ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2006/018

BETWEEN:

CARIBBEAN PHARMACEUTICAL SUPPLIES LTD.

Appellant

and

DR. ALVIN G. EDWARDS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde.Indra Hariprashad-Charles	Justice of Appeal [Ag.]
The Hon. Mde. Janice George-Creque	Justice of Appeal [Ag.]

Appearances:

Sir Richard Cheltenham, QC and Mr. Trevor R. Kendall for the Appellant
Ms. E. Anne Henry and Ms. Debra Burnette for the Respondent

2008: November 25;
2009: March 23.

Civil Appeal – Contract Law – whether there was a novation or variation of the agreement – guarantor – right of indemnification

Interest – whether the learned judge erred in exercise of discretion

By a loan agreement executed in 1992, the respondent ("Dr. Edwards") agreed to and did provide a personal guarantee to the Bank on behalf of the appellant company ("the Company"). The Company defaulted and Dr. Edwards was called upon to honour his obligations under the guarantee in 1999. An investor subsequently took control of the Company and agreed to purchase its debt, representing the principal sum and part of the accumulated interest. By the New Agreement, Dr. Edwards and Dr. Ramsey ("the Doctors") were required jointly and severally to pay to the Bank a sum of $325,000.00 being a part of the remaining accumulated interest. Dr. Edwards paid the sum owing in

accordance with the New Agreement ($162,500.00) and sued the Company for this sum, with interest. He obtained judgment in his favour, although interest was awarded at the rate of 5% and not 12.5% as was claimed. The Company appealed on the ground that the New Agreement represented a novation so that the Doctors became liable as principal debtors and not as sureties/guarantors. Dr. Edwards counter-appealed against the award of interest at the rate of 5%.

Held: dismissing the appeal and counter-appeal and awarding costs to the respondent:

1. Novation denotes the rescission of one contract and the substitution of another. By contrast, a variation merely qualifies the rights and obligations of the parties to a contract, which continues to exist in an altered form. In order to determine whether there has been a novation or variation, the court must have regard to the intention of the parties as determined by an examination of the terms of the subsequent agreement and from all the surrounding circumstances of the case.

2. The earlier agreement cannot be said to have become extinguished, as the basis for the Bank's requirement that the Doctors pay the remaining accumulated interest was pursuant to their obligations arising in respect of the guarantees. The New Agreement merely repeated the guarantors' obligations which were already in existence and quantified the amount due. The New Agreement did not therefore bring about a novation but constituted a variation of the terms of the earlier agreement.

3. A guarantor's right to indemnification is a right to be reimbursed the amount which he has actually paid for the principal debtor with interest and any costs incurred in reasonably defending an action brought by the creditor. There was no express or implied term in the New Agreement to the effect that the Doctors agreed to forego their rights of indemnification. The learned judge did not accordingly err in finding that Dr. Edwards was entitled to be reimbursed the sum of $162,500.00, with interest.

   Brook's Wharf and Bull Wharf Ltd. v Goodman Brothers [1936] 3 All ER 696 and In re Fox, Walker & Co. ex parte Bishop (1880) L.R 15 Ch. Div. 400 applied.

4. In awarding interest at the rate of 5% instead of 12.5%, as claimed, the learned judge did not exceed the generous ambit of her discretion within which reasonable disagreement is possible. There was therefore no basis for interfering with the learned judge's award.

   Dictum of Sir Vincent Floissac, CJ in Michael Dufour et al v. Helenair Corporation et al Saint Lucia Civil Appeal No. 4 of 1995 followed.

JUDGMENT

[1] GEORGE-CREQUE, J.A. [AG.]: This appeal concerns the construction of an agreement executed by various parties including the appellant Company ("the Company") and the respondent ("Dr. Edwards") on 21st January, 2000 ("the New Agreement"). The New Agreement concerned the repayment of a debt owed by the Company to the Antigua and Barbuda Investment Bank ("the Bank") and guaranteed by Dr. Edwards and Dr. Ramsey[1] ("the Doctors") prior to that date. The New Agreement required the Doctors jointly and severally to pay to the Bank a sum of $325,000.00 being a part of the remaining accumulated interest in respect of which the Company was indebted under the earlier loan agreement. The learned judge in the court below held that the Company was obliged, as principal debtor, to reimburse Dr. Edwards, as surety, in the sum of $162,500.00[2], being the amount paid to the Bank in pursuance of the guarantee. The central issue is whether the terms of the New Agreement denote a novation with the effect that the Doctors ceased being guarantors of the debt of the Company and became principal debtors to the Bank. This question will be considered against a brief background.

Background

[2] (a) On 27th November 1992, Dr. Edwards, then a director and shareholder of the Company, agreed to and did provide a personal guarantee on behalf of the Company to secure the payment of a debt in excess of $1.3 million, plus interest pursuant to a loan facility agreement granted by the Bank to the Company.

(b) The Company failed to meet its obligations in accordance with the agreement and on 2nd February 1999, Dr. Edwards was called upon to honour his obligations under the guarantee. Various options were

[1] The Chairman of the Board of Directors and a shareholder of the Company.
[2] Being one half of the sum of $325,000 required to be paid to the Bank under the New Agreement.

explored with a view to salvaging the Company which had sunk into an insolvent state.

(c) An investor, who subsequently became the majority shareholder and effectively took control of the Company, agreed to purchase the Company's debt from the Bank. At that time, the Company was indebted to the Bank in the principal sum of EC$1,253,620.00 and also for accumulated interest in excess of $830,000.00. The New Agreement was accordingly not only as between the Company and the Bank but also included the investor and the Doctors, as parties.

(d) In accordance with the New Agreement, Dr. Edwards paid to the Bank the sum of $162,500.00, representing half of the agreed discounted accrued interest. He satisfied this debt by obtaining a loan from the Bank in the sum of $142,000.00 at an interest rate of 12.5% together with a personal contribution of $20,500.00. He thereafter sued the Company for this sum and interest. He obtained judgment in his favour though he was successful on having interest awarded only at the rate of 5% and not 12.5% as claimed.

Construction of the Agreement

[3] Counsel for the Company argued that the learned trial judge misconstrued the nature of the transaction created by the New Agreement in that it substantially altered the contractual relations between the parties as its essential purpose was to ensure that the Bank would cease to be the Company's creditor. To that end, the investor became the Company's creditor for the original debt in the sum of some $1million and the Bank became a creditor of the Company for the sum of $325,000.00 for which the Doctors became liable as principal debtors.

[4] It was contended for the Company that the Doctors, as sureties under the earlier agreement, were discharged by virtue of the New Agreement and thus became

liable as principal debtors. Counsel argued that when the Company ceased to be a debtor to the Bank (when the investor bought the debt) under the New Agreement, the suretyship came to an end as there can be no surety without a principal debtor. Counsel for the Company relied on the learning in Snell's Equity[3] which states:

> "There can be no suretyship unless there is a principal debtor…Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed."

[5] Counsel for the Company averred also that pursuant to its terms, the New Agreement purported to assign the benefit of all securities and guarantees offered by the Company, its directors and shareholders to the Bank, for the loans and advances to the investor, absolutely. The investor was given the power of enforcement in respect of these securities and guarantees. Counsel therefore argued, in the alternative (to that stated at paragraphs 3 and 4 above), that if the High Court was correct in holding that the $325,000.00 was paid by the Doctors as sureties under the original suretyship the assignment would have meant that the payment of $325,000.00 was to be paid to the investor who took up the benefit of the securities and guarantees.[4]

[6] Counsel argued that this, however, was not the intention under the New Agreement which made separate and explicit provision for the payment of the $325,000.00 by the Doctors to the Bank. It was contended that the amount was required to be paid as consideration for being relieved of liability as sureties for the full debt comprising capital and interest. In essence, he urged that the New Agreement amounted to a novation. In these circumstances, counsel submitted, Dr. Edwards was a principal debtor and had no recourse to the Company for indemnification unless there was a provision in the New Agreement which so provided. Counsel insisted further that nothing turned on the fact that the Doctors were referred to as guarantors in the New Agreement.

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[3] 30th Edition, p. 536, Chapter 11: Suretyship

[4] Although counsel submitted that as a matter of law the investor could not have relied on these guarantees as an assignment of the original sureties could not prevail if the original debtor was no longer debtor.

[7] Counsel for Dr. Edwards on the other hand, argued that the overriding objective of the New Agreement was to secure settlement of the indebtedness of the Company to the Bank. This was to be achieved by assigning a portion of the debt to the investor and the payment by the Doctors of the outstanding interest in accordance with their liability as guarantors under the earlier agreement. That this is clearly the intention is evidenced by the Bank's correspondence both prior and subsequent to the execution of the New Agreement.

Was there a novation?

[8] Chitty on Contracts[5] describes a novation in these terms:

> "[It] signifies 'that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract.' In particular however, it denotes the rescission of one contract and the substitution of another in which the same acts are to be performed by different parties."

At paragraph 22-028 of the same text, the author goes on to say as follows:

> "The question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form. The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances."

The adoption of this approach in resolving this issue is, in my view, a sound one.

[9] Notably, in the Bank's letter of 25th January 1999, whilst indicating their acceptance of the proposed settlement of the Company's indebtedness, the Bank stated that:

> "…we will be contacting the original guarantors to make arrangements for repayment of the outstanding interest."[6]

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[5] 29th Ed. Vol.1 para. 22-031.

[10] The terms of the New Agreement may be helpfully set out here.

The terms of the New Agreement

[11] Portions of the recitals and Clause 1 of the New Agreement bears note. Recital 4 states:

> "The Company has defaulted in the repayment of its loans and advances to the Bank and repayments are more than two (2) years in arrears"

Recital 5 states:

> "The First Guarantor and the Second Guarantor have guaranteed the loans and advances repayments to the Bank."

Recital 8 states:

> "Without a major financial restructuring of the Company, the recovery of loan funds by the Bank and the Investor appears extremely remote."

[12] Clause 1 of the New Agreement then provides as follows:

> "The Bank shall sell and the Investor shall purchase the Bank's outstanding loans and advances to the Company … comprising the principal amount of … (EC$1,253,620.00) and part of (my emphasis) the Accumulated Interest, namely the amount of … (EC$815,303.50) at a price of $1,253,620.00 to be paid in ten annual payments…… . The remaining part (my emphasis) of the Accumulated Interest, that is to say the amount of …(EC$325,000.00) shall be paid to the Bank jointly and severally by the First Guarantor and the Second Guarantor on terms and conditions to be established by the Bank in its sole discretion."

[13] From the negotiations, coupled with the recitals and Clause 1 in the New Agreement, the intention of the parties and the purpose of the New Agreement are readily discerned. The interested and affected parties merely sought to restructure the debt of the Company in a way that would allow the Company an opportunity of becoming viable. Instead of the Bank remaining a creditor of the Company, the Bank, became a creditor of the Company's controlling shareholder. The Bank forgave a portion of the accumulated interest but required the guarantors to pay the smaller remaining portion thereof.

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[6] Record of Appeal, p. 46

[14] The Company remained liable for the debt, albeit in respect of the principal thereof, to the Investor. The Company remained liable to the Bank in respect of the remainder of the accumulated interest. This is clearly addressed in Clause 1 of the New Agreement which recorded and required, in keeping with the Bank's previously expressed position, that the guarantors must settle the sum due in respect of accrued interest. There can be no doubt that the Doctors were being asked to pay this sum pursuant to the guarantees in respect of which the Bank, had already made demand.

[15] In my view, it is significant that nothing in the New Agreement indicates that the guarantees arose (and thus the Doctors' obligations to the Bank thereunder) otherwise than under the guarantees given in consideration of the original loan. The earlier agreement cannot thereby be said to have become extinguished, as the basis for the Bank's requirement that the Doctors pay the remaining accumulated interest was pursuant to their obligations arising only in respect of the guarantees. I accordingly agree with counsel's submission that the New Agreement merely repeated the guarantors' obligations which were already in existence and quantified the amount due. To that extent, as it relates to the guarantors, the New Agreement qualified their existing rights and obligations to the Bank under the guarantees.

[16] I do not agree with the submissions of counsel for the Company that the effect of the New Agreement was to discharge entirely the guarantees under the earlier agreement. If the guarantees were discharged with respect to that portion of the debt assigned to the investor, they were not so discharged in relation to the balance of the debt representing accrued interest due to the Bank in respect of the said debt for which the guarantors had become liable on account of the illiquidity of the Company.

[17] It also bears note that this line of argument is at odds with the Company's pleaded case in the court below and referred to by the learned judge in paragraph 9 of her judgment. In its Defence[7] the Company at paragraph 4 pleaded as follows:

> "The Defendant further asserts that it was an express term alternatively an implied term of the said agreement of 21st January 2000 that:-
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> (a) the Claimant as Guarantor and Shareholder of the Defendant would satisfy part of the Defendant's indebtedness to the Bank in consideration of the Bank and the other parties thereto agreeing to the terms of the said Agreement;
>
> (b) the Claimant would forego any rights of recourse to the Defendant to be indemnified for settling the same;
>
> (c) the Claimant assigned to Chephachu NV…a shareholder of the Defendant all rights and benefits the Claimant enjoyed as guarantor pursuant to the said contract of Guarantee."

On this basis the Company asserted that Dr. Edwards was estopped from making a claim for indemnification for any sums paid pursuant to the New Agreement or the Guarantee.

[18] This makes it clear that the Company accepted that the Doctors' payment to the Bank under the New Agreement was as Guarantor. Having perused the New Agreement in its entirety, I, in like manner as the learned judge,[8] have been unable to find an express term in the New Agreement to the effect that the Doctors agreed to forego their rights of indemnification. Dr. Edwards, as the learned judge found,[9] admitted that the New Agreement contained no such express term.

[19] As for implying such a term, the Company has failed to advance any basis for, implying into the New Agreement such a term. As to the Company's assertion of the assignment by the Doctors of their rights and benefits enjoyed as guarantors to the Investor, it is difficult to rationalize how this affords support for implying such a term. Further, it escapes me as to what rights and benefits are said to have accrued to the Doctors in respect of their guarantees of the Company's debt and accordingly on what basis an estoppel could be said to have arisen.

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[7] Record of Appeal, p. 14 para.4
[8] See: judgment, para. 54; Record of Appeal, p.98
[9] See: judgment, para. 27

[20] I am accordingly satisfied that the New Agreement did not bring about a novation. Dr. Edwards remained a surety and did not become a principal debtor under the New Agreement merely by requiring him to do that which he had become obliged to do as surety in respect of the earlier agreement.

Right of indemnification

[21] It is well-settled that a guarantor's right to indemnification is a right to be reimbursed the amount which he has actually paid for the principal debtor with interest and any costs incurred in reasonably defending an action brought by the creditor.[10] Dr. Edwards is therefore entitled to be reimbursed in the sum of $165,500.00 with interest as ordered by the learned trial judge.

The counter-appeal

[22] Dr. Edwards counter-appealed that the rate of interest applied by the learned judge ought properly to have been 12.5% per annum and not 5%, as was awarded. In the exercise of her discretion to award interest, it cannot be said that the judge's decision exceeded the generous ambit of her discretion within which reasonable disagreement is possible.[11] I will not therefore interfere with the learned judge's award of interest at the rate of 5% per annum.

Conclusion

[23] In conclusion, I would dismiss the appeal and counter-appeal. The Company shall pay Dr. Edwards' costs on the appeal, which shall be two thirds of 80% of the

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[10] Halsbury's Laws of England, 4th Edition Reissue, Volume 20, para. 250; **Brook's Wharf and Bull Wharf Ltd. v Goodman Brothers** [1936] 3 All ER 696 at 707; **In re Fox, Walker & Co. ex parte Bishop** (1880) L.R 15 Ch. Div. 400 at 416 and 421-422.

[11] **Michael Dufour et al v. Helenair Corporation et al Civil Appeal No. 4 of 1995** St. Lucia (delivered 12 February, 1996), per Sir Vincent Floissac, Chief Justice.

costs awarded in the court below and takes into account the dismissal of the counter-appeal which was not aggressively pursued at the hearing of the appeal.

Janice George-Creque
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]