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ROYAL COURT
(Samedi Division)

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25th April, 1997

Before: The Judicial Greffier

Between	Lloyds Bank Plc.,	Plaintiff
And	Michael Joachim O'Donnell	First Defendant
And	Pamela O'Donnell	Second Decendant

Application by the Plaintiff for Summary Judgment.

Advocate D.R. Wilson for the Plaintiff;
Advocate R.J.F. Pirie for the Defendants.

JUDGMENT

THE JUDICIAL GREFFIER: On 10th April, 1997, I heard the parties through their advocates in relation to this matter and reserved Judgment. The Defendants were the beneficial owners and directors of a company known as Softrade (Jersey) Limited (hereinafter referred to as "the Company") which traded from June 1985 onwards as Lido's Bar Café Vins from premises at 4/6 Market Street, St. Helier. The Company had an overdraft facility with the Plaintiff for a number of years which was not supported by any personal guarantees. By the middle of 1993, the overdraft was running at a level of just over £16,000 and the position gradually worsened until by February 1st, 1994, the overdraft was just over £20,000. At the same time, negotiations were continuing between the Company and its landlords for an extension of its lease. By early April, 1994, the Plaintiff was requiring, as a condition of its continuing to support the business through the overdraft, that the Defendants execute a joint and several personal guarantee of the indebtedness of the Company. The

formal guarantee was executed on 21st April, 1994, and was witnessed by Advocate D.J. Petit who was then working for Michael Voisin & Co. The witnessing clause indicated that the guarantee document had been signed by both Defendants in the presence of Advocate Petit after the contents of it had been explained by him. Around 13th May, 1994, it became apparent that no extension of the existing lease was to be granted and the Company ceased trading on 28th May, 1994. The value of what could be realised from the business was paid into the overdrawn account which was reduced by the end of June, 1994, to just over £12,000. The Defendants made certain payments to the bank by way of reduction of the overdraft but when these payments ceased in early 1996, the bank, by letters dated 29th February, 1996, gave formal notice to call in the guarantee. The Plaintiff has sued for the sum of £12,251.96 as being the sum due under the overdraft as at 1st October, 1996, together with interest thereon at 2% above the Plaintiff's base rate from time to time and full indemnity costs.

Although the Defendants, in their Answer, effectively put the Plaintiff to proof of the calculation of the amount due, at the hearing in relation to Summary Judgment, there was no serious attempt to attack the precise calculations on the overdrawn account. However, the Defendants, through their advocate, sought to attack the validity of the guarantee. Whilst admitting that they had signed the guarantee, the Defendants denied that there was any consideration for them so doing as the Company was already indebted to the Plaintiff and as no new facility was being granted to the Company. The Defendants also alleged that the Plaintiff was under a duty of care to the Defendants not to advise them to undertake any obligations for which they were not previously liable. The Defendants were also saying that they had been wrongly pressured into signing the guarantee at a time when there was uncertainty as to whether an extension of the lease would be granted and when the Company was clearly in difficulties and that the fact that the Company was declared en desastre within two months of the signing of the guarantee confirmed the fact that the Company was clearly in difficulties. However, unusually, the affidavits filed on behalf of the Defendants were not sworn by them but by Advocate Pirie on the basis of his clients' instructions and the value of the evidence contained therein is accordingly much less than a sworn statement by the Defendants personally.

Against this, it is clear that Advocate Michael Voisin, who is Mrs. O'Donnell's brother, was closely involved in advising

them and, indeed, had invested quite a lot of his own money in assisting them with the business, and Advocate Petit both witnessed the guarantee and indicated thereon that he had advised the Defendants in relation thereto. The Defendants were not inexperienced in relation to financial matters and had personally lost a property in *Dégrèvement* proceedings during the early 1990s. The Defendants had continued to make some payments under the guarantee after the business had ceased trading and I had before me, attached to various affidavits, a quantity of correspondence between the bank and the Defendants, subsequent to the Company ceasing trading, which was very amicable. When the Defendants had originally filed an answer to the claim on 6th December, 1996, they admitted the existence of the guarantee and it was only once they were pressed with Summary Judgment proceedings that they raised for the first time the issue as to whether or not the guarantee was valid.

The principles in relation to Summary Judgment in Jersey, in general follow those in England and the parties quoted to me from various sections of the White Book to which I referred in the case of Hambros Bank (Jersey) Limited v. Jasper (27th April, 1993) Jersey Unreported and which read as follows:-

> *"(1) The first two paragraphs of section 14/3-4/4 read as follows:-*
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> *"Defendant's affidavit - The defendant's affidavit must "condescend upon particulars," and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it. It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part.*
>
> *A mere general denial that the defendant is indebted will not suffice unless the grounds on which the defendant relies as showing that he is not indebted are stated. If the affidavit commences with a statement that the defendant is not indebted to the plaintiff in the account claimed, or any part thereof, it should state why the defendant is not so indebted, and state the real nature of the defence relied on."*
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> *(2) The text of the opening paragraphs of section 14/3-4/8 reads as follows:-*
>
> *"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.

O.14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the Court, or to make him liable in such a case to be put on terms of paying into Court as a condition of leave to defend. Thus in an action on bills of exchange, where the defendant set up the plea that they were given as part of a series of Stock Exchange transactions, and asked for an account, it was held to be a clear defence, and entitled the defendant to unconditional leave to defend. "The summary jurisdiction conferred by this Order must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion." Summary judgment under this Order should not be granted when any serious conflict as to matter of fact or any real difficulty as to matter of law arises; but however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable, it will give final judgment. And in cases arising out of stock transactions, especially, the Court should be very slow in allowing the plaintiff to take judgment without trial or in making payment into Court a condition of leave to defend.

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."

(3) Continuing with a quotation from section 14/3-4/8 further down -

"On the other hand, a complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some other reason there ought to be a trial; and leave to defend ought to be given unless there is clearly no defence in law such as could have been raised on the former demurrer to the plea and no possibility of a real defence on the question of fact. Where there are unexplained features of both the claim and the defence which are disturbing because they bear the appearance of falsity and disreputable business dealings and questionable conduct, the Court should not make tentative assessments of the respective chances of success of the parties or the relative strengths of their good or bad faith, and should not on such an examination grant the defendant conditional leave to defend, but should give unconditional leave to defend.

In an action by a bank claiming to recover sums due under a guarantee of a company's indebtedness, allegations by the guarantors, who were directors of the company, that the receiver appointed by the bank under a debenture issued by the company was guilty of negligence in realising the company's stock at a gross undervalue because the sale had been held at the wrong time, and had been insufficiently advertised and poorly organised and that the bank had interfered with the conduct of the receivership raised triable issues and the defendants were entitled to unconditional leave to defend."

(4) The fifth paragraph on page 150 of the 1993 White Book of the same section commences as follows:-

"Where there is "a fair probability of a defence" unconditional leave to defend ought to be given."

(5) The penultimate paragraph of section 14/3-4/8 commences as follows:-

Even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given."

(6) Section 14/3-4/9 commences as follows:-

"Some other reason for trial - The former O.14,r.1, provided that the defendant should have leave to defend if he "shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally." These words were replaced in r.3(1) by the words that the defendant should have leave to defend if he satisfied the court "that there ought for some other reason to be a trial" of the claim or part to which the summons for judgment relates. These words, if anything, are wider in their scope than the former. It sometimes happens that the defendant may not be able to pin-point any precise "issue or question in dispute which ought to be tried," nevertheless it is apparent that for some other reason there ought to be a trial."

(7) Section 14/3-4/10 commences as follows:-

"Question of fact - The following principles are laid down in cases decided under this Order. Leave to defend should be given where the defendant raises any substantial question of fact which ought to be tried; or there is a fair dispute to be tried as to the meaning of the document on which the claim is based; or uncertainty as to the amount actually due; such as alleged deception in the prospectus of the plaintiff company; or non-delivery of all the goods, and excessive charges; or whether there had been misrepresentation by the plaintiff; or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witness on his affidavit; or alleged fraud; or whether the plaintiff has fulfilled his part of the contract; or inferiority of work done; or against a surety where there is a reasonable doubt of his liability; or as to the amount of his liability; or where on the facts sworn to there is a prima facie case on both sides."

(8) *Next section 14/3-4/11 commences as follows:-*

> *"Question of law - Leave to defend should be given where a difficult question of law is raised; e.g. whether the claim is in respect of a gambling transaction; or depends on foreign law.*
>
> *Nevertheless, if the point is clear and the Court is satisfied that it is really unarguable, leave to defend will be refused. Thus, e.g. where the words of the statute under which the action was brought clearly made the defendants liable, the court refused to give leave to defend."*

In relation to this application, I have absolutely no doubt that there was consideration and "cause" for the execution of the guarantee. Not only was the Plaintiff going to continue to support the Company but also, it was prepared to see the overdraft figure increase. The Defendants took a commercial decision, after obtaining legal advice, to execute the guarantee, presumably because they thought that this was in their best interests. From the correspondence and notes of the bank manager dealing with this matter at the relevant time, which were attached to the affidavits, I can see that the Defendants were very hopeful either of obtaining an extension of their existing lease or of being able to continue the business run by the Company at other premises. They were relying upon the Company for their own source of income and, therefore, it was very much in their interests for it to be able to continue trading. In such circumstances as this, it seems to me to be completely proper that a bank seek a personal guarantee and that they insist that this be executed after legal advice was obtained. Although the Defendants have sought to attack the conduct of the Plaintiff in seeking the guarantee, their failure to swear an affidavit clearly setting out the circumstances in which the guarantee was executed leaves their defence in the shadowy and speculative category and the Defendants have failed to satisfy the test to enable them to obtain leave to defend. Indeed, in this particular case, it would appear that the Plaintiff had been very generous in its assistance to the Company for a number of years and the correspondence between the parties appears to be fully consistent with this. There cannot, in my view, be any question, in this case, of the bank having acted in any way improperly or having in any way misused its position. This appears to me to be one of those cases in which, once finally pressed for payment, guarantors have sought to find some way to wriggle out of their obligations under the guarantee.

Accordingly, I find the Defendant's case wholely defective and unbelievable. I have also considered whether, for some other reason there ought to be a trial. However, as I cannot see any

suggestion of impropriety on the part of the bank in this case, it does not seem to me that that would be appropriate.

Accordingly, I am giving Judgment for the Plaintiff in the sum sought of £12,251.96 together with interest thereon at the rate of 2% above the bank's base rate from time to time from 1st October, 1996, until payment of the debt. I am also granting permission to sell and will need to be addressed both in relation to the matter of the costs of and incidental to the action and in relation to the weekly rate of any arrest on wages which should be imposed.

Authorities

Royal Court Rules 1992, as amended: Rule 7.

R.S.S. (1997 Ed'n): R.14.

Hambros Bank Ltd -v- Jasper (née Baker) (27th April, 1993) Jersey Unreported.

Hambros Bank Ltd -v- Jasper (née Baker) (13th July, 1994) Jersey Unreported.

Hambros Bank Ltd -v- Glendale Hotel Holding & Ors (27th Otober, 1993) Jersey Unreported.