IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00450

BETWEEN	**BRAYWICK PARTNERS LIMITED**	**CLAIMANT**
AND	**ROBERT McCOOK**	**DEFENDANT**

Application for Summary Judgment-Arbitral award- Whether enforceable against guarantor- Whether guarantor can challenge arbitral award- Whether guarantor has a defense with a real prospect of success- Counterclaim- Whether guarantor entitled to judgment in default on the counterclaim- Observations on judicial function when declaratory or injunctive relief claimed.

Nico Pagan for Claimant instructed by Vaccianna & Whittingham.

Maurice Manning KC and Christopher Dunkley for Defendant instructed by Phillipson Partners

Heard: 13th, 23rd and 27th October 2023

In Chambers (by Zoom)

Cor: Batts J.

[1] By Notice of Application filed on the 10th February, 2023 the Claimant seeks the following relief:

1) *"That summary Judgment be entered against the Defendant pursuant to Supreme Court Civil Procedure Rules 2002 (CPR) Rule 15.6 on the basis that the Defendant has no real prospect of successfully defending the claim.*

2) *Further or in the alternative, that this Honourable Court strike out the Defendant's statement of case pursuant to the CPR rule 26.3 (1)(b) and (c) as either an abuse of the process of the court or that the defence and counterclaim disclose no*

reasonable grounds for defending the claim or any reasonable ground for bringing a claim, respectively.

3) *Consequent to orders made in terms of paragraphs 1 and or 2 above, a further order that judgment be entered in favour of the Claimant as against the Defendant as follows:*

    a. *A judgment in the sum $38,405,041.10 or for such other sums as this Honourable Court may determine.*

    b. *Interest at the daily rate of $9,863.01*

4) *That the requirement to file a defence to the Defendant's counterclaim be stayed pending the outcome of this application.*

5) *Costs to the Claimant*

6) *Such further or other relief as this Honourable Court deems fit."*

[2] Affidavits were filed by both parties as well as written submissions supported by authorities. Each side also made oral submissions, for all of which I am grateful. I will however, in this short statement of reasons, reference only such as are necessary to explain my decision which was announced on the 27th October 2023.

[3] The genesis of this matter is the sale and purchase of certain shares. Laurajam Holdings Inc. (a company registered in St. Lucia and hereinafter referred to as Laurajam) entered into an agreement with Braywick Partners Limited (a company also registered in St. Lucia and the Claimant in this action). In that agreement Laurajam agreed to buy the Claimant's shares in Island Ice & Beverage Company Limited (a company incorporated in Jamaica and hereinafter referred to as Island Ice). The result would be that Laurajam would become the owner of 100% of the shares in Island Ice. It was a term of the said agreement that Laurajam would be allowed to make deferred payments. In consideration for the grant of the deferred payment arrangement Mr. Robert McCook (a director and/or shareholder of

Laurajam and the Defendant in this action) gave a personal guarantee to the Claimant in respect of:

> *"the whole principal, interest and other monies now due or owing or which may hereafter at any time or times become due or owing by Laurajam to Braywick"*

[4] A dispute arose between Laurajam and Braywick with respect to the said agreement for purchase and sale of shares. The matter was referred to arbitration and the arbitrator made a final award on the 6th of April 2022 in in the amount of $42,299.835.62 with interest at a rate of 12% per annum being $9,863.01 per day from June 1, 2021 until payment of the award. Laurajam has made or is making, monthly payments, but the parties to the litigation both agree the balance now owing is $ 31,722,846.16.

[5] The Claimant commenced this claim against the Defendant, Mr. Robert McCook, who gave the personal guarantee. Given the undisputed facts outlined above one would have thought the result of this application for summary judgment is obvious. However, Kings Counsel for the Defendant, in his usual careful and clear style, endeavoured to persuade me that there were triable issues. He took no issue with either the applicable law relating to summary judgment or that the test is whether the defence has a real prospect of success. Kings counsel agreed also that the court may at this stage have regard to documentation and determine whether although facts are disputed, a party has no real prospect of successfully challenging such facts.

[6] King's Counsel urged me to find that there is no evidence that the principal debtor Laurajam is in default and that, as default is necessary to trigger the Defendant's liability under the guarantee, the defence has a real prospect of success. At any rate the Claimant, on whom the burden lies, has failed to establish that the defence has no real prospect of success. King's Counsel pointed to the fact that the arbitrator's award did not say when payment was to be made nor that payment

was to be forthwith. Furthermore, he submitted, there is evidence that Laurajam had been making payments towards the award which were accepted by Laurajam. There was, he stated, no evidence to contradict the Defendant's statement in paragraph 5 of his affidavit that he was told the guarantee would only be called if Laurajam defaulted in any obligation. Secondly, Kings Counsel urged that the Defendant had not been a party to the arbitration. The arbitrator, he says, failed to consider the defence of breach of fiduciary duty and hence the award was hopelessly flawed, see paragraph 156 of the arbitrator's award, exhibit JW2 to the affidavit of Jordan Whittingham filed on the 4th May 2023. Finally, Kings Counsel urged that, as the Claimant has failed to file a Defence to the Counter Claim, a default judgment ought to be entered on the Counter Claim.

[7] The efforts of King's Counsel notwithstanding, I am satisfied that the Defense has no real prospect of succeeding. There is in consequence no triable issue and this claim is one in which summary judgment is appropriate. My reasons may be shortly stated.

[8] The terms of the guarantee are clear. It relates to amounts due and owing. That amount was determined by the arbitrator. There is no requirement for the arbitrator to say on what date the amount becomes due as in the absence of a contrary statement, it becomes due as at the date of the arbitrator's award. Secondly, it is clear that the debtor has defaulted because the amount due has not been paid. There is no evidence by either side that there was an agreement to pay the amount owed by instalments. Furthermore, exhibit JW 3, to the above referenced affidavit of Jordan Whittingham, is a letter dated 4th May 2022 to the Defendant which recites that a demand was made on the principal to pay the award in full and that there was a failure to meet that demand. It seems to me indisputable on the facts and the law, that a situation of default such as to trigger the guarantor's liability arose.

[9] The challenge to the validity of the arbitrator's award caused me pause. This is because it may be unfair for a guarantor to be pursued for a debt which was not

lawfully established against the principal debtor. Arguably, it will have been unlawfully established if there was some defect in the arbitration award. However, such an argument could, even if sustainable, only be made by a guarantor who was not privy to the or any alleged defective arbitration. That is if he was unaware of it or otherwise excluded from having his say. That is certainly not the case here. The Defendant gave evidence before the arbitrator, and I was told this by both counsel appearing before me. The Defendant also controls Laurajam the party to the arbitration. Therefore, he had it in his power to make any lawful challenge to the arbitrator's award. It is well known, and I need no authority to say, that arbitral awards are intended to be binding. They are not easily set aside. Therefore, insofar as the arbitrator finally determined the amount due, the guarantor who has been privy to those proceedings, can make no complaint. He cannot for example seek to relitigate issues which the arbitrator has already determined. Furthermore, the issue he now seeks to litigate concerns an alleged breach of fiduciary duty. That matter was raised before the arbitrator who determined that, it not having been raised in the course of the hearing, he would not consider it, see paragraph 156 of exhibit JW2. He rejected as matters of law and fact the assertion that there had been misrepresentation and non-disclosure, (paragraph 154 of arbitration award, see exhibit JW2 referenced above) and also the allegation that there was a breach of the "*good faith provision or breach of the share agreement*." It seems to me that in these circumstances it cannot be credibly argued that the guarantor has any real prospect of success in its defense to this claim insofar as it involves a challenge to the arbitral award.

[10] As regards the failure to file a Defence to Counter Claim and his entitlement to judgment in default, I again respectfully disagree with Kings Counsel. The application for summary judgment was filed on the 10th February, 2023 four days after the Request for Default Judgment (which was filed on the 6th February, 2023). By Notice of Application filed on the 14th July 2023 the Defendant sought the following orders:

> *"(1) That the Claimant not having filed a Defence to the Defendant's Counterclaim the court do make a determination as to the terms of the Default Judgment to the Applicant/Defendant*
>
> *(2) Costs of this application to the Applicant/Defendant*
>
> *(3) Such further and/or other relief as this Honourable Court deems fit."*

This Application was filed as a result of a requisition to the Defendant from the Registrar of the Supreme Court, see ground 5 to the Notice of Application.

[11] The Counter Claim asserts that the Defendant, as a non-party to the arbitration, is not bound by the award. It challenges the arbitration award on the basis inter alia that the arbitrator,

> *"…failed to provide analysis of any of the heads of Laurajam's Defence …. [and] .. incorrectly ruled against certain of Laurajam's defences as being out of time and so his judgment was inherently unsound. "*

The remedies requested are consequential declarations.

[12] A judgment by default is in many instances an administrative matter. The Registrar is obliged to enter judgment provided service is proved and the failure of the other side to file a defence is established, [Rule 12.5] However, where certain categories of remedies are claimed the court is required to make an order before a judgment in default can be entered. This judicial function is necessary because a determination has to be made whether the remedy claimed is available on the evidence and in law. This happens if declaratory or injunctive relief is applied for, see subparagraphs (4) and (5) of Rule 12 of the Civil Procedure Rules (2002) It is trite, I think, that declaratory orders are not made unless the court is satisfied it is appropriate to do so. The judge ought to bring his or her mind to bear on the issue because declarations of the court bind not only the parties before them, but

all the world, and can be held up to third parties as indicative of the law, or the meaning of terms in a contract, or of the existence of a state of affairs, which a court has determined by declaration, to exist.

[13] This being the situation the making of a Declaration on the application for judgment in default on the counter claim, must fail for the same reasons that the application for summary judgment succeeded. The Defendant, as I decided above, can no longer seek to challenge a final arbitral award in respect of which he was privy. He agreed to guarantee the payment by the principal debtor of amounts due under the agreement for sale and purchase of shares. The amount due has been determined by an arbitrator. The arbitrator's decision unless successfully challenged remains final. The principal debtor has not challenged that award. I do not see that the guarantor can, in these proceedings, do so. This court therefore refuses the relief claimed by way of a request for judgment in default on the counter claim.

[14] In the final analysis, and for all the reasons stated above, my orders made on the 27th October, 2023 were as follows:

1. Judgment for the Claimant against the Defendant in the amount of $31,722,846.16 with per diem interest of $9,863.01.

2. The Defendants application filed on the 14th July, 2023 for declaratory relief on the counter claim is refused.

3. Costs to the Claimant to be taxed or agreed.

David Batts
Puisne Judge.