Judgment
B065/C

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1999/B065

BETWEEN	**BALLENA INVESTMENTS LIMITED**	**PLAINTIFF**
AND	**VINCENT A. CHEN**	**1ST DEFENDANT**
AND	**RONNIE CHIN LOY**	**2ND DEFENDANT**

Mr. Abe Dabdoub instructed by Messrs. Clough, Long & Co. for the plaintiff

Mr. David Batts instructed by Messrs. Livingston, Alexander & Levy for the 1st defendant

Heard: 14th June, 2001, 19th June, 2001, 21st June, 2001, 23rd June, 2001 and 18th January 2002

McCalla, J.

This is an application by the plaintiff for leave to enter summary judgment against the first defendant pursuant to section 79 of the Judicature (Civil Procedure Code) Act. Also, the first defendant seeks an order against the plaintiff for security for costs. Both summonses were heard together. I now set out hereunder the circumstances in which these summonses have been brought and in so doing rehearse in some detail the relevant pleadings in the matter.

The plaintiff in this action is a company registered under the laws of the Cayman Islands with registered office situated in Grand Cayman,

Cayman Islands, British West Indies. The first defendant is an Attorney-at-Law and was at all material times Chairman and Director of J.H.G. Mapp (Successors) Limited, a Jamaican company. The second defendant is a businessman who was at all material times the managing director of J.H.G. Mapp (Successors) Limited. The plaintiff's claim arises under a promissory note dated 24th July 1998, whereby the first and second defendants guaranteed a loan of US$350,000.00 to J.H.G. Mapp (Successors) Limited. The promissory note was in the following terms:-

PROMISSORY NOTE

US$350,000.00 24TH JULY 1998

WE, J.H.G. MAPP (SUCCESSORS) LIMITED DO HEREBY PROMISE TO BALLENA INVESTMENT LIMITED THE SUM OF THREE HUNDRED AND FIFTY THOUSAND UNITED STATES DOLLARS (US$350,000.00) AFTER SIX MONTHS WITH INTEREST THEREON AT A RATE OF TWENTY PERCENT (20%) PER ANNUM TO BE PAID ON THE 24TH AUGUST, 24TH SEPTEMBER, 23RD OCTOBER, 23RD NOVEMBER, 24TH DECEMBER, AND 24TH JANUARY 1999 RESPECTIVELY, PAYABLE IN UNITED STATES DOLLARS.

VALUE RECEIVED

J.H.G. MAPP (SUCCESSORS) LIMITED

.....
sgd. Ronnie Chin Loy

.....
sgd. Vincent A. Chen

PAYMENT GUARANTEED

.....
Sgd. Ronnie Chinloy

.....
Sgd. Vincent A. Chen

J.H.G. Mapp (Successors) Ltd. made several payments beginning in August 1998. The sum of US$50,000.00 was paid on August 18, 1998, US$50,000.00 on September 18, 1998, US$50,000.00 on October 18, 1998 and US$12,688 in December 1998.

By a specially endorsed Writ of Summons issued on 12th March, 1999 the plaintiff sought to recover a balance of US$187, 312.00 with interest, which it claims the defendants refused or neglected to pay.

At paragraph 4 of the Statement of Claim the plaintiff pleads as follows:

> "A Promissory Note dated the 24th day of July,1998 was issued by maker J.H.G.Mapp (Successors)Limited to the Plaintiff for valuable consideration received in the amount of three hundred and fifty thousand United States Dollars (US$350,000.00) as set out in the particulars below."

The plaintiff further avers that it has presented the promissory note to the first and second defendants for payment in their capacity as representatives of J.H.G. Mapp (Successors) Limited as well as on their own

behalf as guarantors of the note and the defendants have failed to honour the note.

Additionally, the plaintiff through its attorneys-at-law has made demands orally and in writing. Notwithstanding these demands for payment, the sum of US$187,312.00 with interest thereon remains due and owing to the plaintiff. The plaintiff further pleads that the first and second defendants have breached the guarantee made in the said promissory note and consequently it has brought this action against them as guarantors of the promissory note who are in breach of their obligations to the plaintiff in that capacity.

The first defendant's defence was filed on the 1st April 1999 and states inter alia:

Paragraph 3

> "No admission is made to paragraph 4 of the Statement of Claim. If ,which is not admitted JHG Mapp (Successors) Limited issued a Promissory Note as alleged the First Defendant says that same is null, void ,unenforceable and/or inadmissible in evidence and has not been stamped in accordance with the provisions of the Stamp Duty Act."

Paragraph 6

"The First Defendant denies that the or any Promissory Note was presented for payment as alleged in paragraph 7 of the Statement of Claim or at all."

Paragraph 7

"The First Defendant admits that he has not paid the sum of US187,312.00 to the Plaintiff as alleged in paragraph 9 of the Statement of Claim and says that such failure is not wrongful and/or unlawful."

Paragraph 8

"The First Defendant says that Mrs. Fay Tortello and a company known as Capstan Investments Limited have also made claims against J.H.G. Mapp (Successors) Limited for the sum of US$350,000.00.J.H.G. Mapp (Successors) Limited has in consequence suspended payments on the said Promissory Note until a court or other lawful tribunal determines whether it is the Plaintiff in this action, Mrs Fay Tortello or Capstan Investments Limited which is entitled thereto."

Paragraph 9

"Further or in the alternative, the First Defendant says that the Plaintiff by itself and/or through its servant or agents wrongfully repudiated the alleged or any Promissory Note in that in breach of the terms thereof the Plaintiff by its servants or agents made a demand thereon in or about August 1998."

Paragraph 10

"The First Defendant denies being a guarantor of the said Promissory Note as alleged in the Statement of Claim or at all and says that the alleged or any guarantee is unenforceable as same does not comply with the Statute of Frauds and denies the existence of the alleged or any contract of guarantee."

In its reply to the defence of the first defendant the plaintiff avers thus:

Paragraph 14

"The Defendants, who were the chairman and shareholder and managing director and shareholder respectively of J.H.G. Mapp (Successors) Limited, were also guarantors of the said Promissory Note .The Defendants are estopped by their promise made under the Promissory Note as well as by their conduct of themselves and J.H.G. Mapp (Successors) Limited by arranging and/or making payments under the Promissory Note to Ballena Investments Limited on various occasions, from denying the validity of the Promissory Note and the obligation to pay the monies under the said Promissory note."

Paragraph 18

"Not only is the Defendants' contention concerning the Promissory Note and its effect of its non-stamping without legal basis, but also by their conduct the Defendants as the Chairman and Managing Director of J.H.G. Mapp (Successors) respectively and the first defendant as an Attorney-at- Law, have confirmed, affirmed and admitted the basis and validity of the Promissory Note as stated herein."

Paragraph 19

"Further in a statement to the police made on the 17th August 1998 the first Defendant affirming what has been pleaded by the Plaintiff in this action, admitted and acknowledged that the monies were due to the Plaintiff from J.H.G. Mapp (Successors) Limited under a Promissory Note which the First Defendant and the Second Defendant guaranteed."

Paragraph 20

"In the Statement by the First Defendant to the police dated 17th August 1998, in reference inter alia to the issue concerning the Promissory Note the first defendant stated:

"I am now saying that I neither borrowed the money from Mrs. Tortella nor did I receive any money from her. Ballena Investment is the creditor of Mapp Successors to whom Mapp owes $350,000.00 to whom Mapp has been paying interest per agreement. All Promissory Notes although signed by me were prepared by J.H.G. Mapp (Successors) Limited. The last Promissory Note dated 24th July, 1998 for six months was prepared for that period... The second signing of the Promissory Note issued to Ballena in my personal capacity is a personal guarantee of Mr. Chin –Loy and myself."

Paragraph 23

"In reply to paragraph 10 of the Defence of the First Defendant the Plaintiff states that the Defendants in fact guaranteed the said repayment of the Promissory Note as a term of the note itself..."

By summons for Summary Judgment the plaintiff seeks leave to enter judgment:

1. For the sum of US$187,312.00
2. For the sum of US$14,369.14 being interest on the said sum of US$187,312.00 from the 1st January, 1999 to 20th May 1999 at the rate of 20% per annum.
3. Interest on the said sum of US$187,312.00 at the rate of 20% per annum from the 21st May, 1999 to the date of payment.

In response to the plaintiff's application for summary judgment counsel for the first defendant seeks to obtain an order that the determination of the action be stayed until the resolution of a pending criminal prosecution as it may be potentially embarrassing for the Court and prejudicial to the first defendant if the summons for summary judgment were to be heard prior to the conclusion of the criminal matter.

Affidavits by Brian Wight and Raymond Anthony Clough were filed in support of the summons for summary judgment. Mr. Wight is the director of the plaintiff company, and it is necessary to set out the relevant paragraphs of his affidavit which are as follows:

"6. A promissory note dated the 24th day of July 1998, was issued by maker J.H.G. Mapp (Successors) Limited to the Plaintiff for valuable consideration received in the amount of Three Hundred and Fifty Thousand United States Dollars (US$350,000.00).

7. The First and Second Defendants as set out in the Promissory Note itself guaranteed the due performance of the said Promissory Note issued by the maker J.H.G. Mapp (Successors) Limited.

8. The said Promissory Note matured on the 25th day of January, 1999, and then J.H.G. Mapp (Successors) Limited paid the amount of US$162,688.00 being US$50,000.00 on August 18th 1998, $50,000.00 on September 18th 1998, US$50,000.00 on October 18th 1998, and US$12,688.00 in December 1998. The balance now due and payable to the Plaintiff is the sum of US$187,312.00 with interest, which the maker J.H.G. Mapp (Successors) Limited has refused and neglected to pay to the Plaintiff.

9. The plaintiff through its Attorneys-at-Law presented the Promissory Note for payment to the First and Second Defendants in their capacity as the representatives of J.H.G. Mapp (Successors) Limited as well as on their own behalf as guarantors of the Note, the Defendants failed to honour the Note.

10. The Plaintiff additionally had made demand through its Attorneys- at-Law orally and by letters dated the 19th August 1998, on J.H.G. Mapp (Successors) Limited and the First and Second Defendants respectively, for payment of the amount of US$187,312.00 with interest thereon.

11. Notwithstanding the Plaintiff's demands for payment, J.H.G. Mapp (Successors) Limited and the First and Second defendants have failed to pay the sum of US$187,312.00 with interest thereon as due to the Plaintiff.

12. On the above premises the First and Second Defendants breached the guarantee made with the Plaintiff in the said Promissory Note, as a term and condition of the said Note.

13. The Plaintiff consequently brings this action against the First and Second Defendants as guarantors of the said Promissory Note who are in breach of their obligation to the Plaintiff under the Note as such guarantors.

14. That the Defendants, Vincent A. Chen and Ronnie Chin Loy, are and were at the commencement of this action justly and truly indebted to the above named Plaintiff in the sum of One Hundred and Eighty-seven Thousand Three Hundred and Twelve United States Dollars (US$187,312) being the amount referred to in paragraph 6 of the Statement of Claim, being money lent to the defendants by the Plaintiff.

15. That it is within my knowledge that the said debt was incurred and is still due and owing as aforesaid.

16. That I verily believe that the Defendant has no Defence to the Plaintiff's Statement of Claim."

The supporting Affidavit of Raymond Anthony Clough, Attorney-at-Law for the plaintiff, at the undermentioned paragraphs, states:

"2. That the First Defendant is the chairman and a shareholder of J.H.G. Mapp (Successors) Limited and was the Attorney-at-Law for J.H.G. Mapp (Successors) Limited and also for the Plaintiff. The promissory note was prepared by J.H.G. Mapp (Successors) Limited and/or the Defendants and/or their Attorneys-at-Law and/or their servants or agents.

3. That the First Defendant guaranteed a loan from his own client to a company in which he was a shareholder, Director and Chairman."

"6. That the first defendant admitted in a statement to the police dated the 17th day of August 1998, that J.H.G. Mapp(Successors) Limited owed the monies to the Plaintiff and admitted that the Second Defendant and himself guaranteed the said indebtedness.

7.That the First Defendant's defence herein does not amount to a defence to the Plaintiff's claim herein.

8. That the Plaintiff is entitled to the monies under the Promissory Note as admitted to the Police by Vincent Chen himself and has every prospect of success. Contrastingly, the Defendant has little chance of succeeding and is clearly using the application for security for costs obstructively and oppressively so as to stifle a genuine claim."

Counsel for the first defendant submits that there are issues of law and fact to be resolved in this matter such as:

(1) Whether or not the promissory note was wrongfully repudiated by the plaintiff

(2) Whether the guarantee has been discharged by the repudiatory breach thereof

(3) Whether or not the promissory note has been duly presented for payment

(4) Whether the document is a guarantee.

The Affidavit of Vincent Chen and numerous authorities are relied on by counsel to fortify his submissions in resisting the plaintiff's summons. In his affidavit, Mr. Vincent Chen states inter alia:

"3. That Capstan Investments Limited of the Cayman Islands hereinafter referred to as Capstan is the complainant in a criminal charge pending in the Corporate Area Resident Magistrate's Court and set for trial on the 13th and 14th September, 1999 whereby I

have been charged jointly with Mr. Ronnie Chin Loy, Caribbean Trust Finance and Investments Limited (hereinafter referred to as CTFI) and Mapp for conspiracy and fraudulent conversion of the sum of US$350,00.00 by placing the said funds in Mapp. This sum is one and the same amount claimed by the Plaintiff in this action.

4. That by a complaint to the General Legal Council sworn to by Mrs. Fay Tortello on the 24th day of September 1998, the said Fay Tortello has alleged that your deponent has taken the sum of US$350,000.00 and invested it with Mapp without her consent and a **"so called Promissory Note dated July 24, 1998"** issued whereby monies given to Caribbean Trust Finance & Investment Limited to be invested in Jamaica Treasury notes amounting to US$350,000.00 was improperly invested in Mapp. This is one and the same amount claimed by the Plaintiff in this action.

5. That in truth and in fact at the direction of Fay Tortello, Capstan Investment Limited invested two sums; J$10,518,000.00 and a further sum of US$50,000.00 in relation to both of which a Promissory note was issued by Mapp to Capstan Investments Limited for US$350,000.00 on the 27th March, 1997, a copy of which is exhibited hereto marked "VAC-3". Mrs. Tortello well knew that this was done and confirmed it in her statement to the police in August 1998.

6. That by letter dated 5th May, 1997 from Mr. Mark Richford of Henry Ansbacher, the operators of Capstan Investments Limited to Mrs. Fay Tortello, Mr Richford advised Mrs. Tortello against placing Capstan's funds at Mapp and suggested two (2) options to her. She attended on me with the letter and asked me to communicate with Mr. Richford to arrange the option which allowed the funds to remain at Mapp.

7. I spoke to Mr. Richford and he advised me that he would allow the funds to remain at Mapp on the basis that Capstan Investments Limited would hold as nominee of Mrs. Tortello for the remainder of the ninety days under the Promissory Note "VAC-3" and

thereafter the funds would be distributed to Mrs. Fay Tortello who could lend to Ballena (the Plaintiff herein) which could then lend to Mapp.

8. This was done by the issue of a note in favour of Ballena Investments Limited (the Plaintiff herein), upon maturity of the note exhibited hereto as "VAC-3". At no time was any money or other consideration paid or given to Mapp by Ballena Investments Limited in return for the issue of the Promissory Note to Ballena.

9. At the time I gave the statement to the police in August 1998 no default had been made by Mapp under the note and Mrs. Tortello had of her own volition renewed the Promissory Notes as they fell due on several prior occasions.

10. On or about the 12th August, 1998 Mrs. Fay Tortello demanded the immediate payment of the full amount of US$350,000.00 and I wrote to her on the 12th August setting out my recollection of what had transpired. She replied by letter of the 13th August, 1998 and through her Attorneys-at-Law made further demand for payment in full by letter of the 27th August, 1998 addressed to Mapp and Mr. Ronnie Chin Loy. This was in breach of the terms of the then existing Promissory Note which would have become due and payable in January 1999.

11. At the instance of Mrs. Tortello and/or Capstan a criminal charge was brought against this deponent and inter alia Mapp in respect of the amount in dispute and several public media reports were made, the effect of which was that Mapp suffered irreparable damage to its reputation and credit, the consequence of which was that all lenders to Mapp required payment of their loans upon maturity and investors who had in the past re-invested their funds with Mapp refused to do so. As a direct consequence of Mrs. Tortello's action Mapp became unable to pay its debts and has been constrained to stop trading.

12. The premature and untimely demand by Mrs. Fay Tortello and/or Capstan and/or Ballena for payment of the principal of US$350,000.00 and the attendant adverse publicity has done financial harm to the principal debtor.

13. In the premises I am advised and do verily believe that I have a good and arguable Defence to this action in that:

(a) the action of the Plaintiff and/or Mrs. Fay Tortello has repudiated the Promissory Note and released and discharged the presentation thereof.

(b) there are contending claimants to the said sum of US$350,000.00 being the Plaintiff in this action and Mrs. Fay Tortello and/or Capstan in the Criminal Court.

(c) that the purported guarantee is not in law an enforceable guarantee there being no consideration therefor and the same having been repudiated as aforesaid.

(d) that in light of the pending criminal proceedings arising out of the same factual situation these proceedings ought to be stayed pending final determination of the criminal proceedings.

Summons for Summary Judgment

Sections 79-86 of the **Judicature (Civil Procedure Code) Act** of Jamaica govern applications for summary judgements and it is necessary to determine whether the procedural requirements for the hearing of the summons have been met.

Section 79(1) provides:

> "Where the defendant appears to a Writ of Summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law the plaintiff may on affidavit made by himself or any other person who can swear positively to the facts, verifying the cause of action and stating that in his belief there is no defence to the action except as to the amount of damages claimed, if any, apply to a judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge, thereupon, unless the defendant satisfies him that he has a good

> defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

According to Professor Kodilinye in his work, *Commonwealth Caribbean Civil Procedure*, at page 141:

> "Summary judgment procedure is appropriate for obtaining judgment against a defendant who has no arguable defence to a claim included in the writ, notwithstanding that a defence may have been filed and served."

It has been clearly established that in instances where it is plain that the defence raised will only have the effect of delaying an inevitable judgment in the plaintiff's favour, that is, where the defendant has no chance of success, the Court ought to grant the application for summary judgment. However, Smith J.A, in ***Langer v International Transport & Earthmoving Equipment Co. Ltd.* (1983) Supreme Court Civil Appeal No. 26 of 1982**, made it abundantly clear that:

> "...where the defendant shows that he has reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to be given leave to defend."

In this case there is no dispute that the procedural requirements have been complied with. The court must therefore make a determination as to whether or not the defendant has satisfied the court that he has a good defence on its merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally.

The case of ***SL Sethia Liners Ltd. v State Trading Corporation of India Ltd.*** **[1986] 2 All E.R. 396** establishes that:

> "...if the court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it give will leave to defend..."

Counsel for the first defendant has submitted that the issue of whether or not the promissory note was wrongfully repudiated is one of mixed law and fact and the matter ought to proceed to trial.

On the issue of questions of law being raised in summary judgement applications, Parker LJ in the case of **Home and Overseas Co. Ltd. v Motor Insurance Co (UK) Ltd.** ***[1989] 3 All E.R. 74*** *states inter alia, as follows:*

> "If a defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived, the plaintiff is entitled to judgment. If at first sight the point appears to be arguable, but with a relatively short argument can be shown to be plainly unsustainable, the plaintiff is also entitled to judgment...If the point of law relied on by the defendant raises a serious question to be tried which calls for detailed argument and mature consideration, the point is not suitable to be dealt with in Order 14 proceedings." [Emphasis supplied]

However, in recent times in our West Indian jurisdiction a more robust approach in relation to summary judgement proceedings was considered to be appropriate.

Sharma JA, in ***Trinidad Home Developers Ltd. v IMH Investment Ltd.*** **(1990) 39 WIR 355,** rejected the emphasized section of Parker LJ's

judgment as being unsuitable to the Trinidadian jurisdiction. In a very detailed and reasoned decision, Sharma JA carefully reviewed the authorities with a view to answering what he considered was a *"most important question"* namely:

> ***"...should we in this jurisdiction follow the practice in the English jurisdiction?"***

He went on to state that there is a substantial difference between the two jurisdictions and that in the English jurisdiction summary judgment *"retains for practical purposes its original objective...that is not, however, the position in our jurisdiction."* He stated further that:

> "N*one* will deny that an application for summary judgment (commonly called an Order 14 application) has lost much of its teeth in our jurisdiction. It is not heard within a matter of days and rarely in a matter of months. It is in fact quite common for such applications to be heard within years after they are filed...There is no question of an accelerated trial here, as in most cases it might have taken years to have the Order 14 application determined. If that is a prize or reward in our jurisdiction, in my opinion it is a hollow and empty one.
>
> There is really no dispute as to the approach the courts should adopt when the point of law can be determined 'then and there', or 'at once', or when 'there is a clear cut issue'. What I have to determine is what approach should our courts take...
> In my judgment, the Master or Judge in our jurisdiction should go on to deal with the point of law, no matter how complex the law or mature the consideration, even if there is likely to be the citation of many authorities. I have come to this conclusion not unmindful that I am departing from a practice that has settled over the years in the English jurisdiction; but at the same time I am conscious and ever mindful of the need, and indeed the obligation of our courts to establish and lay down rules of practice and procedure which are relevant to our

> jurisdiction. None will deny that our courts are over-burdened with litigation. Judicial time is more important than ever...
>
> In my judgment, it would be a complete waste of judicial time if the judge were to remain silent and simply give leave to defend, with the end result being that the matter is sent to another Judge or perhaps may go before the same Judge (as our Judges change jurisdiction every three months) who might a few months or years later be sitting in the trial court to have the same arguments in law rehearsed all over *again.* This is senseless. It is a procedural and practical anachronism. It is judicial extravagance which we can ill afford in this jurisdiction."

The views expressed by Sharma J. are relevant to our jurisdiction and are highly persuasive but in my opinion the determination of this application does not require the level of detailed argument or mature consideration as would take it outside the realm of summary judgment under the prevailing rules.

Here, the first defendant maintains that the guarantee has been discharged by a repudiatory breach. Counsel contends that the first defendant is sued as a guarantor of a Promissory Note which was to be repaid according to specific terms. He stresses that the Note is dated 24th July 1998 and that it is clear that the principal only became due after six months and the interest was payable at monthly intervals. In spite of this, he contends, Mrs. Tortello demanded payment of the principal by letter dated August 13th 1998 and that a threat to wind up the company if his client were not paid was made by the plaintiff's Attorney-at-Law, by letter dated the 27th August 1998.

Counsel for the first defendant submits further that there can be little doubt that the plaintiff and/or its legal representatives and/or its agents repudiated the Promissory Note. The demand for payment before the Note was due was itself a repudiatory breach. Referring to a passage from The Modern Contract of Guarantee by Phillips and Donovan 2nd ed. pp.275-276 and relying on the case of ***National Westminster Bank PLC v Riley* (1986) BCLC 268,** he submits further that the effect in law of such a repudiatory breach is to release the alleged or any guarantors of the principal contract. In other words, a breach, repudiation or variation by the principal (creditor) will discharge the guarantor. He contends that this is the situation in the present case as it is clear that payment of the principal amount was requested prior to January 1999.

A question to be determined is whether this demand amounted to a repudiation of the principal contract and thereby discharged the first defendant of all liabilities as guarantor. The passage from The Modern Contract of Guarantee (supra) to which Counsel referred states:

> "If the creditor repudiates the principal contract or is in breach of a condition of that contract, and the principal debtor accepts the repudiation or breach as terminating the contract, the guarantor will be discharged." [Emphasis supplied]

The evidence of the first defendant is that criminal proceedings were brought against himself and others and that J.H.G.Mapp (Successors) Limited

started to experience financial difficulties. The premature demand for the repayment of the principal amount was complied with, in that the first defendant himself gave instructions that J.H.G. Mapp (Successors) Ltd. start "pre-paying the principal".

Counsel for plaintiff made reference to and relied on the reasoning in the judgment of Lord Fraser in ***Hyundai Heavy Industries Co. Ltd. v Papadopoulos*** **[1980] 2 All E.R. 29**, who referred to Lord Reid's judgment in the case of ***Moschi v Lep Air Services Ltd.*** **[1972] 2 All E.R. 393** where at page 398 it was said:

> "I would not proceed by saying..... there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what the agreement means."

Lord Fraser continued at page 47 in **Hyundai (supra) as follows:**

> "As regards authority, I gratefully adopt the words of Lord Simon in **Moschi** ... where, after rejecting an argument that acceptance of a contract was equivalent to its variation so as to release a guarantor from his obligations, he went on to say this:
>
> 'Moreover, the suggested rule would make nonesense of the whole commercial purpose of suretyship: you would lose your guarantor at the very moment you most need him - namely, at the moment of fundamental breach by the principal promisor... '"

In my opinion even if the premature demand for payment amounted to a repudiation it could not be successfully argued that the first defendant could

avoid liability as guarantor as:

(i) He himself, albeit in his capacity as a representative of J.H.G. Mapp (Successors) Limited gave instructions for the company to start "pre-paying the principal" and must be taken as guarantor to have agreed to that arrangement as there is no documentation to the contrary.

(ii) Although the demand for payment was pre-mature, the guarantee is not stated to be conditional and it has not been pleaded that payment was guaranteed conditionally on those terms being complied with.

(iii) The first defendant is an attorney-at-law and he did not communicate to the plaintiff either in his capacity as a representative of the company or as guarantor that the payments being made amounted to acceptance of the plaintiff's repudiation of the agreement and thereby discharged the company and the guarantors of their liabilities under the note.

Counsel's argument that the payments made amounted to an acceptance of repudiation is unsustainable. To my mind it is clear that the first defendant by arranging for payments to be made on the note on various

occasions even if done as a result of an unlawful demand acknowledged the obligation of the debtor to the plaintiff despite the alleged repudiation and by the same token his liability as guarantor.

In ***Amalgamated Investment & Property Co. Ltd (in liquidation) v Texas Commerce International Bank Ltd. [1981] 3 All E.R. 556,*** the English Court of Appeal looked at all the circumstances of the case and in particular the conduct of the parties in determining whether the company was discharged of its liability to repay a loan. Lord Denning MR, in that case stated that:

> "Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations. It may be used to complete a contract which would otherwise be incomplete: see **Brogden v Metropolitan Railway (1877) 2 App Cas. 666** at **682** per Lord Hatherley. It may be used so as to introduce terms and conditions into a contract which would not otherwise be there: see **J Spurling Ltd v Bradshaw [1956] 2 All E.R. 121**... If it can be used to introduce terms which were not already there, it must also be available to add to, or vary, terms which are there already, or to interpret them. If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."

Counsel for the plaintiff relying on the case of ***Zephyr Bank v Bank of Nova Scotia (1988) 42 W.I.R. 192*** maintained that a promissory note is to be treated as cash, is an unconditional obligation in writing and must be honoured unless there is some good reason to the contrary.

He submits further that the first defendant is "estopped by promise made under the Promissory Note as well as by conduct by arranging and/or making payments under the Promissory Note on various occasions, from denying the validity of the Note and obligation to pay the monies due under the Promissory Note." I find favour with this argument and I am fortified in this view by Lord Denning's conclusion in the **Amalgamated Investment** case (supra) that:

> "When the parties to a transaction proceed on the basis of an undefying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on it, the courts will give the other such remedy as the equity of the case demands."

In his pleadings the first defendant does not admit the issuing of the promissory note and denies its validly if it were in fact issued. He avers also that payments have been suspended "until a court or other lawful tribunal determines who is entitled to payment."

The plaintiff has pleaded that the first defendant in a statement to the police admitted and acknowledged that monies were due to the plaintiff from

J.H.G. Mapp (Successors) Limited under a promissory note which the first and second defendants guaranteed. There is an affidavit of Colbert Edwards to this effect and there has been no denial of that assertion. The first defendant cannot therefore be heard to say that there is uncertainty as to the identity of the proper creditor, payments having been initiated pursuant to the demand.

Repayment of the note having commenced it is not now open to the first defendant to say that there was no due presentation for payment or that the document is not a guarantee.

In these circumstances I find that the first defendant does not have a good defence on its merits and there are no facts sufficient to entitle him to defend the action generally.

Application for Stay of Proceedings

Counsel for first defendant has submitted, citing authorities, that in fairness to the first defendant civil proceedings ought to be stayed until criminal proceedings which have been commenced against the first defendant and others in relation to the same subject matter are concluded.

In the circumstances of this case I find that it has not been established that there is any likelihood of prejudice or other injustice to the first defendant if civil proceedings were not stayed.

The application for stay of proceedings is therefore denied.

Security for Costs

Having regard to my finding that the first defendant does not have a good defence to the action on the merits nor has he disclosed such facts as may be deemed sufficient to entitle him to defend the action generally, there is no basis on which the plaintiff ought to provide security for costs.

Accordingly, the first defendant's summons for security for costs is dismissed.

Having carefully considered all the circumstances of this case, I grant leave to the plaintiff to enter summary judgment against the first defendant, as prayed. Costs granted to the Plaintiff to be agreed or taxed.