

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. 1998/E-248

IN THE MATTER of an Equitable Mortgage of Land
comprised in Certificate of Title registered at Volume
1105 Folio 581 of the Registered Book of Titles

A N D

IN THE MATTER of an Application by CITIBANK.
N.A. for the sale of said land.

A N D

IN THE MATTER of the Judicature (Civil Procedure
Code) Law

BETWEEN CITIBANK, N.A. PLAINTIFF

A N D BLUE CHATEAU LIMITED DEFENDANT

CONSOLIDATED WITH
SUIT NO. E-564 OF 1998

BETWEEN BLUE CHATEAU LIMITED PLAINTIFF

A N D CITIBANK, N.A. DEFENDANT

Mr. Hector Robinson instructed by Patterson Phillipson and Graham for Citibank N.A.

Mr. Patrick Foster and Miss Katherine Francis instructed by Clinton Hart and Co.
for Blue Chateau Ltd.

Hearing on April 13, 15, 22, 27 and June 16, 1999

Judgment

Hibbert, J. (Ag)

For consideration by the Court are two originating summonses numbered E 248 of 1998 and E 564 of 1998. The first was brought by Citibank N.A. (hereinafter called "Citibank") as plaintiff against Blue Chateau Limited (hereinafter called "Blue Chateau") seeking certain declaratory reliefs and an order for the sale of land registered at Volume 1105 Folio 581, the registered proprietor being Blue Chateau. This property is said by the plaintiff to be the subject of an equitable mortgage between Citibank and Blue Chateau. The second summons was brought by Blue Chateau as plaintiff against Citibank seeking certain declaratory reliefs in relation to transactions entered into between Citibank and Caldon Finance Group Limited (hereinafter called "Caldon") and purportedly between Citibank and Blue Chateau. In particular a declaration is sought that an alleged guarantee given by Blue Chateau to Citibank in respect of overdraft facilities given to Caldon by Citibank and a resulting equitable mortgage are invalid, void and/or unenforceable.

In support of the summon filed on behalf of Citibank reliance was placed on two affidavits sworn to by Dorothy Parkins, Vice President of Citibank's Jamaica Branch. The first was sworn to on the 7th day of May 1998 and the second on the 18th day of September 1998. For Blue Chateau reliance was placed primarily on the affidavits of Raphael Gordon, the Liquidator of Caldon Finance Group Limited (In Liquidation) sworn to on the 7th day of July 1998 in support of Summons for Stay of Proceedings, the 27th day of November 1998 in support of the summons filed on behalf of Blue Chateau and the 15th day of December 1998 in response to affidavit of Dorothy Parkins sworn to on 18th September 1998.

From these affidavits and accompanying exhibits the following emerges:

from and since the 29th day of March 1994 Caldon operated a current account with Citibank. It appears that overdraft facilities were made available to Caldon and on the 27 day of January 1998 Caldon's account became overdrawn in the sum of seven million, seven hundred and eighteen thousand five hundred and sixty eight dollars and fifty cents (\$7,718,568.50). By agreement made on the 29th day of January 1998 further advances were made to Caldon by Citibank by way of an overdraft on Caldon's account. On that day the total advances made by way of overdraft was thirteen million nine hundred and eleven thousand one hundred and eighty nine dollars and twenty four cents (\$13,911,189.24). It was agreed between Caldon and Citibank that interest would be charged on the overdraft at the rate of 38 percent (38%) per annum. On the 30th January 1998 there was an oral agreement between Citibank and Henry Fullerton, Chairman of Blue Chateau and Executive Chairman of Caldon. On the 3rd February 1998 at a board meeting the directors of Blue Chateau passed a resolution guaranteeing the financial obligations to Citibank of Caldon arising as a result of temporary facilities provided by Citibank in the sum of nine million dollars (\$9.0 M). On that same day, by covering letter signed by Henry Fullerton, as Executive Chairman of Caldon, on Caldon's letterhead, the certificate of title registered at Volume 1105 Folio 581 was sent to Citibank to cover temporary facilities to Caldon.

By resolution passed by the creditors of Caldon on the 12 March 1998 Raphael Gordon of KPMG Peat Marwick was appointed Liquidator to wind up the affairs of Caldon. On the 24th March 1998 Citibank served formal Demand on the Liquidator of Caldon for the repayment of five million nine hundred and fifty nine thousand five hundred and ninety two dollars and sixty three cents (\$5,959,592.63) then due to Citibank. On the 25th March 1998 formal Demand was served on Blue Chateau. No part of the sum owed to Citibank has been paid, hence Citibank, as equitable mortgagee seeks inter alia the sale of the property registered at Volume 1105 Folio 581 to satisfy the debt due to Citibank. This is opposed by Blue Chateau.

Two Main issues arise for consideration. Firstly, was there an enforceable guarantee given by Blue Chateau to Citibank? Secondly, was there an equitable mortgage created in respect of that property registered at Volume 1105 Folio 581 between Blue Chateau and Citibank?

A contract of guarantee may be described as an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt default or miscarriage of another person, whose primary liability must exist or be contemplated. It has long been established that unless the contract of guarantee is under seal it must be supported by consideration. Additionally, in order for this contract to be enforceable it must comply with the Statute of Frauds Section 4 of which states:

“4 - [.....] no action shall be brought [.....] whereby to charge the defendant upon any special promise to answer for the debt, default and miscarriages of another person [.....] unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.”

Counsel for Citibank submitted that there was a contract of guarantee entered into between Citibank and Blue Chateau. In support of the agreement, he submitted there was consideration in the form of overdraft facilities to Caldon as well as the promised forbearance by Citibank not to call in the overdraft as long as the guarantee was in place. Counsel further submitted that the contract of guarantee was enforceable as there was sufficient memoranda in writing to satisfy the requirements of the Statute of Frauds. These he urged were the resolution passed by the board of directors of Blue Chateau and the letter signed by Henry Fullerton forwarding the title deeds to Citibank.

Counsel for Blue Chateau on the other hand argued that the purported consideration was worthless as it was past consideration. He further argued that even if there was consideration the contract of guarantee was unenforceable as it did not meet the requirements of the Statute of Frauds.

I will deal firstly with whether or not the requirements of the Statute of Frauds have been satisfied.

The text "**The Modern Contract of Guarantee**" by Dr. James O' Donovan and Dr. John Phillips is helpful. At page 79 it is stated:

"Since the object of the statute is to exclude parol evidence any writing embodying the terms of the agreement and signed by the person to be charged or that person's lawfully authorised agent is sufficient."

At page 80 it is stated further:

"A letter to an agent or friend of the person sought to be charged may be sufficient; so too may an affidavit in a different matter; even a signed entry in a personal diary may suffice."

We need therefore to examine the documents relied on by Citibank. I hold that the letter signed by Henry Fullerton by which he forwarded the certificate of title could not be deemed a sufficient memorandum in writing as it was not signed for or on behalf of Blue Chateau. The resolution, however, as it embodies the terms of the agreement and is signed for and on behalf of Blue Chateau in my view is sufficient to satisfy the requirements of the Statute of Frauds.

We can now look to see whether there was a need for consideration and if so whether or not there was consideration needed to make the guarantee binding. It was long ago expressed in **Barrell v Trussell (1811)** 128 ER 273 that unless the contract of guarantee is under seal it must be supported by consideration. In the context of a guarantee, the consideration will be in the form of a creditor incurring some detriment in reliance on the promise to guarantee, rather than conferring a benefit upon the guarantor. One usual form of consideration is the making by the creditor of advances to the principal. Another is the forbearance to sue for a past debt. The mere act of forbearance, however, will not be sufficient consideration; it must be at the express or implied request of the guarantor, [see **Crears v Hunter (1887)** 19 QBD 341] which cannot be inferred simply from proof of an act of forbearance. It is however a fundamental principle of contract law that a guarantee given simply for past or executed consideration will fail.

In order to determine whether or not there was consideration it is imperative that we look at the affidavits of Dorothy Parkins and the resolution of Blue Chateau which was exhibited to her affidavit sworn to on 7th May 1998. Paragraph six (6) of that affidavit states:

"6 - By an agreement made orally and supported by memoranda in writing between the 30th day of January 1998 and the 3rd day of February 1998 it was agreed between the Plaintiff and the Defendant that in consideration for the Plaintiff making the aforementioned advances by

way of overdraft to Caldon the Defendant guarantees the payment of all sums of money up to a limit of Nine Million Dollars (\$9,000,000) due by Caldon to the Plaintiff by virtue of the overdraft on Caldon's Account. The said agreement was arrived at in telephone conversations on the 30th day of January and the 2nd day of February 1998 between Henry Fullerton, a Director of the Defendant on the one hand and Gerald Wright and myself on the other hand on behalf of the Plaintiff."

It is important to note that the overdraft facilities given to Caldon were in place since the 29th March 1994 and were extended on 29th January 1998. However in her affidavit sworn to 18th September 1998 Dorothy Parkins at paragraph two (2) states:

"Further to paragraph 6 of my earlier affidavit I say that by the way of additional consideration for the Defendant issuing the guarantee the Plaintiff at the time the guarantee was being given at the request of the Defendant agreed to forebear to demand immediate payment by Caldon of its indebtedness to the Plaintiff and agreed to permit Caldon to maintain the overdraft facility so long as the guarantee issued by the Defendant remained in place."

It is to be noted that this affidavit was in response to that of Raphael Gordon sworn to on the 7th July 1998. Paragraphs 4 and 5 of that affidavit states:

- "4. That subsequently I made investigations and enquiries of the Attorneys-at-Law for Citibank, N.A. and as a result of which I came into possession of the items exhibited to the affidavit of Dorothy Parkins filed herein and marked DP1 DP2 and DP3 for identification.
5. That I made further investigations but have not been able to locate any instrument of guarantee, or ascertain any commercial benefit to the Company or to determine the existence of any Consideration moving from Citibank N.A. to the Company."

The resolution of Blue Chateau which was passed on the 3rd February 1998 states:

"Resolved:

That Blue Chateau Limited do guarantee the financial obligation to Citibank N.A. of Caldon Finance Group Limited which financial obligation arises as a result of temporary facilities provided by Citibank N.A. in the sum of Nine Million Dollars (\$9.0M)."

It is noticeable that in first affidavit of Dorothy Parkins and the resolution of Blue Chateau, the consideration stated was the making of the advances to Caldon by way of overdraft, the last of these advances being made on the 29th January 1998. I therefore find that the granting of overdraft facilities and the making of advances on the 29th January 1998 could not be good consideration for the formation of a valid and binding contract of guarantee between Citibank and Blue Chateau.

With regards to the forbearance mentioned in the second affidavit of Dorothy Parkins, Counsel for Blue Chateau urged that this evidence be rejected as being a mere afterthought prompted by the first affidavit of Raphael Gordon. Was there this additional consideration? Bearing in mind the history of the relationship between Citibank and Caldon, I find it inconceivable that on the 3rd February 1998 or at anytime between the 29th day of January 1998 and the 3rd day of February 1998 there could have been the contemplation of a demand for immediate payment by Caldon of its indebtedness to Citibank. I therefore find that the additional consideration claimed in paragraph two (2) of the second affidavit of Dorothy Parkins did not exist and was a mere afterthought. I am fortified in this finding by the absence of mention of this consideration from the resolution of Blue Chateau. This therefore leads me to hold that there was no equitable mortgage between Citibank and Blue Chateau in respect of the property registered at Volume 1105 Folio 581 in the Registrar Book of Titles as this would be dependent on the existence of a valid contract of guarantee.

The question of whether or not an equitable mortgage was created would still arise if it was found that there was a valid contract of guarantee. The equitable mortgage was established primarily by extending the doctrine of part performance. A deposit of title deeds by way of security has been taken both as showing a contract to create a mortgage and also as being part performance of that contract even if not a word about such a mortgage has been said. As was shown **In re Wallis and Simmonds (Builders) Ltd.** [1974] 1 WLR 391, the general rule that a deposit of title deeds to secure a debt created an equitable charge on the land applied even when the debt was owed not by the owner of the deeds but by a third party. The deposit must, however, be made for the purpose of giving a security.

The answer to the question: Did Blue Chateau or someone acting on behalf of Blue Chateau deposit the title deeds for the purpose of giving a security? is therefore crucial. To arrive at the answer the following are pertinent facts to be considered:

- I. Henry Fullerton was Executive Chairman of Caldon and Chairman of Blue Chateau.
- II. Ninety-nine percent (99%) of the shares of Blue Chateau were owned by Caldon.
- III. There was an agreement made orally between Citibank and Henry Fullerton regarding the guarantee even before a resolution was passed by Blue Chateau.
- IV. The resolution of Blue Chateau makes no mention of any contemplated deposit of title deeds or even the giving of a security for the guarantee.

- V. The title deeds were sent by Henry Fullerton "as promised" as Executive Chairman of Caldon, not as security for the guarantee given by Blue Chateau; but as stated in his letter: "These are being provided to cover temporary facilities to Caldon Finance Group Limited".

It is also significant that the resolution of Blue Chateau did not accompany the title deeds.

It seems from the letter signed by Henry Fullerton as Executive Chairman of Caldon that what he was seeking to do was to create an equitable mortgage between Caldon and Citibank as security for the overdraft facilities. Caldon could not, however, properly do this. Although ninety-nine percent (99%) of the shares of Blue Chateau were owned by Caldon, Blue Chateau was a separate legal entity which owned the property, which could not therefore be pledged by Caldon.

I therefore conclude that there could not have been a proper equitable mortgage between Blue Chateau and Citibank as Blue Chateau did not deposit the Certificate of Title with Citibank, neither is there any evidence that it authorised anyone else to do so.

During submissions much time was spent in arguments as to whether or not the giving of guarantees was an object of Blue Chateau or was it a mere power given to the directors. It was argued on behalf of Blue Chateau that this was a mere power which was exercised not for the commercial benefit of Blue Chateau and that Citibank had notice of this. In light of my previous findings, tempting though it may be, it is no longer necessary for me to deal with this point.

In light of the foregoing:

The Originating Summons filed in suit E-248/98 is hereby dismissed with costs to the Defendant to be agreed or taxed.

In suit E-564/98 it is hereby declared that:

1. The guarantee which the Defendant alleges that the Plaintiff gave to the Defendant between the 30th day of January 1998 and the 3rd day of February 1998 to secure advances made by the Defendant to Caldon Finance Group Limited is invalid and void because there was no consideration moving from the Defendant to support the alleged guarantee.
2. The equitable mortgage which the Defendant alleges that the Plaintiff created in support of the alleged guarantee by depositing with the Defendant the duplicate Certificate of Title registered at Volume 1105 Folio 581 of the Register Book of Titles is also invalid and void because there was no valid guarantee and further because an equitable mortgage was not authorised by the Directors of the Plaintiff.

It is hereby ordered that:

1. An injunction be issued restraining the Defendant, whether by itself, its Directors, servants, agents, or otherwise howsoever from disposing of, mortgaging, assigning, charging or otherwise dealing with the property or the duplicate Certificate of Title for the said property.
2. The Defendant deliver to the Plaintiff the duplicate Certificate of Title for the said property.

Costs to the Plaintiff to be agreed or taxed.

*Stay of execution granted in respect
of second order for a period of six (6)
weeks.*