IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 294 of 2011

SUZETTE PEYREFITTE	**CLAIMANT**
AND	
IAN SKEEN	**DEFENDANT**

Hearings
2012
22nd May
6th July
10th August

Mrs. Robertha Magnus-Usher for the claimant.
Mrs. Deshawn Arzu-Torres for the defendant.

LEGALL J.

JUDGMENT

1. The claimant was about 18 years old, attending St. John's Junior College, when she began dating the defendant in 1987. Her father was a businessman, property owner, and part owner of Peyrefitte Bros. Co. Ltd., with connections to commercial banks in Belize. The claimant and defendant got married in 1997. The defendant did not

own real estate; but his wife's, and her father's connections, provided him with excellent opportunities to access real property and to put in practice his grandiose thoughts on various investments. He first wanted to invest in the business of selling donuts and frozen treats, but the bank needed property as security for a loan of $50,000. As he had no such property, his wife agreed to charge her property, the matrimonial home, located at King's Park, Block 45 Parcel 1054 in Belize City, to Atlantic Bank Limited for the amount of the loan of $50,000. His wife signed the charge document as chargor dated 28th March, 2003. The memorandum accompanying of the charge document states that in consideration of $50,000 agreed to be advanced to the claimant and the defendant, the claimant agreed to charge the above property to Atlantic Bank. The charge document also referred to the defendant as the "Borrower." The charge document signed by the claimant and defendant contained, among other clauses, the following clause:

> "2. The Chargor and the Borrower hereby jointly and severally convenant with the Chargee that the Borrower and he Chargor will on demand in writing made to the Borrower and the Chargor or one of them pay to the Chargee the balance which on the account of the Chargor and the Borrower with the Chargee shall for the time being (and whether on or at any time after such demand) be due or owing to the Chargee in respect of all moneys now or from time to time hereafter owing by the Chargor and the Borrower." **Emphasis mine**.

2. The defendant proceeded to show interest in, and actually operated, various other businesses at different locations in Belize City, such as selling barbeque and snow cones. In January 2005, Atlantic Bank, with the permission of the chargor in the above legal charge, transferred to Scotia Bank Belize Limited the said legal charge. To implement various investment ideas he arranged with his wife to agree to further charge the above property to Scotia Bank Belize Limited, so that further funds could be disbursed for various business ventures and other purposes. Further funds in the amount of $140,000 were acquired from the bank by virtue of three variations of the original legal charge dated 28th March, 2003. These variations dated 6th January 2005, 25th September, 2005 and 16th August, 2007, caused the balance on the original charge to increase as at August 2007 to a debt of $196,000, and were all signed by the claimant and a representative of the bank. The defendant is not a signed party to these variations, as his signature does not appear thereon.

3. I have no doubt that the defendant arranged with his wife, as she had property, to increase the amounts on the original charge and she voluntarily agreed to the increase. For the purpose of granting the increased loans referred to above, the bank wanted further security for the loans in the form of promissory notes. Promissory notes were executed and signed by both the claimant and the defendant in which they agreed, and promised for "value received, jointly and severally to pay on demand to the order of Scotia Bank (Belize) Limited" the sums loaned: see the first paragraph of the promissory notes. All the business ventures undertook by the defendant failed, so was his

marriage. The parties separated around 2008, and on 2nd September, 2009 the marriage, which produced two daughters, was dissolved on the ground of the defendant's cruelty.

4, Around June 2008 the defendant who had made payments on the loans, failed to continue making these payments; and as a result, by the year 2011, due to interest, late charges and administrative fees, the balance on the loans was $205,832.57. Since the matrimonial home was used as security for the loans, and since the claimant was residing there with the children, the defendant having removed and living elsewhere; and since the home was liable to forfeiture for non-payment of the loans, the claimant got financial assistance from her parents, sold another property, withdrew moneys from her children's accounts, and sold a boat which had been jointly owned by the defendant and herself; and according to the claimant, in her evidence in court, she has paid the full amount of $205,832.57 owing to the bank. The claimant states that though she has paid the debt in full, the title for the property is still with the bank because of a lack of funds to pay legal fees to remove the charge from the title. The claimant's case is that she is entitled, from the defendant, to the sums she paid to the bank, because the defendant used the loans exclusively for the establishment and expansion of his businesses, for the purchase of a motor vehicle, for the purchase of a boat, and repairs to a pier on property that belonged to relatives of the claimant. The claimant filed on 12th May, 2011, a claim against the defendant as follows:

> "(1) The sum of two hundred and five thousand

eight hundred and thirty-two dollars and fifty-seven cents ($205,832.57).

(2) Interest of $47,470.21 up to the 13th day of May, 2011 and thereafter interest calculated at the daily rate of $1.17 per day.

(3) Costs of $5,000."

5. The claimant denied that the loans were obtained for use by both parties and to meet their financial obligations; and said in evidence that the monies from the loans did not benefit her "as far as I can recall," to use her own words. Let us examine the evidence to see whether or not she benefitted from the loans. The claimant swore that she went with her husband to New Orleans and Minneapolis USA to see his family and to purchase equipment for the business; and he paid for the trips. She also admitted that she had "a responsibility to pay the debt as well as the defendant." In an application requesting a Scotia Bank plan loan the defendant and the claimant signed the application as applicant and co-applicant respectively. She admitted that the defendant spent money on the children during the trips abroad and she was clear that the defendant paid utilities at the matrimonial home and paid for entertainment. She also admitted that he paid towards the loans at the bank. The claimant also paid towards these loans at the bank. The total amounts the defendant paid for the above purposes are not exactly known; nor is it known whether those payments were made from the businesses he carried on or from his salary from his employment at Channel Broadcasting Cable, which he held while conducting the businesses at the side; or from his salary of

$3,000 per month which he gets from his present employment at Central Broadcasting Cable. It is clear though that the boat was purchased for $60,000 by both parties, and the defendant contributed $30,000 out of moneys received from the loans. The boat was sold for the sum of $40,000 by the claimant, which was used to assist to repay the debt to the bank. The vehicle a Ford – Ranger XCT Registration No. 16233 which is registered in the names of both parties, is presently used solely by the defendant.

6. In further support of her case that the loans were not used for her benefit, the claimant refers to a letter dated 25th June, 2007 which stated that the defendant – not the claimant and him – wanted to increase his loans at the bank by a further sum of $50,000. But it has to be noted that the letter states that the increase was needed not only for investment purposes; but also to pay property tax and "school fees for my kids." The claimant also relies on an application for an increase of the loans to $196,000 which has the defendant as the sole applicant. But, once again, the application states the purpose of the loan as "Consolidation/Home," indicating that the loan has some relevance to the home of the parties. The claimant's name also appears on the application as the spouse of the defendant. The claimant in evidence said that the defendant gave her money to support the children of the marriage. The claimant admitted that she acted as co-borrower when obtaining the loans. The claimant said that they both met their obligations for the home from their independent salaries and businesses.

7. By letter dated 10th December, 2005 Scotia Bank confirmed a loan of $125,000 to both the claimant and defendant and requested that if the terms and conditions were acceptable, the parties should sign the letter. The claimant and defendant signed the letter on the said date. Another letter from the bank approved additional financing to BZ$151,000 to both parties. The purpose of this financing, according to the letter, was inter alia, to "assist with home improvements and vacation expense …."

8. The defendant states that the money from the businesses benefitted the family; and the promissory notes and the loans were joint ventures by both of them. The loans were spent, according to the defendant, for the benefit of both of them and the children. The defendant said that the funds were used for the family home. The defendant states that he should not be responsible solely for the repayment of the loans as the claimant had a legal responsibility to do so too, since she benefitted from the loans and was a co-borrower and also accepted obligations under the legal charge above. In her evidence in cross-examination, the claimant said that she was not forced to sign the loan documents. She said she acted as co-borrower for the loans. She also acknowledged that she had a responsibility to pay the debt as well as the defendant. The loans were paid into the defendant's account at the bank; but the claimant had access to that account. There is no evidence though that she withdrew any money from that account. From all the evidence above, I am of the view that the claimant and the children benefitted to some extent from the loans and I also believe that the defendant benefitted also.

9. It was further submitted that from the evidence, the claimant's role in relation to the loans was that of a guarantor; and that there was a clear admission of the defendant in his testimony in court that the claimant acted as guarantor. I have found no document in this case describing the claimant as guarantor and I have found no other evidence proving that she acted as guarantor for purposes of the loans. The claimant probably at some point had that in mind. In her evidence in court she said that she went to the bank as guarantor, but the bank said to her co-borrower, and she acted as co-borrower when she obtained the loans. The claimant also testified that she did not indicate to the bank that she went there as guarantor. I therefore do not accept the submission by the claimant's counsel that she acted as guarantor for the loans.

Jointly and severally

10. As shown above the claimant and the defendant signed the original legal charge dated 28th March, 2003, and three promissory notes dated 2nd June, 2010; 12th March, 2010 and 28th July, 2009. In all of these documents, the defendant signed as borrower and the claimant signed as co-borrower. In all of these documents, the claimant and the defendant agreed with the bank that, for the loans received, they "jointly and severally" promised or agreed to pay the bank the sums owed. In that context, what does the phrase "jointly and severally" legally mean? Does it legally mean that if one of the borrowers paid off the debt, that discharges the other borrower from the debt to the bank? In ***AIB UK v. Martin and another 2001 UK HL 63,*** Lord Rodger says that the use of the words jointly and severally indicates

each of the borrowers is liable to pay the whole, or any part of the sums owed. That is in relation to repayment to the bank or lending institution. What is the legal position where a co-borrower of money from a bank pays off the full debt owed? Is he entitled to a contribution from the other co-borrower, and if so in what percentage? There is oral evidence from the claimant that she paid off the debt to the bank; and this was not denied specifically by the defendant. I am satisfied from that evidence that the claimant paid off the full debt to the bank and I do not consider a letter dated 15th June, 2012, attached to the claimant's written submissions to this effect, because this letter was not produced during the period of the actual trial. Counsel for the claimant, rather than applying to the court to reopen the case to disclose or tender this letter, so that the other side could be heard on it, submitted the letter, after the actual trial had ended, attached to written filed submissions ordered by the court. This conduct caught the defendant by surprise, and indeed the court. The court did not reopen the hearing, because as shown above, there is oral evidence by the claimant, accepted by the court, that the loan was paid in full by the claimant.

11. Since the claimant had paid the debt in full, does she have a right to call upon the defendant to pay the full debt or contribute some part of the amount paid on the ground that they agreed jointly and severally to pay the debt? The right to contribution does not depend on any express agreement between the parties. Mrs. Arzu-Torres for the defendant submitted that "the claimant could have sought a contribution for half of the loan sum arising from the joint and several

liability of the parties upon evidence of payment of the debt to the bank, but this was not pleaded." Mrs. Arzu-Torres relied on the Belize Court of Appeal decision of ***Hubert Mark v. Belize Electricity No. 11 of 2009*** where the court held that "the parties are bound by their pleading and ought not to be allowed to go outside their pleaded case." The defendant did raise the issue that both of them had a responsibility to repay the loans. In paragraphs 14 and 15 of the defendant's witness statement the defendant stated:

> "14. I did not agree with the claimant, however and at anytime that I would be responsible <u>solely</u> for the payment of the loans as she had a responsibility to do so as well since she has benefitted from the monies obtained.
> 15. It is clear from the promissory notes and the other loan documents disclosed and signed by the claimant herself that she <u>also</u> had a legal responsibility for the payment of the mortgage." Emphasis mine.

12. It can be inferred from the above, that his defence is that he and the claimant had to contribute to the payment of the debt. The claimant too, as shown above, swore that she had a responsibility to pay the debt as well as the defendant. On the question of contribution, it was held that where two persons jointly employed an arbitrator and one paid the whole of his fees, that person was entitled to recover one half of the fees from the other person: see ***Marsack v. Webber (1860) 6 H & N1***. In ***Lowe v. Dixon 1885 16 QBD 455*** Loper J said that "at law, if several persons have to contribute to a certain sum, the share which

each shall pay is, the total amount divided by the number of contributors….": see page 458. The right to contribute depends primarily, not upon contract, but, unless there is clear evidence to the contrary, upon the well known equitable principle "in equali jure" – the law requires equality. The decision in ***Dering v. Lord Winchelsea 1 Cox 318*** proceeded on the principle of law that where several persons are debtors, unless there is evidence to the contrary "all shall be equal."

13. From the evidence above I have no doubt that the defendant arranged with his wife the claimant to sign the loan documents for him to access the loans. I have no doubt that she signed those documents voluntarily and therefore had a joint and several legal responsibility to repay the loan. The claimant and the children did benefit from the loans as shown above. The defendant also benefitted from the loans. From the evidence, it is not known the precise extent or value of the benefits each party got from the loans. In these circumstances, I think the law requires equality, and the fair and equitable thing to do is that each party is liable in equal shares for payment of the debt. Since the claimant has paid to the bank the full debt of $205,832.57, I give judgment for the claimant of half that amount.

14. I therefore make the following orders:

(1) The defendant shall pay to the claimant not later than 1st March, 2013 the sum of $102,916.28 being one half of the debt repaid to the bank by the claimant.

(2) The defendant shall pay to the claimant interest on the said sum in the amount of 6% per annum beginning from 12th May, 2011 until the said sum is fully paid.

(3) The defendant may apply to the court to pay the debt by installments and for an extension of time to pay same.

(4) The defendant shall pay costs to the claimant in the sum of $5,000.00.

Oswell Legall
JUDGE OF THE SUPREME COURT
10th August, 2012