THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2016/0098

BETWEEN:

FND ENTERPRISES CO-OPERATIVE CREDIT UNION LTD

Claimant

and

DWIGHT SMITH

Defendant

CLAIM NO. SKBHCV2017/0235

BETWEEN:

ALEXES HAZEL

Claimant

and

DWIGHT SMITH

Defendant

Appearances:

Ms. Stacy Ann Aberdeen for FND Enterprises Co-Operative Credit Union Ltd
Mr. Garth Wilkin for Mr. Alexes Hazel
Mrs. Natasha Grey for Mr. Dwight Smith

2019: March 8; April 5, 12;
June 20

JUDGMENT

[1] **VENTOSE, J**.: One of the claims in this matter relates to a loan agreement and the consequences following therefrom – the enforcement of a contract. The other concerns whether the parties have entered into a binding contract. Contract law is one of the mechanisms by which the law allows persons to enter into binding obligations with each other. It is concerned with economic exchange (P.S. Atiyah, An Introduction to the Law of Contract, Clarendon Law Series, 1995 at p. 3). In the course of the nineteenth century, the philosophy of *laissez faire* grounded the law of contract in that the law of contract was designed to provide for the enforcement of private arrangements which the contracting parties had agreed upon (Ibid at p. 8). Notions such as the "sanctity of contract", "freedom of contract" took root and became the foundations on which the whole law of contract was built (Ibid). Equitable doctrines still had a role to play during that time to protect those who had entered into foolish and improvident bargains (Ibid at p. 9). Freedom of contract reflected two important themes. First, contracts were based on mutual agreement between the parties. Second, the creation of a contract was the result of free choice unhampered by external control such as government or legislative interference (Ibid).

[2] The classical theory of contract law waned during the course of the twentieth century because of: first, the emergence and widespread use of standard-form contract; second, the declining importance attached to free choice and intention as grounds of legal obligation; and, third, the emergence of the consumer as a contracting party (Ibid at p. 16). Once parties have entered freely into contracts, they are bound by the agreement so made and only if the requirements for a valid contract have been established would the parties be bound by the terms of that contract. At the heart of this case is the enforcement of contractual relations and the determination of the circumstances in which contractual relations may exist.

Background: FND's Claim against Mr. Smith

[3] The Claimant in Claim No. SKBHCV 2016/0098, FND Enterprise Co-operative Credit Union Ltd ("**FND**"), filed a claim on 30 March 2016 against Mr. Dwight Smith ("**Mr. Smith**") and Mr. Alexes Hazel ("**Mr. Hazel")** for the sum of $77,806.05. FND avers that an agreement was made on 10 August 2011 between FND, on the one hand, and Mr. Smith (as principal) and Mr. Hazel (as co-maker), on the other hand, pursuant to which FND granted a loan to Mr. Smith and Mr. Hazel for the sum of $143,000.00 (the "**Loan**") with an interest rate of 15 per cent on the reducing balance (the "**Loan Agreement**"). Under the Loan Agreement, Mr. Smith and Mr. Hazel agreed jointly and severally to repay the principal and interest of the Loan in monthly installments of $3,404.82 for 59 months commencing in 2011 and ending in 2016.

[4] The Loan was secured by $100,000.00 held in a fixed deposit in the name of Mr. Hazel and shares in FND in the sum of $25,000.00 also in the name of Mr. Hazel. Mr. Smith and Mr. Hazel failed to make the payments as required under the Loan Agreement. FND demanded repayment of the balance due on the Loan. FND avers that it was Mr. Smith that approached FND for the Loan. FND also avers that Mr. James Webbe, the General Manager of FND, facilitated the negotiation and he was only responsible for preparing the necessary documentation for the Loan Application for approval by the Credit Committee of FND.

[5] Mr. Smith filed a defence on 9 May 2016 in which he avers that he never approached FND for the Loan and that the Loan was negotiated between Mr. Webbe and Mr. Hazel but that the Loan Agreement was placed in his (Mr. Smith's) name. Mr. Smith states that the Loan Agreement was entered into on the basis that Mr. Hazel would secure "gigs" for Mr. Smith to enable the monthly payments to be made by Mr. Smith. Those "gigs" involved Mr. Smith playing, with his 4Play Band, on Mr. Hazel's boat, La Pinta, for a period of five (5) years. Mr. Smith avers that it was on that basis that he signed the Loan Agreement. Mr. Smith also avers that he was never given any opportunity by FND to seek independent legal advice in relation to the circumstances surrounding the granting of the Loan.

[6] Mr. Hazel filed a defence on 9 May 2016 in which he denied that FND was entitled to any relief it sought in its claim form and counterclaimed against FND seeking damages for breach of contract and/or unjust enrichment. Mr. Hazel via letter dated 8 August 2011 to Mr. Webbe informed that he waives his right to seek legal advice in relation to his guarantee of the Loan.

[7] The matter was referred to mediation on 18 October 2016 and following the unsuccessful attempt at mediation, the court gave trial directions on 11 April 2017. FND subsequently discontinued the claim against Mr. Hazel and the claim continued only against Mr. Smith.

[8] The issue that arises is whether Mr. Smith is bound by the terms of the Loan Agreement and the Promissory Note and is therefore obligated to pay the balance of the sum owing to FND under the Loan Agreement.

The Loan Agreement

[9] The Loan Agreement is in the name of Mr. Smith and Mr. Hazel, and FND. The amount borrowed was $143,000.00 for 59 months and the monthly payment was $3,404.82. The first payment was to be made on 10 August 2010 and the last payment on 10 August 2016. Clause 1 of the Loan Agreement states that Mr. Smith is the principal and Mr. Hazel is the co-maker. Clause 2 provides that the security for the Loan was a hold on $100,000.00 on a fixed deposit held in the name of Mr. Hazel and $25,000.00 permanent shares in FND also in the name of Mr. Hazel.

[10] Clauses 4, 5 and 6 of the Loan Agreement are as follows:

> 4. In the case of any default in payment as herein agreed, unless excused by the Board of Trustees, the entire balance of this loan shall become immediately due and payable on demand. This loan shall also become due and payable when the borrower becomes bankrupt, or leaves St Kitts-Nevis without at least six months notice.
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> 5. Said principal and co-makers jointly and severally promise to pay all fines imposed in accordance with the rules of the Foundation, for failure to comply with the terms of this loan together with all

costs or expenses incurred in the collection of any sum due; also, if the holder hereof after default shall place this loan in the hands of an attorney-at-law for collection, to pay all costs incurred;

Not withstanding any other provision of this note, if default be made in the payment when due of any part of the installment of principal and interest, the undersigned agrees to pay a delinquency charge for each installment in default **one (1)** day an amount equal to **$20.00** and any amount payable at the same time. In the event the holder of this note elects, upon default being made hereunder, that the whole sum of principal and interest become immediately due and payable, the undersigned agrees to pay a penalty charge of 18% on the principal and interest outstanding on the date of such election.

6. In the event of commencement of a suit to enforce payment of this note, the undersigned agrees to pay such additional sums as attorney fees as the court may adjudge reasonable and also 10% of the amount sued for (which represents the commission paid by the holder to its solicitor for making the collection).

[11] Clause 4 states that in case of any default in payments on the Loan, the entire balance of the Loan becomes immediately due and payable on demand. Clause 5 of the Loan Agreement provides that both Mr. Smith and Mr. Hazel jointly and severally promise to pay all fines imposed in accordance with the rules of FND, for failure to comply with the terms of the Loan Agreement together with all costs and expenses incurred with the collection of any sum due; also, if FND after default shall place the Loan in the hands of an attorney-at-law for collection, to pay all the costs incurred. Both Mr. Smith (as applicant) and Mr. Hazel (as co-maker) signed a promissory note on 10 August 2011 in relation to the sum of $143,000.00 at an interest rate of 15 per cent on the reducing balance (the "**Promissory Note**").

Background: Mr. Hazel's Claim against Mr. Smith

[12] On 31 July 2017, Mr. Hazel filed a claim against Mr. Smith for the sum of $123,170.77 claiming that he (Mr. Hazel) is the guarantor under the Loan Agreement and that the claim is that of a guarantor of a loan to a principal suing the principal for monies paid under the guarantee. Mr. Hazel avers that the Loan Agreement and the Promissory Note are both evidence of the guarantee. He also avers that because Mr. Smith failed to pay the amounts due under the Loan

Agreement and Promissory Note, FND withdrew $123,170.77 from his account as guarantor of the Loan to clear the balance of the Loan to Mr. Smith. Mr. Hazel avers that Mr. Smith asked him to "stand for him" (that is, to guarantee) the Loan provided by FND to Mr. Smith. Mr. Hazel also avers that he agreed to guarantee the Loan as long as Mr. Smith and Mr. Gretson Isaac, both of whom operated a band called 4Play Band, agreed to pay him back. Mr. Hazel avers that the Loan was for Mr. Smith and Mr. Isaac to purchase musical equipment, but he (Mr. Hazel) does not know if they actually purchased any musical equipment with the money loaned by FND to Mr. Smith.

[13] Mr. Smith in his defence filed on 13 October 2017 admitted the existence of the Loan Agreement and the Promissory Note but states that by virtue of the Loan Agreement "both [Mr. Hazel] and [himself] promised to pay [FND] jointly and severally by virtue of the Loan Agreement". Mr. Smith avers that Mr. Hazel promised to pay the sums owing under the Loan Agreement and has failed to honor that obligation. Mr. Smith also avers that the "obligation to repay [FND] was both that of [Mr. Hazel] and [himself]". Mr. Smith states that he (Mr. Smith) defaulted on the Loan payments to FND because Mr. Hazel breached an agreement with him for the provision of musical entertainment by 4Play Band on La Pinta.

[14] The issues that arise are as follows: (1) whether the Loan Agreement and Promissory Note can be construed as a contract of guarantee by which Mr. Hazel agreed to guarantee the obligations of Mr. Smith under those agreements; and (2) whether there was any operative mistake when Mr. Hazel entered into the Loan Agreement and Promissory Note.

Background: Mr. Smith's Counterclaim against Mr. Hazel

[15] Mr. Smith counterclaimed against Mr. Hazel in relation to an alleged agreement between them by which Mr. Hazel promised to pay him (Mr. Smith) $2,000.00 a week to provide musical entertainment with 4Play Band on La Pinta. Mr. Hazel avers that it was that agreement that made both him and Mr. Hazel enter into the Loan Agreement and the Promissory Note with FND. Mr. Smith avers that it was a

term of the agreement that 4Play Band would provide musical entertainment every Friday and Sunday on La Pinta for a period of five (5) years from September 2011 to August 2016 and in return Mr. Hazel would pay the sum of $2,000.00 to Mr. Smith each week. Mr. Smith states that it was also agreed that the sum would be used to pay the monthly repayments of $3,404.82 under the Loan Agreement. Mr. Smith also states that he was expecting to receive the sum of $520,000.00 over the five-year period under that agreement, and that he was always willing and able to provide musical entertainment with 4Play Band for Mr. Hazel on La Pinta.

[16] In his defence to the counterclaim, Mr. Hazel avers that it was Mr. Smith and Mr. Isaac who approached him to play on La Pinta and that they had to buy new musical equipment because the ones they had were not good. Mr. Hazel denies that the musical equipment purchased with the Loan was left on La Pinta. Mr. Hazel avers that Mr. Smith and 4Play Band never played on La Pinta after the Loan Agreement and Promissory Note were signed. Mr. Hazel denies that he entered into an agreement with Mr. Smith by which he agreed to pay Mr. Smith $2,000.00 a week to provide weekly entertainment on La Pinta. Mr. Hazel avers that he informed Mr. Smith and Mr. Isaac that he wished 4Play Band to play on La Pinta but that a price for that service was never agreed and no terms of any such agreement as alleged was ever discussed or agreed.

[17] Mr. Hazel also avers that Mr. Smith informed him that 4Play Band could not play on La Pinta because Mr. Smith had "other gigs" and that he (Mr. Smith) could not guarantee that 4Play Band would play on La Pinta all the time. Mr. Hazel states that Mr. Smith refused to provide entertainment with 4Play Band on La Pinta and that there was never any discussion between himself and Mr. Smith about any sum of money to be paid by Mr. Hazel to Mr. Smith "regularly or otherwise in periodic payments".

[18] The issue that arises is whether there was an agreement between Mr. Hazel and Mr. Smith that 4Play Band would provide musical entertainment every Friday and Sunday on La Pinta for a period of five (5) years from September 2011 to August

2016 and in return Mr. Hazel would pay the sum of $2,000.00 to Mr. Smith each week.

Analysis: FND's Claim against Mr. Smith

[19] Mr. Smith filed a witness statement on 15 July 2017 in which he essentially admits that he received the Loan from FND but that FND failed to offer him the opportunity to seek independent legal advice. During cross-examination at trial Mr. Smith admitted the he owed FND the sums as outlined in the claim form and the statement of claim. Mr. Smith has provided no evidence that he did not voluntarily enter into the Loan Agreement with FND. The Loan Agreement remains binding on Mr. Smith and his obligations thereunder continue until the Loan is paid in full.

[20] Counsel for FND cites the decision of Ramdhani J (Ag.) in **Development Bank of St Kitts and Nevis v Browne et al** (Claim No. SKBHCV 2012/0084 dated 8 April 2014) where he stated as follows:

> [30]. 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.

[21] It seems clear to me that each person who has agreed, pursuant to a loan agreement, to pay the debt has effectively entered into a separate contract to pay the debt. The liability of Mr. Smith to repay the debt is identical to the obligation of Mr. Hazel and that liability is not extinguished because FND decided to discontinue, for whatever reason, the claim against Mr. Hazel. I therefore hold that Mr. Smith is contractually bound to pay the balance owning on the Loan granted to him by FND pursuant to the Loan Agreement and the Promissory Note. I do not find that Mr. Smith was being truthful when he gave the impression that he was

merely an uninterested third party to the Loan Agreement and Promissory Note. I also do not think that it is a basis to avoid his obligations under these agreements that Mr. Smith was not given an opportunity by FND to seek independent legal advice since it was Mr. Smith's Loan Application that FND processed. Moreover, Mr. Smith, while denying liability under the Loan Agreement and Promissory Note in this action, was accepting such liability, alongside Mr. Hazel, in Mr. Hazel's claim against Mr. Smith. On the whole, Mr. Smith did not give the impression that he was telling the truth.

[22] The Loan Agreement provides for the security in the event that the parties default on the loan payments. FND, rather than use the entire security to reduce the balance of the loan and then seek to claim the balance owing, made monthly deductions from the fixed deposit and the shares until the security was exhausted some years later. There is nothing in the Loan Agreement which makes provision for this arrangement. While FND is entitled to judgment, it needs to provide evidence and supporting arguments to justify the amount that it claims to be entitled to in the claim form.

Analysis: Mr. Hazel's Claim against Mr. Smith

[23] I have already noted that the obligation on both Mr. Hazel and Mr. Smith is to jointly and severally pay the balance of the Loan to FND under the Loan Agreement and the Promissory Note. Mr. Hazel does not have a cause of action against Mr. Smith with whom he was jointly and severally liable to pay the Loan in full. On any interpretation of the Loan Agreement and the Promissory Note, one cannot reasonably say that they amounted to a contract of guarantee. Mr. Hazel did not contract to assume the obligations of Mr. Smith in the event that Mr. Smith could not repay the Loan to FND. What he did was also to assume the primary responsibility, alongside Mr. Smith, for the obligation to pay the monthly payments and repay the Loan amount under the Loan Agreement and the Promissory Note. Even if one were broadly to construe the terms of the Loan Agreement and the Promissory Note there is nothing contained therein to suggest even remotely that any contract of guarantee was thereby created in favour of Mr. Hazel.

[24] Counsel for Mr. Hazel submits that when interpreting a commercial contract, the court is concerned to identify the intention of the parties, and that, in ascertaining that intention, the court must consider "what a reasonable person having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean." Counsel cites in support the decision of **Brown Brothers Motor Lease Canada Ltd. v. Ganapathi** [1982] B.C.J. No. 1710, 139 D.L.R. (3d) 227 where Locke J. had to consider the meaning of clause 25 (which was placed after the signatures of the parties) in a lease agreement of a motor vehicle. Locke J. stated that:

> 10. But the whole turns on the interpretation of cl. 25. It falls almost exactly into two halves: the first saying that he will "... as Guarantor, upon demand, pay any monies in default, and will perform the covenants, terms and conditions herein...." The second half: "I shall be and shall be deemed to be a principal debtor and not a surety and accordingly shall not be entitled to previous demand on notice of any kind and shall not be discharged nor shall my liability be affected by any giving of time....".
>
> 11 It is the duty of the Court to find the true intention of the parties. It is to be noted that cl. 25 is in one sense an afterthought. The printed document is complete on its face and has a principal debtor and makes no reference to any guarantee.

[25] Counsel for Mr. Hazel then cites the following paragraphs in the judgment of Locke J. in support of his submission that the clear intention of Mr. Smith and Mr. Hazel was that Mr. Hazel would become a guarantor of the Loan:

> 14 The clause has given me much trouble but I adopt the view of Wilde C.J. and say that even the very specific words "I shall be and shall be deemed to be a principal debtor and not a surety ..." were not intended to alter the basic intention of the parties, i.e., that Ganapathi was intended to be a guarantor alone.
>
> 16 I think the overriding intention was always that Ganapathi be merely a guarantor. Once an overriding intention or circumstance is found, in my view the principle expressed by Davey J.A. (later C.J.B.C.) in Sawley Agency Ltd. v. Ginter (1966), 57 W.W.R. 561, 58 D.L.R. (2d) 757 applies, in words approved by the Supreme Court of Canada [1967] S.C.R. 451, 60 W.W.R. 701, 62 D.L.R. (2d) 768n. When interpreting an ambiguous clause he said [at p. 563 W.W.R.]:
>
>> ... That circumstance, in my opinion, dominates the clause and controls its meaning. ...

(The italics are mine.)

[26] However, Counsel for Mr. Hazel left out this important paragraph:

> 15 Among other reasons, if he was ever intended to be the principal debtor, I do not see why he was not so named as a co-debtor in the body of the agreement, nor do I see the need for any guarantee at all. Again, careful attention should be paid to the words of cl. 25:
>
> > I shall be and shall be deemed to be a principal debtor and not a surety and accordingly shall not be entitled to previous demand on notice of any kind and shall not be discharged...
>
> (The italics are mine.) I take it that the words "and accordingly" indicate that all the parties intended was that while continuing liable as a guarantor he would not have the privilege of seeking a discharge from the guarantee were the terms to be changed without his knowledge and consent.

[27] I agree with Counsel for Mr. Smith that the overriding intention and circumstances are important but only when the intention of the parties is *not* ascertainable in the agreement that they have signed. Clause 25 of the lease in **Ganapathi** was not clear so the court had to determine what exactly was the intention of the parties when they signed the lease. Locke J. held that the overriding intention was always that Ganapathi be merely a guarantor. In the present case, the intention of the parties is clearly discernable from the Loan Agreement and the Promissory Note.

[28] Mr. Webbe testified at trial that in 2011 when the Loan Agreement was signed, FND did not have any guarantee forms and that at that time it was not possible to guarantee any loan without that person also being a co-maker. Consequently, any person wishing to guarantee a loan would be requested by FND to sign the loan as a "co-maker". Mr. Webbe states that any such person would be informed before signing of the nature of the obligation as co-maker. Mr. Webbe gave evidence that Mr. Hazel signed as co-maker and provided security in the form of shares and cash as mentioned above. Mr. Hazel wrote to Mr. Webbe on 8 August 2011 stating that:

> I hereby with to inform you that I waive my right to seek "legal advice" in relation to my guaranteeing the loan of $143,000.00 that is being granted by your institution to Mr. Dwight Smith, of Tabernacle, St. Kitts.

[29] The Loan Agreement and Promissory Note were signed two days later on 10 August 2011 by Mr. Webbe, as General Manager of FND, Mr. Smith, as Principal, and Mr. Hazel, as Co-maker. Although on the face of the Loan Application, there is no signature of the Credit Committee Chairman, nothing turns on this. It is not disputed that the Loan Agreement was signed by the parties and FND cannot now, and did not, claim that there was no proper approval of the Loan Application. Mr. Webbe's evidence was that the Loan must have been approved by the Credit Committee Chairman because only that office holder can approve loans over $50,000.00.

[30] The evidence of Mr. Webbe is that it was Mr. Hazel who called him to inform that he (Mr. Hazel) wished to "put up security" and be "a guarantor" for the loan to Mr. Smith. In order to secure the loan, Mr. Hazel became a member of FND. Since FND is a credit union, it does not serve the general public but provides services only to its members. Since FND only provides services to members, it follows that a co-maker would have to also be a member of FND to be able to get a loan from FND. Mr. Hazel purchased 25,000 shares in FND and therefore became a member, entitling him to participate in the commercial activities of FND.

[31] Mr. Hazel gave evidence at trial that he did not write the letter dated 8 August 2011, adding that he was given the letter to sign by Ms. Vera Manchester, the Loans Manager. He continued that when he was given the letter, he questioned it and was informed by Ms. Manchester that the letter was to protect FND if the "loan goes bad". Mr. Hazel states that he thought it was part of the new policy, so he signed it. Mr. Hazel further states that Ms. Manchester questioned whether he really wanted the loan and he replied that he was just going to go along and help the "young people" to "get the instruments". I accept that Mr. Hazel's overidding objective was to procure the Loan and this provides additional evidence of his determination to ensured that the Loan was secured.

[32] In cross-examination, when asked why he decided to co-sign the Loan with Mr. Smith whom he did not know personally but only knew that he only played in 4Play Band, Mr. Hazel simply replied, "that is a very good question". He insisted that he

did not co-sign the Loan Agreement but gave power for "them" to use his money only as guarantor. Mr. Hazel agreed that it was his signature on the Loan Agreement but claims that it was an error on FND's part to have him sign under the signature line entitled "Co-maker's signature" on the Loan Agreement. In reply to whether he signed as co-maker or not, Mr. Hazel states that if he signed as co-maker it was out of the goodwill of his heart. Mr. Hazel also agreed that he signed the co-maker's statement.

[33] Mr. Hazel states that when he went to FND, he was not aware that he went there to get a loan but went there to be a guarantor for the Loan. However, the documents in evidence tell a different story. On the application form that is dated 21 July 2011, there is an unsigned section for the co-maker. In addition, there is a section on the Loan Application entitled "Co-maker's Statement". That section was completed with details of Mr. Hazel's assets, property and other income and liabilities. It also provides evidence of his monthly income and the location of the real estate that he owns. In cross-examination, Mr. Hazel agreed that he provided FND with the updated information found in the co-makers statement. Importantly, this co-maker's statement was signed by Mr. Hazel on 10 August 2011. Mr. Hazel did not dispute at trial that it was his signature found just below the signature line entitled "Co-maker's signature" at "page 4 of 4" of the Loan Application.

[34] Mr. Hazel signed the Loan Agreement on 10 August 2011. It is curious to note that Mr. Hazel signed approximately one-half inch above the signature line entitled "Co-maker's signature" on the Loan Agreement. This puzzled the court. However, when questioned about this Mr. Hazel simply replied that this was where he was asked to sign. Nothing particularly turns on this, so I say nothing more on it. Mr. Hazel in cross-examination denied that he promised to pay FND the Loan amount plus interest, stating that he thought he was "putting up money" so that Mr. Smith could pay the Loan. When, in cross-examination, Mr. Hazel was informed by Counsel for Mr. Smith that he agreed to pay 59 payments of $3,404.82 in accordance with Clause 1 of the Loan Agreement, Mr. Hazel replied that if that is according to the Loan Agreement, FND put him in a position that he did not know

he was in. Mr. Hazel continued that he agreed with FND that he was guaranteeing the Loan to Mr. Smith. Mr. Hazel accepted that he did not receive any documentation to show that he guaranteed a loan to Mr. Smith from FND.

[35] I agree with Counsel for Mr. Smith that Mr. Hazel has not pleaded a legally recognizable cause of action. The decision of the Court of Appeal of England and Wales in **L'Estrange v E. Graucob Ltd** [1934] 2 KB 394 applies here. Mr. Hazel is bound by his signature on the Loan Agreement and Promissory Note irrespective of whether he read or understood the terms of the Loan Agreement and the Promissory Note. Mr. Hazel did not plead or lead any evidence at trial to show that he was induced by either FND or Mr. Smith to sign the Loan Agreement or the Promissory Note by fraud or misrepresentation.

[36] It is doubtful that there was any operative mistake. There was clearly no common mistake since, for that to operate, it would have to be a mistake common to all the parties to the Loan Agreement. And, in any event, **Bell v Lever Bros [1932] AC 161** makes clear (at p. 219)

> Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.

[37] It is only Mr. Hazel who alleges that he thought he was signing a guarantee for the Loan to Mr. Smith, rather than as co-maker with Mr. Smith as Principal for the Loan. Mr. Hazel, apart from admitting that he thought he was guaranteeing the Loan, did not lead any evidence to show that he was mistaken because of any representation made to him by either FND or Mr. Smith. It might be that this case is one of "unilateral mistake" where only Mr. Hazel has made a "mistake", that is, believing the Loan Agreement and Promissory Note amounted to a contract of guarantee when it was not. On the pleaded case and on the evidence, there is no averment or evidence that either FND or Mr. Smith made any representation to induce Mr. Hazel to enter into the Loan Agreement or the Promissory Note.

[38] On the contrary, the evidence shows that Mr. Hazel was willing to forgo his right to legal advice when he signed the letter, he alleged was given to him by FND, and that he was willing to assist Mr. Smith, a person whom he claims knew little about. The evidence shows that Mr. Hazel was willing to go the extra mile to assist Mr. Smith by becoming a member of FND, putting up $100,000.00 in cash and $25,000.00 in shares in FND as security, and signing the Loan Agreement as co-maker. I agree with Counsel for FND that, first, Mr. Hazel did not plead or submit that any alleged mistake was induced by the misrepresentation of FND or Mr. Smith; second, Mr. Hazel and Mr. Smith signed the Loan Agreement and Promissory Note as Principal and Mr. Hazel signed as Co-maker and both these documents were accepted by all the parties; and, third, there was no ambiguity as to the terms of these documents and the parties held the same understanding as to the purpose of the transaction.

[39] I, therefore, hold that based on the evidence presented in court at trial that Mr. Smith was not mistaken when he signed the Loan Agreement and the Promissory Note. He intended to allow his money and shares to be used in the event of any default under the Loan Agreement and this mirrors the obligations he freely entered into when he appended his signature to the Loan Agreement and the Promissory Note. Mr. Hazel signed the Loan Agreement as co-maker, not a guarantor and no such contract of guarantee can be inferred in light of the clear words of clauses of the Loan Agreement and the Promissory Note. Mr. Hazel is, therefore, not entitled to indemnification from Mr. Smith and his action against Mr. Smith fails.

Analysis: Mr. Smith's Counterclaim against Mr. Hazel

[40] In relation to Mr. Smith's counterclaim against Mr. Hazel, I believe the version of events as outlined by Mr. Hazel as opposed to that of Mr. Smith. Mr. Smith's band, 4Play Band, played live music to the guests of La Pinta at the inaugural party on La Pinta in 2011. Mr. Hazel asked Mr. Isaac, who had performed at the first party on La Pinta, if 4Play Band was willing to play music on La Pinta in the future. In a meeting at College Street Ghaut to discuss whether 4Play Band was so willing,

Mr. Smith and Mr. Isaac informed Mr. Hazel that they needed new instruments as their current ones were not good. Mr. Hazel informed Mr. Smith and Mr. Isaac that he would pay them $1,500.00 each time 4Play Band played on La Pinta. I do not believe that Mr. Hazel informed Mr. Smith and Mr. Isaac that 4Play Band would be the only band to play on La Pinta.

[41] The evidence of Mr. Smith was that 4Play Band was a popular band with numerous gigs per week. At trial, Mr. Smith gave evidence that he cancelled six (6) engagements with other companies, including engagements on Thursdays and some Sundays at the St. Kitts Marriott Resort, to enable him to play on La Pinta where 4Play Band would allegedly play twice a week, on Fridays and Sundays. It seems unbelievable that Mr. Smith would cancel longstanding contracts he had with other venues for any alleged agreement with Mr. Hazel. It seems unrealistic to cancel those longstanding engagements in circumstances where 4Play Band had not played on La Pinta pursuant to the alleged agreement.

[42] I believe the evidence of Mr. Hazel that 4Play Band never played live music on La Pinta after the inaugural party and that Mr. Hazel attempted to book 4Play Band on numerous occasions but was unsuccessful. It seems unlikely that 4Play Band left any musical equipment on La Pinta as stated by Mr. Smith. I believe the evidence of Mr. Dion Berry, the captain of La Pinta at the material time, who testified at trial that: first, La Pinta is an open boat so there is nowhere for equipment to be stored; second, after events, the crew checks, and he double checks, La Pinta before leaving; third, 4Play Band did not leave any equipment on La Pinta when they finished playing at the inaugural party; and, fourth, the members of 4Play Band left with all the equipment they brought with them.

[43] The fact that Mr. Hazel may have wished 4Play Band to play on La Pinta in the future or to be the house band does not, by itself, suggest that any contractual arrangement existed or came into existence between the parties. While this might be relevant to the motivation Mr. Hazel might have had for wishing to assist in respect of the Loan and his subsequent entering into the Loan Agreement and the Promissory Note, it does not provide concrete evidence that a contract existed

between the parties. It goes without saying that to prove that a contract existed, it was incumbent on Mr. Smith to provide evidence that: (1) parties had reached an agreement; (2) the agreement was supported by consideration; and, (3) there was an intention to create legal relations.

[44] Mr. Smith has not shown on the balance of probabilities that he and Mr. Hazel had reached any agreement to the effect that 4Play Band would provide musical entertainment every Friday and Sunday on La Pinta for a period of five (5) years from September 2011 to August 2016 and in return Mr. Hazel would pay $2,000.00 to Mr. Smith each week. Mr. Smith is therefore not entitled to any damages for breach of contract on his counterclaim.

Disposition

[45] Mr. Smith assumed freely the contractual obligations under the Loan Agreement and the Promissory Note and is therefore bound by them. Mr. Hazel also freely entered into the same agreements to assist Mr. Smith in purchasing new equipment for 4Play Band to enable Mr. Smith to play on La Pinta. The evidence suggests that these obligations were freely entered into by both Mr. Smith and Mr. Hazel. Whatever intentions they might have had in entering into the agreement matters little if there is no misrepresentation by any other party. For a person to be bound by any contract, the terms of such an agreement must be clear and there must be some evidence that the requirements of a contract exist, reflecting the classical theory of contract law. For these and the reasons explained above, I make the following orders:

(1) Judgment is given in favour of FND against Mr. Smith with damages to be assessed.
(2) FND shall file and serve an affidavit providing evidence of the amount owing to it under the Loan Agreement and submissions and authorities on or before 2 July 2019.
(3) Mr. Smith shall file and serve an affidavit in response and submissions and authorities on or before 15 July 2019.
(4) The hearing of the assessment of damages is set for 19 July 2019.

(5) Mr. Hazel's claim against Mr. Smith is hereby dismissed.

(6) Mr. Smith's counterclaim against Mr. Hazel is hereby dismissed.

(7) No order as to costs in the claim by Mr. Hazel and the counterclaim by Mr. Smith.

Eddy D. Ventose
High Court Judge

By the Court

Registrar