Neutral Citation Number: [2019] EWHC 1390 (QB)

Case No: QA-2018-000029

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HIGH COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2019

Before :

MRS JUSTICE CHEEMA-GRUBB DBE

- -

Between :

SASCO FOODS UK LIMITED	**Appellants**
SHAHANA SALIM	
- and -	
SANPYA SHWE NGAR COMPANY LTD	**Respondents**
MYINT MYAT HEIN COMPANY LTD	

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Mr G Van Tonder (instructed by **Nova Solicitors**) for the **Appellants**
Mr C Barklem (instructed by **Gunnercooke LLP**) for the **Respondents**

Hearing dates: 14th May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE CHEEMA-GRUBB DBE

Mrs Justice Cheema-Grubb DBE :

1. This is an appeal against Master Davison's decision giving summary judgment to the First Claimant against the First Defendant on the issue of liability, imposing a condition on the continued defence of payment into court of the full amount of the claim plus interest, and refusing the Second Defendant's cross application for summary judgment in the claim against her under a guarantee/indemnity.

2. Mr Van Tonder argued the appeal for both Defendants. Mr Barklem responded for the Claimants. Both counsel were also below.

3. The parties were engaged in the business of frozen fish. The First Claimant, a company registered in Myanmar, sold container loads of frozen fish to the First Defendant, a company registered in the United Kingdom. The dispute arose from an alleged failure to pay in full for supplied goods. The Second Defendant was the sole Director of the First Defendant company. Her husband was the CEO. The Second Claimant was a partner company to the First Claimant and provided processing and transportation. The Claimants acted through the First Claimant's Director, Aung Myo Thant and an English-speaking translator Mr Kyaw Lynn. The supply of frozen fish was governed by a Business Agreement dated 20 May 2012. Clause 11 stated, '*In the event of non-payment, Directors of the Sasco have full liability to pay for the goods.'*

4. During pre-action correspondence the Defendants had made varying responses as to the contractual relationships they were in suggesting that the claim may be defended on the basis that the First Claimant had never supplied to the Defendants, but it was the Second Claimant who did so, either directly or via Mr Lynn as broker, hence the Second Claimant's joinder.

5. The Claim was issued on 29 March 2019 and summarised itself thus, 'The First and Second Defendants are jointly and severally liable to the First Claimant, (or alternatively to the Second Claimant) in the sum of USD$186, 952.83 in relation to unpaid invoices for containers of frozen fish provided to the First Defendant over the period from 3 May 2015 – 10 January 2016. The Claim also includes interest as set out in the particulars of claim.'

6. A Defence and Counterclaim was lodged. The Defendants admitted that Mr Lynn purported to act for the First Claimant when negotiating the terms of the Business Agreement and asserted that they would rely on the terms of the agreement for their full effect, especially as to quality of the produce and ability to off-set payment against lost value from poor quality, where appropriate. However, the Defence elsewhere averred that the First Claimant and the First Defendant did not conduct any business pursuant to the Business Agreement. Their business was with Mr Lynn personally, and the First Defendant was not involved in supplying or being paid for any supplies. Some of the fish supplied by Mr Lynn was of inadequate quality and a reduction in the sums due for specific containers in 2105 & 2016 were agreed with him. In the event of liability being established the Defendants sought to off-set the value of their own counterclaim for the losses incurred due to the poor quality of fish supplied, and interest thereon, so as to extinguish the entirety of the First Claimant's loss.

7. A Reply and Defence to Counterclaim followed. A schedule set out details for each container said to have been provided by the First Claimant numbered from 2 to 15, the invoice amount, dates of payments received and how they were transmitted, together with a running balance owed by the Defendants. The claim was reframed as being for the outstanding balance overall, rather than in respect of specific containers.

8. Subsequently, the Claimants lodged an application for Part 24 summary judgment against the First Defendant on the basis that it had no real prospect of defending liability. The Defendants applied for summary judgment and strike out of the whole claim against the Second Defendant, and a stay of the claim together with security for the Defendants' costs.

9. Master Davison heard these applications on 26th November 2018. The transcript of the hearing has been provided.

10. The CPR24.2 test is straightforward. If there is no real prospect of successfully defending the claim and there is no other compelling reason why the issue should be disposed of at a trial then the court may give summary judgment. The Practice Direction at paragraph 5 explains that among the possible orders are a judgment on the claim and a conditional order.

Summary Judgment on Liability (Contracting Parties)

11. The Claimants' submissions were that although the Defendants had sought to muddy the waters, their pleaded response to the claim enabled the court to conclude that there was no realistic prospect of liability on the part of the First Defendant being defended successfully. Mr Barklem relied on exhibited invoices to demonstrate that having paid various amounts up to January 2016 followed by a small figure in March 2016, the Defendants recognised that they were in arrears and had failed to satisfy the outstanding monies due under the Business Agreement. Exactly what quantum should be was for resolution but the prospect of defending the entirety of the claim was negligible on the basis of emails in which the Second Defendant's husband admitted that money was outstanding even before the particular containers, described in the claim, were despatched. In one email he states, '*I know your money left one and a half container but I said I paying 50k so now I pay start processing the shipment. Can't by or do more. Pleas do not do moaning for money. Please attention to business.'* Furthermore, notebooks copied in the evidence demonstrated that the fact of arrears was agreed on more than one occasion with the amount being settled and counter-signed by the parties' representatives and thereafter acknowledged.

12. The history of pre-action correspondence was said to show how the Defendants had had to abandon a variety of defences. In summary, firstly claiming that they had not contracted with the First Claimant so that the Second Claimant had to be joined. Secondly, alleging that they could not have contracted with the First Claimant as the CEO of the First Defendant had never met the Director of the First Claimant, Mr Thant. This was countered by video evidence of the two men together. Thirdly, the assertion that Mr Lynn was either a broker or the actual contracting party rather than representing the First Claimant was plainly contradicted by the terms of Mr Lynn's signature to the Business Agreement itself (as an agent of the First Claimant) which read '*On behalf of Sanpya Shwe Ngar'*. Fourthly, the Defendants stated in pre-action correspondence that the real party with which they contracted was called City Crown but the Claimants had

demonstrated that City Crown was a money remittance operator who was able to facilitate the banking system of Myanmar to enable the First Claimant to do business. Mr Barklem was also able to take the judge to correspondence with the First Defendant in which Mr Lynn made reference to having to defer to Mr Thant, the First Claimant's director.

13. The outstanding balance was also the subject of submissions, the judge queried the purpose of a liability only judgment in such a case. Mr Barklem pointed out that according to contemporary exchanges in March 2016 and October 2016 the figures outstanding between the parties were agreed at that time (including just one discount for unsatisfactory performance of $5,000) and the First Defendant's CEO had accepted these in correspondence on several occasions. In particular, in October 2016 at a meeting to discuss a hiatus in the trade and the outstanding balance which was said to be $186, 952.83 (in a document headed with reference to the First Defendant's company name), rather than dispute the sum, the First Defendant's CEO made a note that he intended to pay $20,000 of the debt owed. Then, in an email, ten days later, he wrote to Mr Lynn, that the First Defendant wanted to start business again and would send $20,000 following confirmation of the order and another $20,000 after shipment. In that context subsequent disputes, on the basis that substantial discounts were agreed for poor quality fish, were not credible.

14. In response Mr Van Tonder drew attention to a change in the Claimant's position after the Defence and Counterclaim, including that for the first time a running balance of payments made and due featured in the Reply and Defence. He maintained that points could be made on exhibited invoices which could conceivably support the Defendants and he urged the Master not to be drawn into a mini-trial. Allowed to respond on the Claimant's application for summary judgment Mr Barklem reminded the Master that the running total schedule was based on contemporaneous invoices and was compiled for the Claimant's case in Reply and Defence because they had, for the first time, to respond to the Defendant's acceptance that they had purportedly made payments in respect of containers referred to in the Particulars of Claim.

15. Master Davison concluded that the evidence of the records and admissions made by the First Defendant's CEO meant that there was an 'obvious and very significant difficulty' in it contesting liability. He set out with care the relevant exchanges of messages and pointed out where notebooks with the records had been counter-signed by way of agreement. He also considered and dismissed each of the defences put forward over the period of correspondence and then in the pleadings. There was no evidence that the business was with Mr Lynn personally. All the evidence pointed the other way. The assertion that the quality of the product meant that discounts were agreed was, similarly, not supported by contemporaneous records in respect of the relevant containers. Although there is a reference to one payment of $11,000 being made by way of an advance rather than going towards settling a balance the Master was sceptical about the strength of that single contemporaneous record against the weight of the body of evidence supporting the claim.

16. In his judgment the Master concluded,

> 'I can see that where the court is concerned with a running balance and where the course of dealing extends over a long period with many debits and credits, there may be some scope

> for legitimate disagreement – even after apparent acceptance on the part of the first defendant. I can also see some glimmer of a genuine defence in respect of quality issues and in respect of the character of the payment of $11,000. But, at the risk of repetition, I am very sceptical."
>
> In the light of these matters, what I propose to do is to grant the first claimant summary judgment on the issue of which was the contracting party and, pursuant to Para. 5 of the Practice Direction, give the first defendant conditional leave on the other matters but the condition will be that the first defendant brings into court the full amount of the claim and the full amount of the interest.'

17. On the appeal Mr Van Tonder submits that the judge glossed over or took too lenient a view of the change to the Claimant's case occasioned by the service of the Defence and Counterclaim, by the introduction of the concept of a running deficit. Prior to this the claim had been a straightforward one alleging failure to pay in full. Subsequent to the Defence and Counterclaim the schedule of running totals was introduced as well as some adjustments to the amounts paid eg a figure of $102,573.79 was corrected to $100,000, the latter being the amount put forward by the First Defendant. The Reply contradicted the original claim or was inconsistent with it.

18. This is a weak argument. The Defendants having failed to concede any liability at all until the Defence and Counterclaim, once it was accepted that, were the Business Agreement to be found to be the basis of transactions between them, there had been challenges to the rate of payment for containers supplied it was necessary for the Claimants to introduce a fuller picture of the trading relationship. As the Master found, the schedule submitted was based on contemporaneous invoices and other documentation. It was also entirely appropriate for the Claimants to react to information provided by the Defendants where that was agreed to be correct. I reject the argument that the Claimants sought and obtained summary judgment on a basis inconsistent with their Particulars of Claim.

19. It is also argued that the Master failed to ascribe proper weight to the unlikelihood of business continuing between the parties if the running total owed by the Defendants was so great. It seems to me that while this might have been a point had the fact of continued trade been realistically disputed but by the time of the hearing there was no issue that supplies did continue and at the same time some payments continued to be made and further orders sent. The judge did not ignore the Defendants' case about complaints being made and discounts applied. He noted that apart from one reference to defects there was no such evidence in the contemporaneous documentation. On the other hand those records did record that the Defendant company acknowledged there was a running deficit on four occasions over the years.

20. Mr Van Tonder submits that the absence of the name of the First Defendant from the various contemporary shipping documents should have prevented the Master from reaching firm conclusions as to the parties to the business concerned. This is to ignore the plain terms of the Business Agreement which the judge was entitled to place weight

upon. There was no realistic challenge to its legitimacy, and it had been signed by the relevant parties. There was contemporaneous correspondence showing that the First Claimant's agent had had to defer to his directors to make decision and other side was the CEO of the First Defendant who was also the husband of the Second Defendant.

21. It is also argued that the Master had closed his mind to the Defendants' submissions on the inappropriateness of summary judgment. There is no support for this contention in the transcript of the hearing, indeed, as Mr Barklem pointed out, after the morning's hearing on the Defendants' applications Master Davison expressed himself as requiring some persuasion from the Claimants that the question of liability could be satisfactorily considered under the summary judgment procedure. His view at that point was that the claim was "bristling, to use the time-worn phrase, with triable issues." Only after hearing the First Claimant's application presented and argued, and being taken through the evidence lodged did he find favour with the Claimants.

22. It seems to me that the Master's conclusion on this application was not only open to him to reach but inescapable.

Imposition of a Condition

23. The judge was not asked to give judgment on quantum, but Mr Van Tonder submits that by imposing a condition on the defence he as good as determined it. Towards the end of the arguments on the various applications before him Master Davison asked counsel for the Defendants about the prospect of ordering money to be brought into court by way of a condition. Mr Van Tonder acknowledged that there was a wide discretion and when the Master indicated that he was thinking of the amount of the claim the response was that such an order would be 'over-generous to the claimants' but was a matter within the court's discretion. It is argued that the judge did not identify the purpose of the condition and the amount ordered was not just and proportionate. Also, that the Defendants did not have an opportunity of addressing the court as to means. It was asserted in the appeal that the First Defendant did not have the funds to satisfy the condition imposed. No evidence was relied upon.

24. No attempt had been made prior to the hearing of this appeal to seek to persuade the court to receive new evidence. CPR P52.21 does not shut out 'fresh' evidence on an appeal entirely, but the circumstances in which it can be relied upon are strictly limited because an appeal is restricted to a review of the decision of the lower court, unless the interests of justice indicate otherwise. Mr Van Tonder told me after 2pm on the day of the hearing that he had just obtained copies of the First Defendant's accounts for the previous three years. Mr Barklem objected to their admission. This was simply too late and obviously prompted by my observation, prior to the lunch break, that despite Mr Van Tonder's submissions there had been no attempt to demonstrate impecuniosity before the judge or during the filing of the appeal.

25. Although the imposition of a condition which required payment in, with interest of the sum claimed, will not be frequently seen I am not persuaded that the judge erred in applying it here. The situation facing Master Davison was not the same as in the

authorities Mr Van Tonder cited to me. *Huscroft v P&O Ferries Ltd (Practice Note)* [2011] 1 WLR 939 CA which was an application for security for costs and involved the use of case management powers did not principally concern Part 24. In *Goldtrail Travel Ltd v Aydin* [2017] 1 WLR 3014 the Supreme Court unsurprisingly decried the imposition of a condition which would have the effect of stifling further proceedings. Mr Van Tonder urges that this was the effect of the Defendants. The difficulty is that although the judge gave an opportunity for reflection, no application for payment in instalments, or to address the court on means, was ever made. As the court recognised in *Goldtrial,* (another case which did not involve a successful application for summary judgment) if the imposition of a condition will cause unfairness or have a disproportionate impact what would be expected is para. 24.

> "an emphatic refutation of the suggestion both by the company and, perhaps in particular by the owner."

In that case a flurry of exchanges including about assets followed and justice required that evidence to be admitted. The situation is entirely different here.

26. This judge had been taken through all the possible defences to liability on the part of the First Defendant and concluded that there was no realistic prospect of success in any of them. He was in a unique position to decide that the defences to quantum were equally fallible, but he was not asked to decide quantum itself in the application notice. The usual process after awarding summary judgment would have been directions for a hearing but the Master recognised that in these particular circumstances, rather than potentially waste costs by listing another contested hearing, he could prompt some degree of agreement. I am satisfied that he imposed a condition as a pragmatic shortcut and he was entitled to do so. Of course, the sum was not to be paid to the Claimants but into court so that if agreement was not reached a contested hearing on the sum to be awarded would be held.

The Cross-Application

27. The cross-application for summary judgment in favour of the Second Defendant was on a discrete point. Although paragraph 13 of the Defence and Counterclaim concedes, '*The Defendants admit that clause 11 of the Business Agreement purports by its wording to fix the directors of the First Defendant with liability to the First Claimant in the event that the First Defendant does not pay sums due to the First Claimant'* she argued that this liability would be a guarantee and unenforceable because it lacked her signature and was not compliant with the provisions of s.4 Statute of Frauds 1677. She denied that her husband had purported to sign it on her behalf, rather he had done so explicitly on behalf the First Defendant, and so the Claimants had no prospect of success against her.

28. For the Claimants it was argued that s.4 was irrelevant because the Second Defendant had an interest in the transaction and was providing an indemnity rather than a guarantee, so the agreement fell outside the scope of s.4. In the alternative, depending on what view was taken of the factual circumstances of the genesis and completion of the Business Agreement, the Second Defendant's husband had signed the agreement, including Clause 11, with her authority, thereby satisfying s.4.

29. Both as to the applicable law and the factual position, there was a clear dispute with material to engage with on either side. Emails prior to the agreement made reference to the Second Defendant and the discussions between her and her husband during the negotiations. She was not only the sole Director of the First Defendant but also the sole shareholder.

30. At paragraph 11 of the Reply and Defence the Claimants state, '*the Business Agreement was signed at the home of the Second Defendant, as per her arrangement. It was made clear (prior to the meeting at the Second Defendant's house) that it was necessary for her as director of the First Defendant, to give a personal guarantee in order for the First Claimant to supply the First Defendant with fish.'* Para. 13 states, '*….the Claimants admit that the Business Agreement has not been signed by the Second Defendant herself however the Claimants rely on the fact that the Second Defendant was made aware of the guarantee required by the First Claimant and they understood that she drafted the same herself.'* At para. 14, *'…It was important that the Second Defendant was involved in the process of agreeing the Business Agreement because she was at all material times the sole owner and director of the First Claimant and was the one that was giving the personal guarantee.'* And at para. 15, '*The Second Defendant arranged for the final draft of the Business Agreement to be executed at her house and celebrated the completion of the Business Agreement by arranging and preparing a dinner at which Mr Lynn and his wife were invited. This shows that she authorised the personal guarantee.'*

31. The transcript of the 26 November hearing reveals that the Master had well in mind the witness statements of Mr Lynn and his account of the reason why Clause 11 was introduced into the agreement and the circumstances of its signing. Mr Barklem referred to the need for disclosure of emails between the parties, including between the Second Defendant and her husband before the court could determine whether authority for the guarantee, if it was one, had been given.

32. In judgment the Master said,

> 'My view is that clause 11 very probably was a guarantee, not an indemnity. But there is no need to decide that issue because, even if it was a guarantee as the defendant say it was, then it is reasonably arguable that s.4 of the Statute of Frauds was complied with because when Mr Salim signed the agreement he did so with the authority of his wife.'

33. He reached that conclusion from logical inferences available from the fact that the Second Defendant was the only director and 100% shareholder in the company and the Claimants could point to correspondence indicating she may well have had a hand in drafting clause 11 and been present when her husband signed the agreement.

34. On the appeal Mr Van Tonder argued that because the Second Defendant's name does not appear in the Business Agreement and she had not signed it there was no connection between her and the document. That should have been an end to the Claimants' case against her. I was taken to Chitty on Contracts and s.4 Statute of Frauds 1677, as the judge had been, as well as a number of cases said to touch on this aspect of the dispute.

I did not find any of them of assistance. The issue to be decided was whether the agent who signed the Business Agreement was authorised to do so by the Second Defendant. There was contradictory evidence which had to be resolved. This was not the case in *Caton v Caton* (1867) LR 2 HL 127 or *Evans v Hoare* [1892] 1 QB 593 or *J Pereira Fernandes SA v Mehta [2006] 1 WLR 1543 (Ch D.)*

35. On this part of the appeal I have no hesitation in concluding that the only reasonable outcome was for the application for summary judgment to be refused. Plainly, there was a real prospect that the Claimants would succeed. The contested evidence went to the heart of the legal position.

Outcome

36. Having reviewed the Master's decisions, together with the reasons he gave, I am sure they were soundly based on conclusions open to him to reach and I am not persuaded he was wrong. I adopt his analysis and uphold his judgment.

37. Accordingly, this appeal is dismissed, and the order is affirmed.

38. The parties should agree consequential orders, including in respect of the stay by Mr Justice Walker of the order of Master Davison of 21 January 2019, entering judgment against the First Defendant in favour of the First Claimant. In the absence of agreement, I will order the stay to be lifted.