`THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2016

CLAIM NO. SKBHCV2013/0122

BETWEEN:

POLICE CO-OPERATIVE CREDIT UNION
(ST. CHRISTOPHER & NEVIS) LTD

Claimant

and

WILMOTH ALLEYNE

1st Defendant

AUDREY ALLEYNE

2nd Defendant

KERVIN MILLARD

3rd Defendant

GLENROY STANLEY

4th Defendant

Appearances:-

Mr. Sylvester Anthony with Ms. Angelina Gracy Sookoo of Sylvester Anthony Law Offices for the Claimant
Mr. Damien Kelsick with Ms. Keisha Spence of Kelsick, Wilkin & Ferdinand Law Offices for the Defendants

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2016: February 23rd

JUDGMENT

[1] **CARTER J.:** By claim form and statement of claim filed on the 29th April 2013, the claimant sought to recover from the defendants the following:

"*(1) The sum of $118,241.10 as a debt due and owing.*

(2) Interest on the sum of $118,241.10 from the date of demand until the date of the claim.
(3) Further interest on the sum of $118,241.10 from the date of the claim or sooner payment at the rate of 12% per annum.
(4) Costs.
(5) Such other relief as the court seems just."

[2] The basis of the Claim as set out in the Statement of Claim was that:

> *"....*
> *4. By a contract in writing dated August 24th, 2007 and made between the claimant of the one part and the 1st and 2nd defendants as Principals and the 3rd and 4th defendants as co-makers of the other part, the claimant agreed to loan the 1st and 2nd defendant the sum of $100,000.00.*
> *5. Under and pursuant to the said loan agreement, the claimant advanced the said sum to the 1st and 2nd defendants who as Principals, together with the 3rd and 4th defendants as co-makers, jointly and severally agreed to repay the claimant the loan sum of $100,000.00 together with interest at the rate of 1% per month payable on the unpaid balance by way of monthly installments of $1500.00 commencing in November 2007 and continuing thereafter until the entire debt was liquidated or on demand by the claimant.*
> *6. In breach of the terms of repayment the defendants have failed to make the regular monthly payments as and when agreed between the parties.*
> *7. It is an expressed term of the Agreement that in any case of any default in payment as agreed, the entire balance of the said loan and during the currency of the repayment period the defendants have failed to make monthly payments as agreed, as such the entire sum loaned together with interest and other charges, became due and payable under and pursuant to the terms of the said loan agreement and the defendants' total indebtedness now stands in the sum of $118,241.10."*

[3] The first and second defendants each filed acknowledgments of service admitting the claim and filed no defence in the matter. The third defendant failed to file a defence and judgment was obtained against the third defendant on the 10th July 2013.

[4] The fourth defendant in the matter, who was the only defendant before the court at trial, filed a defence on the 20th June 2013. In his defence the fourth defendant raised several issues. He stated at paragraph 3 of the defence that:

"d. The loan proceeds were advanced by the Claimant to the 1st and 2nd Defendants prior to the 6th September 2007;
e. The 3rd and 4th Defendants signed the Loan Agreement as co-makers on the 6th September 2007.
f. The Loan Agreement was not a promissory note and the 4th Defendant purported to execute the same as guarantor of the liability of the 1st and 2nd Defendants to the Claimant.
g. The guarantee given by the 4th Defendant to the Claimant was not under seal and the Claimant provided no consideration to the 4th Defendant for same. There was therefore no valid agreement of guarantee between the Claimant and the 4th Defendant. "

[5] Further in his defence, the fourth defendant claimed that the loan agreement was void for uncertainty in that the Loan Agreement of the 24th August 2007 did not state any interest rate chargeable; did not specifically state whether the loan should be repaid weekly, fortnightly or monthly; and made no provision for the loan to be repaid on demand by the claimant.

[6] At paragraph 7 the fourth defendant submitted that:

"It is denied that the Defendants have failed to make monthly payments as agreed since it was never agreed that the loan should be repaid in monthly installments. It is further denied that the entire sum has become due and payable since there is no agreement as to when the sum of $1500.00 should have being paid and as such the said agreement is vague, uncertain and unenforceable."

Issues for the Court's determination:

(1) Whether the 4th Defendant is Liable to Pay the debt due and owing as pleaded having covenanted with the Claimant pursuant to the Loan Agreement to guarantee payment of the said sum together with interest.

[7] In **Development Bank of St. Kitts and Nevis v Brian Browne et al**[1] Ramdhani J (Ag.) succinctly stated the general principle with regard to the issue of

[1] SKBHCV2012/0084 delivered on 8th April 2014

joint and several liability: "*There can be no doubt that where two or more persons have agreed to be jointly and severally liable for the same debt, a single performance by either of them will discharge the others. This is really the basis upon which the release and discharge rule operates, and this is entirely consistent with the separate obligations and contracts between the promisors to pay the debt. Each person who has agreed to pay the debt has effectively entered into a separate contract to pay the debt. The promisee has a joint and a separate remedy against each. It is in this context that the case law has to be understood. When there is release, it extinguishes the single performance. Where it is a question of recovering the debt, the promisee has the right to sue each and every promisor on the several and separate contract to pay*."

[8] This legal principle is well established[2] and has been reaffirmed by the Privy Council.[3] There is a clear obligation in the on the fourth defendant having agreed to be bound by this obligation. The real issue is whether he is liable to pay as pleaded by the claimant.

(2) Whether the Defendant has failed to pay the sum of $118,241.10 and interest on the said sum at a rate of 12% per annum or any part thereof.

[9] The fourth defendant admits that he has not paid the sum sought by the claimant in the statement of claim, nor any part thereof.

(3) Whether there was consideration to the guarantor by the Claimant.

[10] In written closing submissions filed by the fourth defendant after trial, the defendant stated that the claim was being defended on three bases. He stated as

[2] King v. Hoare 13 M.& W. 494
[3] Rukhmin Balgobin v South West Regional Authority, [2012] UKPC 11

one of these that: "*no consideration was given by the Claimant for the 4th Defendant's execution of the Loan Agreement as a co-maker/guarantor*." However, this was the extent of the submission on that point. The fourth defendant did not develop this argument any further than the statement above.

[11] In his Evidence in Chief the fourth defendant in relation to the signing of the Loan Agreement stated only that: "*Both sections of the Document were signed by the 1st and 2nd Defendants on August 24, 2007. However, I did not sign the document until September 6, 2007. The claimant is therefore put to proof as to when the loan of $100,000.00 was actually advanced to the 1st and 2nd Defendants*."

[12] At trial Mario Wigley, the General Manager of the claimant, gave uncontroverted evidence that: "*I know when the loan was disbursed. It was disbursed on the 12th of October 2007*."

[13] A guarantee involves a promise by the guarantor that the debt owing to the credit provider will be paid if the *debtor* is unable to do so. A guarantee is therefore a contract by which the guarantor undertakes collateral responsibility for the principal debtor's liability to the creditor. Unless the guarantee document is a *deed*, meaning that the document contains the words "signed, sealed and delivered", the guarantee must be given before or at the time the *creditor* lends to the debtor.

[14] A guarantee without consideration is merely an unenforceable gratuitous promise. However in relation to the guarantor, the guarantor need not receive a direct benefit for consideration to exist. The consideration usually consists of a benefit to the debtor or a detriment to the creditor.

[15] Based on the foregoing and the uncontroverted evidence of Mario Wigley, there can be no doubt that at the time that the fourth defendant signed as guarantor,

that the loan had not yet been disbursed and therefore that he signed before the time that the creditor lent the monies to the debtor. To the extent that a lack of consideration from claimant to the fourth Defendant has been proposed as a defence to the claim, such submission fails.

(4) Whether the loan agreement was void for uncertainty due to a lack of a stated interest rate or particularity of the terms of the repayment: weekly, fortnightly or monthly.

[16] The claimant does not deny that the loan agreement was devoid of any provision with regard to the rate of interest on the loan. The evidence of Peter Wigley was to the effect that the rate of interest was inadvertently left out of the Agreement. The claimant's submission on this issue was that "*having specifically pleaded and proved the entitlement to contractual interest, the claimant is entitled to interest on the loan sum. The only issue which arises on the claim for interest is therefore what rate ought to be awarded to the claimant in the circumstances. The claimant avers that it is entitled to 12% per annum (or 1% per month).*"[4]

[17] The claimant's contention was that the court must seek to ascertain the parties' intention by looking at the Loan Agreement in light of the common law principles in relation to the construction of commercial contracts having regard to the express words used in the context of the contract as a whole and to the factual matrix and, to give a meaning which would make commercial sense to a reasonable person. The claimant submits that the loan agreement, while not specifying the rate of interest, did specifically state that the sum loaned was to be repaid with interest:

> "*Wilmoth and Audrey Alleyne as principal and Glenroy Stanley and Kervin Millard as co-workers...jointly and severally promise to pay to the Police*

[4] Claimant's closing submissions filed on 22nd July 2014, para 25, pg. 11

Co-Operative Credit Union Ltd, or order, the sum of $100,000.00 ***with interest"***[5]

[18] With regard to the exclusion of the rate of interest, the claimant submits that this term having been excluded by way of mistake, the court may allow extrinsic evidence to establish the term and that *"Given that all parties to the loan, save the fourth defendant, agree that the rate of interest charged on the subject loan was 12% per annum, we ask the court to exercise its discretion to hold that the rate of 12% per annum was part of the Loan Agreement in this matter."*[6]

[19] The fourth named defendant's submission on this issue was that:

> *"The claimant has not pleaded any other agreement, nor has it pleaded that a term was incorporated into this loan agreement by implication, course of conduct or some other agreement, oral or written.*
> *The agreement at "MW1" contains no interest rate in it and does not specify the frequency at which the installments were to be paid nor the period for which the loan was to continue.*
> *The claimant attempted, in cross examination of the 4th defendant, to elicit evidence of the interest rate paid by the 4th defendant on other loans he has taken out with the claimant. However, this evidence is irrelevant to this case as no basis was pleaded upon which to incorporate an interest rate into the agreement dated 24th August 2007 other than what was expressly stated therein. Further, the agreement was made between the claimant and the 1st and 2nd defendants and there is no evidence that they were aware of any such interest rate."* [7]

[20] The fourth defendant therefore asks the court to find that there is no binding contract in this case as two (2) essential terms (the rate of interest on the loan and the frequency at which the installments were to be paid) were not agreed and that a contract which is uncertain as to essential terms is void *ab initio.*[8]

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[5] Claimant's closing submissions filed on 22nd July 2014, para 27, pg. 12
[6] Claimant's closing submissions filed on 22nd July 2014, para 28, pg. 12
[7] Defendant's submissions filed on 23rd July 2014, pg. 3
[8] The Defendant referred the court to Halsbury's Laws of England (4th Edn Reissue, 1998), Volume 9 at parag 667. "…prima facie, there is no concluded contract where… so many important matters are left uncertain that their agreement is incomplete."

[21] Certainty as to the terms of a contract is an essential element of formation. Simply put, an "*agreement may be so vague or uncertain that it cannot give rise to a binding contract*"[9]. Thus, for example, a contract may be unenforceable if important terms are not settled at the time of offer and acceptance, but left for future discussion without any means of ensuring agreement. However, it is equally clear that a contract which does not, for example, state the price of a good may yet be sufficiently certain if goods are to be supplied at a reasonable price, because a court could make an objective finding as to what constitutes a reasonable price for the goods. But if the contract merely stated that the parties must agree on the price, then there would be no such certainty, and the contract would probably not be enforceable.

[22] In ***Attorney-General v Barker Bros Ltd*** [1976] 2 NZLR 495 (CA), Richmond P set out three principles for determining whether a court should find that a contract is sufficiently certain to be enforceable:

(i) If it appears that the true intention of the parties was not to enter into a binding arrangement until and unless certain unsettled terms of their bargain were settled by agreement between them, then no contract can come into existence in the absence of such further agreement . . .

(ii) If . . . the court is satisfied that the real intention of the parties was to enter into an immediate and binding agreement then the court will do its best to give effect to that intention. . .

(iii) Apparent lack of certainty will be cured if some means or standard can be found whereby that which has been left uncertain can be rendered certain. (498–499)

[9] See Chitty on Contract para 2-099

[23] A court should apply business common sense to questions of interpretation. Lord Diplock in **Antaios Compania Naviera SA v Salen Rederierna AB** [1985] A.C. 191 said that *"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense"*.

[24] The evidence of the fourth named defendant is crucial to the determination of this issue. The relevant aspects of his Evidence in Chief was as follows:

> *"In signing the Document as a co-maker, I was signing as a guarantor.*
> *The Document did not contain any provision providing for the payment of interest on the loan of One Hundred Thousand Dollars Eastern Caribbean Currency (EC$100,000.00).*
> *The Document did not contain any provisions providing for the manner in which the loan was to be repaid and in particular did not indicate whether the installments were payable weekly, monthly or otherwise."*

[25] In cross examination he stated:

> *"When I went on 6th September 2007 to be co-maker for the Alleynes I did not ask any questions. I know how much was for the applicant. He said it was $100,000.00. Mr. Alleyne did not tell me anything else... He told me he took it for a business he was going to start. I did not ask him anything about the business... I did not have any discussions with the Alleynes after 6th September 2007 in relation to the loan – whether they got money, started the business or whether they were paying the loan. I understood my obligation was to repay if they defaulted and on the day I signed I understood that. I agreed to co-sign with no other information except the amount and that it was for a business."*

[26] It is clear from the evidence of the fourth defendant in this matter that he was well familiar with the procedure for application for a loan from the Credit Union and his obligations when he signed as guarantor for the loan. The fourth defendant had himself taken a number of loans from the Credit Union and even volunteered in evidence that at the time that he was giving evidence he was still in the process of repaying one such loan. The fourth defendant admitted in evidence that he never

inquired of the Credit Union the exact terms of repayment of the loan by the 1st and 2nd defendants. However he knew that the full amount of the loan for which he could become liable on default was in the amount of $100,000.00. The fourth defendant stated clearly, "*I agreed to be a co-maker of this loan given to the Alleynes. I understood the co-maker to be that if anything went wrong, I would have to stand in place of the loan, that I would have been responsible for the loan if the Alleynes defaulted."*

[27] It appears to this Court that this was the most salient aspect of the loan agreement as it related to this defendant. Whether the 1st and 2nd defendants had to repay, what amounts and for what period are secondary matters in so far as they relate to his obligation upon default which was the entire sum then due and owing to the claimant.

[28] Applying the dicta in **Attorney-General v Barker Bros Ltd,**[10] there was a clear intention on the part of the fourth defendant to act as guarantor without any need to settle uncertain terms. The intention was to enter into an immediate and binding agreement. As will be highlighted further in this judgment, there was also the means to cure the apparent lack of certainty of which the fourth defendant now complains.

[29] In the circumstances of this case the evidence was that the fourth named defendant was familiar with the workings of the Credit Union. He made no inquiries as to these specifics. They were sufficiently particularized or could be ascertained. Sufficient certainty obtains in this case and the contract is not void for uncertainty.

[10] Ibid pg.8

(5) What is the effect if any of the failure of the Claimant to take effective collateral or to apply the shares of the 1st and 2nd Defendant to the outstanding amounts.

[30] The fourth defendant in closing submissions raised the issue of the failure of the claimant to take effective collateral or to apply the shares of the 1st and 2nd defendants to the outstanding amounts. The fourth defendant submitted that the claimant was to have secured the loan by way of two (2) securities: a bill of sale over the refrigerated container and the two co-makers of the loan with proof of means to pay. The fourth defendant states that the claimant offered no explanation in evidence as to why the loan was offered in a manner which resulted in the Credit Union not obtaining the security in the form of the bill of sale and that the Credit Union did not do what was necessary to obtain the necessary security. In the result the fourth defendant should be relieved of an amount equal to the value of the security that ought to have been taken by the creditor from the 1st and 2nd defendants. The fourth defendant submits that this would amount to the sum of $41,895.52 the sum of the price of the container and power generator.

[31] In support of his submission, the fourth defendant referred the court to **Wulff v Jay** [11] wherein it was stated that:

> *"...where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realize the securities and recoup himself the amount of the debt which he has had to pay. That is now a well-known proposition..."*

[32] On the strength of this authority, a guarantor may be freed from his obligation where the creditor fails to protect the guarantor in particular circumstances, e.g. fails to insure when there is an obligation to do so.

[11] [1865] 7 LR QB 756

[33] A guarantor's liability, being collateral to that of the principal debtor, arises when there has been a default by the principal debtor. The liability arises immediately upon the default. However, ***unless the guarantee provides otherwise***, it is not conditional upon the creditor to do any of the following:

(i) notifying the surety of the principal debtor´s default;

(ii) making a demand upon the surety;

(iii) suing the principal debtor; or

(iv) realizing any security held by the creditor.

[34] It appears that a guarantor who wishes to make his liability so conditional must make specific provision in the guarantee. Where a guarantor executes a personal guarantee, on the understanding that the creditor will take certain securities from the debtor, the guarantor will be released if the securities are not taken and retained. The same applies if other guarantors, who were understood to be providing separate guarantees, do not sign their guarantees. But again, these situations are often covered by the specific terms of the guarantee, in favour of the creditor, excluding a right of a guarantor to avoid a guarantee for failure to take securities or other guarantees.

[35] It is vital therefore to consider the written terms of the guarantee to understand the legal effect of the promise to pay. In the instant case, there has been no evidence led that the guarantor ensured that there was specific provision in the agreement that the liability of the guarantor was conditional upon the creditor having first realized the security in the form of the refrigerated container and power generator. The evidence of the only witness for the claimant on this point was:

> *"The securities for this loan were twofold. A bill of sale over the refrigerated container and two co-makers with proof of means to repay the loan.*
> *Mr. and Mrs. Alleyne did not purchase the refrigerated container. The Credit Union was therefore unable to obtain a bill of sale over this*

container. The security for the loan therefore remained the co-makers, Mr. Millard and Mr. Stanley. "

[36] This Court has also carefully examined the loan agreement and guarantee which were tendered into evidence at trial and has been unable to find any express provision in either of these documents evidencing such liability or obligation on the part of the claimant. Without such provision the fact that the claimant did not take effective collateral or failed to apply the shares of the 1st and 2nd defendants to the outstanding amount of the loan would not absolve the fourth defendant from his obligation under the guarantee and this Court cannot find that he is entitled without such specific provision to be relieved to the sum of the price of the two (2) items which were to provide further security on the loan.

(6) Has the amount of the claim been sufficiently particularized by the Claimant

[37] The fourth named defendant submitted to the court that the claimant had not given sufficient evidence to prove the amount due, if any, under the loan agreement to the 1st and 2nd defendants. The fourth defendant pointed to the claimant's evidence in the witness statement of Mario Wigley that the defendants had made a total of 94 payments leaving outstanding 211 payments. The fourth defendant contends that there is no satisfactory evidence as to what was paid as a bare mathematical calculation of 94 payments of $1500.00 amounts points to some $141,000.00 having been repaid to the claimants, much more than the entire sum now claimed and that the claimants have advanced no satisfactory evidence as to what was paid or what is outstanding. For this reason the fourth defendant submits, this Court should find that there is no sufficient evidence of the sum due and that the claim should fail.

[38] The claimant has claimed the sum of $118,241.10 the particulars of which are as follows:

"Loan Balance……..$100,000.00
Accumulated Interest as at March 30, 2009……..$ 16,241.10
Late Fees……$ 2000.00
Total……..$118,241.10"

[39] The authorities make clear that a claimant who seeks separate judgments against separate defendants for the same debt, they being joint and severally liable for the debt, does not recover twice the amount for the same debt. In **Isaacs & Sons v. Salbstein**[12] the court was clear on this point: *"It is said that, if this is the rule of law, a person may recover a number of judgments against different persons for the same sum of money. I see no great objection to this, having regard to the fact that a plaintiff cannot receive the amount claimed more than once..."*

[40] In **Tang Man Sit v Capacious Investments Ltd**[13], the Privy Council, clarified this issue further: *"... a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery."*

[41] In **Development Bank of St. Kitts and Nevis v Brian Browne et al**[14], a case involving this issue of joint and several liability, Ramdhani J. (Ag.) opined that: *"It might be appropriate, especially in a case such as the present, that if a second judgment is to be granted, that judgment should recite the fact of the first judgment*

[12] [1916] 2 KB 139, 152 at page 155
[13] Ibid pg 3
[14] SKBHCV 2012/0084 delivered on April 8th 2014

and limit the claimant to being able to collect no more than the full sum which [is] the subject matter of the entire claim."

[42] In this instance, the claimant has pleaded the entire sum of the debt. The fact that the claimant has not particularized whether any or how much of the debt have been recovered from other defendants is not a bar to recovery from the fourth defendant. The guarantor is liable for the entire amount of the outstanding debt. The Court's order will ensure that there is no ambiguity as to the amount to be recovered from the fourth named defendant, no double recovery.

The Court's Order:

[43] (i) Judgment for the claimant.

(ii) The claimant shall not recover against the fourth defendant in excess of the sum claimed and particularized at paragraph 38 herein, minus any other sums recovered from any of the other defendants on the claim, in all.

(iii) The claimant is entitled to interest at the rate of 12% from the date of judgment until the judgment debt is satisfied in full.

(iv) The defendant will pay the claimant's costs on a prescribed basis unless otherwise agreed between the parties.

[44] This Court apologizes for the time it has taken to deliver this judgment.

Marlene I Carter
Resident Judge