[2021] JMCA Civ 12

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 69/2018**

**BEFORE: THE HON MR JUSTICE BROOKS P**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**
**THE HON MR JUSTICE F WILLIAMS JA**

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|---|---|---|
| **BETWEEN** | **SOMERSET ENTERPRISES LIMITED** | **1st APPELLANT** |
| **AND** | **LINDEERTH POWELL** | **2nd APPELLANT** |
| **AND** | **NATIONAL EXPORT IMPORT BANK OF JAMAICA LIMITED** | **RESPONDENT** |

**Written submissions filed by Debayo A Adedipe for the appellants**

**Written submissions filed by Nigel Jones & Co for the respondent**

**12 March 2021**

**PROCEDURAL APPEAL**

**(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)**

**BROOKS P**

[1] Somerset Enterprises Limited (Somerset) and its managing director, Mr Lindeerth Powell (collectively referred to as "the appellants"), are seeking to set aside the order for summary judgment entered in favour of National Export Import Bank of Jamaica Limited (the Bank). The relevant portion of the order, by the learned judge of the Supreme Court states:

"(i). Summary judgment in favour of [the Bank] against [Somerset] and [Mr Lindeerth Powell] in the sum amount of Ninety-One Million, Seven Hundred and Thirty-Thousand and Seven Dollars and Eighty-Seven Cents ($91,730,007.87).

(ii) Interest at 12% per annum from May 2016 to the date of this judgment[.]

(iii) Costs to [the Bank] to be taxed or agreed[.]

(iv) Permission to appeal granted[.]

..."

**Background**

[2] In or about February 2007, Somerset was in discussions with the Bank in respect of financing of the purchase of equipment from a supplier overseas. The equipment was needed in order to allow Somerset to capitalise on a cut stones market for the construction of Spanish-owned hotels in Jamaica, and for export. No disbursement was made in connection with those discussions. Somerset claims that the market for that product evaporated. It, however, had already committed to purchase the equipment and needed financing to complete the purchase.

[3] It, therefore, in or about June 2008, applied for a loan from the Bank. Mr Powell signed a form of guarantee and indemnity in respect of the loan, and it was disbursed in November 2008.

[4] Somerset says, however, that it was unable to profit from the use of the equipment, and it fell into arrears with the loan repayment.

[5] On 5 May 2015, the Bank filed a claim in the Supreme Court seeking to recover the debt, costs associated with the loan and interest. It was in that context that it applied for and was granted summary judgment against the appellants.

**The Bank's claim**

[6] The Bank contends that in response to Somerset's loan application, it issued a commitment letter, dated 22 August 2008 (the first commitment letter), which contained the terms of the loan. It states that it agreed to lend Somerset the sum of $58,240,000.00 (the first loan) to purchase certain equipment. Somerset later requested, on two occasions, amendments to the list of needed equipment. Those requests were approved by the Bank. The Bank maintains that all these amendments were still governed by the terms of the first commitment letter. The Bank alleges that it also lent Somerset the sum of $2,500,000.00, the terms of which are outlined in letter dated 6 February 2012 (the second commitment letter). It was a specific stipulation that once any of the loans were in default, the entire loan facility would become due.

[7] The Bank indicates that in order to secure the first loan, it obtained a mortgage over Somerset's property, a Bill of Sale over certain equipment in the sum of $15,000,000.00, and Mr Lindeerth Powell signed the Guarantee and Indemnity.

[8] The Bank states that Somerset incurred other liabilities to it, namely:

a. an additional loan debt, which is indicated in a letter dated 6 February 2012 (loan restructure letter);

b. mortgage premium payments; and

c. costs associated with an attempt to sell Somerset's property by way of power of sale contained in a mortgage.

The Bank's claim also sought to recover these sums from the appellants.

[9] The Bank noted that the total liability, including interest as at 6 May 2016, amounted to the sum of $91,730,007.87 and interest post judgment in the sum of $50,865,017.96. These sentiments were also reproduced in the affidavit of Maria L Burke in support of notice of application for summary judgment filed 5 July 2016.

**The appellants' defence**

[10] In their further amended defence, the appellants accept that they agreed in August 2008 to the terms of the loan, but stress that the Bank and Somerset entered into negotiations from 2007 to secure the loan and time was of the essence. Despite this, the loan was not disbursed until November 2008. They assert that the Bank made certain representations, which induced Somerset to order the equipment and pay a deposit to the overseas supplier, AMS.

[11] They argue that by the time the Bank disbursed the funds, the business opportunity had diminished and the Jamaican economy was in decline. Notwithstanding this decline, Somerset still accepted the loan financing because it was obliged to complete the purchase of the equipment.

[12] Repayment of the loan was, however, challenging. As a result, the term of the loan was re-negotiated and the interest rate of the first loan was reduced to 10.5%.

[13] The appellants contend that during the negotiation discussions, Mr Lindeerth Powell agreed to a personal guarantee, however the Bank presented him with a Guarantee and Indemnity, which he executed without the benefit of independent legal advice. The appellants say that Mr Lindeerth Powell was not prepared to give a Guarantee and Indemnity and did not provide any consideration for it. Accordingly, they assert that the Guarantee and Indemnity is void or voidable.

[14] Consequently, the appellants also argue that the Bank induced them to enter into the loan agreement by virtue of misrepresentations. Those misrepresentations, they state, caused them significant loss. They argue that the misrepresentations caused Somerset to enter into contractual arrangements with AMS and caused them to make additional payments on their contract with AMS to avoid losing the deposit. They also argue that Somerset had to pay a non-refundable commitment fee to the Bank and incur debt from the Bank of Nova Scotia (BNS) to finance the deposit and further payments for the equipment.

[15] Accordingly, Somerset claims a set-off of its payments to AMS against the claims by the Bank. The appellants also claim that the maximum interest rate the Bank can claim is 10.5%. This rate, they argue, extends to the post judgment interest.

**The grounds of appeal**

[16] The appellants filed the following grounds of appeal:

> "i. The learned Judge erred in law in holding that the defences of both [appellants] had no reasonable prospect of success.

ii. [T]he learned Judge erred in law in holding, in effect, that [Somerset] was not entitled to set off its losses against the sums claimed by [the Bank].

[iii] The learned Judge erred in law in failing to find that the personal guarantee which [Lindeerth Powell] had been informed he would be required to give is a different obligation from the guarantee and indemnity which was presented to [Lindeerth Powell] for his signature.

[iv] The learned Judge erred in law in failing to recognise that the Guarantee and Indemnity would be void or at the very least as against [Lindeerth Powell] in the event that the facts pleaded by [Lindeerth Powell] were found to be true at trial.

[v] [T]he learned Judge erred in law in any event in failing to find that the greatest liability that would attach to [Somerset] on the guarantee, if upheld, would have been the amount truly due from [Somerset] on the loan after regard was had to the claimed set off by way of defence.

[vi] The learned Judge erred in law in finding that the rate of interest payable on the principal sums sued for was 17.5% per annum."

[17] The issues arising from these grounds are:

i. The defence's prospect of success (ground i)

ii. The set off (grounds ii and v)

iii. Personal Guarantee versus Guarantee and Indemnity (grounds iii and iv)

iv. Interest rate (ground vi)

**The defence's prospect of success (ground i)**

*The Submissions*

[18] The learned judge found that the intended defence did not have a real prospect of success.

[19] Mr Adedipe, on behalf of the appellants, argued that where a claim can be defended, the defendant is not to be denied a trial. He contended that there were serious issues raised on the defence, accordingly, the matter should proceed to trial. He asserted that the burden of proving that there is no serious issue to be tried rests on the Bank and it has not disputed the appellants' case. He further asserted that credibility is a live issue in the matter, which cannot be tested on a summary judgment application, which is not a mini trial.

[20] Ms Moore, on behalf of the Bank, submitted that since it was the Bank's summary judgment application, it was vested with the duty of satisfying the court below that the appellants had no real prospect of successfully defending the claim. She, however, contended that the appellants were to provide evidence to support their defence. She submitted that the affidavit filed by Mr Lindeerth Powell contesting the summary judgement application contained hearsay statements. Learned counsel argued that in that affidavit, Mr Lindeerth Powell stated that the Bank made certain representations to Somerset's Managing Director, Mr William Powell, which induced Somerset to enter into agreements with AMS. She asserted that those statements were therefore hearsay as the affidavit did not comply with rule 30.3 of the Civil Procedure

Rules (CPR). Accordingly, she submitted, the learned judge should not have considered the offending statements.

[21] Ms Moore argued alternatively that there was no misrepresentation as alleged by the appellants. Learned counsel argued that misrepresentation would involve only the Bank and the appellants and would not involve AMS, as alleged by the appellants.

*The analysis*

[22] Summary judgment is one of methods provided by the CPR to assist the court in achieving its overriding objective. Where a party's case is hopeless, it is in its interest and the interest of justice that it be advised as soon as possible. This position was encouraged by Lord Woolf MR in the well-known, and often cited case of **Swain v Hillman and another** [2001] 1 All ER 91 at page 94.

[23] Part 15 of the CPR addresses summary judgment. Notably, rule 15.2 states that:

> "The court may give summary judgment on the claim or on a particular issue if it considers that-
>
> (a) The claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) **The defendant has no real prospect of successfully defending the claim or the issue**." (Emphasis supplied)

[24] In assessing the Bank's application for summary judgment, the learned judge was required to consider whether the appellants had any real prospect of successfully defending the claim.

[25] The party that seeks the summary judgment must assert that the respondent's case has no real prospect of success. If that party asserts that belief, on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable". In order to successfully resist the other party's assertion, the respondent must prove that its case has "a 'realistic' as opposed to a 'fanciful' prospect of success" (see paragraphs [14] and [15] of **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37). In determining whether there is any real prospect of succeeding, the judge should not conduct a mini-trial.

[26] The Privy Council has also offered guidance on the matter, in **Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright** [2018] UKPC 12. Lord Briggs stated that summary judgment allows the court to determine whether the matter requires a trial. He added that if a trial of the issues between the parties does not affect the claimant's entitlement to the relief sought then the trial is unnecessary (see paragraphs 16-21).

[27] Although the judge considering a summary judgment application is not to conduct a mini-trial, he must carefully examine each party's statement of case and the supporting documents, in order to determine the merits. It is against this background that this matter is to be viewed.

[28] The appellants' primary defence is that the alleged misrepresentations by the Bank's representative caused them to enter into the loan agreements, which caused

them to incur significant losses thereafter. Ms Moore however contends that these were hearsay statements.

[29] Where a witness gives evidence of facts that are not within that witness' personal knowledge, this is hearsay and inadmissible (see paragraph [27] of **Jamaica Public Service Company Limited v Charles Vernon Francis and another** [2017] JMCA Civ 2). However, statute, the CPR and the common law provide exceptions to the hearsay rule (see paragraph [21] of **Jamaica Public Service Company Limited v Charles Vernon Francis and another**). Affidavit evidence may include hearsay statements but these statements must be in the appropriate form. This form is outlined at rule 30.3(2) of the CPR. It states:

> "30.3 (1)...
>
> (2) However an affidavit may contain statements of information and belief-
>
> (a) where any of these Rules so allows; and
>
> (b) **where the affidavit is for use in an application for summary judgment** under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-
>
> (i) **which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief**; and
>
> (ii) **the source for any matters of information or belief**." (Emphasis supplied)

[30] This context is slightly different where the matter involves a company. In **Jamaica Public Service Company Limited v Charles Vernon Francis and another**, the impugned affidavit was sworn to by the legal officer of Jamaica Public Service (JPS) who gave evidence on JPS's late filing of its witness statements. There were numerous challenges to his affidavit, including that the legal officer did not state that the matter was within his personal knowledge, which was in breach of rule 30.3(2) of the CPR. Edwards JA (Ag), as she then was, discussed the peculiar situation involving companies. She stated that the legal officer indicated that he was authorised to depose to the facts having reviewed the company documents. She also stated that JPS, being a company, can only make statements through affiants associated with the company, based on their review of the company's documents. In such a case, their knowledge can be deemed as the company's knowledge (see paragraphs [28]-[31] of **Jamaica Public Service Company Limited v Charles Vernon Francis and Another**). She cautioned however that this will not be applicable in all cases.

[31] In the instant case, Mr Lindeerth Powell filed the affidavit on behalf of Somerset. At paragraphs 10 and 11, however, he admitted that the Bank made its representations to Mr William Powell, and not to him. He said:

> "10. In May 2007 [the Bank] represented to [Somerset] that it would disburse the said some of money within forty days and advised it that it should in the meantime pay a deposit for the acquisition of the tile-making plant so that it could be secured.
>
> 11. Acting on this representation and advice, made/given by [the Bank] through its Mr. Alan Thomas to [Somerset's] director, Mr William Powell, [Somerset] committed itself to

> the acquisition of the tile-making plant by paying a total deposit of Euro$199,849.20 to its supplier, AMS GROUP of Via Gandhi 18,24048 Cumasco di Treviolo BG I in three tranches."

[32] Mr Lindeerth Powell did not depose that he obtained his knowledge from any company documentation and so his affidavit does not conform to the standard indicated by Edwards JA (Ag). The misrepresentation on which the appellants rely is therefore hearsay as it does not conform to rule 30.3(2) of the CPR and cannot be relied on. In the result, the appellants have no evidence of any misrepresentation on the part of the Bank. This is a significant defect in the appellants' assertion to having a real prospect of successfully defending the claim.

[33] Other difficulties face the appellants' assertions of misrepresentation.

[34] Misrepresentation was discussed by H Harris JA in **Bevad Limited v Oman Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2005, judgment delivered 18 July 2008. The learned judge of appeal, at page 8, summarised the law as follows:

> "...In **Derry v. Peek** [1886-90] All E.R. 1 the *locus classicus* on the tort of deceit, Lord Herschell, speaking over a hundred years ago, stated that for an action to lie in the tort it must be shown that the statement was not only false but was 'made knowingly, or without belief in its truth, or recklessly, careless, whether it be true or false'...
>
> Four principal elements of the tort must be established:
>
> (i) There must be a false representation of fact. This may be by word or conduct.

(ii) The representation must be made with the knowledge that it is false, that is, it must be willfully [sic] false or made in the absence of belief in its truth. **Derry v Peek** (supra); **Nocton v Lord Ashborne** [1914-1915] All E.R. 45.

(iii) The false statement must be made with the intention that the claimant should act upon it causing him damage.

(iv) However, it must be shown that the claimant acted upon the false statement and sustained damage in so doing. **Derry v Peek** (supra); **Clarke v. Dickson** [1859] 6 C.B.N.S. 453; 35 Digest 18,100."

[35] In the instant case, the appellants have not satisfied any of those requirements. The Bank issued a letter of commitment to Somerset in February 2007. That letter concerned a proposed loan of $20,000,000.00. The letter indicated that disbursement should take place within 180 days otherwise it would be cancelled. It, however, does not appear that any disbursement took place. No evidence has been provided to explain the failure to disburse. Although the Bank exhibited that letter, it did not provide any explanation for the failure to disburse the loan.

[36] The alleged statement by the Bank's representative in May 2007, that disbursement would take place within 40 days, has not been shown to be a "false representation of fact". The letter of commitment required steps to be taken by Somerset, including the payment of a commitment fee. Somerset has not said that it satisfied those requirements.

[37] In any event, it is plain that the parties embarked on new negotiations for a new, and larger, loan. Those negotiations culminated in the 2008 application and letter of commitment, mentioned above. The documentation shows that the 2007 transaction was overtaken by the transaction in 2008.

[38] Far from protesting a failure to disburse funds pursuant to the 2007 letter of commitment, the appellants participated completely in the 2008 transaction. The documentation demonstrates their participation:

a. Somerset's application for the loan was submitted in June 2008;

b. the application was considered by the Bank's Board on 28 July 2008 and was conditionally approved by 7 August 2008;

c. the Bank, by its first commitment letter, dated 22 August 2008, communicated to Somerset the final approval;

d. Somerset made requests for amendments to the list of equipment; and

e. by letter dated 7 October 2008, the Bank granted Somerset's requests.

[39] In view of the finding above that these statements were hearsay or alternatively that there was no misrepresentation by the Bank's representative, this ground fails.

**The set-off (grounds ii and v)**

*The submissions*

[40] Mr Adedipe recognised that the appellants did not file a claim against the Bank but relied instead on a set-off of the sums paid by Somerset to AMS against the sums found to be owed by the appellants to the Bank. He argued that the appellants were induced and suffered losses as a result of the actions of the Bank's representative. This, he submitted, entitles the appellants to an equitable set-off. He relied on **Hanak v Green** [1958] 2 All ER 141 and **Geldof Metaalconstructie NV v Simon Carves Ltd** [2010] EWCA Civ 667. Consequently, he argued that a trial would be necessary to determine the sums which would be due to the Bank. He submitted that if, at the trial, the Bank's action is found to be negligent or fraudulent misstatements then the appellants would be entitled to an award of damages.

[41] Ms Moore submitted that there was no evidence before the court below of any act by the Bank that caused the appellants to incur any losses, since there was no delay in the processing of the loan. In the circumstances, she submitted that, any loss suffered by the appellants cannot be attributed to the Bank. She also submitted that there is no evidence that the claim and the suggested cross-claim are closely connected to entitle the appellants to a set-off.

[42] She asserted that the Bank's claim is for liquidated sums, however, the appellants' claim requires an assessment of its alleged losses. She relied on **Axel Johnson Petroleum AB v MG Mineral Group AG The Jo Lind** [1992] 2 All ER 163.

Accordingly, she submitted, the defence of set off, whether it be equitable or legal, has no real prospect of success.

*The analysis*

[43] Rix LJ, at paragraph [22] of **Geldof Metaalconstructue NV v Simon Carves Ltd**, relied on Morris LJ's exposition on equitable set off in **Hanak v Green** and noted that it is described as "a masterly account of the subject". Rix LJ also indicated that not all cross-claims are defences to claims. Rix LJ said:

> "[22] It is generally considered that the modern law of equitable set-off dates from **Hanak v Green** [1958] 2 QB 9, [1958] 2 All ER 141, [1958] 2 WLR 755. Morris LJ's judgment there has been described as a masterly account of the subject *(***Gilbert Ash (Northern) v Modern Engineering (Bristol) Ltd** [1974] AC 689 at 717, [1973] 3 All ER 195, 72 LGR 1 *per* Lord Diplock). In **Dole Dried Fruit v Trustin Kerwood Ltd** [1990] 2 Lloyd's Rep 309 at 310 Lloyd LJ said that for all ordinary purposes, the modern law of equitable set-off is to be taken as accurately stated there. Morris LJ set out the law in these terms:
>
> > 'The position is, therefore, that since the Judicature Acts there may be (1) a set-off of mutual debts; (2) in certain cases a setting up of matters of complaint which, established, reduce or even extinguish the claim; and (3) reliance as a matter of defence upon matters of equity which formerly might have called for injunction or prohibition . . . . The cases within group (3) are those in which a court of equity would have regarded the cross-claims as entitling the Defendant to be protected in one way or another against the Plaintiff's claim' [see page 149 of **Hanak v Green**].
>
> However, that did not mean that all cross-claims may be relied on as defences to claims."

[44] Rix LJ went further, at paragraph [43](vi), to state that the test for establishing an equitable set-off is "cross-claims... so closely connected with [the claimant's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim".

[45] As has been demonstrated above, there is no evidence that the Bank made any misrepresentations to Somerset. Accordingly, there is no basis for considering a set-off.

[46] These grounds fail.

**Personal Guarantee versus Guarantee and Indemnity (grounds iii and iv)**

[47] The learned judged found that despite Mr Lindeerth Powell's assertion, that he was unaware of what he was signing, he is bound by the terms of the Guarantee and Indemnity, which he signed.

*The submissions*

[48] Mr Adedipe asserted that Mr Powell was misled into signing a Guarantee and Indemnity as he was only prepared to sign a guarantee. In those circumstances, he submitted, that the Guarantee and Indemnity is unenforceable against Mr Powell or should be limited to only a guarantee.

[49] Ms Moore submitted that the Bank sent Mr Powell a Guarantee and Indemnity, which he executed and returned to the Bank. Additionally, she argued that there is no evidence that Mr Powell was induced to sign the document. In order to establish misrepresentation, Ms Moore contended that there must be an element of inducement.

She cited an extract from Chitty on Contracts, Volume 1 (Thirteenth Edition) Sweet & Maxwell at paragraph 6-032, which states:

> "It is essential if the misrepresentation is to have legal effect then it should have operated on the mind of the representee. It follows that if the misrepresentation did not affect the representee's mind, because he was unaware that it had been made, or because he was not influenced by it, or because he knew that it was false, he has no remedy."

[50] Learned counsel added that the Bank sent a cover letter indicating that Mr Powell was to sign a Guarantee and Indemnity so there could be no misrepresentation. Accordingly, he signed, knowing it was a Guarantee and Indemnity. She relied on **Hayward v Zurich Insurance Co plc** [2016] UKSC 48.

*The analysis*

[51] The distinction between a guarantee and an indemnity was expressed by Gilbert Kodilinye and Maria Kodilinye in their book, Commonwealth Caribbean Contract Law at page 27:

> "The main distinction between a guarantee and indemnity is that the guarantor makes himself secondarily liable for the amount of debt, whereas a person giving an indemnity makes himself primarily liable for the amount."

[52] Mr Adedipe's submissions cannot succeed. There is no misrepresentation on which Mr Powell can rely. The Bank sent a letter dated 24 September 2008 in which it stated that it had attached a "Guarantee and Indemnity in triplicate for execution". The salient sections of the Guarantee and Indemnity have been extracted:

> "1. In consideration of the Bank, at my request, granting a credit facility to SOMERSET ENTERPRISES LIMITED a

limited liability company duly incorporated under the Laws of Jamaica and having its registered office and for other good and valuable consideration (the receipt and sufficiency of which I do hereby irrevocably acknowledge), **I, LINDEERTH POWELL, SNR. Businessman…('the Guarantor), hereby unconditionally and irrevocably guarantee payment to the Bank on the dates and in the manner set forth in the Commitment Letter dated 22 August, 2008 (as same may be amended or renewed from time to time)('the Commitment Letter')** of all the Guaranteed Obligations (as hereinafter defined), including interest thereon (both before and after judgment) at the rate and upon the terms set out in the Commitment Letter and all fees, commissions, charges and legal expenses **(on a full indemnity basis)** incurred by the Bank in relation to the credit facility granted under or in pursuance of the Commitment Letter or the enforcement of any mortgage, debenture, guarantee, indemnity or other security granted to the Bank (whether by me, the Guarantor, or the Borrower) as security for the Guaranteed Obligations

…

3. As a separate, additional and continuing obligation, the Guarantor unconditionally and irrevocably undertakes to the Bank that, should the Guaranteed Obligations not be recoverable from the Guarantor by way of guarantee for any reason whatsoever (including, but without prejudice to the generality of the foregoing, by reason of any provision of the Commitment Letter being or becoming void, unenforceable or otherwise invalid under any applicable law) then notwithstanding that it may have been known to the Bank, the Guarantor shall, upon first written demand by the Bank under this provision, **make payment of the Guaranteed Obligations by way of a full indemnity in such currency and in such manner as is provided for in the Commitment Letter, and the Guarantor shall indemnify the Bank against all losses, claims, costs, charges and expenses to which the Bank may be subject or which the Bank may incur under or in connection with the Commitment Letter or any mortgage, debenture,**

> **guarantee or other security granted to the Bank as security for the Guaranteed Obligations**.
>
> ...
>
> 6. ...**the Guarantor shall continue to be bound by the terms hereof, such liability being as extensive as if the Guarantor was a principal debtor** and shall only be released or reduced by a specific written release of the Guarantor signed by a duly authorized officer of the Bank....” (Emphasis supplied)

Mr Powell was asked to sign the document, have his signature witnessed by a Justice of the Peace, and return the document to the Bank. There is no indication of any coercion.

[53] Mr Powell therefore agreed to repay the Bank on a full indemnity basis. Having signed this document, he is bound by its terms. This point was discussed in **L’Estrange v F Graucob Ltd** [1934] All ER Rep 16. In that case, the plaintiff argued that she was induced, by way of misrepresentation to sign a contract, but did not know the terms and was unaware that she would be bound by the terms. It was held that where a party signs a document, which contains contractual terms, in the absence of fraud and misrepresentation, that party is bound to the terms, irrespective of whether that party has read the document (see **L’Estrange v F Graucob Ltd** at page 19).

[54] There being no evidence of fraud or misrepresentation on the part of the Bank, Mr Powell is bound by the terms of the Guarantee and Indemnity.

[55] These grounds also fail.

**Interest Rate (Ground vi)**

[56] The learned judge awarded, to the Bank, interest at a rate of 12% from May 2016 to the date of the judgment.

*The submissions*

[57] Mr Adedipe submitted that the Bank cannot rely on the penalty interest provision of the commitment letter as the entire interest rate clause was replaced when the loans were rescheduled as indicated in the loan restructuring letter. He further submitted that equity is against the implementation of penalties. Accordingly, the interest rate should be 10.5%.

[58] Ms Moore agreed that the loan was rescheduled, and a component of the rescheduling was the reduction of the interest rate to 10.5%. She, however, highlighted that the loan restructuring letter did not impact the 7% interest that accrued on unpaid principal and interest. She argued that the terms in the first commitment letter are clear and unambiguous. She relied on **Rainy Sky SA and others v Kookmin Bank** [2011] UKSC 50.

*The analysis*

[59] Learned counsel Ms Moore is on good grounds with her submissions.

[60] In **Rainy Sky SA and others**, the court considered a term of a bond which had two possible interpretations. Lord Clarke SCJ, on behalf of the court, distilled the correct approach to construction. He said in part, at paragraph [14] that:

> " ...the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the *Investors Compensation Scheme* case [1998] 1 All ER 98 at 114-115, [1998] 1 WLR 896 at 912-913, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

[61] The learned Supreme Court Judge went further at paragraph [21] to state that:

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

[62] In the instant case, it is not in dispute that the Bank advised the appellants of the loan restructuring. The relevant portion of the loan restructuring letter indicates:

> "...
>
> We also advise that effective 01 January 2012, the interest rate applicable to the delinquent loan will be reduced to 10.5% per annum. The revised amortization schedule detailing, the new monthly instalments effective 28 February 2012 is enclosed for your records.

...

All other terms and conditions pertaining to this loan will continue...."

[63] The first commitment letter indicates the terms in relation to the interest rate as follows:

> "Interest will be charged at a rate of twelve percent per annum (12%) per annum [sic] ('the principal rate') and is calculated on the reducing balance. Unpaid principal and interest installments [sic] shall attract interest at the principal rate plus seven (7) percentage points per annum commencing immediately after the date for payment until such time as payment is received by [the] Bank. The interest rate is subject to review and will be governed by any new interest rate regime which becomes applicable from time to time."

[64] This section, evidently, was interpreted in two different ways. However, the interpretation which is consistent with business sense is the interpretation advanced by the Bank. It is the principal rate that has been reduced from 12% to 10.5%, as indicated in the loan restructure letter. That letter does not address the position concerning the unpaid principal and interest instalments. Accordingly, it is governed by the first commitment letter. Consequently, the interest rate of 7% on unpaid principal and interest instalments is still in effect.

[65] This ground also fails.

**The counter-notice of appeal**

[66] The Bank filed a counter-notice of appeal, with grounds relating to the percentage of interest awarded by the learned judge. These grounds are:

> "1. The honourable Judge erred when he awarded interest on the entire judgment sum at a rate of 12% in circumstances where a portion of the sums claimed attracted interest at the rate of 17.5%.
>
> 2. The honourable Judge erred when he limited the award of interest in relation to [Lindeerth Powell] to the date of judgment as the Guarantee and Indemnity expressly provided for interest to continue at the rate specified in the [first] Commitment Letter both before and after judgment."

[67] By virtue of accepting the Bank's calculation of interest up to 6 May 2016, the learned judge implicitly awarded interest on the loan at a rate of 17.5% up to that date. He, however, reduced the rate of interest to 12% until the date of the judgment.

[68] Ms Moore submitted that the learned judge erred when he reduced the interest rate, since the parties agreed to a rate of 17.5%. She further submitted that there was no reason for the learned judge to vary the rate agreed between the parties.

[69] She contended that the learned judge also erred when he limited the interest payable by Mr Lindeerth Powell to the date of judgment. She argued that the Guarantee and Indemnity that he signed provided that he would repay interest, both before and after judgment. Accordingly, she submitted, Mr Powell is liable to the Bank for interest at the agreed rate of 17.5% beyond the judgment date.

[70] Mr Adedipe submitted that the learned judge was correct in awarding interest at a rate of 12%. Learned counsel asserted that the loan was rescheduled so the rate of 17.5% would amount to a penalty rate of interest. He also submitted that the learned judge was correct to limit Mr Powell's liability in relation to interest to the date of

judgment. He argued that the interest formed part of the judgment so the award of interest following the date of judgment should be at the judgment debt rate.

[71] It is not sufficient for a party seeking to challenge a rate of interest, to merely assert that the rate is a penalty, that party must adduce evidence proving that assertion. This principle was distilled in **University of Technology Jamaica v Colin Davis and Sharon Hall** [2016] JMCA Civ 30. In that case, this court granted judgment in favour of University of Technology (the University) following the breach of a bond agreement by its employee, Mr Colin Davis. Ms Sharon Hall was the guarantor and so was also liable to University of Technology. One of the issues for determination by this court was what rate of interest was to be applied to the sums to be recovered by the University. The bond agreement indicated that in the event of default by Mr Davis, Ms Hall should, within seven days of such default, satisfy the liquidated damages sustained by the University, with interest at a rate of 25% per annum.

[72] Counsel representing Mr Davis and Ms Hall argued that the interest rate was a penalty and was consequently unenforceable. This issue however was only raised at the appeal stage, and was not included as a ground of appeal. Nevertheless, this court, at paragraph [38] ruled that "the party who is alleging that a sum is a penalty and not liquidated damages bears the burden of proving that it is a penalty. Mere assertion, to that effect, will not suffice". The court went further at paragraph [39] to state that:

> "In order to have challenged the rate of interest, [Mr Davis and Ms Hall] would have had to provide proof either to show that it was not a genuine pre-estimate of [the University's] loss, or otherwise lay the basis for an inference that the rate

> was penal in nature. In fact, no evidence was adduced concerning this issue. [Mr Davis and Ms Hall] cannot just assert that the rate amounts to a penalty."

[73] This court is loath to interfere with agreements between parties. This was gleaned at paragraph [40] of **University of Technology v Colin Davis and Sharon Hall**:

> "The rate of interest as stipulated by the agreement should be enforced since it had been agreed upon by the parties as being 'liquidated damages' and [Mr Davis and Ms Hall] are both bound by it. That being the rate of interest, and the basis therefor, agreed between the parties, this court would not disturb their agreement."

[74] In the instant case, the parties have agreed to a rate of interest in the event that the appellants default on repayment. That rate continues to accrue beyond the judgment date. The portion of the first letter of commitment has already been quoted at paragraph [63]. It contemplates that interest will be payable at the stipulated rates until the debt is paid. The Guarantee and Indemnity states, in part, in section 1 that interest accrues "both before and after judgment".

[75] The rate of 17.5% has already been deemed above to be the applicable interest rate. That being the agreement of the parties. The learned judge disregarded those provisions when he restricted the applicable interest to 12% per annum up to the date of judgment. In doing so, it must respectfully be said that he erred.

[76] Accordingly, this court must disturb the learned judge's finding of limiting the award of interest to 12% from May 2016 to the date of judgment. That restriction is contrary to what the parties had agreed.

[77] The consideration of the interest rate after the date of judgment is less straightforward. The Bank, in its particulars of claim sought interest "at the rate of 17.5% per annum…until payment or judgment" (page 22 of the record). The crafting of the claim suggests that the Bank was not claiming interest at the contractual rate after the date of judgment. The learned judge did not address this issue in his reasons.

[78] It would seem that this is a case of poor drafting of the particulars of claim. As has been explained above, interest is to be at a rate of 17.5% until the debt is satisfied. In giving effect to the parties' agreement that aspect of the judgment must also be adjusted. It should, therefore, read:

> "(ii) Interest at 17.5% per annum from 7 May 2016 to the date of payment."

[79] The counter-notice of appeal therefore succeeds.

**Conclusion**

[80] For the reasons indicated above, the appellants, through insufficient evidence and otherwise, do not have a defence with a realistic prospect of success. The learned judge was correct in granting summary judgment to the Bank. The appeal must therefore be dismissed.

[81] The learned judge did, however, err in respect of the interest that he awarded to the Bank on the outstanding sum. He did not give effect to the agreement between the parties in relation to the interest rate and that the interest should continue to accrue until payment. The Bank's counter-notice of appeal should therefore be allowed.

**Costs**

[82] The court is minded to award costs of the appeal and of the counter-notice of appeal to the Bank. If either of the parties are of a different view, they may file written submissions in that regard within 14 days of the date hereof. The other party will have a further period of 14 days from the date of service to file their own submissions. If neither party files written submissions opposing this court's decision on costs, within the stipulated time, the order is that costs of the appeal and of the counter-notice of appeal are awarded to the Bank to be agreed or taxed.

**SINCLAIR-HAYNES JA**

[83] I have read, in draft, the judgment of Brooks P, and agree.

**F WILLIAMS JA**

[84] I too have read the draft judgment of my brother Brooks P. I agree with his reasoning and conclusion and have nothing to add.

**BROOKS P**

**ORDER**

1. The appeal from the decision of the Supreme Court, handed down, herein, on 14 June 2018, is dismissed.

2. The counter-notice of appeal is allowed.

3. Order number (ii) of the said decision is amended to read as follows:

   "Interest at 17.5% per annum from 7 May 2016 to date of payment."

4. Unless submissions are filed to the contrary within 14 days of the date hereof, costs in respect of the appeal and the counter-notice of appeal are awarded to the Bank to be agreed or taxed.

5. If submissions are filed by either party in respect of costs within 14 days of the date hereof, the other party is to reply in writing within 14 days of being served with those submissions.

6. The court will give its decision on costs in writing after receiving the parties' submissions.