

ROYAL COURT

3rd March, 1994

46.

Before: The Judicial Greffier

Between: Mercantile Credit Company Limited Plaintiff

And: Peter Joseph George Wallis First Defendant

And: Pauline Joan Wallis Second Defendant
(by original action)

AND

Between: Peter Joseph George Wallis First Plaintiff

And: Pauline Joan Wallis Second Plaintiff

And: Mercantile Credit Company Limited Defendant
(by counterclaim)

Application by the Plaintiff in the original action for Summary Judgment in the original action and for striking out of the counterclaim.

Advocate A.R. Binnington for the Plaintiff
in the original action.

Advocate S.J. Habin for the Defendants
in the original action.

JUDGMENT

JUDICIAL GREFFIER: Early in in 1990, Black Tulip Hotels Limited (to which I shall refer as "Black Tulip"), the owner of the "Cavendish Hotel" in Torquay, was seeking to re-finance existing borrowings and the Plaintiff in the original action (to which I shall refer as "Mercantile") agreed to lend £850,000 to Black Tulip on certain terms, which included the provisions of personal guarantees by the Defendants in the original action (to whom I shall refer as "Mr. and Mrs. Wallis"). Accordingly, on 20th April, 1990, Mr. and Mrs. Wallis executed a guarantee "for all monies and liabilities which shall for the time being be due, owing" to Mercantile by Black Tulip. The guarantee was not limited in any way and, although the

guarantee document did not state the proper law of the guarantee, Advocate Habin did not dispute that this was English law.

Subsequently, Black Tulip was unable to meet its obligations under the loan and as a result of this, in August 1991, Black Tulip voluntarily gave up possession of the hotel to Mercantile pursuant to the loan agreement. Mercantile continued to run the hotel for a period of over a year with a view to ensuring that the best possible price could be obtained for it. Eventually, on 29th October, 1992, the hotel was sold for £345,500.

Mercantile's claim is for £946,704.71 together with interest from the 12th October, 1993 to the date of payment at 3% above Mercantile's base rate from time to time with interest being added to the outstanding sum monthly in arrears and then compounding.

Mr. and Mrs. Wallis did not challenge the actual calculations produced by Mercantile, subject to the lines of defence mentioned below and so I did not need to examine these calculations in detail.

They did, however, raise the following lines of defence.

In paragraph 3 of their Answer and Counterclaim they alleged that they were induced to enter into the guarantee as a result of various express representations already made to them during telephone conversations by a Mr. T. Caldwell, an agent, servant or representative of Mercantile. The alleged representations are set out in sub-paragraphs (1), (2) and (3) of paragraph 3 of the Answer and Counterclaim. In paragraphs 5 and 6 of the Answer and Counterclaim they allege that the representations constituted express terms and conditions of the guarantee. In paragraphs 7 and 8 of the Answer and Counterclaim they allege that Mr. Caldwell voluntarily assumed the duty of advising and explaining to them the meaning of the guarantee. In paragraph 9 of the Answer and Counterclaim they claim estoppel upon the basis of the Plaintiff's having acted to their detriment on the representations.

Both Mr. and Mrs. Wallis filed Affidavits in answer to the Affidavit in support of the application for Summary Judgment. Paragraph 7 of Mr. Wallis' Affidavit reads as follows:-

"7. I never met Mr Caldwell with my wife and I recall that my wife was reluctant to enter into any guarantee to the Bank and said that the Hotel itself should be sufficient security in view of the Valuation. I therefore spoke to Mr Caldwell on the telephone prior to the conclusion of the transaction and advised him that my wife would not provide a guarantee whereupon he requested to speak personally to my wife; my wife spoke to Mr Caldwell on an extension telephone and I continued to listen to their conversation. Mr Caldwell again told my wife not

to worry in relation to the granting of the guarantee, that it was "normal procedure" and that there would be no problems in view of the Valuation and in any event a guarantee meant that she would only be liable for any shortfall which was particularly unlikely. Mr Caldwell further advised that the Bank had never pursued any such guarantees particularly as she did not live in England. My wife accepted what Mr Caldwell said and in view of his assurances agreed to sign a guarantee jointly with me."

Mrs. Wallis deals with the same matters in paragraph 5 of her Affidavit where she states as follows:-

"5. My only contact with the Bank during the negotiations was when my husband said that the Bank required a personal guarantee from both my husband and I in respect of the loan to BTH ("the Advance"). I specifically recall that I did not want to give any personal guarantee and I questioned why the Bank should require a guarantee when the Valuation, which had been shown to me, showed that the Advance was adequately covered. I recall that my husband telephoned Mr Caldwell to advise him of my reluctance and during that conversation, at which I was present, my husband said to me that Mr Caldwell wished to speak to me personally; I picked up the extension telephone and my husband continued to listen to my conversation with Mr Caldwell on the other telephone. Mr Caldwell was very reassuring and said to me that it was "normal procedure" for the Bank to require personal guarantees but I should not worry as the Valuation revealed that the Advance was more than adequately covered against the Hotel and if any difficulties arose BTH would merely sell the Hotel and there would be no question of any liability under the guarantee. Mr. Caldwell further reassured me by advising me that a guarantee is only used in respect of any shortfall in any event and that the Bank would not pursue the guarantee especially as my husband and I lived in Jersey. I took Mr Caldwell at his word, perhaps foolishly, and agreed to sign the guarantee."

Mr. Caldwell, in his Affidavit in support of the application for Summary Judgment stated towards the end of paragraph 5 thereof:-

"At no time did I or anyone acting on the Plaintiff's behalf represent or otherwise suggest to the Defendants that the said guarantee would not be called upon."

Attached to Mr. Caldwell's Affidavit was Exhibit TQRC2 which was a letter dated 11th April, 1990 addressed by Colin J. How, a

solicitor, to Mr. and Mrs. Wallis. Mr. How was the solicitor acting for Black Tulip. The letter reads as follows:-

"Dear Peter and Pauline,

*Re: Black Tulip Hotels Limited and Mercantile Credit
Remortgage of Cavendish Hotel*

As you know you are both required to guarantee the mortgage loan to be made to Black Tulip Hotels Limited on the security of The Cavendish Hotel, Torquay.

I am required to advise you both to obtain independent legal advice before executing the Guarantee so that you are fully aware of all the implications and liabilities.

I shall be obliged if you will both sign the enclosed copy of this letter confirming that you have either obtained independent legal advice or do not wish to do so.

Yours sincerely,

Colin

We Peter Joseph George Wallis and Pauline Joan Wallis confirm that we have obtained independent legal advice as advised above / do not wish to obtain independent legal advice as advised above."

The copy letter which I have seen had the second alternative of "do not wish to obtain independent legal advice as advised above" crossed out and had been signed by Mr. and Mrs. Wallis.

Mr. and Mrs. Wallis accept that their signatures are on that letter but state in their Affidavits that they do not know when they signed it or how it was returned to Mr. How.

This letter is highly significant because it indicates that Black Tulip's adviser was indicating that he was required to advise them to obtain independent legal advice. The letter in question was addressed to Mr. and Mrs. Wallis c/o the Cavendish Hotel and it is clear to me that Mr. How was not only the normal legal adviser of Black Tulip but also of Mr. and Mrs. Wallis personally in relation to matters concerning the Hotel. What he was saying was that they needed, in order to satisfy the requirement that it be clear that the guarantors had been separately advised from the Company, to obtain advice from someone other than himself, their normal legal adviser in relation to the Hotel.

Attached to Mr. Wallis' Affidavit as Exhibit PJGW2 was a copy of a facility letter dated 15th January, 1990 addressed to Mr. Wallis on behalf of Black Tulip at the Cavendish Hotel.

Paragraph 4(a) of the facility letter states that one of the security requirements of the re-financing would be the personal guarantees of Mr. and Mrs. Wallis. Mr. Wallis signed the final page of the letter to indicate that the offer was being accepted by Black Tulip.

The test in relation to an application for Summary Judgment is not a simple one which can be reduced to a mere formula of words. It is set out at great length in the R.S.C. (1993 Ed'n) and particularly in sections 14/3-4/1 onwards. I do not propose to set out vast sections of the White Book in this Judgment as I have already done so in previous judgments but merely to indicate that I am applying the appropriate test as indicated in the whole of those sections. However, I am going to quote some of the paragraphs from section 14/3-4/8 as follows:-

(a) Commencing at the beginning of section 14/3-4/8 -

"Leave to defend - unconditional leave - The power to give summary judgment under O.14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay". As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.

Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment."

(b) Commencing at the fourth paragraph of section 14/3-4/8-

"Where the defence can be described as more than shadowy but less than probable, leave to defend should be given, especially where the events have taken place in a country with totally different mores and laws.

The affidavit showing cause against summary judgment or any evidence contained in it should be rejected only if it is inherently unreliable because it is self-contradictory or inadmissible or irrelevant or where there is affirmative evidence admitted or unchallengeable by the defendant which is unequivocally inconsistent with his own evidence, without any plausible explanation given of the inconsistency, for in such a case the Court could, but would necessarily conclude

that not even a faint possibility of a defence existed, but the Court should not reject the defendant's evidence if, merely because of its inherent implausibility or its inconsistency with other evidence, it finds it incredible or almost so, though in such a case the Court may consider granting conditional leave."

I have no difficulty whatsoever in rejecting the line of defence that any representations made by Mr. Caldwell on behalf of Mercantile became terms and conditions of the guarantee. The terms and conditions of the guarantee are set out in a brief written document which was signed by Mr. and Mrs. Wallis on 20th April, 1990. There is absolutely nothing in writing to contradict those terms.

I also find no difficulty in rejecting the line of defence that Mr. Caldwell on behalf of Mercantile had accepted responsibility to advise Mr. and Mrs. Wallis in relation to the guarantee. That is clearly contradicted by the letter from Mr. How which was countersigned by Mr. and Mrs. Wallis.

The issue of estoppel and the issue of the representations appear to me to be very similar issues. The real question is: did Mr. and Mrs. Wallis rely to their detriment on any representations which were made. There are two issues here: first, were such misrepresentations made; and secondly, did Mr. and Mrs. Wallis act on them in signing the guarantee.

There was a clear conflict between the Affidavits of Mr. and Mrs. Wallis and the Affidavit of Mr. Caldwell put in on behalf of Mercantile.

I have come to the conclusion that I cannot reject the Affidavit evidence of the Defendants, for the purposes of this application, in relation to the representations made.

The next point for me to consider is: could these representations have induced the Defendants to sign the guarantees. I am bound to say that there are a number of aspects of the Defendants' case in this respect which are less than completely satisfactory. First, this was a re-financing of an existing borrowing and the Defendants do not appear to be people who are inexperienced in commercial matters. Secondly, there is the matter of the letter which they signed indicating that they had taken independent legal advice on the guarantee. Thirdly, there is the fact that they appeared to have a lawyer of their own who was also the lawyer of the Company, namely Mr. How, who was writing to them advising that they should take advice independent of that taken by the Company.

On the other hand, the guarantee document itself indicates that the guarantee was witnessed by a Miss D. Fiddes, a House

Manager at "Hotel L'Horizon", St. Brelade. It therefore appears to me to be quite credible that they did not take any separate advice in Jersey. On the question of causation, I find the case of the Defendants almost incredible but that is not a sufficient test to enable the Plaintiff to obtain Summary Judgment. The defence is in my view more than shadowy.

Accordingly, I am going to give unconditional leave to defend.

A further line of defence raised by the Defendants related to the fact that the Hotel, after re-possession, was eventually sold for a much lower price than its valuation prior to the re-financing. The Plaintiff produced a further Affidavit after the adjournment in this case, which set forth numerous documents and letters which satisfied me completely that the property had eventually been sold for the best reasonably attainable price. The line of defence of the Defendants in relation to that point was, in my view, entirely speculative and if I had not decided to grant unconditional leave to defend in relation to the allegations of misrepresentation then I would have rejected that line of defence for the purposes of Summary Judgment.

I was also asked to strike out the Defendants' amended Counterclaim. The Plaintiff's argument was that the amended Counterclaim consisted of precisely the same allegations as had been pleaded by way of defence and therefore if this failed as a defence, for the purposes of Summary Judgment, it would be illogical to allow it to continue as a counterclaim.

An interesting point arises here because the test in relation to striking out is a more severe test than the test for granting Summary Judgment and it could be that in a suitable case, the test for Summary Judgment would be met but not that for striking out.

That does not, of course, arise in this case as I have already indicated that I am giving unconditional leave to defend.

However, another related point does arise which is: has the amended Counterclaim been properly brought as a counterclaim at all. It appears to me that if a line of defence acts purely as a defence and does not give rise to a potential claim which would stand in its own right if the original claim were to fail then it would be wrong to seek to plead this as a counterclaim.

However, in this case, in paragraph 16 of the amended Answer and Counterclaim under the heading of particulars of loss and damage the Defendants have, over and above their liabilities under the guarantee, pleaded a claim for "further liabilities and subsequential damage suffered by the Defendants in relation thereto".

It appears to me that this goes beyond a mere defence and includes a claim for damages which could stand in its own right if the defence were completely successful. Thus, it appears to me that there is a valid counterclaim and I am therefore refusing to strike it out.

Authorities

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14/3-4/8.

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(9th October, 1991) Jersey Unreported C.of.A.

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1 Ch. 129.

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ER 513 C.A.

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