

IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 607 OF 2013

BETWEEN:

ATLANTIC BANK LIMITED

Claimant

AND

**JUAN JOSE ALAMILLA
MARIA NELIDA ALAMILLA**

**1st Defendant
2nd Defendant**

In Chambers.

BEFORE: The Hon. Mr. Kenneth Benjamin, Chief Justice.

March 25 & April 1, 2014.

Appearances: Ms. Naima Barrow for the Claimant
Ms. Sharon Pitts for the Defendants

JUDGMENT

[1] The Claimant Bank commenced suit by Claim Form filed on November 6, 2013 against the Defendants, Juan Jose Alamilla and Maria Nelda Alamilla, husband and wife, for payment of the sum of \$218,274.38, inclusive of interest due as of October 16, 2013 at a 17 per cent per annum, customary bank charges and Attorney-at-Law charges. A court fee of \$25.00 and legal practitioner's fixed costs on issue of the claim in the sum of \$5,200.00 were also claimed. The amount is claimed pursuant to loan facilities granted to the Defendants on June 30, 2011 for \$137,000.00. Demand has been made to no avail.

[2] The said loan was secured by a promissory note duly executed by the Defendants on June 30, 2011. By terms of the written promissory note the Defendants promised to:

“...pay to Atlantic Bank Ltd. (hereinafter called the Bank), or order, at any of its offices in Belize, in lawful money of Belize the principal sum of One Hundred Thirty-Seven Thousand Belize Dollars together with interest there on at the rate of 17 per centum per annum in installments as follows: The first installment of BZE \$2,500.00 on July 30, 2011 and 11 Monthly installments of BZE \$2,500.00 each, beginning August 30, 2011 and continuing up to and including June 30, 2012 at which time the last installment shall be unpaid balance. In the event all sums due hereunder are demanded the undersigned jointly and severally promise (s) to pay to Atlantic Bank Limited, in addition to all other sums due, interest at the above-mentioned rate on the principal sum outstanding at the date of demand from the date of demand until the principal sum due is repaid in full. All interest shall accrue from day to day and shall run after as well as before any judgment obtained against the undersigned. In the event that the principal sum is repaid in full before the date of the last installment provided for above, the Bank may charge a prepayment fee not exceeding a sum equal to six months interest at advance of the agreed dates for payment provided for above”.

[3] The Credit Agreement of the said Promissory Note goes on to state:

“... in the event that the Bank shall institute any action for the enforcement of collection of the Note, there shall be immediately due from each of the undersigned, in addition to the unpaid principal and interest, all costs and expenses of such action, and an attorney’s fee of twenty percent of the amounts then owing and unpaid by the undersigned”
[Emphasis added]

[4] The Defendants have each filed an acknowledgement of service and separate Defences on January 6, 2014.

[5] The crux of the 1st Defendant's Defence is set out in paragraph 2, 3 and 4 as follows:

"2. The rate of interest are too onerous and unjust and meant to cripple the Defendant's ability to ever meet payments and the \$62.75 per day only makes it worst to the point that the Defendant cannot ever catch up with the payments.

3. I was never given a copy of the promissory document and to date the bank has refused to provide me with my entitled copy and thus I have no way of verifying the breakdown of all other charges, except the principal owed.

4. There is no certainty as to the true cost of the legal fees being charged to me and no justification for this cost being passed to me, as the Claim Form has 'Legal Practitioner's fixed cost on issue is \$5,200.00 but then adds a \$39, 131.51 as fee at large with no proof of work done and the only time I knew a demand was being made was when I got the demand letter from the bank not even the Attorney. The only time I knew there was attorney involved was when my wife got the Claim Form".

Reference was made in the Defence to the Claimant unjustly preventing the sale of a property to which the proceeds would have been used to service the loan.

[6] The essence of the 2nd Defendant's Defence can be found in paragraph 1, 2 and 5 as follows:

"1. I am the wife of the 1st Defendant and a named signatory on the promissory note dated 30th June, 2011 but only entered into said agreement at the insistence of my husband and probing of Atlantic Bank and so I did not understand the magnitude of what I was being asked to agree to.

2. At no time I was ever told, nor encouraged that I must get independent legal advice so that an attorney looking after my interest could advise me as to the severity and implication of what I was getting into.

3. ...

4. ...

5. I was never given a copy of the promissory note and to date the bank has not forwarded a copy to me so that I may seek my own legal advice and so I have no way of verifying the breakdown of all other charges and the principal owed”.

[7] The present proceedings are in respect of the Notice of Application filed by the Claimant on January 8, 2014 for the Defendants’ defences both to be struck out as an abuse of process of the Court and/or as disclosing no reasonable grounds for defending the claim. The Claimant seeks judgment for the sum claimed plus interest and costs. The application asserts that the Defendants have not denied contracting a loan facility from the Claimant and they have failed to set out facts on which they rely to dispute the claim as required by Supreme Court (Civil Procedure) Rules 2005 Part 10 Rule 10.5 and as a result the Defendants’ Defences ought to be struck out pursuant to Rule 26.3(1)(b),(c) and (d) of the Supreme Court (Civil Procedure) Rules, 2005.

[8] The Claimant’s application is grounded upon the case management powers of the Court as set out in Rule 26.3(1)(b)(c) and (d) as follows:

“In addition to any powers under these Rules, the Court may strike out a statement of case if it appears to the Court-

(a) ...

- (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
- (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim; or
- (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10”.

[9] At the hearing of the application, Learned Counsel for the Claimant in her oral submissions first pointed out that the Defendants duly executed the promissory note that contained the indemnity clause set out in paragraph 3 above. She further argued that both Defendants did not deny that they received the benefit of the loan and failed to pay the debt as contracted.

[10] Learned Counsel for the Defendants in her oral submissions argued that the Defendants were refused a copy of the promissory note and had not been provided with the breakdown of all charges and fees. Further it was pleaded on behalf of the 1st Defendant the interest of 17 percent per annum and costs are onerous and unjust. It was further argued that a fixed Attorney’s fee of 20 percent of the amounts owing and unpaid is unreasonable.

[11] On behalf of the 2nd Defendant, Learned Counsel further argued that she was not cautioned to nor did she seek independent legal advice. It was said that given the closeness of the relationship between the Defendants as husband and wife, there was unequal bargaining power with Bank.

[12] In light of the oral submissions made by Learned Counsel on both sides the following issues were raised:

1. Whether the Defendants duly executed the promissory note and were aware of the indemnity clause.
2. Whether the Claimant is entitled to the Legal practitioner's fixed costs and also 20 percent of the amount owing being attorney's fee.
3. Whether the 2nd Defendant should have been advised to seek independent legal advice and whether she was unduly influenced to sign the promissory note.

[13] Neither of the Defendants disputed that each of them had signed and executed the promissory note as is evidenced by averments in their respective Defences. Consequently, the Defendants cannot be heard to say that they were not aware of the contents and purports of the indemnity clause. In this regard, both Counsel made reference to the decision of Hafiz J (as she was then) in the case of **Atlantic Bank Limited v. Larry Feger et al** Claim No. 734 of 2011. That case involved a challenge to an identical indemnity clause in a promissory note. The Court ruled that the Attorney fees were recoverable but in such circumstances the Defendant was not liable to pay the fixed costs levied upon the claim. The issues as to the entitlement to Attorney's fees under the promissory notes were not ventilated in argument during the hearing of the present application. However, I am content to adopt the reasoning of Hafiz, J. and to allow the payment of Attorney's fees pursuant to the indemnity claim and to disallow the fixed costs of \$5,200.00.

[14] The remaining issue is that raised on behalf of the 2nd Defendant who alleges undue influence on the part of her husband, the 1st Defendant. It must be highlighted that in her Defence, the 2nd Defendant related undue influence to a matter involving the signing over of land in her name and not to the signing of the promissory note. Paragraph 2 of her Defence merely alluded to the fact that she was not told nor encouraged to obtain independent legal advice before signing the promissory note. The latter issue was raised in oral argument but no authority was provided to support the

proposition in law. In response, learned Counsel for the Claimant put the matter quite shortly by stating that the 2nd Defendant had signed as a principal party to the promissory note and not as a surety or guarantor, hence she received the benefit of the proceeds of the loan facility. Reference was made to the case of **Royal Bank of Scotland plc v. Etridge (No. 2) [2001] UKHL 44**, in which the House of Lords dealt with undue influence in the context of a wife charging her interest in the matrimonial home in favor of the bank as security for the debt of her husband or husband's business. Suffice it to say that, the transaction in the present proceedings was not disadvantageous to the 2nd Defendant and consequently the equitable principles in the **Etridge case** do not arise. Accordingly, neither of the Defences disclosed any reasonable ground for defending the claim.

[15] In the premises, the application is granted in respect of both Defences which are to be struck out subject to the disallowance of fixed costs being awarded to the Claimant. It is therefore ordered that judgment be entered for the Claimant in terms of the Claim Form in the amount of \$213,074.38 inclusive of interest at the rate of 17 percent per annum from the 16th day of October 2013 and court fee of \$25.00.

KENNETH A. BENJAMIN
Chief Justice