



[2018] JMCC COMM 25

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017 CD 02449

BETWEEN	NATIONAL EXPORT-IMPORT BANK OF JAMAICA LIMITED	CLAIMANT
AND	SOMERSET ENTERPRISES LIMITED	1ST DEFENDANT
AND	LINDEERTH POWEL	2ND DEFENDANT

Application for Summary Judgment-Whether Defence has real prospect of success – Loan- Guarantee and Indemnity- Whether misrepresentation about time of disbursement – Application post dates misrepresentation-Whether guarantor’s error exculpatory.

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

Mr. Debayo Adedipe for the 1st & 2nd Defendants

IN CHAMBERS

HEARD: 14th June 2018

COR: BATTS, J

[1] This is the Claimant’s application for Summary Judgment. The Claim is in respect of money borrowed by the First Defendant and guaranteed by the Second Defendant. The Defendants by way of defence allege breach of an oral collateral contract and/or misrepresentation by the Claimant. On the 14th June 2018, having heard submissions, I entered judgment for the Claimant as follows:

- (i) Summary Judgment in favour of the Claimant against the 1st and 2nd Defendants in the sum amount of **Ninety-One Million, Seven Hundred and Thirty-Thousand and Seven Dollars and Eighty-Seven Cents (\$91,730,007.87)**.
- (ii) Interest at 12% per annum from May 2016 to the date of this judgment
- (iii) Costs to the Claimant to be taxed or agreed
- (iv) Permission to appeal granted
- (v) Stay of execution granted for six (6) weeks.

I promised to put my reasons in writing and this judgment fulfills that promise.

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

“The court may give a 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”

[3] The application for Summary Judgment was supported by an Affidavit of Maria Burke dated 5th July 2016. It details the loan granted. The Defendants say in their defence that the Claimant is not entitled to recover the sum claimed because in or about May 2007, the Claimant’s representative informed the Defendants that the loan would be disbursed within forty (40) days. It is alleged that the First Defendant acted on that representation by entering into contractual arrangements. It is further alleged that the loan was not disbursed in the period promised causing the Defendant to lose the particular business opportunity and hence to be unable to service the loan.

[4] The evidence I considered is to be found in the affidavits of Lindearth Powell dated 15th May 2018 and, Maria Burke dated 4th July 2017. In or about June 2008, the First Defendant applied for the loan, see Exhibit MB3 being letter of application enclosing documentation. The loan, evidenced by a Letter of Commitment dated the 22nd August 2008, was granted to the First Defendant. It

was for the purpose of purchasing equipment overseas in respect of a tile-making plant. The purpose was to take advantage of a then existing market opportunity in Jamaica involving the construction of Spanish Hotels and the export market. The breakdown of the loan amount is as follows:

(i) Purchasing of a Tile-Making Plant	\$33,880,00.00
(ii) Purchase of a Cuber for Block Machine	\$ 6,860,00.00
(iii) Purchase of Two (2) Forklifts	\$2,916,000.00
(iv) Purchase of One (1) Kamatsu PC400 Excavator	\$8,000,000.00
(v) Purchase of tyres for heavy duty equipment	\$3,786,660.00
(vi) Purchase of miscellaneous spare parts	\$2,797,340.00

[5] The First Defendant alleges that due to the late disbursement of funds from the Claimant, heavy losses were incurred. The First Defendant was not able to service the loan because the First Defendant was contractually obligated to AMS Group, the supplier of the equipment to pay for the goods and also responsible for the delivery of such goods. The First Defendant asserts that, by the time the loan was disbursed, there was a change at the Spanish Hotels and the market had essentially evaporated.

[6] The Second Defendant asserts that in order for the loan to be facilitated, he agreed to be the guarantor of the loan: however, when the documents arrived he signed a document entitled “Guarantee and Indemnity” instead of a document entitled “Guarantee”. The Second Defendant says that he was misled by the Claimant and that he did not have independent legal advice and did not understand the distinction between a Guarantee and an Indemnity. He asserts that he was fraudulently or negligently misrepresented to by the Claimant.

[7] Upon reviewing the file to write this judgment I saw an affidavit of Traci – Lee Long dated and filed the 11th June 2018. I have reviewed my notes of the

proceedings and do not see where any submissions were made with specific reference to it. The affidavit attaches a letter of commitment dated 2nd February 2007, in respect of a loan for \$20 million. This does not appear to be the same loan which is the subject matter of this suit. If it is then it means the grant of the loan predated the alleged misrepresentation. It is difficult to see the defence could succeed in such circumstances. The affidavit also attaches a letter dated 24th September 2008. That letter references an "Offer Letter dated 22nd August 2008". It is unclear even from the affidavit how this relates to the letter dated 2nd February 2007. I would have hoped that submissions had been made on this very late affidavit.

- [8] As stated by Gilbert Kodilinye and Maria Kodilinye in their book Commonwealth Caribbean Contract Law at page 27:

"The main distinction between a guarantee and indemnity is that the guarantor makes himself secondarily liable for the amount of debt, whereas a person giving an indemnity makes himself primarily liable for the amount".

- [9] Misrepresentation is defined in Law 8th Edition by David Barker and Colin Padfield at page 153, as:

"An untrue statement of fact made by one party to the other party to a contract, either before or at the time of making the contract, with the intention that the person to whom the statement is made shall act upon such misrepresentation, and he does act".

They further state at page 156, that "negligent misrepresentation is considered as a careless (negligent) statement, though not dishonest". The case **Hedley Byrne & Co. Ltd v Heller & Partner Ltd [1964] AC 465** decided that "where A makes a negligent misstatement to B, as a result of which B suffers damage in reliance on it, B may sue A in tort for negligence providing a 'special relationship' exists between A & B such as banker and customer....".

- [10] In **L'Estrange v Graucob [1934] 2 QB 394**, it was decided that once a signature is affixed to a document the person signing is bound by the terms of the contract. This remains good law. Therefore, the Second Defendant cannot escape his contractual obligation to the Claimant on the basis that when he signed the "Guarantee and Indemnity" he was unaware of what he was signing. The Claimant had no fiduciary, in the sense of a trustee's, duty to either Defendant.
- [11] As regards the alleged misrepresentation, the uncontested fact is that the First Defendant signed the application for the loan on the 26th June 2008. The application was conditionally approved in August 2008 and following the satisfaction of requisitions finally approved on 18 August 2008 .By letter dated the 17th September 2008 the Defendants requested amendments to the list of items to be purchased . This was granted by letter dated 7th October 2018 (Exhibit MLB 6) .The loan was eventually disbursed in November 2008. The Claimant could not, therefore, reasonably have expected disbursement of the loan forty (40) days after the oral collateral contract, or representation, made in May 2007. There had not as yet even been an application made for the loan.
- [12] Only a misrepresentation of fact is actionable, See **Verna Madden v Francis Elliott (1993) 30 JLR 247**. A statement of future intent is only a representation of the intent. The promised future conduct is only actionable if there is a contract to do the act. In the absence of contract, it is a bare promise and not actionable. Equity may however grant relief if a person has acted to his detriment in reliance on such a misrepresentation or promise.
- [13] The First Defendant did not file a counterclaim against the Claimant but has set up a defence of 'set-off' against the Clamant. Set-off as defined in the **Oxford Dictionary of Law 7th Edition** as:
- (1) a monetary cross-claim that is also a defence to the claim made in the action by the claimant or
 - (2) the deduction of monies owed against sums due to be paid.

As Morris LJ summarized in the case of Hanak v Green [1958] 2 QB 9 that:

“equitable set-off is not confined to debts or liquidated damages and so long as the cross-claim is sufficiently closely connected with the debt as to make it equitable to take account of one without taking account of the other, then the set-off of the claim operates to reduce or eliminate the debt”.

- [14] In the case before me, there is nothing to suggest that at the time the Claimant’s representative made the alleged statement of intent, to disburse the loan funds within a certain period, that the bank did not have that intention. He says that he was later told the reason for the alleged late disbursement was that the bank did not have the money. This runs counter to the documentary evidence that as late as October 2008 amendments to the list of items to be purchased were being made at the Claimant’s instance. It is clear also that a loan was in fact granted and the funds disbursed shortly after that amendment. It is evident that there was no written term inserted for the disbursement of the funds within any time frame that was allegedly so important to the Defendants. As such, there was no contractually enforceable term to that effect. The documentary evidence runs counter to the Defendants allegations. The time for disbursement, allegedly promised, predated the formal application for the loan by almost one year. The intended defence has no real prospect of success.
- [15] In the final analysis therefore and for the reasons stated summary judgment was entered in favour of the Claimant.

David Batts
Puisne Judge
25th July 2018.