CAYMAN ISLANDS COURT OF APPEAL

C.I.C.A. (Civil) 10/2017
FSD 148/2017

BETWEEN:

Lewis Ebanks

Plaintiff/Respondent

- and –

(1) Waterfront Developments Ltd.
(2) Heritage Holdings Ltd.
(3) John Burke
(4) Pamella Burke
(5) Invicta Construction Limited

Defendants/Appellants

BEFORE: The Rt. Hon Sir Bernard Rix, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Heard: 16 November 2017

Judgment finalised and released: 21 June 2018

Appearances: Mr Tom Lowe QC instructed by Mr Ian Huskisson of Travers Thorp Alberga for the Appellants
Mr. Pramod Joshi of Brady Law for the Respondent

JUDGMENT

RIX, J.A.:

1. The Plaintiff in this case, in this court the respondent, Mr Lewis Ebanks, is the guarantor of a debt owed to some of the defendants, in this court, the appellants.

2. The debt which Mr. Ebanks has guaranteed is in the sum of about US$2.1 million. It was borrowed by a company called Empire Development Company Ltd (**"Empire"**). Empire was or is a company concerned with property development of which Mr Ebanks was or is the sole director and shareholder. Empire was incorporated for the purposes of undertaking a residential housing development comprising 14 houses, the so-called Hilton Estates development. Empire borrowed the money, which Mr Ebanks guaranteed to repay, from Mr. Ebanks' personal friends Mr and Mrs Burke, the second and third defendant-appellants and their construction company, Invicta Construction Ltd (**"Invicta"**) the fifth defendant-appellant. I shall call those three parties the **"Lenders"**.

3. The origin of this debt went back to November 2012 when the Burkes and Invicta lent Empire an original sum of $1.5 million, to which a further $300,000 was lent in April 2013. Those loans were also guaranteed by Mr. Ebanks under earlier guarantees.

4. In practice, the real debtor was the guarantor, Mr Ebanks, for Empire would only prosper if the Hilton Estates development prospered, and if that did not prosper, Empire presumably had no way of repaying the loan, as Mr Ebanks would have well understood.

5. By the summer of 2015 the total sum under these loans of US$2,161,500 (being the principal and rolled-up interest) was due.

6. So it was that under the terms of the guarantee with which this case is concerned, dated 16, July 2015, (the **"guarantee"**), Mr Ebanks "AGREES *to pay the Lender on or before 30 September 2015 all of the Borrower's liabilities to the Lender plus interest up to 31 May 2015, as evidenced by the Promissory Note to which this Guarantee is attached*". That was a promissory note whereby Empire agreed to repay to the Lenders on or before 30 September 2015 (later extended by agreement to 31 January 2016) the sum of US$2,161,500 plus interest from 1 June

2015. Under the guarantee, Mr Ebanks' liability was expressed to be "*that of a principal debtor*" (clause 1).

7. The guarantee was secured by Mr Ebanks' 50 percent shareholding in another property development company called Waterfront Developments Ltd ("**Waterfront**"), the first defendant-appellant. The other 50 percent of Waterfront's shares -- in truth there were only two shares -- was owned by Mr. Burke's company Heritage Holdings Ltd., the second defendant-appellant ("**Heritage**"). Waterfront was aiming to develop seven parcels of land comprising some 14 acres on the North Sound coast of Crystal Harbour. Waterfront had been set up in November 2013. They negotiated a $7 million loan from Cayman National Bank (the **"Bank"**). Waterfront's land was charged as collateral to the Bank. Mr Ebanks, (together with Mr Burke), also guaranteed the loan from the Bank.

8. There came a time when, due to Mr Burke's age and deteriorating health, he decided to withdraw from his business ventures. He offered Mr Ebanks the opportunity to buy him out: in the event, Mr Ebanks agreed to the guarantee and to put up his 50 percent holding as security for the guarantee as a means of facilitating the time to secure funding for such a buy-out.

9. The security for the guarantee was dealt with under another document, also dated 16 July 2015, called "Equitable Mortgage" in respect of the shares of Waterfront (the "**mortgage**"). Under the mortgage Mr Ebanks delivered to the Lenders an executed but undated transfer of the Waterfront shares to Heritage, and an executed but undated resignation letter from Mr Ebanks resigning as director of Waterfront. There were also a letter of undertaking from Waterfront itself to register the share transfer and other protections scheduled to the mortgage. The mortgage provided by its clause 6.1 that "*At any time after the occurrence of an Event of Default that is continuing or if demand is made for payment of the Secured Obligations*", then "*the security hereby constituted shall become immediately enforceable and the right of enforcement of the Mortgagee under the deed shall*

be immediately exercisable ..." However, even before enforcement of the security in the terms of clause 6.1, clause 5.4, in that part of the clause dealing with rights in respect of mortgage property, provided as follows "*The Mortgagor hereby authorises the Mortgagee to arrange at any time and from time to time prior to or after the occurrence of the event of default that is continuing for the mortgage property or part thereof to be registered in the name of the Mortgagee or its nominee thereupon to be held as so registered subject to the terms of this deed and at the request of the Mortgagee the Mortgagor shall without delay ensure that the foregoing shall be done.*" Clause 5 also provided that "*Unless and until the occurrence of the event of default which is continuing and which is notified to the mortgage by the mortgagee*", it would be the mortgagor, that is to say Mr Ebanks, who would be entitled to exercise voting powers and would be entitled to receive and retain any dividends or other monies which flowed from the mortgage property.

10. In due course, Empire and Mr Ebanks were each unable to discharge the promissory note and the guarantee respectively, and so the Lenders enforced their security inter alia by arranging for the re-registration of Mr. Ebanks' Waterfront share in the name of Heritage, and that was done on 14 July 2016.

11. The issue in these proceedings has arisen because Mr Ebanks, the plaintiff herein, claims that that registration of the transfer of the share was wrongly carried out, since, as he submits, there had been no default under the Guarantee in the absence of a demand for payment of the loan from him and also in the absence of notice to him that the borrower Empire was in default. He therefore claims in these proceedings to have the Waterfront share registered again back into his name by a rectification of the register. For these purposes he has issued an originating summons dated 15 September 2016 in which he claims, pursuant to section 46 of the ***Companies Law*** (2016 Revision) that the register of members of Waterfront be rectified by striking out the entry purporting to record the transfer to Heritage as of 14 July 2016 in order to record Mr. Ebanks again as holder of 50 percent of the

shares (one of the two shares) in Heritage. And he also claims an enquiry as to any loss or damage sustained in the meantime by him.

12. The reason which Mr Ebanks has given for his section 46 claim, and the issue which has been dividing the parties before the judge, Mrs. Justice Mangatal, and on this appeal, is whether the mortgage security could be enforced and/or Mr. Burke's share transferred in the register to Heritage without a prior demand on him under his Guarantee.

13. The Lenders have submitted that because Mr Ebanks is a primary debtor, there is no need for any demand under the Guarantee. They also say that Mr Ebanks, of course, knew that his company, Empire, was in default of payment of the Promissory Note and for that reason as well no demand or notice of Empire's default was necessary; and they also say that even if such demands or notices were necessary, they have now been made.

14. In these circumstances, on 10 November 2016, the defendants herein took out an application to strike out Mr Ebanks' section 46 claim.

15. The strike-out application came before Mangatal, J. on 1 February 2017. A judgment was handed down on 13 February 2017. By the Order of 20 February 2017 she refused to strike out Mr. Ebanks' claim for rectification. She said at paragraph 19 of her judgment:

> "19.... *No authorities have been cited about the issue of the requirement of notice or regarding Mr. Ebanks being a primary obligor and not merely a guarantor. Although the defendants say they have not conceded that the lenders needed to serve notice, they have now given or purported to give notice, since Mr. Ebanks does not concede that proper notice has now been given, and even indicate that they would be prepared to agree to an order that the register show that Mr. Ebanks was the legal owner of the shares up until service of the notices of demand and related documents. However, it is not at all clear to me that such an order*

could be properly made. The point about the giving of all of these notices since the date of filing of these proceedings is that if they point in any direction it is in the opposite direction for striking out, whether under the GCR or under the inherent jurisdiction of the court.

20. In my judgment, even if there is a factual dispute surrounding waiver, it would not involve a substantial dispute as to fact, more importantly it would not arise for determination before the resolution of a number of legal issues; such as, for example:

A) Where the lender is required to serve demand under the terms of the guarantee before they could exercise any rights under the share mortgage and/or the SBA.

B) With any admission or acknowledgment by Mr. Ebanks of his default amount to a waiver, or provide the basis for him being estopped from being given notice in light of the terms of the Guarantee when properly construed.

21. I wish to stress that I only give the issues above a rough and ready framing, by way of example. This is because I am minded to dismiss the defendant's application to strike out and additionally ask the registrar to set this matter back down in a convenient hour slot on the next convenient court date for a directions hearing, including the consideration of what, if any, issues of law or fact should be directed to be tried or determined and in what sequence, if any. At that time the parties can proffer their views as to the issues to be determined".

16. In effect, therefore, the Judge was not satisfied, at any rate to the degree necessary for a strike-out, that a demand was not necessary, or, if it was necessary, that it had been given (or waived).

17. On this appeal, however, for which leave has been given by Sir John Goldring, President of the Court of Appeal, the appellants continue to submit, at any rate as a fallback submission, that no demand was necessary but that in any event a demand has now been given even if after 14 July 2016 but in any event before the Judge below gave her judgment, and that even if the registration of the transfer jumped the gun by a few months, Mr. Ebanks cannot show any possible loss, since Waterfront had not paid a dividend or made any distribution in the meantime. They

also rely on the new point, not made to the Judge below, that under clause 5.4 of the mortgage, which I have cited, the Lenders were entitled to the registration of the transfer of the security even before any right to enforce the mortgage. They have also submitted that even if there were issues to be tried, as the Judge thought, they should not be tried under the summary procedure under section 46 but in separate proceedings if Mr. Ebanks were so to wish.

18. On the other hand, on behalf of Mr Ebanks, Mr Pramod Joshi has submitted, in effect, that the Judge below had exercised her discretion not to strike out but to order issues of the nature of which she gave notice in her judgment, and that discretion was not to be interfered with. He also submitted, although he could not put any flesh upon the claim, that there was an enquiry to be made into any loss or damage which Mr. Burke had suffered by the wrongful registration of the transfer. Even if that wrongful registration would have come to an end by at latest a time following the service of subsequent notices given by the Lenders to Mr Ebanks, nevertheless the enquiry into the issues described by the Judge and into the possibility of loss or damage (which Mr. Joshi also expressed by the term "l*everage*" in respect of the operation of Mr Ebanks' 50 percent holding in Waterfront) should remain alive in these proceedings.

19. The first issue then is whether a demand was necessary. I am prepared to accept, as possibly in his heart Mr. Lowe does as well, but that is beside the point, he has made no concession in this respect, that a demand was necessary under the Guarantee to render Mr Ebanks liable under his guarantee. That is because clause 2 of the guarantee provides as follows: "*The Lender need not exhaust its rights against the Borrower or enforce any other security or obligation it has before demanding payment from the Guarantor under this Guarantee. The lender must not start legal proceedings based on this Guarantee until it demands payment from the Guarantor, and the Guarantor's liability first arises after the Lender notifies it of a default by the Borrower and demands payment from the g Guarantor*".

20. The critical words there are the concluding words "*and the Guarantor's liability first arises after the Lender notifies it of default by the Borrower and demands payment by the Guarantor*". Therefore it is arguable that a demand is necessary and remains necessary even if notice of Empire's default was waived by Mr Ebanks. *Prima facie*, however, under that wording it is also necessary for the lender to notify Mr. Ebanks of a default by the borrower. In that respect, clause 21 of the guarantee states "*Every notice must be in writing. Any notice to be given to the Guarantor will be deemed to have been sufficiently given to him on the date of delivery or on the second business day after the date that notice is posted by registered mail in any post office in the Cayman Islands addressed to the Guarantor at his address set out in this Guarantee or at such other address as he designates*". The address of Mr. Ebanks set out in the guarantee was in these terms "*Lewis Ebanks, Address: c/o PO Box 1009, Grand Cayman KY1-1001, Cayman Islands*".

21. The second issue is whether actual and not merely contingent liability under the guarantee is necessary to the lenders' right to enforce the security under the mortgage. For that purpose one looks to clause 6.1 of the mortgage which I have already cited.

22. So the question under clause 6.1 is whether there has been either (i) *"an event of default*" or (ii) "*a demand for the payment of the secured obligations*". Well, as to (ii), a demand, that takes us back to the first issue. I need say nothing further about that. As to (i) an event of default, that is a defined term and it is defined in the opening definitions of the mortgage as follows:

> *"Event of default" has the meaning given to such term in the Guarantee and/or the failure by the mortgagor to observe or perform any covenant or agreement contained in this deed"* (ie in the mortgage).

23. The trouble is that "event of default" is not defined in the guarantee, and although the appellants submit that in such a case it must mean non-payment of the loan, that is not clearly so in the light of clause 2 of the guarantee. The other possibility

under the definition is a failure to perform any term of the mortgage itself, but Mr Lowe has informed this court that he does not rely upon that alternative.

24. So the next question is whether there has been a notice of Empire's default and a demand on Mr Ebanks under his guarantee. I have already read clause 21 of the guarantee regarding notice. It is interesting to observe that the mortgage also contains a notice clause which provides for the purposes of any notices or demands made under or in connection with the matters contemplated by the mortgage, that such notice or communication shall be in writing and sent to Mr Ebanks at c/o PO Box 1009 Grand Cayman KY1-1001.

25. So what has been done in the way of notices or demands? On 26 October 2016, a letter was written to Mr. Ebanks at PO Box 1009 Grand Cayman KY1-1001 Cayman Islands, which is the address both in the guarantee and in the mortgage giving notice pursuant to clause 2 of the guarantee "*that you are in default of your obligation to pay the Borrower's liabilities under the Promissory Note. We now demand that you pay our clients*" the guaranteed sum.

26. Although the only complaint that Mr Ebanks made at that time was that his real PO Box number was not 1009, which was the PO Box number set out in the formal mortgage, but 10009, and no other point was taken. The fact is that that letter, although telling Mr. Ebanks that he was in default of his obligation to pay the borrower's liabilities under the Promissory Note did not, at any rate expressly, give notice of the borrower's failure to pay its liability under the Promissory Note, although it might be said that that was implicit and inherent in the notice of the guarantor's failure to pay. At any right, in the light of Mr. Ebanks' complaint about the number of his PO Box, a further letter was sent on 4 November 2016 in the same terms as before, because no other complaint had been made, but this time addressed to Mr. Ebanks at PO Box 10009.

27. As a result, perhaps of Mr. Ebanks thereafter taking legal advice, in his affidavit issued as part of the legal proceedings which he then took out, a section 46 originating summons, further complaint was made about the form of the notices and demands given. So it was that by a further letter dated 25 November 2016, sent to Mr Ebanks' address given at his request as PO Box 10009, the letter on that occasion stated that notice was given that the borrower was in default of its obligations under the Promissory Note, and demand for payment under the guarantee continued to be made.

28. The question arises as to when two business days following that, such a letter would be deemed to have arrived: but, at any rate, Mr Lowe, on behalf of the Lenders, is prepared to accept a further delay of a week until 2 December 2016.

29. In truth, in all of these formalities, Mr Ebanks has not suggested that he was unaware of his liability or potential liability under his guarantee.

30. In the submissions that Mr Joshi made, he has said nothing to explain -- and indeed he has not addressed -- the effectiveness of that final notice of demand of 25 November 2016 and I can see no reason why it is not a good notice and demand in the terms of clause 2 of the guarantee.

31. In my judgment, it is therefore unarguable that by at latest 2 December 2016, albeit that is several months after the transfer to Heritage was registered back on 14 July 2016 and also after the commencement of the section 46 proceedings by Mr Ebanks, that Mr Ebanks has, at latest (by concession) on 2 December 2016, received all the notice or demand to which he may be entitled.

32. In these circumstances, albeit not by 14 July 2016, nor by the commencement of these proceedings, Mr Ebanks has received notice and demand as required and was at latest by 2 December 2016 liable to repay the loan and in default of that

obligation and in default of the mortgage which the Lenders were entitled thereafter to enforce in full.

33. The next matter to mention is Mr Lowe's reliance on clause 5.4 of the mortgage. Mr Joshi has not made any submission to explain why that provision should not take effect in accordance with its terms thereby enabling the Lenders to arrange for the transfer of Mr. Ebanks' share in Waterfront at any time even "*prior to ... an event of default*."

34. Therefore, Mr Lowe submits that, by these belts and braces, on any view, either as a matter of right under clause 5.4 of the mortgage, or a few months later, the transfer to Heritage was or would now from 2 December 2016 have been a good transfer. As a further belt or brace, Mr Lowe offers again, as he did to Mangatal J, the offer to have the register rectified so as to record Mr. Ebanks' continuing legal ownership of his share in Waterfront continue past 14 July 2016 down to 2 December 2016.

35. In these circumstances, Mr Lowe has also referred the court to the terms of section 46 and to some jurisprudence concerning it and its antecedents in the company law of the United Kingdom going back, as he has informed the court, to the 19th century.

36. Section 46 of the Cayman Islands' Companies Law is in these terms: "*If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company or the company itself may, by motion to the court, apply for an order that the register be rectified and the court may either refuse such application with or without costs to be paid by the applicant, or, it may, if satisfied with the justice of the case, make an order for the rectification of the register and may direct the company to pay all*

the costs of such motion, application or petition and any damages the party aggrieved may have sustained. The court may, in a proceeding under this section, decide any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register whether such question arises between two or more members or alleged members, or between any members or alleged members of the company and generally the court may in any such proceedings decide any questions it may be necessary or expedient to decide for the rectification of the register:
Provided that the court may direct an issue to be tried, on which any question of law may be raised."

37. It may be observed from the terms of section 46 that (i) the remedy of rectification is discretionary ("*may either refuse ... or it may, if satisfied of the justice of the case, make an order for rectification of the register ...", and (ii)* the court may decide any question of law that it may be necessary or expedient to decide and may direct an issue to be tried on which any question of law may be *raised.*

38. In ***Nilon Ltd. v Royal Westminster Investments SA*** [2015] UKPC 2, [2015] BCC 521, [2015] 3 All ER 372, the Privy Council held, with respect to an essentially identical provision of the BVI Companies Act (at section 43 of that statute) that proceedings could only be brought under this procedure where the applicant had an immediate right to registration by virtue of a valid transfer of legal title, and could not be brought if he merely had a prospective claim. The Privy Council also held that the procedure was summary in form and that if there was a substantial factual question in issue, then the court ought to order the trial of the issue or stay the application or dismiss or strike it out. And that was what happened in that case where the proceeding was struck out.

39. The court also made it clear in section 8 of its judgment headed "*Conclusions*" that registration and the relevant section of the ***Companies Act*** related only to legal title and not to beneficial title; thus, at para 37 the Privy Council said this: "*There*

are two points which emerge from the cases. The first is that from the earliest days of the legislation, the courts have made it clear that the summary nature of the jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute ...

39. There is no doubt that the legislation is primarily concerned with legal title ...

43. On the other hand, in a decision ultimately resting on the principle of the companies not concerned with beneficial interests, the applicant sought rectification of the company's register to remove individuals on the ground that transfers executed in favour of such individuals had been carried out in breach of trust. Rectification was refused on the basis that even if the shares had been transferred in breach of trust, that was not a matter which concerned the company or which invalidated the registration of the transferees' names; Elliot v MacKie & Sons Ltd. 1935 SC 81 ...."

40. In paragraphs 48 and 51, the Privy Council went on to hold that an earlier case ***Re Hoicrest Ltd***, [2001] Weekly Law Reports, 414 which might have suggested otherwise, was wrong as a matter of principle.

41. Mr Lowe also took the court to ***Re Sussex Brick Company*** [1904] 1 Ch 598 where, at 608/609 Lord Justice Stirling said this: *"Now when an order of that sort is made, the court ought to be very careful to see that it does no injustice by making the registration retrospective. I may point out that the power which is conferred by section 35 is not imperative. All it says is that the court "may" in the proper case make an order of rectification therefore the court has full discretion to deal with every particular case which comes before it in such a way as may do complete justice, but in the present case I fail to see that any injustice can be done if the alteration is made as asked".*

42. And Lord Justice Cozens-Hardy at 610/611 said this: "*Then we have authority going back to the very early days of the Companies Act, 1862, that an order under section 35 for rectification of the register "may" not "must" be made having a retrospective effect; that is, may be made in a proper case and imposing such conditions as the court thinks necessary to protect the rights of any third persons; but in a case like the present, where there has been no serious suggestion of any ill result or any unjust consequence which would follow from dating the registration of the transfers as on the dates on which they ought to have been registered, I can see no ground for imposing any condition whatever*".

43. Mr Lowe has taken the court to that authority, both to emphasise the discretionary nature of the jurisdiction under section 46 and the possibility of making a retrospective order to ensure that no possibility of any injustice can occur.

44. In the present case, it seems to me that there would be no injustice in rectifying the register in the manner conceded by Mr Lowe but, equally, that there would be no justice at all in restoring Mr Ebanks to the register in full in the way in which he claims in these proceedings in circumstances where Empire is plainly in default, Mr Ebanks has, at latest, on 2 December 2016, been given notice of that, and a demand has, if possibly somewhat late, been made of Mr Ebanks at latest as of 2 December 2016 under his guarantee.

45. There has, as I have said before, been no more than an entirely unsubstantiated or speculative suggestion, that any loss or damage has incurred or that any leverage could have been effected by Mr Ebanks continuing as the registered shareholder in the period between 14 July and 2 December 2016. In any event, all of his beneficial rights are preserved, whatever had been the state of the register, and in light of the rectification of the register up to 2 December 2016, which Mr Lowe concedes, there is no possibility of any interference even with Mr Ebanks' legal rights in the meantime. If, therefore, perchance the Lenders have jumped the gun by a few months, and even if by chance the effect of clause 5.4 of the mortgage

does not in any event render the registration of Heritage as the legal owner of the share of which Mr Ebanks had previously been the legal owner, the situation will have been preserved, both by the continuation throughout of Mr Ebanks' beneficial ownership and by the terms of the rectification which Mr Lowe has suggested and conceded.

46. In these circumstances, it seems to me that these proceedings, which should not in any event give rise to substantial issues of fact, and which in the light of the matters which I have recorded are no longer of any substantial effect or consequence, should not entitle any rectification of the register beyond that which is conceded by Mr Lowe and the appellants.

47. I would therefore, subject to that rectification, and subject also to the undertaking which Mr. Lowe has given to the court, to render an affidavit as to the conduct of the affairs of Waterfront in the meantime, I would allow the appeal, bringing these proceedings to an end.

FIELD, J.A.: I agree.

MOSES, J.A.: I also agree.