Action No. CL 105/16

IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

BETWEEN

BRITISH CARIBBEAN BANK LIMITED

PLAINTIFF

AND

JOHNSTON INTERNATIONAL LIMITED
(IN LIQUIDATION)

DEFENDANT

Mr. Conrad Griffiths QC for the Plaintiff Bank
Mr. Martin Green for the Defendant Company
Heard on the 14 September, 2016 and 22 February 2017
Before the Chief Justice, the Hon. Margaret Ramsay-Hale

JUDGMENT

Factual And Procedural Background

1. By its statement of claim filed 28th June 2016, the Plaintiff, British Caribbean Bank Limited ("the Bank"), avers that the Defendant, Johnston International Limited (In Liquidation), ("the Company") was a long standing customer of the Bank and as part of the banking services that the Bank provided to the Company, the Company secured a loan with the Bank for the sum of $3,700,000.00. The security for the loan was a debenture executed under seal and dated 27 July 2000 over all of the Bank's assets. This primary debenture ("the Debenture") was varied in 2001 and 2010.

2. Clause 23 of the said Debenture permitted the Bank to appoint a person as Receiver over all or any part of the charged property in an instance where the Company was in default of payment to the Bank. Pursuant to clause 23, a Receiver was appointed on 7th July 2010. By letter dated August 24, 2010, the Bank under the signature of its Director, Stanley J.S. Lightbourne, advised the Receiver that the obligations of the Company to the Bank *"hav[e] been accepted by the Bank as satisfied and accordingly hereby remove you as Receiver of [Johnson International Limited] with immediate effect."*

3. Shortly before the appointment of a Receiver, and during the course of its banking relationship with the Company, the Bank provided two Retention Bonds in favour of Interhealth Canada Construction and Services (TCI) Limited ("Interhealth") in the sums of $480,000.00 and $630,000.00 which were executed on the 3rd and 17th December 2009 respectively. The Bank cannot find the agreement made between itself and the Company with respect to the Retention Bonds but, given that both Retention Bonds are headed "Schedule II," it is reasonable to infer that the Retention Bonds were annexed to an agreement.

4. Shortly after the Bank's Receiver was dismissed, the Company passed a resolution on 27th August 2010 for a voluntarily winding up. This was then converted to a compulsory winding up subject to the supervision of the Supreme Court on 10th June, 2011.

5. In 2012, Interhealth claimed payment from the Bank pursuant to the Retention Bonds in an action before the Supreme Court which, on 27 November 2012, ordered the Bank to pay to Interhealth the sums due under the Bonds. The Bank appealed but the appeal was dismissed on 6 May 2013. Pursuant to the order of the Court of Appeal, the Bank paid to Interhealth the sums of

$1,115,243.84 in respect of principal and part interest on 20 June 2013 and $132,263.63 in respect of legal costs and interest on 29 August, 2013.

6. The Bank subsequently demanded that the Company indemnify it. After an exchange of letters that failed to resolve the issue, the Bank sought leave of the Supreme Court to issue proceedings against the Company [1] but leave, was refused but the Bank prevailed on appeal and leave was granted by the Court of Appeal by order dated 13th May 2016.

This Application

7. By statement of claim filed 28th June 2016 and by a summons for summary judgment filed 11th August, 2016, the Bank seeks against the Defendant: (1) damages to be assessed; (2) interest pursuant to the banking agreement between the Bank and the Company at 9.9%; (3) alternatively to (2), interest pursuant to the Civil Procedure Ordinance at such rate and for such period as to the Court shall seem fit; (4) an accounting to the extent required in the event that monies and assets held are less than the amount due to the Bank which, under a debenture over the assets of the Company are held for the Bank; (5) all such further and other orders and directions as to the Court shall seem fit and in respect of a debenture pursuant to which assets held by the Company are held on trust for the Bank to the extent of the value of the Bank's claim.

8. The summons for summary judgment was supported by the affidavit of Stewart Howard ("Mr. Howard"), the Managing Director of the Bank.

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[1] **Section 130** of the **Companies Ordinance, Cap 16.08** implements a stay on proceedings after an order for winding up is made: *"When an order has been made for the winding up of a company, no suit, action or other proceedings shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose.*

9. By his affidavit, Mr. Howard reiterates the pleaded averments in the Statement of Claim that at the Company's request, the Bank entered into the Retention Bonds with the Company and Interhealth as Surety. He states that he has been unable to locate any express documents relating to the terms on which the Retention Bonds were issued but asserts that bonds such as these are always issued on terms that the customer will indemnify the Bank if it is called upon to pay out as surety under the terms.

10. He also avers that although the Receiver was removed, no formal release or final discharge of the Company's indebtedness to the Bank has ever been provided by the Bank to the Company and that, in the circumstances, the Bank is asserting its rights as a secured creditor in respect of any sums found due to it.

11. The Company, through one of its Joint Official Liquidators ("JOL"), Mr. Andrew Newlands ("Mr. Newlands"), filed an affidavit on 9th September, 2016 in reply to the Bank's application for summary judgment, seeking a stay of these proceedings on the grounds that the Company intended to appeal the decision of the Court of Appeal to give the Plaintiff leave to issue these proceedings and that intention is subject to the Court of Appeal's reasons which are not yet available.

12. He states that, in the interim, the Bank had opted to ask the JOL to consider its claim and they would undertake to do so. He asserts, however, that the fact that the agreement to which the Retention Bonds were annexed is missing has prevented them from coming to a view as to whether or not the Bank has complied with its terms. He seeks to cast doubt on the Bank's assertion that it is unable to produce the agreement as both the Bank and the Company were under the control of the same principal at the material time. In support of the assertion of a lack of bona fides in the Bank, Mr. Newlands asserts that, in

other litigation with respect to the former Misick residence, an officer of the Bank had produced, on oath, a forged document, namely bank statements which purported to be contemporaneous with the events in question but which plainly, on their face, could not have been.

13. He states further that the Bank has not yet provided the JOL with their accounts records in consequence of which they are unable to form a view as to the balance between the parties, if any, but that in the event of the sale of property in the Misick litigation in which the Company is engaged, the Company would have a substantial set off against the Bank.

14. Mr. Howard replied by affidavit filed 13 September 2016 in which he states *inter alia*, that while the Company has served a Notice of Motion seeking conditional leave to appeal to the Privy Council on 3rd June 2016, it has not sought to move the matter forward nor has it made an application for a stay; that there is no basis for the Bank's action to be stayed given that the Retention Bonds are themselves agreements to which the Bank and Company are parties and under which the Company is obliged to indemnify it as a surety; that the Bank has not sought and does not seek to prove the debt in the liquidation and that the Debenture remains valid in any event as no deed of release or discharge under the debenture was ever executed.

15. Unsurprisingly, he takes umbrage at the allegation of forgery which he says is untrue and scandalous and is, in any event, said to be respect of litigation regarding the former Misick residence in which the Bank has no interest and which has no bearing on this action.

Preliminary Submissions

16. Mr. Green suggests that to allow this action to continue, in the face of the Company's intention to appeal the Court of Appeal's decision granting the Bank leave to issue these proceedings, would deprive the Company of the benefit of a successful appeal, but in the circumstances where the Company has not advanced its appeal in any way or sought a stay of the Court's Order, it appears to me that the Bank is entitled to ask the Court to decide its application for summary judgment.

17. Mr. Green also suggests that the Bank has lost its right to pursue these proceedings against the Company as it has submitted a proof to the JOL after leave was granted by the Court of Appeal. He relies in support of this submission on the cases of ***Craven v Blackpool Greyhound Stadium and Racecourse Ltd*** [1936] 3 All ER 513 and ***Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, Interveners)*** [1993] 1 MLJ 149 which are authority for the proposition that that a petitioner, having selected one method of having his claim adjudicated upon, ought not then to be in a position to select another method.

18. The proof of debt he refers to is the letter before action sent to the JOL inviting them to settle the Bank's claim and avoid litigation.

19. In my view, the letter before action, to which a draft of the proceedings was attached, sent after the Bank got leave to commence proceedings, clearly telegraphed the Bank's intention to pursue its rights at law and not in the liquidation. While I accept Mr. Green's assertion that no specific form is required, a creditor's intention to prove the debt in the liquidation must be manifest on the face of the submission relied on.

Does the Bank have a *prima facie* case

20. On the merits of the application, Mr. Green submits that, in the absence of the agreements that were annexed to the Bonds, the Bank cannot establish a *prima facie* case with respect to its pleaded claim at paragraph 11, that it was an express contractual term of the banking agreement between the parties that if the bank were called upon as surety to pay Interhealth the Company would promptly repay those sums to the Bank. He suggests that the Court should regard the failure to produce the agreements by the Bank with suspicion no doubt relying on the assertion of *mala fides* made by Mr. Newlands in his affidavit.

21. He submits further that the Bank cannot meet its burden of proving the allegation set out at paragraph 12 without a trial as it cannot rely on an implied agreement, unless it satisfies the Court that no express agreement exists which is a finding the Court can only make after trial. He relies on the authority of ***Re: Richmond Gate Property Co. Ltd.*** [1964] 3 All ER 936 in support of this proposition. He submits that without the agreement the Court cannot be sure whether the Bank has a claim or if it has a claim, that its right under the agreement to be indemnified is not conditioned, say by a requirement that Notice be given to the Company or that any underlying dispute between the Company and the Employer, Interhealth, being resolved.

22. Mr. Griffiths counters the fact that the banking agreements to which the Retention Bonds are attached are missing is no bar to the success of the Bank's application for summary judgment for the reason that it is an express term of the Debenture that the Company shall pay the Bank on demand for any indebtedness arising out of any obligation.

23. The term on which he relies is to be found at paragraphs 6(b) and (d) of the Debenture which states,

"The Company shall pay the Bank upon demand all monies which the Company is for the time being liable to pay to the Bank (irrespective of the manner in which the liability arises), including but not by way of limitation, monies due to the Bank by the Company: - (b) in respect of any indebtedness whatsoever of the Company to the Bank including any indebtedness arising out of the Guarantee or any other Company or any other guarantee or other obligation given or incurred by the Company to the Bank and including all interest, commission, legal expenses and other expenses properly charged by the Bank. ... (d) in respect of any letter of credit or other accommodation provided, established or arranged by the Bank for or at the request of the Company;"

24. Mr. Griffiths submits that the Debenture entitles the Bank to demand repayment of sums paid out by it as 'Surety' for the Company's debt, the term 'surety' in and of itself indicating that the Bank is entitled to be indemnified by the Company.

25. Alternatively, he submits that an agreement to repay the Bank is implied as a matter of law, the obligation to indemnify a surety arising once the surety has paid money out on behalf of the principal. He relies on the case of ***Re A Debtor*** [1937] 1 All ER 1 in support of this submission.

26. In ***Re A Debtor*** the petitioning creditor had guaranteed money borrowed from the bank by the debtor. The debtor defaulted in paying the bank and the bank called upon the guarantor to pay under the terms of the guarantee. The guarantor discharged the debt due to the bank and subsequently issued a writ against the debtor in respect of the money paid by the guarantor. The guarantor obtained judgment in default and the particular issue which arose in this case was whether the debtor, a married woman, could be made a bankrupt on the petition of the guarantor. Greene LJ, before addressing the

articulated issue in the case which does not concern me at this point, stated at p 7H: *"It is, in my opinion, settled beyond possibility of dispute that where "A" at the request of "B" guarantees payments of "B's" debt to "C", the law implies an undertaking by "B" to indemnify "A" in respect of any sums which he properly pays to "C" under the guarantee. This is merely a branch of a wider rule which is laid down in numerous authorities. I may quote as examples* ***Britain v Lloyd***[2] *where, at p.773 Pollock CB says: 'It is clear, that, if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid ... the request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference.'"* (emphasis mine).

27. Given the principle articulated in ***Re A Debtor,*** I am satisfied that, as a matter of law, an agreement that the Company would repay the Bank, in the event it was called upon to pay as surety under the Bonds, falls to be implied.

28. I do not consider ***Richmond Gate*** to be authority for the proposition that in order to establish an implied agreement to indemnify, the Court would first have to be satisfied that no express contract exists. The starting point of any analysis of that decision must be the principle that Directors have no right at law to be remunerated. In ***In Re George Newman & Co*** [1895] 1 Ch 674 at 686 Lindley LJ stated that,

"Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the

[2] (1845) 14 M & W 762; 12 Digest 520, 4325

company's assets, unless authorised to do so by the instrument which regulates the company or by the shareholders at a properly convened meeting."

29. In ***Richmond Gate***, the Director claiming a quantum meruit for services rendered sought to rely on the decision of the Court in the matter of ***Craven-Ellis v Canons Ltd [1936] 2 All ER 1066*** in which the Court found for the plaintiff managing director, holding that, *"the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law."* Plowman J distinguished ***Craven-Ellis*** on two grounds, the first that the claimant in that case was seeking remuneration, not as a Director, but as a valuer and the second, that there was no contract dealing with remuneration.

30. Dismissing the Director's claim in ***Richmond Gate*** for remuneration on a quantum meruit, Plowman J stated,

"the managing director is at the mercy of the board, he gets what they determine to pay him, and if they do not determine to pay him anything, he does not get anything."

31. This central principle finds expression in the decision of Lord Templeman in ***Guinness Plc. v Saunders*** [1990] 2 A.C. 663

"My Lords, the short answer to a quantum meruit claim based on an implied contract by Guinness to pay reasonable remuneration for services rendered is that there can be no contract by Guinness to pay special remuneration for the services of a director unless that contract is entered into by the board pursuant to article 91."

32. The cases confirm the principle that company directors are volunteers who have no implied right at law to be paid reasonable remuneration for work undertaken and must prove a contract with the company in order to be establish their entitlement.

33. Not so a surety. The surety is not at the mercy of the principal and the law will imply an agreement to indemnify. Even if the Bank by its evidence does not exclude the possibility of the existence of a written agreement setting out the terms of the agreement under which the Bank agreed to act as surety or, conversely, provide parol evidence of what the missing agreement said, the Bank is entitled to ask the Court to find an implied agreement in the Retention Bonds to repay. As Lord Greene says in ***Re a Debtor***, the surety's right to be repaid is settled *"... beyond possibility of doubt..."*

34. Mr. Green's suggestion, that the Bank may have no claim under the express terms of the missing agreement is, with respect, not a credible proposition. This was a commercial relationship between the Bank and the Company and a Bank, unlike a company director, is not a volunteer. Its right to be repaid arises pursuant to the Retention Bonds under which it undertook to pay monies to Interhealth at the request of the Company and did pay. I would say the same of his further suggestion that under the missing agreement, the Bank's claim for indemnity against the Company might not yet have arisen or might have been conditioned on the happening of some other event. The Bank's liability to Interhealth under the Bonds was not contingent on anything except the demand [3] so it is difficult to see why the parties would have agreed that the Company's liability to repay the Bank would be contingent on anything other than proof of payment.

[3] CL 138/2012 Interhealth Construction and Services (TCI) Ltd. v The British Caribbean Bank Ltd

35. In my view, that excludes the possibility also raised by Mr. Green that the Company's liability under the missing agreement might have been contingent on the resolution of the underlying dispute between the Company and Interhealth. It would not make commercial good sense for the Bank's right to be indemnified to depend upon the resolution of a dispute that was irrelevant to its obligation to pay out.

36. The oblique assertion of fraud (dishonesty) made by Mr. Newlands in his affidavit, which finds expression in Mr. Green's invitation to the Court to consider that the agreement that deals expressly with the Company's obligation to the Bank has either been (deliberately) concealed or mislaid, does not lend any greater weight to the submissions in the circumstances where the Company does not challenge the validity of the Retention Bonds themselves or the fact that the Bank made a payment out under the Bonds.

37. I am satisfied that the Bank's right to be indemnified falls to be implied and say that the evidence for the Bank establishes a *prima facie* case of the Company's indebtedness to it for the sums paid out on its behalf.

38. In the circumstances, I do not find it necessary to express a view as to whether the Company's liability to repay the Bank also arises pursuant to an express term in the Debenture as alleged in paragraph 11 of the Statement of Claim.

Leave to Defend

39. O14 r3 directs: *"The Court may give a defendant against whom such an application is made leave to defend the application with respect to the claim, or the part of the claim, to which the application relates, either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit."*

40. In order to be entitled to leave, the Company must show that it has a defence or a fairly arguable point to be argued on its behalf. [4] The first step in determining whether a defendant has cause, is *" to look first at the defence in isolation, in order to see whether there is there a lack of good faith or the defence is a sham..."*[5]

Necessity for an account?

41. The Company has pleaded a bare, one line defence denying the Plaintiff's entire claim. Mr. Green submits this is a holding defence as in the absence of an account - which is not claimed - the Company does not know if it can claim a set off.

42. Mr. Green submits that the Bank's claim must proceed on the basis that there is a zero balance between the parties otherwise the Bank would get double recovery. He submits that the only way to verify that there are no sums due to the Company by the Bank is for there to be an account and that requirement for an account constitutes a complete answer to the Bank's application for summary judgment.

43. From the submissions made by Mr. Green on the 22 February 2017, it appears that what the Company really wants is discovery in order to see whether there is a balance due to them by the Bank but how such a balance would arise is not clear, either from his submissions or from Mr. Newlands' evidence.

44. His evidence is that the JOL have not been able to determine whether a balance is owing to the Company as they have not been able to examine the Company's accounts given the Bank's historical refusal to provide them with

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[4] Note 14/4/2 of the White Book *" When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff"* : per Jessel MR in ***Anglo-Italian Bank v. Wells*** (1878) 38 LT 197, p 201, CA)

[5] ***Extraktionstechnik Gesellschaft Fur Anlagen bau MBH v Oskar*** The FT 23 March, 1984; 128 SJ 417 per Watkins LJ.

any information and its disinclination to co-operate generally but he sets out no grounds for believing that the Bank holds documents that would show a balance due to the Company.

45. Needless to say, Mr. Howard in his affidavit [6] states categorically that the JOL have been provided with its bank statements, that the Bank does not have the Company's internal accounting records and that no amount is due from the Bank to the Company.

46. The principle is that leave to defend should be given where there is reasonable ground for an inquiry or account to ascertain the amount recoverable: see note 14/4/13 White Book. [emphasis mine]

47. There is patently no issue as to the amount recoverable under the Retention Bonds, as the amount which is indisputably due is the sum paid out by the Bank on behalf of the Company.

The putative set off/ counterclaim

48. Although it is normally the case that a set off and counterclaim must be specifically pleaded, in the case of a summary judgment application, the defendant may raise the issue in his reply to the summary judgment application and set out what facts are relied on to support it (Note 14/4/5).

49. In his affidavit, Mr. Newlands suggests that if the Company's claim with respect to the Misick residence is successful, the Company will have a substantial set off against the Bank. From Mr. Green's submissions it would appear that this assertion is made on the basis that the entities are all controlled by the same principal. In the circumstances where the Bank has no interest in the property subject of that claim, it is difficult to see how any sums

[6] Second Affidavit at para 14

realised in that action could form the basis of a claim of set off against the Bank.

50. In my judgment, no arguable claim to a set off is made out on the evidence before the Court.

Is the Bank a Secured Creditor?

51. Mr. Green contends that the Bank is no longer a secured creditor as the Debenture has been discharged. He relies on a letter written by the Bank to the Receiver appointed under the Debenture at the conclusion of his appointment, warranting that the obligations of the Company to the Bank were satisfied.

52. The Debenture at clause 9 states:

"9. The security afforded to the Bank by this debenture shall operate as a running and continuing security between the Bank and the Company irrespective of any sums which may be paid to the credit of any account or accounts of the company with the Bank and notwithstanding any settlement of account or any other matter or thing whatsoever such security shall remain in force and extend to cover any sum of money which may hereafter become owing by the Company to the Bank until a final discharge hereof shall have been executed by the Bank." (emphasis mine).

53. I do not think it can be suggested that it is the practice for a debenture created by deed to be discharged by a letter, not addressed to the borrower, but to the Receiver appointed by the lender pursuant to its terms. In my judgment, the contents of the letter do not raise any triable issue on the question of whether the Debenture has been discharged which is not a central issue in any event, going only to the question of whether the Bank is a secured creditor.

54. In my judgment, the evidence on behalf of the Company does not raise any defence to the Bank's claim and I enter judgment for the Bank in the sums paid out under the Retention Bonds.

Decision

55. Summary judgment is granted to the Bank in the sum of the monies paid out under the Retention Bonds which is a debt due to the Bank. I reject the Bank's request for summary judgment for interest at the rate reserved under the Debenture given the real likelihood that the putative agreement between the Bank and the Company with respect to the Retention Bond might have addressed the issue of interest. I will hear submissions from the parties on the rate to be applied.

56. There remains an issue as to whether the costs of the associated litigation were reasonably incurred by the Bank and that is a question to be resolved after trial.

DATED 28 MARCH 2017

CHIEF JUSTICE

SUPREME COURT ★ TURKS AND CAICOS ISLANDS ★