EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2015/0799

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Claimant

And

1. SUNSPLASH ISLAND TOURS INC
2. ROBERT RAMJEAWAN
3. ANTHONY ALEXANDER

Defendant

Appearances:
Ms. Zinaida Mc Namara with Mr Deale Lee for the Claimant
Mr. Daniel Francis, for the 1st and 3rd Defendants
Mr Horace Fraser for the 2nd Defendant

2017: September 27; 28
2018: January 8

JUDGMENT

[1] ST ROSE-ALBERTINI, J. [AG]: The claimant First Caribbean International Bank (Barbados) Limited (FCIB) commenced an action on 22nd October, 2015 against the defendants Sunsplash Island Tours Inc (SITI), Robert Ramjeawan (Mr Ramjeawan) and Anthony Alexander (Mr Alexander) jointly and severally, to recover the sum of $$874,166.84 plus interest and costs.

The Issues

[2] The issues for determination are:-

1. Whether SITI and Mr Alexander are liable for the sum claimed or is FCIB estopped from claiming such sum and is only entitled to recover the remaining balance on a compromise agreement between the parties.

2. Is Mr Ramjeawan jointly and severally liable for the debts of SITI.

Background

[3] SITI is a locally registered company of which Mr Ramjeawan and Mr Alexander are directors. They also served as guarantors of its debts and liabilities to FCIB. SITI engages in boat touring services and owns a catamaran called Passion.

[4] In October 2005 SITI as principal debtor obtained a loan of $815,070.00 from FCIB. The security for the loan was a Hypothecary Obligation Mortgage Debenture and Floating Charge (the mortgage) securing continuing and fluctuating advances up to a limit of $815,070.00 over immovable property situate at Chaussee Road, Castries and registered in the Land Registry as Parcel No. 0848E 501. The property belonged to Unique Investments Limited (to which Mr Alexander is connected), which served as surety for the loan. The mortgage was registered on 29th November, 2005 as Instrument No. 6228/2005. In addition on 20th October, 2005 Mr Ramjeawan executed a Guarantee and Postponement of Claim[1] to secure the liabilities of SITI up to the value of the loan.

[5] A copy of the 2005 loan agreement was not proffered in evidence, however a copy of the mortgage was furnished during trial.

[6] In November 2009 FCIB granted SITI a "demand installment loan" of $809,000.00 to restructure its existing loan, plus new funds of $30,000.00 to assist with the purchase of a diesel engine for the catamaran. The security for this facility comprised (i) the mortgage

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[1] See Exhibit CS4 at Pages 26-28 of TB2

over Parcel No. 0848E 501 for advances of $815,070.00, (ii) assignment of fire and perils insurance over the mortgaged property, (iii) assignment of comprehensive insurance over the catamaran, (iv) personal guarantee from Mr Alexander for $845,000.00[2], (v) personal guarantee from Mr Ramjeawan for $815,070.00 and (vi) a letter of undertaking from Mr Alexander committing to meet the loan payments should the loan fall more than seven days in arrears. The loan agreement[3] was executed solely by Mr Alexander as Managing Director of SITI.

[7] In December 2010 the bank granted SITI another "demand installment loan" of $784,800.60 for the present balance of the loan restructured in 2009 (inclusive of the new funds of $30,000.00 for purchase of the diesel engine) and a temporary operating line up to a limit of $50,000.00 to assist with working capital. The latter was to be liquidated from tour income by 30th June, 2011. The security for these facilities was the same as the 2009 loan and the agreements[4] were executed by Mr Alexander as Managing Director of SITI.

[8] SITI reneged on its repayment obligations under the 2010 facilities and in January 2012 the bank commenced negotiations with Mr Alexander to halt the company's delinquency. Following a spate of email exchanges, letters and failed efforts at sustained repayments, Mr Alexander put forward a proposal in March 2014 seeking acceptance of $800,000.00 in full and final settlement of all the debts owed by SITI and a separate debt of Unique Investments Limited. This would to be paid by (i) a lump sum payment from proceeds of sale of the mortgaged property, for which Mr Alexander had received an open market offer of $600,000.00; and (ii) the balance to be paid within 6 months of 31st January, 2014, either from sale of the catamaran or loan financing from another lending institution[5].

[9] By letter dated 10th March, 2014 FCIB responded, agreeing to the proposed sale of the property at the price offered and a lump sum settlement of $995,000.00 in full and final settlement of the amounts due from two companies, which then stood at $1,264,133.46[6].

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[2] See Exhibit CS5 at pages 29-32 of TB2

[3] See Exhibit CS1 at pages 16-19 of TB2

[4] See Exhibits CS2 & CS3 at pages 20-25 of TB2

[5] See Exhibit CS22 at pages 60-61 of TB2

[6] See Exhibit CS23 at page 62 of TB2

[10] Soon after the sale of the property a disagreement arose between FCIB and Mr Alexander over a reduction of $100,000.00 in the payment remitted from the proceeds of sale. The bank sought an explanation of the expenses associated with the sale of the property and in October 2014 acknowledged receipt of the sum of $500,000.00 as the net proceeds from the sale. That sum was applied first to fully liquidate the debt of Unique Investments Limited and the remainder to the debts of SITI.

[11] Thereafter Mr Alexander wrote to FCIB requesting confirmation of the outstanding balance due, to arrange settlement. On 14th October, 2014 FCIB confirmed that it was $495,000.00 based on the compromise agreement and requested a firm date for payment, failing which it would be instructing its attorneys to commence legal action against SITI and the guarantors to recover the full balance now due. Numerous proposals and counter proposals followed culminating in FCIB agreeing to extend the time for payment of the balance of $495,000.00 to 31st May 2015 on condition that SITI made monthly payments of $7,000.00 from 31st January, 2015 and a final payment at the end of May[7].

[12] Before the monthly payments commenced the bank's attorneys issued demand letters to each of the defendants on 29th January, 2015 for the full balance due. Discussions ensued with FCIB agreeing to suspend legal action if SITI complied with the latest agreement to pay the balance of the compromise settlement by May 2015, with interim monthly payments of $7,000.00 from February 2015 with a view to increased payments of $10,250.00, failing which the full balance of the debts would be due and payable.

[13] SITI remitted a payment of $7,000.00 in February 2015 and thereafter was unable to meet the full monthly commitment[8]. The balance on the compromise settlement remained outstanding after the agreed timeline of May 2015, at which point FCIB proceeded to file the claim to recover the full balance due, including interest and costs[9].

[14] SITI and Mr Alexander say that under the compromise agreement FCIB agreed to accept the lesser sum of $995,000.00 in full and final settlement of a larger sum owed by SITI and

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[7] See Exhibits CS40–CS51 at pages 88-101 of TB2
[8] See Exhibits CS52-CS55 at pages 102-112 of TB2
[9] See exhibits CS56-CS66 at pages 113-130 of TB2

Unique Investments Limited. Having disposed of the mortgaged property and paid the sum of $500,000.00 towards that agreement FCIB is only entitled to recover the balance of $495,000.00 and is precluded from claiming the full balance owed prior to the compromise. They have counterclaimed for damages for breach of contract or specific performance, interest and costs.

[15] Mr Ramjeawan on the other hand alleges that he is not liable for the debt of SITI because the bank and SITI created new obligations in 2009 and again in 2010 when they restructured the exiting loan and included new funds and an overdraft facility with a very high interest rate, without his intervention or consent. He contends that these actions negated the guarantee which he had given in 2005 and released him from liability for the current debts.

[16] The parties were unsuccessful at mediation and the matter proceeded through case management, culminating in trial over two days.

[17] At trial Mr Curtis Small, Senior Manager of FCIB's Special Loans and Credit Risk Management Unit was the sole witness who testified on behalf of the bank. Mr Alexander testified on his own behalf and on behalf of SITI. Mr Ramjeawan gave testimony on his own behalf. They were all cross examined on their testimony and the documentary evidence.

[18] At the close of trial the Court ordered that written closing submissions be filed by 19th October, 2017 to which the parties complied.

Is SITI and Mr Alexander liable for the sums claimed or is FCIB estopped from claiming such sums and is only entitled to recover the remaining balance of the compromise agreement

[19] It is not disputed that Mr Small as the Senior Manager who negotiated the compromise agreements with SITI had the authority to bind the bank. FCIB has not denied the existence of a compromise agreement but says there were several compromise

agreements which SITI repeatedly breached, the latest of which indicated their intention to reinstate the full balance owed in the event of non-compliance.

[20] Mr Alexander described himself as an honest professional. He owns another business, Cool Running Automotive & Air Conditioning Limited which has been in operation from 1987. He has known Mr Ramjeawan for several years and being in the automotive business longer than he Mr Alexander, they liaised from time to time and commenced SITI as a joint venture.

[21] He testified that the loan obtained in 2005 was to purchase the catamaran and facilitate the touring business. He has not denied his involvement in the new facilities obtained on behalf of SITI in 2009 and 2010 and the course of events leading up to the claim, except that his understanding of the compromise agreement was that FCIB agreed to accept the lesser sum in place of the larger and would not be reinstating to the full balance owed. He says that SITI was experiencing severe financial difficulties and recognizing that there was an obligation to complete the compromise agreement he wrote to FCIB offering to sell the catamaran as the final avenue for paying off the outstanding balance but instead he was served with a claim for the full balance due on the credit facilities.

[22] On this issue Counsel for FCIB's made the following submissions:-

1. The defendants are liable for the full outstanding balance of the debts by virtue of the obligations created and subsequent compromise agreements which contained a condition and understanding that should there be any default the full balance of the debts would be reinstated.

2. Upon acceptance by SITI of the terms and conditions of the 2009 and 2010 credit facilities the defendants never raised any issues concerning the validity of the security documents.

3. Because of Mr Alexander's experience as a businessman and his knowledgeable of banking and loan obligations he clearly understood at all times that FCIB would seek to recover the full balance of the debts should there be failure to comply with the terms of the compromise agreements.

4. SITI defaulted on the repayment of the 2010 credit facilities from inception, at which time the bank became entitled to the full balance owed. SITI put forward a proposal for a compromise settlement knowing that the full balance was owed, in an effort to avoid FCIB pursuing recovery of the larger sum.

5. FCIB agreed to the compromise settlement of a lesser sum in full and final settlement of the larger outstanding debts and instead of making the agreed lump sum payment of $995,000.00 by a first part payment of $600,000.00 from the sale of the mortgaged property, SITI paid the sum of $500,000.00 from the sale, thus defaulting on the agreed terms of that compromise agreement. At that point FCIB immediately became entitled to damages for the non-fulfillment of that obligation. The amount of such damages would be the full balance due on the original debts including interest at the agreed rate.

6. FCIB co-operated by accepting the reduced proceeds of sale and agreeing to an extension of time to May 2015 to remit the balance of the compromise settlement; however SITI defaulted on all the terms of subsequent compromise agreements and was placed in default by virtue of Article 999[10] of the Civil Code[11] (the Code). The bank suffered a loss and became entitled to damages for non-fulfillment of these obligations, by virtue of Article 1001[12]. Such damages are prescribed by Article 1004[13] as the amount of the loss sustained and the profit of which the bank has been deprived.

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7. If there is doubt as to whether the terms and conditions of agreements are explicit this can be resolved from a literal construction of the words in the documents adduced, as stipulated in Article 945[14] of the Code. Such an exercise would clearly indicate the common intention of the parties that any failure to comply with the terms of the compromise agreements would result in recovery of the full balance of the debts.

8. Additionally where a commercial contract is in scrutiny what must be ascertained is the intention which reasonable people would have had if placed in the situation of the parties. In that regard words must be interpreted in light of the relevant factual matrix such as the background, the context and market in which the parties are operating. The shift to a more commercial approach requires where the words in a commercial contract would lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.[15]

9. Because it was a compromise settlement it was always understood that default by SITI meant that the bank would be entitled to pursue recovery of the full balance of the debts, as it has never been the practice of FCIB to maintain the amount of a compromise settlement after there has been a default, because it does not make business sense to do so.

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[10] 999. The debtor is placed in default either by the terms of the contract, through the lapse of the time specified for its performance; or by the mere operation of law; or by the commencement of a suit, or by a demand which must be in writing except in the case of a verbal contract.

[11] Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

[12] 1001. Damages are not due for non-fulfillment of an obligation until there has been default under some one of the provisions of the preceding section……..

[13] 1004.The damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he has been deprived; subject to the exceptions and modifications contained in the following articles of this section.

[14] 945. When the meaning of any part of a contract is doubtful, its interpretation is to be sought rather through the common intent of the parties than from a literal construction of the words.

[15] Gene B. Samuel v Sheron Whinfield - ANUHCV2006/0557 delivered on 10th February, 2009, unreported

10. The issue of estoppel canvassed by SITI does not arise because the final compromise agreement contained the express conditions that if SITI defaulted by failing to pay as agreed FCIB would recommence legal action to recover the full balance of the debts stated in the demand of 29th January, 2015.

11. FCIB is therefore entitled to recover the full balance of the debts as stated in the claim.

[23] Counsel for SITI and Mr Alexander's made the following submissions:-

1. The agreement between the parties to satisfy a larger pre-existing debt by payment of a lesser sum is enforceable under the provisions of the Code because the agreement was for something to be done which was determinable, possible and not forbidden by law[16].

2. It was the common intention of the parties that the lesser sum would be accepted in full and final settlement of the debts owed by SITI and Unique Investments Limited. Having received a part payment of $500,000.00 FCIB confirmed that the balance due was $495,000.00 thus creating a binding agreement for payment of the balance of the compromise agreement only.

3. Upon accepting the lesser sum in March 2014, without more, FCIB represented that it had waived and not suspended, the right to recover the full balance owed and having regard to the subsequent dealings which took place between the parties, FCIB should not be allowed to enforce its strict rights for recovery of the full balance of the debts[17].

4. When FCIB retained the proceeds of sale as part payment towards the debt of SITI the loan agreement and accompanying security ceased to be negotiable instruments on which FCIB could maintain an action for the full balance owed[18].

5. Once FCIB accepted the part payment this amounted to good consideration to render the compromise agreement enforceable. Thus the bank is estopped from reinstating its legal rights under the loan and overdraft agreements to recover the larger sum, as to do so would be inequitable.

6. There was part performance by SITI and having received the part payment on the compromise agreement it was too late for FCIB to revert to the full balance by subsequently giving notice of its intention to do so in October 2014. By that time any purported withdrawal would cause serious injustice to SITI and Unique Investments because the parties had already disposed of the mortgaged property.

7. In the circumstances the bank is only entitled to recover the sum of $495,000.00 from SITI and Mr Alexander.

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[16] Articles 991 et seq. of the Code

[17] Hughs v Metropolitan Rly Co. (1877) 2 AC 439

[18] Hirachand Punamchand And Others v Temple [1911] 2 K.B. 330

Discussion

[24] I have given careful consideration to the evidence, submissions and legal authorities cited in support of respective positions on this issue.

[25] Several of the cases cited by Counsel for SITI concerned instances where one party had fully performed under a compromise agreement and the courts generally took the view that the party suing for the full balance in these circumstances should not be allowed in equity to go back on such a promise. The English Court in Central London Property Trust Ltd v High Trees House Ltd[19] stated

> "*The time had come for the validity of such a promise to be recognized with the logical consequence that a promise to accept a smaller sum in discharge of a larger sum if acted upon is binding notwithstanding the absence of consideration and if the fusion of law and equity led to that result so much the better*".

[26] It appears that such outcome may be no different where there has been part performance in good faith, as was held in MWB Business Exchange Ltd. v Rock Advertising Agency Ltd[20]. Here a defendant company entered into an oral agreement with the claimant to reschedule its license payments and made a payment on the same day in accordance with the payment schedule. The court found that an oral variation agreement would have had a number of beneficial consequences for the claimant who would have recovered some arrears immediately and have some hope of recovering all in due course.

[27] More importantly the court felt that the outcome would not result in further loss to the claimant who had for some time been trying to accommodate the defendant's financial difficulties. There appeared to be a commercial advantage to both parties in trying to reach an agreement and the claimant received a practical benefit which went beyond the advantage of receiving a prompt payment of part of the arrears, which amounted to good consideration, thus rendering the oral variation agreement enforceable.

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[19] [1956] 1 ALL E R 256 at 258.
[20] (2016) EWCA Civ. 553 at para 47 – 48

[28] In the present case there was part performed by SITI albeit for a reduced sum. Substantial funds from the proceeds of sale of the mortgaged property was accepted by FCIB and applied against the compromise settlement, while the parties continued to negotiate on terms for repayment of the balance. I accept that this was sufficient consideration to render the compromise agreement enforceable.

[29] If the bank's intention was always to reinstate the full balance in event of default that right ought to have been clearly reserved in the communication between the parties, when the compromise was negotiated and accepted. The lesser sum was accepted in March 2014. The part payment was made in August 2014. On Mr Small's own admission the warning in relation to reinstating the original balances was first stated in a letter dated 14th October 2014 when FCIB confirmed the balance due on the lesser sum. The agreement between the parties at the time that SITI first default on the compromise agreement was that a lesser sum had been accepted in place of the larger. Nonetheless the part payment was accepted and negotiations continued for payment of the residual balance.

[30] In my opinion it is not open to FCIB in these circumstances, having accepted a substantial part payment without previously indicating its intention to reinstate its legal right to the full balance, in the event of default. Had FCIB stated such intention from inception, only then would it have been able to claim the full balance of the debts for non-fulfillment of the obligation. Having failed to do so the bank was only entitled to enforce payment of the remaining balance on the compromise agreement with interest.

[31] I am fortified in this view from the pronouncements made in WJ Allan & Co Ltd v El Nasr Export & Import Co[21] cited by Counsel for SITI, where the English Court of Appeal agreed that:-

> ……. *"where one party to a contract has by his conduct induced the other party to believe that he will not insist on his strict legal rights under the contract, the party who has waived his rights cannot afterwards insist on them if the other party has*

[21] [1972] 2 Q B 189

acted on that belief differently from the way in which he would otherwise have acted. It is not necessary to show that the other party has acted to his detriment"

[32] The principle of waiver was explained in these terms:-

> *"….If one party by his conduct leads another party to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so…….There may be no consideration moving from he who benefits from the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless the one who waives his strict rights cannot afterwards insist on them……..He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice of that intention or otherwise* ***making it plain by his conduct that he will thereafter insisted upon them…….*** *But there are also cases where no withdrawal is possible. It may be too late to withdraw: or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He is not allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made." (Emphasis Added)*

[33] On the evidence it is clear that SITI had for some time been experiencing financial difficulty and was in continuous communication with the bank with the latter being accommodating. Mr Alexander in a letter to FCIB dated 1st March 2014 when seeking the compromise indicated that over the course of 7 years in excess of $1.1 million had been paid towards the SITI loan and the company was prepared to sell the catamaran to pay off the debts as part of the lump sum payment[22]. For seven months thereafter the compromise agreement remained open ended with no sanction stipulated for default.

[34] When the bank agreed to the compromise settlement in March 2014, without reserving its strict legal rights to reinstate the full balance, the effect was to waive its rights to do so,

[22] See Exhibit CS22 on Page 61 of TB2.

until it was later stated in the letter of 14th October, 2014. By that time Unique Investments Limited and SITI has acted on the open ended agreement whereby the mortgaged property which formed a substantial security for the debts was disposed of at the fair value obtained on the open market. All that is now left as SITI's assets was the value of the catamaran and its tour operations, which may have just about covered the remaining balance under the agreement.

[35] Having sanctioned the sale of the property at the offered price, as part of the compromise agreement, I agree that it would be an injustice to SITI for FCIB to reinstate its strict legal rights to the full balance at this stage. It would no doubt be oppressive and onerous to SITI as a floundering business, which had already taken steps to dispose of the mortgaged property, which it might not have otherwise taken, in the absence of the compromise agreement.

[36] The bank by its conduct had agreed to accept the loss of the amounts waived over the several months during which the parties continued to engage in efforts to settle the balance of the compromise sum. SITI in turn had already parted with the substantial security for the facilities, based on that understanding. I found this to be a fitting case where at the time that FCIB indicated its intention to reinstate the full balance of the debts (October 2014) it was too late for withdrawal of the waiver, without causing an injustice to SITI.

[37] In light of the foregoing I conclude that FCIB is entitled to recover the remaining balance on the compromise settlement and is precluded from claiming the original balances.

[38] Mr Alexander did not take issue with the guarantee which he executed in 2007. Its inclusion as continuing security in the new agreements was negotiated and accepted by him. He was the sole signatory to the loan agreements in his capacity as managing director of SITI, while being fully aware that the guarantee which he gave would continue as security for the new debt. In the circumstances FCIB still has good valid security in that guarantee, therefore I find him jointly and severally liable for the debts of SITI.

Is Mr Ramjeawan jointly and severally liable for the debts of SITI

[39] On this issue FCIB's case is that the Guarantee and Postponement of Claim executed by Mr Ramjeawan in 2005 to secure the debts of SITI is valid and enforceable for recovery of the debt. The existing loan was restructured in 2009 and again in 2010 such that a balance still exists on that loan.

[40] Mr Small testified that guarantees are for continuing debt and if a guarantor wants to revoke the guarantee he may do so by giving 30 days written notice based on the expressed terms of the guarantee[23] and would then become liable to pay the full balance due at that time. He stated that the purpose of the new loans was to restructure the existing loan and the stipulations in relation to security requirements in the agreements were not saying that new security was required. It meant that what existed would continue because FCIB would not require a new guarantee when a loan is restructured. He agreed that in 2005 it was only Mr Ramjeawan who gave a guarantee for the initial sum of $815.070.00 and in 2009 and 2010 the bank was not asking him to guarantee any additional sums. There was a new guarantee from Mr Alexander in 2007 and the one from Mr Ramjeawan remained in place.

[41] Mr Small was not certain of the terms of the 2005 loan and could not say whether the 2009 facility changed the 2005 agreement significantly or added new terms and conditions. He agreed that the overdraft was a new facility which would not have been included in the 2005 loan.

[42] Counsel for FCIB made the following submissions:-

1. At no time were the credit facilities refinanced and no evidence has been adduced by the defendants to show refinancing of the debts or execution of new obligations.
2. The evidence shows that the SITI agreed to a compromise settlement to pay a lesser sum in place of of the original debt under the existing obligations.

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[23] Clause 5

3. The guarantee given by Mr Ramjeawan is valid because it was executed in accordance with Article 918[24] of the Code and was given for the express purpose of guaranteeing the liabilities of SITI up to a limit of $815,070.00
4. Mr Ramjeawan's obligation under the Guarantee could only become extinct by the circumstances outlined in Article 1069 of the Civil Code which includes inter alia payment, novation, release, set-off or confusion, none of which has taken place.
5. By virtue of Article 1102 of the Code novation cannot be presumed and the intention to effect it must be evident. Given the normal practices of FCIB if the intention was to substitute one obligation for another, it would have done so by executing the proper documentation. However should the court accept that the debt was refinanced clause 5 of the guarantee extends to such eventuality because it states;-

   "*This shall be a continuing guarantee and shall cover present liabilities (if any) of the customer……and all liabilities incurred after the date hereof and shall apply to and secure any ultimate balance remaining due……..and shall be binding as a continuing security on the Guarantor……."*
6. In the circumstances the Mr Ramjeawan's guarantee was properly executed, it has not been revoked or extinguished and remains fully operative, enabling a claim against him for recovery of the sums claimed.

[43] Mr Ramjeawan testified that he has been in the automotive business for about 29 years, he was knowledgeable about loan obligations and is the managing director of another company called Ram-J.

[44] He does not dispute that he voluntarily gave a guarantee for the loan to SITI in 2005. He understood that he would be liable for the debts in event of default and as a director he was expected to know about the status of the loan. In cross examination he testified that he was not involved in managing SITI and had no access to its documents or financial information. He believed that the company was in a good position to repay the loan and he knew nothing of its operations. He had no interest in the business but thought that in good faith SITI would do the right thing to repay the loan, hence his reason for giving the guarantee. In 2010 he was no longer a director and had asked to be removed prior. He did not think it was necessary to follow up on whether that was done and he simply relied on good faith. He was aware that he could have revoked the guarantee by giving 30 days written notice to FCIB but he never did.

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[24] 918. A contract to be valid must have a subject and a lawful cause or consideration. The parties to it must be legally capable and their consent legally given.

[45] He admits receiving a demand letter from FCIB's attorneys in January 2015 and was aware of the compromise settlement between FCIB and SITI and the acceptance of a monthly payment of $7,000.00. He also agrees that a manager's cheque in the said sum was issued by 1st National Bank on his instructions, to FCIB as payee, in February 2015. It was not done because he believed he owed the debt or as an effort to prevent FCIB from pursuing him. He explained that he purchased a vehicle from Mr Alexander who asked him to remit a cheque for the said sum directly to FCIB on his behalf and he did so. He did not provide any documentary evidence to support this account.

[46] His case is that the loan agreements in 2009 and 2010 which were executed between FCIB, SITI and Mr Alexander were new agreements under which novation took place, thus releasing him from the 2005 obligation. Further that when FCIB caused Mr Alexander to execute a guarantee in 2007 in respect of a larger sum of $845,000.00 as the only guarantor, FCIB renounced and released him from the 2005 obligation. Thereafter Mr Alexander became the sole guarantor for the company's loan.

[47] In addition he says it was an express term of the new agreements that he was to provide the guarantee as security for the new loans in 2009 and 2010, which he never consented to or executed. On that basis he contends that the guarantee which he gave in 2005 is extinguished and he is not liable for the new facilities which he did not personally guarantee.

[48] Of note is that in cross examination Mr Alexander testified that somewhere between 2007 and 2010 Mr Ramjeawan submitted a letter of resignation as director but to date he had not been formally removed from the records at the Registry of Companies. In the circumstances he might not have been aware of the subsequent restructuring of the loan.

[49] Counsel for Mr Ramjeawan advanced the following legal submissions:-

1. Nothing done by SITI and Mr Alexander in relation to the new credit facilities can bind him because contracts have effect only between the contracting parties and cannot affect third persons[25].

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[25] Articles 955, 961 and 963 of the Code

2. When Mr Alexander executed the guarantee in 2007 for a sum greater than $815,000.00 which was guaranteed by Mr Ramjeawan, FCIB was in effect substituting Mr Alexander as guarantor for the 2005 loan in place of Mr Ramjeawan. In that regard novation took place thus extinguishing Mr Ramjeawan's obligation as guarantor. This is consistent with Article 1069 of the Code which says that: "*an obligation becomes extinct by novation*" and Article 33 which says "*Novation is said to take place with respect to an obligation when a new debt, a new debtor or a new creditor is substituted for the previous debt, debtor or creditor. The term is more particularly described in Articles 1100, 1102, 1103, 1104 and 1105."*

3. Novation also took place when the loan was restructured and new agreements were executed without the knowledge of Mr Ramjeawan. Counsel relied on the case of Roy v Caisse populaire de Chibougamau[26] as a case in point, turning on similar facts to the present case, in which the Quebec Court of Appeal said:-

> *"In principle consolidation of debts operates novation……..When the loan was consolidated under the terms of the contract……the term, the aggregate obligation, the monthly installments and the interest rate were no longer the same. For all intents and purposes, therefore, a new debt was substituted for the old one…….In the absence of novation the appellant could therefore be the subject of a claim under the contract she has signed in 1982 but certainly not under the contract she had not signed two years later……..."* [27]

4. Each loan facility had a different purpose with different and were for larger sums, which cannot be classified as minor changes or modifications of the original debt so as to defeat novation. In that regard Toronto-Dominion Bank v Gurber[28] was cited as the authority for the proposition that simple and minor modifications do not carry away novation and must be obvious. In that case a guarantor was obliged to pay debts for which he was bonded because he was integrally involved in and signed the contracts for subsequent variations to the original facility.

5. Novation also took place when FCIB chose to sue Mr Ramjeawan on the entire loan facilities rather than the existing balance due on the 2005 facility, at the date that the 2009 facility was granted. The effect of suing for the larger sum amounts to a substitution of the balance due at that date for the larger sum which is now due, within the context of under Article 33.

6. The bank's interpretation of clause 5 of the guarantee makes nonsense of the legal principle of certainty of the subject matter of a contract because the obligation can only speak to liabilities incurred in relation to the 2005 loan only. Mr Ramjeawan's liability could only extend to the balance on the 2005 loan at the date the agreement for the 2009 facility was executed and not to the ceiling of $815,000.00 for all future loan facilities. That sum is unknown and was not claimed.

Discussion

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[26] 1992 CanLII 3765 (QC CA)

[27] At paragraphs 22 and 25

[28] 2004 CanLII 43619 (QCCS)

[50] Upon examination of the agreement executed in 2009 it established a credit facility for a demand installment loan and stated its purpose as restructure of existing loan plus new funds of $30,000.00. It was also a condition that *"Upon acceptance this agreement replaces the existing credit agreement dated 22nd March, 2007. Outstanding amounts (and security) under that Agreement will be covered by this Agreement"* The 2010 agreement was for another damand installment loan to cover present balance of the loan restructured in 2009 plus a new operating line up to a limit of $50,000.00. It contained a similar replacement clause as above except that it replaced the agreement dated 25th November, 2009.

[51] The bank's explanation is that a balance existed on the original loan which was never paid off. Mr Ramjaewan's guarantee was a continuing security for that debt and it was not the bank's practice to request a new guarantee when a loan is restructured. Consequently the new agreements merely restated particulars of the security already in place.

[52] In Roy v Caisse populaire de Chibougamau the court accepted that consolidation of debts operates novation and although a later contract for debt consolidation specifically excluded novation, it could not have been held to bind a party to an earlier agreement, who had not intervened and signed the later contract. Consequently that party could not be condemned for a debt which had been guaranteed by intervening in the earlier contract.

[53] In Toronto-Dominion Bank it was said that novation by definition focuses on extinguishment of debt by creating a new one. There must be a new debt substituted for the old one and novation does not operate when minor changes are made to a debt such as the mere extension of the term or the change of mode of payment. In that case the defendants were condemned jointly and severally to pay the debts in question because the court took the view that by signing the new credit agreements with the same debtors the plaintiff only consolidated the debt while meeting the credit needs of the defendants. Moreover at all times the defendants were informed of the changes to the credit conditions and had intervened and signed all the variations to the initial credit agreement for which the bond was given.

[54] In contrast with the present case Mr Ramjeawan who was a debtor for the 2005 loan by virtue of the guarantee which he gave, on the evidence, was not privy to the transactions or a signatory to the agreements in 2009 or 2010. I formed the distinct impression that he was not integrally involved in the management or banking business of SITI at that time. The evidence also seem to suggest that it was SITI and Mr Alexander who were involved in the transactions with the bank from 2007 onwards.

[55] While it is not unusual for lending institutions to restructure existing loans to accommodate borrowers in financial difficulty by varying repayment duration and installments, so as to avoid default or improve liquidity, this does not entail incorporation of new funds and is different to refinancing of a loan where an old debt is paid off by obtaining a new loan with different terms and conditions.

[56] In my opinion there are two issues which affects the complexion of these transactions which the bank has referred to as debt restructuring and which are germane to establishing novation. The first is that a new credit facility was issued on each occasion that existing balances were restructured. It appears that a similar transaction also took place in 2007 (at paragraph 50 above) when Mr Alexander executed the guarantee for $845,000.00. That loan agreement is not in evidence. The second issue is that each credit facility included new debt components to which Mr Ramjeawan was not obligated when he provided the guarantee in 2005. There is nothing to suggest that he was privy to or given the opportunity to intervene in the later transactions. Consequently he would not have been in a position to take issue with security requirements if he had no knowledge that the transactions were taking place.

[57] I have examined the provisions of the Articles 1100, 1102, 1103, 1104 and 1105 and conclude that when FCIB, SITI and Mr Alexander executed the new credit agreements for demand loans to cover existing balances, with the inclusion of new funds and the overdraft facility this had the effect of substituting new aggregate debt with new terms and conditions, in place of the old debts under each of the earlier agreements, leaving only the 2010 agreement in effect when credit facilities went into distress.

[58] At a minimum FCIB and SITI ought to have engaged Mr Ramjeawan to secure his consent to the variation agreements preferably in writing, such that he would have been fully apprised of the changes and exercised his option to intervene in the new agreements as a continuing debtor. While it is true that the guarantee was a continuing security for SITI's obligations up to a limit of $815,000.00 it would only be in respect of liabilities incurred in relation to the sum borrowed under the agreement in which he had intervened in 2005, and nothing more.

[59] I disagree with the submissions of Counsel for FCIB that there was no refinancing of the 2005 debt or any evidence of execution of new obligations. When new demand instalment loans were given in each instance, the new agreement executed on each occasion without Mr Ramjeawan's intervention was sufficient to operate novation such that the 2005 loan was extinguished, as if it had been refinanced under the new facilities. I considered the new agreements as tantamount to a consolidation of funds giving rise to a new aggregate debt, sufficient to operate novation, notwithstanding that the purpose was stated as a restructure of existing debt.

[60] For these reasons I conclude that Mr Ramjeawan's liability under the guarantee given in 2005 is extinguished. The claim against him fails and must be dismissed.

Conclusion

[61] In concluding I therefore make the following orders:-

1. The first and third defendants are jointly and severally liable to pay the claimant the sum of $495,000.00 (less any payments made after January 2015) with interest thereon at the statutory rate of 6% per annum from the date of this judgment until payment in full.

2. The claim against the second defendant is dismissed.

3. The defendants shall be entitled to their costs to be assessed if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar