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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1998/N236

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	PLAINTIFF
AND	HENRY FULLERTON	DEFENDANT

Mr. Maurice Manning instructed by
Messrs. Nunes, Scholefield, DeLeon & Co.
for the Plaintiff.

Mr. Walter Scott and Mrs. Sharon Usim
instructed by Chancellor & Co.
for the Defendant.

Heard: 20th, 21st, March, 2001 and 13th November, 2001

CAMBPELL, J.

Before the Court were two applications;

(1) The Plaintiffs Re-issue Amended Summons for Summary Judgement.

(2) The Defendants' Re-issued Summons for Extension of Time to file Defence and Counterclaim out of time.

It was agreed that the application for Summary Judgement should be heard first. At the end of the plaintiffs submissions, Mr. Scott, for the defendant conceded that in respect paragraph 3 of the plaintiff's summons, no defence had been mounted and that the claim in respect of the defendant's personal overdraft "could not be resisted".

The plaintiff, is a commercial bank, and carries on business as bankers with branches throughout Jamaica. The defendant, is a Chartered Accountant and

Businessman, and was a controlling Shareholder, Director and Executive Chairman of a number of inter-related Companies including Caldon Group Finance (CFG) and MCS Investments Ltd (MCS).

The Caldon Group of companies, is a group of interconnected companies. Some of the Companies within the group are owned by members of the Defendants' family. CFG, owns 49 percent of Kimara Ltd., 100 percent of Caldon Finance Merchant Bank , which owns 60.78 percent of Caldon Finance Merchant Bank , which owns 60.78 percent of G.T. Investment Ltd and 43 percent of Arcal International Ltd., which owns 43 percent of Brecon Ltd.

On the 25th November 1998, the plaintiff commenced the action with a Writ of Summons with specially endorsed Statement of Claim served on the Defendant's attorneys -at - law. Appearance was entered on the 27th November 1998. The defendant's letter of the 8th December 1998, which requested Consent to file Defence out of time, was returned unsigned.

On the 20th January 1999. The defendant issued a Summons for Extensions of Time to File Defence and Counterclaim out of time. On that same date the Plaintiff filed a summons for Summary Judgement seeking Judgement as follows;

i. In the sum of five hundred and one million six hundred and seventy five thousand seven hundred and forth one dollars (J$501,675,741.00) as at the 8th September, 1998 with interest at the rate of 45% per annum on the sum of J$501,675,741.00 from the 9th September, 1998 and interest at the rate of 12% per annum on the sum of

US$216,341.00 from the 8th September, 1998.

ii. In the sum of fifty seven million eight hundred and ninety nine thousand three hundred and sixteen dollars (J$57,899,316.00) and the sum of two million one hundred and fifty nine thousand three hundred and five united states of America dollars (US$2,169,305.00) as at the 8th September, 1988 with interest at the rate of 45% per annum on the sum of $57,895,316.00 from the 9th September, and interest at the rate of 12% to per annum on the sum of US$2,159,305.00) from the 9th of September, 1988.

iii. In the sum of two million three hundred and seven thousand nine hundred and seven dollars and ninety seven cents (J$2,307,907.97) with interest on the said sum of J$2,307,097.97 from the 19th day of September, 1988 at the rate of $1,706.63 per diem.

The Summons was supported by affidavits of Paul Badresingh dated 17th November, 1998, in which he stated at paragraph 4; inter alia;

"CFG and MLS as customers of the plaintiff have loans and credit facilities with the plaintiff which were secured inter alia by the guarantees of the defendant .....

The defendant is also personally liable to the plaintiff in respect of personal overdraft facilities of **two million three hundred and and seven thousand nine hundred and seven dollars and**

ninety seven cents ($2,307,907.97) as at the 18th September 1998 which is in default".

5. The liabilities of CFG and MSC as at the 8th September , 1998 included inter alia overdraft facilities, commercial paper loans and foreign currency loans. The plaintiff holds no security from the defendant in respect of the obligations under the guarantees given by him to secure t indebtedness of CFG and MCS , for example in the form of Mortgages by way of guarantee over property owned by him or the hypothecation of any assets held by him personally.

The defendant on the 27 January 1999, filed an affidavit in opposition to the summons for summary judgement, in which he states:

At paragraph 8.

" That I deny that I am indebted to the Plaintiff in the amount of $501,675,741 and US$215,841 OR THE AMOUNT OF $57,899,316 and US$2,159,305 or at all."

9. That in or about the month of October 1997 Caldon requested of the plaintiff through its servant and /or agent Mr. Ivan Mitch Stephenson (hereinafter called "Stephenson") that in order to satisfy certain concerns of its (Caldon) Auditors., Caldon wished to be released from its guarantee of the indebtedness of MCSI to the plaintiff.

10. The plaintiff eventually advised Caldon that it would only have been prepared to release Caldon from its guarantee of the indebtedness of MCSI to the Plaintiff if I gave an unlimited personal guarantee for the indebtedness of Caldon and MCSI.

11. That I refused to give such personal guarantees and the plaintiff threatened to wrongfully cut off all further credit to Caldon and MCSI. Of which I am the major shareholder and Director. The said threats by the Plaintiff would have led to the utter destruction of Caldon and MCSI and the financial ruin of hundreds of shareholders, creditors of Caldon and MCSI and of my family, my friends and myself.

12. That I was induced to make the guarantee referred to in the Statement of Claim by duress on the part of the Plaintiff through its servants and/or agents , and I am advised by my Attorneys-at -Law and verily do believe that by reason whereof the said guarantee became and was at all material times and is void and of no effect.

13. That in order to induce me to make the contract of guarantee the plaintiff its servant and/or agents represented to me, Caldon and MCSI that;

   a. Caldon/MCSI should not accept the loan of US$11Million offered to it by a Canadian Financial Institution as the terms were too onerous and the plaintiff would offer the same or better financing on terms more favourable to Caldon.

   b. The plaintiff would grant a loan to Caldon/MCSI IN lieu of Caldon/MCSI accepting the financing from the Canadian financiers.

   c. Caldon/MCSI could go ahead and cancel the commitment with the Canadian Financiers for which a commitment fee of US$10,000.00 had been paid as the plaintiff would provide the required financing to Caldon/MCSI.

   d. By reason of the matters set out at (a)(b) and (c) herein I could feel comfortable in making the said contract of guarantee as Caldon /MCSI could and would be in

a far better position to meet their obligations, as the new financing from the plaintiffs would allow them so to do.

e. That acting on the faith and trust of these representations and induced thereby I made the said contracts of guarantee and I have since discovered that these representations were untrue and that the plaintiff made the representations fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false.

On behalf of the defendant, it was submitted that the several defences mounted raised triable issues, which ought to proceed to trial. It was further submitted that the proper legal framework against which an application for Summary Judgement is considered should include the following;

(a) That the application be refused if there is a triable issue.

(b) That the application does not involve a trial on the affidavits and where the material is contradictory, the application ought to be refused and the matter put to trial.

© That the affidavit is not a prequisite to a defendant successfully opposing an application for Summary Judgement, but rather it is whether the defence on its face discloses triable issues.

(d) Judgement should only be ordered where assuming all the facts in favour of the defendant, they do not amount to a defence in law .

(e) The Court is not required to determine the credibility of the affidavits.

He relied on **Jacobs vs Boothe Distillers Company** (1901) 85 L.T. 262 and on **Dojap Investments Ltd vs Donald Panton and Janet Panton and Financial Institutions Services Limited** , SCCA #42/98 where at page 8, Rattray P. said ;

> *"The question to be determined is whether in law an arguable defence arises".*

> And at page 11

> *"Have there been issues of law raised which should be argued and that the justice of the situation would militate against allowing the summary judgment to stand".*

Economic duress is commercial pressure that coerces the will of one party to a transaction to the extent that it vitiates his consent to the said transaction

In **Alec Lobb Ltd v Total Oil G.B.** (1983) 1 All E.R. 994., Peter Millet Q.C. sitting as Deputy Judge of the High Court. In examining the issue of economic duress, said at page 960:

> *" This is a branch of the law which is still developing in this country; but I accept that commercial pressure May constitute duress and render a contract voidable, provide that the pressure amounts to a coercion of the will which vitiates consent"*

The matter was put this way, by Tucker L.J. in **Atlas Express Ltd v Kafco Ltd.** (1989) 1 All E.R. 641, quoting with approval Lord Scarman in **Pao On v. Lau Yiu** (1979) 3 All E.R. 65.

> *"Duress , whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordship agree with the observation of Kerr J. in* **The Siboen and The Sibotre** *(1976) 1 Lloyds Rep 293 at 336 that in a contractual situation commercial pressure is not enough .There must be present some factor " which would in law be regarded as coercion of his will so as to vitiate his consent."*

In order to establish economic duress, a party who seeks to avoid a transaction, must establish the following ;(1) that the transaction was entered into against his will (ii) that he had no realistic alternatives, (iii) that his "consent" was as a result of improper pressure, (iv) that he repudiated the transaction at the earliest opportunity.

Peter Millet Q.C. in **Alec Lobb Ltd. v Total Oil G.B** said:

> "*A plaintiff who seeks to set aside a transaction on the grounds of economic* duress *must therefore establish that he entered into it unwillingly (not necessarily under protest, though the absence of protest will be highly relevant) that his apparent consent was exacted from him by improper pressure exerted by or on behalf of the defendant, and that he repudiated the transaction as soon as the pressure was relaxed".*

The victim must have entered the transaction against his will.

Is there evidence that the victim entered the transaction against his will.

The request for the release of Guarantees held by the Plaintiff emanated from the defendant on behalf of Caldon .The plaintiff proposed that in place of Caldon guarantee of MCSI indebtedness, the unlimited personal guarantee of the Directors of CFG and M.C.S., be obtained.

The defendant in his affidavit, filed on the 27th January, 1997, at paragraph 9, states:

That in or about the month of October 1997 Caldon requested of the Plaintiff through its servant and/ or agent Mr. Ivan Mitch Stephenson (hereinafter called 'Stephenson') that in order to satisfy certain concerns of its (Caldon) Auditors, Caldon wished to be released from its guarantee of the indebtedness of MCSI to the Plaintiff.

The Plaintiff's letter, in response to Caldon's request for release, dated 14 November, 1997 over the signature of Chester C. Giddarie, was stated as follows.

Mr. Henry Fullerton
Executive Chairman
Caldon Finance Group Limited
52-60 Greneda Crescent
Kingston

Dear Mr. Fullerton;

RE: RELEASE OF UNLIMITED GUARANTEE BY CALDON FINANCE GROUP

IN FAVOUR OF M.C.S INVESTMENTS LIMITED.

We refer to the telephone conversation Fullerton/Stephenson of 1997 November 11 with regards to your requesting release of Unlimited Guarantee by Caldon Finance Group Limited to cover the borrowings of M.C.S Investments Limited. In this regard, we are pleased to advise our agreement to this on condition that this Company's Guarantee be replaced by an Unlimited Personal Guarantee of the Directors to cover the borrowings of Caldon Finance Group Limited.

In addition we will also require a Personal Guarantee of the Directors to cover the borrowings of Caldon Finance Group Limited.

The relative Guarantes for execution are attached for your attention.

The defendant's letter ,dated 19th November ,1997, As Executive Chairman of CFG state as follows;

Mr. Chester Giddarie
Snr. Asst. General Manager
National Commercial Bank Jamaica Limited
'The Atrium'
32 Trafalgar Road
Kingston

Subject: Release of Unlimited Guarantee by Caldon Finance Group
In favour of – M.C.S. Investment Limited

Dear Mr. Giddarie,

Please accept my thanks for agreeing to the release of the above, and I now have pleasure in enclosing two (2) signed copies of my personal guarantee in favour of M.C.S Investments Limited.

With kind regards.

Yours Sincerely,

CALDON FINANCE GROUP LIMITED

Henry A. Fullerton
Executive Chairman

In **Pao On v Lau Yiu**, (supra) , at page 78,LORD Scarman ,said

> *" In determining whether there was a coercion of his will such that there was no true consent , it is material to enquire whether the person alleged to have been coerced did not or did not protest".*

The defendant in his affidavit, filed in opposition to the summons dated 27 January 1999, states **inter alia;** at paragraph 11;

> 'That I refused to give such personal guarantee the plaintiff threatened to wrongfully cut off all further credit to Caldon and MCSI.'

Neither the refusal alleged by the defendant nor the plaintiffs threat is evidenced in the correspondence that flowed between the parties. It is not stated to whom this refusal, was made, neither is it stated when it was made.

In **Atlas Express Ltd. V Katco Ltd.,** an authority, on which Mr. Scott, relied. Tucker J had this to say on the issue of protest, at page 645 , letter A:

> *"On 2nd February 1987 the defendants sent to the plaintiffs a cheque for $10,000, expressed as being a payment on account .I do not regard that as*

an acceptance of the new terms .The Defendants made their position quite clear through their solicitors, who wrote to the plaintiffs on the 2nd march 1987, saying that the revised contract was signed under duress. This was three months before the plaintiffs commenced proceedings."

Caldons' request for release of it Unlimited Guarantee was on the 11th November, 1997 the Bank's response and request for replacement security was dated the 14th November 1997, and the defendant's letters enclosing the guarantees were dated the 19th November. There is no evidence that the defendant made clear their protest to NCB. The defendant's assertion of duress is inconsistent with the contemporaneous documentary evidence. When the whole situation is looked at, the defendant has failed to satisfy the Court, that there is a fair or reasonable probability of the defendant having a bona fide defence of duress.

In **Bhogal v National Bank, Basna v Punjab National Bank Punjab** (1988) 2 All E.R.296 303 Bingham L.J said;

"But the correctness of factual assertions such as these cannot be decided on an application for summary judgement unless the assertions are shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence".

See also **Financial Institutions Services v Vehicles and Supplies and Anor** C. L. 1996/F111 where the decision was applied by Harrison J.

In **Banque et des Pays- Bas (Suisse) SA v de Naray** (1984) 1 Lloyd's Rep 21 at page 23, Ackner L.J:

"It is of course trite law that O.14 proceedings are not decided by weighing the two affidavits .It is also trite that the mere assertion in a n affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend, the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants having a real or bona fide defence."

Did the defendant have realistic alternatives open to him

The CFG letter of 2nd December1997, over the signature of Defendant, indicates alternatives for financing that were being pursued by CFG, i.e. the Arcal Joint Venture , and the sourcing of the additional equity/loan to the tune of Ten Million Dollars (US$10.0M) and, also, the disposal of redundant assets. That letter indicates that that they had in fact a firm offer for their office building but were negotiating a better price. The Plaintiff had bargaining power, and had other options open to him. In Atlas Express Ltd. v Kafco Ltd. the Court found that the plaintiff in that case, believed on reasonable grounds that it would be very difficult ,if not impossible to negotiate with another contractor, he felt he was 'over a barrel'. Mr. Fullerton on behalf of CFG, on the other hand , had successfully negotiated a loan with a European based financial institution to the point of being invited to demonstrate intent by forwarding a fee of $US10,000.

Was the victim confronted with coercive acts

In order to constitute duress or undue influence as there must be an unlawful act or illegitimate act or threats to commit unlawful or illegitimate acts directed against the defendant to enter into the transaction.

In Atlas Express (supra) Tucker L.J. said:

> *"A further case, which was not cited to me was* **B & S Contracts & Designs Ltd v Victor Green Publications Ltd** *(1984)ICR 419 at 423, where Eveleigh L J referred to the speech of Lord Diplock in another uncite case,* **Universe Tankship Inc of Monrovia v *International Transport Workers' Federation*** *(1982) 2 All E.R.67 at 75-76".*
>
> *"The rationale is that his apparent consent was induced by pressure exercised on him by that other party* **which the law does not regard as legitimate,** *with the consequence that the consent is* treated in law as revocable unless approbated either expressly or by

> implication after the **illegitimate pressure** has ceased to operate on his mind. "

In commenting on this Eveleigh L J said of the word "illegitimate" (1984) ICR 419 at 384:

> *"For the purpose of this case it is sufficient to say that if the claimant has been influenced against his will to pay money* **under the threat of unlawful damage** *to his economic interest he will be entitled to claim that money back... (emphasis mine)*

The unlawful or illegitimate act alleged or the threats to commit the unlawful act or illegitimate act, according to the defendant, was the plaintiffs threat ' to wrongfully cut off all credit.' Such a threat in the circumstances of this case, is not an unlawful act . In **CTN Cash and Carry v Gallaher** (1994) 4 All E.R 714, Steyn L J , said,

> "*A second characteristic of the case is that the Defendants* were in *law entitled to refuse to enter into any future contracts with the plaintiffs for any reason whatever or for no reason at all . Such a decision not to deal with the plaintiffs would have been financially damaging to the defendants, but it would have been lawful. A fortori, it was lawful for the defendants, for any reason or for no reason, to insist that they would no longer grant credit to the plaintiffs. The defendants demand for payment of* the invoice, *coupled with the threat to withdraw credit, was neither a breach of contract nor of tort.*"

And at letter C, page 718:

> "*The defendants exerted commercial pressure on the plaintiffs in order to obtain payment of a sum which they bona fide considered due to them* .The *defendants motive in threatening withdrawal of credit facilities was commercial self- interest in obtaining a sum they considered due to them. The alleged acts neither constituted breaches of tort or contract. Nonetheless were nature of the commercial pressure such as could void* the transaction?"

In order to render the resulting transaction voidable for duress, the transaction must be wrongful in the sense that the plaintiff obtained an unfair advantage from the defendant

which was manifestly disadvantageous to the Defendant. In **National Westminister Bank plc v Morgan**, (1985) A. C. 686 at pg 704, Lord Scarman stated:

> "*Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence.*"

A valid reason for the defendant entering into the contract of guarantee was to facilitate the companies in which he had shareholdings being able to meet the request of their auditors. There has been no allegation by the plaintiff that this guarantee was not in the usual terms that the Bank uses for all its customers.

The guarantee that was used to secure the loan, was standard. In any event a personal guarantee by a director of a creditor company is a recognised form of security by commercial bankers.

In Pagets Law of Banking- Eleventh edition - Mark Hapgood, under the subtitle guarantees in MODERN Banking Business, the learned authors write;

> "*Banks regularly seek security from third parties by way of a contract of guarantee as where a director or shareholder guarantees lending to the bank's corporate customer; or one company guarantees advances by the bank to its parent or subsidiary company.*"

In Practice of Banking 2nd Edition at page 421 it is said;

> "*When a bank is lending to a limited company it is particularly desirable to have taken a guarantee from the directors, even if they are of small means, for in this way they become more personally associated with the need for the company to repay the bank, and they are less likely to walk away from a difficult situation if one develops.*"

Did the defendant repudiate the transaction

No steps were taken to repudiate the Guarantee as soon as the pressure on the defendant was relaxed. There was nothing done up to the filing of the writ of summons to indicate a repudiation of the transaction. The effect of duress being established is that the consent is treated in law as revocable unless approbated either expressly or by implication. (See Atlas Express Ltd. page 647 letter G)

The defendant's letter of the 19th November 1997 on its face is, an expression of approbation and there was adduced by the defendant, on whom the burden lies in these proceedings, no evidence which is inconsistent with the expressions contained therein .The words of Peter Millet Q.C., Deputy Judge. in **Alec Lobb Ltd. v Total Oil GB Ltd.**, are apposite;

> "*But even if (contrary to my view) the existence of the tie in the 1968 charge constituted coercive pressure on the part of the defendants, the plaintiff company* ***neither protested at the time nor took prompt action*** to *repudiate the transaction of lease and lease-back once the pressure was removed ...... In my judgement, to set the transaction aside in those circumstances on the ground of economic duress is out of the question.....(emphasis mine)*

MISREPRESENTATION

The defendant alleges that that the plaintiff misrepresented to him that it could offer him better financing terms than an overseas financier. The plaintiff has submitted that the guarantees were signed before the Letter of Commitment, from the overseas financiers, was received on the 3rd December 1997. The defendant had not yet paid the necessary fee of $10,000 up to the December 4th . There has been no complaint from Caldon that the plaintiff has misrepresented its intention to the plaintiff.

Contemporaneous correspondence is inconsistent with the allegation that there was misrepresentation made by NCB to the defendant. The defendants letters of the 19th November 1997, returned his signed personal guarantee for the debts of MCS Investment Limited and Caldon Finance Group, respectively. However, the fee of US$10.000 was not paid until sometime after the execution of the guarantee agreements by the defendant on the 2nd December 1997, the defendant was able to write to the plaintiff that " We are progressing with the sourcing of additional equity /loan to the tune of ten million dollars (US$10.000)". The inescapable inference being, that there was no representation operating on the defendants mind, to cause him to believe that " the terms were too onerous and that the plaintiff could offer the same or better financing on terms more favorable to the defendant." as the defendant alleges. If the plaintiff had already made the representations as alleged, clearly it had no effect on the defendant's mind.

The further affidavit of Paul Badresing dated the 29th of January 1999 states at paragraph 13:

By identical letters dated the 10th December, 1997 seperately addressed to Ivan 'Mitch' Stephenson and Chester Giddarie both Senior Managers of the plaintiff, the defendant enclosed a copy of a letter from Chase Global Capital enclosing a letter dated the 3rd December and a letter of commitment and participation agreement in respect of a loan amount of US$11,000,000. The letters relating to the securing of additional financing by the defendant were forwarded to the plaintiff after the defendants request for release of Caldons Finance Group Limited's guarantee of MCSI'S facility and after the guarantee duly executed by the defendant had already been returned to the plaintiff.

Mr. Manning who appeared for the plaintiff, argued that the defendant has never raised the issue of any failure by the plaintiff to honour the alleged representation made to him. Before the CFG was placed in voluntary liquidation, the defendant would no doubt have protested at the plaintiff's failure to provide his company with a loan for the capital investment.

There is nothing in the pleothra of correspondence between the parties to evidence either of the defendant's contentions, that he was the victim of duress by the plaintiff or that the plaintiff misrepresented its position to the defendant.

PAST CONSIDERATION

It was submitted on behalf of the Defendant that although the document (i.e. guarantee) purports to set out the consideration , it was open to a Court to conclude, the true consideration as the Release of the Caldon guarantee.

It has not been said by either side whether the guarantee was under seal, or not. If, not under seal, they must like all other contracts, be supported by a valuable consideration.

The Banks replacement of Caldons guarantee, with that of the plaintiff's guarantee is good consideration. The express terms of the guarantee, apart.

The Banks forebearance to enforce its rights under the previous arrangement with Caldon will provide good consideration at the request of the plaintiff.

The learned authors of Paget's - Law of Banking, 11th Edition, at page 621, puts, it this way:

"The *banks agreement to forbear to sue the customer or otherwise enforce its rights in relation to an existing indebtedness will also provide good consideration as will actual forbearance for a reasonable time at the express or implied request of the guarantor. It has been said that where a creditor asks for and obtains a security for an existing debt, the inference is that but for obtaining the security he would have taken action which he forbears to take on the strength of the security.*"

In these proceedings the burden is on the defendant to satisfy the Court that he has a good defence. Once the Court is satisfied that there are triable issues or there is an arguable defence , it must allow the matter to proceed to trial. It is my view that the defendant has not satisfied the Court that there is a fair or reasonable probability that he has a real or bona fide defence. The plaintiff is therefore entitled to summary judgement in terms of paragraphs 1-3, as amended of the Summons for Summary Judgment dated 29th January, 1999.