

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2011/0545

BETWEEN:

ANTIGUA COMMERCIAL BANK

Claimant

and

KARL GARDNER

MISHA "MOSHE" PERETZ

Defendants

Appearances:

Ms. C. Kamilah Roberts for the Claimant

Mr. Frederick Gilkes Instructed by Clement Bird of The Bird Law Firm Inc. for the Defendants

2015: April 16

JUDGMENT

- [1] **HENRY, J:** By Claim Form filed on August 24, 2011, the Claimant, Antigua Commercial Bank (hereinafter "the Bank") claims against Karl Gardner and Moshe Peretz, the defendants, the amount of EC\$1,300,000.00 being the amount due and owing by Karl Gardner, the first defendant, for breach of contracts of guarantee dated September 19, 2000, January 16, 2001 and October 17, 2001, also an amount of EC\$1,300,000.00 being the amount due and owing by Karl Gardner and Moshe Peretz for breach of contract of guarantee dated June 24, 2002, the defendants having

defaulted in the payment of the amounts due under the said contracts of guarantee. The claimants also seek court fees, costs and interest pursuant to Section 27 of the Eastern Caribbean Supreme Court Act, Cap 143.

[2] The claimant is and was at all material times a company incorporated in Antigua and Barbuda with a registered office in St. John's, Antigua carrying on business as a Bank.

[3] At all material times the defendants are directors of Montpellier Farm Ltd, (Montpellier) a company incorporated in Antigua with registered office at St. Mary's St, St. John's, Antigua.

[4] In its statement of claim, the Bank avers as follows:

By a contract of guarantee in writing dated September 19, 2000, Karl Gardner guaranteed the repayment of all sums of money advanced by the Bank to Montpellier and all liabilities contingent or otherwise which Montpellier has incurred or is under or may thereafter incur or be under to the Bank. The contract of guarantee contained an express limit of EC \$540,000.00.

[5] In addition, by a contract of guarantee in writing on January 16th, 2001, Karl Gardner guaranteed the repayment to the Bank of all sums of money advanced to Montpellier and all liabilities contingent or otherwise as expressed in the first contract of guarantee. It was a term of the contract that it would be a continuing guarantee to the limit of EC\$200,000.00.

[6] By a further contract of guarantee in writing on October 17th, 2001, Karl Gardner guaranteed to Bank the repayment of all sums of money advanced to Montpellier and all liabilities to the limit of EC\$560,000.00.

[7] By a contract of guarantee in writing on June 24th, 2002, both Karl Gardner and Moshe Peretz guaranteed the repayment to the Bank of all sums of money advanced to Montpellier and all liabilities to the limit of EC\$1,300,000.00. The liability of the first and second defendant was to be joint and several.

[8] It was an express term of all four contracts of guarantee that an admission by Montpellier as to its liability to the Bank or a judgment determining such amount, obtained by the Bank against Montpellier, shall be conclusive proof as against the guarantors as to the amount of such liability.

[9] By a facility letter dated September 18th, 2000, the Bank granted Montpellier an overdraft facility on a chequing account in the amount of EC\$540,000.00. On January 3, 2001, this facility was increased to EC\$740,000.00

[10] In or about September 2001 the Bank approved a commercial loan to Montpellier in the amount of EC\$1,200,000.00 with interest at the rate of 13% per annum. The proceeds of the loan were used to liquidate the existing overdraft on an account. The bank also approved an overdraft facility for EC\$100,000.00. The overdraft facility was increased twice, the second time to EC\$700,000.00.

- [11] In or about December 2002 a loan was granted to Montpellier in the amount of EC\$800,000.00 with interest at the rate of 14%.
- [12] In or about March 2003, the balances on the above loans were consolidated into a term loan in the amount of EC\$3,100,000.00 with interest at the rate of 12.5%. The overdraft facility was added to the loan in December 2004.
- [13] Montpellier has defaulted on the loan and failed to make any payment since December 16th, 2004. The Bank, by letter dated July 4th, 2006, demanded repayment of the total amount. Montpellier has failed to liquidate the amount outstanding. On February 11th, 2011 the Bank obtained judgment against Montpellier in the amount of EC\$5,850,945.31 together with costs of \$EC20, 000.00, with interest of 5% per annum from the date of the order.
- [14] Pursuant to the contracts of guarantee signed by the defendants, the Bank, by letter dated April 13th, 2011, made demand for payment of the first and second defendants. They have failed to pay.
- [15] The Bank claims payment of the sum of EC\$1,300,000.00 from the Karl Gardner under the terms of the three contracts of guarantee. They further claim payment of EC\$1,300,000.00 from the both defendants under the terms of their joint contract of guarantee.
- [16] The Defendants, in their defence filed on October 28th, 2011, aver as follows:
- [17] Karl Gardner admits that he did give the said guarantees to secure the repayment of moneys advanced by the Bank to Montpellier.
- [18] Further, he admits that both defendants gave the guarantee dated June 24th, 2002, referred to in paragraph 9 and 10 of the Statement of Claim, (for EC\$1,300,000.00.) ostensibly in consideration of the Bank's temporary extension of Montpellier's overdraft limit to \$700,000.00. They state that in reality the defendants gave the said guarantee by way of additional security for a loan in the sum of EC\$1,200,000.00 that the bank had granted in September 2001. The proceeds of the loan were to be applied in liquidation of Montpellier's indebtedness under the said overdraft facility.
- [19] They further aver that the Defendants were induced to give the aforementioned guarantees by representations made by the Bank's General Manager, Mr. Gregory DeGannes, that he could secure a long term loan from a development bank with which he reportedly had a good relationship, that would carry a lower interest rate than the loan facility the Bank had granted to Montpellier. The representations were made to Misha Peretz orally in late May/early June 2001 on a visit to Montpellier's packing house and later repeated in early June 2002, just before the execution of the guarantee dated June 24, 2002.
- [20] According to the defence Karl Gardner agreed to give the guarantee in October 2001, and to continue to use the earlier guarantees on the faith of the representations made to Misha Peretz in May/June 2001 and recounted to him. Both Defendants agreed to the guarantee given in June 2002, on the faith of said representations.

- [21] The Defendants further aver that the Claimant's Private and Corporate Banking Officer, Mr. David Stevenson Jr, made an oral promise, on May 9th, 2003, to Misha Peretz that he would assist Montpellier in the search for softer funding from a development bank.
- [22] The Defendants' pleaded case is that they agreed to give their personal guarantees to secure the 2004 consolidated loan on the faith of the Bank's promise and/or commitment and in the expectation that their personal exposure to guarantee repayment of Montpellier's indebtedness to the Bank at the relatively high interest rates charged by the Bank would be a short term commitment pending the repayment of the said loan by a facility obtained on softer terms.
- [23] According to them on different occasions between the years 2001 and 2004 when the defendants visited the Bank's offices to discuss Montpellier's accounts, they enquired as to the Bank's progress with the development loan and were assured on those occasions by either Mr. de Gannes or Mr. Stevenson that they were working on it.
- [24] The defendants deny therefore that the Bank is entitled to recover from them, any sums under the guarantees and aver that they were discharged from all liability under the said guarantees by the Bank's failure to honour the representations made and/or undertakings given in 2001 and 2002 by its General Manager and the commitment made in 2003 by its Private and Corporate Banking Officer, Mr. Stevenson.

ISSUE

- [25] Whether or not the defendants are discharged from liability under the contracts of guarantee as a result of the representations or actions of the Bank.

The Alleged Representations

- [26] The defendants have executed written contracts of guarantee which embody terms and conditions. It has been accepted that verbal evidence cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record as part of their contract¹. However, there are a number of exceptions. The court is entitled to look at and should look at all the evidence in order to see what the bargain was that was struck between the parties².
- [27] Misha Peretz states in his witness statement that Montpellier began a banker/client relationship with the Bank in 2000. The then General Manager and Loans Manager visited the farm and expressed a willingness to help in any way possible. Montpellier started negotiating with the Bank in early 2001 for a development loan to acquire infrastructure and facilities to allow for expanded production capacity. Mr. de Gannes, who took over as General Manager in 2001, paid a visit to the farm and spoke with the defendants. According to Mr Peretz, Mr.de Gannes was very impressed

¹ National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd [1972] A.C. 585

² J. Evans & Son (Portsmouth) Ltd. v Andrea Merzario Ltd [1976] 1 W.L.R. 1078 at 1083

with what had been done and very hopeful about the future potential of the farm. He states that Mr. de Gannes then declared that he could help Montpellier get a development loan to reduce capital cost and to get all of Montpellier's starting needs in terms of cash under one umbrella of a development project loan.³ Mr. de Gannes spoke of a 10 year payback period with low interest in order to achieve the target. Montpellier would need to have a viable export contract. The loan would provide the working capital required to grow the produce for export. The Bank would provide the loan for the amount needed for the equipment and to upgrade facilities, including the packing house, to the standard required by the UK Supermarket chain "Utopia" which was prepared to contract with Montpellier.

- [28] On cross-examination Misha Peretz gave further particulars regarding the representation. His evidence is that the reference to a development loan by Mr. de Gannes was a reference to a loan from Central Bank.
- [29] He continues that up to early 2002, Mr. Gannes and Mr. Stevenson expressed satisfaction with the operations of Montpellier. The relationship was mutually satisfactory. Montpellier came to an agreement with an English company on a growing contract of 1000 tons of melons for the 2002 – 2003 season. The fixed price contract value was US \$960,000.00. Mr. Peretz states that he showed the contract to Mr. de Gannes and requested that they see about the promised development business loan.
- [30] Despite assurances to take the issue to the Central Bank and obtain the development business loan on Montpellier's behalf, instead of the development loan, in September 2001, the defendants received a loan proposal with high interest rate. He states that the defendants did not immediately agree to the facility, since it was not what they had expected.
- [31] With regard to the alleged promise made by Mr. David Stevenson Jr, Mr Peretz stated in his witness statement that Mr. Stevenson promised him, in the presence of Mr. Reuven Solomon at a meeting in his office on May 9, 2003, that the Bank would assist Montpellier in the search for a development bank to provide softer funding. He then told Karl Gardner what Mr. Stevenson had promised. On cross-examination however, his evidence is that Mr. Stevenson said basically the same as Mr. de Gannes, that the Bank can apply for Montpellier to get a loan to cover their capital expenses. When pressed, he stated that he could not remember if Mr. Stevenson said "can get a loan" or "can apply for a loan". It was again put to Mr Peretz that he had pleaded in his defense that Mr. Stevenson had promised to assist Montpellier "in the search for a development bank". The second defendant responded: "I cannot say exactly what Mr. Stevenson said. I understood it coming from ECCB".
- [32] In support of his case, Mr. Peretz points to a letter dated May 12, 2003. The letter is addressed to Mr. David Stevenson and is signed by Mr. Peretz as Managing Director of Montpellier. The letter

³ Witness statement of Misha "Moshe" Peretz paragraph 12 &13.

seeks to summarize the key points of the meeting between the parties on May 9th. Paragraph 4 states:

“It is noted that the company is looking to improve its loan portfolio by converting some of its loan to a development track. The Bank promised to assist in the search for the right development bank.”

[33] Mr. Stevenson in his response dated May 19, 2003, states:

“In paragraph 4 you stated that the bank promised to assist in the search for an institution to provide you with softer funding. We recall making some suggestions in this regard but committed to facilitating the ECCB export credit guarantee facility upon presentation of the appropriate documentation.”

[34] At trial Karl Gardner admitted that he was not present at the field visit in early 2001 when the alleged representation was made by Mr. de Gannes. But was present at a meeting in his office, in early 2001 about 2 days after the field visit. His evidence on cross-examination is that during the discussions Mr. de Gannes said he was impressed with what he saw and that he would assist to get a loan from Central Bank because he knew persons. His evidence is that Mr. Stevenson agreed with Mr. de Gannes.

[35] Both defendants insist that they agreed to give each of the guarantees referred to because of the representations made by the Bank's General Manager, Mr. de Gannes, and by Mr. Stevenson and that their understanding of the representations is that the bank would get a development loan on behalf of Montpellier at lower interest rates from the Central Bank.

[36] The Bank's position is that the contracts of guarantee make no reference to the guarantees being temporary or short term and further make no reference to any undertaking or representation by the Bank in relation to the securing of a long term loan at a lower interest rate.

The Documentary Evidence

[37] The contracts of guarantee signed on the 18th September 2000 and on January 16th 2001 were executed by the first defendant prior to the discussions with the Bank, during which it is alleged representations were made. So the first defendant could not have been induced to enter into the contracts as a result of these representations. However, the Mr. Gardener's case is that he consented to or allowed their continued use as security for the loan as a result of the said representations by Mr. de Gannes.

[38] The contracts of guarantee as executed clearly state that they are continuing guarantees. To the limit of the monetary amounts stated. The 3rd paragraph on page 2 of the contract provides that the undersigned (the guarantor) may terminate his further liability under the guarantee by giving to the bank 30 days notice in writing signed by him.

- [39] An examination of the correspondence between the parties, including the commitment letters leading up to the last contract of guarantee is instructive.
- [40] By letter dated 3rd January 2001, the Bank wrote to Mr. Gardner as Director of Montpellier indicating that the Bank had agreed to provide the increase in the overdraft facility from \$540,000.00 to \$740,000.00 as requested by Montpellier. In a separate document the terms and conditions were fully set out including interest rates, repayment, fees and security. The defendants signaled their acceptance of the terms and conditions set out by signing the bottom of the commitment letter as Director and Chairman respectively. The letter was also signed by the Secretary of Montpellier. In addition to executing a separate contract of Guarantee, Karl Gardner also signaled his agreement to guarantee the overdraft facility by signing on the commitment letter as guarantor.
- [41] The letter dated June 11th 2001 from Montpellier to the Bank is significant because it is the first writing after the alleged representations by Mr. de Gannes. The letter is signed by both defendants. It sets out the major investments made by Montpellier to date, explained some of the setbacks the farm had experienced and gives an update of recent developments of the business. It then states: "As a result of these developments, we are formally applying to the bank for a long term loan to cover the company's present overdraft balance of approximately \$1,300,000.00 EC." It then offered certain security in the form of two leases and equipment. Lastly, it mentions that upon the receipt of this loan, the funds securing its current overdraft should be released to fund operating expenses. No mention is made of the alleged promise by the bank to get a development loan from Central Bank.
- [42] By letter dated March 28, 2002 the General Manager of Montpellier requested the Bank to increase its overdraft facility to EC \$250,000.00 for a period of 6 months. After 6 months, the overdraft was to revert to a limit of \$100,000.00. However, a further request was made for a further increase of the temporary allocation of \$250,000.00 to \$700,000.00. By commitment letter dated June 10, 2002, the Bank approved the increase on the terms set out in the letter. The Director, Chairman and Secretary of Montpellier Farms again signified their acceptance of the financing on the terms and conditions set out by signing the bottom of the commitment letter. Again, no mention is made of the alleged representations referred to above. The second item of security listed in the committal letter is the guarantee of the defendants to cover \$1,300,000.00. According to the letter the increase was to be repaid by October 31, 2002, at which time the allocation was to revert to \$100,000.00.
- [43] The defendants make reference to a letter dated August 12, 2002 from the second defendant to Mr. Stevenson at the Bank. The purpose of the letter is to seek financing for a Reverse Osmosis Plant. In the 4th paragraph, the second defendant states: "Going back to our conversation with yourself and Mr. de Gannes talking about the possibility of helping the project by getting a development loan in lower interest rate than we pay now, all subject to approval by ACB and the

Central Bank, the above mentioned [guarantee contract etc] we think one of the following options .
..”

- [44] Having examined the documents, including the correspondence between the parties, the court finds that they do not support the defendants' contentions.
- [45] Firstly, the commitment letters explicitly set out the terms and conditions upon which the financing was, in each case offered. The security required for each facility is clearly set out, including the personal guarantees by the defendants.
- [46] Secondly, the contracts of guarantee likewise set out all the terms and conditions of the contract. They make no mention of the guarantees being short term or being conditional on any representations made by the Bank. Each guarantee clearly states that it is a continuing guarantee within the limits mentioned. The only limits stated in the guarantees are as to the amounts.
- [47] Thirdly, the letters referred to by the defendants are not supportive of the defendants' position. The letters are important because they are the only writing that gives some indication of the defendants' understanding of the discussions had with the Bank on the subject of the development loan. The letter of 12th August 2002, characterizes the discussions had with the Bank as evincing the *possibility* of the Bank helping the project by getting a development loan at a lower interest rate. This is not language indicating a condition. In the court's view this amounts to no more than an offer of assistance by the Bank and evidences no condition upon which the guarantees were executed. In the letter of 12th May 2003, Mr. Peretz states unequivocally that the Bank promised "to assist in the search for the right development bank." Conspicuously absent from either letter is an allegation that the defendants considered the statements allegedly made to be conditions of the guarantees given. Nor did the defendants express anywhere in the letters that notwithstanding that the contracts of guarantee expressly provided that the guarantees were continuing guarantees, that they understood that their exposure would be short term because of the assistance to be given by the Bank in obtaining a loan from another institution.
- [48] Fourthly, the letter dated June 11th 2001 from the defendants made application to the bank for a long term loan. This was less than 2 weeks after the alleged promise by the Bank to secure a development loan from Central Bank. If they understood the promise as alleged, why would they make an application to the claimant for a long term loan?
- [49] Defendants themselves seem unsure as to the nature of the representation made. In their defence, they pleaded that Mr. de Gannes represented that he could secure a long term loan from a development bank with which he had a good relationship that would carry a lower interest rate. Their evidence at trial however, is that the representation was that he could secure the long term loan from the Eastern Caribbean Central Bank (ECCB). The granting of loans to businesses is not within the stated purpose of the ECCB. Further, in regard to obtaining a loan from another financial institution, it is unlikely that Mr. de Gannes could guarantee that the loan would be extended by the institution.

[50] With regard to the evidence, the defendants' evidence was at times inconsistent with its pleaded case. The particulars of the representation elicited on cross-examination were inconsistent with the defendants' witness statement and their pleadings. The court accepts paragraph 4 of the letter of May 12, 2003 as rightly representing the position between Montpellier and the Bank. Montpellier was burdened with high interest loans from a commercial bank. Understandably Montpellier was indeed looking to improve its loan portfolio by converting some of its loans to a development track. Mr. de Gannes and Mr. Stevenson offered to assist in the search for the right development Bank. The court rejects the contention that Mr. de Gannes and Mr. Stevenson promised to get a development loan from Central Bank or any other bank. It is unbelievable that an officer of one bank could commit to secure, on behalf of a customer, a loan from another financial institution. The offer of assistance did not amount to a condition of the credit facilities extended to Montpellier. Nor did it represent any limitation on the written contracts of guarantee executed by the defendants.

[51] In the court's view the facility letters endorsed by the defendants set out all the terms and conditions of the credit extended to Montpellier and the contracts of guarantee signed by the defendants, set out the whole of the bargain made between the parties.

[52] The defendants make reference to the statement in Chitty on Contracts 30th Edition at paragraph 44 which states:

“ It is a well-established and strictly applied principle that any variation in the terms of the agreement between the creditor and the debtor which could prejudice the surety will, unless he consents thereto, discharge him from liability, unless the contract of suretyship provides to the contrary.”

[53] The defendants also refer the court to cases which have applied this principle. However, the court finds no variation in the terms of the agreement between the creditor and the debtor. The defendants' allegations of terms and conditions of the credit facilities approved by the Bank other than those set out in the facility/commitment letters are not supported by the evidence. The defendants have failed to prove that the contracts of guarantee between the parties were other than stated in the documentary evidence before the court. Accordingly, the court finds that there has been no variation and no violation of the above stated principle. The defendants have also failed to prove any conduct on the part of the Bank that would justify the discharge of the defendants from their liability under the contracts of guarantee.

[54] Accordingly, judgment is granted in favour of the claimant Bank as follows:

1. Against the first defendant in the amount of EC\$1,300,000.00;
2. Against the first and second defendants in the sum of EC\$1,300,000.00;

together with fixed cost in the sum of EC\$2,500.00 and interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act at the rate of 2% per annum from the date of the filing of the claim to the date of Judgement.



CLARE HENRY
High Court Judge
Antigua & Barbuda