

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2004/0198

BETWEEN:

DR. ALVIN G. EDWARDS

Claimant

And

CARIBBEAN PHARMACEUTICAL SUPPLIES LTD

Defendant

Appearances:

Ms. E. Ann Henry and Ms. C. Debra Burnette for the Claimant
Mr. Trevor Kendall for the Defendant

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2006: May 24th
August 17th
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JUDGMENT

[1] **Blenman, J:** This is a claim by Dr. Alvin Edwards (Dr. Edwards) against the Caribbean Pharmaceutical Supplies Ltd (the Company) to be reimbursed monies that he expended on behalf of the Company.

Background

[2] Dr. Edwards alleges that he was the director and a shareholder of the Company. The Company was in dire financial difficulties and owed the Antigua and Barbuda Investment Bank (ABIB) the sum of \$1,325,000.00 (one million three hundred and twenty five thousand dollars). He says that by written Agreement dated 27th November 1992 he agreed to provide a personal guarantee on behalf of the company to secure the loan together with accrued interest obtained from ABIB.

[3] The Company failed to honour its obligations to ABIB and ABIB by letter dated 2nd February 1999 called in the guarantee that he had given.

- [4] Dr. Edwards contends that he borrowed the sum of \$142,000 from ABIB at a rate of 12.5% in order on behalf to repay on behalf of the Company the accrued interest in the sum of \$162,500.00t. He also paid ABIB the sum of \$20,500.00 on behalf of the Company.
- [5] Dr. Edwards says that the Company agreed, through its then Chairman Dr. Vincent Richards (Dr. Richards) to indemnify and hold him harmless from any loss or damage he was likely to sustain as a consequence of his guarantee.
- [6] Despite repeated requests, Dr Edwards complains that the Company has failed to indemnify him for the losses he suffered and seeks compensation from the Company.
- [7] In defence, the Company denies that Dr. Edwards is entitled to be compensated as alleged or at all. The Company counters that Dr. Edwards paid the sum of \$162,500.00 pursuant to an Agreement dated 21st January 2000, which was aimed at reorganizing the finances of the company.
- [8] The Company states that the implied/express term of the Agreement dated 21 January 2000 was that Dr. Edwards as guarantor and shareholder of the Company would satisfy part of the Company's indebtedness to ABIB in an effort to salvage the Company.
- [9] Further, the Company says that it was expressly or impliedly agreed that Dr. Edwards would forego any rights or recourse to be indemnified by the company for settling the debt.
- [10] The Company further alleges that Dr. Edwards assigned to one of the Company's shareholders the rights that he enjoyed as guarantor accordingly he is debarred from seeking to rely on those rights.
- [11] Finally, the Company asserts that based on the representations that Dr. Edwards made to the Company and to the investors in the Company, and upon which they relied when they

entered into the Agreement dated 21st January 2000, Dr. Edwards is estopped from relying on his legal rights.

Issues

- [12] The issues that arise for determination as follows:
- (1) Whether the payment of the amount of \$162,500.00 made by Dr. Edwards to ABIB was made pursuant to the Guarantee given on the 27th November, 1992.
 - (2) If so, whether Dr. Edwards, having paid the sum of \$162,500.00 to ABIB, expressly or impliedly under the Agreement of the 21st January, 2000 agreed to forego his rights of recourse to the Company.
 - (3) Whether, Dr. Edwards having made the payment pursuant to the Guarantee, is now entitled to a right of action against the Company for recovery of the monies paid by him to ABIB.

Evidence

- [13] Dr. Edwards testified on his own behalf and Dr. Vincent Richards testified on behalf of the Company. Both witnesses, in addition, relied on documentary evidence in support of their respective positions.

Dr. Edwards' evidence

- [14] Dr. Edwards stated that he and Dr. Prince Ramsey guaranteed a loan which the Company obtained from ABIB. Both of them were required to pay the accrued interest in the sum of EC\$325,000.00. Out of the accrued interest, Dr. Edwards was required to pay \$162,500.00. Dr. Edwards said that he did this by obtaining a loan from ABIB in the sum of \$142,000.00 which he paid towards the \$162,500.00 together with his personal contribution in the sum of \$20,500.00.
- [15] Previously he was a director and shareholder of the Company and had given ABIB a personal guarantee for the Company's debt. Dr. Edwards relied on the written guarantee

that he had given to ABIB in support of his position that he was entitled to be indemnified for the losses that he has suffered.

- [16] Dr. Edwards denied that he was ever told that the Company was not going to repay him. At all times he expected the Company to repay him. Dr. Richards who represented the Company told him (Dr. Edwards) that he would be repaid but that at that time the Company was experiencing financial difficulties.
- [17] During cross-examination by learned Counsel Mr. Trevor Kendall, Dr. Edwards maintained that it was Dr. Richards who negotiated the refinancing of the Company and who had assured him (Dr Edwards) that he (Dr. Edwards) would have been repaid.
- [18] He admitted that the other monies that the Company owed him and which it had agreed to repay him was evidenced in writing but that there was no written documentation to support his contention that the Company had agreed to pay him the money he paid to ABIB which represented the accrued interest.
- [19] Dr. Edwards admitted that at the relevant time the Company was not financially viable and that the sale of the Company 's debts to the investor at a discount was reduced into writing.
- [20] After the investors had bought the Company, they selected persons of their choice to be directors and Dr. Edwards was no longer a director.
- [21] Dr. Edwards stated that he did not have to obtain a written statement to support his contention "since he knew that if he had paid money on behalf of the Company he expected to be paid back."

Dr. Richards' evidence

- [22] Dr. Richards said that he previously served as Chairman of the Company and also a director of the Company. He is also a business consultant to the Company. Dr. Richards

- denied that the Company promised to repay Dr. Edwards. Dr. Richards sought to place much reliance on the Agreement dated 21st January 2000 between Chapeau, the Company, Dr. Prince Ramsey and Dr. Edwards, in support of his contention that “it was anticipated and expected” that Dr. Edwards would forego any rights of recourse against the Company.
- [23] Dr. Richards further stated that the investors and majority shareholders had contributed to the rescue plan of the Company and they were entitled to rely on the common intention that all parties to the Agreement “were prepared to sacrifice something” to put the Company in good standing.
- [24] Dr. Richards next stated that the Company was in financial difficulties and the common intention of all sides was to rescue the Company, and all parties, meaning the bank, Investors, Directors and shareholders including Dr. Edwards and Dr. Ramsey the latter who were heavily exposed by their personal guarantors had ultimately agreed in the course of negotiations “to give up something to achieve the best case “business rescue plan for the Company.”
- [25] Dr. Richards specifically denied making any promises to Dr. Edwards to repay him any money.
- [26] Learned Counsel Ms. E. Ann Henry cross-examined Dr. Richards and he admitted that the Agreement dated 21st January 2000 indicated that Drs. Edwards and Ramsey were personally liable to pay ABIB \$325,000.00.
- [27] Dr. Richards admitted that there was no express term in the Agreement dated 21st January, 2000 to the effect that Dr. Edwards would not seek reimbursement. In his view, however, the Agreement could be interpreted to mean that Dr. Edwards was not pursuing his rights under the Agreement.

The Company's submissions

- [28] Mr. Trevor Kendall, learned counsel submitted that "Dr. Edwards could have been in no doubt that his joint undertaking with the Investors, would result in the clearing of the debt and there would be no exposure of the Company to any relief." Dr. Edwards agreed to this. There was no intention evident or made known on his part otherwise.
- [29] Mr. Kendall next submitted that the Company's contention is that the reduction and the withdrawal of foreclosure proceedings were won by a mutual and agreed position adopted between the Investors, Dr. Edwards, Dr. Ramsey and the Company, whereby all accepted to achieve their respective undertakings. There could be no denying that at no time did the Company intend or anticipated that it would have been required to reimburse Dr. Edwards for the monies he paid towards the accrued interest which the Company owed ABIB.
- [30] Mr. Kendall next submitted that as much as Dr. Edwards asserts a right to repayment in complement to the alleged (which is denied) promise to repay made by the Company, the equity of the circumstances which existed at the time warrant that, and in the alternative Dr. Edwards should not be permitted to insist on enforcing any legal rights against the Company. Dr. Edwards, the Investors, and all parties to the Agreement of 21st January, 2000, all entered same on the express and implied understanding that there was a mutual adjustment of the financial obligations to be won if all parties contributed their required payment. As between Dr. Edwards and the Company there was an assignment in which it was implied that his securities and claims against the Company would be taken up and be vested in the Investors.
- [31] Mr. Kendall therefore stated that this case warrants the Court intervening to prevent Dr. Edwards from maintaining that right. Dr. Edwards clearly wants the Investors to take up the portion that he had agreed to contribute. He wants them to relieve him of his burden. The case is one for the Court to consider all the circumstances and not grant Dr Edwards the reliefs that he claims.

[32] Next, Mr. Kendall submitted that the Company faced foreclosure, and all parties to the Agreement of 21st January, 2000 stood to suffer significant losses individually and collectively. The Agreement recited the purchase by the Investors of the loans of ABIB at an amount in excess of 1.2 million dollars, which the Investors undertook to pay to ABIB; a payment of \$325,000 to be paid by Dr. Edwards and Dr. Ramsey.

[33] Mr. Kendall further submitted that additionally, since the intention was to settle once and for all the loan and guarantee portfolio relating to ABIB Bank, then there must have been some consideration of ABIB Bank's terms for settlement in the negotiations, such as fixing the contributions by the parties to the venture. However, that cannot singularly preclude the inference that there were clear aspirations by the remaining parties to the Agreement and implicit in the Agreement is the evident intention that all parties carried out their undertakings agreed to thereunder, so that the ABIB bank's threat of foreclosure and the resulting threat of losses to the parties and the Company would be avoided. The Company is entitled to rely on the premise that the parties were contributing as per the negotiations bringing forth the subject agreement. At no time, as averred and maintained by Dr. Edwards was there any intention found in the said Agreement for the Company to repay the sum contributed by Dr. Edwards as an advance made by him.

[34] Mr. Kendall advocated that there is no fact of business efficacy in the proposition that Dr. Edwards having entered into an agreed position with other parties whereby it was agreed to contribute a sum and that there was no express or implied Agreement to repay, or to treat same as a loan, that the Company could say to Dr. Edwards we understood based on your representations that there would be no liability on us to pay and that to ask for this sum is unconscionable, and contrary to the representations made when the advance was agreed to be made, and which have been acted upon by us and all other parties thereto.

Dr. Edwards' Submissions

[35] Learned Counsel Ms. Henry submitted that Dr. Edwards' assertions in his pleadings, and his evidence and testimony before this Court are correct specifically in relation to:

- (a) The existence of and his obligations under the guarantee of the 22nd November, 1992.
- (b) The fact of his payment to the ABIB of the total amount of \$162,500.00.
- (c) The fact that ABIB as at the 21st January, 2000 had not released him from the guarantee.

[36] It is the evidence of Dr. Edwards, denied by the Company, that the Chairman of the Board of the Company, Dr. Vincent Richards gave an assurance or representation to Dr. Edwards that the monies which he was required to pay to ABIB would be repaid by the Company.

[37] Ms. Henry stated that while this assertion by Dr. Edwards was strenuously denied by Dr. Richards both in his Witness Statement and in giving testimony on the witness stand, such an assurance or representation is entirely consistent with the law relating to guarantees. As such, if even the Court does not accept the Dr Edwards' evidence on the point, the submission on behalf of Dr Edwards is that his entitlement to claim for the reimbursement is well-grounded in the law relating to Guarantees.

[38] Ms. Henry next argued that if indeed, it was the intention of the Company and its new major shareholders that Dr. Edwards having paid and satisfied the amount demanded by the ABIB from him would have no recourse to the Company then this would have been unambiguously stated in either the Agreement of the 16th November, 1999 or the Agreement of the 21st January 2000. There is no such statement in the Agreement.

[39] The Company has also asserted that Dr. Edwards' rights under his guarantee to the ABIB were assigned to Chephacu N.V., the Investor under the Agreement of the 20th January, 2000. There is no evidence of this, argued Ms. Henry

[40] In giving testimony, Dr. Richards pointed to clause 3 of that Agreement in support of his assertion that Dr. Edwards waived his rights to be reimbursed.

- [41] However, Ms. Henry next submitted that clause 3 only relates to that portion of the Company's debts in respect of which the ABIB reached accord and satisfaction with the Company, namely, the principal amount of \$1,253,620.00 and the part of the accumulated interest in the amount of \$815,303.50 which was bought by Chephacu N.V. for the discounted amount of \$1,253,620.00.
- [42] Counsel then submitted that there is absolutely no evidential support for the Company's assertion that Dr. Edwards agreed to forego his rights to pursue the Company. Ms. Henry further submitted that Dr. Richard's evidence to this effect was not credible and, indeed, he seemed to have been struggling to find some statement in the January 2000 Agreement which could be thus interpreted.
- [43] Ms. Henry then posited that the law reserves to a guarantor who pays a creditor under this guarantee the right to be indemnified fully for the amount paid together with interest and his costs of bringing the proceedings. These statements of the law are expressed in **Halsbury's Laws of England (2 Ed.) Volume 18** at paragraphs 881 to 884 (pages 478 to 481).
- [44] In the case of **Brook's Wharf and Bull Wharf Ltd. V Goodman Brothers [1936] 3 All E.R. 696**, Lord Wright MR. applied the rule formulated by Lord Tenterden CJ in the much earlier case of **Pownal v Ferrand (1827) 6 B & C 439 at 443**.
- [45] At page 707 of **Brook's Wharf** Lord Wright M.R. referred to **Pownal**, in which case Lord Tenterden CJ said "... I am of opinion that he is entitled to recover upon the general principle, that one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter."
- [46] Finally, Ms. Henry referred to the cases of **Ex parte Bishop In re fox, Walker & Co. (1880) 15 CH. Div. 400** in which the said principal was relied upon and the further point made as to the entitlement of a surety to recover interest on the amount paid from the principal.

[47] In **Bishop**, Lord Justice Cotton, at pages 416, 421 to 422 of the Judgment, citing the decisions in **Petre v Duncombe 2L.M. & P.107**, **Hitchman v Stewart 3 Drew. 271**, **Lawson v Wright 1 Cox, 275** and **In re Swan's Estate I.R. 4 Eq. 209** made it clear that "in circumstances where a surety paid the debt for which the principal was legally liable interest in addition to being entitled to reimbursement of the debt so paid, the surety would be entitled to interest."

[48] In concluding her arguments, Ms. Henry asked the Court to find as follows:

- (a) That there is sufficient evidence before this Honourable Court to satisfy the Court that Dr. Edwards paid to the ABIB the amount now claimed to be reimbursed by the Company.
- (b) That there is sufficient evidence before this Honourable Court to satisfy the Court the payment of \$162,500.00 was paid pursuant to the guarantee and, in particular, that the payment made was not made pursuant to the Agreement of January, 2000.
- (c) That it is clear that at no time did the Dr. Edwards expressly or impliedly agree to forego his rights of recourse as asserted by the Company. Further, that Dr. Edwards did not assign any rights under the guarantee to Chephacu NV as asserted by the Defendant.
- (d) Dr. Edwards is entitled to pursue the reimbursement of the monies paid by him to the ABIB under the guarantee, in the amount of \$162,000.00 together with interest at the rate of 12.5% such interest to date from the 5th February, 2001 that being the date on which he borrowed the money from the ABIB to pay the \$162,500 (Exhibit AE9) and to continue as well before as after judgment until payment.

Court's analyses and findings

[49] I have carefully reviewed the evidence adduced by Dr. Edwards and the testimony of Dr. Richards. In addition, I have carefully considered the submissions of counsel and the following represents my analyses and findings.

- [50] The Company was in dire financial circumstances and was heavily indebted to ABIB. At this time, Dr. Edwards was a director and Dr. Richards was its Chairman. Dr. Edwards and Dr. Ramsey signed as guarantors for the debt that the company owed ABIB.
- [51] Subsequently, negotiations and discussions were held between the directors, the chairman and other persons aimed at salvaging the company. The parties recognized that there was the urgent need to inject capital into the Company to keep it afloat. Dr. Edwards who was a shareholder agreed with the Chairman and others that the Company should be refinanced. Investors were prepared to inject capital into the Company to keep it buoyant. The Company was indebted to ABIB and the investors agreed to purchase the Company's debt from ABIB and the investors, who became majority shareholders effectively took control of the Company.
- [52] The Company was required to pay ABIB accrued interest in the sum of \$325,000.00 . The investors, the Company, Dr. Edwards together with Dr. David Ramsey agreed that the Drs. Edwards and Ramsey would pay the accrued interest which the Company owed ABIB. Dr. Edwards had previously signed a guarantor with ABIB which also required him to pay the accrued interest which the Company owed ABIB.
- [53] In addition, the parties entered the Agreement dated the 21st January 2000 which agreement for the most part addressed the financial circumstances of the Company and detailed the financial commitment of the signatories to agreement.
- [54] Even though I have re-read the agreement several times, I am unable to find any express intention of Dr. Edwards not to insist on his rights to be reimbursed.
- [55] I have no doubt that before entering into the Agreement on the 21st January 2000 Dr. Edwards had personally guaranteed the interest that the Company owed ABIB to the tune of \$162,500.00

[56] I also have no doubt that the Company defaulted in its payment to ABIB and ABIB called in the guarantee that Dr. Edwards had given. I am equally satisfied that Dr. Edwards was required by ABIB and did pay ABIB the sum of \$162,500.00 for the Company's indebtedness in relation to the accrued interest owed to ABIB.

[57] On behalf of the Company, it was strenuously contended that Dr. Edwards had agreed to forego his rights to insist on being reimburse for the monies he paid to ABIB Bank under the guarantee. Dr. Edwards, for his part, denied that this was so.

[58] Based on my review of the evidence and my perusal of the Agreement dated 21st January 2000, I am far from convinced that at any time Dr. Edwards agreed not to insist on his strict legal rights in relation to the guarantee. I am also far from persuaded that there is anything in the said Agreement that speaks to Dr. Edwards' rights vis-à-vis the Company in relation to his guaranteeing the Company's debts.

[59] I am equally unconvinced, as Dr. Edwards would have me believe that Dr. Richards in his capacity as the Chairman of the company expressly promised him to "pay him back" the money that he had paid to the ABIB on behalf of the Company and in relation to the accrued interest.

[60] However, It would be remiss of me if I did not state that I am of the firm opinion that listening to the witnesses and observing their demeanour as they testified proved to be very invaluable to my findings.

[61] In the case at Bar, I adopt and apply the principles stated in Halsbury Laws of England Volume 18 Third Edition paragraph 881 that:

"On payment of part of guaranteed debt the surety, as often as he pays anything under his guarantee in relief of the principal debtor, has an immediate right of action against the latter."

[62] In addition, paragraph 882 of Halsbury Laws *ibid* states further that:

"a surety who has paid the creditor in relief of the principal debtor becomes to that extent a creditor of the latter."

- [63] I find paragraph 883 of Halsbury Laws *ibid* very instructive. It states as follows:
- "Right of Indemnification. The surety's right of Indemnification is a right to be recouped the amount which he has actually paid for the principal debtor with interest to which he is entitled because of his right to full indemnification from the principal debtor."
- [64] I can do no better than to adopt the principles stated above. Accordingly, I am of the considered view that in the absence of any evidence which points to a contrary position, Dr. Edwards is entitled to pursue his right of indemnification for the monies he paid to ABIB under the Guarantee.
- [65] I accept Ms. Henry's submissions that if the Company and Dr. Richards had intended that Dr. Edwards should have been debarred from insisting on his legal rights under the Guarantee, this should have been expressed by them and agreed to by Dr. Edwards.
- [66] I therefore do not, for one moment, accept that Dr Edwards agreed to waive his right of recourse to be reimbursed the sum of \$162,500.00 which he was required to pay ABIB pursuant to the Guarantee he had given and consistent also with the Agreement dated 21st January 2000. This in no way negates my finding that the Agreement dated 21st January 2000 indicates that Dr. Edwards and Dr. Ramsey agreed to pay ABIB the outstanding accumulated interest in the sum of EC\$325,000.00.
- [67] However, I am firmly of the view that the Agreement of 21st January 2000 simply does not address the rights of Dr. Edwards to be reimbursed. I have no doubt that Dr. Edwards effected the relevant payment to ABIB based on his obligations/commitments under both the Guarantee and the Agreement of the 21st January 2000.

Conclusion

- [68] In conclusion and for the above reason, I give judgment for Dr. Alvin G. Edwards against the Caribbean Pharmaceuticals Supplies Limited in the sum of \$162,500.00 together with interest at 5% per annum from the date of the issue of the claim to date of judgment and thereafter at the statutory date to rate of payment.

[69] Dr. Alvin Edwards is to have his prescribed costs in accordance with Part 65 of CPR 2000, unless otherwise agreed.

[70] I commend all counsel for their industry.

Louise Esther Blenman
Resident High Court Judge