ANTIGUA and BARBUDA

IN THE COURT OF APPEAL

MAGISTERIAL CIVIL APPEAL NO.2 OF 2003

BETWEEN:

NOEL BARNES

Appellant

and

COURTS [ANTIGUA AND BARBUDA] LTD

Coram:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Ralph A. Francis for Appellant
Ms. Samantha N. Marshall for Respondent

2003: February 4;
March 31.

JUDGMENT

[1] **BYRON, C.J.:** The appellant, guarantor, is seeking a ruling that he is not bound by his guarantee of a hire purchase agreement, because the respondent did not prosecute its claims immediately on the default of the hirer and waited some 2 years before doing so.

[2] I have read the opinions of both Georges J.A. [Ag.] and Alleyne J.A. [Ag.] and since they have disagreed, I give my own view with my reasons for decision. At the outset I should indicate that I agree with the conclusions reached by Georges J.A. [Ag.] who has set out the facts in his opinion.

The Essential Facts

[3] I must with respect comment that it seems to me that a premise on which Alleyne J.A. [Ag.] based his conclusion was that the respondent had made an "accommodation" with the hirer. This implied that it had varied the contract with the hirer without obtaining the consent of the guarantor. That conclusion was inconsistent with the findings made by the learned Magistrate. I can find no justification in differing from her findings of fact. I do not think that there was any evidence to support the conclusion that the terms of the contract had been varied. For my part, I was unable to find any evidence to support such a conclusion of fact. As I have understood the evidence, the hirer defaulted in payment and the respondent did not prosecute its claims until about 2 years had elapsed. The cause of that delay was addressed on the evidence because it was established that the hirer had changed her address without notice to the respondent, and the respondent had made efforts to find her new location. Eventually, the respondent went to the guarantor for assistance to locate her. It was the guarantor who gave the respondent information, which resulted in its finding the hirer and initiating the steps to recover possession of the goods and to institute these proceedings.

[4] I do not support the conclusion that the terms of the contract were varied either expressly or by implication from the conduct of the respondent. The category in which I would put this case is one in which the respondent failed to prosecute its claims promptly. I do not think that the respondent could be said to have acquiesced in the default because the evidence of the efforts to find the hirer rebuts a passive acceptance. The evidence is more supportive of the notion that the hirer evaded the respondent and made it difficult for the respondent to enforce its rights under the agreement.

The Applicable Law

[5] In my opinion, the law on this issue has been well settled for over a century. The general principle is that a guarantor would be discharged from his obligations if there has been some positive act done by the Creditor to the prejudice of the guarantor, or the creditor exhibits such degree of negligence as to imply connivance and amount to conduct which is unfair to the surety. This basic rule, however, does not extend to situations where the creditor merely fails to prosecute his rights diligently.

[6] The law is summarized in Chitty on Contracts 25th edition para 3202:

> "Except where it is provided to the contrary, any variation of the principal agreement by the owner and hirer without his consent will normally discharge the guarantor from his obligations under the contract of guarantee. The guarantor will also be released if the owner enters into a binding agreement with the hirer to grant him an extension of time for payment, unless the owner at the same time expressly reserves his rights against the guarantor or the extension of time is allowed with the guarantor's consent. But the mere omission to press the hirer for payment will not have this effect. The termination of the hiring or the hire-purchase agreement, whether upon a repudiation by the hirer accepted by the owner, or by the owner under the terms of the agreement, or voluntarily by the hirer, will not discharge the guarantor from liability."

[7] The basic rule was expressed in **Holme v Brunskill** QBD (1877-79) 495 where it was held that a guarantor was absolved from liability where the principals had entered into a varied agreement without the consent of the guarantor. In the Court of Appeal affirming that decision at 505 of Cotton LJ said:

> "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 insubstantial, or that it cannot otherwise than be 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 findings 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."

[8] In the case of **The Mayor, Aldermen, and Citizens of Dunham v Fowler and Another** (1889) 22 Q.B.D. 394 the headnote commences "Mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties." In the divisional court Denman J examined the development of the law in detail in demonstrating the extent and rationale of this principle. That analysis was required because the defence had contended that the guarantors were discharged from liability by systematic neglect of several conditions of the bonds in question, which was acquiesced in by the creditors. After affirming the principle stated in the headnote the learned judge went on to explain at 417:

> "but the main contention of the defendants in this case was, that though mere laches, or mere acquiescence in a departure from the conditions of a bond on the part of the obligee, will not be sufficient to absolve the surety, there was evidence here from which the jury might not unreasonably have inferred that the corporation had so conducted themselves as to make it a case for the jury whether they had not, within the language of the last-mentioned case, Mactaggart v Watson and other cases to which I will presently refer, "either by their conduct prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened."

After considering the evidence and concluding that the necessary facts were not proved to govern the conclusion that the defendants sought he continued

> "It must be admitted, however, that there were strong facts shewing a systematic neglect and omission to insist upon the provisions of the bond, and that the principle is strongly laid down that the surety has no right to shelter himself even under a long course of omissions by the obligee to see to the perfomance of the conditions for the performance of which the surety has bound himself by way of giving a security in addition to the covenants of the person for whom he becomes answerable."

At page 420 of the judgment Denman J concluded:

> "Lord Kingsdown's judgment in **Black v Ottoman Bank** puts the matter thus, after referring to several other cases: "From these cases it is clear that upon the point now in dispute the rule at law and in equity is the same; that the mere passive inactivity of the person to whom the guarantee is given, his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge the security; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence, as, in the language of Wood, V.C., in **Dawson v Lawes**, to imply connivance and amount to fraud." Here, again, the language must be understood to mean at least connivance in acts contemplating the probability of a defalcation, and so being guilty of a fraud upon the sureties, in the sense of assisting an act which must be detrimental to them."

[9] The principle had been applied in Australia in **O'Day v Commercial Bank of Australia** (1933) 50 CLR 200, where the High Court of Australia held that a creditor does not prejudice the position of a Guarantor so as to discharge him from his obligations when he fails to sue a principal debtor once the debt becomes due. The facts of the case showed that the creditor had made a defective demand, and appointment of receiver of the principal debtor's assets and the guarantor claimed to have been discharged from liability. Mc Tiernen J said at 224:

> "As the mere inactivity of a creditor which has no other colour than failure to enforce his rights against a debtor will not discharge a surety so also I think that action by a creditor against a debtor which has no other colour or character than action bona fide taken in pursuit of his remedies will not discharge a surety though such action may be taken under a mistake of law as to the creditor's rights."

[10] None of the modern cases has changed this principle which seems to me to accord with principle and equity. The evidence brings this case squarely within the context of an owner that omitted to press for payment without having entered into agreement for an extension of time or varying the terms of the principal agreement. There could be no inference that the owner connived with the hirer or took any action which could have injured the interests of the guarantor. As I mentioned earlier the evidence seems more consistent with the notion that the hirer avoided the appellant. I think that the law is clear that in such a case the guarantor does not avoid liability, by the owner's omission to prosecute the hirer

immediately on her default, and must make good on his guarantee of the due performance and observance of the terms of the hire purchase agreement.

[11] In the circumstances the contention of the appellant has to be rejected. I concur with Georges J.A. [Ag.], and agree that the appeal be dismissed and affirm the decision of the learned Magistrate that the appellant is liable in the sum of $4,501.83 and $75.00 costs. Costs of the appeal in the sum of $500.00 to the respondent.

Sir Dennis Byron
Chief Justice

[12] **GEORGES, J. A:** On the12th December, 1996 the respondent ["Courts"] let to the principal debtor ["Knight"] a Hibiscus 3 piece suite and a Galaxus Anthracite rug on a hire-purchase agreement ["the agreement"] for a total price of $6,032.00 payable by 104 weekly installments of $58.00.

[13] The appellant ["Noel Barnes"] since deceased signed as guarantor on terms by which he guaranteed "the due performance and observance of all the terms and conditions in the said agreement on the part of the hirer to be performed and to be observed, and to pay all the expenses which the respondent may be put to in enforcing the said agreement."

[14] The guarantor further agreed that "no alteration in the terms of the said hire-purchase agreement either by accepting a reduced monthly payment of hire or any other relaxation or indulgence by the respondent in respect of the said terms and conditions shall prejudice the respondent's rights under the guarantee."

[15] At the commencement of the hearing of the appeal it was agreed by Counsel that Jessica Barnes daughter of Noel Barnes deceased be substituted for the said

deceased for the purpose of this appeal only pursuant to Part 21.7 CPR 2000 and the Court so ordered.

[16] The evidence revealed and it was not disputed that about a year after entering into the agreement the hirer began to default on her payments; the last payment made being $106.00 on 16th May, 1998.

[17] The guarantor Barnes was contacted in July of the following year for assistance in locating her and was informed of her default.

[18] On 12th August of the said year viz 1999, the goods were repossessed by the respondent. Due and owing at the time was the sum of $4,201.88 inclusive of interest. The respondent now seeks to recover that amount, legal fees of $300.00 and costs. The goods themselves were then valued by the respondent at $150.00 and dumped.

[19] In a written decision dated 6th March 2001 the learned Chief Magistrate entered judgment for the respondent against the appellant/guarantor Barnes for the amount claimed [$4,501.88] and costs of $75.00. The principal debtor Knight who was jointly sued was not served with a summons and did not appear or participate in the trial.

[20] Learned Counsel for the appellant referring to clause 5 of the agreement contended both here and in the court below that the guarantee of the appellant was limited by the terms of the hire purchase agreement in that in default of any one payment by the hirer the said agreement automatically determined.

[21] Notwithstanding the hirer's default the respondent allowed the hirer to retain the said goods and permitted the arrears of payment to run for two years before retaking possession. In the circumstances learned Counsel posited the appellant's liability was limited to the payment of only **one week's installment i.e.**

$58.00 since the agreement had automatically determined as per clause 5 of the agreement.

[22] The respondent learned Counsel argued that he had an obligation to repossess the goods on default of payment by the hirer of the first installment and not allow the arrears of payment to accumulate and then look to the appellant for payment. With the greatest respect I beg to demur. Clause 5 of the agreement stipulates that:

> "If the Hirer(s) (or any of them) shall make default in payment of the sums payable hereunder or shall fail to observe any other of the terms and conditions hereof whether express or implied or shall commit any act of bankruptcy or have a receiving order made against him or shall make any composition or arrangement with his creditors, or should the Hirer(s) attempt to sell assign or otherwise dispose of the goods, or any of them, or the benefit of this Agreement, or the option herein contained, or it distress or execution shall be levied or threatened upon the goods or upon the premises where the goods may be or if any judgment against the Hirer(s) (or any of them) shall remain unsatisfied for more than Fourteen (14) days or if the Hirer(s) shall abandon the goods then this Agreement shall automatically and without notice determine and thereafter the Hirer(s) shall no longer be in possession of the goods with Owner's consent and subject to the provisions of clause 7 hereof and any pre-existing liabilities of the Hirer(s) hereunder neither party shall have any rights against the other."

[23] Learned Counsel referred to the decision of the British Caribbean Court of Appeal in **Ng-A-Yow Mendonca** (1962) 4 WIR443 and the judgment of Gomes P in particular. In that case [the head note reads]:

> "The appellant guaranteed payment of all sums due under an agreement with interest. In the contract of guarantee it was provided that notice in writing of any default on the part of the debtor was to be given by the creditors to the guarantor who would then be required to make payment within thirty days of the notification of all sums then due under the guarantee."

The original contract between the respondent and the debtor was materially varied without the knowledge of the appellant and to his prejudice. The Court held that the appellant was thereby released from liability. That case is distinguishable from the instant case as the facts are not in my view in pari materia.

[24] As I see it, the hirer's obligation under the agreement [the due performance and observance of which the appellant guaranteed] was not limited only to the payment of the weekly installments. She also agreed to pay interest or **any overdue installments** and any expenses incurred in collecting any arrears and any amount expended by the respondent in ascertaining her whereabouts if she moved without notifying the respondent of her change of address and any costs that may be incurred in repossessing the goods if this became necessary as well as Bailiff's fees and legal costs.

[25] Upon determination of the agreement for default by the hirer pursuant to clause 5 supra, the respondent is not obliged to repossess the goods albeit that they then remain in the hirer's possession without the respondent's consent.

[26] Clause 6 of the agreement states that:

> "Upon the termination of this Agreement pursuant to clause 5 hereof, provided that 70%; of the hire purchase price of the said good(s) has not been paid by the Hirer(s) (or any of them) the owners may with 21 clear days notice retake possession of the goods."

[27] It is to be noted that clause 5 of the agreement stipulates that if the hirer makes default in payment of the sums payable under the agreement or shall fail to observe any of the other terms and conditions thereof the agreement shall automatically determine and **subject to** the provisions of clause 7 and **any pre-existing liabilities of the hirer** thereunder neither party shall have any rights against the others.

[28] It is my considered view that the combined effect of that provision and clause 6 of the agreement preserves the hirer's right to recover all outstanding installments of the hire purchase agreement and other sums then due from the hirer and/or the guarantor.

[29] As the Learned Chief Magistrate aptly put it at paragraph 2 on page 12 of her judgment:

> "What happens when the owner is not able to retake possession of the goods because the hirer has removed the goods to another location in violation of the agreement. The evidence is that it was with the help of the guarantor that the owner was able to eventually locate the hirer and retake the goods. Surely Counsel cannot claim that while the hirer keeps the goods in her possession after having defaulted in payment that she has no obligation to pay the arrears accumulated during the period."

Clearly the hirer's obligation to pay continues as long as the goods remain in his or her possession and the total hire purchase price has not been paid. And a fortiori the guarantor has a like obligation where the hirer has defaulted on his/her payments.

[30] I accordingly agree with the learned Magistrate that all arrears of payment up to the date of repossession by the respondent and all expenses and costs lawfully incurred by the respondent pursuant to the agreement are recoverable by the respondent. As guarantor the appellant is equally liable for the amount claimed in the sum of $4,501.83 and $75.00 costs.

[31] Costs of the appeal to the respondent in the agreed sum of $500.00.

Ephraim Georges
Justice of Appeal [Ag.]

[32] **ALLEYNE, J.A. [AG.]:** This is an appeal from the decision of Chief Magistrate Clare Henry-Wason arising from a claim by the respondent against the appellant as surety to a hire purchase agreement entered into by a third party and guaranteed by the appellant.

[33] By the terms of the hire purchase agreement dated 12th December 1996, the third party agreed in writing to purchase by way of hire purchase certain items (the

goods) from the respondent, by the payment of 104 weekly instalments of $58.00, to a total of $6,032.00, with interest on overdue instalments of 1.5% per month.

[34] It was provided by clause 5 of the agreement, *inter alia,* that if the hirer made default in payment of the sums payable, or failed to observe any other of the terms and conditions of the agreement, "then this agreement shall automatically and without notice determine and thereafter the hirer shall no longer be in possession of the goods with the owner's consent".

[35] Clause 6 of the agreement provides that upon termination of the agreement pursuant to clause 5, and in the events that occurred, "the owners may with 21 clear days notice retake possession of the goods".

[36] Collateral to the hire purchase agreement was a contract of guarantee entered into by the appellant as guarantor whereby the appellant guaranteed the due performance and observance of all the terms and conditions of the agreement on the part of the hirer, and to pay all the expenses the owner may be put to in enforcing the said agreement. The guarantee agreement contained a further provision whereby the appellant agreed that no alteration in the terms of the hire purchase agreement, including *inter alia* any relaxation or indulgence on the owner's part in respect of the terms and conditions shall prejudice the owner's rights under the guarantee.

[37] By November 1997 the hirer fell into arrears and was in breach of the agreement, and under the terms of the agreement, the agreement automatically determined. The respondent elected not to exercise its right to repossess the goods upon breach, but apparently continued to collect money periodically from the hirer. The appellant was not party to this arrangement. The last payment was made on 16th May 1998. The hirer had by then paid a total of $2,749.00.

[38] In July 1999 the respondent contacted the appellant seeking his assistance in locating the hirer, who had apparently relocated. The appellant assisted, and the respondent recovered the goods, valued them at $150.00, and dumped them. On 15th May 2000, the respondent sued the appellant and the hirer on the agreement. The hirer was never served, and the case proceeded against the appellant, resulting in the judgment from which he now appeals.

[39] The goods subject to the hire purchase agreement were a suite valued at $3595.00, and a rug, of presumably much less value. The difference between the "cost" figure of somewhat over $3595.00, and the much higher contracted aggregate of instalments of $6032.00 is accounted for by interest charges.

[40] The claim was for breach of the agreement, and the respondent pleaded particulars of loss in the following terms:

(a)	Installment due from December 1996 to November 1999	
	104 weekly - @ $58.00	$6032.00
	Amount paid	$2949.50
		$3082.50
	Interest on overdue instalments	$1119.33
		$4201.83
(b)	Attorney's Fees	$ 300.00
	Total amount due and owing	**$4501.83**

[41] It seems to me that the claim, at any rate so far as it relates to the appellant, was misconceived. It appears to assume that the contract of guarantee was in respect of a debt, such as might arise out of a credit sale agreement which had been breached. In fact, the appellant's guarantee was in respect of a hire purchase agreement, which, by its terms, came to an end upon default of any instalment. On the facts of this case the hire purchase contract automatically and without the need for notice determined in November 1997 and the appellant's liability under the contract of guarantee thereupon arose and was enforceable. The liability as at

that date would have been the outstanding instalment together with all the costs which would have been incurred in retaking possession of the goods.

[42] The respondent, having elected to enter into new arrangements with the hirer without the concurrence of the appellant, can hardly now seek to recover further losses which it might have incurred as a result of that new arrangement, to which the respondent was not privy, from the respondent under the purported guarantee. It seems to me that the principles so clearly set out by Gomes P. and to which Archer J.A. agreed in **Ng-A-Yow v Mendonca** (1962) 4 W.I.R. 443 apply to the circumstances of this case and preclude the respondent succeeding in its claim as framed.

[43] I am fortified in my view by the case of **Holme v Brunskill** (1878) 3 Q.B.D. 495. In that case the plaintiff had agreed to let a farm including a flock of 700 sheep to B. as a yearly tenant. The defendant gave the plaintiff a bond to secure the redelivery to him at the end of the tenancy of the flock in good order and condition. The plaintiff subsequently entered into an agreement with B involving the surrender of part of the demised premises, with a resultant reduction in the rent. Still later the plaintiff terminated the tenancy, and it was ascertained that the flock was reduced in number and deteriorated in quality and value. The plaintiff sued the defendant on his bond. It was held that the surety (defendant) ought to have been asked to decide whether he would assent to the variation in the terms of the letting, and not having been asked to assent, he was discharged from liability. Cotton, L.J. had this to say:

> "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 that cannot be prejudicial to the surety the court … 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."

[44] In **Midland Motor Showrooms v Newman** (1929) 2 K.B. 256 the payments by the hirer were guaranteed by the defendant. The hirer fell into arrears, and he wrote to the owners offering a cheque drawn by a friend in part payment. The owners wrote accepting the cheque and stipulating that the rest of the arrears should be paid within one month. The payment of the balance was not made as stipulated, and the owners exercised their right to re-possess the car. On a claim against the guarantor on the guaranty, it was held that the defendant was entirely discharged from her suretyship.

[45] **Midland Counties Motor Finance Co. Ltd. v Slade** (1951) 1 K.B. 346; another case of a guarantee on a hire purchase agreement, in which it was agreed that the guarantee should not be avoided, released or affected by the company giving time to the purchaser, but this term was qualified by two provisos, under the second of which the finance company undertook to inform the guarantor when any instalment or payment should be more than 30 days overdue. It was held that as the guarantor had not been informed of that event within a reasonable time after default, he was released from liability under the guarantee.

[46] Under the contract of guarantee in this case the appellant was entitled to assume that, in compliance with the terms of the hiring, upon the hirer failing to pay a single instalment, the owner would exercise its right to repossess the goods and seek to recover from him, if it so chose, the outstanding instalment and the costs of recovery. Instead, the respondent entered into an accommodation with the hirer without seeking the assent of the appellant, and thereby subjected the appellant to considerable additional jeopardy, above and beyond what he had bargained for, as is evident from the order of the Magistrate.

[47] The appellant was not given the opportunity to be, to use Cotton, L.J.'s words, "the sole judge whether or not he will consent to remain liable notwithstanding the alteration". In light of that I think it is contrary to principle that he be held liable for costs far and away greater than what he bargained for.

[48] In Halsbury's Laws of England fourth edition, Volume 22 paragraph 80, the learned author says:

> "A surety is generally discharged if the creditor varies the terms of the principal agreement without his consent, such as by allowing an extension of time for the payment of an instalment under a hire purchase agreement. However, the surety will not be discharged if the creditor merely accepts a repudiation of the agreement."

At note 9 to this paragraph the learned author continues;

> "The surety is discharged altogether and not just in respect of liability for a particular instalment, because the liability for payments under a hire purchase agreement is not severable."

The authority cited for this proposition is **Midland Motor Showrooms Ltd. v Newman** *supra.*

[49] I would allow the appeal with costs here and in the court below.

[Sgd.]
Brian Alleyne, SC
Justice of Appeal [Ag.]