GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 26 OF 1998

BETWEEN:

NEW INDIA ASSURANCE COMPANY
[TRINIDAD] LIMITED

Appellant

and

LIBERTY CLUB LIMITED

Respondent

Before:

The Hon. Mr. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr.Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal

Appearances:

Mr. Russell Martineau S.C., Mr. F. Hussain and
Ms. R. Wilkinson for the Appellant
Sir Harold St. John, Q.C., Mrs. Linda Grant and
Miss Rita Joseph with him for the Respondent

1998: November 25
1999: February 8

JUDGMENT

REDHEAD ALBERT J.A

The appellant, New India Assurance Company [Trinidad] Limited and the Respondent, Liberty Club Limited, entered into a contract of guarantee in writing on 8th February, l991; whereby the guarantor guaranteed the repayment of money to the respondent which the respondent had advanced to a contractor on a building contract.

The guarantee provides in part as follows:-

"1. This agreement is supplemental to a contract [hereinafter called the Contract] dated the 18th day of January, One

thousand nine hundred and ninety one and made between the Employer [The Respondent] of the one part and ABA Invesiones [hereinafter called “The Contractor”] of the other part whereby the Contractor agreed and undertook to perform the works more particularly described in the Contract upon the terms and subject to the condition contained in the Contract.

2. The Employer has agreed to make an advance payment of ten percent [10%] of the contract sum being Six hundred and forty three thousand dollars in the currency of the United States of America [$643,000.00US hereinafter called “the Advanced Payment”] to the Contractor in the manner provided for in Article 4 of the Contract which sum will be recovered by the Employer from the Contractor in accordance with Article 9 clause 9.12 of the Contract.
3. The Guarantor [the Appellant] has agreed to guarantee the repayment in the manner hereinafter appearing.

NOW IT IS HEREBY AGREED as follows:

1. If the Advance payment shall not have been recovered by the Employer from the Contractor in the manner aforesaid or if the default by the Contractor in the manner aforesaid or if the default by the Contractor the Employer fails, or is unable to recover from the Contractor the Advance Payment then and in such event the Guarantor shall irrevocably and unconditionally guarantee the recovery any repayment of the Advance Payment to the Employer and shall indemnify the Employer against all losses, damages, claims costs and expenses whatsoever and howsoever which may be incurred by the Employer by reason thereof.
2. The Guarantor shall not be discharged or released from the Guarantee by any arrangement made between the Contractor and the Employer without the assent of the Guarantor or by any alteration in the obligations undertaken by the Contractor or by any forbearance or forgiveness whether as to payment time performance or otherwise in respect of any matter or thing concerning the Contract. Provided however, if any part of the Advance Payment is recovered as aforesaid the amount of this guarantee shall be reduced accordingly by an amount equivalent to the amount so recovered.
3. The Employer agrees and undertakes to provide the Guarantor with a written statement each month evidencing and acknowledging the amount [if any] by which the Guarantor’s and Contractor’s liability for the Advance Payment is reduced as aforesaid”

The respondent alleged that under the terms of the guarantee it advanced the sum of US$643,000.00 to the Contractor. The Contractor, according to the Respondent, repaid $155,255.10 leaving a balance of $487,774.90.

The respondent, as plaintiff sued the appellant on the guarantee to recover the outstanding balance together with interest . The learned trial judge gave judgment for respondent in the sum of $487,744.90 United States Currency and costs but disallowed the claim for interest.

The appellant now appeals to this court against the decision of the learned trial judge and the respondent has filed a cross appeal against the dismissal of his claim for interest.

Two grounds of appeal were filed on behalf of the appellant.

[ii] The first ground of appeal challenges the learned trial judge's decision that clause 3 of the Guarantee was not a condition precedent

[ii] The learned trial judge erred in holding that the appellant by its conduct had waived its right to rely on the respondent's default and was estopped from so doing

[iii] The learned trial judge erred in finding that the appellant by its conduct created a belief or expectation on the part of the respondent that the appellant did not insist on the timely submission of reports and that it would not on that account seek to avoid its obligations under the guarantee and that the respondent evidently acted on the belief to its detriment and that it would be unconscionable to allow the appellant to avoid the obligation under the guarantee

[iv] The learned trial judge wrongly held that there was no substantial prejudice to the appellant from the respondent's failure to report as required by the guarantee

[v] The learned trial judge erred in finding that only the sum of US$155,255.10 had been paid towards the liquidating the

Advance Payment notwithstanding the documentary evidence that the sum of US$208,356.00 was so paid.

The learned trial judge in his judgment referred to:

Ward v Calvert 7.AD and E 143

And after quoting Littledale J as saying "a surety has a right to require that the obligee shall do his duty" the learned trial judge then opined: "a Statement which I think few would question. That is not to say the same as to say that an obligation under a contract are conditions precedent to liability under the Contract".

He then referred to Halsbury's 4th Edition paragraph 332 Vol. 20 which states:

> "Any departure by the creditor from his contract without the guarantor's consent, whether it be from the express terms of the guarantee itself or from the embodied terms of the principal contract, which is not obviously and without inquiry quite unsubstantial, will discharge the guarantor from liability, whether it injuries him or not, for it constitutes an alteration in the guarantor's obligations"

Learned Senior Counsel for the appellant submitted in his skeleton arguments that the learned trial judge correctly stated the principles but applied them incorrectly. He argued that when one correctly applies the principles in Halsbury's Laws, [above quoted] one does not have to look for the evidence, instead what one looks for is evidence of a departure by the creditor from his contract with the guarantor without the latter's consent.

Learned Counsel argued that once such evidence is found there is an alteration in the guarantor's obligation.

In Mr. Martineau's view in this case there is evidence of the departure in that the creditor departed from the notice requirements under clause 3 of the Contract of Guarantee.

The learned trial judge after reviewing many authorities concluded:

> ".....I do not think they [the authorities] lead to the conclusion that the term of the contract in this case should be read as a condition

> precedent. The linguistic considerations put forward by learned Senior Counsel for the defendant do not persuade me that I should interpret clause 3 of the guarantee agreement as a condition precedent."

Sir Harold St. John, senior counsel, for the respondent, contended that this is a simple matter of construction of a document, that is the guarantee, and that effect must be given to the words of the document which must be construed as a whole. He also argued that when a document contains express words, only in exceptionally rear circumstances can a court imply terms contrary to the express words.

In fact learned senior counsel for the appellant in his submission agreed that the documents must be construed as a whole and must be construed against the factual matrix.

Clause 1 of the guarantee says in effect that if the Advance Payment is not recovered from the Contractor then the Guarantor shall irrevocably and unconditionally guarantee the recovery and repayment of the Advance Payment to the Employer. Whereas by clause 3 the Employer agrees and undertakes to provide the Guarantor with a written statement each month evidencing and acknowledging the amount by which the Guarantor's or Contractor's liability for the Advance Payment is reduced.

Do the words "irrevocably", and "unconditionally" in clause 2 of the guarantee permit of a condition precedent, or to put it another way by the use of those words is a condition precedent excluded?

Mr. Martineau, Learned Senior Counsel, argued that clause 3 must be given meaning and effect whatever unconditionally means. Unconditionally must be construed against clause 3.

Learned Senior Counsel submitted the fact that a contract of guarantee states that a guarantor unconditionally guarantees certain payments does not mean that the guarantee does not contain conditions precedent.

In Associated Japanese Bank [International] Ltd v Credit du Nord SA and another 1988 3.ALL ER. 902

This was an action by the plaintiff bank against the defendant bank. The suit was brought on a Contract of Guarantee in which the defendant bank had "unconditionally" guaranteed to pay the plaintiff bank any lease rental or other sums the lessee shall be in default of. This guarantee agreement arose out of the sale lease back transaction, whereby the plaintiff bank purchased four precision engineering machines from one Jack Bennett and leased them back to him. After Jack Bennett had paid the first quarterly rental and had failed to pay the second quarterly rental; it was subsequently discovered that the machines were not in existence. On appeal it was held on its true construction the guarantee was subject to an express condition precedent that there was a lease in respect of four existing machines. Alternatively, it was reasonable to conclude that the guarantee contained an implied condition precedent that the lease related to existing machines. It followed therefore that since the machines did not exist the plaintiff bank's claim failed and would be dismissed.

At page 908-909 Steyn J. said

> "Clause 6 of the guarantee therefore contemplated the existence of the machine…… Against that background the question is whether it was expressly agreed that the guarantee would only become effective if there was a lease of four existing machines. The point is not capable of elaborate analysis. It is a matter of first impression. On balance, my conclusion is that, sensibly construed against its objective setting, the guarantee was subject to an express condition precedent that there was a lease in respect of four existing machines. If this conclusion is right, AJB's [Associated Japanese Bank's] claim against CDN [Credit Du Nord] as guarantor or sole or principal whether debtor under cl. 11 fails.
>
> If my conclusion about the construction of the guarantee is wrong, it remains to be considered whether there was an implied condition precedent that the lease related to four existing machines. In the present contract such a condition may only be held to be implied if one of two applicable tests is satisfied. The first is that such an implication is necessary to give business efficacy to the relevant contract, i.e. the guarantee. In other words, the criterion is

> whether the implication is necessary to render the contract [the guarantee] workable. That is usually described as the Moorcock test [See Moorcock 1886-90 ALL.R EP. 530]. It may well be that this stringent test is not satisfied because the guarantee is workable in the sense that all that is required is that the guarantor who assumed accessory obligations must pay what is due under the lease. But there is another type of implication which seems more appropriate in the present context. It is possible to imply a term if the court is satisfied that reasonable men faced with suggested term which was ex hypothesis; not expressed in the contract, would without hesitation say, 'yes, of course, this is so obvious that it goes without saying' …….. although broader in scope than the Moorcock test, it is nevertheless a stringent test, and it will only be permissible to hold that an implication has been established on the basis of comparatively rare cases, notably when one is dealing with a commercial instrument, such as a guarantee for reward, nevertheless, against the contextual background of the fact that both parties were informed that the machines existed, and the express terms of the guarantee. I have come to the firm conclusion that the guarantee contained an implied condition precedent that the lease related to existing machines. Again, if this conclusion is right, AJB's claim against CDN as guarantor or as sole or principal debtor under cl. 11 FAILS"

I am firmly of the view that the question of an implied condition can only be considered in the absence of one that is expressed. In the context of this case I have no doubt in my mind that clause 3 of the guarantee does not provide for an express condition precedent.

The contextual back ground of the facts in the instant case is different from those in Associated Japanese Bank case. In the latter both parties were informed that the machines were in existence. The machines which I may call the substrata or the core of the contract of guarantee. Without the existence of the four machines I am confident that neither AJB nor CDN would have entered into the contract. Against that contextual back-ground of that fact it was, in my view an irresistible and logical conclusion to arrive at, that there existed an express or at least an implied term of the guarantee i.e. the machines existed. Looking at the contextual background of the facts in the instant case there is nothing on the face of the guarantee other than clause 3; there is no factual basis for importing

an express or implied term of guarantee. This was money advanced by the respondent to a contractor for which the appellant guaranteed repayment.

In Bank of British Columbia v Turbo Resources Ltd 148 D.L.R 148 P.598 .

By the terms of a guarantee the plaintiff bank undertook to notify the defendant, guarantor of any default on the part of the principal debtor within 15 days, and to make the guarantor a party to any discussions with the principal debtor. The guarantor had taken elaborate precautions, in its business arrangements with the principal debtor, to ensure that the debt was duly paid. The bank failed to notify the guarantor of a default, and held meetings with the principal debtor to which the guarantor was not a party. An action on the guarantee succeeded at trial.

It was held, allowing the appeal, that all the circumstances of the contract were to be considered in determining whether a breach went to the root of the contract. In the present circumstances, the fulfillment of the bank's obligations was vital to the guarantor, and consequently, they should be treated as conditions, non-performance of which had the effect of discharging the guarantor.

At page 605 Laycraft J. A. said:

> "…. In my view, while a surety is not entitled to notice of the debtor's default in the absence of contractual term to that effect, it is open to him to stipulate for notice in his contract, either in terms which make notice a condition precedent to his liability or in circumstances which show that, in any event, the term goes to the root of the contract. In either case breach by the creditor of that stipulation will discharge the surety since the creditor will no longer be able to rely on the guarantee agreement."

And at page 608 he said:

> "The Commercial reality is that Turbo assumed, by its guarantee, contingent liability for a substantial portion of the investment in the station. It took elaborate precautions to maintain control of the transaction by a lease and sublease of the premises. It instituted a gallonage surcharge in an attempt to be certain that a given

> proportion of cash flow of the business would be used to amortize the debt for which it could become liable as surety.
> Even in the new collateral contract for the monthly payments as set forth in the letter of June 2, l976, Turbo referred to the bank obtaining the balance of the payments of $2,000.00 from Mr. Wilson and said "please keep me informed as to how and if he is paying them.
>
> In the context of this agreement, the stipulation for notice of default and for the right to be present at all discussions between creditor and debtor was clearly in furtherance of Turbo's need to be able to take prompt action to protect itself."

Having regard to the contextual background of the facts in this case, in my view, the court could not have come to any other conclusion than that the requirements that the guarantor be notified of any default on the part of the principal debtor and to be a party to any discussions with the principal debtor were conditions precedent.

Learned Senior Counsel, Mr. Martineau argued that the monthly statements as contemplated by clause 3 of the contract of guarantee are important because that is the only way the guarantor will know what is going on between the respondent and the contractor. He argued that it goes to the root of the contract. It provides the guarantor with the means to protect himself. I do not accept this argument.

Sir John on the other hand argued that all the statements are required to provide are the amounts by which the advance payment has been reduced. It does not go to liability. The provision of the statements does not cast any obligation on the contractor to make good the default. Finally, argued learned senior counsel, there is no power to do anything under clause 3.

It is quite clear to my view that clause 3 is not couched in language which says that it is a condition precedent. Construing the guarantee as a whole, can clause 3 be construed as a condition precedent? In the final analysis it is a matter of construction.

In Stoneham v The Ocean Railway And General Accident Insurance Company 1887 11 Q.B.D 237

At page 239 Matthew J. said:

> "In some cases it has been expressly agreed that compliance with the terms imposed should be a condition precedent, and in those cases compliance with the terms has been held to be a condition precedent, but where the question is left at large, it is for the court to say, looking at all the terms of the policy, what the true meaning of the contract is."

Even applying the principle which is wider than the Moorcock as enunciated by Steyn J in Associated Japanese Bank International [referred to above], is it possible to imply a term? Would a reasonable man faced with clause 3 without hesitation say, "yes, of course that is obvious it goes without saying that it creates a condition precedent". I think not. Neither in my view it is necessary to interpret clause 3 to import a condition precedent so as to give it business efficacy to the guarantee.

I now turn to the question of estoppel.

Learned senior counsel, Mr. Martineau, argued grounds 2,3 and 4 together.

Mr. Martineau submitted that the learned trial judge was wrong in holding that the appellant by its conduct waived its right to rely on the respondent's default and was estopped from doing so.

He pointed to the fact that the learned trial judge found that up to 21st September, l992 the respondent had not made a single report to the appellant as it was required to do under clause 3 of the contract of guarantee.

Learned senior counsel submitted that waiver and estoppel require some form of representation, mere inaction, unless it is in circumstances which amount to a representation is not enough.

Finally he argued that in the instant case there has been no representation or circumstances amounting to a representation.

I agree with learned senior counsel that an estoppel requires some form of representation. But it is well established that there can be representation by conduct.

In Crabb v Arun District Council 1975 3ALL ER. 867 Lord Denning at page 871 said:

> "Short of an actual promise, if he by his words or conduct so behaves, as to lead another to believe that he will not insist on his strict legal rights knowing or intending that the other will act on that belief and he does so act, that again will raise an equity in favour of the other, and it is for the court of equity to say in which way equity may be satisfied."

On 21st September, l992 the respondent wrote to the Appellant in the following terms inter alia:

> ……
>
> "Article 9.9.12 stipulates, inter alia, that the advance payment shall be repaid by way of five equal installments commencing with the first interim certificate after the total certificated value of the construction works exceeds 7 percent of the sum stated in the contract. The certificate value of the construction works exceeded the said 7 percent in August, l991 and the construction Manager gave notice to ABA that repayment of the advance payment should start in September, l991. ABA fell behind schedule and subsequently requested our client company to revise the schedule for repayment of the advance payment. Due consideration was given to this request and the construction contract was amended on 7th July, l992. The effect of the amendment is that the balance of the advance payment outstanding as at 24th June, l992 had to be repaid by four equal monthly installments on the thirteenth of each month commencing 30th June, l992 and ending September 30, l992. Other financial assistance was also extended by our client company ABA.
>
> The contract position is that ABA has repaid $155,255.10 leaving an amount outstanding of US$487,744.90. Thus ABA now [sic] behind the revised repayment schedule. Enclosed all the statements showing the amount paid as of date. We on behalf of our client apologise for delay providing you with the foregoing information.
>
> Please do not hesitate to contact us if you require additional information.
>
> Yours faithfully
> Grant and Grant"

The appellant did not respond to this letter. I agree with the submission of Sir Herold St. John that having regard to the contents of the letter along with the apology were circumstances in which the appellant ought to have replied. Failure to reply in those circumstances would have led the respondent to believing or encouraged the belief in the respondent that the appellant would not insist on its legal right.

I therefore agree with the learned trial judge when he said:

> "I find that the defendant [Appellant] by its conduct created or encouraged a belief or expectation on the part of the plaintiff [Respondent] that the defendant did not insist on the timely submission of reports and that it would not on that account seek to avoid its obligation under the guarantee agreement. The plaintiff evidently acted on that belief to its detriments, and it would be unconscionable to allow the defendant to avoid the obligations under that agreement"

I now turn to ground 5

The appellant contends that the sum of US$155,255.10 is the amount paid towards liquidating the advance is incorrect.

It contends that the sum should be US$208,358.06. At the trial Leon Taylor testified on behalf of the respondent. He was cross examined. He said in evidence that the amount of the advance payment was US$643,000.00. The contractor repaid approximately US$155,000.00. The balance was US$487,000.00 The learned trial judge had seen Leon Taylor and accepted his evidence. He found as a fact that the amount outstanding was US$487,744.90. This court will not therefore lightly upset this finding of fact [See Benmax v Austin Motor Co. Ltd 1955 1 AER.326]

I now turn to the cross appeal. The respondent contends that the learned trial judge erred in law when he held that the respondent was not entitled to interest on the Advance Payment under clause 1 of the Guarantee. Clause 1 of the Guarantee [referred to above] states inter alia:

> "…..the guarantor shall irrevocably and unconditionally guarantee the recovery and repayment of the Advance Payment to the

> Employer and shall indemnify the Employer against all losses, damages, claims, costs and expenses whatsoever and howsoever which may be incurred by the Employer by reason thereof."

The fall in the value of the money or inflation is protected by imposition of interest on money loaned. The respondent had advanced US$643,000.00 to the contractor on 18th January, l991. The sum of US$487,744.90 is outstanding. If that US$487,744.90 is repaid today, because of inflation US$487,744.90 would not be able to purchase the goods and service, that sum would have purchased in 1991. It would purchase less. The repayment of US$487,744.90 today would represent a loss to the respondent. To compensate for that loss for which the guarantor is contractual liable for, in my view, the respondent is entitled to recover interest on the sum of US$487,744.90.

Moreover, this being a commercial transaction, it must have been within the contemplation of the parties that interest would be paid on the advance payment. This, to my mind, is reflected in the action of the respondent and the contractor when they amended the construction contract by providing that the balance of the Advance Payment had to be paid on the 30th September, l992 and that the contractor had to pay 1 percent per month interest on the arrears of payment to the respondent.

In Moschi v Lep Air Services Ltd and another 1972 2ALL ER.393 at page 401 Lord Diplock said:

> "It follows from the legal nature of the obligation of the guarantor to which a contract of guarantee gives rise that it is not an obligation himself to pay a sum of money to the creditor, but an obligation to see to it that another person, the debtor does something; and that the creditor's remedy for the guarantor's failure to perform it lies in damages for breach of contract only. That this was so, even where the debtor's own obligation that was the subject of the guarantee was to pay a sum of money, is clear from the fact that formerly the form of action against the guarantor which was available to the creditor was in special assumpsit and not in indebitatus assumpsit.
>
> The legal consequences of this is that whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee the creditor can recover from the guarantor as damages for breach of his contract of guarantee, whatever sum the

> creditor could have recovered from the debtor himself as a consequence of the failure. The debtor's liability to the creditor is also a measure of the guarantor's."

If the creditor's remedy for the guarantor's failure to perform lies in damages for breach of contract and interest is recoverable on damages, then the respondent is entitled to recover interest on the balance of the Advance Payment.

In the premises I hold that the respondent is entitled to be paid interest on US$487,744.90 at 5 percent per annum from the date of the filing of the writ i.e 8th February, l994 until repayment.

The appeal is therefore dismissed. The cross appeal is allowed. The judgment is therefore varied to the extent that the appellant is ordered to pay to the respondent the sum of US$487,744.90 at the rate of 5 per cent per annum from 8th February, l994 until repayment.

Costs of this appeal and cross appeal to the respondent to be taxed if not agreed.

ALBERT J. REDHEAD
Justice of Appeal

I Concur

C.M. DENNIS BYRON
Chief Justice [Ag.]

I Concur

SATROHAN SINGH
Justice of Appeal