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ROYAL COURT
(Samedi Division)

27th April, 1993 55.

Before the Judicial Greffier

BETWEEN	**Hambros Bank (Jersey) Limited**	**PLAINTIFF**
AND	**Marian Lillian Jasper née Baker**	**DEFENDANT**

Application by the Plaintiff for summary Judgment under Rule 7/1(1) of the Royal Court Rules, 1992.

Advocate T.J. Le Cocq for the Plaintiff.
Advocate R.J.F. Pirie for the Defendant.

JUDGMENT

JUDICIAL GREFFIER: There are two elements to the Plaintiff's claim in this action. The first element relates to the personal accounts of the Defendant and the second element relates to the alleged guarantees given by the Defendant in relation to various accounts of a Company known as Media Mailers Limited of which Company the Defendant was at all material times both a beneficial owner and a Director.

The Plaintiff's claim in respect of the personal account is for £25,571.48 plus interest thereon from 31st December, 1992 to the date of payment at 2½% above Hambros Bank base rate from time to time.

The second element of the Plaintiff's claim, in respect of the guarantees, is for the sum of £126,155.13 plus interest from 31st December, 1992 to the date of payment at the rate of 2½% above Hambros Bank base rate from time to time.

For the purposes of this summons, the Plaintiff conceded that it would only seek to rely upon the guarantee dated 7th February, 1991 and the subsequent guarantee document dated 3rd May, 1991 both in the sum of £85,000. The guarantee dated 3rd May, 1991 was executed to replace the guarantee dated 7th February, 1991 which went missing but both were in identical terms.

Both counsel quoted from R.S.C. (1993 Ed'n) sections 14/3-4.

The principles in relation to summary Judgment are clearly set out in those sections and I have quoted them in previous Judgments in order to define the relevant test. I am going to quote a number of these sections from the 1993 White Book whilst omitting case references for the sake of brevity. However, although I am only quoting from certain sections, when arriving at this decision I took into account all those sections.

The quotations are as follows:-

(1) The first two paragraphs of section 14/3-4/4 which read as follows:-

"Defendant's affidavit - The defendant's affidavit must "condescend upon particulars," and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it. It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part.

A mere general denial that the defendant is indebted will not suffice unless the grounds on which the defendant relies as showing that he is not indebted are stated. If the affidavit commences with a statement that the defendant is not indebted to the plaintiff in the account claimed, or any part thereof, it should state why the defendant is not so indebted, and state the real nature of the defence relied on."

(2) 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."

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

"On the other hand, a complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some other reason there ought to be a trial; and leave to defend ought to be given unless there is clearly no defence in law such as could have been raised on the former demurrer to the plea and no possibility of a real defence on the question of fact. 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."

(4) The fifth paragraph on page 150 of the 1993 White Book of the same section commences as follows:-

"Where there is "a fair probability of a defence" unconditional leave to defend ought to be given."

(5) The penultimate paragraph of section 14/3-4/8 commences as follows:-

"Even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given."

(6) Section 14/3-4/9 commences as follows:-

"Some other reason for trial - The former O.14,r.1, provided that the defendant should have leave to defend if he "shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally." These words were replaced in r.3(1) by the words that the defendant should have leave to defend if he satisfied the court "that there ought for some other reason to be a trial" of the claim or part to which the summons for judgment relates. These words, if anything, are wider in their scope than the former. It sometimes happens that the defendant may not be able to pin-point any precise "issue or question in dispute which ought to be tried," nevertheless it is apparent that for some other reason there ought to be a trial."

(7) 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."

(8) Next 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."

The Defendant, in her Affidavit in answer to the Plaintiff's Affidavit in support of the application, raised a number of lines of defence.

The first line of defence related to the extent of the guarantee. I was fully satisfied that the Defendant had personally guaranteed the debts of Media Mailers Limited to the extent set out in the guarantee document which was attached as exhibit "AEHR 11" to the Affidavit of Mr. A.E.H. Rowland in support of the application of the Plaintiff. It was common ground between the parties, for the purposes of this application, that clause 2 limited the extent of the guarantee to £85,000.00 plus interest thereon with half yearly rests as shall accrue due within six months before and at any time after the date of demand by the Plaintiff on the Defendant for payment under the guarantee. It was also common ground that the date of demand was 5th January, 1993, and that therefore the maximum claim under the guarantee was for £85,000.00 plus interest at 2½% over Hambros Bank base rate from time to time from 5th July, 1992, to the date of payment. In a Supplemental Affidavit which was sworn on the date of the hearing and not challenged on behalf of the Defendant the said Mr. Rowland deposed to the effect that this calculation came to the sum of £89,916.77 as at 5th January, 1993.

The next line of defence of the Defendant was that as the summons was for judgment for the whole amount claimed in the action or any part thereof, without a lesser part being clearly defined, then if I were to find that any part of the claim should not be given on summary judgment then I should dismiss the whole of the summons.

Rule 7/2(1) reads as follows:-

> ***"Unless on the hearing of an application under Rule 7/1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed."***

In support of his contention, Advocate Pirie quoted from R.S.C. (1993 Ed'n) Section 14/1/7 on page 144 as follows:-

> ***"14/1/7 Proceeding on part of a claim - This rule enables the plaintiff to proceed under O.14 for part of a claim included in the writ. The plaintiff who knows that the defendant has an arguable defence as to part of his claim, should not proceed under O.14 for this part, but he can properly proceed for the residue. Thus, if the plaintiff's claim is for £9,000 for goods sold and delivered or for work and labour or such like, and the defendant had intimated a defence, whether by way of set-off or counterclaim, as to £1,000 of this sum, the plaintiff may proceed under O.14 for £8,000 as to which there is no defence, leaving the residue to be tried.***
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> ***It is, however, necessary that part or parts of any claim or claims included in the writ in respect of which an application under O.14 is made should be clearly stated and identified in the summons, so that there should be no room for error or mistake as to what remains in issue for trial between the parties."***

On the other hand, the fifth paragraph of Section 14/3-4/2 on page 148 of the 1993 White Book reads as follows:-

> ***"Where part of the claim is clearly due by admission or otherwise, while a defence is shown as to the residue, the Master should order judgment for the sum due and give leave to defend as to the residue. He cannot make leave to defend as to the residue conditional on payment to the plaintiff of the amount due (Dennis v. Seymour [1879] 4 Ex. D.80; Lazarus v. Smith [1908] 2 K.B. 266 C.A.). The Court has power to give summary judgment for part of a claim and refer the balance to arbitration under an arbitration clause, not only where the balance is covered by an arguable defence but also where the defence is founded on a mixture of law and fact more suited to the expertise of an arbitrator (Archrital Luxfer v. Dunning (A.J.) & Son [1987] 1 F.T.L.R. 372 C.A.)."***

I take these paragraphs to mean that when a Plaintiff applies for summary judgment in relation to a specific part only of his claim then he should clearly specify the specific part in relation to which he is so applying. However, I take the second quotation to mean that where an application is made for summary judgment in relation to the whole of the claim, the Court has the power to give judgment for part of the claim and to give leave to defend the balance of the claim provided that it is absolutely clear as to the part of the claim in relation to which summary judgment has been given. I therefore found against the Defendant on this point.

The next point of defence raised related to the fact that Media Mailers Limited had been declared *en désastre*. Advocate Pirie argued that that meant that the debt due by Media Mailers Limited had been frozen as at that date and that therefore the sum due under the guarantee was similarly frozen.

He quoted from Article 29(2) of the Bankruptcy (Désastre) (Jersey) Law 1990 which reads as follows:-

> ***"Where a debt bears interest, interest to the date of the declaration is provable as part of the debt, except in the case of a debt secured by a hypothec, secured interest, or pledge, when interest is provable to the date of payment of the claim and payable out of the proceeds of sale of the secured property to the extent that it is required and able to meet it and is secured thereby."***

Article 29 is headed, "Provable Debts". It codifies the previous common law principle that claims in a désastre were frozen as at the date of the désastre. However, there is nothing either in Article 29(2) or elsewhere in the Bankruptcy (Désastre) (Jersey) Law 1990 to indicate that the actual debt is limited to that sum as opposed to the sum provable in the désastre being limited to that sum.

Furthermore, clause 4 of the guarantee for £85,000 reads as follows:-

> *"For all purposes of the liability of the undersigned to you under this Guarantee (including in particular but 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 which you shall receive actual notice of his death shall for all purposes of this Guarantee be deemed to be included in the moneys due and owing to you by the Principal."

Furthermore, even if the Defendant's submission were correct, which it is not, this would still not help the Defendant because the debts owed by Media Mailers Limited as at the date of the désastre far exceed the limit of the guarantee as previously stated on page 6 of this Judgment.

I am therefore fully satisfied that this line of defence has failed to reach the required standard as set out in the White Book.

The next line of defence related to three cheques which were issued on one of the Defendant's bank accounts by virtue of a mandate form which was signed by the Defendant on 7th September, 1990. The Defendant alleges that this mandate was granted solely to a Mr. G.H. Ritchie who was then the managing director of Ryco Trust Financial Services Limited and that the three payments were not authorised personally by Mr. Ritchie but were authorised by Ryco Trust Financial Services Limited. At the hearing Advocate Pirie conceded that the first payment for the sum of £19,440.00 was confirmed to the Plaintiff by the said Mr. Ritchie and that therefore that payment cannot be disputed. However, the Defendant wished to raise as a defence the further two payments of £20,000 and £4,306.24.

A copy of the mandate in question was attached as exhibit AEHR 13 to Mr. Rowland's affidavit dated 1st March, 1993. This mandate reads as follows:-

"Name of account Marian Jasper
I/We have authorised Ryco Trust Financial Services Limited specimens of whose signatures are in your possession jointly in my/our name

(1) To withdraw monies per procuration on my banking accounts.
(2) To withdraw anything held by you by way of security or for safe custody, collection or any other purpose whatsoever on my account.
(3) From time to time to certify the correctness of any such account.
(4) Generally to act in all matters of business with you.
(5) And I request you to act on the above instructions and in particular to pay on all such cheques bills or notes notwithstanding that any such payment may cause my said account(s) to be overdrawn or may increase an existing overdraft. Above shall continue until I shall give you notice in writing to the contrary."

At the bottom of the mandate form is a space for name(s) & signature(s) of persons authorised to sign and the only name given there is that of Gavin H. Ritchie (M.D.). However, on the form above the words "appear below" were deleted after the word "signatures" and the words "are in your possession" were inserted in their place. Advocate Pirie argued that the effect of the mandate was only to appoint Mr. Ritchie personally and not Ryco Trust Financial Services Limited. I find it impossible to interpret the mandate in that way. Firstly, the mandate is in favour of Ryco Trust Financial Services Limited and not in favour of Mr. Ritchie. Secondly, the mandate talks in terms of signatures which are in the Plaintiff's possession and not signatures below. Thirdly, where Mr. Ritchie's signature is given it is qualified by the initials "M.D." which presumably mean Managing Director, which was the post which he then held with Ryco Trust Financial Services Limited and this shows that if he signed he would sign in that capacity on behalf of Ryco. It may be that the Defendant misunderstood the position but that cannot effect the right of the Plaintiff to act on the plain terms of the mandate. The Defendant also alleged that Mr. Ritchie alone was her financial adviser but Mr. Ritchie was working for Ryco and the Plaintiff produced as exhibit AEHR 18 to Mr. Rowland's second affidavit a letter addressed to Hambros which confirmed Ryco as being her appointed financial advisers.

Advocate Pirie hinted that the mandate might in some way have been forged. However, there was no such allegation in the Defendant's affidavit and no such allegation in the Defendant's draft answer and it appears to me that this is nothing more than wild speculation. Accordingly, I was fully satisfied that this line of defence also failed to reach the required standard as set out in the White Book.

The next line of defence related to a bank account which was set up in the Defendant's name in April 1990 with an initial sum of £29,592.07 and which, due to an error, was stated as being in the name of the Defendant at an address of Messrs. Miller Brener & Co in London. The Defendant alleged that these monies had been misappropriated by the Plaintiff.

The Defendant attached as exhibit MLJ 3 to her affidavit both the letter of 23rd April, 1992 confirming the creation of this deposit and also a subsequent statement 5 dated 29th August, 1990 which indicated that the current balance on that account was £25,778.49. The Plaintiff was able to demonstrate by the production of various bank statements that this account was closed on 23rd November, 1990 and the proceeds thereof transferred to accounts either in the name of the Defendant or in the name of Media Mailers Limited. I was fully satisfied that the Defendant had received value in relation to the reduced sum of £25,778.49 plus further interest thereon from this account.

However, Advocate Pirie then sought to question how the initial balance of £29,592.07 in April 1990 had been reduced to £25,778.49 by August 1990.

I was fully satisfied that at all material times the bank had provided the Defendant with the relevant statements and, indeed, the fact that statement 5 was attached to the Defendant's affidavit tended to confirm this. Although the bank was not able for the purposes of this hearing, to provide me with all the statements on this account I find it totally unconvincing that the Defendant should seek to raise this line of argument in this way at this time. The defence raised was that all the monies in this account had been misappropriated and not that any specific sum had been taken from the account. Furthermore, I am fully satisfied that this specific issue has never been raised before and was not specifically raised in the Defendant's affidavit. It is simply inconceivable that the Plaintiff should have wrongly debited this account without the Defendant raising the issue at the time. Accordingly, this line of defence also fails to reach the required standard as set out in the White Book.

The next line of defence related to an account in the sum of £27,000 which was set up in order to cover arrears of interest payments both on the Defendant's account and also on the accounts of Media Mailers Limited. The Defendant alleged that these monies ought to have been applied immediately whereas they were only applied to the relevant accounts in April 1992. However, the Plaintiffs were able to produce a file note signed by a former managing director, Mr. Brian Curtis, in which he indicated the reasons why this account was set up in October 1991. I was also fully satisfied that the Defendant had been sent statements relating to this account. Furthermore, although this line of defence was mentioned in the Defendant's draft answer it is not mentioned at all in the Defendant's affidavit. Furthermore, the Defendant produced absolutely nothing to indicate that she had requested transfers from this special account at an earlier date. This line of defence therefore also failed to reach the required standard as set out in the White Book.

The final line of defence related to an account in the sum of £85,000 a statement relating to which was attached as Exhibit MLJ 4 to the Defendant's affidavit. The Defendant also alleged that the monies held in this account ought to have been applied earlier in order to reduce the balance of monies due under other accounts. However, the Plaintiff was able to show that this account was set up back to back with another debit account for purely technical reasons in relation to the guarantee for £85,000 and that, therefore, as the two accounts were back to back they cancelled each other out at all times. I was fully satisfied that the information of the bank was correct and that the Defendant had completely misunderstood the situation.

I am bound to say that a number of the lines of defence were entirely speculative and were lacking in the degree of particularity which is required in accordance with the quotation from section 14/3-4/4.

Accordingly, I am granting summary Judgment for the following:-

(A) in relation to the overdrawn personal accounts for the sum of £25,571.48, being the balance due as at 31st December, 1992 together with interest thereon at 2½% above Hambros Bank base rate from time to time from 31st December, 1992 to the date of payment;

(B) in relation to the guarantees in the sum of £89,916.77, representing the sum of £85,000 together with interest thereon from 5th July, 1992 to 5th January, 1993, together with interest thereon at 2½% above Hambros Bank base rate from time to time from 5th January, 1993 to the date of payment thereof;

(C) I am also ordering an arrest of wages at the rate of £40 per week and permission to sell.

I am giving leave to defend for the balance of the Plaintiff's claim which relates to the amount claimed under the guarantee over and above the said sum of £85,000 plus interest from 5th July 1992 onwards.

Finally, I will need to be addressed by both parties on the matter of the costs of this application.

Authorities

Royal Court Rules, 1992: Rule 7/1(1).

R.S.C. (1993 Ed'n): s.14/1/7
s.14/3-4.

Bankruptcy (Désastre) (Jersey) Law 1990: Article 29(2).

London Joint Stock Bank Limited -v- MacMillan and Arthur [1918] A.C. 777.

Paget's Law of Banking (10th Ed'n): 3: Payment of cheques.

B. Liggett (Liverpool) Ltd -v- Barclays Bank Ltd [1928] 1 K.B. 48.

Limpgrange Ltd -v- Bank of Credit and Commerce International S.A. (1986) F.L.R.

Le Masurier, Giffard and Poch -v- Pinson (30th April, 1992) Jersey Unreported.

Standard Chartered Bank Ltd -v- Walker & Anor. [1982] 3 All E.R. 938.

Miles -v- Bull [1968] 3 All E.R. 632.

Jones -v- Stone [1894] A.C. 122.