Newmarket Holdings (Guernsey) Limited
V Musa Holdings Limited
Court of Appeal
31st March, 2014

JUDGMENT
14/2014

Application for leave to appeal and appeal against summary judgment.

Approved Text
31.03.2014

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION
Appeal No. 474

14th March 2014

NEWMARKET HOLDINGS (GUERNSEY) LIMITED **Respondent**

-v-

MUSA HOLDINGS LIMITED **Appellant**

Advocate J M Wessels appeared for the Respondent
Advocate S L Brehaut for the Appellant

DECISION

BELOFF JA President

INTRODUCTION

1. This is an application for leave to appeal against the decision of Judge John Russell Finch ("the Judge'') dated 29th October 2013 ("the Decision'') granting the application dated 24th April 2013 of the Respondents a registered Guernsey company ("Newmarket'') administered by Mercator Trust Company Limited ("Mercator") another Guernsey registered company and a licensed fiduciary for summary judgment, pursuant to Rule 19 of the Royal Court Civil Rules, 2007 ("the 2007 Rules") against the Appellant ("Musa") a registered Guernsey company administered by Confiance Limited ("Confiance") another Guernsey registered company, and licensed fiduciary in the sum of £134,214.25 ("the loan sum"), coupled with a declaration that the sum of £29,350.00 ("the Mercator fees") is payable to Newmarket on the sale of an English property, 64 Hamilton Terrace, London. ("the property''). Both parties were involved in property investments in England via a series of companies.

2. In summary, Newmarket submitted that the loan sum of £134,214.25 is payable on demand under a loan agreement ("the written agreement") signed on 1st February, 2012 which provided:

LOAN AGREEMENT

This loan agreement is made and has been signed in Guernsey.

Between

(1) Newmarket Holdings (Guernsey) Limited whose registered office is at Anson Court La Route des Camps, St Martins, Guernsey, GY4 6AD
(hereinafter called the "Lender")

And

(2) Musa Holdings Limited, whose registered office is at Elizabeth House, Ruettes Brayes, St Peter Port, Guernsey, GY1 4HW
(hereinafter called the "Borrower")

And

(3) Brisk Properties Limited whose registered office is at Elizabeth House, Ruettes Brayes, St Peter Port, Guernsey GY1 4HW
("hereinafter called Brisk")

WHEREAS the Borrower obtained from the Lender a loan of GBP 163,564.45 on ……January 2012, the parties now wish to agree upon the terms of such loan as set out below.

NOW IT IS AGREED AS FOLLOWS:

(A) The Lender has granted to the Borrower a loan totalling GBP 163,564.45 (the "Loan")

(B) The Loan shall be interest free and repayable on demand.

(C) The Lender shall have a second legal charge in favour of the property known as 64 Hamilton Terrace whose address is NW8 9UJ.

(D) Brisk agree to the second legal charge and to co-operate with the first mortgagor in order to satisfy any conditions that may be required.

(E) The loan may be assigned by the lender to Mercator Trust Company Limited as Trustee of Newmarket Settlement.

(F) The Borrower shall repay the loan in full and shall not be entitled or able to make any claim for offer or counterclaim or any deduction whatsoever against the loan due.

(G) This agreement shall be binding upon and inure to the benefit of the respective parties hereto, their successors and assigns. Other than the assignment in recital D above no assignment shall be made without the prior written agreement of both parties.

(H) This agreement is concluded under, and the proper law shall be the Law of Guernsey and the effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed and regulated only according to the laws of Guernsey which shall be the forum of administration hereof.

(I) Three copies of this agreement shall be signed in counterpart.

IN WITNESS whereof this agreement was duly executed day and year first above written.

MUSA HOLDINGS LIMITED [signed by Rudi Falla]
The Borrower

NEWMARKET HOLDINGS LIMITED [signed by C K Damsell]
The Lender

BRISK PROPERTIES LIMITED [signed by Rudi Falla]

(My Emphasis)

3. On 28 January 2013 a formal demand for repayment within 7 days was made by Newmarket pursuant to the written agreement. On 30 January 2013 by email Musa refused payment on the basis that "*whilst not specifically stating that 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"*. ("the payment precondition").

SUMMARY JUDGMENT: THE RULE

4. The Rule in the 2007 Rules which governs this application provides, so far as material, as follows:

> *"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) ……..*
> *(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."*

This provision is identical in terminology to that of the English CPR 24.2.

5. Musa's arguments are twofold, firstly there are issues of fact for the trial judge properly to resolve as to the existence or nature of the agreement between the parties ("the first argument"); alternatively, that even if the written agreement was the complete agreement, there was an implied term, necessary to make the agreement work, that payment was not due until the sale of the property ("the second argument").

SUMMARY JUDGMENT - LEGAL PRINCIPLES

6. Before the implementation of the 2007 Rules applications for summary judgment were decided on the basis of the Royal Court Civil Rules, 1989 ("the 1989 Rules"). The test there was "*no defence*" (Rule 17(2) ("the previous test") rather than "*no real prospect of successfully defending the claim or issue"*) (*"*the present test*"*).

7. The English equivalent to Rule 17(2) RSC Order 14.31(1) which provided that summary judgment was to be refused *"when the Defendant satisfied the Court there was an issue which ought to be tried"* was the subject of some learning in a series of cases decided by the Court of Appeal.

8. In Banque de Paris et de Pay-Bas (Suisse) SA v Costa de Naray [1984] 1 Lloyd's Rep. 21, 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."*

9. 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 or because of their inconsistency with the contemporary documents or other compelling evidence."*

10. In Standard Chartered Bank v Yaacoub (1990) unreported, Court of Appeal (Civil Division) Transcript No. 699, Lloyd LJ said:

> "*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."* – a proposition that he went on to reject.

11. In *National Westminster Bank PLC v. Daniel and Others)* [1993] 1 W.L.R. 1453 Glidewell LJ at page 1457, E 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."*

12. In the CPR era Lord Woolf MR in *Swain v. Hillman* [2001] 1 All ER 9 said of CPR 24.2 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."*

13. In *Three Rivers DC v Bank of England* No. 3 2001 UKHL16 2001 2 AER 513 Lord Hope again approved that test. He said:

> [90] *"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if – (a) it considers that – (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other reason why the case or issue should be disposed of at a trial."*

After contrasting the language of the rules relating to the striking out of a defence and giving summary judgment for a claimant, he noted:

> [91] ……..*In Monsanto plc v Tilly (1999) Times, 30 November, Stuart-Smith LJ said that "24.2 gives somewhat wider scope for dismissing an action or defence. In Taylor's case he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred"*

and continued:

> [92] *The overriding objective of the CPR is to enable the court to deal with cases justly (see r 1.1). To adopt the language of Art. 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950: TS 71 (1953); Cmd 8969) (set out in Sch1 to the Human Rights Act 1998) with which this aim is consistent, the court must ensure that there is a fair trial. It must seek to give effect to the overriding objective when it exercises any power given to it by the rules or interprets any rule (see r 1.2). While the difference between the two tests is elusive, in many cases the practical effect will be the same.*
>
> *In more difficult and complex cases such as this one, attention to the overriding objective of dealing with the case justly is likely to be more important that a search for the precise meaning of the rule. …..*
>
> *[93]* In *Swain's* case, *Lord Woolf MR gave this further guidance*:
>
> *"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 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 that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible…..Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As the proper disposal of an issue under Pt 26 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily." (See [2001] 1 All ER 91 at 94-95.)*
>
> *[94] For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is – what is to be the scope of that inquiry?*

> *[95] I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event, a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in Swain's case [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.*

14. In *Credit Suisse International v Ramot Plan OCD (2010) ER HC 2759 (Comm)* Hamblen J summarised what he saw as the state of the art:

> *Summary judgment – relevant legal principles*
>
> *…….*
>
> *24. In the context of the present application, in which Credit Suisse seeks summary judgment on disputed issues of fact, the following principles are of particular relevance:*
>
> *(1) A real prospect of success means a prospect which is more than fanciful or merely arguable. As Potter LJ stated in ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472; [2003] C.P. Rep 5 at [8];*
>
> *"..the defence sought to be argued must carry some degree of conviction…[and be]… better than merely arguable."*
>
> *(2) 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 assertion 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".*
>
> *(3) The less complex an issue, the easier it is likely to be for the Court to take the view that the basis for it is without substance and determine it on a summary basis. ……*

> *(4) The Court should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts advanced by the other side. As stated in the White Book at para 24.2.5;*
>
> *"If the appellant for summary judgment adduces credible evidence in support of his application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief. The language of r.24.2 ("no real prospect…no other reason…") indicates that, in determining the question, the court must apply a negative test. However, the proper disposal of an issue under Pt 24 does not involve the judge in conducting a mini-trial (Swain v Hillman [2001] 1 All ER 91). 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 (Fashion Gossip Ltd v Esprit Telecoms UK Ltd [2001] EWCA Civ 235, CA; cf, Day v RAC Motoring Services Ltd [1999]1 All ER 1007, per Ward LJ at 1013 propounding the adoption of a negative test on applications to set aside default judgments). When deciding whether the respondent has some real prospect of success the court should not apply the standard which would be applicable at the trial, namely the balance of probabilities on the evidence presented; on an application for summary judgment the court should also consider the evidence that could reasonably be expected to be available at trial (Royal Brompton Hospital NHS Trust v Hammond (No.5), [2001] EWCA Civ 550, CA)"*
>
> *(5) 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. ……*
>
> *25. 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.*

THE PARTIES' SUBMISSIONS

15. In this case the following factors are relied on by Newmarket to say that Musa's claim is bound to fail:

    (i) The written agreement is clear on its face: It bears all the hallmarks of careful drafting, at the very least, with input by a lawyer. It is signed on behalf of Newmarket and Musa by two business people, not by amateurs.

    (ii) The alleged oral agreement is inconsistent with the written agreement. The former does not merely supplement the latter. It contradicts it. The chronology does not

allow for it to be described as a variation of the written agreement, since the oral agreement is alleged to have taken place some two months or so before the written agreement was signed on 1st February 2012.

(iii) If this was indeed a payment precondition, Musa ought in its defence to have sought rectification of the written agreement on the ground of common mistake the criteria for which are strict. See *Chartbrook Ltd v Persimmon Homes Ltd* 2000 UKHL 38 at [48] Chitty op. cit paras 5-115 and would require Musa to establish a common intention as to the oral agreement which persisted up to the time of the written agreement. It has not, however, pleaded or advanced a claim for rectification.

(iv) There is no contemporary internal document, e.g.: a Musa minute, or external, eg a communication from Musa to Newmarket, confirming the oral agreement.

(v) No explanation has been advanced by Musa as to how the written agreement, if discrepant with the oral agreement, came to be signed without reservation. This is particularly striking given that Newmarket indicated in advance of the hearing before the Judge that it would rely on such absence of explanation. The reasonable inference must be that Musa has no explanation. *Prest v. Prest* 2013 UKSC 34 paras 44-45.

(vi) Vay Osborn, in her first affidavit, states [para 10] *I spoke to Stephen Plant on or around 11 November 2011 and 5 December 2011 (who held himself out to me as authorised on behalf of the Plaintiff). It will be recalled that the sale of 89 Winnington Road completed on 10 November 2011. It was therefore understandably important to Mr Plant and the Plaintiff that the terms of the loan between the parties were agreed at the time the creditors were discharged and the loan was effectively advanced to facilitate this. During the conversation we agreed that the Plaintiff would discharge the debt due to the creditors by the Defendant on the basis that the Defendant agreed to repay the Plaintiff, in respect of its share of the sum due to the creditors, upon the sale of 64 Hamilton Terrace. I further agreed that the Defendant would grant the Plaintiff, as security, a second legal charge over the property and that these terms would be subsequently recorded in a written memorandum. [para 11]* It is, however, not expressly stated by Vay Osborn <u>what</u> was said on <u>which</u> of the two occasions.

(vii) It is notable that the agreement that Musa would grant Newmarket a second charge over the property found its way into the written agreement, whereas the alleged payment precondition did not.

(viii) The same point as in (vii) can be made as to Rudi Falla's email to Clive Damsell on 5 December 2011 which Vay Osborn identifies [ditto para 12] as reflecting the oral agreement where he wrote *"I understand that Newmarket is willing to lend to Musa the loan…. The loan will be secured by a second charge on the property"*. That email refers to the loan and to the agreement for a second charge to secure the same. It makes no reference to the payment precondition.

(ix) By instructive contrast the email from Rudi Falla to Clive Damsell (copied to Vay Osborn) dated 30 January 2013 refers – <u>for the first time</u> – to the payment precondition.

16. The following factors are relied on by Musa to assert that their defence has a real prospect of succeeding:

(i) On any view the written agreement is in error in that (a) it identifies the loan as including the Mercater fees; (b) it identifies the payee of the Mercator fees as Newmarket whereas previous email interchange on 5th and 6th December 2011 (which it is not necessary to set out in full) shows that the payee was Mercator.

(ii) Vay Osborn is a company manager and member of the Institute of Chartered Accountants, who has given sworn testimony in support of an oral agreement, which is not self-seeking at any rate as regards her own financial interests. That evidence cannot at this stage be rejected as clearly incorrect.

(iii) On the evidence before the Court it appears that Vay Osborn did have a conversation with someone on the 5 December which led Rudi Falla to send the email confirming his understanding of what had been agreed on the same date.

(iv) However, Stephen Plant for Newmarket disputed not only the absence of any verbal agreement (first affidavit para 14, second affidavit para 6) but any conversation with Vay Osborn at all regarding the details of the loan (second affidavit para 5). He said he only discussed such matters with Rudi Falla. This provides no explanation for Rudi Falla's email of 5 December 2011 or the provision as to the second charge in the written agreement which reflected the understanding that Rudi Falla could only have obtained from Val Osborn. (The e-mail does not read as if his understanding was based on a conversation that he had with someone that day.)

ANALYSIS

17. In my view it is clear that the present test is designed to create a higher hurdle than the previous test, for a defendant who seeks to defend a claim for summary judgment both in England and (materially) in Guernsey. To show that there is a (or some) defence is obviously easier to establish than a defence with a real prospect of success. The jurisprudence contrasts real with fanciful.

18. The overriding objective, which is the foundation of the CPR as it is of the 2007 rules, requires that the Court should recognise that, in the interests not only of the parties, but of the administration of justice more generally, cases should not be permitted to proceed to trial with all the concurrent expenditure of costs and time if the outcome is inevitable.

19. Even under the previous test, certainly in its English form, a statement on oath that an agreement was made, which, if it was made would provide a defence would not automatically require the Court to give permission to defend. A paradigm example of when it would not do so is where such agreement is inconsistent with contemporary documentation.

20. Considering the factors listed in [para 15] above collectively, they do not suggest to me that Musa's attempt to establish that there was a binding oral agreement which should have been, but was not reflected in the written agreement, has more than minimal chance of success. It is inconsistent both with the e-mail of 5th December 2011 and with the written agreement.

21. One matter only causes me to hesitate. Had Mr Plant accepted that a conversation had taken place with Vay Osborn on 5 December 2011 but to the effect only as recorded in Rudi Falla's email of even date, (ie as to the security for the loan to be provided by way of second charge) Newmarket's case would be entirely coherent. But Mr Plant denies that any such conversation took place at all. If so, Newmarket provides no explanation for that email or its content. I am left with a lingering doubt as to whether this court has been furnished with the full story, which could only be provided at a trial with *viva voce* evidence from Ms Osborn, Mr Falla and Mr Plant. However, the issue is not whether the Court has the full story, but whether it considers that the full story could realistically sustain Musa's defence.

22. In the circumstances I would adopt the *via media* of granting Musa's application for leave to appeal and granting Musa leave to defend but on terms that the loan sum is paid into court within 14 days. I recognise that this may disable Musa from defending at all but that cannot be a reason for refraining from making an order which reflects my view of the merits of the case. With such payment to be made, I would consider it highly desirable that the trial on what appears to be a very short point should take place as soon as possible.

23. In view of my conclusion on the first argument, I can deal succinctly with the second argument.

Legal Principles – Implied Terms

24. 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, applied in the Bailiwick the case of Woodbourne Trustees Limited v Generali Worldwide Insurance Company Limited 2011-12 GLR, Note 5 (Southwell LB and Jurats). From the Note I extract the following observations (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."*

See further Chitty op cit Vol 1. Para 13-006 – 13-007.

25. In my view Musa fails to make out a case why business efficacy, as distinct from its own commercial interests, required an agreement that the loan be repayable only after sale of the property. Quite apart from the principle that the implied term cannot contradict an express term, (Chitty. Op. cit para 13-010), the interests of both parties, not just of one, viewed objectively, would be needed to compel such an implication.

Sir John Nutting Bt, JA

I agree.

Sir Michael Birt, JA

I also agree.

