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ROYAL COURT

Hearing dates: 28th September; 28th-29th October, 1992.
Judgment delivered: 15th December, 1992.
Judgment sent for distribution: 23rd April, 1993.

Before the Judicial Greffier.

BETWEEN	Hambros Bank (Jersey) Limited	PLAINTIFF
AND	Glendale Hotel Holdings Limited	FIRST DEFENDANT
AND	Blue Horizon Holidays Limited	SECOND DEFENDANT
AND	David Eves	THIRD DEFENDANT
AND	Helga Maria Eves née Buchel	FOURTH DEFENDANT

(by original action)

AND

BETWEEN	David Eves	PLAINTIFF
AND	Hambros Bank (Jersey) Limited	DEFENDANT

(by counterclaim)

Application by the Plaintiff in the original action (hereinafter referred to as "the Plaintiff") for summary Judgment under Rule 6A of the Royal Court Rules, 1992.

Advocate A.P. Roscouet for the Plaintiff.
The Third Defendant in the original action was present both as a Director of and on behalf of the Second Defendant and on his own behalf.
Advocate P.S. Landick on behalf of the Fourth Defendant.

JUDGMENT

JUDICIAL GREFFIER: Although the Defendants have raised many lines of defence in relation to this application, the case is essentially a relatively simple matter and relates to certain loans which were made to the First Defendant in 1988 and 1989, which loans were purportedly guaranteed by the Second, Third and Fourth Defendants.

The First Defendant had been dissolved by reason of non-payment of annual return fees and so I adjourned the application against the First Defendant *sine die*.

The Plaintiff's case can be summarised as follows:-

(a) That on 27th May, 1988 it loaned £550,000 to the First Defendant which was guaranteed by the Second and Third Defendants at that time and subsequently guaranteed by the Fourth Defendant.

(b) That on 21st April, 1989 it loaned a further £70,000 to the First Defendant which was also guaranteed by the Second, Third and Fourth Defendants.

(c) That interest was paid on these loans quarterly up to the end of June 1989 but that the interest due at the end of September 1989 was not paid.

(d) That the Plaintiff then transferred the arrears of interest to another account upon which it charged interest at 10% above its base rate from time to time.

(e) That as from 1st January, 1990 the Plaintiff changed the rate of interest on the two loans which were as follows:-
   (i) 2½% above Hambros Bank base rate on the loan of £550,000; and
   (ii) 3½% above Hambros Bank base rate on the loan of £70,000;to a new rate of 4% above Hambros Bank base rate.

(f) That arrears continued to accumulate on the accounts for some time thereafter.

(g) That at the end of November 1990 the Glendale Hotel was sold in accordance with arrangements made between the First Defendant and its creditors (the First Defendant being by then effectively bankrupt) and the loan of £550,000, the sum of £35,000 being half of the loan of £70,000, and a further sum of £80,539.83 towards the arrears of interest were credited to the First Defendant.

(h) That £35,000 of the £70,000 loan together with the balance of the sum due by way of interest remain due and continue to attract interest charges.

(i) That certain additional credits and certain additional debits were added to the account relating to the arrears of interest.

(j) That the Plaintiff has calculated the sum due up to the end of September 1991 as being £109,322.27 and claims that sum together with interest thereon at 2½% above Hambros Bank base rate with quarterly rests.

There are a number of lines of defence in relation to this summons which are common to the Second, Third and Fourth Defendants and I propose to deal with these first.

Advocate Landick raised a question as to whether the application complied with the technical requirements for such an application. He argued that Rule 6A is in very similar terms to Order 14 of the Rules of the Supreme Court and that therefore I should be bound by the same principles.

He quoted section 14/1/2 of the R.S.C. (1991 Ed'n) and I am now quoting that section on page 143 of the 1993 Edition:

> ***"Preliminary requirements - The following are the conditions precedent for the plaintiff employing the summary process of O.14:***
> ***(a) the defendant must have given notice of intention to defend;***
> ***(b) the statement of claim must have been served on the defendant; and***
> ***(c) the affidavit in support of the application must comply with the requirements of rule 2."***

The first two sections of that quotation arise from the wording of Order 14 Rule 1(1) which commences as follows:

> ***"(1) where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, ..."***

Advocate Landick therefore argued that it was essential in relation to an application under Rule 6A that a statement of claim be first filed.

Rule 6A/1(1) of the Royal Court Rules, 1992, which is undoubtedly modelled on Order 14, Rule 1(1), commences as follows:

"Subject to the provisions of paragraph (2) of this Rule, where an action has been placed on the pending list, the plaintiff may, on the ground that ...."

The words in Order 14 Rule 1(1) in relation to a statement of claim are therefore missing from our Rule.

Accordingly, I am of the opinion that the filing of a statement of claim by the Plaintiff is not essential even when the action is begun by simple summons and not by Order of Justice. In most cases a statement of claim would be extremely helpful in relation to determining the application but, in my view, it is not essential if the affidavit in support of the application contains sufficient detail to explain the nature of the claim.

Advocate Landick went on to quote various sections from the R.S.C., including sections 18/7/1 and 18/7/3 in relation to the correct method of pleading. I do not propose to quote these here. His argument was that the statement of Claim filed on behalf of the Plaintiff included a number of annexes by way of copies of documents and that these annexes contravened the Rules of pleadings and that therefore the Statement of Claim was not a proper Statement of Claim for the purposes of Order 14, Rule 1(1).

It may be that Advocate Landick's objection to the annexes has some force. The practice has grown up in Jersey of attaching copies of documents as annexes to pleadings and it can certainly be argued that these annexes are not an acceptable form of pleading. However, in this case, even if I am wrong on the matter as to whether a Statement of Claim is required, it is clear to me that the Statement of Claim which was filed was more than adequate to explain the nature of the claim. Advocate Landick's complaint appears to be that the Statement of Claim is too full. I would have more sympathy with such an argument in this context if a totally threadbare Statement of Claim had been filed and that could render an application untenable unless the supporting affidavit adequately explained the matters in issue.

Both Mr. Eves and Advocate Landick quoted a number of sections from the sections 14/3-4 of the 1991 White Book.

I am going to quote the relevant sections from the 1993 White Book whilst omitting case references and do so as follows:

(1) The text of the opening paragraphs of section 14/3-4/8 reads as follows -

"Leave to defend - unconditional leave - The power to give summary judgment under O.14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient

to allow a defendant to defend for mere purposes of delay". As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.

Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.

O.14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the Court, or to make him liable in such a case to be put on terms of paying into Court as a condition of leave to defend. Thus in an action on bills of exchange, where the defendant set up the plea that they were given as part of a series of Stock Exchange transactions, and asked for an account, it was held to be a clear defence, and entitled the defendant to unconditional leave to defend. "The summary jurisdiction conferred by this Order must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion." Summary judgment under this Order should not be granted when any serious conflict as to matter of fact or any real difficulty as to matter of law arises; but however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable, it will give final judgment. And in cases arising out of stock transactions, especially, the Court should be very slow in allowing the plaintiff to take judgment without trial or in making payment into Court a condition of leave to defend.

Where the defence can be described as more than shadowy but less than probable, leave to defend should be given, especially where the events have taken place in a country with totally different mores and laws."

2) Continuing with a quotation from section 14/3-4/8 further down -

"Where there are unexplained features of both the claim and the defence which are disturbing because they bear the appearance of falsity and disreputable business dealings and questionable conduct, the Court should not make tentative assessments of the respective chances of success of the parties or the relative strengths of their good or bad faith, and should not on such an examination grant the defendant conditional leave to defend, but should give unconditional leave to defend.

In an action by a bank claiming to recover sums due under a guarantee of a company's indebtedness, allegations by the guarantors, who were directors of the company, that the receiver appointed by the bank under a debenture issued by the company was guilty of negligence in realising the company's stock at a gross undervalue because the sale had been held at the wrong time, and had been insufficiently advertised and poorly organised and that the bank had interfered with the conduct of the receivership raised triable issues and the defendants were entitled to unconditional leave to defend."

(3) The penultimate paragraph of section 14/3-4/9 reads as follows -

"Circumstances which might afford "some other reason for trial" might be, where, e.g. the defendant is unable to get in touch with some material witnesses who might be able to provide him with material for a defence, or if the claim is of a highly complicated or technical nature which could only properly be understood if such evidence were given, or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in the full light of publicity."

(4) Section 14/3-4/10 commences as follows -

"Question of fact - The following principles are laid down in cases decided under this Order. Leave to defend should be given where the defendant raises any substantial question of fact which ought to be tried; or there is a fair dispute to be tried as to the meaning of the document on which the claim is based; or uncertainty as to the amount actually due; such as alleged deception in the prospectus of the plaintiff company; or non-delivery of all the goods, and excessive charges; or whether there had been misrepresentation by the plaintiff; or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witness on his affidavit; or alleged fraud; or whether the plaintiff has fulfilled his part of the contract; or inferiority of work done; or against a surety where there is a reasonable doubt of his liability; or as to the amount of his liability; or where on the facts sworn to there is a prima facie case on both sides. It is beyond the function of the Court to see if there are any issues of law which could be decided in favour of the plaintiffs on any of the various possible conceivable versions of the facts."

(5) Section 14/3-4/11 commences as follows -

"Question of law - Leave to defend should be given where a difficult question of law is raised; e.g. whether the claim is in respect of a gambling transaction; or depends on foreign law.

Nevertheless, if the point is clear and the Court is satisfied that it is really unarguable, leave to defend will be refused. Thus, e.g. where the words of the statute under which the action was brought clearly made the defendants liable, the court refused to give leave to defend."

(6) Section 14/3-4/13 commences as follows -

"Set-off and counterclaim - If the defence of set-off be raised, the defendant is entitled to unconditional leave to defend up to the amount of the set-off claimed. As to the defence of set-off, see 0.18,r.17.

As to raising a counterclaim or set-off in proceedings against the Crown or by the Crown see, 0.77,r.6.

The defence of set-off may be raised in respect of debt or damages, whether the amount is ascertained or not and whether it is also added as a counterclaim, see 0.18, r.17. The principle is that the plaintiff should give credit for the amount of the set-off in his action against the defendant and ought not to insist upon his claim without taking the set-off into account. "If there is a set-off at all, each claim goes against the other and either extinguishes it or reduces it".

A set-off may consist of a set-off of mutual debts, or the setting up of matters of complaint which, if established, reduce or even extinguish the claim, or the setting up of an equitable set-off."

(7) Later in the same section there is the following paragraph -

"Moreover, where the defendant sets up a bona fide counterclaim arising out of the same subject-matter of the action, and connected with the ground of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counterclaim, but should be for unconditional leave to defend, even if the defendant admits the whole or part of the claim. In such circumstances, such admission is to be treated as being subject to the counterclaim, which might then turn out to be larger in amount. Although a counterclaim is (for many purposes) a cross-claim, for the purposes of 0.14 it ought to be treated as a defence.".

Both Mr. Eves and Advocate Landick raised the matter of the length of the hearing as being an indication that this was not an appropriate case for an Order under Rule 6A. It is true that the Defendants raised a number of different possible lines of defence. However, length of the hearing alone cannot be a decisive factor. In this particular case, a fair amount of time was wasted in fruitless attempts on the part of the Defendants to obtain adjournments of the hearing. Furthermore, an inventive defendant can always raise a variety of lines of defence. The real question is as to whether there is any substance whatsoever to those lines of defence and the appropriate tests in relation to whether or not summary judgment ought to be given are those set out in the passages quoted above and not the question as to how long it takes for the parties to explain their lines of argument. This is particularly so in a case such as this where the Defendants put in an inordinate number of repetitive affidavits.

The Defendants have raised in their pleadings various allegations against the Tourism Committee and its President during 1989 and 1990, Senator John Rothwell, of improper conduct in relation to the enforced closure on more than one occasion of the Glendale Hotel. These lines of argument take various forms. One form is a claim that the wrongful actions of the Tourism Committee have made it impossible for the First Defendant to meet its obligations. Mr. Eves claimed that the alleged wrongful actions were breaches of the European Convention on Human Rights.

On page 11 of my decision in the case of Lydan Developments Limited -v- Medens (Jersey) Limited, (11th May, 1992) Jersey Unreported I said -

> ***"The point in relation to the right of indemnity from the vendor of the vehicle also does not help the Defendant. If a Plaintiff who had a right of action against a Defendant had to wait until the Defendant could enforce his indemnity against the Third Party then this would be manifestly unjust to the Plaintiff. I find it very hard to conceive of any circumstances in which a judgment against a Defendant should be delayed pending the obtaining of an indemnity against the Third Party."***

Inasmuch as any claim against the Tourism Committee or Senator Rothwell would be a type of Third Party claim, it falls within the terms of that paragraph of the Lydan and Medens Judgment and therefore cannot operate as a successful defence to this application.

A second variation on the Tourism Committee theme was the submission by Mr. Eves that the behaviour of the Tourism Committee had created an impossible situation in which the guarantees given by the Second, Third and Fourth Defendants could no longer

operate. Although Mr. Eves did not mention the legal concept of frustration of the performance of the contract, this concept is the closest thing to what he was suggesting. However, this is not a matter of the performance of specific parts of a contract which has been rendered impossible in some way, this is a matter of the repayment of a debt and of the calling in of personal guarantees relating thereto. Therefore the concept of frustration cannot possibly apply and this is not a tenable line of defence.

The next associated line of argument was that the Plaintiff had failed to perform its duties and responsibilities in order to assist the First Defendant in lobbying the Tourism Committee in order to prevent the hotel premises from being closed. When pressed on this point, Mr. Eves conceded that this was not a legal duty but a moral duty. Even if he had not conceded this point I would have come to the conclusion that there was no legal duty here. In my view, a lender is not under a legal duty to assist the borrower in relation to the conduct of the borrower's business for that is a matter for the borrower. This was not a case of a partnership but of a loan.

Yet a further line of argument, was that the Plaintiff should have pursued the Tourism Committee directly in order to recover damages on behalf of the First Defendant and had not done so. Any right of action against the Tourism Committee is vested in the Defendants and not in the Plaintiff and I cannot see that the Plaintiff is under any legal duty to assist in the way suggested. Indeed, this argument is closely related to the Third Party claim argument which I have rejected already under the principles set out in Lydan and Medens.

Thus none of the arguments relating to any claim against the Tourism Committee have any validity as a defence to this action. If this had been an application to strike out the parts of the defence relating to these arguments then I would have granted that application.

I come next to a similar line of defence to that relating to the Tourism Committee. The Defendants claimed that they or some of them had a valid claim in negligence against the legal firm of Bois Labesse relating to conveyancing work when the Glendale Hotel was purchased by share transfer. Again similar arguments to those put forward in relation to the Tourism Committee were advanced. These arguments also fail for exactly the same reasons.

Mr. Eves alleged that due to the conditions imposed by the Tourism Committee for the re-opening of the Hotel in May 1990, the business of the First Defendant was effectively conducted without his knowledge and without the knowledge of Mrs. Eves for four or five months during 1990. Again he advanced similar lines of argument to those advanced in relation to the Tourism Committee. These also fail for precisely the same reasons.

I have already quoted parts from sections 14/3-4/8 and 14/3-4/9 of the 1993 White Book. Mr. Eves and Advocate Landick laid great stress upon the reference in the penultimate paragraph of section 14/3-4/9 to a situation where the Plaintiff's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in the full light of publicity. Mr. Eves argued that the behaviour of the Tourism Committee had been harsh and unconscionable and therefore that there ought to be a full trial of this case in order that this might be exposed in the full light of publicity. I have already indicated that I would strike out any lines of defence relating to the Tourism Committee for the reasons set out above. I would merely comment in passing that there was a great deal of publicity in 1990 in relation to the closure of the Glendale Hotel by the Tourism Committee and that the Defendants have had every opportunity since to bring a separate action in relation thereto. Mr. Eves also argued that the actions of the bank in seeking to charge higher interest rates than those which had originally been agreed at a time when the First Defendant was in financial difficulties were harsh and unconscionable and ought to be exposed to the full light of publicity. There is clearly a dispute as to the appropriate rates of interest which were chargeable at different times and I will deal with that point later in this Judgment. However, I cannot agree that this creates a situation in which it would not be right to grant summary judgment if summary judgment were appropriate.

At the hearing Mr. Eves raised a point in relation to an alleged survey report obtained by the Plaintiff before the Glendale Hotel was purchased. This point was not raised in pleadings and I am not sure that it was even raised in any of the multiple affidavits filed in this case by the Defendants. However, nevertheless, as he and the Second Defendant were litigants in person I allowed him to address me on the point. The Plaintiff replied that this was simply a valuation obtained for the purpose of determining how much money should be loaned on the security of the Hotel. Mr. Eves failed to satisfy me that there was anything remotely approaching a defence here.

Mr. Eves also raised the matter of an alleged indemnity insurance policy held by the Plaintiff. This was not raised in the defence pleadings and again I do not think that it was raised in any of the multiple affidavits. His allegation was that the Plaintiff had insurance cover against any loss by reason of the making of the loans. The Plaintiff replied that there was a policy limited to insuring against the value of the property dropping to less than the capital sum loaned. I am fully satisfied that such a policy as Mr. Eves has alleged did not and could not possibly have existed. No insurance company would give such a totally open ended indemnity against future interest. This line of defence therefore also fails.

Mr. Eves referred me to a letter written on 27th November, 1990 by Mr. R.W. Morris on behalf of the Plaintiff to Mr. B.W. Marr on behalf of Barclays Bank plc in relation to arrangements for the distribution of the proceeds of sale of the Glendale Hotel amongst the various creditors of the First Defendant. The first sentence of the third paragraph of that letter reads -

> *"As a consequence of these reductions, Hambros is prepared to take a reduced sum from the sale proceeds of £20,000."*

Mr. Eves urged on me that this meant that Hambros was agreeing to reduce the debt owed to it by £20,000. In the context of that letter and of the surrounding circumstances it is totally clear that that is not the position. There had been a reduction in the sale price due to some conveyancing problems and storm damage and the Plaintiff was discussing with another secured creditor how much of their existing debt would be paid at this time out of the sale proceeds.

Although, this point was not argued on behalf of the Defendants, I believe that I should mention in passing that I am satisfied from the terms of the guarantees that the rights of the Plaintiff against the Defendants are not affected by the fact that the First Defendant has been dissolved.

I come now to the matter of the method of calculation of any sum due under the guarantees. As I have already mentioned above, the Plaintiff transferred overdue interest payments to a current account on which it charged 10% above Hambros Bank base rate. Advocate Roscouet argued that this was normal banking practice. The Plaintiff has failed to satisfy the necessary test under Order 14 that any interest charges above the levels agreed in the initial facility letters, that is to say -

(a) 2½% above Hambros Bank base rate on the loan of £550,000; and
(b) 3½% above Hambros Bank base rate on the loan of £70,000; should be applied to any arrears of interest.

I am satisfied that the bank is entitled under the terms of the loan agreements and, in particular, the facility letters, to charge these lower rates of interest upon arrears of interest with quarterly rests and that such charges are contractual and could be embodied in an Order of the Court up to the date of payment thereof.

As from the 1st January, 1990 the bank raised the interest charges on the initial capital loans from those mentioned above to 4% above Hambros Bank base rate. Again Advocate Roscouet urged that this was normal banking practice. Again the bank has failed to satisfy the appropriate test under Order 14. There was

insufficient proof furnished that the First Defendant had agreed to this higher rate. It is not for me to determine, on a test of the balance of probabilities, whether this sum will be found to be due to the bank for that will rest with the final trial Court. However, I made my distaste clear to the Plaintiff at the hearing, in relation to the alleged normal banking practice of increasing the interest rate payable by a borrower who was already struggling to pay the interest due.

Paragraph 2 of the guarantees contained a proviso to the effect that the total amount recoverable under the guarantees would not exceed the initial capital sum in addition to such further sum for interest on that amount, or on such less sum as may be due or owing, with half yearly rests ..... The interest due under the loans is due on a basis of 3 monthly rests rather than half yearly rests. I therefore considered whether the amount of interest recoverable under the guarantees ought to be limited to interest calculated upon the basis of half yearly rests rather than quarterly rests. I have come to the conclusion that this would not be an appropriate limitation. It is clear to me that the effect of the guarantees is to guarantee all liabilities of the First Defendant to the Plaintiff. The effect of that proviso appears to me to be merely to limit the total sum which might be due under the guarantees. With the repayment of a substantial sum from the proceeds of sale of the Glendale Hotel, the total sum currently due under the guarantees cannot be anywhere near approaching the total potential sum due.

The Defendants also raised certain points in relation to three items which had been debited to the First Defendant's account which were as follows -

(a) the sum of £250 for bank charges;
(b) the sum of £274 which was paid in October 1991 to the Parish of St. Martin; and
(c) the sum of £654.65 for advocates fees.

Advocate Roscouet explained that these were due for the following reasons -

(a) that the bank charges were normal charges;
(b) that the payment to the Parish of St. Martin was 30% of the amount which they were claiming; and
(c) that the legal costs related to research in relation to a possible claim against Messrs. Bois Labesse.

The Defendants denied that these had been properly debited.

The Plaintiffs have failed to satisfy the appropriate test in relation to an application for summary judgment in relation to all three of these deductions. I have serious doubts by reason of the apparently arbitrary increase in the rates of interest, as to the

validity of the bank charges of £250. I have serious doubts as to whether it was appropriate that the Parish of St. Martin be paid 30% of their claim so long after the original sale. It is part of the Plaintiff's case that unsecured creditors were paid 30% of their claims in order to prevent them from applying for a désastre within ten days after the passing of the contract of sale of the Glendale Hotel. Advocate Roscouet indicated that the Parish had not been willing to accept a payment of only 30% but had wanted to be paid in full. If that were so, then it would appear to me that there was no contract between the First Defendant and the Parish and that once the ten day period had elapsed from the passing of the contract there was no reason to make a payment to the Parish in preference to the payment of interest due to the Plaintiff.

Advocate Roscouet submitted that the legal costs were incurred in relation to exploring as to whether or not there was a right of action against Bois Labesse. I am left with some doubts on a number of issues in relation to the legal costs. Firstly, it is not completely clear as to whether these were incurred in relation to advice as to whether the Plaintiff had a right of action against Bois Labesse or as to whether the First Defendant had a right of action against Bois Labesse. Even if they relate to the latter there is some doubt as to whether or not this sum could be properly debited to the First Defendant's account.

Mr. Eves also alleged that the amount of £3,050 which had been credited to the First Defendant's account by virtue of an insurance claim was not as great as it ought to be. I cannot see how this can be a sustainable claim by way of a defence to the action. If the insurance company has not paid as much as it ought to pay then that would be a matter for the First Defendant to pursue against the insurance company and not a matter between the Plaintiff and the First Defendant. In any event, the First Defendant must have agreed to the settlement or else the insurance company would not have made a payment.

Section 14/3-4/13 which I have quoted above refers to the position in relation to a counterclaim. Mr. Eves has sought to bring a counterclaim against the Plaintiff. However, all of the matters which are mentioned in the counterclaim were also raised as defences. If they do not suffice as defences then they cannot, as a counterclaim, serve to prevent an Order being made under Rule 6A as all of these matters were related to the original debt.

Accordingly, I have come to the conclusion that there is no sustainable defence on behalf of the Second and Third Defendants other than in relation to certain aspects of the claim which are mentioned above. It is a simple matter of arithmetical calculation to correct the interest rates to those which ought to have been charged and to remove the debits which ought not to have been debited and I have done this. I have calculated interest due on each of the two debts and where this was overdue I have

calculated further interest thereon at the same rate of interest as the original loan. Thus arrears of interest on the £550,000 loan bear interest at 2½% interest above Hambros Bank base rate and arrears of interest on the £70,000 loan bear interest at 3½% interest above Hambros Bank base rate. Where payments have been made I have first credited these to the arrears of interest on the £70,000 loan and thereafter to the arrears of interest on the £550,000 loan thus putting the First, Second and Third Defendants in the best possible position. I have also excluded the debits in relation to which I have doubts. As from the date of the payment of the proceeds of sale of the Hotel, I have calculated all interest at 2½% above Hambros Bank base rate from time to time with quarterly rests. The figures up to and including 30th September, 1992 come to £35,000 capital plus £67,291.57 of accumulated interest.

Thus I am giving summary Judgment against the Second and Third Defendants for the sum of £102,291.57 due up to 30th September, 1992 with continuing interest thereon at 2½% above Hambros Bank base rate from time to time with quarterly rests at the end of each quarter of a year. I am also granting permission to sell in relation to those Judgments. I will need to be addressed on the matter of any arrest on wages as against the Third Defendant and on the matter of costs.

I turn now to the additional lines of defence which are available to the Fourth Defendant, Mrs. Eves, who was represented by Advocate Landick. Neither of these two lines of defence were available to the Second and Third Defendants.

Although the first loan of £550,000 was made to the First Defendant on 27th May, 1988 and guarantees were executed in May 1988 on behalf of the Second and Third Defendants, Mrs. Eves was not well enough at that time to execute any personal guarantee. Her personal guarantee was executed on 25th August, 1988 and was witnessed by Mrs. Linda Williams a Jersey solicitor and a partner of Messrs. Bois Labesse. A second guarantee to the second loan of £70,000 was signed by Mr. and Mrs. Eves on 20th April, 1989 and at the same time they both signed a document which stated -

> *"This Guarantee is given without prejudice to the Guarantee in the sum of £550,000 executed in the Bank's favour by Mr. D. Eves dated 27th May, 1988, and a Guarantee in the sum of £550,000 executed by Mrs. H.M. Eves dated 25th August, 1988."*

That document bears the witnessing signature of Advocate B.E. Troy and the date 19th May, 1989. Advocate Troy has also written in his own handwriting the following -

> *"The adjoining signatures were confirmed to me on 19th May, 1989 as being those of the Guarantors. The implications of the guarantee were explained to Mrs. Eves."*

On 2nd June, 1989, Mr. and Mrs. Eves signed a further guarantee in the sum of £35,000 and this was witnessed by two individuals neither of whom were lawyers and whom I believe to have been officials of the Plaintiff. That guarantee had the following words endorsed on it -

> *"This Guarantee was given without prejudice to any existing Registrations executed by us in favour of Hambros Bank (Jersey) Limited."*

I would mention in passing that the purpose of the third guarantee was in relation to a change of the security structure of the loans under which the previous charge of £70,000 on the Hotel was being replaced by a £35,000 charge on the Hotel and a £35,000 charge on realty belonging to Mr. and/or Mrs. Eves.
Mrs. Eves' first additional line of defence is that she suffered from mental illness at various times and was not well enough to understand what she was signing. In her affidavit in support of her case, she has stated that the terms of the guarantee documents were not properly explained to her. The Plaintiff's Assistant Manager on the other hand, has stated in the affidavit in support of its case, that in the case of both the first two guarantees, it insisted that they be witnessed by qualified lawyers of Mrs. Eves' choice so that she would be properly advised. On 9th August, 1988 the Plaintiff wrote to Mrs. Williams indicating that it required that Mrs. Eves execute a guarantee under legal advice as part of the security arrangements for the first loan of £550,000. On 1st September, 1988 Mrs. Williams wrote back to the bank and stated -

> *"I am therefore pleased to return the three forms of guarantee duly signed by Mrs. Eves in my presence after I had explained to her the general tenor and purport of the commitment thereby undertaken ."*

I am also bound to ask myself the question as to why, if Mrs. Eves did not understand the first guarantee, she then proceeded to sign a second and a third guarantee in both of which she referred back to the original guarantee.

Advocate Landick also referred me to the terms of the first facility letter dated 15th April, 1988 in relation to the original loan of £550,000. Paragraph 11(g) thereof stated -

> *"In the interests of all parties, we require Mrs. H.M. Eves to obtain proper and separate legal advice as to the implications of the commitment being undertaken and the security documentation to be completed. Detailed confirmation from the solicitor consulted is to be forwarded directly to the Bank."*

Advocate Landick argued that clause 11(g) was binding upon the Plaintiff to the effect that the Plaintiff was effectively contracting that Mrs. Eves should obtain such advice. He argued that as she had not received such advice then the guarantees should be void.

This line of argument is ingenious but totally lacking in merit. It is abundantly clear to me that section 11 of the agreement relates to documents and other matters which the Plaintiff required as conditions of the making of the loan. Section 11(g) says that something is required and that can only be required by the Plaintiff.

As far as the execution of the guarantees is concerned I have absolutely no doubt that Mrs. Eves knew what she was doing. It is completely unrealistic to claim that two sets of lawyers failed to advise her properly. I have received no evidence whatsoever that she was still unwell in August 1988. However, even if I had had some doubts on this point, I would still have found against her for the following further reason. Even if she were not properly advised, the Plaintiff could not possibly know about this because of the letters and the endorsement written by the lawyers. The Plaintiff must therefore be entitled to rely upon the documents which have been executed as giving rise to a contract in their plain and obvious terms. To hold otherwise would mean that any lender would have to obtain an affidavit from a lawyer as to what they had done and a certificate from a doctor as to the fitness of a party to execute a document, before they could proceed and this is clearly ridiculous.

The second line of argument which was put forward by Advocate Landick on behalf of Mrs. Eves related to the arrangements which were made around the time of the sale of the Hotel. It was conceded on behalf of the Second and Third Defendants that the First Defendant had agreed to certain arrangements. Furthermore, the Plaintiffs produced to me a letter dated 21st November, 1990 signed by the Third Defendant on behalf of the First Defendant in which it gave authority in relation to those arrangements.

The arrangements amounted to this -

(a) the First Defendant was by that time effectively bankrupt although it owned the Glendale Hotel and the contents thereof;

(b) the Plaintiff and the First Defendant had come to the conclusion that the best way of obtaining a proper price for the Hotel was for it to be sold with its existing contents and there was a prospective purchaser;

(c) the Plaintiff and the First Defendant were concerned that if a contract of sale were simply to be passed then any one of

the many unsecured creditors might seek to declare a désastre on the next Friday thus setting aside the transaction;

(d) they were also concerned that if there were to be a désastre and if the movable contents of the Hotel were to be sold then the remaining realty, stripped of its contents, could not possibly fetch anything like the price that would be fetched as a going concern with contents;

(e) there were discussions and correspondence between the creditors to which the First Defendant was a party and which were to the knowledge of the Second and Third Defendants and this led to a general agreement under which the unsecured creditors were to receive 30% of their claims and the secured creditors were to receive various proportions of their claims at that time.

Mrs. Eves claims that she was again unwell at that time and did not know about these arrangements. She claims that the Plaintiff, who was co-ordinating these arrangements, should have relied upon its own security by way of charges for the sum of £585,000 plus interest and should not have received as little as the sum of £665,539.83 out of the proceeds of the sale which it actually received. Mrs. Eves, through Advocate Landick, is effectively saying that the bank acted in such a way as to cause the sum due under the guarantee to not be diminished as much as possible and this to her prejudice.

I have calculated that if the correct interest formula had been applied up to that time then at 11th December, 1990 the arrears of interest due on all the loans would have been £138,031.67, although this would have included arrears of interest on the £70,000 second loan and not just on the £35,000 which was charged on the Hotel.

Advocate Landick laid great stress on a particular paragraph from section 14/3-4/8 which I have already quoted but which I will now repeat -

> ***"In an action by a bank claiming to recover sums due under a guarantee of a company's indebtedness, allegations by the guarantors, who were directors of the company, that the receiver appointed by the bank under a debenture issued by the company was guilty of negligence in realising the company's stock at a gross undervalue because the sale had been held at the wrong time, and had been insufficiently advertised and poorly organised and that the bank had interfered with the conduct of the receivership raised triable issues and the defendants were entitled to unconditional leave to defend." (Standard Chartered Bank v. Walker [1982]1W.L.R. 1410;[1982]3 All E.R. 938,C.A.)."***

Advocate Landick argued that this case was similar to Standard Chartered v. Walker. However, there are clear differences here. Firstly, there is absolutely no indication that the Hotel was sold for less than its full value. Secondly, there is every reason to believe that the Plaintiff and the First Defendant were trying to maximise the sale price of the property. Thirdly, although the Plaintiff was assisting in co-ordinating this, the ultimate decision to sell and to agree to pay certain dividends to unsecured creditors was made and agreed to by the First Defendant.

In addition to this there are certain paragraphs of the forms of guarantee which are relevant. All the guarantees are basically in a standard form subject to additional words being added in relation to any previous guarantees. I am now going to quote various relevant paragraphs of the standard form of guarantee -

"4. *For all purposes of the liability of the undersigned to you under this Guarantee (including in particular without prejudice to the generality of the foregoing for all purposes the liability of the undersigned for interest) every sum of money which may now be or which hereafter may from time to time become due or owing to you as aforesaid by the Principal shall be deemed to continue due and owing to you by the Principal until the same shall be actually repaid to you notwithstanding the bankruptcy or winding up of the Principal or any other event whatever and in case of the death of the Principal all sums which would have been due or owing as aforesaid to you by the Principal if the Principal had lived until the time at which you shall receive actual notice of his death shall for all purposes of this Guarantee be deemed included in the monies due and owing to you by the Principal.*

9. *Any admission or acknowledgement in writing by the Principal or any person on behalf of the Principal of the amount of the indebtedness of the Principal or otherwise in relation to the subject matter of this Guarantee or any judgment or award obtained by you against the Principal or proof by you in Bankruptcy or Companies Winding Up which is admitted or any statement of account furnished by you the correctness of which is certified by any one of your Directors or Managers shall be binding and conclusive on the undersigned.*

11. *In the event of the bankruptcy or insolvency of the Principal or of his entering into a composition or arrangement with his creditors or if the Principal is a company society or corporation in the event of the*

Principal going into liquidation or being wound up or reconstructed or making any arrangement with their creditors any dividends or payments which you may receive from the Principal or his estate or any other person shall be taken and applied as payments in gross and shall not prejudice your right to recover from the undersigned to the full extent of this Guarantee the ultimate balance which after the receipt of such dividends or payments may remain owing to you by the Principal."

All three of these sections of the guarantee which are quoted above are clear to me to be highly relevant. They are saying simply that any monies which are not repaid by the First Defendant must be repaid by the Guarantors.

I have absolutely no doubts that the Guarantee is binding upon Mrs. Eves and furthermore, I have absolutely no doubts that under the terms of the guarantee Mrs. Eves remains liable to the Plaintiff in precisely the same amounts as the Second and Third Defendants. Accordingly, I also give Judgment against her with permission to sell in the sums mentioned above and will need to be addressed on the matters of an arrest of wages and costs.

Finally, although the Defendants raised many possible lines of defence at the end of the day I have found that there was absolutely no merit in any of these lines of defence. They all individually and all collectively fall short of the test required in order for me to grant leave to defend.

Leave to defend is, however, granted for the balance of the Plaintiff's claim.

Authorities

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Wallis -v- Taylor (1965) J.J. 455.

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