IN THE SUPREME COURT OF BELIZE, A.D. 2000

ACTION NO: 147 of 2000

BETWEEN	(ABEL RODRIGUEZ (INESITA RODRIGUEZ ((AND (((DENYS BRADLEY	PLAINTIFFS DEFENDANT

Mrs. S. Musa-Pott for the plaintiffs.

Ms. V. Flowers for the defendant.

AWICH, J.

16.2.2004 **J U D G M E N T**

1. *Notes: Guarantee:-* *is an accessory or secondary contract; there cannot be a guarantee without a principal contract, the principal obligation; a guarantee to a bank loan; the guarantor, as part of the guarantee mortgaging to the bank the property he has sold to the borrower but title to which he has not yet transferred. A volunteering guarantor is not entitled to indemnification, it is not so in this case; default by principal debtor to pay the renders guarantor liable to pay and he is entitled to claim payment from the principal debtor as indemnification.*

2. At the close of trial last Friday, 6.2.2004, at which some vigorous submissions were made by both learned counsel, I reserved judgment so that I would reappraise the evidence to see whether my first view of the evidence would change. The evidence had appeared so plain except for the usual minor differences about details and about so few material points that it caused me to think that I might not have sufficiently weighed every aspect of it. After careful evaluation of the evidence my view of it has not changed. The facts are largely common grounds. Where the evidence for the plaintiffs differed from the defendant's, the differences were of no consequence in the determination of the case, which is based on the law regarding contracts of guarantee and of indemnity. In my view this is a case about which parties might have stated to the Court the largely common facts and the limited areas of differences and simply asked the Court to decide a question or questions of law which would have determined whether or not the claim or counterclaim would succeed or neither would succeed. That procedure is available under ***O. 36 r 1 of the Rules of the Supreme Court Cap. 82, Statutory Instruments, Laws of Belize.***

The Facts.

3. The material facts are as follows: In 1995, Mr. Denys Bradley Jr., the defendant, requested Mr. Abel Rodriguez, the first plaintiff, to let the defendant have the use of land, Parcel No. 1365, of Block 16, in the Caribbean Shores, Belize City, Registration Area, for the defendant's boat building business. The first plaintiff had at the time some right to the land; he expected to obtained freehold title. The plaintiff agreed to the

defendant's request and the defendant took exclusive possession, and set up his business on the land. He said he paid rental of $200.00 per month for a short period before they agreed on sale and purchase. The plaintiff denied that rental payment was asked for nor was it paid. The difference is of no consequence in the case.

4. On 1.2.1996, the first plaintiff, of the one part, and the defendant of the other part, entered into a written agreement by which the first plaintiff agreed to sell his right to the land and the "freehold" title that he was to subsequently obtain to the defendant. The agreement is exhibit P(AR)-1. The purchase price was $250,000.00. A deposit of $4,781.00 was paid by the defendant, the remainder would be paid by instalments of $4,781.00 over 8 years. Interest at 17% per annum would be charged. The first plaintiff would proceed to obtain, "the freehold title free of encumbrances", and would transfer it to the defendant after the eight years upon completion of payment of the purchase price. On 24.4.1996, the first plaintiff, as expected, obtained "title absolute" which a is freehold title, under ss: 11, 26 and 34 of the Registered Land Act, Cap. 194, Laws of Belize. The title was free of encumbrances. It was jointly held by the first plaintiff and his wife, Inesita Rodriguez, the second plaintiff. They kept the land title and the land certificate. Transfer was not signed and kept as an escrow to be presented (delivered) at the completion of payment as one might have expected.

5. According to testimonies for both sides, the instalments were payable monthly. The plaintiffs said that the defendant was late most of the time in making the payment. The defendant denied that. Again I do not consider

the difference material.

6. Then some time in 1996, said the first plaintiff, the defendant told him that the bank would give the defendant a loan to pay off the purchase price, if the plaintiffs would "put up the land for mortgage". The defendant denied having told the first plaintiff so and went on to say that it was the first plaintiff's idea that a loan be obtained, he would guarantee the loan. The first plaintiff, the defendant said, needed the money to pay for his children's education in the USA. Again this divergence of facts does not matter in the determination of the case. At whichever party's initiative, a bank official from the Belize Bank visited the property; the first plaintiff and the defendant were present. The loan and the land as security were discussed.

7. In October, 1996, the plaintiffs and the defendant attended on the loan official at the Belize Bank, Albert Street. The defendant agreed to the loan to him and to the plaintiffs guaranteeing the loan. He said so in his testimony. The loan was granted in the sum of $250,000.00. Out of that the defendant wrote and signed a cheque, exhibit P(AR)-2, for $217,300.00, in favour of the plaintiff. The sum represented the part of the purchase price that remained owing to the plaintiffs. The defendant had paid by instalments a total of $32,700.00 to the plaintiffs. Then the bank required that $100,000.00 out of the $217,300.00 remain on the plaintiffs' bank account for a year while the bank monitored payment of the loan by the defendant; the sum was retained. The plaintiffs signed a guarantee, exhibit P(AR)-3, guaranteeing the loan. About a month later, they signed a charge over the property for which by this time they had registered title absolute. The

charge was for the principal sum of $150,000.00 payable with interest. The plaintiffs said the defendant signed all the loan papers on that occasion including a promissory note for the payment of the loan. The defendant, however, said he signed the promissory note later in the afternoon, he had reservation about the title not having been transferred to him, the bank reassured him on telephone and he then signed the promissory note. Again the divergence does not matter.

8. After the loan transaction, the defendant continued to be in exclusive possession of the land. Transfer of title from the plaintiffs to the defendant was not effected. The defendant commenced payment of the loan by instalment which was much less than the instalment sum he had paid to the plaintiffs earlier on the sale agreement.

9. A little after a year in March 1998, the plaintiffs and the defendant went to the bank and the plaintiffs collected the $100,000.00 that had been retained. The plaintiffs also wanted to be released as guarantors. The bank declined. Transfer of the title to the land was discussed. The plaintiffs said that the bank offered the services of their attorneys to effect the transfer for a fee of $20,000.00, but the defendant said he could get the transfer done cheaper. The defendant, on the other hand, denied that he was told all along that he was free to do the transfer at his expense.

10. Payment of the loan by the defendant did not proceed well. He defaulted, he said, because business was slow. By 15.10.1998, the defendant was in arrears of $290,778.13. The bank sent written demand to the defendant as

debtor, and to the plaintiffs as guarantors, to pay up not later than 29.10.1998, otherwise the bank would take action. Following the letter, the bank met with the defendant and the plaintiffs about payment. The plaintiffs again asked to be released. The bank refused. The defendant said the bank agreed that it was perfectly legal for the plaintiffs to withdraw as guarantors. We now know that the bank never released the plaintiffs. On that occasion the bank asked the defendant to provide further security for the loan that was in arrears. The defendant offered his home which the bank subsequently assessed at $60,000.00. The bank demanded further security. The defendant was unable to provide the further security. He made effort and raised $45,000.00 to pay towards the arrears. He said the response from the bank was that they wanted the whole sum paid or nothing. The bank insisted on their demand that the defendant pay the loan in full. The defendant failed to pay. He was much vexed.

11. As at 30.1.1999, the loan plus interest stood at $307,770.86, and because payment remained in arrears and the banks demand to the defendant to pay the loan in full was not met, attorneys for the bank sent notice dated 4.2.1999, to the plaintiffs as chargors of the land, that the bank would sell the land and use the proceeds to pay the sum owing. The notice is a requirement under s: 75 of the Registered Land Act, Cap. 194, Laws of Belize.

12. In October 1999, when the sum owing stood at $343,411.36, the land was sold. The proceeds were applied to the payment of related costs, and $150,000.00 was applied to the payment of the loan. The sum owing was

reduced to $209,700.00. The bank demanded payment of it from the defendant and then from the plaintiffs as guarantors. On 18.1.2000, the plaintiffs paid off the loan. They said they had to obtain a loan to pay and subsequently sold property to raise the money to pay.

13. On 4.8.2000, the plaintiffs took action in which they claimed the sum of $209,733.14 which was owing as at that date after the proceeds of sale of the property charged had been applied to the payment of the loan made to the defendant. The claim was amended on 11.10.2001, to $226,127.85. The escalation was due to interests. The plaintiffs said they had to obtain a loan on which they paid interest, and they claimed the interest as well. They also claimed damages, interest on any judgment sum and costs of suit.

The Law.

14. The plaintiffs claim is based on the contract of guarantee, exhibit P(AR)-3, usually referred to simply as a guarantee. A guarantee is an accessory contract whereby the promisor undertakes to be answerable to the promisee for the debt, default or miscourage of another person whose primary liability to the promisee must exist or be contemplated: ***- see Lakeman v Mountstephen (1874) L.R. 7 H.L. 17, or the Law Times Report Vol. XXX, 439***, a House of Lords case, decided at the early stage of the development of the concept of a contract of guarantee. In the case, the plaintiff knowing something about contract jobs given by a local authority, refused to proceed from a completed job to another, which was to connect sewer line to certain local occupiers of land, “unless the board would be responsible”. He would not take the order from the occupiers. The defendant, the Chairman of the

local authority said to the plaintiff: *"Go on and do the work, and I will see you paid"*. If the communication constituted a contract of guarantee then it needed to be in writing because of the ***Statute of Frauds Act 1677, (UK)***, which it was not. The trial judge decided that there was not sufficient evidence to put the case to the jury. Their Lordships deciding the second appeal, held that there was sufficient evidence to go to the jury, regarding a primary obligation to go to the jury. They pointed out the difference between a guarantee and a primary contract or principal obligation. At page 439 of the Law Times Report, Lord Selborne said:

> *"Some of the expressions of the learned judges of the Queen's Bench look as if they thought that a secondary liability could exist, even if there was not any principal or primary liability. But there can be no surety unless there is a principal debtor. His liability may be created ex post facto; until it is, there can be no surety, there cannot be a guarantee unless there is something to be guaranteed."*

15. In this case, the first point to be decided is whether the evidence has proved a primary obligation, which would be a loan agreement between the bank and the defendant. The second point to be decided then will be whether the evidence has proved an accessory, ancillary or secondary contract or obligation to answer for the default or debt of the debtor in the primary loan obligation. The accessory contract would be the document exhibit P(AR)-3, the guarantee. The principal debtor, the plaintiffs said, was the defendant. The defendant, however, denied responsibility to pay the loan, so in effect he denied that he was the principal debtor. I have to appraise the evidence.

16. If the loan agreement and the guarantee are proved, the liability of the debtor will flow from the contract of guarantee. It is an incident of it, I would say; -

see Re Debtor [1937] 1 ALL ER 130, the case cited by learned counsel V. Flowers for the defendant. The guarantor then becomes liable in the second degree, to the creditor, the bank. It follows that I shall then proceed to decide whether the evidence has proved that the events have occurred upon which the guarantors, the plaintiffs, were entitled to claim indemnification from the principal debtor, the defendant.

17. The right of a guarantor of a debt such as a bank loan only arises when the principal debtor has failed to pay the debt and the guarantor has been called upon to pay. That again will be a question of evidence.

Determination

18. By the close of evidence most of the issues of facts had evaporated. That simplified the application of the law to the case.

19. Whether or not when the defendant was given permission to use the land he paid $200.00 per month rental, is not an issue in this case. It is not relevant in anyway to the plaintiff's case which is based on the loan, nor is it relevant to the counterclaim which is based on the loan and purchase agreement.

20. Whether or not the defendant made late payments of the purchase price instalments is also not an issue. The plaintiff's claim is not based on it. In any case, the arrangement by which the defendant was allowed to use the land was varied or overtaken by the purchase agreement, exhibit P(AR)-1.

21. Whether it was the plaintiffs' or the defendant's idea to have the defendant

obtain the loan, and whether they all went to the bank together or not, does not matter; in the end the defendant conceded that he was at the bank to obtain a loan and he signed the papers. Two of the relevant questions put to him were as follows: *"Did you know you would be getting a loan?" Did you agree?"* His answers were these: *"I was told. Yes, I agreed"*. Whatever initiatives had been taken before the defendant signed the loan papers were mere invitations to treat. The material fact was that the defendant, having considered his commercial circumstances, freely entered a loan agreement with the Belize Bank. The contract was, for the purposes of this case, the primary contract. The defendant was the principal debtor. There was nothing wrong if the plaintiffs thought it beneficial and took the initiative to have the defendant obtain a loan so that the plaintiffs would get the whole purchase price earlier and in a lump sum. There was also nothing wrong if the defendant preferred a bank loan that would be paid by smaller instalments and the defendant took the initiative. What mattered was for one of them having conceived the proposal, to persuade the other to agree to it so that the sale contract between them would be varied accordingly. The evidence proved conclusively that whichever party took the initiative, the parties agreed and had the contract of sale substantially varied by the introduction of the bank loan and guarantee.

22. Whether the defendant signed the promissory note later did not have any effect on the loan contract. The promissory note was in law not an element in the loan contract; it was simply an independent basis on which the bank, the promisee, could make a claim. I think banks use it as a double catch, a double means of making a claim in the event they have to take court action.

23. That the defendant defaulted in the payment of the loan and the loan was in large arrears was admitted. That the bank having failed to get payment from the defendant, the principal debtor, demanded and obtained payment from the plaintiffs was amply proved by uncontroverted evidence. It would follow that the plaintiffs would be entitled to indemnification from the defendant.

24. That the plaintiffs had offered to guarantee the loan without having been requested also ceased to be an issue of fact, because in the end the defendant consented to the plaintiffs guaranteeing the loan. My notes on the point reads:

> *"Q. You were aware and consented to Mr. Rodriguez guaranteeing the loan, correct?*
>
> *A. Correct.*
>
> *Q. You had no objection to Mr. Rodriguez guaranteeing the loan?*
>
> *A. No, I did not object, it was suggested by him."*

25. The sound point of law raised by Ms. V. Flowers, that a person who volunteers without being requested, to guarantee a debt of another is not entitled to indemnification from the debtor, for which point of law she cited, ***Owen v Tate and Another [1975] 2 ALL ER 130***, must also fall away. The evidence proved that even if the plaintiffs had initially offered to guarantee the loan, the loan and guarantee were discussed at the bank and the defendant agreed and by implication requested the plaintiffs to guarantee the loan.

26. A point which seemed to have much vexed the defendant is that title to the land was not transferred to him. There is no legal basis in that to deny the plaintiffs the right to indemnification. First I accept the evidence for the plaintiffs that the defendant was told that the title could be transferred to him at a rather high cost to him and he preferred to leave the transfer pending. Secondly, the property for all purposes was the defendant's by reason of the purchase agreement, but subject to the incumbrance introduced to secure the loan to him. Even if title had been transferred to him he would have the incumbrance attached, that was the only way he would obtain the loan. His default to pay the loan would have resulted in sale of the property in the same way.

27. Finally, the point that the charge on the property might have been a charge to secure in addition other liabilities of the plaintiffs, did not invalidate the effect of the liability of the plaintiffs as guarantors of the primary liability of the defendant. In any case there was evidence that the proceeds of sale of the property was applied only to the payment of the defendant's debt and costs of sale.

28. For the reasons I have given, it is my decision that the plaintiffs have proved their claim for indemnification from the defendant in the sum claimed, $226,127.85. They have also proved that they are entitled to interest at 14.5% per annum. I enter judgment for the sum claimed and interest at 14.5% from the date of filing the action until today, 19.2.2004, and thereafter at 6% per annum until the judgment debt is satisfied. I also grant

costs of this suit to the plaintiffs. No general damages were proved, other than the sum claimed, $226,127.85. I make no award for any other damages.

29. The defendant has failed to prove the counterclaim. It is dismissed.

30. Exhibits may be returned to the parties who tendered them.

1. DATED this Thursday, the 19th day of February, 2004

At The Supreme Court

Belize City.

SAMUEL AWICH
JUDGE