

Judgment 31/2013

**Newmarket Holdings (Guernsey) Limited
v Musa Holdings Limited
Royal Court
28th October, 2013**

Application for summary judgment pursuant to Rule 19 of the Royal Court Civil Rules, 2007.

**Approved Text
29.10.2013**

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY COURT)**

Between: NEWMARKET HOLDINGS (GUERNSEY) LIMITED Plaintiff

-v-

MUSA HOLDINGS LIMITED Defendant

Application heard on: 23rd September, 2013

Judgment handed down on: 29th October, 2013

Before: John Russell Finch, Esq., Judge of the Royal Court

Advocate for the Plaintiff: Advocate J M Wessels

Advocate for the Defendant: Advocate S L Brehaut

Cases and materials referred to in judgment:

Royal Court Civil Rules, 1989, Rule 17(2);

Royal Court Civil Rules, 2007, Rule 19(2);

CPR, Rule 24(2);

The White Book, paragraph 24.2;

Woodbourne Trustees Limited v Generali Worldwide Insurance Company Limited 2011-12 GLR, Note 5;

Banque de Paris et de Pays-Bas (Suisse) S.A. v Costa de Naray [1984] 1 Lloyds's Rep. 21;

Attorney General of Belize and Others v Belize Telecom Ltd and Another [2009] UKPC 10;

Bhopal v Punjab National Bank [1998] 2 All E.R. 296;

Britannia Building Society v Prangley and Others (12th June, 2000, Ch D, unreported);
Coca-Cola Financial Corporation v Finsat International Ltd and Others [1998] Q.B. 43;
Credit Suisse International v Ramot Plana OOD [2010] EWHC 2759 (Comm);
ED & F Man Liquid Products Ltd v Patel and Another [2003] EWCA Civ 472;
National Westminster Bank PLC v Daniel and Others [1993] 1 W.L.R.1453;
Reigate v Union Manufacturers Co (Ramsbottom) Limited [1918] 1 K.B. 592;
Standard Chartered Bank v Yaacoub (1990) (unreported); Court of Appeal (Civil Division) Transcript No. 699;
Swain v Hillman [2001] 1 All E.R. 91

DECISION

Background

1. For the purposes of this application the background facts in the Plaintiff's ("P's") Cause, especially at paragraphs 6-12 and 17-18 are accepted and show the history of the dealings between the parties. References to documents are as given in the joint consolidated bundle (the "Joint Bundle") and we next come to P's application dated 24th April, 2013 at tab 3, which seeks summary judgment, pursuant to Rule 19 of the Royal Court Civil Rules, 2007. P's skeleton argument is at Tab 9, and the Defendant's ("D's") at Tab 10. At the hearing on 23rd September oral submissions based on these skeleton arguments were made and it was indicated that a written decision would be handed down as soon as possible, which this is.
2. Summary judgment is sought in the sum of £134,214.25 with a declaration to be given that the sum of £29,350.00 is payable to P by D on the sale of an English property, 64 Hamilton Terrace, London. In summary, P submits that the total sum of £163,564.45 is payable under a loan agreement signed, it would appear, on 1st February, 2012 and payable on demand (see pages 27-28 of the affidavit of Mr Plant in support of the Application at Tab 4 of the Joint Bundle); page 29 for the repayment demand dated 28th January 2013, and page 32 for D's response. D accepts the existence of this contract and that the sums are due, but states that there is no over-arching written agreement, but one agreement partly evidenced in writing. The oral part of the agreement, according to D, is as set-out in Mrs Osborn's first affidavit, Tab 7 of the Joint Bundle, paragraphs 10 and 11, to the effect that payment is not due until 64 Hamilton Terrace is sold.
3. The Rule governing this application is set out in D's skeleton at Tab10 (2A) of the Joint Bundle. It reads:

"Power to give summary judgment

19. (1) *The Court may, at any time after inscription of the action on the Rôle des Causes à Plaider, on the application of a party to the action, give summary judgment against any other party on the whole of the claim or on a particular issue.*
- (2) *The grounds of the application for summary judgment shall be that –*
 - (a) *the plaintiff has no real prospect of succeeding on the claim or issue, or*
 - (b) *the defendant has no real prospect of successfully defending the claim or issue,*

and there is no other compelling reason why the claim or issue should be disposed of at a trial."

It is not disputed that this provision is analogous to the English C.P.R. 24.2 (D's skeleton Tab 1B) and that therefore a number of English decisions are of material assistance. A selection of such cases was cited by both parties. More details of the facts as seen by the parties can be gleaned from the affidavits of Mr Plant (for P) at tabs 4 and 8 of the Joint Bundle and Mrs Osborn (for D) at tab 7 and 10 (1A) of the Joint Bundle. D's argument, put very shortly, is that firstly, there are fundamental issues of fact for the trial judge to properly resolve and, if that does not find favour, a secondary argument that there was an implied term necessary to make the contract work to the effect that payment was not due until the sale of 64 Hamilton Terrace. D's case is that there was simply one agreement on or about 11th November, 2011, evidenced subsequently by the written item of 31st January, 2012 (para 3.2 of D's skeleton).

Legal Principles – Summary Judgment

4. As Advocate Brehaut put it in argument, the parties are not far apart in the legal principles here. (It is correct to note, as paragraph 4 of D's skeleton reminds us that Guernsey cases before the implementation of the Royal Court Civil Rules, 2007 were decided on the basis of the Royal Court Civil Rules, 1989. The test there was "no defence" (Rule 17(2)) rather than "*no real prospect of successfully defending the claim or issue*").
5. Advocate Wessels referred to National Westminster Bank PLC v Daniel and Others [1993] 1 W.L.R. 1453 (Tab 9 (5)). The head-note (in part) reads:

"On an application for summary judgment, a court is entitled to reject a defendant's affidavit evidence. If, having looked at the whole situation, it concludes that the defendant has failed to show a fair and reasonable probability of having a real or bona fide defence or that his evidence is not credible."

It was held that:

"....in a material respect the defendant's evidence was incredible; and that, accordingly since it could not be said that there was any fair or reasonable possibility of the defence succeeding the order for conditional leave would be set aside and judgment would be given for the Plaintiff."

In his judgment at page 1456, E-G Glidewell LJ referred to earlier authorities. The first one of significance is Banque de Paris et de Pay-Bas (Suisse) SA v Costa de Naray [1984] 1 Lloyd's Rep. 21, where Ackner LJ said:

"It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence."

Glidewell LJ then referred to two other cases. In Bhopal v Punjab National Bank [1988] 2 All E.R. 296, 303, Bingham LJ said:

"But the correctness of factual assertions such as these cannot be decided on an application for summary judgment unless the assertions are shown to be manifestly false either because of their inherent implausibility with the contemporary documents or other compelling evidence."

And in Standard Chartered Bank v Yaacoub (1990) unreported, Court of Appeal (Civil Division) Transcript No. 699, (Tab 9.4), Lloyd LJ indicated:

“It is sometimes said that in an application under Order 14 the court is bound to accept the assertion of a defendant on affidavit unless it is self-contradictory or inconsistent with other parts of the defendant’s own evidence, and that the court cannot reject an assertion on the simple ground that it is inherently incredible.”

In his own judgment (at page 1457, E) Glidewell LJ concluded that:

“I think it right to ask, using the words of Ackner LJ in the Banque de Paris case at p23 “Is there a fair or reasonable probability of the defendants having a real or bona fide defence?” The test posed by Lloyd LJ in the Standard Chartered Bank case “Is what the defendant says credible?” amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.”

6. Advocate Wessels also referred to Britannia Building Society v Prangley and Others (12th June, 2000, Ch.D unreported). This was a passing-off action, where the facts are so stark that Rattee J’s conclusions were inevitable. The defence was wholly destitute of merit.
7. There are a number of other cases relied upon by P and D in the Joint Bundle. The decision in ED&F Man Liquid Products Ltd v Patel and Another [2003] EWCA Civ 472 relates to the setting aside of a judgment. In his judgment Potter LJ indicated that the wording of CPR 13.3(1) on setting-aside (“a real prospect of successfully defending the claim”) and CPR 24.2 on summary judgment (“no real prospect of successfully defending the claim or issue”) were the same test. Potter LJ approved the observation of Lord Woolf MR in Swain v Hillman [2001] 1 All E.R. 91 at 92J that:

“The words “no real prospect of succeeding” do not need any amplification, they speak for themselves. The word “real” distinguishes fanciful prospects of success and they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success.”

8. Both P and D relied upon Credit Suisse International v Ramot Plana OOD [2010] EWHC 2759 (Comm) where Hamblen J conducted a valuable review of the relevant authorities. At paragraph 24 (2) he said:

“Whilst a summary judgment application is not an opportunity to conduct a mini-trial, that does not mean that the court has to accept without question the defendant’s evidence. As stated by Potter LJ in the ED&F Man case at [10]:

“In some cases it may be clear that there is no substance in factual assertions made, particularly if contradicted by contemporaneous documents. If so, issues which are dependent upon those assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable”.

Hamblen J went on, at paragraph 24 (5), to state:

“The Court’s jurisdiction to grant summary judgment should be exercised so as to give effect to the overriding objective. In appropriate cases summary determination saves expense, achieves expedition and avoids the court’s resources being used up to no purpose. As Lord Woolf MR stated in Swain v Hillman:

“It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it

avoids the court's resources being used up on cases where this serves no useful purpose; and I would add generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that is the position. Likewise, if a claim is bound to succeed, the claimant should know this as soon as possible".

The review of the authorities concluded at paragraph 25 of the judgment as follows:

"The authorities show that for the court summarily to reject factual evidence as being fanciful it must be "clear" that it has "no substance". This will generally only be the case where the factual assertions made are inherently improbable or incredible and/or are contradicted by the evidence on which they are based and/or by the documents."

Legal Principles – Implied Terms

9. The classic exposition of the relevant principles is found in Attorney General of Belize and Others v Belize Telecom Ltd and Another [2009] UKPC 10 at paragraphs 16 to 27 in the judgment of Lord Hoffman. These principles were applied in the recent Guernsey Royal Court case of Woodbourne Trustees Limited v Generali Worldwide Insurance Company Limited 2011-12 GLR, Note 5 (Southwell LB and Jurats). From the Note, the following observations stand out (citations omitted):

- "(c) the issue as to whether any further term were to be implied could arise only if there were something missing or not dealt with in express terms, or if the express terms required an implied term to make sense*;
- (d) the necessity for implying a term had to arise from the construction of the express terms; it was not to be considered in isolation from or in contradiction of, the express terms, and it had to be required in order to make real sense (commercially or otherwise) of the express terms – not merely to add what the parties might reasonably have added if they had so decided*; and
- (e) a term was only to be implied if it would be necessary to give business efficacy to the contract; it had to be so obvious that it went without saying; it had to be capable of clear expression, and it was not to contradict any express term of the contract."*

Application of the Legal Principles to the Facts as Pleaded

10. There are two possible errors that need to be avoided in an application for summary judgment. The first is to eschew conducting what the White Book at para 24.2.5 (cited at paragraph 24 of Hamblen J's judgment in the Credit Suisse case (supra)) warns against in these terms:

"Therefore the Court hearing a Pt 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted, or some extraneous evidence which would contradict it ..."

The second possible pitfall is also dealt with by the White Book, earlier in the same passage and cannot be ignored:

“The respondent’s case must carry some degree of conviction the court is not required to accept without question any assertion he makes.”

This is also covered in the pre CPR case of National Westminster Bank v Daniel (see paragraph 5 above). The authorities here are consistent and all stress, despite slightly different wording, a test that is the same throughout.

11. Each case, of course, depends on its own facts. The value of this truism is especially apparent in applications of this nature, and a cool-headed look at the documents and pleadings is necessary. A good place to start is the loan agreement itself (pages 27-28 of the affidavit of Mr Plant at Tab 4 of the Joint Bundle). This is a very simple and straightforward document and at (B) it says, *“The loan shall be interest free and repayable on demand”*.

We next go to the affidavit of D’s witness Vay Osborn (Tab 7), paragraphs 9-13. The nub of this is the contention that was advanced by D’s Mr Falla in his e-mail of 30th January, 2013 (page 13 of the affidavit of Mr Plant at Tab 4 of the Joint Bundle), which states *“..... whilst not specifically stating the whole balance would be repayable from the proceeds of the sale of 64 Hamilton Terrace it was based on this understanding that the loan agreement was signed”*.

It is P’s case, of course, that there never was such an agreement to defer D’s obligation to repay the loan (see, e.g. the first affidavit of Stephen Plant, paragraphs 14-19, at Tab 4 of the Joint Bundle). In the course of argument the question was put to Advocate Brehaut seeking an explanation of why D signed an agreement that did not contain such an important element; or, at the risk of over-simplification, why D signed a document that was wrong - not reflecting the alleged real bargain between the parties. Advocate Wessels submitted that no intelligible answer was received. A slightly softer way of putting it is that no satisfactory explanation could be discerned. It is also worthy of note that there is no documentary evidence, even internal e-mails or memoranda, that support D’s position on the contract. Advocate Wessels also suggested that it is not sufficient just to put up evidence, it needs to be credible. The time for repayment of a loan in this case encapsulates the parties’ bargain. It is also correct that the parties are not well-meaning amateurs but business-people versed in the task of administering companies and familiar with money matters. The failure to reflect this very important, indeed fundamental, element in the written loan agreement is inherently so implausible as to have no rational explanation; it is not credible and indeed is barely arguable in all the circumstances. It does not carry what Potter LJ referred to in the ED&F case (supra) *“some degree of conviction”*. Accordingly P’s submissions are well-founded on this point and succeed.

12. D did not consider the implied point arose, but did argue it as a “secondary” point. The Belize case, and the subsequent Guernsey case of Woodbourne Trustees have been referred to at paragraph 9 above. The early formulation by the celebrated commercial judge Scrutton LJ in Reigate v Union Manufacturing Co (Ramsbottom) Limited [1918] 1 K.B. 592 at 605 remains good law:

“A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties ‘What will happen in such a case’, they would both have replied ‘of course, so and so will happen, we did not trouble to say that; it is too clear’. Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties have not themselves expressed”

There is, as was submitted on behalf of P, nothing in the factual matrix to imply such a term. It boils down, whichever aspect of the case is examined, to the question of why a matter of

such fundamental importance affecting the contract was not placed into writing when the loan agreement was signed.

13. Accordingly, it is considered that P has established D has no realistic chance of succeeding with the argument put forward and that the defence does not on what has been adduced carry any degree of conviction and is wholly inherently improbable. In respect of the implied term point, the authorities all show that D is a long way from meeting the test. P's application therefore succeeds as set down.

Counterclaim/Set-Off

14. The Court did not have to concern itself a great deal with this aspect of the case for the purposes of the present application. The counterclaim relates to other properties. D is entitled to apply for a stay in respect of the summary judgment pending resolution of this matter. The principles in Coca-Cola Financial Corporation v Finsat International Limited and Others [1998] Q.B. 43 would likely be of much assistance.

Costs

15. This should presumably follow the event, unless there is anything D wishes to submit that would change this approach.

Procedure

16. If D wishes to apply for a stay, then written submissions are invited within seven days of the date this judgment is finally handed down, with seven days for P to respond. The same timetable should apply to anything relating to costs.

J R Finch
Judge of the Royal Court