BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No. 116 of 2013

BETWEEN

SCOTT GOODMAN **CLAIMANT**

AND

VENTURE KENDAL INTERNATIONAL INC. **FIRST DEFENDANT**

HORN BARLOW INTERNATIONAL INC. **SECOND DEFENDANT**

TYSON THOMPSON **THIRD DEFENDANT**

DENNIS HARRISON **FOURTH DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2013: July 04,10
2017: February 02

Mr. Gregory P.B. Nicholls and Ms. Lani Daisley, Attorneys-at-Law for the Claimant.
Ms. Nicole C. Roachford, Attorney-at-Law for the Second and Fourth Defendants.

DECISION

Introduction

[1] In this matter, the Claimant is seeking summary judgment against the Defendants under Part 15 of the Supreme Court (Civil Procedure) Rules 2008, ("the CPR"). The application for summary judgment was filed on 08 February 2013, approximately two weeks after the filing of the claim form.

Background

[2] The Claimant's action was initiated against four Defendants. The statement of claim alleges that by a written agreement between the parties, dated 28 September 2012, the Claimant agreed to lend the First Defendant $500,000.00 Barbados dollars.

[3] The abovementioned loan was intended to be secured by:

(1) a third legal charge over property owned by the Second Defendant;

(2) personal guarantees by the Third and Fourth Defendants;

(3) a promissory note executed by the Third and Fourth Defendants, on the same day as the contract, and in favour of the Claimant; and

(4) the assignment to the Claimant of an undetermined portion of the commercial and other rents due to the Second Defendant,

these payments to continue until the principal sum and interest were repaid in full.

[4] The parties entered into a second written agreement on 29 October 2012. The initial loan was increased from $500,000.00 to $650,000.00 Barbados dollars. The terms remained the same as at paragraph [3] above. The execution of promissory notes, by the Third and Fourth Defendants, coincided with the execution of both agreements.

[5] On the instructions of the Defendants, the Claimant disbursed two sums equivalent to $600,000.00 Barbados dollars, to Broughton Capital Ltd., in September and October 2012. It was a term of each agreement that the principal sums advanced were to be repaid no later than 20 November 2012, together with interest at 10 per cent per annum. However, by that date the Defendants had failed and/or refused to repay either the principal sum, or the accrued interest, or to execute a deed of charge by way of legal mortgage.

[6] The Claimant also lays claim to an additional sum of $22,500.00 Barbados dollars paid by him, as legal professional fees due to counsel, for work done and time spent on matters relating to the agreements. This sum was deducted by the Claimant from the remaining $50,000.00 from the loan, pursuant to Clause 10 of the second agreement.

[7] The total claim is for $622,500.00, payable by the Third and Fourth Defendants on their individual promissory notes executed on 29 October 2012, or by all the Defendants as money had and received. There are additional and/or alternative claims for general damages, and specific performance of both agreements specifically in relation to the execution of a third charge over the Second Defendant's leasehold property.

[8] The Claimant also seeks an injunction to restrain the Defendants from selling, disposing of or dissipating their interests in any property owned by them; interest; such further or other relief as the Court deems just; and costs.

The Relevant Rules

[9] Part 15 of the CPR addresses the grounds on which a court may grant summary judgment, the procedure to be followed, and the filing of affidavit evidence. The relevant portions of the CPR are Rules 15.2, 15.4 and 15.5. Rule 15.2 states that:

> "The court may give summary judgment against a party on the whole of a claim or on a particular issue if
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> (a) it considers that
>
> (i) the claimant has no real prospect of succeeding on the claim or issue; and
>
> (ii) the 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 trial".

[10] Rules 15.4 provides that:

> "(1) Notice of an application for summary judgment identifying the issues to be raised must be served not less than 14 days before the date fixed for the hearing of the application.
>
> (2) The court may exercise its powers without such notice at any case management conference, provided it is satisfied that each party has had a full opportunity to present any relevant evidence and argument".

[11] And Rule 15.5 further provides that:-

> "(1) The applicant must
>
> (a) file evidence on affidavit in support of his application, and
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> (b) serve copies on the party against whom summary judgment is sought not less than 14 days before the date fixed for the hearing of the application.
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> (2) If the respondent wishes to reply on evidence he must at least 7 days before the summary judgment hearing
>
> (a) file the evidence on affidavit; and
>
> (b) serve copies on the applicant and any
>
> other party".

[12] The grounds of the application are contained in the Notice of Application. The grounds fall squarely within Rule 15.2, and contend that:

(1) the Defendants have no real prospect of successfully defending the claim; and

(2) there is no other reason why the case should be disposed of at trial.

[13] By virtue of Rule 15.2, the Court is faced with two inquiries. First, it must decide whether the Second and Fourth Defendants have no real prospect of successfully defending the claim. And, even if the Court resolves this issue in favour of the Claimant, the other inquiry is whether any other reason exists that supports the resolution of the claim by a trial.

[14] What then are the guidelines available to this Court to assist with the determination of whether the Defendants have a real prospect of success? The editors of The Caribbean Civil Court Practice 2011 posit that:

> "The Court should interpret 'real' as the opposite of fanciful and should not conduct a mini-trial in order to establish whether a summary disposal [is] appropriate: **Swain v. Hillman [2001] 1 All ER 91 CA.**
>
> The test under Part 15.....is whether there is a real prospect of success in the sense that the prospect of success is realistic rather than fanciful; when undertaking this exercise, the court should consider the evidence which can reasonably be expected to be available at the trial – or the lack of it; it is not appropriate for the court to undertake an examination of the evidence (without a trial) and adopt the standard applicable to a trial (namely, the

> balance of probabilities). See **Royal Brompton Hospital NHS Trust v. Hammond (No. 5) [2001] EWCA Civ. 550".** (Pages 144-145).

[15] And in the well known case of **Three Rivers District Council v. Bank of England (No.3) [2001] 2 All ER 513**, the House of Lords reflected on the comparable English rule. **Three Rivers** involved a striking out application on behalf of the Bank of England as a defendant, where it was alleged that the claim against it for misfeasance in public office was plainly and obviously unsustainable.

[16] Lord Hope commented that:

> "94....the question is whether the claim has no real prospect of succeeding at trial, and.....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....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 documentary or other material on which it is based. The simpler

> the case the easier it is likely 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". (Pages 260-261).

[17] In **Three Rivers**, Lord Hobhouse also opined that:

> "158....The important words are "no real prospect of succeeding." It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a "discretionary" power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly....
>
> 159....There is no point in allowing claims to proceed which have no real prospect of success, certainly not in proceeding beyond the stage where their hopelessness has clearly become apparent". (Pages 282-283).

[18] The Court also takes guidance from the Eastern Caribbean Court of Appeal where Blenman JA observed that:

> "Summary judgment is available in cases where there is no serious factual dispute and, if a legal issue, then no more than a crisp legal question as well decided summarily as otherwise. A defendant with no more than a partial defence will not be allowed to cheat a claimant of his just deserts by producing an [illusion] of complexity

> where none exists. Where the point at issue is a short one, the court will recognise that fact and act accordingly. It is always open to a claimant even in circumstances where a defendant has filed a defence to assert that the defendant has no defence to the claim or part thereof except as to the amount of damages claimed. It is the law that a court has the inherent jurisdiction to prevent misuse of its process and to prevent the unnecessary protraction of a claim or part of claim by granting summary judgment in a clear case.
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> .....What must be shown is that the claim or defence has no real prospect of success". (See **Walton v. de la Haye, BVICA No.4 of 2014, decision dated 14 August 2015,** at para. [52]; see also **Saint Lucia Motor & General Insurance Co. Ltd v. Modeste, SLUHCVAP 2009/2008, decision dated 11 January 2010).**

The Affidavit Evidence

[19] The Claimant filed two evidentiary affidavits in support of his application on 08 February and 12 June 2013. A third explanatory supplementary affidavit was filed by the Claimant on 08 July 2013, at the request of the Court. These affidavits annexed a number of documents that provided the background to the contractual relationships between the parties.

[20] Clause 10 of the second agreement, executed on 29 October 2012, makes it clear that this agreement replaced the first agreement of 28 September 2012. Any future reference to any agreement between the parties will be to the second agreement only.

[21] The purpose of the loan was to facilitate the payment of project finance as a precursor to the purchase of Paradise Beach Limited by the First Defendant. The First Defendant was incorporated by the Third and Fourth Defendants, who were also Directors of the First Defendant. Two sums of US $200,000.00 and US $100,000.00 were paid by the Claimant to Broughton Capital Ltd as the agent of the First Defendant.

[22] The purpose of the Second Defendant, a limited liability company, was to provide security for the loan by way of a third legal charge over leasehold property it owned at the Harbour Industrial Estate in the parish of St. Michael. The Fourth Defendant was also a Director of the Second Defendant.

[23] There is another company, common to the Third and Fourth Defendants, that is not a party to these proceedings. That company is Advance Investments Inc., an international business company incorporated in St. Vincent. According to Clause 3 of the agreement, both the First Defendant and Advance Investments were set up "for the purpose of structuring the transaction for the purchase of Paradise Beach Limited".

[24] The Third and Fourth Defendants, and a Michael R.Yearwood, were among the Directors and shareholders of Advance Investments in August 2012. The relevance of this information will become apparent later in this judgment. (Infra at para.[61]). By Clause 12 of the agreement, the Claimant

was to be assigned 20 per cent of the shareholding in this company on execution of the agreement.

[25] No affidavits were filed on behalf of the First and Third Defendants. In fact, on 16 April 2013, these two Defendants filed a joint Acknowledgment of Service indicating that the claim would not be defended. On that same day the Court entered judgment for the Claimant against the First and Third Defendants.

[26] The Second and Fourth Defendants have resisted the application for summary judgment. To this end, the Fourth Defendant filed two affidavits on 08 May 2013, on behalf of himself and the Second Defendant respectively. It is alleged on behalf of the Second Defendant that:

(1) there is no company resolution authorising the use of its leasehold property as security for the loan;

(2) counsel for the Claimant was tasked with "care and control of the legal transaction", and in that capacity he did not advise that the Second Defendant should receive independent legal advice. Such advice was necessary so that it could be determined whether a charge on the leasehold interest was permissible under the Companies Act, Cap.308. There was no financial or other advantage to be gained by the Second Defendant under the loan agreement; and

(3) the application for summary judgment was improper given that the Second Defendant was not allowed to either file evidence "or produce any evidence upon which [the Court could] make a proper determination".

[27] The Fourth Defendant raised two issues in his own affidavit. He contested the inclusion of the full amount of $22,500.00 in the debt claimed. This figure represented legal fees incurred by the Claimant. It was further contended that as a co-guarantor, he was only responsible for one-half of any money to be repaid to the Claimant.

[28] Based on the affidavit evidence, there are a number of uncontested facts. The loan proceeds were issued to the First Defendant, via its agent, but before the agreement was executed by the parties. Therefore, the only security thus far are two promissory notes, each signed by the Third and Fourth Defendants respectively. The loan was not repaid, either by the date anticipated by the agreement, or by the filing of the claim. The Court now moves to a consideration of whether there are relevant disputed facts, or issues of law, that would require the exercise of the Court's discretion against summary judgment.

The Case for the Second Defendant

(1) Is a Defence Necessary?

[29] As noted earlier, three submissions were advanced on behalf of the Second Defendant (Supra at para.[26]). For convenience the Court will treat first with the allegation that this Defendant was not permitted to file a defence. In the affidavit filed on 08 May 2013, the Second Defendant stated that:

> "10. The 2nd Defendant is advised...and verily believe[s] that the actions of the Claimant in applying for summary judgment [were] improper as the 2nd Defendant was not allowed to file a defence or produce any evidence upon which this Honourable Court [is] to make a proper determination.
>
> 11. The 2nd Defendant ask[s] that this Honourable Court dismiss the application of the Claimant for summary judgment and grant the 2nd Defendant twenty-eight days in which to file a Defence in this matter".

[30] It is possible that when the Claimant's application for summary judgment was filed, the time for the filing of an acknowledgment of service, and a defence, had not yet expired. Generally, the CPR allows the acknowledgement of service to be filed within 14 days after the service of the claim form on a defendant. (Rule 9.3). The Court is not aware of the date of service of the claim form.

[31] An acknowledgment of service is only required where a defendant intends to dispute the claim, or the court's jurisdiction. (Rule 9.2(1)). A defendant may dispense with an acknowledgment of service, if the defence is filed

within the same 14 day period. (Rule 9.2(3)). A defendant is not bound by the general 14 day rule. He may take the risk of filing the acknowledgment at a later date, but that later date must be before the Claimant files a request for a default judgment. (Rule 9.3(3)). The other general rule is that the defence should follow within 28 days of the claim. (Rule 10.3(1)).

[32] Nothing in the CPR precludes a Claimant from filing an application for summary judgment, before the expiration of time for the acknowledgment of service and the defence to be filed. In contrast, Rule 24.4 of the English Rules provides that:

> "(1) A claimant may not apply for summary judgment until the defendant against whom the application is made has filed –
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> (a) an acknowledgment of service; or
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> (b) a defence, unless
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> (i) the court gives permission; or
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> (ii) a practice direction provides otherwise...
>
> (2) If a claimant applies for summary judgment before a defendant against whom the application is made has filed a defence, that defendant need not file a defence before the hearing".

[33] Counsel for the Second Defendant contends that the failure to await the filing of the defence occasioned a breach of the requirements of the overriding

objective for saving expense, and for placing the parties on an equal footing. It was submitted that:

> "It may be necessary to note that the process of summary judgment is on the basis that the Defendant has no or no reasonable defence. It flies in the face of justice that a decision should be made in the Defendant's case where the Defence had not been presented to the Court in the correct form, that is, in the form of a defence and not in the form of an Affidavit. The application is based on the statement of case. Were that not the procedure every Claimant, on his statement of case alone, could nullify the Defendant's claim as the court would not have a complete and unbiased picture before it. To accept the Claimant's argument would be to accept the truth of the claim of the Claimant without more when the function of the court is simply to weigh the evidence". (Para.26 of Written Submissions filed on 24 June 2013).

[34] The Court is not persuaded that the absence of a defence has wrought an injustice on the Second Defendant. The CPR provided an opportunity for the filing of affidavit evidence. And in this regard, this Court made an order, on 16 April 2013, permitting both the Second and Fourth Defendants to file affidavits in reply, on or before 07 May 2013. Therefore, the filing of a defence was not critical to a fair hearing. The Second Defendant was allowed to place before the Court all the evidence that it considered pertinent to the hearing of the Claimant's application. Additionally, it was open to the Second Defendant to annex a draft defence to any affidavit filed on its behalf.

[35] The Second Defendant had ample time to gather and present its affidavit evidence. From as early as 28 December 2012, Mr. Michael Yearwood, attorney-at-law, was placed on notice that a claim and an application for summary judgment would be filed if the debt remained unpaid. (See Exhibit SG6 annexed to the Claimant's affidavit filed on 08 February 2013). And the application was not heard until 04 and 10 July 2013. In these circumstances, the Court is not moved to deny an order for summary judgment on the basis that the Second Defendant was not allowed to file a defence.

(2) Is The Security Illegal?

[36] Because the loan funds needed to be disbursed urgently, the Claimant took the risk of releasing the funds before the security from the Second Defendant was in place. The Claimant accepted the two promissory notes from the Third and Fourth Defendants as an interim measure. It is evident from the correspondence, passing between Mr. Yearwood and counsel for the Claimant, that efforts were made to put the leasehold security in place, even though the agreement was executed already, and the debt had become due and payable.

[37] By letter dated 08 January 2013, an engrossed deed of charge was forwarded to Mr. Yearwood for execution by the Second Defendant. The letter also

requested that the deed be executed and returned to counsel for the Claimant by the close of business on 11 January 2013. (See Exhibit SG9 to the Claimant's affidavit of 08 February 2013). This did not occur, and it is against this background that the Claimant filed his claim seeking, inter alia, specific performance of the charge.

[38] The claim is formulated in this way:

> "3. Further and/or in the alternative, specific performance of the contract dated the 28th day of September 2012 and the contract dated the 29th day of October 2012 particularly in relation to the due execution of the Third Charge over the property of the Second Defendant by way of Legal Mortgage in favour of the Claimant as Mortgagee".

[39] The Court understands the Second Defendant's objection to this aspect of the claim to be based on mixed fact and law. The point of law arises from the allegation that the security is illegal by virtue of Section 53 of the Companies Act ("the Act"). Section 53 enacts that:

> "(1) When circumstances prejudicial to the company exist, the company or any company with which it is affiliated shall not, except as permitted by section 54, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise
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> (a) to a shareholder, director, officer or employee of the company or affiliated company, or to an associate or any such person for any purposes, or

> (b) to any person for the purpose of, or in connection with, a purchase of a share issued or to be issued by the company or a company with which it is affiliated.
>
> (2) Circumstances prejudicial to the company exist in respect of financial assistance mentioned in subsection (1) when there are reasonable grounds for believing that
>
> (a) the company is unable or would, after giving the financial assistance, be unable to pay its liabilities as they become due, or
>
> (b) the realisable value of the company's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, would, after giving the financial assistance, be less than the aggregate of the company's liabilities and stated capital of all classes".

[40] A company seeking to shelter behind Section 53(1) must prove that at the time it rendered financial assistance, circumstances prejudicial to the company existed. In this case, the Second Defendant would be required to demonstrate that either of the circumstances mentioned in Section 53(2) existed when the loan funds were made available to the First Defendant, or are currently existing. A court would be unlikely to order specific performance of an illegal or unenforceable security.

[41] A careful perusal of the affidavit filed on behalf of the Second Defendant reveals nothing by way of an allegation that the security would be in breach of Section 53 of the Act. More importantly, there is nothing alleging the existence of circumstances prejudicial to the Second Defendant.

[42] The information available to the Court about the Second Defendant, was gleaned from two documents annexed to the Second Defendant's affidavit, and from other documents exhibited by the Claimant. The confirmed facts are as follows:

(1) The Second Defendant was incorporated on 29 May 2003 as Company No. 22462.

(2) As at 16 March 2011, the Directors of the Second Defendant are the Fourth Defendant, Veronica Arlene Prescod and CFS Management Limited.

(3) The Registered office of the Second Defendant is at Harford House, Roebuck Street, St. Michael.

(4) The Second Defendant owns leasehold property at Harbour Industrial Estate, St. Michael.

(5) There are two pre-existing legal charges on the Harbour property. The first charge is in favour of Caribbean Financial Services Corporation, dated 30 December 2003, and securing a principal sum of

$1,600,000.00 with interest. The second charge, dated 02 February, 2004, is in favour of Richard Edghill to secure the principal sum of $700,000.00 with interest.

(6) The Second Defendant executed an undated guarantee in favour of Caribbean Financial Services Corporation.

(7) There is a deed of assignment dated 20 November 2003, in favour of Colgate Palmolive Manufacturing (Barbados) Limited.

[43] None of the above factual data about the Second Defendant, is sufficient to ensconce it within the definition of prejudicial circumstances in Section 53(2) of the Act. There is no documentary evidence that would nudge the Court towards a conclusion that there are triable issues of fact and/or law in relation to Section 53 of the Act.

[44] The case of **Overseas Property Bond Management Ltd. v. Antigua Commercial Bank Ltd et al, Suit No. ANUHCV 2006/0552, ECSC, decision dated 27 January 2012**, is instructive. One of the issues in that case was whether a loan of EC $2.6 million to a company was contrary to Section 53 of the Companies Act 1995 of Antigua. That section prohibited a company from giving financial assistance to a director or to any person for the purpose of buying the company's shares, if circumstances prejudicial to the company existed.

[45] Floyd J noted that:

> "Section 53 will not, however come into play unless circumstances prejudicial to the company existed at the time of the provision of the financial assistance. Section 53 indicates when prejudicial circumstances exist. Essentially, they exist when the company will be unable to meet its liabilities after giving the financial assistance or the realizable value of the company assets would, after giving the financial assistance, be less than the company's liabilities and capital".
> (Para.90).

[46] The learned Judge was not provided with any corporate books or records. The only information before him was correspondence setting out the assets and outstanding liabilities of the company. Floyd J concluded that

> "Based on the figures actually referred to in the letter, the company's value was $2,929,500 ECD and the loan was $2.6 million ECD. As a result, I am satisfied that circumstances prejudicial to the company did not exist and therefore the loan agreement did not contravene the terms of the Companies Act, 1995, in particular S.53". (Para.93).

[47] Floyd J delivered his decision after a full trial. The case before this Court is at the stage of an interlocutory application for summary judgment. While there is no need for the Second Defendant to place all the evidence in its favour before the Court, it behoves the Second Defendant at the very least, to afford the Court a glimpse of that evidence in its affidavit of evidence.

[48] No concerns were expressed about the solvency of the Second Defendant. There are no accounting statements or records that speak to the solvency or the liquidity of that company. There is nothing referring to the financial implications of either the agreement or the security for the company. Regrettably, the Court was provided with no foundation for translating from the fanciful to a realistic prospect of success in relation to the issues canvassed around Section 53 of the Act.

[49] Counsel for the Second Defendant emphasized that the company had nothing to gain from the agreement. There is no disputing that the agreement is disadvantageous to the Second Defendant. But it does not follow that a disadvantageous contractual agreement is a circumstance prejudicial to the Second Defendant. There must be a correlation between that disadvantage, and the definition of prejudicial circumstances in Section 53 (2) of the Act. No such correlation was hinted at or made clear in any of the documents before this Court.

(3) The Necessity for Independent Legal Advice

[50] An associated argument raised on behalf of the Second Defendant is that it had no independent legal advice. The Fourth Defendant averred that:

> "7. Though I am personally aware of Mr. Gregory Nicholls, Attorney-at-Law, during the course of the said transaction I was introduced by the Claimant

> to him as the Attorney-at-Law with care and control for the legal transaction.
>
> 8. That though this was the first time that the assets of the company were to be used in such a matter it was never advised by the said Mr. Gregory Nicholls, Attorney-at-Law that the company should obtain independent legal advice in order to determine whether the use of company assets in such a manner was allowable in law pursuant to the Companies Act, Chapter 308 of the laws of Barbados given the fact that there was no advantage, financial or otherwise to be gained by it.
>
> 9. That I am of the opinion that the Claimant, who had independent legal advice as alleged in his Affidavit would have or ought to have had full knowledge of the provisions of the Companies Act as his Attorney-at-Law would or should have had the requisite knowledge and advised his client based on the same". (Affidavit filed 08 May 2013).

[51] The crux of the argument is that counsel for the Claimant did not advise that it was in the interest of the Second Defendant to have its own independent legal advice. The specific advice required was whether the assets of the Second Defendant could legally be deployed to provide the proposed security for the loan. Further, having received advice from his legal counsel, the Claimant knew, or ought to have known, that it was illegal for the Second Defendant to execute a third charge in favour of the Claimant.

[52] The affidavit appears to be deliberately vague, in that certain definitive statements are missing. First, the affidavit does not say whether counsel for

the Claimant acted for the Second Defendant during the negotiation and execution of the agreement. Secondly, or alternatively, there is no statement that neither Mr. Michael Yearwood, nor any other lawyer, represented the Second Defendant's interests during the negotiation and execution of the loan agreement.

[53] What is clearly stated is that counsel for the Claimant failed to warn the parties that the Second Defendant should obtain independent legal advice. But there is no definitive statement that the Second Defendant never received independent legal advice either before or after the execution of the agreement.

[54] The submissions made, in relation to an absence of independent legal advice, are woven together from the Claimant's affidavits, and from inferences drawn from statements and documents in those affidavits. But if the independent legal advice was for the purpose of certifying the legality of the security, the Court has already determined that the Second Defendant has not placed any issue, surrounding the financial circumstances of this company, properly before the Court. There is nothing in the various affidavits or documents before this Court that speaks to existing prejudicial financial circumstances in the context of Section 53(2) of the Act. Therefore, any

submission that is dependent upon the existence of a triable issue, in relation to Section 53, cannot be sustained.

[55] Except for the illegality point raised on behalf of the Second Defendant, counsel did not identify any other challenges to the leasehold security, that were based on an absence of independent legal advice. In other words, even if the Court accepts that there are issues of fact surrounding the legal representation of the Second Defendant, the affidavit and submissions on behalf of the Second Defendant were limited to the twinning of the issues relating to independent legal advice and the illegality of the proposed security under Section 53 of the Act.

[56] The absence of independent legal advice is a relevant factor where either duress, undue influence or unconscionable dealing is alleged. (See, for example, **RBTT Bank Barbados Limited v. Davis et al, Civ. Ap. No.2 of 2015, decision dated 01 September 2016; Barclays Bank Plc v. O'Brien [1994] 1 AC 180; Royal Bank of Scotland Plc v. Etridge (No.2) [2002] 2 AC 773** (considering undue influence)). None of these issues were canvassed on behalf of the Second Defendant, either in the affidavit, or in the submissions of counsel appearing for the Second Defendant.

[57] All the documents before this Court point to an agreement involving a series of transactions. The Claimant did not advance the loan proceeds in a vacuum.

The agreement envisaged supporting securitization. It cannot be said with certainty that Mr. Yearwood represented the Second Defendant from the outset of the negotiations. But it was conceded by counsel that the Second Defendant was his client during the preparation of the mortgage document.

[58] Mr. Yearwood was aware of the terms of the first agreement. He also knew that a second agreement was required. He communicated to the Claimant's counsel that his clients would execute the promissory notes. So at a minimum, the Third and Fourth Defendants were represented by Mr. Yearwood when the second agreement was executed.

[59] Having embarked on the preparation of the mortgage, Mr. Yearwood was fully seized of the contractual matrix in which the mortgage of the Second Defendant's leasehold interest was required. Surely, as counsel for the Second Defendant at that stage, it was a part of Mr. Yearwood's remit to advise his client about the validity of the security which was not yet in place.

[60] The first agreement was executed on 28 September 2012. On that same day, and before the execution of the second agreement on 29 October 2012, counsel for the Claimant required Mr. Yearwood to confirm that "the creation of a third legal charge on the [Second Defendant's] property is permissible under the terms of the two existing charges". (See Exhibit SG9 annexed to the Claimant's affidavit filed on 12 June 2013).

[61] Prior to forwarding the email in Exhibit SG9 to Mr. Yearwood, counsel for the Claimant engaged in discussions with Mr. Yearwood. And in the email, counsel also informed Mr. Yearwood that "I have also advised my client that he can advance the loan to [the First Defendant] if we are able to conclude the terms of the agreement and satisfy ourselves that the directors of the companies affected have agreed by way of formal resolutions to the loan and guarantee that will stand in the name of the [Second Defendant]".

[62] Exhibit SG9 confirms that counsel for the Claimant was only acting on behalf of the Claimant, and not on behalf of the other parties to the contract. A reasonable inference is that Mr. Yearwood was representing the interests of the Third and Fourth Defendants; and he was being asked to confirm information about the First and Second Defendants. Another reasonable inference is that the Fourth Defendant was the agent of the Second Defendant, with ostensible authority to act on behalf of the Second Defendant. At this critical stage, the responsibility for advising that the Second Defendant required independent legal advice cannot be laid at the feet of counsel for the Claimant.

[63] Independent legal advice was available to the Second Defendant in relation to the mortgage, either directly, or via the Fourth Defendant as its agent. And it was available prior to the execution of the second agreement. But the

question of independent legal advice became a non issue, first, when there was no evidence placed before this Court to indicate that, prior to the filing of the claim, there were genuine concerns about the legality of the security; and secondly, when the Court was not provided with any affidavit or document that raised any questions relating to the financial viability of the Second Defendant, if it was to provide the security.

[64] There is evidence before the Court suggesting that Mr. Yearwood was aware of and involved in the structuring of the corporate vehicles set up to facilitate the acquisition of the Paradise property. He is a shareholder and a director of Advance Investments Inc., the IBC said to own all the shares in the First Defendant. The Third and Fourth Defendants are also shareholders and directors in this IBC. (See Exhibit SG5 annexed to the Claimant's affidavit filed on 08 February 2013). In fact, Mr. Yearwood was appointed Vice President of Advance Investments Inc. on 17 August 2012.

[65] It must not be forgotten that the Fourth Defendant is connected to both the First Defendant borrower and to the Second Defendant. He is a director of both companies. Although there was no direct benefit to the Second Defendant in the agreement, there most certainly was a benefit to the Second Defendant as a shareholder in both the Second Defendant and the IBC that owns the Second Defendant.

[66] Even if a relationship of trust is assumed between the Second Defendant and counsel for the Claimant, the terms of the contract that impact on the Second Defendant are readily explicable by the relationship between the various Defendants in this matter. True, the agreement is disadvantageous to the Second Defendant, but the Court does not consider the agreement to be so manifestly unfair as to require an explanation. (See **Etridge** supra, and Halsbury's Law of England, Fifth ed., Vol. 76 at para.838).

[67] The affidavit imputes actual or constructive knowledge of the provisions of the companies legislation to the Claimant. (See para.9 of affidavit, supra at para. [50]). This is understood as an assertion that the Claimant had knowledge that the proposed security was in breach of Section 53 of the Act.

[68] Section 55 of the Act provides that:

> "A contract made by a company contrary to section 53 may be enforced by the company or by a lender for value in good faith without notice of the contravention".

[69] If the Claimant had knowledge of such a contravention he would not be "a lender for value in good faith without notice of the contravention". In those circumstances, the Claimant would be unable to enforce the agreement against the Second Defendant.

[70] Again the Court reiterates that, having laid no foundation to show that circumstances prejudicial to the company existed, other submissions,

intending to establish the unenforceability of the agreement as a result of the illegality of the loan, are untenable. Additionally, no issues of duress or undue influence were placed before the Court. Therefore, any questions about the actual or imputed knowledge of the Claimant are not relevant within the context of undue influence. (See **O'Brien** and **Etridge**, supra at para.[56]; also **O'Sullivan v. Management Agency and Music Ltd [1985] 1Q.B. 428,** and **Vale v. Armstrong [2004] EWHC 1160 (Ch)).**

[71] As noted before, independent legal advice is relevant to an assertion of an unconscionable bargain by a party to a contract. The learned author of Halsbury's Laws of England explains that:

> "As part of the jurisdiction to grant relief against contracts entered into as a result of conduct contrary to good conscience, courts of equity have acted to protect persons in cases in which it was apparent, from the intrinsic nature and subject of the bargain itself, that it was one which no person in his senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other; in fact, an inequitable and unconscionable bar-gain". (5th ed., Vol.76, 2013 at para.850).

[72] Nelson Enonchong noted three prerequisites for establishing the existence of an unconscionable bargain.

> "The authorities indicate that for a transaction to be set aside on the ground of unconscionable dealing three requirements must be satisfied (i) the party seeking relief must have been

> under some special disadvantage or disability (such as poverty or ignorance), (ii) the stronger party must have acted in a way which is unconscientious in taking advantage of the weaker party's disability (that is to say, there must be impropriety in the defendant's conduct) and (iii) there must be a significant imbalance in the substance of the transaction to the disadvantage of the weaker party". ("Duress, Undue Influence And Unconscionable Dealing", 2006, at para. 15-004).

[73] The affidavit filed on behalf of the Second Defendant, does not address these three prerequisites in a manner that would confirm that the Second Defendant is seeking to avoid the contract, on the basis of an uncon-scionable bargain. If a lack of knowledge of the legal implications of the security is argued, the Court notes that this is not the first time that the Second Defendant's property would be charged to secure a loan. There are two pre-existing charges securing in total over two million dollars with interest. (See para.[43](5) supra).

[74] The three directors of the Second Defendant are by no means impoverished ignorant persons in the classic sense. There is nothing indicating such. In fact, as a Director of the First Defendant, the Fourth Defendant reminded the Third Defendant that

> "....I am the individual that created this initiative and brought all others in as my professional project associates including you as my associate". (See Exhibit SG12 annexed to affidavit of Claimant filed on 12 June 2013).

[75] Exhibit SG12 is especially informative. In this email the Fourth Defendant described himself as having:

> "…. a broad based background as well as being a Senior Professional in the Built Environment Sector....where I am a registered Architect as well as a member of the Barbados Institute of Architects for several years and a very experienced professional who know (sic) this Sector and the Construction industry extremely well".

[76] The second Director of the Second Defendant is an accountant by profession, and the third Director is a management company. All three Directors of the Second Defendant may be described as persons with some individual and collective business acumen. There is nothing before the Court to suggest that these two Directors had any objections to or expressed any concerns about the use of the Second Defendant's property as security for the loan to the First Defendant.

[77] The Court is not persuaded that there are issues of fact or law regarding the independent legal representation of the Second Defendant, that would require ventilation by way of a trial.

(4) Absence of a Resolution from the Second Defendant

[78] Paragraph 6 of the Fourth Defendant's affidavit of 08 May 2013 states that:

> "....I was personally involved in a transaction as detailed in the Statement of Claim

> and Affidavit of the Claimant. As a result of the transaction it was suggested that there should be a debenture mortgage on the said property at Harbour Road...However, there has never been a resolution of the company authorising the use of its property in such a way and for such a purpose".

[79] It is not disputed that a resolution was never produced authorising the use of the Second Defendant's property as security for the loan to the First Defendant. A corporate resolution was not required by the terms of the agreement. However, counsel for the Claimant, in a letter to Mr. Yearwood dated 04 October 2012, requested a corporate resolution authorising the guarantee of the loan as part of the preliminary requisitions on the leasehold title.

[80] A perusal of the agreement reveals that the Directors of the Second Defendant warranted that the requisite company resolutions had been passed. Clause 6 of the agreement provides that:

> "The Directors hereby warrant that by these presents, all necessary resolutions of the Boards of [the First and Second Defendants] have been duly passed to facilitate the completion of the purchase of Paradise Beach Limited by [the First Defendant] and the creation of a third legal charge over the said property of the [Second Defendant] as security for the said loan".

[81] There is nothing before this Court to suggest that, in signing the agreement on behalf of the Second Defendant, the Fourth Defendant acted outside of the

scope of his authority. There is no allegation that the Claimant knew, or ought to have known, that the Fourth Defendant had no authority to commit the Second Defendant to the terms of the agreement.

[82] The Claimant was entitled to assume that the Fourth Defendant was authorised to act on behalf of the Second Defendant, as its duly constituted agent, in relation to the negotiation and execution of the contract. The Claimant is protected by the provisions of Sections 17, 19 and 21 of the Act. Therefore, there are no issues of fact or law, relating to the authorisation of the Second Defendant, that require resolution at a trial.

The Case for the Fourth Defendant

[83] The Fourth Defendant contends that there are issues of fact and law arising from the payment of legal fees by the Claimant to his lawyer, and from his position as a co-guarantor for the repayment of the loan.

(1) *The Legal Fees*

[84] In his affidavit, the Fourth Defendant set out his position on the legal fees paid to the Claimant's counsel as follows:

> "4. That I note that the Claimant is claiming the sum of $622,500.00, $22,500.00 of which is for the legal fees incurred. A copy of the said invoice is hereto annexed and marked **"DH1"**.

> 5. That having reviewed the same and having spoken to my Attorney-at-law....I am of the opinion that the sum being charged is exorbitant.
>
> 6. That I am advised...and verily believe that items (iv) to (ix) [form] part of the process for the preparation of a mortgage. I am further advised and verily believe that the preparation of a mortgage is prescribed by the Legal Profession (Attorneys'-at-Law) (Remuneration for Non-Contentious Business) Rules 1997, made under the Legal Profession Act Cap. 370A of the Laws of Barbados and the cost in respect of that portion of the bill, for a mortgage of $650,000.00 is $6,562.50 together with value added tax of $1,148.44 if [counsel for the Claimant] is so registered.
>
> 6. I am further advised and verily believe that the sum of $14,789.06 if VAT registered or $15,937.50 if not so registered for the preparation of the agreements dated the 28th day of September 2012 and the 29th day of October 2012 is exorbitant especially given the fact that the second agreement was merely a change of certain figures".

[85] The challenge to the amount of the legal fees must be understood in the context of Clause 10 of the second agreement. This Clause provides that:

> "The Lender will retain the balance of $25,000.00 United States Dollars out of the proceeds of the said loan to the Borrower which are to be applied as necessary in respect of the payment of professional fees, charges, disbursements and out-of-pocket expenses incurred by the Lender in the furtherance of this transaction".

[86] Incidentally, in the first agreement, $500,000.00 was to be loaned and $100,000.00 retained by the Claimant to cover expenses. (Clause 8). The

reasonable inference is that there was some discussion between the parties that initiated the reduction by half of the money retained to cover expenses.

[87] By signing the agreement, all the parties accepted that the Claimant was permitted to retain part of the loan to cover his expenses, including professional fees. In challenging the amount paid for legal fees, the fourth Defendant is saying two things. First, he is contending that although an amount was agreed to cover expenses, those expenses are unreasonable. And secondly, if the expenses are unreasonable, the amount of debt claimed cannot be $622,500.00. The claim should only be the actual amount disbursed , (ie.$600,000.00), plus a reasonable sum for legal fees.

[88] In her written submissions filed on 24 June 2013, counsel for the Fourth Defendant argued that "the sums charged by the Attorney-at-Law for the Claimant [were] excessive and not proportionate to the work done". (Para.15). A perusal of Exhibit DH1 indicates that a global figure was stated for legal fees. There are no sums credited to the nine individual components that make up counsel's fees. And noticeably absent is any reference to either the drafting or perusal of the promissory notes.

[89] The Claimant did not challenge the legal fees charged. Neither have the other three Defendants in this matter. Moreover, it was open to the Fourth

Defendant to make an application for taxation of the legal fees. Section 43 of the Legal Profession Act, Cap.370A, provides that:

> "Where any person is liable to pay or has paid any bill of costs either to an attorney-at-law or to a party chargeable with such bill, such person...may make such application for a reference for the taxation and settlement of such a bill as the party immediately chargeable therewith might himself make, and the same reference and order shall be made thereon and the same course pursued in all respects as if the application had been made by the party so chargeable with such bill".

[90] Section 32 of Cap.370A also enacts that –

> "For the purposes of this Part –
> "party chargeable" in relation to an attorney-at-law's bill of costs, includes any person who has paid or who is liable to pay the bill either to the attorney-at-law or to any other person chargeable with the bill".

[91] It seems to the Court that there is a means of redress available to the Fourth Defendant if he entertains genuine concerns about the reasonableness of the legal fees charged. Section 71 (1) of the Supreme Court of Judicature Act, Cap.117A, also provides that:

> "The jurisdiction of the High Court and the Court of Appeal in relation to the taxation of costs is vested in the Registrar and shall be exercised in accordance with the rules of court".

[92] There is no deadline in Cap.370A for a taxation application. Therefore, the Court is disposed to adjourn these proceedings, in order to allow the Fourth Defendant a reasonable time in which to apply for taxation of the bill of costs.

(2) The Fourth Defendant as a Co-Promisor

[93] Paragraph 7 of the Fourth Defendant's affidavit says that:

> "...I am advised and verily believe that the law in respect of co-guarantors is that each co-guarantor [is to] be responsible for one-half of any funds to be repaid and accordingly I am asking the court to make an order that the 3rd and 4th Defendants be equally responsible for the payment of one-half of the borrowed sum...".

[94] Both the Third and Fourth Defendants executed individual promissory notes in the sum of $650,000.00. They have not challenged the validity of the notes. But it is the Fourth Defendant who is seeking an order from the Court that each of them is only responsible for payment of half of the debt.

[95] The issue to be resolved here is whether this Court is empowered to make the order sought by the Fourth Defendant. It is a neat question of law and fact, and should be resolved, without requiring a full trial, if all the relevant facts are before the Court.

[96] One author explains that:

> "...between themselves, co-sureties prima facie are *aequali jure*, although they agree to be bound for different sums. It is, therefore, immaterial that they are bound jointly, jointly and

> severally, or simply severally; that they are bound by the same or different instruments; that they are ignorant of each other's existence; or that the first surety agreed to become a surety before the second surety had even been approached; provided that they are co-sureties for the same principal and guarantee the same debt". (Goff and Jones, The Law of Restitution, 8th ed., para.14-007).

[97] It follows from these principles that there is a right of contribution between co-sureties. In the words of Chitty on Contracts:

> "Joint and joint and several debtors have a restitutionary right of contribution among themselves: that is to say, if one has paid more than his share of the debt, he can recover the excess from the others in equal shares, subject to any agreement to the contrary. In the absence of agreement to the contrary each co-debtor is liable for an equal share of the debt or obligation".
> (30th ed.,Vol.1, para.17-027).

[98] When does this right to contribution arise? The general law is that the right to contribution does not arise until a co-promisor discharges more than his share of the debt. (See **Davies v. Humphreys (1840) 6M&W** 153, at 168-169; **Ex parte Snowdon (1881) 17 Ch. D. 44).**

[99] According to Chitty, if the co-promisor:

> "...merely pays his share and no more, he has no present right to contribution: but he will acquire such right as soon as anything happens in the future which discharges the debt and thus brings it about that he has paid more than his share, for instance if the debt becomes statute-barred. Moreover, a surety against whom the principal creditor has

> obtained judgment for the full amount of the debt, but who has paid nothing in respect of that judgment, can obtain a prospective order directing a co-surety, on payment by the surety of his own share of the debt, to indemnify him against further liability, or (if the principal creditor is party to the action) an order directing the co-surety to pay his proportion to the principal creditor". (Supra para. [97] at para. 17-028).

[100] **Wolmershausen v. Gillick [1893] 2 Ch.514** is the authority by which the surety is entitled to a declaration of his right to contribution, where the creditor obtained judgment against him. In that case, the plaintiff and four other persons were sureties for the debt of a company to a bank. The plaintiff had not yet paid any part of the debt. The question before the court was whether a claim for contribution could be made against the sureties, or whether the plaintiff needed to sustain a loss before making a claim against the co-sureties.

[101] Wright J held that:

> "...if the Plaintiff had made the creditor a Defendant to the present action, I ought to have held that the allowance of the principal creditor's claim in the administration action was equivalent to a judgment against the Plaintiff for the whole amount of the guarantee, and...the Plaintiff would have been entitled to a declaration of her right to contribution and to an order upon the solvent co-surety to pay his portion to the principal creditor. The principal creditor not being a party, I think that I cannot order payment to him or directly prevent him from enforcing his judgment against the

> Plaintiff alone. Nor can I at present order the co-surety to pay his half to the Plaintiff, for the Plaintiff cannot give him a discharge as against the principal...creditor...But I think that I can declare the Plaintiff's right, and make a pros-pective order under which, whenever she paid any sum beyond her share, she can get it back, and I therefore declare the Plaintiff's right to contribution, and direct that, upon the Plaintiff paying her own share, the Defendant...is to indemnify her against further payment or liability, and is, by payment to her or to the principal creditor or otherwise to exonerate the Plaintiff from liability beyond the extent of her own share". (Pages 528-529).

[102] **Wolmershausen** was applied in the Court of Appeal decision of **Stimpson v. Smith [1999] Ch. 340**. Counsel for the Fourth Defendant relied on this case. In **Stimpson**, Gibson LJ held that:

> "In particular circumstances an action for contribution will lie even before payment is made; thus when judgment has been entered by the creditor against one guarantor, who has paid nothing in respect of the judgment, he can maintain an action in equity against his co-guarantor and obtain an order requiring payment of the co-guarantor's due share to the creditor (if a party to the action) or (if the creditor is not a party) an order that a co-guarantor indemnify the judgment debtor, on payment of his own share, against further liability". (Page 348).

[103] In discussing **Stimpson**, the learned editors of "The Law Of Restitution" posited that:

> "A right to contribution would arise provided that: the amount of the liability was

> ascertainable". (2002, Butterworths Common Law Series at para.7.17. See also **Stimpson**, supra para. [102] per Gibson LJ and Judge LJ).

In this case the full amount of the Fourth Defendant's liability is not yet ascertainable because the legal costs paid to the Claimant's counsel are to be taxed.

[104] Also in this case, both the debtor and the other surety are parties to the action, as Claimant and Third Defendant. The Claimant has already obtained a judgment against the other co-surety. However, both sureties are Defendants. In **Wolmershausen** and **Stimpson**, one surety was the claimant, and the co-surety a defendant. Here, the Fourth Defendant is seeking an order against another co-defendant.

[105] The Third Defendant has neither opposed nor agreed to the Fourth Defendant's application for contribution. He was unrepresented and not heard by the Court on this issue. The literature also suggests that the appropriate process for seeking contribution is by way of a separate equitable action in which all co-sureties are parties. (See "The Law Of Restitution supra para.[103]) at para 7.9). Therefore, the Court should make no order for contribution as between the Third and Fourth Defendant in these proceedings.

[106] It is unlikely that the Third Defendant would object to an opportunity to reduce his liability to the Claimant. An order for contribution would mean that he would be responsible for only half of the debt. But such an order cannot be made against the Third Defendant without evidence of his solvency.

[107] An essential element of contribution is that it is only permitted between solvent co-sureties. Writing in 1949, Glanville Williams enunciated these principles:

> "All co-debtors must contribute in equal proportions to the sum payable by way of contribution, and no one is liable for more than his proportion....There is one exception to the principle and that is in the case of insolvency of a co-debtor. If one co-debtor is insolvent the loss resulting from his insolvency is spread equally over the solvent debtors". ("Joint Obligations", at para.86).

[108] Chitty repeats the insolvency principle, adding that:

> "A surety suing his co-sureties for contribution must join as defendants all those who are liable to make contribution, unless one of them is insolvent or there is some other good reason why he should not be joined". (Supra para.[97] at paras.17-027 and 17-028).

[109] Neither the Third nor Fourth Defendant has provided any evidence that the Third Defendant is solvent. Without this evidence, a court would be unable to make an order for contribution. In all these circumstances, this Court is

unable to make an order for contribution. The Court considers that this is an issue between two Defendants that should not hijack the Claimant's application for summary judgment.

Disposal

[110] The Second Defendant raised no issues that would require resolution at a trial. In addition, there appears to be no other reason why this aspect of the case should be disposed of at a trial. The Court grants an order for specific performance of the agreement dated 29 October 2012 whereby a third charge is executed over the Second Defendant's property on or before 28 February 2017.

[111] Judgment was entered against the First and Third Defendants on 16 April 2013. However, given the live issue in relation to the legal fees paid by the Claimant, that order is varied to enter judgment against the First and Third Defendant respectively in the sum of $600,000.00.

[112] Judgment is entered against the Fourth Defendant in the sum of $600,000.00.

[113] The Fourth Defendant shall file an application before the Registrar of the Supreme Court for taxation of the bill of costs in the sum of $22,500.00, on or before 28 February 2017. If the application is not filed, judgment will be entered against the First, Third and Fourth Defendants respectively for the additional sum of $22,500.00.

[114] The Court will now hear the parties on the award of costs in these circumstances.

Apology

[115] The Court tenders an apology to all the parties for the time taken to deliver this judgment.

Sonia L. Richards
Judge of the High Court