

SUPREME COURT OF NOVA SCOTIA

Citation: GE Canada Equipment Financing G.P. v. 3068485 Nova Scotia Ltd., 2009 NSSC 414

Date: 20091125

Docket: Hfx No. 264303

Registry: Halifax

Between:

GE Canada Equipment Financing G.P.

Plaintiff

v.

**3068485 Nova Scotia Limited, DRL Coachlines Limited,
DRL Vacations Limited and
Ruth Roberts-Tetford**

Defendants

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Judge: The Honourable Justice John D. Murphy

Heard: July 13, 14; 16 and 22, 2009, in Halifax, Nova Scotia
{Oral decision rendered November 25, 2009}

Written Decision: February 5, 2010

Subject: Guarantor's Liability

Summary: Plaintiff loaned funds to principal debtor and obtained guarantees from Individual Defendant Ms. Roberts-Tetford, Corporate Defendant Coachlines, and # Corporation. The initial loan amount was reduced by Supplemental Agreements and the remaining debt was referenced in an Acknowledgment Agreement; GE claimed all relevant guarantee documents were duly executed by individual guarantor, and by her late son Jarvis Roberts on Coachlines' behalf. GE obtained summary judgment against principal debtor and # Guarantor, but no payment was received.

Proceeding continued against remaining guarantors, Ms. Roberts-Tetford and Coachlines. At trial Roberts-Tetford denied signing most security documents, and claimed she did not appreciate significance of documents she admitted to signing. Corporate Defendant alleged that Jarvis Roberts had no authority to bind it as guarantor. Both Defendants alleged *non est factum*, and claimed their positions were illegally compromised because GE liquidated security without their knowledge or consent.

Issues: Whether Individual Defendant executed the documents; if so, was she relieved of liability based on unconscionability/*non est factum* or because GE failed to provide notice of material changes with respect to security?

Whether signatory had authority to execute documentation for Corporate Defendant?

Result: GE entitled to judgment jointly and severally against individual and corporate guarantors.

Plaintiff presented *prima facie* case. Individual Defendant was President of principal debtor and her deceased son purported to have signing authority on Coachlines' behalf. GE took reasonable steps to obtain security documentation, and had no basis to be concerned with respect to the identity or authority of persons purporting to sign guarantees.

The individual Defendants' evidence at trial, where she denied signing most security documents, contradicted her earlier testimony in affidavits and given orally during summary judgment hearing. Ms. Roberts-Tetford was an experienced businesswoman who attempted to minimize her knowledge and involvement in the affairs of the principal debtor and Coachlines. Her evidence at trial was not accepted; she executed the documents and knew she was signing to guarantee repayment of the loan, and she stood to benefit from the success of the principal debtor. The Individual Guarantor was the head of a family business, understood what she was signing and provided security documentation in circumstances which were not unconscionable.

Javis Roberts executed the Coachlines' Guarantee when he had actual authority to do so as its general manager; alternatively, he had ostensible authority and any reasonable person doing business with Coachlines would assume that his authority as agent was unrestricted. Ms. Roberts-Tetford, owner of Coachlines, was aware of and ratified its activity guaranteeing the principal debtor's liability.

GE did not deal with the principal debtor or the security in a manner which relieved guarantors' liability. Supplementary documentation in connection with sale of secured assets was properly executed by the guarantors, who were not accommodation securities but parties who initiated the dealings with respect to security, and benefited from the transactions. Guarantors were not prejudiced by GE's dealings with the principal debtor or security.

Defendants' arguments that documents were forged, and that Javis Roberts acted as agent of GE, were rejected.

Roberts-Tetford and Coachlines Guarantees were held to be valid and enforceable; judgment granted for \$810,000.00.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

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{Oral decision rendered November 25, 2009}

Written Decision:

February 5, 2010
*{Editing in written decision limited to improving grammar,
providing citations for referenced authorities, and incorporating
parties' agreement concerning interest.}*

Counsel:

David G. Coles, Q.C., and Joshua J. Santimaw, for the
plaintiff
Gavin Giles, Q.C., and D. Jeffrey Aucoin, for the
defendants

By the Court:

INTRODUCTION AND BACKGROUND FACTS

[1] I have considered all the evidence and submissions both before and after the trial, and if I do not refer to some of the evidence, that does not mean that I have not considered it in reaching the decision.

[2] *Legend* - For ease of reference, I will be referring to the parties as follows:

The Plaintiff - GE Canada Equipment Financing as “GE”

DRL Vacations Limited as “Vacations”

DRL Coachlines Limited as “Coachlines”

Ruth Roberts-Tetford as “Roberts-Tetford”

Javis Roberts as “Javis”

3068485 Nova Scotia Limited as “# Co”

[3] This trial concerned GE’s claim against Roberts-Tetford and Coachlines based on guarantees allegedly provided when GE advanced a loan to Vacations for the purchase of school buses.

[4] During February 2003 Vacations borrowed \$5.9 million from GE (the “Loan”), and GE claims it obtained guarantees for that financing from Coachlines and Roberts-Tetford. The initial \$5.9 million loan was reduced by Supplemental Agreement to \$3.7 million, by Second Supplemental Agreement to \$1.4 million, and eventually to \$633,514.44, with reductions occurring when buses were sold and GE security on those assets released.

[5] # Co became a guarantor in 2005 when the Second Supplemental Agreement was made.

[6] GE maintains that in accordance with the First and Second Supplemental Agreements and an Acknowledgement Agreement concluded in January 2006, Coachlines and Roberts-Tetford remained guarantors, and are liable for the \$633,514.44 debt which was outstanding as of January 2006, and went into default.

[7] In March 2006 GE commenced this proceeding against Vacations, Coachlines, Roberts-Tetford and # Co. All Defendants defended. In August 2006, this Court granted GE's motion for Summary Judgment against Vacations and # Co; no payment has been made pursuant to that judgment. The Plaintiff's Summary Judgment Application against Roberts-Tetford and Coachlines was dismissed.

[8] The original loan and security arrangements, including the requirement for guarantees by Coachlines and Roberts-Tetford, are set out in correspondence from GE to Vacations dated January 30, 2003 (Exhibit Book Tab 1) ("Commitment Letter").

[9] The principal security documents upon which GE relies in advancing its claim against Coachlines and Roberts-Tetford are:

- (1) Equipment Loan and Security Agreement dated February 6, 2003 (Exhibit Book Tab 3);
- (2) Guaranty and Indemnity dated February 6, 2003 from Roberts-Tetford (Exhibit Book Tab 8) ("Roberts-Tetford Guaranty");
- (3) Guaranty and Indemnity from Coachlines dated February 6, 2003 (Exhibit Book Tab 9) ("Coachlines Guaranty");
- (4) Supplemental Equipment Loan Security Agreement dated March 23, 2005 (Exhibit Book Tab 11) ("First Supplemental Agreement");
- (5) Supplemental Equipment Loan and Security Agreement dated August 29, 2005 (Exhibit Book Tab 13) ("Second Supplemental Agreement");
- (6) Acknowledgment and Agreement (Exhibit Book Tab 14) ("Acknowledgment").

Documents provided to GE by Coachlines were executed by Jarvis.

POSITIONS OF THE PARTIES

[10] GE claims that Coachlines and Roberts-Tetford are jointly and severally liable for special damages in the amount of \$633,514.44, representing the balance of the Loan owing to GE referenced in the Acknowledgment, special damages in amount of \$2,000.00 representing costs pursuant to agreement among the parties, plus interest on damages to date at 2.5%, plus costs and disbursements associated with preparation for and conduct of trial.

[11] GE maintains that Roberts-Tetford executed the Roberts-Tetford Guarantee, that Jarvis executed the Coachlines Guarantee when he was authorized to do so, and that those guarantees are binding on Roberts-Tetford and Coachlines respectively. GE also maintains that the two Supplemental Agreements and the Acknowledgment were properly executed and are binding on Coachlines and Roberts-Tetford.

[12] Roberts-Tetford and Coachlines have advanced various positions at different stages in defence of the claim, which may be summarized as follows.

- (A) Initially, during April 2006 a Joint Defence on behalf of all original Defendants provided a general denial and also alleged that GE misrepresented the nature of the documents to be executed, thereby inducing Roberts-Tetford and Coachlines to execute documents which those Defendants did not understand to be guarantees, and which were executed under pressure. The Defendants denied the validity of the underlying security documents in their Joint Defence.
- (B) In June 2006 an Amended Defence was filed on behalf of Roberts-Tetford and Coachlines, which continued the standard denial. Roberts-Tetford claimed to be the sole shareholder of Coachlines, pleaded that she was not advised the meaning of documents she signed, and claimed she received only the final “signing page” by facsimile, and was not provided with full documentation. Roberts-Tetford pleaded *non est factum* and lack of consideration. Coachlines defended on the basis that Jarvis was not a shareholder or officer or director of that company and had no authority to

sign guarantee documents. Roberts-Tetford maintained in the Amended Defence that she had refused to sign for Coachlines as guarantor.

- (C) During the Summary Judgment Hearing, in affidavits filed in response to the Motion Application, and during cross examination, Roberts-Tetford acknowledged that she signed security documents including the Roberts-Tetford Guarantee, and the First and Second Supplemental Agreements. Roberts-Tetford denied authorizing Jarvis to sign the Coachlines Guarantee. (When declining to award summary judgment against Coachlines, this Court found there was no dispute that Jarvis signed the Coachlines Guarantee, but determined that a factual dispute existed concerning whether Jarvis had actual or apparent authority to sign as officer and secretary of Coachlines, and thereby bind the company as guarantor.)
- (D) The Defendants' pre-trial memorandum, which Roberts-Tetford acknowledged at trial that she had read and agreed with, asserted that she didn't sign any security documents - not the Roberts-Tetford Guarantee, not the Supplemental Agreements, the Acknowledgment, nor a Vacations Borrowing resolution (Exhibit Book, Tab 4). In effect, just prior to trial Roberts-Tetford's position was that any documents bearing her signature in connection with the Loan were forgeries.
- (E) At trial, Roberts-Tetford denied signing any documents for the Loan, except for the Roberts-Tetford Guarantee and a financial information release, which she testified she executed in Montreal in the presence of her daughter as witness, when they were urgently faxed to her by Jarvis with a demand for immediate return. She denied having read or appreciated the significance of those documents.
- (F) Coachlines' position in the Defendants' pre-trial memorandum and at trial remained that Jarvis had no authority to execute any documentation on its behalf. Coachlines also advanced, with Roberts-Tetford, *non est factum*, and claimed Defendants' positions were illegally compromised because GE liquidated security for the Loan without Defendants' consent or knowledge.
- (G) At commencement of trial, Defendants Roberts-Tetford and Coachlines were permitted to amend their Defence to expand Roberts-Tetford's denial to claim that no guarantee documentation was received or signed by her. (The

prior pleading had suggested only the final page of documents had been received and signed.)

ISSUES

[13] The Plaintiff very simply characterizes the issue as whether GE is entitled to judgment against Roberts-Tetford and Coachlines based upon the guarantees.

[14] The Defendants expanded the statement of the issues in paragraphs 28 and 29 of their pre-trial memorandum to include the following:

28. Is Roberts-Tetford liable for the debt by virtue of a Guarantee?
 - (a) Did Roberts-Tetford sign the Documents?
 - (b) If Roberts-Tetford is found to have signed the Documents, is she relieved of liability based on the doctrine of unconscionability or *non est factum*?
 - (c) If Roberts-Tetford is found to have signed the Documents, is she relieved of liability because GE Canada failed to give her notice of material changes with respect to the Security?

29. Is Coachlines liable for the Debt?
 - (d) Did Jarvis Roberts have authority to sign the Documents on behalf of Coachlines?
 - (e) Did Jarvis Roberts have authority to sign the Documents on behalf of Roberts-Tetford?

I agree with those statements of issues.

PLAINTIFF'S EVIDENCE - TESTIMONY AND DOCUMENTATION

[15] The Loan was described on the Plaintiff's behalf by Mr. Bruce Rutherford, GE's Senior Manager for Atlantic Canada who was in Halifax and supervised the

dealings with the Defendants. As particulars of the Loan and liability of the principal debtor are not in issue, having been addressed at the summary judgment stage, much of Mr. Rutherford's background testimony need not be canvassed in the context of the issues now before the Court. He described GE's dealings with Jarvis and Roberts-Tetford including providing notification when the Loan was in default, GE's role respecting the sale of buses secured by the Loan, and the Supplemental Agreements to reflect reductions of the Loan following those sales.

[16] Mr. Rutherford testified that Coachlines had an account with GE's Burlington, Ontario office before the Loan was made to Vacations. He explained that GE relied upon a resolution of the Board of Directors of Coachlines authorizing it to guarantee the Loan (Exhibit 1 Tab 5). That resolution was executed by Jarvis as secretary, and authorized him to sign for Coachlines. Mr. Rutherford testified that GE understood that Ms. Roberts-Tetford had signed the Roberts-Tetford Guarantee (Exhibit 1 Tab 8). He confirmed that GE sent the Roberts-Tetford Guarantee to her by fax to Montreal for signing. GE similarly understood that the Coachlines' Guarantee, executed by Jarvis as secretary (Exhibit 1 Tab 9) was a binding commitment, in accordance with the requirements in the Commitment Letter. Mr. Rutherford was aware from various documentation that Roberts-Tetford was director and president of Coachlines. Mr. Rutherford testified that the Supplemental Agreements and Acknowledgment were intended to indicate that GE released its security in buses being sold, and to confirm that guarantors, including Roberts-Tetford and Coachlines, consented to the sale and release of GE security, and recognized their continuing liability. He also testified that GE understood Roberts-Tetford to be the president of the principal debtor, Vacations, but that his direct dealings were with Jarvis on behalf of Vacations. Demands for payment when the Loan was in arrears were directed to Roberts-Tetford and Coachlines, and mailed to their Newfoundland addresses shown in the guarantee documents.

[17] In cross examination, Mr. Rutherford confirmed that GE had no direct discussion with Roberts-Tetford in 2003 in connection with the Loan, and that it was corporate practice to send guarantees without direct contact with guarantors. GE did have previous direct dealings with Ms. Roberts-Tetford through its Burlington office when Coachlines obtained a loan. GE left it to Jarvis to arrange the Coachlines and Roberts-Tetford Guarantee delivery, except that GE did send Roberts-Tetford's Guarantee directly to her for signing via fax to Montreal.

Mr. Rutherford testified that GE's only direct contact with Roberts-Tetford in the context of the Loan occurred later when Mr. Burn called her to demand payment.

[18] Mr. Rutherford assumed Roberts-Tetford would know when Vacations was selling its buses because she was president of that company. He noted that payment for an outstanding overdue portion of the Loan was received the same day Mr. Burn made a telephone demand to Ms. Roberts-Tetford, but he also acknowledged that he spoke with Jarvis the same day and wasn't sure what triggered the payment.

[19] Mr. Burn, on GE's behalf, testified that he contacted Ms. Roberts-Tetford concerning the Loan's delinquency during July of 2004. He advised that he spoke by telephone, and that the person he called attributed the delay in payments to waiting for an insurance payment due to the Defendants' group of companies. Mr. Burn indicated he assumed that he had spoken to Ms. Roberts-Tetford, because the person he talked with knew the Loan scenario, he reached her at the number provided for Ms. Roberts-Tetford, and that payment followed.

[20] I find that GE presented a *prima facie* case to support recovery against Roberts-Tetford and Coachlines pursuant to guarantees. I do not agree with the Defendant's submission that there were "red flags" which should have alerted the Plaintiff to potential flaws in its security. Jarvis was the "on sight" person in Nova Scotia dealing with GE, and he purported to have signing authority for Coachlines. Ms. Roberts-Tetford was president of Vacations and Coachlines, and GE received what appeared to be a personal guarantee of Vacations' debt signed by her, and returned by fax promptly after GE sent it to her in Montreal.

[21] The Defendants suggest that GE was sloppy in processing the Loan and arranging documentation. However, I do not find that GE was lax when it followed what Mr. Rutherford described as its usual practice, or that there was any reason for GE to be concerned with respect to the identity or authority of persons purporting to sign the Coachlines or Roberts-Tetford's Guarantees. GE took reasonable steps to obtain security documentation, but that, of course, is not the end of the matter, and I will consider the defences advanced later in these reasons.

[22] I note at this stage, however, that the disputes upon which this litigation is based might not have arisen if GE had followed a lender's preferred practice when advancing substantial loans. In my experience, it is not unusual for lenders to

require legal opinions with respect to authenticity of signatures and validity and enforceability of security documentation from solicitors representing borrowers and guarantors. The Commitment Letter did not require any such certificates or opinions in this case, and while their absence is certainly not fatal to the Plaintiff's claim, the problems which have arisen demonstrate the efficacy of the practice which is often followed, notwithstanding that borrowers and guarantors may complain about the burden and legal fees associated with such requirements.

[23] The issues to be determined in this case - Roberts-Tetford's and Coachlines' liability - will be resolved upon determination whether those Defendants executed the relevant documentation with sufficient understanding of the commitments being made, and authority to bind, and, if so, whether their obligation should be relieved based upon GE's subsequent dealings with Vacations and the buses secured.

DEFENCE EVIDENCE

[24] Jarvis Roberts died in 2006, and the evidence on behalf of the Defendants was provided by Ms. Roberts-Tetford, supplemented by brief testimony from her son Jason Roberts denying that he witnessed his mother signing the Acknowledgment, and concerning the execution of a guarantee in favour of GE dated August 5, 2005 in connection with a different transaction involving Coachlines as principal debtor.

[25] Ms. Roberts-Tetford testified at length and was cross examined in detail. Counsel urged me to make vastly differing assessments of her evidence. Defence counsel portray her as elderly, unsophisticated, confused, grieving for her son whom they suggest duped her, and honest. Plaintiff's counsel, on the other hand, characterizes Ms. Roberts-Tetford as an experienced and astute businesswoman who understood what she was doing, who made a conscious decision to delegate the Nova Scotia aspect of the family bus business to and rely upon Jarvis; and who did not provide truthful evidence.

[26] Ms. Roberts-Tetford's direct examination shows that she completed grade nine in school and has no formal business education. She worked in the family grocery and dry goods business, including supervising staff and ordering inventory, from approximately 1960 until 1995. After the death of her husband, businessman Dorman Roberts, she sold the retail business in 1995, and in 1996

purchased Coachlines. Ms. Roberts-Tetford emphasized in her testimony that “she” and not “we” purchased Coachlines, which was a limited Newfoundland company that operated trans-Newfoundland bus service and later expanded into tour and charter activities. Ms. Roberts-Tetford testified that she ran Coachlines, including looking after its office and financial affairs, with her son Jason being involved in day-to-day operations and another son Jefferson looking after vehicle maintenance. Ms. Roberts-Tetford continues to own Coachlines. Jarvis moved to Nova Scotia in 2000, and thereafter he was no longer involved in any Coachlines operation in Newfoundland; he took over a small Coachlines operation between Halifax and Yarmouth, and was primarily involved operating Vacations in Nova Scotia.

[27] Ms. Roberts-Tetford was also president of Vacations, a Newfoundland incorporated company whose operation was confined to Nova Scotia and according to her testimony, was managed by Jarvis without her input.

[28] Ms. Roberts-Tetford claims to be of modest means and denied preparing or providing financial information for GE in connection with the Loan. On direct examination she denied involvement with the Nova Scotia operations of either Vacations or Coachlines, and denied participation obtaining the GE Loan, but acknowledged that she was aware of the school bus business in Nova Scotia and understood that the Loan was to finance purchase of school buses to be operated by Vacations under Jarvis’ direction. Ms. Roberts-Tetford acknowledged that Vacations was “her” company and that there was a family-operated business, but she denied any personal involvement in Vacations’ school bus business.

[29] Ms. Roberts-Tetford also took the position that Jarvis acted without her authority in Nova Scotia in February 2003 when he purported to do things on behalf of Coachlines.

[30] During direct testimony at trial, she advised that she signed the Roberts-Tetford Guarantee (Exhibit Book, Tab 8) in Montreal during February, 2003. Her version of the signing at trial was that while she was visiting in Montreal, Jarvis advised her he was faxing important documents which he instructed her to sign and put on a flight to Halifax. She maintained that she did not read the guarantee, but signed and took it from her daughter’s office in Laval to the airport. She testified that Jarvis did not tell her what the document was, only that it was something that had to be signed for GE. Ms. Roberts-Tetford indicated

that she didn't think there was any need to read it, and although she acknowledged her signature at the end, she denied initialing the previous pages. She testified that she did not give any thought to what she was committing to when she signed, and could not recall if she received complete documents or just the signature pages. She indicated that she "just thought if it was so important for GE she should sign.." and she indicated she had "dealt with them before."

[31] Ms. Roberts-Tetford disavowed any knowledge of the Coachlines Guarantee and testified that she did not authorize Jarvis to sign it. During direct testimony, she minimized her knowledge of sales of Vacations buses in 2005 and 2006. Except for acknowledging her signature on the Roberts-Tetford Guarantee, the thrust of Ms. Roberts-Tetford's direct testimony was to deny that she signed any other documents, and to deny giving Jarvis any authority to act on Coachlines' behalf; she claimed no knowledge of Coachlines' activities in Nova Scotia or of what Vacations was doing in Nova Scotia. She specifically denied signing the First Supplementary Agreement (Exhibit 1 Tab 11); or the Second Supplementary Agreement (Exhibit 1 Tab 13), or authorizing Jarvis to sign them on Coachlines' behalf.

[32] Ms. Roberts-Tetford also denied signing the Acknowledgment (Exhibit 1 Tab 15), and disavowed agreeing to guarantee payment of \$633,514.44 plus \$2,000.00 by Vacations. She similarly denied authorizing anyone to commit Coachlines to guarantee that amount, and claimed not to have authorized anyone to execute the Acknowledgment on Coachlines' behalf.

[33] Ms. Roberts-Tetford was cross examined at length and in detail. She acknowledged that she read and accepted the pre-trial brief filed by counsel on her behalf, including the assertion in paragraph 20 that she hadn't signed any security documents; she also re-affirmed her direct evidence that she had signed the Roberts-Tetford Guarantee, and admitted that the statement in paragraph 20 of the pre-trial brief must have been a falsehood or a mistake. During cross examination she maintained that her evidence on direct at trial was correct - that the only security document she signed in connection with the Loan was the Roberts-Tetford Guarantee.

[34] Cross examination disclosed many inconsistencies between her direct evidence at trial and her testimony on previous occasions. She admitted that during the Summary Judgment Hearing she had acknowledged signing each of the

Supplementary Loan Agreements, but maintained during cross examination at trial that she hadn't signed them as she had previously testified, but had been confused during the Summary Judgment Hearing. When pressed further, she acknowledged that she had sworn an affidavit on July 17, 2006, supplemental affidavit on July 18, 2006 and second supplemental affidavit July 21, 2006. Those affidavits were filed prior to the Summary Judgment Hearing, where Ms. Roberts-Tetford was cross examined during August, 2006. At that hearing she was shown and acknowledged the signing of documents which she denied executing at trial - including the First Supplemental Agreement and Second Supplemental Agreement. At the Summary Judgment Hearing, she testified that she received and signed only the last page of those documents from Jarvis and signed them at his request. She testified that she did not read the pages she signed or ask to see the prior pages of the documents, and never had any need to question what Jarvis asked her to sign. She indicated she could have spoken to Jarvis before signing, but trusted him and released the documents she signed for GE. At trial Ms. Roberts-Tetford said during cross examination that she was confused when she testified in 2006 that she had received and signed the final pages of the First and Second Supplemental Loan Agreements.

[35] Her evidence was also contradictory as to whether she signed a borrowing resolution for Vacations - at the Summary Judgment Hearing she testified that she executed the document; she denied signing it during the trial - in both her testimony at the Summary Judgment Hearing and paragraph 19 of her affidavit sworn July 17, 2006, Ms. Roberts-Tetford indicated she was faxed only the last page of documents by Jarvis, which she signed and returned. Her trial evidence was contradictory - during cross examination she admitted receiving the entire Roberts-Tetford Guarantee in Montreal, but denied ever receiving any part of the other documents, including the First and Second Supplemental Agreements and the Vacations resolution. During cross examination, however, she also acknowledged signing in Montreal a consent to release personal information (Tab 25 Sub-tab 11) (which was witnessed by Roxanne Roberts), but denied receiving or executing other documentation which bore similar fax transit stamps to the Roberts-Tetford Guarantee and Consent to release, such as Vacations borrowing resolution (Exhibit 1 Tab 4) and personal financial statement.

[36] The net result of Ms. Roberts-Tetford's testimony is that she admitted signing various documents both during the Summary Judgment Application and in affidavits, maintaining however that she only saw the last page. Her evidence at trial differed, and she denied seeing or signing any documents except those on

which her signature was witnessed by her daughter Roxanne - i.e. the Roberts-Tetford Guarantee and Consent to Release Financial Information.

[37] Ms. Roberts-Tetford testified at trial that when she signed the document in Montreal she didn't know it made her personally liable. At the Summary Judgment Hearing she testified when asked:

Did you understand what you were guaranteeing was repayment of the loan?

She answered:

I certainly did.

[38] Ms. Roberts-Tetford distanced herself from Vacations during direct examination, but admitted on cross examination when shown corporate and registry documentation, that she was the company's incorporator, director and registered agent in Newfoundland. She acknowledged being president of Vacations, and admitted that when the company was incorporated in 1998 she signed documentation describing herself as "owner."

[39] Ms. Roberts-Tetford maintained at trial that there was very minimal connection between Coachlines and Vacations, with Jarvis running Vacations, according to her, independently in Nova Scotia. However, she acknowledged that she testified by affidavit in 2006 that Vacations from time to time leased buses from Coachlines and that on occasion Coachlines acted as guarantor for Vacations.

[40] Ms. Roberts-Tetford acknowledged that with her permission, Jarvis applied under Coachlines name for URB Motor Transport licenses in Nova Scotia. She advised that she left all paperwork in every respect concerning Nova Scotia operations of both Vacations and Coachlines to Jarvis. She testified that as with URB documents, she didn't review documentation with GE or read the documents, just trusting Jarvis and taking his word. She stated that Jarvis was acting on his own in Nova Scotia and that she didn't go against him, but that she "should have a good many times."

[41] Ms. Roberts-Tetford admitted during cross examination that she knew that Jarvis was obtaining the Loan to finance school buses in order to fulfil a transportation contract. She confirmed that in 2004 she was still an officer and

director of Vacations and probably received the company's financial statements, but didn't read them. She confirmed that according to Registry of Joint Stock Companies documentation required in 2006, she continued to be Director and President of Vacations and that the records showed Jarvis to be its "general manager."

[42] Ms. Roberts-Tetford's testimony at trial also differed from her summary judgment evidence concerning a lease agreement for two buses between Coachlines and GE in 2000. At trial she testified she did not sign it; in her supplementary affidavit and at the Summary Judgment Hearing she said otherwise.

[43] During cross examination Ms. Roberts-Tetford testified that she owns Coachlines, and that she also owned other companies including Travel Travel Inc., Triton Ocean Products Limited and Dorman Roberts Limited.

[44] She acknowledged that Coachlines and Vacations fleets had common insurance policy coverage, but maintained the fleets were otherwise separately operated.

[45] During cross examination, I noted that Ms. Roberts-Tetford was often reluctant to look at documents before maintaining a denial that she signed everything except the Roberts-Tetford Guarantee and Authority to Release Financial Information (which were witnessed by her daughter) and on occasion had to be instructed to look at the signature on the pages on other documents before giving evidence.

[46] Although she maintained during direct examination that she had no involvement in or knowledge of Vacations' activities in Nova Scotia, during cross examination Ms. Roberts-Tetford acknowledged being part of the decision to purchase and finance Vacations' school buses and the assessing of their likely value after five years to determine whether the GE loan could be paid off. She stated on cross examination that she "did the math", noted that she was "a prudent woman", and said with Jarvis' help they decided to purchase the buses. The evidence indicated she participated in the assessment which considered financing for the buses, and was involved in the decision making for Vacations Nova Scotia business. When Vacations lost the school bus contract in November of 2005, she realized there were problems with the operations of Vacations in Nova Scotia and she contacted counsel.

JASON ROBERTS' TESTIMONY

[47] Jason Roberts testified briefly on the Defendant's behalf; his evidence confirmed that anything of significance concerning Coachlines' operation in Newfoundland is discussed with Ms. Roberts-Tetford. He acknowledged on cross examination that Jarvis was general manager of Vacations in Nova Scotia, and also general manager of Coachlines in Nova Scotia from March 2000 onward until his death in November 2006. Jason Roberts confirmed that Jarvis was responsible for all Nova Scotia operations, he testified that Jarvis was the contact person for insurance purposes for both Coachlines and Vacations in Nova Scotia and was responsible for the daily operations of both companies in Nova Scotia although there was little to do for Coachlines. Jason Roberts also testified that he did not witness a guarantee by Roberts-Tetford of Coachlines Liability to GE in 2005 (Exhibit 1 Tab 12) and he said the signature on that document was not hers (that guarantee is not a document at issue in this case). He also stated that he did not witness Ms. Roberts-Tetford's signature on the Acknowledgment.

EVIDENCE EVALUATION

[48] I have carefully considered the whole of Ms. Roberts-Tetford's evidence, and the testimony of Jason Roberts. I had the opportunity to observe Ms. Roberts-Tetford on the witness stand for a long time.

[49] I have concluded that Ms. Roberts-Tetford is much closer to the experienced, astute businesswoman portrayed by Plaintiff's counsel than the elderly, unsophisticated, confused and grieving mother described by Defence counsel.

[50] I did not find Ms. Roberts-Tetford to be a credible witness. Her testimony at trial repeatedly contradicted the contents of three affidavits which she swore in 2006, and the evidence she provided orally at a Summary Judgment Hearing before another judge of this court. The thrust of Ms. Roberts-Tetford's testimony concerning documentation related to the Loan was to deny, often with reluctance to look at the document, reading or executing anything other than the two pages upon which her daughter, Roxanne witnessed her signature in Montreal during February, 2003 - (the Roberts-Tetford Guarantee and the Authorization to Release Financial Information). Ms. Roberts-Tetford understood the questions she was asked at trial, and she gave the impression when answering that she was trying to avoid the liability which she appreciated would ensue if she were found to have signed the documents with knowledge of their contents. When confronted with clear contradictions in her testimony on previous occasions, she claimed to have been confused at that earlier time, notwithstanding that the affidavits were prepared by her counsel, and that the transcript of oral testimony at the Summary Judgment Hearing, where she was accompanied by counsel, displayed an understanding of questions asked and responses which were not qualified.

[51] I have no confidence in Ms. Roberts-Tetford's evidence.

[52] The thrust of her testimony was to paint her late son Jarvis as the person solely responsible for any liability to GE, suggesting that he was embarking on a frolic of his own with Vacations in Nova Scotia. She attempted to deny or minimize in every way her knowledge or involvement in that company's affairs, as well as Jarvis' association with Coachlines, on whose behalf he executed the

Coachlines Guarantee, which she portrayed as happening without corporate authority.

[53] Ms. Roberts-Tetford gave me the impression that between 2000 and 2006, including during while the GE Loan and security documents were in play, Ms. Roberts-Tetford as matriarch of a family transportation business allowed Javis to act with substantial autonomy in Nova Scotia without significant supervision of his activities, despite his working through Vacations and Coachlines, companies which she owned and of which she was president. Ms. Roberts-Tetford trusted Javis, and she relied upon him to operate the businesses in Nova Scotia, including dealing with GE. She was prepared to follow his advice and direction, execute any document he requested or advised that a lender required her to sign, and she did not question his motive or judgment. When the Nova Scotia operation collapsed financially, Ms. Roberts-Tetford had been placed at risk as a result of her delegation of authority to Javis and reliance upon him. As a witness, she gave the impression that she believed that she had been well motivated in allowing Javis to act independently and in placing her reliance upon him. She was trying to avoid being punished financially for not monitoring the Nova Scotia operation more closely and not taking care with respect to the guarantee she provided, when her intention was simply to help the Nova Scotia business and her son succeed and not to leave a creditor unpaid. My impression, after observing her carefully as a witness, is that because she has concluded that she did nothing wrong (except perhaps to misplace trust in her son to run a business and provide her with honest reports and advice), she should not suffer financially. Having made that judgement, she gave such answers as she felt were appropriate to protect her position, as she feels any wrongdoing was Javis' and not hers.

[54] It is not, however, for Ms. Roberts-Tetford to decide whether GE should be entitled to recover from her or from Coachlines; that must be determined by the Court based upon testimony and documentary evidence, and application of the legal principles, which were ably canvassed by counsel.

[55] I will proceed to assess the evidence to determine whether the Plaintiff is entitled to recover against Ms. Roberts-Tetford and Coachlines. Although I have expressed very serious concern about Ms. Roberts-Tetford's credibility, the Plaintiff is entitled to judgment only if she executed a guarantee in circumstances which were not unconscionable, if Javis had authority to sign documentation on

Coachlines' behalf, and if guarantors are not prejudiced by GE's dealings with the principal debtor Vacations or with security.

LIABILITY OF MS. ROBERTS-TETFORD - WAS A VALID GUARANTEE PROVIDED?

[56] I have previously noted that the Plaintiff's evidence establishes that GE obtained guarantee documentation, purportedly executed by Roberts-Tetford and Coachlines. I am satisfied based on the documents showing fax transmittal information and the oral evidence that the entire Roberts-Tetford Guarantee was transmitted to Montreal and that she received the whole document. I also find, based on the transmittal letter, that it was sent to her directly by GE, and not by Jarvis, and that she was not pressured to sign immediately or under duress; indeed, she was invited to contact GE if she had any questions. I disagree with the Defendant's submission that the law saves Ms. Roberts-Tetford from liability because she did not enjoy similar bargaining power to GE. She was an experienced businesswoman who testified that she "certainly" knew she was guaranteeing repayment of the Loan, a loan which she participated in deciding Vacations should obtain in order to purchase the school buses. I disagree with the Defendant's position that she had no interest or benefit to obtain from the loan - Vacations, Coachlines, and other entities were part of a family business group owned by Ms. Roberts-Tetford, and she stood to gain or lose depending on the success or failure of any branch of the business, including Vacations, notwithstanding she may not have been receiving revenue from the company during the period the loan was outstanding. Unlike in the various authorities referenced by the Defendant - **Lloyd's Bank, Limited v. Bundy** [1974] 3 All E.R. 757, as well as **Chaplin & Co., Limited v. Brammall** [1908] 1 K.B. 233 (C.A.) and **E.& R. Distributors v. Atlas Drywall Ltd.** [1980] B.C.J. No. 1213 (C.A.) and others in the supplementary authority booklet, Ms. Roberts-Tetford was the head of the business, the person who had operated the family business affairs for several years after Dorman Roberts' death, and was not a naive parent duped by business-wise offspring. Ms. Roberts-Tetford was capable of appreciating what she was signing, or of seeking advice if she deemed it appropriate to do so - her level of sophistication was far higher than that of the guarantors referred to in the authorities cited by the Defendants. The guarantee she was signing was her support for a business operated by Jarvis in Nova Scotia; she was owner, president and director of the Company running that business, and could

have asserted her authority in that regard with respect to Vacations. Those circumstances do not connote inequality of bargaining power with GE.

[57] I reject the Defendant's position that Jarvis was GE's agent, an assertion not supported by the facts of this case. Ms. Roberts-Tetford signed a guarantee sent by GE directly to her. Because she signed what Jarvis asked her to execute in order to obtain a loan for a company she owned does not suggest Jarvis was the lender's agent, or that GE did anything which should interfere with its right to enforce the guarantee. Ms. Roberts-Tetford was a principal of the borrower, she operated related companies and was an experienced businesswoman. It is not open to her to plead the type of ignorance which led the courts to protect parties in cases such as **E. & R. v. Atlas** (*supra*). She chose to let her son run a branch of a business and relied upon him. That she trusted him too much and that he may have misled her is not GE's responsibility and is not a factor which should interfere with enforcement of its security.

[58] Ms. Roberts-Tetford established the corporate business structure, knew Vacations was borrowing from GE, and chose to delegate judging the appropriateness of loan arrangements and her exposure to Jarvis. Any pressure that she may have received was from her son whom she trusted to conduct the business, and not from GE. Ms. Roberts-Tetford could have requested time to seek independent legal advice; she chose not to do so. She was not at a "manifest disadvantage" as in **Geffen v. Goodman Estate** [1991] 2 S.C.R. 353 and the onus on the lender who was dealing with Jarvis who apparently had authority, was to do no more than provide the guarantee to her, and offer to respond to inquiries, which it did. In this case, Jarvis received the authority to operate a business in Nova Scotia from Ms. Roberts-Tetford - she was not a bystander or a non-participant, but rather a principal who chose, to her regret, to allow Jarvis to run the Nova Scotia operation, and she relied on him to advise what she should sign.

[59] In concluding that Ms. Roberts-Tetford executed a guarantee in circumstances which were not unconscionable, I also rely upon and accept the following submissions made by the Plaintiff.

- Ms. Roberts-Tetford's lack of credibility, evidenced by the variation in her version of events expressed in affidavits, during testimony at Summary Judgment, in adopting the statements in a pre-trial brief on her behalf, and

during testimony at trial, display a desire to withhold any information from the Court which she expects would hurt her position.

- Different explanations mask the true version of events.
- Roberts-Tetford incorporated and was owner and director of Vacations and participated in the decision to borrow money from GE to purchase buses. She made informed decisions and was aware of Vacations' loan relationship with GE, and knew what she was signing.
- Raising a forgery issue just before trial after completing pleadings, affidavits and Summary Judgment's Application without reference to forgery, and only when Jarvis is no longer in a position to respond, suggests manufacturing a defence to avoid liability.
- A defendant can't claim *non est factum* or unconscionability if she voluntarily chooses not to read documentation which she signs.
- Ms. Roberts-Tetford was a director of Vacations, an owner, and was also a principal of Coachlines which was a creditor of Vacations. She was not an accommodation surety.

[60] I am satisfied that Ms. Roberts-Tetford executed a guarantee in favour of GE on February 11, 2003, that it was signed under circumstances which were not unconscionable, that she knew what she was signing, and could have sought professional advice or questioned the lender if she had chosen to do so, instead of delegating judgement to her son and relying on him. The Roberts-Tetford Guarantee is valid, binding and enforceable unless some activity by GE after execution prejudiced Ms. Roberts-Tetford.

IS THE COACHLINES GUARANTEE PROPERLY EXECUTED AND ENFORCEABLE?

[61] This depends on Jarvis' authority.

[62] At trial Ms. Roberts-Tetford denied knowing that Jarvis advised people he was secretary of Coachlines. That statement was contrary to her testimony at the Summary Judgment Hearing (Exhibit 3 p.50) where she said, "Sure," when asked

whether she was aware Jarvis had communicated with people identifying himself as secretary of Coachlines.

[63] At trial Ms. Roberts-Tetford testified that she did not know whether Jarvis made URB applications in Nova Scotia under Coachlines, but in her affidavit filed during the Summary Judgment Motion at para.12 she testified she allowed licenses for Vacations to be obtained in the name of Coachlines. During oral evidence at the Summary Judgment Hearing, she also acknowledged that Vacations was able to license its buses in Nova Scotia under the name of Coachlines with her permission (p.26-27 Transcript S.J.).

[64] She also testified at the Summary Judgment hearing that she was aware Jarvis communicated with people identifying himself as secretary of Coachlines, and she never objected to that or told people that he was not secretary.

[65] I reject the Defendant's submission that Jarvis was not authorized to enter the Coachlines Guarantee. Jarvis had authority to bind Coachlines, and he did so. Ms. Roberts-Tetford knew that Jarvis was dealing with GE on behalf of companies which she owned, and made no objection. She was aware that Jarvis was using Coachlines to obtain licenses to operate Vacations buses in Nova Scotia and that she was playing no role in Coachlines Nova Scotia activities. Jarvis did more than sign Coachlines' documents for the URB. Ms. Roberts-Tetford knowingly allowed Jarvis to do all Coachlines' work and activity in Nova Scotia - while the work was not as extensive as in Newfoundland or as Vacations' activities in Nova Scotia, Ms. Roberts-Tetford clearly allowed him to pursue those activities as Coachlines' representative, and indeed as the company's named general manager. There was a complete release of responsibility for Coachlines Nova Scotia activities to Jarvis, which indicates he had actual authority to act as its agent. Accordingly, GE was justified in dealing with Jarvis as Coachlines' representative. As the only officer, shareholder, director and President of Coachlines, Ms. Roberts-Tetford nominated him to be general manager, allowed full authority for Nova Scotia operations to rest with him and he was held out as the face of the company in Nova Scotia.

[66] Even if Jarvis did not have actual authority, I find that he had ostensible authority, and any reasonable person doing business with Coachlines would assume in Nova Scotia that his authority as agent was unrestricted.

[67] Furthermore, Coachlines and Ms. Roberts-Tetford ratified the Coachlines' activities undertaken by Jarvis in Nova Scotia. Coachlines accepted benefit from Jarvis' activities on its behalf, including being established as a creditor with respect to licenses obtained in Coachlines' name for Vacations.

[68] I reject Ms. Roberts-Tetford's assertion that she was not aware of Coachlines providing a guarantee to GE; in affidavits filed for the Summary Judgment Application, Ms. Roberts-Tetford acknowledged that Coachlines acted as guarantor for Vacations (see initial affidavit, paragraph 13 and supplemental affidavit, paragraph 5). Ms. Roberts-Tetford was aware of Coachlines' activity guaranteeing Vacations' liability, and ratified it.

[69] I find that Jarvis had the necessary authority to provide the Coachlines' Guarantee and that is valid and enforceable by GE.

DID GE DEAL WITH THE PRINCIPAL DEBTOR OR THE SECURITY IN A MANNER WHICH RELIEVED GUARANTORS ROBERTS-TETFORD OR COACHLINES OF LIABILITY?

[70] The Defendants suggest that GE changed the terms of the guarantee by selling the underlying security, the buses, without guarantor's awareness. In this context, the Defendants suggest Roberts-Tetford and Coachlines were accommodation sureties.

[71] I reject the Defendants' position on this issue. It is premised to a substantial extent on Ms. Roberts-Tetford's not executing the First and Second Supplemental Agreements and the Acknowledgment. I conclude that she executed both Supplemental Agreements - she admitted doing so in affidavits and oral testimony at the Summary Judgment stage, and I do not believe her denial at trial. The Defendants offered no expert evidence in support of their position that Ms. Roberts-Tetford's signature on these or any other documents was forged. I have rejected her assertion that she was confused at the Summary Judgment stage - the relevant affidavits were drafted by her counsel who was present during her cross examination and no objection was taken after the hearing to the accuracy of the transcript where her executing the documents was reported. While there is no direct testimony respecting her execution of the Acknowledgment, the document shows a signature above the printing of her name (Exhibit 1 Tab 15, last page).

Aside from Ms. Roberts-Tetford's persistent denial that she signed documents, which I reject, there is no reliable evidence that the signature on the Acknowledgment is not hers. That Jason Roberts denies he witnessed the signature is inconclusive, and no expert evidence suggests her signature was forged.

[72] I find that Ms. Roberts-Tetford executed the two Supplemental Agreements and the Acknowledgment, but in any event, even without those signings, GE would not be denied enforcement of its security. Roberts-Tetford and Coachlines are not accommodation sureties - they were entities related to Vacations who stood to benefit from Vacations borrowing money to acquire the school buses for operation in Nova Scotia. Coachlines' licenses were used and a debt was shown on company records as owing to Coachlines. Roberts-Tetford participated in the business decision to borrow the money and acquire the buses and was owner, officer and director of Vacations, which owned them.

[73] The evidence also indicated that Ms. Roberts-Tetford was aware when buses were sold; indeed, she was still the owner, president and director of the company when they were sold. This is not a situation where a creditor - GE - or a principal debtor disposed of a secured asset without a guarantor's knowledge; rather the principal debtor, owned by the guarantor Roberts-Tetford and managed by Jarvis, who also managed Coachlines in Nova Scotia, chose to sell an asset with approval of the creditor, GE.

[74] Nothing suggests that the sale of the buses was contrary to contractual arrangements, that the sale happened without Ms. Roberts-Tetford's knowledge, or that she was prejudiced by it.

[75] I reject the suggestion documents were forged - they were disclosed and are deemed under *Rule 20.03(1)* of *Nova Scotia Civil Procedure Rules (1972)*, which was in effect at the time of disclosure, to be authentic documents signed or executed as purported. No objection was made by notice pursuant to *Rule 20.03(1)* denying their authenticity, and no expert evidence was presented to that effect at trial. (Note: Plaintiff's list of documents filed February 23, 2007 contains Supplemental Agreements at #'s 14 and 16, and Acknowledgment and Agreement at #18.)

[76] I find that Ms. Roberts-Tetford executed not only the two Supplemental Agreements, but also the Acknowledgment . A page bearing her signature was an exhibit at trial, and forms part of Exhibit ‘F’ to the Affidavit of Bruce Rutherford in August 2006 in connection with the Summary Judgment Motion.

[77] I am accordingly satisfied that the documentation binds Ms. Roberts-Tetford to the changes to security arrangements and that her guarantee continues in accordance with the terms of the Acknowledgment.

[78] Alternatively, I am satisfied that the “No Release” clause, (Exhibit 1 Tab 8, paragraph 4.1), and the **Manulife Bank of Canada v. Conlin** [1996] 3 S.C.R. 415 decision recognize that a specific provision to continue the guarantee may be enforceable, and find the obligation continues in this case.

[79] Ms. Roberts-Tetford was not prejudiced by GE’s dealings with the principal debtor Vacations, or with the security. Similarly, Coachlines was aware and involved with developments respecting sale of the buses and Supplemental Agreements and Acknowledgments, as indicated by Jason’s signature, and Coachlines was similarly not prejudiced.

[80] Accordingly, the Roberts-Tetford and Coachlines’ Guarantees are valid and enforceable and judgment will be entered in favour of GE against those Defendants for the following amounts:

Balance of Loan owing \$633,511.70

Special Damages \$2,000.00

Following discussion, counsel agreed that interest on damages and special damages totals \$174,861.37 to November 25, 2009. Accordingly GE shall have judgment against Roberts-Tetford and Coachlines for \$810,373.07, inclusive of interest to November 25, 2009.

[81] If the parties are unable to agree with respect to costs and disbursements, written submissions may be provided within 60 days. In the meantime, an Order reflecting the decision given today may be taken out in accordance with the

provisions of *Rule 78*, with the matter of costs reserved for future determination by me.

J.