In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION

2019: No. 209

BETWEEN:

CENTAUR VENTURES LTD.

Plaintiff

-and-

AKASH GARG

Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Richard Horseman, Wakefield Quin Limited, for the Plaintiff**
Mr Ben Adamson, Conyers Dill & Pearman, for the Defendant

Date of Hearing: **26 February 2020**

Date of Judgment: **1 March 2020**

JUDGMENT

Application for a summary judgment; whether what the defendant asserts is credible; whether there is a fair or reasonable probability of the defendant having a real or bona fide defence

Introduction

1. This is an application by Centaur Ventures Ltd ("Centaur" or the "Plaintiff) for summary judgment against Akash Garg ("Mr Garg" or the "Defendant") for amounts due under two loan agreements set out in the Specially Endorsed Writ Of Summons dated 27 May 2019.

2. In the Statement of Claim, the Plaintiff refers to two loan agreements dated 10 April 2017 and 13 November 2017. In relation to the first loan agreement dated 10 April 2017, the Statement of Claim asserts that the Plaintiff agreed to lend to the Defendant the sum of US$1 million. It is alleged that it was an express term of the agreement that the loan would carry interest at the rate of 4% from the date of the advance of the loan which was 10 April 2017. It was also an express term of this loan that it would be repaid on or before 9 April 2018. The loan agreement was governed by the laws of Bermuda and the parties agreed to submit to the exclusive jurisdiction of the Bermuda Courts. By letter dated 30 April 2019, the Plaintiff made a demand for repayment but in breach of the loan, the Defendant has failed to make any payment at all.

3. In relation to the second loan, it is asserted that by written agreement dated 30 November 2017, the Plaintiff agreed to lend to the Defendant the sum of US $100,000. It was subject to the same terms as the first loan except that it was to be repaid by or before 12 November 2018. By letter dated 30 April 2019, the Plaintiff made a demand for repayment but in breach of this second loan agreement, the Defendant has again failed to make any payment at all.

4. On 28 June 2019, Kawaley CJ granted a Worldwide Freezing Order against the Defendant up to the amount of US $1,191,289.03.The Freezing Order also required the Defendant to give disclosure of his assets. The Defendant complied with that obligation by filing an affidavit dated 4 September 2019.

5. On 26 September 2019, the Court made an Order that unless the Defendant files and serves on the Plaintiff's attorneys a Defence within seven days, the Defendant is debarred from defending the claim and the Plaintiff will be entitled to Judgment in the amount claimed of US $1,191,289.03 with costs to be taxed if not agreed.

6. On 3 October 2019 Conyers, the Defendant's new attorneys, filed a Defence on his behalf. The Defence admits that Defendant has received the amounts under the two loan agreements and accepts that he has not repaid any amount but claims that such non-payment is not a breach of the agreements.

7. In the Defence, the Defendant explains that until August 2018, he was the owner of 50% of the shares in the Plaintiff company and a director on the Plaintiff's board. The Defendant also asserts that he has over the years worked for and acted as a director of the Plaintiff's subsidiary companies.

8. In the Defence, the Defendant raises two factual defences. First, the Defendant says that the loans were not repayable in accordance with the terms of the loan agreements, but the first and second loan agreements were entered into "*to reflect dividends payable to the Defendant."* The Defendant advances this defence despite the fact that both loan agreements expressly provide that "*This Agreement constitutes the entire agreement between the parties and there are no representations, warranties, covenants or agreements collateral here to other than as contained herein".*

9. In relation to the second factual defence, the Defendant asserts that in August 2018, he agreed to sell his shares in the Plaintiff company to Mr. Deepak Raswant and that in light of the existence of the loans, Mr. Raswant refused to purchase the shares unless the loans were repaid or waived. The Defendant says that at a meeting on 13 August 2018 in Dubai, attended by Mr. Garg, Mr. Raswant and (on behalf of the Plaintiff) Mr. Daniel McGowan, the Plaintiff jointly promised Mr. Garg and Mr. Raswant that the Plaintiff did not require repayment and that the loans were waived

by the Plaintiff ("the Waiver"). The Defendant says that on the basis of the Waiver, Mr. Raswant agreed to buy and the Defendant agreed to sell the 50% shares in the Plaintiff company.

10. The Defendant in his Second Affidavit dated 30 October 2019, sworn in opposition to the application for summary judgment, states that "*The debt which it is alleged I owe, was waived by Mr. McGowan on behalf of the Plaintiff. Another director of the Plaintiff was witness to this".*

11. The application for summary judgment is supported by the Fifth Affidavit of Mr. McGowan dated 24 October 2019. In that affidavit, Mr. McGowan explains that when the loans were not repaid in accordance with the terms of the loan agreement, a legal demand was sent to the Defendant via email and FedEx on 30 April 2019. The demand letter, which was copied to Mr. Raswant who was by this time a 50% shareholder and a director of Plaintiff company, stated in part:

> "*As of the date of this Demand Letter, you owe the Company the amount of United States Dollars one million one hundred eighty eight thousand thirty two and eighty eight (US $1,188,032.88), due immediately, composed of United States Dollars one million one hundred thousand (US $1,100,000.00) principal past due and United States Dollars eighty eight thousand thirty two and eighty eight (US $88,032.88) accrued interest past due.*
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> *We hereby demand that you make an immediate payment of United States Dollars one million one hundred eighty eight thousand and eighty eight (US $1,188,032.88) into the custodian account of the Company set forth below".*

12. The Defendant responded to the legal demand letter by letter dated 22 May 2019 addressed to the Plaintiff's company. The letter is headed *"Your Demand Letter for the payment of the Overdue Loan Facility Agreement*" and states:

"In reference to your demand letter, I request you to kindly provide me the following information at your earliest convenience, to enable me to reconcile actual outstanding payable, if any, so that I can proceed further:

(i) Copy of the loan facility agreement dated 10 April 2017 executed with The Centaur Ventures Ltd. In terms whereof the loan under demand has been extended by Centaur Ventures Ltd.

(ii) Copies of bank account transfers/swift details along with bank account statements of Centaur Ventures Ltd. confirming transfer of loans made by Centaur Ventures Ltd. to enable me to reconcile the actual amounts transferred"

13. It is to be noted that in this letter, in response to a letter demanding for repayment of the amounts due under the two loan agreements, the Defendant makes no suggestion that the loans were made by the Plaintiff on account of dividends to be paid to the Defendant. Furthermore, this letter does not suggest that the loans were made by the Plaintiff on account of salary to the Defendant. Finally, this letter makes no suggestion that these loans were in fact waived by Mr. McGowan on behalf of the Plaintiff at a meeting held in Dubai 13 August 2018, nine months earlier.

14. By letter dated 22 May 2019, the Plaintiff provided the requested information to the Defendant and that letter was again copied to Mr. Raswant.

15. The Defendant responded to the Plaintiff's letter providing the information requested by his letter addressed to the Plaintiff company dated 24 May 2019. In that letter the Defendant stated:

"I would thank you for your prompt response and sharing the requested information. The provided information is being looked into by my team on

a priority basis and is being reconciled with the information available with me, which is necessary for me to substantiate the claimed amounts. I will respond to the claims made under your demand letter dated April 30, 2019 subsequently, after having reviewed and reconciled the information.

Accordingly, you are requested to grant me some reasonable time to look into the matter in totality and review the provided information. I am of the considerate view that any premature legal recourse initiated by you, as stated in your letter under response, will not be in the best interests of either party".

16. It is again to be noted that this response, made 4 months before the Defence filed by Conyers, does not suggest in any way that the loans were made on account of dividends or salary to be received by the Defendant or that both loans had been waived by the Plaintiff at the meeting attended by Mr. McGowan on behalf of the Plaintiff, Mr. Raswant and Mr. Garg in Dubai on 13 August 2018.

17. In his Third Affidavit dated 23 November 2019, Mr. Garg says that he worked for the Plaintiff for several years but was never paid any salary and dividends. Instead he received loans and that Mr. McGowan, who was responsible for the Plaintiff's financial side, told me that this was the best structure for tax reasons. He also says that he suspects that this was done to artificially inflate the value of the Plaintiff company.

18. In response Mr. McGowan, in his Sixth Affidavit dated 5 December 2019, points out that the Defendant was paid United Arab Emirates Dirhams 50,000 per month from 1 September 2016 and this amount accords with his employment contract with the Plaintiff. He also states that the Defendant is correct that he has never received any dividends but this is because the board of the Plaintiff company has never declared any dividends. Finally, Mr. McGowan points out that the Plaintiff, as a Bermuda exempted company, does not pay any tax on its profits and therefore there

would be no tax advantages to booking compensation or expenses as loans as alleged by the Defendant.

19. In his Fifth Affidavit, Mr. McGowan produces copies of the minutes of the board meeting of the Plaintiff held on 26 April 2019 attended by Mr. McGowan and Mr. Raswant, as the two directors of the company. The minutes of that meeting of the directors record the decision to pursue legal action against the Defendant in respect of his failure to make payments under the two loan agreements. The minutes record:

> "*DJM [Mr. McGowan] confirmed the first loan was a loan dated 10 April 2017 between the Company and Akash Garg ("AG") for US$1m, interest rate 4% p.a. and the loan was due to be repaid to the Company (including any interest) on or before 9 April 2018; that loan has not been repaid to the Company. DR [Mr. Raswant] said ok. DJM confirmed the second loan was a loan dated 13 November 2017 between the Company and AG for US $100k, interest rate 4% p.a. and loan was due to be repaid to the Company on or before 12 November 2018; that loan has not been repaid to the Company. DR said ok…..*
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> *DJM asked DR if he had any queries on this loan. DR said no he was ok whatever was the legal way to get these things done whether in Bermuda he thought the Company should go ahead and press for that."*

The test for summary judgment

20. Mr. Adamson referred me to paragraph 14/4/9 of the *Supreme Court Practice* 1999 setting out the commentary under the heading "*Leave to defend-unconditional leave'*. I accept that the test in relation to an application for summary judgment is that set out by the Court of Appeal in *National Westminster Bank plc v Daniel* [1994] 1 All ER 156. Glidewell LJ, with whom Butler-Sloss LJ agreed, said at page 160: "*Is there a fair and reasonable probability of the defendants having a real*

bone fide defence?" Or, as Lloyd LJ posed the test: *"is what the defendant says credible"? If it is not, then there is no fair and reasonable probability of him setting up the defence".*

21. As the commentary in paragraph 14/4/9 notes, the Court of Appeal in *National Westminster Bank plc v Daniel* approved the approach to summary judgment applications set out in *Banque de Paris et des Pays-Bas (Suisse) S.A. v Costa de Naray* [1984] 1 Lloyd's Rep. 21, a case which has certain parallels with the facts of this case. In that case the defendant, a businessman, agreed to provide a personal guarantee in support of loans made by the bank to finance a number of vessels. When the bank made a demand under the guarantee, the defendant at no time denied liability but instead pointed out that if the bank enforced the guarantee he would be made bankrupt.

22. However, when the bank commenced proceedings against the defendant under the guarantee, the defendant took the position that the bank officers had assured him that the guarantee was only required for cosmetic purposes. He understood that the bank required the guarantee for their records, but that there was no question of that guarantee ever been enforced against him and that he could remain assured that it would not involve him in any personal liability. Ackner LJ dealt with that argument, in the context of an application for summary judgment, in the following terms:

> *"Mr. Pollock, on one of those rare occasions on which reality was not uppermost in his submission, said: Well, it is so frequently the case that it is not until the lawyers come on the scene that the defence surfaces, and he asked whether one can really criticize the two defendants for having failed to realize that their one and only defence in this case was the result of two specific conversations relied upon by Mr Walters. To that rhetorical question the answer in my judgment is plainly Yes.*

A businessman of experience of the defendants, faced with a demand under a guarantee of $4m or $5m, or any significant sum, knowing that he had only signed the guarantee on an assurance that it did not render him under any obligation at all, would not have waited for his lawyers to express his indignation, let alone his appreciation of the substance of the defence which he must have. I find it quite incredible that it was not until the solicitors had been consulted who are experienced enough to appreciate that O.14 proceedings would follow as night follows day, that the letter dated 4 March 1983 arrived. I do not think it is uncharitable to say that the other defences raised in that letter, of undue influence, unconscionability and duty of care, all of which are now accepted are not to be worth the paper they were written on, shows the degree of desperation which confronted the defendants."

Discussion

23. Mr Adamson fairly accepted that the two letters from the Defendant dated the 22 and 24 May 2019, written in response to a formal legal demand seeking payment under the two loans, were not consistent with the Defence filed by his attorneys, Conyers, on 3 October 2019. On a fair reading of the two letters, the Defendant appears to accept liability under the two loans and, as he says, he is seeking the requested information so that he can "*reconcile actual outstanding payable, if any"*. As noted earlier there is no suggestion in these two letters that the two loans were made as an advance on account of salary payments and/or dividends. There is no suggestion in these two letters that when the loans were made it was understood by all concerned that the Defendant would never be required to repay the loans. There is no suggestion in these two letters that at a meeting held in Dubai on 13 August 2018, attended by the Defendant, Mr. McGowan and Mr. Raswant, Mr McGowan made a promise jointly to the Defendant and Mr Raswant that the loans were waived. Mr Adamson advised the Court that the first document where the Defendant asserts that the loans were made as advance payments for salary and

dividends and that the loans were in fact waived at a meeting on 13 August 2018, is in the Defence filed by Conyers on 3 October 2019.

24. It is also to be noted that the Defendant did not seek to set aside the Worldwide Freezing Order on the ground that the repayments under the loan agreements had been waived by the Plaintiff that the loans were never repayable as they were advanced payments on account of salary and dividends.

25. Mr Adamson accepts that the two letters by the Defendant dated 22 and 24 May 2019 are not consistent with the Defence filed by Conyers on 3 October 2019. However, Mr Adamson contends, the letters are consistent with someone who writes in a pedantic and robotic style. He says the two letters are consistent with someone who has multiple business interests and someone who appears to have forgotten about the loan agreements. He also says that the letter of 22 May 2018 is consistent with someone who paid no attention to the loan agreement and probably did not have a copy.

26. I am unable to accept these submissions advanced by Mr Adamson. In his Second Affidavit dated 30 October 2019 Mr Garg, the Defendant, goes out of his way to point out that he is "*a respected Indian businessman and entrepreneur."*

27. Any person, let alone a respected businessman, when confronted with a demand to pay over US $1.1 million under two loan agreements would be anxious to point out, as his first and main point, that the loans had been waived by the Plaintiff at the meeting in Dubai on 13 August 2018, if that was indeed the factual position. He would also be anxious to point out that the loans were not repayable because they were made as advance payments on account of salary and dividends, if that was indeed the factual position.

28. He would not be asking, as Mr Garg does in his letter of 22 May 2019, for copies of bank account transfers *"to enable me to reconcile the actual amounts*

transferred". There would be no point in "*reconciling the actual amounts transferred"* if the loans had been waived or if there were never repayable because they will advance payments for salary or dividends.

29. When the information is provided he would not be saying, as Mr Garg does in his letter of 24 May 2019, that the information is being looked upon by his team on a priority basis and is being reconciled with the information available to him and "*which is necessary for me to substantiate the amounts claimed*". There would be no point in substantiating the amounts claimed if the two loans had been waived at the meeting attended by Mr Garg, Mr McGowan and Mr. Raswant in Dubai on 13 August 2018. It is noteworthy that the decision to commence legal proceedings was taken at the meeting of directors of the Plaintiff Company on 26 April 2019 attended by the same Mr McGowan and Mr. Raswant.

30. In the circumstances, I have come to the clear view that the Defence filed by Conyers, on behalf of the Defendant, is a sham. What the Defendant has asserted in the Defence dated 3 October 2019 is not credible. It is entirely inconsistent with the position taken by the Defendant in his letters dated 22 and 24 May 2019. I am bound to conclude that the Defendant does not have a fair and reasonable probability of having a real or bona fide defence. Accordingly, I give leave to the Plaintiff to enter judgment against the Defendant in the principal amount of US $1.1 million together with contractual interest at the rate of 4% per annum up to the date of judgment.

31. I see no reason why the Defendant should not pay the Plaintiff's costs of this action. However, I will allow the Defendant 21 days if he wishes to be heard in relation to the issue of costs.

Dated 10 March 2020

NARINDER K HARGUN

CHIEF JUSTICE