Neutral Citation Number: 2014 EWHC 3403 (Ch)

Claim No HC 12B 02992

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Date: 22.10.2014

Before :

Mr John Baldwin QC

(sitting as a Deputy Judge of the Chancery Division)

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Between :

NIGEL CHARLES GOSS

Appellant/Defendant

- and –

BM SAMUELS FINANCE GROUP PLC

Respondent/Claimant

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- -

Andrew Butler (instructed by Ashley Wilson Solicitors LLP) appeared on behalf of the Appellant.

Iain Pester (instructed by Sylvester Amiel Lewin & Horne Solicitors LLP) appeared on behalf of the Defendants.

Hearing date: 15 October 2014

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Approved Judgment

I direct that 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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1. This is an appeal from the order of Deputy Master Nurse made on 15 May 2013 whereby he gave summary judgment to the Claimant pursuant to CPR 24.2 and struck out the Defendant's counterclaim pursuant to CPR 3.4(2)(a). In addition there is an application to adduce fresh evidence on the appeal.

2. I was reminded at the outset by the Respondent Claimant that the appeal takes place by way of review rather than rehearing, but the circumstances were such that there was, in effect, a rehearing.

3. I was also reminded of the relevant principles to be applied in applications of this kind. They are extracted from the decision of Lewison J in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339, [15] and set out in [6] of the decision of Deputy Master Nurse and were not in dispute.

4. The matter arises out of the desire by the Appellant, Mr Goss, to develop a property at 2 Audley Way, Frinton on Sea. The Respondent, BMS, is a finance company specialising in short term bridging loans secured on property and, as a result of approaches to BMS, a Deed of Guarantee including Facility Letter (dated 20 April 2010 and accepted 27 April 2010) was entered into on 19 May 2010. The agreement comprised within the Facility Letter was between BMS and a company called Lamaid Estates Limited (LEL) and provided for the supply of funds of £675,000 on various terms and was for the purpose of financing the development at 2 Audley Way (the Development). Mr Goss and a Mr Spencer were named as Guarantors of the loan. Mr Spencer was the sole director of LEL and majority (100:2) shareholder of a company called Lamaid Limited which was, itself, the sole shareholder of LEL.

5. Mr Spencer gave an unlimited guarantee whereas Mr Goss guaranteed £100,000 of the monies loaned by BMS. There was a default on repayment of the loan and by these proceedings BMS seek to enforce the guarantee given by Mr Goss. No attempt has been made to enforce the guarantee given by Mr Spencer, although Mr Goss has obtained an order (by default) against him for a contribution if Mr Goss has incurred any liability.

6. Proceedings were issued on 30 June 2012 and a Claim Form and Particulars of Claim were served on that date. A Defence and Counterclaim was filed on 24 September 2012 and the application under appeal was filed on 19 February 2013.

7. The following defences were put forward. First, it was contended (by §11 of the Defence) that it was an implied term of the facility agreement that BMS would not itself do anything to hinder or obstruct the satisfactory progress of the Development and (by §22) that there had been a breach thereof by the provision of funding by BMS to another party (Jarvis, a company in which a member of the Spencer family had some interest) which had the consequence that Mr Spencer left work on the Development to join workers for Jarvis.

8. Second, it was contended (by §15) that BMS was under an obligation to disclose to Mr Goss any unusual features of the contractual relationship between BMS and LEL which might affect the risk undertaken by Mr Goss of which he was unaware, and an obligation not, subsequent to the execution of the guarantee, to act in any way prejudicial to Mr Goss and, in particular, not to connive in the default of LEL. It was said that there has been a breach of this obligation as BMS had connived in the default of LEL since it knew or ought to have known that the provision of funding to Jarvis would result in the neglect or abandonment of the Development. By §25 it was repeated that the provision of funding by BMS to Jarvis amounted to connivance in LEL's default since it had enabled Mr Spencer to continue to earn a living without needing to concern himself with the obligations of LEL, including those to BMS.

9. Third, (by §16 of the Defence) there was, in summary, a blanket non-admission that there had been any default of LEL or of the matters required to be proved to make good this claim.

10. Fourth, (by §23 of the Defence) it was said that "if and in so far as there was, at the time of the advance to [LEL] and the execution of the Guarantee, any arrangement between [BMS] and [LEL] (in the person of Mr Spencer) that [BMS] would provide funding [to Jarvis] for the construction work at [Jarvis'] property or (or indeed funding for any other project), that was a matter which it should... have disclosed to Mr Goss. The failure to give such disclosure vitiates the Guarantee; put another way, [BMS] impliedly represented that there were no such arrangements between it and the company, and [Mr Goss] relied on that representation in entering the guarantee. If and in so far as such arrangements had been made, that representation was false. In those circumstances, [Mr Goss] is

thereby entitled to and does rescind the Guarantee." The conditional aspect of this plea is noteworthy, especially in relation to reliance but also generally.

11. It is convenient to take the third Defence first. Although it is set up by way of non-admission, it became apparent from the skeleton argument that the case being put was that no formal demand of LEL for repayment of the loan had been proved to have been made of LEL and, accordingly, there was no default by or indebtedness of LEL with the result that the claim on the guarantee was not triggered. Counsel described the contention as merely technical, but contended that it was a good point and, as such, was a complete answer to the claim.

12. The Deputy Master considered the Guarantee and concluded that as a matter of construction, it was not necessary for a formal demand to be made upon LEL. He went on to say that even if that was not right, the overwhelming weight of the evidence was that by the time of the formal demand made on Mr Goss, all the money that was the subject of the Facility Letter had become due from and repayable by LEL.

13. I think the decision of the Deputy Master was right. Clause 1 of the Deed of Guarantee provides that '[Mr Goss] hereby covenants with [BMS] to pay and satisfy on demand all indebtedness due from [LEL] to [BMS]', and 'indebtedness' was defined in wide terms in the second preamble to the Deed[1]. Further, clause 2.7 of the Deed provides that 'Before enforcing this Guarantee, [BMS] shall not be obliged to ... make any demand of [LEL].

14. It seems to me clear on the evidence that when BMS made a demand of Mr Goss to satisfy his guarantee there was an indebtedness (within the meaning of the Deed) of LEL to BMS in excess of £100,000 and, accordingly, the guarantee was properly triggered. Accordingly I do not accept Mr Butler's argument that the words 'whether actual or contingent and whether or not matured or accrued due'

[1] The second preamble to the Deed reads as follows (where the Lender is BMS and the Borrower is LEL): 'It was a term of the Lender's loan facility that the Guarantor would by entering into this Deed guarantee payment to the Lender for all the Borrower's present or future indebtedness to the Lender pursuant to the loan facility and all the Borrower's other liabilities whatever and whenever to the Lender, whether actual or contingent and whether or not matured or accrued due and whether incurred solely, severally or jointly with any other person, together with interest and any other costs, charges and expenses charged or incurred by the Lender in perfecting or enforcing or attempting to enforce this guarantee or any other security held by the Lender from time to time (hereinafter called "indebtedness")'.

in the definition of "indebtedness" do not relate to any indebtedness pursuant to the loan facility and only relate to 'other liabilities'. Indeed, the punctuation in the definition makes the matter as clear as it needs to be.

15. With respect to the fall back position of a demand on the facts, the position is that, prior to calling upon the guarantee, BMS had called in charges it had on the properties charged to secure the loan, and at least one property had been sold in partial satisfaction of the obligation to repay the loan. Mr Goss was the de facto managing director of LEL at the time and he was in a perfect position to say, if it were true, that there was no existing indebtedness or that there had been no demand for repayment of the sums due. Not only did he not do so, but he must have cooperated to some extent in the sale of the charged properties, sales being made because of the indebtedness of LEL to BMS in respect of the loan.

16. With respect to the alleged implied terms, the Deputy Master considered each of them and assumed, for the purposes of his evaluation that such terms would be implied. He found nothing in the Defence, or in the evidence filed on the application, which came close to establishing any breach. I agree with the Deputy Master.

17. Mr Butler, for Mr Goss (who presented the matter as well as it could be presented, for which I am grateful) urged that the circumstances surrounding the supply of funds to LEL and then the supply of funds to Jarvis together with Mr Spencer's departure from site at Audley Way to join works at Jarvis' site were ripe for investigation, since they strongly pointed to there being some matters which would afford a defence to the claim. It was put to him in argument that his client was 'hoping that something would turn up' and, although Mr Butler resisted the suggestion, it appears to me that this is an accurate statement of the position.

18. This brings me to the application to adduce fresh evidence. I have considered this evidence in the light of the *Ladd v Marshall* guidelines. Most of the evidence postdates the hearing before the Deputy Master so it could not have been obtained earlier and therefore the main consideration is whether or not the fresh evidence would have a material influence on the case. The fresh evidence is to the effect that BMS and Mr Spencer have been involved in other transactions involving building works and that these transactions have not gone well (including the one

for Jarvis); in some cases they appear to have gone very badly. But I have to set that against other matters such as the fact that BMS has been in business with Mr Spencer for very many years and Mr Goss himself has been in business with Mr Spencer for some time. Indeed, by 2008 Mr Goss' company had charges over the property of LEL or a related company in respect of advances of several million pounds.

19. Mr Butler contended that the fresh evidence was Similar Fact Evidence and was sufficient to bolster his argument that in this case there either was a clear defence on the pleadings or, at least, there was a compelling other reason for the matter to go to trial. He referred me to *Miles v Bull* [1969] 1 QB 258 and said that justice demanded a proper examination of the dealings between BMS and Mr Spencer and his companies. He also relied upon the fact that only BMS and Mr Spencer know what really happened regarding the provision of funds to support the Development and the provision by BMS of further monies to Jarvis which led to Mr Spencer downing tools with the consequence that the LEL defaulted on the loan and Mr Goss' guarantee was called upon.

20. I am not satisfied that this fresh evidence is sufficiently probative or relevant that, if it were admitted into evidence, the result would be that Mr Goss had established there was a good reason for there to be a trial of this matter. On the materials which I have seen, I think the Deputy Master was right in the decision to which he came.

21. I turn now to the Counterclaim. It arises out of dealings with Mr Goss' company Evengain Investments Limited (Evengain). It is pleaded that Evengain has advanced monies over the years to LEL and other companies connected with Mr Spencer for the purposes of funding construction projects and that at all material times there existed a Legal Charge between Evengain and LEL. It is said that by a clause in the charge there was an obligation '*to protect all existing buildings fixtures and fittings and all other property now or for the time being comprised in or subject to this security*'. The pleading goes on to allege an oral contract of Joint Venture between Evengain and LEL and that there was an express or implied term of which that LEL would pursue the Development with reasonable diligence and to completion. It is then pleaded that the provision of funding by BMS to Jarvis for the purposes of allowing that party to retain Mr Spencer

facilitated a breach of LEL's obligations under the Charge and under the Joint Venture Contract. Accordingly, it is said, BMS committed against Mr Goss the tort of procurement of breach of contract.

22. There are no particulars at all of why anything which LEL or BMS might have done led to a *'failure to protect...'*, or of what was the consequence of that failure to protect. Nor is anything material said about the failure to pursue the Development with reasonable diligence, save that we know from the Defence that Mr Spencer walked off site. Nor is it said how mere facilitating a breach amounts to the tort of procuring a breach of contract.

23. These are only some of the difficulties. The main difficulty is that Mr Goss is not a party to the relevant contracts, Evengain being the contracting party.

24. Mr Butler contended he was not seeking to pierce the corporate veil. He contended that if A procures a breach of contract by B against C which is the *alter ego* of D, then D can sue A. He said that was an important point of law which should not be decided on a summary basis but should permitted to go forward to trial.

25. I do not agree that the case should go forward for trial. Certainly it is a novel point, but the case is so poorly particularised that, on the facts, it is not suitable for exploration at trial. Moreover, if there is a case buried somewhere, then Evengain is well able to pursue it so there is no reason for this case to go forward. I agree with the Deputy Master and dismiss the appeal in its entirety.