SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 654 OF 2001

BETWEEN:

ROYAL BANK OF CANADA

Claimant

and

HELENAIR CARIBBEAN LIMITED

Defendant

Appearances:

Ms. Brenda M. Floissac-Fleming for the Claimant.
Ms. Lorraine B. Williams for the Defendant.

2002: March 12
September 23

APPLICATION FOR SUMMARY JUDGMENT…PART 15:2 OF CPR 2000…DOES DEFENDANT COMPANY HAVE A REAL PROSPECT OF SUCCESSFULLY DEFENDING CASE AT A TRIAL…IS DEFENCE INHERENTLY INCREDIBLE AND UNSUSTAINABLE…SECTION 96 OF COMPANIES ACT…OMINA PRAESUMUNTUR RULE…ARTCILES 1163 AND 1165 OF CIVIL CODE…UNJUST ENRICHMENT

JUDGMENT

1. HARIPRASHAD-CHARLES J: The Claimant is a limited liability company duly incorporated under the Acts of the Parliament of Canada. It carries on the business of banking at its principal place of business at William Peter Boulevard in the City of Castries.

The Defendant is an airline corporation and was at all material times a customer of the Claimant.

2. On 30th day of October 2001, the Claimant approached the Court by way of Summons for summary judgment for the amount of $468,819.36, (being the balance of the overdraft less deferred loan income) accrued interest of $45,907.45 to the 11th day of May 2001 and interest thereafter at $160.55 per diem or 12.5% per annum from 12th day of May 2001 until date of payment and Costs. This application is made pursuant to Part 15.2(b) of CPR 2000 on the ground that the Defendant has no defence to the Claimant's claim or no real prospect of successfully defending the Claimant's claim.

3. Part 15.2 (b) of CPR 2000 states that "the court may give summary judgment on the claim or on a particular issue if it considers that the defendant has no real prospect of successfully defending the claim or the issue."

4. Ms. Floissac-Fleming for the Claimant submitted that notwithstanding the use of the word "may" in Part 15.2 of the Rules that a Claimant is entitled to summary judgment if the Defendant fails to prove that it has a defence to the Claimant's claim or has a real prospect of successfully defending the Claimant's claim. In support of her submission, she cited the dictum of Robert Goff LJ at page 515 (e) to (h) in *European Asian Bank AG v Punjab & Sind Bank (1983) 2 All ER 508* This is what the Learned Lord Justice had to say:

> "Now it is true that the words used in the rule are 'the court *may* give such judgment for the plaintiff…', and at first sight the word 'may' could be read as indicating that the court has a discretion. But it is to be observed that the court can only give such judgment if (1) the court has not dismissed the plaintiff's application (presumably for some defect in the application itself, e.g. that there is no due verification of the claim) and (2) the defendant has not satisfied the court either (a) that there is an issue or question in dispute which ought to be tried or (b) that there ought for some other reason to be a trial. Once these three possibilities are eliminated, it is very difficult indeed to conceive of circumstances where the court should not give judgment for the plaintiff, especially when it is borne in mind that the policy underlying Ord 14 has always been that, on a proper application, if the judge is satisfied that there is no triable issue, he should give judgment for the plaintiff (see *The Supreme Court Practice 1982 vol 1, p 165, para 14/3 – 4/2,* and the cases there cited). The use of the word 'may' in this context is, we strongly suspect, a survival from the days when Ord

> 14 did not contain the words 'or the defendant satisfies the court…that there ought for some other reason to be a trial…' if, having regard to those words, there remains any discretion in the court, once the three possibilities we have referred to are eliminated, to decline to give judgment, it can only be a discretion of the most residual kind."

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5. I will gratefully adopt the words of Lord Justice Robert Golf that a Claimant is entitled to summary judgment if the Defendant fails to prove that it has a defence to the Claimant's claim or has a real prospect of successfully defending the Claimant's claim.
6. Counsel next submitted and in my judgment, correctly so that a Claimant is entitled to summary judgment if the Defendant's defence is inherently incredible or is otherwise manifestly invalid and unsustainable: see *Glidewell LJ at p 159 (b) to (c), (f) to (j) and p 160 (a) to (b).*

7. The broad issue which the court is being asked to rule upon is whether the Defendant has a real prospect of successfully defending the Claimant's claim. To do so, I turn to the Defendant's defence which is two-fold in nature namely:
   (1) That the Defendant did not request or agree to an overdraft facility.
   (2) That the Claimant never requested any collateral from the Defendant to secure the overdraft facility in keeping with usual existing banking practices.

8. Out of the broad issue arises two sub-issues namely:
   (1) Whether the defence that there was no request for or agreement in regard to an overdraft facility is a credible or valid and sustainable defence and
   (2) Whether the defence that the Claimant did not request any collateral from the Defendant to secure the overdraft facility is a valid and sustainable defence?

IS THE DEFENCE THAT THERE WAS NO REQUEST OR AGREEMENT FOR AN OVERDRAFT FACILITY CREDIBLE AND SUSTAINABLE

9. The Claimant submitted that where the parties to a transaction conventionally, consensually or mutually assumed (by representation by words or conduct) that certain facts are true or that a legal obligation or liability has been, is being or will be incurred and where the transaction was based on that common assumption, if a party to the transaction

relied or acted on that common underlying assumption to his detriment or if it would otherwise be unconscionable or unjust to allow the parties to the transaction to deny that assumption, the parties will be deemed to be estopped by convention from refuting, denying or repudiating that common underlying assumption. In *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd (1981) 3 All ER 577, Lord Denning MR* said at *page 584 (h-j):*

> "When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does not seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

10. In the present case, the common assumption was a factual common assumption that the Defendant requested and the Claimant granted to the Defendant the overdraft facility. See: Exhibits MA1- MA 10. The common assumption was the basis of the transaction of the loan or any other loan by means of overdraft. The Claimant acted on the common assumption by permitting the Defendant to overdraw its account and to incur the debt which is the cause of this action.

11. I think that it would be unconscionable and unjust to allow the Defendant to refute, deny or repudiate the common assumption. Otherwise, as pointed out by Mrs. Floissac-Fleming, the Defendant would be unjustly enriched by obtaining the benefit of an overdraft without any correlative liability on the part of the Defendant to repay the amount overdrawn. Unjust enrichment is not a novel concept in our law. It is firmly rooted in our Civil Code. Article 979 provides as follows:

> "He who receives what is not due to him, through error of law or of fact, is bound to restore it; or if it cannot be restored in kind, to give the value of it."

12. In the circumstances, the Defendant is estopped by convention from refuting, denying or repudiating the common assumption that the Defendant requested and the Claimant

agreed to grant the overdraft facility to the Defendant as a result of which the debt was incurred.

13. In my judgment, the Defendant's defence that there was no request for or agreement in regard to an overdraft facility is inherently incredible and unsustainable.

IS THE DEFENCE THAT THE CLAIMANT DID NOT REQUEST ANY COLLATERAL FROM THE DEFENDANT TO SECURE THE OVERDRAFT FACILITY INVALID AND SUSTAINABLE

14. The Claimant maintained that the request for or the grant of collateral security for a loan by way of overdraft or otherwise is not in law a prerequisite to the validity or enforceability of a loan. I agree. In so far as the Defendant's defence is based on the fact that the Claimant did not request any collateral from the Defendant to secure the overdraft facility, this defence is untenable and unsustainable.

SECTION 96 OF THE COMPANIES ACT (PARAGRAPH 5:1 AND 5:2 OF BY-LAWS OF THE COMPANY)

15. Counsel for the Defendant, Mrs. Lorraine Williams launched a two-pronged attack on the Claimant's application for summary judgment. Counsel stated that the Claimant's application is unmeritorious as there are serious issues to be determined at a trial. Firstly, she argued, that in accordance with paragraph 5:1 of the By-Laws of the Defendant Company (which is identical to Section 96 (1) of the Companies Act) it is stated inter alia that the Directors of the Company may borrow money upon the credit of the Company. And under paragraph 5:2 [Section 96 (2)], the Directors may by resolution delegate to any officer of the company all or any of the powers conferred in paragraph 5:1. According to Counsel, there was no delegation of such power to Ms. Leonnie Franklin, the Chief Financial Officer of the Defendant Company. Counsel next submitted that the Claimant has failed to prove that any such resolution was adopted and passed by the Directors of the Company.

16. Notwithstanding the very able argument by Counsel for the Defendant, I am of the opinion that section 96 (1) of the Companies Act authorizes the directors of the Company to borrow money upon the credit of the Company without authorization of the shareholders and Section 96 (2) does not provide that a resolution is necessary for the purpose of the exercise of the power to borrow.

17. Mrs. Floissac-Fleming in reply submitted that under the doctrine "*omnia praesumuntur rite esse acta"* (all formalities which are required to be observed are presumed to have been observed), where a Company borrows money in the exercise of its power to borrow, and in so doing cannot be said to have acted ultra vires. The lender (who in good faith lends the money to the Company) is entitled to assume that the Company has passed such resolution or has otherwise observed such internal or domestic formalities as may be necessary for the purpose of the exercise of the company's borrowing powers.

18. In my opinion, the Claimant's arguments are more plausible and tenacious. By virtue of the *"omnia praesumuntur*" maxim, the Claimant was entitled to assume that the Defendant and its directors had observed all internal or domestic formalities required to be observed for the purpose of the exercise by the Defendant of its borrowing powers. Since the "*omnia praesumuntur"* maxim is a presumption of internal or domestic regularity, the onus is on the Defendant to rebut that presumption by proving which put the Claimant on enquiry that there was an internal or domestic irregularity in regard to the Defendant's borrowing of money from the Claimant. The Defendant has not discharged that burden. See: *Royal British Bank v Turquand (1856) 6 E&B 327, Ex Ch.*and *Morris v Kanssen and Others (1946) 1 All ER 586 (H.L.).*

ARTICLES 1163 AND 1165 OF THE CIVIL CODE

19. The Defendant next contended that the Claimant has not provided proof of any document signed by the Defendant Company in compliance with Article 1165 (3) of the Civil Code which reads as follows:

> "Even in commercial matters, in the absence of a writing signed by the debtor, no action or exception can be maintained when the sum involved exceeds forty-eight dollars, upon an obligation arising from a representation, or assurance with the object of obtaining credit, money or goods for another."

20. It is accepted by the Defendant that the Claimant's claim is one of a commercial nature. The general rule governing such claims is contained in Article 1163 (1) of the Civil Code. It states that all facts concerning commercial matters may be proved by oral testimony and need not be proved by writing signed by the debtor.

21. The Defendant's argument is premised on the fact that the Claimant's claim is not caught by the general rule but by the exception to the general rule contained in Article 1165 (3) of the Civil Code.

22. In her well-researched and comprehensive submissions, Mrs. Floissac-Fleming referred to Article 1165 (3) of our Civil Code which is patterned after Article 1253 (3) of the Quebec Code and which is reproduced at page 445 of 17 Revue du Barreau. According to Quebec jurisprudence, Article 1165 (3) of the Civil Code presupposes the involvement of three parties namely the Claimant, the Defendant and a third party. It applies to a cause of action based on a representation by the Defendant to the Claimant in favour of the third party with the object of enabling the third party to obtain credit, money or goods from the Claimant.

23. In other words, Article 1165 (3) of our Civil Code does not apply to this claim because the cause of action is not based on a representation by the Defendant as guarantor or surety in favour of a third party but is based on a commercial obligation on the part of the Defendant as principal debtor.

24. As a consequence, the general rule laid down in Article 1163 (1) applies to this case with the result that the Claimant's claim is not required to be proved in writing signed by the Defendant. The Saint Lucian cases of *Anthony Jn. Jules v Veronica Fletcher [Civil Suit*

No.40B of 1986] [unreported] and Sonia Girard v Vincent Doxerie [Civil Suit No. 408 of 1986] [unreported] have no relevance to this case.

25. Accordingly, my Order will be:

That there be summary judgment for the Claimant against the Defendant in the following terms:

(1) The sum of $468,819.36 being the balance of the overdraft less deferred loan income.

(2) Accrued interest of $45,907.45 to the 11th day of May 2001 and interest thereafter at $160.55 per diem or 12.5% per annum from 12th day of May 2001 until date of payment.

(3) Costs to the Claimant of $3,000.00 as agreed by both Counsel to be paid by 31st day of March 2003.

INDRA HARIPRASHAD-CHARLES

High Court Judge