

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

BETWEEN:

REPUBLIC BANK (GUYANA) LIMITED, a company incorporated under the provisions of the Companies Act, CAP 89:01 and continued under the Companies Act 1991 and whose registered office is situate at Lot 155-156 New Market Street, North Cummingsburg, Georgetown.

Plaintiff

-and-

GUYANA SUGAR CORPORATION INCORPORATED, a company incorporated under the provisions of the Companies Act, CAP 89:01 and continued under the Companies Act 1991 and whose registered office is at Ogle Estate, East Coast Demerara.

Defendant

-and-

S & R ABDULA CANE FARMING INC., a limited liability company duly incorporated under the provisions of the Companies Act of Guyana 1991, of Lot 44 Kingston, No. 79 Village, Corentyne, Berbice.

Third Party

The Honourable Justice Navindra A. Singh, Puisne Judge

Mr. Adrian Anamayah for the Plaintiff

Mr. Narendra Singh for the Defendant

No appearance by or for the Third Party

Delivered July 3rd 2018DECISIONBACKGROUND

The undisputed facts are that the Plaintiff, the Defendant and the Third Party entered into a written contract titled "Agreement for Sugar Cane Cultivation" on July 14th 2008, (hereinafter referred to as the Tripartite Agreement - **Exhibit "A1 - A4"**), whereby it was agreed that the Third Party would develop some 600 acres of land in its possession under and by virtue of Lease No. A22271 (**Exhibit "C1 - C4"**) for the cultivation of sugar cane for the purpose of supplying the Defendant with sugar cane and the Plaintiff would advance the monies to the Third Party in the form of a loan to finance the said venture.

The contract detailed the various obligations of the parties.

That contract was amended in writing on July 11th 2011 (**Exhibit “B1 - B3”**) for the specific purpose of extending the period of repayment of the monies advanced by the Plaintiff to finance the venture.

The Third Party also executed a mortgage on Lease No. A22271 (**Exhibit “D1 - D5”**) in favour of the Plaintiff as partial security for the loan.

Less than half of the land earmarked for development was developed by the Third Party.

One crop was harvested in December 2010 and all activity ceased on the land on or around September 2011.

The Plaintiff's case is that the Defendant is liable under the contract for the repayment of the monies the Plaintiff had advanced to the Third Party.

The Defendant contends that the contract did not create a legal obligation on its part to repay the loan and further that the Plaintiff had and still has a legal obligation to pursue its remedies available under the mortgage to recover the monies it advanced to the Third Party.

ISSUE I

Is the Defendant liable under the contract for the repayment of the monies advanced by the Plaintiff to the Third Party?

FACTS

The contract contains a section titled “CORPORATION AGREES” which sets out “the obligations and promises” of the Defendant under the contract.

Paragraph numbered (4) of that section provides;

*“That they (**the Defendant**) shall take over the maintenance and operation of the land for the cultivation of the sugar cane in the event the Company (**the Third Party**) fails to continue their obligation under the agreement”.*

Paragraph numbered (5) of that section provides;

*“That if at the time of taking over the total maintenance and operation of the land the Company (**the Third Party**) have not discharged their obligation to the Bank (**the Plaintiff**) then all the proceeds from the sale of the sugar cane from the land shall be paid directly to the Bank (**the Plaintiff**) and this shall continue until the Bank (**the Plaintiff**) has been fully repaid”.*

Paragraph numbered (6) of that section provides;

*“That if at the time of the taking over the total maintenance and operation of the land the Company (**the Third Party**) have not discharged their obligation to the Bank (**the Plaintiff**) the Corporation (**the Defendant**) shall continue to maintain and operate the land until such time as the Bank (**the Plaintiff**) has been fully repaid”.*

[All of the words above in **bold** have been inserted by the Court for the sole purpose of identifying the parties herein in the contract.]

The Defendant, by written correspondence dated September 28th 2012 (**Exhibit “G”**), informed the Plaintiff that it will be taking over management of the Cane Farm **in keeping with its obligations under the Tripartite Agreement**.

The Defendant, by written correspondence dated February 20th 2013 (**Exhibit “H”**), again informed the Plaintiff that it will be taking over management of the Cane Farm on **February 25th 2013** in keeping with its obligations under the Tripartite Agreement.

LAW

Under the law of contract, a failure, without justification, to perform a contractual promise at the time agreed is a breach that triggers a right to a remedy.

Parties to a contract may themselves specify in their contract the remedy available to a party following another’s breach.

A contract of suretyship is in essence a contract by which one person (the surety - the **Defendant** in this case) agrees to answer for some liability of another (the principal debtor - the **Third Party** in this case) to a third person (the creditor - the **Plaintiff** in this case). [Chitty on Contracts, 29th edition, vol. 2, chapter 44-001]

ANALYSIS

The terms of the contract is clear and unambiguous that should the Third Party breach the contract the Defendant must assume control of the land and essentially perform the obligations of the Third Party for the singular purpose of repaying any monies that was then owed to the Plaintiff.

The Court further agrees with Counsel for the Plaintiff, Mr. Anamayah's, submissions that the Tripartite Agreement is also a contract of suretyship, a fact which is reinforced by Exhibits "G" and "H", the written correspondences from the Defendant to the Plaintiff.

This leaves no room for doubt as to the Defendant's obligations/ liability thereunder.

CONCLUSION

The Defendant is liable under the contract for the repayment of the monies advanced by the Plaintiff to the Third Party.

ISSUE II

Did the Plaintiff have a duty to mitigate its losses?

FACTS

Based on the evidence the Third Party had effectively ceased all activity with respect to the Tripartite Agreement by September 2011.

The Defendant, by written correspondences informed the Plaintiff that it will be taking over management of the Cane Farm on February 25th 2013 in keeping with its obligations under the Tripartite Agreement [Exhibits "G" and "H"].

The Defendant never took over management of the Cane Farm.

The Plaintiff commenced legal action against the Defendant by filing this Action on November 24th 2014.

The evidence of the Defendant is that the Third Party (and several other farmers) were part of a Sugar Modernisation Project whereby the Third Party would clear

the virgin forest and put in drainage and irrigation and the Defendant would provide extension services and supervise the work of the farmers.

With respect to the Third Party, the evidence of the Defendant is that the Defendant would recommend to the Plaintiff the disbursement of funds to the Third Party based on inspection of works done.

It was only based on the recommendations of the Defendant that the Plaintiff would disburse funds to the Third Party.

The Defendant was supposed to harvest the cane and the loan to the Third Party would be serviced by the Defendant paying any monies due to the Third Party from the harvest directly to the Plaintiff.

LAW

The first rule of mitigation is that the Claimant cannot recover damages for any part of its loss consequent upon the Defendant's breach of contract which the Claimant could have avoided by taking reasonable steps.

The second rule of mitigation is that if the Claimant in fact avoids or mitigates its loss consequent upon the Defendant's breach, it cannot recover for such avoided loss.

The first rule imposes on a Plaintiff a duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars that Plaintiff from claiming any part of the damage which is due to its neglect to take such steps. [**British Westinghouse Electric Co. Ltd. v Underground Electric Rys** [1912] A.C. 673 @ 689].

The onus of proof is on the Defendant, who must show that the Claimant ought, as a reasonable man, to have taken certain steps to mitigate his loss, [**Strutt v Whitnell** [1975] 1 W.L.R. 870], **and** that the Claimant could thereby have avoided some part of his loss. [**Standard Chartered Bank v Pakistan National Shipping Corp.** [2001] 1 All E.R. (Comm) 822, CA].

ANALYSIS

It can be deduced from the Tripartite Agreement and the evidence, particularly of the Defendant's sole witness, Sherlock Bailey, that the Plaintiff had minimal knowledge and expertise in the area of cane farming and relied heavily on the Defendant's management and expertise in cane farming in entering into the Tripartite Agreement.

It is clear that the repayment of any funds disbursed under the loan facility to the Third Party was guaranteed by the Defendant's agreement to taking over the project to ensure such repayment.

This coupled with the unique nature of cane farming in Guyana, the Defendant being the sole purchaser of harvested cane, it is inconceivable that the Plaintiff could have taken any steps to mitigate its losses with respect to management of the Cane Farm and in fact, that has not been suggested by the Defendant.

In fact, the evidence clearly demonstrates that it was for the Defendant to do certain acts in accordance with the terms of the Tripartite Agreement in the event that the Third Party breaches, which would have ensured that the Plaintiffs would not have suffered loss.

The Plaintiff, however, had and are still the holders of a mortgage on the very property that the Third Party was developing for Cane Farming and it is indeed bewildering that the Plaintiff, the largest commercial bank in Guyana, never sought to proceed in execution against the property therein mortgaged to try to recover the monies disbursed.

While it is excusable that the Plaintiff may not have proceeded in execution against the mortgaged property up to and during the year 2013 since this could very well have jeopardised the Defendant fulfilling its obligations under the contract, the Plaintiff certainly ought to have done so in November 2014, having determined that the Defendant had evinced a clear intention to breach the contract.

CONCLUSION

There was nothing that the Plaintiff could have done with the Cane Farm or pursuant to the **Tripartite Agreement** to mitigate its losses, however, once the

Plaintiff decided to commence legal proceedings to recover the monies disbursed, the Plaintiff ought to have proceeded in execution against the property mortgaged by the Third Party, at the same time.

In this regard, the Plaintiff failed to mitigate its losses, in the form of interest accruing from November 24th 2014 (the date of filing of this action) to November 6th 2017 (the commencement of the trial of this action) and therefore will not be able to recover interest for that period.

ISSUE III

Was the Plaintiff obligated to pursue its remedy under the mortgage before pursuing its remedy under the contract (as stated in ISSUE I)?

ANALYSIS

The Plaintiff had two courses which it could have pursued.

It could have proceeded in execution against the mortgaged assets of the Third Party as explained in ISSUE II and it could also have pursued its remedy in damages for breach of contract against the Defendant, as it has done by virtue of this action.

Since the causes of action, for lack of a better description since action on the mortgage is not really a cause of action, are against different entities (Parties), the Plaintiff was free to pursue either or both courses of action.

CONCLUSION

Based on the reasons given in ISSUE II and the analysis above, the Plaintiff was not obligated to pursue its remedy under the mortgage before pursuing its remedy under the contract, however as explained in ISSUE II the choice to not proceed in execution against the mortgaged property mitigates in the Defendant's favour to some extent.

ISSUE IV

What is the measure of damages that the Plaintiff is entitled to?

FACTS

The Plaintiff, a commercial bank, agreed to lend certain sums of monies to the Third Party and the expected gain would be the interest to be recovered on the repayment of the loan.

LAW

An aggrieved party should recover both net gains prevented by the breach (expectation) and any other uncompensated losses resulting from the breach.

CONCLUSION

The measure of damages that the Plaintiff is entitled to is equivalent to the recovery of the monies disbursed to the Third Party together with interest thereon as per the contract subject to the exclusions stated in ISSUE II.

In the circumstances and in accordance with the powers vested in this Court by virtue of **section 25 of the High Court Act; CAP 3:02 of the Laws of Guyana** the Court orders that the willing and voluntary condemnation of a Deed of First Mortgage No. 259 of 2008 executed on the 18th day of August 2008 before Paula Ferdinand, Acting Deputy Registrar of Deeds of Guyana by **S AND R ABDULLA CANE FARMING INC.** vesting the right of a First Mortgage on all of **S AND R ABDULLA CANE FARMING INC.** rights, title and interest in and to State Land Lease No. A22271 executed on the 24th day of April 2008 be duly strengthened and confirmed according to its legal tenor and effect and consequently the Plaintiff be permitted to proceed in execution against the property thereby mortgaged and recover from the proceeds of the sale thereof the sum of \$260,959,022.00 (two hundred and sixty million nine hundred and fifty nine thousand and twenty two dollars) together with interest at the rate of 12% (twelve percent) per annum on the sum of \$160,784,135.00 (one hundred and sixty million seven hundred and eighty four thousand one hundred and thirty five dollars) from November 6th 2017 until fully paid AND it is further ordered that the Plaintiffs be permitted, in the event of the mortgaged property not realising at execution sale, sufficient to pay the judgment sum, interest and costs herein, to proceed as in ordinary cases against the property in general of the **Defendant** for the recovery of any amount remaining unpaid.

The Court orders costs to the Plaintiff in the sum of \$250,000.00.

Justice N. A. Singh