IN THE SUPREME COURT OF BELIZE, A.D. 2013

CONSOLIDATED CLAIMS NOS: 74, 105, 106 and 120 of 2013

BETWEEN

THE BELIZE BANK LIMITED **CLAIMANT**

AND

LUKE ESPAT **DEFENDANT**

Keywords: Practice; Summary Judgment; Striking out; Principles; CPR Part 15; Sham Defences; Contract of guarantee; Discharge of guarantee; Debt; Breach of Contract; Contracts Under Seal and Deeds; Consideration; Misrepresentation; Entire Agreement Clauses.

Before the Honourable Mr. Justice Courtney A Abel (Ag)

Hearing Dates: **22nd day of July 2013**
18th day of October 2013

Appearances:

Mr. Godfrey P. Smith S.C, for the Claimant

Mr. Said Musa S.C, Counsel for the Defendant.

DECISION ON SUMMARY JUDGMENT APPLICATION
Delivered on the 18th day of October 2013

Introduction

[1] The Claimant seeks summary judgment against the Defendant in the present 4 consolidated claims, alternatively that the Defendant's Statements of Case be struck out pursuant to parts 15, 26.3(b) and 26.3(c) of the Supreme Court (Civil Procedure) Rules 2005.

[2] The grounds of the applications are that the Defendant has no real prospect of successfully defending the claims, and that his defence is an abuse of process and amounts to a delaying tactic and a sham.

[3] The Defendant strenuously resists the applications by the Claimant and wishes to be allowed to defend the claims.

The Proceedings

[4] The 4 claims were respectively filed on 11th February 2013 (amended on the 19th February 2013), 11th February 2013, 19th February 2013, and 25th February 2013.

[5] In each case a Statement of Claim was filed in which it claimed:

a) That the Claimant is and was a commercial bank.

b) That the Defendant, unconditionally and irrevocably guaranteed the proper and punctual payment and performance by individual Borrowers, of all their obligations and liabilities under a written loan agreement, and upon which basis the Claimant advanced specific sums of money to such Borrowers.

c) That in each case the Defendant "signed sealed and delivered" to the Claimant a written 'Guarantee and Postponement of Claim' agreement, (collectively "the Guarantees") containing specific applicable terms, in consideration for the Claimant advancing a specific sum to each Borrower, and guaranteeing payment to the Claimant of all debts and

liabilities at any time owing by each Borrower to the Claimant up to a specified limit, with interest from the date of demand for payment at a specified rate of interest.

d) That the Claimant notified the Defendant that the Borrower was in breach by failing to make payments when due, and made demand for payment, which the Defendant has failed to pay and that the Claimant is entitled to payment of a specified sum.

[6] Defences to the claims (or amended claims) were all respectively filed on the 8th March 2013. Replies to the respective Defences were all filed on the 2nd May 2013.

[7] The parties, on the application of the Claimant filed 9th April 2013, consented to an order dated 15th April 2013 consolidating the claims on the grounds that, the respective Claimants and Defendants were all the same, they were represented by the same Attorney, and in addition that:

a) They all arose out of the same factual background, namely that the Defendant entered into the Guarantees all dated 20th August 2008, to repay the liability of Borrowers in the event of their default for loans advanced to those Borrowers by the Claimant bank.

b) All 4 claims involved the same legal argument, namely that the Defendant issued a personal guarantee for and on behalf of the various Borrowers to make payment to the Claimant upon the default by any of the Borrowers on their outstanding balances, and that the Borrowers have in fact defaulted.

c) That the only substantive difference between them was the amount of the relief sought.

[8] The consolidated claim is now therefore brought respectively on the claims for:

a) The sum of BZ $12,166,995.48 inclusive of contractual interest to date at rate of 17% per annum (20th August 2008 to 10th February 2013) being debt owed under the Guarantee dated 20th August 2008 in respect

of all debts and liabilities of Ideco Enterprises limited; or alternatively damages for breach of contract together with interest and cost, including prescribed cost.

b) The sum of BZ 11,540,988.32 inclusive of contractual interest to date at rate of 12% per annum (20th August 2008 to 10th February 2013) being debt owed under the Guarantee dated 20th August 2008 in respect of all debts and liabilities of Belize Crocodiles and Reptiles Breeders ; or alternatively damages for breach of contract together with interest and cost, including prescribed cost.

c) The sum of BZ 4,696,291.32 inclusive of contractual interest to date at rate of 17% per annum (20th August 2008 to 20th February 2013) being debt owed under the Guarantee dated 20th August 2008 in respect of all debts and liabilities of Belize Ready Mix Concrete Ltd.; or alternatively damages for breach of contract together with interest and cost, including prescribed cost.

d) The sum of BZ $1,028,347.21 inclusive of contractual interest to date at rate of 17% per annum (20th August 2008 to 11th February 2013) being debt owed under the Guarantee dated 20th August 2008 in respect of all debts and liabilities of Ideco Enterprises limited; or alternatively damages for breach of contract together with interest and cost, including prescribed cost.

[9] In summary, the parties disagree on most of the matters pleaded and as a result many issues of fact and law are raised. Many of the issues of fact however, are not relevant to the main issues brought by the application for summary judgment which the Claimant filed on the 11th April 2013.

[10] The Defendant, in his threefold defence, contends that:

a) There was no consideration to support the Guarantees. Alternatively, that if there were consideration, it was past consideration.

b) The Defendant was induced to sign the Guarantees by a misrepresentation of the Claimant (which involved the President of the Claimant and various side transactions and circumstances in which the Defendant and the President were involved) and that the Guarantees were a mere formality and did not expose the Defendant to personal liability.

c) The Guarantees (described by the Claimant's President to the Defendant as "a mere paper formalities") were instead a new form of unlimited guarantee and which claimed an oppressive interest rate.

[11] There exists various Counterclaims for recession, an accounting, declarations for rescinding/setting aside the Guarantee and cancellation of the Guarantees.

[12] In response to the Defendant's defence the Claimant contends that:

a) The consideration was not past and that the Guarantees are legal and binding.

b) The Guarantees were not based on misrepresentation but were a standard bank document to secure loan money advanced, which the Defendant understood, and which is valid and binding.

[13] The present application for summary judgment is supported by an Affidavit of the General Manager of the Claimant filed herein on the 11th April 2013 and is resisted by an Affidavit of the Defendant filed herein on the 10th May 2013.

[14] The Claimant's application is further supported by substantial written submissions filed on 13th June 2013 to which the Defendant responded with written submissions. The Claimant responded by further written submissions filed on 17th July 2013. The Defendant filed a further submission on the 9th August 2013 on the issue of whether the Guarantees are liable to be avoided if induced by material misrepresentation and whether clause 13 of the Guarantees are a "complete and irrebutable answer to the allegation of misrepresentation as submitted by the Claimant. This latter submission was responded to by a further written submission of the Claimant dated 27th August 2013.

[15] The test to be applied in this case, on the application for summary judgment, is whether the matters raised by way of defence and counterclaim, have any real prospect of success at a final hearing.

[16] The central issue appears to be whether the Defendant's defence is real or a sham.

Facts

[17] The uncontested facts on the pleadings are as follows:

a) The Claimant is a company duly registered under the Companies Act of Belize doing business as a commercial bank.

b) The Defendant is a businessman and the principal shareholder/director of a Group of companies, LEG, including the 4 companies which are the subject of this consolidated claim.

c) The companies individually operated with overdrafts provided by the Claimant and secured by First charges and Mortgage Debentures on the real and personal estate of the Companies.

d) In about August 20, 2008 the Defendant was presented with the Credit Facility and Guarantee documents by Mr. Philip Johnson, the then President of the Claimant.

[18] The Claimant's case is a model of clarity alleging, as it does:

a) That the Defendant is an experienced businessman who has been involved with major and diverse businesses in Belize for many years, and has been engaged in banking transactions with the Claimant over the course of 19 years with some 7 major companies (including the companies involved as borrowers with the consolidated claim), and as such is taken to be well aware of any relevant legal implications.

b) That the Defendant signed, the Guarantees as Guarantor for the amounts claimed, which latter documents are standard form contracts of the bank.

c) That the Borrowers have defaulted on the loans and the Defendant is liable under the Guarantees for the payments due.

[19] In addition the Claimant relies on the following terms and provision of the Guarantee:

a) The signed Guarantees, in identical terms, are stated to be "FOR VALUABLE CONSIDERATION, receipt whereof is hereby acknowledged" and they purport to set out in numbered paragraphs, their terms.

b) Paragraph 3 of the Guarantees provides:

"The Bank shall not be bound to exhaust its recourse against the customer or other or any securities it may at any time hold before being entitled to payment from the undersigned of the liabilities. The undersigned renounces(s) to all benefits of discussion and division."

c) Paragraph 8 of the Guarantees states:

"…any sum which may not be recoverable from the undersigned on the footing of a guarantee shall be recoverable from the undersigned ….as a sole or principal debtor in respect therefor and shall be paid to the Bank on demand with interest and accessories."

d) Paragraph 13 of the Guarantees specifically, and in the following terms, purports to exclude liability for any representations made outside of the Guarantee , as it states:

"This instrument covers all agreements between the parties hereto relative to this guarantee and assignment and postponement, and none of the parties shall be bound by any representation or promise made by any person relative thereto which is not embodied herein."

e) In each case, the Guarantee states that it is "GIVEN UNDER SEAL at BELIZE CITY, BELIZE" this 20th day of AUGUST 2008" and then appear the words: "SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF" under which a signature appears, to which is then added a further signature above the words "LUKE ESPAT" and

followed by the typed characters "(Seal)" on the same line as the signature.

[20] The Defendant's case alleges that:

a) Each of the Borrowers, being one of several companies which comprised the Defendant's group (LEG) that operated in Belize with overdraft facilities provided by the Claimant, were collateralized by first charges and mortgage debentures on the various real and personal properties held by the Borrowers and that the Defendant was induced to give the Guarantees by things said and done by the then President of the Bank.

b) There were other side transactions concerning a separate cruise terminal facility in which a number of persons not parties to the present proceedings were involved [1] (some or all of whom were directors of various companies not parties to the present proceedings), and also involving monies which were paid by persons and companies (not parties to the present proceedings) which would cover the overdrafts to the borrowing companies as part of a complicated financial arrangement (or joint venture).

c) General elections in Belize resulted in hostility to the side transactions and the Defendant.

d) As a result of the Central Bank of Belize's intervention it was necessary to perfect the documentation for the monies advanced in relation to the side transactions and that pressure was brought to bear on the Defendant to sign the Guarantees as "mere paper formalities" with an alleged representation by the Claimant that there would be no personal obligation on the Defendant in relation thereto.

e) Various assurances were given to the Defendant which were reneged upon and the various borrowing companies were put into receivership as well as related companies.

[1] A person who was the principal of the Claimant bank (one Lord Ashcroft),the then President of the Claimant (Philip Johnson), and a legal Counsel to the Claimant (Philip Osborne)

f) At the time, the Guarantees were signed there was no consideration moving from the Claimant to support the Guarantees.

g) Since the borrowing companies were put into receivership by the Claimant, equipment and assets have been sold in fire sales, and fixed assets have been allowed to deteriorate and there has been no accounting provided to the Defendant by the Claimant or its appointed Receiver.

h) As a result the Defendant should be allowed to defend the consolidated claims and to pursue counterclaims for the declarations and accounting as mentioned in the defences

[21] It is noteworthy that in his defences, the Defendant does not specifically deny, nor does he admit, that he signed the Guarantees (which were specifically pleaded by the claimant). Instead the Defendant leaves it up to the Court to infer that he signed the Guarantees from the admission he made that he was "induced to give the Guarantee". The Defendant thereafter proceeds to detail the above elaborate and somewhat complicated version of events, under the heading "Particulars of Falsity", by means of which he seeks to avoid being bound by the terms of the Guarantees.

[22] Also, the misrepresentation alleged by the Defendant is neither specifically alleged to be fraudulent, negligent nor innocent, which are again left entirely for the Court to determine, from the particulars provided under the said heading of "Particulars of Falsity".

[23] In addition, the centerpiece of the Defendant's defence of misrepresentation, is the alleged representations by the President of the Claimant to the Defendant. Such misrepresentations were alleged to have been made to the Defendant, who is an experienced businessman, and whose group (LEG) included the Borrowers who were operating in Belize with overdraft facilities from the Claimant[2]. Further, that the Defendant was, and could be induced, by a bank official to sign

[2] Involving the not inconsiderable sums of monies which were the subject of the loan facilities and some $64 million which was alleged to have been loaned by a third party entity to reduce the exposure of the Claimant bank

the Guarantees on the basis that such documents were "mere paper formalities and would involve no personal obligation or liability" to him.

[24] Also left to be deduced (without the pleading specifying that a counterclaim is being pleaded) from the Defendant's claims, are Counterclaims for the various reliefs which the Defendant claims.

[25] The facts are thus bitterly contested by the Defendant.

[26] Indeed every time I attempted to follow the events being described by the Defendant in his pleadings, and his Affidavit, I felt that I was being drawn into an impenetrable labyrinth of circumstances, involving actors and companies which/who are not joined in these proceedings, transactions which are collateral to the Guarantees pleaded, and generally matters which can never be pursued in the present proceedings, as they are clearly collateral or tangential to pleaded issues in the case.

The Law

The Civil Procedure Rules

[27] Part 15.2 of the Supreme Court (Civil Procedure) Rules 2005 provides:

> *"The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *a) ...*
>
> *b) The defendant has no real prospect of successfully defending the claim or the issue."*

[28] Part 26.3(1) of the Supreme Court (Civil Procedure) Rules 2005 provides:

> *"In addition to any other powers under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court: -*

a) That the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.

b) That the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim."

[29] Part 15 sets out the types of proceedings for which summary judgment is not available (which do not apply to the present proceedings), the procedure for summary judgment[3], the evidence which is required for the purposes of such applications[4], and the powers of the Court on such applications.

[30] The powers of the Court are specifically set out at Part 15.6(1) of the Supreme Court (Civil Procedure) Rules 2005 which provides:

"The court may give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end."

[31] The summary judgment application may be defeated if the Defendant can show some "prospect" or chance of success. This apparently, and somewhat deceivingly, simple test, ("The Defendant has no real prospect of successfully defending the claim or the issue") needs to be further elaborated upon.

[32] In the English Court of Appeal case of *Swain v Hillman and another*[5], Lord Woolf MR in interpreting the same provision of the English civil procedure rules, determined that the word 'real' in 'no real prospect of succeeding' directs the Court "to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success". Lord Woolf went on to authoritatively opine in delivering the judgment of the Court:

"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

[3] Which has been complied with in the present proceedings
[4] Again, which has been complied with in the present proceedings.
[5] [2001] 1 All ER 91

to the overriding objective 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 interest to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible….

Useful though, the power is under Part 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 Mr. Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involved the judge conducting a mini trial, that is not the objective of the provisions; it is to enable cases, where there is not real prospect of success either way, to be disposed of summarily"

[33] Thus accepting as I do, this opinion as correctly stating the law in Belize, it appears to me, that once the Claimant is able to satisfy its burden of establishing, by credible evidence, that there are grounds to believe that the Defendant has no real prospect of success and there is no reason for a trial, the evidential burden shifts to the Defendant to prove, in order for him to succeed, that there is some real prospect or chance of success. To succeed therefore, he must establish, albeit not to a very high standard, and that his defence is not false, fanciful or imaginary and is better than arguable.

[34] The Court, in my understanding of the law, is not entitled thereby, to embark on a probabilistic consideration of the merits of the case, taking into account the burden on the Claimant to prove its case on the balance of probabilities, but the Court, for the Claimant to succeed, must be satisfied as to the "the absence of reality" of the facts and matters relating to the Defendant's defence see: *Three Rivers DC v Bank of England (No. 3*[6]*).*

[6] [2001] 2 All ER 513

[35] In determining whether there is some real prospect of success, the Court is thereby entitled to consider the merits of the case to the extent, and only to the extent necessary, to determine whether the Defendant's case has sufficient merit to proceed to trial.

[36] It is also clear that where the Court, in a summary judgment application such as the present one, has to consider short points of law or construction, the Court is entitled to decide such points of law or construction, if it has all the evidence before it for a proper determination, and it is satisfied that the parties have had an adequate opportunity to address the points in argument.

[37] Finally where there is a complex or complicated set of matters of fact and law, which would necessitate a trial of the relevant issues, having regard to the admissible evidence which can be brought before the Court, and having regard to the law which governs such facts and matters, it is not appropriate to grant summary judgment[7].

The sealing of a document

[38] In relation to the Guarantees generally, it is well established, in accordance with general common law contractual principles, and the law relating to guarantees, that a contract of guarantee, if it is not embodied in a deed, must be supported by consideration (which is not past consideration) for such contract of guarantee to be enforceable. Such contracts of guarantee which are embodied in a deed (contracts under seal) are exempt from the requirement for consideration of any kind[8].

[39] Under the Chapter 190, of the Law of Property Act, Revised Edition 2000, laws of Belize, a deed is defined as:

[7] Apvodedo NV v Collins [2008] EWHC 775 (Ch) referered to in Part 24.2.3 of the UK Civil Procedure Rules and Practice Directions 2011.
[8] *Robinson v Rivero Belize Supreme Court Claim* No. 31 of 2012 and *Shah v Shah*[2001] EWCA Civ 527.

> *"…. a writing or instrument written on paper or parchment, signed, sealed and delivered, to prove and testify the agreement of the parties whose deed it is, to the things contained in the deed"*

[40] In England, Section 1(1) of the Law of Property (Miscellaneous Provisions) Act 1989 abolished the requirement of a seal for the valid execution of an instrument as a deed by an individual. So a Court in Belize must be very wary of the current law in England and of its applicability to Belize. In the absence of such similar statutory provision within Belize, which abolishes the requirement of a seal, the applicable law of England relating to such deeds would be the common law in England, which predated such abolition.

[41] In the absence of a case in Belize being brought to my attention, I therefore refer to an applicable case in England, before the implementation of this 1989 Act, which demonstrates that there are a variety of ways in which a document could be determined to be sealed, without an actual seal being affixed to the document.

[42] In the pre-abolition English case of *First National Securities Ltd. v Jones and Another* [9], Sir David Cairns stated the requirements needed to establish that a document has been sealed are as follows:

> *"Moreover, while in 1888 the printed indication of a locus sigilli was regarded as being merely the place where a seal was to be affixed, I have no doubt that it is now regarded by most business people and ordinary members of the public as constituting the seal itself. I am sure that many documents intended by all parties to be deeds are now executed without any further formality than the signature opposite the words "Signed, sealed and delivered" usually in the presence of a witness, and I think it would be lamentable if the validity of documents so executed could be successfully challenged."*

[9] [1978] Ch. 1099

[43] Thus, the requirement of a formal seal, since as long ago as 1978, is no longer required at common law to satisfy the requirement of sealing a document, and a deed would be established by simply a signature alongside the words "signed sealed and delivered".

Consideration

[44] The first argument put forward by the Defendant is that there was no consideration given for the Guarantees.

[45] The Claimant's response is that the loan advanced to the Borrowers was consideration and that in any event:

a) Consideration is not necessary in respect of contracts under seal where the words 'signed sealed and delivered' are against the signature of the Defendant,

b) Even if the Guarantees were not sealed, the Defendant is estopped from denying it was sealed, relying on *TCB Ltd v Gray* [10].

c) That if the Defendant's individual signatures were in fact without an actual seal, while all of his other signatures where he signed as the Director of the companies had the seal of the companies, does not mean that the documents cannot be regarded as deeds.

[46] I agree with these arguments put forward by the Claimant.

[47] I also agree with the argument advanced by the Claimant that on the facts of the present case, the Guarantees were documents under seal or deeds, as they comply with the dicta in *First National Securities Ltd. V. Jones and Another.*[11]

[48] In the instant case, the Defendant signed the Guarantees and its signature was between the words:

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[10] [1986] 1 All ER 587.

[11] - [1978] Ch. 109).

" Signed Sealed and Delivered in the presence of " and " (seal) "

[49] That, in my opinion, makes it very clear that the parties were dealing with a deed which does not require any consideration.

The Entire Agreement Clause

[50] Where contracts of guarantees are concerned the law in relation to misrepresentations is not unlike other contracts, in that, it is liable to be avoided if induced by a material misrepresentation of fact made by a bank or its agent.

[51] Specifically, an alleged representation that the signing of guarantees "were mere paper formalities and would involve no personal obligation or liability of the Defendant" has been the subject of academic, as well as judicial comment, as quoted in Para 5-005 Page 133 of Andrews & Millet's Law of Guarantee, where it states:

> *"It is fairly common for the surety to complain that he was reassured by the creditor that the guarantee would be a "mere formality", or that it was unlikely that he would ever be called upon to pay under it; but it has been held in Australia that the expression of an opinion that the creditor would be unlikely to place reliance upon the guarantee is not a promise that it will never be enforced: Morris v Wardley Australia Property Management Ltd (1994) A.S.C. 56-268. However, a binding promise or an assurance that the creditor will release the surety in certain circumstances or a promise not to enforce the guarantee may give rise to a defence. The difficulty for the surety generally lies in proving that the promise was made by the creditor in the first place, since the surrounding documentation will usually contradict it."*

[52] Such documentation, referred to in the just quoted passage, may include an expressed provision in a contract of guarantee which amounts to what has been called: "an entire agreement clause".

[53] Entire agreement clauses, such as that set out in paragraph 13 of the Guarantees, and which is the subject of the present proceedings, often appear in the various guises and have been subjected to judicial interpretation .

[54] I am prepared to accept, for the purposes of the present case, and as submitted by the Defendant, that paragraph 13 has to be interpreted in accordance with the same restrictive construction as exclusion clauses, whereby any doubt or ambiguity must be resolved in favour of the party who did not draft it, and against anyone who seeks to rely on it (consistent with what is known as the contra proferentem rule).

[55] It seems to me however, that this clause, in the context of the present case, is quite unambiguous and clear, and seeks to exclude the binding effect of any verbal assurance or promise which is not embodied within the body of the Guarantee. This clearly is not confined to innocent misrepresentations alone and does include negligent misrepresentations. Obviously fraudulent misrepresentations may not be so easily excluded as a result of the vitiating effect of fraudulent conduct. The reference to "any representation or promise" would therefore, it seems to me, clearly capture both innocent and negligent misrepresentations.

[56] I therefore agree with the Claimant that by paragraph 13 the parties have contracted out their right to rely on any statement or representation (other than fraudulent ones) not found in the Guarantees.

[57] It should be noted at this point that guarantors and sureties are not dissimilar in relation to creditors, in that, they promise to pay the debt of another. Their difference lies in the stage at which they become liable to the creditor with respect to the principle debtor. (see *JPMorgan Chase Bank N.A. v Earth Foods Inc*.[12]),

[12] 939 N.E.2d 487 (Ill. 2010)

For the purposes of this case, where the focus is on their relationship with the creditor, a guarantor and a surety are therefore analogous.

Misrepresentation

[58] I agree with the Claimant that in the case of negligent misrepresentations the maker of the statement should have 'special knowledge or skill' as set out in the Court of Appeal case of *Esso Petroleum Co. v Mardon*[13].

[59] It is trite law that in order for there to be liability for negligent misrepresentation, there needs to exist a special relationship between the parties giving rise to a duty of care. Such duty generally exists where the party making the statement has special knowledge or skill in relation to the subject matter of the contract (see: *Harris v Wyre Forest District Council* [1988] AC 831) and can reasonably foresee that the other party will rely upon their statement (see: *Chaudry v Prabhakar* [1988] 3 All ER 718).

[60] It is a matter for determination, based on an examination of the Defendant's defence, as to whether fraudulent, negligent or innocent misrepresentation has been pleaded. Such a determination, in my view, cannot definitively be made in the present case because the defence is somewhat defective as it fails to specifically plead the nature of the alleged misrepresentation, that is, whether it is fraudulent, negligent or an innocent misrepresentation.

[61] The second argument put forward by the Defendant in its defence is that he was induced to sign the agreement by misrepresentation.

[62] Although the Claimant denies that a misrepresentation was made I am prepared to assume, for the purpose of the Defendants' argument, that an innocent or negligent misrepresentation was made and pleaded.

[63] There is, I believe, considerable merit in the Claimant's argument that the alleged statement is one of law and not fact, and that if the alleged statement (or representation) was made it was made by a non-legal practitioner and could not therefore be relied upon.

[13] [1976] 2 All ER. 5.

[64] It has been established[14] and has been reiterated by HHJ David Cooke in the recent case of *Nationwide Building Society v Christie and another*[15], a case which is generally not dissimilar to the present case, that in the case of negligent misrepresentation (which is the Defendant's case at its highest) the tort of negligence requires that there is "a special relationship between the parties (typically that between an adviser and his client) which is not present between a creditor and surety." Without the said special relationship there can be no duty of care.

[65] The relevant facts in Nationwide Building Society v Christie and another are that principal debts arose on three commercial loan facilities granted to the first Defendant. The amounts outstanding were secured by legal mortgages over two properties. The second Defendant, an experienced businessman, agreed to personally guarantee the discharge of all present and future liabilities of the first Defendant. The first Defendant defaulted in payment. The second Defendant argued among other things, that he was not provided with sound independent legal advice when entering into the guarantee and that the Claimant imposed undue influence on him into entering the guarantee.

[66] This position is conveniently summarised in Chitty on Contracts, under the chapter dealing with Suretyship, at §44-122: "*the Courts have clearly set their face against imposing a duty of care in the tort of negligence on a creditor to the surety to safeguard the economic welfare of the latter's position*."

[67] On the basis that there can be no special relationship between creditor and surety, then in my view there can be no reliance on statements made, because a creditor does not operate in an advisory capacity in such circumstances, and such a relationship would conflict with the respective interests of the parties. Their relationship will be regulated by the terms of the contract.

[68] Further, it should be added that, the Courts have not recognised any general duty on a creditor to safeguard the economic interests of a surety, either in the tort of

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[14]

[15] [2013] EWHC 127 (ch)

negligence or by way of implied term in the suretyship contract; see Chitty on Contracts para 44-110 .

[69] The facts of the present case demonstrate why such special relationships cannot exist between a creditor and a surety. The Claimant cannot be under a duty to use reasonable care in his representations because it is expected that the Defendant, an experienced businessman, would seek legal advice regarding any material fact, before entering into a contract of this nature, where millions of dollars may be at risk.

[70] The Claimant contends that even if the statement is found to be a misrepresentation, clause 13 of the Guarantee excludes liability for any representations made outside of the Guarantee and relying on Andrews & Millet, Law of Guarantees, 4th Ed. At p 134, para 5-007, and maintains that such statements are common in guarantee contracts. I agree with this contention of the Claimant.

[71] In any event, I am satisfied that clause 13 of the Guarantee, containing the entire agreement provision, is clear in its terms and effectively excludes liability for negligent or innocent misrepresentations made outside of the Guarantee .

[72] The Defendant, did not specifically plead fraudulent misrepresentation, which is required in order to enable him to rely on such misrepresentation.

Conduct of the Receiver

[73] The third argument raised by the Defendant in its submission relates to the conduct of the Receivers of the Borrowers.

[74] I entirely agree with the Claimant's submission that this issue is not directly relevant to the present claims and is a complete and separate issue with its own cause of action. It does not in my view merit detailed consideration.

Conclusion

[75] I am satisfied that the Claimant has discharged its burden of establishing, by credible evidence, on the merits, that there are grounds to believe that the Defendant has no real prospect of succeeding at the trial.

[76] There was therefore an evidential burden on the Defendant of proving some real prospect of success at a trial.

[77] In all the circumstances of the case I am not satisfied, even on the not very high applicable standard of proof, that when stripped of the matters which the Defendant has sought to establish, which it seems to me clearly cannot be the subject of any trial of the issues before the Court, that what is left amounts to the Defendant not having a real prospect of succeeding at trial.

[78] The Defendant failed, in my view, in his attempt to seek to establish a complex or complicated set of matters of fact and law, which would have necessitated a trial of the relevant issues, having regard to the admissible evidence which can be brought before the Court, and having regard to the established law which governs such facts and matters.

[79] On such facts and matters and issues raised, when carefully examined, and stripped of the attempt to confuse and complicate them (what are in effect relatively simple matters) there is a clear picture left: that the Claimant has a plain and straightforward, strong and convincing case. That the Defendant, in contrast, is seeking to mount a smokescreen of a defence to conceal the fact that he has no real defence, no real prospect of succeeding at trial, and that he is attempting to delay an early and just disposal of the matters in issue between the parties.

[80] In my view there are clear indications of the Defendant's lack of bona fides in his defence. These indications are firstly, the Defendant's lack of forthrightness in directly admitting that he signed the Guarantees. Secondly, the raising of facts and matters which cannot be pursued in the present proceedings (as they are collateral to the present claims). Finally, the inclusion of, or reference to parties, who or which are not parties to the present proceedings (and would have had to be necessarily joined in the present proceedings) for the just disposal of the facts and

matters which the Defendant has raised, and therefore the matters concerning them, cannot properly be resolved by the Court.

[81] I therefore find that none of the arguments advanced by the Defendant give rise to any real prospect of the Defendant successfully defending this claim at trial with regards to his liability as a guarantor.

[82] I am therefore satisfied that there should be summary judgment accordingly for the Claimant on all of its claims.

[83] I have not found it necessary to consider the alternative basis of the Claimant's application, namely to strike out the defences, and if I did, the same reasoning which I have found on the summary judgment application, would apply to the strike out application.

[84] Finally I have not in detail considered the question, which has been ventilated in the submission, of whether the Claimant must exhaust his execution of other securities which has been commenced, such as the First charges and Mortgage Debentures on the real and personal estate of the Borrowing Companies, before it can proceed with executing any summary judgment.

[85] I am satisfied, based on the decision of the Chief Justice of Belize in this Court (in the case of the Heritage Bank (Belize) Limited v William Lindo Claim No. 503 of 2011), in an analogous circumstance to the present one, that this court can make the orders which it proposes, as, based on this case, a Claimant Bank, as mortgagee, is free to pursue a claim for payment of a sum as well as seek to exercise its contractual power of sale under the mortgage deed, but is precluded from recovering more than the mortgage debt due and owing.

[86] Thus the Claimant may pursue **a**nd obtain summary judgment in its present consolidated claims as well as pursue his execution of other securities. This is without prejudice to any application which the Defendant may make for a stay, including of execution, in relation to any question which may arise in the simultaneous pursuit of such claims or execution.

[87] This latter question is properly the subject of an application which is not at present before this Court. If and when any such an application is made I, or I am sure any judge of the Supreme Court, will give full and proper consideration to it.

Costs

[88] I also order that the Defendant should pay the Claimant's prescribed costs on the consolidated claims.

Disposition

[89] For the reasons given above, I will order summary judgment on the Claimant's claims as follows:

a) The sum of BZ $12,166,995.48 inclusive of contractual interest at rate of 17% per annum from the 20th August 2008 to 10th February 2013, and continuing until payment, being debt owed under the Guarantee dated 20th August 2008 in respect of all debts and liabilities of Ideco Enterprises limited; including prescribed costs.

b) The sum of BZ 11,540,988.32 inclusive of contractual interest to date at rate of 12% per annum from the 20th August 2008 to 10th February 2013 and continuing until payment, being debt owed under the Guarantee dated 20th August 2008 in respect of all debts and liabilities of Belize Crocodiles and Reptiles Breeders; including prescribed costs.

c) The sum of BZ 4,696,291.32 inclusive of contractual interest to date at rate of 17% per annum from 20th August 2008 to 20th February 2013 and continuing until final payment, being debt owed under the Guarantee dated 20th August 2008 in respect of all debts and liabilities of Belize Ready Mix Concrete Ltd; including prescribed costs.

d) The sum of BZ $1,028,347.21 inclusive of contractual interest to date at rate of 17% per annum from the 20th August 2008 to 11th February 2013 continuing until final payment, being debt owed under the

Guarantee dated 20th August 2008 in respect of all debts and liabilities of Ideco Enterprises limited; including prescribed costs.

The Hon. Mr. Justice Courtney A. Abel (Ag.)