



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 219

BETWEEN:

HSBC BANK BERMUDA LIMITED

Plaintiff

-and-

SANZ EUGENE PEARMAN

Defendant

Before:

The Honourable Chief Justice Hargun

Appearances:

Ms. Jennifer A. Haworth, MJM, for Plaintiff

The Defendant was unrepresented and did not appear

Date of Hearing:

16 October 2023

Date of Judgment:

22 November 2023

JUDGMENT

HARGUN CJ

Claim by a Bank against the Defendant for monies due under a guarantee given by the Defendant in support of the facility granted by the Bank; allegation of undue influence by

the Defendant in relation to his agreement to enter into the guarantee; allegation of sharp practice by the Defendant in securing the Defendant's personal guarantee; test to be applied

Introduction

1. In these proceedings HSBC Bank Bermuda Limited ("**the Bank**"), the Plaintiff, seeks judgment against Mr Sanz Eugene Pearman ("**the Defendant**") in the amount of \$3,185,000.00 due under a guarantee dated 17 December 2008 ("**the Guarantee**") provided by the Defendant as Part of the security provided to the Bank in relation to a loan made by the Bank to the trustees of the Hideaway Trust ("**the Trust**" and "**the Trust Loan**") in order to refinance another loan in the name of the Trust and to assist with the construction of a six-story mixed-use commercial building at 9 Par-La-Ville Road in Hamilton ("**9 Par-La-Ville**"). In his Amended Defence and Counterclaim dated 4 March 2021 ("**the Amended Defence**"), the Defendant puts the Bank to strict proof of any monies due from the Trust to the Bank and further alleges that the Defendant's agreement to enter into the Guarantee was procured by the undue influence of Ms Karen Patterson ("**Ms Patterson**"), a Trustee of the Trust and the Defendant's relative, namely his aunt.

Factual background

2. The factual background to these proceedings is derived from the witness statements of Ms Susan Tessitore ("**Ms Tessitore**"), a business risk officer at the Bank, and Mr Andrew Cassidy ("**Mr Cassidy**"), who was employed by the Bank between 1997 and 2013 as a junior lender in the Bank's commercial banking team, and their *viva voce* evidence given at the hearing.
3. The Defendant signed a guarantee dated 17 December 2008 whereby he unconditionally guaranteed the obligations of Ms Patterson and Ms Shirley D Simmons ("**Ms Simmons**"), as trustees of the Trust to the Bank for a sum not exceeding \$3,185,000.00

4. The Trust was established by the Defendant by the Indenture of Settlement dated 25 October 2000 and was used by the Defendant as a vehicle for conducting his commercial activities and in particular the development of residential and commercial properties. The Defendant was the settlor of the Trust, and the beneficiaries of the Trust were specified as “(a) the Settlor- Sanz Eugene Pearman; (b) mother of the Settlor- Lucille Caines; and (c) the future born children of the Settlor.”
5. According to a copy of the Deed of Retirement of Ms Patterson dated 8 January 2016, she was a trustee of the Trust from its inception until she retired as a trustee on 8 January 2016. Ms Simmons of Trott & Duncan, the Defendant’s attorneys, was a trustee of the Trust from 30 November 2007 until she retired as a Trustee on 5 March 2014. According to the Deed of Retirement of Ms Patterson, Terri-Lynn Duveen Brown of Trott & Duncan appears to be the sole remaining trustee of the Trust.
6. The Trust sought credit in the sum of \$16,556,000.00 from the Bank to refinance existing borrowing and fund the construction of commercial property at 9 Par-La-Ville. The facility letter dated 10 December 2008 setting out the terms of the credit facility (the “**Facility**”) was accepted by the trustees of the Trust.
7. It was a condition of the Facility that the Defendant enter into the Guarantee. The Guarantee guaranteed all amounts owing to the Bank from the Trust, including those under the Facility.
8. The Trust did not meet its obligations under the Facility, accruing arrears of \$16,213,008.88 by 11 July 2018. Failure by the Trust to pay any sum due to the Bank was an event of default under the Facility. An event of default entitled the Bank to demand payment of the entire sum due under the Facility and to demand repayment from the Defendant under the Guarantee without first seeking repayment from the Trust.

9. On 11 July 2018, the Bank sent a written demand to the Defendant for him to pay the entire sum due under the Facility up to the limit set out in the Guarantee. No payment was made by the Defendant pursuant to the Guarantee and as a result these proceedings commenced on 3 June 2019.

10. Ms Tessitore gave evidence, which the Court accepts, that the Bank routinely requires the beneficiaries of a trust such as the Defendant to provide guarantees for the trust's borrowing so that the Bank has an alternative means of recovery in the event that the trust does not fulfil its obligations under a loan facility. Ms Tessitore understood that the Defendant is an experienced and sophisticated commercial property developer with a history of obtaining financing from the Bank for that purpose. It was also Ms Tessitore's understanding that it was the Defendant who would direct the borrowing activities of the Trust which he had created for the purpose of his business activities.

The Defendant's Defence to the claim under the Guarantee

11. The original Defence file by the Defendant and dated 7 August 2019 merely contended under Paragraph 7(b) that "*it is denied that the Defendant's non-payment is a breach of the Guarantee. it is averred that the Plaintiff has to prove indebtedness by the Hideaway Trust before any amount becomes due under the guarantee.*" In other words, the Defendant accepted liability subject to the Bank establishing to the satisfaction of the court that monies were indeed due from the Trust to the Bank.

12. However, on 4 March 2021, the Defendant filed an Amended Defence alleging for the first time that the Guarantee was secured as a result of undue influence. It is said by the Defendant that his agreement to enter into the Guarantee was procured under the undue influence of Ms Patterson, a Trustee of the Trust and his aunt. The Defendant says that the relationship between him and Ms Patterson was one of trust and confidence in that he had trust and confidence in Ms Patterson. The Defendant further says that the Bank (a) knew of the relationship between the Defendant and Ms Patterson; (b) knew that the Defendant was not providing the Guarantee on a

commercial basis; and (c) knew that the Defendant was not receiving any compensation in relation to the Guarantee that was being provided. The Defendant complains that the Bank failed to take any steps whatsoever in light of its knowledge of the non-commercial familial relationship between Ms Patterson and the Defendant, in particular (a) the Bank failed to advise the Defendant to seek independent legal advice in relation to providing the Guarantee; (b) the Bank failed to ensure that a competent attorney had explained the effects and consequences of signing such a guarantee; and (c) the Bank failed to provide the relevant financial information in order to enable the Defendant to take independent legal advice.

13. The Defendant also complains that the Bank wilfully neglected its obligations to him and engaged in sharp lending practices in that (a) at all material times the Defendant dealt with Mr Cassidy who pressured the Defendant to provide the Guarantee and actively discouraged the Defendant from seeking independent legal advice; (b) the Bank advanced a loan to the Trust for \$16,556,000.00 without even meeting the trustees prior to advancing the loan; and (c) Mr Cassidy received bonuses based on what he was able to lend on behalf of the Bank, which was the basis for the sharp lending practice alleged by the Defendant.

Procedural background

14. As noted earlier, the Bank commenced these proceedings by filing its Specially Endorsed Writ dated 3 June 2019. The Defendant's Amended Defence was filed on 4 March 2021. The Bank's Amended Reply and Defence to Counterclaim was filed on 15 August 2022.

15. Directions for the trial of this matter were given at the hearing on 18 May 2023. At that hearing the Defendant's attorneys, Trott & Duncan, came off the court record as attorneys for him in these proceedings. The Defendant has been unrepresented since that time. At that hearing the Court ordered that (i) the parties should exchange witness statements on or before 14 July 2023; (ii) the witnesses including the

Defendant shall attend in person shall be available for cross examination; (iii) the Bank shall file and serve a trial bundle no Later than 28 days before the hearing; and (iv) the Bank shall file and serve its skeleton argument with authorities not later than three clear days before the hearing and the Defendant to be at liberty to do so.

16. As noted earlier, the Bank has filed and served witness statements and exhibits of Ms Tessitore dated 16 August 2023 and Mr Cassidy dated 18 August 2023 on the Defendant on 25 August 2023. In addition, the trial bundle was served on the Defendant on 5 October 2023. However, the Defendant has failed to serve any witness statement on his own behalf and or otherwise participate in these proceedings. The Defendant was advised by the Registrar of the Supreme Court that the trial of this matter would proceed as scheduled on Monday, 16 October 2023 at 9:30 am. The Defendant elected not to participate in the trial of this matter and did not appear.

The amount due from the Trust to the Bank

17. The Guarantee signed by the Defendant and dated 17 December 2008 provides that the Defendant unconditionally guarantees the payment to the Bank, upon demand, of all and every sum of money which now shall at any time hereafter be owing by the Trust to the Bank including all interest.
18. Section 3 of the Guarantee provides that the Defendant's liability to make payment shall arise upon demand for payment and the Defendant's liability shall bear interest from the date of demand until the date of payment, both after as well as before judgment, at the Bank's prevailing rate from time to time for overdrafts in the currency of the indebtedness together with the Bank's usual administration fees determined as a such liability were an overdraft facility.
19. The demand for payment under the Guarantee was made by the Bank by its letter dated 11 July 2018 and served upon the Defendant on the 17 July 2018. The Court is satisfied with the evidence of Ms Tessitore, and the Bank statement produced by her

that as at 16 December 2022, that the Trust owed the Bank, in relation to account number 010-058980-254, the sum of \$3,144,636.26. The Court is satisfied that, subject to the other defences pleaded by the Defendant, he is liable to pay to the Bank, under the terms of the Guarantee, the said sum of \$3,144,636.26 together with contractual interest in accordance with section 3 of the Guarantee. Counsel for the Bank is directed to provide to the Court, by way of a sworn statement, the calculation of the contractual interest up to the date of judgment upon the said sum of \$3,144,636.26.

Undue influence

20. In *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, Lord Nicholls, explaining the doctrine of undue influence held:

*8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. the second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. An example from the 19th century, when much of this law developed, is a case where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts: see *Bainbrigge v Browne* (1881) 18 Ch D 188.*

...

13. Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. this is the general rule. the evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the Parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.

...

*16. Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. **This use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has***

succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. the use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of res ipsa loquitur is invoked. there is a rebuttable evidential presumption of undue influence.

...

21. As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. first, that the complainant reposed trust and confidence in the other party, or the other Party acquired ascendancy over the complainant. second, that the transaction is not readily explicable by the relationship of the parties.

...

88. Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees.”
(emphasis added)

21. The Court is satisfied based on the uncontroversial facts of this case, that this is not a case where the Defendant can properly rely upon the doctrine of undue influence. Essentially, this was a commercial transaction entered into by the Defendant for his own benefit with the background of the long history of similar commercial transactions. This is a case where (i) the Trust established by the Defendant, was used by the Defendant to facilitate the carrying on of the Defendant’s residential and commercial construction business; (ii) it was the Defendant himself and not the trustees of the Trust, who negotiated the Trust Loan with the Bank and who agreed to provide a personal guarantee; (iii) the Trust had previously guaranteed a bridging loan obtained by the Defendant from the Bank; (iv) the Defendant was an astute businessman who had been involved in multiple loan facilities provided by the Bank and had borrowed and repaid loans in excess of \$30 million during the period 2005 and 2008; (v) the only beneficiaries of the Trust were the Defendant, his mother and his children; and (vi) the Guarantee given by the Defendant is in the same category as “a company... guaranteeing the debts of another company in the same group.” as referred to by Lord Nicholls in *Etridge (No. 2)* at [88].

22. The Court accepts the evidence of Mr Cassidy, who was involved in the negotiation and inception of the facility, including the Guarantee given by the Defendant to the Bank, that by 2008, the Defendant had a significant, established, and growing banking relationship with the Bank.
23. Mr Cassidy states, which the Court accepts, that when he first became the Defendant's relationship manager, the Defendant was primarily a residential property developer with a track record of undertaking relatively modest residential developments. The Defendant would typically finance residential property developments with loan facilities with the Bank. The borrower under these residential development loan facilities would typically be the trustees of the Trust or Defendant's other companies, although the Defendant did sometimes borrow in its own name. Thus, the Bank made a revolving loan facility of up to \$5,250,000 to the trustees of the Trust pursuant to a facility letter dated 23 November 2005.
24. It is the evidence of Mr Cassidy, which the Court accepts, that the Defendant used the Trust as the borrowing entity for the purposes of his domestic and commercial construction development business. Although the Defendant was not named borrower under these residential development loan facilities, the Defendant would at all times speak for the Trust, would be the driving force behind the Trust and would instigate all discussions and negotiations with the Bank on behalf of the Trust.
25. Mr Cassidy explained that typically when the Defendant required the development loan, the Defendant would contact him to determine the required finance and would explain to him what he wanted to achieve. Mr Cassidy would then be tasked with formulating an indicative (or informal) offer (which might take the form of an email) setting out the terms on which the Bank might be prepared to extend a development loan facility to the Defendant. An indicative offer is not binding on the Bank and is subject to subsequent approval by the Bank's risk management teams (in Bermuda and internationally). The Defendant and Mr Cassidy would also perform a sensitivity

analysis, testing whether the repayments could be maintained despite a projected drop in rental income or if on completion of the development the valuation of the property was less than the professional valuation received and used prior to construction. The Defendant was therefore involved in the process leading up to the issuing of an indicative offer, and by this process would become aware of the strengths and weaknesses of this proposal on various issues relevant to the Bank.

26. It is Mr Cassidy's recollection that during the period between 2005 and 2008 when he had dealings with the Defendant, the Defendant had been involved in multiple loan facilities provided by the Bank and borrowed and repaid loans in excess of \$30 million. The Defendant therefore had experience of the process required to submit a development loan application to the Bank's risk management teams for approval and will have been familiar with the detailed supporting evidence required to accompany any such development loan application. Mr Cassidy states and which the Court accepts, that the Defendant will have known that Mr Cassidy, as his relationship manager, had no power or authority to approve the development loan application for the facility, and also that Mr Cassidy had no power or authority to dictate the terms and conditions on which (if approved) the Facility would be granted and/or the nature and extent of the loan and security documents required by the Bank in respect of the Facility.

27. It is the evidence of Mr Cassidy, which the Court accepts, that by the time the Defendant approached the Bank to request the Facility, it was clear to Mr Cassidy that the Defendant: (a) was a sophisticated, astute and successful businessmen with a significant net worth and a track record of successful property developments; (b) had obtained several loans from the Bank to finance the acquisition and development of residential property; (c) had a history of successful real estate development; and (d) had strong relationships with other project managers, local real estate agents and other advisers, who provided him with an operating knowledge of where the demand was within the real estate market.

28. It was clear to Mr Cassidy that the loans to the Defendant were often made to the Trust. It is the evidence of Mr Cassidy, which the Court accepts, that (a) the Defendant was the guiding and driving force behind the Trust in respect of each of the loans; (b) the Defendant negotiated the terms of these loans with the Bank; and (c) the Defendant administered the loans and was the point of contact for the Trust if any loan issues arose, such as extending repayment dates to accommodate construction delays.
29. The Court accepts Mr Cassidy's evidence that when the Defendant approached him to request the Facility, the Defendant had considerable experience of negotiating loans with the Bank and would have been familiar with the loan approval process including Mr Cassidy's role in it. The Defendant was familiar with the way in which the Bank structured property development loans and was aware of the nature and extent of the security the Bank required to support the making of these loans, including that the Bank would require the Defendant to provide a personal guarantee such as the Guarantee.
30. The development loan application process described above was followed when the Defendant approached Mr Cassidy in 2008 and requested the Bank to make the Facility available to him (via the Trust) to enable them to undertake a commercial development property at 9 Par-La-Ville.
31. It is the evidence of Mr Cassidy that the development loan facility requested by the Defendant to assist in to finance the development of 9 Par-La-Ville was for a significant amount; much greater the previous loans the Bank and made available to the Defendant. Inevitably, the loan application was complicated and required the production of a great deal of supporting documents and evidence. This would have taken considerable time, stretching over a number of months before the facility letter for the Facility was issued on 10 December 2008.

32. The borrower under the Facility Letter was the Trust, not the Defendant. However, it is Mr Cassidy's evidence that so far as the Bank was concerned, the Trust was the Defendant's alter ego. The Defendant was the driving force in connection with the Facility and, so far as Mr Cassidy recalls, his understanding was that the Defendant was a beneficiary of the Trust.
33. Mr Cassidy does not recall meeting the trustees of the Trust personally. He does not recall the personal involvement of the trustees of the Trust in the Facility other than that the trustees were named as the borrower on the Facility Letter and related security documents. It was clear to the Bank that the trustees of the Trust had appointed Trott & Duncan to act for them in connection with the Facility. The Facility Letter was addressed to the Trustees of the Trust, whose address was given as care of Trott & Duncan.
34. In the circumstances, the Court is satisfied that the contention of undue influence, introduced by the Amended Defence dated 4 March 2021, is entirely at odds with the uncontroversial facts in this case. Accordingly, the Court has no hesitation in rejecting the Defendant's pleaded case that the Defendant's agreement to enter into the Guarantee was procured by the undue influence of Ms Patterson. The Defendant has elected to produce no evidence in support of this allegation.

Sharp practice

35. In this pleaded case, introduced by the Amended Defence, the Defendant asserts that the Bank wilfully neglected its obligations to the Defendant and engage in sharp lending practices in that (a) at all material times the Defendant dealt with Mr Cassidy who pressured the Defendants to provide the Guarantee and actively discouraged the Defendant from seeking independent legal advice; (b) the Bank advanced a loan to the Trust for \$16,550,000.00 without even meeting the trustees prior to advancing the loan; and (c) Mr Cassidy received bonuses based on what he was able to lend on behalf of the Bank, which was the basis for the sharp lending practice set out above.

36. The Defendant elected to call no evidence in support of these allegations and as noted above, did not appear at the trial of this action. Mr Cassidy did appear at the trial and gave evidence in relation to these allegations made by the Defendant.
37. The Court accepts Mr Cassidy's evidence that neither he nor the Bank engaged in "sharp lending practices" or that he or anyone else at the Bank would have pressured the Defendant to enter into the Facility or to provide the Guarantee to the Bank. The Court accepts Mr Cassidy's evidence that the preparation of an indicative offer for the Facility and the submissions of an application for the Facility to the Bank's credit committee was a collaborative process which extended over a number of months and with which the Defendant would have been closely involved and would have required his close collaboration.
38. Mr Cassidy gave evidence that the Bank set performance and lending targets for him and to an extent his remuneration was linked to these targets, as is standard for working relationship managers employed by the Bank. However, although he had lending targets, there were also wider performance targets which he always met during his time with the Bank, such as having a loan book with no loss provisions and undertaking annual loan reviews on time. The Court accepts Mr Cassidy's evidence that he will not receive any bonuses relating to a loan made by him to a borrower which was not performing, such as the loan made by the Bank to the Trust.
39. The Court also accepts that Mr Cassidy's evidence that there was in fact no room or opportunity for "sharp lending practices" and no incentive for him to engage on them. It was Mr Cassidy's evidence that all loan applications had to go through the Bank's rigorous approval processes and were also subject to post closing audit and review.
40. Mr Cassidy gave evidence that it was his understanding that the development of 9 Par-La-Ville failed as a result of the downturn in the economic climate in Bermuda following the global financial crisis in 2008. Mr Cassidy understood that the

Defendant found it difficult to secure an anchor tenant for 9 Par-La-Ville, and that consequently rental income was insufficient to meet the loan repayments required to be made to the Bank under the Facility Letter.

41. Having regard to the evidence of Mr Cassidy, which the Court accepts, the Court rejects the Defendant's allegation of sharp practice made in Paragraph 14 of the Amended Defence.

Conclusion

42. The Court gives judgment in favour of the Bank requiring the Defendant to pay to the Bank the sum of \$3,144,636.26 together with contractual interest calculated pursuant to section 3 of the Guarantee from 16 December 2022 to the date of this Judgment. The Bank is directed to file a sworn statement setting out the calculation of the contractual interest due to the date of the Judgment.

43. The Defendant is further ordered to pay to the Bank the costs of these proceedings on the standard basis to be taxed, if not agreed.

Dated this 22nd day of November 2023



NARINDER K HARGUN
CHIEF JUSTICE