

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Civil Suit No: 861 of 2012**

**BETWEEN:**

**RBC ROYAL BANK (BARBADOS) LTD.**

**CLAIMANT**

**AND**

**GRAHAM BETHEL**

**DEFENDANT**

**Before: The Honourable Madam Justice Shona Griffith, Judge of the High Court**

**Date of Hearing: 2020: 11<sup>th</sup> May**

**Date of Oral Decision: 2020: 20<sup>th</sup> July**

**Date of Written Decision: 2020: 07<sup>th</sup> August**

**Appearances:**

**Mr. Garth Patterson Q.C. in association with Mr. Bartlett Morgan, LEX Caribbean for the Claimant**

**Mr. Bryan Weekes, Bryan L. Weekes & Associates for the Defendant**

**DECISION**

***Claim for monies due under guarantee – Application to Strike Out Defence - CPR R 26.3(3)(b) – No reasonable ground for defending the claim - Application for Summary Judgment – CPR R 15.2 - No real prospect of successfully defending claim.***

## Introduction and Background

[1] The Claimant is RBC Royal Bank (Barbados) Limited, which claims against the Defendant Graham Bethel the sum of one million dollars (\$1,000,000) plus interest, being monies owed by the Defendant to the Claimant under a guarantee and postponement of claim executed in March, 2005. The guarantee was executed by the Claimant jointly and severally with four other persons on behalf of the company Isis Development Limited ('the company'). The Defendant at the material time, was a director and shareholder in the company. On 28<sup>th</sup> November, 2011 the Claimants issued a demand for payment of the one million dollars under the guarantee, plus interest. The Defendant failed to pay, thus the Claimants filed the present claim for recovery under the guarantee.

[2] The Defendant Mr. Bethel pleaded a number of defences as follows:-

- (i) unilateral mistake;
- (ii) common mistake;
- (iii) *non est factum* – namely - that he was not aware that he had signed a document in the nature of a personal guarantee in relation to the indebtedness of Isis Development Limited and that he therefore lacked the intention to sign, execute and be bound by such a guarantee.

The Defendant pleaded that he was under a belief that he was signing security instruments (for the company) in his capacity as a director of Isis Development Limited;

- (iv) The Defendant further pleads:-
- (a) that he neither received nor was offered or ever informed, of his right to independent legal advice in relation to the guarantee and loan transaction;
  - (b) There was a conflict of interest in relation to the attorney-at-law for the Claimant having also acted for him and the company in the guarantee/loan transaction;
  - (c) More particularly, the Claimant's attorneys as attorneys for all parties concerned, (and as agent for the Claimant) – had a duty and as such the Claimant had a duty – to ensure that the Defendant was advised independently, or advised of his right to seek independent legal advice, in relation to the guarantee. As a result, the Defendant says that the Claimant was estopped from, or it would otherwise be unconscionable, for the Claimant to enforce the guarantee.

- (v) The Defendant also pleaded that the guarantee was contrary to business sense as he held only 3.5% of the shares in Isis Development Limited and accordingly there was no consideration for the guarantee.

With respect to the Defendant's shareholding it was also asserted that there was a mistake of fact on the part of the Claimant that the Defendant was a substantial shareholder in Isis, so that the Claimant also lacked the intention necessary to bind the Defendant. The Defendant counterclaims for rescission of the guarantee.

### *The Applications*

- [3] The Claimants filed an application to strike out the defence pursuant to **CPR Rule 26.3(3)**, as well as an application for summary judgment pursuant to **CPR Rule 15.2**. The application to strike out was filed on the basis that the defence disclosed no reasonable ground for defending the claim (or for bringing the counterclaim), whilst the application for summary judgment asserted that the Defendant had no realistic prospect of defending the claim or maintaining the counterclaim.
- [4] Pursuant to permission granted by the Court, the Defendant filed an amended defence in February, 2014, which expanded the particulars pleaded in respect of the initial defences. The amended defence also pleaded in the alternative,

that by the actions of the Claimant as set out below, the Defendant was discharged from his liability under the guarantee:-

- (i) Fundamental breach by the Claimant of the loan agreement with Isis;
- (ii) Negligent mishandling and impairment of its securities to the prejudice of the Defendant;
- (iii) Altering the terms of the agreement between Isis and the Claimant by increasing the amount of the loan to Isis without the consent of and to the prejudice of the Defendant;
- (iv) The Claimant by its conduct materially increasing the risk that the guarantee would be enforced against the Defendant

[5] Lastly, the amended defence pleaded undue influence, bad faith, recklessness and negligence on the part of the Claimant and its Attorney-at-Law towards the Defendant, so much so that it would be unconscionable for Claimant to enforce the guarantee; and the Claimant's conduct created an estoppel against such enforcement against the Defendant. The amended defence set out extensive particulars in support of these expanded and further defences. Notwithstanding the amended and extensively particularised defence, the Claimant maintained both its applications to strike out and for summary judgment.

[6] The two Applications did not differentiate whether, and if so, which aspects of the defence were being made subject to which application. The grounds of the respective applications were thus advanced on the same bases, which were set out as follows:-

- (i) The defense of common mistake is not available to the Defendant on the basis that the pleadings do not disclose the elements of the defence which are said to be threefold:- (i) a common assumption as to the existence of a particular state of affairs; (ii) a warranty by either party that the state of affairs existed; (iii) the non-existence of the state of affairs must render performance of the contract impossible;
- (ii) Unilateral mistake can only be pleaded in circumstances where the party who was not mistaken, was both aware that the other party was acting on the mistaken assumption, and tried to take advantage of the mistake. Whilst the Defendant pleaded that the Claimant was constructively aware of matters or had knowledge by way of actual or constructive notice of matters, the pleadings failed to disclose how the Claimant sought to take advantage of such alleged knowledge.;
- (iii) The defence of *non est factum* could only be relied on where the document signed is fundamentally different in nature, character or effect, to which the party advancing the plea intended to sign.

Additionally there is a burden on the party making the plea to show that he or she was not negligent in signing the document. The Defendant's pleadings fail to disclose any of the characteristics of *non est factum*;

- (iv) The requisite elements of undue influence are not established – namely
  - (a) the existence of a relationship of trust and confidence with the wrongdoer; (b) the existence of a transaction which calls for an explanation, so that a presumption is raised that the wrongdoer abused the relationship of trust in procuring the transaction. The defence does not establish the existence of any of the accepted relationships of trust and confidence such as solicitor/client, or parent/child nor that any relationship existed between the parties to give rise to the defence of undue influence;
- (v) The Defendant had access to legal advice thereby absolving the Claimant as creditor from any responsibility to ensure that the Defendant as guarantor received independent advice. Such advice is deemed as sufficient even where the same legal advisor acts for all of the parties to the guarantee transaction;
- (vi) The Defendant was not discharged from any liability under the guarantee for the following reasons:-

- (a) the terms of the guarantee entitled the Claimant as guarantor to take such action deemed fit in relation to the company, therefore the Claimant cannot be held to be in fundamental breach of the agreement with the company;
- (b) the Defendant contracted out of his common law rights under the guarantee, thus any claim that the Claimant negligently mishandled or impaired its securities to the prejudice of the Defendant cannot be maintained as such claims arise under the common law only;
- (c) The guarantee given by the Defendant was an 'all monies' guarantee which contemplated future liabilities thus it was not open to the Defendant to claim that the amount of the loan to Isis was increased without his consent;
- (d) any complaints about the Claimant's conduct or that of its agent (their attorneys-at-law) increasing the risk of enforcement of the guarantee against the Defendant, is a common law remedy and as such unavailable to the Defendant as he has contracted out of his common law rights;

(vii) the Defendant has failed to properly plead a defence of bad faith in that the critical element of dishonesty on the part of the Claimants has not been pleaded.

[7] The Defendant's response to the Claimant's Applications was initially comprehensive, seeking to have all of the defences pleaded upheld. At the critical time of the hearing however, Counsel for the Defendant (who was not the initial counsel on record), declined to pursue all of the defences pleaded and instead restricted his response to the Applications to three areas. Counsel for the Defendant declined to address the Court in relation to common mistake and characterized the unilateral mistake as in effect, the plea of *non est factum*. As a result, the Court considers the Defendant to have conceded the Applications in relation to unilateral mistake and common mistake.

[8] The first of the three areas in which the respective Applications to strike and for summary judgment are defended is *non est factum*. The second, the Court terms an 'umbrella of defences' arising from the breach of the alleged duty on the part of the Claimant to advise the Defendant of the nature of the document he was signing, or at the very least to advise the Defendant to obtain independent legal advice. Under this umbrella is also alleged undue influence, breach of fiduciary duty, estoppel and unconscionable conduct. The third aspect of the Defendant's answer to the Applications, was that the Claimant's

conduct in relation to the Principal (Isis) under the guarantee, was such that entitled the Defendant to be discharged from any liability under the guarantee. The specific allegations of this defence are already outlined under paragraph 4 above. This aspect of the defence also comprises bad faith, recklessness and negligence on the part of the Claimant and its Attorney-at-Law towards the Defendant, thereby rendering enforcement of the guarantee unconscionable and subject to estoppel.

[9] Based on the brief account above, the Defendant's answer to the strike out and summary judgment applications will be examined under three headings, namely (i) '*non est factum*'; (ii) 'breach of duty to advise/ absence of independent legal advice'; and (iii) 'the Claimant's conduct and discharge of liability under the guarantee'. In terms of evidence, the Claimant's application for summary judgment (as amended) was supported by three affidavits<sup>1</sup>, however the submissions on the Applications were almost entirely based on legal arguments. The Defendant filed a total of four affidavits<sup>2</sup> in response to the Application for Summary Judgment but additionally, his amended Defence was pleaded to the point of prolixity, consisting of 17 pages. The submissions of Counsel together with authorities cited in respect of the three

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<sup>1</sup> Jacquelin Bryan, 11 Mar, 2013; Ramon Alleyne, 7 Feb, 2014; Bryan Edwards, 2 Mar, 2020.

<sup>2</sup> June 14, 2013; 4 Feb, 2014; 9 Sept, 2015 (x2)

headings identified above will be examined in specific detail below, thereafter followed by the Court's discussion and analysis of the Applications.

### **Submissions of Counsel**

#### *(i) Non est factum*

[10] In terms of his pleading, the Defendant's position is that the defence of *non est factum* is available to him on the basis that he was not aware that he had signed a personal guarantee for Isis' indebtedness to the Claimant.

The Defendant pleads that he was of the belief that he was signing security instruments on behalf of Isis in his capacity as a director. As a consequence, he lacked the requisite intention to be bound by the document, which was of a radically and fundamentally different nature from that which he thought he was signing. The radical and fundamental difference was that the document was to bind not the company, but himself, personally. The Defendant also pleads in support of the defence of *non est factum* that it was never explained to him that he was signing a personal guarantee as opposed to a security document for the company.

[11] By way of evidence, the Defendant deposed<sup>3</sup> that he was unaware of what he was signing. Further, that contrary to the allegations of Jaqueline Bryan (representative on behalf of the Claimant), he never signed what was termed

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<sup>3</sup> Affidavit of Graham Bethel filed June 14, 2013 paras 3(b), 4 & 6

the ‘facility letter’ required to be signed by all guarantors, which set out the requirement for the personal guarantee in order for the company to receive the intended financing. As a result, the existence of that letter could not impute knowledge to him that he was signing a personal guarantee, as was asserted in the Affidavit of Ms. Bryan. The Defendant also adverts to his immediate refusal in February, 2009 to sign a second guarantee for further financing of the company, as supporting his assertion that he did not know that he had signed a personal guarantee in March, 2005. In particular, the Defendant points to his response to the request for him to sign the second guarantee – (i) he was only a nominal shareholder; (ii) he stood to gain very little financially from the company; and (iii) his involvement with the company was virtually nil.

[12] The Defendant further averred by his affidavit<sup>4</sup>, that in relation to his refusal to sign the second guarantee, he explained his mistake in signing the first guarantee to the Claimant and as such was not required to sign the second guarantee. Instead, the other investors and shareholders of the company signed the personal guarantees and the second amount of financing was disbursed. The Defendant advances the position that the Claimant’s conduct in accepting that he was not required to sign the second personal guarantee

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<sup>4</sup> June 14, 2014 para 6(c)-(e)

constitutes acceptance on their part of his mistaken apprehension of the nature of the personal guarantee which he signed. Against this factual background, the Defendant asserts that the legal requisites for a plea of *non est factum* are supported. Counsel also submitted that the most important aspect of the plea of *non est factum* is the subjective intention of the person who raises the plea.

[13] By way of authority, the Defendant cites **Saunders (Executrix of the Will of Rose Maud Gallie, Deceased) v Anglia Building Society**<sup>5</sup> in support of his argument that it is the subjective intention<sup>6</sup> of the Defendant that is critical to establishing whether he intended to be bound by the guarantee or not. It was also contended (relying on **Saunders**), that contrary the argument of Queen's Counsel for the Claimant, it was not only a person subject to some disability who could establish a *non est factum* defence. It was possible for a person of normal intellect to rely on the plea and rather than considering only whether a person is subject to a disability, the Court is obliged to interrogate all of the circumstances attendant upon the signing of the document which impacted upon the Defendant's understanding of what he was signing. (For example who was present, or what was said or done at the time of signing). An

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<sup>5</sup> [1971] AC 1004

<sup>6</sup> Ibid @ 1036

investigation into such circumstances, Counsel says, could only properly be carried out at a trial.

[14] The Defendant's arguments on the plea of *non est factum* are attacked by the Claimant both in terms of sufficiency in law and evidential support. Queen's Counsel on behalf of the Claimant's primary position is that the defence is not supported by the pleading and as such should be struck out on its face.

In the alternative, there is no real prospect of the defence of *non est factum* succeeding in the circumstances of the claim. On the face of the pleading, the Claimant's argument was that the legal requirements for a successful plea of *non est factum* were not met. Specifically, that the defence was generally available only to a person under a disability, which the Claimant was not; as well as that the plea was not available to a person who signed a document carelessly. It was suggested that the Defendant's case suggested that he had been careless, given that he never discovered the nature of the document until well after its execution. Reliance was likewise placed on **Saunders**<sup>7</sup> in support of the Claimant's argument on *non est factum*. By way of evidence, the Claimant relied on the affidavits of Jacqueline Bryan<sup>8</sup> and Brian Edwards<sup>9</sup> both of whom confirm that the Defendant signed the guarantee.

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<sup>7</sup> Fn 5 *supra*

<sup>8</sup> Filed on March 11, 2013

<sup>9</sup> Filed on March 3, 2020

(ii) *Duty to advise/Independent legal advice/Undue influence*

[15] The Defendant asserts that he should be relieved from any obligation under the guarantee on the basis that he ought to have received independent legal advice prior to its execution and did not. The Defendant's position more so is that given the nature of the guarantee, (a continuing guarantee), the Claimant was obliged either to inform the Defendant of the implications of the guarantee,<sup>10</sup> or to advise him to obtain independent legal advice prior to executing the guarantee. The Defendant in his defence asserted that the same attorney-at-law acted for the Claimants, the Defendant and the principal debtor, Isis Development Company Ltd. As a consequence, the Defendant pleads that the Claimant's attorneys and by extension the Claimant, had a fiduciary duty to inform the Defendant that he should obtain independent legal advice in relation to the transaction. Counsel cited **Re: Coomber**<sup>11</sup> in support of the requirement for independent legal advice to have been issued to the Claimant.

[16] Counsel for the Defendant's submission in relation to the Defendant's lack of independent legal advice also raised a point concerning certain practices alleged in relation to incurrence of attorneys' fees. The argument alleges that

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<sup>10</sup> This position was based on **Royal Bank of Canada v Fazakas** [1994] S.J. No. 63

<sup>11</sup> [1911] 1 Ch. 723 @ 730

a practice exists of financial institutions encouraging borrowers to utilize the institution's attorney-at-law in order to capitalize on lower legal fees. It was stated that such a practice deprives borrowers of the opportunity of obtaining independent legal advice. This was advanced by Counsel as being a novel issue of law which ought not to be struck out as it required ventilation at trial as a developing area of law.

Inasmuch as the Defendant's case alleged undue influence in the same breath as estoppel, unconscionable conduct and breach of fiduciary duty, Queen's Counsel for the Claimant rejected the underlying concept of the existence of any duty on the part of the Claimant towards the Defendant to either advise of the need to obtain independent legal advice; or to advise the Defendant of the nature of the guarantee. This position was supported by reference to **Caribbean Commercial Bank v Jackman**.<sup>12</sup>

[17] Queen's Counsel for the Claimant referred to **Murray v Deuberry**<sup>13</sup> to support his contention that the defence pleaded did not make a case for either actual or presumed undue influence. According to this authority, it was submitted that the Defendant was obliged to plead the course of dealing between the parties which gave rise to a relationship of trust and confidence.

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<sup>12</sup> BB 2000 HC 1 @[32] – [33]

<sup>13</sup> (1996) 52 WIR 147

Also, that the defence needed to have identified (i) how the influence was exercised, (ii) the aspect of the influence rendered that was to be classified as undue, and (iii) that the exercise of such influence brought about the Defendant's execution of the guarantee. In relation to the issue of any duty to advise the Defendant of the implication of the continuing guarantee, Queen's Counsel for the Claimant rebutted Counsel for the Defendant's reliance on *Royal Bank of Canada v Fazakas*.<sup>14</sup> It was pointed out that the Court in that case, affirmed that there was no duty on a lender in that jurisdiction (Saskatchewan, Canada) to explain the nature and contents of a guarantee to a guarantor.

[18] Queen's Counsel also pointed out in relation to **Fazakas**, that whilst the Court therein acknowledged that where a debtor understands that he is guaranteeing a specific debt, but is in fact giving a continuing guarantee - a lender's failure to disclose and explain the nature of the continuing guarantee seriously jeopardises its validity. It was pointed out however, that in **Fazakas**, such an effect was negated by the commercial experience of the guarantor, together with his prior relationship with the debtor and the bank. Queen's Counsel attributes to the Defendant in the case at bar, the same commercial experience and prior relationship with principal debtor Isis, of which he was a director.

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<sup>14</sup> fn 10 supra

Further in any event, Queen's Counsel categorises the judge's remarks regarding any failure to disclose the nature of a continuing guarantee, as *obiter*.

[19] Lastly in relation to the question of legal representation, the Claimant's position is that their attorneys never acted for the Defendant in the loan transaction for Isis.

By affidavit filed in February, 2014<sup>15</sup> a partner of the Claimant's attorneys deponed that the law firm acted for the Claimant bank and Isis Development (respectively as lender and borrower) in a mortgage loan transaction but was never retained by the Defendant for that or any other transaction save the incorporation of a company in 2000. Further in this regard, Queen's Counsel for the Claimant pointed out that the Defendant had not in fact pleaded, that he had ever retained the Claimant's attorneys to act for him in his role as guarantor in the loan transaction. As a consequence there was no relationship which existed between the Claimant and Defendant much less any duty on the part of the Claimant, fiduciary or otherwise.

(iii) **Claimant's conduct resulting in Defendant's discharge under guarantee**

[20] The Defendant claims that the Claimant was in fundamental breach of the loan agreement with Isis, thereby discharging him as guarantor under the

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<sup>15</sup> Affidavit of Ramon Alleyne, filed Feb 07, 2014

agreement. The defence set out at length the details said to give rise to such fundamental breach. A brief account of the gist of the particulars, is that the purpose of the loan was to facilitate Isis in purchasing and developing land for residential development and subsequent sale of subdivided lots with dwelling houses.

The Defendant claims that the Claimant's attorneys also acted as attorneys for purchasers of the houses, as well as the contractor engaged in the development. As a consequence, the Claimant itself as lender, and through its attorneys as their agent, was fixed with actual and constructive knowledge of all aspects of how the construction project was managed and the loan agreement discharged.

[21] The Defendant alleges in his defence that numerically, the monies advanced under the loan were well within reach for repayment within the loan period, except for the negligence of the Claimants themselves, through their attorneys-at-law (by virtue of the attorneys acting for all parties involved in the loan, construction and purchase). The negligence alleged was the failure to adhere to the terms of the loan agreement regarding the application and remittance of proceeds of sale towards discharging the loan. It is not necessary to go beyond this explanation but it is acknowledged that the above is a simplistic reduction of the ten pages of particulars laid out in the defence. By

the various particulars, the Defendant alleges the fundamental breach; negligent mishandling of finances hence impairment of the loan securities (meaning his guarantee); altering the terms of the loan agreement by increasing the loan without the consent of the Defendant; and by conduct, materially increasing the risk of enforcement of the guarantee.

[22] The Claimant's position on their respective Applications with respect to these defences is that they all arise at common law and that the Defendant by the terms of the guarantee, has contracted out of these rights. Specifically, Queen's Counsel for the Claimant points to paragraph one of the guarantee as extinguishing the defences which would have been available to the Defendant at common law. In support of this submission, Queen's Counsel referred to **Clico Holdings (Barbados) v Royal Bank of Canada (Barbados) Ltd.**<sup>16</sup> as illustration of a guarantee that was upheld and which by similar terms, expressly reserved the rights of the creditor, including a discretion to allow time to the borrower to pay. Queen's Counsel commended this case unto the Court in support of the full import of the nature of the guarantee given by the Defendant, which was explained by the Court of Appeal therein<sup>17</sup>.

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<sup>16</sup> (2001) 61 WIR 49

<sup>17</sup> Ibid @ pg 63

## The Court's Consideration

### *Legal Principles*

[23] The Court must now consider whether the Claimants should be afforded the relief they seek either by way of a strike out of the defence to the claim, or by way of summary judgment. This will be considered with reference to each of the three responses ultimately advanced on behalf of the Defendant in answer to the Applications.

Before examining the Defendant's three responses, the Court will consider the relevant law to be applied in respect of each Application. There is no variance between Counsel for the respective parties on the law to be applied in determining the respective Applications to strike out and for summary judgment. The law in relation to both of these areas is well settled and the Court is able to extract the applicable principles from the submissions of both Counsel. The following principles are extracted in relation to an application to strike out a defence:-

- (i) An application to strike out a defence pursuant to **CPR Rule 26.3(3)(b)**, namely on the basis that there is no reasonable ground for defending the claim, is determined only with reference to the pleadings – **Bentley Rose v City of Kingston Co-op**;<sup>18</sup>

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<sup>18</sup> (2008) HCV 02180

- (ii) No reasonable ground for bringing or defending the claim would include *‘those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides...or not being a valid claim or defence as a matter of law...’*;<sup>19</sup>
- (iii) By the same token, the discretion to strike out should be sparingly exercised, as well as exercised having regard to the overriding objective to deal with cases justly, coupled with the court’s case management powers;<sup>20</sup>
- (iv) The power to strike out should not be exercised where it would involve *‘a minute and protracted examination of the documents and facts of the case...’*<sup>21</sup> nor is it appropriate to strike out a claim *‘where the central issues are in dispute’*;<sup>22</sup>
- (v) The Court must not grant an application to strike out a claim unless it is certain that the claim is bound to fail.<sup>23</sup>

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<sup>19</sup> Submissions on behalf of Claimant para 13, citing Civil Procedure (The White Book Service) 2011 para 3.4.2

<sup>20</sup> Submissions on behalf of the Defendant paras 8-10, citing The Caribbean Civil Court Practice 2011; **J.D. Edghill et ux v Paradise Beach Ltd**, Barbados Court of Appeal, December 2012, Unreported)

<sup>21</sup> **Edghill** supra @ para 21

<sup>22</sup> Ibid @ para 23 citing *King v Telegraph Group Ltd*. [2003] EWHC 1312.

<sup>23</sup> Submissions on behalf of the Defendant, citing *Fortress Value Recovery Fund I LLC et al v Blue Skye Special Opportunities Fund LP et al* [2013] EWHC 14

[24] An application for summary judgment pursuant to **CPR Rule 15.2(a)(ii)** on the other hand is enabled where a defendant ‘has no real prospect of successfully defending the claim or issue’.

- (i) This application must be determined with reference to evidence filed before the Court as opposed to only the pleadings;
- (ii) The applicable test is generally taken from **Swain v Hillman**,<sup>24</sup> namely, that the claim or defence has a ‘real’ prospect of success as distinguished from a ‘fanciful’ prospect of success;
- (iii) The term ‘real’ has been held to require no explanation, but at the same time it is accepted that ‘real’ is not to be equated with ‘good’ or ‘arguable’;
- (iv) In order to ascertain the prospect of success the court is required to conduct an assessment of the party’s case to determine its probable ultimate success or failure.<sup>25</sup> However, the court should not conduct a mini trial where there is a conflict of facts which would only properly be resolved through a trial process, with the aid of discovery and a full blown investigation of the evidence through cross examination;<sup>26</sup>

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<sup>24</sup> [2001] 1 All ER 91

<sup>25</sup> Submissions on behalf of the Claimant, citing *Stewart et al v Samuels SCCA*, 02 of 2005 pgs 6-7

<sup>26</sup> **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical** [2006] EWCA Civ 661

(v) Complex cases of law of fact should also not be disposed of via summary judgment.<sup>27</sup>

[25] It is not a complicated task to set out these principles, however, it is far more difficult to apply them. The case at bar presents some difficulty because there has been no clear delineation in what the scope of each application is intended to capture.

The Applications are broadly expressed to be in the alternative, but not individually directed towards any specific aspect of the defence. Additionally, the defence as pleaded is prolix and particularly in relation to the plea of lack of independent legal advice, there are legal principles lumped together in a manner that is lacking in clarity and conciseness. The Court reiterates that Counsel for the Defendant was not the initial counsel on record and as such does not have ownership of the unhappily drafted pleadings. The Court must nonetheless do its best to determine the Applications without eliding any material parts of the defence simply because it is prolix.

[26] It was earlier stated that Counsel for the Defendant declined to defend all aspects of the defence as pleaded. Those defences left unanswered upon the application to strike are unilateral mistake and common mistake. Queen's Counsel for the Claimant had addressed these defences in terms that they did

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<sup>27</sup> **Three Rivers District Council v Governor and Company of the Bank of England** [2001] 2 All ER 513

not arise on the circumstances pleaded<sup>28</sup>. The Court does not consider it necessary to do anything other than acknowledge that within the context of the factual matrix pleaded by the Defendant, Queen's Counsel on behalf of the Claimant is correct in his categorization of the defences as bound to fail. The legal requirements for both pleas of unilateral nor common mistake are accepted as set out by the Applications<sup>29</sup> and it is also accepted that neither plea arises on the factual circumstances of the case. There having been no attempt by Counsel for the Defendant to further advance these pleas in his response to the applications, both defences of unilateral mistake and common mistake are accordingly struck out from the defence as pleaded. In relation to the remaining defences which were pursued (*non est factum*, breach of duty to advise/undue influence, and breach of contract with guarantee principal), these defences will now be examined with reference to the Applications to strike out and for summary judgment.

***Non est factum***

[27] The Defendant's case is that he was unaware that he was signing a personal guarantee – he thought he was signing a document in his capacity as director of the company in furtherance of the company's dealings with the Bank. The

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<sup>28</sup> Para 6 supra

<sup>29</sup> Para 6 supra.

Defendant thus says he lacked the requisite intention to sign the guarantee. As proof of his lack of intention to be personally bound by the document he signed, the Defendant says the following:-

- (i) He was under the belief that he was signing documents pertaining to the Company's indebtedness and it was never explained to him that he was signing a personal guarantee;
- (ii) The Defendant did not receive, was never offered nor informed, of his right to independent legal advice in relation to the guarantee. The Claimant's attorney acted in that capacity for the Claimant as lender; the Defendant himself as guarantor; and the Company as principal under the guarantee. The attorneys also acted as such for other parties in the business dealing, namely, the contractor (the company's business was and the loan pertained to residential development); as well as purchasers of properties sold under the residential development. As such the Defendant says there was a conflict of interest in relation to the attorneys-at-law who acted for all parties;
- (iii) In addition to there being a conflict of interest by virtue of the Claimant's attorneys acting for all parties in the entire course of dealings, the Defendant says the Claimant's attorneys, and as a

result, the Claimant had a fiduciary duty to ensure that the defendant was advised independently or advised of his right to seek independent advice, in relation to the document he was signing;

- (iv) Further in relation to evidence of his lack of intention to be bound by the personal guarantee, the Defendant also points to the fact that he did not sign the facility letter which set out the requirement for the personal guarantee. Also, that his minimal shareholding of 3.5% in the company negated the possibility that he ever intended to be bound personally by the guarantee, as he did not stand to benefit from the company's activities. The Defendant also says that the amount of the guarantee was so disproportionate to his minimal shareholding of the company, that there was no consideration for the execution of the guarantee.

[28] The above matters are pleaded in the defence. In terms of evidence supplied, the Defendant's affidavits repeat the same allegations. In his submissions, Counsel for the Defendant indicates that at this stage of the proceedings, there has been no discovery, witness statements are yet to be filed, and the Defendant is entitled to cross examine the Claimant regarding the circumstances of execution of the guarantee.

As such, the Court is not in a position to strike out the proceedings or award summary judgment having regard to the test for either process. Queen's Counsel for the Claimant's submission was that both on the face of the pleadings and by lack of evidence, the plea of *non est factum* was not made out in law or in any event is bound to fail. Before considering both facets of the attack on this defence, the Court notes that given the application for summary judgment, the Defendant was entitled if not obliged, to put the evidence upon which he relies before the Court.

[29] In relation to the plea not being made out, the Court as did both Counsel, makes reference to **Saunders v Anglia Building Society**<sup>30</sup> for purposes of extracting the law applicable to establishing a plea of *non est factum*. Queen's Counsel for the Claimant had referred to this decision as establishing the following criteria required in order for the plea to succeed:-

- (i) that the Defendant was under a disability;
- (ii) that the document signed was fundamentally, radically or totally different from the document the Defendant thought he was signing; and
- (iii) that the Defendant was not careless or failed to take precautions to ascertain the contents or significance of the document he was signing.

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<sup>30</sup> Supra fn 4

The authorities in which this decision has been continuously cited however express that a person seeking to rely on a plea of *non est factum* must establish the following criteria:-

- (i) That there was a radical or fundamental difference between what the person relying on the defence signed and what the person thought they were signing;
- (ii) That the mistake was as to the general character of the document as opposed to its legal effect; and
- (iii) That there was a lack of negligence i.e. that the person took all reasonable precautions in the circumstances to find out what the document was.

The criteria are thus slightly different as found by the Court, but the issue of a person being under a disability is nonetheless relevant to establishing the plea and will be examined.

[30] Queen's Counsel for the Claimant's position is that the Defendant on the face of the Defence, has not established any of those three aspects of the plea, as he was under no disability; he was aware that he was signing a security document for indebtedness, even if mistaken as to its legal effect (which was not accepted by the Claimant); and having himself adverted to becoming aware of the nature of the document he signed only after its execution, by his

own admission, was negligent in signing the document. Further, that the Defendant had failed to plead any circumstances at all which could establish that he did take care in signing the document. Counsel for the Defendant on the other hand points to the dictum of **Lord Reid** in **Saunders** who accepted that it was possible for a person not under a disability to rely on the defence.<sup>31</sup> Further, that as the test for intention was subjective, the issue of the Defendant's intention in relation to signing the document, was one to be determined at trial. Counsel for the Defendant did not address the issue of want of care in signing the document.

[31] **Saunders** is a unanimous decision of House of Lords in which there are five fully reasoned decisions, each containing individual emphatic statements on the law. In these kinds of cases, one has to be careful to ensure that reliance is not placed on only one aspect of the entire decision (as expressed by one Law Lord), by reason of the fact that that one aspect is so authoritatively expressed and comprehensively reasoned. The Court finds that Counsel for the Defendant has fallen prey to this danger, insofar as he has singled out reasoning on intention arising from one Law Lord's judgment without due regard for the full context within which the remarks were made.

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<sup>31</sup> Saunders @ para 1016

Intention, as was correctly submitted by Counsel for the Defendant, was addressed at length by **Lord Pearson**, who delivered the leading judgment. However, the question of intention, arises only in relation to one of the three criteria for the defence, i.e. whether the document was of a nature fundamentally different from that which the Defendant thought he was signing. Apart from the defendant's intention as applicable to the document thought to have been signed, the criteria of the nature of the document and want of carelessness must be viewed in equal measure.

- [32] The issue of whether or not the defendant is a person under a disability should also be addressed, as Counsel for the Defendant submitted that according to **Saunders**, the defence could nonetheless be made available to a person not under a disability. In relation to the issue of disability – Counsel for the Defendant mentioned the dictum of Lord Reid, to the effect that there could be an instance where the plea is available to a person of full capacity. The full import of **Lord Reid's** statement in this regard however was very restrictive. **Lord Reid** started out by recognizing the origin of the plea as applying firstly to persons who did not in fact sign the document – thereafter extending to persons who did sign the document - but due to blindness, illiteracy, defective education, illness or some innate incapacity, were unable to have any real understanding of the document.

**Lord Reid** prefaced the extension of the plea from persons who didn't sign, to persons who did sign but disavowed the document as theirs, on the following statement<sup>32</sup>:-

*“Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no reason to doubt their validity”*

[33] Evidently therefore, the availability of the plea must be considered within an underlying rationale which requires it to be applied restrictively. **Lord Reid** continued on to categorise the burden of proof on the person seeking to invoke the remedy as ‘a heavy one’, requiring the person to ‘prove all circumstances necessary to justify its being granted to him. Counsel for the Defendant’s reference regarding capacity was stated by **Lord Reid** thus<sup>33</sup>:-

*“I do not say that the remedy can never be available to a man of full capacity”*

Continuing on however, the full import of what was being said must be extracted from what immediately follows<sup>34</sup> (emphasis mine):-

*“But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinizing the document before signing it was that he was too busy or too lazy. In general I do not think he can be heard to say that he signed in reliance on someone he trusted. But particularly when he was led to believe that the document which he signed was not one which*

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<sup>32</sup> Saunders @ pg 1016

<sup>33</sup> Ibid

<sup>34</sup> Ibid

*affected his legal rights, there may be cases where this plea can properly be applied in favour of a man of full capacity.”*

*“The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have a such a belief unless he had taken steps or been given information which gave him some grounds for his belief.”*

[34] In the instant case, with such a high threshold to meet, the Defendant as a person of normal capacity needs not only to exclude his execution of the guarantee from the lack of care described by Lord Reid, but also to establish a circumstance in which he was either led to believe or was given information that gave him grounds to believe, that the document was radically different from what he thought it was. Queen’s Counsel for the Claimant points out that the Defendant has not asserted that the Claimant represented to him that the document was that which he (the Defendant) says he thought it was – security for the loan in his capacity of director of the company.

Further, the Defendant has not by his pleading or by evidence, given any specifics of what actions on the part of the Claimant, upon execution of the document, caused him to think that it was anything other than a personal guarantee. The Court agrees with Queen’s Counsel’s assessment of the

Defendant's case as wanting, insofar as it pertains to any question of disability or the high threshold the Defendant would have to establish regarding the circumstances of execution of the document, as a person without a disability.

[35] With respect to the question of the document being fundamentally different from what the Defendant thought he was signing, the Court is willing for the sake of argument, to consider the Defendant's submission regarding lack of independent legal advice as impacting his knowledge of the document he signed. For this argument to meet the high threshold of what the Defendant must establish, there must be merit to the legal proposition that the Claimant owed the Defendant a duty to provide him with, or to notify him of, his right to seek independent legal advice in relation to execution of the guarantee. Counsel for the Defendant has provided no such legal authority, save for the case of **Fazakas**<sup>35</sup>. Queen's Counsel for the Claimant has pointed out weaknesses of *Fazakas*, which the Court agrees with.

Firstly, the specific remarks as commended unto the Court by Counsel for the Defendant, regarding the effect of failure to explain the nature of a continuing guarantee<sup>36</sup>, are said to have been *obiter*.

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<sup>35</sup> fn 10 *supra*

<sup>36</sup>Fazakas @ para 34 - 36

[36] Secondly, the issue in *Fazakas* was not about the requirement for independent legal advice,<sup>37</sup> but rather, about a creditor's duty to disclose matters pertinent to the transaction or the borrower, which would otherwise not be within the guarantor's knowledge. The duty to disclose was said to be possibly applicable where a guarantor believes a guarantee to be for a specific debt but the guarantee is in fact a continuing guarantee. The judge in fact affirmed that under the applicable law therein (of Saskatchewan), there was no duty on a creditor to explain the nature of a guarantee, to a guarantor; but there was a duty not to misrepresent the nature of the guarantee. (It is not the Defendant's case that there was any misrepresentation made to him regarding the document he signed). The remarks referred to by Counsel are viewed as *obiter*, on the basis of the following.

[37] The specific guarantee in *Fazakas* was drawn on a prescribed form from another province, which by law<sup>38</sup>, required the guarantor's certification that he had read and understood the contents of the guarantee. That certification was not completed on the guarantee form. The judge's remarks were to the effect that the lack of evidence that the guarantor had read and understood the guarantee, could have affected its enforcement, except for

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<sup>37</sup> *Fazakas* @ para 34

<sup>38</sup> The Guarantees Acknowledgment Act, R.S.A. 1980

the fact that the certification was not a legal requirement in the province of that Court (Saskatchewan). In any event, the judge went on to state, that even if evidence of the guarantor's understanding of the document were required, the guarantee would still be enforceable given the guarantor's standing as an experienced businessman, and close business relationship with the debtor. The Court therefore agrees with Queen's Counsel for the Claimant that *Fazakas* is of no assistance to the Defendant as it pertained to any issue of the Claimant having a duty to explain the guarantee or otherwise ensure the Defendant had legal advice.

[38] Still on the issue of a duty to advise insofar as any failure so to do impugns the Defendant's knowledge of the document he signed, Queen's Counsel for the Claimant cited **Caribbean Commercial Bank v Jackman**<sup>39</sup> as refuting any question of an obligation on a lender, to facilitate independent legal advice in relation to a guarantor to a loan. The responsibility for the legal consequence of the guarantee was therein upheld as the guarantor's.<sup>40</sup>

In the instant case, the Defendant was most certainly not under a disability and has pleaded no fact or circumstance which alleges that the Claimants misrepresented or otherwise led him to believe that the guarantee was some

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<sup>39</sup> Fn 12 supra; Barbados High Court CV796 of 1996

<sup>40</sup> Ibid per Moore J para 22.

other document. With respect to his assertion of the Claimant having a duty to advise, or the fact that the guarantee was a continuing guarantee, the Defendant has not provided any legal submission which supports any duty on the part of the Claimant to have either explained the guarantee to him, or advised him of the need to obtain independent legal advice.

[39] The Court further observes, that inasmuch as the Defendant states that he thought he was signing security documents for the company – what exactly the Defendant thought he was signing has not been pleaded. It could not be the case that he thought he was signing a guarantee for the company to be bound, as he was well aware that the company was the borrower of the loan. It was incumbent upon the Defendant to plead what he thought he was signing, but even more so, having been faced with the application for summary judgment, to have set out by way of some evidence, what he actually thought he was signing. The Defendant's generalized pleading that he thought the document pertained to the company's liability in respect of the loan does not suffice as an answer to the application for summary judgment.

[40] The third criteria for establishing the defence of *non est factum* which speaks to want of care in executing the document, naturally follows from the above discussion. Lord Reid<sup>41</sup> has basically said that a person's failure to find out

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<sup>41</sup> Saunders, per Lord Reid @ 1015-1016

the general effect of the document, or reliance on trusted advisors without making any inquiry as to the purpose or effect of a document, would render the plea of *non est factum* unavailable to the person who signs in such circumstances. Viscount Dilhorne discussed the context of negligence as being no more than the ordinary usage of the word, as distinct from arising out of a corresponding duty of care on the other party<sup>42</sup>. It was recognized that there could be instances where a person of full capacity failed to read a document before signing in circumstances which had nothing to do with negligence – and the plea could be available. Examples alluded to by Viscount Dilhorne however spoke to such a person having been actively led to believe that the document was other than what it was.

[41] That is not the circumstance of the case at bar. The Defendant herein has only asserted his own lack of awareness, and as stated before, has not pleaded that the Claimant in any way misled him as to the nature of the document.

**Lord Wilberforce** also opined that cases in which adult and literate persons could successfully plead *non est factum*, to be rare.<sup>43</sup> The Court cites for good measure, an illustration of the application of the various dicta in *Saunders* as extracted above, in a case considered to be of comparable circumstances to

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<sup>42</sup> Saunders, per Viscount Dilhorne @ 1022-1023

<sup>43</sup> Saunders, per Lord Wilberforce @ 1027.

the case at bar. This is Jamaican authority **Bank of Nova Scotia Jamaica Ltd. v Walmar Trading Co. Ltd., Rudolph Anthony Walcott et al**<sup>44</sup>. This case concerned an application for summary judgment in respect of a guarantee given by several family members, of a loan to the 1<sup>st</sup> defendant company by the plaintiff bank. The Court rejected the 2<sup>nd</sup> defendant's plea of *non est factum*, as it had been clearly pleaded that the 2<sup>nd</sup> defendant signed the document without asking too many questions, upon the strength of representations made by his brother, the 4<sup>th</sup> defendant.

[42] **Rattray J**, cited the exact passages from *Saunders* extracted above<sup>45</sup> in addition to similar passages from Viscount Dilhorne<sup>46</sup> in relation to capacity and want of care. **Rattray J** himself stated that<sup>47</sup>:-

*“The plea of non est factum is rarely established by a person of full capacity and the burden of proving such a plea falls squarely on the shoulders of the person seeking to disown the document.”*

The Defendant at this juncture has failed to establish either by pleadings or evidence, two of the three elements which on the authority of *Saunders*, are required in order to successfully rely on the plea of *non est factum*. Already therefore, the defence is bound to fail, but the Court will specifically address the question of the Defendant's intention in executing the document, as this

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<sup>44</sup> JM [2002] SC 102

<sup>45</sup> Paras 32-32 supra citing Lord Reid in *Saunders* @ 962-963 (AC 1015-1016)

<sup>46</sup> *Saunders* supra @ para 966-967 (AC 1021-1023)

<sup>47</sup> *Bank of Nova Scotia Jamaica v Walmar Trading Co. Ltd. et al*, supra, (pg 6 of judgment)

was heavily relied on by Counsel for the Defendant. The question of intention arises in relation to whether the document was one which was fundamentally different in nature from that which the person signing thought they had signed.

[43] There are two elements which arise on this issue. There is the question of whether the fundamental difference must relate to the nature and character of the document, as distinct from its legal effect. There was extensive discussion in *Saunders* on this issue<sup>48</sup>, which ended by Lord Pearson acknowledging that contrary to earlier authority, a difference in consequence, could be such as to qualify the document as being fundamentally different in nature, from what was thought to be signed.

Again, for the purpose only of argument favourable to the Defendant, the Court is prepared to accept that the Defendant can be afforded the benefit of acceptance that the guarantee, (which turned out to be a personal continuing or all monies guarantee), was of a fundamental difference from a guarantee which bound only the company.

[44] With this assertion accepted, the Court nonetheless has to consider the actual manifestation of the Defendant's intention to sign the document, within the context of the circumstances he has presented. Counsel for the Defendant commended to the Court, **Lord Pearson's** reference to '*Ascertainment of*

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<sup>48</sup> Saunders supra. Lord Pearson @ paras 1031 - 1032

*intention*', as being subjective, as in the intention a man has in his own mind, rather than the intention he manifests to others, i.e. in the eyes of reasonable men. There are two issues which do not assist the Defendant in this argument. First, **Lord Pearson** immediately followed this statement regarding subjective intention, with the following<sup>49</sup>:-

*“There are however, some cases in which the subjective test of intention can be applied so as to produce the same result as would be produced by the objective test.”*

In other words – the subjective is to be found by traveling the objective road. By way of example, **Lord Pearson** illustrated – the person who signs relying on their solicitor intended to sign exactly what was put in front of them; and a busy managing director signs from a amongst a pile of documents what is put before him by his secretary.

[45] In both scenarios the persons who signed were found to have intended to sign exactly what was put in front of them, albeit motivated by different reasons. Secondly, aside from the dialing back of a purely subjective test of intention, **Lord Pearson's** discussion of intention arose within the context of qualifying the formulation of the plea of *non est factum* set out by the Master of the Rolls in the Court of Appeal decision, which he felt was too rigid and in need of

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<sup>49</sup> Saunders supra per Lord Pearson @ 1035

amplification and qualification.<sup>50</sup> **Lord Pearson's** qualification at the end of the day went no further than eschewing a rigid and inflexible formulation of the plea, whilst at the same time affirming the general rule of its narrow application. These two matters do not assist Counsel for the Defendant's submission that the Court's interrogation of the Defendant's intention is to be by means of purely subjective inquiry.

[46] In this regard, the Court is also constrained to note that regarding the question of intention – even taken in the most subjective sense – the Defendant has not led any evidence of any specific allegation of fact regarding his state of mind at the time of signing the document. (The facts pleaded relate to external or subsequent facts from which he seeks to rationalize his earlier intention – namely, the fact that he did not sign the commitment letter; his minor shareholding; and his refusal to sign the 2<sup>nd</sup> personal guarantee). It was incumbent upon the defendant to plead relevant facts as to his state of mind at the time of signing the guarantee, which he has failed to do. It is therefore considered that the plea of *non est factum* has neither (i) been effectively raised by pleading, nor (ii) supported by evidence. For the sake of clarity, the Court's findings in relation to the defence of *non est factum* are as follows:-

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<sup>50</sup> Saunders per Lord Pearson @ paras 1035-1036

- (i) The burden of establishing reliance on the plea was on the Defendant, and a heavy burden to discharge;
- (ii) The Defendant was not a person under any disability and as such was obliged to establish exceptional circumstances giving rise to the plea;
- (iii) The Defendant has not provided any authority which supports any obligation on the Claimant to have either explained the guarantee to him, or offered or advised him to obtain independent legal advice prior to execution;
- (iv) The Defendant has not pleaded that the Claimant made any representations (much less misrepresentations) to him in relation to the document he signed;
- (v) The Defendant has pleaded only a general statement that he thought the document he signed was a security document for the company which he signed in his capacity as director of the company.
- (vi) The Defendant has not pleaded what he actually thought he was signing, nor has he pleaded what the circumstances were, under which he signed the guarantee;
- (vii) The Defendant provided no answer to the affidavit filed on behalf of the Claimant which averred that there was no retainer between the Claimant's attorney and the Defendant in relation to the guarantee; also

that the Claimant's attorneys in no way acted as such for the Defendant in relation to the guarantee;

- (viii) The Defendant's case establishes that he asked no questions and otherwise took no care to read and understand what he was signing, as a result of which there is evidence on the Defendant's case that he signed the guarantee without taking due care as to its contents.

In the circumstances of all of the above, the Court finds that the plea of *non est factum* has not been established by the Defendant, according to the criteria established by *Saunders*, neither on his pleaded case, nor by the evidence led in support.

### **Duty to Advise, Undue Influence, Estoppel, Unconsonable Conduct**

- [47] This aspect of the defence has already been examined as it arose in relation to the plea of *non est factum*. The consideration of this aspect of the defence can be restricted to the pleadings, as its sufficiency must first be assessed in relation to the law relative to the facts pleaded. As argued with reference to authority accepted by the Court<sup>51</sup>, there was no legal duty on the Claimant bank to advise the Defendant in relation to the guarantee. Insofar as the Defendant alleges that he thought he was signing a security document for the company to be bound, this is a bald assertion as there are no facts pleaded to

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<sup>51</sup> *Supra*, *Caribbean Commercial Bank v Jackman* BB 2000 HC1

support the circumstance which gave rise to that belief. It is also not pleaded that the Claimant or any other person represented to the Defendant that he was signing security documents for the company. By contrast the Court refers to **Ulster Bank Ireland Ltd v Geary et anor**.<sup>52</sup>

[48] In this case, the claim was similarly for recovery of monies under a guarantee, against defendants who were directors, shareholders and senior managers of the borrower company. The defendants claimed they had been misled into thinking that the document they signed was an assignment of life insurance policies they had been asked to take out in relation to assisting with the company's finances. Moreover, the defendants claimed that the plaintiffs had deliberately misled them in relation to the documents they signed. The application for summary judgment was in this case refused and the case allowed to go to trial as there was evidence to support the defendants' claim. The defendants in *Ulster Bank* had pleaded and exhibited the actual life assurance policies which they had taken out for the benefit of the company; they also alleged that they had not met with the plaintiffs on the day of the date of the guarantee (thus they could not have signed it on that day); and that even though the guarantee documents were clearly titled 'guarantee', they had never seen those particular pages of the document.

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<sup>52</sup> 2015 IEHC 322

[49] The plaintiff argued the application for summary judgment on the law only and filed no reply disputing the defendants' assertions regarding the circumstances of execution, or the misrepresentations as to the nature of the document they were asked to sign. The court decided that given the failure of the plaintiffs to respond to the defendants' factual allegations which were supported, that there was sufficient factual basis before the court for the matter to be taken to trial. This is not the situation in relation to the pleadings and evidence before the Court in the case at bar. As stated before, the Defendant herein has done nothing more than assert that he did not know what he had signed. The Defendant's lack of signature from the commitment letter and his minor shareholding do not provide any factual basis for his assertion that he was unaware of the nature of the document he signed.

[50] Further, as was held in *Fazakas*, the Defendant's relationship with the company, as well as his status and experience as a businessman, militate against the acceptance by the Court of a bare assertion in relation to his lack of knowledge of the document he signed. With further reference to evidence available, as pointed out by Queen's Counsel for the Claimant, the Defendant again, makes only an assertion that the Claimant's attorneys-at-law acted for him (and all other parties involved in the totality of the transaction), but there is no pleading or other evidence to support a retainer. The Claimant on the

other hand adduced evidence by affidavit from their Attorneys (at the material time), which refuted any legal retainer with the Defendant. In the face of that denial, on a summary judgment application, the Defendant needed to have done more than rely on his asserted pleading that the Claimant's attorneys acted for him.

[51] For example, there is no evidence of fees paid or correspondence to or from the attorneys, referable to an attorney/client relationship in relation to the transaction. Against this lack of evidence or pleading, there is not much further the Court can go in relation to the defences which were predicated on the existence of a relationship of attorney/client. In the circumstances, the Court agrees with Queen's Counsel for the Claimant that there was no factual basis for the existence of a fiduciary or other duty; undue influence; unconscionable conduct; or estoppel. Further, the context within the unconscionable conduct and estoppel were advanced was not made clear. Regrettably, the lack of clarity of and absence of factual bases for these defences places them in the realm of fanciful, as referred to by Lord Hope of Craighead in **Three Rivers**.<sup>53</sup>

[52] There was another related aspect to these defences which arose out of the issue of legal representation. Counsel for the Defendant in his submissions, made

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<sup>53</sup> [2001] 2 All ER 513 @ para 94 et seq.

reference to implications arising out of what was described as the practice of financial institutions encouraging parties to transactions, to utilize the institution's attorney-at-law in order to save on legal fees. This practice Counsel submitted, had the effect of depriving a borrower, to their detriment, of the benefit of independent legal advice. This situation was put forward as an emerging area of law and as such not appropriate to be subjected to summary judgment. In the first place this argument arose only in submissions, there was no pleading in this regard. Thus for that reason alone the Court is not minded to entertain the submission. Further and in any event however, there was no jurisprudence proffered by Counsel for the Defendant which supported this contention of an emerging area of law.

[53] Counsel for the Defendant identified a practice within the legal and financial sectors as in his view, undesirable, and in need of regulation or imposition of standards. An emerging area of law is regarded in terms of **Barrett v Enfield London Borough Council**<sup>54</sup> in which there was a series of conflicting authorities concerning the existence or not of a duty of care at common law versus statute, in relation to injury or harm suffered to children whilst in the care of state institutions. The application of the local authority to strike out the proceedings filed therein was ultimately refused by the House of Lords

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<sup>54</sup> [2001] 2 AC 550 per Lord Browne-Wilkinson @ 560

after comprehensive review of the state of the law, which was referred to as ‘uncertain and developing’. That description can hardly be applied to what the Court has termed above as an undesirable practice identified by Counsel, moreover, the matter was simply not pleaded. In the circumstances, the defences attempted to be advanced in relation to the duty to advise as to the nature of the guarantee; lack of independent legal advice; breach of fiduciary duty; undue influence; estoppel and unconscionable conduct – these are all regarded as not supported on the face of the pleadings and are accordingly struck out pursuant to Rule 26.3(3)(b).

### **Discharge from Guarantee due to actions of the Claimant**

[54] The Defendant’s allegations in respect of this aspect of his defence are that he is entitled to be discharged from his liability under the guarantee on the basis that:-

- (i) There was a fundamental breach of contract between the Claimant and Isis (the principal under the guarantee);
- (ii) The Claimant negligently mishandled and impaired its securities (the guarantee being one such security) to the prejudice of the Defendant;
- (iii) The Claimant altered the terms of its agreement with Isis by increasing the loan amount to the prejudice and without the consent of the Defendant;

(iv) The Claimant by its conduct, materially increased the risk that the guarantee would be enforced against the Defendant.

[55] The Defendant gave extensive particulars of the Claimant's conduct as alleged above, however as stated before, it is not considered necessary to set out those particulars, having regard to the ground of the application for summary judgment on this issue. Queen's Counsel for the Claimant submitted that the grounds for discharge pleaded by the Defendant, were all defences available to a guarantor at common law. With respect to such defences, Queen's Counsel for the Claimant's position is that the terms of the guarantee expressly permitted the actions complained of by the Defendant. More particularly that, (i) the guarantee permitted the Claimant to deal with the company as it saw fit; (ii) the guarantee was an 'all monies' guarantee which contemplated future liabilities. Therefore, contrary to what was contended in the defence regarding the Claimant's conduct – the Claimant was entitled by the terms of the guarantee,<sup>55</sup> to have applied monies received by the company as they saw fit; also, to have granted increases in, or time to pay, the loan, without notice to or the consent of the Defendant.

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<sup>55</sup> Queen's Counsel referred to clause 1 of the guarantee in particular as providing an express contractual entitlement for the Bank to have done the actions complained of by the Defendant.

[56] Queen's Counsel drew the Court's attention to the guarantee under consideration in **Clico Holdings (Barbados) Ltd. v Royal Bank of Canada (Barbados) Ltd.**<sup>56</sup> as containing the same terms as the guarantee signed by the Defendant. Further, that the said terms were upheld by the Court of Appeal as excluding the principles otherwise available to protect a guarantor in a case where the creditor deals with the principal debtor in a way otherwise than as contemplated by the contract of guarantee.<sup>57</sup> Based upon binding authority of the Court of Appeal of Barbados therefore, Queen's Counsel for the Claimant submitted that the Defendant could not seek discharge of the guarantee based upon the specific allegations of conduct of the Claimant in relation to the principal debtor.

[57] In relation to the authority cited, the dictum of the Court of Appeal was clear and the Court extracts the following statement as being directly applicable to the allegations made by the Defendant in relation to the Claimant's conduct under the loan agreement with the principal debtor (emphasis mine):-

*“Although a guarantor may be discharged from his liabilities under a guarantee if the creditor, without the guarantor's consent and without expressly reserving his rights against the guarantor, enters into a binding arrangement with the principal debtor to give him extra time in which to perform the principal obligation, the guarantor's liability to the creditor will be preserved if the contract of guarantee expressly authorizes the*

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<sup>56</sup> (2001) 61 WIR 49

<sup>57</sup> Ibid @ 60

*creditor to give extra time to the principal debtor and the right of the creditor to pursue the terms of the guarantee as a separate and distinct issue is expressly reserved.*”

The Court finds that clauses 1, 2, and 3 in particular, of the guarantee signed by the Defendant authorized the Claimant to (i) increase the loan amount to the company without the consent of the Defendant; to carry out a wide range of actions in relation to the company as deemed fit; to apply monies received from the company or from other securities to such part of the loan deemed fit; and to change the application of such monies in whole or in part as seen fit.

[58] Most importantly, the following term is seen as fatal to the Defendant’s defence in relation to the conduct of the Claimant under the loan agreement with the company:-

*“no loss of or in respect of any securities received by the Bank from the customer [the company] or others, whether occasioned by the fault of the Bank or otherwise, shall in any way limit or lessen the liability of the undersigned under this guarantee.”*<sup>58</sup>

The Court supplements its acceptance of this authority and Queen’s Counsel’s argument on the Defendant having contracted out of his rights to be discharged, with reference to Halsbury’s Laws of England<sup>59</sup> as follows:-

*“Equity intervenes to protect a guarantor...a guarantor is discharged if the creditor without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time without reserving his rights against the*

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<sup>58</sup> Clause 1 of the Guarantee signed by the Claimant – “BE2” of Affidavit of Brian Edwards, filed in support of amended application to strike out and for summary judgment.

<sup>59</sup> 5<sup>th</sup> Ed. Vol. 49 (2015) para 839

*guarantor...any variation of the principal contract made without his consent discharged him from his guarantee, unless the variation is clearly insubstantial or obviously cannot prejudice him.”<sup>60</sup>*

[59] The guarantor’s rights as stated above are however subject to an exclusion of such rights by the terms of the guarantee, as stated by Halsbury’s in the following terms:-<sup>61</sup>

*“Contracts of guarantee often contain provisions which entitle the creditor to vary the principal contract, give time to or release the principal debtor, release security or other guarantors, or otherwise act in a way which would discharge the guarantor in equity, while nevertheless preserving the guarantor’s liability under the guarantee. Such provisions, if on their true construction they cover the events which have happened, are effective to preserve the guarantor’s liability to the creditor.”*

There was no argument by Counsel for the Defendant that the conduct complained of in some way fell outside of the provisions of the guarantee, or that that it was a disputed fact in issue as to whether such conduct was covered by the terms of the guarantee. In the absence of any such argument to the contrary, the Court does find that the specific allegations regarding the Claimant’s conduct or actions towards Isis, as principal debtor, were covered by the terms of clauses 1, 2, and 3 of the guarantee signed by the Defendant.

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<sup>60</sup> Ibid

<sup>61</sup> Ibid @ para 841

## Disposition

[60] The Court determines that both of the Claimant's Applications are successful, albeit with reference to varying parts of the Defendant's case. The Court's determination of the Applications are:-

- (i) The defences advanced of unilateral mistake, common mistake, undue influence, breach of fiduciary duty, unconscionable conduct, estoppel, and bad faith, are all struck out from the face of the amended defence, pursuant to **CPR Rule 26.3(3)(b)**;
- (ii) The defence of *non est factum* is determined by the Court to have no reasonable prospect of success based on the absence of evidence provided by the Defendant in support of such a plea;
- (iii) The defence that the Defendant was entitled to be discharged from the guarantee on the basis of the Claimant's conduct towards the debtor company under the loan agreement, has no reasonable prospect of success.

The defences raised in paragraph 5 of the defence are equitable defences which have been refuted by the express rights reserved to the Claimant under the guarantee contract;

- (iv) Summary judgment is accordingly awarded to the Claimant in the sum of **one million dollars (\$1,000,000) with interest thereon at the rate**

**of 8.5% per annum**, being the rate provided under the guarantee; such interest to run from the **28<sup>th</sup> November, 2011 being the date of default under the guarantee, to the date of judgment**. The total sum of \$1,000,000 plus interest as provided in this paragraph is hereinafter referred to as '**the judgment debt**';

- (v) Prescribed costs on the judgment debt are awarded to the Claimant;
- (vi) Statutory interest pursuant to **section 35(5) of the Supreme Court of Judicature Act, Cap. 117A** is awarded on the judgment debt at the rate of 6% per annum, from the date of judgment until payment.

**SHONA O. GRIFFITH**  
Judge of the High Court