

ANTIGUA AND BARBUDA
Claim No: ANUHCV1997/0373

Appearances:

Dane Hamilton for the Claimant

Sharon Cort for the Defendant

JUDGMENT

[1] **FERDINAND, J (Ag.)** : This is a claim for recovery of an alleged debt and the principal issue for judicial determination is whether the said debt is owed by the Defendant personally, as opposed to being owed by a limited liability company of which the Defendant was a director.

- [2] The Claimant alleged that by an oral agreement in or about 1994 the Defendant established an account to purchase goods on 30-day credit from the Claimant, who was a wholesaler and retailer of goods. It is not disputed that the Claimant supplied goods in commercial quantities, at wholesale prices, and that these were delivered to a supermarket managed by the Defendant. Goods, principally beverages, were supplied, delivered and paid for over a period of at least many months.
- [3] The Defendant states that the supermarket business which he managed was operated by a limited liability company incorporated in Antigua and Barbuda under the name "Stanmar Agencies Limited". That Company went into voluntary liquidation on 23rd February 1996 and its assets were apparently insufficient to pay all of its debts. This latter fact is why the issue as to whether the Defendant is personally liable for the price of the credited goods is of crucial importance to the Claimant.
- [4] The Defence formally denied that goods were purchased from the Claimant, but the liquidator of Stanmar Agencies Limited testified that he was made aware by the Defendant that the said Company owed the Claimant for goods supplied, although he could not recall the amount of the debt. Notwithstanding some jousting with the Claimant's counsel under cross-examination where the Defendant asserted that it was for the Claimant to prove his debt, the Defendant himself did not really refute that the Claimant was owed monies at the date Stanmar Agencies Limited went into voluntary liquidation.
- [5] In his evidence, the Defendant never wavered from his assertion that he never personally incurred or acknowledged any personal liability to the Claimant.
- [6] Except for two letters from his Solicitor, the Claimant did not put into evidence any documentary evidence in support of his claim against the Defendant. There was no written proof submitted to establish the opening of the credit account, no written orders, no bills or invoices, no payment receipt records for past transactions, nor anything of that character. The absence of some such evidence is striking, particularly in light of the denial of any debt at all in the Defence.

- [7] In spite of this lack of documentation, this Court is prepared to hold on the evidence adduced, that the Claimant did in fact supply goods to a value of \$10,159.85 as claimed. I do so mainly because the evidence of the liquidator acknowledged that the Claimant was owed a debt by Stanmar Agencies Limited and no figure different to that claimed was ever alleged by or on behalf of the Defendant or anyone else. The crucial issue in this case is whether that debt was owed by the Defendant personally.
- [8] It is well settled law in this jurisdiction that a limited liability company is a separate entity in law, distinct from its shareholders and directors: W.T. Western Limited & Ian Simpson & Anne Simpson v Jeffrey Colen, (5th July 2001, unreported Nevis Circuit Civil Appeal No. 9 of 2001, per Byron C.J.). Accordingly, liabilities of the company are not generally those of its shareholders, directors or employees.
- [9] The Claimant in his evidence testified that he was aware in 1994 that the supermarket business managed by the Defendant was declining and that the creditors of the said supermarket were not being paid on time. The Claimant also testified that he saw the newspaper "Notice to Creditors" published in March 1996 by the liquidator of Stanmar Agencies Limited. The Claimant's thoughts upon reading that Notice are noteworthy and will be addressed later in this judgment.
- [10] The Claimant's counsel points out that the demand letters from the Claimant's Solicitor to the Defendant are dated 8th February 1995 and 17th May 1995, both therefore pre-dating the said Notice. However, there is no admissible evidence before this Court that those letters were ever received by the Defendant. The Defendant also denies the assertion contained in the second of the said letters that he ever attended the said Solicitor's chambers and promised "to pay the amount owed (\$10,159.85) by March 31, 1995".
- [11] The Writ of Summons in this case was issued on 18th November 1997, but there is also evidence that an earlier Writ claiming the same debt had been issued on 14th June 1995 and discontinued on 18th November 1997. This discontinuance was possibly due to the

old Order 34 of the Rules of the Supreme Court 1970 for the Claimant said in cross-examination that it was discontinued because nothing was done for over a year.

- [12] It was suggested on behalf of the Defendant that the description of the Defendant in the first Writ as “Teddy Santos trading as Stanmar Agencies” in comparison to the second Writ’s reference to him as simply “Teddy Santos” was an attempt to hide the Claimant’s knowledge of the “Stanmar Agency” business. I do not attach any significance to this difference since in both Writs the claims were against the Defendant personally. Of more significance perhaps is the fact that paragraph 2 of the Statement of Claim in both of the Writs declared that the Defendant operated “a business under the name of Stanmar Agency” whereas in the witness statements of both the Claimant and his witness Karen Crawford they refer to “Stanmar’s Supermarket” rather than “Stanmar Agency”. This may have been a deliberate, if belated, effort to avoid any use of the earlier pleaded “Stanmar Agency”, which more closely resembled the name of the limited liability Company “Stanmar Agencies Limited”.
- [13] The absence of any material documentation which may have assisted this Court in resolving the issue herein is regrettable. While it is true that there are in evidence correspondence and Notices from the liquidator of the Company which state its proper corporate name, these all post-date the commencement of the liquidation and therefore are not particularly probative on the real issue to be decided.
- [14] Under Section 80 of the Companies Act, Cap 358, *inter alia*, any director, manager or officer of a limited company who issues or authorizes the issue of any notice, advertisement or other official publication of such company, or signs or authorizes to be signed on behalf of such company any cheque, order for money or goods, or issues or authorizes to be issued any invoice, receipt or letter of credit of the company, wherein its name is not mentioned shall be personally liable to the holder of any such cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company. Due to the dates of the transactions in issue in this case, both counsel agree that Cap. 358

is the applicable legislation, notwithstanding that it was later repealed by the Companies Act 1995.

- [15] The Claimant is unable to avail himself of the protection afforded to creditors by Section 80 because he has not produced any relevant documentation which can be used to affix personal liability upon the Defendant.
- [16] On the Claimant lies the burden of proving, *albeit* on a balance of probabilities, that he is owed the debt claimed and that he is so owed by the Defendant personally.
- [17] I have earlier stated that there is no documentation in evidence that establishes the personal liability of the Defendant. Although I have found that a debt is indeed owed to the Claimant, “unbusinesslike” is the gentlest expression that can be used to describe the manner in which the Claimant has sought to prove that debt, given its formal denial in the Defence.
- [18] The Claimant testified that he “became aware of Stanmar Agencies Limited” when he saw the newspaper Notice to Creditors issued by the liquidator. He does not recall receiving any letters from the liquidator. The Claimant testified that when he saw the said Notice he “was surprised because (he) always thought that it was (the Defendant’s) business ... his personal business ... I thought he was giving me a 6 for a 9, trying to fool me, and give me a wrong impression ... to get away from paying me ... When I saw this Notice I linked it to the Defendant’s business”
- [19] Although the Claimant says that he “linked” the liquidator’s published Notice to Creditors to the Defendant’s business, he did not contact the liquidator. In this regard, it must be remembered that the Claimant denied having received any correspondence from the liquidator.
- [20] The Claimant’s testimony that he thought when he saw the Notice that the Defendant had “tried to put something together ... so as not to pay the monies that were outstanding,”

suggests that the Claimant at some point in time concluded that the Company's assets were likely to be insufficient to pay its creditors such as himself. This Court cannot be sure at what point in time the Claimant so concluded, but such awareness would be strong incentive for the Claimant to pursue the Defendant personally on the debt. The Court is mindful that the first Writ had already been issued when the Notice to Creditors was published. Therefore, for such awareness to be relevant in this case, it would have had to have arisen prior to March 1996. That point was well made by the Claimant's counsel and is recognized as valid.

[21] In his oral testimony the Claimant stated that he has documentary evidence as to what the sum claimed related to: "I have not got them here ... [but] my records regarding this are still in my possession." The Court also heard the Claimant say at one point that his Solicitor had some such documentation.

[22] The Core Trial Bundle included a List of Documents filed on 9th October 2003 and signed by the Claimant and his Solicitor, in which the Claimant listed only the two letters from the Claimant's Solicitor to the Defendant in Schedule 1 thereof, and further stated under Schedule 2 thereof that:

"Copies of statements and invoices ... were misplaced and/or lost during the Claimant's move from Sheppard Street to Perry Bay."

[23] The Claimant's List of Documents states that it was filed pursuant to an Order for Standard Disclosure dated 25th September 2003. Rule 28.4 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR 2000") states:

"If a party is required by any direction of the Court to give standard disclosure, that party must disclose all documents which are directly relevant to the matters in question in the proceedings."

Here again it is appropriate to recall that the Defence as filed denied that any debt whatsoever was owed to the Claimant, therefore the proof of same was clearly a "matter in question in the proceedings".

- [24] In his address the Claimant's counsel was unable to offer any explanation for the Claimant's testimony concerning available documents. This conflict between the Claimant's testimony and the statements in his signed List of Documents did not help to advance the prospects for his claim's success.
- [25] The testimony of the Claimant and the Defendant conflict directly on the question of whether or not the Defendant ever acknowledged the debt claimed by the Claimant. The Claimant's Solicitor's letter dated 17 May 1995 cannot amount to proof of such acknowledgement since the Defendant denies its contents (and receipt of either letter) and there was no evidence led as to the actual delivery of these letters. The statement at paragraph 9 of the Claimant's witness statement does not constitute such evidence as it is hearsay and cannot override the testimony on oath by the Defendant that directly contradicts same. The said paragraph 9 states:

"I am advised by my solicitor that on receipt of the letter Mr. Santos visited his Chambers and acknowledged the debt and promised to liquidate the same by 31st March 1995".

- [26] The Claimant's case is further weakened by his statement in paragraph 11 of his witness statement that:
- "... I never knew there was a company called Stanmar Agencies Limited. I was always under the impression that the business was owned solely by Teddy Santos. I became aware of such a company when I saw notices in the Newspaper relating to the liquidation of the company. His company had account with me. His account was established by him personally."

The reliability and credibility of the parties is of decisive importance in this case. The Claimant initially testified under cross-examination that:

"I was of the impression that the goods were for the Defendant's personal consumption."

However, soon after saying this the Claimant admitted that he sold the Defendant large quantities of goods, at wholesale prices, and that he was aware that the goods were for resale by the Defendant. The Claimant's earlier testimony was clearly an unsustainable

attempt to bolster his claim against the Defendant. That testimony damaged his credibility. To my mind, this testimony is far more damaging to credibility than any contradictions in the evidence of the Defendant's witnesses as to where, when, and by whom, the Stanmar business was conducted.

- [27] The Claimant's reliability was not enhanced by his evidence in his witness statement that:
"Prior to the year 1994 Teddy Santos established an account with me whereby he would take goods on credit and pay at a later date."

This contradicts paragraph 3 of his statement of claim which states that:

"Between June 1994 and January 1995 the Defendant personally established an account with the Plaintiff and purchased goods from the Plaintiff....."

- [28] Companies are not physical beings. They can only act through individuals. Therefore, the mere fact that an individual is conducting a transaction does not necessarily mean that it is not being done on behalf of a company. The burden of proof in this case lay on the Claimant. I agree with the comment of learned Counsel for the Claimant that the Defendant sounded "well-schooled" in the concepts of company law when he testified to the effect that it is the Claimant who has sued and therefore it is "for him not me" to prove the debt that is alleged to be owed by the Defendant to the Claimant. These views are no less correct because they come from a litigant rather than a lawyer. No doubt this litigation will also increase the Claimant's knowledge and awareness of company law principles, if he did not already process them in full measure.

- [29] For the reasons given in this judgment, the claim against the Defendant is dismissed and the Claimant is ordered to pay Costs to the Defendant, which Costs were agreed in the sum of \$3,000.00 at the start of this case.

J. EMILE FERDINAND
High Court Judge (Acting)