IN THE SUPREME COURT OF BELIZE A.D. 2000

ACTION NO. 126 OF 2000

	(THE BANK OF NOVA SCOTIA	PLAINTIFF
	(	
BETWEEN	(AND	
	(	
	(	
	(AUGUSTINE LIU	
	(EUGENE ZABANEH	DEFENDANTS

Mr. E. Flowers, SC. for the plaintiffs
Mr. R. Williams, SC, for the second defendant

AWICH. J.

March 3, 2004 **JUDGEMENT**

1. *Notes:* *Guarantee - a contract of guarantee with bankers to secure a loan; the loan to the debtor is the consideration to the guarantor for guaranteeing the loan; whether there has been material alteration of the loan contract; changes in interest rates, charging the loan account with premium sums for insuring life of the debtor; whether the creditors carried out the contract in a manner prejudicial to the guarantor.*

   Guarantee - notice to the guarantor of the default by debtor is not necessary unless it is a term in the guarantee.

   Guarantee - subsequent agreement between guarantor and creditors for release of guarantor is not enforceable without consideration.

   The Bank Undertaking (The Bank of Nova Scotia Belize operations) Vesting Act, No. 17 of 2003, SS: 3(1), 3(2)(c), 4(1)(a)(i), 4(1)(c) and 4(1)(e).

   Reference for computation of the accurate sum owing.

2. ***The Claim**: The Loan and Guarantee.*

On 20.3.2003, the Bank of Nova Scotia, the plaintiffs, issued a writ of summons against Augustine Liu, the first defendant, and Eugene Zabaneh, the second defendant. The claim was for money lent, at his request, to the first defendant to whom I shall refer as the principal debtor or simply the debtor. The claim against the second defendant to whom I shall refer as the guarantor, was based on a guarantee he was said to have furnished for the loan obtained by the principal debtor. It was claimed that the principal debtor defaulted in the payment of the loan, and as at 15.3.2000, five days before the court action commenced, the debt stood at $227,317.80. The plaintiffs seek judgment order that the defendant answer for the default of the debtor and pay the sum.

3. The statement of claim gave the particulars of the claim as follows:

“ PARTICULARS

	Loan Account as at 15 March, 2000	-	
i)	Total Principal balance outstanding	-	$66,281.57
	Actioneer’s Fees	-	$11,099.20
	Insurance on loan	-	$6,070.20
	Total	-	$83,450.97
ii)	Interest on Principal	-	$112,212.06
iii)	Interest on Insurance [premium]	-	$1,704.52
iv)	Late Fee Charge	-	$300.10
v)	Attorney’s Collection fee	-	$29,650.15
	Total	-	$227,317.80

AND THE PLAINTIFF claims -

1) The sum of Bz$227,317.80

2) Interest thereon at the daily rate of $38.87

3) Costs."

4 Both defendants filed defences. The principal debtor's memorandum of defence simply contested the sum owing. He contended that if all the proceeds of the sale of the two properties charged to secure the loan were applied to the payment of the loan, the maximum sum owing would not be more than $147, 691.88. At trial, however, counsel for the debtor admitted liability for the whole debt. She was excused from attending at the rest of the trial. In view of the defence of the guarantor denying his entire liability, the Court decided to postpone entering judgment under ***O. 34 r 4 of the Rules of the Supreme Court,*** for the plaintiffs against the debtor, on the admission, until the determination of the case against the guarantor. It is noted that admission by the debtor is not proof of the admitted fact against the guarantor.

5 The guarantor's memorandum of defence raised three points. First he denied that, "he entered into the alleged or any guarantee". Secondly, he stated that if he entered into a guarantee, then there was no consideration from the plaintiffs to support the agreement, any consideration was past consideration. Thirdly that the plaintiffs agreed to release him from the guarantee if he paid $75,000.00 to the plaintiffs; he made the payment, so

he should be regarded as released.

6 In addition, during the trial, Mr. R. Williams SC, learned counsel for the guarantor, led evidence on which he relied for the point of law submission that the plaintiffs subsequently changed the terms of the loan and that the change entitled the guarantor to release from the obligation under the guarantee. Mr. Williams cited, ***Holme v Brunskill (1878) QBD 495,*** in support of his submission. That was certainly a new head of defence which should have been brought in by amendment of the defence. However, objection to it was not taken; the plaintiffs seemed to regard the new head of defence as a point of no surprise or embarrassment.

7 Mr. Williams in crossexamining the witness for the plaintiffs, also put forward a contention that the Bank of Nova Scotia, the claimants and plaintiffs, who obtained the guarantee and lent the money were no longer in business, instead there were at the time of trial, 12.1.2004, Scotia Bank Belize Ltd, there had been material change which entitled the guarantor to release from the guarantee. It was also implied that because of the change in identity there were no plaintiffs claiming against the two defendants. Those points of contention could also be regarded as new heads of defence or could be regarded as parts of the omnibus denial at paragraph 1 of the defence, that there had been any agreement of guarantee between the plaintiffs and the guarantor. Again objection was not taken to the crossexamination advancing the new heads of defence.

8 Further, Mr. Williams canvassed in crossexamination, the point that the plaintiffs, the creditors, did not give notice of the default by the debtor to the guarantor, as stipulated in the guarantee. That again was a new point raised at the trial. No objection was taken to it.

The Facts: *The Testimony for the Plaintiffs.*

9 For the plaintiffs, only Ms. Judith Molina, the manager then, at Dangriga Branch of the plaintiffs' bank testified. Some of what she said were subsequently admitted by the guarantor in his testimony, others were directly denied and contradicted.

10 Apparently the debtor has left Belize. Although at the initial stages he was able to give instruction to defend the claim against him, he did not attend at the trial.

11 Ms. Molina testified to the following. In 1990 the debtor first made an application to the Dangriga Branch of the bank for a loan of $350,000.00 without any offer of a guarantee. The loan was for the purchase of land, (the particulars of the land were not given in evidence). Ms. Molina sent the application to the Head Quarters for decision. The Head Quarters refused the application for the reason that the debtor would be unable to pay the monthly instalment.

12 Later the guarantor contacted the bank and offered to guarantee the loan to the debtor. The guarantor wrote a letter dated, 8.8. 1990, tendered as exhibit

P(JM)1, in which he offered his personal guarantee and that his own bank account would be debited in the event the debtor defaulted in payment of the monthly instalment. On. 6.9.1990, the guarantor signed a written guarantee, tendered as exhibit P(JM)2. The guarantee was for $350,000.00. The Head Quarters approved the loan on the strength of the guarantee. The land bought with the loan was charged with the sum of $350,000.00.

13 On the 7.9.1990, the day the loan was disbursed, the debtor signed a document described as "Scotia Plan Loan: Promissory Note". The guarantor signed the back of the document. It would be replaced on the third anniversary with a new one in which any change in interest rate would be shown. The "Promissory note" was said to have been replaced accordingly on 8.10.1993, and the replacement was replaced on 3.9. 1997. That was the last replacement, it was tendered as exhibit P(JM)5. The signature of the debtor was on it, but not the signature of the guarantor. Ms. Molina said the guarantor was asked to go to the bank and sign it, several messages were left for him but he did not go. The terms of the last note were said to be the same as the terms of the previous two, except for the change in the rate of interest and the sums payable as the total debt and as instalment.

14 Ms. Molina said that the debtor made payment of only one instalment, subsequent payments were debited, that is, deducted from the bank account of the guarantor at the plaintiffs' bank . On 8.3.1995, the guarantor wrote to the plaintiffs stating: " This is to advise that no further deductions should be made to my account on behalf of Mr. Agustine Liu". The bank refused to heed.

15 In October 1996, the guarantor made a proposal to Ms. Molina that the second charged property belonging to the debtor be sold for $75,000.00 and that the guarantor would add $25,000.00 to make $100,000.00 payment to the bank. On that arrangement, he proposed that he be released from the guarantee. Ms. Molina said, the Head Office accepted the first two proposals, but rejected the proposal to release the guarantor from the guarantee. Ms. Molina seemed to use the expressions Head Quarters and Head Office interchangeably. The property was sold and $75,000.00 was paid to the bank. The guarantor did not pay the $25,000.00 proposed. In 1997, the bank, "got sporadic payments from the account of the guarantor", because he did not keep sufficient funds on the account.

16 On 17.9.1998, the loan payment was in arrears of $27,616.90, and the total debt was $290,391.19. The bank sent a letter of demand, exhibit P(JM) 9, on that date, addressed to the debtor and copied to the guarantor. Ms. Molina said in rexamination that she attached a compliment slip to the copy to the guarantor, she wrote on the slip the words: "this is your copy of demand". The letter warned that if payment was not made, foreclosure would follow. Despite the letter, default continued and the property charged was sold in December 1999, or January 2000. The proceeds, $200,000.00 were applied to the payment of the loan. The debt owing was shown as having been reduced to $83,950.97. The bank made several telephone calls to the guarantor, but could not speak to him. He did not respond to messages left at his house and office. The bank instructed attorneys. On 20.3.2000, this court action was taken.

The Facts: *The Testimony for the Guarantor.*

17 The guarantor also testified alone in his defence. His testimony differed from that of Ms. Molina only in details. He testified as follows. He offered and signed a guarantee for $100,000.00 not for $350,000.00 to secure part of the $350,000.00 loan given by the Bank of Nova Scotia to Agustine Liu, the debtor, for the purchase of property owned by the debtor's brother. Ms. Molina had explained to the guarantor that the two adjoining properties offered as securities were insufficient securities. The guarantor said he signed the letter, P(JM)1, agreeing that his account would be debited in the event the debtor defaulted in paying any instalment. He signed the guarantee on the last page and initialed at the sum of $100,000.00 and at the provisions about interest and arrears. He accepted that the signature on the last page of P(JM) 2 was his, but denied that the document he signed was for $350,000.00, so exhibit P(JM)2 was not the complete guarantee he signed. He further said that Ms. Molina and him had agreed that upon the payment of the first $100,000.00 of the loan his guarantee would cease. The guarantor denied ever signing any promissory note.

18 Later when the loan was in arrears, the guarantor said, the debtor, and Ms. Molina and him arranged that the second property charged be sold. It was sold and $75,000.00 was applied to the loan which was reduced by approximately $100,000.00. As the result all his securities, that is, properties he had charged in favour of the bank "in the normal course" of his own business were released to him. Later Ms. Molina informed him that Head Office had overruled her about the release of his securities; she

wanted him to provide a charge over his property as additional security for the debt still owing. He refused.

19 Then in 2000, Ms. Molina asked for the guarantors' assistance in getting the debt paid. The bank had moved to sell the property bought with the loan; the highest bid that had been obtained was only $132,000.00. The guarantor persuaded the debtor's sister to buy the property for $200,000.00. He said, " the understanding was that if the $200,000.00 was paid, Mr. Liu's debt would be ended". He added that the record had shown that the debtor had already paid three times the loan. Liu's sister paid the purchase price, $200,000.00 to the bank.

20 The guarantor denied that he received a copy of the letter of demand, exhibit P(JM)9, or any other letter of demand.

Determination.

21 Some of the guarantor's heads of defence including those raised for the first time at trial, are inconsistent. He is, of course, permitted to plead inconsistent heads of defence provided they are in the alternative, and provided they are not fictitious. The Court has to answer the questions raised in the main and if need be, in the alternative.

22 At trial the guarantor admitted that he entered a guarantee for the loan made to Mr. Liu, although he said it was to the extent of $100,000.00, not $350,000.00. The issue then becomes: for what sum did the guarantor provide guarantee, and no longer whether he provided any guarantee, as raised in his pleading at paragraph 1, that he never, "made or entered ...any agreement of guarantee ..."

23 From the admission it is conclusive that Zabaneh entered a guarantee. That aside, the partial admission introduces ambiguity as to the issue of consideration pleaded as lacking. In the admission of partial guarantee has it been admitted that consideration is available in the transaction as a whole, or has it been admitted that only consideration for the guarantee to the extent of $100,000.00 has been provided? I think for certainty sake, it is better I decide the entire question of consideration, which question was originally raised at paragraph 2 of the defence in the words: "there has been no consideration moving from the plaintiff to support the alleged guarantee ... the alleged guarantee discloses a past consideration."

Determination: *Consideration*

24 A guarantee is, but a contract of a special kind. It is an accessory or collateral contract by which the promissor undertakes to answer for the debts, default or miscarriage of another whose primary liability to the promisee must exist or be contemplated - ***Lakeman v Mountstephen (1874) LR 7,*** a case in which Mr. Lakeman's words: " go on and do the work and I will see you paid" were considered as to whether they amounted to an undertaking to be primarily liable, or to a promise to answer for the debt of

another. It is correct therefore, that even a contract of guarantee (not under seal) must be supported by consideration, if it is not to be regarded as a mere unenforceable *nudum pactum.* The difference is in the diversity and sometimes in the burden of proof of considerations in guarantees.

25 The mere existence of an antecedent debt, default or miscarriage of another person is not valuable consideration to support the promise of the "guarantor" to the creditor. Parker J held, in ***Wigan v English and Scotish Law Life Assurance Association (1909) 1 ch 291,*** that an assignment of assurance policy to the creditor to secure part of an existing debt was an assignment without consideration. He cited a very old case, ***Alliance Bank v Boom 2 Dr & Son, 289,*** to show in contrast that a banker's forbearence to sue on a debt due to the bank is good consideration for security provided by the customer.

26 In a guarantee, the guarantor's promise must be founded on a new consideration such as: a promise to give loan to another, forbearance to sue the debtor, a promise to reschedule the debtor's loan and a promise not to close the debtor customer's bank account - see ***National Bank of Nigeria Ltd v Oba M.S. Awolesi [1964] 1 WLR 1311.*** The Consideration must move from the creditor to the guarantor, not to the debtor, however, it need not be of any direct benefit to the promissor, the guarantor. A banker's forbearance to sue on a debt already incurred is not a past consideration; it is good consideration to a guarantor. The consideration is the forbearance. It directly benefits the debtor, not the guarantor. There may be a reason or motive by which the guarantor benefits, but that is only indirectly beneficial

to the guarantor. A banker usually offers a promise to lend money to one person, the debtor, as consideration to another, the guarantor, for his guarantee because the banker has more confidence in the guarantor than in the debtor, and usually when the debtor does not have sufficient property to secure the loan. The loan benefits the debtor directly, not the guarantor. This last example is what took place in this case. Money was lent to Liu on the guarantee given by Zabaneh.

27 Admittedly Mr. Zabaneh wrote to the bank, exhibit P(JM)1, offering to answer for the debt or default of Mr. Liu in that event. The sum to be guaranteed was not stated. The offer was accepted when the loan was given to Mr. Liu. The acceptance and the loan provided consideration. There can be no doubt that the bank provided the loan, as consideration for the guarantee offered by Mr. Zabaneh , which guarantee he said was to the extent of $100,000.00. I have to decide the extent. The question of past consideration does not arise at all. There had been no earlier transaction that Zabaneh was to provide a guarantee for. Counsel did not, in his submission, mention lack of consideration. Perhaps he realised that the defence was baseless.

28 So the question that follows is whether the guarantor agreed to guarantee only up to $100,000.00. It is a question of facts. For the plaintiffs, Ms. Molina testified that the guarantor agreed to guarantee the whole loan, he signed the guarantee, exhibit P(JM)2, in which the sum of $350,000.00 was stated. The guarantor, on the other hand, testified that he guaranteed only $100,000.00 of the loan, he signed only the last page of exhibit P(JM)2. He

therefore suggested that the other pages on which were stated the sum guaranteed as $350,000.00, interest and other things were fraudulently substituted.

29 I prefer and accept the testimony of Ms. Molina on the point and reject that of the guarantor. The guarantor's letter of offer did not state the sum he would guarantee, nor any limit. It is reasonable to infer that he offered to guarantee the whole loan. I also considered that his credibility in Court was poor. Even in examination in chief the guarantor's responses to questions were ambiguous and often non-committal. For example when asked which branch of the bank held securities for his own affairs, the guarantor said: " It would be unfair to say only Belize City Branch held the securities."He added that he did not know whether the Dangriga Branch did not hold the securities, and further still that he did not know whether it was Ms. Molina who released the securities. He must have offered the securities for his own business at a particular branch of the bank. He did not want to reveal that. Moreover, it is improbable that anybody who undertakes an obligation to pay a sum as large as $100,000.00 would not keep a copy of the guarantee. The guarantor in this case is admittedly a businessman who receives a lot of correspondence, he would most probably keep such a record. In the absence of any other guarantee produced in Court, I accept exhibit P(JM)2, as sufficient proof of the guarantee in writing, offered by Mr. Zabaneh to the Bank of Nova Scotia. It was for $350,000.00. That was the sum that Mr. Zabaneh guaranteed. The loan given to Mr. Liu was consideration to Mr. Zabaneh for the full guarantee. The loan was also the subject of the primary contract between the bank and Mr. Liu.

30 Having held that the guarantee that Mr. Zabaneh offered for the loan to Mr. Liu is the document dated 6.9.1990, I must proceed to hold that there was no further agreement that the guarantor would be released upon payment of the first $100,000.00 of the loan. To hold otherwise would be contrary to the rule forbbiding oral evidence adding terms to a written contract. I did not believe it anyway.

31 The fact that the first promissory note dated 6.9.1990, said to have been signed on the back by the guarantor was not produced, does not necessarily mean that the guarantor did not sign it. Ms. Molina gave explanation which I accept, that on the third anniversary, a new promissory note was issued because of the change in interest rate, and that it was and is still the practice to destroy the replaced promissory note. I also accept her explanation that the guarantor was asked to go and sign the last promissory note, exhibit P(JM)3; he did not go. It is noted, that was when payment of the loan was deeply in arrears.

32 I would like to mention that the promissory note was not the loan contract, the primary contract itself, although it was evidence of some terms of it. Ms. Molina's statement that the promissory note was the contract was merely her opinion, not evidence. It has been decided in ***Singer v Elliot (1888) LTLR 524 CA,*** that the appellant who simply wrote his name across the back of a bill of exchange not endorsed to him, did so, *"with the intention of making himself liable in some capacity. It was obvious that he*

intended to make himself liable as a guarantor". In this case I hold that Zabaneh signed the first promissory note as a guarantor. I have to point out though that this case was not grounded on the promissory notes. I have used them in this judgment beause the rule of proof is that a promissory note given by a debtor and guarantor for a definite sum payable on a fixed date is presumed to be given in consideration of an advance to the debtor on the date of the note. I suppose bankers use promissory notes such as exhibit P(JM)3, mainly for the purposes of proof since as it is in this case, the guarantor would have signed a separate document as a guarantee. Even if I were to accept that the guarantor did not sign any promissory note, I would still hold, based on the other evidence, that he guaranteed the debtor's full loan of $350,000.00.

Determination: *Has there been Default?*

33 That brings me to the question as to whether an event or events have occurred that entitled the plaintiffs to make a claim against the guarantor on the guarantee which I have decided was for the whole $350,000.00 loan. The two events in this case that would, if occurred, entitle the plaintiffs to claim the debt owed by Mr. Liu from the guarantor are: (1) default by Mr. Liu, and if so, (2) whether notice of the default was given to the guarantor. If these questions are answered in the positive, then it will be necessary to proceed to answer the contention that there have been changes so that the guarantor was entitled to release from his obligation.

34 As a general rule, default by a principal debtor is a precondition for the liability of a guarantor to arise. The liability of a guarantor is secondary to that of the debtor. That, however, does not mean that the creditor must first make demand on the debtor or take legal action against him or first realise any security provided as collateral, unless those had been made terms in the guarantee or required by a particular rule of the law - see, ***In re J. Brown's Estate; Brown v Brown [1893] 2 ch 300,*** a case in which prior demand on the surety was an express term of the surety.

35 Default by the debtor in making payment of the monthly instalment has been accepted by the guarantor. His defence was conducted on the footing that the debtor had failed to pay the loan. Much of the testimony of the guarantor was about his own efforts to get the debt paid off. There has, in any case, been abundant other evidence of default in payment of the loan. The only connected issue to be decided is the accurate sum of the indebtedness as at 15.3.2000. The plaintiffs claimed it was $227, 317.80. The debtor has admitted it, nonetheless, it remains an issue as between the plaintiffs and guarantor.

Determination: *Notice of Default.*

36 The guarantor contended that notice of the default by the debtor had not been given to him before court action was taken, his liability would only arise after he would have been given written notice of the debtor's default. He relied on para 4 of the guarantee which stated:

> “4. The Guarantor’s liability to make payment under this guarantee shall arise after demand for payment has been made in writing on the undersigned or any one of them, if more than one, and such demand shall be deemed to have been effectually made when an envelope containing such demand addressed to the undersigned or such one of them at the address of the undersign or such one of them last known to the Bank is posted, postage prepaid, in the post office; and the Guarantor’s liability shall bear interest from the date of such demand at the rate set out in paragraph 5 hereof.”

37 I note that the guarantor relied on a paragraph on a page which he said he never agreed to, he never initialed. I also note that this head of defence was never raised in the memorandum of defence. It was first raised in crossexamination of the witness for the plaintiffs. Not surprising, Mr. Flowers, SC, learned counsel for the plaintiffs, introduced, only in reexamination of Ms. Molina, a copy of a letter of demand, written to the debtor and copied to the guarantor. Ms. Molina was then able to add that she attached a compliment slip to the guarantor’s copy, and wrote on the slip that the copy was the guarantor’s copy of demand. The copy and slip were sent to his address. Given that the point of defence was introduced that late and that the guarantor said he received a lot of correspondence, he did not know whether he received the copy, I find that the notice in the form of a copy of a letter dated 17.9.1998, and the compliment slip was sent to the guarantor. It was sufficient written notice to the guarantor before legal action was taken. The date of the notice was 17.9.1998.

Determination: *Changes Since the Guarantee was Furnished.*

38 That there have been changes without the approval of the guarantor so the guarantor was entitled to be relieved of his obligations under the guarantee was, in my view, the strongest contention put forward in this case. The changes pointed out were: (1) that the creditors changed themselves from the Bank of Nova Scotia to Scotia Bank Belize Ltd; (2) that a loan sum of $6,070.20 for insurance premium for insuring the life of the debtor to the extent of the original loan, in favour of the creditors and interest thereon were added to the original loan; (3) that interest rates chargeable were changed; (4) that fees for late payment of the monthly instalment were charged to the loan; (5) that auctioneer's fees were charged to the debt; and (6) that attorneys collection fees were charged to the debt.

39 It was not directly contended that the creditors and the debtor agreed to vary the terms of the primary contract, the loan contract, so it was not contended that the changes in this case were effected in a similar way to the changes ***in Holme v Brunskill,*** cited by Mr. Williams. In that case, the creditor and the debtor, without the knowledge of the guarantor, agreed that the creditor would give back one field of a leased farm and that the rent would be reduced by L10. The contention in this case was that the bank effected the charges under the 6 heads unilaterally when neither the debtor nor the guarantor had agreed to the changes. It is similar to the situation in Re: ***Darwen v Pearce [1927] 1 Ch 177,*** wherein on pages 183/184 Lawrence J said*: "where the creditor takes upon himself (although without agreement between himself and the principal debtor) to alter the rights of the parties so*

as to interfere with the arrangements between the surety and the principal debtor such an alteration would have the effect of releasing the surety."

40 Usually it is a simplier case to decide if the primary contract has been expressly altered by the principals or by dealings between them. On the other hand, much more careful consideration must be given to a change which is brought about by the manner the primary agreement and the guarantee have been carried out by the creditor. Two considerations come to mind namely, whether the manner of carrying out the contracts amounts to alteration of the contracts or whether it is simply noncompliance by the creditor with the contract s.

41 The law is that only material changes will relief the guarantor. Material changes are those that prejudice the guarantor. The general rule in its strict form was laid down in the majority judgment of the Court of Appeal (England) in the ***Holme v Brunskill case*** by Cotton L. J in the Law Times as follows:

> *"The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that, if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged, yet that, if it is not self evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action*

against the surety go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not so consented, he will be discharged."

42 Over the long time since those words of Cotton L. J. were written, a more liberal meaning of the rule has been applied in cases. It appears that the words of Brett L. J. in his dissenting judgment in the same case have become the more accurate formulation. Brett L.J. stated:

" In the case of a suretyship bond, where there are some alterations in the contract or relation of the parties under the bond as to guaranteeing performance, the question is whether the alteration is material or substantial, and whether the surety is released. I cannot bring my mind to think that the surety is released in the present case, for the law takes no notice of alterations which are neither material nor specific. The proposition of law as to suretyship to which I assent, is this: if there is a material alteration of the relation in a contract, the observance of which is necessary, the surety is released, and if a man makes himself surety in an instrument reciting the principal relation or contract in such specific terms as to make the observance of specific terms the condition of his liability, then any

alteration which happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between the parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract. My opinion is in accordance with the finding of the jury and it would be most dangerous in this particular case to put ourselves in the place of a jury, and because we think seven acres may make a difference, or 10L a year may make a difference, to set aside the finding of the jury, which is that neither one nor the other is material or substantial. I think this case comes within the third proposition, and that the surety is not released."

43 An illustration of the rule as stated by Brett L.J. is in the judgment of the Privy Council in the Nigerian case, ***The National Bank of Nigeria Ltd v Oba M.S. Awolesi [1964] WLR 1311.*** In the case the guarantor, the respondent, guaranteed an overdrawn account of a debtor. The account was then allowed to continue and the debtor was able to have his rejected cheques met. Unknown to the guarantor the bank, the creditor, allowed the debtor to open a new account. Several payments were made into the new account and a third account at another branch. If the payments had been made into the account guaranteed, the account would have occasionally had credit balances. Later because the debtor operated large overdraft on the account guaranteed, the bank demanded reduction of the overdraft and that security be provided. The debtor was unable to meet the demand. The bank sued the debtor and the respondent as guarantor. The debtor admitted liability for L10,023. The court entered judgment against the respondent as

guarantor, for L9,610 14S. 4d., the sum determined by combining the three accounts. The respondent was successful on the first appeal and at the Privy Council. It was held by the Privy Council that by permitting the opening of the second account, the bank had permitted *a substantial variation* of the terms of the contract without the defendant's knowledge and to his detriment. Further, that the three accounts had been operated in such a way as to increase the burden on the respondent.

Changes in Interest Rates.

44 The submission that charging interest at changed interest rates was material alteration has no basis. The guarantor admitted that in the guarantee he signed, he also initialed at the paragraph specifying that interest would be charged and at the paragraph that showed that the guarantee was for $100,000.00. So by admission there was a provision about interest to be charged, there can be no complaint that interest was charged. I have already decided that exhibit P(JM) 2 was the guarantee provided. In it paragraph 5 provided for interest rate that would change according to change in the prime rate. The creditors were allowed to charge 2% above prime rate. That is the formula by which Ms. Molina said they varied the interest rate. The guarantor did not offer any evidence to the contrary. My finding is that no alteration took place in regards to interest rates contrary to agreed terms and that charging interest to the loan was in accordance with a term in the guarantee. I would like to point out that even if the wrong rate of interest had been charged that would not be regarded as a material change - see ***Egbert and Others v Northern Crown Bank (1918) LTR 3,*** a Canadian case in which interest rate was increased to 8% per annum, an illegal rate. The

Privy Council held the guarantor liable, but the interest rate was reverted to 7% which was legal.

Insurance Premium and Interest thereon.

45 About charging loan for insurance premium and thereafter charging interest on it, I accept the submission that there has been no proof that it had been agreed in the primary loan contract. Counsel for the plaintiffs has conceded. In any case, I do not consider it an alteration, let alone a material one, of the primary contract, or that it amounted to carrying out the contract in a manner prejudicial to the guarantor. The statement of claim shows it as a distinct head of claim. The sums for the loan and interest thereon were simply added to the bank statement of account. The sum can be excised from the account without any prejudice or difficulty.

Auctioneer's Fees, Attorneys' Fee and Late Payment Fee.

46 Counsel for the plaintiffs conceded that in the evidence presented to Court there were no proofs as to liability for auctioneer's fees, insurance loan and interest thereon and attorneys' fee. To that I add fees for late payment of instalments. The plaintiffs are not entitled to any claim without proof.

Changes in the Idenity of the Plaintiffs.

47 That there has been a material change in the identity of the plaintiffs to entitle the guarantor to release from the guarantee, is totally without

substance. The submission did not explain what made the change a material one and how it was prejudicial to the guarantor. ***The Bank Undertaking (The Bank of Nova Scotia Belize Operations) Vesting Act, No. 17 of 2003,*** provides a complete answer to the contention that there has been material change entitling the guarantor to release, and to the suggestion that the plaintiffs are no more. The Act authorised the agreement by which assests, liabilities, obligations and rights of the Bank of Nova Scotia, were transferred to the Scotia Bank Belize Ltd. Rights and obligations under a guarantee are included. It excluded and therefore made it unnecessary to obtain prior consent of each affected person who had been privy to any contractual transaction with the Bank of Nova Scotia. Guarantee is specifically dealt with in sections 3(2) (c), 4(1)(a)(i), 4(1)(c) and 4(1)(e). I set them out below, beginning with the general provision in S: 3(1) which states:

48 *"3(1) Subject to the Agreement, at the close of business on the Appointed Day, the Undertaking of the Transferor shall by virtue of this Act vest absolutely in the Transferee without any further assurance, and upon such vesting all existing assets, liabilities, rights, obligations and other property which by the Agreement have been agreed to be transferred shall vest in the Transferee, and where any real property and any security has by virtue of this Act, vested in the Transferee, the Registrar General, the Registrar of lands and the Registrar of Companies shall take due notice thereof and shall, ...make such annotations on the records as may be necessary and issue all such certificates as may be required to perfect the title of the*

Transferee to such real property or security."

49 Then S: 3(2)(c) states:

" *(2) The transfer or vesting of any part of the Undertaking of the transferor effected by this Act shall not;*

(c) invalidate or discharge any contract or security."

50 Further S:4(1)(a)(i) and 4(1)(c) and 4(1)(e) state:

"4(1) The effect of this Act as regards the Undertaking hereby transferred shall be that as and from the close of business on the Appointed Day:

(a) every existing contract and security comprised in the Undertaking to which the Transferor is a party, whether in writing or not, shall be construed and have effect as if-

(i) the Transferee had been a party thereto instead of the Transferor:

....

(c) any instruction, direction, mandate, power of attorney, guarantee, pledge, assignment, debenture, mortgage, bill of sale, charge, chose in action, insurance policy, security or consent given to the Transferor shall have effect as if given to the Transferee without notification to the maker thereof;

(e) any security transferred to the transferee by virtue of this Act that immediately before the close of business on

the Appointed Day was held by the Transferor as security for the payment or discharge of any debt, liability or obligation, whether present or future, actual or contingent, shall be held by and shall be available to, the Transferee as security for the payment or discharge of such debt, liability or obligation, and any such security which extends to future advances or liabilities shall, from the close of business on the Appointed Day, be held by and shall be available to, the Transferee as security for future advances by, and future liabilities to, the Transferee in the same manner and in all respects as future advances by, or liabilities to, the Transferor were secured thereby immediately before the close of business on the Appointed Day:"

51 The above provisions of the Act leave no doubt that any guarantee which may have been given to the Bank of Nova Scotia before the appointed date, (later in 2003), was included in the transfer of; assets, liabilities, rights, obligations and securities of the Bank of Nova Scotia to the Scotia Bank Belize Ltd, by statutory authority. The transfer has been termed "vesting of the bank undertaking." The rule of the Common Law regarding alteration of a contract of guarantee or any contract must give way to the statutory law.

Was there Release of the Guarantor?

52 The final defence which was also alternative, was that Ms. Molina, for the bank, and the guarantor agreed when the debt remained owing, that if the guarantor paid $75,000.00, he would be released from his obligations as a guarantor. In his testimony, the guarantor said the debtor participated in the agreement. The guarantor seemed to accept that at the time the loan was in arrears. According to his testimony, the sum of $75,000.00 was to come from the sale of one of the debtor's two properties already charged with the loan. The property was sold and $75,000.00 was paid to the bank. Ms. Molina's testimony was that it was a proposal by the guarantor, she sent it to the Head office. She said the Head office accepted the part of the proposal to sell the property, and rejected the part to release the guarantor.

53 In view of other evidence showing that Ms. Molina had to send the application for such a large loan to the Head office, I reject part of the guarantor's testimony that Ms. Molina accepted, on behalf of the bank, that the guarantor would be released. Even if it was agreed by the bank that the guarantor would be released, that would be an instance of an agreement not supported with consideration from the guarantor. It would be unenforceable. The guarantor made that point in his favour in regard to another head of defence. The bank had the right to sell the property anyway. I am certain an estopel would not arise.

54 The guarantor also said that it was the understanding that the debtor would be released upon the sale for $200,000.00 of the main property charged. Again my decision is that there was no such agreement and, if there was, then it was unenforceable because it was not supported with consideration.

Again an estopel would not arise.

Orders.

55 In accordance with the reasons I have given, the plaintiffs' claim succeeds with modification. Auctioneer's fees, attorney's fee, loan to pay insurance premium and interest thereon and late payment fees are excluded from the judgment. The judgment that the Court enters for the plaintiffs includes: (1) part of the principal sum lent and owing as at 20.3.2003; (2) interest thereon at bank rates until the date of this judgment and thereafter at the court rate of 6% per annum until payment; and (3) costs of this suit.

56 The exact judgment sum requires computation. I direct a reference authorising that the plaintiffs nominate an accountant or one of their employees knowledgeable in computing loan account, and the guarantor nomuniate an accountant or someone who has working knowledge in accounting and forward the names and particulars to the Registrar. The Court will consider appointing them as referees for the purpose of computing the over all sum owing as at 20.3.2003. The sum computed will have to be presented to the Court for confirmation.

57 The judgment that I enter against the debtor on his admission is for the same sum that the referees will find owing against the guarantor, and the Court will have confirmed, and for the same interest. Cost payable by the debtor will be only up to the close of pleadings. It is clarified that the plaintiffs are not entitled to receive payments that in total will be more than the sum

determined owing as at 20.3.2003, and interest and costs as stated above.

58 Dated this Tuesday the 30th day of March 2004.

At the Supreme Court, Belize City.

Sum Lungole Awich

Judge of The Supreme Court.