rendered by him, in the case – **Barclays Bank Plc. v Landgraf** – [2014] EWHC 503 (Comm), is apt:

> *'The principles applicable to the exercise of interpreting contractual documents are also well established by decisions at the highest level including* ***Investors Compensation Scheme Ltd. v West Bromwich Building Society*** *[1998] 1 ALL ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896,* ***Chartbrook v Persimmon Homes Ltd.*** *[2009] UKHL 38, [2009] AC 1101, [2009] 4 ALL ER 677 and* ***Rainy Sky v Kookman Bank*** *[2011] UKSC 50, [2012] 1 ALL ER 1137, [2011] 1WLR 2900. In particular the court must consider the language used and ascertain what a reasonable person having all the background knowledge which was reasonably available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The content of such background knowledge is what is commonly referred to as the factual matrix. It is not necessary to find some ambiguity in the language before having regard to the factual matrix and a consideration of the factual matrix may indicate that the meaning which the parties would reasonably be taken to have intended could be given effect despite the fact that it was not, according to conventional usage, an 'available' meaning of the words or syntax which they had actually used: per Lord Hoffman in Chartbrook at 37.'*

[35] I have applied the legal principles as above – quoted in considering the claimant's application for summary judgment, in the particular context of this particular case.

[36] The 3rd defendant is, to frame it summarily, (no pun intended), contending in his defence, that at the time of the execution of the guarantee agreement, the debt of

the 1st defendant, which was guaranteed by the 2nd and 3rd defendants, was in the sum of $25,000,000.00, plus interest at the rate of 12% per annum and was referable to the principal contract as set out in the commitment letter dated October 6, 2008.

[37] The second commitment letter constitutes, to my mind, a substantial variation of the first commitment letter. That second commitment letter is dated February 6, 2012 and it is to be recalled, that the guarantee agreement is dated November 3, 2008. The 3rd defendant is contending, in his defence, that the guarantee agreement does not extend to the loan facility granted by the claimant to the 1st defendant, on February 6, 2012, and instead, only relates and applies to the loan facility granted by the claimant to the 1st defendant, arising from the first commitment letter which is dated October 6, 2008 and therefore pre-dates the guarantee agreement.

[38] That second commitment letter created increased debt, owed by the 1st defendant to the claimant. In respect of the first commitment letter, the unpaid principal would attract an interest rate of 19% per annum (12% per annum – the principal rate plus 'seven percentage points'), whereas, in respect of the second commitment letter, unpaid principal would attract, 'post maturity interest' at the principal rate of 20% points from the due date to the date of full settlement of the loan.

[39] To my mind, that interest rate variation appears to be a variation which is disadvantageous to the 3rd defendant as guarantor and therefore, unless the 3rd defendant agreed to it, in one of the three (3) ways as specified in the next paragraph of these reasons, then, that would mean that the 3rd defendant is discharged from the guarantee agreement and thus, guarantee obligation, which he entered into, with the claimant.

[40] There are perhaps, other material/substantial variations between the first and the second commitment letter, which would have that same effect, but further

consideration need not be given to same, since a single, 'material variation' will result in the discharge of the 3rd defendant, from his prior guarantee obligation, unless the guarantee agreement had authorized such variation or the 3rd defendant had authorized same, of if that variation was expressly contemplated by the wording of the first commitment letter.

[41] It has not been forgotten that it is the law, that, as stated by the authors – Andrew and Millett, a variation which merely affects the surety's ultimate liability, but which leaves the risk of default by the principal, unchanged, is not considered as being a substantial/material variation. To my mind though, the variations between the first and second commitment letters, go above and beyond, merely affecting the surety's ultimate liability.

[42] There exists evidence which has disclosed that the 2nd and 3rd defendants had signed the second commitment letter and that they had thereby, in writing, expressed their approval of same. That evidence was given by one Charles Lewis, in an affidavit which he deponed to, on September 15, 2016 and which was filed on said date, At the time when he deponed to that affidavit, Mr, Lewis was the Chief Officer of the Trade Financing and Risk Management Division. He deponed to having been involved in processing the second loan to the 1st defendant and that, '*the second loan was issued to Yono Industries Ltd. – the 1st defendant with the full knowledge and consent of both Mr. Andre Prince and Mr. Andre Jones being the 2nd and 3rd defendant.*' (paragraph 3)

[43] At paragraph 4 of his affidavit, Mr. Lewis has deponed as follows: '*Both the 2nd and 3rd defendants, who are Directors of the 1st defendant, knew of the second loan and approved same as both accepted the terms on which this loan was being issued. In fact it was a term of the commitment letter dated February 6, 2012 that security for this loan would include the existing personal guarantees of Mr. Andre Prince and Mr. Andre Jones. I have indicated that both the 2nd and 3rd defendants accepted the terms of the commitment letter dated February 6, 2012*

as both men were required to and did sign the commitment letter dated February 6, 2012.'

[44] That evidence stands at this time, before this court, as uncontradicted evidence. That does not mean though, that this court is, for the purposes of the claimant's summary judgment application, bound to accept that evidence.

[45] It is correct to state that in the second commitment letter, which is what set out the terms of the loan variation as between the claimant and the 1st defendant and which is the commitment letter which the 3rd defendant is now contending that his guarantee agreement with the claimant does not pertain to, there is in clause 4 of that commitment letter, the following, amongst other wording which is not relevant for present purposes: '*Security for the loan facility will be by way of the existing unsupported personal guarantees of Dr. Andre Jones and Mr. Andre Prince.'*

[46] This court accepts that the 2nd and 3rd defendant signed the second commitment letter and that they did so, with full knowledge of the contents thereof, or in other words, with full knowledge that their personal guarantee which they agreed on with the claimant was being relied on, as a means of security for the loan facility offered pursuant to the second commitment letter.

[47] When they signed that letter though, the back page of that letter, makes it apparent, that they did so, not on their personal behalf, but rather, '*for and on behalf of Yono Industries Ltd.'*

[48] If they had signed that letter on their own behalf, then there could be no doubt, that the 3rd defendant along with the 2nd defendant guaranteed the loan agreement as per the second commitment letter and agreed that their earlier guarantee agreement would be one of the securities utilized for the second loan agreement, as per the second commitment letter.

[49] Having though, not signed the same on their own behalf, I am prepared to and will, conclude that it cannot properly be accepted by this court, at this time, that by having signed the second commitment letter, '*for and on behalf of Yono Industries Ltd.'* they were thereby extending their personal guarantee to the loan agreement as set out, in that second commitment letter.

[50] Whether those signatures of the 2nd and 3rd defendants on that second commitment letter constitute an acceptance by those defendants, that the guarantee agreement earlier contracted between themselves and the claimant extended to the loan agreement as set out in the terms of that second commitment letter, is, to my mind, an issue which would have to be resolved at a trial, if this matter were to go to trial.

[51] I am however, firmly of the view that the terms of the guarantee agreement which has been entered into, between the 2nd and 3rd defendants and the claimant, are such that the 3rd defendant has consented to the guarantee of any and all loan facilities granted by the claimant to the 1st defendant – Yono Industries Ltd.

[52] The guarantee agreement is headed as follows: 'JOINT AND SEVERAL GUARANTEE AND INDEMNITY.'

[53] Clauses 1 and 15(a) to my mind, when considered together, make it pellucid that the said guarantee agreement, when interpreted according to the legal principles enunciated in the cases referred to earlier, such as the **Investors Compensation Scheme** case (*op. cit.).* The guarantee agreement is addressed to: 'National Export – Import Bank of Jamaica Ltd. 11 Oxford Road, New Kingston, Kingston 5 (herein called 'the Bank').

[54] Clause 1 reads as follows:

> *'In consideration of the Bank at our request, granting a credit facility to YONO INDUSTRIES LIMITED, a limited liability company duly incorporated under the laws of Jamaica and having its registered office at 7-9 Temple Hall, Stony Hill, Kingston 9 in the parish of St.*

> *Andrew ('the borrower') and for other good and valuable consideration (the receipt and sufficiency of which we do hereby irrevocably acknowledge), we, ANDRE JONES, Doctor of Chemistry of 2 Grove Manor Drive, Kingston 8, in the parish of St. Andrew and ANDRE PRINCE, businessman of 4792 NW 109th Passage, Miami, Florida, 33178 in the United States of America, ('the Guarantors') hereby jointly and severally unconditionally and irrevocably guarantee payment to the Bank on the date and in the manner set forth in the commitment letter of all the guaranteed obligations (as hereinafter defined), including interest thereon (both before and after judgment) at the rate and upon the terms set out in the commitment letter and all fees, commissions, charges and legal expenses (on a full indemnity basis)incurred by the Bank in relation to the credit facility granted under or in pursuance to the commitment letter or the enforcement of any mortgage, debenture, guarantee, indemnity or other security granted to the Bank (whether by us, the guarantors, or the borrower) as security for the guaranteed obligations.'*

[55] Clause 15(a) reads as follows:

> *'In this guarantee and indemnity (a) the term 'guaranteed obligations' means all principal, interest, fees, commissions, expenses (including legal costs on a full indemnity basis), damages and other moneys from time to time owing by the borrower to the Bank under or in connection with the commitment letter and/or any other banking facility granted by the Bank to the borrower.'*

[56] It is to my mind therefore, very clear that the guarantors, being the 2nd and 3rd defendants, obligated themselves to pay to the claimant all sums owed by the 1st defendant ('the borrower') to the claimant, either under or in connection with the commitment letter and/or any other banking facility granted by the Bank (the claimant) to the borrower (the first defendant).

[57] The second loan granted by the claimant to the 1st defendant is another banking facility granted by the Bank to the borrower. Clearly therefore, the 3rd defendant guaranteed that loan, jointly and severally, with the 2nd defendant. The 2nd

defendant has, it should be noted, not defended the claim and thus, default judgment had earlier been entered against him.

[58] Clearly, since the second loan agreement between the claimant and the 1st defendant post-dated the guarantee agreement, the guarantee agreement would not and could not, have expressly referred to same, whereas, on the other hand, that agreement could have and did refer to the commitment letter dated October 6, 2008 – which is in fact the first in time, of the two (2) commitment letters. It will be recalled that the second commitment letter is dated February 6, 2012.

[59] I am reinforced in my view that the guarantee agreement is not limited to guaranteeing the loan facility as referred to, in the first commitment letter, by the wording of clause 7 of the guarantee agreement. That clause reads as follows: *'This guarantee and indemnity is a continuing security and covers the ultimate balance owing to the Bank by the borrower under the commitment letter or otherwise not withstanding liquidation of the borrower or any settlement of account thereunder or other matter whatsoever and is in addition to any other guarantee, indemnity, lien, pledge, bill, note, mortgage or other security or general lien, right or set-off or other remedy now or hereafter held by or available to the Bank.'*

[60] The words 'continuing security' and 'the commitment letter or otherwise,' make it apparent that the parties intended the guarantee to be a continuing security for the ultimate balance owed by the borrower to the Bank, whether under the commitment letter or otherwise. That 'or otherwise,' would, to my mind, embrace within, 'its framework,' the second loan granted by the Bank to the first defendant, the terms of which, are set out in the second commitment letter.

[61] My conclusions in that respect, are mirroring the conclusions reached by the claimant's counsel and referred to, by them, in their written submissions which were filed as regards their summary judgment application, at pages 10-13 thereof.

Conclusion

[62] In the final analysis therefore, I have decided that this matter should not go to trial and have, as it were, 'grasped the nettle' in having reached that conclusion, which is based solely on my conclusion that the 3rd defendant's defence is not one which has any realistic prospect of success.

[63] His defence, which is that there was a variation of the initial loan agreement between the claimant and the 1st defendant and that the said variation, as per the second commitment letter, had the effect of discharging him of his guaranteed obligations freely entered into by him, has no realistic prospect of success. It has no realistic prospect of success because it is based on a false premise, that being that the guarantee agreement does not embrace within its ambit, that variation which was the second loan agreement between the claimant and the first defendant. It is in fact the contrary to that false premise, that is in fact, true.

[64] In the circumstances, my orders are as follows:

i. Judgment is entered in favour of the claimant, against the 3rd defendant, in terms as follows:

a. Principal in the sum of $1,626,774.18 and additionally, interest up to September 4, 2014, in the amount of $190,081.06 and continuing at the rate of $534.83 per diem, from as of September 5, 2014, to date of judgment.

b. Principal amount of $25,136,597.16 and additionally, interest up to September 4, 2014, in the amount of $15,066,948.37 and continuing at the rate of $12396.13 per diem, from as of September 5, 2014, to date of judgment.

c. Principal amount of $15,616,107.02 and additionally, interest up to September 4, 2014, in the amount of $5,328,531.63 and continuing at the rate of $8556.77 per diem, from as of September 5, 2014, to date of judgment.

d. Principal amount of $2,007,707.26 and additionally, interest up to September 4, 2014, in the amount of $52,475.42 and continuing at

the rate of $990.10 per diem, from as of September 5, 2014, to date of judgment.

e. Principal amount of $562,500.00 and additionally, interest up to September 4, 2014, in the amount of $5,363.01 and continuing at the rate of $184.93 per diem, from as of September 5, 2014, to date of judgment.

ii. The costs of this claim are awarded to the claimant and such costs are to be taxed, if not sooner agreed.

iii. Upon the oral application of the 3rd defendant, leave to appeal is granted.

iv. Stay of execution of judgment in respect of this claim against the 3rd defendant, is granted for a period of time not exceeding six (6) weeks from the date of this order.

v. The claimant shall file and serve this order.

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Hon. K. Anderson, J.