

ROYAL COURT
(Samedi Division)

131.

30th June, 1994

Before: The Deputy Bailiff, and
Jurats Blampied and Rumfitt

Between: **Mercantile Credit Company Limited** **Plaintiff**

And: **(1) Peter Joseph George Wallis**
 (2) Pauline Joan Wallis **Defendants**

And: **(1) Peter Joseph George Wallis**
 (2) Pauline Joan Wallis **Plaintiffs**

And: **Mercantile Credit Company Limited** **Defendant**
 (by Counterclaim)

Appeal by the Plaintiff against the Order of the Judicial Greffier of 3rd March, 1994, refusing the Plaintiff's application for summary Judgment.

Advocate A.R. Binnington for the Plaintiff.
Advocate S.J. Habin for the Defendants.

JUDGMENT

THE DEPUTY BAILIFF: This is an appeal from an Order of the Judicial Greffier of 3rd March, 1994, dismissing an application by the Plaintiff for summary Judgment against the Defendants.

5 The action arises from a guarantee given by the Defendants to the Plaintiff guaranteeing the indebtedness of a company called "Black Tulip Hotels Limited" (to which we shall refer as Black Tulip) to the Plaintiff. It is common ground between the parties that the proper Law of the Contract of Guarantee is English Law.

The Plaintiff has brought its action against the Defendants in this jurisdiction because they are resident here.

5 The brief history of the matter is that Black Tulip was unable to meet its obligations to the Plaintiff under the loan and in August, 1991, voluntarily gave up possession of the hotel which it owned to the Plaintiff pursuant to the loan agreement. The Plaintiff continued to run the hotel for a period of over a year with a view to ensuring that the best possible price could be
10 obtained for it. Eventually, on 29th October, 1992, the hotel was sold for some £345,500.

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

20 These calculations were not themselves challenged by the Defendants before the Judicial Greffier, but the Defendants raised the defence that they were induced to enter into the guarantee by various express representations made to them by Mr. Thomas Caldwell, a manager of the business leasing unit of the Plaintiff.

25 Those alleged representations were basically threefold: first, that the asset being acquired by Black Tulip, namely the Cavendish Hotel in Torquay, was worth more than the amount of the loan and the Defendants should not therefore worry about any liability which they might otherwise have under the guarantee. Secondly, if repayments could not be made by Black Tulip the
30 Plaintiff would continue to support the companies since it was in the Plaintiff's interest to do so and in the circumstances would not in fact call upon the Defendants under the guarantee and furthermore had never previously called upon similar guarantees in other cases. Thirdly, in any event, the hotel would first be sold
35 and the Defendants would be liable under their guarantee only for the shortfall between the amount realised and the amount of the loan but that because the Defendants lived in Jersey, it would not be worthwhile for the Plaintiff to take action against them because it would be too expensive.

40 Those were the representations which the Defendants said had induced them to sign the guarantee in favour of the Plaintiff.

45 Mr. Caldwell's reply to that was that the representations were not made. Furthermore, before the execution of the contract of guarantee, the Defendants had received a letter from their legal adviser, advising them to obtain independent legal advice about the guarantee. They had countersigned a copy of that letter confirming that they had obtained such advice. It was, therefore,
50 not open to the Defendants, it was said, to argue that they were not aware of the nature of the guarantee.

Mr. Binnington also drew our attention to correspondence in 1991 between the first Defendant and Mr. Caldwell, which, it was submitted, suggested that the first Defendant was aware of the existence of the guarantee which thus gave the lie to his assertion that he thought that the guarantee was an empty document.

The existence or otherwise of a defence to the claim is, as we have said, a matter governed by English Law. Mr. Caldwell's affidavit exhibited an opinion of English counsel, Mr. J.H.S. Russen, which reviews the pleadings and the defences raised by the Answer. Counsel expresses the opinion that the guarantors - that is the Defendants - do not have a good defence for the purpose of any application for summary Judgment. He states that the alleged representations of Mr. Caldwell border on the incredible. He concludes his opinion in the following way.

"I cannot say that the defences of misrepresentation and estoppel are wholly misconceived. It is clearly open to the court to conclude that the terms of a written agreement have been overridden by an oral promise upon which the promisee has relied (See for example City and Westminster Properties (1934) Ltd -v- Mudd (1959) 1 Ch. 129 and J Evans and Son (Portsmouth) Ltd -v- Andrea Merzario Ltd (1976) 2 All ER 930 CA). The problem for the guarantors in the present case is that there was in fact no such reliance. It is this which leads me to the conclusion that the guarantors do not have an arguable defence to Mercantile's claim."

The opinion of Mr. Russen is the only evidence of English Law before the Court. Mr. Habin told us that the Defendants could not afford to commission an opinion from English counsel. Mr. Habin pinned his argument in part, however, upon the penultimate sentence of the extract which we have cited. The issue as to whether there was any reliance upon the alleged representations, assuming they were made, is, Mr. Habin submits, a question of fact. On this question of fact the Judicial Greffier reached the conclusion that he could not reject the affidavit evidence of the Defendants for the purpose of the application for summary Judgment.

Mr. Habin then drew our attention to a leading English case on this subject of European Asian Bank AG -v- Punjab and Sind Bank (No 2) (1993) 1 WLR 642, where Gough LJ stated in relation to factual disputes:

"We wish however to conclude with this comment: If the Judge has already decided on the evidence that there is a triable issue on a question of fact, it must, in the very nature of things, be unlikely that this Court will interfere with his decision and decide that no trial

should take place because where such a conclusion has already been reached by a judge, this Court will be very reluctant to hold that there is no issue or question which ought to be tried."

5

On the other hand Mr. Binnington reminded us that this was an appeal from the Judicial Greffier which could not be equated with an appeal from the High Court to the Court of Appeal in England.

10

We have considered carefully the arguments deployed by Mr. Binnington and we have reviewed the relevant parts of the White Book dealing with the equivalent Order 14 procedure in England. In particular we have had regard to paragraph 14/3-4/22 under the heading "Guarantees" where there is a citation from the Judgment of Bramwell LJ in Lloyds Banking Co -v- Ogle (1876) 1 Ex.D. 236.

15

"In my opinion it ought to be a general rule that where there is no acknowledgement of the debt by the defendant or anything else to show that the defence is for mere purposes of delay, in the case of a guarantor or sûreté like the defendant, he should not be prevented from going to trial."

20

25

In our judgment the defences raised are not so insubstantial as to warrant depriving the Defendants of the opportunity to develop them. We make no observations on the strength of the Defendant's case but we have reached the conclusion that there are triable issues as to whether the representations were made and whether the Defendants placed reliance upon them, and furthermore as to whether a defence of estoppel might be available. We are reinforced in this conclusion by the fact that the latter question is, so far as this Court is concerned, a question of foreign law. The appeal is therefore dismissed.

30

Authorities

Royal Court Rules, 1992: Rules 7/1 and 6/13.

R.S.C. (1993 Ed'n): Order 14.

Lloyds Banking Co -v- Ogle (1876) 1 Ex.D. 263.

European Asian Bank AG -v- Punjab and Sind Bank (No 2) (1993)
1WLR 642.

Le Masurier Giffard & Poch -v- Andre Ghislain Pinson (30th April,
1992) Jersey Unreported.

Pothier (1827 Ed'n) Vol 1: para 401.

Lloyds Bank -v- Ellis-Fewster & Anor (1983) 2 All ER 424 CA.

City & Westminster Properties (1934) Ltd -v- Mudd (1959) 1 Ch.129.

J. Evans & Son (Portsmouth) Ltd -v- Andrea Merzario Ltd (1976)
2 All ER 930 CA.

Cornish -v- Midland Bank (1985) 3 All ER 513 CA.

Stephens (née Baureiss) -v- Stephens (1989) JLR 284.